I. INTRODUCTION

Compliance with applicable laws and regulations has always been a concern of business ventures. Historically, internal or external legal counsel provided guidance, usually on a case by case basis. Over recent history, compliance efforts have become more structured and formal as the number and complexity of rules have increased, and as government has provided rewards for demonstrating efforts to comply and punishment for failing to demonstrate efforts to comply. As business entities and government have interacted over the years, a complex system of compliance management has evolved.

II. STRATEGIC CONSIDERATIONS

A. The Current Compliance Context

Today, compliance programs are commonplace. Many different professions are involved, including a new class of “compliance professionals” with their own certifying bodies. Compliance rules stretch across many federal rule areas, witnessed by the fact that more than a dozen agencies potentially have a say in how a U.S. financial institution operates abroad. Compliance concerns no longer stop with legal compliance, and now include industry protocols, licensing requirements, and an array of standards and ethical concerns.

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1 Sentencing Reform Act of 1984, 18 USCA § 3551 et seq.
2 For example, see SOCIETY OF CORP. COMPLIANCE AND ETHICS, www.corporatecompliance.org; and HEALTH CARE COMPLIANCE ASS’N, www.hcca-info.org.
Additionally, foreign compliance regimes now span the global business environment and do not necessarily match up with U.S. compliance rules as reflected, for example, by the fact that common U.S. compliance hotlines appear to conflict directly with EU and individual European nation data protection rights.\(^4\) Parts of Europe are opposed to anonymous reporting.\(^5\) Growing international protocols regarding foreign bribery are expanding compliance requirements for many companies.\(^6\)

What began as voluntary efforts to mitigate corporate monetary penalties in the event of certain federal criminal prosecutions, have evolved into mandated or quasi-mandated compliance programs. Over time, these compliance programs have become increasingly complex and expansive, and the continuous layering of rule explanations has morphed into a maze of intricate requirements.\(^7\) Some contend that the annual cost of compliance programs in the United States exceeds $1.75 trillion.\(^8\)

This paper focuses on a single aspect of this evolution, the growing need to adequately monitor and audit the compliance system itself. Certainly, for some time, the use of internal and external audits has been a part of compliance activities. This paper contends that more and more organizations will find it imperative to apply audit protocols to the compliance program itself. That is, compliance programs themselves need to be audited to insure that the compliance program is itself compliant.

### B. Compliance Program Goals

While compliance activities have a long history, most credit for their current scope is attributed to the growth of Federal Sentencing Guidelines in the 1990s which provided reduced corporate criminal sentences when the corporation had established a corporate compliance program.\(^9\) The idea was that successful compliance programs help with early detection and prompt correction of noncompliance with laws.\(^10\) Over the past two decades, there

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5 Id. at 151.
have been continued increases in government involvement in compliance, and it is reasonable to expect that increased enforcement is likely for the foreseeable future. As compliance efforts grow, new areas for concern are added to the mix. An example of the trend is the Department of Justice, in settlements with companies over alleged violations, gradually requiring the company to include mandatory due diligence practices with all of their third-party business partners.

One of the difficulties in discussing compliance program auditing is the less-than-agreed-upon language used to describe compliance in general, as well as particular compliance program elements. The terms used in the focus on compliance now include monitoring, auditing, enterprise risk management, internal controls, performance auditing, risk stratification, compliance programs, and many more.

Regardless of the terminology, an integrated approach to compliance is becoming expected. There is a growing belief that all of the compliance elements, including audit, risk, and legal, do not work when they are isolated into narrow silos, but do work when integrated and coordinated. Today, the key to a good compliance program is mixing all of the diverse elements into an effective compliance program.

The current economic environment has also affected the compliance environment. During periods of economic distress, entities and individuals are increasingly inclined to cut corners. The tough economy results in heightened regulatory scrutiny which leads to an increased need for compliance program effectiveness. Compliance is expensive, but the cost is minor compared to dealing with investigations, fines or sanctions. In the current compliance environment, no prudent alternative exists to putting significant resources toward compliance. Tough economic times make it...

15 Id.
17 Id. at 16.
18 Husisian, supra note 3, at 224.
19 Id.
imperative for companies to find efficient, proactive ways to manage regulatory compliance risks.20

C. Compliance Program Scope

The scope of the compliance effort should match the particular compliance issues facing a company. Clearly, the compliance programs should both prevent and detect misconduct, including conduct which is not just criminal.21 Often, compliance programs also address the potential for civil liabilities and various industry specific standards.22

Setting the proper scope for the compliance program is never easy. It is difficult to determine the true value of a compliance program to the organization.23 Unfortunately, the maze of rules and modifications requires both regulators and the regulated to develop a “minefield” mentality where one misstep can have catastrophic effects.24 Each compliance program will have a unique approach. Likewise, the resulting compliance program work plan, which articulates annual goals, monitoring, and audit activities, will be unique to that company at that point in time.25

D. Role of Governance, Risk, and Compliance (GRC)

The word compliance has evolved to have many different meanings.26 Amid this definitional broadening, there has been a melding of the concepts of governance, risk, and compliance (referred to as GRC).27 Additionally, among these various meanings there are overlaps, gaps, and conflicts.28

GRC usually includes corporate governance, enterprise risk management (ERM), and compliance with rules and regulations as well as ethical and other compliance issues.29 Originally, governance and risk were

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22 Id.
23 Belton, supra note 16.
24 Birdsong, supra note 7, at 375.
27 Id.
28 Id.
little more than mere written principles, but over time they have become robust, integrated, management practices. In the process, however, the titles given to specific activities, such as audit, risk, compliance, ethics, legal, and various combinations of terms, have become less clear.

GRC is a very broad concept that looks at issues, including risk. Some equate GRC with a compliance program. However, GRC is not primarily aimed at the traditional compliance activities of finding and fixing problems. Certainly, overseeing risk management is critical to legal compliance. But monitoring and maintaining compliance is not just regulatory, it is a critical component of an effective ERM program. ERM is becoming a key process in the GRC framework, and its significance continues to grow. The lack of exact clarity in the terminology has not limited the importance of GRC overall, as GRC software, systems, and services are estimated to have a annual cost of $52 billion.

E. The Role of the Compliance Program

The location of “ownership” of compliance efforts within an organization is crucial. It is important that these efforts are not “owned” only by compliance staff, especially since many internal audit functions do not measure operational performance against specific regulatory requirements. In reality, compliance duties, responsibilities, and actors, spread throughout an enterprise in many varying ways.

There is often a compliance committee, a compliance department, or both. A compliance department incorporates all of the compliance functions as opposed to a compliance committee. A compliance committee approach usually matches membership with the key compliance risk areas for the

30 Brozzetti, supra note 26.
31 Id.
32 Snell, supra note 29, at 3.
33 Id.
34 Id.
38 Bamberger, supra note 35, at 669.
39 Keen & Therrien, supra note 13, at 23.
40 Brozzetti, supra note 26.
41 Kurti, supra note 11, at 36.
The general view is that the compliance committee benefits by having as members persons with varying responsibilities in the organization. When both a compliance committee and a compliance department exist, the compliance committee role is usually to support the compliance officer.

There is a continuing debate as to the roles of different enterprise functions with regard to compliance. Early compliance efforts emanated heavily from the legal and financial functions. Some now argue that different corporate roles such as general counsel, chief internal auditor, or chief compliance officer in fact conflict with one another. Some discussions of current best practices suggest that, ideally, neither legal nor financial should be merged with compliance. One strain of the argument is that both financial and legal functions have risk assessment aspects, and that the organization’s appetite for risk should not be part of the compliance professionals’ activity.

The discussion has become more focused with regard to the relationship between the legal department and the compliance function. Sometimes the compliance officer is in the legal department and reports to the general counsel. It is a tough decision whether compliance belongs in or out of the legal department and at present there seems to be no clear answer.

