

WHAT BOARDS AND EXECUTIVES NEED TO KNOW ABOUT CONFLICTS OF INTEREST

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Board members and staff of philanthropic institutions regularly reach out to CMF to learn more about conflicts of interest. Conflicts of interest are of concern for both private foundations and public charities. While self-dealing is strictly prohibited, organizations have the opportunity to manage conflict of interest situations through policies and procedures. The IRS now requires that foundations file a conflict of interest policy with its application materials, if they have adopted one. In practice, receiving exempt status essentially requires that a conflict of interest policy be adopted and submitted.

The “What Boards and Executives Need to Know” series of resources is designed to address questions of interest to board members and senior leaders of grantmaking organizations. These resources may be particularly useful for orientations, board trainings and general professional development and provide better understanding of key concepts that are necessary for the success of the governance and management of foundations in the field.

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Conflicts of Interest

Private foundations face restrictions on certain activities based on the self-dealing rules (See [“What Boards and Executives Need to Know About Self-Dealing”](#)). However, all charitable organizations should consider adopting a conflict of interest policy and set of related procedures as a best practice. The foundation’s governing documents can also be a resource for language or policies about conflicts of interest (i.e., articles of incorporation, bylaws) and how they should be handled. Such written resources are critical, particularly recognizing that while some conflict of interest situations may seem

straightforward, others are made more complicated by an organization's location, relationships, funding structures and personnel. Further, conflict of interest situations that are not well-handled can be damaging to organizational reputation and interpersonal relationships, and more extreme situations can result in legal or enforcement action.

If the foundation is concerned about issues of self-dealing or other questionable situations, they should engage qualified legal counsel who are familiar with rules and regulations applicable to grantmaking foundations.

Board members of charitable organizations have a legal, fiduciary duty to place the foundation's interests ahead of their own. A conflict of interest, perceived or real, can occur in any circumstance when the foundation-related activities of a board member, officer, staff member or even some volunteers overlap with their other activities. This may include other board activities, business/professional roles, charitable activities or any other affiliation where their professional and personal lives intersect with their foundation role. Foundation staff, board members, officers and volunteers (especially those serving on selection committees) should act in a way that is unbiased and ensures that ethical decisions are made in the best interest of the organization, both from a legal and reputational standpoint.

Among private foundations, situations involving overlapping board members that serve multiple organizations may spark questions about self-dealing. While the presence of a single individual serving two organizations is not necessarily self-dealing, it can present a conflict of interest. For example, a sibling of a disqualified person is not a disqualified person¹. For the purposes of self-dealing, a board member's sister, who serves as the CEO of a local nonprofit, would not be considered a disqualified person of the foundation. However, that relationship would likely qualify as a conflict of interest in most policies. The foundation's conflict of interest policy would likely include a requirement that its board members declare close family relationships with potential grantees, including their sister's position as a CEO at a local nonprofit. Certain other "filial" (non-financial) interests, i.e., where an individual serves on the board of a grantmaking foundation and the board of a potential grantee of that foundation, would likely not result in prohibited self-dealing but would amount to a conflict of interest.

Most organizations have a policy and related procedures that require board members to disclose potential conflicts; board members with conflicts would not be permitted to vote for a particular grant and may have to leave the room during board deliberations.

Conflict of Interest Procedures

Beyond developing a conflict of interest policy, most organizations also develop a set of procedures that guide how the conflict of interest policy is implemented. These documents help the organization to codify the actions involved to ensure that self-dealing is avoided and situations that could negatively impact the public perception of the organization are navigated appropriately (including public conflicts

¹ In the private foundation context, "family members" are lineal descendants; however, for DAFs, siblings do count as "family members" in relation to the automatic excess benefit transactions rules.

and disagreements between board members). These procedures also offer the foundation one way to put their internal code of ethics into action.

Typically, all directors/trustees and staff members (as well as volunteers, if they are involved in selection committees) are required to sign a conflict of interest policy document annually, which should be reviewed and filed by a designated staff or board member. The foundation should also have disciplinary steps in place in the event that a staff or board member does not properly disclose a conflict or disregards the standing policy.

Conflict Regarding a Relationship with a Current or Potential Grantee

Ideally, the conflict of interest policy should include key supporting documents. One such critical document is a disclosure form upon which the foundation personnel can indicate organizations that may present a potential conflict, based on the individual's board service and related activities. If a situation arises where the individual finds they have a conflict, they should follow the foundation's conflict of interest policy and indicate a conflict at the earliest opportunity.

If a board member has a conflict of interest regarding a potential grantee or another transaction/activity being considered by the foundation, the individual should recuse themselves from the vote. The disclosure and recusal should also be noted in the meeting minutes. An individual making a disclosure on their conflict of interest form does not take the place of the individual making their conflict known to the full board during discussions and decision making regarding the organization in question.

Correctly navigating conflict of interest situations requires that board or staff members follow all of the steps in the foundation's policy and procedures, which typically includes both the disclosure form and a process to disclose those conflicts during relevant discussions.

Conflict Regarding a Board Member Providing a Service to the Foundation

With public charities, conflicts of interest can occur based on board members' financial or business positions. If a board member is offering the foundation a service in their professional capacity, the foundation should not simply default to using the board member's services. Typically, organizations will insist that at least three potential firms or individuals be considered for the role by collecting competitive bids to ensure a fair price for every significant transaction or service being entered into by the foundation. (In the private foundation context, this could be self-dealing unless the service fits within the personal services exception, including legal, accounting, and investment advising.)

In the case that an individual has a relationship with a firm or entity being considered for any kind of service or business relationship with the foundation, that fact should also be disclosed.

To Learn More

Council of Michigan Foundations. "An Operations Checklist for Foundation Compliance." 2022.

<https://www.michiganfoundations.org/resources/operations-checklist-foundation-compliance>.

Edie, John A. (PriceWaterhouseCoopers). "Self-Dealing: A Concise Guide for Foundation Board and Staff." 2006.

Exponent Philanthropy. "The Trustee Handbook: The Essentials for an Effective Board Member." 2014.
<https://community.exponentphilanthropy.org/ProductDetail?id=01t15000005dzHcAAI>.

About Ask CMF

This document was authored by Brittany Kienker, Ph.D., Knowledge Insights Expert in Residence for the Council of Michigan Foundations (CMF). Legal aspects of this document were reviewed by Jennifer Oertel, outside legal counsel to CMF. CMF members can find answers to their most pressing questions through CMF's Knowledge Insights division, including Ask CMF, the Knowledge Center and the Sample Documents Hub. Ask CMF is a free service to CMF members, available through the "Ask CMF" link on the CMF homepage or by visiting <https://www.michiganfoundations.org/practice/ask-cmf>.

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