

**STATE BOARD WAIVER
INSTRUCTIONS AND FORM FOR
SDCL 3-23-1 through 3-23-5 (hereinafter the “Disclosure Laws”)
Effective July 1, 2016**

INTRODUCTION

Absent a waiver, the Disclosure Laws prohibit current and certain former members of certain State boards, commissions and authorities (hereinafter “Boards” and “Board Members” or “Members”) from contracting with, or from deriving direct benefits from a contract with, a State agency if the contract is within the jurisdiction or related to the subject matter of the Board. Absent a waiver, the Disclosure Laws also prohibit Board Members from contracting with, or deriving direct benefits from contracts with, political subdivisions of the State that administer or execute similar subject matter programs as the Member’s Board. The foregoing prohibitions also apply to direct benefits derived from a State or political subdivision contract by a spouse or other person living with the Board Member and commingling assets with the Board Member.

The Disclosure Laws, however, do not apply to all State boards, commissions and authorities. The Disclosure Laws also do not supplant existing prohibitions applicable to members of certain State boards, commissions, and authorities, the prohibitions on self-dealing applicable to all public officers found at SDCL 3-16-8, or the prohibitions on State employees receiving dual compensation for serving on a State board, commission, or authority found in SDCL 3-8-4.1. The Disclosure Laws apply to persons serving as Board Members on or after July 1, 2016, and extend for a period of one year after the end of the Member’s term on the Board.

These instructions will assist a current or former Board Member with determining whether a prohibited conflict exists or might exist and, if so, will guide the current or former Board Member through the process for requesting a waiver. The instructions will also guide the Board in acting on the waiver request. However, the instructions are not intended to be used in isolation: instead, they should be used in conjunction with a review of the Disclosure Laws and the State Board Disclosure and Waiver Decision Matrix. Attorneys for the State agency, board, authority or commission may answer general questions about the applicability of the Disclosure Laws or about the other laws that address self-dealing or dual compensation. However, because these attorneys represent the agency, board, or commission and not the Board Members in their individual capacities, Board Members should contact a private attorney if they have questions as to how the Disclosure Laws apply to their individual interests and contracts.

SUMMARY OF THE DISCLOSURE LAWS

Who the Disclosure Laws apply to:

The prohibitions apply only to individuals who, on or after July 1, 2016, are members of the following State boards, commissions and authorities:

- (1) South Dakota Building Authority;
- (2) Board of Economic Development;
- (3) South Dakota Housing Development Authority;
- (4) South Dakota Health and Education Facilities Authority;
- (5) Science and Technology Authority Board of Directors;
- (6) South Dakota Ellsworth Development Authority;
- (7) South Dakota Commission on Gaming;
- (8) South Dakota Lottery Commission;
- (9) State Brand Board;
- (10) Game, Fish and Parks Commission;
- (11) Banking Commission;
- (12) Board of Trustees of the South Dakota Retirement System;
- (13) Aeronautics Commission;
- (14) South Dakota State Railroad Board;
- (15) Transportation Commission;
- (16) South Dakota Board of Education;
- (17) Board of Regents;
- (18) Board of Pardons and Paroles;
- (19) Board of Minerals and Environment;
- (20) Board of Water and Natural Resources;
- (21) South Dakota Railroad Authority; and
- (22) Board of Water Management.

The prohibitions apply while the member serves on the board, and for a period of one year after the end of the member's term.

What the Conflicts Laws do:

The Disclosure Laws prohibit a Board Member from contracting with the State, or from deriving a direct benefit from a contract or transaction with the State, if the contract or transaction is within the jurisdiction or relates to the subject matter of the Member's Board. The Disclosure Laws also prohibit a Board Member from contracting with, or deriving a direct benefit from, a contract with a political subdivision of the State if the political subdivision administers or executes similar subject matter programs as the Member's Board. The foregoing prohibitions also apply to certain former Board Members, as will be explained below.

What “derive a direct benefit” from a contract means:

A Board Member derives a direct benefit from the contract if one or more of the following is true of the Member, the Member’s spouse, or a person with whom the Member lives with and commingles assets:

- 1) Has a five percent ownership or other interest in an entity that is a party to the contract;
- 2) Derives income, compensation or commission directly from the contract or from the entity that is a party to the contract;
- 3) Acquires property under the contract; or
- 4) Serves on the board of directors of an entity (including a nonprofit) that derives income or commission directly from the contract or acquires property under the contract.

“Direct benefit” does not include gain from a contract based solely on the value of a Board Member’s investment in an entity that is a party to the contract, if that investment represents less than a five percent ownership in the entity. It also does not apply to contracts or transactions where the Board Member only benefits from an act of the Board that has general application, such as a decision by the Board to increase or decrease a fee that many South Dakotans pay.

Note the Disclosure Laws apply to public employment contracts.

