

CONFLICT OF INTEREST: KEY ELEMENTS, PRACTICAL TIPS, AND SAMPLE POLICY

A conflict of interest exists when a board member or employee has a personal interest that may influence him or her when making a decision for the organization. While the law focuses primarily on financial interests and provides some guidelines, nonprofit organizations contend with a variety of potential and perceived conflicts of interest, only some of which may be detrimental to the organization. The key for nonprofit boards is not to try to avoid all possible conflict-of-interest situations, which would be impossible; rather, boards need to identify and follow a process for handling them effectively.

Both board members and employees must abide by conflict-of-interest policies. Generally, conflict-of-interest policies should clarify what a conflict of interest is, what board members and employees must do to disclose possible conflicts of interest, and what board members and employees should do to avoid acting inappropriately if and when a conflict of interest does arise. How an organization ensures open and honest deliberation affects all aspects of its operations and is critical to making good decisions, avoiding legal problems and public scandals, and remaining focused on the organization's mission.

Key Elements

- Every organization needs a conflict-of-interest policy. Remember, conflicts of interest are not uncommon and not inherently illegal. Rather, they create situations that need careful attention and a process for handling them appropriately.
- Conflicts are not only financial in nature. Issue conflicts (for example, if a board member takes a position or supports another organization that is counter to the organization's mission and principles) may have to be addressed as well.
- Conflict-of-interest policies should be applicable to the board and key staff, at a minimum; they may also include other employees and key constituents with influence over the organization (e.g., major donors).
- A conflict-of-interest policy should clearly define a consistent process for dealing with conflicts. This process should include, at a minimum, disclosure and recusal. It also often includes the expectation for the board member in question to leave the room for the discussion and voting and, in extreme situations, to resign.
- Ultimately, the policy should clarify the consequences for violating the policy, which may include dismissal.
- Some organizations, instead of using the term conflict of interest, use a term duality of interest. A duality of interest recognizes that, under certain circumstances, even if a board member has multiple interests, those interests do not necessarily create a conflicting situation.

Practical Tips

- Conflicts of interest are sometimes quite obvious and other times more obscure. To provide better guidance, consider including examples of what constitutes a conflict of interest for the organization. These examples may be lengthy, organization-specific, and/or distinguish among real, perceived, or potential conflicts.

- On the administrative side, determine who will maintain proper documentation of signed conflict-of-interest disclosure statements, as well as who has responsibility for determining whether or not an actual conflict of interest occurs. Often, these responsibilities are shared between the chief executive and a board committee.
- Keep in mind that many conflicts of interest arise unexpectedly and can't be "planned" for. They may only become apparent during board discussions on a specific topic.
- Busy and engaged people, like board members, are involved in various activities in the community, and these affiliations are likely to collide at times. At least annually, consider requiring board and staff members to disclose — in writing — any relationships that might constitute a conflict of interest. By openly and preemptively disclosing these potentially conflicting connections, the organization is better able to carry out proper due diligence.

Sample IRS Conflict-Of-Interest Policy

This comprehensive conflict-of-interest policy follows a traditional legal format and is recommended by the IRS. Part V, Section 5 of IRS Form 1023 asks questions to determine if the organization has procedures on handling conflicts and makes recommendations on creating a conflict-of-interest policy if one does not exist.

Article I: Purpose

The purpose of the conflict-of-interest policy is to protect this tax-exempt (ORGANIZATION)'s interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the organization or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

Article II: Definitions

1. Interested Person
 - a. Any director, principal officer, or member of a committee with governing board—delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

[For networked organizations]

- b. If a person is an interested person with respect to any entity in the network of which the organization is a part, he or she is an interested person with respect to all entities in the network.
2. Financial Interest
 - a. A person has a financial interest if the person has, directly or indirectly, through business, investment, or family
 - b. an ownership or investment interest in any entity with which the organization has a transaction or arrangement

- c. a compensation arrangement with the organization or with any entity or individual with which the organization has a transaction or arrangement
- d. a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the organization is negotiating a transaction or arrangement
- e. Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.
- f. A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

Article III: Procedures

- 1. Duty To Disclose
 - a. In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board-delegated powers considering the proposed transaction or arrangement.
- 2. Determining Whether a Conflict of Interest Exists
 - a. After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he or she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.
- 3. Procedures for Addressing the Conflict of Interest
 - a. An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he or she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.
 - b. The chair of the governing board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.
 - c. After exercising due diligence, the governing board or committee shall determine whether the organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.
 - d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the governing board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the organization's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination, it shall make its decision as to whether to enter into the transaction or arrangement.

4. Violations of the Conflicts-of-Interest Policy
 - a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.
 - b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV: Records of Proceedings

The minutes of the governing board and all committees with board-delegated powers shall contain

- a. the names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed
- b. the names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings

Article V: Compensation

1. A voting member of the governing board who receives compensation, directly or indirectly, from the organization for services is precluded from voting on matters pertaining to that member's compensation.
2. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the organization for services is precluded from voting on matters pertaining to that member's compensation.
3. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

[For networked organizations]

4. People who receive compensation from the organization, whether directly or indirectly or as employees or independent contractors, are precluded from membership on any committee whose jurisdiction includes compensation matters. No person, either individually or collectively, is prohibited from providing information to any committee regarding compensation.]

Article VI: Annual Statements

Each director, principal officer, and member of a committee with governing board–delegated powers shall annually sign a statement that affirms such person

- a. has received a copy of the conflict-of-interest policy
- b. has read and understands the policy
- c. has agreed to comply with the policy
- d. understands the organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities that accomplish one or more of its tax-exempt purposes

Article VII: Periodic Reviews

To ensure the organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm’s-length bargaining
- b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the organization’s written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes, and do not result in inurement, impermissible private benefit, or in an excess benefit transaction

Article VIII: Use of Outside Experts

When conducting the periodic reviews as provided for in Article VII, the organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.