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Conflict of Interest Handbook

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Conflict of Interest Handbook

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The *Conflict of Interest Handbook* is the 12th publication in the *Ethics Handbook Series* of The Ethics Institute.

The *Ethics Handbook Series* was first introduced in 2012. The purpose of this series of publications is to provide persons involved in the governance or management of organisational ethics with practical hands-on resources to deal with various aspects of organisational ethics. All the publications in this series are made available for free on the website of The Ethics Institute (www.tei.org.za). We are delighted to see that these publications are used in organisations in the private and public sectors as well as in tertiary education in many different countries. Some of these publications are now also available in Portuguese.



The practical guidance provided in the *Conflict of Interest Handbook* addresses an issue of cardinal importance for organisations. A large portion of unethical conduct in organisations like corruption, nepotism, and fraud, are manifestations of conflicts of interest. Conflicts of interest also appear on all levels of organisations as well as in the governance structures of organisations.

This book introduces various forms of conflicts of interest, which are richly demonstrated with practical examples. More importantly, the book focuses on what should be done once conflicts of interest have been identified. An outstanding feature of the book is that it does not only follow a compliance approach to the management of conflicts of interest, but embeds it in the context of ethical organisational culture.

I would like to thank my colleague, Kris Dobie, for his meticulous research into the practical realities of dealing with conflicts of interest in various organisational settings. In the process of preparing the material for this handbook, he consulted widely with ethics practitioners who are dealing with conflicts of interest on a regular basis. We would like to extend a special word of appreciation to Natasha Pharo (Sasol), Phindi Twala (Vodacom), Johanna van Wyngaard (MTN), Farzana Lorgat and Nokwazi Mabuza

(AngloGold Ashanti), who each contributed in their own unique way to the insights displayed in this book.

I wish all our readers a good reading experience and trust that you will find in the *Conflict of Interest Handbook* a handy and trusted companion in dealing with conflicts of interest.

Prof Deon Rossouw

CEO: The Ethics Institute

Although a small sub-field of organisational ethics management, conflicts of interest have had an outsized role to play in the shaping of South Africa's state capture years. Behind almost every corruption incident there was some conflict of interest. Generally, these incidents involved people who were wilfully abusing their positions for private interests. Of course, not all conflicts of interest situations entail the wilful abuse of position. Sometimes people just have conflicting interests that need to be managed.

When choosing a strategy for managing conflicts of interest in an organisation one needs to keep in mind that most of the interests that you want to manage are those of well-intentioned people who need guidance and a system. A small (but critical) minority of incidents involves people dealing in bad faith who want to abuse the system. A strategy, therefore, has to address both of these groups.

Conflicts of interest occur in both the public and private sectors, and consequently the handbook has been developed as a resource for both sectors. It is predominantly a resource to those who are responsible for managing conflicts of interest in their organisations. It draws on the rich experience of practitioners who have gone through the growth pains of setting up conflict of interest management policies and systems, and who have managed these systems over many years.

The handbook considers conflicts of interest predominantly from an ethical perspective rather than a purely legal one. Nonetheless the South African regulatory environment forms the basis of legal considerations.

While the principles that are set out in the handbook apply to all employees and directors of an organisation, the main focus is on managing conflicts of interest for employees. Directors' conflicts of interest are thoroughly regulated in South Africa, and there already exists substantial guidance in this regard.

The handbook is divided into three sections:



1. Understanding conflicts of interest

This section defines conflicts of interest and provides a vocabulary for discussing different types of conflicts of interest. It also sets out the South African regulatory and common law environment dealing with conflicts of interest. It should be of interest to all readers.



2. Managing conflicts of interest

This section provides guidance on considerations and approaches to managing conflicts of interest in organisations. It covers policies, procedures, and systems for managing conflicts of interest, and is aimed at ethics practitioners.



3. Making conflict of interest decisions

Whereas the previous section is defined at a systems level, this section considers the thinking process of evaluating individual conflict of interest situations. It might be of interest to any organisational employee, but predominantly for managers and ethics practitioners.

2.1. Principal-agent relationship

Underlying all conflicts of interest is the principal-agent relationship. This is where one person or organisation (the agent), acts on behalf of, and in the interest of, another person or organisation (the principal). A typical example of a principal-agent relationship is where I appoint a lawyer to act on my behalf. I am the principal, and the lawyer is my agent, with a responsibility to act in my best interest.

Another example of a principal-agent relationship is where I am employed by an organisation, or I am part of the governing body of an organisation. Because I have been vested with the powers to act on behalf of the organisation, I have the corresponding responsibility to act in its best interest.



When I am employed by an organisation I act in its interest, not my own.

It is therefore clear that I cannot, when acting on behalf of the principal, put my own interests before theirs. I have a duty to act in their interest with care, loyalty and in good faith. These duties are related to the concept of a fiduciary duty.

Fiduciary relationships are often of the financial variety, but the word fiduciary does not, in and of itself, suggest pecuniary (“money-related”) matters. Rather, fiduciary applies to any situation in which one person justifiably places confidence and trust in someone else, and seeks that person’s help or advice in some matter. The attorney-client relationship is a fiduciary one, for example, because the client trusts the attorney to act in the best interest of the client at all times. Fiduciary can also be used as a noun referring to the person who acts in a fiduciary capacity, and fiducially or fiducially can be called upon if you are in need of an adverb. The words are all faithful to their origin: Latin fidere, which means “to trust.”

<https://www.merriam-webster.com/dictionary/fiduciary>

2.2. Defining conflicts of interest

While definitions of conflicts of interest abound, the following definition from the Global Reporting Initiative (2014) is brief and to the point:



“Conflict of Interest: A situation where an individual is confronted with choosing between the requirements of his/her official function and his/her own private interests.”

There are three distinct elements to a conflict of interest:



1. Official function. This is generally one's responsibility to the employer.
2. Private interest. This can be one's own interest, or the interests of others that may cause bias.



3. Action, decision-making or influence. One is in a position where you have to act, make a decision, or exert influence that might bring private interests in conflict with one's official function.

I would therefore have a conflict of interest if, while applying my mind to a matter that involves my employer, I also have a personal interest that would make it difficult to act objectively in the best interest of my employer.

It should be emphasised that it is not only a conflict with my own private interests that come into play, but also other people's interests that may cause me bias.

For example:

- I am the major shareholder in Company ABC that bids for an IT contract with the organisation where I serve as IT manager. I am very clearly confronted with choosing between my own company and the one where I am employed.
- I may, however, also find it difficult to apply myself objectively if I have no personal interest in Company ABC, but it is owned by my spouse (which will indirectly be in my financial interest), or even by my best friend (where I may have no financial interest).

The above examples indicate some important distinctions when it comes to interests that might cause a conflict.

Direct vs indirect interests



- A direct interest is where I hold the interest directly in my own name. From the above examples, it is where I directly own Company ABC.



- An indirect interest could be one of two things. The one option is that I do not hold the interest myself – it is held by my spouse, another related person, or a business associate. The second option is that there are intermediary structures that hold the interests. Here the example would be that I hold an interest in Company X, which in turn holds an interest in Company ABC. Although my name is not listed as an owner of Company ABC, I am still a beneficial owner.



Beneficial owner is a term used to indicate who, once the intermediary structures have been unravelled, derives financial benefit from a company or asset. Due to complex holding structures and laws that do not promote transparency, it is not always easy to determine beneficial ownership in all jurisdictions.

Financial vs non-financial interests



- A financial interest is the most common in conflicts of interest. I, or someone with whom I am financially entwined, might gain financially from a transaction where I have a decision-making role.



- Non-financial interests could refer to relational interests, such as me benefitting my friend, even though there is no financial benefit to me. Any bias that I might have, for or against someone, that impacts on my ability to apply my mind in the best interest of my organisation, could be seen as a conflict of interest. Another example of a non-financial conflict is where a judge makes a ruling in a case where their child is the accused, thereby saving them from a prison sentence.

