

APPROVED WORKING GROUP AMENDMENTS TO ACFE MEMBERSHIP RULES
(REDLINED VERSION)

One of the duties of the ACFE Board of Regents is to ensure that the rules of conduct governing members are relevant, fair and in accordance with the expectations of the professional anti-fraud community. In February 2019, the Board established an advisory working group of CFEs to advise it on possible revisions to the ACFE rules. The working group's members are:

- Isabel Cumming, J.D., CFE, CIG – Inspector General, Baltimore City
- Raj Dhanlall, CFE, CA (South Africa), CIA – Partner, PwC
- Derek Ellington, CFE, ACFE, CEDS – Senior Consultant, Ellington Digital Forensics
- Quincy Howard, CFE, CCEP, CIPP – Manager, Global Fraud Investigations, Cardinal Health
- Dan Ramey, CFE, CPA, CFF – Founder and President, Houston Financial Forensics

The working group developed a list of recommendations and supporting arguments for the Board to consider. After careful review of the recommendations, the Board submitted several potential amendments for member comment regarding the ACFE Bylaws, the Code of Professional Standards, and the ACFE's Guidance on the Code of Professional Standards. The comment period closed May 13, 2020. The Board reviewed the member comments in its June 2020 meeting, and made its final revisions based on that feedback. The Board approved the final proposed amendments, effective November 1, 2020.

A redlined version of the amendments is provided below. In addition to these redlined changes, the Board also updated the ACFE rules to use gender-neutral language.

ACFE BYLAWS

PROPOSED AMENDMENTS TO SECTION 5

Section 5.06 Member Resignation. A Member may resign from membership in the Corporation at any time. Resignation shall be in writing and may be offered to the Board of Regents. Actions on such resignations, as well as actions on applications for reinstatement, shall be undertaken by the Board of Regents under such provision as may be prescribed in these Bylaws.

In the event that a Member resigns or allows their membership to expire after a formal notice of a disciplinary complaint has been filed against them by the ACFE but before a final determination on the complaint by the Board of Regents, that Member shall not be eligible for renewal of membership with the ACFE unless authorized by the Board of Regents. Additionally, such a Member shall be assigned the status of "not eligible for membership" in ACFE records, which the ACFE may disclose to persons inquiring about the individual's membership status.

Section 5.07 Suspension and Expulsion. The Board of Regents, 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:

[...]

C. Engaging in deceit in pursuit of becoming an ACFE member, obtaining the CFE credential (including submitting false exam application information or receiving or providing improper assistance in relation to any person taking the CFE Exam), renewing ACFE membership (including the false reporting of Continuing Professional Education or failure to disclose character issues as required upon renewal), and any similar misconduct established by the disciplinary body of another professional organization to which the Member belongs, including submitting false application information or receiving or providing improper assistance in relation to any person taking the CFE Exam.

ACFE CODE OF PROFESSIONAL STANDARDS

PROPOSED AMENDMENTS TO THE GUIDANCE ON SECTION III. A. 2.

Section III. A. Integrity and Objectivity.

[...]

2. Prior to accepting the fraud examination, Certified Fraud Examiners shall investigate for actual, potential, and perceived conflicts of interest. CFEs shall disclose any 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~~ Member's ability to act objectively, or in the best interests of ~~his or her~~ their client ~~and/or~~ employer, is impaired ~~or is reasonably likely to be impaired~~ by any current, prior, or anticipated future relationship with parties relevant to the fraud examination. Similarly, a potential conflict of interest exists when the Member's objectivity is reasonably likely to be impaired due to a potential event or situation. For example, a conflict of interest might exist if a ~~member~~ Member is asked to conduct a fraud examination of someone with whom ~~he or she~~ they have ~~has~~ strong personal or business ties, such as a relative, a friend, ~~or~~ a business partner, an entity the Member has a financial interest in, or— in the case of a potential conflict—someone with whom the Member reasonably foresees having a strong personal or business relationship. 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~~ could be hindered.

The wording in the Standards that CFEs “*shall* disclose any actual, potential, and perceived conflicts of interest” makes it clear that a CFE may not proceed with an engagement before each affected client and/or employer ~~client/employer~~ has been notified of the conflict. However, the rule does not necessarily bar CFEs from accepting engagements where an actual, potential, or perceived conflict of interest exists. Instead, the rule only requires that such a conflict be disclosed. After disclosure, it is the client and/or employer ~~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, potential, or perceived conflicts to his or her their client and/or employer ~~client/employer~~ in writing. And if, after disclosure, the client and/or employer ~~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, potential, or perceived conflicts “prior to accepting the fraud examination...” CFEs should be mindful of the potential for conflicts throughout the engagement, and if 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 and/or employer/client/employer. Otherwise, the CFE’s work product might be vulnerable to claims that the CFE lacked objectivity.

[...]

