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The Board's Education Through Compliance Consultants

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Duke Law School and ECGI

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ECGI Working Paper Series in Law

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Abstract

This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. Boards consult a range of internal and external agents to provide that education. External compliance consultants, in particular, increasingly provide valuable information to boards via compliance assessments. Compliance assessments are not audits, traditional legal advice, or even a type of internal investigation, though they may borrow insights from each of those functions. Instead, they are an exercise that assesses whether a firm's compliance program is doing what it says it is supposed to do on paper, which provides crucial insight to the board as directors to meet their fiduciary obligations. As a result, compliance consultants play a distinctive role in board governance because they function as key educational intermediaries through whom boards come to better understand the firm's compliance risks. In providing compliance assessments, compliance consultants shape what boards learn about the status of the compliance program and whether concerns are flagged for further review by directors. Understanding compliance consultants in this way may help scholars and firm leaders to better understand the import of these engagements. If compliance assessments are a primary mechanism through which boards educate themselves for oversight, then the incentives and professional obligations of the consultants who conduct them matter.

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THE BOARD'S EDUCATION THROUGH COMPLIANCE CONSULTANTS

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This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. Boards consult a range of internal and external agents to provide that education. External compliance consultants, in particular, increasingly provide valuable information to boards via compliance assessments. Compliance assessments are not audits, traditional legal advice, or even a type of internal investigation, though they may borrow insights from each of those functions. Instead, they are an exercise that assesses whether a firm's compliance program is doing what it says it is supposed to do on paper, which provides crucial insight to the board as directors to meet their fiduciary obligations.

As a result, compliance consultants play a distinctive role in board governance because they function as key educational intermediaries through whom boards come to better understand the firm's compliance risks. In providing compliance assessments, compliance consultants shape what boards learn about the status of the compliance program and whether concerns are flagged for further review by directors. Understanding compliance consultants in this way may help scholars and firm leaders to better understand the import of these engagements. If compliance assessments are a primary mechanism through which boards educate themselves for oversight, then the incentives and professional obligations of the consultants who conduct them matter.

* Simpson Thacher & Bartlett Distinguished Professor of Law, Duke Law School. Research Member of the European Corporate Governance Institute. Many thanks to the Fiduciary Law symposium participants, with special thanks to Julian Velasco and Roy Schapira for providing comments and suggestions. Grateful for excellent research assistance from Jesse Levinson. Please note, LC&P is a journal that prefers pieces to be "lightly footnoted," so there are instances where sources cited in this Article could have been cited more extensively. 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.

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I. INTRODUCTION

Boards today face an expanding and exacting set of expectations to ensure that corporate compliance programs function effectively, which requires the compliance program to properly prevent, detect, investigate, and remediate (alleged) misconduct occurring within a firm.[1] Regulatory and legal mandates, enforcement guidance, and even some state corporate law decisions increasingly require boards to oversee managers' implementation of an effective ethics and compliance program. This is true, even though directors may not have significant, prior expertise in the compliance industry or in compliance matters. Boards therefore sometimes rely on external compliance consultants to provide education,

[1] CRIM. DIV., U.S. DEP'T OF JUST., 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) (explaining that the law requires "that a board make a good faith effort to put in place a reasonable system of monitoring and reporting" to deal with corporate risk and wrongdoing)*;* Veronica Root, *The Compliance Process*, 94 IND. L.J. 203 (2019) (discussing the impact of corporate failures to prevent misconduct and the importance of establishing effective compliance systems); Asaf Eckstein, Roy Shapira & Ariel Shillo, *Board Overload* 104 Wash. U. L. Rev. __, *3–6 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6395198.

advice, and guidance, so that the board can effectuate its oversight responsibilities.

The reliance of boards on compliance consultants is occurring at the same time that significant changes in board composition and committee responsibilities are occurring at some firms. Traditionally, the individuals serving on the boards of public companies—and audit committees in particular—were selected, in part, based on their past experience in senior executive roles, especially as CEOs, CFOs, or other financial leaders. The audit committee's core mandate at many public firms focused primarily on oversight of mandatory financial reporting, internal controls, and the work of external auditors. That limited mandate made sense when the most important risks confronting boards were predominantly financial in nature. Today, however, audit committees and boards more generally are routinely tasked with overseeing a diverse set of regulatory requirements and compliance risks, including how to respond to internal investigation findings, the creation of a strong compliance culture, and ever emerging technological innovations. But a board member's financial expertise does not necessarily translate to that member having sufficient expertise to properly oversee managers' implementation of compliance programs. As public firms have grown larger and more complex,[2] and their regulatory and compliance challenges have increased, the gap between board members' prior experience and the scope of their oversight responsibilities appears to have widened, making board education efforts essential to effective oversight.

This Article suggests that boards' use of compliance consultants to assist them in obtaining the education and expertise necessary to fulfill their oversight of compliance efforts requires further study from scholars and policymakers. Compliance consultants appear to sometimes be treated as fungible actors whose backgrounds and reports are interchangeable, but compliance consultants come from different backgrounds, including law, accounting, consulting, and the compliance industry more generally. As a result, compliance consultants have different backgrounds, training, and professional expectations and responsibilities. Some operate within professional licensure and ethical regimes (e.g., lawyers and accountants); others do not (e.g. consulting firms). Those differences might matter because the external compliance consultant's background may impact their compliance assessments and the way they approach board education. Yet, the work of all compliance consultants has the potential to frame how

[2] Veronica Root Martinez, *Considering Middle Managers*, _ B.U. L. Rev. __ *12 & n.42 (forthcoming 2027) (on file with author) (citing Mark J. Roe & Charles C. Y. Wang, *Half the Firms, Double the Profits: Public Firms' Transformation, 1996–2022*, 8 J.L. Fin. & Acct. 211, 212–13, 223–24 (2025)).

boards understand and exercise their nondelegable oversight responsibilities. The question is not whether boards should use external compliance consultants—boards already do—but how boards can structure those relationships so that consultants educate directors in a manner that allows them to fulfill their oversight duties.

This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. Obtaining appropriate board education often requires the retention of outside compliance consultants to understand whether the compliance program is functioning properly. A board's decision to retain an external compliance consultant therefore must be undertaken with great care, so that the education boards receive is candid, independent, and properly aligned with the firm's commitments. Part II explains why boards must often obtain greater education to properly oversee compliance efforts at firms. It reviews the duty of oversight under Delaware law and explains why education is an essential component of that duty. Part III turns to compliance consultants themselves, detailing the scope of these engagements, who performs them, and why differences in the backgrounds of compliance consultants may materially impact the education they provide to boards.[3] Part IV offers normative proposals, such as a consultant code of conduct and formal measures to protect consultant independence and to manage conflicts of interest. It then addresses some additional considerations raised by this Article's suggestions and argument, including concerns related to board overreach and assumptions about the interchangeability of compliance consultants. Boards often require educational opportunities from external actors; the goal should be to provide that education in a manner that assists the board in meeting its oversight responsibilities.

