

The Complete Compliance and Ethics Manual 2023

Conflicts of Interest: Evaluating Outside Board of Director and Advisory Service Roles

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Evaluating outside board of director service for your own organization's employees begins with the underlying presumption that directors with board oversight responsibility have a triad of fiduciary duty—good faith, loyalty, and due care.^[2] Public policy also generally asserts that directors protect the interests of their organization. This means they must refrain from doing anything that might injure or deprive it of profit or some advantage that a director could provide by virtue of their board service. This unwritten rule therefore requires an undivided *loyalty* to the organization, meaning that the director has no conflict between that duty and self-interest. Self-interest can and most likely will include personal income derived from employment at your company, which will also demand a duty of loyalty.

Recall that the definition of a conflict of interest pits the personal interest with the interests of another to whom one owes some duty. The tension that will result from the loyalty to one's company or employer and the fiduciary duty assumed by serving on an organizational board of directors gives rise to the need to identify board service as a potential conflict of interest.

Risk Identification and Board Service Types

The compliance program will not only need policies and disclosure forms, but also specific analysis of the inherent risks that materialize as a result of that tension. The simultaneous demand for loyalty requires a targeted assessment to determine whether the outside board service and employment create too high a risk of an employee breaching a duty of loyalty to your organization.

When establishing an approach to outside board service by employees, the most fundamental question to ask is, "Does our conflict of interest policy permit outside board service, or does that activity in and of itself conflict with this organization's policy and expectations concerning an employee's duty of loyalty?" The answer to that question will vary according to an organization's risk tolerance. It should also help form a conflict analysis framework for these types of disclosures.

There are different ways to assess the risk that outside board service may pose to an organization. A tactical questionnaire designed to match organizational board types may be integrated into the initial employee disclosure forms or the documented conflict analysis review performed by the ethics and compliance function.

Standard board service organization types include, but are not limited to, the following:

1. Public company board
2. Private company board
3. Advisory board (i.e., consultative in nature)
4. Nonprofit board, as determined by the U.S. Internal Revenue Service

- 501c3:^[3] Examples include the national and local United Way or Boys & Girls Clubs organizations
- 501c4:^[4] Examples include social welfare organizations, such as volunteer fire departments or organizations that lobby politically for social welfare causes^[5]
- 7501c6:^[6] Examples include trade or business league associations, such as American Institute of Certified Public Accountants (AICPA)^[7]

The risks associated with organizational board service categories will vary. At a minimum, disclosures for out side board service or requests for approvals should be evaluated for competitive threats, competing resources, personal benefit, and antitrust risks. At the outset of the analysis, ask the following questions:

- Does this board service pose a competitive threat, whereby this organization is involved in the same or similar industry or line of business as the employee's company or organization?
- Could the employee be at risk or susceptible to disclosing trade secrets or competitive/confidential business information in the course of fulfilling their board service?
 - What type of information does this employee have access to? Are they an executive with access to information that must be strictly guarded against disclosure or use outside the company? For example, has this employee signed a confidentiality agreement prohibiting outside activities such as board service due to potential disclosure risk?
 - Will this board service potentially disrupt the employee's existing workload or schedule due to board-level responsibilities, including meetings, travel, or board officer-level duties?
 - Will the employee interface with employees at competitor companies where they might be discussing trade or industry topics?
 - Does the employee's company or organizational human resource policies permit volunteer or paid board service, and is paid board service interpreted as outside employment subject to any additional employment or management approvals?
 - If your organization is a public company, do your organization's board officers who serve on outside boards require any governance-related disclosure or filing, such as a proxy statement?
 - For community-related nonprofit organizations, does the employee have access to company funding that could be donated to fulfill board member fundraising obligations?
 - If your organization is a public company, does your board officer disclosure process include a conflict of interest question that covers outside board service?

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