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Effective ethics and compliance board reporting: The need for direct and autonomous access

» An organization's governing authority (typically the board of directors) has a fiduciary duty of care to the organization with which it is affiliated.

» An organization's governing authority is expected to be knowledgeable about the content and operation of the organization's ethics and compliance program across all programmatic elements and key risk areas, not just hotline data or information related to investigations.

» An organization's ethics and compliance leader is expected to report directly and autonomously to the organization's governing authority.

» An organization's ethics and compliance leader is expected to provide timely, complete, and accurate information to the organization's governing authority.

» Any aspect of the ethics and compliance organizational structure or board reporting process that interferes with the expectation of direct and autonomous access undermines the design of an effective ethics and compliance program.

It is well-settled that an organization's governing authority, which is typically an organization's board of directors, owes a fiduciary duty of care to the organization with which it is affiliated.[1] In the context of ethics and compliance programs, this duty of care includes being knowledgeable about the content and operation of the organization's ethics and compliance program. This oversight responsibility extends beyond being merely familiar with hotline statistics and key investigations, and includes the duty to be knowledgeable about all programmatic elements across key risk areas. Over the decades, this comprehensive duty of oversight and care has been established and re-affirmed in a variety of guiding frameworks, agency guidance, and relevant case law.

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For instance, the United State Federal Sentencing Guidelines (Guidelines) provide, "[An] organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program."[2] The Guidelines represent the most widely recognized and adopted framework for an effectively designed ethics and compliance program.

Most organizations count somewhere between seven and a dozen programmatic elements that compose the design of their ethics and compliance programs. The number of programmatic elements in any given organization varies, because the form and substance of an effectively designed program can be organized numerous ways. Regardless of the number of programmatic elements in place in a given organization, however, the Guidelines expect governing authorities to be knowledgeable about the content and operation of all programmatic elements across key risk areas, not just an organization's hotline data or investigations. This expectation of comprehensive oversight is addressed in various guiding frameworks, agency guidance, and relevant case law.[3]

In order to help an organization's governing authority fulfill its fiduciary duty of care and oversight, it is similarly well-settled that an organization's senior ethics and compliance leader is expected to report periodically to the organization's governing authority and to have *direct* and *autonomous* access to the governing authority. On these points, the Guidelines expect an organization's ethics and compliance leader to (1) ensure that the organization has an effective ethics and compliance program, (2) have direct access to the organization's governing authority, and (3) report periodically to the governing authority on the effectiveness of the ethics and compliance program.[4] While the Guidelines are silent on the expectation for autonomous reporting, other guiding frameworks and agency guidance address this expectation squarely.

In 2012, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) echoed the notion of direct access and took the expectation one step further to include the concept of autonomy. That is, in its combined guidance with regard to an organization's compliance with the U.S. Foreign Corrupt Practices Act, the DOJ and SEC advised that the senior ethics and compliance leader should have "adequate autonomy" from management and "direct access" to the organization's governing authority.[5] Direct and autonomous access help to ensure that the information provided by the senior ethics and compliance leader to the governing authority is timely, accurate, and complete.

Five years later, in its guidance issued in 2017, the DOJ reiterated the need for direct and autonomous access. In its guidance, the agency indicated that, when evaluating ethics and compliance programs in the context of criminal proceedings, it inquires whether the high-level individual responsible for designing and implementing the organization's ethics and compliance program has direct reporting lines to the organization's governing authority.[6] In addition, the DOJ indicated that it inquires whether the senior ethics and compliance leader participates in executive or private sessions with the board or a committee of the board—an example of autonomous access.[7] The DOJ's focus on executive or private sessions underscores the importance of, and need for, direct and autonomous access in the context of effectively designed ethics and compliance programs.

The concept of direct and autonomous reporting is also reflected in other guiding frameworks and agency guidance. For instance, the Organization for Economic Co-operation and Development's (OECD) framework for an effectively designed anti-corruption compliance program indicates that the high-level leader tasked with designing and implementing an organization's compliance program is expected to report matters directly to the organization's governing authority. The OECD also expects that ethics and compliance leaders will have

an adequate level of authority and autonomy from management.[8]

While the expectation for direct and autonomous access has gained traction and momentum over the last decade or so, agency guidance on this topic is not necessarily a recent phenomenon. For instance, in 2003, when the Office of Inspector General (OIG) issued guidance to pharmaceutical companies as to effective ethics and compliance governance structures and reporting processes, the OIG indicated that ethics and compliance officers should have the authority to "report directly to the board of directors … [and the ability] to exercise independent judgment."[9] The OIG has also inquired into direct and autonomous access when reviewing the design of an organization's ethics and compliance program outside of the pharmaceutical industry.[10]

