

Managing conflicts



Avoiding the reality and perception of conflicts of interest

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Recently the UK media have debated, at some length, the appointment of Sir David Green, former director of the Serious Fraud Office, to a new job at the law firm Slaughter and May, given that Slaughter and May represented some of the biggest companies that Sir David prosecuted during his six years as head of the Fraud Office.

Sir David had to wait six months (which is common practice) from leaving his role in the public service. He also had to wait for approval from the Advisory Committee on Business Appointments which vets the suitability of new jobs for former senior civil

servants and ministers.

Despite all the above Slaughter and May still announced that Sir David effectively had been ring-fenced at the law firm, which he is joining as a consultant, after concerns were raised over his new role, namely, that there was a risk that his new job could lead to conflicts of interest.

The process now followed in the UK is designed as much to prevent the perception of conflict, as the reality. It came about as a result of a perceived "revolving door" where senior public figures left their role to turn up on the boards of the very firms they had been negotiating with, taking action against or giving contracts to. Few seriously believed that these people may have acted in an inappropriate way to secure their new appointment but anything that left a perception that they might have done debased both the individual and the organization they previously worked for.

Six months time period

Having the requirement for independent approval removes that risk as does the imposition of a six month gap.

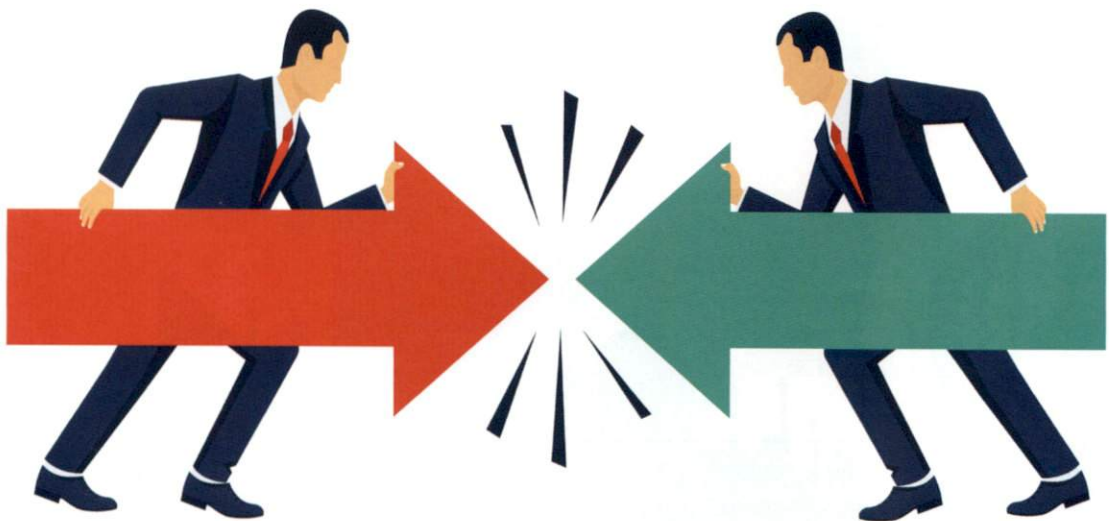
Six months is, by itself a compromise. It is wrong to deny an individual the right to continue to work after they leave (and it is logical that their future employment will be linked to the skills they have built up during their working life, including in their previous role). However it does allow their knowledge of specific ongoing matters to become dated. I was subject to this six month rule when I left the FSC although this was reduced to four and a half as I was asked to stay six weeks after my agreed leave date because my successor was unable to start then. My predecessor had been subject to a 12 month prohibition. The work restriction during this period is, by necessity, wide, as conflicts are not always apparent on day 1.

Conflicts of interest are not simply an issue for former public servants. Non-Executive Directors (NEDs), given their

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enhanced role in recent years, are increasing having to consider the possibility of such conflicts and how to deal with them. NED contracts for services now normally contain clauses prohibiting an NED taking a similar role with a competing firm and often require approval of subsequent board appointments.



Overboarding

Conflict must also be seen far wider than simply the risk that an individual may learn something on one board which would be commercially advantageous to another board they sit on. Two key conflict issues are time and the ability to properly perform all your expected duties.

In respect of time, regulators have become increasingly concerned about the

The ability to perform your full range of duties is another matter an NED must consider. Traditionally, one way for an NED to manage a conflict is to stand aside from the matter over which the conflict exists. For example, not participating in a credit decision where the potential borrower is linked. Recusing on a case by case basis is effective

to perform their duties renders them unsuitable to continue and the need for them to be replaced by someone who can. Such an impairment is inconceivable for an executive director, it should be no more acceptable for an NED.

The above two matters are vital but are not the only considerations. They are however unique as they defy the standard approach of disclosing an interest and managing it accordingly with board support. Furthermore they are not covered by standard confidentiality clauses, as confidentiality is not the issue.

As such, and particularly for NEDs on the boards of licensed entities, they must now be material considerations. Regulators have become increasingly focused on the role of NEDs who have never been more vulnerable to sanction if something goes wrong. It is difficult seeing a large level of sympathy resulting from an excuse from the NED that they didn't have time or had precluded themselves from playing their full fiduciary role because of their other activities.

If an NED has to recuse themselves from a material part of the board's considerations on an ongoing basis then it has to be questioned whether they can truly perform their role properly

concept of "overboarding". This is where an NED assumes too many roles with the resultant risk that they cannot devote sufficient time to each to enable them to conduct their fiduciary role properly. Indeed MiFID II has specific requirements and restrictions over this. These requirements are even stricter where an individual is already the CEO of a licensed entity. Whilst such a proscriptive approach is less than ideal as no account is taken of the size of the entities or their activities, the message is clear, such possible conflicts of time interest must be considered by all NEDs. Furthermore, as the level of an NEDS work is not consistent, the time available must allow for peaks and not just a steady state.

and is vital in a small jurisdiction such as Gibraltar where such situations are not uncommon.

Chronic conflict

Of more difficulty is "chronic" conflict. Here the conflict manifests itself on a permanent basis and is not restricted to a single client or counterparty. An NED is a director of the board, the board covers the entire activities of the business. If an NED has to recuse themselves from a material part of the board's considerations on an ongoing basis then it has to be questioned whether they can truly perform their role properly. The company may justifiably question the extent to which such a hampering of the board member in their ability

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