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Open Society Institute - Office of the General Counsel

## MEMORANDUM

Ricardo A. Castro, General Counsel (ext. 1149); Robert Yarbrough, Deputy General Counsel (ext. 1158); Maria Santos Valentin, Deputy General Counsel (ext. 1340); Dennis Vinokourov, Senior Associate General Counsel (ext. 1131); Eileen B. Hershenov, Special Counsel (ext. 1601)

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**DATE:** May 3, 2005

**TO:** OSI-NY Program and Administrative Staff

**FROM:** Ricardo A. Castro

**RE:** OSI-NY Conflicts of Interest and Gift Policy

The OSI-New York Board of Trustees has approved the attached Conflicts of Interest and Gift Policy (the "Policy"), which supersedes the policy previously adopted by the Board of Trustees in 2001. The Policy, which applies to Trustees, to officers, to expert committee and advisory board members, and to all OSI staff, will be included in subsequent editions of the Employee Handbook. The Policy is intended to ensure that these persons do not receive improper personal benefit from their positions at OSI as a result of transactions entered into by OSI (*i.e.*, consultancies, vendor arrangements, grants, etc.).

### Disclosing and Managing Conflicts of Interest

The Conflicts of Interest portion of the Policy requires all staff members to disclose to the General Counsel, in writing, any Interest (as defined below) they have in connection with a transaction being considered by OSI at the Board level or below. The General Counsel will in turn notify the President and the Chairman of the Board of Trustees in writing of the disclosure. Moreover, the Policy requires such individuals to recuse (*i.e.*, remove) themselves from consideration of the relevant transaction and all related discussions, unless they are asked by the decision-makers to provide necessary information regarding the proposed transaction. In no event may interested staff members approve transactions in which they have an Interest, nor may they be present when a vote is taken with respect to the transaction.

The Policy provides that a staff member has an Interest if:

--he or she, or, *to his or her knowledge*, the staff member's "Family Member" (including parent, grandparent, spouse, domestic partner, sibling, child, or grandchild) or "close business associate" or "close friend" either:

--is employed by, and receives any compensation from, any organization or person with which OSI has entered into a transaction or is considering entering into a transaction (*i.e.*, consultancy, grant, etc.), or

--holds a senior or fiduciary position or has a shareholder or partnership interest greater than 5% in any organization in which OSI has entered or is considering entering into a transaction (*i.e.*, consultancy, grant, etc.); or

--has derived or will derive a financial benefit either directly or indirectly from a transaction entered into or being considered by OSI (*i.e.*, consultancy, grant, etc.).

In addition to the above, the Policy requires staff members to disclose to the General Counsel in writing all articles, books or speaking engagements on topics related, directly or indirectly, to their OSI employment, and for which they will obtain compensation (other than reimbursement of expenses) from a grantee, a prospective grantee, or any third party with which OSI is contemplating a transaction. The General Counsel shall bring the disclosure to the attention of the President, who shall determine whether it is appropriate for the staff member to accept the proposed compensation.

If you have questions as to whether a conflict of interest is raised by a proposed transaction, please consult with the Office of the General Counsel.

#### Conflicts of Interest Disclosure Questionnaire

The Policy now requires all covered persons – including ***all*** staff – to complete and submit to the General Counsel once a year the Conflicts of Interest Disclosure Questionnaire attached to the Policy as Exhibit A. The Questionnaire is meant to elicit information that will assist OSI in implementing the Policy, and requires staff members to attest that they are in compliance with the Policy. Please answer all of the items in the Questionnaire, including the two items appearing just before the signature line, and please feel free to attach additional sheets if necessary in completing these two items.

The second item at the bottom of the Questionnaire requires the respondent to identify organizations from which he or she (or a Family Member, to his or her knowledge) receives remuneration. The Questionnaire elicits this information in order to allow us to determine whether it is appropriate for the respondent to participate in the decision-making with respect to transactions OSI is contemplating with such organizations. In completing this item, you should identify only those organizations from which you receive more than a de minimis amount of compensation on a regular or semi-regular basis. For instance, if you are on retainer with the Rand Corporation and you receive regular compensation from Rand as a result of that arrangement, then it would be appropriate to identify the Rand Corporation when completing this Questionnaire item. In contrast, if you receive a one-off honorarium payment for a speech delivered at Stanford University, there is no need for you to identify Stanford University when completing this item. We are interested in knowing about your affiliations and remunerative arrangements with organizations with which you have a sustained relationship and which could in theory influence your judgment with respect to OSI's dealings with such organizations.

