



Department of Transportation
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MEMORANDUM

TO: Patricia Saukel

FROM: Karla L. Engle

DATE: July 20, 2017

RE: July 27, 2017, Commission Meeting – Agenda Item: Discussion of New Conflicts of Interest Laws and Consideration of Conflicts of Interest

Effective July 1, 2017, new laws went into effect relating to conflicts of interest for members of certain state boards, authorities, and commissions, including the Transportation Commission. I enclose the following documents, which I hope to discuss in further detail at the Commission's meeting on July 27, 2017:

1. House Bill 1170 – the new conflict of interest law. I am enclosing two copies of the new law relating to conflicts of interest for state boards, authorities and commissions. In one copy, changes in the law are tracked to facilitate comparison between the former law and the new law. In the other copy, only the language of the new law is shown.
2. State Board Disclosure Laws Instructions and Forms
3. State Board Disclosure Laws Waiver & Disclosure Decision Matrix.

Thank you.

KLE
Attachments

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State of South Dakota

NINETY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2017

463Y0542

SENATE LOCAL GOVERNMENT ENGROSSED

NO. **HB 1170** - 3/1/2017

Introduced by: Representatives Mickelson, Haggar, Holmes, Johns, Lust, Peterson (Kent), Qualm, Rhoden, Ring, Schoenfish, Stevens, Tieszen, and Tulson and Senators Curd, Bolin, Cronin, Frerichs, Greenfield (Brock), Maher, Monroe, Otten (Ernie), Peters, Rusch, and Sutton

FOR AN ACT ENTITLED, An Act to revise certain provisions regarding conflicts of interest for authority, board, or commission members.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 3-23 be amended by adding a NEW SECTION to read:

Terms used in this chapter mean:

- (1) "Board member," an elected or appointed member of the governing board;
- (2) "Cooperative education service unit," a legal entity created pursuant to §§ 13-5-31 through 13-5-33, inclusive, including subcontractors, agents or assigns of the cooperative education service unit;
- (3) "Disgorgement," the act of giving up on demand or by legal compulsion something that was obtained by illegal or unethical acts;
- (4) "Education service agency," an agency created pursuant to § 13-3-76;
- (5) "Local service agency," an entity created pursuant to § 13-15A-1; and

- (6) "School district," a school district as defined in § 13-5-1.

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Section 2. That § 3-23-1 be amended to read:

3-23-1. No elected or appointed member of a state authority, board, or commission may have an interest in ~~any contract or derive a direct benefit from any contract with the state which is within the jurisdiction or relates to the subject matter of the state authority, board or commission or with a political subdivision of the state if the political subdivision administers or executes similar subject matter programs as the state authority, board or commission, nor may the member have an interest in any contract or derive a direct benefit from any contract for one year after the end of the member's term on the authority, board, or commission except as provided in §§ 3-23-3 and 3-23-4:~~

_____ (1) With the state agency to which the authority, board, or commission is attached for reporting or oversight purposes that requires the expenditure of government funds;

_____ (2) With the state that requires the approval of the authority, board, or commission and the expenditure of government funds; or

_____ (3) With a political subdivision of the state if the political subdivision approves the contract and is under the regulatory oversight of the authority, board, or commission, or the agency to which the authority, board, or commission is attached for reporting or oversight purposes.

No elected or appointed member of a state authority, board, or commission may derive a direct benefit from any contract as provided under this section for one year after the end of the member's term on the authority, board, or commission, except as provided in § 3-23-3 or 3-23-4.

Section 3. That § 3-23-2 be amended to read:

3-23-2. An elected or appointed member of ~~an a state~~ authority, board, or commission derives a direct benefit from a contract if the ~~state authority, board, or commission member,~~ the

~~authority, board, or commission member's spouse, or any other persons the authority, board, or commission person with whom the member lives with and or commingles assets:~~

_____ (1) Is a party to or intended beneficiary of the contract;

_____ (2) Has more than 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

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(4) ~~Serves on the board of directors of an entity that derives income or commission directly from the contract or acquires property under the contract.~~

~~—An authority, board, or commission member does not derive a direct benefit from a contract based solely on the value associated with the authority, board, or commission member's investments or holdings, or the investments or holdings of other persons the authority, board, or commission member lives with and commingles assets. A member of an authority, board, or commission does not have an interest in a contract nor does the member receive a direct benefit by participating in a vote or a decision where the member's only interest is the effect of an act of general application. Will receive from the contracting party compensation, commission, promotion, or other monetary benefit that is directly attributable to the contract.~~

Section 4. That chapter 3-23 be amended by adding a NEW SECTION to read:

An elected or appointed member of a state authority, board, or commission has an interest in a contract if the member, the member's spouse, or any other person with whom the member lives or commingles assets:

- (1) Is employed by a party to the contract; or
- (2) Receives more than nominal compensation or reimbursement for actual expenses for

-serving on the board of directors of an entity that derives income or commission directly from the contract or acquires property under the contract.

Section 5. That chapter 3-23 be amended by adding a NEW SECTION to read:

A state authority, board, or commission member does not derive a direct benefit from or have an interest in a contract:

- (1) Based solely on the value associated with the member's publicly-traded investments or holdings, or the investments or holdings of any other person with whom the member lives or commingles assets;
- (2) By participating in a vote or a decision in which the member's only interest arises from an act of general application;
- (3) If the member is a state employee and is authorized to enter into the contract pursuant to §§ 5-18A-17 through 5-18A-17.6, inclusive;
- (4) If the contract is for the sale of goods, or for maintenance or repair services, in the regular course of business at or below a price offered to all customers;
- (5) If the contract is subject to a public bidding process; or

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(6) If the contract is for the deposit of public funds in a financial institution as otherwise authorized by law.

