

LEGISLATIVE UPDATE

March 2018

Hospital Services Accountability Agreement (H-SAA) 2018-2020 Conflict of Interest Policies

The *Local Health System Integration Act* (LHSIA) requires LHINs to sign service accountability agreements (SAAs) with the health service providers funded by the LHIN. The H-SAA template forms the basis of all accountability agreements for funding for hospitals services in Ontario. All LHINs use the H-SAA template and add specific performance targets and local terms and conditions in appropriate Schedules, which reflect the specific services that are provided within each LHIN.

The OHA and LHINs recently concluded negotiations on a new H-SAA template. As such, the new 2018-2020 H-SAA is being rolled out for the 2018-2019 funding year.

Section 3.4 of the 2018-2020 H-SAA template requires hospitals to adopt a conflict of interest policy that includes requirements for disclosure and effective management of perceived, actual and potential conflict of interest and a code of conduct, for directors, officers, employees, professional staff members and volunteers.

Many hospitals already have conflict of interest policies in place for their boards and through staff codes of conduct. The following provides some considerations for hospitals if they choose to develop a new conflict of interest policy or wish to amend their current policies.

Conflict of Interest for Board Members

Through their fiduciary duty to the corporation, hospital board members are required to disclose conflicts of interest in decisions made by the board. Disclosure of a conflict is to be made by a director or officer where the director or officer has a material interest in, or is a party to, a **material** contract or transaction or proposed material contract or transaction with the corporation.¹

While this is currently a common law duty (i.e. a legal requirement that is not codified in legislation), this will be legislative statutory requirement when the *Not-for-Profit Corporations Act* (Ontario) (NFPCA) comes into force.

¹ For more information, refer to the OHA's Guide to Good Governance, 3rd Ed., at pp. 109, 117, 187, 267, 268.

The process for disclosure of conflicts is that general notice is given and a director with a conflict does not to vote or attend any part of a meeting where the contract or transaction is discussed.²

See Appendix A of this document for a sample Board Conflict of Interest policy excerpted from the OHA's Guide to Good Governance.

Conflict of Interest in Procurement

As organizations covered by the *Broader Public Sector Accountability Act*, hospitals must follow the Broader Public Sector Procurement Directive (Directive) approved by the Management Board of Cabinet. The Directive includes requirements related to conflict of interest and organizations must monitor any conflict of interest that may arise as a result of the organizations board members', senior executives', employees', advisors', external consultants', or suppliers' involvement with supply chain activities. Where a conflict of interest arises, it must be evaluated and an appropriate mitigating action must be taken. [Click here to view the BPS Procurement Directive.](#)

The Broader Public Sector Procurement Directive Toolkit (2011) defines "conflict of interest" as:

...a situation in which financial or other personal considerations have the potential to compromise or bias professional judgment and objectivity. An apparent conflict of interest is one in which a reasonable person would think that the professional's judgment is likely to be compromised.

Hospitals should ensure that their policies, processes and documentation define conflict of interest and reserve the right of the hospital to solely determine whether any situation or circumstance constitutes a conflict of interest. Hospitals should ensure that the individuals noted above sign a conflict of interest declaration, and that any potential and actual conflicts of interest are disclosed in writing. Policies should include a process for declaring/disclosing a conflict, as well as consequences for failing to declare/disclose.

As noted in the Broader Public Sector Procurement Directive Toolkit (2011), situations that may result in a conflict of interest could include:

- Being engaged in outside employment;
 - Having relationships that may affect or may be perceived as affecting an individual's objectivity in carrying out an official role;
 - Accepting favours or gratuities from those doing business with the hospital;
 - Having access to confidential information that may affect or may be perceived as affecting one's objectivity or judgement in carrying out an official role;
 - Providing assistance or advice to a supplier participating in a competitive process;
- and

² OHA Guide to Good Governance, 3rd Ed., at p. 268. If no quorum exists by reason of directors being excluded as a result of conflicts, the remaining directors are deemed to constitute a quorum. If all directors are excluded, the contract may be approved by members.

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- Having an ownership, investment interest or compensation arrangement with any entity participating in a competitive process.

Hospitals should consider providing specific examples applicable to their organization, such as external appointments/positions, grant and research funding, consulting activities and intellectual property rights.