II. COMPLIANCE OVERSIGHT, EDUCATION, AND AGENTS

A. Oversight Requirements

Under Delaware state corporate law, the "business and affairs" of the corporation are managed by officers under the direction of the board,

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[3] As a note to readers, Parts I and II are not an expansive treatment of these issues, but a broader overview to situate Part IV. 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 Lookback." Jon Smollen & Books Schatschneider, *The Caremark Decision at 21 – Corporate Compliance Comes of Age*, TEMPLE 10-Q (Oct. 26, 2017), https://law.temple.edu/10q/caremark-decision-21-corporate-compliance-comes-age/.

and that allocation of authority carries significant fiduciary obligations.[4] Among those obligations, the duty of oversight is particularly important, because it is directly tied to the internal governance of the firm and oversight of the firm's compliance program. Beginning with *In re Caremark International Inc. Derivative Litigation*, Delaware courts require directors to make a good-faith effort to ensure that the firm has information and reporting systems reasonably designed to provide information to the board about the firm's legal, compliance, and core business risks.[5] *Caremark*'s influence has been profound—even as most *Caremark* claims are unsuccessful—because the case and its progeny have shaped board practice and committee responsibilities.[6]

Deborah DeMott's scholarship demonstrates why a board's oversight obligations are essential to firms' corporate governance and compliance efforts. As DeMott has emphasized, fiduciary obligations are not reducible to contract law violations or to outcome-based assessments of harm after something has gone wrong at a firm.[7] Rather, fiduciary duties require those acting as fiduciaries to remain loyal to the principal, properly consider the principal's directions and expectations, and exercise judgment in line with the grant of oversight authority from the principal.[8] As a result, directors must remain sufficiently informed to exercise independent judgment on matters that implicate the firm's obedience to legal and regulatory mandates and ethical commitments.[9] Additionally, proper board oversight requires boards to oversee the implementation of internal governance and compliance efforts that make lawful and ethical conduct plausible within large, complex organizations.[10]

Compliance oversight is a core component of the board's oversight responsibilities. Today's corporate firms operate in increasingly complex regulatory environments, requiring firms to address compliance obligations across a diverse set of areas, including antitrust, anti-corruption, data privacy, labor and employment, environmental protection, financial integrity, and emerging areas such as cybersecurity and artificial

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[4] DEL. CODE ANN. tit. 8, § 141(a) (2025).

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

[6] *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).

[7] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882–85 (1988).

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

[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).

intelligence.[11] Delaware courts have considered a firm's compliance efforts to be "mission critical" when 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*, Delaware courts have scrutinized whether boards provided meaningful oversight over compliance risks when those risks were integral to the firm's business.[13]

Boards often delegate oversight over compliance efforts to specified board committees, most commonly the audit committee and, increasingly, dedicated risk or compliance committees.[14] Yet, the full board retains ultimate oversight authority and must satisfy itself that compliance systems are functioning as intended.[15] Importantly, DeMott has explained that fiduciary obligation cannot be satisfied by box-checking or ritualized processes alone.[16] Thus, a compliance program or a reporting system that exists on paper but fails to surface meaningful information to directors does not appear to discharge the board's oversight responsibility.[17]

B. Education Requirements

The expanding scope of board oversight obligations has intensified concerns about the ability of boards to (i) appropriately oversee legal and business risks and (ii) absorb and analyze the large amounts of information presented to them. Scholars have documented the phenomenon of "board overload" occurring when directors are tasked with overseeing increased legal and regulatory requirements and social risks while operating within fixed constraints like board meeting time and space on meeting agendas.[18] This reality heightens the need to understand and carefully manage how information reaches the board and how it is presented. Boards cannot—and should not—manage the day-to-day of compliance programs. But they must remain sufficiently educated about issues related to the compliance program, so they are able to ask the right

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[11] *See generally* Veronica Root Martinez, *Purpose-Driven Compliance*, 13 TEX. A&M L. REV. 1351, 1351–55 (2026).
[12] 1*See* Marchand v. Barnhill, 212 A.3d 805, 822–24 (Del. 2019).
[13] 1*See id.* at 824; *In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-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, 388–89 (2022).
[15] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[16] DeMott, *Beyond Metaphor, supra* note 7, at 887–90.
[17] 5*See* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); *see also* Hill & Zakiani, *supra* note 6, at 44.
[18] Eckstein, et al., *supra* note 1.

questions, discuss and recognize potential red flags, and understand when information the board receives from management warrants skepticism.[19]

Here again, DeMott's work is instructive. Her scholarship on agency and loyalty underscores that the quality of oversight depends on formal authority and informational dynamics.[20] Fiduciaries rely on others to furnish certain sets of information, yet they remain responsible for how that information is used.[21] In the compliance context, this means that boards must cultivate informational systems that promote candor and that enable potential red flags to be escalated up through the firm.[22] Boards may fail in their oversight responsibilities when they ignore known violations occurring within the organization, but it is also problematic when internal governance and information systems fail to alert boards to red flags about the firm's performance or culture.[23]

Recent corporate governance scholarship on "information governance" emphasizes that boards increasingly function as sites where knowledge is synthesized so that actions can be taken in response.[24] Decisions about what data is collected and how and when that information is presented to the board shape how an organization directs its decisionmaking.[25] Board oversight of a firm's compliance efforts is necessarily related to board oversight of a firm's information systems, internal reporting structures, and understanding the various intermediaries—both internal and external to the firm—who translate information about how the firm operates into information the board understands.[26]

Thus, a board's oversight over compliance efforts appears to be both a legal obligation and an educational challenge. To fulfill their fiduciary role, directors must acquire enough understanding of the way the business functions and the firm's internal compliance structures so that the board can evaluate their effectiveness without intruding into the day-to-

[19] Jennifer O'Hare, *Continuing Education for Directors of Public Companies*, 51 FLA. ST. U. L. REV. 373, 379–83 (2024).
[20] Deborah A. DeMott, *Agents and Advisors*, 72 FLA. L. REV. F. 145, 149–50.
[21] Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 850–53 (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); Martinez, *Considering Middle Managers*, *supra* note 2 at *27–30 (discussing middle managers' role in transmitting red flags upward and the risks when information stalls within the firm).
[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.

day operations of the firm.[27] The law does not require directors to become compliance experts, but it does require them to remain informed enough to exercise appropriate oversight over the compliance program the firm's managers implement.[28] As DeMott has observed in related contexts, fiduciaries should pay attention to the context in which business and legal decisions are made as well as the firm's sensitivity to risk, but fiduciaries should not blindly rely on their trust of firm actors or agents or on those individuals' formal assurances of loyalty.[29]

The need for appropriate board education is particularly important for a firm's compliance program because wrongdoing within firms often remains invisible until significant or pervasive misconduct has already occurred. Yet, there may have been signs of problems within the firm for a significant time prior to the misconduct being detected, such as deficiencies with the firm's culture, patterns of silence by employees or in particular teams, or odd internal reporting patterns.[30] Effective board oversight, therefore, requires boards to invest in understanding how compliance systems operate in practice and whether they align with the firm's stated values and risk tolerance.[31] The board's need for appropriate education about the firm's compliance program and information systems is one of the reasons compliance assessments have become an important tool, and why boards sometimes need to turn to outside consultants to help them better understand the state of a firm's compliance efforts.

The importance of board education is recognized in contemporary corporate governance expectations. Industry-facing guidance increasingly frames director education as a necessary component of 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 ensuring their ability to engage in continuous learning as business models and regulatory environments evolve and increase in complexity.[32] Practitioner materials reflect the importance of board education, cataloguing education opportunities that

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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, *Breach of Fiduciary Duty, supra* note 8, at 929–31.
[30] *See* Maizel, *supra* note 23, at 41–44.
[31] *See* Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 L. & CONTEMP. PROBS. 36, 54–57 (1997); Veronica Root Martinez, *Purpose-Driven Compliance*, *supra* note 11, at 1390–91, 1394–95, 1407.
[32] Tom Kim, *Board Education as a Strategic Imperative*, IDC VIEWPOINTS (Oct. 23, 2025), https://www.idc.org/ici-viewpoints/board-education-as-a-strategic-imperative.

are targeted at full boards, audit committees, and risk committees on topics ranging from cybersecurity to whistleblower systems.[33] Together, these materials suggest that ensuring appropriate levels of board education has become a central mechanism through which boards ensure that they are satisfying their oversight responsibilities. Yet even as the importance of board education has been recognized, there does not appear to be much scholarship dedicated to understanding the standards, incentives, and professional obligations that shape how that education is delivered by agents external to the firm.

