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The compliance officer's role in board oversight of the compliance program

By H. Rebecca Ness

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The boards of not-for-profit hospitals are experiencing an expanded scope of their governing authority in today's health care environment. As board member accountability increases, so does the responsibility of the compliance officer (CO) to support them in meeting their oversight duties.

To assist the board, it is important for the CO to understand the basis of board member responsibilities. The underlying principle of the trustee obligation is to act in accordance with the trust and confidence placed by the hospital or health system to govern on behalf of the organization. The foundation of this obligation is set in the following fiduciary and legal responsibilities, which in many states are incorporated in the laws that govern not-for-profit organizations:

- **Duty of care** requires a board member to exercise reasonable care that an ordinarily prudent person would use in similar circumstances.
- **Duty of loyalty** requires a board member to act faithfully in the best interest of the organization and never for self-benefit financially or any other personal gain.
- **Duty of obedience** requires a board member to serve in a manner that is faithful to and consistent with the organization's mission.

In addition, increased governance accountability arises from the implications for non-profit organizations in the Sarbanes-Oxley Act of 2002 as well as the Internal Revenue Service requirements in both the IRS Form 990 and the IRS focus on board oversight of executive compensation. Board oversight obligations have also been heightened

with the link between Medicare and Medicaid reimbursement and patient care quality, and with The Joint Commission's expectation that board members are well versed in quality and patient safety issues. Two factors directly affecting board oversight of compliance are the expanded government focus on fraud and abuse recovery initiatives and the Health Reform Law of 2010. More familiar to the CO are the Federal Sentencing Guidelines (FSG), as amended in 2004, which obligates the governing authority to be knowledgeable about and exercise oversight over the compliance program.

The compliance officer relationship to the board

Recommended guidelines for board oversight and the reporting structure of the CO are not new. Dating back to 1998, the OIG guidance for an effective compliance program outlines these recommendations, indicating that every effective compliance program must begin with a formal commitment by the hospital's governing body to include the FSG seven elements.¹ One of these elements is the designation of a chief compliance officer who reports directly to the CEO and the governing body. The 1998 program guidance also notes the importance of independence in the compliance function, separating it from key management positions, specifically the General Counsel or Chief Financial Officer.²

However, 2010 brought renewed focus to these issues, making it seem to some like an added component in the compliance arena. This increased emphasis is in large part due to the November 1, 2010 amended FSG, specifically the changes connecting an effective compliance program to the reporting relationship of the CO to the board. For an organization to potentially mitigate penalties or lower the culpability score under these advisory guidelines, the CO must have a direct reporting relationship to the board. This 2010 FSG amendment defines a "direct reporting obligation" as one where the individual with operational responsibility for the compliance program has express authority to communicate personally to the governing authority or appropriate subgroup thereof.³

There is a subtle, but significant, point about the wording of the FSG that board members and compliance professionals should recognize. The FSG states, “specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics programs.”⁴ It is this individual who has the direct reporting obligation to the governing authority. Hospitals and health systems have varied organizational structures. In some, the person with operational responsibility for the compliance program may have the title of Director or Vice President and the CEO or another senior executive may hold the CO title. If you are a Director of Compliance, responsible for the operations of the compliance program, but report to another senior executive or to the General Counsel, having a discussion with your CEO and board would be prudent advice. Educating them on the significance and implications of the government guidance on what constitutes an effective compliance program is essential. A revision of the organizational reporting chart may be necessary to meet government recommendations. This is a practical matter, reducing potential organization risk associated with government anti-fraud initiatives and potential board member liability for breaching their compliance plan oversight duty. A useful resource for this conversation is the 2010 article in *Trustee Magazine*⁵ by US Department of Health and Human Services Inspector General Daniel Levinson. The Inspector General addresses compliance program board oversight, the reporting relationship of the CO to the board, and the link between quality patient care and compliance. Another comprehensive resource is the OIG/AHHA joint publication, *The Health Care Director’s Compliance Duties: A Continued Focus of Attention and Enforcement*.⁶

Understanding the driving factors of governance accountability and fiduciary duties, which are the foundation of compliance program board oversight, sets the stage for practical steps the CO can take to establish an effective relationship with the board.