Section 6. That § 3-23-3 be amended to read:

3-23-3. Any elected or appointed ~~state~~ authority, board, or commission may authorize an authority, board, or commission member to ~~have an interest in a contract or to~~ derive a direct benefit from a contract if:

(1) ~~The authority, board, or commission~~ member has provided full ~~written~~ disclosure to the authority, board, or commission, including:

_____ (a) All parties to the contract;

_____ (b) The member's role in the contract;

_____ (c) The purpose and objective of the contract;

_____ (d) The consideration or benefit conferred or agreed to be conferred upon each party; and

_____ (e) The duration of the contract;

(2) ~~The authority, board, or commission has reviewed the essential terms of the transaction or contract and the authority, board, or commission member's role in the contract or transaction~~ finds that the terms of the contract are fair, reasonable, and not contrary to the public interest; and

(3) ~~The transaction and the terms of the contract are fair, reasonable, and not contrary to the public interest~~ authorization is a public record included in the official minutes of the authority, board, or commission, that shall be filed with the auditor-general and attorney general.

~~No member of a state authority, board, or commission may participate in or vote upon a decision of the state authority, board, or commission relating to a matter in which the member has an interest or derives a direct benefit.~~

~~—The authorization shall be in writing. Any authorization given pursuant to this section is a public record. Each authorization shall be filed with the auditor-general. The auditor-general shall compile the authorizations and present them annually for review by the Government Operations and Audit Committee. A member of an authority, board, or commission may comply with this section if: the authority, board, or commission puts on its regular meeting agenda an inquiry for conflicts disclosure prior to the consideration of any substantive matters; the member publicly discloses his or her interest in a contract, direct benefits, or other conflict with any matter on the agenda; the member is excused from discussion and consideration of the matter;~~

~~the board determines the matter underlying the conflict is fair, reasonable, and not contrary to the public interest; and the disclosure is included in the minutes which are publicly~~

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available who requests an authorization under this section shall make the request prior to entering into any contract that requires disclosure or within forty-five days after entering into the contract. Once disclosed and authorized by the governing board, no further disclosure or authorization is required unless the contract extends into consecutive fiscal years. A contract that extends into consecutive fiscal years requires an annual disclosure but no new authorization is required. If the authority, board, or commission rejects the request for authorization made by the member, the contract is voidable and subject to disgorgement pursuant to § 3-23-5, or the member may resign from the authority, board, or commission. No member of a state authority, board, or commission may participate in or vote upon a decision of the state authority, board, or commission relating to a matter in which the member derives a direct benefit.

Section 7. That chapter 3-23 be amended by adding a NEW SECTION to read:

Any elected or appointed state authority, board, or commission member may have an interest in a contract if:

- (1) The member, upon learning of the interest subject to the provisions of this chapter or a transaction that may create an interest subject to the provisions of this chapter discloses the interest no later than the first meeting of the authority, board, or commission held after the first day of July of each year;
- (2) The authority, board, or commission is notified of the contract and the member's role in the contract;
- (3) The terms of the contract do not violate any other provision of law; and
- (4) The disclosure is included in the minutes that are publicly available and are filed with the auditor-general and attorney general.

Each member shall receive a form, developed by the attorney general, for the purpose of annual disclosure of any interest and direct benefit covered by the provisions of this Act. In addition to any interest in a contract and direct benefit covered by the provisions of this Act, the member shall also disclose at least annually any ownership interest of five percent or greater in any entity that receives grant money from the state, either directly or by a pass-through grant, or that contracts with the state or any political subdivision for services. An authority, board, or commission member who has an interest in a contract pursuant to this section shall disclose the existence of a contract in which the member has an interest but for which authorization by the authority, board, or

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commission is not required for the person to have an interest in the contract. The auditor-general shall compile and present any disclosure annually for review by the Department of Legislative Audit and the Government Operations and Audit Committee.

Section 8. That § 3-23-4 be amended to read:

3-23-4. Within the one-year period prohibiting any contract with an elected or appointed authority, board, or commission member, the authority, board, or commission may approve a former ~~authority, board, or commission~~ member to contract with the elected or appointed authority, board, or commission if the authority, board, or commission determines that ~~the transaction and~~ the terms of the contract are fair, reasonable, and are in the best interests of the public. ~~The authorization shall be in writing.~~

Any approval given pursuant to this section shall be included in the official minutes of the authority, board, or commission and is a public record. Each approval ~~The minutes including the approval~~ shall be filed with the auditor-general and attorney general. The auditor-general shall compile ~~the~~ approvals and present them ~~any approval~~ annually for review by the Government Operations and Audit Committee.

Section 9. That § 3-23-5 be amended to read:

3-23-5. Any elected or appointed state authority, board, or commission member who knowingly violates §§ 3-23-1 to 3-23-4, inclusive, shall be removed from the authority, board, or commission and is guilty of a Class 1 misdemeanor. Any person who knowingly violates §§ 3-23-1 to 3-23-4, inclusive, and is also guilty of theft under chapter 22-30A, shall be penalized at the next greater class of penalty prescribed by chapters 22-6 and 22-30A. No authority, board, or commission member who has submitted a good faith request for authorization pursuant to section 6 of this Act may be convicted of a crime under this chapter. Any benefit to the authority, board, or commission member in violation of §§ 3-23-1 and 3-23-2 is subject to ~~forfeiture~~ disgorgement and any contract made in violation of this chapter is voidable by the authority, board, or commission.

