

# Governance Notes

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## Mission Critical: Boards' Role in Protecting Their Organizations

The following is a summary of a presentation by Fletcher Brown, Partner at Waller, at The Governance Institute's 2021 Governance Support Forum.

**Over the last several years, there has been heightened government enforcement in healthcare, and financial recoveries from healthcare providers in the form of penalties and settlements are expected to increase.**

Vigorous enforcement of healthcare fraud and abuse laws remains a top priority of the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) and the Department of Justice (DOJ). In fiscal year 2020, the DOJ and OIG jointly reported 990 criminal cases filed, 1,860 new civil actions, and 2,148 exclusion actions. The DOJ also obtained \$1.8 billion in healthcare fraud settlements and judgments from healthcare-related False Claims Act cases.

Enforcement is not slowing down anytime soon, so boards need to be knowledgeable about the laws and regulations that affect their organizations and ensure they have an effective compliance program in place.

### The Rise of the Whistleblower

There has been a steady increase in the number of new fraud matters opened by the DOJ's Civil Division based on newly received referrals, investigations, and *qui tam* actions. *Qui tam* actions involve a whistleblower who reveals misconduct by his or her employer or another business or entity. The majority of false claims actions are filed under the whistleblower, or *qui tam*, provisions of the False Claims Act.

There are several reasons that there are now more whistleblowers than ever before, including:

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- There has been major expansion of whistleblower protections under federal law.
- The government is increasingly relying on whistleblowers as a source for new cases.
- The False Claims Act creates a “bounty” for whistleblowers to recover a percentage of recovery—up to 30 percent recovery.

Because of this, the board should take a careful look at their organization’s compliance program and confidential reporting systems. Whistleblowers are often disgruntled employees who feel that they were not heard. When employees see their concerns being addressed actively and responsibly, they are less likely to become whistleblowers. Conversely, employees who feel their complaints have fallen on deaf ears are more likely to pursue a *qui tam* action.

## DOJ’s Emphasis on Individuals: The Yates Memo

The Yates Memo, a memorandum written in 2015 by Sally Quillian Yates, Deputy Attorney General for the U.S. Department of Justice, increased the emphasis on individual accountability. In this document, Sally Yates writes: “One of the most

### → Key Takeaways

Board members and C-suite leaders must:

- Know and adhere to laws and regulations that affect their organization.
- Supervise the compliance program and policies and procedures.
- Devote sufficient resources to compliance.
- Take appropriate action when compliance problems are identified in the organization.
- Demonstrate throughout the entity their support for the compliance program and those who administer it (general counsel, chief compliance officer, etc.).

To help the board, governance support staff should:

- Ensure the board is continually educated around compliance issues.
- Take meeting minutes that sufficiently reflect what was discussed at the meeting and any action taken. The more mission critical the issue discussed, the more detailed minutes you should have.
- Provide corporate documentation and relevant explanations to federal and state regulatory agencies, as well as to corporate banking and financial institutions to meet compliance requirements.
- Maintain complete corporate records in a safe environment

effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

The Yates Memo provides six directives to federal prosecutors regarding the enhanced focus on individual prosecutions:

- To be eligible for cooperation credit, the corporation must disclose what it knows about individual misconduct.
- Investigations should focus on individual conduct from inception.
- Civil and criminal prosecutors should have routine communication with one another.
- Resolution with the corporation will not provide liability relief for individuals.
- Corporate cases should not be resolved before deciding how to resolve related individual cases.
- An individual's ability to pay should not factor into determining whether to pursue civil actions against individuals.

This is significant because it provides that in order for a corporation to receive "cooperation credit," for criminal cases, the corporation has to identify *all* individuals who had any involvement in the conduct at issue. These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by self-policing their organizations. Having an effective compliance program allows hospitals and health systems to effectively encourage ethical conduct and comply with all applicable laws.

Going forward, the OIG will focus more on what hospitals and health systems are actually doing to ensure that their compliance programs are functioning effectively and less on how the compliance program is structured. OIG will:

- View poorly a well-written compliance plan that sits on the shelf.
- View favorably a well-funded, resourced compliance program.
- View favorably an independent compliance officer, with direct access to C-suite and the board.

