



EXECUTIVE COMPENSATION POLICY

California Nonprofit Public Benefit Corporation

Exempt from Taxation Under Internal Revenue Code Section 501(c)(3)

About this form: Public Counsel's Community Development Project has designed the attached form of Executive Compensation Policy for a California nonprofit public benefit corporation exempt from taxation under Internal Revenue Code section 501(c)(3) to assist nonprofit organizations seeking to adopt or amend such a governance policy and the *pro bono* attorneys who represent them. The form is annotated with explanatory endnotes, including citations to applicable laws, alternatives, and recommended practices. For further instructions on how to use this form, how to create a policy that will allow a corporation to answer “yes” to Part VI, Line 15 on the IRS Form 990, and how to implement this governance policy, please see the endnotes.

The material is intended to provide general guidance on the establishment of policies for approving executive compensation. It does not attempt to comprehensively review all aspects of executive compensation governance nor is it intended to be relied on for guidance on how to address a specific situation. Public Counsel will periodically update this form for changes in law, recommended practices, and available resources.

Important Notes: In creating any governance policy, it is very important that a nonprofit corporation institute procedures that the corporation is likely to be able to comply with consistently in the long term. Therefore, this sample should be used only after carefully considering every provision, and a corporation should not adopt any provision that will be too burdensome for the corporation to follow given its circumstances. A governance policy will not protect a nonprofit corporation from liability if it is not followed, and in some cases, a failure to consistently follow a written policy may be more likely to result in a finding of liability for the corporation than if no written policy existed.

This form should not be construed as legal advice. Please contact an attorney for legal advice about your organization's specific situation. This sample should not be used "as is" but should be modified after careful consideration of the explanations in the endnotes. Some corporations may need to include additional provisions not discussed in this form to qualify for certain funding or comply with laws applicable to specific types of organizations.

Public Counsel’s **Community Development Project** builds strong foundations for healthy, vibrant and economically stable communities through its comprehensive legal and capacity building services for nonprofits that assist low income neighborhoods in Los Angeles County. If your organization needs legal assistance, or to access the latest version of this document, call (213) 385-2977, extension 200 or visit <https://publiccounsel.org/issues/community-development/nonprofit-services-capacity-building/>.

FORM OF EXECUTIVE COMPENSATION POLICY FOR A CALIFORNIA NONPROFIT PUBLIC BENEFIT CORPORATION

COMPENSATION POLICY FOR OFFICERS, DIRECTORS, TOP MANAGEMENT OFFICIALS, AND KEY EMPLOYEES¹

ARTICLE I POLICY AND PURPOSES²

This is the policy of [Name of Organization] (the “organization”) with respect to the review and approval of compensation of its directors, officers, and executive employees.

It is the policy of the organization that all compensation paid by the organization, based upon a review of comparability information, be fair and reasonable and not excessive.

This policy is intended to supplement and/or implement state³ and federal laws governing executive compensation that are applicable to nonprofit organizations.

ARTICLE II COMPENSATED INDIVIDUALS COVERED BY POLICY⁴

This policy provides a procedure for the review and approval of the compensation of Compensated Individuals.

For the purposes of this policy, Compensated Individuals are (i) the organization’s [insert titles of officers, key employees, and other persons covered by the policy, e.g., executive director, chief operating officer, chief financial officer, etc.], (ii) any other disqualified person defined in Internal Revenue Code Section 4958, and (iii) officers, and key employees whose compensation is or would be reportable on the IRS Form 990 or Form 990-EZ.⁵

ARTICLE III PROCEDURE FOR APPROVAL OF COMPENSATION ARRANGEMENT

Section 1. Governing Body. The [Board of Directors/Executive Compensation Committee of the Board of Directors] (“Governing Body”) shall approve the compensation of Compensated Individuals.⁶

Section 2. Approval by Persons without a Conflict of Interest. Compensation of Compensated Individuals shall be approved by the Governing Body, provided that persons with a conflict of interest with respect to the compensation arrangement at issue are not involved. Members of the Governing Body do not have a conflict of interest if they:

- (a) Are not benefitting from or participating in the compensation arrangement or a family member of any such person;
- (b) Are not in an employment relationship subject to the direction or control of any person benefitting from or participating in the compensation arrangement;

- (c) Do not receive compensation or other payments subject to the approval of any person benefitting from or participating in the compensation arrangement;
- (d) Have no material financial interest affected by the compensation arrangement; and
- (e) Do not approve a transaction providing economic benefits to any person participating in the compensation arrangement, who in turn has or will approve a transaction providing economic benefits to the member.⁷

