

The New Battle Over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What Is a Conflict?

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INTRODUCTION¹

In our earlier article about indemnity provisions in client outside counsel guidelines (“OCGs”)² we noted how the balance of power between attorneys and their clients has changed, and that today the power lies largely in the hands of the clients—especially when they are large corporations controlling significant amounts of legal work to be assigned to outside counsel. In connection with the increasingly common imposition of indemnity provisions in their OCGs, we noted that inside counsel have increasingly taken advantage of this change in the balance of power to impose their own rules on the outside counsel relationship, thereby significantly limiting outside counsels’ independence.

In this article we show how this process has gone even further in the area of conflicts of interest. Where “long ago, in a galaxy far, far away” the boundaries of what constituted a conflict were defined by the regulators of the legal profession and the courts, today this function has been usurped by large corporate clients. In this article we examine the different ways in which clients have sought to expand the definition of conflicts of interest, and will show how, in doing so, they are seriously undermining the ability of law firms to operate, and how in the long run, clients are acting contrary to their own best interests.

We will also demonstrate that these OCGs frequently create serious ethical issues, and not only in connection with the rules governing conflicts of interest. The examples we present and discuss include provisions that would—if accepted and adhered to by outside counsel—require violations of ethical duties of confidentiality, diligence and competence, as well as violations of the basic fiduciary duty of loyalty. Such provisions inevitably present outside counsel with serious dilemmas as to how to address them, and how to respond to clients that make these demands. In many instances, these provisions arguably expose the inside counsel who promulgate them to jeopardy of professional discipline just as much as any outside counsel who agree and adhere to them.

It is not an exaggeration to say that lawyers’ independence is under attack. The most destructive weapons in this battle are OCGs that redefine conflicts of interest so broadly that they significantly impair lawyers’ ability to make decisions (both legal and business-related) as to what clients they may

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represent and matters they may work on, and to act as trusted and independent counselors on behalf of those self-same clients. Finally, after considering the cumulative effects of these changes on both the legal profession and the clients themselves, we offer a suggestion for how the regulators of the profession could revise the rules of professional conduct in a way that would roll back and prospectively limit this wholesale redefinition of what is a conflict, thereby protecting lawyers' professional independence in the future. Importantly, we believe that the changes we propose also inure to the long term interests and benefit of the clients themselves, in preserving their ability to exercise their own choice of lawyers for future matters.

We begin by demonstrating the three principal ways that clients are using OCGs to redefine what constitutes a conflict of interest:

- By expanding the definition of who is the client (far beyond the bounds of prevailing case law);
- By explicitly limiting the universe of other clients from whom lawyers and their firms may accept work; and
- By expanding the definition of "interest" and "positional" conflicts in order to prevent lawyers and firms from undertaking or continuing to work for other clients that may take public positions on issues that the client unilaterally—and often ex post facto—deems adverse to its own interests.

THE EXAMPLES

OCGs That Expand the Definition of Who Is the Client

The most common OCG provisions inflate the definition of client for purposes of conflicts analyses. By agreeing to such provisions, lawyers create a variety of problems for themselves, the most obvious being greatly increased difficulty in screening for conflicts, along with an increased likelihood of becoming conflicted out of a future representation where current law would not recognize a conflict.

Here are two examples:³

1. It is BIG BANK'S policy that, notwithstanding ABA Ethics Opinion 95-390 (January 25, 1995) or similar regulations applicable in the jurisdiction concerned, outside counsel must treat BIG BANK and each of its subsidiaries as if they are one entity for the purpose of all conflicts of interest analyses. For purposes of trying to identify potential conflicts of interest, BIG BANK is deemed to include any entity listed on Appendix X, or any list of BIG BANK entities delivered after the date hereof.
2. Please note that we will not permit any firm to represent a party adverse to ZEUSS, Inc. or any entity on Attachment A without prior written consent, and in no event will we allow representation of an adverse party in litigation. Attachment A is an extremely confidential list of entities for your firm's use in screening for conflicts. This list includes (a) multiple names for some entities, (b) some entities that are no longer owned or controlled, but which may have been at a relevant time, (c) entities that may be affiliated with ZEUSS, Inc.'s parent companies, and (d) entities that may

not be controlled by ZEUSS, Inc. or its parent companies, but in which they may have an ownership interest. Although lengthy, this list will assist us in identifying potential conflicts so that they may be addressed expeditiously.

As the first example itself points out, such an agreement is contrary to ABA Ethics Opinion 95-390.⁴ In addition, the provision is also inconsistent with Model Rule 1.7, Comment 34, which provides that a “lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”⁵

These client guidelines, which do not permit any investigation or consideration of specific facts, also conflict with the normal rational inquiry by courts, which focus “on the reasonableness of the client’s belief that counsel cannot maintain the duty of undivided loyalty it owes a client in one matter while simultaneously opposing that client’s corporate affiliate in another.” *GSI Commerce Solutions, Inc. v. Babycenter, L.L.C.*⁶ The analysis is fact-specific, and courts tailor it to the particular set of facts at issue, “generally focus[ing] on: (i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other.”⁷

By removing a fact-specific determination of the actual connection between the client and its affiliates, OCG provisions like the ones above attack the prevailing narrow (and rational) notion of client identity. What ought to be an objective inquiry based upon the specific situation of the client and its subsidiaries is instead replaced by a generalized and wholesale expansion of the meaning of what is the “client.” By imposing this hugely expansive definition (and burdensome enlargement of the conflict checking process by law firms), the “client” enormously narrows the universe of other possible clients whom the lawyer could represent.

