Compliance Today - November 2021

Incorporating ESG into healthcare compliance programs

By Kari L. Czeszewski and Benjamin D. Bresnick, JD, CHC

Kari L. Czeszewski (kari.czeszewski@ankura.com) is Associate, Healthcare Compliance, and **Benjamin D. Bresnick** (benjamin.bresnick@ankura.com) is Managing Director, Healthcare Compliance, at Ankura in Chicago.

- linkedin.com/in/kari-czeszewski-538848bb/
- linkedin.com/in/benjaminbresnick

Environmental, social, and governance (ESG) is a framework or set of beliefs that are adopted by corporate entities as part of their business strategy and operations. ESG is predicated on the belief that a corporate entity can exist to simultaneously create profit or fulfill its nonprofit mission while also considering and making decisions that contemplate and account for environmental and social concerns. ESG thinking affects stakeholders—anyone that has an interest in the company (e.g., vendors, suppliers, customers, employees, subcontractors, government entities, or the community, especially for nonprofit hospitals)—of the company and holds that the stakeholders should have a say in what ESG investments the company makes.

As an example, consider an energy exploration company that has discovered a large energy reserve in a poor or undeveloped nation. The government of that nation tells the energy company that in exchange for leasing the rights to the reserve, it must build a school and water treatment facility to serve the citizens, and it must employ a certain number of local citizens. The building of the water treatment facility and the school benefits the community, and the energy reserve creates local jobs that would otherwise not exist. At the same time, the exploration company gets access to an asset that will create positive revenue that will, in turn, be shared with stockholders.[1]

ESG is neither new nor novel, but rather the result of the evolution of decades of management studies from notable experts such as Dr. Michael Porter of Harvard Business School.[2] Porter and others used the term "shared value" to argue the central premise that the competitiveness of a company and the health of the communities around it are mutually dependent.

The shared value concept has its fair share of criticism and operational challenges. It also seems to have largely skipped over the healthcare provider space. ESG, however, is now evolving and growing in popularity in not only the business world, but also in the healthcare industry. Unlike the ideas of shared value, ESG is now being discussed in the board rooms and C-suites of academic medical centers, community hospitals, and Fortune 500 companies alike. Companies and their stakeholders have an increased interest in integrating ESG programs into the culture of their organizations and various industry regulators are beginning to require ESG reporting. The overarching outcome for which ESG strives is the ability to continue to operate a business for its legal purpose, while continually considering and addressing ways to achieve desired business outcomes. Essentially, ESG incorporation allows the company to do business while being good stewards of the environment and the individuals that are affected or have a connection to the work that is done.

There are many examples of how healthcare provider organizations implement an ESG focus. Companies may incorporate environmental sustainability measures such as switching to sustainable or more efficient energy sources, limiting greenhouse gas emissions, recycling construction waste, ensuring the ethical treatment of animals, investing in community health measures and initiatives, and conserving natural resources.[3] Similarly, many companies, including healthcare providers, are implementing changes that align with the social component of ESG, including promoting diversity and inclusion, hiring senior executives into chief diversity or chief inclusion officer roles, educating staff on human rights and human trafficking concerns, promoting gender equality, excluding vendors that rely on supply chains with lax labor standards, promoting a healthy and safe workplace, and managing food insecurities. Companies exhibit desirable governance traits by ensuring that the organization is making proper tax disclosures, practicing good business ethics, not engaging in activities that involve bribery and corruption, following Foreign Corrupt Practices Act and False Claims Act regulations, having accurate accounting methods, and having good leadership and tone at the top.

