The Board's Education Through Compliance Consultants

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Many thanks to the Fiduciary Law symposium participants, with special thanks to Julian Velasco for providing comments and suggestions on a prior draft of this Article. Grateful for excellent research assistance from Jesse Levinson. On a personal note, I am deeply grateful for the mentorship and support that Professor Deborah DeMott, the honoree of this symposium, has graciously given me; it has made a world of difference in my career and life.

Abstract

Organizations today face increasing expectations to ensure the effectiveness of their compliance programs. Regulatory guidance, including the Department of Justice's Evaluation of Corporate Compliance Programs, emphasizes not only the existence of compliance structures but their ongoing effectiveness in preventing, detecting, and responding to misconduct. These expectations place boards of directors at the center of compliance oversight, even where boards may lack the expertise or information necessary to assess whether internal systems are functioning as intended. In response, organizations have turned to a growing market of outside compliance consultants to assist boards in evaluating speak-up mechanisms, investigation processes, compliance culture, and program design. These engagements can include program assessments, interviews, cultural audits, climate surveys, and other evaluative tools, and they increasingly intersect with complex regulatory environments and emerging technologies that further complicate compliance oversight. As boards navigate these requirements, they face consequential choices about when to engage outside consultants and which types of consultants to retain—choices that are often treated as routine but in fact carry significant governance implications. This Article argues that boards must take seriously their responsibility to secure appropriate education for compliance oversight — a duty that often requires not just retaining outside consultants, but deliberately structuring, constraining, and governing those engagements so that the education boards receive is candid, independent, and aligned with the firm's purpose and fiduciary commitments. The Article examines how differences in consultants' constraints, incentives, and institutional positions may affect the education boards receive. Professional norms may help channel consultant behavior, but they are neither universal nor sufficient. Where consultants lack formal professional obligations, boards may bear greater responsibility for structuring engagements around clearly articulated, measurable standards rooted in the firm's purpose, ethical commitments, and risk profile, and for defining expectations of candor, independence, and escalation. Ultimately, the question is not whether boards should engage compliance consultants to assist them—that is largely a foregone conclusion—but how boards can structure those engagements to ensure they are meaningfully educated for the oversight role they retain.

Keywords: Board education, Compliance consultants, Fiduciary duty, Compliance assessments, Corporate governance

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Organizations today face increasing expectations to ensure the effectiveness of their compliance programs. Regulatory guidance, including the Department of Justice's Evaluation of Corporate Compliance Programs, emphasizes not only the existence of compliance structures but their ongoing effectiveness in preventing, detecting, and responding to misconduct. These expectations place boards of directors at the center of compliance oversight, even where boards may lack the expertise or information necessary to assess whether internal systems are functioning as intended. In response, organizations have turned to a growing market of outside compliance consultants to assist boards in evaluating speak-up mechanisms, investigation processes, compliance culture, and program design. These engagements can include program assessments, interviews, cultural audits, climate surveys, and other evaluative tools, and they increasingly intersect with complex regulatory environments and emerging technologies that further complicate compliance oversight. As boards navigate these requirements, they face consequential choices about when to engage outside consultants and which types of consultants to retain—choices that are often treated as routine but in fact carry significant governance implications.

This Article argues that boards must take seriously their responsibility to secure appropriate education for compliance oversight — a duty that often requires not just retaining outside consultants, but deliberately structuring, constraining, and governing those engagements so that the education boards receive is candid, independent, and aligned with the firm's purpose and fiduciary commitments. The Article examines how differences in consultants' constraints, incentives, and institutional positions may affect the education boards receive. Professional norms may help channel consultant behavior, but they are neither universal nor sufficient. Where consultants lack formal professional obligations, boards may bear greater responsibility for structuring engagements around clearly articulated, measurable standards rooted in the firm's purpose, ethical commitments, and risk profile, and for defining expectations of candor, independence, and escalation. Ultimately, the question is not whether boards should engage compliance consultants to assist them—that is largely a foregone conclusion—but how boards can structure those engagements to ensure they are meaningfully educated for the oversight role they retain.

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INTRODUCTION

Boards today face an expanding and more exacting set of expectations to ensure that corporate compliance programs do more than exist on paper—they must function effectively to prevent, detect, and respond to wrongdoing.[1] Regulatory guidance and judicial decisions increasingly put the board at the center of that task, even though directors are often generalists overseeing highly specialized systems. As a practical matter, boards therefore rely on external compliance consultants to translate operational complexity into board-level understanding.

This reliance is occurring against a backdrop of significant change in board composition and committee responsibility. Traditionally, boards of public companies—and audit committees in particular—were populated largely by individuals selected for their experience in senior executive roles, especially as CEOs, CFOs, or other financial leaders. Correspondingly, the audit committee's core mandate at many firms focused primarily on oversight of financial reporting, internal controls, and the work of external auditors. That institutional design made sense when the most salient risks confronting boards were predominantly financial in nature. Today, however, audit committees and boards more generally are routinely tasked with overseeing a

[1] U.S. Dep't of Just., Crim. Div., *Evaluation of Corporate Compliance Programs* 11–14 (2024). https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl; see Marchand v. Barnhill, 212 A.3d 805, 822–24 (Del. 2019)*;* see Veronica Root, *The Compliance Process*, 94 IND. L.J. 203 (2019).

far broader array of compliance risks, including regulatory compliance across multiple domains, internal investigations, compliance culture, data governance, and emerging technological risks. The expertise that once mapped cleanly onto oversight of financials does not necessarily translate to effective oversight of complex, enterprise-wide compliance systems. As firms have grown larger and risk portfolios more diffuse, the gap between board members' prior experience and the scope of their oversight responsibilities has widened, making board education not merely beneficial but essential.

This Article suggests that the governance consequences of the Board's use of external consultants to assist it in obtaining the education necessary to fulfill its oversight of compliance activities requires further study. Compliance consultants appear to sometimes be treated as fungible vendors whose reports are interchangeable artifacts of procedural rigor; in truth, consultants differ deeply by institutional form, professional constraint, incentives, and orientation. Some operate within licensure and ethical regimes that channel their judgments; others do not. Some are structurally positioned to surface uncomfortable truths; others are embedded in management networks that invite accommodation. Those differences matter because compliance assessments are not neutral audits but educational exercises—translation and framing work that critically shapes the board's capacity to exercise its nondelegable oversight responsibilities. The question is not whether boards should use consultants—boards already do—but how boards can structure those relationships so that consultants educate directors faithfully, rather than substitute for their judgment or obscure the information the board needs to fulfill its duty.

This Article argues that boards must take seriously their responsibility to secure appropriate education for compliance oversight — a duty that often requires not just retaining outside consultants, but deliberately structuring, constraining, and governing those engagements so that the education boards receive is candid, independent, and aligned with the firm's purpose and fiduciary commitments. Part I locates the board's compliance-education problem within the legal and institutional landscape: it reviews the duty of oversight under Delaware law, explains why education is an essential component of that duty, and shows how directors necessarily act through agents whose informational roles shape board judgment. Part II turns to compliance consultants themselves—what these engagements do in practice, who performs them, and why differences in professional constraint, incentives, and institutional position materially affect the educational value of consultant work.[2] Part III offers normative and practical responses: it

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[2] As a note to readers, Parts I and II are not an expansive treatment of these issues, but a more broad overview to situated Part III. This reflects the space constraints of this particular symposium. That said, the literature on *Caremark's* influence over compliance efforts is significant. For more discussions, one might begin by reviewing pieces published in the 2018 Temple Law Review symposium on "Caremark And Compliance: A Twenty-Year

recommends a consultant code of conduct, sets out concrete measures to protect consultant independence and to manage conflicts and incentives, and addresses recurring concerns—such as fears of board overreach and mistaken assumptions of consultant fungibility—so that boards can obtain the education they need while preserving the proper allocation of authority between directors and management.

