

Memorandum

From: Bruce D. Platt 

To: Chairman Raed Assar

Company: Florida Health Maintenance Organization Consumer Assistance Plan

Date: June 20, 2018

Subject: Board Member Conflict of Interest

QUESTION PRESENTED

You have asked what the members of the board of directors ("Board Members") of the Florida Health Maintenance Consumer Assistance Plan (the "HMOCAP") should consider when voting upon HMOCAP matters.

ANSWER

The HMOCAP statutes reflect that Board Members will have an inherent bias in favor of the kind of HMOs they represent. However, when serving on the HMOCAP Board of Directors, the Board Members are subject to certain standards to ensure that they reflect the best interest of the HMOCAP and all Florida HMOs. These standards are reflected in the conflict of interest statement that the Board Members sign (a sample is included as Attachment 1). The applicable standards are also reflected in Article XIV of the HMOCAP's Plan of Operations (a copy of this section is included as Attachment 2), HMOCAP policy 1.6 and the accompanying statement of fiduciary obligations (Attachment 3). Finally, although they may not explicitly apply to the Board Members, Florida statutes and case law applicable to not-for-profit corporations also provide guidance to Board Member actions.

As noted, the HMOCAP statutes contemplate that Board Members will bring their own biases when participating in decisions of the HMOCAP's Board of Directors. Specifically, when appointing Board Members, Section 631.816(2), Florida Statutes, provides that the Department of



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As noted, the HMOCAP statutes contemplate that Board Members will bring their own biases when participating in decisions of the HMOCAP's Board of Directors. Specifically, when appointing Board Members, Section 631.816(2), Florida Statutes, provides that the Department of

Financial Services "shall consider . . . whether all member HMOs are fairly represented." Obviously, this contemplates that the board members will represent the interest of their HMO, and similarly situated HMOs, when making decisions. However, the Board Members do not have unfettered discretion in making decisions that impact Florida HMOs. Rather, the Board Members must also act in the best interest of the HMOCAP and the Florida HMO industry.

It is important to note that the Conflict of Interest Statement also recognizes that Board Members are "also officers or employees of other business or professional organizations and that many matters may arise in the relationship between such business or organization and the [HMOCAP] which may involve such persons in an apparent conflict of interest. This statement is not designed to alter or affect such relationship or the duties or obligations, which such person owes to his employer or organization." Although the statement also provides that the Board Members shall not permit their private interests to conflict with the proper discharge of their duties, the language quoted above clearly recognizes that Board Members can serve on the Board while also performing their duties to their respective HMOs.

The Conflict of Interest Statement also provides a list of activities that could be considered a conflict of interest. It provides that a conflict of interest may exist where the actions or activities of the Board Members "may result in (a) improper personal gain or advantage to the individual, (b) unnecessary adverse effect upon the [HMOCAP's] interest, or (c) improper gain or advantage to a third party." However, the statement does not give further direction, and it states that the Board Members should "exercise the utmost good faith and judgment in situations involving the existence of a possible conflict of interest.

Article XIV of the HMOCAP Plan of Operations also provides guidance regarding conflicts of interest, and it also recognizes that the Board Members are affiliated with member HMOs. Paragraph (ii) prohibits Board Members from using their position on the Board "to foster or facilitate any pecuniary gain for themselves, their member HMO(s), or any other entity" in which they have a substantial financial interest. Paragraph (i) requires the adoption of the Conflict of Interest Statement referenced above, and the entire conflict of interest provision should be read in conjunction with the requirements of the Conflicts of Interest Statement.

Note that the Fiduciary Obligations statement requires that the Board Members agree to use the best of their ability to ensure that the HMOCAP complies with federal and state not-for-profit laws. Section 617.0830, Florida Statutes, provides the general standards for directors of not-for-profit corporations, and this statute requires that the directors (a) act in good faith, (b) act with the care of an ordinarily prudent person in a similar situation, and (c) act in a manner he or she reasonably believes to be in the best interest of the corporation. Importantly, Paragraph (4) of this statute provides that a "director is not liable for any action taken as a director, or any failure to take such action, if he or she performed the duties of his or her office in compliance with this section." Section 617.0832, Florida Statutes, provides guidance on director conflicts of interest in transactions with the not-for-profit corporation. This statute allows board members of a not-for-

profit, corporations to vote on contracts with which they are financially interested in a few situations, including when the following occurs:

- (b) The fact of such relationship or interest is disclosed or known to the members entitled to vote on such contract or transaction, if any, and they authorize, approve, or ratify it by vote or written consent; or
- (c) The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members.