The look and feel of ESG in a particular company largely depends on the industry, maturity, and location of the company, as the decisions that are made to support ESG initiatives may vary greatly across different industries. As regulators have been changing their standards of corporate compliance to not only focus on individual liability or isolated cases of noncompliance, but rather the company as a whole and what structures are in place to promote a culture of compliance and prevent noncompliance, ESG works well with this more holistic view of corporate governance, enterprise risk management, and compliance.[4] In nonhealthcare companies, the compliance and ethics program has become the home for monitoring and incorporating ESG thinking into the culture and values of the company, as it is the regulators who are requiring ESG monitoring and reporting.[5] The compliance and ethics program will likely become the home for ESG incorporation and monitoring within healthcare businesses as well. This revelation should not come as a surprise, since healthcare providers are heavily regulated, often proactive regarding compliance, and usually adopt healthy community standards into their mission statements as they work toward improving both the health of the communities they serve as well as the social determinants of health for those same areas.

Why ESG is important for healthcare companies

Taking cues from other industries, there is a good chance that regulators may institute ESG expectations, including ESG reporting and auditing, for healthcare entities. As such, it is important to work proactively to build ESG into operations, and the compliance program can be a natural fit to help an organization achieve ESG compliance metrics. If healthcare providers wait to adopt ESG until regulators require it, they may find themselves forced into a reactive stance rather than a more desirable proactive posture.

The good news is, whether or not you have intentionally considered ESG, there is a strong possibility that ESG-related behaviors are already part of your current compliance program or enterprise risk management work. ESG initiatives in the healthcare space may include using recyclable or reusable medical devices in lieu of single-use disposable instruments or drugs, looking for a Leadership in Energy and Environmental Design certification when building or renovating, using efficient fleet or courier vehicles, reducing energy consumption with server virtualization, or focusing on service lines that are deficient in the community served, such as mental health services. Certain single-use medication vials can be reused pursuant to individual state laws subsequent to the Drug Quality and Security Act of 2013, which provided oversight responsibility to the states. This can reduce medication waste. And looking for sterilizable versus disposable surgical tools can cut down waste that makes its way into landfills.

If your organization is nonprofit, consider many of the Internal Revenue Code (IRC) Section 501(r)(3) regulations that were imposed as part of the Patient Protection and Affordable Care Act to support tax-exempt status and be recognized as a nonprofit institution aligned with ESG.

"Section 501(r)(3)(A) requires a hospital organization to conduct a community health needs assessment (CHNA) every three years and to adopt an implementation strategy to meet the community health needs identified through the CHNA."[6] The CHNA is very clearly tied to social determinants and align very closely with the tenants of social thinking as part of ESG.

Section 501(r)(3)(B) provides that the CHNA must:

- Take "into account input from persons who represent the broad interests of the community served by the hospital facility, including those with special knowledge of or expertise in public health," and
- Be "made widely available to the public."[7]

Again, as ESG instructs us to look toward stakeholders that have an interest in the company operations, the committee required by Section 501(r) regulations imposes an analogous steering group to consider the input of those not directly connected by formal employment or governance relationship to the organization.

Other Affordable Care Act requirements include the requirement to publish a list of every affiliated physician and whether they follow their charitable care policies and the requirement that key documents must be made available in the local language for people across the service area.[8] These two examples also go toward addressing the social aspects of ESG.

ESG practices are good for the community, and a healthy community is good for healthcare providers. It creates an opportunity to increase revenue while improving population health. If reimbursement continues to shift toward incentivizing payments for keeping people healthy rather than the current fee-for-service structure, it will be important to have strong ESG programs as part of a financial strategy. Again, it is quite likely that work you have done toward population health management initiatives align very closely with ESG criteria.

Actions steps for incorporating ESG into healthcare compliance programs

A good starting place for building an ESG program is incorporating it into corporate mission and vision statements. More importantly, the ESG-minded mission and vision statements need to be widely publicized so that the entire organization adopts these values.[9] This will set the stage for long-term growth. Dr. Donald Lurye from Elmhurst Clinic, a multi-specialty physician group in Elmhurst, Illinois, described how Elmhurst moved away from the typical "culture of autonomy" among physicians and successfully integrated their mission and vision statements across the group practice by creating a "hybrid local leadership structure."[10] They established four strategic objectives for their practice (access, quality, growth, and a fulfilling work environment) and applied them to the hiring process. This resulted in happier employees and physicians and a lower turnover rate.