The upshot is that the education required for appropriate board oversight contradicts, at least in part, the way boards have traditionally been constituted and organized. Public company directors typically have prior experience 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, primarily focused on issues related to financial reporting and the work of external auditors.[34] The purposeful decision to select directors with significant experience overseeing firms' financial risks made sense when the biggest board oversight responsibility was tied to a firm's financial state (and success). But contemporary board oversight obligations now extend well beyond financial matters and encompass regulatory and compliance concerns across a range of areas. As firms have grown larger and more complex, and as the scope of "mission critical" risk has expanded under state corporate law, the gap between directors' background expertise and their oversight responsibilities appears to have widened.[35] Ensuring appropriate

[33] *See, e.g.*, WOODRUFF SAWYER & CO., 2026 BOARD EDUCATION RESOURCE GUIDE 2–4 (2026), https://www.jdsupra.com/legalnews/the-essential-guide-for-board-education-9289381/ (outlining different opportunities for board education).

[34] *See* Renée B. Adams, *Boards, and the Directors Who Sit on Them*, *in* THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 291 (2017); RESTATEMENT OF THE LAW, CORP. GOV. § 3.01(b)(5)–(7) & cmt. g–h (A.L.I. 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 experimenting with the design of their committees to ensure proper board-level attention is paid to a range of enterprise risks. February 2026 reporting documents increasing discussion at boards about establishing separate risk committees—a 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 purposefully done, and that the manner in 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?.

board education, therefore, has become a necessity of modern board oversight. And because that education cannot realistically be generated internally by generalist directors alone, it must be received through management or actors external to the firm, like compliance consultants. When external actors are engaged to provide education to boards, it raises foundational questions about the compliance consultants whom boards learn from and the incentives and constraints that shape those consultants' work.

C. The Board's Use of Agents

Directors require information about the operations of the firm to satisfy their oversight obligations. As a result, directors must obtain information from individuals who have access to the firm's operations who then gather and transmit information up to the board. Deborah DeMott's agency law scholarship notes that principals act through agents whose conduct, knowledge, and judgments impact the principal's ability to make appropriate decisions.[36] For boards, the use of both internal and external agents, like compliance consultants, is essential for directors to understand when the firm may be in need of board-level intervention.[37]

Within the firm, boards rely heavily on internal agents such as corporate officers; lawyers in the general counsel's office; and chief compliance officers and other members of the compliance department to provide directors with information and education about the firm. DeMott's work situates these types of internal agents within the common law of agency.[38] Internal agents are responsible for executing directives from the board and shareholders and furnishing material information necessary for directors to perform their oversight obligations.[39] Importantly, it appears that some failures of board oversight are a result of breakdowns in the relationship between the board and internal agents, which may result in a failure to properly communicate red flags and other important pieces of information to directors.[40]

DeMott's scholarship also explains that internal agents—who are compensated by the firm—operate within incentive structures that come directly from the firm itself, which may distort the internal agent's loyalty if information provided to the board might diminish the agent's ability to

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[36] *See* DeMott, *Disloyal Agents, supra* note 10.
[37] *See* DeMott, *Agents and Advisors, supra* note 20.
[38] *See* DeMott, *Corporate Officers as Agents, supra* note 21.
[39] *Id.*; *see also* DeMott, *The Crucial but (Potentially) Precarious Position, supra* note 22.
[40] *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.

obtain compensation or be perceived as successful.[41] In short, the internal agents responsible for elevating compliance concerns to the board may face a range of pressures that may discourage or distort the flow of that information to directors.[42] As DeMott has observed, agency relationships are especially vulnerable to succumbing to "disloyal" acts where monitoring by the principal is imperfect and where agents' performance is difficult to observe ex ante.[43] For boards, this sometimes creates a predicament, because they must rely on information from internal agents, yet there is no guarantee that boards will receive adequate information from internal agents to meet directors' oversight responsibilities.

Boards, therefore, at times, supplement the information they receive from internal agents by retaining external agents—such as law firms, auditors, consultants, and other advisors—whose distance from management is believed to enhance the external agents' independence and objectivity. DeMott's analysis of agents and advisors helps explain why a board's decision to retain external agents is rational and also deserving of caution.[44] External agents, like internal ones, can occupy fiduciary roles depending on how the relationship is structured.[45] When external advisors to the board position themselves as sources of expert judgment that the board should rely upon, fiduciary norms may attach.[46] But whether the external agent is a member of a profession or subject to formal regulatory requirements varies widely across these actors who often serve as external compliance consultants, which has the potential to result in meaningful differences in their behavior and understandings of loyalty.[47]

Thus, boards and scholars should consider how to best structure the relationships between directors and external agents, including compliance consultants. Directors are responsible for (i) their decision to rely upon external agents, (ii) how information reaches them from those external agents, and (iii) "the corporation's culture."[48] Yet, external compliance consultants, who are increasingly tasked with educating boards, may be operating without consistent or formal rules and expectations.

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[41] *See* DeMott, *Organizational Incentives to Care About the Law, supra* note 31.

[42] *See* DeMott, *The Crucial but (Potentially) Precarious Position, supra* note 22; Martinez, *Considering Middle Managers*, *supra* note 2 at *20–24, 27–30 (discussing the risk that middle managers will downplay or stall red flags before they reach senior leadership).

[43] *See* DeMott, *Disloyal Agents, supra* note 10, at 1062.

[44] *See* DeMott, *Agents and Advisors, supra* note 20.

[45] *Id.*

[46] *Id.*; *see also* DeMott, *The Domains of Loyalty, supra* note 9.

[47] *See* DeMott, *The Domains of Loyalty, supra* note 9.

[48] DeMott, *Organizational Incentives to Care About the Law, supra* note 31, at 41.

III. THE BOARD'S COMPLIANCE CONSULTANT(S)

As explained above, boards must determine which agents to retain to achieve the directors' need for education and information. To effectuate oversight over a firm's compliance program, boards sometimes retain outside compliance consultants to assess whether the firm's internal systems and compliance program are functioning as intended. These engagements appear to be relatively routine due to increased regulatory expectations, often from federal enforcement authorities, and under state corporate law, which requires boards to remain meaningfully informed about "mission critical" risks. It appears that many firms may be treating the external consultants who conduct the firm's compliance assessment as interchangeable. This Part challenges that assumption.

This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. As a result, compliance consultants play a distinctive role in board governance because they function as key educational intermediaries through whom boards come to better understand the firm's compliance risks. Compliance assessments are not audits, traditional legal advice, or even a type of internal investigation, though they may borrow insights from each of those functions. Instead, they are an exercise that assesses whether a firm's compliance program is actually doing what it says it is supposed to do on paper. Compliance assessments provide crucial insights to directors as they attempt to meet their oversight obligations. In providing compliance assessments, compliance consultants shape what boards learn about the status of the compliance program and whether concerns are flagged for further review by directors.

Understanding compliance consultants in this way helps scholars and firm leaders to understand the import of these engagements. If compliance assessments are a primary mechanism through which boards educate themselves for oversight, then the incentives and professional obligations of the consultants who conduct them matter. The subsections below examine what compliance consultants do, who they are, and why those distinctions should matter to boards seeking to fulfill their oversight responsibilities.