Structural and organizational considerations

As noted above, hospitals and health systems differ in how the organization is structured. This will impact the governance approach taken to carry out the board oversight obligation. How is your board set up? Does it have a Compliance Committee, or an Audit and Compliance Committee, or a Finance and Audit Committee? Who reports at the committee level and how is that information passed on to the full board?

Your first task is to understand both the organizational and the governance structures of your organization to ensure that appropriate regulatory and compliance issues are reviewed and reported on to the board – even if you are not doing the reporting. Take into consideration

all entities within your organization, such as the hospital, home health agency, long-term care facility, and physician practices. If your organization is part of a larger system, become familiar with that structure as well to know what is reported up to the parent corporation.

Always keep in mind two additional key considerations. First, the board is comprised of voluntary members with limited time to execute the breadth of organizational oversight required of the governing authority, and compliance is just one area of responsibility. Second, a diverse board representing the community’s needs necessitates a broad range of core competencies (i.e., areas of expertise) among its membership. Not all board members will have the necessary depth of knowledge on the complexity of the compliance program for which they have an oversight responsibility. This leads the CO to other practical action areas, board member education on the compliance and regulatory environment, and the report content provided by the CO and other management staff to the board committee(s).

Education

What does your board need to be well-served and positioned to oversee the compliance program? Education provided by the CO is fundamental in establishing an effective relationship with board members.

Board orientation is crucial. All new board members go through an orientation process to educate them on the organization’s strategic plan, operating plan, mission, financial statements, quality plan, and community benefit initiatives. The compliance program is an equally important element, but not always given due attention. The CO should ensure that compliance is properly covered in the board orientation. Basic elements all board members should know include:

- Key components of the of the compliance plan
- What the OIG Work Plan covers
- How the OIG Work Plan influences a hospital’s annual Compliance Work Plan
- Risk assessment process to understand how priority focus areas are established
- Internal and external audit processes
- The connection between compliance monitoring and auditing, and Medicare and Medicaid reimbursement and the hospital’s financial health
- The link between compliance and quality of care

This content should be presented as a high-level overview. More detailed and in-depth education should be provided at the committee level.

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Committee level orientation should include:

- Compliance plan policies
- An understanding of the major compliance laws such as the False Claims Act, Stark Law, Anti-kickback Statute, HIPAA and HITECH, and the Emergency Medical Treatment and Labor Act
- OIG program guidance and the Federal Sentencing Guidelines
- Federal and state fraud and abuse recovery initiatives
- Compliance program effectiveness assessments

A glossary of compliance terminology is an essential aspect of board education. It should be updated regularly to keep pace with the growing number of terms and acronyms associated with the changes in today's compliance environment.

All board members should receive the Code of Conduct and understand that this general statement, outlining the fundamental ethical and compliance principles guiding the hospital operations, is a recommendation in the OIG program guidance.

The OIG program guidance also addresses developing open lines of communication to increase the hospital's ability to identify and respond to compliance problems by using alternative communication methods. These periodic notices to employees could also be sent to board members as an educational tool.

Board Compliance Committee meetings should include education as a standing agenda item. It could be a discussion on a relevant article distributed prior to the meeting, or a presentation on a new law or government initiative. Educating board members on the compliance program implications in the Patient Protection and Affordable Care Act of 2010 (PPACA) should be a priority.

Reporting to the board

What do you include and how do you format your report to the board committee? Reports should be comprehensive yet concise, and easily understood. Learning how to effectively report so that board members are fully informed in their oversight role—but not overwhelmed by operational details—is a challenge for COs that is more art than science.