2.3. Types of conflicts of interest

Another typology for conflicts of interest (World Bank, OECD, UNODC, 2020) breaks it down into actual, perceived and potential conflicts of interest.

- Actual conflicts of interest are where my personal interests are in real conflict with my official responsibilities. An example of this is where I am on an interview panel and my child has applied for the position.
- Perceived, or apparent conflicts of interest are where it may reasonably seem to an independent third party that a conflict of interest exists, whether or not this is actually the case. An example of a perceived conflict of interest would be where a government minister's son is awarded a contract in the minister's department, even though due process was followed.
- One can see that for outside stakeholders, it is difficult not to suspect that, due to internal power relations, some pressure may have been wielded to influence the process. The more senior the related official is, the greater their perceived and actual influence in the organisation, and the more likely that there will be a perception of abuse of power. The same principle would apply to the private sector.



It is important to not only be ethical, but also to be perceived as ethical.

For purposes of building and maintaining a trust relationship with stakeholders it is important to not only be ethical, but also to be perceived as ethical. An organisation should therefore manage not only actual conflicts of interest, but also perceived conflicts of interest.

- Potential conflicts of interest are where there is not currently a conflict of interest, but if something changes there is the likelihood that one may arise. An example of this would be to have the possibility to be promoted into a position where you will be the relationship manager with your cousin's company. There is currently no conflict, but it may come into play if circumstances change.

We can also make a distinction between personal and professional conflicts of interest. Most of what we have been describing up to this point falls in the category of personal conflicts of interest in that there is a personal interest that conflicts with official duties. Another possibility is that there might be conflicts between two professional interests. An example would be where a law firm is faced with the prospect of representing two separate clients who have competing interests in a matter. The lawyer might have no personal benefit one way or the other, but will struggle to objectively represent the interests of both clients simultaneously. We will call this a professional conflict of interest.

In this handbook we will deal predominantly with personal conflicts rather than professional ones.

2.4. Examples of conflicts of interest

While it is impossible to list all conflict of interest examples, the following examples should assist with building an understanding of what a conflict of interest can look like:

- Having a financial interest or directorship in a company that competes with your employer.
- Having a financial interest or directorship in a company that does business with your employer.
 - The above two examples would also apply to related parties (i.e., close family, close friends, or business associates) who compete or do business with your employer.
- Being involved in a decision for awarding a contract, or appointing a staff member where a member of your family, a close friend, or business associate is applying.
- Being involved in a regulatory or oversight decision where you, or a related party is the subject or applicant.
- Being in a direct reporting line with someone you are closely related to, or romantically involved with.
- Doing external work in the time that you are supposed to be doing work for your employer.
- Using your employer's resources for doing external work.

- Abusing your position with your employer to obtain benefits for yourself or family members in your relationships with customers, suppliers, contractors, and other business partners.
- Receiving expensive gifts, meals, or entertainment (that can cloud your judgement) from those you are making a decision about.



Conflicts of interest are related to the concepts of nepotism and cronyism, where you benefit those close to you in family or other relationships.

The word nepotism has an interesting etymology. It is from the Italian nepotismo, from nipote 'nephew'. It derives from the special "privileges bestowed on the 'nephews' of popes, who were in many cases their illegitimate sons." These 'privileges' included them being appointed as cardinals.

- Oxford Languages (<https://en.wiktionary.org/wiki/nepotism>)

2.5. Conflicts of interest and corruption

The relationship between conflicts of interest and corruption becomes apparent when their definitions are compared:



- *Conflict of interest: "A situation where an individual is confronted with choosing between the requirements of his/her official function and his/her own private interests."* (GRI)
- *Corruption: "The abuse of entrusted power for private gain."* (Transparency International)

In the above definitions the underlined concepts have very similar definitions. Comparing these definitions shows why the two concepts are so closely intertwined. A conflict of interest exists where an official could abuse their position for private gain, whereas corruption exists where an official does abuse their position for private gain. Thus, while a conflict of interest does not always lead to corruption, corruption always involves a conflict of interest.

It is because of the implicit link between conflicts of interest and corruption, and the severe reputational and regulatory fall-out that might flow from an actual or perceived conflict of interest, that it is necessary for organisations to manage conflicts of interest.



Those responsible for the governance of an organisation should ensure that employees and governing body members keep the possibility of conflicts of interest at top of mind and know how to manage them should they occur – thereby preventing corruption from occurring.

2.6. Regulatory environment

Many organisations also manage conflicts of interest in an attempt to comply with local and international anti-corruption legislation. For the purpose of this publication, we will focus on legislation and regulation that relates to conflicts of interest specifically, and not anti-corruption legislation in general. The focus will also be limited to the South African regulatory environment specifically.

When it comes to conflicts of interest, it seems that the legislators are more concerned with protecting public than private interests. Conflicts of interest are, as a consequence, far more regulated in the public than in the private sector. However, as is set out below, any organisation would be protected by the common law duty of good faith that employees owe to their organisations.

Case law

The *duty to act in good faith* towards an employer is quite firmly entrenched in South African case law. In our legal system this means that it has become ‘common law’, and that the principles can be deemed to apply to all cases.

This duty has been increasingly deemed to include the requirements to avoid conflicts of interest and to fully disclose external interests. Coetzer and Wingfield (2022) sets out the following principles derived from case law.

1. *“It is an implied term of every contract of employment that an employee will act in good faith towards their employer and will serve their employer honestly and faithfully.”*
 - Labour Appeal Court - Sappi Novoboard (Pty) Ltd v Bolleurs (1998)
2. *“In the absence of an agreement to the contrary, the employee owes a duty of good faith to their employer. This entails among others, a duty:*
 - *not to work against their employer’s interests;*
 - *not to place themselves in a position where their interests conflict with those of their employer;*
 - *not to make a secret profit at the expense of their employer; and*
 - *not to receive a bribe, secret profit or commission in the course of or by means of their employment with the employer.”*
 - Supreme Court of Appeal – Ganes & Another v Telecom Namibia Ltd (2004)
3. It is not only actual conflicts of interest that need to be avoided, but also the *“real sensible possibility of a conflict of interest”*.
 - Supreme Court of Appeal – Phillips v Fieldstone Africa (Pty) Ltd (2004)
4. *“Calculated silence in the face of a duty to inform an employer of material facts amounts to a fraudulent non-disclosure”* and *“The dishonest non-disclosure of a material fact justifies a dismissal.”*
 - For example, if an employer has a policy that requires disclosure of all external interests, and the employee then fails to make a disclosure in line with the policy.
 - Labour Appeal Court – Schwartz v Sasol Polymers and Others (2017)
5. *“Where employees are involved with the service providers of their employer, they have a duty to disclose this”*.
 - Labour Appeal Court – De Beers Consolidated Mines Ltd (Venetia Mine) v National Union of Mineworkers & Others (2020)
6. *“An employee who runs a side-line business (or ‘side-hustle’) and fails to disclose this to their employer acts in violation of the duty of good faith owed to their employer.”*
 - Labour Appeal Court – Bakenrug Meat (Pty) Ltd t/a Joostenburg Meat v CCMA and Others (2020)

7. *“No real competition between the employer and the employee need exist for dismissal of the employee to be considered the appropriate sanction.”*

- The example used is if someone has a side-hustle, this business does not need to compete with the employer to be considered a conflict, as it can still impact negatively on the employee’s ability to do their job.
 - Labour Appeal Court Bakenrug Meat (Pty) Ltd t/a Joostenburg Meat v CCMA and Others (2020)

Adapted from Cowan Harper Madiki:
<https://www.chmlegal.co.za/conflicts-interest-explained>

a) Private sector – Directors

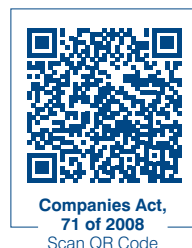
The private sector does have legislation that regulates conflicts of interest, and this is specifically applicable at the governance level of the organisation.