A. What They Do

As boards confront increasing expectations to oversee the effectiveness of compliance programs,[49] they have turned with growing

[49] CRIM. DIV., U.S. DEP'T OF JUST., *supra* note 1.

frequency to outside consultants to conduct compliance assessments. Compliance assessments evaluate whether existing compliance systems operate as the internal compliance program policies and procedures dictate they should. Federal enforcement guidance emphasizes that compliance programs must do more than exist on paper. Compliance programs must prevent, detect, and investigate potential risks and internal misconduct in a manner that generates information that enables meaningful board oversight.[50] Compliance assessments have become an important tool through which boards attempt to understand how the compliance program operates within and throughout the firm.

Compliance assessments are distinct from several adjacent professional services. Financial audits are focused on verification of financial information within specifically defined parameters, most notably those tied to financial reporting obligations.[51] Legal advice, by contrast, traditionally focuses on interpreting a firm's legal obligations, assessing legal risk, and advising on the firm's permissible courses of action, typically within settings where the attorney-client privilege and other similar protections apply. Internal investigations typically focus on discrete allegations or incidents and are designed to (i) establish the facts surrounding the allegations, (ii) assess the firm's potential liability as it relates to those allegations, (iii) support remediation efforts if misconduct is uncovered, and (iv) manage subsequent interactions with enforcement authorities.[52] In contrast, compliance assessments examine whether the firm's internal compliance systems—policies, reporting channels, training, monitoring, and escalation mechanisms—function reliably and as intended across the organization.[53]

In practice, external compliance consultants who conduct compliance assessments engage in a range of activities to evaluate a firm's compliance program. These assessments often include testing adherence to internal policies and procedures; evaluating whether the firm is operating in accordance with regulatory expectations; and assessing whether compliance functions are adequately resourced and empowered to make

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[50] *Id.* at 17–18.

[51] *See, e.g.*, Vanessa Teitelbaum, *Fostering Constructive Dialogue with the External Auditor*, NAT'L ASS'N OF CORP. DIRS. (Dec. 18, 2025), https://prod.nacdonline.org/all-governance/governance-resources/directorship-magazine/online-exclusives/2025/q4-2025/external-auditor-assessment/.

[52] MCKENNA LONG & ALDRIDGE LLP, GUIDE TO CONDUCTING AN EFFECTIVE INTERNAL INVESTIGATION, ASS'N OF CORP. COUNS., https://www.acc.com/sites/default/files/resources/vl/membersonly/ProgramMaterial/19856_1.pdf (last visited Sep. 18, 2026).

[53] COMPLIANCE RISK ASSESSMENTS: THE THIRD INGREDIENT IN A WORLD-CLASS ETHICS AND COMPLIANCE PROGRAM, DELOITTE (2015) (on file with author).

decisions within the firm.[54] External compliance consultants may also evaluate a firm's compliance program relative to industry standards, particularly in areas such as data privacy, anti-corruption, and third-party risk, where regulatory requirements often operate alongside evolving norms about what members within the industry consider reasonable.[55] Compliance assessments sometimes extend beyond an assessment of a firm's written internal controls and examine speak-up systems; employees' perceptions of retaliation risk and psychological safety; and the role of middle management in shaping whether concerns are raised or suppressed.[56]

Because compliance 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 external compliance consultants precisely for their expertise and ability to compare a firm's compliance program against others the consultant has reviewed or assessed, even when the engagement does not formally call for benchmarking activities. As recent work on collaborative compliance explains, external intermediaries play a central role in transmitting information about shared risks, emerging practices, and evolving standards across firms within the compliance sector.[57] In large, complex firms—where limits on board capacity may constrain directors' ability to directly gather such information—the information directors receive from external compliance consultants can substantially shape how boards understand the firm's compliance risks and the effectiveness of the compliance program.[58]

Importantly, external compliance consultants function as educational intermediaries but their findings are not a substitute for board oversight. Their assessments do not displace the board's responsibility to exercise its own judgment. Instead, compliance assessments provide directors with information required for boards to exercise their own judgment. By framing the findings of compliance assessments and distinguishing between isolated failures and systemic weaknesses in the

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[54] FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY & OFFICE OF THRIFT SUPERVISION, INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES (Apr. 2011), https://www.federalreserve.gov/boarddocs/rptcongress/interagency_review_foreclosures_20110413.pdf.

[55] James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183, 209 (2021).

[56] Veronica Root Martinez, *Considering Middle Managers*, *supra* note 2, at _ *12 & n.42.

[57] Kevin E. Davis & Veronica Root Martinez, *Collaborative Compliance* __ UC L. J. __ (forthcoming 2027) (on file with author).

[58] Eckstein, et al., *supra* note 1; Stevelman & Haan, *supra* note 24, at 183.

compliance program, external compliance consultants influence what boards learn, which impacts directors' priorities and responses. Understanding what compliance consultants do—and how their work may differ from financial audits, legal advice, and internal investigations—is therefore necessary for evaluating when and how boards should rely on them.

B. Who They Are

External compliance consultants who perform compliance assessments that provide information and education to firms and boards have varied backgrounds. For example, law firms frequently conduct compliance assessments, and they may be selected due to a pre-existing relationship with the organization or due to their ability to protect portions of their work via the attorney-client privilege or other related protections.[59] Additionally, accounting firms often perform compliance assessments—which are distinct from financial audits—and they may be selected because they already have a relationship with the board or audit committee of a firm and typically have experience developing and conducting testing methodologies.[60] Boards also sometimes engage specialized compliance boutiques or advisory firms whose staff have backgrounds in law, accounting, or investigations.[61] Finally, large management consulting firms market and offer compliance assessments as part of a broader set of services related to compliance risks and governance requirements.[62] These actors may appear interchangeable when the firm or board is selecting an external compliance consultant. Each type of external compliance consultant will likely provide the board with promises of significant compliance expertise and tout their ability to

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[59] *See, e.g.*, *Compliance Services*, HOLLAND & KNIGHT LLP, https://www.hklaw.com/en/services/practices/corporate-transactions-and-finance/compliance-services (last visited Jan. 31, 2026); *Compliance Counseling – White Collar*, SIDLEY AUSTIN LLP, https://www.sidley.com/en/services/white-collar-defense-and-investigations/compliance-counseling--white-collar (last visited Jan. 31, 2026).

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

[61] *Corporate Services*, AFFILIATED MONITORS INC., https://www.affiliatedmonitors.com/corporate-services/ (last visited Jan. 31, 2026); *What We Do*, HC ETHICS LLC, https://www.huichenethics.com/what-we-do (last visited Jan. 31, 2026).

[62] *See, e.g.*, *Risk and Ethics & Compliance*, MCKINSEY & CO., https://www.mckinsey.com/careers/internal-roles/capabilities-and-roles/risk-and-ethics-and-compliance (last visited Jan. 31, 2026).

exercise independent judgment during the compliance assessment. Additionally, each set of potential external compliance consultants may honestly assure the firm and board that they are experienced in conducting compliance assessments. Finally, each type of external compliance consultant discussed above is familiar with the process of producing a final, polished report that will provide management and directors with the results of the compliance assessment.

That appearance of interchangeability amongst external compliance consultants may be reinforced by how compliance assessments are framed and presented to the board. For example, boards may focus on the mechanics of the engagement, which may include factors like 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. Additionally, a board's decision on what external compliance consultant to select may be impacted by considerations like familiarity with the consultant, costs associated with the compliance assessment, speed with which the assessment can be completed, or the consultant's perceived credibility with regulators. What may receive less attention is who, precisely, is performing the assessment and how that actor's professional obligations and incentives may shape the way the consultant ultimately transmits information to the board.