This expansion of the definition of what is the client also creates serious subordinate problems. For example, through corporate actions, the identity of the OCG-defined client can and does change frequently, and with no notice to, or input from, the lawyer. The law firm is now required to run a new conflicts check every time the “real” client merges with, buys, sells, or creates a new subsidiary.⁸ Realistically, however, because the lawyer often has little or no contact with the subsidiary/OCG defined clients, the lawyer will have no idea when a new conflicts check is required, and can fall into a disqualifying conflict despite the best of intentions and the most sophisticated conflict system in existence. This is precisely what happened in the GSI case.⁹

OCGs That Limit The Universe of Other Clients From Whom Law Firms Are Permitted to Accept Work

Another group of OCG provisions shows that clients have not fully considered the potential harm expansive conflict provisions may create for the clients themselves. For example, for many years clients understood that a lawyer who was knowledgeable about the client’s industry because the firm represented multiple entities with similar businesses was, as a result, able to provide more complete and comprehensive service, often identifying and understanding issues because of deep experience and

years of practice. That has changed dramatically with the genesis of OCG provisions that define the representation of a client's competitor as a conflict, notwithstanding the fact that the rules of professional conduct consider and reject this position.

Here are two examples:

1. As part of confirming the absence of any conflicts, the Firm should inform NEMESIS CO. of any situations where outside counsel either individually or through the outside counsel firm represents clients that are business competitors of NEMESIS CO. or affiliates of NEMESIS CO.
2. GIANT CO. may conclude that an actual conflict of interest exists if Outside Counsel or Outside Counsel's law firm represents a significant competitor of GIANT CO. or its subsidiaries or affiliates. A list of GIANT CO.'S principal subsidiaries is attached as Exhibit D. As a pre-condition of engagement, Outside Counsel must disclose in writing the identity of any national or regional retailers or any significant competitors of GIANT CO. or its subsidiaries or affiliates (see Exhibit E for examples) that the Outside Counsel firm represents, together with a general description of the type of legal services that the Outside Counsel firm provides to such client(s). If Outside Counsel concludes that it would be improper to provide this information to the Company, Outside Counsel should decline the engagement.

This type of provision conflicts with Rule 1.7, Comment 6 of the Model Rules, which states that "simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."¹⁰

By expanding conflicts to include economic competitors, clients hurt not only the law firm, but themselves as well. Enforcing such an expansive definition of conflict limits the ability of lawyers to understand industry-wide issues from multiple perspectives, and ultimately makes it more difficult for lawyers to provide the best possible, and most informed, service to the client.

These provisions also ultimately threaten the economic viability of law firms in at least two ways. First, by excluding the firm's ability to represent competitors in an industry in which the firm has experience, these provisions tend to make firms much more dependent upon a single client. This, by definition, reduces the firm's utility to the client as an unbiased, independent counsellor. Firms that rely primarily on a single client can be tempted to provide advice based not on what is best for the client, but on what is most likely to keep the relationship (and therefore the firm) alive. Second, by significantly limiting the firm's ability to attract and serve other clients, the client robs the firm of power to manage its own practice and financial future. In the end, if the firm fails, the client will be required to go out and find itself a new captive law firm, with all the costs and difficulty that entails. In fact, clients are best served by firms that are economically stable and that can provide independent advice, based on a breadth of experience unaffected by extravagant definitions of conflicts that unnecessarily threaten their financial viability and limit their ability to manage their business.

OCGs That Redefine "Interest" and "Positional" Conflicts

These provisions seemingly portend the limitless expansion of the definition of positional or interest conflicts. Typically, these clauses require the outside lawyer simultaneously to read the client's mind and to accurately predict what type of issue might (at some point in the future) be adverse to the client, or to forecast what position the client might (at some point in the future) consider to be a conflict. In addition, as we shall show, these provisions explicitly demand that lawyers and firms continuously violate their ethical and fiduciary obligations to their other clients.

Here are three examples:

1. In addition to actual conflicts of interest, the Firm may be asked to represent a person(s) or entity that raises an issue conflict with Client. That is, there may also be situations in which the Firm may be asked to take positions on behalf of a person or entity that *could be contrary to* a position Client is currently asserting, or one that Client *might take on* an issue affecting the industry. Even if the ethical rules do not prohibit the Firm from representing such a person or entity, as a partner with Client the Firm agrees not take positions on behalf of other clients that are or may *be contrary to* Client's positions on issues affecting the industry. If the Firm is asked to represent a client on an issue affecting the industry and the Firm is not familiar with Client's position on the issue(s), the Firm must *contact one of the individuals at Client identified to determine its position before undertaking that representation*. If the Firm undertakes representation of a client, then discovers that the position(s) on an issue affecting the industry it would have to take on behalf of that client are contrary to Client's position on the issue, then the Firm must notify Client through one of the individuals identified within fifteen (15) days of discovering the issue conflict and *withdraw if requested by* Client. If the rules of ethics prohibit the Firm from advising Client of the issue conflict, then the Firm agrees to withdraw from representing the other client with respect to the issue. (Emphasis added.)
2. Outside counsel *should advise of any* positions it has taken in the recent past or is presently taking on issues that may *be adverse*, harmful or otherwise prejudicial to the interests of Client. This includes, without limitation, positions taken by Outside Counsel before administrative and regulatory agencies, bodies or other tribunals. (Emphasis added.)
3. Outside counsel are required to search for and disclose to HEPHAESTUS, Inc. any actual or potential conflicts of interest prior to accepting an engagement. Outside counsel *should identify and disclose to* HEPHAESTUS, Inc. any existing or prospective engagement by another client that *could create an* actual or potential conflict of interest with counsel's representation of HEPHAESTUS, Inc. (or the appearance thereof). (Emphasis added.)

The ethical and legal dilemmas created by these provisions are significant and troubling. When retained under these terms, lawyers must decide whether to breach the engagement agreement with the client imposing the guidelines, or breach their ethical and fiduciary duties to other clients. In order to comply with the requirements of this contractual provision, a law firm and its lawyers would have to breach the fundamental duties to preserve client confidences under Model Rule 1.6, as well as their fiduciary duties

of loyalty to their other clients. In so doing, the firm and the lawyers risk professional discipline, loss of client relationships, demands for fee disgorgement, and civil liability to the other clients, as well as potentially devastating reputational injury.

