

**BOARD MANUAL**

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<b>Approved By:</b>	Board	<b>Number:</b>	3-B-4
<b>Date Issued:</b>	January 24, 2012	<b>Page:</b>	1 of 2
<b>Last Review Date:</b>	Feb.4, 2015	<b>Last Revision Date:</b>	Feb. 24, 2015
<b>SUBJECT:</b>	<b>General Principles Regarding Conflict of Interest</b>		

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Included in the fiduciary duty that a director owes to the corporation is a requirement that the director must also avoid situations where the interests of the director will be in conflict with the duties that are owed to the corporation.

Conflict of interest is often expressed as a conflict between the personal interest of the director and the fiduciary duties the director owes the corporation. There may also be situations that are better described as a conflict between “duty and duty.” These are situations in which the duties the director owes to the corporation are in conflict with duties owed elsewhere (e.g., to another corporation).

### **Types of Conflicts of Interest**

Situations in which a conflict of interest may arise cannot be exhaustively enumerated but include the following:

#### ***1. Transactions with the Corporation***

The *Corporations Act* provides a “safe harbour” for a director who is in a conflict of interest by virtue of being directly or indirectly interested in a contract or proposed contract with the corporation. Provided the director has declared the interest and refrained from voting, the director will not be accountable for any profit realized from the contract and the contract is not voidable by reason only of the director being in a fiduciary relationship with the corporation that is a party to the contract.

Under the *Not-for-Profit Corporations Act*, the “safe harbor” arises where a director or officer:

- Is a party to a material contract or transaction with the corporation; or
- Is a director or officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation.

#### ***2. Acting for an Improper Purpose***

It is a breach of the duties of the director if the director acts in self-interest or for a collateral purpose. The director must act in the best interests of the corporation. The courts will examine what was uppermost in the mind of the director when the decision was made. The director’s primary motivation must be in the best interest of the corporation.

**3. *Appropriation of Corporate Opportunity***

A director will be in breach of duties owed to the corporation when the director diverts to his or her own use and benefit an opportunity in which the corporation has an interest.

**4. *Serving on the Board of Other Corporations***

A director who is a director of two corporations that are transacting with one another will be in a conflict of interest. A director who serves as a director of more than one corporation may also be in a position where there are competing or conflicting duties.

This may arise where the director serves as a director of two corporations that are competing with one another (e.g., if two corporations are both seeking to take advantage of the same opportunity). A director may be in possession of confidential information received in one boardroom that is of importance to a decision being made in the other boardroom. The director cannot discharge the duty to maintain such information in confidence while at the same time discharging the duty to make disclosure.

**5. *Misuse of Confidential Information***

Directors have a duty to hold information in confidence and to use it only for purposes of the corporation and not for personal gain.

**The Extent of Disclosure that Must be Made by a Director**

The disclosure required will vary with the facts and circumstances of each case but must be sufficient to inform the corporation fully of the nature and extent of the director's interest.

**Procedures When Conflicts Arise**

The *Corporations Act* requires the director to make disclosure and refrain from voting. The process set out in the *Corporations Act* applies to a direct or indirect interest (usually a personal or financial interest) in a contract or proposed contract.

Under the *Not-for-Profit Corporations Act*, a director is not only required to disclose and refrain from voting but is not to attend any part of the meeting of directors during which the contract or transaction is discussed.

Not all conflicts may be addressed through the provisions in the *Corporations Act* or the *Not-for-Profit Corporations Act*. There is some case law to suggest that a corporation can approve the director's actions in connection with a corporate opportunity if the director has made full disclosure of the opportunity. Where that situation arises, both the director and the corporation should obtain independent legal advice.

In some cases, a director may have no option but to resign.