

E. TAX-EXEMPT HEALTH CARE ORGANIZATIONS REVISED CONFLICTS OF INTEREST POLICY

by

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1. Introduction

The 1997 CPE Text discussed a community board and conflicts of interest policy as factors the Service takes into consideration in determining whether hospitals and other health care organizations satisfy the community benefit standard in Rev. Rul. 69-545, 1969-2 C.B. 117. One significant fact demonstrating that a tax-exempt health care organization promotes the health of the community as a whole, rather than benefitting private interests, is the organization's adoption of a substantial conflicts of interest policy. The 1997 CPE Text included a sample conflicts of interest policy that can be adopted in an organization's bylaws or through resolution by its board of directors.

Based on comments we received from the interested community, the sample policy has been modified in several respects, as explained below. The revised sample policy is also attached to this article.

2. Article II, Definitions

A. Section 2, Financial Interest

The sample policy was revised to clarify that a person having a financial interest does not necessarily have a conflict of interest. The board of directors or the appropriate board committee has the responsibility to determine, based on all the facts and circumstances, whether the financial interest of an interested person rises to the level of a conflict of interest. Thus, the following new sentence was added:

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate board or committee decides that a conflict of interest exists.

3. Article III, Procedures

Several clarifications were made to the Procedures part of the sample policy.

A. Section 1, Duty to Disclose

Before the board or committee makes a determination whether the financial interest of an interested person rises to the level of a conflict of interest, the interested person must be given the opportunity to disclose all material facts relating to his/her financial interest.

B. Section 2, Determining Whether A Conflict of Interest Exists

If the interested person discloses all material facts relating to his/her financial interest, the board or committee can continue to discuss the issue with the interested person to clarify or obtain additional information relevant to the financial interest. However, before the board or committee discusses and votes on whether the interested person's financial interest is a conflict of interest, the interested person must leave the meeting.

C. Section 3(a), Procedures for Addressing the Conflict of Interest

An interested person with a conflict of interest in a transaction or arrangement is not precluded from making a presentation to the board or committee regarding the transaction or arrangement. However, before the board or committee discusses and votes on the transaction or arrangement, the interested person must leave the meeting.

4. Article V, Compensation

The Compensation part of the sample policy was also modified to clarify several items.

A. Section 1

A new paragraph was added providing that an individual who is a voting member of the board of directors and receives compensation from the corporation for services may not vote on any matter pertaining to that member's compensation.

B. Section 2

Another new paragraph was added stating that a physician who is a voting member of the board of directors and receives compensation, directly or indirectly, from the Corporation for services is precluded from discussing and voting on matters pertaining to that member's and other physicians' compensation. In addition, the sample policy provides that no physician or physician director, either individually or collectively, is prohibited from providing information to the board of directors regarding physician compensation.

C. Section 4

A new sentence was added providing that although a physician with a direct or indirect financial interest in a corporation may not be a member of a compensation committee, the physician may provide information to the committee regarding physician compensation in general.

In all other respects, the sample conflicts of interest policy that appeared in the 1997 CPE text remains unchanged.

SAMPLE CONFLICTS OF INTEREST POLICY
(Revised 1999)

Article I

Purpose

The purpose of the conflicts of interest policy is to protect the Corporation's interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Corporation. This policy is intended to supplement but not replace any applicable state laws governing conflicts of interest applicable to nonprofit and charitable corporations.

Article II

Definitions

1. Interested Person

Any director, principal officer, or member of a committee with board delegated powers who has a direct or indirect financial interest, as defined below, is an interested person. If a person is an interested person with respect to any entity in the health care system of which the Corporation is a part, he or she is an interested person with respect to all entities in the health care system.

2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment or family--

- a. an ownership or investment interest in any entity with which the Corporation has a transaction or arrangement, or
- b. a compensation arrangement with the Corporation or with any entity or individual with which the Corporation has a transaction or arrangement, or

- c. a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Corporation is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate board or committee decides that a conflict of interest exists.

Article III

Procedures

1. Duty to Disclose

In connection with any actual or possible conflicts of interest, an interested person must disclose the existence of his or her financial interest and must be given the opportunity to disclose all material facts to the directors and members of committees with board delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest

- a. An interested person may make a presentation at the board or committee meeting, but after such presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement that results in the conflict of interest.
- b. The chairperson of the board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

- c. After exercising due diligence, the board or committee shall determine whether the Corporation can obtain a more advantageous transaction or arrangement with reasonable efforts from a person or entity that would not give rise to a conflict of interest.
 - d. If a more advantageous transaction or arrangement is not reasonably attainable under circumstances that would not give rise to a conflict of interest, the board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Corporation's best interest and for its own benefit and whether the transaction is fair and reasonable to the Corporation and shall make its decision as to whether to enter into the transaction or arrangement in conformity with such determination.
4. Violations of the Conflicts of Interest Policy
- a. If the board or committee has reasonable cause to believe that a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.
 - b. If, after hearing the response of the member and making such further investigation as may be warranted in the circumstances, the board or committee determines that the member has in fact failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV

Records of Proceedings

The minutes of the board and all committee with board-delegated powers shall contain--

1. the names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the board's or committee's decision as to whether a conflict of interest in fact existed.

2. the names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection therewith.

Article V

Compensation

1. A voting member of the board of directors who receives compensation, directly or indirectly, from the Corporation for services is precluded from voting on matters pertaining to that member's compensation.
2. A physician who is a voting member of the board of directors and receives compensation, directly or indirectly, from the Corporation for services is precluded from discussing and voting on matters pertaining to that member's and other physicians' compensation. No physician or physician director, either individually or collectively, is prohibited from providing information to the board of directors regarding physician compensation.
3. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Corporation for services is precluded from voting on matters pertaining to that member's compensation.
4. Physicians who receive compensation, directly or indirectly, from the Corporation, whether as employees or independent contractors, are precluded from membership on any committee whose jurisdiction includes compensation matters. No physician, either individually or collectively, is prohibited from providing information to any committee regarding physician compensation.

Article VI

Annual Statements

Each director, principal officer and member of a committee with board delegated powers shall annually sign a statement which affirms that such person--

- a. has received a copy of the conflicts of interest policy,
- b. has read and understands the policy,
- c. has agreed to comply with the policy, and
- d. understands that the Corporation is a charitable organization and that in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII

Periodic Reviews

To ensure that the Corporation operates in a manner consistent with its charitable purposes and that it does not engage in activities that could jeopardize its status as an organization exempt from federal income tax, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable and are the result of arm's-length bargaining.
- b. Whether acquisitions of physician practices and other provider services result in inurement or impermissible private benefit.
- c. Whether partnership and joint venture arrangements and arrangements with management service organizations and physician hospital organizations conform to written policies, are properly recorded, reflect reasonable payments for goods and services, further the Corporation's charitable purposes and do not result in inurement or impermissible private benefit.
- d. Whether agreements to provide health care and agreements with other health care providers, employees, and third party payors further the Corporation's charitable purposes and do not result in inurement or impermissible private benefit.

Article VIII

Use of Outside Experts

In conducting the periodic reviews provided for in Article VII, the Corporation may, but need not, use outside advisors. If outside experts are used their use shall not relieve the board of its responsibility for ensuring that periodic reviews are conducted.