



**Standing Advisory Board Meeting
Minutes**

Date: Monday, March 25, 2019
Time: 4:00 PM
Location: 1225 “Eye” Street NW, 4th Floor, Board Conference Room or by
Conference Call
Call- in Number: 1-650-479-3208 access code: 732 901 652

Members Present: Jill DeGraff, Laurie Kuiper, Billy MacCartee, Claire McAndrew, Dania Palanker

Members Absent: Chile Ahaghotu, Dave Chandrasekaran, Kevin Dougherty, Chris Gardiner

I. **Welcome, Opening Remarks and Roll Call**, *Claire McAndrew, Vice Chair*

Ms. McAndrew called the meeting to order at 4:03 p.m. A roll call of members present confirmed that there was a quorum with five members present:

This meeting has been called at the request of the HBX Executive Board Ad Hoc Committee on Legislation (Committee). The HBX Executive Board created this Executive Board committee to review and consider changes needed to the HBX enabling legislation. The Committee reviewed the HBX enabling legislation and discussed three areas of needed updates and has asked the Standing Advisory Board to provide input on these areas.

The District enacted the Health Benefit Exchange Authority Establishment Act of 2011 on March 2, 2012. It is the enabling legislation that created the DC Health Benefit Exchange Authority to implement the ACA in the District. Seven years later, and with a change in Administrations at the Federal level, it is time to review the law and make any needed updates.

HBX staff members are with us today to walk us through the recommended areas for change. Today’s meeting will focus on understanding the areas needed for input, the legislative history of

the current statute, and potential changes. We will then convene next week on April 1, 2019 at 4:00 p.m. to continue discussing changes to settle on areas of consensus. Then, we will convene a third meeting to vote on SAB's input on proposed changes to the enabling legislation.

II. Approval of Draft Agenda, *Claire McAndrew, Vice Chair*

It was moved and seconded to approve the draft agenda. The motion passed unanimously by voice vote.

III. Approval of Minutes, *Claire McAndrew, Vice Chair*

It was moved and seconded to approve the minutes of the January 30, 2019 meeting. The motion passed unanimously by voice vote.

IV. Discussion Item

- a. Discuss Clean Up of DC Health Benefit Exchange Authority Enabling Legislation – *Purvee Kempf, HBX Staff*

Ms. Kempf said she was reviewing the document called “Discussion Points for HBX Clean-Up Legislation (located [here](#)). These are the three areas that the Committee determined required review and solicited the input of the Standing Advisory Board (SAB).

The first area is revising anything in the enabling legislation (our statute) that refers to the ACA. The way the legislation is set up is often to refer to the requirements of the federal act. The federal act is defined by referring to the technical name of the two acts comprising the ACA and any amendments or guidance pursuant to the federal act. That means that if there are major amendments made to the federal act that amended major parts of the federal act might vitiate, for example, HBX' existence and the requirements of the ACA as they apply to our markets. Also, there are lawsuits out there that are challenging the entire ACA. So if there was Congressional agreement to repeal major components of the ACA, those requirements no longer exist. However, the District does have the right to have its own requirements, thus requiring cleanup of our statute. To be sure, there are certain aspects of the federal act that if repealed at the federal level, the District would be unable to enact, such as the federal tax credits. However, the District can require an exchange to exist and consumer protections for health insurance products. The purpose of this review is to maintain the status quo, not change anything.

Mr. MacArtee said that the ACA has been good for the District, but it is not perfect. He asked if the federal law were changed in other ways, what would we be able to do. Ms. Kempf said we are working with the Office of the Attorney General to get the language right with respect to this project. If the federal law changed, it depended on how it was changed; some things in our law

might be preempted if our statute was in conflict with it, or we might need to improve our law accordingly. For example, if a federal reinsurance program was created, that would apply to us.

The third area of review (skipping the second for the moment) regards independent procurement authority for HBX. The District has centralized procurement authority. However, numerous agencies have exemptions from the requirement to use the centralized agency. HBX has a time-limited exemption. An exemption for HBX is necessary because of the very fast timelines we have to get things implemented, and we need an exemption from the conservative timelines of the centralized process. There are many, and ever-changing, federally-required IT functions, and others, that require swift implementation.