Conflict of Interest for Professionals

It is also important to note that regulated health professionals have existing conflict of interest obligations, both through their Regulatory College and through statute. Most professions have regulations relating to conflicts of interest and consider practicing the profession while in a conflict of interest to be professional misconduct.

For example, Part IV of Regulation 114/94 of the *Medicine Act* governs conflict of interest for physicians. Generally, a physician must always act in the patient's best interests and a physician's interests should not be in conflict with the patient's. Any conflicts of interest must be avoided or must be properly managed so as not to compromise the patient's best interests. The College of Physicians and Surgeons (CPSO) has a number of policies regarding conflict of interest including Physicians' Relationships with Industry: Practice, Education and Research Policy.

Nurses, pharmacists, midwives, dentists and other regulated professionals have professional obligations regarding conflicts of interest under their governing health professions legislation, and through their respective regulatory College.

Areas of note for hospitals to consider in staff conflict of interest policies include: speaking engagements; independent medical evaluations; financial interests/ownership interests and other holdings; and, generally, other activities that may impact, or be perceived to impact, on the staff member's ability to objectively perform his or her hospital duties.

Conflict of Interest related to Research

Hospitals involved in research must also consider conflicts of interest related to research. The *Tri-Council Policy Statement (TCPS 2) for Ethical Conduct for Research Involving Humans* requires institutions to develop and implement conflict of interest policies including procedures to identify, eliminate, minimize or otherwise manage conflicts of interest that may affect research.

All researchers, research ethics board (REB) members, and administrators should act in a transparent manner in identifying and addressing conflicts of interest. Hospitals should make their written conflict of interest policies and procedures public and available to all research participants, REBs, researchers, administrators and research sponsors.

[Click here to view the TCPS 2 related to conflict of interest.](#)

For more information, please contact Jeff Bagg at jbagg@oha.com or 416.205.1374.

Appendix A: Sample Board Policy on Conflict of Interest³

Purpose

All directors have a duty to ensure that the integrity of the decision-making processes of the board are maintained by ensuring that they and other members of the board are free from conflict or potential conflict in their decision-making. It is inherent in a director's fiduciary duty that conflicts of interest be avoided. It is important that all directors and officers understand their obligations when a conflict of interest or potential conflict of interest arises.

Application

Applies to all directors and officers including ex officio directors, and all non-board members of committees.

“Officers” means officers appointed by the board including the president, a vice president, secretary or assistant secretary, treasurer or assistant treasurer, general manager and others who perform functions for the corporation similar to those normally performed by such officers.

Policy

Directors, officers and non-board committee members shall avoid situations in which they may be in a position of conflict of interest or perceived conflict of interest. The by-laws contain provisions with respect to conflict of interest that must be strictly adhered to.

In addition to the by-laws, the process set out in this policy shall be followed when a conflict or potential conflict arises.

Description of Conflict of Interest

A conflict of interest arises in any situation where a director's duty to act solely in the best interests of the corporation and to adhere to his or her fiduciary duties is compromised or impeded by any other interest, relationship or duty of the director. A conflict of interest also includes circumstances where the director's duties to the corporation are in conflict with other duties owed by the director such that the director is not able to fully discharge the fiduciary duties owed to the corporation.

The situations in which potential conflict of interest may arise cannot be exhaustively set out. Conflicts generally arise in the following situations:

1. Transacting with the Corporation

- When a director transacts with the corporation directly or indirectly.
- When a director has a material direct or indirect interest in a transaction or contract with the corporation.

³ OHA Guide to Good Governance, 3rd Ed., at p. 120.

2. Interest of a Relative

- When the corporation conducts business with suppliers of goods or services or any other party of which a relative or member of the household of a director is a principal, officer or representative.

3. Gifts

- When a director or a member of the director's household or any other person or entity designated by the director, accepts gifts, payments, services or anything else of more than a token or nominal value from a party with whom the corporation may transact business (including a supplier of goods or services) for the purposes of (or that may be perceived to be for the purposes of) influencing an act or decision of the board.

4. Acting for an Improper Purpose

- When directors exercise their powers motivated by self-interest or other improper purposes. Directors must act solely in the best interest of the corporation. Directors who are nominees of a particular group must act in the best interest of the corporation even if this conflicts with the interests of the nominating party.