This type of provision goes well beyond, and indeed is flatly inconsistent with the rules of professional conduct that define conflicts of interest. For example, Rule 1.7, Comment 24 makes clear that issue or positional conflicts are not conflicts at all, unless certain specific factors exist:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.¹¹

This has always been the law. Lawyers are, by definition, advocates. The positions they advance on one day, on a given set of circumstances, necessarily differ from positions that may be appropriate for them to take on behalf of other clients, at another time, under different circumstances.

In addition to requiring lawyers and firms to breach their Rule 1.6 duty of confidentiality, the contractual requirement here could create a Rule 1.7(a)(2) material limitation on representation of other clients. By requiring withdrawal, these OCG provisions also violate the limitations placed on a lawyer's ability to withdraw, under Rule 1.16. Other Model Rules of Professional Conduct are also implicated, depending upon the exact language of the OCG provision: 1.9 (former client conflicts), 1.10 (imputation), and 1.18 (duties to prospective clients).¹² For these reasons, agreeing to these requirements with a client puts lawyers and firms in an untenable position—breach the engagement agreement with the client imposing the guidelines or breach the rules of professional conduct and fiduciary duties to other clients. The potential domino effect of these provisions is nothing less than devastating.

Cumulatively, the unilateral expansion of the definition of what constitutes conflicts of interest undermines lawyers' independence to manage their legal practice, and to provide unbiased, impartial advice to all of their clients.

Abiding by the expanded conflicts provisions also creates administrative headaches and vastly increased expense for law firms on which they are imposed. In one example the authors learned of, a mid-sized US law firm landed what appeared to be a significant new client engagement to represent in litigation a local subsidiary of a US-based Fortune 500 global conglomerate. The company had in-house legal teams in almost 40 countries around the world. After a conflict check, the firm contacted the general counsel of the local subsidiary, and received permission to proceed with the representation.

Then the nightmare began for the firm (and potentially for the client). Because the matter involved more than one jurisdiction, the client's OCG conflict management rules required approval from each one of the nearly 40 local general counsel around the world. Assuming that it would even be possible to get a response from a local general counsel in, for example, Peru, to a conflicts inquiry from a mid-size

US law firm with respect to a matter having no possible connection with Peru, the process would take months, filled with countless hours of administrative (unbillable) time for the firm. The representation thus came at an enormous cost to the firm of time, expense, and difficulty. But clients also suffer.

In this example, the ability of a firm to move rapidly and effectively on its client's behalf is compromised when it needs to obtain client consent in a way that requires months of global email exchanges, in circumstances where all but a very few of those contacted have absolutely nothing to do with the matter under discussion, and have no incentive to provide any kind of response at all, let alone a positive one. Evidently—at least to an outside observer—the client had given no thought to the impact of its conflicts requirements on the ability of its chosen counsel to react with speed and efficiency on the matter for which it was being engaged.

This situation, among others, demonstrates that corporations seeking to impose these requirements have often not considered the ramifications of these expanded and onerous conflicts provisions. In their single-minded desire to keep their lawyers loyal to them (which the Rules of Professional Conduct already require), clients have created a Catch-22 situation in which the clients themselves prevent the lawyer or firm from providing effective representation. A conflicts provision like the one described above could (and many risk managers would argue, should) prevent the law firm from accepting the representation. The client has effectively obviated its own ability to obtain the counsel of its choosing.

RESPONSE BY THE PROFESSION

As shown by the examples above, and the additional examples included in Attachment A, OCG conflicts provisions enormously expand what is identified as a conflict under the Rules of Professional Conduct. These expansive conflict of interest provisions restrict the lawyer's ability to represent other clients in many situations where there is no conflict under the Model Rules or governing case law.

This situation raises a critical question: is there anything that the profession and its regulators can do to protect lawyers and firms from the deeply troubling consequences of these OCG provisions? Equivalent language to these OCG provisions, relating to what clients the law firm could or could not represent in the future, were they contained in settlements of client controversies, would incontrovertibly contravene Rule 5.6, which provides as follows:

Rule 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the terms of engagement of a lawyer by a client or of the settlement of a client controversy.¹³

The history of Model Rule 5.6 reveals two policy justifications, which are both mentioned in its comments. One justification is “to ensure the freedom of clients to select counsel of their choice.”¹⁴ The second policy justification is to promote a “lawyer’s personal autonomy by allowing the lawyer some freedom of movement.”¹⁵

The profession has hitherto jealously guarded lawyers’ autonomy to represent clients of their own choosing, and to protect potential clients’ rights to choose representation as they see fit (in the absence of a disqualifying conflict—as defined in the applicable rules of professional conduct). Even when considered in terms of a garden-variety employment restriction, the 1969 notes to the Model Code of Professional Responsibility condemn “unwarranted restriction[s] of the right of the lawyer to choose where he will practice and [they are] inconsistent with our professional status.”¹⁶

We contend that a coordinated response to the assault on lawyers’ independence is required of the profession and its regulators. Only through the bar associations, as its representative organizations, and its regulators does the profession have the ability to address this problem, and we contend that these institutions have an obligation to do so.

We suggest that an effective response to the increasing threat to lawyers’ independence posed by OCG conflicts provisions like those highlighted here would be to revise Rule 5.6 to explicitly prohibit lawyers and law firms from agreeing to any and all OCG provisions that have the effect of limiting their ability to represent other clients beyond what is already encompassed in the Model Rules generally and in the conflicts provisions specifically. To that end, we propose that Rule 5.6 be amended to read as follows (added language underlined):

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer’s right to practice is part of the terms of engagement of a lawyer by a client or of the settlement of a client controversy.

Alternatively, subsection (b) could be amended to read simply “an agreement containing a restriction on the lawyer’s right to practice.”

If adopted, either amended version of Rule 5.6 would enable firms to respond to corporate counsel who press outside counsel guidelines that seek to define conflicts in ways that far exceed the purview of the Model Rules, so their guidelines are unethical as proposed, and firms are therefore unable to agree to them. Such an amendment to Rule 5.6 would enable the profession to take a principled position that would empower individual firms to fight back on a stronger footing—without running afoul of anti-trust

law. This approach should be effective even when the client proposing the guideline is not a GC or a lawyer, because the law firm can explain that it may not bind the lawyers in the firm to a provision that is unethical, and because such a provision restricts other clients' ability to choose one of the firm's lawyers to represent them where the firm would otherwise be permitted to do so under the Rules.

