

A Practical Approach to Establishing and Maintaining
A Values-Based Conflicts of Interest Compliance System

by

Prof. Mark Davies *

[PowerPoint Slide 1]

Introduction

I have distributed an outline, which I'll follow. I have also distributed a long article from which these remarks are extracted. The outline, article, these remarks, and the accompanying PowerPoint slides are on our website: <http://www.nyc.gov/ethics> on the Publications page, listed at the top left of our home page, and then under International. You may contact me at davies@coib.nyc.gov or through our website ("Contact Us").

We are gathered at a Global Forum on Fighting Corruption, but I am here to speak on behalf of our honest public servants.

Let me ask you: how many of you believe that most of the public officials in your country are dishonest and corrupt? How many of you believe that most of your public servants are crooks?

At the New York City Conflicts of Interest Board, we have welcomed visitors from 55 countries on six continents, from the richest countries to the poorest, from every form of government – and not one of those representatives, not one, has ever said that most of their public officials are corrupt.

Just the opposite - they believe that most of their public officials are honest. No matter how big a problem corruption is globally, most public servants around the world are basically honest.

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So what are we doing for these honest public servants?

Are we giving them guidance on how to stay out of ethical trouble? Are we protecting them against superiors or co-workers or outside companies that try to lead them astray? Are we reassuring our citizens that our public servants are serving the public and not themselves? Do we have a system in place that keeps our honest public servants honest and that discourages dishonesty, not by punishing it but by preventing it? Are we creating a culture of integrity, not out of a fear of being caught but out of a commitment to values?

That is what an effective conflicts of interest system does. And that is why it is so critically important. Yet, too often in our concern about corruption and our rush to fight corruption, we fail to address the needs of our honest officials.

In my country we have a saying: “We can’t let the tail wag the dog.” If most public servants are honest – and if we wish to keep them that way – then we must provide them with an effective conflicts of interest system. [Slide 2] We cannot let that little tail of corrupt officials wag the great big dog of an honest public service.

Now, I do not wish to minimize in any way the importance of criminal anti-corruption laws, against bribery and kickbacks and theft of government funds and the like. And I do not wish to minimize in any way the enforcement of those laws by undercover agents and wiretaps and sting operations. I am not suggesting that criminal anti-corruption efforts are not important. They are very, very important. We all know the devastating impact that corruption can have in our countries. But criminal anti-corruption efforts are not enough.

Because enacting criminal anti-corruption laws and prosecuting corruption may convince the public that we are serious about fighting corruption but it will never, never convince the public that government is honest.

Mayor Bloomberg in New York City is a billionaire. And when he was first elected, we received phone calls from all over the world and there were stories in newspapers all over the world suggesting it was a conflict of interest for him to own all that he owns and be mayor of the City of New York. Those phone calls and those stories stopped the day after our agency issued an advisory opinion approving the plan we worked out for the mayor to avoid conflicts of interest. In other words, a conflicts of interest system can help create a sense of public

confidence in the integrity of public officials, even while other officials are being investigated and prosecuted for corrupt activities. Criminal anti-corruption efforts can never do that because they focus on dishonesty and punishment, but a conflicts of interest system focuses on honesty and prevention. What I am suggesting is this: that every nation, from the richest to the poorest, from the least corrupt to the most corrupt, must have an effective conflicts of interest system in place if the public is ever to have confidence in the integrity of that nation's government. By having both effective criminal anti-corruption efforts and an effective conflicts of interest system, the government can, over time, convince the people that, while instances of corruption may exist, the government is working to root out those instances of corruption and that despite those instances of corruption the government, as a whole, is honest.

We had a visitor from a certain country one time, who, after listening to our presentation on New York City's conflicts of interest law, told me that New York City's rule on gifts would not work in his country because in his country it's the custom, when a government official does something for you, to give that official a goat. I asked, "But what if I can afford only a chicken?" "Ah," he said, "That's a problem."

It is a problem all right. In fact, conflicts of interest are a problem in every one of our countries. And amazingly, the kinds of problems are remarkably similar. Now the solutions may be very different, but the problems are amazingly the same. Gifts, misuse of office, post-employment (revolving door), nepotism, moonlighting, and so forth.

Let me make one thing very clear right up front. I am not saying that New York City has all the answers. In fact, we don't even know all the questions. And in New York City we have a lot of conflicts of interest. For example, our Board found that a former Police Commissioner violated the conflicts of interest law; and our Board has fined another former Police Commissioner, our former welfare commissioner, former comptroller, and former cultural affairs commissioner, not to mention dozens of other officials. We fined the former sheriff \$84,000 for running a private law practice out of the sheriff's office. So far this year, our little agency has received over 160 complaints of conflicts of interest – that's not criminal corruption; that's just conflicts of interest, in one city.

