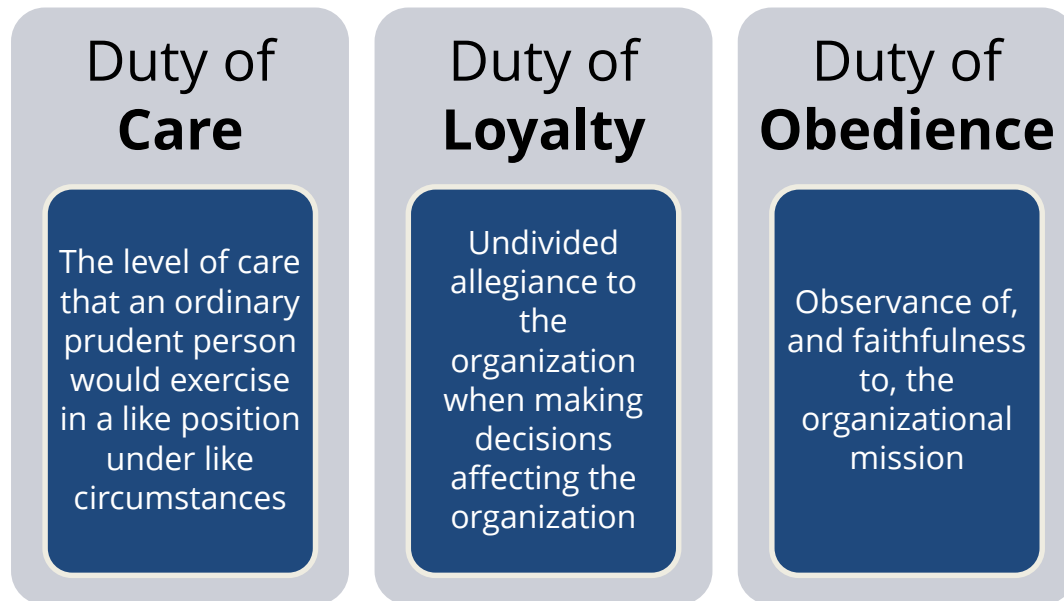


# Conflict of Interest in Rural America and the Board of Directors Role

Jacqueline C. Leifer, Esq.  
January 9, 2019

# BOARD'S FIDUCIARY DUTIES

- Board owes Fiduciary duties to the health center:



# TRADITIONAL FIDUCIARY DUTIES

- Safeguarding the Duty of Loyalty
  - Bylaws or other written board-approved policy: prohibit *actual conflicts of interest or the appearance of conflicts of interest* by board members, employees, consultants and those who furnish goods or services to the health center
  - “Standards of Conduct”
    - Define “conflict of interest” and requirements for disclosure and recusal of conflicts of interest
      - Note: Federal procurement rules provide specific standards when Federal funds support purchase or lease of goods and services
    - Address confidentiality, nepotism, gifts, gratuities
    - Specify consequences of violations

# HRSA COI POLICY

- **HRSA Federal Financial Assistance Conflict of Interest Policy**
  - November 16, 2017
  - 45 C.F.R. § 75.112 Conflict of interest
    - (a) HHS awarding agencies must establish conflict of interest policies for Federal awards. The non-Federal entity [“grantee”] must disclose in writing any potential conflict of interest to the respective HHS awarding agency or pass-through entity in accordance with applicable HHS awarding agency's policy. As a general matter, HHS awarding agencies' conflict of interest policies must:
      - (1) Address conditions under which outside activities, relationships, or financial interests are proper or improper;
      - (2) Provide for advance notification of outside activities, relationships, or financial interests, and a process of review as appropriate; and
      - (3) Outline how financial conflicts of interest may be addressed.

---

# Identifying Potential Conflicts of Interest

# CONFLICT OF INTEREST DEFINED

---

“A conflict of interest arises when the employee, officer, agent, (including but not limited to any member of the governing board), any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a *firm considered for a contract.*”

See: 45 C.F.R. § 75.327(c)(1) and Compliance Manual at p.54, fn. 1.

# CONFLICT OF INTEREST DEFINED, CON'T.

---

“A significant financial interest that would directly compromise or bias professional judgment and objectivity related to the *management of federal financial assistance*.”

See: HRSA Financial Assistance Conflict of Interest Policy

# POTENTIAL CONFLICTS OF INTEREST AREAS OF CONCERN

---

HRSA's focus areas:

1. The selection, award, and administration of contracts by non-Federal entities (procurement)
2. Organizational conflicts of interest (procurement)
3. Situations that raise concerns about the appearance of a loss of impartiality (procurement +)



---

# Procurement

# STANDARDS OF CONDUCT - PROCUREMENTS

---

“The [grantee] must maintain **written standards of conduct** covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts.”

“The standards of conduct **must provide for disciplinary actions** to be applied for violations of such standards by officers, employees, or agents of the [grantee].”