A counter argument to this proposed change that is likely to be advanced is that it may be viewed as preventing clients from taking the "Coke/Pepsi" position—namely that if outside counsel represents 'Coke,' then it may not also represent 'Pepsi'. But such requirements may properly be based not on expanded definitions of conflicts of interest, but rather on concerns that the engagement of the client will involve outside counsel in learning highly confidential and trade secret information that no amount of screening can ensure will be protected from being used, or even passing to the rival entity. This type of very narrow, confidence and secrets based enforcement of a client's right to secure its secrets as part of the conditions of a law firm's engagement should not be seen as violating the revised version of the Rule because the purpose of the restriction is to protect the client's valuable secrets, not to expand outside counsel's duty of loyalty or otherwise restrict outside counsel's freedom to practice law. If need be, a comment can be included to clarify how firms and their clients may deal with these situations.

Rule 5.6 has been the subject of five Formal ABA Formal Ethics Opinions.¹⁷ Formal Opinion 94-381, Restrictions on Right to Practice, appears to be the most relevant to the topic of outside counsel guidelines. This opinion supports the position advocated here, that the proposed revision would comport with the Rule's intent and provide protections on the freedom of clients and lawyers to enter into representations as they see fit, within the Rules.

In Formal Opinion 94-381 the Committee considered two questions:

- (1) whether a corporation's in-house counsel may offer or an outside lawyer may accept an agreement making the representation in a specific matter contingent upon an agreement by the outside lawyer never to represent anyone against the corporation in the future, and (2) whether such an in-house counsel may offer or a lawyer may accept in-house employment contingent upon the same agreement.¹⁸

According to the opinion, the proposed restriction on representation would prevent representation where the Rules would not, because it would have the effect of "prohibiting the lawyers involved from representing others in any matter adverse to the corporation, even if that matter were unrelated to any representation of the corporation in which the lawyers had been involved."¹⁹

The opinion relied on the two reasons for Model Rule 5.6:

- First, such an agreement would limit a lawyer's 'professional autonomy.' Second, a restrictive covenant barring future adverse representations would limit 'the freedom of clients to choose a lawyer.'²⁰

For these policy reasons, the Committee found the proposed restrictions run “afoul of Model Rule 5.6” because they prohibit future adverse representation in unrelated matters. Most importantly for purposes of our proposal, the opinion recognizes that a proposal “restricting a lawyer from ever representing one whose interests are adverse to a former client would impermissibly restrain a lawyer from engaging in his profession.”

Ultimately, the Committee concluded the agreements contemplated by the inquiries would violate Rule 5.6 because “an agreement denying the lawyer the opportunity to represent any interest adverse to a former client is an overbroad and impermissible restriction on the right to practice.”

We believe that this opinion provides support for the revision proposed here to Rule 5.6. The concern regarding limitations on practice has been relevant for years. That concern should now be addressed given the proliferation of OCGs like those highlighted here that incorporate ever more expansive conflicts language. In attachment A, the authors include a variety of additional conflicts provisions taken directly from client-generated OCGs. Each of these provisions—some of which are very lengthy—pose some (or in several cases, all) of the problems identified in this article. We invite our readers to review them and identify the problems they present to law firms that are asked to agree to them.

We suggest that there exists today a critical need to restore the traditional balance between what clients can legitimately define as their expectation regarding the loyalty of their outside counsel, and lawyers’ (and other clients’) ability to act independently and to accept engagements permitted under the existing definitions of conflicts under the Rules of Professional Conduct. We assert that the proposed amendment to Rule 5.6 would enable—and require—clients and law firms to abide by the existing rules defining what is—and is not—a conflict of interest, and to require firms to reject all attempts by individual clients to enlarge that definition. For all the reasons set out above, we believe that such a restoration of the traditional balance would benefit all clients, as well as the profession, by preserving the professional independence of lawyers.

ATTACHMENT A

EXAMPLES²¹

Example 1

It is BIG BANK’S policy that, notwithstanding regulations and cases applicable to outside counsel, outside counsel must treat BIG BANK and each of its subsidiaries as if they are one entity for the purpose of all conflicts of interest analyses. In transactional matters, consent to a waiver request by a law firm will ordinarily be given where it is clear that BIG BANK’S interests will not be impaired.

For purposes of trying to identify potential conflicts of interest, BIG BANK is deemed to include any entity listed in Appendix X, or any list of BIG BANK entities delivered subsequently.

Example 2

Potential conflict of interest situations may include:

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- Representation of another party in any contested matter, for other clients, in which Outside Counsel argues positions on policy or legal principles that are adverse to Client's interests, whether covered by the applicable code of professional conduct or not.

Example 3

Outside counsel must advise [CLIENT] of any positions it has taken in the recent past or is presently taking on issues that may be adverse, harmful or otherwise prejudicial to the interests of Client, including, without limitation, positions taken by Outside Counsel before administrative and regulatory agencies, bodies or other tribunals. In addition, Outside Counsel agrees to take all reasonable steps to ensure its lawyers not take positions that may be adverse to the interests of Client.

Example 4

Conflicts of Interest

Any potential conflict of interest must be disclosed to ZEUSS, Inc. and waived in writing prior to beginning work on a matter. Requests for any conflict of interest waivers must be made in writing and addressed to []. Please note that we will not permit any firm to represent a party adverse to ZEUSS, Inc. or any entity on Attachment A without prior written consent, and in no event will we allow representation of an adverse party in litigation. Attachment A is an extremely confidential list of entities for your firm's use in screening for conflicts. This list includes (a) multiple names for some entities, (b) some entities that are no longer owned or controlled, but which may have been at a relevant time, (c) entities that may be affiliated with ZEUSS, Inc.'s parent companies, and (d) entities that may not be controlled by ZEUSS, Inc. or its parent companies, but in which they may have an ownership interest. Although lengthy, this list will assist us in identifying potential conflicts so that they may be addressed expeditiously.

