

Transition2017



TO: Transition Board
FROM: Gregory Weber, Partnership Staff
DATE: March 9, 2017
SUBJECT: Partnership Director Conflicts of Interest Policy

Recommendation:

Accept the Governance Committee's recommendations that:

1. Building from the materials inherited from the Council, the Partnership should develop a more robust conflicts of interest policy that addresses self-dealing, organizational conflicts, and apparent conflicts involving Partnership directors.
2. Until the Partnership adopts such a policy, it needs to develop clear ground rules for its committees to avoid any such actual or apparent conflicts.
3. Partnership staff should first propose such ground rules for the Landscape Committee—its most active committee. Staff should then adapt such ground rules as necessary for other committees.

Background:

Ordinarily, at the first Board meeting of each new calendar year, new directors receive a board-member orientation. Included in that orientation is the short document set out in Appendix A. Paragraph 10 of that document contains the most specific language on conflicts of interest at the board level:

Conflict of Interest. The director shall not participate in any Council decision when that director has a material financial interest in the transaction in question without first informing the board of the interest and following proper procedures, as outlined in Article XII of the By-laws.¹

This provision, and the referenced bylaws, reiterate California nonprofit corporation law. They address "self-dealing." Self-dealing simply involves a director's personal financial gain from an organizational decision in which he or she participates.

Beyond that specific provision, several paragraphs refer to a director's general duty to act in the organization's best interest. These "best interests of the Council" provisions implement, in part, the director's general duty, under California law, of "loyalty" to the Partnership.

Paragraph 2 states:

It is also expected that directors be able to consider and act on what is best for the organization as a whole, and the organization's mission, and not just the interest of the constituency represented by the director.

For its part, paragraph 4 states: "A director is bound by law to ... make decisions that are in the best interests of the Council regardless of whether he or she is compensated by the Council. "

¹ Bylaws section 12.01(b). See also section 8.02(b). For the full text of these provisions, see Appendix B.

And paragraph 5 reiterates: “A director must ... be prepared to act in the best interests of the Council.”

The bylaws changes adopted by the members on December 30, 2016, create new possibilities for conflicts of interest that did not exist under the prior governance structure. The elimination of the three separate membership groups means that representatives of for-profit Partnership members are eligible to serve as Partnership directors. Conceivably, such directors might participate in decisions that do not benefit themselves directly; rather, they benefit the organization that they represent. The current Partnership “policy,” set out below, did not address this kind of organizational conflict. It does not tell the director with the potential conflict what to do. It also does not tell other directors what to do if the affected director does not act.

In anticipation of such potential organizational conflicts, Article 12 of the transition bylaws contains provisions that address some organizational conflicts. For example, Section 12.01(a) states:

No Representative of a Member of the Council shall make, participate in making, or in any way attempt to use his or her position as a Representative, Director, or officer of the Council to influence any decision or action of the Council at a Plenary Meeting or any decision or action of the Board with respect to contracts to provide services to the Council if the Representative is personally aware that the Member he or she represents on the Council, or any constituent organization that is a Member, or an affiliate of the Member, or the Member Representative him or herself, has a direct or indirect material financial interest in the subject matter of the decision or action to which the vote of the Council pertains. (Emphasis added.)

Thus, this provision is broad enough to address self-dealing type conflicts between the Partnership and:

- Any member (not just a Director)
- A member’s constituent organization (undefined)
- A member’s affiliated organization (undefined); and
- The member’s representative.

It also includes direct and “indirect” material financial interests. It goes on to define “material financial interest” as one involving \$2,000 or more whose value would be increased by at least 10% during the term of the agreement or grant with the Partnership.

While these provisions expand the range of the self-dealing limitations, they do not exhaust the types of organizational conflicts. Under Section 12.01(a)(i)-(iii), they are limited to specific grants or agreements. And, in any event, the bylaws provisions lack a narrative format, written in plain English, which includes illustrations of their application.

Similarly, there may be occasions where although a director’s role in a decision does not rise to the level of either self-dealing or a formal organizational conflict, an independent observer might reasonably conclude that a conflict appears to exist. Again, the Partnership’s policy does not address what should be done when an apparent conflict exists.

Finally, neither the current policy nor the current bylaws address actual or potential conflicts that may arise from the personal relationships of Directors with, e.g., water utilities, potential contractors, businesses or other organizations.

At its March 8, 2017 meeting, the Governance Committee accepted staffs recommendation that the Partnership should develop a formal policy to address all four kinds of conflicts: self-dealing, organizational conflicts, apparent conflicts, and conflicts arising from personal relationships. The policy should first define the conflicts, giving illustrations. It should then identify how the affected

director should respond in different situations. Finally, it should set out what other directors should do when they suspect an actual or apparent conflict that has not otherwise been raised.

In developing such a policy, staff suggested that it should first survey similar nonprofit corporations to build off of possible examples. As appropriate, Partnership staff would work with its outside counsel. Staff would then develop and present suggested language for the ad hoc Bylaws Committee recommended by the Governance committee (See Attachment for “Potential Bylaws and Committee Structure Revisions” elsewhere on this Transition Board agenda.)