The two most important regulatory documents related to conflicts of interest of company directors are the King IV Report on Corporate Governance in South Africa, 2016 (King IV) and the Companies Act, 2008. Since King IV was published (in 2016) after the Companies Act, it has chosen to largely align with the Companies Act on this. We will consequently deal with the Companies Act first.

Companies Act, 71 of 2008

In the Companies Act, it is specifically Section 75 on ‘Director’s personal financial interests’ that is applicable. This section applies to directors and any other people serving on board committees. It also includes ‘prescribed officers’ which could include the CEO or Managing Director.



Consequence of non-disclosure

The most far-reaching aspect of the act is that where a director failed to disclose a *personal financial interest*, or failed to manage it appropriately, the resolution taken on that matter by the board will be invalid. The decision can later be validated by shareholders or made valid through a court application by an interested party. Nonetheless, the potential impact is sufficiently substantial to warrant serious attention by governing bodies.

The Act specifies that, in order for a decision to be valid, the following must happen:

- The interest must be disclosed;
- The director must leave the meeting after the disclosure; and
- The director may not take part in considering or executing on the matter.

Personal financial interests (What needs to be disclosed?)

Since the above applies to 'personal financial interests' it is important to better understand what this means in law. Section 75 of the Companies Act sets out that personal financial interests are interests which are:

- Held by directors and related parties – Despite the word 'personal', the requirement for disclosure includes interests held by the director as well as their related parties;
- Financial – i.e., monetary or economic, or to which a monetary value can be attributed; and
- Material – meaning significant enough to be of consequence in the matter, or if it might reasonably influence a person's judgement in the matter.

Related parties

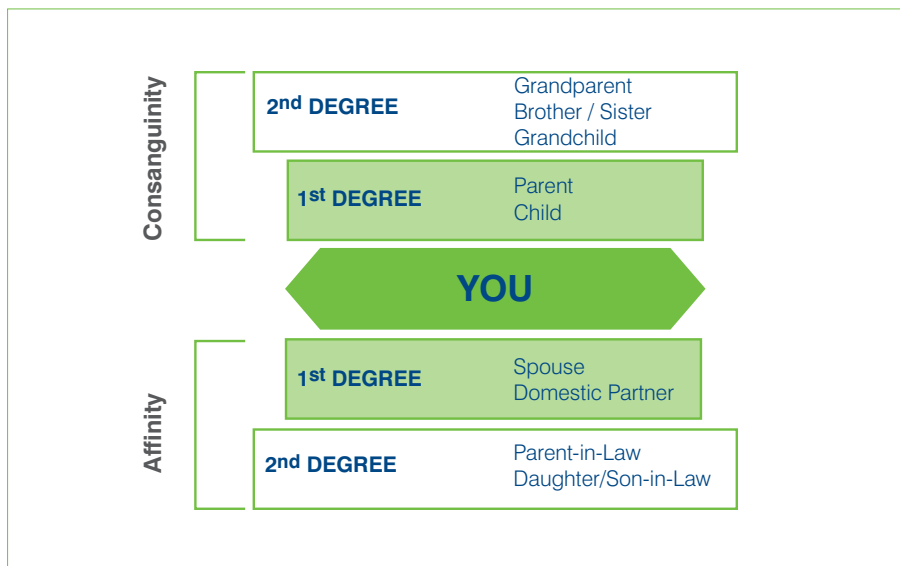
Section 2(1) of the Companies Act defines a related party as follows:

- (a) "An individual is related to another individual if they –
 - (i) Are married or live together in a relationship similar to marriage; or

- (ii) Are separated by no more than two degrees of natural or adopted consanguinity or affinity;
- (b) An individual is related to a juristic person if the individual directly or indirectly controls the juristic person”.

It goes on to give significantly more detail about being related to a juristic person, but the issue of control remains key.

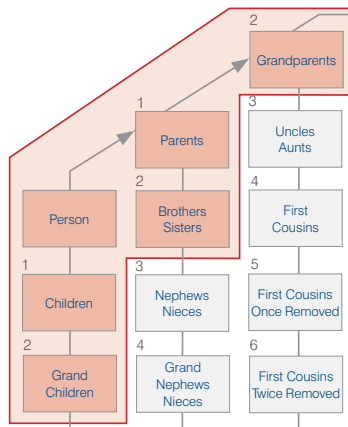
To understand degrees of ‘natural or adopted consanguinity’, the diagram below is useful:



Adapted from: <http://www.jsu.edu/hr/nepotism/index.html>

Accordingly, the Companies Act requires members of the governing body to disclose (over and above their own interests) also the interests of their spouses, their children (and children-in-law), their parents (and parents-in-law), their siblings, their grandparents, and their grandchildren, that could be relevant to the organisation in question.

There seems to be different interpretations of degrees of consanguinity, and the King IV Practice Note on Declarations of Interest defines second degree relatives as including “the member’s natural or adopted consanguinity or affinity grandparents, grandchildren, aunts, uncles, nephews, nieces or half-siblings.” This seems to misinterpret the definition of second-degree relatives too broadly. The table on the right sets out an understandable logic of degrees of natural consanguinity, which is in line with various sources dealing with ethics and nepotism. The shaded relatives would be included in the definition.



Source: Wikipedia

The Act furthermore places a strong obligation on board members to pro-actively ascertain whether their related parties have such interests. So simply saying that you do not know does not seem to be an excuse.

One can only assume that it is an attempt to counter the extent of corruption and abuse of power that has become manifest in South Africa, that has driven the legislator to include such a wide-ranging definition of ‘knowing’.

“knowing”, “knowingly” or “knows”, when used with respect to a person, and in relation to a particular matter, means that the person either—

- (a) had actual knowledge of that matter;
 - (b) was in a position in which the person reasonably ought to have—
 - (i) had actual knowledge;
 - (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
 - (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;
- Definitions section of the Companies Act, 2008.

(We elaborate on the practicalities of managing the disclosures on related parties under section 3.3 which deals with Procedures.)



King IV Report on Corporate Governance in South Africa, 2016 (King IV)

Under its first principle, which deals with ethical leadership, King IV has a section on the characteristics that leaders should cultivate and exhibit. The first of these characteristics is integrity, and it is here that the report gives its principled position on conflicts of interest:



“Members of the governing body should avoid conflicts of interest. In cases where a conflict cannot be avoided, it should be disclosed to the governing body in full at the earliest opportunity, and then proactively managed as determined by the governing body and subject to legal provisions” (IoDSA, 2016: p43).

It furthermore defines a conflict of interest as follows:



“A conflict of interest, used in circumstances relating to members of a governing body and its committees, occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit, as well as use of the property of the organisation, including information. It also applies to the member’s related parties holding such interests” (IoDSA, 2016: p15).

The definition therefore goes wider than the Companies Act in that it refers to:

- Conflicts ‘in fact or in appearance’ – in other words not just actual, but also perceived conflicts; and
- ‘Financial, economic and other interests’ – in other words it extends beyond pure financial interests as set out in the Companies Act.

The King Committee also published a Practice Note on 'Declaration of Interests' in 2018. This practice note provides guidance on how to implement the recommendations of the King Report as it relates to conflicts of interest.

It specifies two types of disclosure – general disclosures and specific disclosures. This handbook has utilised the same typology in describing the management of conflicts of interest in section 3.3. As a consequence, just the description of each type of disclosure given by King IV will be mentioned here.

General disclosures



“Subject to legal provisions, each member of the governing body should submit to the governing body a declaration of all financial, economic and other interests held by the member and related parties at least annually or whenever there are significant changes.”

