



INTRODUCTION TO BOARD AND MANAGEMENT RESPONSIBILITIES FOR COMPLIANCE OVERSIGHT

HCCA/SCCE Board & Audit Committee Compliance Conference
February 18 – 19, 2019
Scottsdale, AZ

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Overview

Part I

- The ethics and compliance challenge
- The “risk tolerance” dilemma

Part II

- Compliance program foundations
- Role of the board, compliance officer, management and employees



Challenge — workforce ethics

Ethics perception: _____

Ethics reality

- Cheating
- Stealing
- Resumes
- Reporting
- Character/competence assessment
- Culture/tone at the top

Challenge — workforce ethics

Ethics reality, cont.

- Regulatory environment
- Aggressive enforcement climate
- Inadequate control processes
- Management pressure areas
- Careless communication

Risk tolerance

Risk tolerance question is difficult.

- Risk is not always clear.
- Do we put greater weight on criminal rather than civil risk?
- Do we consider 'enforcement' probability?
- How do we factor in reputation exposure?
- Risk to different parties may be unequal.

Make sure you fully understand the risk before you accept the risk!

Compliance foundations

Federal Sentencing Guidelines – Organizations (FSGO)

- Chapter 8B2. Effective Compliance & Ethics Programs. Outlines minimally required components of an “effective compliance and ethics program” (attached)

Basic elements

- Policies and procedures (addressing program operation and substantive risks)
 - High-level oversight of program (board, management, compliance officer)
 - Screening out of people who don't play by the rules
 - Education (both about program and substantive risks)
 - Monitoring and auditing (including use of complaint mechanisms to identify problems)
 - Promotion and enforcement (FSGs require both incentives to perform and discipline for failures)
 - Appropriate response to misconduct (corrective action, disclosure, discipline, etc.)
 - Risk assessment
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Compliance foundations

U.S. Department of Justice (DOJ) Evaluation of Corporate Compliance Programs
<https://www.justice.gov/criminal-fraud/page/file/937501/download>

US Department of Health & Human Services (HHS) Office of Inspector General (OIG)
 Compliance Program Guidance <https://oig.hhs.gov/compliance/compliance-guidance/index.asp>

- Hospital
- Home Health Agencies
- Hospice
- Ambulance
- DME
- Clinical Laboratories
- Nursing facilities
- Physicians/Small group physician practices
- Billing companies
- Pharmaceuticals
- Medicare + Choice

Corporate Integrity Agreements

Deferred Prosecution Agreements



Compliance foundations

Role of the Board (FSGs: “Knowledgeable about content and operation; exercise reasonable oversight regarding implementation and effectiveness”).

- Get basic education on compliance programs
- Define scope of the program
- Approve key policies and procedures
- Align incentives
- Require regular, substantive reporting by management and compliance officer
- Monitor corrective action plans (be skeptical of CAPs that rely primarily on education)
- Read the newspaper. Ask questions!

Tip: Add compliance expertise to board or appropriate committee.



Compliance foundations

Role of Compliance Officer

- Work effectively with:
 - Board
 - Management
 - Peers (legal, human resources, internal audit, quality, risk services, etc.)
- Work within limits of organization's resources
- Have appropriate (fair) expectations
- Design/redesign program with input from management, employees, peers and experts
- Develop policies, procedures and educational content
 - Structural → OSGs
 - Substantive → high risk areas
- Clearly articulate what needs to be done
- Monitor management performance
- Report to management and board on management execution
- Be respectful of management and board time. Answer their questions.

Compliance foundations

Role of Compliance Officer

- Simplify the complex, clarify the ambiguous. Keep the program simple!
- Tackle highest risks first
- Take a position
- Give management/employees clear direction – ambiguity paralyzes, specificity enables accountability
- Respond to enforcement/legal changes
- Have the difficult conversations
- Continuously revise/rework the compliance program

Compliance foundations

Compliance Officer Reporting

Note: It is important to understand that the Compliance Officer is responsible for the compliance function. Management is responsible for compliance (to execute the program).

- Reports to Board (committee) and/or CEO
- Regular executive sessions
- Reasonable severance package
- Minimize conflicting responsibilities
- Educated compliance officer

Compliance foundations

Role of Management

- Actively promote/support program
- Ensure implementation of program
- Create culture that permits questions
- Hold themselves and subordinates accountable
- Align incentives

Tip: It's management's job to implement the program and ensure compliance. The role of the compliance officer is to ensure management has the tools and resources.

Compliance foundations

Align incentives (element of 6A. of FSGs)

- Incentive compensation
- Merit increases/promotional opportunities
- Transparency
- Performance evaluation
- Recognition
- Keeping promises

Compliance foundations

Role of Employees

- Participate in program — complete education, follow P&Ps
- Seek advice when they have questions
- Bring issues of non-compliance to attention of appropriate people
 - Internal
 - Anonymous
- Cooperate in investigating/fixing identified problems

Compliance foundations

Management and Board reporting — written reports

Purpose is to inform, report and educate

- Issues/Investigations (internal and external)
- Audit reports (summary), highlighting past due items
- Annual work plan progress
- Key metrics
 - high risk areas
 - Program operations
- Recent developments (law changes, enforcement changes, industry issues, etc.)

Compliance foundations

Management and Board reporting — oral reports

Highlight

- New investigations/issues
- New reports/tools
- Key messages

Respond to management/board questions

Compliance foundations

Management and Board reporting — minutes

Purpose: To reflect topics, deliberations and actions in meeting and demonstrate that participants are effectively fulfilling their role

- General topic area
- Issues
- Questions/deliberations
- Action

See Corporate Minute-Taking: A General Counsel's Guide by Michael Peregrine & Russ Hayman
http://www.mwe.com/info/pubs/HLN_Analysis0106.pdf

Controls

Culture

- Management example
- Management action

Control Process

- Board and management have an obligation to ensure:
 - Effective control processes in place
 - Control processes are being followed

Trust is not an internal control!