5. Appropriation of Corporate Opportunity

- When a director diverts to his or her own use, an opportunity or advantage that belongs to the corporation.

6. Duty to Disclose Information of Value to the Corporation

- When directors fail to disclose information that is relevant to a vital aspect of the corporation's affairs.

7. Serving on Other Corporations

- A director may be in a position where there is a conflict of "duty and duty". This may arise where the director serves as a director of two corporations that are competing or transacting with one another. It may also arise where a director has an association or relationship with another entity. For example, if two corporations are both seeking to take advantage of the same opportunity, a director may be in possession of confidential information received in one boardroom or related to the matter that is of importance to a decision being made in the other boardroom. The director cannot discharge the duty to maintain such information in confidence while at the same time discharging the duty to make disclosure. The director cannot act to advance any interests other than those of the corporation.

Process for Resolution of Conflicts and Addressing Breaches of Duty

1. Disclosure of Conflicts

A director, officer or committee member who is in a position of conflict or potential conflict shall immediately disclose such conflict to the board by notification to the chair

or any vice chair of the board. Where the chair has a conflict, notice shall be given to the vice chair. The disclosure shall be sufficient to disclose the nature and extent of the interest. Disclosure shall be made at the earliest possible time and, where possible, prior to any discussion and vote on the matter.

Where (i) a director is not present at a meeting where a matter in which the director has a conflict is first discussed and/or voted upon, or (ii) a conflict arises for a director after a matter has been discussed but not yet voted upon by the board, or (iii) a director becomes conflicted after a matter has been approved, the director shall make the declaration of the conflict to the chair or vice chair as soon as possible and at the next meeting of the board.

If an officer becomes interested in a contract or transaction after it is made or entered into, the disclosure shall be made as soon as possible after the officer becomes so interested.

A director or officer may make a general declaration of the director's relationships and interests in entities or persons that give rise to conflicts.

2. Abstain from Discussions

The director or officer who has declared a conflict shall not be present during the discussion or vote in respect of the matter in which he or she has a conflict and shall not attempt in any way to influence the voting.

Process for Resolution of Conflicts and Addressing Breaches of Duty

All directors shall comply with the requirements of the by-laws.

A director may be referred to the process outlined below in any of the following circumstances:

1. Circumstances for Referral

Where any director believes that he or she or another director:

- a. Has breached his or her duties to the corporation;
- b. Is in a position where there is a potential breach of duty to the corporation;
- c. Is in a situation of actual or potential conflict of interest; or
- d. Has behaved or is likely to behave in a manner that is not consistent with the highest standards of trust and integrity, and such behaviour may have an adverse impact on the corporation.

2. Process for Resolution

The matter shall be referred to the following process:

- a. Refer matter to chair or where the issue may involve the chair, to any vice chair, with notice to chief executive officer.

- b. Chair (or vice chair as the case may be) may either (i) attempt to resolve the matter informally, or (ii) refer the matter to either the executive committee (if one has been established) or to an ad hoc sub-committee of the board established by the chair (or vice chair, as the case may be) which shall report to the board.
- c. If the chair or vice chair elects to attempt to resolve the matter informally and the matter cannot be informally resolved to the satisfaction of the chair (or vice chair as the case may be), the director referring the matter and the director involved, then the chair or vice chair shall refer the matter to the process in (b) (ii) above.
- d. A decision of the board by majority resolution shall be determinative of the matter.

It is recognized that if a conflict, or other matter referred cannot be resolved to the satisfaction of the board (by simple majority resolution) or if a breach of duty has occurred, a director may be asked to resign or may be subject to removal pursuant to the by-laws and *Corporations Act*.

Perceived Conflicts

It is acknowledged that not all conflicts or potential conflicts may be satisfactorily resolved by strict compliance with the by-laws. There may be cases where the perception of a conflict of interest or breach of duty (even where no conflict exists or breach has occurred) may be harmful to the corporation notwithstanding that there has been compliance with the by-laws. In such circumstances, the process set out in this policy for addressing conflicts and breaches of duty shall be followed.

It is recognized that the perception of conflict or breach of duty may be harmful to the corporation even where no conflict exists or breach has occurred and it may be in the best interests of the corporation that the director be asked to resign.

Amendment

This policy may be amended by the board.

Approval Date:

Last Review Date: