

# ***EXTENDING LEGAL PRIVILEGES TO COMPLIANCE WORK***



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YEARS

NJ CLE Ethics Presentation to



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# About Our Presenter



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- Chief Compliance & Ethics Officer, UnitedHealth Group
  - Fortune 5 company with \$250B revenue
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# TODAY'S AGENDA

## Legal/Compliance Organization

- Structure
- Ethical obligations

## Defining Compliance Activities

- Non-privileged activities
- “Grey” areas

## Enhancing Privilege in “Grey” Areas

- Recommendations
- Practical guidance

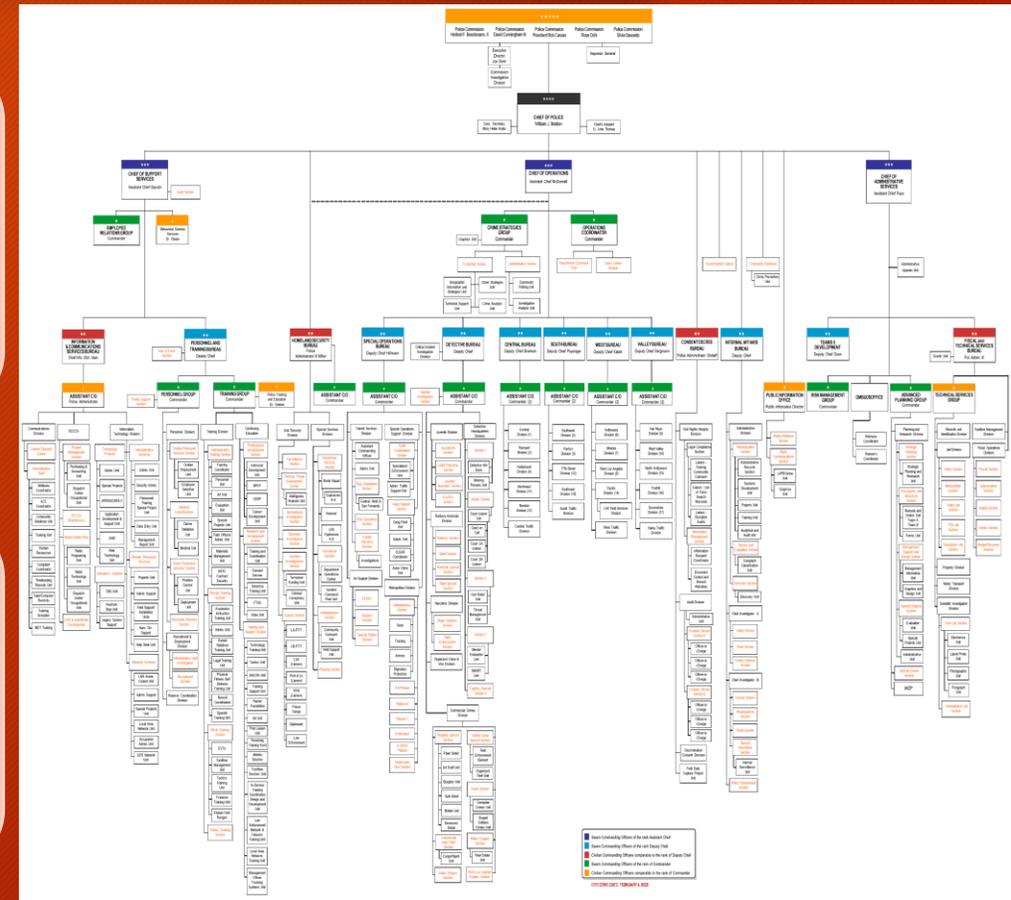
# LEGAL/COMPLIANCE ORGANIZATION - STRUCTURE

Regulators prefer operational separateness

- GC advocate for the entity
- CCO independent gatekeeper

Bright-line separation imposed by CIAs

- Terms often require CCO not be subordinate to GC
- Some functional blurriness inevitable



# LEGAL/COMPLIANCE ORGANIZATION

- Regulatory focus on structure, autonomy and independence of compliance function
- Addressing concerns
  - Dotted-line reporting relationships
    - CCO - - - - Audit Committee
  - Annual GC compliance session with BOD
    - Arguably effective to blunt concerns

U.S. Department of Justice  
Criminal Division  
Evaluation of Corporate Compliance Programs  
(Updated June 2020)

**Oversight-** What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have...

**Autonomy-** Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure independence of the compliance and control personnel?

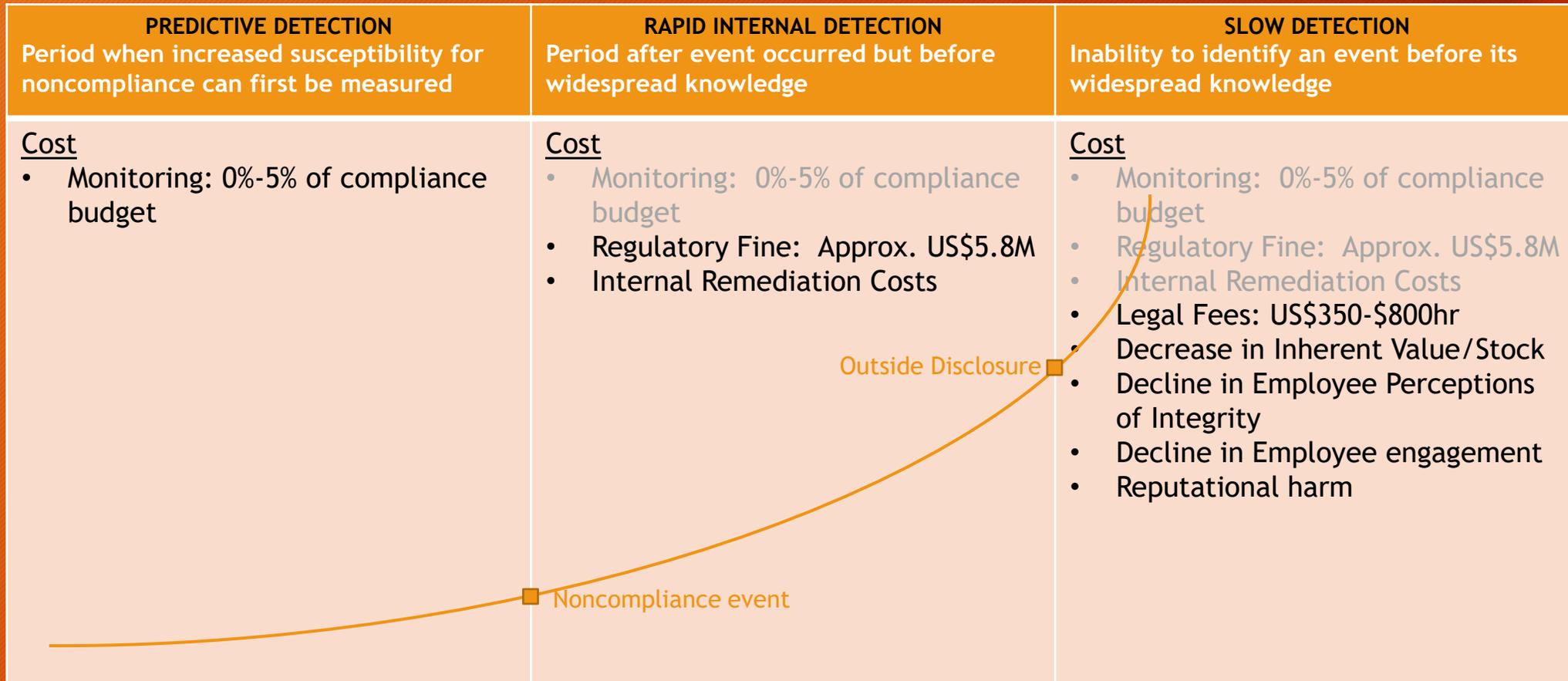
**Structure-** Where within the company is the compliance function house (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company?

# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

- May benefits be realized from a particular structure?
  - Essence of an effective program is due diligence in the assessment and remediation of compliance risk
    - Understand risk, measure, and control for noncompliance
- Compliance looks to motivate individuals within an organization to report their concerns internally
  - Anonymous telephone hotlines
  - Disciplinary standards
  - Speak-up/open-door (non-retaliation) communications
  - Ethical standards of behavior/tone-from-the-top

# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

COST OF NONCOMPLIANCE



# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

- Internal & External Reporting Obligations - Attorney Disclosure
  - ABA Model Rule 1.6 permits certain disclosures (“may” disclose)
  - NJ RPC 1.6 requires certain disclosures (“shall” disclose)
  - No statutory authority applicable to compliance personnel
    - Cannot waive privilege, but facts are not privileged

# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

- Internal & External Reporting Obligations - Attorney “Reporting Up”
  - ABA Model Rule 1.13
    - NJ RPC 1.13 generally tracks ABA Model Rule, and further articulates considerations for reporting “up-the-ladder”
    - Both rules apply to information “related to representation”
  - 17 C.F.R. § 205.3 (“Attorneys appearing before the SEC”)



# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

- Internal & External Reporting Obligations - Compliance Personnel
  - Client-confidentiality rules may not apply to compliance personnel
    - Often are not attorneys; even if attorneys, may not be subject to rules
    - Highly fact-dependent inquiry
      - Provision of “law-related services” under RPC 5.7
      - Corporation’s reasonable belief that individual is providing legal services
      - Acting in legal vs. business capacity
        - Review of privileged investigative results to establish consistent disciplinary standards
  - Other potential limitations
    - Breach of fiduciary duty of loyalty
    - Conflict of interest

# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

- Dodd-Frank Act
  - Pursuant to 17 C.F.R. § 240.21F-4, certain information will not be considered “independent knowledge:”
    - Obtained through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to 17 C.F.R. § 205.3(d)(2), applicable state attorney conduct rules, or otherwise
    - Obtained by an employee whose principal duties involve compliance or internal audit responsibilities
    - Learned in connection with the entity’s processes for identifying, reporting and addressing possible violations of law
  - Exceptions exist for compliance personnel who wait 120 days from the time the information was provided to the audit committee or chief legal office
    - At to attorneys, reporting out may be permissible to prevent crime/fraud, but obtaining a bounty is quite different

# LEGAL/COMPLIANCE ORGANIZATION - ETHICS

## FALSE DICHOTOMY

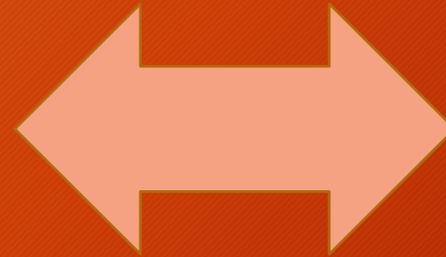
CONTENTS MESSAGE FROM OUR CEO ACT WITH INTEGRITY COURAGE EXCELLENCE EQUITY & JOY **SPEAK UP**

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# LEGAL/COMPLIANCE ORGANIZATION – PRACTICAL CONSIDERATIONS

- As to DOJ, preservation of privilege & client confidences may yield to other considerations
  - DOJ cannot condition cooperation credit on waiver of privilege BUT Yates memo requires disclosure of “all relevant facts about the individuals involved in corporate misconduct”
  - Unlikely compliance program will be adjudged “ineffective” based solely on structure:
    - “Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.” See U.S.S.G. § 8B2.1(a).

# LEGAL/COMPLIANCE ORGANIZATION – PRACTICAL CONSIDERATIONS

## Leverage Compliance Affirmatively

- Commitment to compliance program maturation
- Corrective action & disciplinary measures

## Limit Sensitive Information from Disclosure

- Compliance plans
- Risk assessments and monitoring

## How Best to Enable Dual Goals

- Privilege may improve quality of process
- Waiver arguments might force broader disclosure than intended

# DEFINING COMPLIANCE ACTIVITIES

Programmatic compliance activities: presumptively not privileged

Policies/SOPs

Hotline reports

Certain investigations conducted by compliance personnel

Control oversight by business personnel

Annual risk assessment

Internal audit

Training on policy requirements may be privileged

Manner in which reports are triaged likely privileged

Not including those conducted under legal oversight

# DEFINING COMPLIANCE ACTIVITIES - GREY AREAS OF PRIVILEGE

- “Grey Areas”
  - Second-line monitoring of business compliance
    - Sensitive reviews/audits
    - Control testing/validation
    - Granular risk assessment
  - Subject matter expertise
    - Privacy/security advice
      - Breach notification/BAA requirements
    - Other regulatory areas
      - Filing of lobbying disclosures
  - Root-cause analyses of investigative results
    - Implementation of corrective/remedial measures



# ENHANCING PRIVILEGE IN GREY AREAS

- Litigants, including DOJ, often seek documents relating to compliance reviews, audits, and other self-assessments
  - Litigants may use such documents to establish knowledge
    - Proof that a client knew of a significant compliance risk
    - Proof that a client recklessly “turned a blind eye”
  - May also be informative regarding the stature of compliance in organization
    - Disconnect between compliance information/recommendations and action
- Privilege may be asserted over these documents where appropriate
  - How to enhance privilege over these compliance activities

# ENHANCING PRIVILEGE IN GREY AREAS

Likely in client's best interest to enhance privilege claims over "grey area" compliance activities

- Privilege does not preclude disclosure of facts gleaned through the process
  - Control when/where released
  - To some degree, the extent of the information released

Conducting activities under privilege arguably improves quality of information and level of discourse

- Provides greater level of comfort when dealing with business
- Facilitates more candid discussion of risks and potential hot spots

# ENHANCING PRIVILEGE IN GREY AREAS

- Evaluate whether a compliance activity may be privileged
  - Who is the client?
    - Dissemination of final product
    - Dissemination of information gleaned
  - Who is RACI (“Responsible, Accountable, Consulted & Informed”)?
    - Involvement of counsel/non-lawyers/business personnel
  - What is the purpose of the activity?
    - To provide business/legal advice?
    - Anticipation of litigation?
    - Reflect advice of attorney?



# ENHANCING PRIVILEGE IN GREY AREAS

## Steps Taken at the Outset of Matter May Reinforce Privilege Claims

- Third-party consultants, accountants, should be formally retained by counsel
- Company employees should be deputized via a formal communication
- Counsel should be closely involved to oversee and “direct” the activity
  - Direction to non-lawyers at the commencement of the matter
  - Involvement in regular meetings/calls with functionaries
  - Provided with communications for direction/supervision, as appropriate
- Instructions should be provided to participants and potential witnesses to maintain the confidentiality of the matter
- Consideration should be given to separating legal analysis from factual underpinning in written documentation

## Robust Documentation Critical to Maintain Privilege Claims

# QUESTIONS?

## Let's Continue the Conversation



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