Decoding the Code of Conduct

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Outline

• How to comply with the Code of Conduct for CPA directors and officers (D&Os)
• Main legal duties of CPA D&Os
• Real life challenges of applying the Code: Conflicts, Gifts, Inside Information, Outside Employment, Records & Privacy
• Beyond the Code
Background

- CPA D&Os are subject to the Code of Conduct built into their CPA’s Letters Patent
- The Code addresses, among other things, how D&Os must seek to avoid and, where unavoidable, manage conflicts of interest
Objective of the Code

- Enhance public confidence in the integrity and impartiality of D&Os and the business activities and transactions carried on by CPAs by establishing clear conflict of interest rules (s. 1.1)
Interpreting the Code

- 3 principles (s.1.2):
  - Every D&O must conduct themselves in a manner so as to preserve impartiality of the CPA
  - Duty may go beyond acting merely in accordance with technical requirements
  - Appearance of conflict may be as detrimental as actual conflict
Scope of Code Obligations

- May require additional action to be taken beyond the specific requirements of the Code (s. 1.5)
Main Legal Duties of CPA D&Os
Under the Code

1. Acknowledge compliance with Code
2. Avoid conflicts (or at least manage and resolve them as they arise through disclosure to Board and absenting self from meeting)
3. Follow disciplines for acceptance or offering of gifts
4. Do not use corporate information for personal benefit
Acknowledgement Requirement

- Each D&O has to acknowledge annually in writing that they have read the Code and are in compliance (ss. 1.6 and 1.8)
1. Conflicts Of Interest

- Generally,
  - Avoid conflicts or appearance of conflicts with respect to personal interests or personal interests of a Related Party (s. 2.1)
Definition of Related Party

- Spouse, child, brother, sister or parent
- Relative other than above, or a relative of the spouse of a director or officer if the relative has same residence as the director or officer
Definition of Related Party

- A corporation, partnership, trust or other entity which is directly or indirectly controlled by such director or officer or by a spouse, child, brother, sister or parent of such director or officer
- A partner of such director or officer acting on behalf of a partnership of which the director or officer and the partner are partners
Types of Conflicts

- Types:
  - Competition with the CPA
  - Transactions with the CPA or a User; Material Interests
  - Interest in Material Contract
  - Acceptance of Offices with Conflicted Entities
Some Conflicts Can Be Approved

• The following shall not be deemed conflicts if written approval is obtained (s. 2.3):
  ▪ Acceptance of Offices with Entities Benefiting from CPA
  ▪ Use of CPA Property
Conflicts Must Be Disclosed

- Written disclosure must be made after D&O becomes aware of conflict or appearance of conflict (s. 3.1)
- D&O can’t vote or provide recommendations on any matter related to the conflict (s. 3.3)
Conflicts Must Be Disclosed

- D&O must absent themselves from portions of meetings during which the transaction giving rise to the conflict is considered (s. 3.4)
- A single written annual disclosure is required for recurring conflicted transactions (s. 3.5)
Voluntary Actions Once Conflict Disclosed

- When a conflict arises, a D&O may voluntarily choose to address the conflict by (s. 4.1):
  - Divestment
  - Withdrawal
  - Resignation
- These actions are not determinative (s. 4.2)
Determining Compliance When Conflict is Disclosed

- The Governance Committee determines whether disclosure made by D&O illustrates a conflict; and
- Whether D&O has failed to comply with the Code
Recommendation by Governance Committee

- Upon determining a conflict exists and/or D&O has failed to comply with Code ...
  - Governance Committee shall make recommendation to Board as to appropriate compliance measures
Possible Compliance Measures

- Voluntary actions mentioned above
- Disclosure if satisfactory
- Other actions
- Director resigns
- Sanctions imposed against officers
Determination By Board

- Board makes final determination as to (s. 4.5):
  - Whether there is a conflict
  - Whether D&O has complied with Code
  - Whether the conflict has been addressed
  - In the case of an officer, measures to be taken or sanctions
  - In the case of a director, whether they should resign
Opportunity To Be Heard