Yet, the types of external compliance consultants described above 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 how they approach their obligation of independence, candor, and loyalty. Being a member of a self-regulating profession does not eliminate conflicts or guarantee optimal behavior, but professional norms and expectations do impose external constraints and shared understandings about permissible conduct for lawyers and accountants. By contrast, many compliance consultants—particularly those operating outside the legal and accounting professions—are not subject to formal, professional obligations.[63]

These differences matter, at least in part, because compliance assessments function as educational tools for boards. When external compliance consultants develop and provide compliance assessments that contribute to the board's understanding of acceptable compliance risks, they are providing directors with important information about which issues within the firm merit the board's attention. But because the consultant may be retained by management—while still providing

[63] DeMott, *Agents and Advisors, supra* note 20; DeMott, *Disloyal Agents, supra* note 10.

information the board will ultimately act upon—the consultant's relationship with management; tolerance for escalating concerns to the board, perhaps against management's wishes; and conception of their own independence may impact whether and how information is provided to the board. 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.[64] If boards assume that all compliance consultants will educate directors in roughly the same way, they may overlook how the underlying differences and backgrounds of their consultants may shape the informational environment on which *Caremark* oversight depends. Recognizing that compliance consultants come from diverse professional backgrounds is 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

Research suggests that today's boards are operating under significant and growing constraints of time and capacity due, in part, to increased regulatory and compliance expectations over the past two decades.[65] As public companies have grown larger and more complex, the distance between boards and the employees responsible for the day-to-day operations of the firm has widened, yet boards' oversight responsibilities remain.[66] Federal enforcement authorities expect board engagement across an expanding set of compliance areas, while Delaware state corporate law continues to insist that directors make a good-faith effort to ensure that information and reporting systems function effectively.[67] The result is that boards remain subject to robust oversight obligations, yet must discharge them in an environment where risks continuously shift and expand, requiring boards to rely on internal and external agents to give them appropriate information, so directors have enough education to meet their oversight responsibilities.[68] The upshot is that directors must rely on

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[64] Fanto, *supra* note 55; *see also* NAT'L ASS'N OF CORP. DIRS., *Fostering Constructive Dialogue with the External Auditor* (2025), https://www.nacdonline.org/all-governance/governance-resources/directorship-magazine/online-exclusives/2025/q4-2025/external-auditor-assessment/ (illustrating professionalized expectations of independence and candor in audit contexts).

[65] Eckstein, et al., *supra* note 1.

[66] *See* Stevelman & Haan, *supra* note 24.

[67] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996); Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019).

[68] *See* Eckstein, et al., *supra* note 1.

subject-matter and industry experts in order to remain informed enough to exercise proper oversight.

The board's practical need to rely on a range of internal and external agents does not, however, lessen the board's oversight obligations. *Caremark* does not permit directors to outsource oversight.[69] *Caremark* does acknowledge that boards may utilize information systems and intermediaries to conduct their work.[70] Compliance consultants can assist boards by helping them assess whether a firm's compliance programs and information systems function as intended. Compliance consultants often have the underlying expertise necessary to evaluate and assess large amounts of information regarding the operational realities at a firm and provide a synopsis of this information to management and directors. Effective external compliance consultants can make directors' oversight efforts more efficient and, perhaps, more competent. But the board retains ultimate responsibility for obtaining that information and for ensuring that the educational tools it relies on are appropriate.[71]

As Part III.B described, some external compliance consultants operate as members of professions 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 regarding independence and candor.[72] Those regimes constrain the conduct of lawyers and accountants. These constraints often reflect a broader legal and societal commitment to the idea that there are limits on what corporations—and their advisors—may pursue in the name of profit.[73] For example, Sarbanes-Oxley, professional rules of conduct, and related doctrines recognize that a firm's attempt to maximize shareholder wealth is constrained by law, ethics, and obligations to third parties.[74] External compliance consultants trained and socialized within these professional norms and frameworks—such as lawyers and accountants—are accustomed to operating within such limits, even when doing so

[69] *See Caremark*, 698 A.2d at 970.
[70] *See* Stevelman & Haan, *supra* note 24, at 233–49.
[71] *See* DeMott, *Agents and Advisors, supra* note 20.
[72] *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998); DeMott, *The Crucial but (Potentially) Precarious Position, supra* note 22.
[73] *See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* § 2.01(a), (b)(1)–(3) (A.L.I. 1994); *PRINCIPLES OF THE LAW, COMPLIANCE AND ENFORCEMENT FOR ORGANIZATIONS* §§ 1.01(g), (h), (m), (n), (v), 2.02(a)–(b) (A.L.I. 2021); *see also* Emilie Aguirre, Gina-Gail S. Fletcher & Veronica Root Martinez, *Profiting from Prediction*, __ CAL. L. REV. __ *1, 42 (2027 *forthcoming*) (on file with author).
[74] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 301, 307, 116 Stat. 745; Fanto, *supra* note 55.

complicates or frustrates a firm's business objectives and pursuit of profit.[75]

Other external compliance consultants, however, do not maintain membership in a profession that places constraints on the consultant's behavior. Management consultants and advisory firms are not subject to comparable licensure or self-regulation and may approach compliance assessments through a fundamentally different lens—one more readily aligned with prioritizing shareholder wealth over other competing concerns.[76] This is not to suggest that these compliance consultants are incompetent or engaged in purposeful bad faith. But external compliance consultants operating outside professional constraints may differ in how they frame compliance risks and understand their independence obligations. Behavioral ethics research suggests that how questions are framed—as business, legal, or ethical decisions—and how actors are compensated or incentivized often shapes their judgment and advice in meaningful ways.[77]

To be clear, this Article does not claim that lawyers or accountants are necessarily better external compliance consultants, nor that professional membership will predict how well an external compliance consultant will exercise good judgment. The Article does, however, suggest that membership in a profession supplies a range of affirmative constraints and shared normative expectations on behavior. Those constraints do not guarantee that an external compliance consultant will provide information to the firm and board with candor or independence, but they may alter the way in which external compliance consultants engage in decisionmaking.[78]

The upshot is that, if compliance assessments are an important way for boards to educate themselves, then the structure of the engagements with the external compliance consultants who conduct those assessments is important. The next Part argues that boards must therefore approach the selection and structuring of compliance consulting engagements with the same care they apply to other core governance decisions.

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[75] *See* DeMott, *The Lawyer as Agent, supra* note 73.

[76] *See* Fanto, *supra* note 55, at 215–222.

[77] *See* MAX H. BAZERMAN & ANN E. TENBRUNSEL, *The Gap between Intended and Actual Ethical Behavior, in* BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 10–27 (2014).

[78] *See, e.g.*, Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Behavioral Foundations of the Attorney–Client Relationship*, 2012 WIS. L. REV. 495 (discussing how professional training does not eliminate motivated reasoning or accommodation); DeMott, *Beyond Metaphor, supra* note 7 (emphasizing that fiduciary obligation structures expectations but does not guarantee loyal performance).

IV. STRUCTURING CONSULTANT RELATIONSHIPS FOR BOARD EDUCATION

This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. To do this, boards must often retain external compliance consultants. When these consultants are retained, this Article suggests that boards should structure those engagements so that the education boards receive is candid, independent, and aligned with the firm's obligations. This Part addresses how boards might structure consultant engagements to support—rather than undermine—the board's nondelegable oversight responsibilities. The central claim is that boards should take affirmative steps to enter into agreements with compliance consultants that specify considerations like (i) ethical expectations, (ii) independence protections, and (iii) appropriate management of conflicts of interest and incentives. Taking steps of this nature may better equip boards to obtain the education necessary for directors to exercise their oversight obligations over compliance programs and information systems in a manner consistent with federal expectations and *Caremark* and its progeny.