**Please return the completed Questionnaire to me by May 31, 2005.** If you have any questions relating to the Questionnaire, please do not hesitate to contact me at Ext. 1149 or via e-mail.

#### Gift Policy

The Gift portion of the Policy precludes ***all*** covered persons from accepting a gratuitous payment or article of monetary value of greater than \$75 from actual or prospective grantees, contractors, or suppliers of OSI.

#### Applicable State and Federal Law

Senior OSI staff should be aware that they are likely to be considered “foundation managers” within the meaning of the Internal Revenue Code. Thus, they are subject to the Code’s prohibitions against “self-dealing,” that is, they are prohibited from engaging in certain transactions with OSI. These transactions, and the penalties which may be imposed on foundation managers who engage in them, are discussed in greater detail in the Summary of Federal and State Law attached to the Policy as Exhibit B. The Summary also discusses other provisions of state and federal law applicable to conflicts of interest.



**OPEN SOCIETY INSTITUTE**  
**CONFLICTS OF INTEREST AND GIFT POLICY**

**I. Introduction**

The public purpose and tax-exempt status of charitable organizations impose a special obligation to maintain the public trust. Members of the Board of Trustees ("Trustees"), expert committee and advisory board members, officers, and staff of the Open Society Institute (OSI) must conduct OSI's affairs in the best interests of OSI. They must avoid conflicts of interest, or the appearance of conflicts of interest, between their personal interests and those of OSI, and they must ensure that neither they nor their family members receive any improper personal benefit from their position at OSI. Accordingly, the Board of Trustees of OSI has adopted the following procedures to govern OSI's decision-making processes. In addition, Trustees, officers, OSI staff, and others who exercise managerial control are subject to the legal prohibitions against self-dealing described in the attached Summary of Federal and State Law.

**II. Conflict of Interest Definitions and Scope**

For purposes of this policy and the Conflicts of Interest Disclosure Questionnaire annexed at Exhibit A hereto, the following terms shall have the following definitions:

**A. "Family Member"** means parents, grandparents, spouses, domestic partners, siblings, children and grandchildren.

**B. "Officers"** means the Chairman, President, Executive Vice President, Vice Presidents, Chief Financial Officer, General Counsel, Treasurer, Assistant Treasurer, Controller, Secretary, and any other officer appointed from time to time by the Board of Trustees of OSI.

**C. "Transaction"** means any program-related investment, grant, or contract for the purchase of goods or services.

**D. An "Interest"** exists when a Trustee, Officer, expert committee/advisory board member, or staff member or to that person's knowledge a Family Member, close business associate or close friend (i) is employed by and receives any compensation from any organization or person with which OSI has entered into a Transaction or is considering entering into a Transaction; (ii) holds a senior or fiduciary position or has a shareholder or partnership interest greater than 5% in any organization in which OSI has entered into a Transaction or is considering entering into a Transaction; and/or (iii) has derived or will derive a financial benefit either directly or indirectly from a Transaction entered into or being considered by OSI.

This policy applies to Trustees, Officers, expert committee/advisory board members, and all OSI staff.

In the event that an OSI practice, policy or procedure conflicts with this policy, the OSI Conflicts of Interest and Gift Policy shall govern.

### **III. Reporting Requirements**

#### **A. Trustees**

1. If a Trustee has an Interest with respect to a Transaction being considered for approval by the Board, the Trustee shall disclose the Interest, in writing, to the full Board, and shall copy the OSI General Counsel on the disclosure.

2. If a Trustee has an Interest with respect to a Transaction being considered for approval below the Board level, the Trustee shall disclose the Interest, in writing, to the OSI General Counsel, who in turn shall notify the President and the Chairman of the Board in writing.

#### **B. Officers**

If an Officer has an Interest in a Transaction being considered for approval by OSI at the Board level or below, the Officer shall disclose the Interest, in writing, to the President, and shall copy the OSI General Counsel on the disclosure. If the President has an Interest in a Transaction being considered for approval by OSI at the Board level or below, the President shall disclose the Interest, in writing, to the Chairman of the Board, and shall copy the OSI General Counsel on the disclosure.