- King IV, Principle 7, Practice 25

Specific disclosures



“At the beginning of each meeting of the governing body or its committees, all members should be required to declare whether any of them has any conflict of interest in respect of a matter on the agenda. Any such conflicts should be proactively managed as determined by the governing body and subject to legal provisions.”

- King IV, Principle 7, Practice 26

The following are the key take-outs from the Companies Act and King IV regarding conflicts of interest:

- Provisions apply to members of the governing body and its committees.
- Actual and perceived conflicts should be disclosed.
- Own and related parties' interests should be disclosed.
- Once disclosed, conflict of interest situations should be proactively managed.

b) Private sector – Employees

Conflicts of interest of employees are quite unregulated by formal legislation, and it seems that each organisation has a responsibility to put their own policies in place. Nonetheless, case law would protect organisations inasmuch as it prescribes a duty of good faith to the employer. (See the 'Case law' text box on page 11.) Some of the case law would seemingly only apply should the employer have their own policies in place.

c) Public sector – Politicians

Legislation and regulations abound for politicians at different levels of government. This is contained in the following documents:

- Parliament
 - Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members
- Executive (Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils)
 - Executive Members' Ethics Act (Act No. 82 of 1998)
 - Executive Ethics Code (Notice No. 41 of 2000)
- Local Government Councillors
 - Code of Conduct for Councillors (Schedule 7 of the Municipal Systems Act - added by s. 36 of Act 3 of 2021)
 - Code of Conduct for Councillors Regulations (Notice No. 1322 of 2022)

Each of these pieces of legislation or regulations contain numerous prescripts related to conflicts of interest which are quite self-explanatory, and will not be unpacked in detail. Some principles are however relatively common across the mentioned codes:

1. Politicians have a duty to act in good faith and in the public interest.
2. They may not use their position (or information obtained in their position) to improperly benefit themselves, direct family or business partners.
3. They are not allowed to receive any benefit for voting or not voting in a specific manner.

4. They may not receive any benefit for lobbying.
5. They are not allowed to vote on a matter in which they (or their direct family or business partners) have an interest.
6. They must disclose any interest in any matter that is being discussed or voted on.
7. They must disclose gifts above a certain amount (lower limits differ from R1000 to R1500).
8. They may not do business with an organ of state.
9. They may not have external remunerative work without permission.
10. They must submit an annual (general) disclosure of interest. Part must be publicly available to inspect, and part (usually financial values) can be confidential. They must also submit disclosures of their family members where they are aware of these.



Organisation has a responsibility to put their own disclosure policies in place. Case law would protect organisations inasmuch as it prescribes a duty of good faith to the employer.

The definition of family and related parties is set out below for different standards:

	Parliament	Executive Ethics Code	Code for Councillors
Family definitions	<i>'Immediate family' means a member's spouse, permanent companion or dependents;</i>	<i>'Family member', in relation to a member, means the member's parent, spouse, companion or dependent child;</i>	<i>'Partner' means a person who permanently lives with another person in a manner as if married.</i>

	Parliament	Executive Ethics Code	Code for Councillors
Which 'related parties' interests must be disclosed?	<i>Details of all financial interests of a member's spouse, dependent child or permanent companion to the extent that a member is reasonably aware of;</i>	<i>5.1 Every member must disclose to the Secretary particulars of all the financial interests, as set out in paragraph 6, of- (a) the member; and (b) the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests.</i>	<i>(a) disclose to the municipal council, or to any committee of which that councillor is a member, any direct or indirect personal or private business interest that that councillor, or any spouse, partner or business associate of that councillor may have in any matter before the council or the committee;</i>
Who is included under 'personal' interests?		<i>3.5. the personal or private financial or business interest of a member includes any financial or business interest which, to the member's knowledge, the member's spouse, permanent companion or family member has</i>	<i>(2) A councillor who, or whose spouse, partner, business associate or close family member, acquired or stands to acquire any direct benefit from a contract concluded with the municipality, must disclose full particulars of the benefit of which the councillor is aware at the first meeting of the municipal council.</i>

It is notable that the extent of a 'related party' extends further for directors in the private sector than it does for politicians. For politicians it goes to the first degree of consanguinity or affinity, whereas the Companies Act specifies the second degree for directors.

d) Public sector – Officials

i. Public Service

The Public Service encompasses all those government employees who fall under the Public Service Act and the Public Service Regulations. It includes employees in national and provincial departments, but excludes those in local government.

Most of the standards on conflicts of interest relevant to this sphere are contained in the Public Service Regulations (2016).

While there is a separate section on financial disclosures, one should first look at Chapter 2, Part 1 of the regulations which contains the Code of Conduct for Public Servants. The following is an extract of some of the most applicable broad principles that indicate the duty of good faith and objectivity:



11. *An employee shall:*

- (a) be faithful to the Republic and honour and abide by the Constitution and all other law in the execution of his or her official duties;*
- (b) put the public interest first in the execution of his or her official duties;*



12. *(b) serve the public in an unbiased and impartial manner in order to create confidence in the public service;*



13. *(b) not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties.*

Furthermore, the Code contains rules on:

- Receiving 'gratification';
- Conducting business with an organ of state (which is prohibited);
- Declaration of conflicts and recusal from such decisions;
- Favouring friends and relatives;

- Gifts (where everything above R350 requires permission); and
- External remunerative work (which requires permission and may not be done in work time).

When managers decide whether something constitutes a conflict of interest, they should first use the principles, and then consider the rules. In other words, the rules cannot trump the principles.



Private sector companies should note that politicians and public servants are not allowed to be directors of companies who do business with an organ of state, so they should not be appointed to these positions if the company wants to do business with government or state-owned entities.

Chapter 2, Part 1 of the Regulations deal specifically with financial disclosures. It sets out predominantly who needs to disclose, what needs to be disclosed, as well as other procedural issues.

Importantly it also sets out that the Public Service Commission will verify the interests of all senior managers in the Public Service. Potential conflicts of interest will be directed back to departments who need to manage any conflicts and disciplinary matters arising from these.

A different process is followed for 'designated employees' who have to disclose but who are not senior managers. Here the department has to do the verification itself, to identify possible conflicts of interest, and manage them appropriately.



According to the Regulations it is the responsibility of ethics officers in the department to manage the disclosure system and also any processes related to external remunerative work.

Interestingly there is a specific section on 'Decision-making in cases of conflict of interest' which triggers when a 'functionary' has to take a decision but has a conflict. While not clearly stated it seems that this relates to specific senior functions, such as heads of department, who are assigned responsibilities, but may be conflicted.

ii. Municipalities

The majority of the principles and rules for municipal staff members related to conflicts of interest can be found in the Code of Conduct for Municipal Staff Members, which is contained in the Municipal Systems Act.