At its March 8, 2017 meeting, the Governance Committee accepted staff’s recommendation that, In the meantime, before the Partnership Board can adopt a new conflicts policy, each Board or Partnership committee needs to have clear ground rules, specific to its composition, to avoid any organizational conflicts. As noted in the update for the Ad Hoc AWE Relationship Committee, elsewhere in the agenda for this Transition Board meeting, that committee agreed to two such ground rules.

The Governance Committee asked staff to develop draft ground rules for other Transition Board and Partnership committees. While the ground rules for any given committee will depend upon the specific composition of that committee, the Governance Committee directed staff to develop draft rules for the Landscape Committee– the Partnership’s most active committee. Those rules could then be adopted by or adapted for other committees.

Appendix A: Director's Roles and Responsibilities

This overview of Council Director Roles and Responsibilities is intended to provide clarity and direction to prospective and sitting board members for the purpose of creating positive and appropriate working relationships among each other, the Executive Director and staff members. While it does address legal responsibilities as board members, its primary purpose is to create a sense of the type of organization the Council strives to be – a learning organization with a spirit of mutual support and respect. The spirit of these guidelines is as important as the guidelines themselves, to create an effective organization, working in a positive and productive environment to address the crucial water resources issues facing the state of California.

1. **General Role.** A director is a member of the board, which is the governing body of the Council. The primary function of the board is to provide overall guidance on programs and policies to accomplish the mission of the Council, approve budgets, assist with fundraising and work closely with the Executive Director to accomplish organizational objectives. Board members are responsible for fiduciary oversight and the financial health and sustainability of the Council, consistent with fulfilling California laws for governing a nonprofit 501(c)3 organization. In addition to meeting these responsibilities, directors should serve as ambassadors for the Council, actively promoting the organization's vision and mission.
2. **Director Profile.** Directors should be committed to the vision, mission and primary objectives of the organization.
It is also expected that directors be able to consider and act on what is best for the organization as a whole, and the organization's mission, and not just the interest of the constituency represented by the director.
3. **Authority.** A director's authority is vested as a member of the board based on the description under General Role (above). A director has no authority in the management of the day-to-day affairs of the Council. The bylaws or the board may delegate specific additional authority to an individual director. For example, the bylaws grant additional authority to officers. The board may delegate additional authority to officers, to committees, task forces or individual directors following the rules of the bylaws.
4. **Duties.** A director is bound by law to perform the duties of the position and make decisions that are in the best interests of the Council regardless of whether he or she is compensated by the Council.
5. **Be Informed and Prepared.** A director must be informed about the affairs of the Council and be prepared to act in the best interests of the Council. The director should read all relevant Council literature, particularly all informational material provided with a meeting agenda.
6. **Decision Making.** The board deliberates and acts only by consensus of Groups 1 and 2 (with a minimum two-thirds majority for votes taken among Group 1) during a properly called and noticed meeting with a quorum. Once a decision is made by the board, directors shall support that decision in communications representing the organization. If asked, a director should fairly describe the decision making process, the basis for the decision and their personal position (if desired), but not attempt to undermine the decision.
7. **Resolving Concerns or Disputes.** Directors shall make every effort to work through differences and disagreements among themselves in a manner that maintains good working relationships and clearly resolves any outstanding issues or differences. Concerns conveyed to directors by members related to the day-to-day operations of the organization should be shared with the Executive Director before any other action is taken. In the case of a staff member contacting a director with a complaint against another staff member, the director should advise the complainant to follow the conflict

resolution process contained in the Personnel Handbook. In the case of a Director receiving a complaint against another Director or member, the issue should be referred to the Chair of the Board.

8. **Meeting Attendance and Participation.** It is expected that directors will attend the annual board member orientation held in February each year. Directors should generally be able to participate in quarterly meetings of the board and meet other responsibilities designated or assigned as a member of the Board. The By-laws indicate directors missing two consecutive meetings are subject to dismissal. If a director is no longer able to function as an effective member of the board, due to scheduling or other issues, the process for replacement is outlined in the By-laws. To keep board meetings efficient and effective, alternates are not allowed if a director must miss a meeting.
9. **Knowledge of Roles and Responsibilities.** All directors should be familiar with the director's roles and responsibilities outlined in this document. Directors should also be aware of board responsibilities and guidelines as contained in the By-laws to avoid personal liability to the Council for any action taken as a director.
10. **Conflict of Interest.** The director shall not participate in any Council decision when that director has a material financial interest in the transaction in question without first informing the board of the interest and following proper procedures, as outlined in Article XII of the By-laws.
11. **Relationship with the Executive Director.** Directors should support the Executive Director in her/his role as chief executive officer, responsible for the day-to-day operations of the Council. Directors should work closely with the Executive Director in providing guidance on policy and program issues essential to the Council's mission. Directors should also confer with the Executive Director on budget and fundraising issues, while supporting the Executive Director's responsibilities to manage the daily and long-term affairs of the Council. As the Council is a member-driven organization, it is essential for the Executive Director to be aware of and responsible for all major initiatives of the Council, including providing staff support for the board, Committees and other bodies acting on behalf of the board or membership as a whole. While Directors provide overall guidance, it is the Executive Director's role and responsibility to manage the organization (e.g., finances, personnel, contracts, etc.) and carry out the activities necessary to achieve the mission of the Council and meet the needs of members.
12. **Guidelines for Interaction.** To maintain the professionalism of the organization and encourage open, honest and constructive communications among the board, Executive Director, members of the Council and staff, the following guidelines serve as a template to guide board and plenary meetings:
 - Provide an opportunity for all participants to share their points of view in an atmosphere of openness and mutual respect
 - Check assumptions about statements, information or attributed motives before responding or engaging in discussions
 - Work through differing points of view in a manner that recognizes and incorporates the contributions from each point of view
 - Seek consensus whenever possible, seeking solutions that address the primary interests of all involved to the extent possible
 - Encourage differences between individuals to be reconciled privately, or with the assistance of a third-party, to ensure productive long-term working relationships are maintained.