Section 3. Use of Comparability Data.⁸

- (a) In reviewing and approving compensation, the Governing Body shall rely upon comparability data to affirmatively determine that the compensation of the Compensated Individual is reasonable to the organization based upon information sufficient to determine whether the value of services is the amount that would ordinarily be paid for like services by like enterprises, whether taxable or tax exempt, under like circumstances.⁹
- (b) Relevant information includes, but is not limited to, compensation levels paid by similarly situated organizations, both taxable and tax exempt, for functionally comparable positions; the availability of similar services in the geographic area of the organization; current compensation surveys compiled by independent firms, and actual written offers from similar organizations competing for the services of the Compensated Individual.¹⁰
- (c) *[If the organization has average annual gross receipts of less than \$1 million for the prior three tax years, the Governing Body will be deemed to have obtained appropriate comparability information if it has information on compensation paid by three comparable organizations in the same or similar communities for similar services.]*¹¹

Section 4. Compensation to be Considered by Governing Body. In determining whether the compensation paid to the Compensated Individual is reasonable, the Governing Body must take into account all benefits paid to the Compensated Individual by the organization including but not limited to base salary, fees, bonuses, severance payments, retirement benefits, fringe benefits, and payments to welfare benefit plans, such as plans providing medical, dental, life insurance, and disability benefits.¹²

[Section 5. Remuneration in Excess of \$1 Million or Parachute Payments. The Governing Body shall consult with an attorney or tax professional prior to approving (1) any compensation to any individual in excess of \$1 million for a taxable year (including compensation paid by entities related to the organization); (2) a payment to a highly compensated employee as defined in Internal Revenue Code section 414(q) which is contingent on the employee's involuntary separation from the organization and where the present value of the payment is equal or exceeds an amount equal to three times the employee's average taxable wages; or (3) any compensation to any individual which the Governing Body believes might result in an excise tax under Internal Revenue Code section 4960. The Governing Body may approve any compensation that results in an excise tax under Internal Revenue Code section 4960 only if it determines that it is in the best interests of the organization to do so.]¹³

Section 6. Recording Compensation Deliberations. The Governing Body shall contemporaneously document and maintain records with respect to the deliberations and

decisions regarding the compensation arrangement. The documentation of the decision shall include:

- (a) The terms of the compensation;
- (b) The date approved;
- (c) The names of the members of the Governing Body who were present during the discussion;
- (d) The comparability data obtained and relied upon, and how it was obtained;
- (e) Any action taken with respect to consideration of the compensation by a member of the Governing Body who had a conflict of interest with respect to the compensation;
- (f) Results of the vote on the compensation arrangement, approvals and rejections by each voting member; and
- (g) If the reasonable compensation is higher or lower than the range of comparability data obtained, the basis for the decision.¹⁴
- (h) [If the Governing Body was required to consult with an attorney or tax professional pursuant to Section 5 of this policy, the opinion of an attorney or tax professional as to whether an excise tax might be imposed;
- (i) If the compensation would result in an excise tax under section 4960 of the Internal Revenue Code, an explanation as to why the compensation is in the best interest of the organization.]¹⁵

Such records of the deliberations and decisions shall be prepared *[before the later of the next meeting of the Governing Body or sixty days after the decision as to compensation was made **OR insert earlier time frame for preparation, if desired]***. Such records shall be approved by the Governing Body as reasonable, accurate, and complete within a reasonable time period after preparation.¹⁶

Section 7. Schedule of Compensation Deliberations. The Governing Body's review and approval of compensation shall occur initially upon hiring, whenever the term of employment, if any, is renewed or extended, and whenever the compensation is modified.¹⁷ Separate review and approval shall not be required if a modification of compensation extends to substantially all employees.¹⁸

HOW TO USE THIS FORM: This sample executive compensation policy has been developed for use by California nonprofits for educational purposes only. The endnotes discuss the applicable law, recommended practices, and why we have included certain language. Bold bracketed language in this form indicates that information specific to the corporation adopting the executive compensation policy must be inserted. A choice between two or more alternatives is bracketed and signaled with the use of a slash (/). Other provisions contain bracketed italicized text showing alternatives that may or may not be required, based on a nonprofit organization's expected purposes and activities. In such cases, the notes explain under what circumstances an organization would choose to include the italicized language.

Whether or not a nonprofit organization adopts a specific governance process or policy (or modifies an existing one), either in response to income tax disclosure requirements or to change its governance practices for other reasons is a matter to be carefully considered by the organization, with input from the board and advisors and evaluation of specific circumstances. A form policy is not intended to suggest that the policy is appropriate for every nonprofit organization nor that, if a policy on that topic is determined to be appropriate, the formulations in the sample necessarily fit the needs of an individual nonprofit organization. A customized approach with outside professional advice may be necessary.

² The purpose of the form policy is to provide procedures for preparing, reviewing, and approving compensation arrangements for executive employees of nonprofit public benefit corporations exempt from taxation under Internal Revenue Code section 501(c)(3). The IRS attaches significance to the manner in which all tax-exempt nonprofit organizations are governed and encourages organizations to consider implementing policies related to activities such as executive compensation, if necessary or appropriate to the organization's operations.