AN ACT

ENTITLED, An Act to revise certain provisions regarding conflicts of interest for authority, board, or commission members.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 3-23 be amended by adding a NEW SECTION to read:

Terms used in this chapter mean:

- (1) "Board member," an elected or appointed member of the governing board;
- (2) "Cooperative education service unit," a legal entity created pursuant to §§ 13-5-31 through 13-5-33, inclusive, including subcontractors, agents or assigns of the cooperative education service unit;
- (3) "Disgorgement," the act of giving up on demand or by legal compulsion something that was obtained by illegal or unethical acts;
- (4) "Education service agency," an agency created pursuant to § 13-3-76;
- (5) "Local service agency," an entity created pursuant to § 13-15A-1; and
- (6) "School district," a school district as defined in § 13-5-1.

Section 2. That § 3-23-1 be amended to read:

3-23-1. No elected or appointed member of a state authority, board, or commission may have an interest in or derive a direct benefit from any contract:

- (1) With the state agency to which the authority, board, or commission is attached for reporting or oversight purposes that requires the expenditure of government funds;
- (2) With the state that requires the approval of the authority, board, or commission and the expenditure of government funds; or
- (3) With a political subdivision of the state if the political subdivision approves the contract and is under the regulatory oversight of the authority, board, or commission, or the agency

to which the authority, board, or commission is attached for reporting or oversight purposes.

No elected or appointed member of a state authority, board, or commission may derive a direct benefit from any contract as provided under this section for one year after the end of the member's term on the authority, board, or commission, except as provided in § 3-23-3 or 3-23-4.

Section 3. That § 3-23-2 be amended to read:

3-23-2. An elected or appointed member of a state authority, board, or commission derives a direct benefit from a contract if the member, the member's spouse, or any other person with whom the member lives or commingles assets:

- (1) Is a party to or intended beneficiary of the contract;
- (2) Has more than a five percent ownership interest in an entity that is a party to the contract;
- (3) Acquires property under the contract; or
- (4) Will receive from the contracting party compensation, commission, promotion, or other monetary benefit that is directly attributable to the contract.

Section 4. That chapter 3-23 be amended by adding a NEW SECTION to read:

An elected or appointed member of a state authority, board, or commission has an interest in a contract if the member, the member's spouse, or any other person with whom the member lives or commingles assets:

- (1) Is employed by a party to the contract; or
- (2) Receives more than nominal compensation or reimbursement for actual expenses for serving on the board of directors of an entity that derives income or commission directly from the

contract or acquires property under the contract.

Section 5. That chapter 3-23 be amended by adding a NEW SECTION to read:

A state authority, board, or commission member does not derive a direct benefit from or have an interest in a contract:

- (1) Based solely on the value associated with the member's publicly-traded investments or holdings, or the investments or holdings of any other person with whom the member lives or commingles assets;
- (2) By participating in a vote or a decision in which the member's only interest arises from an act of general application;
- (3) If the member is a state employee and is authorized to enter into the contract pursuant to §§ 5-18A-17 through 5-18A-17.6, inclusive;
- (4) If the contract is for the sale of goods, or for maintenance or repair services, in the regular course of business at or below a price offered to all customers;
- (5) If the contract is subject to a public bidding process; or
- (6) If the contract is for the deposit of public funds in a financial institution as otherwise authorized by law.

Section 6. That § 3-23-3 be amended to read:

3-23-3. Any elected or appointed state authority, board, or commission may authorize an authority, board, or commission member to derive a direct benefit from a contract if:

- (1) The member has provided full disclosure to the authority, board, or commission, including:
 - (a) All parties to the contract;
 - (b) The member's role in the contract;
 - (c) The purpose and objective of the contract;
 - (d) The consideration or benefit conferred or agreed to be conferred upon each party; and
 - (e) The duration of the contract;

(2) The authority, board, or commission finds that the terms of the contract are fair, reasonable, and not contrary to the public interest; and

(3) The authorization is a public record included in the official minutes of the authority, board, or commission, that shall be filed with the auditor-general and attorney general.

The auditor-general shall compile the authorizations and present them annually for review by the Government Operations and Audit Committee. A member who requests an authorization under this section shall make the request prior to entering into any contract that requires disclosure or within forty-five days after entering into the contract. Once disclosed and authorized by the governing board, no further disclosure or authorization is required unless the contract extends into consecutive fiscal years. A contract that extends into consecutive fiscal years requires an annual disclosure but no new authorization is required. If the authority, board, or commission rejects the request for authorization made by the member, the contract is voidable and subject to disgorgement pursuant to § 3-23-5, or the member may resign from the authority, board, or commission. No member of a state authority, board, or commission may participate in or vote upon a decision of the state authority, board, or commission relating to a matter in which the member derives a direct benefit.

Section 7. That chapter 3-23 be amended by adding a NEW SECTION to read:

Any elected or appointed state authority, board, or commission member may have an interest in a contract if:

- (1) The member, upon learning of the interest subject to the provisions of this chapter or a transaction that may create an interest subject to the provisions of this chapter discloses the interest no

later than the first meeting of the authority, board, or commission held after the first day of July of each year;

(2) The authority, board, or commission is notified of the contract and the member's role in the contract;

(3) The terms of the contract do not violate any other provision of law; and

(4) The disclosure is included in the minutes that are publicly available and are filed with the auditor-general and attorney general.

Each member shall receive a form, developed by the attorney general, for the purpose of annual disclosure of any interest and direct benefit covered by the provisions of this Act. In addition to any interest in a contract and direct benefit covered by the provisions of this Act, the member shall also disclose at least annually any ownership interest of five percent or greater in any entity that receives grant money from the state, either directly or by a pass-through grant, or that contracts with the state or any political subdivision for services. An authority, board, or commission member who has an interest in a contract pursuant to this section shall disclose the existence of a contract in which the member has an interest but for which authorization by the authority, board, or commission is not required for the person to have an interest in the contract. The auditor-general shall compile and present any disclosure annually for review by the Department of Legislative Audit and the Government Operations and Audit Committee.