I. COMPLIANCE OVERSIGHT, EDUCATION, AND AGENTS

A. Oversight Requirements

Corporate boards occupy a distinctive institutional position within the firm. Under Delaware law, the "business and affairs" of the corporation are managed by or under the direction of the board, and that allocation of authority carries with it fiduciary obligations that extend beyond episodic decisionmaking.[3] Among those obligations, the duty of oversight has taken on particular salience in the modern corporate governance landscape. Beginning with *In re Caremark International Inc. Derivative Litigation*, Delaware courts made clear that directors are required, at a minimum, to make a good-faith effort to ensure that the firm has information and reporting systems reasonably designed to provide timely, accurate information about legal compliance and core business risks.[4] Caremark's influence has been profound—not primarily as a source of ex post liability, but as a source of ex ante governance expectations that shape board practice, committee structures, and the use of advisors.[5]

Deborah DeMott's scholarship helps illuminate why oversight occupies this central place in corporate governance. As DeMott has emphasized, fiduciary obligation is not reducible to contract or to outcome-based assessments of harm.[6] Rather, fiduciary duties reflect structured expectations of loyalty, attentiveness, and judgment that arise from the allocation of authority itself.[7] Directors are not agents subject to shareholder control, but

Lookback." Jon Smollen & Brooks Schatschneider, *The Caremark Decision at 21 – Corporate Compliance Comes of Age*, TEMPLE 10-Q (Oct. 26, 2017), https://www2.law.temple.edu/10q/the-caremark-decision-at-21-corporate-compliance-comes-of-age/.

3 DEL. CODE ANN. tit. 8, § 141(a) (2025).

4 In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

5 See Claire A. Hill & Zohreh Zakiani, *What Should Caremark Encompass?*, 19 BROOK. J. CORP. FIN. & COM. L. 33, 35–37 (2024) (describing Caremark's influence as largely ex ante and normative rather than liability-producing).

6 Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882–85.

7 Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 926–28 (2006).

neither are they free-floating monitors.[8] Their fiduciary role requires them to remain sufficiently informed to exercise independent judgment on matters that implicate the firm's legal obedience, ethical commitments, and long-term integrity.[9] Oversight, in this sense, is not merely about detecting violations after the fact; it is about maintaining governance conditions that make lawful and ethical conduct plausible within complex organizations.[10]

Compliance oversight has therefore become a core component of the board's responsibilities. Modern firms operate in dense regulatory environments and face compliance obligations that cut across antitrust, anti-corruption, data privacy, labor and employment, environmental protection, financial integrity, and emerging areas such as cybersecurity and artificial intelligence.[11] Delaware courts have increasingly framed these obligations as "mission critical" where they are central to the firm's business model or risk profile.[12] In cases such as *Marchand v. Barnhill* and *In re Clovis Oncology, Inc. Derivative Litigation*, courts have scrutinized whether boards meaningfully engaged with compliance risks tied to food safety, clinical trial integrity, and product safety—risks that were not ancillary to business strategy but integral to it.[13]

Boards typically operationalize compliance oversight through committee structures, most commonly the audit committee and, increasingly, dedicated risk or compliance committees.[14] Yet delegation does not eliminate responsibility. The full board retains ultimate oversight authority and must satisfy itself that compliance systems are not only formally in place but functioning as intended.[15] This emphasis on function rather than form resonates with DeMott's insistence that fiduciary obligation cannot be satisfied by box-checking or ritualized processes alone.[16] A reporting system that exists on paper but fails to surface meaningful information to directors does not discharge the board's oversight responsibility, even if it satisfies superficial compliance metrics.[17]

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8 Deborah A. DeMott, *Agents and Advisors*, 72 FLA. L. REV. F. 145, 146–48 (2022).
9 Deborah A. DeMott, *The Domains of Loyalty: Relationships Between Fiduciary Obligation and Intrinsic Motivation*, 62 WM. & MARY L. REV. 1137, 1154–56 (2021).
10 See Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1050–52 (2007).
11 See generally Veronica Root Martinez, *Purpose-Driven Compliance*, __ Texas A&M Law Rev. __ (forthcoming 2026) (manuscript at 3–7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6078766.
12 See Marchand, supra note 1 at 822–24.
13 See Marchand, supra note 1 at 824; In re Clovis Oncology, Inc. Derivative Litig., No. 201722-JRS, 2019 WL 4850188, at *13–15 (Del. Ch. Oct. 1, 2019).
14 See Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 382–85 (2022).
15 See Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
16 DeMott, *Beyond Metaphor*, supra note 6, at 887–90.
17 See Caremark, supra note 4; see also Hill & Zakiani, supra note 5, at 40–41.

B. *Education Requirements*

At the same time, the expanding scope of board oversight obligations has intensified concerns about board capacity and information management. Scholars have documented the phenomenon of "board overload," as directors are tasked with overseeing an ever-growing array of legal, regulatory, and social risks while operating within fixed constraints of time, attention, and agenda space.[18] This reality heightens the importance of how information reaches the board and how it is framed. Boards cannot—and should not—manage compliance day to day. But they must remain sufficiently educated to ask the right questions, to recognize red flags, and to understand when management's assurances warrant skepticism.[19]

Here again, DeMott's work is instructive. Her scholarship on agency and loyalty underscores that the quality of oversight depends not only on formal authority but on informational dynamics.[20] Fiduciaries rely on others to furnish information, yet remain responsible for how that information is used.[21] In the compliance context, this means that boards must cultivate informational channels that promote candor rather than deference, and that enable escalation rather than suppression of uncomfortable facts.[22] Oversight fails not only when boards ignore known violations, but also when governance structures predictably filter out information that would challenge prevailing narratives about performance or culture.[23]

Recent developments in corporate governance scholarship reinforce this point. Work on "information governance" emphasizes that boards increasingly function as sites of knowledge synthesis rather than passive monitors.[24] Decisions about what data is collected, how it is aggregated, and how it is presented to directors shape organizational behavior downstream.[25] In this sense, board oversight of compliance is inseparable from board oversight of information systems, reporting architectures, and the intermediaries who translate operational realities into board-level understanding.[26]

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[18] Asaf Eckstein, Roy Shapira & Ariel Shillo, *Board Overload*, at 3–6 (2025) (unpublished manuscript) (on file with author).
[19] Jennifer O'Hare, *Continuing Education for Directors of Public Companies*, 51 FLA. ST. U. L. REV. 373, 379–83 (2024).
[20] DeMott, *Agents and Advisors*, supra note 8, at 149–50.
[21] Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 850–52 (2017).
[22] See Deborah A. DeMott, *The Crucial but (Potentially) Precarious Position of the Chief Compliance Officer*, 8 BROOK. J. CORP. FIN. & COM. L. 56, 73–78 (2013).
[23] See Elise Bernlohr Maizel, *Illegal Corporate Cultures*, 75 DUKE L.J. 1, 26–31 (2025).
[24] Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 181–84 (2020).
[25] Id. at 233–39.
[26] Id. at 249–56.

Against this backdrop, compliance oversight emerges as both a legal obligation and an educational challenge. Directors are generalists overseeing highly specialized systems. To fulfill their fiduciary role, they must acquire enough understanding of compliance structures to evaluate their effectiveness without collapsing into management.[27] The law does not require directors to become compliance experts, but it does require them to remain informed enough to exercise judgment.[28] As DeMott has observed in related contexts, fiduciary obligation presupposes attentiveness to context and sensitivity to risk, rather than reliance on trust alone or on formal assurances of loyalty.[29]

This need for board education is particularly acute in compliance matters because failures often remain invisible until harm has already occurred. Cultural signals, patterns of silence, or subtle distortions in reporting may precede overt violations by years.[30] Oversight, therefore, is not simply retrospective. It is anticipatory, demanding that boards invest in understanding how compliance systems operate in practice and whether they align with the firm's stated values and risk tolerance.[31] That educational function sets the stage for the discussion that follows: why compliance assessments have become a central governance tool, and why boards so often turn to outside consultants to help them discharge these responsibilities.

The importance of board education is not merely a scholarly insight or judicial implication; it is also deeply embedded in contemporary governance practice. Industry-facing guidance increasingly frames director education as a prerequisite for effective oversight, particularly in areas involving regulatory complexity and compliance risk. For example, governance organizations and industry groups now characterize ongoing education as a "governance imperative," emphasizing that directors cannot exercise independent judgment over risk, compliance, and strategy without continuous learning as business models and regulatory environments evolve.[32] Practitioner materials similarly reflect the normalization of board education, cataloguing extensive offerings targeted at full boards, audit committees, and risk committees on topics ranging from compliance oversight and cybersecurity to investigations

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[27] Lawrence A. Cunningham, *Rediscovering Board Expertise: Legal Implications of the Empirical Literature*, 77 U. CIN. L. REV. 465, 468–71 (2008).
[28] Smith v. Van Gorkom, 488 A.2d 858, 872–74 (Del. 1985).
[29] DeMott, *Justifiable Expectations of Loyalty*, supra note 7, at 929–31.
[30] See Maizel, supra note 22, at 41–44.
[31] See Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 LAW & CONTEMP. PROBS. 39, 54–57 (1997); see Root, *The Compliance Process*, supra 1 note at 226–29.
[32] Tom Kim, *Board Education as a Strategic Imperative*, IDC VIEWPOINTS (Oct. 23, 2025), at 1–2, https://www.idc.org/ici-viewpoints/board-education-as-a-strategic-imperative#:~:text=Policymakers%20are%20expressing%20new%20openness,director%20community%20in%20this%20regard..

and whistleblower systems.[33] Together, these materials underscore a critical point: education has become a central mechanism through which boards attempt to satisfy their oversight responsibilities—even as little attention has been paid to the standards, incentives, and professional obligations that shape how that education is delivered.

Taken together, these educational demands collide with the way boards have traditionally been constituted and organized. Public company directors have long been selected largely for prior service in senior executive roles—most commonly as CEOs, CFOs, or other members of the C-suite—reflecting an era in which board oversight, and audit committee oversight in particular, centered on financial reporting, internal controls, and the work of external auditors.[34] That design was neither accidental nor misguided; it reflected a sensible alignment between director expertise and the most salient risks firms were thought to face. But contemporary compliance oversight now extends well beyond financial integrity to encompass regulatory compliance across multiple domains, organizational culture, internal investigations, whistleblower systems, and emerging technological risks. The skills and experiences that once mapped cleanly onto financial oversight do not necessarily translate to effective oversight of these diffuse, operationally embedded compliance systems. As firms have grown larger and more complex, and as the scope of "mission critical" risk has expanded, the gap between directors' background expertise and their oversight responsibilities has widened.[35] Education, therefore, is no longer a supplemental good or a

[33] *See e.g.,* WOODRUFF SAWYER & CO., *2026 Board Education Resource Guide* 2–4 (2026) (outlining different opportunities for Board Education), The Essential Guide for Board Education in 2026 | Woodruff Sawyer.

[34] See Renée B. Adams, *Boards, and the Directors Who Sit on Them*, ECGI Working Paper No. 515/2017, at 2–5 (2017) (documenting the historical emphasis on senior executive experience and financial expertise in board composition), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002219; RESTATEMENT OF THE LAW, CORP. GOV. § 3.01(b)(5)–(7) & cmt. g–h (AM. L. INST., Council Draft No. 4, 2025) (describing board-level oversight of both financial reporting and compliance and noting that audit committees commonly oversee the compliance function in addition to internal and external audit) (on file with author).

[35] Recent reporting indicates this is not merely theoretical: boards are increasingly experimenting with committee redesign to secure sustained board-level attention to enterprise risks. February 2026 reporting documents increasing discussion at boards about establishing separate risk committees — an architectural response to "long-term uncertainty" that aims to relieve overloaded audit committees and create a standing structure for rapid response to emerging threats. That trend reinforces the Article's central claim that board education must be institutionalized, not episodic, and that the loci through which directors receive education (full board, audit committee, or a dedicated risk committee) will shape what they learn and who controls the consultant engagement. Anna Bianca Roach, *As Volatility Soars, Boards Set Up New Risk Committees*, *Agenda* (Feb. 9, 2026), https://www.agendanews.com/lead/c/5086254/715894/volatility_soars_boards_risk_committees?.

matter of best practice; it has become a structural necessity of modern board oversight. And because that education cannot realistically be generated internally by generalist directors alone, it must be mediated—raising foundational questions about the agents through whom boards learn, the incentives and constraints that shape those agents' work, and the governance consequences that follow from treating all sources of board education as interchangeable.

C. The Board's Use of Agents

Boards cannot satisfy their oversight and educational obligations alone. As a matter of institutional design, directors necessarily act through others—individuals situated closer to the firm's operations who gather, process, and transmit information upward. Deborah DeMott's scholarship makes clear that this reliance is not incidental to fiduciary governance but constitutive of it.[36] Agency law presupposes that principals will act through agents whose conduct, knowledge, and judgments affect the principal's legal and practical position.[37] For boards, whose authority is both ultimate and episodic, agents are indispensable to translating dispersed operational realities into forms that can inform board-level judgment.[38]

Within the firm, boards rely heavily on internal agents such as corporate officers, general counsel, and chief compliance officers. DeMott's work situates these actors squarely within common law agency, emphasizing that officers are not merely managerial subordinates but fiduciaries whose duties of loyalty and performance run to the corporation and whose agency obligations enable boards to exercise control at a distance.[39] Internal agents are charged not only with executing directives but with furnishing material information necessary for directors to perform their statutory and fiduciary roles.[40] The duty to inform is thus not ancillary; it is central to the board's capacity to govern. Failures of oversight often trace not to board inattention, but to breakdowns in these agency relationships—where information is filtered, softened, or withheld before it ever reaches directors.[41]

At the same time, DeMott's scholarship underscores the fragility of these internal agency arrangements, particularly in compliance contexts. Internal agents operate within incentive structures shaped by the organization itself, and those structures can distort loyalty, judgment, and candor.[42] The very actors tasked with surfacing compliance risks may face pressures—cultural,

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[36] See DeMott, *Agents and Advisors*, supra note 8.
[37] See Deborah A. DeMott, *Disloyal Agents*, supra note 10.
[38] See DeMott, *Agents and Advisors*, supra note 8.
[39] See DeMott, *Corporate Officers as Agents*, supra note 21.
[40] Id.; see also DeMott, *The Crucial*, supra note 22.
[41] See DeMott, *Corporate Officers as Agents*, supra note 21; see also Deborah A. DeMott, *The Stages of Scandal and the Roles of General Counsel*, 2012 Wis. L. Rev. 463.
[42] See DeMott, *Organizational Incentives to Care About the Law*, supra note 31.

financial, or positional—that discourage escalation or favor managerial narratives over uncomfortable truths.[43] As DeMott has observed in her work on organizational incentives and disloyal agents, agency relationships are especially vulnerable where monitoring is imperfect and where agents' performance is difficult to observe ex ante.[44] For boards, this creates a recurring dilemma: reliance on internal agents is unavoidable, yet reliance alone does not guarantee that boards will be adequately informed.

Boards therefore supplement internal agency with external agents—law firms, auditors, consultants, and other advisors—whose distance from management is often presumed to enhance independence and objectivity. DeMott's analysis of agents and advisors helps explain why this turn to outsiders is both rational and fraught.[45] External agents, like internal ones, can occupy fiduciary roles depending on context, function, and the expectations they cultivate.[46] When advisors invite trust, shape reliance, and position themselves as sources of expert judgment, fiduciary norms may attach—even where formal authority to bind the firm is absent.[47] But professional status, regulatory regimes, and self-governance vary widely across these actors, producing meaningful differences in how loyalty is constrained and how disloyalty is sanctioned.[48]

Recognizing boards' dependence on agents thus reframes the problem of compliance oversight. The question is not whether boards should rely on others to educate them—they must—but how boards should understand, select, and structure those agency relationships in light of fiduciary obligation. DeMott's work makes plain that agency does not displace responsibility; it reallocates it.[49] Directors remain accountable for how information reaches them, for the governance choices embedded in their reliance on particular agents, and they are "accountable for the corporation's culture."[50] This insight sets the stage for examining compliance consultants specifically: actors increasingly tasked with educating boards, yet operating under heterogeneous—and sometimes thin—regimes of loyalty, accountability, and professional constraint.

II. THE BOARD'S COMPLIANCE CONSULTANT(S)

If boards must rely on agents to satisfy their oversight and educational obligations, the question becomes which agents boards turn to, for what

[43] See DeMott, *The Crucial*, supra note 22.
[44] See Deborah A. DeMott, *Disloyal Agents*, supra note 10.
[45] See DeMott, *Agents and Advisors*, supra note 8.
[46] Id.
[47] Id.; see also DeMott, *The Domains of Loyalty*, supra note 9.
[48] See DeMott, *The Domains of Loyalty*, supra note 9.
[49] See DeMott, *Corporate Officers as Agents*, supra note 21.
[50] See DeMott, *Organizational Incentives to Care About the Law*, supra note 31.

purposes, and under what conditions. In the compliance context, one increasingly prominent answer is the use of outside compliance consultants to assess whether internal systems are functioning as intended. These engagements are now a routine feature of contemporary corporate governance, spurred by regulatory expectations that emphasize effectiveness over formal design and by judicial doctrine that demands that boards remain meaningfully informed about "mission critical" compliance risks. Yet despite their growing prevalence, compliance assessments are often treated as technical or procedural exercises—as interchangeable evaluations that can be conducted by any competent outside firm using accepted methodologies. This Part challenges that assumption.

This Part argues that compliance consultants play a distinctive role in board governance because they function not merely as evaluators of compliance programs, but as educational intermediaries through whom boards come to understand compliance risk, organizational culture, and information flow. Compliance assessments are not audits, legal advice, or investigations, though they may borrow tools from each. Instead, they are exercises in translation: converting complex, often ambiguous organizational realities into narratives, frameworks, and judgments that directors can use to discharge their fiduciary obligations. In performing that function, consultants inevitably shape what boards learn, how they learn it, and what they perceive as worthy of attention.

Understanding compliance consultants in this way reframes the governance stakes of these engagements. If compliance assessments are a primary mechanism through which boards educate themselves for oversight, then the identity, incentives, and professional obligations of the consultants who conduct them matter in ways that boards may too often overlook. Treating compliance consultants as fungible obscures meaningful differences among the actors who perform this work—differences that bear directly on candor, independence, and the framing of risk. The sections that follow examine what compliance consultants do, who they are, and why those distinctions should matter to boards seeking to fulfill their oversight responsibilities without relinquishing them.

A. What They Do

As boards confront increasing expectations to oversee the effectiveness of compliance programs,[51] they have turned with growing frequency to outside consultants to conduct compliance assessments. These engagements are best understood not as exercises in compliance program design, but as efforts to evaluate whether existing systems operate as intended in practice. Contemporary enforcement guidance emphasizes that compliance programs must do more than exist on paper; they must surface risk, promote escalation,

[51] U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs*, supra note 1.

and generate information that enables meaningful board oversight. [52] Compliance assessments have emerged as a response to this shift—functioning as tools through which boards attempt to understand how compliance operates across the organization, rather than whether formal requirements have been met.

Compliance assessments are analytically distinct from several adjacent professional services with which they are often conflated. Financial audits, even when they touch on compliance-related controls, are oriented toward assurance and verification within defined parameters, most notably those tied to financial reporting and internal controls. [53] Legal advice, by contrast, focuses on interpreting legal obligations, assessing legal risk, and advising on permissible courses of action, typically within privileged settings that shape both the scope and framing of information available to the board. Internal investigations similarly center on discrete allegations or incidents and are designed to establish facts, assess liability, and support remediation or interaction with enforcement authorities.[54] Compliance assessments serve a different purpose. Rather than asking whether a particular violation occurred, they examine whether compliance systems—policies, reporting channels, training, monitoring, and escalation mechanisms—function reliably across the organization.[55]

In practice, compliance consultants conducting assessments engage in a mix of evaluative activities that cut across legal, operational, and cultural domains. These assessments often include testing adherence to internal policies and procedures; evaluating alignment with regulatory expectations articulated by enforcement agencies and prudential regulators; and assessing whether compliance functions are adequately resourced, empowered, and positioned within the firm.[56] Consultants also evaluate compliance relative to industry practices and informal standards, particularly in areas such as data privacy, anti-corruption, and third-party risk, where regulatory requirements

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[52] U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs*, supra note 1.
[53] *See e.g.*, Nat'l Ass'n of Corp. Dirs., *Fostering Constructive Dialogue with the External Auditor* (2025), https://prod.nacdonline.org/all-governance/governance-resources/directorship-magazine/online-exclusives/2025/q4-2025/external-auditor-assessment/.
[54] McKenna Long & Aldridge, *Guide to Conducting an Effective Internal Investigation*, ACC, https://www.acc.com/sites/default/files/resources/vl/membersonly/ProgramMaterial/19856_1.pdf
[55] Deloitte, *Compliance Risk Assessments: The Third Ingredient in a World-Class Ethics and Compliance Program* (2015), https://www.deloitte.com/us/en/services/consulting/articles/compliance-risk-assessments-the-third-ingredient-in-a-world-class-ethics-and-compliance-program.html.
[56] Interagency Review of Foreclosure Policies and Practices, Federal Reserve System, Office of the Comptroller of the Currency & Office of Thrift Supervision (2011), https://www.federalreserve.gov/boarddocs/rptcongress/interagency_review_foreclosures_20110413.pdf.

coexist with evolving norms about what constitutes reasonable practice.[57] Increasingly, assessments extend beyond formal controls to examine organizational culture and information flow—probing speak-up systems, retaliation risk, psychological safety, and the role of middle management in shaping whether concerns are raised or suppressed.[58]

A defining feature of compliance assessments is their reliance on comparative and benchmarking judgments. Because consultants operate across firms and industries, they accumulate experiential knowledge about how compliance systems are structured and how they perform in different organizational contexts. Boards often engage consultants precisely for this comparative perspective, even when it is not labeled as formal benchmarking. As recent work on collaborative compliance explains, intermediaries play a central role in transmitting information about shared risks, emerging practices, and evolving standards across firm boundaries.[59] In large and operationally complex firms—where organizational distance and limits on board capacity constrain directors' ability to independently synthesize such information—this comparative framing can substantially shape how boards understand both risk and adequacy.[60]

Seen in this light, compliance consultants function as educational intermediaries rather than substitutes for board oversight. Their assessments do not displace the board's responsibility to exercise judgment; instead, they structure the informational environment in which that judgment occurs. By framing findings, translating ambiguity, and distinguishing between isolated failures and systemic weaknesses, consultants influence what boards learn, what they prioritize, and how they respond. Understanding what compliance consultants do—and how their work differs from audits, legal advice, and investigations—is therefore a necessary predicate to evaluating when boards should rely on them and how those engagements should be designed.

B. Who They Are

A wide range of outside actors now perform compliance assessments for corporate boards. Law firms frequently conduct assessments, often leveraging their pre-existing familiarity with the organization, the potential ability to protect work in privilege, and their expertise in legal risk and enforcement expectations.[61] Accounting firms perform compliance-related

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57 James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments and Outcomes* (2021), https://jlepp.org/wp-content/uploads/2021/05/5fanto.final_.pdf.
58 Veronica Root Martinez, *Middle Management: A Mission-Critical Risk* (working draft, on file with author).
59 Kevin E. Davis & Veronica Root Martinez, *Collaborative Compliance* (working draft, dated Jan. 25, 2026).
60 Eckstein et al, supra note 18; Stevelman & Haan, supra note 24.
61 See e.g., Holland & Knight LLP, *Compliance Services*, https://www.hklaw.com/en/services/compliance-services (last visited Jan. 31, 2026); Sidley

assessments in non-audit roles, drawing on control-testing methodologies and their long-standing relationships with audit committees.[62] Boards also engage specialized compliance boutiques and cross-functional advisory firms whose practices are dedicated to ethics, compliance, and investigations.[63] Finally, large management consulting firms increasingly offer compliance assessments as part of broader risk, governance, or culture practices.[64] From the board's perspective, these actors may appear interchangeable: each promises independence, expertise, and a structured methodology, and each produces a polished report purporting to evaluate the effectiveness of the firm's compliance program.

