Report on Medicare Compliance

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Some CCOs Are Foiled by Reporting to Counsel, Weak Commitment to Compliance

For some compliance officers, the job doesn't live up to expectations. The compliance program isn't in the organization's DNA, and resources fall short. Some compliance officers report to general counsel instead of the CEO or directly to the board, and their independence suffers. Reports may be sanitized by the general counsel, who may have a different mindset than compliance.

"The Affordable Care Act made the compliance program mandatory, but it won't happen unless there is a regulation that explains what you need to do," says one compliance officer, who asked to not be identified. "If the government wants this, they have to step up. Otherwise, if there is room to wiggle, there will be wiggling going on." The best thing that could come out of the forthcoming regulation is to stop making compliance officers subordinate to general counsel, she says. But if and when that regulation materializes is anyone's guess.

Sometimes leadership is ambivalent about compliance and underfunds compliance programs, leaving compliance officers overwhelmed. Without a culture change and the money to conduct adequate audits, compliance officers are left hanging. "They are doing all they can do and don't have the time to change hearts and minds," says Mark Pastin, president of the Council of Ethical Organizations in Alexandria, Va. But the fault is not always in the stars. There are compliance officers who are not that effective, either because they didn't want the job in the first place or it doesn't suit them, he says.

Here are some of the factors that subvert the work of compliance officers, experts say:

(1) Legal departments that won't cede enough control to compliance officers. In some organizations, compliance reports to the legal department, even though the HHS Office of Inspector General's compliance-program guidance frowns on it, Pastin says. OIG states that " there is some risk to establishing an independent compliance function if that function is subordinate to the hospital's general counsel, or comptroller or similar hospital financial officer. Freestanding compliance functions help to ensure independent and objective legal reviews and financial analyses of the institution's compliance efforts and activities." But some organizations put legal counsel between the compliance officer and the C-suite and board, which can marginalize compliance and defeat its purpose. "It's not the best reporting relationship," Pastin says. There may be unhealthy competition between the departments, with legal trying to limit compliance to billing and coding and keeping it away from physician contracting and conflicts of interest, he notes.

The compliance officer who requested anonymity says general counsel, whose job is to assist the organization in conducting its business affairs, has a different orientation than the compliance officer. Positioning compliance officers under the general counsel is intended to "contain" the compliance officers, she says. "General counsel will argue in support of the will of the organization, while the responsibility of the compliance officer is to oversee the organization's business conduct: 'does this business approach fall within the letter of the law and regulation? Is it ethical?'" she asks.

Compliance officers must report directly to the CEO or the chair of the board or a board audit/compliance committee because a middleman may interfere with senior leaders and board members getting the unvarnished truth in most cases, the compliance officer says. "What happens in the time the compliance officer prepares a report and the report gets to the board? General counsel is in a position to edit the compliance officer's communication to the board and it has an effect on the report," she says. If the compliance officer red flags a particular process, counsel may disagree, white-out that part of the report or dilute it.

Access to the Board and CEO Are Critical

Legal counsel and compliance officers both need direct access to the board and CEO so they can hear independently from both perspectives and make judgments accordingly, says Julie Chicoine, senior assistant general counsel at Wexner Medical Center at the Ohio State University Medical Center in Columbus, Ohio. "Legal departments are charged with advising an organization as to viable options and business strategy, and protecting the organization's problems with the attorney/client privilege, whereas compliance is generally charged with monitoring and minimizing the risks associated with such activity," Chicoine says. "Both have the organization's interests at heart, but they come from different perspectives."

(2) Leadership that doesn't have compliance in its bones. "One of the hardest questions in compliance is how to get leadership to appreciate the benefits compliance can offer to the organization," Pastin says. "[Some senior leaders] know they should have a compliance function, it is something the government wants, but they don't get it." For example, compliance programs lead to overpayment refunds, and management may find it hard to swallow that that's good for their business. "It's good because it reduces risk. Health care is too complex and hard to manage for anyone to be perfect. But if you pay back the money when you find mistakes, you are not a very interesting target for enforcement," he says. "Payback is a bargain." Some CEOs grasp the importance of compliance, Pastin says. "They want to be able to run their organization with the security that they don't have a big compliance problem. Then they will staff the compliance program to the point where they feel risk is reduced to a minimum," he says. But some executives are "fatalistic," he says. They figure no matter what they do, the government may come, so why bother? "They don't necessarily articulate these attitudes, but you can see it."