The point is: the people view New York City's government as honest, despite these instances of conflicts of interest and occasional corruption scandals. That is not true, for example, in Philadelphia, which people seem to view as

corrupt. I believe the difference comes from the fact that in New York City we have an effective conflicts of interest system. In Philadelphia, they do not. [Slide 3] Despite instances of corruption and conflicts of interest (which we will always have), an effective conflicts of interest system can help convince the public and public officials that their government is inherently honest.

So, out of all this, I would like to spend the next 20 minutes or so talking about what I believe is one approach – a framework, a skeleton, if you will - for a conflicts of interest system that I assert will work in almost all of our countries, regardless of culture, government, wealth, history, or amount of corruption. This is not the only system that will work, but I believe it will work. That is an audacious claim, but I'm making it.

Purpose and Principles of Conflicts of Interest Systems

I would first like to spend a couple minutes on the purpose and principles of a conflicts of interest system. [Slide 4] And by “conflict of interest” I mean divided loyalty – that is, a conflict, usually (though not always) a financial conflict, between one's private interests and public duty.

[Slide 5] As I see it, the purpose of a conflicts of interest system lies in promoting both the reality and the perception of integrity in government by preventing conflicts of interest before they occur. Inherent in this purpose are certain basic principles against which we must measure every government conflicts of interest system. Indeed, it is important to understand not only what such a system is but also what it is not. If we expect this system to do what it is not designed to do, we will be very disappointed. Unfortunately, few of our public officials, and even fewer of our citizens, understand these underlying principles. But until we understand what a conflicts of interest system does and does not do, we cannot possibly draft, implement, interpret, or enforce an effective conflicts of interest program. It is not possible.

We can identify, I believe, at least eight fundamental principles that underlie an effective conflicts of interest system. [Slide 6]

A conflicts of interest system:

- Promotes both the reality and the perception of integrity in government;
- Focuses on prevention, not punishment;

- Is not intended to catch crooks but instead recognizes the honesty of the majority of public officials;
- Does not regulate morality (in most countries);
- Does not focus on efficiency but does save the government money;
- Requires that the public have a interest in the system;
- Must be tailored to the particular nation, society, and culture; and
- Must undergird the essential values of the nation.

Briefly, let me talk about each of these.

First, a conflicts of interest system seeks to promote not only integrity in fact but also the public and private perception that those in government are acting with integrity. Whatever system of government a nation has, how can that government function effectively if the public believes that its officials are corrupt, even if they are not?

Second, in sharp contrast to criminal anti-corruption laws such as bribery and kickback statutes, a conflicts of interest system focuses not on punishment but on prevention. The goal lies not in punishing a conflict of interest after it occurs but in stopping that conflict of interest from ever occurring, because once the conflict occurs, the damage is done. With this system, we do not want to punish a violation of law; we want to stop that violation from ever occurring. Prevention is what this is all about. That is why conflicts of interest advice and education are so critical.

Third, a conflicts of interest system is not intended to catch crooks. These systems are not so much anti-corruption as they are pro-integrity. Indeed, these systems assume that the vast majority of government officials are honest and want to do the right thing, and that's a fact.

Fourth, in most countries, though not in all, a conflicts of interest system does not regulate morality. Often conflicts of interest laws are referred to as ethics laws, but that is a misnomer. In most countries, so-called ethics regulations are not really about ethics at all, in the sense of right and wrong, good and evil, moral and immoral.

Fifth, a conflicts of interest system is not really intended to punish inefficiency. Yet, at the same time, this system does save money, for example, by preventing a government official from giving an inflated government contract to his brother's company. And small businesses should love these rules because small businesses cannot afford to send government officials to Majorca in winter. So while

a conflicts of interest system has no announced economic intent, it does have a positive economic impact.

Sixth, regardless of the type of government the nation has, the public, including private citizens and companies, should have a stake in the conflicts of interest system. But in most jurisdictions in the United States, for example, a private company can give a gift to a public servant. If the public servant accepts the gift, he or she may well violate the conflicts of interest law, may pay a big fine for that violation, and may even lose his or her job. But, as long as the gift is not a bribe, the company will pay no penalty at all. That is an outrage: It is unfair to the public servant; it undermines support for the conflicts of interest system; it encourages private companies to get around that system; it makes public officials feel unprotected in the face of attacks from outside the public service; and thus it promotes disrespect for integrity in government.