A common argument is that the general counsel role and compliance chief role have actual and potential conflicts, and as a result, it should be viewed as very questionable when they are not separated. Additionally, under certain circumstances, the attorney-client privilege may be weaker for in-house counsel when dealing with internal auditing than for external counsel. While on the topic of attorney-client privilege, it is interesting to note here that some argue that even attorney-client privilege between inside counsel and executives should not block the authority and reach of an internal audit. The scope of this question is not limited to narrow legal or

43 Id.
44 Kurti, supra note 11, at 36.
45 Brozzetti, supra note 26.
46 Kurti, supra note 11, at 37.
47 Snell, supra note 29, at 3.
48 Ryan McConnell, Daniel Trujillo & Katherine Southard, Take It To The Board: There's No Perfect Org Chart- But Compliance Officers Need a Direct Line to Directors, COMPLIANCE 14, 15 (ALM Supplement Winter 2012).
49 Id.
50 Kurti, supra note 11, at 37.
51 Brozzetti, supra note 26, at 10.
52 Id.
compliance issues, as one writer argued that compliance should not be part of the legal function, because the organization should not give the responsibility for compliance to the group that, in the writer’s opinion, has failed to get the compliance job done correctly for the last one hundred years.53

III. DESIGN AND IMPLEMENTATION

A. Determining Compliance Adequacy through Monitoring and Auditing

At regular intervals, an organization’s compliance program should be asked a number of probing questions. The following are some of the questions that must be addressed:

1. What have we already said that we are going to do for compliance?
2. Are we doing what we said we would do?
3. Are we doing it in a consistent manner?
4. Is what we are doing achieving what it is supposed to accomplish?
5. Is what we said we will do what we are really required to do?
6. How do we determine that our compliance program complies with all applicable rules?
7. Are there appropriate processes for reviewing the maintenance of the program?
8. Is there adequate compliance program oversight?
9. Can we document processes in place to effectively deal with the discovery of non-compliance?
10. Can we document processes for evaluating preparedness for changes which occur in the future?
11. Are we able to adequately document the basis upon which our compliance program operates?
12. Can we document that we appropriately evaluate the entire compliance program?

These and other questions all assess the overall effectiveness of a compliance program. Part of any assessment involves broad questions

53 Snell, supra note 14, at 66.
concerning levels of organizational risk tolerance, the extent of organizational compliance buy-in, and compliance culture in general. These are all important parts of monitoring a compliance program. Under the sentencing guidelines, monitoring and auditing are linked,\(^5\) and many organizations use the terms auditing and monitoring interchangeably, but many argue they are not interchangeable.\(^5\) Sometimes the audit function owns the monitoring process; other times there may be a dedicated monitoring team independent of the audit process.\(^5\) Whatever the case, a key element of a good compliance program includes consistent monitoring and auditing.\(^5\)

There is no road map or textbook on effective implementation of compliance programs in a particular organization.\(^5\) Monitoring is defined as measuring operational performance so as to insure that regulatory and other standards are met.\(^5\) Auditing focuses on testing, spot checking, and inspections, done at a point in time, and is both independent and objective.\(^5\) Any discussion of compliance program auditing, such as this paper, presupposes an effective monitoring system to which audit results flow. It is important to view the compliance program audit as another layer in a good compliance program and not as something separate.\(^\)

**B. The Compliance Program Audit**

The compliance program audit is an essential part of an effective compliance program for several important reasons. Most significantly, recent U.S. Department of Justice (DOJ) settlements include an audit to show that compliance is not just a paper program.\(^6\) Put simply, an organization should audit its compliance program because that is the first thing the government

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54 Keen & Therrien, *supra* note 13, at 22.
55 *Id.*
56 *Id.* at 24.
58 Keen & Therrien, *supra* note 13, at 23.
59 *Id.* at 22.
61 Practising Law Institute, *Kicking the Tires and Taking Her Out For a Spin – How to Audit a Compliance Program*, 4 PRACTISING L. INST’S COMPLIANCE COUNS. 1 (2007).
will do before making any decision on whether or not to prosecute and the level of penalties that will be sought if they do prosecute.63

A key a part of a compliance program is systematically looking for problems through means like auditing.64 Ten years ago the compliance department was often never audited,65 while today many regulations require regular testing of the effectiveness of controls.66 Auditing the compliance program is best viewed as an important part of an overall comprehensive evaluation.67