## Maintaining and Measuring a High-Functioning Compliance Program

Historically, providers were encouraged to maintain an effective compliance program, but there were few resources that outlined what a successful program entailed. In

1998, the OIG published a document called the “Seven Elements of an Effective Compliance Plan.” The seven elements are:<sup>1</sup>

1. Implement written policies, procedures, and standards of conduct.
2. Designate a compliance officer and compliance committee.
3. Conduct effective training and education.
4. Develop effective communication lines to receive complaints and protect anonymity.
5. Conduct internal monitoring and auditing.
6. Enforce standards through well-publicized disciplinary guidelines.
7. Respond promptly to detected offenses and undertake corrective action.

This guidance essentially 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 March 2017, *Measuring Compliance Program Effectiveness: A Resource Guide* was released with ideas for measuring the effectiveness of the seven elements of an effective compliance program.<sup>2</sup> The stated purpose of the guide is “to give healthcare organizations as many ideas as possible, be broad enough to help any type of organization, and let the organization choose which ones best suit its needs.” There is no need to adopt all or even a large number of the suggestions. Instead, hospitals and health systems should select measures based on the specific needs, resources, and risks of the organization.

There is a specific section for boards (see **Table 1**). For example, to show the board is active in administering the compliance program, the guide encourages boards to review minutes of meetings where the compliance officer reports in-person to the audit and compliance committee of the board on a quarterly basis.

Around the same time, the DOJ published its guidance in “Evaluation of Corporate Compliance Programs.”<sup>3</sup> This publication provided a list of more than 100 questions that federal investigators use to inquire across a range of compliance program

- 1 For a more detailed description of the seven fundamental elements of an effective compliance program, see Colin Luke, Fletcher Brown, and Jennifer Weaver, *The Increasing Importance of Legal Counsel and Compliance and Their Interaction with Healthcare Boards*, 2nd Edition, The Governance Institute, Summer 2021.
- 2 HCCA-OIG Compliance Effectiveness Roundtable, *Measuring Compliance Program Effectiveness: A Resource Guide*, March 2017.
- 3 U.S. Department of Justice, “[Evaluation of Corporate Compliance Programs](#),” June 2020.

**Table 1: Compliance Program Effectiveness Guide: The Board’s Role**

		Board of Directors:	
What to Measure		How to Measure	
2.1	Active Board of Directors	<ul style="list-style-type: none"><li>Review minutes of meetings where compliance officer reports in-person to the audit and compliance committee of the board of directors on a quarterly basis.</li><li>Conduct inventory of reports given to boards and applicable committees.</li></ul>	
2.2	Board understanding and oversight of their responsibilities	<ul style="list-style-type: none"><li>Review of training and responsibilities as reflected in meeting minutes and other documents (training materials, newsletters, etc.). Do minutes reflect board’s understanding?</li><li>Review/audit board education—how often is it conducted? Conduct interviews to assess board understanding.</li></ul>	
2.3	Appropriate escalation to oversight body	<ul style="list-style-type: none"><li>Review minutes/checklist in compliance officer files.</li></ul>	
2.4	Commitment from top	<ul style="list-style-type: none"><li>Review compliance program resources (budget, staff).</li><li>Review documentation to ensure staff, board and management are actively involved in the program.</li><li>Conduct interviews of board, management, and staff.</li></ul>	
2.5	Process for escalation and accountability	<ul style="list-style-type: none"><li>Process review (document review, interviews, etc.). Is there timely reporting and resolution of matters?</li></ul>	

operating functions and that were found to be useful in evaluating provider fraud, waste, or abuse. The DOJ recognizes there are common questions a federal prosecutor should ask when making an individual determination and notes three “fundamental questions” a prosecutor should ask when evaluating an organization’s compliance program:

1. **Is the corporation’s compliance program well designed?** This includes if the organization is effectively assessing risk, has the necessary policies and procedures in place and ensures those are regularly updated, is actively committed to training and education, and has a confidential reporting and investigatory process.
2. **Is the corporation’s compliance program adequately resourced and empowered to function effectively?** There should be a commitment to compliance by senior management and the board. The board of directors and executives should also set the tone for the rest of the company. Since these issues are so complex, it is critical that the board and senior management are regularly educated on the compliance program and can exercise reasonable oversight. There should also be autonomy and resources for the compliance department and incentives for compliance and disciplinary measure for failure to comply.

3. **Does the corporation’s compliance program work in practice?** This includes if there is continuous improvement, periodic testing, and review; actual investigation of misconduct; and an analysis and remediation of any underlying misconduct.