Oh, and by the way, I don't accept that argument that the culture can't be changed. The culture can be changed. Perhaps some of you remember the film *Serpico*. In the 1960's and early 1970's, New York City had horrendous police corruption. But the culture was changed.

Seventh, conflicts of interest problems appear strikingly similar throughout the world; and thus a template, a framework, a skeleton for a conflicts of interest system that is globally uniform exists. But the solution of conflicts of interest problems within that system must be tailored to the particular nation, society, and culture. For example, one country in this hemisphere adopted a conflicts of interest law from a jurisdiction in the northern hemisphere, and it didn't work. That should surprise no one. If someone were to tell me their country was just going to adopt New York City's conflicts of interest law, or even the model law in my written materials, I would say they're crazy. What works in New York City, for instance, may be a disaster in Thailand. There is no easy way to establishing a conflicts of interest system; it is a long hard road. But as those of us in government know, the process is just as important as the product. By the way, here's an interesting example of tailoring a conflicts of interest provision to a particular place: Recently, in the Chinese city of Nanjing, 95% of the officials convicted of corruption were found to be having extramarital affairs, so the city ordered its politicians to confess their extramarital affairs so they couldn't be blackmailed. I'm not sure I'll suggest that in New York City.

And finally, eighth, perhaps most important of all, a conflicts of interest system must undergird, must reinforce, the essential values of the nation.

The Antiquity of Conflicts of Interest Systems

Since conflicts of interest systems are so important, we should not be surprised to learn that they go back not just centuries but millennia. In the United States, conflicts of interest regulation originated largely in contracting scandals during the American Civil War. In Germany, formal conflicts of interest regulations date back at least to 18th century Prussia. In France, Louis IX (Saint Louis) issued comprehensive governmental conflicts of interest restrictions in 1254. In the Qur'an, there are over 50 verses addressing corruption. The Hebrew Scriptures are replete with conflicts of interest concerns, as when, for example, God condemns the house of Eli and ousts them as priests at Shiloh because they convert for their own use the people's sacrifices.

In China, the ethical principles of K'ung Tzu, known in the West as Confucius, principles that precluded corruption, had become the foundation of the public service by the Han Dynasty in the 3rd Century B.C.E. Over 2,500 years ago, the Buddha enjoined bribery. Over 3,700 years ago, the Code of Hammurabi contained punishment for improper official conduct; for example, a corrupt judge suffers a stiff fine and removal and permanent debarment from holding judicial office. And throughout the ancient Hindu texts run threads of anti-corruption, for example, in the concept of artha, which includes good government ("The tyrant's request for gifts from his people is like the armed highway robber's demand couched in the language of politeness").

So what I am saying today is, I admit, very, very old news.

Values-based and Compliance-based Conflicts of Interest Systems

Having talked about the purpose and principles of conflicts of interest systems, let me discuss the bases of those systems. Those who structure government conflicts of interest programs have developed two main approaches, approaches that most see as competing and incompatible. In fact, I would suggest that these two approaches are inextricably linked, a sort of yin and yang of a conflicts of interest system.

The first, inherently Western (even U.S.)-based approach requires a compliance-based system. In a compliance-based conflicts of interest system, laws and regulations (rules) prohibit specific interests and conduct. [Slide 7] For example: "A public official shall not accept a gift from any person or firm doing business with the government." This approach offers one substantial benefit: it gives

clear guidance to public officials on what actions are permissible and what actions are not permissible. But this approach has two overwhelming drawbacks. First, it transforms correct government conduct into a series of rules – “don’t do this; don’t do that.” As a result, a compliance-based approach is divorced from values and ethics. But it is values and ethics that promote a public service that is not merely non-conflicted but that is affirmatively devoted to advancing the public good. Since in a compliance-based system what is not prohibited is allowed, that system invariably focuses officials’ attention not on doing what is right but on not doing what is wrong, not on doing one’s best but on not doing one’s worst. Second, as a related point, a compliance-based conflicts of interest system cannot promote the essential values of the nation because rules are negative whereas values are positive. Rules do not inspire. Values inspire.

The second approach to a conflicts of interest system is values based. A values-based conflicts of interest system exhorts public officials to strive for and attain certain standards. For example: “Public officials shall place the interest of the public before themselves.” Properly crafted, this approach clearly promotes essential national values. It also encourages the official always to strive toward an ideal, not to do the ethical minimum but to do the ethical maximum. Such a system properly deserves the name not merely of a conflicts of interest system but of an ethics system; by promoting values, not merely rules and regulations, it instills ethical standards in public officials. But a values-based conflicts of interest system possesses one devastating drawback: it provides no clear guidance to public officials as to what is and what is not permitted in actual, real-life circumstances; therefore, it also offers little reassurance to the people that their public officials are in fact acting in the public interest.