#### **C. Staff Members and Expert Committee/Advisory Board Members**

If a staff member or an expert committee/advisory board member has an Interest in a Transaction being considered for approval by OSI at the Board level or below, he or she shall disclose the Interest, in writing, to the OSI General Counsel, who in turn shall notify the President and the Chairman of the Board in writing.

#### **D. Trustees, Officers, Staff Members, and Expert Committee/Advisory Board Members**

1. In addition to the aforementioned disclosures, upon accepting a Board position or employment by OSI and annually thereafter in January, Trustees, Officers, expert committee/advisory board members, and all OSI staff must complete a Conflicts of Interest Disclosure Questionnaire and must provide written attestation of compliance with OSI's Conflicts of Interest and Gift Policy in the form attached hereto as Exhibit A. The completed form must be submitted to the office of OSI's General Counsel and must be retained by the General Counsel or the General Counsel's designee.

2. If, after execution of the Conflicts of Interest Disclosure Questionnaire, any information in the Conflicts of Interest Disclosure Questionnaire no longer is accurate or requires updating for any reason, Trustees, Officers, expert committee/advisory board members, and staff members must promptly notify the OSI General Counsel, in writing, of the specific inaccuracy and change to be made.



3. All officers and staff members must disclose to the General Counsel in writing all articles, books or speaking engagements on topics related, directly or indirectly, to their OSI employment, and for which they will obtain compensation (other than reimbursement of expenses) from a grantee, a prospective grantee, or any third party with which OSI is contemplating a Transaction. The General Counsel shall bring the disclosure to the attention of the President, who shall determine whether it is appropriate for the officer or staff member to accept the proposed compensation.

#### **IV. Management of Conflicts**

A. A Trustee who has disclosed or is found to have an Interest with respect to a Transaction being considered for approval by OSI at the Board level or below must recuse himself or herself from consideration of the relevant Transaction and all related discussions, unless the Board asks the Trustee with an Interest to provide necessary information regarding the proposed Transaction. In no event shall a Trustee vote on a Transaction in which he or she has an Interest, nor shall he or she be present when a vote is taken with respect to the Transaction.

The nature of the Interest and the Trustee's recusal shall be recorded, where appropriate, in the Board Minutes. In determining whether to approve the proposed Transaction, the Board shall consider the merits of the Transaction as well as the legal prohibitions against self-dealing described in the attached Summary of Federal and State Law that is attached hereto as Exhibit B.

B. If an Officer has disclosed or is found to have an Interest with respect to a Transaction that is being considered for approval by OSI at the Board level or below, the Officer must recuse himself or herself from consideration of the relevant Transaction and all related discussions, unless he or she is asked to provide necessary information regarding the proposed Transaction. In no event may an Officer approve a Transaction in which that Officer has an Interest, nor shall he or she be present when a vote is taken with respect to the Transaction. In such case, the nature of the Interest and the Officer's recusal shall be documented and the documentation should be retained by the General Counsel or his designee.

C. If a staff member or expert committee/advisory board member has disclosed or is found to have an Interest with respect to a Transaction that is being considered for approval by OSI at the Board level or below, the staff member or expert committee/advisory board member must recuse himself or herself from consideration of the relevant Transaction and all related discussions, unless he or she is asked to provide necessary information regarding the proposed transaction. In no event may the staff member or expert committee/advisory board member approve a Transaction in which that staff member or expert committee/advisory board member has an Interest, nor shall he or she be present when a vote is taken with respect to the Transaction. In such case, the nature of the Interest and the person's recusal should be documented and the documentation should be retained by the General Counsel or his designee.

**V. GIFT POLICY**

No Trustee, Officer, or expert committee/advisory board member, or staff member of OSI shall accept a gratuitous payment or article of monetary value of greater than seventy-five dollars (\$75.00) from actual or prospective grantees, contractors, suppliers or Program-Related Investment recipients, except (a) gifts presented to OSI where the recipient is representing OSI and thereafter presents the gift to OSI, or (b) gifts that are motivated solely by a family or personal relationship, but are in no way connected with the recipient's official OSI duties. In general, a recipient should make every effort to decline to accept gifts on behalf of OSI, but, in cases, where it would be considered ungracious to do so, should make clear that the gift is being accepted on behalf of, and will be given to, OSI.