EFFECT ON FORMER BOARD MEMBERS

The law prohibits a Board Member from entering into a conflicted transaction during the Board member's term and for a period of one year after the Member's term on the Board. The law becomes effective July 1, 2016.

Accordingly, a Board Member who enters into a conflicted transaction on or after July 1, 2016, will need to obtain a waiver. This will apply to every conflicted transaction during the Board member's term and for one year after the end of that term.

However, the law is not retroactive. Thus, it does not apply to former Board Members whose term ended before July 1, 2016. Therefore, any Board member who does not wish to be subject to the new law must resign before July 1, 2016. ***Note that resignations should be submitted as soon as possible because resignations are generally not effective until a replacement board member is appointed.***

CONTRACTS AWARDED PRIOR TO JULY 1, 2016

The Disclosure Laws are not retroactive, and thus do not apply to contracts or transactions entered into and effective prior to July 1, 2016 – even if the contract continues in effect on or after July 1, 2016. The exception is a contract that was entered into prior to July 1, 2016 which includes a renewal provision that is effective on or after July 1, 2016. A Board Member who, prior to July 1, 2016, entered into or derived a direct benefit from a contract with the State or a political subdivision which contains such a renewal provision should go through the waiver process described below even if the provision states that the contract renews automatically.

EXAMPLES OF TRANSACTIONS PROHIBITED ABSENT A WAIVER

- 1) A current commissioner of Game, Fish and Parks enters into a seasonal contract to mow Game Fish and Park properties, or a contract with a city or county to mow park properties. These are prohibited direct contracts with the State related to the subject matter of the commission or contracts with a political subdivision of the State that administers similar programs as the commission (Parks). The contracts are allowable only if proper waiver is sought and secured from the Commission.
- 2) A current member of the State Board of Education lives with and commingles assets with a person employed by a staff recruiting agency. That recruiting agency enters into a contract with a school district to recruit speech and language pathologists for the school district. This is a prohibited contract with a political subdivision of the State (the school district) that administers similar subject matter programs (K-12 education) as the Board of Education. The contract is allowable only if proper waiver is sought and secured from the Board.

- 3) A current Game Fish & Parks (GFP) commission member also serves on the board of directors of a non-profit organization which facilitates providing game meat to organizations who use the meat to feed the hungry. On an annual basis, the GFP Commission adopts a resolution which approves a grant of X thousand dollars to the nonprofit organization to use to defray the costs of processing the game as well as to pay an individual (other than the GFP commission member) a stipend and out-of-pocket expenses for coordinating the program. Because the nonprofit organization derives income directly from a contract (i.e., the grant) awarded to it by the GFP Commission, this is a prohibited transaction allowable only if proper waiver is sought and secured from the GFP Commission.

AGENCY-SPECIFIC CONFLICTS STATUTES

There may be other specific conflict of interest laws relating to a specific board, commission or authority. In the event the Disclosure Laws described in these instructions and the laws specific to the board, commission, or authority are different, the more restrictive law will be applied.

PENALTIES FOR NON-COMPLIANCE WITH THE DISCLOSURE LAWS

Any Board Member who knowingly violates the provisions of the Disclosure Laws shall be removed from the Board and is guilty of a Class 1 misdemeanor. The contract is voidable by the Board. Any benefit that the Board Member received from the contract is subject to forfeiture.

WAIVERS

A waiver may be granted to authorize a Board Member to derive a direct benefit from a contract with the State or with a political subdivision that administers or executes programs similar to the subject matter of the Board if the following conditions are met:

1. The Board Member provides a full written disclosure to the Board;
2. The Board reviews the essential terms of the contract or transaction and the Member's role in the contract or transaction;
3. The transaction and terms of the contract are fair and reasonable and not contrary to the public interest; and
4. The authorization of the Board is in writing and filed with the Auditor-General.

PROCESS TO OBTAIN A WAIVER

A written request for a waiver should be submitted to the Board prior to a meeting. Boards are advised to have a standing item at the beginning of their meeting agendas during which the

Board will address any Board Member Requests. The requesting Board Member should be prepared to answer any questions the Board may have. Then, the requesting Board Member should leave the meeting while the other Board members discuss the request and determine whether authorization for waiver is appropriate. The request and the Board's determination shall be included in the minutes of the meeting.

CAUTION: The failure of a Board to act on a request for a waiver does not mean the waiver was or will be allowed. The Board Member requesting waiver is responsible to follow up on waiver requests as necessary.

INSTRUCTIONS FOR STATE BOARD MEMBERS SEEKING WAIVER

If the potential for a conflict exists, you should immediately prepare and submit the form Request for State Board Waiver. This should be done before entering into a conflicted contract or transaction. If in doubt whether a conflict exists, disclose.

Briefly describe your relationship to the contract in question and why you believe it may be covered by the law, including how you, your spouse or anyone with whom you live and commingle assets might benefit from the contract. Examples of persons other than your spouse might include a girlfriend, boyfriend, roommate, or an adult child.