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The expectation for direct and autonomous reporting was recently reaffirmed in the International Organization for Standardization's (ISO) 2016 standard that sets forth a detailed framework for an effectively designed anti-corruption compliance program. Among other things, the ISO standard expects an organization's governing authority to be knowledgeable about the content and operation of the program, and for the compliance and ethics leader to report to the governing authority as to the performance of the program. The ISO standard further expects that the compliance function will be adequately resourced, have appropriate "authority and independence," and enjoy direct access to the governing authority.[11]

Clearly, direct and autonomous access of the ethics and compliance program leader to the governing authority helps to ensure that the governing authority receives timely, complete, and accurate information. This helps the governing authority to fulfill its fiduciary duty of oversight and care with regard to being knowledgeable about all elements of the organization's ethics and compliance program. For these reasons, any aspect of the ethics and compliance governance structure or reporting process that interferes with the governing authority's ability to fulfill its duty stands in direct contradiction to the expectations set forth in a variety of guiding frameworks, agency guidance, and relevant case law.

Examples of such interference may exist when a member of management, including the CEO, establishes an internal "review" step in order to create an opportunity to inappropriately modify, filter, or censor the information. Another example may exist when a member of management participates in board or committee meetings and attempts to downplay, explain away, or modify the information being reported by the organization's ethics and compliance leader to the governing authority.

In sum, when read together, a variety of guiding frameworks, agency guidance, and relevant case law expect an organization's governing authority to be knowledgeable about all aspects of the ethics and compliance

program across key risk areas. These programmatic drivers also expect that an organization's ethics and compliance leader will have direct and autonomous reporting access to the governing authority. Lastly, any aspect of an organization's ethics and compliance governance structure or reporting process that interferes with these fundamental expectations undermines the design of an effective ethics and compliance program, inhibits the governing authority's ability to fulfill its fiduciary duty of care and oversight, and ultimately exposes the organization to risk. ✳

1. *See e.g., In re Caremark International Inc.,* 698 A.2d 959 (Del. Ch. 1996); Office of Inspector General of the U.S. Department of Health and Human Services and the American Health Lawyers Association, *Corporate Responsibility and Corporate Compliance: A Resource for Healthcare Boards of Directors*, 04-02-2003; and American Bar Association, Section of Business Law, Revised Model Nonprofit Corporation Act, § 8.30 (1987).
2. *See* United States Sentencing Commission, *Guidelines Manual*, § 8B2.1.b.2.A. (1991, 2012).
3. *See e.g.*, the International Organization for Standardization's ("ISO") standard 37001, which deals with effective anti-corruption compliance program design; *Evaluation of Corporate Compliance Programs,* Department of Justice, Criminal Division, Fraud Section, § 2 (2016); and *In re Caremark International Inc.,* 698 A.2d 959 (Del. Ch. 1996).
4. *See* United States Sentencing Commission, *Guidelines Manual*, §§ 8(B)(2)(1)(b)(2)(B) and (8)(B)(2)(1)(b)(2)(C).
5. *See Resource Guide to the U.S. Foreign Corrupt Practice Act,* Department of Justice and Security and Exchange Commission, §§ 314 and 315 (2012).
6. *See Evaluation of Corporate Compliance Programs,* Department of Justice, Criminal Section, Fraud Division (2017).
7. *See id.*
8. *See* Recommendation of the Council for Further Combating Bribery of Foreign Government Officials in International Business Transactions, *Good Practice Guidance on Internal Controls, Ethics, and Compliance, Annex II* § A.(4) (2010).
9. *See* Office of Inspector General's Guidance for Pharmaceutical Manufactures, Federal Register / Vol. 68. No 86 23731 (2003).
10. *See e.g., Florida A&M University Anti-hazing Program Preliminary Report of Investigation,* U.S. Office of Inspector General, Complaint No. 2011-038 (2012) (when, in the context of reviewing the adequacy of the university's anti-hazing compliance program, the OIG reviewed, among other things, the compliance-related information provided directly by FAMU's Council for Student Affairs to Student Affairs Committee of the Board of Governors).
11. *See* ISO 37001 § 5.1.1(c)(e)) and ISO 37001:2016 § 5.3.2(d).

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