Effective Compliance: What is the Board’s Role?

Debbie Troklus, CHC-F, CCEP-F, CHRC, CHPC, CCEP-I
Managing Director, Aegis Compliance and Ethics Center
dtroklus@aegis-compliance.com

Presentation Objectives

At the end of this session, the participant will be able to:

- List the primary responsibilities of a board of directors related to compliance programs
- List criteria for the board of directors to establish a review structure for its compliance oversight
- Understand the collaborative effort it takes to have an effective compliance program
- Assist in the development of questions for the governing body to ask the senior management team relative to compliance program activities
A critical element of effective oversight is the process of asking the right questions.

Principle common to an effective global E&C program:

- **Top-Level Commitment**
  - The tone at the top from the highest level of management is the most critical component of an effective E&C Program. Top-level commitment means “walking the walk” and not just “talking the talk.” Legal compliance is not limited to one individual or one group of individuals within a company. It extends to Boards of Directors, audit committees and others in senior positions within the company or its governing Boards or committees.

Board Expectations in Relation to the Compliance Program: What are the Right Questions?

- Does a reporting system exist, is it adequate and is it working?
- What benchmarks are being used as assessment tools to measure compliance program effectiveness?
- Are annual resolutions required by our Board?
- Is the scope and adequacy of our compliance program relative to the size and complexity of our organization?
- What plan is in place to keep the Board updated on the regulatory landscape?

Does a Reporting System Exist, is it Adequate and is it Working?

- An effective reporting system is a key compliance element.
- The Board should have a clear understanding of the reporting system.
- The Compliance Officer should discuss reporting formats with the Board: Know what the Board wants and needs.
  - Internal vs. External reporting systems
- Compliance Officers should be sure the information is provided to the Board in a timely manner.
What Benchmarks are Being Used as Assessment Tools to Measure Compliance Program Effectiveness?

- Benchmarking against organizations similar to yours
- Benchmarking against oneself
  - Timeliness in addressing reports of non-compliance
  - Questions and reports after compliance education
  - Employee surveys
- Prepare annual reports
- Prepare scorecards

Are Annual Resolutions Required by the Board?

- Many organizations require annual board resolutions.
- Resolutions are signed by Board members and/or Board committees.
- The resolution should refer to the oversight of the compliance program.
- Best Practice: Have Board members attest to compliance training.
Is the Scope and Adequacy of the Compliance Program Relative to the Size and Complexity of the Organization?

- Compliance Programs are not a one size fits all.
- Guidelines allow for variation, depending on the size and complexity of the organization.
- Complexity of the organization will dictate the necessary structure of the compliance program.
- Small organizations: Usually less complex, less formality, fewer resources and responsibilities carried out by available staff.
- Boards of smaller organizations are usually involved to a greater degree.

What Plan is in Place to Keep the Board Updated on the Regulatory Landscape?

- A formal plan should be developed.
- Know who is going to be responsible for the updates.
- Compliance Officers should attend board meetings.
- Board members may need to take outside education to develop a better understanding of compliance, industry risk, regulatory requirements and the components of an effective compliance program.
- Boards should consider appointing a compliance expert to the Board.
Board Questions to Evaluate a Compliance Program

- To management: Is there anyone interfering with your ability to implement any of the elements of an effective compliance program?
- To CO: Is there anyone interfering with your ability to prevent, find, or fix this organization's legal, policy, or ethical issues?
- To CO: Do you have any responsibilities outside of compliance and ethics that could cause you to have a conflict?
- To Employees: Do you report to anyone who has any responsibilities that could cause conflicts of interest for the compliance program?
- To CO: Is anyone with a conflict of interest guiding or directing the compliance and ethics program?

Board Questions to Evaluate Compliance Program (cont’d.)

- To Management and/or CO: Are there any issues that have been reported to you that are not being addressed?
- To CO: Has any issue been outstanding beyond a reasonable amount of time?
- To CO: Have we ever had an outside evaluation of our compliance and ethics program?
- To CO: Are we staying abreast of current trends in enforcement and effective compliance program management?
- To Management: Are we anticipating any potential new legal risks in the near future?
- To CO: Are there any substantive compliance issues currently under investigation?
Board Questions to Evaluate a Compliance Program (cont'd.)

Ask the Compliance Officer:
- What issues are the enforcement community currently reviewing/investigating in our industry and where do we stand on those issues?
- How do you evaluate our organization's ethical culture?
- Is there anything that leadership can do to help further develop, maintain, or support the compliance and ethics programs?
- Is there any further compliance and ethics education that you think leadership should attend?
- Do we need more compliance and ethics expertise on our governing board?