That appearance of interchangeability—what this Article terms assumed fungibility—is reinforced by how compliance assessments may be scoped and described. Boards may focus on the mechanics of the engagement: the assessment framework to be used, the data to be collected, the number of interviews to be conducted, and the form of the final deliverable. Selection decisions may turn on familiarity, cost, speed, or perceived credibility with regulators. What tends to receive less attention is who, precisely, is performing the assessment and how that actor's professional obligations, incentives, and institutional position shape the way information is gathered, interpreted, and conveyed. As a result, boards may treat compliance consultants as substitutable vendors so long as the process looks rigorous and the output appears professional.

Deborah DeMott's work on agents and advisors helps explain why this assumption is problematic. Advisors who present themselves as sources of expert judgment and invite reliance may occupy roles that carry fiduciary-like expectations, even when they lack formal authority to bind the firm. Yet advisors differ markedly in the extent to which their conduct is constrained by external professional regimes. Lawyers and accountants operate within established systems of licensure, professional discipline, and legally enforceable duties that shape norms of independence, candor, and loyalty. Those regimes do not eliminate conflicts or guarantee optimal behavior, but

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Austin LLP, *Compliance Counseling – White Collar*, https://www.sidley.com/en/services/white-collar-defense-and-investigations/compliance-counseling (last visited Jan. 31, 2026).

62 See e.g., KPMG LLP, *Compliance Managed Services*, https://kpmg.com/us/en/services/advisory/managed-services/compliance-managed-services.html (last visited Jan. 31, 2026); Deloitte, *Regulatory Compliance and Legal Services*, https://www.deloitte.com/us/en/services/legal/regulatory-compliance-legal-services.html (last visited Jan. 31, 2026).

63 Affiliated Monitors Inc., *Corporate Services*, https://www.affiliatedmonitors.com/services (last visited Jan. 31, 2026); HC Ethics LLC, *What We Do*, https://www.huichenethics.com/what-we-do (last visited Jan. 31, 2026).

64 See e.g., McKinsey & Co., *Risk and Ethics & Compliance*, https://www.mckinsey.com/careers/our-people-and-roles/risk-and-ethics-compliance (last visited Jan. 31, 2026).

they do impose external constraints and shared understandings about permissible conduct. By contrast, many compliance consultants—particularly those operating outside the legal and accounting professions—may not be subject to comparable self-regulatory structures or enforceable professional obligations, even as they perform work that directly influences board oversight.[65]

These differences matter, at least in part, because compliance assessments function as educational tools for boards. Consultants do not simply report findings; they frame risk, translate ambiguity, and signal which issues merit board attention. A consultant's relationship to management, tolerance for escalation, and conception of independence affect whether uncomfortable information is surfaced or softened, whether silence is treated as a red flag or benign absence, and whether cultural weaknesses are characterized as systemic concerns or isolated gaps. As James Fanto and others have observed, the professional status of compliance remains uneven and contested, with important implications for independence and authority within organizations.[66] If a board were to assume that all compliance consultants will educate them in roughly the same way, they overlook how these underlying differences shape the informational environment on which Caremark oversight depends. Recognizing variation among compliance consultants is therefore a necessary step toward understanding why the structure of these engagements—and the identity of those who perform them—should be made in a deliberate and careful manner.

C. Why That Matters

Boards today operate under significant and growing constraints of time, attention, and capacity. As public companies have become fewer but substantially larger and more complex, the distance between boards and operational reality has widened, even as legal and regulatory expectations for board oversight have intensified.[67] Federal enforcement regimes now demand board engagement across an expanding set of compliance domains, while Delaware law continues to insist that directors make a good-faith effort to ensure that information and reporting systems function effectively.[68] The result is not diminished responsibility, but heightened strain. Boards remain subject to robust oversight obligations, yet must discharge them under

[65] DeMott, *Agents and Advisors*, supra note 8; Deborah A. DeMott, *Disloyal Agents*, supra note 10.
[66] Fanto, supra note 57; see also Nat'l Ass'n of Corp. Dirs., *Fostering Constructive Dialogue with the External Auditor* (2025) (illustrating professionalized expectations of independence and candor in audit contexts).
[67] See Stevelman & Haan, supra note 24.
[68] See Caremark, supra note 4; Marchand, supra note 1.

conditions of structural overload and informational dependence.[69] In this environment, reliance on subject-matter and industry experts is not optional; it is often indispensable to boards' ability to remain informed enough to exercise judgment.

That reliance, however, does not displace the board's role. Caremark does not permit directors to outsource oversight, nor does it treat expert engagement as a safe harbor.[70] What it does recognize—implicitly but necessarily—is that boards govern through information systems and intermediaries.[71] Compliance consultants can assist boards by helping them assess whether those systems function as intended, by translating complex organizational realities into usable forms, and by enabling boards to allocate scarce attention more effectively. In this sense, consultants can make oversight more efficient and more competent. But they cannot make it unnecessary. The board retains responsibility for how information is gathered, framed, and acted upon, and for ensuring that the educational tools it relies on are fit for that purpose.[72]

This is where the identity and constraint of compliance consultants become consequential. As Part II.B described, some consultants operate within professional regimes that impose affirmative obligations and external limits on their conduct. Lawyers and accountants are subject to licensing, professional discipline, and legally enforceable duties that shape norms of independence, candor, and permissible assistance.[73] Those regimes reflect a broader legal commitment to the idea that there are limits on what corporations—and their advisors—may pursue in the name of profit. Sarbanes-Oxley, professional conduct rules, and related doctrines embody the premise that shareholder wealth maximization is constrained by law, ethics, and obligations to third parties.[74] Consultants trained and socialized within these professional frameworks are accustomed to operating within such limits, even when doing so complicates or frustrates business objectives.[75]

Other compliance consultants, however, operate outside these professional constraint systems. Management consultants and advisory firms that are not subject to comparable licensure or self-regulation may approach compliance assessments through a fundamentally different lens—one more

[69] See Eckstein et al, supra note 18.
[70] See Caremark, supra note 4 at 970.
[71] See Stevelman & Haan, supra note 24, at 233–49.
[72] See DeMott, *Agents and Advisors*, supra note 8.
[73] See Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998); DeMott, *The Crucial*, supra note 22.
[74] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 301, 307, 116 Stat. 745; James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments and Outcomes* (2020).
[75] See DeMott, *The Lawyer as Agent*, supra note 73.

readily aligned with business optimization or risk pricing than with legal or ethical boundary-setting.[76] This distinction does not imply bad faith or incompetence. But it does mean that consultants may differ in how they frame risk, how they treat silence or ambiguity, and how willing they are to surface information that challenges revenue-driven strategies. Behavioral ethics research underscores how professional role, incentive structure, and framing shape judgment in ways that are often unconscious rather than deliberate.[77] A consultant who has internalized shareholder wealth maximization as the dominant objective may evaluate conduct differently than one whose professional obligations include refusing to assist in conduct that causes foreseeable harm, even if profitable.[78] For boards, these differences matter precisely because consultants shape how compliance risks are understood before directors ever deliberate or decide.

To be clear, this Article does not claim that lawyers or accountants are categorically better compliance consultants, nor that professional status reliably predicts judgment, courage, or integrity in any given engagement. Individual virtue, experience, and situational context matter enormously, and in many cases may swamp institutional form. The claim is instead a more modest—and more structural—one: all else equal, professional regimes supply ex ante constraints and shared normative expectations that shape behavior under conditions of uncertainty, information asymmetry, and organizational pressure. Those constraints do not guarantee candor or independence, but they alter the default environment in which judgment is exercised.[79]

The upshot is that if compliance assessments are a key mechanism through which boards educate themselves for oversight, then the structure of those engagements—and the expectations placed on consultants—becomes a governance design question. The sections that follow argue that boards must therefore approach the selection and structuring of compliance consulting engagements with the same care they apply to other core governance decisions, rather than treating them as interchangeable technical exercises.