Section 8. That § 3-23-4 be amended to read:

3-23-4. Within the one-year period prohibiting any contract with an elected or appointed authority, board, or commission member, the authority, board, or commission may approve a former member to contract with the elected or appointed authority, board, or commission if the authority, board, or commission determines that the terms of the contract are fair, reasonable, and are in the best interests of the public.

Any approval given pursuant to this section shall be included in the official minutes of the authority, board, or commission and is a public record. The minutes including the approval shall be filed with the auditor-general and attorney general. The auditor-general shall compile and present any approval annually for review by the Government Operations and Audit Committee.

Section 9. That § 3-23-5 be amended to read:

3-23-5. Any elected or appointed state authority, board, or commission member who knowingly violates §§ 3-23-1 to 3-23-4, inclusive, shall be removed from the authority, board, or commission and is guilty of a Class 1 misdemeanor. Any person who knowingly violates §§ 3-23-1 to 3-23-4, inclusive, and is also guilty of theft under chapter 22-30A, shall be penalized at the next greater class of penalty prescribed by chapters 22-6 and 22-30A. No authority, board, or commission member who has submitted a good faith request for authorization pursuant to section 6 of this Act may be convicted of a crime under this chapter. Any benefit to the authority, board, or commission member in violation of §§ 3-23-1 and 3-23-2 is subject to disgorgement and any contract made in violation of this chapter is voidable by the authority, board, or commission.

Section 10. That § 3-23-6 be amended to read:

3-23-6. No board member, business manager, chief financial officer, superintendent, chief executive officer, or other person with the authority to enter into a contract or spend money in an amount greater than five thousand dollars of a local service agency, school district, cooperative education service unit, education service agency, nonprofit education service agency, or jointly governed education service entity that receives money from or through the state may have an interest in a contract nor receive a direct benefit from a contract in amount greater than five thousand dollars or multiple contracts in an amount greater than five thousand dollars with the same party within a twelve-month period to which the local service agency, school district, cooperative education service

unit, or education service agency is a party except as provided in § 3-23-8.

Section 11. That § 3-23-7 be amended to read:

3-23-7. A person described in § 3-23-6 derives a direct benefit from a contract if the person, the person's spouse, or any other person with whom the person lives and commingles assets:

- (1) Is a party to or intended beneficiary of any contract held by the local service agency, school district, cooperative education service unit, or education service agency;
- (2) Has more than a five percent ownership interest in an entity that is a party to any contract held by the local service agency, school district, cooperative education service unit, or education service agency;
- (3) Acquires property under the contract; or
- (4) Will receive compensation, commission, promotion, or other monetary benefit directly attributable to any contract with the local service agency, school district, cooperative education service unit, or education service agency.

Section 12. That chapter 3-23 be amended by adding a NEW SECTION to read:

A person described in § 3-23-6 has an interest in a contract if the person, the person's spouse, or any other person with whom the person lives and commingles assets:

- (1) Is employed by a party to any contract with the local service agency, school district, cooperative education service unit, or education service agency; or
- (2) Receives more than nominal compensation or reimbursement for actual expenses for serving on the board of directors of an entity that derives income or commission directly from the contract or acquires property under the contract.

Section 13. That chapter 3-23 be amended by adding a NEW SECTION to read:

A person described in § 3-23-6 does not derive a direct benefit from or have an interest in a contract:

- (1) Based solely on the value associated with the person's publicly-traded investments or holdings, or the investments or holdings of any other person with whom the board member, business manager, chief financial officer, superintendent, or chief executive officer lives or commingles assets;
- (2) By participating in a vote or a decision in which the person's only interest arises from an act of general application;
- (3) Based on the person receiving income as an employee or independent contractor of a party with whom the local service agency, school district, cooperative education service unit, or education service agency has a contract, unless the person receives compensation or a promotion directly attributable to the contract, or unless the person is employed by the party as a board member, executive officer, or other person working for the party in an area related to the contract;
- (4) If the contract is for the sale of goods or services, or for maintenance or repair services, in the regular course of business at a price at or below a price offered to all customers;
- (5) If the contract is subject to a public bidding process;
- (6) If the contract is with the official depository as set forth in § 6-1-3;
- (7) Based solely on the person receiving nominal income or compensation, a per diem authorized by law or reimbursement for actual expenses incurred;
- (8) If the contract or multiple contracts with the same party within a twelve-month period with whom the local service agency, school district, cooperative education service unit, or education service agency contracts in an amount less than five thousand dollars.

Section 14. That § 3-23-8 be amended to read:

3-23-8. A local service agency, school district, cooperative education service unit, or education

service agency may authorize a person described in § 3-23-6 to derive a direct benefit from a contract if:

(1) The person has provided full written disclosure to the agency, district, or unit governing board of all parties to the contract, the person's role in the contract, the purpose or objective of the contract, the consideration or benefit conferred or agreed to be conferred upon each party, and the duration of the contract;

(2) The governing board finds that the terms of the contract are fair, reasonable, and not contrary to the public interest; and

(3) Any request for authorization or governing board action are public records. The official minutes of the governing board shall include any governing board action on each request for authorization and shall be filed with the auditor-general and attorney general.

A person described in § 3-23-6 who has an interest in a contract pursuant to section 12 of this Act shall disclose the existence of a contract in which the person has an interest and the person's role in the contract but no governing board authorization is required for the person to have an interest in the contract. Disclosure shall also be made at the annual reorganization meeting if the contract extends into consecutive fiscal years. The interest disclosure shall be included in the official minutes of the governing board.

Any person receiving a direct benefit from a contract and requesting an authorization pursuant to § 3-23-8 shall make the request prior to entering into any contract that requires disclosure or within forty-five days after entering into the contract that requires disclosure. Any authorization by the governing board requires no further disclosure or authorization unless the contract extends into consecutive fiscal years. If the contract extends into consecutive fiscal years, disclosure shall be made annually at the annual reorganization meeting but no new authorization is required. If the entity rejects any request for authorization, the contract is voidable and subject to disgorgement pursuant to § 3-23-9 or the person may resign from the local service agency, school district, cooperative education service unit, or education service agency.

No board member of a local service agency, school district, cooperative education service unit, or education service agency may participate in or vote upon a decision of a local service agency, school district, cooperative education service unit, or education service agency relating to a matter in which the member derives a direct benefit.

Section 15. That chapter 3-23 be amended by adding a NEW SECTION to read:

Each local service agency, school district, cooperative education service unit, or education service agency shall develop a written conflict of interest policy, including any disclosure and authorization form that includes the list of any disclosable interest in contracts or direct benefits covered by this Act.

Section 16. That § 3-23-9 be amended to read:

3-23-9. Any person who knowingly violates §§ 3-23-6 to 3-23-8, inclusive, shall be removed from office or employment and is guilty of a Class 1 misdemeanor. Any person who knowingly violates §§ 3-23-6 to 3-23-8, inclusive, and is also guilty of theft under chapter 22-30A, shall be penalized at the next greater class of penalty prescribed by chapters 22-6 and 22-30A. No person described in § 3-23-6 who has submitted a good faith disclosure or request for authorization pursuant to section 14 of this Act may be convicted of a crime under this chapter. Any benefit to a person derived from the person's knowing violation of §§ 3-23-6 to 3-23-8, inclusive, is subject to disgorgement. Any contract made in violation of §§ 3-23-6 to 3-23-8, inclusive, is voidable by the governing body of the local service agency, school district, cooperative education service unit, or education service agency.

Section 17. That § 22-30A-11 be amended to read:

22-30A-11. Any person convicted of theft under § 22-30A-10 for unlawfully obtaining property of

this state, of any of its political subdivisions, or of any agency or fund in which the state or its people are interested shall, in addition to the punishment prescribed by § 22-30A-17 and chapter 22-6 and that may also be prescribed under § 3-23-5 or 3-23-9, be disqualified from holding any public office, elective or appointive, under the laws of this state.

An Act to revise certain provisions regarding conflicts of interest for authority, board, or commission members.

<p>I certify that the attached Act originated in the</p> <p>HOUSE as Bill No. 1170</p> <p>_____ Chief Clerk</p>	<p>Received at this Executive Office this _____ day of _____,</p> <p>20____ at _____ M.</p> <p>By _____ for the Governor</p>
<p>_____ Speaker of the House</p> <p>Attest:</p> <p>_____ Chief Clerk</p>	<p>The attached Act is hereby approved this _____ day of _____, A.D., 20____</p> <p>_____ Governor</p>
<p>_____ President of the Senate</p> <p>Attest:</p> <p>_____ Secretary of the Senate</p>	<p>STATE OF SOUTH DAKOTA,</p> <p>Office of the Secretary of State</p> <p>Filed _____, 20____</p> <p>at _____ o'clock __ M.</p> <p>_____ Secretary of State</p> <p>By _____ Asst. Secretary of State</p>
<p>House Bill No. <u>1170</u></p> <p>File No. _____</p> <p>Chapter No. _____</p>	

**State Board Disclosure Laws
Instructions and Forms
SDCL 3-23-1 et seq.
Effective July 1, 2017**

OVERVIEW

This document outlines requirements found in SDCL Chapter 3-23, including updates that take effect on July 1, 2017 (hereinafter “disclosure laws”). The disclosure laws apply to current and certain former members of certain State boards, commissions and authorities (hereinafter “Boards” and “Board Members or Members”). The disclosure laws prohibit a current Board Member absent proper disclosure and/or waiver, from having an interest in, or from deriving a direct benefit from certain contracts with the State or with certain political subdivisions of the State. This document refers to contracts that are implicated under this law as “covered contracts”. The disclosure laws also prohibit certain former Board Members, absent proper waiver, from deriving a direct benefit from covered contracts. The foregoing prohibitions also apply to direct benefits derived by a spouse or other person living with the Board Member or commingling assets with the Board Member. 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 most recent updates to the disclosure laws can be found in HB 1170 and SB 65 from the 2017 Legislative Session. SB 65 added the South Dakota Board of Technical Education to the list of authorities, boards, or commissions covered by the law. HB 1170 revised the disclosure laws found in HB 1214 from the 2016 Legislative Session. More specifically, HB 1170 distinguishes between “deriving a direct benefit from” a covered contract and “having an interest in” a covered contract. Under the new law, a current or former Board Member may only derive a direct benefit from a covered contract if the contract is disclosed and a waiver¹ is authorized by the Board. The Board Member must disclose covered contracts in which they “have an interest” only during the Member’s term on the Board. Former Board Members are not subject to the disclosure requirements for contracts in which they have an interest but from which they do not derive a direct benefit.

These instructions include best practices and are not intended to be used in isolation: instead, they should be used in conjunction with a review of the disclosure laws, the State Board Decision Matrix, and the annual disclosure form. 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 or board, their client is the agency, board, authority or commission: board members in their individual capacity are not their clients, nor do they owe a

¹ The term “waiver” is used to describe the process by which a board reviews and approves of or authorizes a board member’s covered contract.

legal obligation to board members in their individual capacity. These attorneys cannot provide private legal advice regarding the best interests of an individual board member or the board member's employer or business, and cannot guarantee the confidentiality of communications with individual board members. As a result, members are encouraged to contact a private attorney in regard to their individual interests and contracts. Private attorneys may, in turn, contact the attorneys for the state board, authority or commission with questions.

