

**SOUTH DAKOTA BOARD OF REGENTS**

**Academic and Student Affairs**

**AGENDA ITEM: 6 – F**

**DATE: March 30 – April 1, 2016**

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**SUBJECT: BOR Policy 4:35 – Conflict of Interest (Second Reading)**

The first reading of the proposed amendments to BOR Policy 4:35, set forth in Attachment I, was approved by the Board at its [December meeting](#) and is now back before the Board for final approval. No concerns or suggested revisions to the proposed changes have come forward since the first reading of the policy. By way of background, COPS and the various councils have previously discussed the implementation of [HB1064](#) (*An Act to prohibit unlawful self-dealing by state officers and employees*). The content of HB1064, which took effect on July 1, 2015, is codified in SDCL [3-16-8](#) and [5-18A-17](#) thru [5-18A-17.6](#), and in-large part align with our existing practices with respect to administering and managing conflicts of interests in accordance with BOR Policy 4:35. With that said, the new law does have a number of subtle differences, to include the requirements that any authorization granted in accordance therewith (which equates to an approval granted under existing BOR Policy 4:35) to be filed with the Bureau of Human Resources. Additionally, the authorization/approval must be in writing and is considered a public document. To provide clarity on the nuances of the new law, two [attachments](#) containing additional guidance and examples were prepared for the councils. Given the new requirements, it was recommended that the new changes to law be reflected in BOR Policy 4:35 so that employees looking for relevant authority on the topic can find everything in one place and not be expected to comb through statutes to find other applicable restrictions.

The proposed changes to BOR Policy 4:35, set forth in Attachment I (which can be found on pages 5-6 and which are highlighted for ease of ease of reference), are intended to combat any lack of awareness regarding the new law by including its relevant parts within Board policy, to include clarifying the manner and level at which authorizations will be administered. It is important to note that these changes to policy do not place any new or additional requirements on Board employees, as the restrictions are already imposed by state law. The intent is simply to increase the probability that our employees are aware of the statutory restrictions.

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**RECOMMENDED ACTION OF THE EXECUTIVE DIRECTOR**

I move to approve the second reading of the proposed amendments to BOR Policy 4:35 set forth in Attachment I.

**SOUTH DAKOTA BOARD OF REGENTS****Policy Manual****SUBJECT:** Conflict of Interest**NUMBER:** 4:35

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1. Persons employed full-time by the South Dakota Board of Regents in professional capacities, whether as faculty members, extension agents, administrators with authority over organizational units, programs, supervision of personnel or purchasing or other contract approval on behalf of the Board or the institution, together with civil service staff who make effective recommendations for purchasing shall devote their best professional efforts to the service of the institution to which they are assigned.
  - A. The duty to devote the best professional efforts to the service of the employing institution means that professional employees shall apply themselves to the proper work entrusted to them in order to achieve in the most effective and efficient manner the goals that have been set for them.
    1. Professional employees who serve the Board full-time in professional capacities may not simultaneously be employed full-time by other employers; provided that this provision shall not apply to persons appointed as faculty members by the medical school but employed full-time by other employers.
  - B. Professional employees should avoid entering into outside employments, occupations or endeavors for profit of any kind that may reasonably be thought to influence the decisions that they make in their capacity as Board employees, the degree of thought and effort that they devote to their responsibilities as Board employees or, in any other manner, the loyalty and diligence with which they pursue the best interests of the Board and of the students and citizens who rely upon the Board and its employees.
    1. In addition to the Investigator Financial Disclosure requirements contained in Board Policy No. 4:32, professional employees shall certify compliance with this policy annually by disclosure of outside employments, occupations or endeavors for profit, including investments or ownership interests held by immediate family members, that may reasonably be thought to influence, either directly or indirectly, institutional business, research or other decisions in matters in which the employee or immediate family member has a significant financial interest. If circumstances arise that suggest to the institutional chief executive officer, or that person's designee, that such outside interests have caused their work for the university to suffer or have given rise to an appearance of conflict of interest, the institutional chief executive officer, or that person's designee, may inquire into such activities, and the professional employees shall cooperate fully by disclosing such additional information as the institutional chief executive officer may request.

