

## Conflict of Interest Options:

IRS – Instructions for Form 1023 – Application for Exemption as 501(c)(3)

“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 organization has a transaction or arrangement,
- b) a compensation arrangement with the organization or with any entity or individual with which the organization 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 organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

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 governing board or committee decides that a conflict of interest exists.

IRS Information on Purpose of Conflict of Interest:

“A conflict of interest policy is intended to help ensure that when actual or potential conflicts of interest arise, the organization has a process in place under which the affected individual will advise the governing body about all the relevant facts concerning the situation. A conflict of interest policy is also intended to establish procedures under which individuals who have a conflict of interest will be excused from voting on such matters. ... Apart from any appearance of impropriety, organizations will lose their tax exempt status unless they operate in a manner consistent with their charitable purposes. Serving private interests more than insubstantially is inconsistent with accomplishing charitable purposes.”

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Institutional Conflicts of Interest, defined by Eric Hargan of McDermott Will & Emery LLP in Chicago:

“Conflicts of Interest” are defined by the Association of American Medical Colleges and the Association of American University as “situations in which financial considerations may compromise, or have the appearance of compromising, an investigator’s professional judgment in conducting or reporting research.” (May/June 2008)

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American Health Lawyers Association: Corporate Governance Update, Governance Provisions of Proposed Form 990 Instructions, by Michael W. Peregrine and Elizabeth Mills, McDermott Will & Emery

2. “Relationships among Officers, Directors, etc.: One of the most controversial governance questions on the Form 990 in recent years is that which inquires about horizontal business and financial relationships among officers, directors, and key employees. The goal is to identify relationships that could create bias in the decision-making process. Proposed definitions of “family relationship” and “business relationship” are provided. Note that the definition of

“business relationship” includes types of employment relationships, business arrangements, common ownership of business entities, and board service on the same business entity.”

6. “Conflict of Interest Policy: The proposed instructions provide substantial guidance on the Line 12 questions regarding the exempt organization’s conflict of interest policy. For example, a definition of “conflict of interest,” is provided (note: the IRS template conflicts policy does not contain any such definition). In addition, “dualities of interest” are not considered conflicts unless they involve material financial interest or benefit to the person. A description is provided of the types of conflicts disclosures to be made on the annual questionnaires (e.g., list of family members, substantial business or investment holdings, and other transactions or affiliations with businesses and other organizations. Also significant is the detail sought (for Schedule O) on the conflicts enforcement practices, whether discovered before or after the transaction has occurred. This includes a description of the types of persons covered by the policy, the level at which the conflicts determination is made, and at which actual conflicts are reviewed, as well as any restrictions imposed upon persons determined to have a conflict with respect to a particular transaction.

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MEDICARE DEFINITION UNDER PHYSICIAN SELF-REFERRAL Section –  
Financial relationship – Subchapter XVIII Sec. 1395nn

(2) Financial relationship specified

For the purposes of this section, a financial relationship of a physician (or an immediate family member of such physician) with an entity specified in this paragraph is:

- (A) except as provided in subsections (c) and (d) of this section, an ownership or investment interest in the entity, or
- (B) except as provided in subsection (e) of this section, a compensation arrangement (as defined in subsection (h)(1) of this section) between the physician (or an immediate family member of such physician) and the entity.

An ownership or investment interest described in subparagraph (A) may be through equity, debt, or other means and includes an interest in an entity that holds an ownership or investment interest in any entity providing the designated health service.

Exception under (e) to ownership or investment prohibition includes: rural providers – and the whole hospital provision.

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South Carolina's Prohibition against Health Care Providers referring to entity in which there is an investment interest: Exceptions for:

- 1) investment interest where the health care professional directly provides the health care services within the entity or will be personally involved in the provision, supervision, or direction of care to the referred patient;
- 2) the provider's investment interest is in registered securities purchased on a national exchange of over-the-counter market and issued by a publicly held corporation:
  - a. whose shares are traded on a national exchange or on the over-the-counter market; and
  - b. whose total assets at the end of the corporation's most recent fiscal quarter exceeded \$50 million;or
- 3) with respect to an entity other than a publicly held corporation described in subsection (A)(2) and a referring provider's investment interest in the entity, each of the following requirements are met:
  - a) no more than 50% of the value of the investment interests are held by investors who are in a position to make referrals to the entity;
  - b) the terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are no different from the terms offered to investors who are not in a position to make referrals;
  - c) the terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are not related to the previous or expected volume of referrals from that investor to the entity;
  - d) there is no requirement that an investor make referrals or be in a position to make referrals to the entity as a condition for becoming or remaining an investor.

B. With respect to an entity or to a publicly held corporation in subsection A(2):

- 1) the entity or corporation does not lend funds to or guarantee a loan for an investor who is in a position to make referrals to the entity or corporation if the investor uses any part of the loan to obtain the investment interest;
- 2) the amount distributed to an investor representing a return on the investment interest is directly proportional to the amount of the capital investment, including the fair market value of preoperational services rendered in the entity or corporation by that investor.

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