45 C.F.R. § 75.327(c)(1)

# PROCUREMENTS

Element 1: "No employee, officer, or agent may participate in the **selection, award, or administration** of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. "

Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, **has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.**"

45 C.F.R. § 75. 327(c)(1).

# PROCUREMENTS, CON'T.

---

Element 2: “The officers, employees, and agents of the non-Federal entity may **neither solicit nor accept gratuities, favors, or anything of monetary value** from contractors or parties to subcontracts.”

“However, non-Federal entities may set standards for situations in which the financial interest is not **substantial** or the gift is an **unsolicited item of nominal value**.”

45 C.F.R. § 75.327(c)(1)

# HEALTH CENTER COMPLIANCE MANUAL – CHAPTER 13

The health center has and implements written standards of conduct that apply, at a minimum, to its procurements paid for in whole or in part by the Federal award. Such standards:

- Apply to **all health center employees, officers, board members, and agents** involved in the selection, award, or administration of such contracts;
- Require **written disclosure** of real or apparent conflicts of interest;
- **Prohibit individuals** with real or apparent conflicts of interest with a given contract from participating in the selection, award, or administration of such contract;

# HEALTH CENTER COMPLIANCE MANUAL – CHAPTER 13

---

- **Restrict** health center employees, officers, board members, and agents involved in the selection, award, or administration of contracts from soliciting or accepting gratuities, favors, or anything of monetary value for private financial gain from such contractors or parties to sub-agreements (**including subrecipients or affiliate organizations**); and
- Enforce **disciplinary actions** on health center employees, officers, board members, and agents for violating these standards.

# STANDARDS OF CONDUCT – ORGANIZATIONAL CONFLICTS OF INTEREST

“If the [grantee] has a parent, affiliate, or subsidiary organization **that is not a state, local government, or Indian tribe**, the [grantee] must also maintain **written standards of conduct** covering organizational conflicts of interest.”

- **Organizational conflicts of interest** means that because of relationships with a parent company, affiliate, or subsidiary organization, **the [grantee] is unable or appears unable to be impartial in conducting a procurement action involving a related organization.**”

45 C.F.R. § 75.327(c)(2)

# HEALTH CENTER COMPLIANCE MANUAL = CHAPTER 13

---

If the health center has a parent, affiliate, or subsidiary that is not a State, local government, or Indian tribe, the health center has and implements written standards of conduct covering organizational conflicts of interest that might arise when conducting a procurement action involving a related organization. These standards of conduct require:

- **Written disclosure** of conflicts of interest that arise in procurements from a related organization; and
- **Avoidance** and **mitigation** of any identified actual or apparent conflicts during the procurement process.



# ORGANIZATIONAL CONFLICTS OF INTEREST

---

Some possible items to include in your standards of conduct are:

- Identify affiliates that may, from time to time, participate in organization's procurements.
- Provide that when drafting specifications, organization personnel involved in drafting shall not draft to favor any affiliated entity (to mitigate "biased ground rules").
- Provide that in planning and conducting procurements, no affiliated organization may be permitted access to non-public information related to the procurement; and provide that to the extent such information may already be in the possession of an affiliated organization, it will (to the extent not otherwise commercially sensitive) be incorporated into the solicitation. (to mitigate "unequal access to information").

# ORGANIZATIONAL CONFLICTS OF INTEREST

---

- Provide that in evaluating offers and awarding contracts, organization personnel shall not give any preferential consideration to any affiliated organization (to mitigate “**impaired objectivity**”).
- In the event an organizational conflict, including the appearance of impropriety, cannot be sufficiently mitigated through the above methods, the affiliated company may be **barred from competing**.

---

# Appearance of a Loss of Impartiality

# APPEARANCE OF A LOSS OF IMPARTIALITY

---

Final focus area (at least addressed through the COI policy):

A potential COI is presented where the employee, officer, or agent of the grantee is involved in a particular matter involving specific parties and the employee, officer, or agent of the grantee **knows (or should know)** that:

(1) The matter is likely to affect the **financial interests** of a member of an employee, officer, or agent's household; or

# APPEARANCE OF A LOSS OF IMPARTIALITY, CON'T.

---

(2) One or more of the parties to the matter is or is represented by one of the following:

- i. A person or organization with whom the employee, officer, or agent of the grantee has or seeks a **business relationship**;
- ii. A person who is a **member** of an employee, officer, or agent's **household**;
- iii. A person who is a **relative** with whom the employee, officer, or agent of the grantee has a close personal relationship;

# APPEARANCE OF A LOSS OF IMPARTIALITY, CON'T

---

iv. A person or organization for whom the grantee's employee, officer, or agent or his or her spouse, parent, or dependent child is serving or seeking to serve as an **officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee;**

v. Any person or organization for whom the employee, officer, or agent of the grantee has, **within the last year**, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; or

vi. An organization, other than certain political organizations, in which the employee, officer, or agent of the grantee is an **active participant.**

# DIVISION OF FINANCIAL INTEGRITY

## Division of Financial Integrity's Financial Management Requirements:

“Recipients must establish P&Ps to prevent employees, consultants, members of governing bodies, and others involved in grant-supported activities from **using their positions for purposes** that are, or give the appearance of being, motivated by a desire for **private financial gain** for **themselves** or others, such as those **with whom they have family, business, or other ties.**”

- <https://www.hrsa.gov/sites/default/files/hrsa/grants/manage/fmr-guide.pdf>

---

# Disclosure Requirements



# WITHIN THE ORGANIZATION

---

- To Whom?
  - Board members
  - CEO
  - Employees
- When?
  - Timeframes?
- How?
  - Written
  - Electronic

# REASONABLE PERSON TEST

In the event that it is not readily apparent whether a conflict of interest exists, HRSA provides the following:

- To determine if a perceived conflict of interest should be addressed:
  - (1) Health Center should consider whether a **reasonable person** with knowledge of the relevant facts would question the individual's impartiality if the individual participated in the matter.
  - (2) If the Health Center concludes that the individual's impartiality would be questioned, the individual **should not participate in the matter**.