- a. For purposes of this policy, financial interests are significant and reasonably thought to influence, whether directly or indirectly, institutional business, research or other decisions that the professional employee makes on behalf of the Board and the institution when an outside entity:
    - i. employs the professional employee, or an immediate family member,
    - ii. or retains such a person as a consultant, or in any other compensated capacity, or
    - iii. when the professional employee or immediate family members, either individually or in aggregate, own equity in the outside entity in such amounts as would be reportable under federal regulations governing investigator conflicts of interest. (At the time of the 2005 negotiations, these sums would equal 5% of the equity issued by the entity or at least \$10,000 of ownership interests in the outside entity.
  - b. For purposes of this policy, “immediate family” includes a spouse, a common law spouse, or any other adult with whom the professional employee lives and commingles assets, unemancipated natural or adopted children, persons over whose affairs the professional employee or spouse exercises the responsibilities of guardian.
  - c. Disclosures required under this section shall be made to the institutional chief executive officer, or that person’s designee, and shall be treated as confidential material to be retained in personnel files, but without being subject to disclosure during promotion, tenure or continuing appointment reviews.
  - d. The duty to disclose conflicts shall be continuing. Each professional employee shall have an obligation to supplement the annual disclosure within one month of the time that the employee or immediate family member acquires employments or other business or financial interests that would be reportable under the policy; provided that immediate disclosure is required if the professional employee is actively participating in decision-making in a project or other endeavor involving the outside employer, contractor or entity.
2. When requesting additional information under this policy, the institutional chief executive officer, or that person’s designee, will indicate the circumstances that gave rise to the request.
  3. Faculty members may engage in private consulting on such terms and conditions as provided herein and under Board Policy No. 4:19 or, for members of the faculty bargaining unit, under § 9.5 of the collective bargaining agreement between the Council of Higher Education and the Board.
    - a. Notwithstanding any other provision of Board policy or of a collective bargaining agreement, absent the specific written consent of the chief executive officer of the employing institution, no faculty member may serve as an expert witness on behalf of a party pursuing a claim against the Board, an institution

under its control, or an officer, agent or employee of the Board, where the matters at issue involve deliberative or evaluative processes of the institution and the prospective expert witness participated in such deliberations or evaluations and helped to develop the institutional position with respect to such matters.

- i. This restriction may not be construed as an effort to prevent such employees from testifying in other capacities as to unprivileged matters within their personal knowledge.
4. Exempt staff, classified staff and extension agents who serve the Board full-time in professional capacities may engage in private consulting, in the manner, under such conditions and to the extent permitted under SDCL ch 3-8 and this policy.
    - a. Notwithstanding any other provision of Board policy, absent the specific written consent of the chief executive officer of the employing institution, no exempt staff member, classified staff member or extension agent may serve as an expert witness on behalf of a party pursuing a claim against the Board, an institution under its control, or an officer, agent or employee of the Board, where the matters at issue involve deliberative or evaluative processes of the institution and the prospective expert witness participated in such deliberations or evaluations and helped to develop the institutional position with respect to such matters.
      - i. This restriction may not be construed as an effort to prevent such employees from testifying in other capacities as to unprivileged matters within their personal knowledge.
    - b. Extension agents and extension specialists may not enter into consulting contracts to be performed within their assigned areas.
    - c. Extension agents and extension specialists may not contract to serve as expert witnesses as to matters related to the expertise that they exercise as part of their employment.
- C. Professional employees shall be subject to the Investigator Financial Disclosure policy contained in Board Policy No. 4:32. Absent prior consent, professional employees shall not engage in service businesses or enter into contracts to provide services where
    1. The services to be provided by the businesses or under the contracts are also made available to the public by Board institutions, and
    2. The professional employees are expected to provide such services on behalf of the Board as part of their regular assignments.

The prior approval requirement stated in this section shall not apply to activities undertaken by professional employees with nine month, ten month or eleven month contracts outside the dates of active contractual service; except that any agreement to

provide instructional service or consulting services of any kind to postsecondary institutions not governed by the Board, whether or not the course of instruction or services are offered by Board institutions, and whether or not the services are provided outside the dates of active contractual service, must receive prior approval.

- D. Professional employees who hire or engage junior colleagues, subordinates, or students for purposes unrelated to the activities of the institution
1. May not use their institutional positions to induce such junior colleagues, subordinates or students to accept such employment or engagements, and
  2. May not permit disputes arising from an outside employment or engagement to influence decisions that the professional employees make on behalf of the Board about the performance of the junior colleagues, subordinates or students.
- E. ~~Outside businesses in which faculty members, administrators and extension agents who serve the Board full-time in professional capacities have direct or indirect financial interests may be subject to the prohibitions contained in the South Dakota Codified Laws when bidding on contracts offered by Board institutions or other state agencies.~~

Persons employed by the Board of Regents are subject to the prohibitions imposed upon state employees in the South Dakota Codified Laws, to include SDCL 5-18A-17 to 5-18A-17.6. In general, these statutes prohibit state employees from deriving a direct benefit from certain state contracts, while employed or for a period of one year thereafter.