The audit plays an assurance function.68 The primary compliance audit report purpose is communication to management and stakeholders.69 An audit typically looks for independent verification of risk control mechanisms.70 Auditing does not fix problems because that is not its charge.71

Many internal audit functions do not measure operational performance against specific regulatory requirements.72 An overall compliance monitoring plan should be formally written and clearly identify both purpose and objectives.73 If the compliance effort is not measurable, it cannot determine if efforts are driving better compliance outcomes.74

Auditing a compliance program can provide an independent determination of appropriateness and effectiveness.75 Also, auditing the compliance program supports assessing performance and effectiveness.76 A compliance program audit tests systems, and in turn, helps get the full benefit of sentencing guidelines when needed.77

Auditing the compliance framework itself enables early identification of systemic issues,78 and can identify areas for improvement.79 Existing compliance processes need to be continually reassessed.80

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63 Swanson & Tabuena, supra note 36.
64 Snell, supra note 29, at 65.
65 Karen Stensgaard, Have You Audited Your Compliance Department Lately?, INTERNAL AUDITOR 45, 46 (Apr. 2002).
66 Bamberger, supra note 35.
67 Swanson & Tabuena, supra note 36.
69 Keen & Therrien, supra note 13, at 24.
70 Id. at 22.
71 Snell, supra note 14, at 67.
72 Keen & Therrien, supra note 13, at 23.
73 Id.
74 Id.
75 Swanson & Tabuena, supra note 36.
76 Id.
77 PRACTISING L. INST., supra note 61.
79 Swanson & Tabuena, supra note 36.
80 Chong Ee, Overcoming Checkbox Compliance, INTERNAL AUDITOR 55, 56 (Dec. 2010).
On a larger scale, auditing compliance programs can increase integration of governance, risk, and compliance. Additionally, auditing of the compliance program can be a catalyst for changes in GRC to support improved operational effectiveness. By assuring after the fact that risk is being properly managed, compliance is able to proactively mitigate future risk.

C. Role of Compliance Program Audits

A company needs to assume that, at some point, an employee or business associate will engage in illegal activity. While criminal violations are central to compliance programs, risk issues for compliance program audit can include regulations, culture, reputation, and the like. The most common thread is the focus on utilization of non-compliance as the evaluation starting point. Often a transaction’s review points to the need for a systems review which looks at patterns and processes as a whole.

Auditing typically looks for independent verification of risk control mechanisms. This is achieved in a number of ways. Compliance program audit issues include consistency across the organization, the clearness of lines of authority, appropriate segregation of compliance program duties, and the relationship between the compliance program and others in the organization are all expected. The audit looks at the sufficiency of the process in and of itself, and also at the effects and outcomes of the process. Directly or indirectly, this occurs under two broad headings: process audits and substantive audits.

81 Swanson & Tabuena, supra note 36.
82 Id.
84 Schroeder, supra note 57, at 7.
85 Swanson & Tabuena supra note 36.
86 Cornelia M. Dorfschmid, Systems Reviews verses Transaction Reviews — A Closer Look at a New Era of Mandatory Compliance: Use of Both Review Types May Be the Best Preparation for Effectiveness Certification in Coming Years, 12 J. HEALTH CARE COMPLIANCE 41, 43 (2010).
87 Keen, & Therrien, supra note 13, at 22.
88 Burch, supra note 78, at 54.
89 Swanson & Tabuena, supra note 36.
90 Burch, supra note 78, at 59.
91 Dorfschmid, supra note 86.
D. Process Audits and Substantive Audits

The process audit addresses the “are we doing what we said we would do” question. The audit first asks if key features of the compliance plan have been implemented. This leads to audit inquiries as to whether the program components are operating as intended. In the simplest form, a process audit determines if the protocols are implemented and whether the employees are following the protocols.

A substantive audit determines if the resulting work product meets regulatory requirements. A key problem in the monitoring and auditing of compliance programs is that a substantive audit must check for alignment of the overriding compliance program requirements with the many internal audit functions which often do not measure operational performance against specific regulatory requirements. That is to say, the audit process needs to be designed to evaluate whether the program is substantively addressing the specific compliance concerns.

