

Broadband Investment Fund: Conflicts of interest policy

Introduction

1. This document set outs the Ministry of Economic Development's (MED's) policy on how potential actual or perceived conflicts of interests on the part of certain categories of persons involved in the Broadband Investment Fund (BIF) process are to be managed.
2. The process for allocation of funding from the BIF requires impartial and independent input from persons involved in the process. All such persons must ensure there is no conflict between discharging their BIF role and their personal, private or business interests.
3. The primary responsibility for assessing whether or not an interest exists falls on the person or organisation concerned and requires a judgment to be made in the particular circumstances of the case. This is a continuing responsibility and must be applied whenever circumstances change; either for the person concerned or in relation to applicants or other persons the person is working with or is in a position to influence.
4. All potential conflicts, once they have been identified, must be disclosed to MED. MED will then decide whether a conflict exists in fact and, how it should be managed. The existence of an interest will not always mean the person will be barred from continuing in their role, and the situation may be able to be managed so that the government can obtain the benefit of the person's expertise without compromising the decision-making process.

Application

5. This policy applies to three categories of persons involved in the BIF process:
 - members of the BIF sub-group of the Digital Strategy Steering Group
 - external contractors engaged by MED who have access to BIF information
 - Independent Application Evaluators (IAEs)
 - persons providing applicant support.
6. This policy does not apply to MED staff or Ministers of the Crown. MED staff are required under the MED Code of Conduct to disclose any actual or perceived conflicts of interest in the performance of their duties in relation to the BIF. The relevant manager will then decide how any conflict is to be managed. The provisions relating to conflicts of interest contained in the *Cabinet Manual* apply to decisions made by Ministers.
7. For the purposes of this policy the term "person" includes all legal entities such as companies and incorporated societies, and organisations such as partnerships and trusts. Where a "person" referred to in clause 5 is not an individual the policy applies to the extent relevant to the circumstances. For example the provisions in this policy relating to financial benefits will generally apply to companies, while those relating to familial relationships generally will not. Each situation though need to be assessed on its merits. An interest might arise, for example, if a majority shareholder stands to receive a significant collateral benefit that could be seen as influencing the company when it discharges its BIF role.

Conflicts of interest: general

8. A conflict of interest will arise in relation to the BIF process where a person's responsibilities in relation to the BIF are, or might be presumed to be, affected by, another personal interest in the decision that person might have. In such a case the person's role in relation to the BIF and his or her private interest are in conflict. The person should ask themselves whether there is an overlap between the persons' role in the BIF process and their private interest. In some cases a person can be shown to have *actually been influenced* by the interest. These kinds of situations tend to be rare. More commonly the interest is apparent; leading to a presumption the person *might be influenced* by the interest. This can lead to a claim the person is biased and is no longer acting independently.
9. In the context of the BIF there is considerable scope for conflict between a person's responsibilities to provide advice or assistance or make recommendations as part of the BIF process and private interests of a range of kinds. The approach taken to conflicts of interest varies depending on the *degree of influence* the person can bring to bear on the outcome of the funding decision; whether positively in favour of a particular applicant for funding, or negatively against that applicant's interest. Such a "negative" interest could, for example, arise where a person is interested in funding being allocated to an applicant *other than* the applicant they are working with or in relation to.
10. For the purposes of this policy an "applicant" not only includes a formal applicant for funding under the BIF but also any related parties.
11. A wide range of personal interests might potentially give rise to a conflict depending on the circumstances¹. . They include:
 - holding a public office;
 - being an employee, advisor, director, or partner of another business or organisation;
 - pursuing a business opportunity;
 - being a member of a club, society, or association;
 - having a professional legal obligation to someone else (such as being a trustee or an advisor to a BIF applicant);
 - owning a beneficial interest in a trust;
 - owning or occupying a piece of land (being a resident in a particular geographic area will not usually prevent a person from participating in relation to an application being made in relation to that area);
 - owning shares or some other investment or asset;
 - receiving a gift, hospitality, or other benefit from someone;
 - owing a debt to someone;
 - holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue;
 - being a relative or close friend of someone who has one of these interests (or who could otherwise be personally affected by the decision of the public entity)
12. This policy focuses on the most common types of interest namely: financial interests, commercial relationships in the course of trade, professional and personal relationships but is not intended to be (nor can it be) an exhaustive list.

¹ *Managing conflicts of interest: Guidance for Public Entities* : published by the Controller and Auditor-General June 2007 paragraph 2.33. See also s 62(2) of the Crown Entities Act 2004.