So, both compliance-based and values-based conflicts of interest systems contain significant defects. [Slide 8] The answer to this problem lies in transforming these two, apparently contradictory systems into a single unified whole. [Slide 9]

This shouldn’t surprise us. Many of our professional codes do this very thing – like codes for lawyers or doctors or accountants. India’s rules for lawyers follow this format.

So, too, a values-based conflicts of interest compliance system [Slide 10], combining both the yin of a values-based approach and the yang of a compliance-based approach, should first set forth a values-based Code of Ethics for Public Officials, which draws upon, reflects, and reinforces the essential values of the nation. Then out of that code of ethics should be drawn specific, compliance-based

conflicts of interest rules; and violation of those rules should result not only in disciplinary action but also in civil fines and, in appropriate cases, criminal prosecution.

By the way, we should not fall into the trap of saying: all of our public officials are professionals, so we can just have a values-based code of conduct. That won't work if only because most of our citizens are not professionals – our citizens have rules, and they want rules for their public officials. So we need a system based on both: values and rules.

For example, in a country whose law is based upon Shariah, which is drawn from the Qur'an and other Muslim religious sources, the code of ethics would lay out those principles from the Shariah that address conduct by public officials, particularly the concept of FASAD (which I am told means corruption). And then out of the principles enjoining FASAD in the Shariah may be drawn specific legal prohibitions on conflicts of interest. Those legal prohibitions will address the same issues as similar legal prohibitions in other countries with very different cultures and traditions, although, again, the substance of the prohibitions must be tailored to the particular society.

Cautions

Before I turn to the specific structure of a conflicts of interest system, I would like to note two big warnings from my own experience. First, we should approach academic articles on conflicts of interest programs with great care. With all due respect to scholars (and I have been a law professor myself for over 20 years), most academic pieces on conflicts of interest laws display an appalling ignorance of how these laws work in practice. A conflicts of interest program is not some kind of glass bead game. When a government enacts and enforces a conflicts of interest system, it interferes in people's lives in a very fundamental way, where even a hint by the enforcing agency that an official may have engaged in improper conduct can destroy a career or throw an election or rob a public official of his or her livelihood. A conflicts of interest system is serious business.

Second, we must never let the perfect be the enemy of the good. If we wait to establish a conflicts of interest system until we can set up the perfect system, then we will never set up any conflicts of interest system at all. A good system is better than no system. At the same time, a poor conflicts of interest system is worse than no system at all. If we cannot meet certain minimal requirements in our conflicts of interest system, then we should not set up a conflicts of interest

system. Time and again I have seen a poor system generate substantial, ultimately overwhelming, criticism and undermine public confidence in the integrity of government.

So, now, with the fundamental purpose of conflicts of interest laws and their underlying principles in mind, and mindful of the need to ensure that conflicts of interest rules reflect the values of the society, let us turn to the structure of an effective conflicts of interest system.

The Structure of an Effective Conflicts of Interest System

An effective conflicts of interest system rests upon three pillars or legs, like a three-legged stool. [Slide 11] The first pillar or leg is a clear and comprehensive conflicts of interest code derived from a values-based statement of the public duties of public officials. The second pillar or leg is sensible disclosure – transactional disclosure, applicant disclosure, and annual disclosure (asset declaration). The third pillar or leg is effective administration – a conflicts of interest board or office that provides quick answers to questions about the conflicts of interest code, that trains officials in the requirements of that code, that regulates disclosure, and that enforces the code. If we remove of *any* of these pillars [Slide 12], the entire structure will collapse [Slide 13].

A conflicts of interest system that does not meet these requirements – for example, that lacks an effective enforcement mechanism – is not only a flawed system; it is a bad system. And, again, a bad conflicts of interest system is worse than no conflicts of interest system at all.

Appendix A of my written materials has a possible model conflicts of interest law.

First Pillar: Conflicts of Interest Code

The first pillar of a conflicts of interest system is the conflicts of interest code. Again, in order to provide clear guidance to officials and reassurance to citizens, this code will be compliance based, but it must be derived from the essential values inherent in the national ethics fabric. Indeed, in many societies, a conflicts of interest code will be unintelligible apart from those national values. Therefore, the government may wish to set forth, as the very first section of the conflicts of interest law, a clear statement of the values from which the conflicts of interest code is derived. Depending on the particular society, this statement itself

may come from a fundamental religious or spiritual work (e.g., the Shariah, the Hebrew Scriptures, the Upanishads, or the teachings of the Buddha), from a political or human rights work widely accepted in the country (e.g., Declaration of the Rights of Man and of the Citizen from 1789 or Universal Declaration of Human Rights or even Das Kapital), from a cultural or ethical work (e.g., Analects of K'ung Tzu), or from a compilation of expressions on the duties of public officials.