III. STRUCTURING CONSULTANT RELATIONSHIPS FOR BOARD EDUCATION

This Article argues that boards must take seriously their responsibility to secure appropriate education for compliance oversight — a duty that often

[76] See James A. Fanto, supra note 8, at 34–41.
[77] See Max H. Bazerman & Ann E. Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do About It* ch. 1 (2014).
[78] See Deborah A. DeMott, *Disloyal Agents*, supra note 10.
[79] See, e.g., Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Behavioral Foundations of the Attorney–Client Relationship*, 2016 Colum. Bus. L. Rev. 100 (discussing how professional training does not eliminate motivated reasoning or accommodation); DeMott, *Beyond Metaphor*, supra note 6 (emphasizing that fiduciary obligation structures expectations but does not guarantee loyal performance).

requires not just retaining outside consultants, but deliberately structuring, constraining, and governing those engagements so that the education boards receive is candid, independent, and aligned with the firm's purpose and fiduciary commitments. This Part addresses how boards should structure consultant engagements to support—rather than undermine—the board's nondelegable oversight responsibilities. The central claim is that boards cannot treat consultant selection and management as routine administrative matters. Instead, boards must affirmatively govern their relationships with compliance consultants by articulating ethical expectations, protecting independence, managing conflicts and incentives, and anticipating recurring concerns such as fears of board overreach or assumptions of consultant fungibility. Doing so equips boards to receive candid, reliable education and to exercise judgment over compliance systems in a manner consistent with federal expectations and Caremark and its progeny.

A. Adopting a Consultant Code of Conduct

If boards are to rely on compliance consultants to provide them with information and education that is needed for directors fulfillment of their oversight obligations, they must attend not only to what consultants do, but to the normative frameworks within which consultants operate.[80] One potential mechanism for doing so is the adoption of a board-mandated consultant code of conduct—a document that specifies the ethical commitments, loyalty expectations, and escalation norms that govern the consultant's engagement with the firm and its directors.[81] Properly designed, such a code can serve as an additional resource to guide the behavior of consultants with the professional constraints that attach automatically (e.g., for lawyers and auditors), while also clarifying expectations even for consultants who are not members of a regulated profession.[82]

The premise of this intervention is straightforward. As Deborah DeMott has long emphasized, fiduciary and agency relationships are defined not only by formal authority, but by justified expectations of loyalty, candor, and faithful performance.[83] Where those expectations are reasonable, the law responds forcefully to betrayal, imposing distinctive remedies that are not reducible to contract.[84] Yet many compliance consultants—particularly those operating outside licensed professions—are governed primarily by contract and reputation.[85] In those settings, boards cannot assume that shared

[80] See Caremark, supra note 4 at 970; DeMott, *Organizational Incentives to Care About the Law*, supra note 31.
[81] See e.g., Veronica Root, *Constraining Monitors*, 85 FORDHAM L. REV. 2227, 2234–36 (2017).
[82] See DeMott, *Agents and Advisors*, supra note 8, at 145-47.
[83] See DeMott, *Beyond Metaphor*, supra note 6, at 882–85.
[84] See Deborah A. DeMott, *Disloyal Agents*, supra note 10, at 1050-52.
[85] See Root, *Constraining Monitors*, supra note 81.

understandings about independence, escalation, or ethical constraint will emerge organically. They must be articulated.

A consultant code of conduct provides one means of doing so. At a minimum, such a code should make explicit that the consultant's role is to educate the board for oversight—not to optimize business outcomes, validate management preferences, or minimize regulatory exposure at all costs.[86] This framing is critical because compliance assessments inevitably involve judgment calls about what constitutes a "risk," what signals merit escalation, and how silence or ambiguity should be interpreted.[87] A code of conduct that foregrounds the board's oversight function helps channel those judgments toward governance, rather than managerial accommodation.

Importantly, a consultant code of conduct should not be drafted in isolation. Boards should anchor it in the firm's own code of conduct and stated ethical commitments, ensuring that consultants are expected to operate consistently with the values the board has publicly endorsed.[88] This alignment matters for both internal and external reasons. Internally, it reinforces the board's role as the steward of the firm's ethical culture rather than a passive consumer of expert services. Externally, it reduces the risk that consultants will frame compliance effectiveness in ways that are untethered from the firm's articulated purpose or risk tolerance.[89]

Many firms already impose analogous obligations on third-party business partners through supplier or business-partner codes of conduct, which require adherence to specified legal, ethical, and compliance standards as a condition of engagement.[90] Extending this logic to compliance consultants is not a conceptual leap; it is a recognition that consultants tasked with evaluating compliance systems occupy a position of heightened influence over governance outcomes.[91] Indeed, the case for doing so is stronger here than in ordinary supply-chain relationships, given that consultants are often asked to assess speak-up systems, retaliation risk, and the credibility of internal reporting—all areas where candor and independence are paramount.[92]

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[86] See DeMott, *Agents and Advisors*, supra note 8, at 146.
[87] See Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 272–78 (2020).
[88] See DeMott, *The Crucial*, supra note 22; see also Martinez, *Purpose-Driven Compliance*, supra note 11.
[89] See DeMott, *The Milieu of the Boardroom and the Precinct of Employment*, 89 N.C. L. Rev. 749, 750–52 (2011); Martinez, *Purpose-Driven Compliance*, supra note 11.
[90] See, e.g., *Clorox Business Partner Code of Conduct* (2021), https://www.thecloroxcompany.com/wp-content/uploads/2021/06/636155_CRP_BPCOC_English_REV_2021_R1.pdf
[91] See Root, *Constraining Monitors*, supra note 81.
[92] See DeMott, *Whistleblowers: Implications for Corporate Governance*, 98 Wash. U. L. Rev. 1645, 1666–67 (2021).

At the same time, boards must recognize that a consultant code of conduct may be perceived differently depending on the consultant's professional background. For lawyers and accountants, many of the expectations embedded in such a code—duties of candor, independence, and refusal to assist unlawful conduct—will feel familiar, even redundant.[93] Those actors already operate within licensing regimes and professional codes that impose enforceable obligations and sanction disloyalty.[94] For management consultants or other advisory firms without comparable professional structures, however, the same provisions may feel novel or even intrusive. That difference is precisely the point. As DeMott's work on the domains of loyalty illustrates, externally imposed norms can "crowd in" loyal conduct where they are perceived as reinforcing, rather than displacing, intrinsic motivations.[95] A clearly articulated consultant code of conduct can help supply that reinforcement in settings where professional identity alone does not do the work.

To that end, boards should require consultants to disclose whether and how the firm's consultant code of conduct diverges from the consultant's own internal code or ethical guidelines.[96] Many large consulting firms maintain internal codes of conduct, but those documents are typically designed to manage firm-level risk and reputation, not to align the consultant's obligations with a particular client's governance commitments.[97] Requiring disclosure of conflicts or divergences serves two functions. First, it alerts the board to potential misalignments before the engagement begins. Second, it forces an explicit conversation about which norms govern when tensions arise—an issue that is otherwise likely to surface only after a contested assessment or failed escalation.

This disclosure-and-alignment function parallels the role that conflict-of-interest disclosures play in other fiduciary and quasi-fiduciary settings. As DeMott has observed in the context of asset managers and other advisors, mandated disclosure can be a blunt tool when treated as a box-checking exercise.[98] But when tied to meaningful governance decisions—such as whether and how to engage a particular consultant—it can sharpen accountability rather than dilute it.[99]

[93] See Model Rules of Pro. Conduct pmbl. & rr. 1.2(d), 2.1 (Am. Bar Ass'n 2023).
[94] See DeMott, *Corporate Officers as Agents*, supra note 21.
[95] See DeMott, *The Domains of Loyalty*, supra note 9, at 1146-48.
[96] See DeMott, *Agents and Advisors*, supra note 8, at 148.
[97] See Root, *Constraining Monitors*, supra note 81, at 284–86.
[98] See Deborah A. DeMott, *Regulatory Techniques and Liability Regimes for Asset Managers,* in LIABILITY OF ASSET MANAGERS (Danny Busch & Deborah A. DeMott eds., Oxford Univ. Press 2012).
[99] Id.

