

## APPROVED CHANGES TO ACFE RULES

In February 2017, the ACFE Board of Regents established a working group of CFEs to advise the Board on a number of proposed amendments to the ACFE rules of conduct for its members. The members of the Working Group were Janet McHard, CFE, CPA; Eric Feldman, CFE; Tiffany Couch, CFE, CPA; Bert Lacativo, CFE, CPA; Astra Williamson, CPA (Canada); and Hugh Penri-Williams, CFE.

The Working Group met on April 10, 2017, to consider how each potential change might impact the ACFE and its reputation, as well as whether each rule change could potentially be harmful or burdensome to our members or to the public at large. The Working Group submitted its findings and recommendations, which the Board reviewed during its June 2017 meeting. The Board decided to submit several proposed amendments for public comment by ACFE members. The public comment period was open throughout September and October of 2017.

After compiling and evaluating the public comments, the Board of Regents made further adjustments to the amendments to meet members' concerns. The following red-lined versions reflect the approved amendments to the ACFE Bylaws, Code of Professional Standards with Interpretation and Guidance, and the Code of Professional Ethics. These changes go into effect on March 15, 2018.

### ACFE BYLAWS PROPOSED AMENDMENTS TO SECTION 5

Section 5.07 Suspension and Expulsion. ~~The Board of Regents may suspend, expel, or discipline any member if the member is found guilty by a court of competent jurisdiction of a crime punishable by imprisonment for more than one year, a felony, or any crime involving moral turpitude. A crime of moral turpitude is one that calls into question the integrity and judgment of the offender and includes but is not limited to offenses such as bribery, fraud, corruption, solicitation, embezzlement, theft by a fiduciary or trustee, or theft by trick, deceit or false pretenses.~~

The Board of Regents ~~may also,~~ in its sole discretion, shall have the authority to expel, suspend, or discipline a Member if, under such procedures as the Board of Regents may establish, it determines that a Member has committed any violation listed in this Section 5.07. Members are subject to discipline for the following:

- A. ~~Failed-Failing~~ to abide by the Corporation's governing rules (including these By-Laws), ~~or~~ the Corporation's Code of Professional Ethics, the Corporation's Code of Professional Standards, or other rules of conduct for Members as the Board of Regents may adopt from time to time.
- B. Being found guilty by a court of competent jurisdiction of a crime punishable by imprisonment for more than one year, a felony, or any crime involving moral

turpitude. A crime of moral turpitude is one that calls into question the integrity and judgment of the offender and includes, but is not limited to, offenses such as bribery, fraud, corruption, solicitation, embezzlement, theft by a fiduciary or trustee, money laundering, tax evasion, or theft by trick, deceit or false pretenses.

C. Engaging in deceit in obtaining the CFE credential, including submitting false application information or receiving or providing improper assistance in relation to any person taking the CFE Exam.

BD. ~~Has committed~~Committing any act discreditable to the Corporation or its membership.

C. ~~Has been declared by a court of competent jurisdiction to be insane or to lack legal capacity.~~

DF. ~~Failed-Failing~~ to cooperate with a disciplinary investigation of the Corporation.

EG. ~~Failed-Failing~~ to use the “Certified Fraud Examiner” or “CFE” designations in accordance with the licensing agreement with ACFE, Inc.

If a Member fails to pay the required membership dues or is found to have falsified any information submitted to the Corporation, such Member ~~shall~~may be automatically expelled without the necessity of a vote by the Board of Regents.

Any Member who becomes delinquent in non-dues payments owed to the Corporation for ninety (90) days shall be suspended for ninety (90) days or until such time as the Member’s account is paid in full or resolved to the satisfaction of the Corporation. If at the end of the ninety-day suspension the Member’s account has not been paid in full, the Member shall be expelled without the necessity of a vote by the Board of Regents.

Any Member who fails to meet or prove compliance with the established Continuing Professional Education requirements shall be suspended indefinitely until such time as the Member demonstrates ~~that he or she has complied~~compliance to the satisfaction of the Corporation.

The Board of Regents may suspend or terminate the membership of a Member who has been declared by a court of competent jurisdiction to be insane or to lack legal capacity.

The Board of Regents may provide the conditions and procedures under which the Board of Regents may reinstate a Member who has been suspended or expelled or whose membership was otherwise terminated. Notice of a disciplinary action, together with the reasons for such action, may be published in any manner as the Board of Regents may prescribe.

Section 5.08 Disclosure of Convictions. Any Member convicted of a felony shall disclose the conviction to the Corporation within 30 days of the date of the conviction.

Additionally, any Member convicted of a misdemeanor involving moral turpitude as defined in these Bylaws shall disclose the conviction to the Corporation within 30 days of the date of the conviction.

Section 5.0809 Payment of Fees and Dues. All Member services shall be rendered by the ACFE, Inc. Annual fees for such services shall be set by ACFE, Inc. ACFE, Inc. may refuse to certify as a Member in good standing any person who is delinquent in the payment of his/her annual fees.

