

**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.

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: Office of Attorney General Attn: Board Minutes 1302 E. Highway 14, #1 Pierre, SD 57501	Minutes may be filed with the auditor-general by email attachment in PDF format to: DLAMinutes@state.sd.us or sent by mail to: Department of Legislative Audit 427 S Chapelle c/o 500 E Capitol Pierre, SD 57501
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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 _____