**EXHIBIT A**

**OPEN SOCIETY INSTITUTE ("OSI")  
CONFLICTS OF INTEREST DISCLOSURE QUESTIONNAIRE  
FOR CALENDAR YEAR 2005**

You are required to complete, sign and return this form to OSI's General Counsel by May 31, 2005.

QUESTION	CIRCLE RESPONSE	NAME AND RELATIONSHIP OF CONFLICTED PERSON	NAME OF ORGANIZATION & AFFILIATION	NATURE OF CONFLICT
Within the past year, have you, or has a family member or close friend or business associate (an "Interested Party"), received or been promised any salary, loan, fee, honorarium or gift from a business or organization that does business with or received a payment from OSI?	YES  NO			
Do you or an Interested Party hold a position as a trustee, director, officer, senior manager, consultant, advisor or other representative of a business or organization that does business with or receives funding from OSI?	YES  NO			
Do you or an Interested Party hold an ownership interest of 5% or more in a business or organization that does business with or receives funding from OSI?	YES  NO			
Are you aware of any other circumstances involving you or an Interested Party that may result in an actual or perceived conflict of interest as described in OSI's Conflicts of Interest and Gift Policy ("Policy")?	YES  NO			

I inform OSI that I or, to the best of my knowledge, a Family Member (as that term is defined in the Policy) currently serve or, within the past year, served in a fiduciary, policy-making or managerial capacity with the following employers or organizations (attach separate sheet if needed):

Person                      Employer or Organization                      Position

I inform OSI that I or, to the best of my knowledge, a Family Member (as that term is defined in the Policy) received a salary, honorarium, or fees from the following organizations within the past year (attach separate sheet if needed):

Person                      Employer or Organization

I have read the OSI Conflicts of Interest and Gift Policy and I am in compliance with all of its requirements. I understand that if any of the information provided above changes, I am responsible for promptly notifying OSI's General Counsel, in writing, of the changes.

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Print Name**

\_\_\_\_\_  
**Date**



## EXHIBIT B

### SUMMARY OF FEDERAL AND STATE LAW APPLICABLE TO CONFLICTS OF INTEREST AND SELF-DEALING

#### I. *Federal Law*

Federal law supplies three doctrines to resolve issues related to potential conflicts of interest: the prohibitions against self-dealing, private inurement, and private benefit.

##### (a) *Self-Dealing*

The self-dealing rules, found in the Internal Revenue Code (the “Code”), prohibit certain transactions between private foundations and “disqualified persons,” including members of the Board of Trustees and officers and senior management of OSI. The rules, with relevant exceptions noted below, generally preclude private foundations from engaging in any acts of “self-dealing,” regardless of whether the transactions benefit the foundation. “Disqualified persons” include “a substantial contributor” to the foundation; “foundation managers,” including “officer[s], director[s], or trustee[s] (or an individual having powers and responsibilities similar to those of officers, directors or trustees,” as well as “with respect to any act (failure to act),” foundation employees who have authority or responsibility with respect to such act (or failure to act).” The family members of “disqualified persons” (defined as the spouse, ancestors, children, grandchildren, great grandchildren and the spouses of children, grandchildren and great grandchildren) of a substantial contributor or a foundation manager are also deemed to be “disqualified persons.”

The Code defines “self-dealing,” in relevant part, as “any direct or indirect”:

- sale, exchange, or leasing of property between a private foundation and a “disqualified person” (except that the leasing of property by a disqualified person to a private foundation *without charge* is not an act of self-dealing);
- lending of money or other extension of credit between a private foundation and a “disqualified person” (except that an extension of credit by a disqualified person to a private foundation is not an act of self-dealing *if the transaction is without interest or other charge, and the proceeds of the loan are used exclusively for charitable purposes*);
- furnishing of goods, services, or facilities between a private foundation and a “disqualified person” (except that the furnishing of goods, services, or facilities by a disqualified person to a private foundation is not an act of self-dealing *if they are furnished without charge and used exclusively for charitable purposes*, and that the furnishing of goods, services, or facilities by a private foundation to a disqualified person is not an act of self-dealing *if the furnishing is made on a basis no more favorable than that on which the goods, services, or facilities are made available to the general public*);
- payment of compensation (or payment or reimbursement of expenses) by a private foundation to a “disqualified person” (except that payment of compensation, or payment or reimbursement of expenses, by a private foundation to a disqualified person is not an



act of self-dealing if it is (a) for the performance of personal services that are reasonable and necessary to carrying out the private foundation's charitable purposes, and (b) the compensation is not "excessive"; and