Note that there may be more specific provisions relating to a board, commission or authority than what is set forth in the disclosure laws. 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.

SUMMARY OF THE DISCLOSURE LAWS

Who do the disclosure laws apply to?

The disclosure laws apply to individuals who, on or after July 1, 2017, 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;
- (22) Board of Water Management; and
- (23) South Dakota Board of Technical Education.

What types of contracts are prohibited under the law?

A current Board Member is prohibited from having an interest in or deriving a direct benefit from any contract:

- 1) with the state agency to which the Board is attached for reporting or oversight purposes if the contract requires the expenditure of government funds;
- 2) with the state if the contract requires approval of the Board, and the expenditure of government funds; or
- 3) with a political subdivision of the state if the political subdivision approves the contract and²

² Contracts with political subdivisions do not require the expenditure of government funds to be subject to the disclosure laws.

- a. is under the regulatory oversight of the Board; or
- b. is under the regulatory oversight of the agency to which the Board is attached.

Current and former Board Members are prohibited from deriving a direct benefit from any such contract. Additionally, a former board member may not contract with the board for a year after his or her term ends unless the Board determines that the terms of the contract are fair, reasonable, and in the best interests of the public.

What does it mean to “derive a direct benefit” from a contract?

A current or former Board Member derives a direct benefit from a covered contract if the Member, the Member’s spouse, or a person with whom the Member lives or commingles assets:

- 1) Is a party to or intended beneficiary of the covered contract;
- 2) Has more than a five percent ownership interest in an entity that is a party to the covered contract;
- 3) Acquires property under the covered contract; or
- 4) Will receive from a party to the covered contract compensation, commission, promotion or other monetary benefit that is directly attributable to the covered contract.

What does it mean to have “an interest” in a contract?

A current Board Member has an interest in a covered contract if the Member, the Member’s spouse, or a person with whom the Member lives or commingles assets:

- 1) Is employed by a party to the covered contract (but does not receive any compensation, commission, promotion or other monetary benefit directly attributable to the covered contract); OR
- 2) Receives more than nominal compensation or reimbursement for actual expenses for serving on the board of directors of an entity that derives income or commission directly from the covered contract or that acquires property under the covered contract.

What is not covered under the terms “derive a benefit” or “have an interest”?

A current or former Board Member does not need to disclose or request a waiver for a contract if:

- 1) The derived benefit or interest is based solely on the value associated with the Member’s publicly-traded investments or holdings, or the investments or holdings of any other person with whom the member lives or commingles assets; or
- 2) The Member’s benefit or interest is only 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; or

- 3) The Member is a state employee and authorized to enter into the contract pursuant to SDCL 5-18A-17 through 5-18A-17.6; or
- 4) The covered contract is for the sale of goods, or for maintenance or repair services, in the regular course of business at or below a price offered to all customers;
- 5) The contract is subject to a public bidding process; or
- 6) The contract is for the deposit of public funds in a financial institution as otherwise authorized by law.

How can a Board Member obtain a waiver for a direct benefit?

A current or former Board Member who derives a direct benefit from a covered contract that is entered into or renewed on or after July 1, 2017, will need to obtain a waiver for those contracts. A waiver may be granted to authorize a direct benefit from a covered contract if the following conditions are met:

1. The Board Member provides a full disclosure to the Board, including:
 - a. The parties to the covered contract;
 - b. The Member's role in the contract;
 - c. The purpose and objective of the contract;
 - d. The consideration or benefit conferred or agreed to be conferred upon each party;
 - e. The duration of the contract;
2. The Board finds that the terms of the covered contract are fair, reasonable, and not contrary to the public interest; and
3. The authorization by the Board is a public record included in the official minutes of the Board that are filed with the auditor-general and attorney general.

Note: For record keeping purposes, it is advisable that Board Members use the attached forms to provide written disclosure of a direct benefit and that Boards use the attached forms for authorization for the Member to derive the direct benefit. The forms should be included with the minutes.

All efforts should be made to disclose and seek authorization before the Board Member derives a direct benefit from the covered contract. However, a Board Member may disclose and seek authorization for a contract up to forty-five days after the contract has been executed. The Board Member may not participate in the discussion or vote regarding the Board's approval of the waiver.

Once a waiver is obtained, further disclosure or authorization is not required unless the contract extends into consecutive fiscal years. If so, the contract must be disclosed at least annually but no additional waiver is required. A form for annual disclosure is available on the Attorney General's website: <http://atg.sd.gov/legal/opengovernment/authorityboardcommission.aspx>.

Under what circumstances can a current board member have an interest in a contract?

A current Board Member may have “an interest in” a covered contract if the Board Member discloses, on at least an annual basis (no later than the first meeting after July 1 of each year), the contract giving rise to the interest and the Board Member’s role in that contract.³ The covered contract must not violate any other provision of law and the disclosure must be included in the minutes of the Board that are publicly available and are filed with the auditor-general and attorney general. The Member shall make an annual disclosure of covered contracts in which the Member has an interest using a form which is available on the website for the Office of Attorney General at: <http://atg.sd.gov/legal/opengovernment/authorityboardcommission.aspx>. The Member must also disclose, on at least an annual basis, any ownership interest of five percent or greater in any entity that receives grant money from the state, either directly or by pass-through grant, or that contracts with the state or with any political subdivision for services (“ownership disclosures”).

What are some examples of how the law would be applied?

