

# CONFLICTS OF INTEREST FOR NOMINEE DIRECTORS



Session 7

## Conflicts in Directorships

What we will talk about:

- Operational Conflicts
- Sharing of information with portfolio team
- Draft of Revised IFC Nominee Directorship Directive

2



## Conflicts in Directorships

### ➤ Operational Conflicts

- Identify When a Conflict Exists
- How to Manage the Conflict

- Sharing of information with portfolio team
- Draft of Revised IFC Nominee Directorship Directive

3



## Operational Conflicts

- IFC Staff Nominee Directors
  - Conflicts arise due to nominee's responsibilities to IFC as IFC staff, on the one hand, and nominee's responsibilities to the company as board member owing fiduciary duties to the company, on the other hand. Conflict risks are greater when IFC staff nominee is involved in same sector and region as the company.
- External Nominee Directors
  - Conflicts can arise from the candidates' other interests including other directorships, business activities, personal investments, family relationships, or present or past employment
- Circumstances change. COIs may arise throughout the term of a directorship. Nominee Director must assess all conflicts concerns as they arise and seek guidance for managing the conflicts if necessary.

4



## Example 1 – Staff responsibilities and director's obligations

- What happens if Company A wants an influx of capital and seeks additional capital from some of its larger existing shareholders, including IFC?
- Can IFC nominee participate in board discussions and vote on the additional financing?
- Does it matter that nominee is external or IFC staff?
- In very rare circumstances, the IFC staff member may also be the IFC portfolio officer for the company (e.g. early stage company). What should the director do?



## Example 1 – Staff Responsibilities & Director Obligations

- What happens if Company A (IFC investee with IFC staff as IFC board nominee) decides to ask IFC for a loan, is there a conflict?
- Can IFC nominee participate in board discussions and vote on the IFC loan proposal?
- Does it matter that the IFC staff works in the same sector?
- In very rare circumstances, the IFC staff member may also be the IFC portfolio officer for the company (e.g. early stage company). What should the director do?

6



## Example 1 cont'd

- What are the potential risks of unmanaged conflicts:
- Could the unsecured creditors sue the IFC nominee on the basis that the IFC nominee was an interested director when the loan from IFC was approved?
- Director's position generally may be helped if:
  - Director disclosed to the board that he is IFC staff and conflicted by loan request
  - Director did not vote on loan transaction
  - Director recused himself from any special committee that considered the loan
  - Minutes recorded recusal and abstention from vote and discussions.

7



## Example 2 – Competitors and Protection of Information

- IFC has equity investment in Company A
- IFC has right to nominate director; nominates IFC staff member
- Staff's 'day job' at IFC involves the sector and region in which Company A operates
- IFC is considering an investment in Company B, a competitor of Company A, that will allow Company B to expand its market and may potentially take some business away from Company A. Company A is aware of Company B's interest in growing its market and is deciding on a strategy to strengthen its presence in the market.
- Should the staff or anyone reporting to her be staffed on the Company B transaction?

8



## Operational Conflicts

### Recap - Examples of operational conflicts in directorships

- Generally applicable to regular IFC staff nominees only:
  - Supervisory conflicts.
  - Competition conflicts.
  - Equity/Debt conflicts.
  - Distress situations heighten the risk
- Generally applicable to both IFC staff and external nominees:
  - Personal conflicts/Staff Rules implications
  - Other business interests

9



## Operational Conflicts

### Recap: How IFC Manages COI in a directorship

- Depends on facts and circumstances, including local law and company charter
- Full disclosure of conflict (including for example that staff is wearing two hats)
- Recusals as necessary
- Walling off from conflicting issues within IFC
- In extreme circumstances, stepping down from director seat
- Mitigation does not eliminate all conflicts risk – residual risk will remain that should be weighed against benefit of having nominee director on the board

10



## Conflicts in Directorships

- Operational Conflicts
- **Sharing of information with portfolio team**
- Draft of Revised IFC Nominee Director ship Directive

11



## Sharing of information with portfolio team

- Sharing authorized is the default position, by consent of company (and other shareholders if SHA)
- Notification letter to the investee company provides:

"The company hereby acknowledges and agrees that the nominee director may share with IFC any information he or she has received as a member of the board including without limitation information relating to the business operations and activities of the company as well as provide periodic reports to IFC as to how he/she is discharging his/her duties as a director.\* The company hereby agrees to provide the nominee director access to all information available to any director of the company in his or her capacity as a director."

12



## Sharing of information with portfolio team

- Policy in effect since November 12, 2012 (and to be incorporated into new Directive)
- Confidential information can be shared with portfolio team subject to:
  - Obligations arising from fiduciary duties of the directors towards the companies on whose boards they serve;
  - Applicable laws and regulations;
  - IFC's policies and procedures (i.e. COI policies);
  - Certain exceptional cases (ie attorney/client privileges)

13



## Sharing of information with portfolio team

Once in IFC's possession, how should information be handled?

- IFC Policy: IFC has a general undertaking to our clients to safeguard confidential information they entrust to us. IFC staff may not divulge such information to sources outside IFC without the prior consent of the client (IFC Disclosure Policy).
- When confidential information is received from nominee director, IFC shall handle it in accordance with IFC's document security classification procedures under the information security policy.
- Information received from a fiduciary must be treated with due care and be classified as confidential and iDesk access must be restricted to portfolio team and corporate governance group.

14



## Conflicts in Directorships

- Conflicts Arising in IFC's Business Operations
- Sharing of information with portfolio team
- **Draft of Revised IFC Nominee Director ship Directive**

15



## Current IFC Directive (2010)

- Current directive provides guidance among other things as to who can serve as IFC nominee directors
- Generally, staff who are structurally conflicted may not sit on boards of client companies.
- Exceptions may be granted by the Nominee Director Panel.
- Many exception requests have been granted over the past couple of years leading the way to a revised and streamlined process.

16





## Draft of Revised Directive (2014)

- Revised directive (which has not been finalized yet) permits internal staff with *structural* conflicts to be nominated, and requires the COI risks to be managed. Among other things:
  - The relevant “Global Head of Industry” is responsible for assessing the conflicts risks and conflict management
  - Disclosure to the company required
  - Carve outs for early stage companies (eg supervisory conflicts ok; portfolio officer ok; competitor conflicts still not ok)
  - New training requirements – generally, and specific training for COI’s and listed companies
  - Restates Nov 2012 information sharing principles

17



## Other Conflicts Considerations

Other issues to keep in mind. These are handled outside the IFCCOI Office:

- Staff Rule based personal conflicts (Contact EBC)
  - E.g restrictions on financial interest in IFC client and disclosure; use of confidential information for personal use; gifts policy; concurrent and post WBG employment; Principle 3.
  - Applies to external nominees too.
- Procurement related conflicts (Contact GSD/Procurement)

18



## The IFC Conflicts and Integrity Office (IFC Conflicts Office)

- ❑ A unit of IFC's Legal Department
  
- ❑ John Coogan - Head of Conflicts and Integrity (202 473 5334);
  - ❑ Maura Goldstein - Deputy Head (202 458 9449);
    - Cathy Richards - Senior Counsel (202 473 3735)
    - Vicky Berberi-Doumar - Consultant (202 473 9580)
  
- ❑ IFC Conflicts provides support to HQ and field based IFC teams on conflicts of interest, including those involving nominee directors.