Conflict of Interest Policies and Information Efficiency

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ABSTRACT

Where conflicts of interest exist for professionals, difficult decisions must be made regarding when conflicts of interest should be allowed, while being disclosed, monitored, and managed. At other times, the conflicts need to be eliminated or avoided. Current trends in practice trend towards the elimination of conflicts of interest, partly as a response to extensive publicity over some very questionable activities when individuals clearly had conflicts of interest. In many instances the public interest is best served when conflicts of interest are clearly avoided, public trust is reinforced, and there is not even the appearance of impropriety. Yet at times conflicts of interest are better managed than avoided, especially when the potential interests of all stakeholders are considered.

When new rules governing conflicts of interest are developed, the primary emphasis is typically on the implications for the principal organization writing the rules, and the public perception of this organization. The interests of the employees of this organization, to whom the rules are applied, are also considered. With much less frequency, the implications of conflict of interest rules on other stakeholders are considered. The position taken in this paper is that the interests of multiple stakeholders should be considered when conflict of interest policies are developed. Keywords: conflict of interest, stakeholders, stakeholder analysis, materiality, public interest

STAKEHOLDER INTERESTS AND CONFLICT OF INTEREST RULES

Conflicts of interest have always been present, and guidelines governing the management of such conflicts are constantly under revision. In recent years increasing attention has been paid to conflicts of interest, with particular emphasis on governmental appointments and usage of governmental funds. In 2009, the executive branch of the U.S. government paid particular scrutiny to the prior activities and financial holdings of any individual working for the new Obama administration, and some highly qualified individuals were not considered for cabinet-level appointments as a result of their recent lobbying, consulting, or employment history (Kirkpatrick, 2008). A number of medical journals have recently required that authors of accepted articles disclose any financial relationship they may have relating to their research (Lanier, 2009; Hirsch, 2009). Universities have also been challenged to review conflict of interest policies in order to assure that integrity of research results is not questioned (Dorschner, 2009). The potential conflicts of interest for corporate board members have caused some directors to resign (e.g., Eric Schmidt from Apple) and others have been encouraged to do so (e.g., Warren Buffet from Coca-Cola). In recent years, one of the most publicized examples of an organization struggling with appropriate conflict of interest guidelines involves the National Institutes of Health.

During the Spring of 2004, the U.S. Congress held hearings on whether certain high level scientists in the National Institutes of Health (NIH) had violated federal ethics statutes as a result of paid consultancy (or advisory) services to firms that were recipients of NIH grants. A blue ribbon task force looked into this matter, as well as whether activities that may have been legal, were, however, unethical and created the appearance of impropriety (NIH, 2004). In one situation, a NIH scientist received a prestigious prize (with monetary value) from an organization that was under consideration to receive NIH funding from his institute. In another case, a scientist was working in an official NIH capacity with one biotech firm, while moonlighting as paid consultant to one of its competitors (Willman, 2003). Nevertheless, the initial reactions by the NIH suggested that allowing scientists to have regular contact with private industry helped promote the flow of knowledge and the development of science (NIH, 2003). As a result of these inquiries, since February 2005 senior level NIH scientists are now largely prohibited from engaging in any outside consulting or serving on firms’ scientific advisory boards (Brainard, 2005). Most universities that receive funding from
the NIH have found it necessary to revise their conflict of interest policies as well, in order to apply for new NIH grants. While these actions may help eliminate potential conflicts of interest, it is less clear that they are unambiguously in the public interest, or help promote efficient flows of scientific information. Morgan and Reynolds (2002) argued that many inappropriate and poorly conceived decisions get made in an attempt to avoid even the appearance of impropriety. These new rules potentially also infringed on the rights of NIH employees and university-based scientists, and have been viewed as too strict or overkill by some observers (Gold, 2006).

MANAGING CONFLICTS OF INTEREST

In most situations, however, removal of real or perceived conflicts of interest may not be the only factor relevant when considering how issues should be handled. The following factors may also contribute to the development of appropriate guidelines for handling conflicts of interest.

Materiality

The absolute prohibition on certain activities due to their very nature ignores the question as to whether these activities are likely to have any material impact on the decision maker, or on the public good. For example, a family doctor who owns a hundred shares of Merck stock will not meaningfully impact his wealth, or the value of Merck stock, through his prescription writing decisions. Nor will the accountant, whose child has one share of mouse-eared Disney stock framed on their wall, likely let that share influence the quality of the audit performed. Concern over the “potential” for conflict should be mitigated by practical materiality considerations. The federal government has regulations that allow employees to receive small gifts from outside firms without any need to report the gift. This practice also presumes that such gifts would not constitute a potential conflict of interest.

