

Society of Corporate Compliance and Ethics
Compliance and Ethics Institute
Session P25

NAVIGATING THE MURKY (AND SOMETIMES TREACHEROUS) WATERS OF CONFLICTS OF INTEREST

Christopher Miller
Regional Compliance Officer
General Motors

Rebecca Walker
Kaplan & Walker LLP

September 15, 2019

1

Discussion Overview



2

- The risks and potential impact of COIs
- Controls
 - ▣ Policies
 - ▣ Training
 - ▣ Questionnaires
 - ▣ Approval methodologies
- Real-world fact patterns
- Enhancing the culture of integrity and sense of organizational justice at your company

2

Digging into the Question of What Constitutes a Conflict of Interests

3

- 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.



3

Complex and Challenging

4

- 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

4

Harms Created from Conflicts

5

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



5

Behavioral Ethics

6

- 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.

6

Self-Serving Bias

7

- 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



7

Impact of Disclosure of Conflicts

8

- 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



8

Pre-Disclosure

9



9

Post-Disclosure

10



10

Impact of Disclosure of Conflicts

11

- 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



11

Conflicts Compliance Strategies

12

- Policies
- Training and communications
- Disclosure and approval systems
- Questionnaires
- Oversight
- Auditing
- Investigations
- Mitigating Measures



12

Conflicts Policies: Specificity v. Flexibility

13

- Broad enough to provide flexibility
- But helpful to have some level of specificity tailored to the organization, e.g. address specific risk areas
 - Financial interests
 - Working for business partners or competitors
 - Family members at the company or industry
 - Personal use of company property
 - Corporate opportunities
 - Board membership



13

Conflicts Policies: Specificity v. Flexibility

14

- GM Practice is Disclose, Disclose, Disclose!
- Policy cannot anticipate every possible situation in a global organization of 100k+ employees
- COI Policy is less prescriptive and gives flexibility to managers & compliance to make appropriate decisions
 - Helps ensure compliance with various global laws and empowers managers
- Disclosure and sign-off process built into existing Code of Conduct training
 - Training provided for managers & HR

14

Global Perspectives and Issues



15

- 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.

15

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

16

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

16

Approvals

17

- 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



17

Polling Question 2: Approvals

18

- 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.

18

Training and Communications

19

- 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



19

Training and Communications

20

- 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

Board
of
Directors



20

Questionnaires/Certifications



21

- 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

21

Polling Question 3: Questionnaires/Certifications

22

- Which individuals at your organization are required to complete periodic questionnaires and/or certifications regarding conflicts of interest?
 - ▣ All employees as part of an annual code of conduct certification process
 - ▣ All employees as part of a self-standing COI disclosure process
 - ▣ 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
 - ▣ Certain employees not covered by your categories above
 - ▣ No one

22

Auditing

23

- 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



23

Oversight of Conflicts Standards

24

- 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



24

Gifts and Entertainment

25

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



25

Gifts and Entertainment

26

- 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

26

GM's Gifts & Entertainment Evolution

27

- From zero tolerance to a hybrid values/rules based approach
- One global standard but differing thresholds for gifts from/to suppliers and gifts to government officials
- \$50/\$100/\$150 thresholds
 - General set of principles and accepting/receiving gifts must be compliant with general principles
 - Limited regional specific policies
- Empowers managers to make appropriate decisions

27

Polling Question 4: Gifts and Entertainment

28

- ☐ 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

28

Standards for Entertainment

29

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



29

Approval Procedures

30

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



30

A Scenario to Explore

31

- Your company is a publicly traded manufacturing company with a large charitable foundation, which receives donations from the company and from individual employees. The Foundation's mission includes support of educational causes. The CEO's children attend a private Catholic elementary school, and he asked the Foundation director to make a \$25,000 donation to the school.
- Is this okay?

31

A Scenario to Explore

32

- Your company's head of Procurement just suffered the tragic loss of his spouse to pancreatic cancer. He coped with his loss by creating a charity that seeks to raise funds for pancreatic cancer research. He asks if he can invite a number of the Company's suppliers, with whom he works closely and enjoys good relationships, to the charity's first big fundraising dinner and auction.
- Is this a problem?
- What if the employee is not the head of Procurement but is instead a member of the Compliance Department? Does that change the analysis?

32

A Scenario to Explore

33

- 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?

33

A Scenario to Explore

34

- Your company's marketing director is responsible for spending on social media companies. A number of social media companies form a group to support women's issues and invite the marketing director to join the board of directors of the charity.
- Is this a problem?
- What if the group seeks to provide the marketing director with an award?

34

A Scenario to Explore

35

- Your company's marketing director is responsible for spending on social media companies. A number of social media companies form a group to support local public school children and invite the marketing director to join the board or directors.
- Is this a problem?
- What if the group seeks to provide the marketing director with an award?

35

A Scenario to Explore

36

- One of your employees is a wine enthusiast and grows his own grapes. He shares his passion at the workplace and other employees enjoy hearing about his vineyards. He would like to supply his wine at the next company event.
- Is this a problem?
- Does it matter if he provides the wine at cost?



36

A Scenario to Explore

37



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 it okay to use the supplier's vacation home?
- 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?