The answers to these three questions are designed to assist federal prosecutors in determining to what extent a corporation’s compliance program was effective at the time of the offense and at the time of resolution. This will help them decide on the form of resolution or prosecution, the monetary penalty, if any, and compliance obligations for any corporate criminal resolution (e.g., monitoring or reporting obligations).

#### → Recommended Resources

- *The Increasing Importance of Legal Counsel and Compliance and Their Interaction with Healthcare Boards, 2nd Edition* (white paper)
- “Welcome to the Future: A Healthcare Board’s Practical Guide to New Compliance Program Priorities” (*BoardRoom Press* Special Section)
- “Measuring the Compliance Program’s Effectiveness: Suggestions for the Board” (*BoardRoom Press* Article)
- “Best Practices in Academic Medical Center Compliance Oversight” (*Academic Health Focus* Article)

## Conclusion

Regulatory compliance should be a priority for every healthcare organization. Boards must not only be knowledgeable about healthcare regulatory issues, but they need to establish an organizational culture of compliance and provide oversight and assistance to compliance officers and in-house legal counsel in dealing with operational and hospital management issues. Organizations that establish an effective compliance program will reduce the organization’s risk for legal liability and create an organizational culture that supports patient safety and quality of care.



# Game Changers: Successes, Challenges, & Tips for Supporting Today's Healthcare Boards

The following is a summary of themes discussed during a panel session at The Governance Institute's September 2021 Governance Support Forum in San Diego, CA. Panelists included **Emily Sicard**, former Governance & Legal Consultant, Legal Department, *Allina Health*; **Marissa Bailey**, Executive Assistant, *Penn Highlands Healthcare*; & **Kathryn C. Peisert**, Managing Editor, *The Governance Institute*.

## The Role of the Consent Agenda in Maximizing Board Focus on Strategy

Use of a consent agenda is considered a governance best practice and recommended for all boards by The Governance Institute. The Penn Highlands system board has specifically focused on making the consent agenda process as robust as possible to free up as much board meeting time for strategic discussions and deliberation.

But the consent agenda must be used properly. If your board doesn't currently use a consent agenda, or only uses it very sparingly, implementing and/or making it more robust will require more review of materials outside of board meetings. It is important to keep that in mind as when crafting a consent agenda plan, and adjust board member expectations accordingly about how much materials they will be required to review prior to board meetings if that will change significantly.

Governance Institute research has found that boards that do spend more time in active deliberation and debate about the strategic priorities of their organization perform better as a board, and have a bigger impact on the organization's performance. The consent agenda is a key tool to free up this time on the agenda. Further, setting up meetings in such a way makes a direct impact on board member engagement—ensuring that the time spent is valuable, focuses on the future, and makes direct use of the skills around the table.

The following are some best practice recommendations regarding use of the consent agenda:

- What can go into the agenda? Meeting minutes, committee and management reports, past education/information that has already been seen—anything that doesn't require discussion.

- Work closely with legal counsel to make sure the agenda is set up appropriately; that board members really have the opportunity to go through everything prior to the meeting. Nothing should be a surprise, and this requires thought and care during the process.
- Consider your organization's corporate policy structure. Not everything needs to come to the board. Make sure the board is not spending time reviewing and approving things that could or should be approved by the management team or a committee.
- Make sure that board members clearly understand that they have the opportunity to pull an item out if they feel it requires more discussion, and that everyone knows how and when to do so.
- Make sure materials requiring review are sent out at least a week prior to the board meetings so that all board members have plenty of time to review everything.

### → Key Takeaways

- Consent agenda and board materials: standardize an executive summary that enables board members to see at a glance, the key information and recommendation or action required.
- Be intentional about term limits, including how they are structured and why they help your board. Build flexibility into your bylaws so that you can have partial terms and extend terms if the circumstances require it. Connect the term limits planning to recruitment and board leadership succession planning so that plans overlap and complement each other, rather than getting in the way of each other.
- Use the individual board member assessment and competency assessment tools to help identify potential board leaders and competency gaps as members term off, criteria for board member reappointment, and to open up more opportunity for constructive feedback.
- Culture is really important, especially today—both that of the organization and of the board. Having governance tools and processes such as those discussed in this article help to make the desired culture happen by building a strong foundation that makes governance more rigorous. Once you build the tools and processes, they are easily repeated and can be adjusted to fit other needs, so you don't have to reinvent the wheel every time.