1. The prohibition applies to contracts, other than employment contracts, with any state agency, and it applies whenever an employee:
  - a. Approves, awards, or administers;
  - b. Recommends for approval or award; or
  - c. Supervises a person who approves, awards, or administers the contract.
2. A state employee derives a direct benefit from a contract when the employee, the employee's spouse, or other persons with whom the state officer or employee lives and commingles assets:
  - a. Has more than a five percent ownership or other interest in an entity that is a party to the contract;
  - b. Derives income, compensation, or commission directly from the contract or from the entity that is a party to the contract;
  - c. Acquires property under the contract; or

d. Serves on the board of directors of a for-profit entity that derives income or commission directly from the contract or acquires property under the contract.

A state employee does not derive a direct benefit from a contract based solely on the value associated with the officer's or employee's investments or holdings, or the investments or holdings of other persons with whom the state employee lives and commingles assets.

3. An authorization may be granted in accordance with SDCL 5-18A-17.2, to allow employees to derive a direct benefit from a contract described in section 1.E.1, by the:

a. Institutional chief executive officer or their designee for authorizations for employees of the institution;

b. Executive Director and CEO for authorizations for Board staff and the chief executive officers of the institutions; or

c. President of the Board for authorizations for the Executive Director and CEO.

Every authorization granted pursuant to SDCL 5-18A-17.2 is a public record and must be filed with the commissioner of the Bureau of Human Resources.

F. Faculty members are subject to the specific prohibition stated in S.D. Const. art. VIII, § 17 against profiting from the sale of books or apparatus that they have authored, invented or manufactured to students attending any public K-12 school, vocational institute or university located in the State of South Dakota.

G. When engaged in outside employments, occupations or endeavors for profit, professional employees shall indicate that they are acting in their private capacities and not as employees or agents of the Board or its institutions.

1. Professional employees may disclose their institutional affiliation to the extent that it may be customary to do so in order to inform another individual of one's credentials.

a. Professional employees who have obtained licenses on terms and conditions approved by the Board may use the name of the Board or of their employing institutions, or any logo, insignia or marks associated with them, for advertising purposes.

H. No professional employee may use for any purpose unrelated to the discharge of official duties any confidential information acquired by virtue of or in the course of his or her employment by the Board.

1. The prohibition stated in this section precludes the use for private purposes of information regarded as confidential by extramural organizations. Particular care

- must be taken to safeguard such confidences reported by students who acquired the information through service in institutionally sponsored internships or comparable placements.
- I. Professional employees may not use for any purpose unrelated to the discharge of official duties supplies, equipment or staff provided by virtue of or in the course of their employment by the Board; except that, such use may be permitted where:
    1. The use has been authorized in furtherance of approved consulting or private research, and appropriate arrangements have been made to reimburse the employing institution for such use, or
    2. The use has been authorized as de minimis and consistent with the effective operation of the public work place and does not increase the cost of the resource to the state.
  
  - J. Professional employees may not solicit or accept for personal use, or for the use of others, any gift, favor, loan, gratuity, reward, promise of future employment or any other thing of monetary value that might influence or appear to influence the judgment or conduct of the employee in matters involving institutional business activities or academic decisions. Professional employees may accept occasional unsolicited courtesy gifts or favors provided that the gifts or favors are customary in the industry and not of substantial value, and will not influence or appear to influence the judgment or conduct of the employee in matters involving institutional business activities, research or service endeavors or academic decisions. Ordinarily, no permitted gift or gratuity will have a value exceeding two hundred (\$200). If an otherwise proper gift or gratuity has a value exceeding that sum, acceptance of the gift or gratuity shall be disclosed to the professional employee's immediate supervisor. Notwithstanding the foregoing, upon prior written approval of the institutional chief executive officer, professional employees may accept a business trip paid for by a prospective vendor for purposes reasonably related to the evaluation of equipment, goods or services for possible acquisition by the institution.
    1. Any disclosure made under this section shall be in writing and receipt of the same shall be acknowledged in writing. Such writings shall be treated as confidential material to be retained in personnel files, but without being subject to disclosure during promotion, tenure or continuing appointment reviews.
  