Finally, a consultant code of conduct should specify expectations around escalation and communication with the board. Compliance consultants are often retained through management, interviewed by management, and embedded within management-controlled processes.[100] Without clear guidance, consultants may default—consciously or unconsciously—to managerial norms of deference.[101] A board-adopted code can counteract that gravitational pull by clarifying when and how consultants are expected to raise concerns directly with directors, particularly where findings implicate senior management, compliance leadership, or the integrity of reporting systems themselves.[102]

By adopting and enforcing a consultant code of conduct, boards take a modest but meaningful step toward structuring their reliance on compliance consultants in a way that supports—rather than undermines—their nondelegable oversight obligations.

B. Ensure Consultant Independence

The reality is that the use of external consultants to educate and advise the board is not without its own risks—boards must treat consultant independence as an active governance problem—not a default assumption.[103] Independence is fragile. It can be eroded by who hires the consultant, how the engagement is staffed and paid, the consultant's ongoing commercial relationships, and the social and cognitive dynamics that arise when consultants work closely with management.[104] As Donald Langevoort has shown in adjacent contexts, independence is often lost not through bad faith or overt corruption, but through processes of gradual accommodation—what he terms "getting too comfortable"—in which professional judgment becomes subtly aligned with client preferences through motivated reasoning, deference, and shared frames of reference.[105] Boards should therefore build three complementary safeguards into their use of consultants: (1) structural safeguards that insulate consultants from managerial capture; (2) disclosure, screening, and conflicts procedures that surface and manage institutional and individual conflicts; and (3) compensation and contracting[106] terms that reduce incentives to slant findings.

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[100] See Root, *Constraining Monitors*, supra 81, at 272–74.
[101] See DeMott, *The Stages of Scandal and the Roles of General Counsel*, supra note 41.
[102] See DeMott, *Whistleblowers*, *supra* note 92, at 1666–68.
[103] Caremark, supra note 4 at 970. *see e.g.* Langevoort, supra note 79, 507–15 (2012).
[104] Don A. Moore, Philip E. Tetlock, Lloyd Tanlu & Max H. Bazerman, *Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling*, 31 ACAD. MGMT. REV. 10, 11–18, 21–24 (2006).
[105] Langevoort, supra note 79, at 507–15.
[106] It may seem counterintuitive in a symposium honoring Professor DeMott to emphasize the use of contractual terms to govern the conduct of compliance consultants. But the challenge with many compliance consultants is that they are retained to conduct

1. Structural Independence and the Risk of Capture

Structural safeguards matter because independence is frequently compromised by process and proximity. In practice, management often selects, scopes, and hosts consultants; even where the board formally retains a consultant, that consultant typically must work through management to access documents, interview employees, and validate facts. These operational dependencies create repeated opportunities for capture: gradual alignment of the consultant's perspective with management's narratives through daily interaction, shared incentives, and social identification.

Langevoort's work helps explain why these dynamics are so powerful. He emphasizes that professional advisors embedded in organizational settings are prone to cognitive co-dependence: failures of expertise, excessive deference to business counterparts, difficulty perceiving incremental change, and motivated inference that resolves ambiguity in favor of preferred outcomes.[107] Crucially, these effects do not depend on conscious bias. Advisors may sincerely believe they are exercising independent judgment even as their conclusions drift toward managerial comfort.[108]

Behavioral research on auditors and expert evaluators documents the same phenomenon. When professionals are hired, evaluated, and repeatedly engaged by the parties they are meant to assess, cognitive and incentive-based pressures—moral seduction, escalation of commitment, and group identification—push judgment toward accommodation rather than dispassionate critique.[109] As Langevoort cautions, formal independence in contract or organizational charts does little work if cognitive independence is undermined in practice.[110]

Because of these dynamics, boards should insist on procedures that preserve structural independence in operation, not merely on paper. Practical measures include: (a) having the board—typically through the audit or compliance committee—formally retain the consultant and approve the engagement letter;[111] (b) specifying dual reporting lines that require

"assessments" in contexts where professional norms, duties, and enforcement mechanisms are often underdeveloped or indeterminate. In that setting, the contractual terms emphasized in this Article are not offered as a substitute for fiduciary obligation, but rather as a mechanism for clarifying expectations, allocating responsibility, and identifying when a consultant's conduct departs from the role the board reasonably understood it to be hiring.

107 Langevoort, supra note 79, at 508–13.

108 Id. at 512–15.

109 Moore et al., supra note 104, at 12–18.

110 Langevoort, supra note 79, at 497–98.

111 Where a separate risk committee exists, boards should consider routing certain compliance-assessment engagements through that committee — or require dual deliverables to both the risk committee and the full board — to reduce managerial filtering and ensure

confidential reporting to the board or committee independent of management; and (c) controlling access to documents and data through a neutral custodian, such as a board-designated legal or compliance officer, to limit selective gatekeeping by management. These measures mirror reforms adopted in adjacent governance domains—most notably Sarbanes–Oxley's shift of audit oversight to independent audit committees—and reflect recommendations from the evaluation literature aimed at reducing informational capture.

2. Conflicts of Interest, Disclosure, and Screening

Second, boards must confront institutional and individual conflicts of interest directly by adopting disclosure, screening, and mitigation rules modeled on enforceable professional and procurement regimes. High-profile regulatory and investigative accounts demonstrate how costly failures of disclosure and screening can be.

The House Committee on Oversight's investigation of McKinsey documented repeated instances in which consultants worked simultaneously for federal regulators and regulated firms on overlapping subject matter, used government-facing work to solicit private-sector business, and failed to disclose these conflicts as required by contract and regulation.[112] These conflicts were not merely theoretical; the Committee found evidence that consultants leveraged regulatory insights and relationships in ways that compromised objectivity.[113]

The Promontory–Standard Chartered episode illustrates a different but equally instructive failure. In that matter, New York regulators concluded that Promontory lacked independent judgment after acceding to client requests to soften language, remove red flags, and omit "painful" information from reports submitted to regulators.[114] Internal communications revealed that maintaining the client relationship had become a salient consideration in shaping the consultant's work product—precisely

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enterprise integration. Industry reporting shows boards are actively discussing risk-committee creation as a structural response to volatility; the very existence of such committees changes how independence and reporting lines should be structured for consultant engagements. *See* Roach, supra note 35.

[112] H. Comm. on Oversight & Reform, THE FIRM AND THE FDA: MCKINSEY & COMPANY'S CONFLICTS OF INTEREST AT THE HEART OF THE OPIOID EPIDEMIC (Apr. 13, 2022), https://www.govinfo.gov/content/pkg/GOVPUB-Y4_OV2-PURL-gpo182429/pdf/GOVPUB-Y4_OV2-PURL-gpo182429.pdf.

[113] Id. at 29–38.

[114] N.Y. State Dep't of Fin. Servs., REPORT ON INVESTIGATION OF PROMONTORY FINANCIAL GROUP, LLC 1–3 (Aug. 2015), https://business.cch.com/bfld/NYDFS-PromontoryReport-08032015.pdf.

the kind of motivated inference Langevoort identifies as endemic to embedded advisory roles.[115]

These failures support three board-level rules. First, boards should require timely, specific disclosure of any past, present, or prospective engagements that could create organizational or individual conflicts, including work for competitors, regulators, or key counterparties. Disclosure should go beyond generic certifications and identify relevant personnel, subject matter, and timeframes. Second, boards should require documented screening—or "Chinese wall"—procedures where appropriate, and insist that such screens be timely, auditable, and enforced. The legal ethics literature underscores that screening is effective only when implemented early and monitored rigorously; the same discipline should apply to consulting firms.[116] Third, boards should require an independent, board-level conflicts review prior to engagement, with an explicit determination as to whether disclosed relationships are disqualifying or can be mitigated, and how.

These concerns are heightened in markets with limited supplier options, such as large accounting or consulting firms, where repeated engagements and overlapping client relationships are common. Recent GAO reports and congressional action addressing consultant conflicts in federal contracting underscore that market concentration amplifies conflict risks and demands heightened disclosure, mitigation, and oversight mechanisms.[117]

3. Payment, Incentives, and Skeptical Review

Third, payment and incentive structures predictably influence judgment and therefore must be designed with independence in mind. A robust behavioral literature demonstrates that economic dependence on a client—through fee concentration, contingent compensation, or expectations of future work—creates both pragmatic and psychological pressures that degrade independence over time.[118] As Langevoort emphasizes, advisors often underestimate the extent to which such incentives shape their own reasoning, making self-policing unreliable.[119]

Boards should therefore take at least three steps with respect to compensation. First, they should avoid fee arrangements that create strong contingent incentives tied to outcomes that favor management. Second, they

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[115] Id. at 6–10; see also Langevoort, supra note 79, at 512–13.