The conflicts of interest code forms the heart and soul of a conflicts of interest system. The code must be clear, comprehensive, straightforward, sensible, and short and must set out an inclusive list of do's and don'ts that will guide and protect public officials. Simple and sensible. Public officials cannot obey a code they do not understand and will not obey (or only grudgingly obey) a code that does not make sense to them. In the world of conflicts of interest, common sense is king, and queen.

Whenever possible, a conflicts of interest code (in contrast to the code of ethics) should contain bright-line rules [Slide 14] – that is, clear and unambiguous rules. If the primary purpose of the conflicts of interest system lies in preventing conflicts of interest, then public servants must know exactly what it is that they may not do.

Exceptions and definitions should never go in the conflicts of interest code. We should put them in separate sections. They're too confusing for non-lawyers – and most public officials are not lawyers. The idea is this: if the public servant reads only the code itself – nothing else (not the definitions and not the exceptions) - and complies with the code, then he or she will never violate the conflicts of interest law.

The conflicts of interest code must fulfill the purpose and the principles I talked about before. If possible, the code should set a minimum, uniform standard for all government officers and employees, with perhaps some stricter standards for certain high level officials. Every public servant deserves a conflicts of interest code, from the man who sweeps the floor to the president of the country.

The goal is a conflicts of interest code that contains a simple and complete list of do's and don'ts that a public official (without a lawyer) can understand, that can be posted on the wall of government offices, that government employees can point to when a co-worker or superior or private citizen or company asks them to violate the law, and that a high-level official unjustly accused of a conflict of interest can hold up to the accuser and show that in fact what the official did was not a conflict of

interest. A clear and comprehensive conflicts of interest code can be a public official's best friend because it tells the official what the rules are and keeps him or her out of trouble.

A list of the most significant provisions, in my opinion, in a conflicts of interest code would include those on the screen [Slides 15 and 16]:

- Using one's government office for private gain
- Using government resources for non-governmental purposes
- Soliciting gifts or accepting gifts from persons doing business with the government
- Seeking or accepting private compensation for doing one's government job (gratuities)
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job (except as expressly permitted by law)
- Disclosing confidential government information or using that information for a private purpose
- Appearing before government agencies on behalf of private interests or representing private interests in government matters
- Seeking a job from a private person or firm with which one is dealing in one's government job
- After leaving government service,
 - Appearing on behalf of a private employer before one's former government agency or
 - Working on a matter on behalf of a private employer that one worked on while in government service
- Inducing other government officials to violate the conflicts of interest code.

There are many, many other possible provisions, some of which might be critical in the particular society, like prohibitions on certain political activities or nepotism. The written materials have a list of possible provisions.

Finally, the government may wish to consider imposing restrictions on private citizens or firms to ensure that they have a stake in public officials complying with the conflicts of interest code and to protect officials against coercion to violate the code. Specifically, the government may wish to include in

the conflicts of interest system restrictions on private persons and firms causing an official to violate the conflicts of interest code.

Second Pillar: Disclosure

The second pillar of an effective conflicts of interest system is disclosure. Conflicts of interest systems typically include three kinds of disclosure, which should work together to provide an effective disclosure system:

- (1) Transactional disclosure;
- (2) Applicant disclosure;
- (3) Annual disclosure.

(1) *Transactional disclosure.* The most important kind of disclosure is transactional disclosure, which occurs when a potential conflict actually arises. Transactional disclosure is often accompanied by recusal, that is, disqualification of the disclosing official from dealing with the matter. For example, suppose that an official in the Bridge Division of the Ministry of Transportation who is responsible for evaluating proposals for bridges has a brother whose company is seeking a contract with the Ministry to construct a bridge. The official should be required to disclose the fact of his family relationship with the company and should also recuse – disqualify - himself from working on that project: "One of the contractors who is bidding on our agency's bridge contract is my brother; so I recuse myself from this matter." Rarely should a public official object to this kind of disclosure.

(2) *Applicant disclosure.* Applicant disclosure is disclosure by a private person or non-government entity that is bidding on government business or requesting a permit or license from the government. The purpose of this kind of disclosure lies in making government officials aware of their own possible conflicts of interest and in alerting other government officials, other bidders or applicants, and, where appropriate, the public and the media, to possible conflicts of interest. Applicant disclosure therefore serves as a "check" on transactional disclosure. This type of disclosure also serves to give the public and private firms some stake in public officials complying with the conflicts of interest code.