Informational Efficiency

In many situations an individual may have knowledge that should be shared with others to promote overall economic efficiency. The CEO of a retail firm may have advanced knowledge of trends in consumer buying and growth in certain segments of the market. To the extent that this CEO can provide knowledge to a supplier as a member of the supplier’s board, they can help the supplier prepare for changes in the market (even if these changes are ones the retailer’s firm is unlikely to take advantage of). Likewise a NIH scientist may have ideas or inklings that indirectly arise from existing research, but which are outside the realm of current NIH projects to adequately explore or address. If the scientist can discuss these ideas with other scientists at firms that may be in a better position to investigate the idea, it is more likely that the idea will be thoroughly vetted. While such an interaction could take place without the scientist having any formal ties to private firms, if the scientist does have regular meetings with other firms (as would occur as consultant or member of a scientific advisory board), it is more likely that the issue will come out for discussion. Thus, prohibitions on any situations that may involve conflicts of interest could prevent individuals with relevant knowledge from sharing it with others that would benefit from the knowledge.

Efficacy of Disclosure

In some instances, full disclosure of potential conflicts of interest can be an effective control for assuring that individuals do not act inappropriately. In the legal profession, there are very few outright prohibitions on activities where conflict of interest could arise. Instead, attorneys are required to fully disclose all potential conflicts, and failure to do so has severe penalties. Thus, clients and other parties to the proceedings can ask that attorneys (or judges) recuse themselves or remove the conflict by divesting ownership in the potentially conflicting interest. The attorney with the conflict also knows that any actions taken will be even more carefully scrutinized because of the potential conflict. Members of boards frequently recuse themselves from certain decisions that may affect another company in which they have an interest, and professors are expected to recuse themselves from assigning grades to students who may be family members or with whom they have a close personal relationship (or in some institutions, have these grades reviewed by an independent evaluator). The federal government has clear guidelines requiring employees to disclose outside income.
Under some circumstances only internal disclosure is required, while in other cases income must be publicly disclosed. At the NIH, however, deliberate actions were taken to circumvent public disclosure. Public disclosure, when properly implemented and when reasonable levels of materiality are observed, may provide sufficient information to all parties, and serve to constrain potentially unethical behavior. Under these conditions individuals can continue to participate in decisions where a potential conflict of interest arises. (In other situations, however, disclosure may have less relevance, as a sick patient is unlikely to look at a physician’s financial disclosures before agreeing to a particular test or procedure.)

Public Interest

The public interest may be best served when each individual, firm, and government entity has all the relevant information to make well-informed decisions. If individuals with relevant information are prohibited from participating in the process due to potential conflicts of interest, those left to make the decisions may not have sufficient information to make decisions that are in the best interest of all parties. Should a county economic development board contain no members who might benefit from further economic development (e.g., other business persons), even though these individuals are the ones who locally have experience in economic development? Should a board of directors of a public firm have no members who are quite familiar with the industry or the firm, just to ensure that there are no potential conflicts of interest? In neither of these situations would the public interest likely be served if those participating on the relevant boards had little relevant knowledge on which they could make decisions. NIH scientists have a duty to both disseminate knowledge and protect those who hold intellectual property rights. The public interest may not be fully served if their contact with scientists in private industry is severely constrained.

Personal Freedom

One of the unalienable rights in the United States, and in many other countries, is liberty. Individuals have liberty to make certain choices, and influence their own wealth and happiness. When individuals are constrained from influencing some decisions because of previous decisions they have made, some personal freedom is lost. In many situations this is normal and appropriate – when we choose to be employed by one firm, we generally cannot moonlight as a paid consultant to a competitor. In other situations, however, when the potential for real conflicts of interest are low, personal freedom is unnecessarily constrained if the simple appearance of potential impropriety is the basis for prohibiting certain actions or decisions.

CONCLUSION

There is no doubt that individuals confronted with true conflicts of interest are in a difficult position, and their decisions have the potential to lead to poor decisions by others, personal harm to some, erosion of public trust, and may be counter to public interest. But some good can also come from conflicts of interest, and an outright ban on situations where the potential for conflict of interest may arise can also create harm and likewise be counter to the public interest. When government and businesses choose to regulate situations where conflicts of interest may arise, as has happened recently at the NIH, it is appropriate that other alternatives are explored in addition to outright bans. Materiality, information efficiency, disclosure, public interest, and personal freedom should all be considered when designing appropriate controls on potential conflicts of interest.
REFERENCES