Example 5

You will not act in relation to a matter where there is a conflict of interest in relation to that matter, or a related matter, or there is a significant risk that there is a conflict of this kind unless you have our written consent. We expect that you would discuss any possible conflict with us in advance, wherever possible. You agree that you will not undertake, or continue any engagement with any person in any claim, complaint, action or proceedings brought against us or any of our affiliates. A conflict may also exist if you act on a transaction for a party negotiating against us or where there could be a conflict of duties. You agree that, wherever possible, unless precluded from doing so by the duty of confidentiality you owe to another client, you will obtain our prior written approval before undertaking any such engagement.

You acknowledge that there are certain companies where a perceived conflict may exist or arise if you were to act for them. In respect of these companies you agree to enter into an agreement to enhance and ensure the confidentiality and appropriate screens. You also acknowledge that there are some companies where we would deem it an outright conflict were you to act for any such company on any matter. Currently, these companies are ABC, XYZ, 123, 456 and 789, and we may notify you of others or changes from time to time.

*Example 6***Conflicts of Interest**

Outside counsel seeking to represent and representing MegaManufacturer must avoid any actual or potential conflict of interest. Engagements which MegaManufacturer considers as creating a potential conflict include those engagements which:

- (1) limit the ability of outside counsel from zealously representing the interests of MegaManufacturer;
- (2) compromise or place at risk MegaManufacturer's proprietary or confidential information such as where outside counsel's representation of a third party might cause him/her to rely upon MegaManufacturer's confidential or proprietary information to effectively represent the third party; or,
- (3) inappropriately require outside counsel to rely upon or use the proprietary or confidential information of a third-party in order to effectively represent MegaManufacturer.

Even though an actual conflict or potential conflict may be too remote to cause a court to order counsel disqualified, nor be significant enough for an attorney licensing authority to take remedial action, MegaManufacturer may (in its discretion) nevertheless deny a conflict waiver request.

A conflict of interest may arise in litigation or in a non-litigated matter. A conflict may also arise when outside counsel fail to reasonably cooperate with MegaManufacturer in the resolution of any dispute regarding fees for legal services provided MegaManufacturer.

For purposes of conflict analysis only, representation of a MegaManufacturer Company (e.g., a subsidiary or business unit) constitutes representation of the Corporation. For example, absent written disclosure and written waiver consistent with this policy, a firm which represents one MegaManufacturer business unit or subsidiary may not represent a MegaManufacturer Competitor on a matter adverse to a different MegaManufacturer business unit or subsidiary. This provision does not preclude MegaManufacturer from limiting the scope of outside counsel's retention (e.g., by limiting the retention to representation of just a MegaManufacturer subsidiary, business unit or MegaManufacturer employee), and excluding from the scope of that representation other areas (e.g., representation of a different MegaManufacturer subsidiary, business unit, employee or the Corporation itself).

Concurrent with seeking any representation of MegaManufacturer (whether initiated by a firm, or as may be initiated by MegaManufacturer), outside counsel must execute a "MegaManufacturer Outside Legal Services 'No Conflict' Acknowledgement" form to certify that the law firm does not have any actual or potential conflict of interest. Lawyers or firms seeking to represent MegaManufacturer must also acknowledge that they have adequate systems in place to receive, monitor, track and manage information regarding MegaManufacturer Companies and potential MegaManufacturer competitors so as to insure avoidance of any conflict of interest and so as to seek, where appropriate, waivers from MegaManufacturer.

Even after a conflict has been reported or a waiver granted, outside counsel representing MegaManufacturer must notify the MegaManufacturer Risk Manager or in-house MegaManufacturer attorney working on the matter of any material change in facts.

a. Required Disclosures

Outside counsel representing or seeking to represent MegaManufacturer must provide MegaManufacturer Timely Disclosure of any actual or potential conflict of interest. Any such disclosure must be made to the MegaManufacturer attorney with whom you are working on the form provided with this policy; that in-house MegaManufacturer attorney will, in turn, provide the information to the MegaManufacturer Risk Manager for appropriate internal review.

Required disclosures include, but are not limited to, the following:

- Whether your firm represents or has represented within the last 5 years any interest adverse to any of the MegaManufacturer Companies;
- Whether your firm represents or has represented in the last 5 years any MegaManufacturer competitor;
- Whether there exists a conflict of interest between your firm or any member thereof and any current member of the MegaManufacturer Board of Directors or current employer of any member of the MegaManufacturer Board of Directors;
- Whether, in the last 4 years, your firm or any member thereof has issued, prepared or provided a written legal opinion challenging the validity of any intellectual property owned by or licensed to MegaManufacturer;
- Whether in the last 10 years your firm or any current member thereof has ever been disciplined, sanctioned, suspended, disbarred, or had any other adverse action taken against it by the SEC, DOJ, FDA, HHS, FTC, OIG or similar US or foreign agency;
- Whether in the last 10 years your firm or any current member thereof has been convicted of a felony or is currently a party to an administrative or judicial proceeding in which fraudulent activity is alleged;
- Whether your firm or any current member thereof has been adjudicated to have committed malpractice within the last 5 years;

and

- Whether you are aware of any other matter which should be disclosed to MegaManufacturer in order to allow MegaManufacturer to have adequate informed consent about the existence of an actual or potential conflict of interest;
- Whether your firm has an obligation to a MegaManufacturer competitor to keep confidential the mere fact of the firm's representation of the competitor.