As pertains to the HMOCAP, it is public knowledge as to the HMO with which each Board Member is affiliated, and each Board Member should have at least a basic understanding of the interests of the other Board Members when exercising their votes.

Finally, applicable case law recognizes that members of the board of directors of a not-for-profit corporation in Florida are protected if they act consistent with the statutory requirements. In *Conboy v. Black Diamond Properties, Inc.*, 2010 WL 2944374 (July 23, 2010, USDC, M.D. Fla.), the court stated as follows:

Under § 617.0830, a director of a not for profit corporation has the duty to discharge his duties: (i) in good faith, (ii) with the care an ordinarily prudent person in like position would exercise under similar circumstances, and (iii) in a manner he or she reasonably believes to be in the best interests of the corporation. Consistent with the “business judgment rule” the statute provides that if the director performs his duties in compliance with these standards the director is not liable for the actions taken. “[D]irectors are protected by the [business judgment rule under Florida law], no matter how poor their business judgment, unless they acted fraudulently, illegally, oppressively, or in bad faith.”

While directors may not engage in self-dealing, it is not inappropriate, per se, for a director to derive personal benefit from a transaction. Indeed, a so-called “conflict of interest transaction” *will not be void or voidable if there is disclosure or the transaction is fair and reasonable to the corporation*. It is a “cardinal principle” that a director will not be allowed to make an undisclosed profit adverse to the interests of the corporation, nor will he be permitted to acquire for his own advantage interests adverse or antagonistic to the corporation.¹

Again, as pertains to the HMOCAP, there is “disclosure” as to each Board Member’s HMO when voting on HMOCAP issues.

In summary, it is clear from the HMOCAP policies and procedures, from the conflict of interest and fiduciary interest forms, and from Florida Statutes that the Board Members should act in the

¹ Emphasis added, and internal citations omitted.

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best interest of the HMOCAP and in the best interest of all of the HMOs in the state of Florida. It is also clear that the Board Members will have an inherent bias on behalf of their HMO, and similarly situated HMOs, when voting on HMOCAP matters. Finally, Florida statutes and case law recognize that disclosure of potential conflicts of interest, prior to voting on issues where a conflict may arise, will help protect a director from being considered in violation of his or her fiduciary duties.

**Florida Health Maintenance Organization
Consumer Assistance Plan**

Fiduciary Obligations

As a member of the Board of Directors of the Florida Health Maintenance Organization Consumer Assistance Plan, I acknowledge that I have a fiduciary obligation to adhere to the following general duties:

DUTY OF CARE

I agree that my decisions and actions will be in the best interest of the organization taken as a whole.

DUTY OF LOYALTY

I agree that while serving on the Board of Directors I will have no conflicts of interest with other organizations.

DUTY OF OBEDIENCE

I agree that to the best of my ability I will ensure that the organization complies with prevailing federal and state not-for-profit law as well as the organization's by-laws.

Signature: _____

Name: _____

Position: _____

Date: _____

**FLORIDA HEALTH MAINTENANCE ORGANIZATION
CONSUMER ASSISTANCE PLAN**

CONFLICT OF INTEREST STATEMENT

It is a policy of the Florida HMO Consumer Assistance Plan (FHMOCAP) that no member of the Board of Directors or any committee or subcommittee thereof, no officer or employee of the FHMOCAP and no person who spends a substantial amount of their time performing services for the FHMOCAP shall permit their private interests to conflict with the proper discharge of their official duties for the FHMOCAP nor shall they use their position or knowledge gained therein in such manner as to give the appearance of such conflict. Conflicts of interest may be considered to exist in those instances where the actions or activities of an individual on behalf of the FHMOCAP may result in (a) improper personal gain or advantage to the individual, (b) unnecessary adverse effect upon the FHMOCAP's interest, or (c) improper gain or advantage to a third party.

No attempt is made here to further define any interest that might be considered to be or that might give rise to a conflict of interest as that may vary between individuals and situations. It is incumbent upon the individuals to be conscious of the importance of the utmost rectitude in these areas and they should exercise the utmost good faith and judgment in situations involving the existence of a possible conflict of interest. It is assumed that everyone of sufficient capacity to exercise the responsibilities delegated to them will have like capacity to recognize any situation that might create a possible conflict of interest.

The FHMOCAP recognizes that members of the Board of Directors of the FHMOCAP and its various committees or subcommittees are also officers or employees of other business or professional organizations and that many matters may arise in the relationship between such business or organization and the FHMOCAP which may involve such persons in an apparent conflict of interest. This statement is not designed to alter or affect such relationship or the duties or obligations, which such person owes to his employer or organization.