Financial interests

13. Financial interests can arise in a variety of circumstances. In the context of the BIF three questions need to be considered:

- Does the person (whether directly or indirectly) stand to obtain a financial benefit or suffer a financial loss from a particular applicant for funding either succeeding or not succeeding in their application for funding?
- Is the extent or degree of that interest more than minimal?
- Could the interest create an incentive for the person to act in a manner that may not be in the best interests of the government or that could compromise the integrity of the funding allocation process?

14. Financial interests take a number of forms and these are discussed in the following paragraphs.

Shareholding

15. A person engaged or involved in the BIF process should not have any direct or indirect shareholding in an applicant they are assisting or assessing or in any other business that is likely to be directly and materially affected by a decision to grant or not grant funding to a particular applicant they are assisting or assessing.

16. This would include owning shares in any business that is likely to benefit from the construction of any network facilities or equipment; such as an engineering firm or a business that is likely to obtain a disproportionate benefit as a result of the provision of a broadband service in the relevant locality.

17. A person will have an indirect shareholding, even if they do not own the shares, if they stand to benefit from their increase in value or from dividends and the like. This would be the case if the person owns shares in a parent company or is a beneficiary under a trust.

18. It may be that the shareholding is so small it does not create an interest because any effect on the person's financial position as a result of potential changes in the share price from their role in the BIF would be minimal. Even if this is the case this should nonetheless be disclosed to MED. In each such case the causal link (if any) between the person's role and the potential gain or loss must also be disclosed. If the prospective gain or loss is speculative or remote *and* of limited value MED may decide that the value of the contingency is such that no interest exists.

Debt securities

19. An interest may arise if a person holds debt securities in an applicant (or a participant in an applicant consortium).

20. If securities are held in unit trusts or managed funds and the person does not have any active trading involvement in the trust or fund an interest will not generally arise. This includes index funds. In general, securities that carry fixed interest rates will not give rise to an interest that needs to be disclosed.

Trusts

21. An interest will arise if a person involved in the BIF assessment process is a trustee of a trust that owns shares in an applicant or in a business that is likely to be affected by a funding decision. In such a case the same rules apply as if the shares are held by the person in his or her personal capacity.
22. Similarly, if the person is a beneficiary of a trust that owns shares in an applicant or in a business likely to be affected by the decision and the trust is not a blind trust, then the person will have an interest.
23. A blind trust is a trust structure designed to avoid conflicts of interest. A person involved in the BIF process may transfer money to a trustee with an instruction to manage the trust in the investment of assets with complete autonomy and an instruction that he or she is not to be informed of the nature of the assets of the trust while he or she is involved in the assessment process. The lack of knowledge of the person in these circumstances would generally mean that an interest would not arise.

Commercial relationships in the usual course of trade

24. In general, being a customer of an applicant or company likely to be significantly affected by a funding decision in the usual course of trade or consumption does not give rise to an interest.
25. These are however only general rules and if the size of the transactions or the nature of the relationships (and any prospective benefits) are such that there is an opportunity to exercise influence or control, it is likely an interest will arise. On the other hand, holding shares in a market participant that has only a peripheral connection to the applicant (such as an airport that might facilitate business), is not likely to give rise to an interest.
26. As with all questions in this area, a judgment must be made about the materiality of the incentive effect of the relationship in terms of its duration and value to the person concerned.

Professional relationships

27. An interest will arise if a person involved in the assessment process is a partner, a director or employee of, or is engaged in a professional capacity with, a participant or other company likely to be materially affected by a funding decision.
28. Past and prospective relationships may also give rise to conflicts depending on the situation. Where a person has only recently relinquished a position in an affected company he or she will need to be sensitive to the perception that he or she might be inclined to *either* favour the company concerned or have some grievance or bias against it. A reasonable minimum period after a person has left such a position is 12 months. Depending on the extent of the involvement that period may need to be extended.
29. In smaller regional areas of New Zealand, if the person involved in the assessment process lives in the same geographic area as the applicant, then they will need to also carefully consider ongoing interactions with the applicant in social or other business contexts.

Personal Relationships

30. An interest will arise if a person involved in the process has a personal relationship with an applicant or with another person likely to be materially affected by a funding decision. Types of personal relationships that could give rise to such an interest are:

- spousal or de facto relationships (including civil unions)
- children
- parents
- other dependents
- other wider kinship and familial relationships;
- friendships, particularly longstanding ones;
- professional acquaintances (although these in and of themselves are unlikely to give rise to an interest).
- relationships in the context of a conflict or a dispute (ie Court proceedings and the like)

31. If any such interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the person's decisions or conduct when carrying out their responsibilities, the person will not have an interest.

32. These interests could arise in the context of ownership of shares, the holding of debt securities or where the other person is the beneficiary of the trust of or related to an applicant may be an interest.

