

by Paul P. Jesepe, JD, MPS, MA

# OIG offers new guidance for healthcare governing boards

- » Ensure a process to identify and address compliance risks.
- » Explore, and apply when appropriate, best practices of similar organizations.
- » Evaluate employee performance based in part on promoting and nurturing compliance.
- » Define the complementary, yet distinct, roles of Legal, Compliance, and independent audits.
- » Craft and ask probing questions of senior management. Ensure protocols exist to obtain information directly from any staff person.

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In April 2015, the Office of Inspector General for the US Department of Health and Human Services, in collaboration with the Association of Healthcare Internal Auditors, American Health Lawyers Association, and Health Care Compliance Association, issued

"Practical Guidance for Health Care Governing Boards on Compliance Oversight."<sup>1</sup> Below are the five main topic areas with editorial commentary weaved in to elaborate.



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## Expectations for oversight

A critical element to oversight is whether the board gathers enough unfiltered information from multiple sources, not solely relying on potentially shaded information from senior management. This is not to suggest senior management is doing anything intentionally wrong, but there are instances where middle management has not always been forthright with the next level up. This can directly impact what senior leadership communicates to the board. As discussed later, the document makes a distinction between expectations and reporting protocols.

According to the Guidelines, "The existence of a corporate reporting system is a key compliance program element, which not only keeps the Board informed of the activities of the organization, but also enables an organization to evaluate and respond to issues of potentially illegal or otherwise inappropriate activity." In short, information empowers and leads to smart decision making.

Resources to use include the Federal Sentencing Guidelines, Office of Inspector General's (OIG) voluntary compliance program guidance documents, and Corporate Integrity Agreements.

If you're in New York State, be sure to incorporate the "Compliance Program Self-Assessment Form" by the Office of Inspector General.<sup>2</sup> Although state laws differ, it still might be a good idea to review the document no matter where your health organization is based. It elaborates on eight elements to an effective compliance program every board should take to heart.

The Guidelines provide for some flexibility regarding "the scope and adequacy of the compliance program in light of the size and complexity of their organizations." Consideration must be made for organization size and resources, though this does not give an excuse for failing to have adequate safeguards in place or for the board to be complacent or disengaged.

The Guidelines, for example, call for annual resolutions signed by “each member of the Board, or the designated board committee.” This costs nothing while underscoring the duty of board members and their commitment to be engaged. It also puts them on notice not to be complacent. Looking at the best practices of other organizations is also low cost when limited resources are a concern.

A locked compliance box, for example, is a best practice. It empowers staff to leave anonymous notes and is a negligible expense. Creating Google news alerts about HIPAA, IT security, and other trending issues is something staff should be doing and reporting to the appropriate board committee. Free webinars offered by a state inspector general’s office is another option for directors to stay apprised of key issues.

Lastly, board recruitment must carefully examine what organizational needs exist and plan accordingly. Every board should have at least one attorney, but is he/she versed in compliance, or are they someone who does trust and estate work? A warm body isn’t good enough. Board candidates should be screened for expertise.

### Roles and relationships

Organizations too often have internal turf battles. This causes a silo mentality where the left hand doesn’t know what the right is doing and information is not readily shared, which causes collaboration to suffer.

The Guidelines make it clear that organizations “should define the interrelationship of the audit, compliance, and legal functions in charters or other organizational documents.”

Again, the Guidelines provide for some flexibility, since, for example, not all organizations can retain full- or part-time legal counsel and will hire an outside attorney when a need arises. Yet there must be clear directives that counsel doesn’t influence or dictate to Audit or Compliance. These are distinct roles.

“The *compliance function*,” according to the Guidelines, “promotes the prevention, detection, and resolution of actions that do not conform to legal, policy, or business standards.” The function includes developing policies and procedures, creating incentives for employee involvement, and work plans to improve or sustain compliance.

The Guidelines highlight that the “*legal function*” advises the organization on the legal and regulatory risks of its business strategies, providing advice and counsel to management and the Board about relevant laws and regulations that govern, relate to, or impact the organization.”

Internal audits provide “an objective evaluation of the existing risk and internal control systems and framework within an organization.” They “ensure monitoring functions are working as intended and identify where management monitoring and/or additional Board oversight may be required.”

Human Resources (HR) and Quality Improvement (QI) functions are also discussed independent of the other areas. A basic definition is offered for HR while the core elements of improving efficiency and bettering health outcomes with measurement define QI. “Quality improvement is critical to maintaining patient-centered care and helping the organization minimize risk of patient harms.”

Overall, the document places special importance on addressing risk: identifying, investigating, correcting, and communicating findings and the need for change throughout the organization. Boards are duty bound to know how management approaches risk and the way the above referenced functions interact.

### Reporting to the board

Boards are required to “set and enforce expectations for receiving particular types of compliance.” This does not mean everything will come from the compliance officer, but clearly boards should be getting regular

updates on departmental audits, risk assessments, and quality assurance projects.

The Guidelines provide that, "By engaging the leadership team and *others deeper in the organization*, the Board can identify who can provide relevant information about operations and operational risks" (emphasis added). Boards should not merely rely on the CEO, COO, CFO, or Clinical Director for information. Middle and lower management can be just as important in getting information "deeper in the organization." Read this topic area in conjunction with the earlier discussed section, "Expectations for oversight." There is overlap here.

In going deeper, the board can more thoroughly "identify who can provide relevant information about operations and operational risks." Issues brought to the board's attention could include "internal and external investigations, serious issues raised in internal and external audits, hotline call activity, all allegations of material fraud or senior management misconduct." This could range from waste and fraud to inappropriate conduct by healthcare providers.

### Identifying and auditing risks

Most focus areas under this category shouldn't surprise anyone. Every board already should be mindful of billing claims, privacy breaches, quality assurance, medically unnecessary procedures, and the 60-Day Rule for refunds and overpayments.

One area worth highlighting is "referral relationships." The Guidelines don't elaborate on this, but one interpretation could involve when a board member, some of whom will be active in the business community, recommends a consultant or outside contractor. Business of course is about referrals, relationships, and networking.

It is important that a policy is in place for a transparent process to solicit competitive bids for outside work. Your organization shouldn't be retaining a particular contractor solely based on the recommendation of a board

member. This isn't to suggest a board member can't invite a business or professional acquaintance to submit a bid, but the process should always be open, transparent, and competitive, unless rare or unique expertise is involved.

### Encouraging compliance and accountability

The Guidelines use the phrase "a way of life" in describing the importance of compliance. This infers a culture or philosophy that is ingrained into the organization's soul that makes policies something more than words on paper. It hints at something culturally organic involving organizational values and the attitude of every member of the team.

Don't underestimate the importance of something as deceptively simple as a values statement. Get your board to discuss values and roll out a short, one-page document to staff. Post the values liberally and identify ways to incorporate them into daily operations.

Attitudes of individual staff can be assessed in an employee evaluation. Evaluations should no longer be just about, for example, whether the doctor is competent and treats patients with respect, but also whether he/she is promoting departmental risk assessments and quality assurance projects, and helping to determine if colleagues are properly documenting for services rendered.

"These assessments," according to the Guidelines, "can then be used to either withhold incentives or to provide bonuses."

### Conclusion

The Guidelines offer clarity and direction, but also opportunities to go above and beyond what's expected, showing an energized commitment to an ethical culture that is sustained and vigorous. It may even demonstrate how the organization can be a leader for best practices. ☐

1. <http://1.usa.gov/1GMMd2w>

2. See "Compliance Program Self-Assessment Form" under Forms at <http://on.ny.gov/1IzRjc3>