

# 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:

- 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 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

### → 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

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.