In checking or clearing for conflicts, it is not adequate for outside counsel to rely only on the representative list of MegaManufacturer Companies or representative list of medical device companies. Outside counsel must also independently assess whether an actual or potential conflict exists or may arise in connection with their representation of a non-MegaManufacturer individual or entity.

b. Conflict Determination & Waiver Authorization

It is solely within the discretion of the MegaManufacturer General Counsel, or his/her designee(s), to determine whether an actual or potential conflict exists. Conflicts of interest may only be waived, in writing, by the MegaManufacturer General Counsel or his/her designee, and may only be validly granted following appropriate written disclosure by outside counsel of all material information regarding the actual or potential conflict. Inadequate disclosure invalidates any waiver granted.

c. Specific Waivers, “Blanket” & “Implied Waivers”

Waivers may be granted to individual attorneys or to specific law firms. Waivers granted to law firms do not apply to others with whom the law firm may associate with during the representation of MegaManufacturer, unless otherwise expressly agreed, in writing, by MegaManufacturer. Waivers granted by MegaManufacturer also do not automatically apply to any other class of professional that may directly, or indirectly through outside legal counsel, provide services to MegaManufacturer, such as expert witnesses, third-party examiners or testing facilities, judicial personnel, or arbitrators, mediators, or other ADR neutrals who may be required to clear conflicts prior to involvement in a matter involving MegaManufacturer.

Requests for waivers are considered only on a case-by-case basis. Except in particularly extraordinary circumstances, and upon full written disclosure and written approval of the General Counsel or his/her designee, MegaManufacturer will not grant requests for waivers covering multiple, prospective, unidentified, blanket, “implied,” or hypothetical matters.

Any waiver granted will not be deemed a blanket or implied waiver.

d. Assignment & Transfer

Waivers granted by MegaManufacturer are not assignable or transferable. Waivers granted to an individual attorney will not transfer from one firm to another if that lawyer changes firms or the firm changes its organizational status (e.g., by merger with another firm).

e. “Conflict Screens” or “Conflict Walls”

If a waiver has been granted to an individual attorney, and not to the attorney's law firm, the attorney must take appropriate steps to ensure there are internal processes and controls to create a "Conflict Screen" or "Conflict Wall" around that attorney and other members of the law firm, as well as around any work product or documents (paper or electronic) which relate to the representation, including client documents as well as non-public or confidential portions of briefs, affidavits, depositions, etc.

f. Waiver Request & Decision Notification Process

Other than as the MegaManufacturer General Counsel may prescribe, the process for outside counsel seeking a waiver is as follows:

1. Immediately telephone or email the MegaManufacturer attorney with whom you are working or seek to work with to notify that person of any actual or potential conflict which has arisen.
2. Prepare a written disclosure of the conflict on the form provided with this policy, describing, where relevant:
 - the nature of the conflict;
 - the parties, entities and individuals involved;
 - the nature of the work that has been, and/or currently is being, performed for MegaManufacturer; and,
 - other relevant facts which would allow for "informed consent" in considering the request.

Upon receipt of the disclosure and waiver request, the MegaManufacturer Risk Manager will submit the waiver request to the MegaManufacturer Conflict Review Committee ("MCRC") and the Vice President & Senior Legal Counsel for the functional area or business unit affected by the representation or sought representation, for a recommendation on whether to grant or deny the request. The Chair of the MCRC shall submit the recommendation to the General Counsel or his/her designee for a determination of whether to grant or deny the waiver. The Chair of the MCRC will advise you whether the requested waiver is granted, denied, modified/limited, or if more information is needed.

3. Expedited Review: If outside counsel believes it is necessary for MegaManufacturer to act on the waiver request within 24 hours, counsel should request "Expedited Review" on the waiver request form. The MegaManufacturer Risk Manager will use his/her best efforts to act on the request within 24 hours. The failure to act on the request within 24 hours should not be interpreted as having either granted or denied the request.

g. Factors Considered In Granting Waiver Requests

When a waiver is requested, the MCRC will balance the need to have adequate representation of MegaManufacturer with all relevant factors. Without regard to priority or "weight," some factors considered may include, but are not limited to:

- The nature of the conflict (e.g., MegaManufacturer would unlikely grant a waiver to any firm who has ever sued MegaManufacturer, whether any subsequent representation concerned the same or similar matter or presented an actual conflict or not);
- Whether granting a waiver would present unreasonable risk to MegaManufacturer;
- How promptly counsel notified MegaManufacturer of a conflict;
- How fully the conflict was disclosed;
- Whether the conflict concerns current or former matters;
- Whether the firm or attorney seeking to represent MegaManufacturer has expertise in a particular area that may not exist among other lawyers or in other law firms;
- Whether a third party has been granted, or refused to grant, a waiver, and whether such an act is or was legally or ethically required;
- Whether the conflict could affect the ability of outside counsel to zealously represent the interests of MegaManufacturer;
- Whether the conflict was “inherited” by the firm (e.g., through imputed disqualification provisions of state bar and ABA Model Rules) with the employment of an attorney or arose independent of any such circumstances;
- The size of the firm and the potential efficacy of “conflict screening” mechanisms;
- Whether the conflict concerns a “major” versus “minor” competitor of MegaManufacturer;
- The extent to which MegaManufacturer is a significant client of the firm.

Neither this policy, nor any of the illustrative considerations listed above, provide outside counsel with any right to a waiver. MegaManufacturer’s grant of a waiver to one firm or attorney on a matter is no guarantee that MegaManufacturer would grant that same firm or attorney a future waiver on a similar matter.

Each conflict must be separately disclosed. Each waiver request will be determined on a case-by-case basis.

Example 7

Initial Conflicts Check

Outside Counsel shall thoroughly check for actual or potential conflicts of interest that may arise from counsel’s representation of the Company, as defined in these Guidelines or in any applicable code of professional responsibility or rules of professional conduct. Giant Co. expects Outside Counsel to use their best efforts to identify and discuss with the Giant Risk Manager any potential conflicts of a philosophical or policy-driven nature that may compromise a position taken by the Company.

Any conflict must be discussed with the Giant Co. Risk Manager as soon as it becomes known. Giant Co. reserves the right to make an independent determination whether Outside Counsel has an actual or potential conflict of interest. The obligation to disclose actual and potential conflicts of interest continues throughout the term of the representation. Outside Counsel must review conflicts of interest on an ongoing basis as new matters are opened. Any new attorney/client relationships that create a conflict shall be reported to the Company immediately.

The acceptance of an engagement on a matter by Outside Counsel without written disclosure of any conflicts and the written waiver by Giant Co. of all conflicts disclosed constitutes a representation by Outside Counsel that a conflicts check has been conducted and that there are no conflicts.

