

Frankly Speaking

Health Care Compliance Association's 2019 Compliance Institute
Boston, April 9, 2019
Frank Sheeder
Frank.Sheeder@Alston.com

What is “Frankly Speaking?”

- Unplugged
- Unvarnished
- Based on experiences in the compliance and legal worlds

***The Gnarly Issues that
We Need to Address***

What Are the Issues for Today?

- Conflicts of Interest
- Stakeholder Pushback
- Turf Wars Between Legal, Compliance, Operations

3

Why Conflicts of Interest Matter

- Can tarnish public image and erode community trust
- Government expects organizations to assess and address exposure to conflict of interest risks
- Potential criminal exposure – AKS, Commercial Bribery – for:
 - Individuals who engaged in the activity
 - Individuals who knew/had reason to know and did nothing
 - *See, e.g.,* Misprision of a Felony, Accessory, Conspiracy, etc., Federal and State Law
 - Organizations in which the activities occurred

4

Nature of Conflicts of Interest

- Conflicts themselves not nefarious: issue is identifying and managing them properly
- Hard for us to see or judge our own
- Appearances are as important as reality
- The risks of not identifying or not responding can be as severe as the risks of the underlying circumstances

5

How Conflicts of Interest Arise

- Financial interests
 - Both legitimate and illegitimate
- Personal stake in a matter under investigation
 - Involved at front end
 - Interested in outcome
- Personal relationships
- Cultural pressure
- Misaligned incentives
- Hubris, self-delusion, poor judgment

6

Common Conflicts of Interest in Healthcare

- Use of information and assets for personal gain
- Hidden ownership
- Bid rigging
- Procurement fraud
- Kickbacks
- Service on a board
- Family relationships

7

Kickbacks

Giving or receiving of anything of value to influence a business decision without the employer's knowledge or consent

- Cash
- Gifts
- Travel
- Entertainment
- Loans on favorable terms
- Work on person's home, boat, car
- Payment of personal expenses
- Medical treatment

8

Board Member Conflicts of Interest

- Self-dealing and related party transactions
- Outside business interests
- Service as Director on another board, and compensation
- Personal relationships with organization's employees
- Duty of confidentiality
- Skills and expertise

9

Conflict of Interest Policies

- Embedded in Code of Conduct
- Free-standing policies with details for specific circumstances
- Explain conflicts with examples
- Why important
- Identification
- Management
- Oversight
- Consequences of not disclosing

10

Conflict of Interest Risk Assessment

- Integrate into existing risk assessment processes
- Identify key risks
- Gather sufficient information to make sound decisions
- Design effective policies and procedures
- Determine who should be queried
 - Regulatory considerations
 - Organizational needs, culture, history
 - Higher-level personnel at greater risk
 - Indicators from specific compliance experiences
 - Third-party risks
- Document monitoring and management of potential conflicts

11

Conflict of Interest Questionnaire

- Q: Do you have any **CONFLICTS OF INTEREST**, as defined by our lengthy, tedious, cumbersome, unintelligible definition, which is intended to encompass all legal and regulatory theories for all potential conflicts of interest in all possible situation

- A:

N/A
EBW

12

An Alternative to Interrogation: An Activity Inventory

- What services are you performing for the organization?
- What speaking engagements have you had over the last 12 months? (Attach CV please)
- What honoraria have you received?
- Have you published any papers?
- Do you do business with the organization in any other capacity?
- Do you have family members who do business with the organization?
- What are your most essential vendor relationships?
- Do you own or invest in any organization that does or wants to do business with us?
- Which vendors have provided you or your team with meals, entertainment, or travel?
- Are you aware of any relationships that others may have that could cause a conflict of interest concern?

13

Elements of Conflict of Interest Policies

- Dollar values
- Nominal, customary, inexpensive, reasonable, appropriate
- Infrequent, annual limits
- Doing business
- Reporting
- Tracking
- Approval
- Special policies for government personnel

14

Conflict of Interest Education

- Scenarios work best: *Values and behaviors. Not dry examples that we would never do.*
- Keep it simple
- Encourage inquiries
- Highlight communication channels
- Would I be concerned if others learned of this?
- Front page of newspaper?
- How would I feel if it involved someone else?
- What is the right thing to do?
- What are potential consequences?

15

Certifications, Disclosures, Attestations

- Periodic by board, high-level, high-risk employees
- Read and familiar with Conflict of Interest policy and Code of Conduct, agree to adhere
- Not aware of any potential violations by themselves or others
- Questionnaire responses were accurate
- Ongoing duty to report

16

Stakeholder Pushback

- It will never happen to us
- We are an ethical organization
- You are making a mountain out of a molehill
- I am willing to take the risk
- They deny so many claims that this just evens the score

17

Responses to Pushback

- Protection for you, me, and organization
- Emphasize core values and accountability
- Why do you ask?
- What solution do you recommend?
- If you get qualified counsel to opine in writing. . . .
- Let me talk to “all of the others” “around the country” who are doing it this way

18

Turf Wars Between Legal, Compliance, & Ops

- Legal and regulatory compliance, risky = Counsel
- Legal and regulatory compliance, risky = Compliance Officer
- Management is responsible for compliance
- Misconceptions about “advocacy” vs. “policing” vs. “running a business”
- Lawyers and managers usually win the battles, and often the wars
- Pick your battles and protect your reputation/credibility

“Why Can’t We All Just Get Along?”

19

Identify Traits in Self and Others

This Doesn’t Work Well

- Authoritarian
- Know-it-All
- Micro Manager
- Conflict Avoider
- Indecisive
- Malleable

This Can Work

- Collaborator
- Active Listener
- Delegator and Empowerer
- Researcher
- Detached
- Champion
- Highly Placed
- Well-equipped

20

How We Might Avoid Wars

- There is a place for everyone at the table
- Develop compliance champions
- Solve problems and add value – be a resource
- It's okay not to know the answer
- Strong working relationships with counterparts
- Be careful with labels and polarizing language
- Use external prophets
- Refer to standards, not only theories and concepts
- Don't set expectations
- Be flexible

21

How to Have Treaties

- Define roles before there is a crisis
- Strong working relationships with counterparts
- Partnership and collaboration, not secrecy
- Celebrate smaller successes
- Use privilege and work product protections properly
- Call on external prophets
- Resist temptation to fix things yourself
- Call a cow a cow

22

The logo for Alston & Bird, consisting of the company name in a bold, sans-serif font.The word "Discussion" in a large, bold, sans-serif font, centered over a background image of a modern interior with curved architectural elements and recessed lighting.

Frankly Speaking

Health Care Compliance Association's 2019 Compliance Institute
Boston, April 9, 2019
Frank Sheeder
Frank.Sheeder@Alston.com