

# Measuring the Compliance Program's Effectiveness: Suggestions for the Board

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The Department of Health and Human Services' Office of Inspector General (OIG) has long encouraged healthcare organizations to establish compliance programs. Not only does a compliance program serve to guide the organization through the maze of regulations, it also serves as a best practice and a firewall against regulatory sanctions, legal actions, and negative publicity. Further, should there be criminal action, a compliance plan offers favorable sentencing credit under the United States Sentencing Guidelines—and last year the U.S. Department of Justice released guidance for compliance programs related to the sentencing review.

Given the importance placed on compliance programs by federal agencies, including the OIG, the United States Attorney's Office, and the Centers for Medicare and Medicaid Services (CMS), how can a healthcare board measure the effectiveness of its compliance plan in dealing with an ever-expanding regulatory environment?

## Maintaining and Measuring a High-Functioning Compliance Program

While historically providers were encouraged to maintain effective compliance programs, there were few resources of published guidance or objective criteria to consider when determining whether their compliance programs were effective. Then, in 1998, the OIG published a document commonly called the "Seven Elements of an Effective Compliance Plan."<sup>1</sup> This outlined seven elements that providers could use to establish and maintain compliance programs:

1. Implementing written policies, procedures, and standards of conduct
2. Designating a compliance officer and compliance committee
3. Conducting effective training and education
4. Developing effective communication lines to receive complaints and protect anonymity

5. Conducting internal monitoring and auditing
6. Enforcing standards through well-publicized disciplinary guidelines
7. Responding promptly to detected offenses and undertaking corrective action

Essentially this guidance establishes a framework for a compliance program that, through the compliance officer, develops policies, receives complaints, monitors and audits conduct, and responds to compliance concerns. However, the seven elements do not address or provide guidance on measuring the effectiveness of a compliance program.

In fact, shortly after publishing the seven elements, the OIG stated that "[s]uperficial programs that simply purport to comply with the elements discussed and described in this guidance or programs that are hastily constructed and implemented without appropriate ongoing monitoring will likely be ineffective and could expose [providers] to greater liability than no program at all."<sup>2</sup>

This statement clearly indicates that going forward the OIG will focus more on what providers are actually doing to ensure that their compliance programs are functioning effectively and less on how the compliance program is structured. This shift in focus is also the reasoning behind the March 2017 release of the publication *Measuring Compliance Program Effectiveness: A Resource Guide*.<sup>3</sup>

About the same time, the Department of Justice subsequently released a guidance publication titled "Evaluation of Corporate Compliance Programs."<sup>4</sup> This publication provides an extensive list of more than 100 questions that federal investigators use to inquire across a range of compliance program operating functions and that were found to be useful in evaluating provider fraud, waste, or abuse. Many of these questions target the provider's actions before

## Key Board Takeaways

In light of aggressive government enforcement and the dramatic rise in whistleblower cases, simply having a compliance program in place is not enough. Hospitals and health systems should actively manage, monitor, measure, and modify compliance efforts. The board should consider the following:

- A compliance "dashboard" is an effective tool for boards to monitor ongoing compliance efforts.
- When staff members feel comfortable raising concerns they are less likely to become whistleblowers.
- To be effective, a compliance program must adapt as healthcare regulations and markets evolve; the board is responsible for knowing when it's time to update the compliance program.

and after the alleged conduct occurred—all of which emphasize the existence of an effective compliance program.

Evidence of the critical importance of effective compliance programs is easy to find. It's been splashed across media for the past few years. In 2016, South Carolina-based Tuomey Healthcare System paid \$72.4 million to resolve a \$237 million judgment for illegally billing the Medicare program for services referred by physicians with whom the hospital had improper financial relationships. Tuomey's former CEO also paid a \$1 million settlement and was excluded from participation in federal healthcare programs for four years. Additionally, the health system's board of directors and management were replaced, and ultimately Tuomey merged with Palmetto Health.

## Fostering a Culture of Compliance

Simply having a compliance program in place is not enough. An organization must work actively to manage, monitor, and modify its compliance efforts. A compliance program is not inherently effective if no reports have been received. In reality, no news is probably bad news. When few or no compliance issues are being reported it is most likely because staff members are

1 Office of Inspector General, Publication of the OIG Compliance Program Guidance for Hospitals, Federal Register, Vol. 63, February 23, 1998; pp. 8987, 8989.

2 Office of Inspector General, Publication of the OIG Compliance Program Guidance for Home Health Agencies, Federal Register, Vol. 63, August 7, 1998; pp. 42410–42411.

3 *Measuring Compliance Program Effectiveness*, HCCA-OIG Compliance Effectiveness Roundtable, March 27, 2017.

4 U.S. Department of Justice, "Evaluation of Corporate Compliance Programs" (available at [www.justice.gov/criminal-fraud/page/file/937501/download](http://www.justice.gov/criminal-fraud/page/file/937501/download)).

unaware of the procedures for communicating concerns or they are afraid to raise an issue for fear of a negative response or even the loss of their job. To truly foster a culture of compliance, individuals should feel comfortable asking questions and raising concerns. Whistleblower cases filed under the False Claims Act's *qui tam* provisions have risen dramatically since the 1980s. Ensuring that staff members can confidently and comfortably voice their concerns on compliance issues can be a critical tool in reducing the number of employees who turn into whistleblowers.

Boards increasingly rely on performance dashboards for quick and easy access to high-level information on clinical care, finances, and other indicators of facility or system performance. A *compliance* dashboard is equally valuable for communicating information on how many compliance reports have been received, how many

investigations have been conducted, and the amount and type of compliance training that has been provided to staff members and employees. A compliance dashboard is a powerful tool for board members to monitor ongoing compliance efforts, and the use of a dashboard reflects positively on the board's commitment to its compliance program.

To truly be effective, a compliance program must be viewed as a living document that adapts as healthcare regulations and markets evolve. It should not be placed on a shelf and only dusted off periodically. We recommend that boards place equal effort and emphasis on their compliance programs as they commit to their Joint Commission accreditation. It is up to the board to recognize when an outside assessment of its compliance program is needed. The board is also responsible for knowing when the compliance plan needs updating.

In conclusion, boards that regularly ask insightful and thoughtful questions designed to inquire across a range of compliance program functions will have a better chance of developing and maintaining an engaged, adaptive, and focused compliance program. Additionally, by pursuing a multi-level inquiry across the range of compliance functions, the organization will be better positioned to not only demonstrate a program utilizing the "seven elements" but will also demonstrate an active and engaged level of compliance program monitoring. ●

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