- transfer to, or use by or for the benefit of, a "disqualified person" of the income or assets of a private foundation (except that the fact that a disqualified person receives *an incidental or tenuous benefit from the use by a private foundation of its income or assets* will not by itself make the use an act of self-dealing).

The rules prohibit even arms-length transactions between private foundations and disqualified persons. They often are counterintuitive; for example, the regulations prohibit a disqualified person from selling property to the private foundation, even at a price substantially below-market. Similarly, a disqualified person may not make a low-interest loan to a private foundation.

Violations of the self dealing prohibitions may result in penalties and fines. A tax equal to 5% of the amount involved for each year (or part thereof) in the taxable period is imposed on the self-dealer for each act of self-dealing. This 5% tax applies to any disqualified person who participates in the self-dealing, other than a foundation manager acting without knowledge. For these purposes, senior OSI staff are likely to be considered to be "foundation managers." The 5% tax is an initial penalty. If the act is not corrected within the taxable period, an additional penalty equal to 200% of the amount involved will be imposed on the disqualified person who participates in the act of self-dealing, other than a foundation manager acting without knowledge.

Foundation managers also may be subject to both an initial and an additional tax if they are aware of the self dealing on the part of the disqualifying person and do not take adequate steps to prevent it. Under such circumstances, a tax equal to 2.5% of the amount involved for each year (or part thereof) in the taxable period will be imposed on the foundation manager, and an additional tax equal to 50% of the amount involved will be imposed if the foundation manager refuses to agree to all or part of the correction.

Thus, the individuals involved in the transaction, rather than the foundation, bear the penalties for acts of self-dealing. However, willful repeated violations of these rules may be penalized by termination of the private foundation's status and the imposition of additional taxes. In addition, self-dealing transactions may expose the private foundation and the disqualified person to regulatory investigations or suit under state law.

(b) *Private Inurement and Private Benefit*

The Internal Revenue Service's "private inurement" rule, like its rules against self-dealing, buttresses the principle that tax-exempt organizations are to serve, exclusively, the exempt purposes set forth in Section 501(c)(3) of the Code. An organization subject to the rule must therefore establish that it is neither organized nor operated for the benefit of "Insiders," defined by IRS regulations as "persons having a personal and private interest in the activities of the organization," *i.e.*, private individuals other than appropriate grantees. Such persons include the creators of the organization, trustees, directors, officers, members of their families, or entities

or persons controlled by these individuals. It should be noted that many transactions between Insiders and tax-exempt organizations subject to the doctrine do not rise to the level of prohibited private inurement. Reasonable compensation for services rendered, for example, does not constitute private inurement. Instead, the doctrine tests transactions against a standard of “reasonableness,” comparing the conduct of the subject organization to that of similarly situated organizations, acting prudently, in like circumstances, to discharge the charitable purposes of the organization.

The IRS’s “private benefit” doctrine, like the private inurement rule, prohibits subject tax-exempt organizations from being organized or operated for the benefit of private interests, but is distinct from the “private inurement” rule in that those receiving the benefits need not be Insiders to violate the rule. Benefits to private individuals must be quantitatively and qualitatively incidental to the foundation’s furthering of tax-exempt purposes to avoid violation of the rule.

## II. *State Law*

Section 715 of the New York Not-for-Profit Corporation Law permits board authorization of a transaction in which a board member has an “interest,” provided that “the material facts” as to the “interest” are disclosed in good faith or known to the board or committee, and that the board or committee authorizes the transaction without the interested board member’s vote. Section 715 defines “interest” as a leadership (director or officer) position or “substantial financial interest” in an entity with which the board is considering entering into a transaction.