Conflicts of Interest Defined

Known and actual conflicts of interest involve a law firm's representation of a client in a matter in which the other client's interests *are* or *become* adverse to Giant Co.. Giant Co. classifies these as actual conflicts of interest.

Potential conflicts of interest generally occur when a law firm's representation of a client in a matter, though not actually adverse to Giant Co., has the potential of becoming adverse during the course of the law firm's representation. Giant Co. classifies these as potential conflicts of interest.

Actual and potential conflicts of interest are treated the same for purposes of these Guidelines. Law firms representing Giant Co. *shall not* represent a client in any matter in which the other client's interests are in actual or potential conflict to Giant Co.'s interests, unless Giant Co. has waived the conflict of interest consistent with the processes and procedures outlined herein.

Conflict Waiver Requests

Giant Co. expects a strong degree of loyalty from its Outside Counsel. Conflict waiver requests are not preferred and should be used only when absolutely required by the circumstances.

Requests to waive an actual or potential conflict shall be made by the law firm at the earliest possible time after discovery, via a signed letter on law firm letterhead. The conflict waiver request letter should be in the format of the standard letter attached hereto as Exhibit C.

No general, prospective or unlimited waivers will be considered and should not be requested. All conflict waivers must be approved by the Executive Vice President and General Counsel.

The letter should be submitted by e-mail, in PDF or MS Word format, to the Giant Co. General Counsel and shall set forth *all* relevant facts about all aspects of the conflict. The letter shall include a specific discussion of each of the Relevant Facts listed below and shall state affirmatively and with particularity each Representation listed below.

Relevant Facts

The identity of the other client;

The specific work to be performed for the other client (after obtaining the client's authorization to make such disclosure);

The type of work performed by the law firm for Giant Co.;

Whether the law firm has obtained the written consent of the other client;

The identity of individuals within the firm who will perform the engagement for the other client and their location (e.g., Chicago office);

The individuals within the firm who perform, and will perform (to the extent known), work for Giant Co.;

Whether the adverse representation concerns subject matter or substantive law that may be important to Giant Co.;

A discussion of the law firm's analysis, under the applicable code of professional responsibility or rules of professional conduct, that a waiver is consistent with the rules of ethics applicable to the particular jurisdiction; and

A list of all in-house Giant Co. counsel whose matters may be affected by the conflicts waiver request.

Representations

The matter is not related to, does not arise out of, and will not result in a litigated matter between Giant Co. and the other client;

The matter involves an area of practice in which the law firm does not represent and has not represented Giant Co.;

The law firm has not learned anything through its course of representing Giant Co. that is substantially related to the subject of the representation of the other client;

It appears that the representation of the other client will not adversely affect the relationship between Giant Co. and the law firm or dilute the law firm's loyalty to and zeal in its representation of Giant Co.;

The law firm's other client is a pre-existing client of the law firm in the practice area for which the waiver is sought;

Failure to grant the waiver will cause an unreasonable hardship for the law firm's other client (for example, where the law firm acts as the other client's *de facto* real estate department, and it would cost the client a significant amount of money to bring another law firm up to speed on the transaction);

It appears there is no chance of the parties becoming fundamentally antagonistic, or that Giant Co.'s interests could in any way be prejudiced;

The law firm agrees that it will withdraw completely from the matter if litigation ensues between Giant Co. and the other client or if Giant Co. subjectively believes that the parties have become fundamentally antagonistic, or that it will suffer prejudice;

A confirmation by the law firm that a conflicts waiver by Giant Co. does not waive the law firm's duty to keep confidential all information about Giant Co. that is obtained during the representation of the Company; and

Giant Co. and the other client consent to the waiver.

Cost of Determining Conflict

Time spent investigating, reporting and resolving actual and potential conflicts or preparing conflict waiver requests is not billable.

Representing Significant Competitors

Giant Co. may conclude that an actual conflict of interest exists if Outside Counsel or Outside Counsel's law firm represents a significant competitor of Giant Co. or its subsidiaries or affiliates. A list of Giant Co.'s principal subsidiaries is attached as Exhibit D. As a pre-condition of engagement, Outside Counsel must disclose in writing the identity of any national or regional retailers or any significant competitors of Giant Co. or its subsidiaries or affiliates (*see* Exhibit E for examples) that the Outside Counsel firm represents, together with a general description of the type of legal services that the Outside Counsel firm provides to such client(s). If Outside Counsel concludes that it would be improper to provide this information to the Company, Outside Counsel should decline the engagement.

Multiparty Representation

The approval of the Giant Co. General Counsel is needed in all situations where it is proposed that a single law firm represent both Giant Co. and other parties in a matter. All requests for approval of such representations must be submitted in writing and should contain statements from Outside Counsel describing: (a) the extent and nature of the proposed joint representation, (b) the steps that the law firm will take to protect proprietary or confidential Giant Co. information from being disseminated to jointly represented clients, and (c) the likelihood for adversity among the proposed clients. As a rule, such engagements will be approved only where the potential for adversity is remote and where all parties agree in writing in advance that in the event of a conflict that the law firm will either withdraw completely or continue solely representing Giant Co..

Representing Giant Co. in Bankruptcy Proceedings

A law firm representing Giant Co. as a creditor or party-in-interest in connection with a bankruptcy proceeding may concurrently represent other creditors and parties in interest in the case, provided that the representation is disclosed to Giant Co., the other clients are similarly situated to Giant Co., and the representation does not result in positional adversity to Giant Co..

The Giant Co. General Counsel should be informed of any such representation.