(A signature and date line are included at the end of the actual document.)

Appendix B: Bylaws Provisions on Conflicts

Section 8.02. Limitations on Powers.

(a) ...

(b) Self-Dealing Transactions. Notwithstanding the powers conferred on the Board pursuant to Sections 7.01 and 8.01, above, the Council shall not engage in any transaction which meets the definition of a "self-dealing transaction" as defined in California Nonprofit Corporation Law Section 5233 unless the transaction has been approved by one of the means specified in Section 5233(d). Generally speaking, Section 5233 defines a "self-dealing transaction" as any transaction to which the Council is a party and in which one or more of its directors (i.e., Board members) has a material financial interest. Certain transactions are excluded by that statute from being classified as self-dealing transactions.

(c) Transactions Between Corporations Having Common Directorships. Unless it is established that the contract or transaction is just and reasonable as to the Council at the time it is authorized, approved or ratified in accordance with the requirements imposed by California Nonprofit Corporation Law Section 5234, the Council shall not enter into a contract or transaction with any other corporation, association, or entity in which one or more of the members of the Council's Board are directors, unless the material facts relating to the transaction and the common directorship of the Director are fully known or disclosed to the Board. The Board must approve, authorize, or ratify any such contract or transaction in good faith and by a vote sufficient without counting the vote of the member(s) of the Board having a common directorship in another corporation that is a party to the transaction.

(d) Loans to Directors or Council Officers. The Council shall not make any loan of money or property to, or guarantee the obligation of, any Director or other officer, unless the transaction is first approved by the California Attorney General. This provision shall not apply to any reasonable advance on account of expenses anticipated to be incurred in the performance of the duties of the Director or other officer.

Section 12.01. Conflicts of Interest.

(a) No Representative of a Member of the Council shall make, participate in making, or in any way attempt to use his or her position as a Representative, Director, or officer of the Council to influence any decision or action of the Council at a Plenary Meeting or any decision or action of the Board with respect to contracts to provide services to the Council if the Representative is personally aware that the Member he or she represents on the Council, or any constituent organization that is a Member, or an affiliate of the Member, or the Member Representative him or herself, has a direct or indirect material financial interest in the subject matter of the decision or action to which the vote of the Council pertains. For purposes of this Article XII, a material financial interest is defined as an interest satisfying each of the following three elements:

(i) the interest relates to a grant received by the Member (or any Member-affiliated organization or the Member Representative him or herself) or originates from an agreement between the Member (or any Member-affiliated organization or the Member Representative him or herself) and any other person;

(ii) the interest is or will be worth \$2,000.00 or more in value provided to, received by, or promised to the Member, any Member-affiliated organization or the Member Representative him or herself) within twelve (12) months of the date when the Council vote is conducted; and

(iii) the outcome of the vote is, or is likely to have, a positive impact on the aforementioned interest which will enhance its value by a factor of ten percent or more during the term of the agreement or grant.

(b) If a Member Representative knows that a material financial interest of his or her Member (or any Member-affiliated organization, or the Member Representative him or herself) may be positively influenced by a Council vote on any of the matters described in subparagraph (a) above, then prior to any vote by the Council on the matter the Representative shall be obligated to disclose to the Council the fact that his or her Member (or one or more of its Member-affiliated organizations, or the Member Representative him or herself) has/have a conflict with respect to the matter which involves a material financial interest. As a result of that disclosure, the Representative must be recused from voting on behalf of the interested Member, or any Member-affiliated organizations, or the Member Representative him or herself.

(c) Prior to entertaining any discussion and vote on any matter described in subparagraph (a) above, the presiding Chair shall read a statement reminding all attending Members of their obligations under this Article XII. That statement shall include a recital of the above definition of what constitutes a material financial interest.

Section 12.02. Enforcement. If any Member Representative or Member is found by the Board to have willfully failed to disclose a conflict of interest, as defined in Section 12.01 above, said conduct shall be grounds for voiding the vote of the Member. In addition, if it is determined that the Member Representative with the undisclosed conflict actively participated in any deliberations of the Board preceding the vote, it shall be presumed that the vote was adversely affected and thus rendered void and of no effect unless subsequently ratified by a proper vote which excludes the Member Representative with the conflict.