The relevant principles are contained in section 2 on General Conduct:

A staff member of a municipality must at all times-

- a. *perform the functions of office in good faith, diligently, honestly and in a transparent manner;*
- b. *act in such a way that the spirit, purport and objects of section 50 (of the Municipal Systems Act dealing with basic values and principles governing local public administration) are promoted;*
- c. *act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and*
- d. *act impartially and treat all people, including other staff members, equally without favour or prejudice.*

Furthermore, there are more specific rules related to conflicts of interest. Among other things municipal staff members may not:

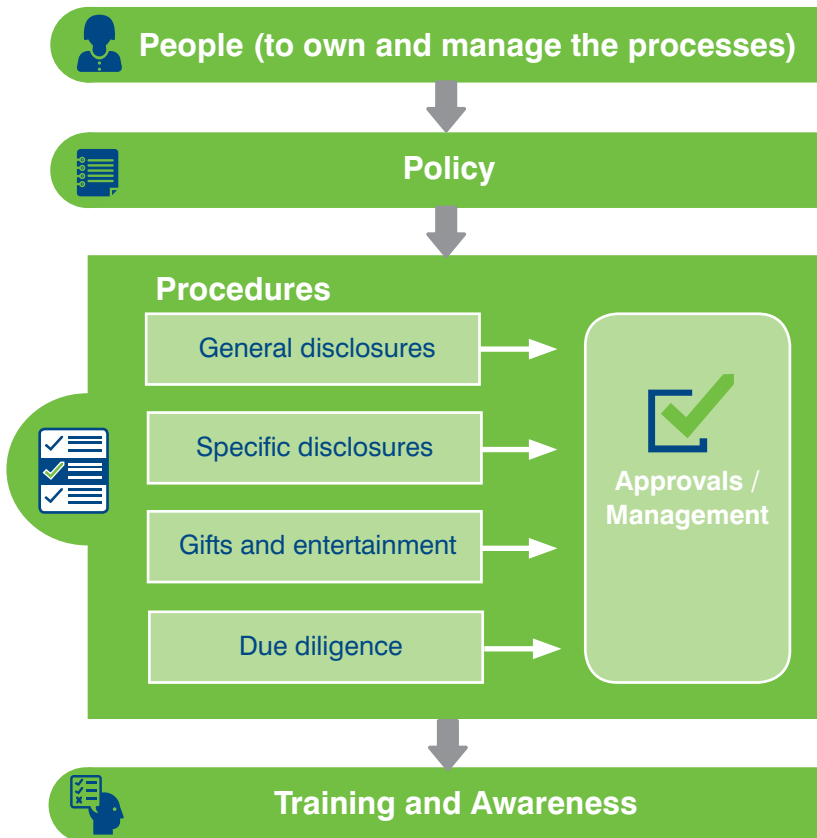


- Abuse their position for personal gain (for themselves or someone else);
- Do business with the municipality;
- Unduly influence other functionaries to their own benefit or the benefit of others; and
- Accept or request gifts or favours for abusing their powers.

There is no requirement for general annual disclosures of interest, but staff members must disclose if they, or their “*spouse, partner, business associate or close family member, acquired or stands to acquire any direct benefit from a contract concluded with the municipality*”.

There seems to be broad convergence in methods of managing conflicts of interest in organisations. The framework that we present here is the outcome of discussions with a number of listed entities about their conflict of interest management practices, as well as reviewing legislation and literature on the topic.

Framework for managing conflicts of interest



1. Firstly there should be *people* (i.e. staff members) to own and manage the policy.
2. A suitable *policy* should be developed.
3. *Procedures* should be put in place to give effect to the policy. The procedures should include means for making potential conflicts transparent, including through:
 - General disclosures of interest;
 - Specific disclosures of interest;
 - Disclosure of gifts and entertainment; and
 - Due diligence procedures.Once interests are transparent, they should be either approved, or actively managed.
4. Lastly, one should consider a *training and awareness* approach to influence the organisational culture on conflicts of interest.

In managing conflicts of interest, there are a number of considerations that should be kept in mind.

- **Control vs. inculcation of responsibility**



What a compliance approach neglects is helping people understand the basic principles of conflicts of interest, and building an organisational culture where people proactively disclose their conflicts as and when they arise.

Some approaches to managing conflicts of interest take more of a compliance than an ethics approach. In practice this means getting people to submit disclosures of all their interests on an annual basis, and (in some cases) the organisation then verifying those interests. What it neglects is helping people understand the basic principles of conflicts of interest, and building an organisational culture where people proactively disclose their conflicts as and when they arise.

An unintended outcome of a strong focus on annual disclosures is that employees may read between the lines that they have now disclosed their interests, and if there is a conflict, the organisation will tell them.

Imagine the scenario where I am sitting in a bid evaluation committee where a company in which I have an interest has submitted a bid. If I disclosed my interest in the company in my annual disclosure, I might feel that it is unnecessary for me to disclose again, and that the responsibility is now on the organisation to let me know if there is a conflict. This would however require the organisation to go back to the disclosure forms and check for any conflicts. This step frequently does not happen – especially where forms are kept manually.

Rather than communicating to staff that the organisation is controlling their conflicts of interest once they have disclosed, it is important to convey to employees that they retain the moral responsibility to raise possible conflicts as and when they occur.

- **Rules vs. principles**



It is best to specify some broad principles for the avoidance of conflicts of interest, and then have some rules and examples that set out more specific cases.

While there are some employees who are actively trying to extract wealth from the system through self-dealing and nepotism, most are likely above board and will try to do the right thing. The challenge is to decide whether we manage conflicts of interest by trying to catch out the first group, or by creating a supportive culture for the second group. One will likely have to find the balance and do a bit of both.

When trying to catch out culprits one is tempted to write rules that are very specific so that people can be retrospectively held accountable if they did not comply. For example: like the Companies Act does, one might be very specific about defining family members, and very specific about what 'knowing' about their interests means. While this *might* retrospectively help to hold someone accountable when they have defrauded the organisation through conflicts of interest, it limits some other aspects of conflict of interest management, such as disclosures related to friends. We cannot regulate disclosures when friends are involved, because it would be impossible to clearly draw a line between which friends would be included, and which not.

For this reason, it is probably best to specify some broad principles for the avoidance of conflicts of interest, and then have some rules and examples that set out more specific cases.

- **Organisational risk vs. employee rights**



The organisation has to consider how much it needs to know about employee interests to balance employees' right to privacy.

Employees have a right to external interests, as long as these do not go against the interest of the organisation, and do not impact negatively on their work. The organisation has to consider how much it needs to know about employee interests to balance employees' right to privacy with its risk appetite.

Some organisations choose to have employees disclose all their external interests for transparency purposes. An organisation may then scrutinise the disclosures and engage employees on those issues that they consider could pose conflicts of interest. Many organisations, however, miss out on the scrutiny step, and simply require disclosures. It is not clear what value these disclosures then have in the pro-active management of conflicts.

Another approach is to only require employees to disclose interests that they think could pose a possible conflict. So not all interests are disclosed – simply those that could be problematic. This lowers the administrative burden on the organisation, and also imposes more of a pro-active responsibility on employees. But it requires more of an active training and awareness campaign to inculcate employees with this responsibility. This approach might not be suitable for all organisations.

3.1. People

As any management area, managing conflicts of interest will require capacity development in staff members. Organisations should consider this from the outset, as it might determine the extent of one's processes. The more comprehensive the processes, the more capacity will be required.

Organisations will also need to decide who will be responsible for managing conflicts. This will often be the Ethics Officer, or sometimes a compliance or risk practitioner. In some organisations disclosures of interest are seen as an HR issue, and it is managed from there. One should, however, consider that the staff members who manage conflicts should do so with the correct mindset of influencing a transparent culture.

Many organisations find that a well-functioning automated disclosure system is critical to assist with the workload.

In some organisations, the disclosures of interest of directors are dealt with separately from that of staff, and it then falls to the Company Secretary to manage that component.

3.2. Policy



The policy sets out an organisation's position on conflicts of interest. It will specify what is allowed and not allowed, and what is required from employees.

Core principles

A good policy will set out its core principles first, so that everything else in the policy can be measured against that.

In section 2.2 of this handbook the elements of conflicts of interest were set out. It makes sense to craft principles that address each of these elements.

Elements	Principles to manage them
Official function	We deal in <u>good faith</u> with the organisation and make decisions in its best interest and in line with our official duty.
Private interest	We are proactively <u>transparent</u> in order to manage conflicts of interests.
Action, decision-making or influence	We apply ourselves <u>objectively</u> in the best interest of the company and ensure that there are no conflicting interests that can impact on this objectivity.

Of course, the underlying principle is what is also found in the common law, which is to act in good faith in the best interest of the company. This is the core principle against which all conflicts of interest decisions should be measured.

Rules and examples



Guard against rules that are too narrowly written.