The duty of care requires the directors of a nonprofit organization to approve fair, reasonable, and non-excessive compensation for an organization's executive employees. Moreover, the IRS may impose an excise tax on certain individuals, including board members, who engage in excess benefit transactions with a charitable organization. (IRC § 4958). An excess benefit transaction is a transaction where an economic benefit is provided by the organization to a person who meets the definition of a disqualified person, and the value of the benefit exceeds the value of the consideration (goods or services) received in exchange for the benefit. (IRC § 4958(c); Treas. Reg. § 53.4958-4(a)). When preparing compensation arrangements, if the organization follows specific IRS procedures, the actions may provide a rebuttable presumption that the compensation is reasonable, and the organization has not engaged in an excess benefit transaction. (Treas. Reg. § 53.4958-6). The burden of proof then switches to the IRS to show that the compensation was not reasonable.

The Internal Revenue Code does not require nonprofit organizations to adopt specific governance or management policies. However, IRS Form 990, the annual filing required for nonprofit organizations with gross receipts greater than or equal to \$200,000 or total assets greater than or equal to \$500,000 (hereinafter "Form 990"), requires organizations to answer, and if necessary describe, whether the process for determining compensation for the CEO, executive director, top management official, other officers, or key employees included the following:

- (a) Review and approval by authorized body comprised of independent persons;
- (b) Reliance upon comparability data; and
- (c) Contemporaneous substantiation of the deliberation and decision. (IRS Form 990, Part VI, Section B, Line 15 a and b). This process is the same process outlined in the Treasury Regulations to create a rebuttable presumption of reasonableness. (*See* Treas. Reg. § 53.4958-6(c)).

Similarly, IRS Form 1023 (the application for tax exemption under section 501(c)(3)) asks whether the applying organization will approve compensation arrangements in advance of paying compensation, document in writing the date and terms of the approved compensation, and approve compensation based on information about compensation paid by similarly situated organizations for similar services. (Form 1023, Part V, Line 1).

In addition to the tax on excess benefit transactions, the 2017 Tax Cuts and Jobs Act imposes an excise tax at the corporate tax rate on remuneration paid by tax-exempt organizations to a covered employee in excess of \$1 million per year and on certain separation pay when a covered employee who meets a certain salary threshold leaves involuntarily (i.e., parachute payments). (IRC § 4960). A covered employee is an employee who is either (i) one of the five highest compensated employees of the organization for the taxable year, or (ii) a covered employee of the organization (or any predecessor) for any preceding taxable year beginning after December 31, 2016.

This form policy is designed to meet IRS guidelines for completion of Form 990 and to address the requirements of the Internal Revenue Code and Treasury Regulations. The policy also complies with the California Nonprofit Integrity Act's provisions on approving high-level compensation.

In addition to IRS rules, organizations should also be aware of the rules regarding self-dealing transactions under California Nonprofit Corporation Law, i.e., a transaction to which the nonprofit is a party and in which a director (or a family member of a director) has a material financial interest. (*See* Cal. Corp. Code § 5233). For an annotated form of Conflict of Interest Policy which covers both self-dealing and IRS restrictions on private inurement, see <https://publiccounsel.org/wp-content/uploads/2021/12/Annotated-Form-of-Conflict-of-Interest-Policy-2010.pdf>.

³ This sample policy may be of assistance with respect to nonprofit organizations that are not subject to oversight under California law.

⁴ In order to comply with the excess benefit transaction rules in the Internal Revenue Code and Treasury Regulations, the California Nonprofit Integrity Act, and the elements for approval of executive compensation described in the instructions to the Form 990, an organization's policy should cover individuals receiving any form of compensation from the organization who are:

- (1) **Disqualified persons** under IRS regulations governing excess benefit transactions;
- (2) **Officers and key employees** as defined in the Form 990 and Instructions; or
- (3) Occupying **specific management roles**, discussed below.

A **disqualified person** is a person or the family member of a person in a position to exercise substantial influence over the organization. The status applies to the position and is applicable regardless of whether or not the person actually exercises the influence. Family members include a disqualified person's spouse, brothers or sisters (whether whole or half), spouses of brothers or sisters (whether whole or half), ancestors, children (including a legally adopted child), grandchildren, great grandchildren, and spouses of children, grandchildren, and great grandchildren. (IRC §4958(f)(1)(A); IRC § 4958(f)(4)).

IRS regulations provide that persons with substantial influence over an organization include directors and persons holding the power of president, chief executive, chief operating officer, treasurer, and chief financial officer (Treas. Reg. § 54.4958-3(c)). In addition, any other person may or may not be a disqualified person depending on all the relevant facts and circumstances. The Treasury Regulations also provide examples of facts and circumstances that tend to show a person has substantial influence over the affairs of an applicable tax-exempt organization including:

- (1) The person founded the organization
- (2) The person is a substantial contributor to the organization
- (3) The person's compensation is based primarily on revenues derived from organization activities the person controls
- (4) The person has or shares authority to control or determine a substantial portion of the organization's capital expenditures, operating budget, or compensation for employees
- (5) The person manages a discrete segment or activity of the organization that represents a substantial portion of its activities, assets, income, or expenses
- (6) The person owns a controlling interest in a corporation, partnership, or trust that is a disqualified person
- (7) The person is a non-stock organization controlled directly or indirectly by one or more disqualified persons. (Treas. Reg. § 53.4958-3(e)(2)).

If an employee does not fall into one of the above categories and is not a "highly compensated employee," then they will not be considered a disqualified person. (Treas. Reg. § 53.4958-3(d)). A highly compensated employee is an employee whose compensation exceeds an amount set by the IRS which changes from year to year. In 2022, the threshold amount was \$135,000. (*See* "COLA Increases for Dollar Limitations on Benefits and Contributions," at <https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions>).

The Treasury Regulations also provide facts and circumstances that tend to show a person does not have substantial influence over the affairs of an applicable tax-exempt organization including:

- (1) The person has taken a bona fide vow of poverty as an employee, agent, or on behalf of a religious organization
- (2) The person is an independent contractor whose sole relationship to the organization is providing professional advice and the person has no decision making authority and will derive no direct or indirect benefit from the transaction except for the customary fees for professional advice
- (3) The direct supervisor of the person is not a disqualified person
- (4) The person does not participate in any management decisions affecting the organization as a whole or affecting a discrete segment of the organization that represents a substantial portion of its activities, assets, income, or expenses of the organization, as compared to the organization as a whole ((Treas. Reg. § 53.4958-3(e)(3)).

As discussed in note 2, the Form 990 asks about the compensation approval procedures for the CEO, Executive Director, or top management official, as well as **other officers** and **key employees**. An **officer** is a person elected or appointed to manage the organization's daily operations. The officers of the organization are determined by reference to the organizing document, bylaws, or resolutions of the controlling governing body, or as otherwise designated consistent with state law. (2021 Form 990 Instructions, Part VII, Section A, at 26).

A **key employee** is an employee of the organization (other than an officer, director or trustee) who meets all three of the following tests, applied in the following order:

- (1) *\$150,000 Test*: Receives reportable compensation from the organization and all related organizations in excess of \$150,000 for the calendar year ending with or within the organization's tax year.
- (2) *Responsibility Test*: At any time during the calendar year ending with or within the organization's tax year:
 - a. Has responsibilities, powers, or influence over the organization as a whole that is similar to those of officers, directors, or trustees;
 - b. Manages a discrete segment or activity of the organization that represents 10% or more of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole; or
 - c. Has or shares authority to control or determine 10% or more of the organization's capital expenditures, operating budget, or compensation for employees.
- (3) *Top 20 Test*: Is one of the twenty employees other than officers, directors, and trustees who satisfy the \$150,000 Test and Responsibility Test with the highest reportable compensation from the organization and related organizations for the calendar year ending with or within the organization's tax year. (Form 990 Instructions, Part VII, Section A, at 27).

Last, there are **specific management roles** that should be covered by the policy, regardless of compensation: The Chief Executive Officer or President, and Chief Financial Officer or Treasurer or individuals with equivalent powers, duties, or responsibilities. (Cal. Gov't. Code § 12586(g)).

⁵ A nonprofit organization should fill in this definition with the titles and positions within the organization that are covered by this policy, as described in note 4. In case an organization does not list every possible employee covered by the policy, this sentence includes a catch-all provision. This definition of Compensated Individuals covers the employees whose compensation must be approved pursuant to the procedures outlined in this policy in order to comply with the excess benefit transaction rules in the Internal Revenue Code, Treasury Regulations, and California Nonprofit Integrity Act, as well as to answer Form 990, Part VI, Section B, Line 15 in the affirmative – of course, a nonprofit may expand the definition of Compensated Individuals to include more employees (e.g., all employees whose annual compensation is over \$100,000 or all employees designated as a supervisor).

Sample Language: *For the purposes of this policy, Compensated Individuals are (i) the organization's directors, officers, Chief Executive Officer, Chief Financial Officer, General Counsel, (ii) any other disqualified person defined in Internal Revenue Code Section 4958, and (iii) officers and key employees whose compensation would be reportable on the IRS Form 990 or Form 990-EZ.*

⁶ The Treasury Regulations provide that executive compensation may be approved by the board of directors or by a committee of the board so long as the committee is permitted by state law to act on behalf of the board. (Treas. Reg. § 53.4958-6(c)(1)(i)(B)). Under the California Corporations Code, in order for a committee to have the power to act on behalf of the board of directors, the committee must consist of two or more directors and its creation, as well as appointments to the committee, must be approved by a majority of the directors then in office (rather than a majority of a quorum). The committee may not include individuals who are not members of the board of directors. (Cal. Corp. Code § 5212). Therefore, if an organization chooses to delegate the authority to approve compensation to a committee of the board, the creation and composition of the committee must conform to the requirements of the California Corporations Code. A sample board resolution creating and authorizing a committee to approve compensation is included in the [Appendix](#).