A. Adopting a Consultant Code of Conduct

If and when boards rely on external compliance consultants to provide them with information and education, they should pay careful attention to the normative frameworks within which those consultants operate.[79] One potential mechanism for doing so is the adoption of a consultant code of conduct—a document that specifies the ethical commitments and loyalty expectations that govern the consultant's engagement with the firm and its directors.[80] Such a code of conduct may help to set clear expectations and direct the behavior of consultants with professional backgrounds (e.g., for lawyers and auditors) and consultants who are not members of a regulated profession.[81]

As Deborah DeMott's scholarship has explained, fiduciary and agency relationships are defined by formal authority and by justified expectations of loyalty, candor, and faithful performance.[82] Where those expectations are reasonable and clearly provided, the law responds forcefully to any betrayal of those expectations and provides for the

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[79] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); DeMott, *Organizational Incentives to Care About the Law*, *supra* note 31, at 55.

[80] *See, e.g.*, Veronica Root, *Constraining Monitors*, 85 FORDHAM L. REV. 2227, 2234–36 (2017).

[81] *See* DeMott, *Agents and Advisors, supra* note 20**Error! Bookmark not defined.**, at 145–47.

[82] *See* DeMott, *Beyond Metaphor, supra* note 7, at 882–85.

imposition of remedies.[83] Yet many compliance consultants—particularly those operating outside licensed professions—are governed primarily by contract and reputation.[84] In those settings, boards cannot assume that shared understandings about how to conduct a compliance assessment with appropriate levels of independence or ethical constraint will emerge organically.

A consultant code of conduct provides one way for firms and boards to set expectations of their compliance consultants. At a minimum, such a code should make explicit that part of the consultant's role is to educate the board so that directors can perform their oversight obligations.[85] The consultant's primary consideration should not necessarily be to optimize business outcomes or validate management preferences. Making these expectations clear to external compliance consultants is important because compliance assessments inevitably involve judgment calls about what constitutes a "risk" and what potential red flags merit escalation to the board.[86] A code of conduct that makes explicit the importance of the board's ability to properly engage in its oversight function helps clarify to external compliance consultants how compliance assessments will be used by directors.

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.[87] Ensuring that the consultant code of conduct is consistent with the firm's general expectations and standards helps to reinforce the board's role in setting a strong "tone at the top," which is widely understood to be important for the development of a positive organizational culture. Moreover, it may reduce the risk that consultants will frame compliance program effectiveness in ways that are divorced from the firm's already articulated purpose or risk tolerance determinations.[88]

Many firms already impose analogous obligations on third-party business partners through supplier or business-partner codes of conduct, which require adherence to the firm's standards as a condition of

[83] *See* DeMott, *Disloyal Agents, supra* note 10, at 1050–52.
[84] *See* Root, *Constraining Monitors, supra* note 80.
[85] *See* DeMott, *Agents and Advisors, supra* note 20, at 146.
[86] *See* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 272–78 (2020).
[87] *See* DeMott, *The Crucial but (Potentially) Precarious Position, supra* note 22; *see also* Martinez, *Purpose-Driven Compliance*, *supra* note 11.
[88] *See* Deborah A. 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.

engagement.[89] Extending this sort of practice to the retention of external compliance consultants recognizes that consultants tasked with evaluating and assessing compliance systems occupy an important position in a firm's governance and compliance efforts.[90] Indeed, the case for doing so is strong, because external compliance consultants are often asked to assess internal compliance efforts—such as speak-up systems or employees' perception of retaliation risk—areas where the information and education the board receives from the consultant enables the board to assess organizational culture.[91]

At the same time, boards should recognize that a consultant code of conduct may not be received in the same way by all external compliance consultants. For lawyers and accountants, many of the expectations embedded in such a code—like a requirement to provide candid, independent advice or to refuse to assist unlawful conduct—may feel redundant.[92] Lawyers and accountants already operate within professional licensing regimes that impose enforceable obligations and, in some instances, sanction disloyalty or violations of those professional expectations.[93] For management consultants or other advisory firms that operate outside of traditional "professions," the same provisions within a consultant code of conduct may be perceived as atypical or even heavy-handed. That said, DeMott's work on loyalty suggests that externally imposed norms like a code of conduct may "crowd in" loyal conduct where it is perceived as reinforcing appropriate intrinsic motivations.[94] A consultant code of conduct may help provide important guidance in settings where professional identity alone cannot (or does not) create a baseline of behavior for external compliance consultants.

To ensure clarity of expectations between boards and their consultants, boards should require consultants to disclose whether and how the firm's consultant code of conduct does or does not deviate from the consultant's firm's own internal code or ethical guidelines.[95] Many large consulting firms maintain internal codes of conduct, but those documents may be designed to manage the consulting firm's risks and reputation, which is different than an effort to align the consultant's

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[89] *See, e.g.*, *Clorox Business Partner Code of Conduct,* The CLOROX CO. (2021), https://www.thecloroxcompany.com/wp-content/uploads/2021/06/636155_CRP_BPCOC_English_REV_2021_R1.pdf.
[90] *See* Root, *Constraining Monitors, supra* note 80.
[91] *See* Deborah A. DeMott, *Whistleblowers: Implications for Corporate Governance*, 98 WASH. U. L. REV. 1645, 1666–67 (2021).
[92] *See* MODEL RULES OF PRO. CONDUCT pmbl. & rr. 1.2(d), 2.1 (AM. BAR ASS'N 2023).
[93] *See* DeMott, *Corporate Officers as Agents, supra* note 21.
[94] *See* DeMott, *The Domains of Loyalty, supra* note 9, at 1146–48.
[95] *See* DeMott, *Agents and Advisors, supra* note 20, at 148.

obligations with a particular client's expectations.[96] This sort of disclosure is important for two reasons. First, it provides an opportunity for the board to identify potential misalignments between the external compliance consultant's understanding and the board's expectations before the engagement begins. Second, it creates a mechanism to trigger a conversation about what norms will govern the consultant's work. As DeMott has observed in the context of asset managers and other advisors, mandated disclosure requirements between parties are often a blunt tool when treated as box-checking exercises, but when they are paired with meaningful governance interventions—such as whether and how to engage a particular consultant—they may improve accountability for all parties involved in the relationship.[97]

Finally, a consultant code of conduct should specify the board's expectations around when potential red flags should be communicated by the external compliance consultant directly to the board. Compliance consultants are often retained through management, interviewed by management, and their work is often directed by management.[98] Without clear guidance on when external compliance consultants should go above management, consultants may defer—consciously or unconsciously—to management's preferences on the escalation of potential red flags.[99] A board-adopted code can counteract that potential pitfall by clarifying when and how external compliance consultants are expected to raise concerns directly with directors, particularly where findings may implicate senior management in potential wrongdoing or may suggest there are problems with the integrity of the firm's internal reporting systems.[100]

By adopting and enforcing a consultant code of conduct, boards can take a modest but meaningful step toward structuring their reliance on

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[96] *See* Root, *Constraining Monitors, supra* note 80, at 284–86; *see, e.g.*, *Our Code of Conduct*, MCKINSEY & CO., https://www.mckinsey.com/~/media/mckinsey/about%20us/code%20of%20conduct/McKinsey_Our_Code_of_Conduct.pdf (last visited Mar. 30, 2026); *Code of Conduct*, BAIN CAP. SPECIALTY FIN., INC., https://www.baincapitalspecialtyfinance.com/sites/baincapitalspecialtyfinance.com/themes/bcsf/assets/documents/governance/BCBDC_Code_of_Conduct.pdf (last visited Mar. 30, 2026); *Code of Conduct*, KPMG LLP, https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/kpmg-us-code-of-conduct.pdf (last visited Mar. 30, 2026).

