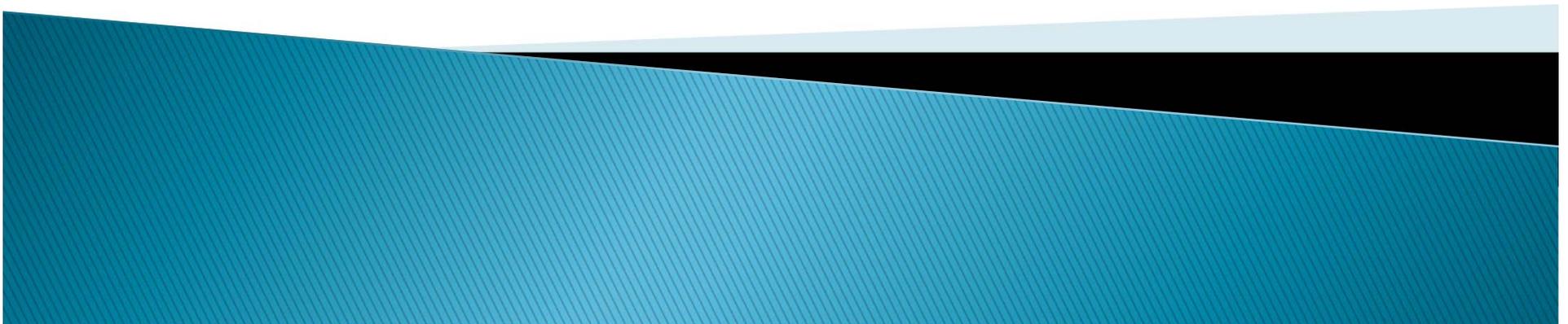


Ethical Considerations in Organizing the Compliance Function

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Ethical Considerations in Organizing the Compliance Function

Before we start, we must disclaim:

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Ethical Considerations in Organizing the Compliance Function

AGENDA

- ▶ **Organization of the Compliance Function: A Tale of Two Models**
- ▶ **Ethical Considerations and the Professional Rules of Ethics**
- ▶ **The Government's View**
- ▶ **Review of Real World Examples**
- ▶ **Panel Discussion**
- ▶ **Final Thoughts**



Ethical Considerations in Organizing the Compliance Function

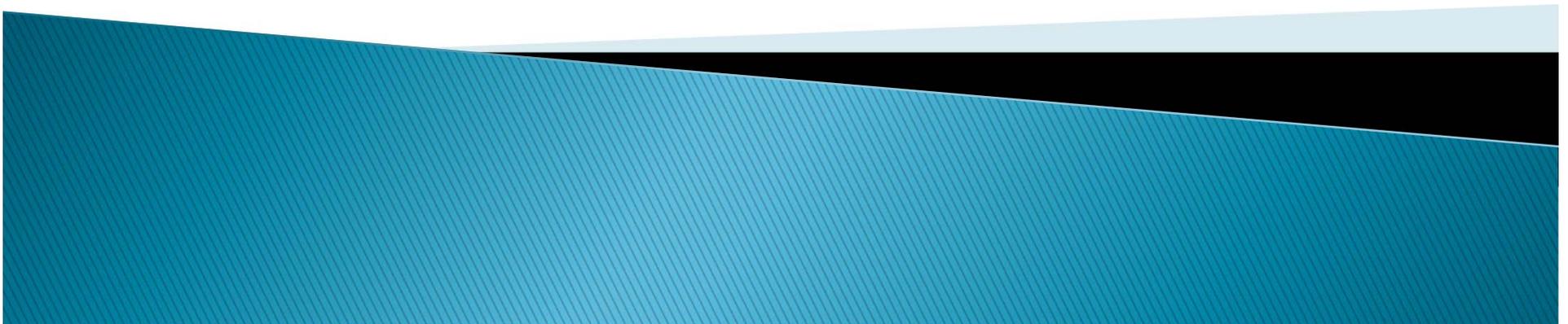
Organization of the Compliance Function: *A Tale of Two Models*

- ▶ **The Stand-Alone Compliance Department**
- ▶ **A Dedicated Compliance Office within the Legal Department**