Alternatively, a nonprofit organization may also delegate to a committee the task of recommending compensation, with final approval by the full board. If that is the case, then the full board would be the governing body under this policy and has the responsibility to ensure that the procedures in this policy are followed.

⁷ Treas. Reg. § 53.4958-6(c)(1)(iii). For example, a board member may not participate in approving the compensation of a family member or supervisor. A board member may also not participate in the approval of compensation of an employee who has the authority to approve another, unrelated transaction that could benefit the

board member. As an example, if the CEO sits on the board of another nonprofit organization that employs the spouse of a board member, that board member should not participate in the approval of compensation of the CEO since the CEO has the authority to approve the compensation of the board member's spouse.

⁸ In order to take advantage of the IRS' rebuttable presumption of reasonableness, a tax-exempt organization must review comparability data in determining that the compensation paid to an executive was reasonable. (Treas. Reg. § 53.4958-6(a)(2); (c)(2)). Article III, Section 3 of the policy provides further details on how to use comparability data consistent with the Treasury Regulations.

⁹ The purpose of the comparability data is to demonstrate the compensation arrangement is *reasonable*. The Treasury Regulations specifically direct the organization to assess reasonableness with regard to what is ordinarily paid for *like services* at *like enterprises* under *like circumstances*. Whether compensation is paid for "like services" should be based on the duties and responsibilities of the job, rather than job titles. Factors to include in determining whether services are comparable may include the number of employees managed, the size of the budget managed, whether the position is national, regional, or local, and the number of functions or departments managed. "Like enterprises" would include organizations of a comparable size, purpose, and resources. Although the Treasury Regulations permit a tax-exempt organization to rely upon data from taxable (i.e., for-profit) enterprises, for-profit comparison data should not be exclusively used unless there are no nonprofit comparables in the organization's market, or both for-profit and nonprofit organizations are competing for the same specialized talent. A nonprofit organization should also ensure that it is comparing compensation under like circumstances – for example, by taking into account the experience of the individual whose salary is being approved and by comparing salaries in the same geographic area or accounting for cost-of-living differences if comparable data is not available in the geographic area. (*See generally* Treas. Reg. § 53.4958-6(c)(2)(iv); Instructions for Form 1023, Rev. January 2020, at 10).

That a compensation arrangement is subject to a cap is a relevant factor in determining the reasonableness of compensation. (Treas. Reg. § 53.4958-4(b)(1)(ii)(A)). Other factors courts rely upon in determining whether compensation is reasonable include prevailing rates of compensation for comparable positions at comparable employers, the nature and scope of the employee's work, whether the agreement was negotiated at arm's length, control of an organization by a family or founder, the employer's compensation policy for all employees, employee's qualifications, compensation paid in prior years, comparison of salaries paid with the employer's gross and net income, general economic conditions, and the employer's financial position. (*See* Treas. Reg. § 53.4958-4(b)(1)(ii)(A)) (providing that Section 162 standards apply in determining reasonableness); *see also Haffner's Service Stations v. Commissioner of Internal Revenue*, 326 F.3d 1 (1st Cir. 2003) (addressing reasonableness under Section 162); *Alpha Medical Inc. v. Commissioner of Internal Revenue*, 172 F.3d 942, 946, 951 (6th Cir. 1999) (same); *Dexsil Corp. v. Commissioner of Internal Revenue*, 147 F.3d 96 (2nd Cir. 1998) (same); *Rutter v. Commissioner of Internal Revenue*, 853 F.2d 1267, 1271 (5th Cir. 1988) (same)).

¹⁰ See Treas. Reg. § 53.4958-6(c)(2)(i). Suggestions for obtaining comparability data include:

- a. Annual Filings – The publicly available Form 990 and 990-EZ provide salary amounts for organization officers. A search by geography, category and income range would likely provide similarly situated nonprofits; however, there is no information about job responsibilities or benefits. Annual filings for nonprofits are available free of charge on www.guidestar.org.
- b. [Center for Nonprofit Management's *Compensation and Benefits Report* – the nonprofit Center for Nonprofit Management publishes an annual report on compensation levels at nonprofits in Southern and Central California. The report covers 179 separate job titles. The report can be purchased in whole or in part through the Center for Nonprofit Management at www.cnmsocal.org.
- c. Guidestar's *Nonprofit Compensation Report* analyzes compensation paid by over 100,000 exempt organizations in fourteen job categories. The report is available for purchase at <https://learn.guidestar.org/products/nonprofit-compensation-solutions/guidestar-nonprofit-compensation-report>.
- d. Independent survey - A telephone or e-mail survey may be conducted by contacting similar nonprofit organizations and requesting information about salaries, benefits and job duties. The information should be documented in a formal report for presentation to the governing body.