Creating an ESG committee within the compliance committee may be a logical starting point that will allow for the ESG work that is done to be recorded and incorporated into preexisting reporting structures. The head of sustainability at Dell Technologies created an "Executive Steering Committee" and an "ESG Interlock Team" that includes the head of sustainability, the chief ethics and compliance officer, the head of investor relations, the head of diversity and inclusion, and other representatives from various business units. The Executive Steering Committee of people meet regularly to determine what needs to be done, while the ESG Interlock Team is responsible for moving the ideas into action.[11]

ESG initiatives should always be changing based on what services are needed by the community at any given time.[12] Determining which ESG programs or initiatives to implement can be overwhelming, and leadership needs to determine what is best for the specific location of each entity. This is often dependent on the geographic location of the hospital. Healthcare compliance programs can tackle these challenges by appointing a leader from the ESG committee to each territory within the greater community of each hospital. The appointed leader can communicate with stakeholders, including the community, to better understand their concerns. Bon Secours Mercy Health intervened in the Baltimore housing market due to their community engagement.[13] The Community Health Department learned that a significant health concern the community faced was related to rats and trash. In response, they investigated and discovered the source of the rats and trash, which was vacant homes being used as dumping grounds.

To make sure that values are aligned, it is important to conduct mission due diligence on other healthcare entities that are being considered for partnership. Nonalignment can inhibit successful communication and collaboration between the parties over time.

Amending your risk assessment to include ESG can also be a means of integrating ESG into current compliance processes. A needs assessment or materiality assessment can be done in addition to routine risk assessments to emphasize the stakeholders' opinions when addressing other regulatory matters.[14]

When strategizing for ESG, leaders may feel overwhelmed with the amount of work to be done. It is best to create short-term, feasible goals.[15] The accumulation of small successes will result in long-term growth for the healthcare system and measurable ESG integration. ProMedica, a health system based in Toledo, Ohio, uses a strategy called "implementation planning" to create a realistic timeline and plan to accomplish the needs that are discovered in the needs assessment. Implementation planning focuses on moving plans into action by determining what resources, partnerships, and other measures are needed in the short term in order to achieve long-term growth. Healthcare compliance programs may consider adopting a similar process for their ESG committee.

You should also ensure your company's ESG information is widely available to the public. Many millennial leaders search for ESG information on companies when considering business collaboration.[16] Without even knowing it, the company may miss out on opportunities or be viewed negatively if ESG information and reports are not easily accessible to the public.

Other ESG examples

Sterigenics International, a company located in suburban Chicago, Illinois, that sterilizes medical equipment, pharmaceutical drugs, and food, is under federal investigation for allegedly emitting a toxic carcinogen called ethylene oxide into the air and endangering residents of the surrounding communities.[17] The U.S. Environmental Protection Agency released a study linking the chemical to breast and blood cancer and has been working with Sterigenics to manage and monitor the situation. Proactively working with government agencies, such as the Environmental Protection Agency, to ensure that the sterilization of medical equipment is safe and free of hazardous air pollutants that potentially endanger employees or the community is an example of both social and governance thinking within the ESG framework.

Dr. Sam Ross, chief community health officer of Bon Secours Mercy Health, recently discussed one of their most successful ESG initiatives in an ESG roundtable.[18] Bon Secours developed a reentry program for inmates in the Maryland correctional system after discovering that the highest percentage of inmates in that system come from their hospital's primary and secondary zip codes. They meet with inmates six months prior to release, pick them up on the day of their release, and then start a five-week program to reacclimate them to life outside of prison. The main goal of the initiative is to prevent recidivism and prepare them for employment.

Kendra N. Smith, director of social determinants of health at ProMedica, discussed in the same ESG roundtable that their biggest success story was the social determinants of health infrastructure they built. They built a team of experts to look at data and research, clinical integration, and the community to create a quantitative story to supplement their qualitative case for why ESG is important. They evaluate and report their projects to the board, staff, and community using what they call a "health impact matrix." The matrix showcases the ESG projects they are working on, the time frame in which they are being executed, and the financial return on investment.