# PROCEDURES FOR ADDRESSING THE CONFLICT OF INTEREST

---

- Recusal
- Alternative Arrangements
- Best Interests of the Organization
- Pervasive Conflicts of Interest

# HRSA COI POLICY – DISCLOSURE TIMING

- Where federal support is involved, “...NFEs [grantees] must provide to HRSA written disclosure of potential COIs, as applicable, **within 30 calendar days** of discovery of the potential COI, and in accordance with the terms and conditions of their award.”
- “Pass-through entities (including states) must require that **subrecipients disclose** potential COI...to them **within 30 calendar days of discovery** of the potential COI and in accordance with the terms and conditions of their award. In turn, **pass-through entities must disclose** subrecipient COIs to HRSA **within 30 calendar days** of receiving **notification** of a potential COI by the subrecipient unless HRSA approves, at the request of the pass-through entity, **a longer period of time to resolve** and/or disclose the COI.”

# HRSA COI POLICY – DISCLOSURE CONTENT

---

- “All COI disclosures, including potential COI disclosures, must be **in writing**, from the Authorized Organization Representative (AOR) of the [Health Center]. Such disclosures should be sent by **email communication**.”
- “For the potential COIs, [Health Center] must provide HRSA with any information regarding its **plan** and/or measures taken **to eliminate, mitigate** or otherwise **resolve** the COI.”

# HRSA'S ACTIONS –COI POLICY

---

“HRSA will review COI disclosures and plans/measures identified by [Health Centers] to resolve the COI. HRSA will ordinarily respond to this communication **within 30 calendar days** of the disclosure, unless a longer period of time is necessary due to the complexity of the situation.”

---

# Getting Ready for a Review

# COMPLIANCE MANUAL

---

- Communication:
  - “The health center has mechanisms or procedures for **informing** its employees, officers, board members, and agents of the health center’s standards of conduct covering conflicts of interest, including organizational conflicts of interest, and for governing its actions with respect to the selection, award and administration of contracts.”
- Records:
  - “In cases where a conflict of interest was identified, the health center’s procurement records **document** adherence to its standards of conduct (for example, an employee whose family member was competing for a health center contract was not permitted to participate in the selection, award, or administration of that contract).”



# RELATED CONSIDERATIONS

## CONFLICTS OF INTEREST

---

- The health center determines the appropriate methods for employees, officers, board members, and agents to disclose real or apparent conflicts of interest, as it applies to the procurement process.
- The health center determines how to inform its employees, officers, board members, and agents about the health center's standards of conduct (for example, [inclusion within operating procedures](#) or [staff manuals](#), as part of [disclosure forms/statements](#), employee and board orientations or trainings).
- The health center determines whether to establish additional standards of conduct that are not addressed by Federal requirements.
- The health center determines whether to set standards that define when a financial interest is not substantial or a gift is an unsolicited item of nominal value and, therefore, could be accepted by employees, officers, board members, and agents of the health center.

# AND NOW THE SVP...

- Documentation containing the health center's standards of conduct (e.g., articles of incorporation, bylaws, board manual, employee manual, standards of conduct, policies and procedures, disclosure forms)
- Sample of written disclosures with respect to real or apparent conflicts of interest completed by officers, employees, board members and agents of the health centers (e.g., forms, signed statements, employment contracts)
- Sample of supporting documentation for one to two procurements supported with Federal funds from the past 3 years (can be same sample as used for Contracts and Subawards)
- Agreements with parent corporation, affiliate, subsidiary, or subrecipient organization (if applicable)

# THE 5 D'S OF CONFLICT

1. **Define** what is a Conflict in your P's & P's, don't forget what is a nominal gift that is ok
2. **Distribute** P's & P's to employees, board members and others through appropriate means
3. **Disclosure:** have affected persons do annual disclosures of relationships that can give rise to a potential conflict
4. **Disposition:** how did you resolve the conflict or potential conflict such as recusal
5. **Document:** records showing how you determined and resolved conflicts and potential conflicts

# RESOURCES

---

- **Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (45 C.F.R. Part 75)**
  - 45 C.F.R. § 75.112
  - 45 C.F.R. § 75.327(c)(1)
  - 45 C.F.R. § 75.327(c)(2)
- **Health Center Compliance Manual**
  - Chapter 13: Conflict of Interest
- **Health Center Program Site Visit Protocol**
  - Chapter 13: Conflict of Interest