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- e. Offer letters - If the compensated individual received multiple offers for similar positions, the letters may be used as evidence of comparable data.
 - f. Targeted salary survey - An independent firm may be hired to perform a customized survey related to executive placement and compensation.
 - g. Generic survey - A generic survey, similar to a Guidestar search, may provide data indicating comparability, however the information may not be sufficient for determining the job responsibilities or similar situation of the organization.
 - h. Taxable/For-profit enterprises survey - As a supplement to information obtained for nonprofit organizations, for-profit organizations may also have similar positions and comparable ranges. This data is permissible as comparability data but should not be the sole source when comparing to a nonprofit.

¹¹ **OPTIONAL.** The Treasury Regulations specifically state that an organization with annual gross receipts of less than \$1 million will be considered to have appropriate data if it has compensation data from three comparable organizations. (Treas. Reg. § 53.4958-6(c)(2)(ii)). Organizations that expect to have gross receipts of less than \$1 million may include this paragraph.

¹² A tax-exempt organization must take into account all economic benefits provided to the individual in exchange for the performance of services, unless specifically excluded by the regulations. (See Treas. Reg. § 53.4958-4(a) and (b)(1)(ii)(B); Form 990 Instructions, Glossary, at 55). The list of benefits in Article III, Section 4 of this sample policy is *not exhaustive*. An organization should consult an attorney if it has a question as to whether an economic benefit should be included in analyzing the reasonableness of compensation.

¹³ **OPTIONAL.** Section 5 is unnecessary if compensation in excess of \$1 million or parachute payments are financially unfeasible for the foreseeable future. An organization may still wish to include it in case financial circumstances change.

As discussed in Note 2, the 2017 Tax Cuts and Jobs Act imposes an excise tax at the corporate tax rate (currently 21 percent) on remuneration paid by tax-exempt organizations to a covered employee in excess of \$1 million per year and on any “excess parachute payment.” (IRC § 4960.). An excess parachute payment is a payment that is contingent on an employee’s involuntary separation from employment with the nonprofit and is equal to or in excess of three times the amount of an employee’s average annual compensation over the past five years (“the base amount”). (IRC § 4960(a)(2) and (c)(5); Treas. Reg. § 53.4960-3(d)) The tax on an excess parachute payment is on the difference between the payment and the employee’s base amount. (IRS §4960(c)(5)).

A nonprofit should give special consideration before authorizing any compensation in excess of \$1 million or any parachute payment that can be taxable. Under no circumstance should the board approve compensation that is subject to taxation unless it is in the best interests of the corporation – for example, if it is the market rate necessary to recruit and retain personnel or, in the case of a parachute payment, the board deems it necessary to remove an executive while avoiding a costly lawsuit or damaging publicity. Instead of requiring consultation with an attorney or tax consultant, an organization could instead choose to forbid any payments that could be subject to an excise tax. For example, the policy can read:

The Governing Body shall not approve: (1) any compensation to any individual in excess of \$1 million for a taxable year (including compensation paid by entities related to the organization); (2) a payment to an employee contingent on the employee’s involuntary separation from the organization where the present value of the payment is equal or exceeds an amount equal to three times the employee’s average taxable wages; or (3) any compensation to any individual which results in an excise tax under Internal Revenue Code section 4960. If the Governing Body does not know whether a compensation package will result in an excise tax under section 4960, it shall consult an attorney or tax professional before approving such compensation.

The excise tax applies to payments paid to “covered employees.” A covered employee is an employee who is either (i) one of the five highest compensated employees of the organization for the taxable year, or (ii) a covered employee of the organization (or any predecessor) for any preceding taxable year beginning after December 31, 2016. An employee does not need to earn \$1 million per year to be a covered employee (and therefore receive a

taxable parachute payment), although the tax on parachute payments only applies to “highly compensated employees,” which are employees whose compensation exceeds a specified amount set annually by the IRS (\$130,000 in 2021). (IRS §4960(c)(5)(C)(iv)).

“Remuneration” includes wages for purposes of federal income tax withholding (e.g., salary and bonuses), including the cash value of non-cash payments, as well as all amounts included in gross income under a nonqualified deferred compensation plan under section 457(f) of the Internal Revenue Code. (IRC §§ 4950(c)(A); 3401(a)). Remuneration does not include amounts paid to a licensed medical professional for the performance of medical services. (IRC § 4960(c)(3)(B)). Note that remuneration also includes compensation paid by a related entity. (IRC § 4960(c)(4)). An organization’s related entity can include, among other things, a supporting or supported organization, a nonprofit in which fifty percent of the board are representatives of the organization (or vice versa), a nonprofit where the organization has the right to appoint fifty percent or more of the board (or vice versa), and a corporation or partnership of which the organization owns more than 50 percent of the stock, profits interest, or capital interests. (IRC § 4960(c)(4)(B); Treas. Reg. § 53.4960-1(i)(1)-(2)). Therefore, if an organization owns any for-profit businesses or has any affiliated organizations, it may need to consider compensation paid by those entities in determining whether the compensation is over \$1 million.

