

## ORGANIZATIONAL POLICIES AND INSURANCE: CONFLICTS OF INTEREST, RECORD RETENTION, WHISTLEBLOWERS, AND MORE

40<sup>TH</sup> ANNUAL  
NONPROFIT ORGANIZATIONS INSTITUTE  
JANUARY 19, 2023

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## ORGANIZATIONAL POLICIES

- Operational guidelines to protect and guide the organization, its decision makers, and its staff
  - Assist in complying with state law fiduciary duties
  - Assist in maintaining the organization's federal income tax exemption and in avoiding federal excise taxes
  - Contribute to a climate of ethical conduct
  - Assist in reducing improper behavior, ineffective decision making, or harmful situations
  - Provide opportunity for leadership to consider appropriate handling of situations before those situations arise

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## FORM 990 ASKS ABOUT ORGANIZATIONAL POLICIES

### **Core Policies**

- Conflict of Interest Policy
- Whistleblower Policy
- Document Retention and Destruction Policy

### **“If/Then” Policies**

- Chapter Policy
- Joint Venture Policy
- ~Executive Compensation Policy~

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## CONFLICT OF INTEREST

A fiduciary of a charity has a duty to . . . (b) address reasonably situations that involve the potential for self-dealing in which interests of a fiduciary or related person may conflict with the interests of the charity . . .

- Restatement of the Law Charitable Nonprofit Organizations, § 2.02

- Not required by federal law, but “encouraged”
- Some state statutes require a COI policy
- Other states (Texas) provide a limited “safe harbor” for interested transactions if certain processes are followed (see, e.g., TBOC § 22.230)
- Key is disclosure and how the board deals with disclosed conflict (i.e., disinterested review of the matter)

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## DRAFTING POINTS ARISING FROM STATE LAW CONSIDERATIONS

- Draft to encourage compliance with state statutes (e.g., TBOC § 22.230; § 22.225 (prohibiting loans to directors)).
- Coordinate policy with provisions of organizational documents.
  - Are there specific procedures addressed in the Bylaws?
  - Are there particular types of interested transactions authorized in the organizational documents?

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## DRAFTING POINTS ARISING FROM FEDERAL TAX LAW CONSIDERATIONS

- Tailor the policy to the specific type of nonprofit entity in question as it is classified under the Internal Revenue Code (the "Code").
  - Not all Section 501(c)(3) charities are subject to the same rules governing COI transactions.
    - Draft to account for the difference between private foundations and public charities.
    - Draft to account for the unique rules governing supporting organizations and donor-advised funds.
  - Not all tax-exempt *non-charities* are subject to the same rules governing COI transactions.
    - Draft to account for the application of the excess benefit transactions excise tax (Code Section 4958) to tax-exempt Section 501(c)(4) entities (e.g., social welfare organizations).

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First appeared as part of the conference materials for the  
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"MASTER CLASS: Organizational Policies and Insurance: Conflicts of Interest, Record Retention, Whistleblowers, and More"