

Conflicts of Interest Policies Under the
Not-for-Profit Corporation Law

Charities Bureau
www.charitiesnys.com

Guidance Document
Issue date: September 2018

Conflicts of interest for board members are almost inevitable in not-for-profit corporations, and the existence of conflicts of interest should not disqualify board service. In fact, board members with significant community and business relationships are valuable because of the contacts and expertise they bring to the board, and more likely to have conflicts arising from those relations. An effective conflict of interest policy allows a not-for-profit entity to benefit from engaged and sophisticated board members, and to manage conflict of interest issues in ways that provide reassurance that the mission of the entity remains paramount.

This guidance has been drafted to assist not-for-profit corporations and trusts (hereafter collectively “nonprofits”) that are drafting, reviewing, or revising their Conflict of Interest Policies (and 13-Pd 3853.64 and 13-Pd 3853.64) and implementing those policies. 13-Pd 3853.64 and 13-Pd 3853.64 were enacted in November of 2016, with one exception, but are not retroactive when drafted.

The N-PCL follows both common law and best practices literature in requiring directors to make disclosures about potential conflicts of interest at the beginning of their service, and on an annual basis thereafter. It also requires directors, officers and key persons (called “key employees” prior to the 2016 amendments) to disclose potential conflicts of interest in issues that come before the board and to refrain from participating in board deliberations and decisions on those issues. The N-PCL requires that a nonprofit’s procedures for disclosing and resolving conflicts of interest be set forth in a Conflict of Interest Policy adopted by the board. Conflict of Interest Policy adopted by the Board must reflect the minimum standards set forth in N-PCL Section 715a.

Where a director, officer, or key person has a conflict of interest, as defined by a nonprofit’s Conflict of Interest Policy, in an issue coming before the board, that individual must disclose the circumstances giving rise to the conflict. The nonprofit has an obligation to make a record of the existence of the conflict and how it was addressed, both with respect to the individual and with respect to the transaction.

Director, officer, key person, related party and relative are all terms that are defined in the N-PCL. See N-PCL §§102(a)(6), 102(a)(22), 102(a)(23), 102(a)(25), 715(f). A 2016 amendment to the N-PCL replaced the term “Key employee” with the term “key person” and defined a key person as someone who is not an officer or director and who, whether or not employed by the corporation, has responsibilities or powers similar to those of officers and directors, manages the corporation of a substantial part of its activities, assets or finances, or has a role in controlling a substantial part of its capital expenditures or budget.

A key person might be

A founder who, although he or she has no title or official role,

Conflict of Interest Policy: Minimum Statutory Requirements

The board of each nonprofit must adopt, implement and oversee compliance with a Conflict of Interest Policy to ensure that its directors, officers, and persons act in the [nonprofit's] best interest and comply with applicable legal requirements. The policy must cover conflicts and possible conflicts of interest, including related

conflict of interest” to exclude the responsibility of an officer director to the

action, if successful, could result “ in the outcome which the officer or director could not deliberate or vote on directly. Improper Influence on Conduct of Audits,” <http://www.sec.gov/rules/final/34-47890.htm>).

5. Requirement that the existence and resolution of a conflict be properly documented, including in the minutes of any meeting at which the conflict was discussed or voted upon (N-PCL § 715a(b)(5)).

6. Procedures for disclosing, addressing, and documenting related party transactions pursuant to N-PCL § 715. Related party transactions include any transaction, agreement, or other arrangement in which a related party has a direct or indirect financial interest and in which the nonprofit or an affiliate participates. (N-PCL § 715a(b)(6)).

A person has an indirect financial interest in an entity if a relative defined by

reviewing or influencing these transactions, should not consider or be affected by a related party's involvement in decisions on matters that may affect the decision-maker or those who review or influence the decision.

- What constitutes a “de minimis” transaction will depend on the size of the corporation’s budget and assets and the size of the transaction. A transaction that merits review by the Board of a smaller corporation might not merit review by the Board of a larger organization.
- A transaction or activity is in the ordinary course of business if it is consistent either

project puts out a written request for proposals for fuel supply for its properties, evaluates, and recommends the election of the board member's company based upon cost and service.

- G. A university board member owns a 35% share of a restaurant conveniently located near the campus of the university. Some faculty members responsible for arranging staff holiday lunches buy food from this restaurant, using university credit cards. Each department has a modest authorized budget for these lunches, and faculty members have discretion about where to buy food for the lunches.

To qualify for the exception for benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission, the benefits must be provided in good faith and without unjustified favoritism towards the related party.

Example of a transaction in this category: A legal services firm agrees to handle the eviction case of one of its board members who is eligible to be a client, and who is serving as one of the minimum number of eligible board members that is required by federal regulations. The decision to accept the case is made pursuant to the organization's policy.

Example of a transaction in this category: A legal services firm agrees to handle the eviction case of one of its board members who is eligible to be a client, and who is serving as one of the minimum number of eligible board members that is required by federal regulations. The decision to accept the case is made pursuant to the organization's policy.

which the director is an officer, director, trustee, member, owner, or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director has or might have a conflicting interest.

Disclosure of conflicts is required; the requirement of disclosure to the Secretary can be satisfied by disclosure to the Secretary's designee (e.g., the compliance officer), if set forth in the conflict of interest policy.

When initial election to the board is not reasonably foreseeable, for example when board candidates are nominated from the floor at an annual meeting of members held to elect directors, the written statement may be provided to the Secretary promptly after the initial election.

A conflict of interest disclosure statement is required from directors, officers, and key persons of nonprofits. All types of nonprofits are covered, including religious corporations.

The Secretary must provide a copy of the completed statements to the chair of the audit committee or the chair of the board. There is no statutory requirement that conflict of interest disclosure statements be shared with other members of the board, or members of the corporation, or with the public. Conflict of interest disclosures often contain sensitive personal financial information that could be harmful if disclosed.

The Secretary may direct his/her designee to provide a copy of the completed statements to the chair of the audit committee or the chair of the board. The Secretary should maintain a record of conflict of interest disclosures.

The N-PCL does not prescribe the method or content of assertions that a board member, officer, or key person's participation in deliberations or voting (8.2.2)(ti)8.5(c22)

individual board member, officer, or key person did not participate in discussions or voting on the topic.