Chicoine thinks leadership accepts compliance, but "sometimes cannot grasp the depth of a problem" and doesn't want to believe it's happening. "Indirect facts and anecdotal information about a problem can go on for a long time until something big happens and unfortunately the organization belatedly scrambles to get ahead of disclosure when they are already way behind in even understanding the problem," she says.

(3) Lack of funding/staff. Chicoine says corporate integrity agreements indicate that some leadership takes the attitude that "we are in good shape, we have a good command, we don't need to add a heavy infrastructure over business operations." They may also want to be leaner and meaner amid financial pressures from value-based purchasing and ICD-10. If money for compliance is tight and there's no CIA forcing the organization's hand, "you can still do your job effectively," she says. "Engage other individuals to take on compliance activities as part of their daily role and demonstrate the cost savings compliance is bringing." Report to the CEO and board how negotiating overpayment refunds directly with the MAC avoided potential false claims liability. "I call these strategic saves," Chicoine says. When she was the compliance officer, Ohio State University hired certified coders for every clinical department in the faculty practice plan and addressed poor documentation. That often leads to more revenue, she says, because "physicians don't document enough what cognitively happened in physician patient encounters."

(4) A human resources function that's used to running the show. In some organizations, the HR director becomes the CEO's right hand person and views the compliance officer as a competitor because he or she has access to the board and senior leaders, Pastin says. This may lead to the HR director interfering with compliance functions, he says. For example, HR may try to wrestle away hotline investigations, and then investigate complaints with an eye toward reducing the impact of compliance issues on senior managers. Or HR may not recognize compliance time bombs in HR complaints. For example, a coder may complain to the hotline that her supervisor doesn't understand the questions that coders ask. "That's an HR complaint but it is a serious compliance risk," Pastin says. "HR will resent it if compliance takes over that complaint and pursues it. There will be a power struggle between compliance and HR."

(5) Disinterested board members. There should be a synergy between the board and the compliance program, Pastin says. "You can almost immediately tell if the board is interested in compliance because there is an energy that the program gets from the board's interest," he says. "When the board isn't interested, a lot of times the compliance program doesn't have energy." He also sees more support for compliance when there has been some board turnover and the same people have not been sitting there for 20 years. "Organizations with younger leadership and dynamic boards get compliance," he says. The board's support is indispensable so its indifference is a killer. "Only the board and CEO can give you legitimacy," Pastin says. It helps when board members come from other highly regulated industries, such as banking, defense and financial services. "They will get compliance," he says. The dynamic with the CEO and CFO also plays a role in the board's attitude. "A lot of boards are comfortable with their CEO and CFO and take it from there."

Compliance has to compete for the board's attention with other pressing agenda items, Chicoine says. This is complicated by the fact that board members may have "the invincibility factor" — compliance problems can't happen here — and may not be health care professionals. She recommends compliance officers make their presentations as compelling as possible, and steer clear of Medicare lingo. Put problems in context. "If you talk about fraud or sound like the police, they won't listen," she says. "You need to show you are supporting senior management in strategic decisions and not just part of the regulatory overhead."

Even in organizations where they are supported, compliance officers have a hard road ahead. "The rule is, grow or die," Pastin says. "Compliance risk is changing rapidly and if you don't change with it, you will be a spare wheel." For example, the 340B drug-discount program is a hot topic, and he doubts many CEOs and CFOs understand it. "It's an area where the compliance officer can really contribute," Pastin says. Reducing risk seems to be overwhelming the compliance function, he notes. But the risk-reduction part of the job shouldn't swallow up the function of maintaining the compliance program itself. Compliance can't be a one-person job, he says.

Overcoming the obstacles also requires compliance officers to "market their talent and skill set and help the organization navigate challenges," Chicoine says. "You need to be embedded in the organization's business. You can't operate in a silo and have this program and expect people to come to you with problems."

Contact Pastin at mpastin@corporateethics.com and Chicoine at julie.chicoine@osumc.edu. ✧