E. The Compliance Program Audit Process

A very important aspect of audit design is to understand the audit objectives given the level of assurance sought by the board. In the audit planning phase, all of the important issues and risks need to be identified. Very often, the compliance program audit will use a risk-based approach to identify important issues. In compliance programs, auditing for internal controls is different from auditing for compliance effectiveness.

Compliance program auditing needs to understand existing compliance program strengths and weaknesses. This can often take the form of some kind of mapping of the compliance environment. The design of the process first audits for overall compliance, then looks to the remediation of identified issues, inquires if there are root causes for the problems, and finally addresses the compliance program within that context.

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92 Swanson & Tabuena, supra note 36.
93 Id.
94 Id.
95 Id.
96 Keen & Therrien, supra note 13, at 23.
97 Swanson & Tabuena, supra note 36.
98 Id.
99 Id.
100 Keen & Therrien, supra note 13, at 24.
101 Id.
102 Ee, supra note 80, at 57.
F. The Compliance Program Audit Plan

Assessing compliance risk should be part of the overall risk assessment and specifically incorporate compliance auditing into audit plans.\(^{103}\) There needs to be a clear compliance-auditing plan.\(^{104}\) The audit plan should include a statement of auditing standards which spell out compliance audit particulars.\(^{105}\) Additionally, there should be a clear delineation of the basic strategy of the compliance program audit, the scope of the audit program, audit objectives, time frame, personnel, methodology, and reporting.\(^{106}\) While specificity is important, overly strict audit process standardization should be avoided.\(^{107}\) Flexibility sufficient to pursue unexpected results is important.

The compliance-auditing plan must focus audit related activity on both operational compliance performance and overall compliance effectiveness.\(^{108}\) It is impossible to develop a good compliance plan without a thorough understanding of the operations and how they relate to regulations affecting those operations.\(^{109}\) On a large scale, the compliance program audit components include the program design structure, the selected processes, the implementation process, and finally the actual audit for compliance using the designated standards.\(^{110}\) At the more operational level, the compliance program audit plan articulates the compliance audits to be conducted for the specified time period.\(^{111}\)

Each compliance program audit will require careful planning.\(^{112}\) Auditing a compliance program is much like any other audit in structure, planning, fieldwork, and reporting.\(^{113}\) In the audit planning stage identification of audit objectives is a crucial step.\(^{114}\) Part of compliance program audit includes documented policies and procedures for conducting

\(^{103}\) Burch, \textit{supra} note 78, at 54.
\(^{104}\) Keen & Therrien, \textit{supra} note 13, at 23.
\(^{106}\) Practising Law Institute, \textit{supra} note 61.
\(^{107}\) Keen & Therrien, \textit{supra} note 13, at 24.
\(^{108}\) \textit{Id}.
\(^{110}\) Swanson & Tabuena, \textit{supra} note 36.
\(^{111}\) Boerner, \textit{supra} note 25.
\(^{112}\) Keen & Therrien, \textit{supra} note 13, at 24.
\(^{113}\) Swanson & Tabuena, \textit{supra} note 36.
\(^{114}\) \textit{Id}.\n
inquiries and investigations. The planning phase of the audit results in confirming the scope of the audit and getting sign-off to proceed.

IV. TACTICAL CONSIDERATIONS

A. Conducting the Audit

Compliance program audits also raise questions regarding conflicts of interest. International standards for professional internal auditors say that they should not be participating in activities they also audit. The compliance auditing plan needs independent, disciplined, audit protocols. Utilizing the already established audit avenues for the organization can have difficulties because a typical audit unit often favors financial audits and often they do little in other areas of regulatory noncompliance.

B. Establishing the Basis for Audit Evaluations

A self-assessment prior to the audit can be valuable. Determining the sufficiency of the level of audit testing is left to an individual’s professional determination. The audit should be based on comprehensive audit risk assessment, that is, focused on key compliance risks. Because compliance and ethics efforts cover a very broad span of activities, the audit process must carefully define the proper focus. Auditing the compliance program may not answer whether the program actually reduced non-compliance. In fact, auditing the compliance program alone is likely not sufficient to demonstrate the program effectiveness. Compliance monitoring needs data, metrics, reporting systems, and the ability to take into account that internal audit functions do not directly measure operational performance against specific regulatory requirements.