[97] *See* Deborah A. DeMott, *Regulatory Techniques and Liability Regimes for Asset Managers*, *in* LIABILITY OF ASSET MANAGERS (Danny Busch & Deborah A. DeMott eds., 2012).

[98] *See, e.g.*, Annick Dominique Hortense Van Rossem, *Assessment and selection of management consultants: A comparative cognitive study between small- and large-scale companies*, 27 J. PURCHASING & SUPPLY MGMT. 100673 (Jan. 2021), https://www.sciencedirect.com/science/article/abs/pii/S1478409221000030.

[99] *See* DeMott, *The Stages of Scandal and the Roles of General Counsel*, *supra* note 40.

[100] *See* DeMott, *Whistleblowers, supra* note 91, at 1666–68.

external compliance consultants in a way that supports—rather than undermines—their nondelegable oversight obligations.

B. Ensure Consultant Independence

Boards should ensure that external compliance consultants maintain their independence, so that directors receive appropriate information and education.[101] Independence within consulting—and similar—engagements is fragile and it can be impacted by a range of factors. For example, research suggests that independence can be impacted by (i) who hires the consultant (e.g. management or the board), (ii) how the engagement is staffed and paid, and (iii) the consultant's other ongoing commercial relationships.[102] As Donald Langevoort's scholarship details, consultant independence may be impeded—what he terms "getting too comfortable"—when an actor's professional judgment becomes aligned with their client preferences.[103] To combat a decline of independence, boards should consider incorporating three complementary safeguards when retaining external compliance consultants. First, boards should implement safeguards that insulate consultants from managerial capture. Second, boards should adopt affirmative disclosure procedures that have the ability to identify potential conflicts of interest. Third, boards should identify compensation and contracting[104] terms that reduce incentives for external compliance consultants to soften or temper their findings.

1. Safeguards Against the Risk of Capture

Adopting a range of safeguards is important for ensuring external compliance consultants maintain high levels of independence when conducting their assessments. Management of the firm often selects, directs, and even hosts external compliance consultants during the scope of their compliance assessments. And even when a board retains an

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[101] *See, e.g.*, Langevoort, *supra* note 78, at 507–15.

[102] Don A. Moore et al., *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).

[103] Langevoort, *supra* note 78, at 507–15.

[104] 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 "assessments" in contexts where professional norms, duties, and enforcement mechanisms are often underdeveloped or unclear. In that setting, the contractual terms emphasized in this Article are likely necessary to clarify expectations and identify when a consultant's conduct departs from the role the board reasonably understood it to be hiring the consultant to complete.

external compliance consultant directly, that consultant still must typically work with management to access documents and engage with employees. The external compliance consultant's interactions with and dependence on members of a firm's management team create repeated opportunities for capture—the gradual alignment of the consultant's perspective with that of management.

Langevoort's work emphasizes that professional advisors embedded in organizational settings are sometimes prone to capture.[105] Importantly, the external compliance consultant may not be aware that their actions are being impacted as a result of the consultant's relationship and interactions with management. External compliance consultants may sincerely believe they are exercising independent judgment even as their conclusions change in ways that express management's preferences instead of the consultant's independent judgment.[106]

Behavioral research on auditors has documented auditor capture. When auditors or other professionals are hired, evaluated, and repeatedly engaged by the parties they have been hired to assess, cognitive and incentive-based pressures sometimes erode the auditor's independent judgment in ways that favor the firm or management.[107] As Langevoort cautions, formal independence requirements contained in a contract or within organizational charts are unlikely to be effective if the external compliance consultant's independence is undermined as a result of their day-to-day interactions with management.[108]

Thus, boards should adopt safeguards aimed at preserving the independence of external compliance consultants. For example, directors—typically through the audit or compliance committee—may choose to formally retain the consultant and approve the engagement letter.[109] Additionally, the board may consider creating dual reporting lines for the external compliance consultant that require confidential reporting to the board, or board committee, independent of management involvement. The board might also consider identifying mechanisms for the external compliance consultant to access documents and data through a neutral custodian, such as a board-designated legal or compliance officer,

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[105] Langevoort, *supra* note 78, at 508–13.
[106] *Id.* at 512–15.
[107] *See* Moore et al., *supra* note 102, at 12–18.
[108] Langevoort, *supra* note 78, at 497–98.
[109] Where a separate risk committee exists, boards should consider routing compliance assessments through that committee—or require dual deliverables to both the risk committee and the full board—to reduce potential interference from management. Industry reporting shows boards are actively discussing risk-committee creation, and the existence of such committees may change how reporting lines should be structured for external compliance consultant engagements. *See* Roach, *supra* note 35.

instead of from management, which may limit the ability of management to steer the consultant's work in particular directions.

2. Conflicts of Interest, Disclosure, and Screening

Second, boards must manage potential conflicts of interest by adopting disclosure, screening, and mitigation rules for external compliance consultants. There is a range of professional and procurement models in place that can serve as exemplars for boards that want to adopt such measures. Indeed, past high-profile regulatory and investigative accounts demonstrate how costly failures of disclosure and screening can be for firms.

For example, the House Committee on Oversight's investigation of McKinsey documented repeated instances in which consultants (i) worked simultaneously for federal regulators and regulated firms on overlapping subject matter, (ii) used government-facing work to solicit private-sector business, and (iii) failed to disclose these conflicts as required by private contracts and governmental regulations.[110] The Committee found evidence that consultants leveraged insights from their governmental work and relationships to secure private-sector work.[111]

The Promontory–Standard Chartered episode illustrates a different but equally instructive independence failure by an external compliance consultant. 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.[112] Internal communications allegedly revealed that maintaining the "client" relationship impacted the work product the consultant provided to the government about the monitored-organization's compliance efforts—precisely the kind of conduct Langevoort's work warns may occur when external compliance consultants develop strong relationships with internal firm actors.[113]

These failures support three board-level rules. First, boards should require external compliance consultants to provide timely and specific disclosures of any past or present engagements that may create

[110] 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.
[111] *Id.* at 3–5, 29–39.
[112] 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.
[113] *Id.* at 6–10; *see also* Langevoort, *supra* note 78, at 512–13.

organizational or individual conflicts, including work for competitors or regulators. External compliance consultants' disclosures may need to identify relevant personnel or the subject matter of other engagements that might impact the ability of the consultant to provide unconflicted advice. Second, boards should require documented screening procedures where appropriate, insist that such screens be implemented in a timely manner, and ensure that their effectiveness be audited. Legal ethics literature suggests that screening is most effective when implemented early and monitored rigorously.[114] Third, boards should require an independent, board-level conflicts review prior to entering into an engagement with an external compliance consultant to determine whether disclosed relationships or other potential conflicts should be treated as disqualifying.

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 when only a few large consultants have the capacity to provide certain services, it increases the risk of conflicts of interest, requiring consultants to provide more robust disclosures and to subject themselves to specific oversight mechanisms.[115]

3. Payment, Incentives, and Skeptical Review

Finally, payment and incentive structures may also impact an external compliance consultant's independent judgment. Scholarship demonstrates that when an external compliance consultant's dependence on a client for their economic success—such as through fee concentration, contingent compensation, or expectations of future work—it creates both pragmatic and psychological pressures that may contribute to the degradation of the consultant's independence over time.[116] As Langevoort emphasizes, external consultants often underestimate the extent to which such financial incentives shape the consultant's own reasoning, making self-policing an unreliable safeguard.[117]

Boards should therefore take at least three steps with respect to compensation. First, boards should avoid fee arrangements for external

[114] Erin A. Cohn*, Comments: The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession*, 35 U. BALT. L. REV. 367, 378–85 (2006).