[116] Erin A. Cohn, *The Use of Screens to Cure Imputed Conflicts of Interest*, 35 U. BALT. L. REV. 367, 378–85 (2006).

[117] U.S. Gov't Accountability Off., *Federal Contracting: Timely Actions Needed to Address Risks Posed by Consultants Working for China*, GAO-24-106932 (2024), https://www.gao.gov/assets/gao-24-106932.pdf.

[118] Moore et al., supra note 104, at 18–22.

[119] Langevoort, supra note 79, at 512–15.

should require disclosure of fee concentration (e.g., how economically dependent the consultant is on a particular client or set of clients) and consider diversification thresholds (e.g., whether the consultant's financial exposure to the company is sufficient that the loss of the engagement would materially affect the firm, practice group, or lead partner) as a factor in consultant selection. Third, boards should consider contractual mechanisms—such as cooling-off periods, escrowed fees, or limits on follow-on engagements—that decouple immediate compensation from future commercial solicitation. These mechanisms are imperfect, but they force explicit tradeoffs at the outset and make incentive-related bias easier to detect ex post.

Just as importantly, boards must remember that payment-related bias cannot be eliminated through contract alone. Consistent with Caremark, oversight authority remains nondelegable. Consultants can assist boards by educating them and structuring information, but consultant reports are not substitutes for board judgment.[120] Reliance on expert intermediaries often increases, rather than decreases, the need for skepticism, precisely because expertise can obscure the judgment calls embedded in evaluative work.[121] Boards should therefore review consultant findings with informed skepticism, probing assumptions, methodologies, and framing choices rather than treating reports as neutral facts.

4. Operational Guardrails

Several operational practices follow from these principles and from the documented failures discussed above. Where feasible, boards should require separate written deliverables from consultants for directors, not solely management-facing reports, to reduce narrative filtering.[122] Boards should insist on documented change logs identifying any substantive edits made at management's or counsel's request, a safeguard adopted in the wake of the Promontory investigation.[123] Boards should approve key engagement personnel in advance and require approval for substitutions that could reintroduce conflicts.[124] And for long-term or monitoring engagements, boards should consider rotation, external peer review, or periodic refreshment of engagement teams to counter escalation-of-commitment dynamics documented in the behavioral literature.[125]

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[120] Caremark, supra note 4 at 970.
[121] Langevoort, supra note 79, at 497–98.
[122] Brown & Klerman, *supra* note 8, at 803–04.
[123] N.Y. State Dep't of Fin. Servs., *supra* note 11, at 7.
[124] H. Comm. on Oversight & Reform, *supra* note 9, at 7–14.
[125] Moore et al., supra note 104, at 21–24.

C. *Additional Questions & Concerns*

1. Board Overreach

A predictable objection to greater board engagement with compliance consultants is the risk of board overreach. Corporate law draws a clear allocation of authority: management runs the day-to-day operations of the firm, while the board's role is one of oversight, not execution. From management's perspective, increased board engagement—particularly through outside consultants—can feel like an incursion into managerial prerogatives. Practitioner literature reflects this concern with some regularity. For example, recent governance guidance aimed at CEOs warns of the "inquisitor" director who engages in persistent questioning that puts management on the defensive, strains board–management relations, and blurs the line between oversight and management.[126] Similar concerns are raised about "lane drifting," where directors stray into operational matters under the banner of engagement.[127] These accounts underscore a real tension in modern governance: as expectations for board involvement increase, so too does managerial anxiety that boards will substitute their judgment for management's or disrupt established lines of authority.

That concern, however, misunderstands both the source and the limits of the board's obligation. Delaware law does not permit boards to abdicate oversight in order to preserve managerial autonomy. Caremark and its progeny make clear that boards retain a nondelegable duty to make a good-faith effort to ensure that information and reporting systems exist, particularly with respect to mission-critical risks.[128] In *Marchand v. Barnhill* and subsequent cases, the Delaware courts emphasized that boards must be able to understand and engage with compliance information relevant to the firm's core operations.[129] Boards cannot fulfill this obligation if they lack the baseline education necessary to interpret what management presents or to know which questions to ask and when to press further. Reliance on external consultants in this context does not reflect managerial displacement, but fiduciary necessity. Consultants, when properly selected and structured, serve an educational function that enables boards to perform oversight without

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126 Lucy Nottingham, *The CEO's Playbook for Difficult Board Directors*, MIT SLOAN MGMT. REV., (Jan. 13, 2026), https://sloanreview.mit.edu/article/the-ceos-playbook-for-difficult-board-directors/ (describing the "inquisitor" director and noting management defensiveness as a barrier to effective board–management relationships).

127 Id. (discussing "lane drifting" and concerns about unclear delineation between board and management roles).

128 Caremark, supra note 4 at 970; Marchand, supra note 1; see also *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *12–14 (Del. Ch. Oct. 1, 2019).

129 Marchand, supra note 1 at 821–24; see also *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *12–14 (Del. Ch. Oct. 1, 2019).

managing the business itself. Far from constituting overreach, board engagement with consultants can help preserve the proper allocation of authority by equipping directors to evaluate management's systems and responses rather than attempting to replicate them.

2. Consultant Fungibility

A related concern is the tendency of boards to treat compliance consultants as fungible. Many compliance engagements are structured around familiar tasks—program assessments, culture reviews, hotline evaluations, risk benchmarking—that can be performed by a wide range of outside actors, including law firms, accounting firms, specialized compliance boutiques, and management consultants. Because the surface-level services appear similar, boards may assume that the choice among consultants is largely interchangeable, driven by availability, cost, or familiarity rather than by differences in institutional role, professional obligation, or orientation. That assumption is mistaken.

Boards should therefore begin by interrogating *why* a consultant has been engaged in the first place. Often, the impetus for retaining a compliance consultant is not internal preference but an external governance signal: regulatory guidance emphasizing program effectiveness, enforcement expectations around culture and escalation, or judicial doctrine underscoring the board's responsibility to engage with mission-critical risks. Understanding the background norm or expectation that gave rise to the engagement is essential to determining whether the task is one that can be appropriately outsourced, whether it is meant to supplement management's existing compliance work, or whether it is intended to educate the board directly for oversight. A consultant retained to help management operationalize controls performs a fundamentally different role from a consultant retained to inform the board's evaluation of whether those controls are working as intended.

Treating consultants as fungible obscures these distinctions and can undermine oversight rather than support it. If boards do not clearly understand what a consultant is doing—and how that work fits within the board's own oversight responsibilities—they risk either over-relying on consultant outputs or misinterpreting them as substitutes for judgment. Oversight requires comprehension, not delegation. To that end, boards should insist on clarity about the consultant's function, audience, and normative frame before engagement begins. Doing so allows boards to oversee management without supplanting it, to rely on consultants without deferring to them, and to preserve the distinction between education for oversight and execution of compliance itself.

CONCLUSION

As regulatory expectations and judicial scrutiny push compliance to the center of corporate governance, boards cannot treat their education about compliance as incidental or outsourced; they must proactively structure how they obtain and use outside expertise. Drawing on fiduciary and agency theory—especially Deborah DeMott's insights about loyalty, informational dynamics, and the limits of delegation—this Article has shown that compliance consultants are not interchangeable vendors but actors whose institutional form, professional constraints, and incentives materially shape what directors learn. To discharge their nondelegable oversight duties, boards should therefore adopt clear codes of conduct for consultants, create operational safeguards that protect independence and surface conflicts, and design compensation and reporting arrangements that preserve skeptical, board-focused inquiry rather than managerial comfort. These reforms equip directors with the candid, contextualized education they need to ask the right questions, detect emerging risks, and exercise judgment in service of the corporation's lawful and ethical purpose.

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