How to report on ESG

Until there are clear mandates from the government or quasi-governmental accreditation agencies to develop ESG priorities, there is flexibility in whether, how, and when ESG initiatives are reported. It seems logical to start performing an inventory of all the work currently being performed (particularly under the Section 501(r) requirements) and incorporate that into an ESG dashboard or committee report. Purposeful discussions with leadership in facilities management, purchasing, pharmacy, and IT are likely to uncover opportunities for environmental considerations that are geared toward reducing waste and reducing the carbon footprint. The ideas from these discussions should be reported and discussed with the ESG committee or the board of directors and incorporated into a plan that is regularly monitored and shared with senior leadership.

Finally, the successes of these initiatives can be published on external-facing webpages so the work can be shared with the community and interested stakeholders.

Notice: Ankura is not a law firm and cannot provide legal advice.

Takeaways

- Environmental, social, and governance (ESG) is a belief that a company can be profitable while simultaneously making decisions that consider environmental and social concerns in the community.
- Many industries require ESG reports, but the healthcare industry does not (yet).
- Healthcare companies should consider adopting ESG criteria now to prepare for reporting and auditing requirements in the future.
- Healthcare companies can adopt and incorporate ESG criteria by recycling/reusing medical devices, focusing on social initiatives for the community served, and creating a pleasant work environment.
- Healthcare compliance programs can adopt and incorporate ESG criteria by creating a committee, conducting needs assessments, widely publicizing the mission, and determining a strategy for achieving short-term goals.

1 Benjamin D. Bresnick, "Is Corporate Social Responsibility an Effective Stand-in for De Facto Legal Restrictions on U.S. Corporate Governance?" May 2016.
2 Michael E. Porter and Mark R. Kramer, "Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility," *Harvard Business Review*, December 1, 2006, 78-92, https://hbsp.harvard.edu/product/R0612D-PDF-ENG.

3 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations,” webinar, accessed September 15, 2021, https://bit.ly/3zj4fex.
4 Sarah Hunt, Georges Racine, and Daniel Martin, “ESG Compliance – What It Is, Why It Matters and What You Need to Know, October 2017,” Holman Fenwick Willan, accessed September 15, 2021, https://bit.ly/3Aexv7z.
5 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations.”
6 “Community Health Needs Assessment for Charitable Hospital Organizations - Section 501(r)(3),” Charities and Nonprofits, Internal Revenue Service, updated August 3, 2021, https://bit.ly/3lrCBr9.
7 26 U.S.C. § 501(r)(3)(B) .
8 26 U.S.C. § 501(r)(4) .
9 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations.”
10 Sam Ross, Rashard Johnson, Kendra N. Smith, Donald R. Lurye, and Lynn Wiatrowski, “A Healthcare-Specific Framework for ESG Principles,” roundtable, *HealthLeaders Magazine*, November/December 2019, https://bit.ly/2XkZK6B.
11 “ESG Governance: Governance is foundational to our ESG strategy,” Dell Technologies, accessed September 15, 2021, https://bit.ly/39gLded.
12 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations.”
13 Sam Ross, Rashard Johnson, Kendra N. Smith, Donald R. Lurye, and Lynn Wiatrowski, “A Healthcare-Specific Framework for ESG Principles.”
14 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations.”
15 Sam Ross, Rashard Johnson, Kendra N. Smith, Donald R. Lurye, and Lynn Wiatrowski, “A Healthcare-Specific Framework for ESG Principles.”
16 ComplianceLine, “ESG: Prepping for new risk, rules, and regulations.”
17 Michael Hawthorne, “High cancer risk in southeast DuPage County linked to company co-owned by Rauner’s former firm,” *Chicago Tribune*, August 28, 2018, https://bit.ly/2XlFdOE.
18 Sam Ross, Rashard Johnson, Kendra N. Smith, Donald R. Lurye, and Lynn Wiatrowski, “A Healthcare-Specific Framework for ESG Principles.”