- Consistency with the way the materials in the board packet are set up can help immensely. For example, each committee and management report could have a standardized executive summary page that shows, at a glance, the key points from the report and what the needed recommendation or action item is for the board, up front.

## Connecting Board Recruitment with Board Leadership Succession Planning

Two of The Governance Institute’s Intentional Governance pillars are board recruitment and board leadership succession planning. Board recruitment is the first pillar—essentially the starting place when forming an intentional board. Board leadership succession planning is the last pillar in the circular framework. It loops right back to recruitment, because boards need to think about who has the potential to be a future board leader while in the recruitment process. With that kind of intentional planning, boards can build a leadership succession pipeline and develop those board members to be leaders from the start. Board leadership succession planning is



usually a last priority and often doesn't get done, but it makes a significant impact on the board's level of performance as well as board culture.

The CEO and senior leadership succession plan is an essential board responsibility, and we consider board leadership succession planning to be equally important. It should be set up in a similar manner and treated with the same level of importance, starting with a list of criteria of leadership attributes to help shape your leadership pool.

Other tools that can be applied to help make board leadership succession planning more robust include:

- A board mentoring program
- A former chair/new chair mentoring program (both board and committee)
- Regular opportunities for board members to express their continued desire to serve and their desire to become future board leaders
- Individual board member assessment, which is an important tool to help implement reappointment criteria, and can also help the board and governance support staff build out a matrix of leadership skills

## **Balancing Expertise & Engagement with Term Limits**

Having board member term limits is a long-standing governance best practice. Implementing term limits well involves more nuance, however. Primary concerns are about losing excellent people. There are ways to structure term limits to ensure that terms are properly staggered and there are alternate avenues to keep critical expertise when circumstances require.

First off, the governance/nominating committee should not assume that a board member will want to continue their service if they have a remaining term. At Allina, the governance committee chair reaches out (at least 6 months in advance) to make sure that the board members coming up on the end of their term would like to continue to serve. Just opening up the opportunity to have the conversation has proven to be beneficial, and allows a board member to feel they are not obligated to continue to serve if they feel their own time has come to an end. Doing this in advance helps inform the open seats with more active time for recruitment.

Allina utilizes The Governance Institute's individual board member assessment to assist in this process as well, and the board chair and committee chairs conduct a peer evaluation through an anonymous process facilitated by The Governance

Institute, which adds integrity. Since Allina has implemented this practice, it has always re-elected board members, but it has also opened up opportunity for constructive feedback. This helps with board member engagement as well.

Allina also uses a distinctive competency assessment that helps to keep track of the gaps that will be created as board members term off.

It is important that the board's bylaws allow for some flexibility in term limits so that there is room to extend terms if necessary and/or to allow for partial terms if a board member leaves or comes onboard mid-year. Some boards allow for a one-year hiatus and then enable a board member to serve another term. While boards should avoid amending bylaws too frequently, it is an option to consider if the circumstances warrant it. It is all about finding the right balance of maintaining critical expertise and historical/legacy knowledge, while also having fresh perspectives and new approaches. During the coronavirus pandemic, for example, many boards with excellent leaders felt it critical to find ways to keep them on during such a challenging time.

**"We need to do things differently going forward based on what we have learned from the pandemic. We know how important the board's role is, and term limits are a key tool to enable the forward progression and movement—the ability to change and be flexible and adapt because there are new perspectives coming in, making it easier to get away from the 'we've always done it that way' mentality."  
—Kathryn C. Peisert**

A key barrier to properly implementing term limits is that people are often more motivated by the fear of loss than by the potential gain of someone new but unknown. Having ways to continue to engage former board members such as emeritus councils can help get away from this mentality. Another such tool is allowing former board chairs to serve as a mentor to the new board chair as appropriate. (Involve the CEO in the process to make sure the former board chair is not overstepping any boundaries.)

Board term limits also provide more opportunity for boards to help further their diversity goals. Everyone around the table needs to add value and improve the way the board oversees the organization. It's a two-pronged approach. Your board needs to represent the community—nothing compares with having that level of perspective on the board, because different people will ask different kinds of questions based on their life experience. But it is also important to go out and find those pockets in the community, the voices who need to be heard, and ask sensitive questions. Have people with you who speak the language and are part of the culture so that the communication can really be meaningful. By taking both of these approaches simultaneously, the efforts will come together to meet those goals that are most meaningful to patients you serve, while also meeting people who could be board members that you wouldn't have met otherwise.