Section 5.10 Member Information. Members shall update their contact information with the Corporation immediately after, but in no case more than 60 days from the date when the information changed. Notices sent by the Corporation to the physical address or email address listed in the Corporation's records at the time of distribution will be deemed delivered to Members.

## ACFE CODE OF PROFESSIONAL STANDARDS INTERPRETATION AND GUIDANCE

### PROPOSED AMENDMENTS TO SECTION III. A. 2.

2. *Prior to accepting the fraud examination, Certified Fraud Examiners shall investigate for actual, ~~or~~ potential, and perceived conflicts of interest. CFEs shall disclose any ~~actual or potential~~such conflicts of interest to potentially affected clients or to their employers.*

#### **Guidance**

An actual or potential *conflict of interest* exists when a member's ability to act objectively, or in the best interests of his client/employer, is impaired or is reasonably likely to be impaired by any current, prior, or future relationship with parties relevant to the fraud examination. For example, a conflict of interest might exist if a member is asked to conduct a fraud examination of someone with whom he or she has strong personal or business ties, such as a relative, a friend, or a business partner. A perceived conflict of interest exists when a situation would cause a neutral and informed third party to reasonably conclude that a CFE's ability to conduct a fraud examination in an objective manner would be hindered.

The wording in the Standards that CFEs "*shall* disclose any actual, ~~or~~ potential, and perceived conflicts of interest" makes it clear that a CFE may not proceed with an engagement before each affected client/employer has been notified of the ~~actual or potential~~ conflict. However, the rule does not necessarily bar CFEs from accepting engagements where an actual, ~~or~~ potential, or perceived conflict of interest exists. Instead, the rule only requires that ~~the actual or potential~~such a conflict be disclosed. After disclosure, it is the client/employer's decision as to whether the CFE may continue the engagement.

As a matter of best practice, a CFE should disclose any actual or potential conflict to his client/employer in writing. And if, after disclosure, the client/employer consents to allow the CFE to continue the engagement, the consent should be in writing as well. Thus, a record of both the disclosure and the written consent should be maintained in case the CFE's objectivity is later called into question.

Although the Standard only specifies that CFEs shall investigate for actual, ~~or potential,~~ or perceived conflicts "prior to accepting the fraud examination..." CFEs should be mindful of the potential for conflicts throughout the engagement, and if ~~an actual or potential~~ such a conflict arises in the midst of an examination that was not known at the outset, it is best practice for the CFE to disclose that conflict immediately and suspend work until written consent has been obtained from the client/employer. Otherwise, the CFE's work product might be vulnerable to claims that the CFE lacked objectivity.

The following are examples of how CFEs could conduct an engagement where there is a potential or perceived conflict of interest if it is properly disclosed.

Example

A CFE is approached by a company to investigate a possible corruption scheme, and she checks for conflicts prior to accepting the engagement. She discovers that she briefly worked at another organization with someone in the company's purchasing department, but they had little interaction. The CFE discloses the potential conflict to Company A, whose leadership decides that they are not concerned that the conflict will affect the CFE's judgment. The CFE prepares a written disclosure that identifies the conflict, states that Company A acknowledges the situation and consents to the engagement, and is signed by an authorized representative of Company A.

Example

A CFE is approached by Company A to provide a fraud examination in relation to a business agreement between Company A and Company B. Two years earlier, the CFE performed consulting services for Company B in an unrelated matter. The CFE must disclose and obtain signed consent from both Company A and Company B.

Example

A university approaches a CFE's private firm to conduct a fraud examination in a case that could potentially involve liability on the part of the university. The CFE has an extended family member who is about to graduate from the university. The CFE does not believe there is an actual conflict of interest, because the family member had already received final grades and been officially notified of graduation eligibility before the CFE was approached about the engagement. However, the CFE determines that there could be

a perceived conflict of interest, and therefore must disclose the situation to the potential client prior to accepting the engagement.

### PROPOSED AMENDMENTS TO SECTION III. A. 3.

3. *Certified Fraud Examiners shall maintain objectivity in discharging their professional responsibilities within the scope of the fraud examination.*

#### **Guidance**

*Objectivity* refers to the ability to conduct fraud examinations without being influenced by one's own personal feelings or the personal feelings and motives of others. An objective CFE provides professional services or recommendations in an impartial manner and is not influenced by bias, prejudice, or other information that cannot be substantiated or that has no foundation. *Bias* refers to partiality that prevents an individual from objectively considering an issue or situation, whereas *prejudice* refers to a preconceived attitude, belief, opinion or feeling that prevents objective consideration of an issue or situation.

A CFE would likely be found to have violated this Standard, for example, if he or she were to determine at the outset of an examination that Suspect A had misappropriated funds, and then proceeded to only gather or seek out evidence showing that Suspect A was responsible for the missing money, while ignoring evidence that tended to show Suspect A was not responsible.