To CO: Do you have a good working relationship and independent access to internal and external legal counsel, consultants, and auditors?

To CO: Are you getting cooperation on compliance training and what type of feedback are you getting from the training?

To Everyone: What are you most concerned about?

To CO: Do you feel that everyone in this organization feels comfortable reporting potential issues and do they have a reasonable opportunity/mechanism to share their concerns about a policy, legal, or ethical infraction with you?
How is the Compliance Program Addressing Significant Risks?

- One of the primary goals of the compliance program is to help ensure that we get it right the first time.
- New business ventures are evaluated for potential risk.
- Timely response is made to newly developed rules and regulations.

The Structure: Roles and Relationships

- The Compliance Function
- The Legal Function
- The Internal Audit Function
- The Human Resource Function

- Define the interrelationships in charters and other organizational documents
- Cooperation and collaboration
- Boards should evaluate the compliance program structure
The Compliance Function

- Is an operational function
- Must be independent
- Prevent, detect and deter non-compliance
- Assist in compliance policy development
- Develop incentives to promote compliance
- Develop compliance work plans
- Develop effectiveness measures
- Work with management to develop corrective action plans and then ongoing monitoring
- Develop reports for management and board
- Conduct investigations
- Assure appropriate background checks are conducted
- Assure all seven elements are in place and working

The Legal Function

- Advises the organization on the legal and regulatory risks of its business strategies
- Provides advice and counsel to management and the Board
- Defends the organization in legal proceedings
- Initiates legal proceedings against other parties
- Collaborates with the compliance officer
- Evokes attorney-client privilege
- Is considered a management function
- Conflicts arise when the legal function is/or oversees the compliance function
The Internal Audit Function

- Provides an objective evaluation of the existing risk and internal controls
- Ensures monitoring functions are working as intended
- Identify where management monitoring and/or additional oversight is needed
- Helps management enhance internal controls, reduce risk and promote efficient use of resources.
- Internal audit can fulfill the auditing requirements of the Guidelines if they have the skill set.
- Internal audits involvement does not exempt compliance from being engaged in the process and the outcomes.
- An internal audit representative should be on the Oversight Committee.

The HR Function

- Manages recruiting and hiring
- Conducts employee screening
- Conducts employee sanction checks, compliance should monitor the process
- Coordinates employee benefits
- Can be involved in the education and training of employees
- If HR develops compliance education and training, compliance should be involved in the design and assignment
- Can be part of the compliance investigative team
- Partner with compliance and management regarding disciplinary actions
- Many hotlines calls are HR related, compliance should monitor until resolution
Collaboration Between Functions

- Investigate without duplication of effort
- Identify compliance risks
- Communicate between the various functions throughout the process
- Identify and implement correction actions

Reporting to the Board

- Management reports should be independent from compliance
- Compliance reports
  - Objective scorecards
  - Internal and external investigations
  - Serious issues raised during audits
  - Hotline call activity
  - Allegations of material fraud
  - Sr. management misconduct
Know What the Board Wants

- Discuss with the Board the format and frequency for reporting
  - Dashboards
  - Balance too much and too little information
  - Timely reporting of suspected violations
  - A snapshot of where the organization is in regards to compliance
- Regular executive sessions
  - Open dialogue
  - Avoids suspicion

Boards Role in Identifying and Auditing Potential Risk Areas

- Boards Responsibility
  - Ensure that management and the Board have strong processes for identifying risk
    - Internal
    - External
  - Ensure that management consistently reviews and audits risk areas, as well as develops, implements, and monitors corrective action plans
    - Recent regulatory trends
    - New regulations
    - Compare data against peers
  - Understand how their organization is reviewing physician arrangements and what level of risk is acceptable in the arrangements
  - Be prepared to answer tough questions from stakeholders
Encouraging Accountability and Compliance

- Compliance is an enterprise-wide responsibility
- Employees should have defined incentive goals and objectives against which performance may be measured and incentivized
- Board should ask management about its efforts to develop policies and procedures
- Proactive in self-disclosing any wrongdoing
- Assure there is good communication channels across the organization

Next Steps

- The governing body and leadership can engage in an effective dialogue with the compliance professional with some version of the suggested Board questions
- Once your organization develops this best practice, the leadership question list can further evolve into a more effective tool for maintaining an effective relationship with leadership in the future
Conclusion

- The Board should do the following
  - Make an effort to increase its knowledge of risks, how the organization handles the identified risks and the flow of reporting to Sr. Management
  - Encourage a level of accountability from everyone
  - Assure that the organization complies with relevant laws