115 Burch, supra note 78, at 59.
116 Swanson & Tabuena, supra note 36.
117 Henry, supra note 68, at 29.
118 Keen & Therrien, supra note 13, at 23.
119 Snell, supra note 14.
120 Swanson & Tabuena, supra note 36.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Keen & Therrien, supra note 13, at 23.
The evaluation phase starts with asking if absolute minimum regulatory requirements have been met (referred to as a baseline evaluation).\textsuperscript{127} As it unfolds, the evaluation phase of an audit looks at specific data, information systems, and performance reporting measures.\textsuperscript{128} Ironically, although the government often demands the implementation of an effective compliance program, it generally offers little guidance as to what that is or how to measure it.\textsuperscript{129}

Benchmarks and other measurement tools are useful. The auditing of compliance programs evaluates effectiveness compared to both internal and external measures.\textsuperscript{130} There are no standard measurement techniques for auditing for compliance. In some areas of compliance, the regulatory regime suggests that one method of internal measurement is a “snapshot” of the compliance program for use as a future benchmark.\textsuperscript{131} In some settings, benchmarks are an essential part of a compliance program.\textsuperscript{132} Even then, there are few metrics and standards for defining an effective program.\textsuperscript{133}

In the evaluation stage of an audit, where it is essential to look beyond minimum practices, a common practice model looks at the practices of leading peers in the industry.\textsuperscript{134} This can be in the form of looking at leading peer practices through organizations such as the Ethics and Compliance Officer Association or the Open Compliance and Ethics Group.\textsuperscript{135} It is also useful to look further into more leading-edge practices.\textsuperscript{136} Finally, benchmarks need to be regularly monitored for evolving trends.\textsuperscript{137}

C. Actual Audit Tactics Vary

Compliance program auditing can include teams of cross-trained peer reviewers conducting quarterly case record reviews in every program area to match documentation to requirements.\textsuperscript{138} Often, compliance program auditing will include a monthly review of case records.\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{127} Swanson & Tabuena, \textit{supra} note 36.
\bibitem{128} \textit{Id.}
\bibitem{129} Miriam Hechler Baer, \textit{Governing Corporate Compliance}, 50 B.C.L. Rev. 949, 954 (2009).
\bibitem{130} Swanson & Tabuena, \textit{supra} note 36.
\bibitem{131} Jillian Bower, \textit{Use of Surveys to Evidence Compliance Program Effectiveness: When Deciding Which Survey to Use, Keep in Mind It Must Be Credible to an Outside Third Party}, 13 \textit{J. HEALTH CARE COMPLIANCE} 43, 44 (2011).
\bibitem{132} \textit{Id.}
\bibitem{133} Dorfschmid, \textit{supra} note 86, at 42.
\bibitem{134} Swanson & Tabuena, \textit{supra} note 36.
\bibitem{135} \textit{Id.}
\bibitem{136} \textit{Id.}
\bibitem{137} Bower, \textit{supra} note 131, at 64.
\bibitem{139} \textit{Id.}
\end{thebibliography}
program auditing can also include month to month tracking and analysis of identified risk areas. Many transaction reviews can use statistical auditing and extrapolation tools as part of the compliance program audit. An example would be the variety of ways coding in healthcare settings are tested for compliance. Another way of compliance auditing is by examining company emails. Any email, utilizing a company email address, is company property and contains significant amounts of information for review. Email compliance program audits can be aided by key word searches.

Compliance program audits have begun using statistical concepts. A lot of auditing employs state of the art technology. Reporting that is required for compliance is often created technologically. Technological compliance solutions "interpret" hundreds of rules. Compliance is going hi-tech using a wide array of technology compliance tools. Technological compliance activities are heavily involved in modern risk regulation. A large amount of compliance system auditing is automated. Technology profoundly affects the auditing of all risk management issues including compliance. Much compliance program auditing is reported in dashboard form. Some compliance program auditing happens in real time. Technological compliance activities are used widely from bank capitalization to Sarbanes to information privacy. At the same time, some argue that technological compliance activities can hinder the compliance decision process. One of the arguments is that technological compliance activities frequently lack transparency.

