

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

40TH ANNUAL
NONPROFIT ORGANIZATIONS INSTITUTE
JANUARY 19, 2023

Jeffrey E. Sher
Fizer Beck
www.fizerbeck.com
jsher@fizerbeck.com

Darren B. Moore
Bourland, Wall & Wenzel, P.C.
www.bwwlaw.com
dmoore@bwwlaw.com

1

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

2

2

1

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~

3

3

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)

4

4

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?

5

5

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).

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/eLibrary\)](https://utcle.org/eLibrary)

Title search: Organizational Policies and Insurance: Conflicts of Interest, Record Retention, Whistleblowers, and More

Also available as part of the eCourse

[2023 Nonprofit Organizations eConference](#)

First appeared as part of the conference materials for the
40th Annual Nonprofit Organizations Institute session

"MASTER CLASS: Organizational Policies and Insurance: Conflicts of Interest, Record Retention, Whistleblowers, and More"