Briefly describe the essential terms of the contract. What goods or services are provided? What price is paid? What parties are involved? What is the timeframe of the transaction?

Also, briefly describe why you believe a waiver would not be contrary to the public interest. For example, was the contract part of a competitive bidding process? Were others involved in the decision-making process? Are the terms consistent with other, similar contracts?

THE REQUEST FOR WAIVER IS A PUBLIC DOCUMENT THAT WILL BE OPEN TO PUBLIC INSPECTION.

INSTRUCTIONS FOR THE STATE BOARD ACTING ON A REQUEST FOR WAIVER

A procedure for receiving and distributing waiver requests prior to a meeting should be adopted. Boards are also advised to have a standing item at the beginning of their meeting agendas during which the Board will address conflict requests and advised to establish special meetings as necessary.

The request for a waiver should be reviewed by the other Board Members prior to the next Board meeting and, to the extent necessary, the other Board Members should be prepared to ask the requesting Board Member questions during the meeting in order to determine whether the contract or transaction is eligible for waiver.

In the interest of fairness to Board Members requesting waivers and persons with whom they may be dealing, all waiver requests should be decided at the meeting in which the request is brought forth. If you deem the request form incomplete, you must ask for additional information from the requesting Board Member. The Board should avoid using an incomplete request form as a reason to extend the time for review if the needed information is readily provided by the Board Member.

Unless readily apparent from the disclosure or written request, other Board Members should ask questions to determine the requesting party's relationship to the contract; the requesting party's relationship to the outside contracting party; whether the contract terms are reasonable and in the public interest; and any other questions the other Board Members believe will help establish the true facts and circumstances surrounding the award of the contract and the request for waiver.

If the authorization is granted, the decision must be included in the meeting minutes. In addition, following the meeting a written authorization should be prepared using the appropriate State Board Disclosure Laws Waiver Authorization form, signed by the chair of the Board or other authorized Board Member, and filed with the Auditor General.

ALTERNATIVE PROCESS FOR AUTHORIZATION

An alternative procedure may be used for authorization of certain contracts, transactions, or other conflicts during a meeting of the Board. In order to utilize the alternative procedure, the Board's agenda for the meeting must include an item for conflicts disclosure prior to consideration of any substantive matters on the agenda, and the conflict item must relate to a substantive matter on the agenda. Under these circumstances, a Board Member may publicly disclose a direct benefit or other conflict in regard to a substantive matter on the agenda without prior written disclosure. After the Member discloses the conflict and answers questions from the other Board Members, the requesting Member must be excused from discussion and consideration of the substantive matter. The Board may waive the conflict if it determines that, based upon a review of the essential terms of the contract, transaction, or conflict and the Member's role in the same, the transaction and terms of the contract are fair, reasonable, and not contrary to the public interest. **Both the disclosure by the Member and determination by the Board must be included in the official minutes made available to the public and a copy of the minutes must be filed with the Auditor-General.**

REQUEST FOR STATE BOARD WAIVER

THIS IS A PUBLIC DOCUMENT

Date: _____

Name of Board Member or Former Board Member: _____

Name of Board, Authority or Commission: _____

Brief explanation of your potential conflict of interest:

Brief explanation of the current or anticipated business transaction with a State agency or with a political subdivision of the State and your role in the transaction:

Brief explanation of the essential terms of the contract or transaction.

Brief explanation of why you believe a waiver should be granted:

Signature of Person Requesting Waiver:_____

STATE OF SOUTH DAKOTA

(insert name of board/commission/authority)

STATE BOARD DISCLOSURE LAWS
WAIVER AUTHORIZATION
PURSUANT TO SDCL 3-23-3 (current member)

A written request for waiver of conflict, dated _____, was received from
_____. The request was acted upon by the members of
_____ (insert name of board/commission/authority) during a meeting held on
_____.

(check one)

_____ The request for waiver was denied for the following reasons:

_____ The request for waiver was authorized for the following reasons:

_____ The request for waiver was authorized subject to the following conditions:

Signature of Chairperson or Authorized Member

Date

Printed Name: _____

Date mailed to Auditor-General: _____

STATE OF SOUTH DAKOTA

(insert name of board/commission/authority)

STATE BOARD DISCLOSURE LAWS
WAIVER AUTHORIZATION
PURSUANT TO SDCL 3-23-4 (former member)

A written request for waiver of conflict, dated _____, was received from
_____. The request was acted upon by the members of
_____ (insert name of board/commission/authority) during a meeting held on
_____.

(check one)

_____ The request for waiver was denied for the following reasons:

_____ The request for waiver was authorized for the following reasons:

_____ The request for waiver was authorized subject to the following conditions:

Signature of Chairperson or Authorized Member

Date

Printed Name: _____

Date mailed to Auditor-General: _____