140 Id.
141 Dorfschmid, supra note 86, at 70.
142 Belton, supra note 16, at 15.
144 Id. at 48.
145 Id. at 70.
146 Dorfschmid & Macedo, supra note 60, at 24.
147 Bamberger, supra note 35, at 701.
148 Id. at 669.
149 Id.
150 Id. at 673.
151 Id. at 694.
152 Id. at 693.
153 Id. at 695.
154 Id.
155 Id. at 670.
156 Id.
157 Id. at 676.
D. Audit Documentation Sufficiency

A major compliance audit issue is whether the documentation for the compliance program is sufficient and in place.\(^{158}\) A key requirement is that program audit results are accurately presented to appropriate parties.\(^{159}\) It is vital to document all of the implementation, updating, and evaluation of compliance programs.\(^{160}\) Compliance program effectiveness review is a huge documentation gathering function.\(^{161}\)

One source argues that an entity should be able to describe the compliance program in detail without saying one word, since if the investigator has to ask questions to understand the program, then the documentation is insufficient.\(^{162}\) While that may be a difficult standard, if investigated, there is an immediate need to be able to produce a binder that lays out the compliance program in detail with policies, guidelines, and supporting records.\(^{163}\)

V. CONCLUSIONS

A. Compliance Program Audits in the Larger Organizational Setting

Compliance program audits need to be based in trust and cooperation. Additionally, stakeholders need to understand the importance of transparency in audit processes.\(^{164}\) The Institute of Internal Auditors (IIA) International Standards for the Professional Practice of Internal Audits standard 2110 stresses the importance of effectively communicating information with board members, external and internal auditors, and management.\(^{165}\)

The compliance culture is often more important than the rules themselves in compliance programs.\(^{166}\) With the passage of time, it has become ever more important that compliance professionals report directly to an internal governing authority like the audit committee of the board of directors.\(^{167}\) The organization should have at least an annual report from the compliance officer to the board directly.\(^{168}\)

158 Swanson & Tabuena, supra note 36.
159 Id.
163 Id.
166 Brozzetti, *supra* note 26, at 10.
168 Id.
In some areas such as healthcare, the regulatory compliance burdens are massive and are passed on to consumers.\textsuperscript{169} Another drawback of compliance programs is the reality that they create a record of misdeeds.\textsuperscript{170} The government leaves very little room for discretion when compliance plans uncover violations of law.\textsuperscript{171} The Dodd Frank Act puts companies into the dilemma of choosing between early self-reporting with sketchy information and the prospect of losing the benefits of self-reporting when a whistleblower goes to the agency first.\textsuperscript{172} The government’s strategy of “enforcement first” presents a serious challenge to the regulated community.\textsuperscript{173} It is no insignificant problem that self-reporting almost always guarantees penalties or conviction.\textsuperscript{174}

\textbf{B. The Need for Proactive Compliance Program Auditing}

Compliance auditing needs to look beyond identified high risk areas to see if there are unexpected risk issues.\textsuperscript{175} A compliance auditing plan needs to be able to evolve and mature.\textsuperscript{176} The compliance program audit should be seeking potential problem areas that have not yet been noticed as problem areas.\textsuperscript{177} At the same time, the current compliance environment leaves little room for experimentation.\textsuperscript{178} The entire compliance program, including an audit which asks whether the compliance program is itself in compliance, must be vigorously proactive.

\textsuperscript{169} Birdsong, \textit{supra} note 7, at 377.
\textsuperscript{170} Vandergrift, \textit{supra} note 10, at 173.
\textsuperscript{171} Baer, \textit{supra} note 129.
\textsuperscript{172} Villareal, \textit{supra} note 21, at 34.
\textsuperscript{173} Porter, \textit{supra} note 109, at 1.
\textsuperscript{175} Keen & Therrien, \textit{supra} note 13, at 24.
\textsuperscript{176} \textit{Id}.
\textsuperscript{177} Husisian, \textit{supra} note 3, at 215.
\textsuperscript{178} Baer, \textit{supra} note 129.