Discussion Overview

- Risk and impact of conflicts of interest
  - Including a diversion into behavioral ethics
- Compliance controls
  - Policies
  - Training
  - Oversight
- Questionnaires, approvals and audits

What are Conflicts of Interests?

- Incompatibility between a person’s private interests and his or her public, fiduciary or professional duties.
- Potential to undermine a person’s impartiality because of a clash between personal interests and other duties.
- Organizational Conflicts: Conflict between company and customer or other third party to whom company owes some duty.
Complex and Challenging

- 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

Harms Created from Conflicts

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

Behavioral Ethics

- Study of how humans make decisions when confronted with ethical dilemmas – or ethical decision making
- Why do we sometimes make bad choices?
- Ethics and morality are more reactive to situational and social forces than was previously thought.
- In other words, the ethical climate that exists in organizations helps determine individual conduct.
- Most of the unethical behavior in organizations is committed by individuals who consider themselves ethical.
- Some very interesting insights for conflicts analysis.
Self-Serving Bias

Gather, aggregate, process and remember information in a way that reinforces our pre-existing views and aligns with our self-interest.

An interest in viewing things from a particular perspective makes it harder for us to be objective.

Those with a conflict "often esteem too highly their own reliability" (Michael Davis)

Implications for

Conflicts controls
Approval processes

Impact of Disclosure of Conflicts

Not the panacea we all once believed
In fact, can make things worse
The theory is that disclosure creates a moral/psychological license to be more blatant in your bias.

Coins in a jar

Estimators
Advisors
Advisors get paid based on how accurate the estimate is
Advisors get paid based on how high the estimate is
Advisors disclose their conflict
And things only get worse
Impact of Disclosure of Conflicts

- Implications
- Disclosure does not solve the problem of biased judgment resulting from conflicts
- Consider other types of controls
  - Ethics walls
  - Other means of isolating the person with the conflict from decision-making
Conflicts Compliance Strategies

- Policies
- Training and communications
- Disclosure and approval systems
- Questionnaires
- Oversight
- Auditing

Conflicts Policies: Specificity v. Flexibility

- Broad enough to provide flexibility
- But helpful to have some 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

Global Perspectives and Issues

- 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.
Question 1: Does your organization “localize” its COI policy?

☐ In other words, is the policy different in different parts of the world?
  ☐ Yes
  ☐ No

Question 2: Approvals

☐ At your organization, do COI approval decisions occur at the enterprise level (i.e., at a centralized office such as C&E) or at the local level (such as with a business unit leader)?
  ☐ All COI approval decisions are made at the enterprise level.
  ☐ All COI approval decisions are made at the local level.
  ☐ Some COI approval decisions are local, and others (the more significant) occur at a centralized level.
Training and Communications

- 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

- 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

Questionnaires/Certifications

- 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
Question 3: Questionnaires/Certifications

☐ At your organization, are employees required to complete a periodic (e.g., annual) questionnaire and/or certification regarding compliance with the COI policy?
   ☐ Yes, this is part of my organization's annual code of conduct questionnaire/certification process.
   ☐ Yes, we have a self-standing process in which we ask employees to disclose any undisclosed conflicts and certify to compliance with the COI policy.
   ☐ No.

Question 4: Questionnaires/Certifications

☐ Which individuals at your organization are required to complete periodic questionnaires and/or certifications regarding conflicts of interest?
   ☐ All employees
   ☐ Senior leaders
   ☐ Senior leaders and employees in sensitive positions (such as members of the procurement, legal or C&E departments)
   ☐ Everyone at the level of supervisor and above
   ☐ No one

Auditing

- For substantive compliance with the policy
  - Review of pre-approval determinations and waivers for consistent application
  - Review of other responses to disclosures
  - Cross check of employee and vendor data
  - Review T&E receipts for sensitive procurement areas
- For policy implementation
  - Policy certification
  - Training completion
  - Questionnaires and certifications
  - Awareness
Oversight of Conflicts Standards

- 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

- Rationale
  - Why give gifts and entertainment in the business setting?
  - Rule of Reciprocity
  - Disclosure
  - Impact

Gifts and Entertainment

- 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
Question 5: Gifts and Entertainment

☐ Does your organization have stricter gifts and entertainment rules applicable to certain categories of employees, such as members of procurement, the law department or the C&E department?

☐ Yes
☐ No

Questions 6 & 7: Gifts and Entertainment

☐ Are the senior leaders at your organization subject to different gifts and entertainment rules than other employees?

☐ Yes, the written policy sets forth different rules for senior leaders
☐ Senior leaders are sometimes or always treated differently in terms of application of the policy, but that is not reflected in the written policy
☐ No

☐ If yes, are the dollar limits/thresholds for senior leaders:

☐ Higher than for other employees
☐ Lower than for other employees
☐ The same amount, but with different approval procedures

Standards for Entertainment

• 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

- Process
  - Different from COI?
  - Who and how of approval
- Register
- Tracking
- Resources for questions
- Resources for reporting concerns
- Controls
  - Appropriately tailored and monitored

A Scenario to Explore

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, located near a ski resort. You and your family love to ski. Is this okay?
- Yes because he's already a supplier.
- Yes because he's a personal friend
- No
- It depends on the value of a stay in the ski house

A Scenario to Explore

- 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?