[115] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106932, FEDERAL CONTRACTING: TIMELY ACTIONS NEEDED TO ADDRESS RISKS POSED BY CONSULTANTS WORKING FOR CHINA (Sep. 19, 2024), https://www.gao.gov/assets/gao-24-106932.pdf.

[116] Moore et al., *supra* note 102, at 18–22.

[117] Langevoort, *supra* note 78, at 512–15.

compliance consultants that create incentives tied to outcomes that favor management. Second, boards should require external compliance consultants to disclose items such as (i) fee concentration (e.g., how economically dependent the consultant is on a particular client or set of clients) or (ii) client diversification thresholds (e.g., whether the consultant's financial exposure to the company is sufficient that the loss of the engagement would materially impact the financial success of the consulting firm or lead partner). If the external compliance consultant is too dependent financially on the firm it is assessing, it may impact the consultant's independence. Third, boards should consider entering into contractual provisions—such as cooling-off periods or limits on follow-on engagements—that separate the external compliance consultant's current compensation from future business opportunities from the firm. These mechanisms are imperfect, but they are an attempt to identify mis- or poorly-aligned incentive structures for external compliance consultants.

Just as importantly, boards must remember that payment-related bias cannot be eliminated through contract alone. As noted above, the board's oversight authority under *Caremark* is nondelegable. Consultants can assist boards by educating them and structuring information, but consultant reports are not substitutes for directors' independent judgment.[118] Reliance on expert intermediaries like external compliance consultants may increase the need for skepticism by boards about the information presented to them, because deference to the consultant's expertise can make it difficult to identify the judgment calls embedded in the consultant's work product.[119] Boards should therefore review consultant findings carefully, ask questions about assumptions the consultant may have made while conducting their assessment, and obtain clarity on the methodologies and framing choices the consultant made.

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 external compliance consultants for directors and for management, so that management does not have the opportunity to interfere with the way the consultant's assessment is presented.[120] Additionally, boards should consider requesting documentation about any changes (e.g., a change log) made at the request

[118] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).
[119] Langevoort, *supra* note 78, at 497–98.
[120] *See* Abigail B. Brown & Jacob A. Klerman, *Independent Evaluation: Insights from Public Accounting*, 36 EVALUATION REV. 186, 187–188 (2012).

of management or counsel (a practice adopted after the Promontory investigation).[121] Boards should consider retaining the right to approve key engagement personnel in advance and to receive explicit notification of personnel substitutions that could introduce conflicts.[122] Finally, for long-term engagements, boards should consider rotation of or periodic refreshment of the external compliance consultant's teams to counter the potential of capture.[123]

C. *Additional Questions and Concern*

1. Board Overreach

The above discussion of the board's oversight responsibilities as they relate to a firm's compliance program may make one concerned about the potential risk of board overreach. Corporate law typically draws a line between management's day-to-day running of the firm's operations and the board's oversight role. From management's perspective, increased board engagement in decisionmaking regarding a firm's compliance program—particularly through external compliance consultants—may feel like an improper intrusion of management's decisions. Practitioner guidance has noted these types of concerns. For example, a recent business publication warned of the "inquisitor" director who engages in persistent questioning that puts management on the defensive and potentially blurs the line between oversight and management.[124] The publication also discussed "lane drifting," where directors stray into operational matters of the firm—management's ambit and responsibility—based on the rationale of proper board engagement.[125] This account highlights the reality that management may have concerns that increased expectations for board involvement may result in the board improperly intruding on management's judgment and authority.

While there is some validity to that concern, it fails to properly consider the source and the limits of the board's oversight obligations. Delaware state corporate law does not permit boards to abdicate their oversight responsibilities because it may make management uncomfortable or change management's intended course of action.

[121] N.Y. STATE DEP'T OF FIN. SERVS., *supra* note 112, at 7.
[122] H. COMM. ON OVERSIGHT & REFORM, *supra* note 110, at 7–14.
[123] Moore et al., *supra* note 102, at 21–24.
[124] 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).
[125] *Id.* (discussing "lane drifting" and concerns about unclear delineation between board and management roles).

Caremark and its progeny require boards to make a good-faith effort to ensure that information and reporting systems exist, particularly with respect to mission-critical risks.[126] 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.[127] Boards cannot fulfill this obligation if they lack the baseline education necessary (i) to interpret and understand the information management presents to them or (ii) to know which questions to ask management in response to the information provided. When boards rely on external compliance consultants to provide information via compliance assessments or other methods, it is not meant to displace management's role, but instead to ensure that directors are properly equipped to perform their oversight responsibilities. External compliance consultants, when properly selected and retained, help provide valuable information and education to the board, which aids directors in their oversight efforts. The goal for directors should be to equip the board to better evaluate management's decisions regarding the implementation of a compliance program and information systems; not to replace management's decisions.

2. Interchangeable External Compliance Consultants?

This Article has focused on the board's reliance on external compliance consultants to conduct compliance assessments. Firms use a number of external consultants for a variety of compliance or compliance-related efforts. For example, in addition to completing a compliance assessment, an external compliance consultant might assist with a climate survey, review the effectiveness of an internal reporting hotline, and gather benchmarking data from other firms in the same industry, as well as a number of other activities. These tasks could be performed by a range of external actors—including law firms, accounting firms, specialized compliance boutiques, and management consultants. Firms may assume that the choice among consultants and their backgrounds is largely interchangeable, which may elevate factors such as availability, cost, or familiarity with the firm when selecting amongst the consultant options. That assumption may be mistaken.

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[126] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); Marchand v. Barnhill, 212 A.3d 805, 822–24 (Del. 2019); *see also In re* Clovis Oncology, Inc. Derivative Litig., No. 2017-0222-JRS, 2019 WL 4850188, at *12–14 (Del. Ch. Oct. 1, 2019).

[127] *Marchand*, 698 A.2d at 821–24; *see also In re Clovis Oncology,* 2019 WL 4850188, at *12–14.

Firms, and their boards, should begin by interrogating why a consultant is being retained and for what purpose. The retention of an external compliance consultant may be in response to something—like a letter from a regulatory agency—or it may be a routine review that the firm conducts on a regular basis. Whatever the impetus to the retention of an external compliance consultant, the firm should make clear what the goal of the engagement is and consider whether the background training (and perhaps membership in a profession) of the consultant may impact their ability to successfully complete the assigned task. A consultant retained to help management create and implement compliance programs or internal controls may perform a fundamentally different role from a consultant retained to inform the board about whether those controls are working as intended or required by law.

If firms, and boards, assume that external compliance consultants are interchangeable, they may fail to identify important sets of expertise necessary for a successful engagement. If boards do not clearly understand what an external compliance consultant is doing—and how that work fits within the board's own oversight responsibilities—they risk over-relying or improperly relying on the information and education provided to them by the consultant. Boards should obtain clarity about the external compliance consultant's background, work plan, and output requested from the consultant before engagement begins.

V. CONCLUSION

As regulatory expectations and judicial scrutiny increasingly raise the importance of effective oversight over compliance programs by boards, directors must carefully manage how and from whom they receive education about the firm's compliance program. This Article suggests that boards' use of compliance consultants to conduct compliance assessments and assist directors in obtaining the education and expertise necessary to fulfill their oversight of compliance efforts requires further study from scholars and policymakers. This Article argues that boards must take seriously their responsibility to seek out education to support their ability to engage in effective compliance oversight. To do this, boards must often retain external compliance consultants who, amongst other activities, conduct compliance assessments. When these consultants are retained, this Article suggests that boards should structure those engagements so that the education boards receive is candid, independent, and properly aligned with the firm's obligations and objectives.

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