While some rules will be necessary to manage conflicts of interest, one should guard against rules that are too narrowly written. If there are things that one wants to expressly forbid, it should be clearly stated that these are in addition to the general principles and that the principles still apply to all decisions.

Employees might feel that the general principles are too vague to apply in practice, and might need more clarity on what is allowed, what is not allowed, and what needs to be disclosed. To assist with this one might make use of examples rather than rules. This helps employees understand the boundaries more clearly, but still urges them to assess their conflicts in terms of the core principles.

Contested areas

While there is broad convergence on managing conflicts of interest, there are a few key areas where approaches differ, and where an organisation will have to take a clear policy stance.



- [Doing business with staff or family of staff](#)

Most businesses have a policy that they do not, as a rule, do business with staff. This may be reviewed if there is a business case for it, though such decisions are rare. Section 13.c. of the Public Service Regulations (2016), specifies that an employee “*may not conduct business with any organ of state, or be a director of a public or private company conducting business with an organ of state*”. This is a very broad ban on employees doing work with their employer, which sets a strong precedent.

When it comes to doing business with family of staff, there is less of a standard approach. Many businesses will take a discretionary approach, meaning that each case is reviewed on its merits. As with any discretionary decision, it may be difficult to apply a consistent standard – especially when decisions are made in a decentralised manner by line managers.



Supply chain management are viewed as high-risk staff as they engage with procurement decisions on a regular basis.

Other organisations take a risk-based approach, banning family of high-risk staff from doing work with the company. This might include senior managers and executives, and those working in supply chain management. The thinking is that the more senior a person is, the greater the perception that they may be influencing decision-making. Those in supply chain management are viewed as high risk as they engage with procurement decisions on a regular basis.

The South African Public Service does not ban family members doing work for the state, but full disclosure is required to actively manage possible conflicts.



- [Defining 'related parties'](#)

Another decision would be how broadly one would define 'family' or 'related parties'. Many organisations take their cue from the Companies Act definition of related parties, and work with two degrees of consanguinity or affinity (see section 2.6), as well as businesses that are under 'control' of the individual.

Some organisations define related parties as those who live in a financially interdependent way with the staff member – such as living in the same household. For example, if my spouse benefits financially, then it is financially beneficial to me as well. If my child is dependent on me financially, we are interdependent, and if they benefit financially, it reduces my financial burden. This approach considers direct and indirect financial gain to the staff member, but does not necessarily consider non-financial pressures that might apply.

- [Perceived conflicts of interest](#)

Perceived, or apparent conflicts of interest were explained in section 2.3, but in short, it is where there seems to be a conflict of interest, but this is not actually the case. An example would be where a company contracts with the child of the CEO, even though due process has been followed. While the CEO may have had no part in the decision, the power dynamics do make it seem unlikely that no influence was wielded. Where senior people are involved, the perception of a conflict of interest can be as damaging to the organisation's reputation as an actual conflict of interest. For this reason, it is seen as good practice to include perceived conflicts in definitions of conflicts of interest.

Some organisations, however, feel that the mere perception of a conflict of interest is insufficient grounds for limiting someone's rights and participation. There is also a fear that the definition might be abused as it is very subjective. The instances of perceived conflicts of interest are probably few and far between, and one can imagine that it would mostly apply to those at the top of the organisation who wield significant influence.

- [Business with former employees](#)

 **Many companies have contractual inclusions with business partners and suppliers that prohibits the revolving door practice.**

An often-forgotten conflict of interest is what is referred to as the revolving door. This is where an employee uses their organisational powers to set up business opportunities for themselves outside the company and then leaves for that opportunity as soon as things are in place.

An example of this would be a manager negotiating with a potential business partner on behalf of their organisation. Halfway through the negotiations the business partner offers them a job with a massive salary. This will, however, only commence once the negotiations are finalised. It is clear that the manager will be less protective of the interest of their current company, and more lenient towards the potential business partner.

To mitigate such risks many companies have contractual inclusions with business partners and suppliers that prohibits this practice. One may also put in place contractual inclusions with staff directly, but this can be difficult to enforce once employment ends.

3.3. Procedures

a) General disclosures of interest

One of the most common practices in managing conflicts of interest is the annual disclosure of interests. This is also referred to as a general disclosure, because it requires employees and directors to disclose not only interests where there could be a possible conflict, but all of their interests in general.

This is usually done on an annual basis, but also as soon as there is any change in interests.

What should be disclosed?

The South African Public Service Regulations (2016) require designated employees to disclose the following:

- Shares / equity in companies
- Income generating assets
- Trusts
- Directorships and partnerships
- External remunerated work
- Consultancies and retainers
- Sponsorships
- Gifts and hospitality
- Ownership in immovable property
- Vehicles

This is a very broad list of disclosures, and extends beyond merely assessing conflicts of interest. It contains information on movable and immovable property that also allows the employer to conduct a broad lifestyle audit. If an employee has wealth that goes beyond their salary and interests (i.e. unexplained wealth), it could be seen as a red flag that has to be investigated. Most private sector entities do not go to this extent.

Organisations differ in what they require to be disclosed. The following is a relatively comprehensive list.

- Board memberships
 - Including boards of professional bodies or not-for-profit organisations.
- Financial interests in businesses
 - Generally, excludes shares held through collective investment funds such as retirement annuities.
- Outside work
 - Paid or unpaid
- Loans or sponsorships
 - Specifically, from people or organisations who are not registered Financial Service Providers.
- Relationships in the organisation
 - Family or romantic relationships in the workplace
- Gifts and hospitality
 - This is sometimes dealt with in a separate policy and system, but can as easily be dealt with as part of general disclosures.

Disclosures must be made prior to joining the organisation, then annually, or as there are significant changes.

General disclosures are usually restricted to the employee's own interests and would not include that of their related parties or family members. As the following text box indicates, King IV gives a different view on the interest of directors' related parties.



King IV (Part 5.3, Principle 7, Practice 25)

Subject to legal provisions, each member of the governing body should submit to the governing body a declaration of all financial, economic and other interests held by the member and related parties at least annually or whenever there are significant changes.

- IoDSA, 2016


This places a massive burden on directors to pro-actively approach related parties, which might include parents-in-law, or siblings, about all their financial interests. In many families this information is deemed to be private, and it is not clear how practical this guidance would be. The Companies Act, 71 of 2008, requires disclosure only of such interests of related parties that may cause a conflict (in other words 'specific disclosures'). This seems to be a much more realistic approach, and it is not recommended that non-directors be required to follow King IV's guidance on this matter.

Who should disclose?

The regulatory framework requires directors and politicians to disclose. In the Public Service, members of the Senior Management Service, as well as other 'designated employees' are required to disclose.

A good practice would be for senior managers to be required to make a general disclosure, together with people who work in high-risk areas such as procurement, sponsorships, acquisition and disposal of property, and regulatory or enforcement roles.

What should be done with the information?

 **Information should be kept in a digital format for a due diligence process associated with third party risk management.**

Some thought needs to be given to what the organisation is going to do with this information. It serves very little purpose for an organisation to require general disclosures and then to simply file it away. One argument is that, should a conflict be discovered at a later stage, one can check whether an employee had disclosed it. If they had not, they might face disciplinary consequences. What is not clear is what one would do if they had disclosed it, but nothing was done with this information.

Ideally the information should be kept in a digital format so that it can be searched as part of the due diligence process associated with third party risk management. (See section d) below). Some organisations still make use of paper-based disclosure forms, but these serve very little value as the information cannot be digitally searched.

Many organisations require line managers or divisional managers to sign off on the disclosures submitted by their subordinates. They will typically evaluate each disclosure to determine if there is a possible conflict of interest that needs to be further managed. This will be discussed in depth under section e) 'Approval and management of conflicts'.



Confidentiality of information



Information should be confidential, and only accessed by those who are responsible for managing conflict of interest risk.