- D&Os have opportunity to be heard in connection with initial determination, recommendation and determination
2. Gifts

• Definition (s. 1.3)
  ▪ “Gift” includes any good, service, benefit, hospitality, promise of favour

• General Rule
  ▪ No director or officer shall offer gifts to, or accept gifts from, users or potential users without the prior written consent of the Governance Committee (s. 5.1)
Gifts

Exceptions to Gift Rule:
• Not cash or cash equivalent
• Not intended to be and not of sufficient value to be construed as a bribe
• Gift is of modest value and acceptance is customary business practice
3. Inside Information

Rule on Use (s. 6.1)

- Cannot use information for personal benefit or for benefit of any other person unless information is disclosed to public
Inside Information

Rule Against Disclosure (s. 6.2)

- Shall not disclose any Confidential Information about CPA which has not been disclosed to the public without prior consent of Governance Committee
- Confidential Information is information on business and affairs of CPA acquired in connection with position
Inside Information

Permitted Disclosures (s. 6.3)

- Disclosure is necessary to perform duties including financing transaction
- Disclosure is required by law
- Disclosure to professional advisors
4. Outside Employment

- Shall not be affected by offers or potential offers of outside employment or appointment
- Must disclose any firm offers of employment that may affect performance as a director or officer
Requirements **Beyond** the Code

- Voluntary compliance by director or officer with measures in Code (i.e., divestment, withdrawal or resignation) does **not** relieve:
  - the director from complying with such other measures as the entity appointing the director determines to be appropriate; or
  - the officer from complying with such other measures as the board determines to be appropriate (s. 4.2)
5. Records and Privacy

- All information provided by director or officer in connection with the Code will be kept confidential.
- Governance Committee shall take all efforts to ensure that privacy of the director or officer disclosing personal information is fully respected.
Requirements Beyond the Code

- Example: *The Conflict of Interest and Post-Employment Code for Public Office Holders 2004*
- See 2003 letter from Office of Ethics Counsellor re: CPA directors as part-time GIC appointees
Requirements **Beyond the Code**

- Section 19 of CMA permits CPA director to be removed “for cause” by the entity that made the appointment (or, curiously, by the “other directors”)
- Office of Ethics Counsellor appears not to initiate investigations but responds to complaints
Requirements **Beyond the Code**

- According to statements of the Ethics Counsellor, CPA directors, as part-time GIC appointees, have limits on their “political activities” while they remain on the Board, which appear to include:
  - not running for political office
  - not managing the campaign of someone running for political office
  - not attending political party conventions *(Ottawa Citizen, August 5, 2003, “Patronage Appointees Told to Skip Liberal Convention”)*
Requirements Beyond the Code

*Code of Business Ethics*

- For directors, officers and other employees
- To deal with matters such as:
  - compliance with laws and regulations
  - record keeping and confidentiality
  - protection and proper use of CPA assets
  - reporting of illegal and unethical behavior
Legal Requirements Affecting Corporate Governance in Addition to the Code

- See special requirements in:
  - *Canada Marine Act*
  - *Port Authorities Management Regulations*
  - *Letters Patent*
Coming Down the Pipe: Treasury Board of Canada Model Code

- Bill C-11 was passed by the House of Commons on October 4, 2005
- Intended to establish procedure for disclosure of wrongdoing in the public sector
- Protection of persons who disclose wrongdoing
Treasury Board of Canada
Model Code

• Crown Corporations (to which Bill C-11 applies) will be required to have a Code of Conduct

• Code must be consistent with Treasury Board’s Code (to be developed)
Treasury Board of Canada Model Code

- While Bill C-11 does not apply to CPAs, they should still monitor development of Treasury Board’s Code as:
  - it will provide guidance to interpreting and applying the CPA’s Code
  - it might be problematic if the two Codes were inconsistent
Canada Marine Act Review

- No proposals to change the Code in 2003 CMA Panel Review Report
- Bill C-61: Amendments to Canada Marine Act, June, 2005
  - Contains no revisions to the Code
Questions