1. A current commissioner of Game, Fish and Parks enters into a contract with Game Fish and Parks for the landscape design at a new state park facility. This is a contract with the state agency to which the Game, Fish and Parks Commission is attached. Accordingly, the contract is allowable only if properly disclosed and 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 who owns a commercial property development firm. The local school district enters into a purchase agreement to buy certain property from the firm. This is a prohibited contract with a political subdivision of the State (the school district) that is under the regulatory authority of the Board of Education. The contract is allowable only if properly disclosed and waiver is sought and secured from the Board.
3. A current Aeronautics Commission member owns a construction company. The construction company contracts with the State for the construction of air navigation facilities. Such facilities must be approved by the Aeronautics Commission pursuant to statute. This is a prohibited contract because it is with the State and requires approval of the Aeronautics Commission. The contract is allowable only if properly disclosed and waiver is sought and secured from the Commission.
4. A member of the Board of Economic Development sits on the board of a non-profit organization which provides job training. The organization applies for and receives a loan from the Board of Economic Development to build a new job training center. The board member receives a \$10,000 per year stipend for serving on the organization’s

³ As noted above, former Board Members are not required to disclose contracts in which they have an interest but from which they do not derive a direct benefit.

board. This is a prohibited contract because the member receives more than nominal compensation for service on the non-profit board and, as a result, has an interest in a covered contract. The contract is only allowable if the person properly discloses to the Board of Economic Development the contract and the member's relationship to the non-profit organization. No waiver is necessary.

GUIDANCE FOR BOARD MEMBERS

How can I obtain a waiver?

If a waiver is necessary, a written request for a waiver should be submitted to the Board prior to a meeting. This should be done as soon as the Member is aware that he or she has or will derive a direct benefit from a covered contract. If in doubt whether a direct benefit exists, disclose and request a waiver.

Briefly describe the parties to the covered contract. Briefly describe your role in the contract and how any relationship you have may give rise to the necessity for a waiver, including how you, your spouse or anyone with whom you live or commingle assets might derive a direct benefit from the contract. Examples of persons other than your spouse might include a girlfriend, boyfriend, roommate, or an adult child.

Briefly describe the purpose and objective of the covered contract. What goods or services are provided? What project is the contract for?

Briefly describe the consideration or benefit conferred or agreed to be conferred upon each party to the covered contract. How much money is being paid directly? Are there any bonuses or commissions involved?

Briefly describe the duration of the covered contract. What is the anticipated timeline for completion?

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

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.

CAUTION: No “blanket” waivers may be granted under the disclosure laws. For example, a Board Member could not seek approval to derive a direct benefit from “any land lease transaction with the Department of Game, Fish and Parks.” Because the Board must review the terms of the contract to determine that the terms are fair, reasonable and not contrary to the public interest, each contract must be given separate approval. Some Boards may need to schedule special meetings depending on how often the Board meets or the frequency of waiver requests.

How do I disclose a contract?

Disclosures not requiring authorization or waiver by the Board, including disclosures of covered contracts in which the Member has an interest, disclosures of direct benefits which were previously authorized by the Board, and ownership disclosures, should be done on at least an

annual basis. If in doubt whether an interest exists, disclose. Disclosures should be completed using the annual disclosure form available on the website for the Office of Attorney General at: <http://atg.sd.gov/legal/opengovernment/authorityboardcommission.aspx> and sent to the Auditor-General and Attorney General after review by the Board.

What are the penalties for failing to comply with the law?

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 covered contract is voidable by the Board and any benefit that the Board Member received from the contract is subject to disgorgement. In the event that the Board Member is also guilty of theft under SDCL Chapter 22-30A, including theft by direct criminal conflict of interest,⁴ his or her criminal penalty is enhanced. However, a Board Member who has submitted a good faith request for a waiver related to a direct benefit cannot be convicted of violation of the disclosure laws in connection with the covered contract.

⁴ Created by Chapter 98, 2017 Session Laws, effective July 1, 2017.

GUIDANCE FOR THE BOARD

What are best practices for acting on a request for waiver from a board member?

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 disclosures and waiver requests. The request for a waiver should be reviewed by the other Board Members prior to the 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 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. Boards are advised to conduct special meetings if necessary for timely action on a waiver request. If you deem the request form incomplete, you should ask for additional information from the requesting Board Member during the meeting, rather than delaying action on the request.

Unless readily apparent from the disclosure or written request, you 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 fair, reasonable and not contrary to the public interest; and any other questions you believe will help establish the facts and circumstances surrounding the contract and the request for waiver.

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 a waiver is appropriate. The request and the Board's determination shall be included in the minutes of the meeting. 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.

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 and Attorney General.

<p>Minutes may be filed with the attorney general by email attachment in PDF format and sent to ATGMinutes@state.sd or sent by mail to:</p> <p style="text-align: center;">Office of Attorney General Attn: Board Minutes 1302 E. Highway 14, #1 Pierre, SD 57501</p>	<p>Minutes may be filed with the auditor-general by email attachment in PDF format to: DLAMinutes@state.sd.us or sent by mail to:</p> <p style="text-align: center;">Department of Legislative Audit 427 S Chapelle c/o 500 E Capitol Pierre, SD 57501</p>
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STATE OF SOUTH DAKOTA

(insert name of board/commission/authority)

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

THIS IS A PUBLIC DOCUMENT

A written request for waiver 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 sent to Auditor-General _____ Date sent to Attorney General _____

STATE OF SOUTH DAKOTA

(insert name of board/commission/authority)

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

THIS IS A PUBLIC DOCUMENT

A written request for waiver 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 sent to Auditor-General _____ Date sent to Attorney General _____

**State Board Disclosure Laws
WAIVER & DISCLOSURE DECISION MATRIX
SDCL 3-23-1 et seq.
Effective July 1, 2017**

DO I NEED TO DISCLOSE OR REQUEST A WAIVER?