STATEMENT BY INDIVIDUAL: I am familiar with and understand the established position of the FHMOCAP with respect to conflicts of interest as enunciated in the preceding Conflict of Interest Statement.

Except as indicated below or in such Statement, there does not exist as of the execution hereof of any material conflict of interest which violate such Statement and I do not know of any fact or circumstance which is or likely to be in conflict with such Statement. Should any change occur in my situation, I shall submit a further Statement to the FHMOCAP, and if at any time I find that there is doubt as to the proper application of the FHMOCAP's policy on Conflict of Interest with respect to any particular situation, I shall refrain from exercising responsibility in any FHMOCAP matter which might reasonably be thought to be affected by my other interest.

EXCEPTIONS: _____

Signature
Date: _____
Position with Plan: _____
Membership Affiliation: _____

ARTICLE XIV.
Conflict of Interest, Ethics

To ensure that the Plan and its Board are free from potential conflict or inappropriate behavior, the following guidelines for conduct of the Board members and all contractors, agents, and employees of the Plan are hereby adopted:

- (i) Each Board member, contractor, agent or employee shall have an affirmative duty to notify the Board and the Department if the member, contractor, agent or employee, or HMO that the Board member represents, has a potential conflict of interest. Each Board member, contractor, agent or employee shall, upon appointment, contracting or hiring and annually thereafter, sign a conflict of interest statement. Such statement form shall be approved by the Board.
- (ii) No Board member, contractor, agent, or employee, shall use their position to foster or facilitate any pecuniary gain for themselves, their member HMO(s), or any other entity in which the Board member, agent or employee, or the member HMO, has a substantial financial interest.
- (iii) No Board member, contractor, agent, or employee, shall use their position to secure or promote any business relationship from which they may derive a financial gain.
- (iv) All Board members, contractors, agents, and employees shall be subject to the following restrictions regarding the receipt of gifts:
 - a. In connection with the conduct of official business, Board members, contractors, agents and employees may accept meals on a single calendar day (including cocktails parties, receptions and the like) having a value of less than one hundred dollars (\$100) from a person doing business with the HMOCAP or from any political committee or committee of continuous existence as defined by section 106.011, Florida Statutes; or from a lobbyist who lobbies the HMOCAP, or any partner, firm, employee or principal of such person, committee, or lobbyist. However, all such meals, snacks, candy, gum or other food, drink or tobacco product shall be reported to the Board and the Department within five (5) days of consumption unless the consumed item had an estimated value of less than twenty-five dollars (\$25).
 - b. Souvenirs or mementos having a value of less than five dollars (\$5) may be accepted but only if they are given in connection with a meeting or function relating to official duties and responsibilities.
 - c. The restrictions specified above are not intended to prohibit a contractor, agent or employee from accepting compensation from a client or employer with respect to services provided which are not in any way related to the business of the HMOCAP. This provision is not intended to relieve the contractor, agent or employee of the affirmative duty of disclosure provided in (i) above.

- d. The restrictions specified above are not intended to prohibit a Board member, contractor, agent or employee from receiving any type of compensation that the Board member, contractor, agent or employee might receive from his or her employer for the performance of his or her duties.
- (v) Board members shall avoid extravagant or excessive Board expenses.
- (vi) All travel reimbursements made by the Plan, shall be made pursuant to the rates set forth in Section 112.061 Florida Statutes.
- (vii) Each contractor, agent or employee shall have an affirmative duty to notify the Board and the Department if the member, contractor, agent or employee represents, in any capacity, any Member HMO or affiliated company.
- (viii) Neither the Plan Manager nor any member of the Board shall personally represent another person or entity for compensation before the Board for a period of two years following the vacation of the position, unless employed by an agency of state government.
- (ix) All contracts entered into for services after January 1, 2006, shall be accompanied by a disclosure form requiring the vendor to disclose any relationships, financial or otherwise, with the Plan Manager or member of the Board, and placing the vendor on notice of the conflict of interest applicable to contractors, agents or employees of the Plan, including the limitation on gifts.
- (x) Any breach of conflict of interest, post-employment restrictions, other ethics policies or suspected fraud or compromise of public trust by the Plan Manager or members of the Board shall be reported by the Plan Manager to the Chair of the Board immediately upon discovery. If such breach constitutes potential criminal activity, the full circumstances shall also be reported by the Plan Manager to the Department of Financial Services, Division of Insurance Fraud within 48 hours of discovery.

Form 3.35

Fiduciary Obligations Form

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Date: _____