Another consideration is the privacy of the information that has been disclosed. Ideally the information should be confidential, and only accessed by those who are responsible for managing conflict of interest risk.

In the public sector there are requirements for some of the information – especially of public representatives (i.e., politicians) – to be made public. Due to the public nature of the position, it makes sense for this to happen, but there should still be a limitation on what is shared. Good practice suggests that the interests should be listed without financial information, as this gives the public sufficient information to identify a possible conflict.

b) Specific disclosures of interest

While the general disclosures process is a broad disclosure of all interests, the specific disclosure process is limited to specific interests which could pose a conflict of interest, and most likely relate to a matter currently under consideration.

In-meeting disclosures

Specific disclosures of interest are typically raised at the point of decision-making or influence, for example at a committee meeting where a specific matter is under consideration. An example would be, sitting on a selection committee and realising that my niece is one of the applicants. I would then formally raise this interest in line with the procedure set out.



King IV (Part 5.3, Principle 7, Practice 26)

At the beginning of each meeting of the governing body or its committees, all members should be required to declare whether any of them has any conflict of interest in respect of a matter on the agenda. Any such conflicts should be proactively managed as determined by the governing body and subject to legal provisions.

- IoDSA, 2016

As the King IV practice above indicates, it is not sufficient to simply disclose. The interest should be discussed, and 'proactively managed'.

Most organisations have a formal process in place for committee meetings where people disclose their interests prior to the meeting commencing. Generally, there is a form where people have to indicate if they have a conflict of interest to disclose or not.



Good practice would be for members of committees to also declare their conflicts verbally.

Good practice would be for members of committees to also declare their conflicts verbally. If this is not done the chairperson of the meeting should engage with the disclosure forms prior to the meeting commencing and determine what action should be taken to mitigate the risk.

The Companies Act, 71 of 2008, specifies that directors should recuse themselves from the decision, leave the room, and not participate in the making or execution of the decision. While this would be good practice for staff as well, one can imagine situations where the possible conflict of interest is deemed insignificant. For example – I might disclose that one of the parties that submitted a bid under consideration was in my class at university. The committee should engage with the level of conflict and determine whether it would be or be, perceived to be a significant conflict to the extent that I should recuse myself. This should be weighed against the specific expertise that I bring to the meeting and the composition of the meeting in terms of expertise and diversity.

It is important to note that specific disclosures should be made *over and above* general disclosures. In other words, even if I had disclosed an interest in my annual disclosure, I should raise it again at the point of decision-making. It is unlikely that the committee members are aware of what I disclosed in my general disclosure, and would therefore not be able to make an informed decision about how to manage the situation unless I raise it again. It should be communicated to employees that the responsibility for raising conflicts of interest always remain with themselves.

Disclose related-party interests when doing specific disclosures.

Another important difference between general and specific disclosures is that one would *also disclose related-party interests* when doing specific disclosures. For example, if I know that my brother has an interest in a company that has submitted a bid under consideration, I should raise this in the meeting.

Out of meeting disclosures

Besides raising specific interests during meetings, staff should also raise possible conflicts as they arise in their ordinary work. The following are some examples of issues that should be disclosed:

- As above, if my brother is submitting a bid there for a tender, he should disclose this in the bidding documents. I should also raise this if there is any concern about perceived conflicts.
- A manager should make a specific disclosure if they start to date one of their subordinates.
- An employee should disclose when their spouse is promoted into a position at their company, causing them to be the relationship manager with the spouse.

There should ideally be a specific way for employees to raise these interests. The easiest way is for them to raise it in writing with their line manager. Some organisations use electronic disclosure systems for their general disclosures. These specific disclosures can then be disclosed using the same system.

c) Gifts and hospitality



Excessive gifts and entertainment can cause an employee to give preference to the gift giver above other candidates.

Gifts and hospitality are sometimes governed by a separate policy and procedure. It should, however, be kept in mind that the reason we are concerned about gifts and hospitality is because it may cause bias in recipients. Excessive gifts and entertainment can cause an employee to give preference to the gift giver above other candidates, or to abuse their power in the interest of the gift giver. In other words, it can create a conflict of interest.

Organisations differ vastly in terms of their approach to managing gifts and hospitality. Some have a zero-gift policy, while others simply require the disclosure of all gifts. A good middle ground would be that all gifts above a certain cumulative value per year, should be disclosed. The employee's line manager should sign off on anything above this value. Some gifts that are deemed excessive should be returned, or if this may be considered offensive, can be donated to a charity.

Hospitality, such as travel and accommodation should be pre-approved by line managers. Most organisations however have policies that specify that travel and accommodation will be paid for by the organisation itself if it deems the trip to have a business purpose.

If the organisation has a good online disclosure process that automatically escalates certain decisions to the appropriate manager, it makes sense to also use this process for the escalation of gifts and hospitality decisions.




d) Due diligence

More and more organisations are completing due diligence checks on their suppliers, third parties and intermediaries. The purpose of such exercises is to protect themselves from business and reputational risk. Many international anti-corruption laws require that organisations make sure that the people they do business with are legitimate, are not

involved in money laundering or corruption, or even human rights or environmental abuses. For this reason, it is also important to know who the beneficial owners of organisations are so that possible risks of doing business with Politically Exposed Persons (PEPs) or Prominent Influential Persons (PIPs) can be managed.

For the purposes of this handbook, we are more interested in utilising the due diligence processes to avoid doing business with staff or managing other possible conflicts of interest.

The following due diligence checks can be performed to determine possible conflicts:

-  - Checking whether staff have disclosed all their interest by verifying the disclosures (based on their ID numbers) against the records of the Companies and Intellectual Property Commission (CIPC);
-  - Checking company registration numbers of suppliers and potential new suppliers with those disclosed by staff;
-  - Related party transactions (e.g., having shares in business partners) can be analysed for frequency of work given to them, or the value of their contracts.

There are service providers that conduct these checks and who can go even further to ascertain if the company is doing business with family of staff members. From a protection of personal information perspective, it is important that only publicly available information, or information disclosed by staff for this specific purpose be utilised for such checks.




It is important to note that information obtained from the CIPC may be out of date. One should therefore first approach employees about their interests before accusing them of wrongdoing.

e) Approvals and management

As was indicated above, the disclosure of interests, as well as due diligence processes are merely the first step of managing conflicts of interest. They serve to increase transparency so that conflicts can be appropriately dealt with.

Who approves interests?

 The two main approaches are that it be done centralised (for example by the Ethics Officer), or that it be done decentralised by line managers or divisional managers.

There are various approaches as to who considers the interests that have been disclosed. The two main approaches are that it be done centralised (for example by the Ethics Officer), or that it be done decentralised by line managers or divisional managers.

The benefit of centrally approved disclosures is that one is likely to achieve greater consistency in how matters are dealt with across the organisation. On the downside, the Ethics Officer is unlikely to know the ins and outs of an employee's tasks, and may not be as informed when making the decision. They will therefore still have to consult with the employee and the manager in making the decision. In large organisations it can mean that dedicated staff will have to be appointed simply for managing conflicts of interest.

For this reason, many organisations specify that line, or divisional managers be the ones that approve or decline the interests of their subordinates. This, however, requires that these managers be trained on the principles of conflicts of interest so that they can make informed decisions. Even with training, managers find themselves out of their comfort zones, and many cases are still referred to the Ethics Office.

Some organisations require the manager to make a recommendation, while the final decision is taken by the Ethics Office. In other organisations managers take the decision, and the Ethics Office monitors a sample of the decisions annually. This monitoring is an essential step to indicate to managers that their decisions are important and will be scrutinised.

What if interests are declined?

In many cases the general disclosures of interest may be signed off without incident as none of the interests are deemed to conflict with the employee's professional responsibilities.

There will however be cases that are deemed to pose a conflict of interests and that have to be managed one way or another.