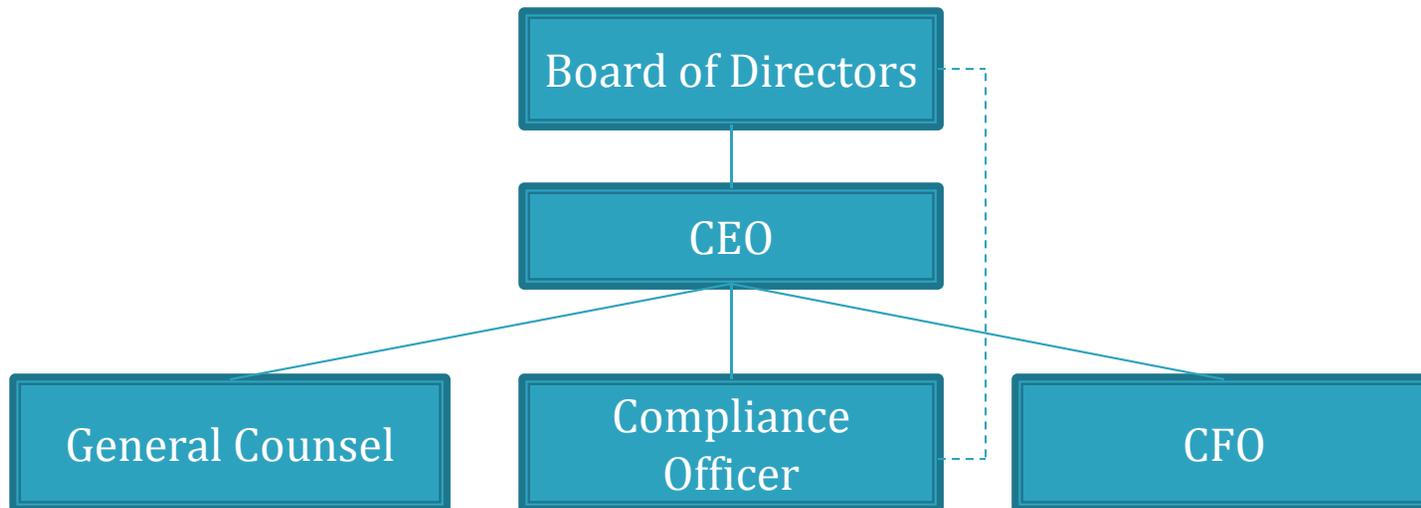
POLL: Compliance and the General Counsel's Office

What is your experience?



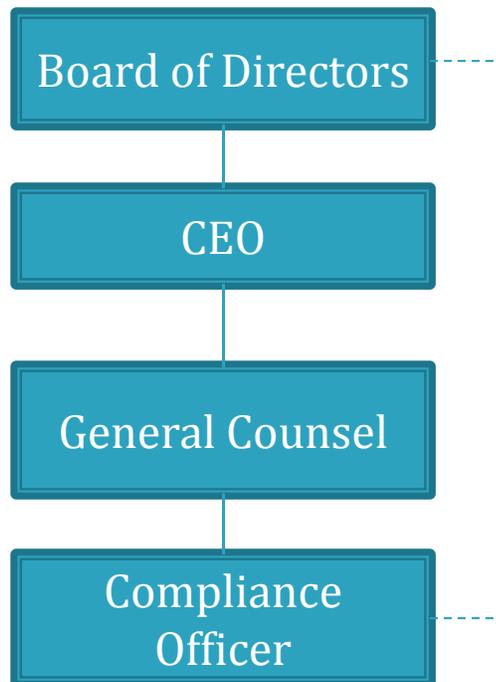
Ethical Considerations in Organizing the Compliance Function

The Stand-Alone Compliance Department



Ethical Considerations in Organizing the Compliance Function

A Dedicated Compliance Office within the Legal Department



Ethical Considerations in Organizing the Compliance Function

Ethical Considerations and the Professional Rules of Ethics

- ▶ Model Rules of Professional Conduct
- ▶ Pennsylvania Rules of Professional Conduct
- ▶ HCCA's Code of Ethics for Health Care Compliance Professionals



Ethical Considerations in Organizing the Compliance Function

- ▶ Rule 1.6: Confidentiality of Information
 - ▶ Rule 2.1: Advisor
 - ▶ Rule 4.1: Truthfulness in Statements to Others
 - ▶ Rule 8.4: Misconduct
- ▶ Rule 1.6: Confidentiality of Information
 - ▶ Rule 2.1: Advisor
 - ▶ Rule 4.1: Truthfulness in Statements to Others
 - ▶ Rule 8.4: Misconduct

Model Rules of Professional
Conduct

Pennsylvania Rules of
Professional Conduct

Ethical Considerations in Organizing the Compliance Function

Rule 1.6: Confidentiality of Information

- ▶ A lawyer may reveal information if necessary ...
 - to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services. [Model Rule]
 - to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. [Model Rule]
 - to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another. [PA Rule]
 - to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used. [PA Rule]



Ethical Considerations in Organizing the Compliance Function

Rule 2.1: Advisor

- ▶ In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
- ▶ In rendering advice, a lawyer may refer not only to law ***but to other considerations*** such as moral, economic, social and political factors, that may be relevant to the client's situation.