For purposes of calculating the value of a parachute payment, remuneration includes not just wages and salary, but all compensation (whether taxable or not) including fringe benefits, health insurance, transfer of property, vesting of a stock option, life insurance, pension benefits, and the vesting of bonuses, equity, and deferred compensation. (IRC § 4960(c)(5); Treas. Reg. § 53.4960-3(b)).

It is highly recommended to consult an attorney or tax advisor in determining whether a compensation arrangement is taxable as the rules for whether certain forms of compensation are included in calculating the value of remuneration and a parachute payment are complex and contain many exceptions.

¹⁴ Concurrent documentation of the basis of the decision is required to comply with the IRS's rebuttable presumption of reasonableness procedures. (Treas. Reg. § 53.4958-6(a)(3); 2021 Form 990, Part VI, Line 15; 2021 Form 990 Instructions, Part VI, Line 15, at 24.) Article III, Section 6 of this form policy outlines the information that must be included in order to meet the documentation requirements in the Treasury Regulations. Documentation should be in the form of minutes of the board or committee meeting where compensation was approved or in the form of a board or committee resolution, the approval of which is reflected in the minutes of the board or committee meeting. Sample resolution approving executive compensation is in the [Appendix](#) to this form policy.

¹⁵ **OPTIONAL.** Only include if including section 5. See Note 13.

¹⁶ For a documentation to be concurrent, it must be *prepared* before the later of the next meeting of the governing body or sixty days after the final decision was made by the governing body. The governing body must then *review and approve* the records within a reasonable time. (Treas. Reg. § 53.4958-6(c)(3)(ii)). An organization may use the italicized language if it wants to grant its governing body the maximum time in which to prepare the record of the decision or may require the documentation to be prepared sooner.

Sample Language: *Such records of the deliberations and decisions shall be prepared within thirty days after the decision as to compensation was made.*

¹⁷ The Treasury Regulations on the rebuttable presumption of reasonableness contain an exception for *written initial employment contracts* where the compensation is fixed (i.e., does not include a bonus or other compensation left to the discretion of the governing body) and the individual hired was not a disqualified person immediately prior to entering into the contract. (Treas. Reg. § 53.4958-4(a)(3)). However, the questions in the Form 990 on the process for approval of compensation of the top management official, officers, and key employees do not carve out an exception for initial, written contracts. As such, in order to be able to answer in the affirmative to Part VI, Line 15 of the Form 990, the executive compensation policy should apply to initial contracts.

The California Nonprofit Integrity Act requires the board of directors or an authorized committee to review and approve compensation for the CEO or President and the CFO or Treasurer or the individuals with similar powers, duties and responsibilities to ensure compensation is just and reasonable. The review required by the California Nonprofit Integrity Act is required upon hiring or when there are modifications to compensation agreements. (Cal. Gov't. Code §12586(g)).

¹⁸ The California Nonprofit Integrity Act does not require review of compensation modifications if it is a modification that extends to all employees (e.g., a cost-of-living increase). (*See* Cal. Gov't. Code §12586(g)).

APPENDIX

Note: The sample resolutions in this appendix are for purposes of an example only. Organizations will need to tailor their documentation of decision-making to reflect their particular circumstances and needs.

Resolution of Board Creating Executive Compensation Committeeⁱ

RESOLVED, by affirmative vote of a majority of all directors of this Corporation in office, that the board of directors establishes an executive compensation committee (the “Executive Compensation Committee”) as authorized by Section 5212(a) of the California Corporations Code, consisting of director Rosa Ruiz as chair and directors Sonali Shah and Michael Tran as members.

FURTHER RESOLVED, that the Executive Compensation Committee shall have the authority to act on behalf of the board of directors with regard to approving the compensation of (i) the Chief Executive Officer, Chief Financial Officer, General Counsel, (ii) any other disqualified person defined in Internal Revenue Code Section 4958, and (iii) officers and key employees whose compensation is or would be reportable on the IRS Form 990 or Form 990-EZ;

FURTHER RESOLVED, that in approving compensation, the Executive Compensation Committee shall ensure that the compensation is just and reasonable as required by the California Nonprofit Integrity Act and shall follow the procedures described in IRS Treasury Regulations sections 53.4958-4 and 53.4958-6 to create a rebuttable presumption that the approved compensation is reasonable and does not constitute an excess benefit transaction;

FURTHER RESOLVED, that the Executive Compensation Committee shall make a report to the board of directors at the next board meeting following the approval of compensation.

The following directors, constituting a majority of all directors in office, voted in favor of the above resolution: Rosa Ruiz, Sonali Shah, Michael Tran, Rebecca Rosenstein, Asma Sayed, Melissa Higgins, and John Frank.

ⁱ This resolution may be used only if the board has delegated the authority to approve compensation to a committee of the board. If the board wishes to retain ultimate authority to approve executive compensation, this resolution is inapplicable.