  - K. Professional employees may accept honoraria from government or nonprofit organizations in recognition of services provided as a professional expert pursuant to Board Policy No. 4:19 (4), unless:
    1. The person, company, or organization offering the honorarium wants, or could reasonably be expected to want, to sell goods or services to the institution or to the system, and the employee is in a position to influence the decision to acquire that type of good or service;
    2. The person offering the honorarium is regulated by the institution or the system,

and the employee is in a position to participate in the regulation;

3. The person offering the honorarium:
    - a. is seeking or opposing or is reasonably likely to seek or oppose enactment of legislation or adoption of administrative rules or actions, or policy changes by the institution or the system; and
    - b. the employee may participate in the enactment or adoption;
      - or
  4. The payment would be classified as a conflict of interest under other provisions of this policy if it were made by a for-profit entity.
  5. "Honoraria," as used in this policy, means money or a thing of value offered to an institutional employee for a speech, appearance, article, or similar item or activity in connection with the employee's official role. Honoraria may include money or a thing of value offered to employees serving on scholarly or advisory bodies related to their academic work, public commissions, boards of philanthropic organizations, review panels or accreditation teams, or similar activities.
2. Institutional chief executive officers or their designees may direct professional employees to curtail or to abandon outside business endeavors, or they may, in their sole discretion, reassign the professional employees to duties that do not entail conflicts of interest, if professional employees have failed to observe limitations specified in this policy or have otherwise acted in a fashion, not otherwise expressly addressed hereunder, that compromises the interests that this policy seeks to protect.
- A. Where the institutional chief executive officers or their designees believe that a professional employee has violated or departed from the public policies adopted herein, they shall:
1. Give the affected professional employee written notice of the facts and circumstances that ground such concerns and advising them of the actions that the institution will require;
  2. Meet with the affected professional employee within ten working days after the initial notice was sent. The purpose of the meeting will be to discuss the factual basis for the institution's concern and the actions that the institution will require;
  3. Within five working days after the meeting, give the affected professional employee written notice of those actions that he or she must take in response to the institution's concerns.
- B. Professional employees must comply with the directives given to them.



3. Insofar as any determination of the institutional chief executive officers or their designees might give rise to a grievance within the meaning of applicable collective bargaining agreements or policies, professional employees may invoke their respective grievance procedures to challenge such determinations.
4. The chief executive officers of the institutions and the Executive Director and CEO of the Board of Regents are subject to sections 1 through 3 of this policy to the same extent as are any other professional employees of the Board. The provision of this section state additional, substantive requirements applicable to the chief executive officers of the institutions and the Executive Director and CEO, and they establish procedures to be followed whenever a chief executive officer or the Executive Director and CEO is required to disclose a potential conflict, to obtain permission, or to accept direction in such matters. This section also allows for limited review of decisions affecting chief executive officers or the Executive Director and CEO rights under these policies.
  - A. The institutional chief executive officers and the Executive Director and CEO shall not accept without prior authorization, any outside appointment to the board of a for-profit entity, whether compensated or not, that might reasonably be thought to influence the discharge of their executive duties on behalf of the particular school, university or system.
    1. Any request for permission to serve on a for-profit board shall specify the number of meetings per year and days per meeting that will be required for such service.
      - a. Authorization to accept an appointment to a for-profit board, whether compensated or not, does not authorize the use of institutional time, equipment, personnel, facilities or resources for such purposes. Appropriate leave must be taken for absences of one day or more for purposes of the for-profit board.
    2. The Board President or the Executive Director and CEO may authorize acceptance of appointment to a for-profit board if the annual compensation for the directorship is less than the total compensation approved by the Board for its most highly compensated executive; a directorship involving greater compensation may be accepted only with prior authorization by the Board.
    3. The Board may make exceptions to the standards and practices ordinarily required under this policy where, in its discretion, circumstances justify such departures to serve what it deems to be the best interests of the particular school or university or the system.
  - B. Whenever this policy requires a chief executive officer or professional employee to make a disclosure or to request permission, institutional chief executive officers shall submit the required disclosure to the Executive Director and CEO, and the Executive Director and CEO shall submit the required disclosure or request to the President of the Board.

- C. The Executive Director and CEO shall exercise the authority provided for under § 2, above, with respect to curtailment or termination of endeavors undertaken by chief executive officers, and the President of the Board shall exercise such authority over the Executive Director and CEO.
- D. If a chief executive officer or the Executive Director and CEO believes that a directive issued under ¶ C of this section misapplies, misinterprets or violates a specific term or condition of Board policy, he or she may submit the matter to the President of the Board, who may attempt informal resolution of the complaint. If the President of the Board elects not to attempt an informal resolution, or if an informal resolution cannot be reached, the President shall appoint a hearing officer to review the dispute and to forward a recommendation to the Board for final action.

**SOURCE: BOR, June 1997; BOR, December 2002; BOR, June 2005; BOR, March 2006; BOR, October 2010.**