(3) *Annual disclosure.* Annual disclosure is also known as financial disclosure or asset declaration. This form of disclosure exists in governments throughout the world. Annual disclosure discloses once each year certain basic information about the filer's finances, such as the names of his or her private employer or business (if any). It is by far the most common form of disclosure, the

most controversial, the most misunderstood, and the most abused. Yet sensible annual disclosure that complies with the purpose and principles I talked about before is critical to an effective conflicts of interest system.

The problem is, in my experience, that many, many governments, including New York, have adopted annual disclosure forms that do not meet these purposes and that, in particular, require far too much information from far too many people, information that is often of little help in preventing conflicts of interest. Governments do this, in my experience, because they are under enormous pressure to do something about corruption, and disclosure is a quick fix: hey, look, we've got disclosure. And a lot of that pressure comes from civil society. With all due respect to civil society, often they simply do not understand either the purpose of annual disclosure or its impact upon the public service. One nation I consulted with estimated they'd have over 50,000 disclosure forms filed with the conflicts of interest agency. That's insane.

Annual disclosure forms do not catch crooks. They do not stop the corrupt. No one has ever reported on an annual disclosure form: "Bribes accepted, 5,000 dollars." But that is not their purpose. [Slide 17] Instead, annual disclosure forms seek to prevent conflicts of interest from occurring by:

- Focusing the attention of officials at least once each year on where their potential conflicts of interest lie. For example, if an official's brother is a builder, that official will have a possible conflict if his or her agency deals with the brother.
- Letting the government agency that enforces the conflicts of interest system, as well as, where appropriate, the public, the media, the government, and people who do business with the official's agency know what the official's private interests are.
- Providing a "check" on transactional disclosure - that is, annual disclosure will reveal if the filer is making required transactional disclosures and recusals.

If we apply the purpose and principles of an effective conflicts of interest system to annual disclosure, we come up with guidelines for drafting an annual disclosure form. These are discussed in the written materials, which also include (in Appendix B) a possible model annual disclosure form. I just summarize those guidelines here:

- Request only information that would reveal a conflict of interest under the code.
- Include only those questions in the form for which a need exists.
- Do not ask for amounts on the form.
- Limit the universe of filers to those public servants at significant risk of conflicts of interest.
- In a government that seeks transparency, make the reports available to the media and the public because, again, it is the public, in particular the media, who discover conflicts of interest.
- Work toward electronic filing.
- Provide for late filing fines and significant penalties for failure to file, for failure to report required information, or for misstatements of information.
- Keep the form short and simple. Annual disclosure forms are like zucchini: more and bigger is not necessarily better.

Criminal prosecutors will often insist on a longer annual disclosure form because of the assistance it provides to them in criminal investigations and prosecutions. Again, however, catching crooks is not the point of the conflicts of interest system, or of annual disclosure. For that reason, some governments require certain of their high-level officials to file two forms. One is the public annual disclosure form. The other form is a confidential form to which only a handful of government security officials may have access. This second, confidential form contains the personal data desired by a prosecutor's office to detect and prosecute corruption.

Third Pillar: Administration

The third pillar of a conflicts of interest system is effective administration, in particular an adequately funded agency to provide quick answers to questions on the conflicts of interest code, to train officials on that code, to regulate disclosure, and to enforce the code. The written submission discusses these items in detail. I will just touch on them here. I should emphasize that administration of a conflicts of interest system is relatively inexpensive. Criminal anti-corruption efforts can be very expensive, as you know. But an effective conflicts of interest system is relatively cheap.

(1) *Nature of the administrating agency.* Two basic agency structures exist for administering a conflicts of interest system: an office, such as the United States Office of Government Ethics, and a board, such as the New York City Conflicts of Interest Board. In North America, at least, a “commission” could take either form. Hybrids also exist. For example, in the United Republic of Tanzania, if a preliminary investigation by the Ethics Secretariat, which is an extra ministerial department of the Government under the Office of the President, determines that any of certain high-level public officials may have violated the code of ethics, the Ethics Commissioner appoints a tribunal to investigate the allegation.

In my opinion – and I know that many of you will disagree with me – but in my opinion, regardless of the form of the government, a conflicts of interest board is preferable to a conflicts of interest office, particularly where the enforcing agency covers the entire public service, for several reasons. First, as recognized by Tanzania in the provision for appointing an investigatory tribunal, where the conflicts of interest agency is performing a quasi-judicial function, a panel, rather than a single official, provides a more judicial approach, both in reality and in the perception of officials who are accused of wrongdoing and of the public. In addition, a board can be comprised of part-time officials of national stature whose very presence will lend stature to the board and will reassure both officials and citizens that the agency’s decisions are fair and just and uninfluenced by political pressure.