Example

A company requests a CFE to investigate certain transactions with a local vendor that the company uses. The CFE has a close family member who has seriously considered applying to the local vendor for employment but has not yet done so. Even though there may not be a current conflict of interest, the CFE should disclose the potential for a conflict to the company.

PROPOSED AMENDMENTS TO THE GUIDANCE ON SECTION III. A. 3.

Section III. A. Integrity and Objectivity.

[...]

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

Guidance

[...]

Another issue that CFEs should consider when accepting a fraud examination engagement is whether a proposed contingency fee (i.e., an arrangement where the amount of the fee for services is dependent on the outcome of the case) will compromise the CFE’s objectivity or give rise to an actual or perceived conflict of interest. Generally, contingency fees can expose CFEs to allegations of bias, because CFEs are expected to be objective and to avoid the appearance of a conflict of interest. However, there may be situations in which a contingency fee is customary, reasonably unlikely to result in bias, and/or is required by law for certain services performed by CFEs. For instance, contingency fees would be acceptable under the ACFE Code of Professional Standards in the following hypothetical situations:

- Royalty auditors are customarily paid a contingency fee based on recovery of royalties that were not properly distributed (whether the royalties were improperly held due to fraud or otherwise).
- As required by the relevant jurisdiction’s law, a health care claims recovery auditor is paid contingency fees based on recovered overpayments (whether the overpayments made were due to fraud or otherwise).

Another consideration for CFEs who are members of or licensed by other professional organizations is that there might be conflicting rules on contingency fees, in which case the CFE should follow the more stringent of the rules (see Section II of the Guidance). Therefore, contingency fees should be approached with caution, but there are some circumstances where

such fees may be acceptable if they are reasonable and unlikely to impact the objectivity of the CFE.

PROPOSED AMENDMENTS TO SECTION III. F. AND THE GUIDANCE

Section III. F. Confidentiality. Certified Fraud Examiners shall not disclose confidential or privileged information obtained during the course of a fraud examination without the express permission of a proper authority (such as the client or where required by statute or regulation) or the lawful order of a court. This requirement does not preclude professional practice or investigative body reviews as long as the reviewing organization agrees to abide by the confidentiality restrictions.

Guidance

In general, *confidential* information includes any information:

1. that is held by or concerns the client/employer, whether technical, business, financial or otherwise
2. that the client/employer discloses to the CFE or that the CFE obtains in the course of a professional engagement and
3. that the client/employer treats as confidential or secret, or which the client/employer does not make publicly available

Privileged information means information obtained within the context of a legally protected relationship that the law protects from forced disclosure. In the context of a fraud examination, the most likely privileges to exist are the legal professional privileges that protect communications between professional legal advisors (e.g., solicitors, barristers, attorneys, etc.), their clients and, in some situations, third-party consultants hired to help provide legal advice to clients. The requirements for the application of these privileges vary among jurisdictions, but generally, if a CFE is retained by and working under the direction of an attorney, then certain communications made between the CFE and the client/employer or the attorney might be deemed privileged.

Due to the nature of fraud examinations, CFEs often will come into contact with confidential or privileged information of the client/employer. This Standard provides that CFEs may not disclose such information without “the express permission of a proper authority or the lawful order of a court.” Obviously, the most common “appropriate authority” is the client/employer itself, who owns the confidential or privileged information. A CFE should generally not disclose a client/employer’s confidential or privileged information without the client/employer’s consent or else ~~he or she~~they will have breached that client/employer’s trust and would likely be found to have violated this Standard.

There are, however, certain exceptions. The Standard specifically permits CFEs to turn over confidential or privileged information when compelled by a lawful court order to do so. In some circumstances the CFE may also be permitted to turn over confidential or privileged information if authorized by the law of that CFE’s jurisdiction — for example, if the CFE becomes aware of an ongoing fraud and is obligated by statute to report the crime. Similarly, if the CFE is ordered to turn over confidential or privileged information by a legislative or regulatory body, an investigative review board or another entity with the proper legal authority to compel the production, then the CFE is permitted to disclose the information.

When presented with a lawful order directing him to turn over the client/employer's confidential or privileged information, a CFE must alert the client/employer unless directed otherwise by the body issuing the order. If the CFE is notified that the client/employer will make a legal challenge to the compelled production, then the CFE may delay in producing the information until the challenge has been settled, provided that the CFE's delay does not violate the order.

CFEs should evaluate whether the identity of a whistleblower is considered confidential information. Statutes, regulations, or organizational policies may define a whistleblower and might provide protections to that person, including protection from disclosure of their identity. Whether this information must remain confidential will be based on the circumstances, the best interest of the client, the relevant law, and organizational policies, all of which the CFE should take into account. In addition to being a potential violation of Section III. F., improper disclosure of a whistleblower's identity risks retaliation against the whistleblower and can result in claims against the CFE and the CFE's client or employer.