

Society of Corporate Compliance and Ethics
Compliance and Ethics Institute

CONFLICTS OF INTEREST: EXPLORING RISKS, HARMS AND CONTROLS

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Discussion Overview

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- Conflicts of interest challenges and considerations
- Harms
- Strategies and approaches for effectively mitigating COI risk
- Global challenges
- Gifts and entertainment

What are Conflicts?

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- Incompatibility between a person's private interests and his or her public, fiduciary or professional duties.
- A situation with the potential to undermine a person's impartiality because of a clash between personal interests and professional duties.
- An incentive to serve one interest at the expense of another interest or obligation. (Carlo di Florio, former SEC Director)
- Where a person has a duty to more than one person or organization and cannot adequately satisfy the duties to both.
- When employees engage in activities or advances personal interests at the expense of their employer.
- Organizational Conflicts: Conflict between company and customer or other third party to whom company owes some duty

Complex and challenging

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- Complex area of compliance law
 - Lack of unified law
 - Amorphous nature of concepts
 - Wide scope of activities prone to conflicts
 - Highly personal context in which conflicts arise
 - Ability to conceal conflicts of interest
 - Failures can diminish credibility of the compliance and ethics program and harm corporate culture
 - Frequent perception of double standards
 - “Apparent” conflicts are often just as damaging as actual
- An area over which C&E often has primary responsibility

Harms Created from Conflicts

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- Skewed judgment/poor decision-making
- Lost business opportunities
- Diminished effort
- Disclosure or misuse of confidential information
- Taint/loss of Intellectual Property
- Creation of inappropriate work environment
- Corrosion of culture/perception of lack of fairness
- Harm to the systemic integrity of an organization or system

So why not just ban all outside work?

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- Benefit to employee: personal development; skills and experience
- Benefit to employer: employee retention; employee experience/skills used at employer
- Varies by industry sector and company culture

Conflicts Compliance Strategies

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- Risk assessment
- Policies
- Approval systems
- Questionnaires
- Training and communications
- Oversight
- Auditing

COI Risk Assessment

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- Capacity to cause harm
 - Procurement
 - Senior leaders and other decision-makers
 - Compliance, Legal, HR
 - Other
- Interests
 - Financial/ownership
 - Corporate opportunities
 - Outside employment
 - Board membership/consulting
 - Nepotism/personal relationships
 - Group affiliations/public duties
 - Gifts and entertainment
 - Other

Conflicts Policies: Specificity v. Flexibility

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- General principles to guide the program
 - Policies broad enough to provide flexibility
- Providing a certain level of specificity, e.g.,
 - Address specific risk areas
 - Financial interests
 - Working for business partners or competitors
 - Family members at the company or in the industry
 - Personal use of company property
 - Corporate opportunities
 - Board membership

Conflicts Policies

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- Restrictions re and definitions of family members
- Standards re what types of opportunities employees are free to pursue
- Gift and entertainment standards (discussed soon)
- Should policies be localized?

Global Perspectives and Issues

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- Privacy and Personhood
 - Novartis – France 2004: French Civil Court ruled that certain code provisions violated employees' privacy rights.
 - Preapproval for employment and volunteer activities that might constitute a conflict
 - Conflicts involving the activities of family members of employees.
 - Wal-Mart – Germany 2005: The right to determine one's personhood - including whether and with whom to enter into relationships – is inalienable and may not be interfered with by employers.

Approvals

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- Centralized process (e.g. C&E or Legal?)
 - Consistency
 - Independence
- Decentralized (e.g., by supervisors)
 - Consider **written** approval requirement
 - Avenues for supervisors to seek guidance
 - Training re the responsibility
- Perception of fairness is critical
 - But perceptions of double-standards are common

Training and Communications

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- Challenges
 - Breadth of area
 - Varying legal standards
- Organizational justice issue
 - Employee perceptions of COIs by managers and senior leaders undermine C&E program as a whole
- Relevant hypotheticals and case studies
- Use of real stories

Training and Communications

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- For the board of directors, consider covering three areas:
 - Their own COI risks, such as
 - Corporate opportunities
 - Transactions with the Company
 - Monitoring the COIs of senior executives
 - Oversight of the COI program
 - Consistent with their Caremark duties

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Questionnaires/Certifications

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- Increasingly used for either high-level or all employees
- Provide an opportunity for disclosures
- May require employees to certify that they
 - have read and are familiar with the COI policy
 - are not aware of policy violations or have reported suspected violations
- May review the COI policy at a high level or by risk area
- Logistical/practical challenges

Auditing

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- For substantive compliance with the policy
 - Review of pre-approval determinations and waivers for consistent application
 - Cross check of employee and vendor data
 - Review T&E receipts for sensitive procurement areas
- For policy implementation
 - Policy certification
 - Training
 - Questionnaires
 - Awareness

Oversight of Conflicts Standards

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- Often ultimately resides with CECO, including ownership of
 - Policy interpretation, revision
 - Certification/questionnaire process
 - Pre-approval process
 - Training and communications
 - Investigations of suspected non-compliance
 - Discipline
- Importance of
 - Independence
 - Authority

Gifts and Entertainment

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- Rationale
 - Why permit gifts and entertainment in the business setting?
 - Global concerns and issues
- Standards for accepting gifts:
 - Dollar limit? (Per gift or per year?)
 - Approval required after specified value?
 - Discussion of acceptable types?
 - Prohibited gifts (e.g., cash)

Gifts and Entertainment

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- Standards for accepting gifts:
 - Prohibition against soliciting gifts?
 - Are regional differences permissible?
- Different rules applicable to specific categories of employee?
 - Members of procurement team
 - Members of C&E department, legal department
 - Members of political/lobbying groups

Standards for Entertainment

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- Dollar limit? (Per activity, or per year?)
- "Business purpose" requirement?
- Discussion of acceptable types?
- Frequency standards?
- Payment of travel permissible?
- Discuss consumption of alcohol?

Approval Procedures

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- Process
 - Who and how of approval
 - Register?
 - Regional guidelines?
 - Resources for questions
 - Resources for reporting concerns
- Controls
 - Appropriately tailored and monitored

Behavioral Ethics and Conflicts

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- How individuals make decisions when confronted with moral dilemmas – or ethical decision making
- Some important lessons for conflicts analysis:
 - Bounded ethicality – failure to notice our own or others' unethical behavior when it is advantageous not to
 - Can we even recognize that a conflict exists?
 - Identifying an issue as involving an ethical dimension makes ethical behavior more likely
 - Self-serving bias – tendency to see the world through self-serving-colored glasses
 - Controls and approvals/waivers
- A personal interest makes it difficult to address a situation without bias, even when we think we can be unbiased.

A Question

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- Jane is a star coder at your company. She has been approached by a college friend who has a start-up and has asked Jane to do some coding for his venture on weekends. The venture would not compete with your company. Is this okay?
- Does it change the analysis if the venture will be competing with your company?
- What if Jane is asked to serve on the board of directors of the start-up?

A Question

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- Your nephew Jonathan just graduated from Georgetown with honors. He's smart, diligent and a great kid. Jonathan asks you about the possibility of getting a job at your company, and you think he would make a terrific new hire. Are there any concerns with your calling Debbie, your buddy in HR, and asking her to give Jonathan a special look?
- Does it change the analysis if you are the CEO?

A Question

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- A supplier you have worked with for many years has become a personal friend of you and your family. He has offered you and the family use of his vacation house in a ski resort. You and your family love to ski. Is this okay?
- Does it change the analysis if he and his family will be with you at the vacation house?
- Does it change the analysis if you and the supplier were friends before you started working for the company?