Ethical Considerations in Organizing the Compliance Function

Rule 4.1: Truthfulness in Statements to Others

- ▶ In the course of representing a client a lawyer shall not knowingly:
 - *make a false statement of material fact or law to a third person*; or
 - fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.



Ethical Considerations in Organizing the Compliance Function

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

- ▶ It is professional misconduct for a lawyer to:
 - violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; or
 - engage in conduct involving ***dishonesty, fraud, deceit or misrepresentation.***



Ethical Considerations in Organizing the Compliance Function

HCCA's Code of Ethics for Health Care Compliance Professionals

- ▶ Two kinds of standards: *Principles* and *Rules of Conduct*.
 - The *Principles* are broad standards of an aspirational and inspirational nature, and as such, express ideals of exemplary professional conduct.
 - The *Rules of Conduct* are specific standards that prescribe the minimum level of conduct expected of each HCCP.



Ethical Considerations in Organizing the Compliance Function

The Government's View

- ▶ **U.S. Sentencing Guidelines**

- ▶ To have an effective compliance and ethics program, an organization shall—
 - (1) exercise due diligence to prevent and detect criminal conduct; and
 - (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

- ▶ Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that ***the program is generally effective in preventing and detecting criminal conduct.***



Ethical Considerations in Organizing the Compliance Function

U.S. Sentencing Guidelines (*cont'd*)

- ▶ Okay, but what does that mean?
- ✓ **High-level personnel** of the organization shall ensure that the organization has an effective compliance and ethics program.
- ✓ Specific individuals **within** high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
- ✓ Specific individuals within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program.
- ✓ Individuals with operational responsibility **shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program.**



Ethical Considerations in Organizing the Compliance Function

Evaluation of Corporate Compliance Programs

- ▶ **Stature** – How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions?
- ▶ **Experience and Qualifications** – Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?



Ethical Considerations in Organizing the Compliance Function

Evaluation of Corporate Compliance Programs (*cont'd*)

▶ ***Autonomy***

- Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors?
- Who reviewed the performance of the compliance function and what was the review process?
- Do the compliance and relevant control personnel in the field have reporting lines to headquarters? If not, how has the company ensured their independence?

▶ ***Empowerment***

- Have there been specific instances where compliance raised concerns or objections in the area in which the wrongdoing occurred?
- How has the company responded to such compliance concerns?
- Have there been specific transactions or deals that were stopped, modified, or more closely examined as a result of compliance concerns?



Ethical Considerations in Organizing the Compliance Function

The OIG Weighs In ...

Designation of a Compliance Officer and a Compliance Committee

- ▶ Focal point of compliance activities.
- ▶ Appointment of “a high-level official” in the organization.
- ▶ Direct access to the company’s governing body, the CEO, and all other senior management and legal counsel.



Ethical Considerations in Organizing the Compliance Function

BEWARE OF THE OIG'S FOOTNOTES!

- ▶ *“The OIG believes that it is **not advisable** for the compliance function to be **subordinate to** the ... organization’s general counsel, comptroller or similar company financial officer. Free-standing compliance functions help to ensure independent legal reviews and financial analyses of the institution’s compliance activities. By separating the compliance function from the key management positions of general counsel or CFO (where the size and structure of the organization make this a feasible option), a system of checks and balances is established to more effectively achieve the compliance program’s goals.”*



Ethical Considerations in Organizing the Compliance Function

Panel Discussion – How the Models Triage Issues

- ▶ An employee calls the Compliance hotline to report a billing issue that may create liability for the organization under the federal False Claims Act.
- ▶ A competitor health care organization reports an issue to the U.S. Attorney's Office that your organization is paying physicians for referrals by providing the physicians with office space at less than fair market value.
- ▶ An employee of an outside vendor reports an issue to their point of contact in your Sourcing department that the vendor is hiring staff without checking whether they have been excluded from participation in federal health care programs, notwithstanding that they send you an annual certification that they conduct such employee screenings.



Ethical Considerations in Organizing the Compliance Function

Final Thoughts

