CONFLICTS OF INTEREST:
EXPLORING BEST PRACTICES

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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
  - 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

- 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

http://ethicsunwrapped.utexas.edu/glossary/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

Pre-Disclosure

Estimator

Advisor

452 coins

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Post-Disclosure

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
**Approvals**

- Centralized process (e.g. C&E or Legal?)
  - Consistency
  - Independence
- Decentralized (e.g., by supervisors)
  - **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
- In-group bias

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**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

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?

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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?