The appointment of commissioners or board members will vary according to the type of government. But where a government purports to be committed to transparency, the conflicts of interest system must be administered, interpreted, and enforced by an independent conflicts of interest agency, independent from the political process and political pressures and from outside influences, both in reality and in appearance. Without independence, few persons, either inside or outside of government, will believe the agency’s actions are fair and impartial (particularly when the agency rules in favor of a public official), which undercuts the agency’s usefulness.

A conflicts of interest agency’s independence derives from at least four touchstones [Slide 18]:

- Qualified and independent commissioner or board members,
- Budget protection (I can testify first hand to how important a guaranteed budget is to independence because we don’t have it),

- A staff that is accountable only to the commissioner or board, and
- The unique power to authoritatively interpret the conflicts of interest code, subject to review only by the courts. No other agency should be authorized to authoritatively interpret the code.

(2) *First function of the board/office: conflicts of interest advice.* If the conflicts of interest code is to succeed in preventing conflicts of interest from occurring, then the conflicts of interest board or office must provide quick, confidential answers to questions arising under the conflicts of interest code and easy access to such advice.

Indeed, one of the most important functions of the board or office is to provide “cover” for officials unjustly accused of wrongdoing, so that when someone suggests to the official, “Isn’t this a conflict of interest,” the answer is, “Well, as a matter of fact, here is a letter from the conflicts of interest agency that says it is not.” End of story. That’s exactly what happened with the questions about whether Mayor Bloomberg had any conflicts of interest.

Advice on the conflicts of interest code can take many forms. In New York City, for example, we take a lot of questions not only by letter and email but also by telephone; last year we got about 2,600 phone requests for advice, and people can call anonymously. Whatever form the request and advice take, it is critical that the documents and work of the board or office be confidential to the fullest extent permitted by law. Without a guarantee of confidentiality, persons will hesitate to come to the board, either to ask advice or to file complaints.

As a related matter, a conflicts of interest board should have the authority to grant wavers of the conflicts of interest code because sometimes a provision of the code just does not make sense in the particular situation - for example, when the government wants to place one of its employees as the head of a non-governmental agency that is having serious problems but where required communications between the employee and his or her former agency would violate the code’s post-employment restrictions.

(3) *Second function of the board/office: training and education.*
 [Slide 19] If the primary purpose of a conflicts of interest system lies in preventing conflicts of interest from occurring, then training government officials in the requirements of the conflicts of interest code constitutes the single most important duty of the conflicts of interest board or office and its highest priority. But it’s hard to measure the success of a training program (how do you count the number

of conflicts of interest that conflicts training has avoided), so governments tend to skimp on training resources – that is certainly true in New York City. Big mistake, because unless public servants know what the conflicts of interest code requires, they can't obey it. This is particularly true for new public servants and for public servants who are recruited from outside the public service, where in all likelihood less stringent conflicts rules apply, if they exist at all.

Training in the conflicts of interest code should therefore be mandatory for all public servants, starting with those public officials most susceptible to conflicts of interest – elected officials and public servants involved in purchasing, government contracting, issuance of permits, and inspections – and with those who give conflicts advice within government agencies, such as attorneys or personnel officers. But eventually even low-level public servants with little danger of conflicts of interest should receive conflicts of interest training. Training *all* public servants helps foster a culture of conflicts-free government, and low-level officials may spot conflicts by their superiors.

Training tens of thousands of officials can be a real challenge, but there are ways of doing it. The conflicts board or office can train personnel in each department to train their employees. At the very least, a videotape or DVD can be distributed to agencies and every employee required to watch it once a year. In governments with widespread technology, the conflicts of interest board or office can develop a web-based interactive conflicts of interest computer-training program; these programs can track which employees have completed it and even offer a printed certification to each employee upon completion.

But for those most at risk of conflicts of interest, there is no substitute for live training, whether in the form of workshops, seminars, briefings, or conferences, for many reasons, not the least of which is the powerful message that the government takes the conflicts of interest code and conflicts of interest training seriously, especially when the department head attends the training session and actively participates. Don't kid yourself: when the public and public officials see the President or Prime Minister or Premier actively participating in a conflicts of interest training session with his or her cabinet, they take notice; no matter what they say, they're impressed. Other advantages of live training are discussed in the written materials.