Sample Board Resolution for Approval of Executive Compensationⁱⁱ

The Board of Directors (“Board”) of ORGANIZATION, a tax-exempt California nonprofit public benefit corporation, does hereby adopt the following resolution pursuant to the California Nonprofit Integrity Act, and as also required by the Internal Revenue Service requirements for organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code:

WHEREAS, the Board must ensure that the proposed compensation of \$175,000 to be paid to Shawn Smith, Chief Financial Officer of ORGANIZATION, plus any other monetary or non-monetary benefits to be provided, is reasonable; and

WHEREAS, the Board must assign the compensation of the Chief Financial Officer within the confines of legal requirements and best practices for tax-exempt, nonprofit corporations; and

WHEREAS, the Board must ensure the Chief Financial Officer’s compensation is within the range of compensation paid by organizations comparable with regard to budget, number of employees, and geography, also taking into account other factors the Board believes pertinent to the setting of its Chief Financial Officer compensation; and

WHEREAS, the Board has been presented with and considered comparability data and compared the compensation to be paid to Ms. Smith for her services as Chief Financial Officer with the compensation paid to the equivalent employees from ten nonprofit organizations, comparable to ORGANIZATION with regard to mission, budget, and size of staff. The comparability data was obtained by reviewing the reported compensation of chief financial officers and treasurers in the annual IRS filings of ten tax-exempt organizations in Southern California, comparable to ORGANIZATION with regard to mission, budget, and size of staff. A report summarizing the comparability data, along with copies of the annual filings of the organizations, is attached as **Exhibit A**. The annual compensation of chief financial officers and treasurers in the organizations included in the report ranged from \$100,000 to \$210,000; and

WHEREAS, the Board recognizes the unique experience and benefits provided by Ms. Smith including (a) fifteen years of experience in financial management in the nonprofit sector and five years as a chief financial officer or similar role; (b) uniformly positive performance reviews from supervisors and peers.

NOW THEREFORE IT BE RESOLVED, that the annual compensation of Shawn Smith for her services as Chief Financial Officer of ORGANIZATION be set at \$175,000.

ⁱⁱ This resolution documents the process the board or executive compensation committee needs to follow in order to take advantage of the rebuttable presumption of reasonableness. The resolution, which is a record of a binding action of the board or committee, may be incorporated into minutes of a meeting. If the board or committee acted without a meeting, the resolution can be incorporated into a unanimous written consent, signed by every single member of the board/committee.

RESOLVED FURTHER, that the Secretary of ORGANIZATION will ensure that this resolution, including Exhibit A, along with the comparability data upon which it is based, will be kept at the principal office of ORGANIZATION;

RESOLVED FURTHER, that the Secretary of ORGANIZATION hereby is authorized to certify this resolution.

IN WITNESS THEREOF, the ORGANIZATION Board of Directors has adopted the above resolution by the following vote at a special Board meeting on September 26, 2021.

Ayes: 6 (Sonali Shah, Rosa Ruiz, Michael Tran, Rebecca Rosenstein, Asma Sayed, Melissa Higgins)

Nos: 0

Abstained: 1. Director John Frank did not participate in the discussion or vote approving the compensation of Shawn Smith for her services as Chief Financial Officer due to a conflict of interest. Specifically, John Frank is the executive director of the Children's Foundation. As a member of the board of directors of the Children's Foundation, Shawn Smith votes on John Frank's compensation package.

By: _____
Rosa Ruiz, Secretary

Date: September 26, 2021ⁱⁱⁱ

ⁱⁱⁱ In this example, the resolution documenting the decision to set the executive compensation was prepared and approved the same day the board of directors made the decision. However, the treasury regulations allow the board or committee more time to prepare and approve the documentation of the decision -- in order for documentation of the governing body's decision to be concurrent, the documentation must be prepared before the later of the next governing body meeting or sixty days and the documentation must then be approved by the governing body within a reasonable time. For example, the Secretary may prepare the minutes and resolution recording the decision after the meeting and then the governing body would approve the minutes at its next meeting.

Exhibit A to Resolution

Report on Comparability Data for Determining Executive Compensation^{iv}

Name of Officer or Key Employee:

Position Under Consideration:

Duration of Contract:

Current Compensation

 Salary:

 Bonus:

 Deferred Compensation:

 Fringe Benefits:

Proposed Compensation:

 Salary:

 Bonus:

 Deferred Compensation:

 Fringe Benefits:

Description of types of comparability data relied upon (e.g., association surveys, phone inquiries, etc.)

Summary of Data

Name of Org						
Location						
Annual Budget						
Position						
Base Salary						
Bonus/Contingent Salary						
Retirement/Deferred Compensation						
Nontaxable Benefits						
Year						
Source						

^{iv} This is a sample of a report summarizing comparability data that could be presented to the board or committee and attached to the resolution.