This Standard is closely related to Section III.A.2., which requires CFEs to disclose actual, ~~or~~ potential, or perceived conflicts of interest, but it is broader in some respects. While CFEs are only required to disclose conflicts of interest, which maybe waived by the client/employer, there is no waiver option for this Standard. A CFE who fails to maintain objectivity is in violation of the Standards regardless of whether the client/employer consents to the CFE's conduct. Therefore, a CFE should remove himself from an engagement if his objectivity has become so diminished that it could significantly impact the outcome or findings of the examination.

### PROPOSED AMENDMENTS TO SECTION V. B. 2.

2. *No opinion shall be expressed regarding the legal guilt or innocence of any person or party.*

#### **Guidance**

Standard III.C.2 permits CFEs to draw reasonable conclusions in a fraud examination if those conclusions are supported by evidence that is relevant, competent and sufficient. However, this Standard, which is taken directly from Article Five of the ACFE Code of Professional Ethics, makes clear that those conclusions should not include the CFE's opinion regarding the legal guilt or innocence of any person or party.

The reason for this rule is to prevent the CFE from inserting himself into the role of the judge or jury. The CFE's job in a fraud examination is to present evidence and draw reasonable conclusions from that evidence. But the CFE may draw a clear line between a report that essentially says, "Here is the evidence and the conclusions that can be drawn from it," and one that steps over the line and says, "Suspect A is guilty of committing fraud."

If a person is guilty (or innocent) of a crime is not a decision for the CFE to make. That determination must be made by a judge or jury. The CFE might adamantly believe that a suspect has committed fraud, but until that suspect has been convicted by a court of law, he or she is not guilty.

The CFE may still draw reasonable conclusions about a person's misconduct without violating this Standard. For example, it is permissible for a fraud examination report to include conclusions that a person misappropriated cash, misrepresented a transaction, concealed funds and so on. Provided that it has a reasonable basis in fact, any conclusion of this sort that focuses on a person's conduct, rather than on his legal guilt or innocence, is permissible.

A CFE's report may also contain evidence and conclusions relating to every element of a particular crime. For example, suppose that a criminal fraud statute has four elements:

- (1) a material false statement
- (2) made with knowledge of its falsity
- (3) which was relied upon by a victim and
- (4) which caused harm to the victim

Assuming-Presuming that the evidence supports ~~them~~those elements, the CFE would be permitted to draw conclusions that a suspect made a material false statement, that the suspect knew the statement was false, that the victim relied upon the suspect's statement and that the victim suffered harm as a result. All of these conclusions focus on the conduct of the suspect or the victim and could be reasonably supported by the facts of the case. But this is where the CFE's conclusions must stop. He or she is not permitted to then give the opinion that the suspect is guilty of the crime of fraud, because that decision must be left to the judicial system.

The following are examples of permissible statements that would not violate the prohibition against opinions of guilt or innocence.

"It is my opinion that [Client] has suffered losses of \$XXX as a result of cash skimming and payroll disbursement schemes between [Date 1] and [Date 2] (Exhibit A).

Of the amounts identified as losses, \$XXX is attributable to a cash skimming scheme whereby your company billed and collected revenue from tenants but the funds were deposited to [Shell Company Name]

bank accounts (Exhibit B). We can confirm that [Shell Company Name] LLC is owned by [Subject]. We identified a total of 12 customer checks diverted away from your accounts and into the [Shell Company Name] accounts. Our investigation shows a systematic and contemporaneous manipulation of [Client's Name] accounting file each time your revenues were diverted.

In addition, we have analyzed your Company's payroll records. It is my professional opinion that [the Subject] overpaid herself \$XXX in gross pay by overstating hours worked. As a result of this overpayment, [Client's Name] overpaid employer-related taxes of \$XXX. Our analysis of the XXX payroll scheme can be found at Exhibit C."

Additionally, the rule does not prohibit CFEs from presenting a statement attesting to the sufficiency of evidence if, during the course of a fraud examination, they develop an opinion that a crime has been committed. For example, a CFE could write a report that states:

"Given the investigation and evidence presented in this report, there is sufficient evidence to believe that [the Subject] might have committed a crime, and I recommend that this matter be referred to the appropriate law enforcement agency for investigation."

The rule against opinions on guilt or innocence also does not prohibit judges or officers of courts or tribunals from performing their essential functions, such as advocating for or against a guilty verdict or determining guilt or innocence. For example, it is not a violation for a prosecutor who is a CFE to argue before a judge or jury that the defendant is guilty. Similarly, it is not a violation for a defense attorney to argue that a client is not guilty.

## **ACFE CODE OF PROFESSIONAL ETHICS PROPOSED AMENDMENT TO ARTICLE II**

- II. An ACFE Member shall not engage in any illegal or unethical conduct, or any activity which would constitute a ~~an improper~~ conflict of interest that has not been properly disclosed to the appropriate parties.