Conflicts of interest training should be provided to those who regularly deal with the government, namely, government contractors, vendors, and permittees.

The content of the training can be tailored not only to the particular society and culture but also to the individual agency and type of employee. Training for public officials who deal extensively with government contractors may differ from training for public servants who perform law enforcement functions.

Conflicts of interest training should be not only accurate and in good taste. In order to be effective, the training must also be fun, or at least interesting. Employees will learn little from a lecture or a videotape when they sleep through most of it. For example, one conflicts of interest office used clips from classic movies to illustrate conflicts of interest situations. Popular culture can point the way to creative training methods – like cartoons or picture novels or anime. We once did a rap video; it was pretty awful, but it spread our message.

Agencies can be required to hang in every facility an eye-catching conflicts of interest poster with, for example, popular television characters (or classic paintings) and a brief summary of the conflicts of interest code. Printed materials may include short leaflets on various conflicts of interest topics (e.g., gifts, moonlighting, post-employment, enforcement, waivers). A bookmark summarizing the conflicts of interest code can be distributed with paychecks. Short radio or television commercials (public service announcements) can be highly effective in educating not only public servants but also the public and those who deal with the government about the requirements of the conflicts of interest law.

We have to recognize, and emphasize, that conflicts of interest training cannot be expected to make experts of every public servant. Our aim is not to create experts but to make public servants aware of possible problems and thus prevent conflicts of interest before they occur. New York City's Conflicts of Interest Board, for example, distributes a one-page guide, which is on the back of the handout. In training, our most important message is this: ask before you act.

(4) Third function of the board/office: regulating disclosure.

Disclosure is a key part of transparency in government and forms the third function of the conflicts of interest board or office, which must distribute, collect, file, and review the transactional, applicant, and annual disclosure forms filed with the board or office. Where authorized by law, the board or office must also make the forms available to the public and to the media.

(5) Fourth function of the board/office: enforcement. As I have repeatedly emphasized, the primary purpose of a conflicts of interest system lies in

preventing conflicts of interest from ever occurring. So enforcement actions may be a criminal prosecutor's successes, but they are a conflicts board's failures. Every time our agency has to prosecute a NYC official for violating the conflicts of interest law, we have failed, either because we didn't teach that official what the law is or because we didn't convince him or her to obey it.

That said, lack of effective enforcement authority renders a conflicts of interest agency a toothless tiger that will raise expectations it cannot meet and that will increase public cynicism; no one takes a conflicts agency seriously unless it has real enforcement power. Time and again, it has been shown that a conflicts of interest board without enforcement power will fail, or at least it will be marginalized and ignored.

The purposes of conflicts of interest enforcement, then, are thus three-fold [Slide 20]:

- To educate officials about the requirements of the conflicts of interest code; enforcement provides the single most effective educational tool.
- To show officials that the government is serious about the conflicts of interest law.
- To punish conflicts of interest and discourage other officials from committing conflicts of interest (deterrence).

The written materials discuss ten principles of effective enforcement for a conflicts of interest system as well as the possible stages of enforcement for a Western-style system.

By the way, our agency has the power to impose only civil fines. We have no criminal jurisdiction. I don't want criminal jurisdiction because if we had the power to put people in jail, public servants would hesitate to come to us for advice and training. That's not prevention.

[A Step-by-Step Approach to Establishing a Conflicts of Interest System – see written materials]

Conclusion

And there you have it. There is no magic in adopting an effective conflicts of interest system – just hard work, perseverance, and good will. Yet, it is very important. When the public begins to question the integrity of our public officials, government just does not work. [Slide 21] But a values-based conflicts of interest compliance system grounded upon a code of ethics and based upon the three pillars of a comprehensive conflicts of interest code, sensible disclosure, and effective administration promotes both the reality and the perception of integrity in government by preventing conflicts of interest before they occur, guiding our honest public servants, reassuring our citizens, and reinforcing the core values upon which the government is founded.

Our offices are located only a few blocks from the World Trade Center. In New York City, after the horrible events of September 11th, at the Conflicts of Interest Board we were shocked that requests for conflicts of interest advice continued to roll in. The mayor's office and other City agencies contacted us repeatedly about conflicts of interest issues raised as a result of the World Trade Center collapse, like free gifts for firefighters and police, along with the usual more ordinary questions. And we asked ourselves why. Why in the midst of all that death and tragedy were New York City officials still thinking about the conflicts of interest law? You know why? Because it means something. Because the conflicts of interest system, and we who administer that system, serve as the conscience of the City, and of the nation.

As difficult as it may be, adopting an effective values-based conflicts of interest compliance system invariably proves worth all the effort.

Thank you.