Start by identifying the key elements board members need to know and then develop a clear dashboard report card. Review the OIG program guidance for recommended content that should be reported to the board. Much of this information can be summarized in report card format, including organization measurements related to the FSG seven elements such as hotline calls, education and training programs, and

monitoring and auditing by the CO. The annual Compliance Work Plan can be formatted with a status column where the CO records progress made toward completion of each item. When sending the Work Plan to the board committee prior to their quarterly meeting, highlight only those items that have a status change, so board members are able to quickly scan the Work Plan and visually identify what information they need to review. Develop a dashboard report for audit entities: Recovery Audit Contractors (RACs), Medicare Administrative Contractors (MACs), Medicaid Integrity Contractors (MICs), Zone Program Integrity Contractors (ZPICs), and Comprehensive Error Rate Testing (CERT) audits (see the need for a glossary?). Board members need to know what government fraud and abuse recovery initiatives are underway, but do not need the detail of these audits unless there is an audit outcome that presents a risk to the organization.

Plan the board committee meeting agenda to focus on reporting and discussion of identified potential risk areas. Review your report cards, the Work Plan, and internal audits to identify risk areas, and then prioritize them by relative importance and level of impact to the organization. Always include your plan of action to address each item.

As noted above, there should be an education agenda item focusing on new laws, regulations, and other government initiatives. Keeping the board informed of the content and impact of new developments on the compliance program is essential in assisting the board with their oversight obligation.

Additional CO action

If you provide reports to the board Compliance Committee but not directly to the full board, there are additional steps you can take to ensure that board members are fully informed. These steps will also aid you in showing the effectiveness of the compliance program to an external party, if the need arises.

Work with the Chief Governance Officer or Governance Director on the following three items.

1. **Review all committee meeting minutes** to ensure they accurately and completely reflect your report to the board committee. These meeting minutes are provided to all board members and you should take responsibility to know that all necessary information is memorialized in the board documentation retained and required by law.
2. **Read the board committee charter**, which guides the committee in fulfilling its oversight role. The charter components should include a statement of purpose, responsibilities and authorities,

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membership criteria, and meeting frequency requirement. A periodic review of the charter with the board committee is advised.

3. **Make suggestions to the Governance Director** if there is an area of expertise not represented among the composition of the current board Compliance Committee that you think would contribute to effective oversight. Your recommendations can then be considered by the board Governance Committee when recruitment and committee assignment decisions are made.

Annual compliance report

A final recommendation is to write a year-end annual compliance report that summarizes all compliance activity. This is a high-level document that provides an overview of progress made to enhance the compliance program. Content areas could include, but are not limited to:

- Summary of the compliance Work Plan key deliverables
- Compliance program effectiveness initiatives
- External audit review findings
- Management and board oversight
- Activities that relate to the OIG seven elements and other OIG program guidance recommendations, such as education and training provided to employees and board members
- Updated or new compliance plan policies
- Summary of internal audits
- Other notable initiatives that should be documented in writing (i.e., specific action taken to enhance billing compliance)

The benefit of having an annual report is two-fold. For the Compliance files, there is an easily accessed record of activity during each year for future reference. Second, this report should be included with material distributed to the full board, and will serve to inform all board members of key compliance program activity, assisting them in their oversight obligation.

Conclusion

As the compliance officer who is responsible for the daily operations of the compliance program, you have a duty to yourself and to the board to take an active role in ensuring effective board oversight of the compliance program. ■

1 Federal Register Vol. 63, No. 35, Feb. 23, 1998, 8989
2 Federal Register Vol. 63, No. 35, Feb. 23, 1998, Note 35
3 Federal Sentencing Guidelines, November 1, 2010, §8C2.5(f) (3) (c) (i)
4 Federal Sentencing Guidelines, November 1, 2010, §8B2.1(b) (2) (c)
5 Daniel R. Levinson: Trustee Engagement and Hospital Success. Trustee Magazine, Viewpoint, July 2010. Available at http://www.trusteemag.com/trusteemag_app/articledisplay.jsp?dcrpath=TRUSTEEMAG/Article/data/07JUL2010/1007TRU_viewpoint
6 Office of the Inspector General and the American Health Lawyers Association: The Health Care Director's Compliance Duties: A Continued Focus of Attention and Enforcement. PDF available at <http://www.healthlawyers.org/Resources/PI/Documents/Health%20Care%20Director's%20Compliance.pdf>