Some mitigation measures that can implemented include the following:

- The employee can *recuse* themselves from the decision-making process, or be removed from the process. This is an obvious solution for once-off decisions. Care should however be taken to ensure that there is not the perception that influence was nevertheless wielded by the employee – specifically if they are in a senior position.
- The employee can be *transferred* to another area of operations. For example, if my romantic partner is my direct manager, the situation could be resolved by one of us transferring to another division.
- The employee can *disinvest* from the interest, or step down from an external position.
- *Independent third-party oversight* can be brought in. This might have cost implications and is not an ideal long-term solution for recurring conflicts.
- The employee might need to choose between their current employ and their external interest. This might mean that they need to *resign* if there is no other solution.

Sometimes certain interests can be allowed to continue, provided that it does not interfere with an employee's performance and duties. For example, if I am moonlighting in a part time second job, there is the potential that it can interfere with my ability to do my job according to standard. In such cases an employee's manager will have to monitor their performance to ensure that it does not deteriorate as the interest continues. This can be included in quarterly performance conversations.

Sometimes the best way of managing the conflict is to ask the employee for their view on the way forward. Employees frequently understand the conflict and come up with viable solutions.

It is important to be fair when making decisions. One should keep in mind that you are dependent on employees for being transparent, and they are unlikely to come forward if your approach to conflict of interest management seems unnecessarily strict or unreasonable.

Appeals and escalation

Policies should allow for decisions to be taken on review or escalated. Such review decisions are often taken by the Ethics Officer if the line manager was responsible for the first decision. Alternatively, an operational Ethics Committee can be responsible for oversight on escalated matters.

3.4. Training and awareness

When managing organisational risk, we refer to the hard control environment and the soft control environment. The hard control environment would include all the processes set out above, whereas the soft control environment would be the culture of transparency in the organisation, and the general sense of self-awareness and integrity that leaders and staff have in terms of avoiding conflicts of interest.



Training and awareness will be critical to raise awareness of the policy and procedures, but should also be used to influence the general understanding of conflicts of interest so that people internalise this in their decisions-making.



A good training programme will target all staff that may need to disclose.

A good training programme will target all staff that may need to disclose. As indicated earlier, when managers are required to make decisions on their staff's interests, they will also require special training that uses scenario-based exercises that get them to practice their decision-making skills.

Since it is impossible to describe every conflict of interest situation, and each situation is likely to differ somewhat, it can be challenging to evaluate possible conflicts of interest situations. While the legislation and organisational policy prescripts will provide some guidance, one may still need to apply additional judgement in making determinations.

As a result, managers and employees often require guidance when making such decisions.



Employees should be encouraged to escalate their potential conflicts of interest.

Employees should be encouraged to escalate their potential conflicts of interest by transparently disclosing them. Managers will however need to make a determination on whether a situation poses a conflict, and if so, how it should be managed. Managers must evaluate the general disclosures made by their employees every time it is updated, and may also be the ones to make a call when a specific disclosure is made.



In many organisations the Ethics Officer will be required to either provide oversight of the decisions, or to make the final call based on recommendations from managers.

4.1. Regulatory and policy considerations

A good starting point for evaluating conflicts is the regulatory and policy environment.

As indicated in section 2.6 which deals with the regulatory environment, this can differ significantly from one sector to another, and one needs to study the prescripts that are applicable to one's sector. At its broadest, the common law principle of good faith to the employer would apply to all sectors, and this should always be considered as the most basic requirement.

When utilising regulation or policies, one should be careful of getting caught up in the minutiae of the rules. One should first assess the situation against the broader principles that generally deal with good faith, objectivity, and transparency. The remainder of the rules generally give clarity as to how these broad principles should be applied.

Furthermore, it is important to apply each prescript to the purpose for which it was intended. For example, the policy might say that one should do a general annual disclosure for oneself and close family. This should not be interpreted to mean that a conflict can only occur when there is close family involved. If I have to investigate a close friend, it would undoubtedly put me in a difficult situation. One should go back to the broad principle and assess whether the person can be deemed able to apply their mind objectively to the situation.

Another example where rules are mis-applied relates to the financial limits of gift disclosures. If a gift of above R350 requires permission, it does not automatically mean that anything below R350 would be acceptable. It again needs to be measured against the broad principle of whether it influences decision-making. One can see how a 'gift' of R200 can be deemed to influence a traffic officer, regardless of the gift limit set by the regulations.

Disclosure requirements are introduced to raise transparency levels. As such, the act of making a disclosure is simply the first step in managing a conflict. Having made a disclosure does not automatically make the conflict disappear.

4.2. Principle-based considerations

When considering broad policy statements there should at least be some principle-based criteria to guide managers when making conflict of interest decisions. This is to avoid managers being overly lenient or overly strict when applying the policy. One wants to reach a point where decisions are made fairly and consistently across the organisation.

The following list of questions can be a useful checklist to consider:

		YES	NO
1	Will the employee be competing with the employer?		
2	Is the employee seeking to do business with the employer?		

		YES	NO
3	Is there a potential to abuse organisational influence to benefit the employee?		
4	Is there the potential for the abuse of confidential information?		
5	Will the employee be conducting work with employer's clients?		
6	Is there a possibility of reputational damage to the employer?		
7	Will the employee be using organisational time and resources to further their own interests?		
8	Will the employee still have sufficient time and energy to do their work?		
9	Is the employee's current work performance up to standard?		

This checklist should be used to guide decision-makers in making informed choices. A 'yes' may not necessarily mean that an interest is automatically declined.

One needs to keep in mind that the reason we manage conflicts of interest is to protect the interest of the organisation. We should therefore, after all is said and done, ask the question of '*what is in the best interest of the organisation?*'. It may be that an employee has a sideline business, but they are the only supplier in a specific area, and using another supplier might pose significant additional costs. In such a case it might be in the best interest of the organisation to do business with the employee, and manage any potential conflicts that may arise.

Other lenses that could be used are:

1. Materiality

- How material is the decision to the organisation?
- How material is the impact on the employee, and as a consequence, how likely is it to affect the employee's decision?

2. Extent of discretion
 - How much discretion does the employee have to influence the decision by themselves? Can they make the decision, or are there others who would balance their views?
3. Perceived influence
 - How senior is the person involved, and how likely is it that people will suspect undue influence?

Conflict of interest decisions will invariably still require significant judgement. The only way to develop judgement is to practice, and to discuss one's decisions with colleagues and peers.

Conclusion

While there are many procedural issues that are important to mention when discussing the management of conflicts of interest, one should never lose sight of the big picture. At the end of the day, one wants to build an organisational culture where employees fulfil their obligations in good faith and with professionalism, where they are transparent when conflicts arise, and deal with such matters with integrity.

We should consider this when designing our conflict of interest management processes. We should avoid systems that do not make employees consider the ethics of their actions, but just whether they are following procedure.



Yes, it is important to try to catch the bad apples, but we should avoid removing the morality from work in the process.

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Conflict of Interest Handbook

Every act of corruption entails a conflict of interest. In South Africa, and globally, organisations are more than ever aware of their responsibility to manage conflicts of interest effectively.

This book builds on numerous consultations with organisations who have walked the hard miles in developing their conflict of interest management systems. It is aimed at those who are responsible for managing conflicts of interest in their organisations, be it in the public or private sectors.

It is divided into three sections:

1. **Understanding conflicts of interest**

This section defines conflicts of interest and gives a vocabulary for talking about different types of conflicts with examples. It also sets out the South African regulatory and common law environment dealing with conflicts of interest.

2. **Managing conflicts of interest**

This section gives guidance on considerations and approaches to managing conflicts of interest in organisations. It discusses policies, procedures and systems for managing conflicts of interest.

3. **Making conflict of interest decisions**

This section considers the thinking process of evaluating and resolving individual conflict of interest situations.

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