Example 8

Conflict Checks. You will: (a) remain free of conflicting interests and the appearance of impropriety at all times; (b) thoroughly check for actual or potential conflicts of interest; (c) review Exhibit 21.1 to Company's U.S. Securities and Exchange Commission Form 10-K, which lists Company's subsidiaries, and request an up-to-date listing of subsidiary companies to facilitate a conflicts check; (d) immediately advise us upon your discovery of a conflict or potential conflict, even if you believe that the matter does not amount to a directly adverse potential conflict; (e) immediately bring the matter to the attention of the Company Lead and resolve the actual or potential conflict prior to providing any services to Company (or any additional services should the conflict or potential conflict be discovered after commencing work for Company); (f) immediately advise us of actual or potential representations that may be or may become adverse to the interests of Company (including its interests in a fiduciary capacity) or of any situation that you know or have reason to know may involve a conflict of interest, *before* any representation commences or continues; and (g) prior to accepting any engagement and during such engagement, provide Company at no expense with any publications, presentations or other public writings by any member of your organization that directly relate to the facts at issue in the engagement or that might negatively impact the engagement.

By accepting an engagement from Company, you represent that a conflict check has been conducted, that all disclosures required by this Section 1.3.1 have been and will be made, that no actual or potential conflict of interest exists. Accepting additional engagements from Company constitutes your continuing representation that conflict checks have been conducted as to each matter and that no conflicts of interest exist. Actual and potential conflicts of interest are treated the same way for purposes of this Policy.

Third party subpoenas seeking information from Company constitute potential conflicts. Prior to sending such subpoenas, you will discuss the matter with Company's Legal Counsel (LegalCounsel@XXXXXX.com).

1.3.2. Conflict Waivers. Requests to waive an actual or potential conflict must be made at the earliest possible time after discovery of the conflict, via a signed letter on your letterhead or by an email to the Company Lead. Conflict waiver request letters will set forth *all* relevant facts about the conflict, including the following: the identity of the other client; the specific work to be performed for the other client (after obtaining the client's authorization to make such disclosure); the type of work performed by your organization for Company; whether your organization has obtained written consent of the other client, in accordance with laws and rules; the identity of individuals within or for your organization who will perform the engagement for the other client and their location; the individuals within your organization who perform, and will perform (to the extent known), work for Company; whether the adverse repre-

sentation concerns subject matter or substantive law that may be important to Company; a discussion of your analysis, under the applicable code of professional responsibility or rules of professional conduct, that a waiver is consistent with the rules of ethics applicable to the particular jurisdiction; and a list of all Company legal department personnel whom you know to be working on the matter for which the conflict waiver request is sought.

Any conflict waiver will be conditioned on the following: (a) Company's right to reconsider its consent to the conflict waiver if the interests of outside counsel's other client or Company materially change; (b) no personnel involved in, or previously involved in, performing work for Company will work on the matter in conflict; (c) personnel working on the matter in conflict will, in the course of such work, neither consult with personnel involved or previously involved in performing work for Company, nor access such personnel's Company-related work product or files, including but not limited to imposition of an ethical screen acceptable to Company which appropriately restricts access to Company documents on your network (electronic and hard copy); (d) your organization will not represent Company or its conflicted client as litigation or dispute resolution counsel in any dispute arising from or out of the conflicting matter; (e) there is no chance of the parties becoming fundamentally antagonistic, or that Company's interests could in any way be prejudiced by granting the waiver; (f) confirmation that a conflicts waiver by Company does not waive your organization's duty to keep confidential all information about Company that is obtained during the representation of Company and with respect to such information, extends beyond any termination of the attorney-client relationship; and (g) such other conditions as Company, in its sole discretion, may require.

Endnotes

1. The authors are indebted to James Jones (Senior Fellow at the Center for the Study of the Legal Profession at Georgetown University Law Center in Washington, D.C.), Martin I. Kaminsky, General Counsel of Greenberg Traurig, LLP, for their insights, and numerous other law firm general counsel who have provided us—anonously—with examples of provisions from clients' OCGs, and to our partner Janis Meyer for her invaluable comments. Marquette University law student Andrew Trevino provided invaluable research assistance. However, the views expressed are entirely our own.

2. Anthony E. Davis & Noah Fiedler, *Indemnity Provisions in Outside Counsel Guidelines: A Tale of Unintended Consequences*, 23 PROF.LAW. no. 4, 2016, at 1.

3. These are excerpts from real-world OCGs. Other examples are set forth in full in Attachment A.

4. According to the Opinion, a lawyer who represents a corporate client is not by that fact alone barred from representation adverse to a corporate affiliate of that client in an unrelated matter. The Opinion provides a number of factual considerations in the analysis, including the reasonable expectation of the client, the obligation of a corporation to keep the lawyer apprised about changes in affiliates, the nature of the work performed, and whether confidential information was ever obtained from an affiliate.

5. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [34] (2016).

6. 618 F.3d 204, 210 (2d Cir. 2010).

7. *Id.*

8. *See, e.g.*, the provision in Attachment A, Example 8, which requires outside counsel to review the client's 10-k filings in order to ascertain the client's current subsidiaries.

9. *Id.*
10. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2016).
11. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [24] (2016).
12. MODEL RULES OF PROF'L CONDUCT R. 1.9, 1.10 & 1.18 (2016).
13. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2016).
14. Neil W. Hamilton, *Are We A Profession or Merely A Business? The Erosion of Rule 5.6 and the Bar Against Restrictions on the Right to Practice*, 22 WM. MITCHELL L. REV. 1409, n. 10 (1996) (citing GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 824, 824.5 (2d ed. Supp. 1996) (explaining that if lawyers are not permitted to compete openly for the business of clients, "client choice" becomes an empty idea)); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381 (1994) (Restrictions on Right to Practice).
15. Hamilton, *supra* note 14, at n. 13 (citing Committee on Prof'l Responsibility, Ass'n of the Bar of City of N.Y., *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORD-HAM URB. L.J. 897, 909 (1993)); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14.
16. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110, n. 105 (1969).
17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371 (1993), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-444 (2006), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-394 (1995), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000).
18. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14.
19. *Id.*
20. *Id.*
21. A number of law firm general counsel were helpful in providing material (on an anonymous basis—both as to the identity of the firms providing the information and as to the source of the provisions) for the conflicts provisions included in this Attachment or referred to in this article. Some of the examples have been edited (without affecting the purport of the provisions) so as not to reveal the identity of the firm providing the information or the source of the provisions.