Non dependent family members

33. In general, persons affected are not required to make formal inquiries into potential financial benefits of other (non-dependent) family members. However, if such a person becomes aware of a financial benefit, it must be disclosed.

Disclosure of interests

34. The primary responsibility for determining whether or not a conflict of interest exists falls on the person concerned. This is because that person will always have the most extensive knowledge of their own affairs and interests and those of their immediate family.

35. Any person who falls under one of the categories referred to in paragraph 5 must disclose any actual or perceived interest to MED for MED to decide how any potential conflict is to be managed or dealt with at MED's sole discretion. The interest must be disclosed by notification in writing to:

The Deputy Secretary, Energy and Communications Branch
Ministry of Economic Development
33 Bowen Street,
P O Box 1473
Wellington.

36. Disclosure must occur as soon as reasonably practicable and no later than 3 working days after the person concerned becomes aware of the existence of the interest.

37. All disclosures must be made in writing. When making disclosure the person must disclose:

- the nature of the interest and its monetary value (to the extent that is quantifiable);
- all the relevant surrounding circumstances; such as how and when the interest came to light;
- whether the conflict has already been raised with the applicant or any other affected party.

38. All disclosures will be treated as confidential but may be disclosed to other officials within MED, MED's Chief Executive, Ministers and their legal and other advisers. The disclosures and any documents created during any investigation process will be information for the purposes of the Official Information Act 1982.

39. It is better to err on the side of openness in deciding whether or not a particular situation should be disclosed. Many situations are not clear cut. If a person is uncertain about whether or not the interest does give rise to a conflict, it is generally safer and more transparent to disclose the interest. The matter is then out in the open, and MED's expertise can be used to judge whether the situation constitutes a conflict of interest, and whether the situation is serious enough to warrant further action. This is always better than the member or official silently trying to manage the situation by themselves.

40. Persons in the process who have oversight of such persons should also be vigilant to spot potential conflicts of interest.

41. If a matter in which a person has an interest arises at a formal meeting, the person should declare to the meeting that they have an interest in the matter before it is discussed. The declaration should be recorded in the minutes of the meeting and the person should then absent him or herself from the meeting while the matter is being considered or voted on.

42. If something significant changes about the person's role or the other interest, or the nature of the connection between them, the person should make a further disclosure in accordance with the process set out above.

Process following disclosure

43. Following a disclosure MED will investigate the matter and decide whether an interest exists and whether there is a conflict. Without limiting the process MED may follow; MED may discuss the interest and its implications with the applicant, any competing applicants and any business, trust or professional organisation that might be affected or involved.

44. In making its decision MED will consider the how outside observers might reasonably perceive the situation and will consider any relevant Audit Office guidelines and legal requirements. It will also carefully assess the seriousness of the conflict of interest; and the range and likely effectiveness of possible mitigation options. A strict approach will be taken to conflicts of interests arising in relation to the BIF subgroup and the IAEs. A less strict approach will be taken to persons providing applicant support given they do not have a direct decision-making role. The decision in each case though will depend on its particular facts and assessed on its individual merits.

45. MED will provide a draft of its decision to the person who made the disclosure and give the person an opportunity to make written comments before any adverse decision is made.

Mitigation options

46. If MED determines that a conflict of interest exists it may do one or more of the following:

- decide the interest is insignificant, and is not sufficient to influence the person's judgment and that no action needs to be taken;
- enquire as to whether the affected parties are prepared to consent to the person continuing in their role;
- decide that the person may continue to be involved in the BIF process but must absent themselves from any part of the funding decision-making process or otherwise ensure that they are not in a position where they will be able to influence the process or any BIF funding decision. This will include absenting themselves from meetings at which such issues will be discussed or if the interest arises at a meeting absenting him or herself from the meeting while the matter is being considered or voted on;
- restrict or withhold access to information to the person and require them to deliver up any information that they might have received in discharging their responsibilities in relation to the BIF that might benefit their personal interest;
- decide that the person should be reassigned to a different role as part of the BIF process and have no further involvement in assisting or assessing a particular applicant or in a particular locality;
- decide that the person should play no further role in the BIF assistance or assessment process and that their contracts are to be terminated in accordance with the terms and conditions of their contracts;
- reach agreement with the person that they relinquish their private interest;
- make any other decision as it considers appropriate in the circumstances of the particular case.

47. MED will ensure that the person is promptly informed of its decision and will keep a written record of its decision. This will include details of the factual position, who undertook the assessment and the process that was followed and the action was taken as a result.

48. MED reserves the right to exercise any legal rights it may have in relation to any particular conflict of interest.