



Government Operations & Audit
SENATOR LARRY TIDEMANN, CHAIR
REPRESENTATIVE DAN DRYDEN, VICE-CHAIR

June 22, 2016

Marcia Hultman, Secretary
Department of Labor and Regulation
Kneip Building
700 Governors Drive
Pierre, SD 57501

Letter of Intent Regarding the implementation of House Bill 1214, approved in the 2016 Session

Dear Secretary Hultman:

This Letter of Intent sets forth a particular view held by the Government Operations and Audit Committee related to the implementation of House Bill (HB) 1214, An Act to regulate conflicts of interest for authority, board, or commission members. As such, this Letter of Intent seeks to supplement that legislation with specific policy guidance as approved on June 20, 2016. While the guidance does not have the direct force of statutory law, it rests solidly on a long-standing tradition of Legislative-Executive relationships in South Dakota and it will be used by the Government Operations and Audit Committee as one basis for the operational oversight of your agency and its compliance with HB 1214.

The legislation was intended to identify potential contractual conflicts so that the respective authorities, boards, or commissions had the opportunity to make a determination as to whether or not the contracts were fair, reasonable, and not contrary to the public interest. To accomplish this goal, the legislation sets forth two processes, each with a distinct focus, by which a board may authorize a waiver of an otherwise prohibited relationship to a contract.

Because members of the committee have received questions from board members about the application of this law, this letter is intended to explain the process for compliance envisioned by the Legislature – in particular to emphasize the availability of the second process as a way to comply.

First process

Under the first process described in the first portion of Section 3 of HB 1214, the Board engages in an examination of the particular terms of a single contract or transaction. Upon receipt of the written request by a Board member, the Board is to look at the “essential terms of the contract” and determine whether the “terms of the contract are fair, reasonable, and not contrary to the public interest.”

Second process

Alternatively, the last sentence of Section 3 establishes a more generalized conflict inquiry by the board:

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 available.

Under this second process, the Board does not examine the “essential terms of the contract or transaction” as under the first process. Instead, the Board’s determination of whether a waiver is appropriate is based on whether “*the matter underlying the conflict* is fair, reasonable, and not contrary to the public interest[.]” (emphasis added) This inquiry into the “matter underlying the conflict” requires the board to examine the broader circumstances creating a conflict or potential conflict. Because the “essential terms of the contract” need not be examined, the board may under this process prospectively grant a broader waiver for a general category of transactions disclosed by a board member.

For example, a board member works at a retail establishment that, from time to time, may sell goods to a party to a contract with the State related to the subject matter of the board. It may be impractical for the board member to disclose each single transaction between his employer and the party to the contract. Instead of seeking a waiver for each particular transaction, the board member could disclose the underlying matter of this direct benefit or potential direct benefit to the Board. The Board may determine that the underlying matter (the board member’s employment with an entity engaging in routine retail transactions) is fair, and grant a waiver covering the underlying matter-allowing retail transactions between the board member’s employer and the entity.

It is important to note that this second process allows a board member to comply with the law by raising a new contract or transaction, a contract or transaction of which the board member is newly aware, or an anticipated contract or transaction at the beginning of the next regular meeting.

A board wishing to use the second process should follow this procedure, as is explained in Section 3:

- Include “Conflicts disclosure” as an agenda item at every regular meeting, prior to the discussion of any substantive matters.
- At that point in the meeting, any board member who has a conflict with an item on the agenda should disclose the conflict publicly and explain “the matter underlying the conflict” to the satisfaction of the board.
- Likewise, any board member who has a new, newly-discovered, or anticipated contract or transaction covered by HB 1214 should disclose it publicly and explain “the matter underlying the conflict” to the satisfaction of the board.
- The board should discuss the disclosure and determine whether “the matter underlying the conflict is fair, reasonable, and not contrary to the public interest.”
- If there is any substantive discussion of the matters disclosed, the conflicted board member should excuse himself from discussion and consideration of the matter.

- The Board's minutes should reflect the substance of the disclosure, and the Board's determination that "the matter underlying the conflict is fair, reasonable, and not contrary to the public interest." The minutes should be made available to the public and should be forwarded to the Auditor General.

It is the opinion of GOAC that following this process completely complies with HB 1214 and is consistent with the intent of the Legislature in passing this legislation.

The purpose of this act is to protect the public interest, to prohibit self-dealing, and to bring greater transparency to relationships that board members may have. We acknowledge that, in a small state, board members may have personal matters that relate to the business of the boards; in fact, many boards require that board members be active in the Board's areas of responsibility.

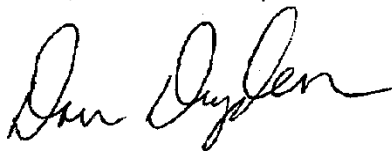
It is each Board's responsibility to protect the public interest. In some situations, protecting the public interest may require a detailed investigation of the particular terms of a single transaction. In other situations, such an inquiry would unnecessarily consume the precious time and resources of the board. Boards must use discretion to determine in each case which type of examination is best suited to protect the public and preserve the board's resources.

We understand that HB 1214 may create some complex questions from board members regarding what is required or not required to be disclosed and waived under the law. We recognize that it is imperative for board staff, including board counsel, to provide clear guidance and assistance with compliance to each board, commission or authority covered by HB 1214.

Thank you for your cooperation.



Senator Larry Tidemann
Chair, Government Operations and Audit Committee



Representative Dan Dryden
Vice-Chair, Government Operations and Audit Committee