This matrix will assist a current or former state board member in determining whether it is necessary to disclose an interest in a contract or to seek a waiver in order to receive a benefit from a contract with a State agency or with a political subdivision of the State. This matrix is not designed to be used in isolation. Instead, it should be used in conjunction with the State Board Disclosure Law Instructions and Forms, the annual disclosure form prepared by the Attorney General's Office,¹ a review of the Disclosure Laws, and discussions with legal counsel. This matrix is intended as a general guide only and is not by itself determinative of whether disclosure is necessary. The statutes covered by this matrix can be found in HB 1170 and SB 65 from the 2017 legislative session. These laws go into effect on July 1, 2017.

The questions in this matrix may not address your specific situation. In addition, to answer these questions, you should keep in mind that an agreement does not always need to be in writing to be considered a contract. Also, keep in mind that a board member him or herself need not be a party to the contract for the contract to be covered under the disclosure laws. If you have any doubt as to the answer to any of the questions below, you are encouraged to choose "YES" for the purposes of completing the matrix and deciding whether you need to disclose a contractual relationship or request a waiver.

1. Within the last year, was I a member of one of the boards, commissions, or authorities listed below?
 - (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;

¹ This form can be on the Attorney General's website at:
<http://atg.sd.gov/legal/opengovernment/authorityboardcommission.aspx>.

- (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;
- (22) Board of Water Management; or
- (23) South Dakota Board of Technical Education.

If YES, proceed to next question.

If NO, no disclosure or request for waiver is needed.²

2. Do I have an ownership interest of five percent or greater in any entity that receives grant money from the state, either directly or by a pass-through grant, or that contracts with the state or any political subdivision for services?

If YES, **DISCLOSURE IS NECESSARY FOR CURRENT BOARD MEMBERS ONLY. HOWEVER, NO REQUEST FOR WAIVER IS NEEDED.** Proceed to question 3 to determine if you have additional obligations under the law.

If NO, proceed to the next question.

3. Does the contract involve the expenditure of government funds?

If YES, proceed to next question.

If NO, no disclosure or request for waiver is needed unless:

- (a) the contract is with a political subdivision of the state; and
- (b) the political subdivision approves of the contract and is under the regulatory oversight of the authority, board, commission, or the agency to which the authority, board, or commission is attached for reporting or oversight purposes.

If (a) and (b) are satisfied proceed to the next question.

4. Is the contract with:
 - a. The state agency to which the authority, board, or commission is attached for reporting or oversight purposes; OR
 - b. With the State and requires approval of the authority, board, or commission; OR

² This matrix does not address conflicts for a board member, fiscal agent, officer, or executive of a local service agency, school district, cooperative education service unit, or education service agency, that receives money from or through the state. However, such persons are also subject to the provisions of HB 1170.

- c. With a political subdivision which is under the regulatory oversight of the authority, board, or commission or under the regulatory oversight of the agency to which the authority, board or commission is attached?

If YES, proceed to next question.

If NO to all, no disclosure or request for waiver is needed.

- 5. Does the contract fit one of the following exceptions:
 - a. The only financial benefit to the board member is the value associated with the member's publicly-traded investments or holdings or the value associated with the investments or holdings of a person with whom the board member lives or commingles assets; OR
 - b. The member's only interest arises from an act of the Board that has general application; OR
 - c. The member is a state employee and authorized to enter into the contract pursuant to SDCL 5-18A-17 through 5-18A-17.6; OR
 - d. The contract is for the sale of goods, or for maintenance or repair services, in the regular course of business at or below a price offered to all customers; OR
 - e. The contract is subject to a public bidding process; OR
 - f. The contract is for the deposit of public funds in a financial institution as otherwise authorized by law?

If YES to any, no disclosure or request for waiver is necessary.

If NO to all, proceed to next question.

- 6. Am I, my spouse, or any other person with whom I live or commingle assets a party to or intended beneficiary of the contract?

If YES, **DISCLOSURE AND REQUEST FOR WAIVER IS NEEDED.**

If NO, proceed to next question.

- 7. Do I, my spouse, or any other person with whom I live or commingle assets have more than a five percent ownership interest in a party to the contract?

If YES, **DISCLOSURE AND REQUEST FOR WAIVER IS NEEDED.**

If NO, proceed to next question.

- 8. Will or do I, my spouse, or any other person with whom I live or commingle assets acquire property under the contract?

If YES, **DISCLOSURE AND REQUEST FOR WAIVER IS NEEDED.**

If NO, proceed to next question.

9. Will or do I, my spouse, or any other person with whom I live or commingle assets receive from a contracting party compensation, commission, promotion, or other monetary benefit directly attributable to the contract?

If YES, **DISCLOSURE AND REQUEST FOR WAIVER IS NEEDED.**

If NO, proceed to next question.

10. Am I, my spouse, or any other person with whom I live or commingle assets employed by a party to the contract?

If YES, **DISCLOSURE IS NECESSARY FOR CURRENT BOARD MEMBERS ONLY. HOWEVER, NO REQUEST FOR WAIVER IS NEEDED.**

If NO, proceed to the next question.

11. Am I, my spouse, or any other person with whom I live or commingle assets serving as a board member of an entity that is a party to the contract and receiving more than nominal compensation for service on such board?

If YES, **DISCLOSURE IS NECESSARY FOR CURRENT BOARD MEMBERS ONLY. HOWEVER, NO REQUEST FOR WAIVER IS NEEDED.**

If NO, no disclosure or request for waiver is necessary.