There are two parts of the local Procurement Practices Reform Act that all agencies must comply with: any contract over \$1 million, and any multi-year contract, must go through DC Council.

HBX has had temporary exemptions, most recently enacted for five (5) years. Some people at Council have asked whether we should go ahead and ask for a permanent exemption. Since we are doing cleanup legislation, it is prudent to clean up all issues of which we are aware. Besides, we need to demonstrate continually to the federal government that we have the ability to fulfill with the requirements of federal law, and part of demonstrating consistency and stability includes having independent procurement authority.

The second area of review on the Discussion Points handout is that of conflict of interest provision in our [statute](#). The specific section is 31-3171.10. Council decided to make HBX a quasi-public/private partnership agency. It has a governing Executive Board, comprised of seven voting and public nonvoting members (the heads of the Department of Insurance, Securities and Banking, Department of Health Care Finance, Department of Human Services and Department of Health). The voting members are District residents with expertise in a variety of related areas, such as (A) Individual or small employer health care coverage; (B) Health benefits plan administration; (C) Health care finance; (D) Administering a public or private health care delivery system; (E) Purchasing health plan coverage; (F) Prior experience in commercial insurance management; (G) Actuarial analysis; (H) Health care economics; (I) Human services administration; (J) Health care consumer interest advocacy; (K) Public health programs; or (L) Enrolling individuals into health benefit plans. These members are nominated by the Mayor and approved by Council.

Across the country, as well as here in the District there was concern that these newly-created animals and their Boards (and staff) be free of conflicts in order to further the goals of transparency and affordable, meaningful coverage. At the time our statute was passed, there did not exist a comprehensive code of conduct in District law, so one was included in our statute.

Our statute's conflict of interest provisions are as follows:

Dc. Code § 31-3171. Conflicts of interest.

(a)(1) A member of the executive board or of the staff of the Authority shall not be employed by, a consultant to, a member of the board of directors of, affiliated with, or otherwise a representative of, a health carrier or other insurer, an agent or broker, a health professional, or a health care facility or health clinic while serving on the board or on the staff of the Authority.

(2) A member of the executive board or of the staff of the Authority shall not be a member, a board member, or an employee of a trade association of health carriers, health facilities, health clinics, or health professionals while serving on the board or on the staff of the Authority.

(3) A member of the executive board or of the staff of the Authority shall not be a health professional unless he or she receives no compensation for rendering services as a health professional and does not have an ownership interest in a professional health care practice.

(b) No member of the executive board or of the staff of the Authority shall, for one year after the end of the member's service on the board or employment by the Authority, accept employment with any health carrier that offers a qualified health benefit plan through the exchanges.

(c) No member of the executive board shall make, participate in making, or in any way attempt to use his or her official position to influence the making of any decision that he or she knows or has reason to know will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on him or her or a member of his or her immediate family, or on either of the following:

(1) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating \$250 or more in value provided to, received by, or promised to the member within 12 months prior to the time when the decision is made.

(2) Any business entity in which the member is a director, officer, partner, trustee, or employee, or holds any position of management.

Ms. Kempf noted that subsection (a) is quite broad, dealing with prohibited affiliations and membership. Subsection (b) deals with post-service (Board member) or post-employment (staff)

prohibitions. Subsection (c) is a more nuanced, no financial interest provision. These three provisions were put into place to ensure that HBX got off the ground with no questions about how decisions were being made.

Pedro Briones, HBX Attorney Advisor, reviewed the legislative history regarding HBX' conflict of interest provisions.

Quick background

Then-Council Member Catania introduced the bill to create HBX on January 4, 2011. The bill was referred to two Council Committees: 1) Committee on Health; and 2) then-Committee on Public Services & Community Affairs. A public hearing was held in February 2011. Our statute was enacted on January 17, 2012 and became effective March 2, 2012.

Legislative history: It includes three primary sources from 2011: a published report by each of the two Committees and a video of a Public Hearing by the Committee on Public Services & Community Affairs.

October 24, 2011 Report of the Committee on Public Services & Consumer Affairs

The report almost immediately jumps into a conflict of interest discussion. The Committee recognized that the District residency requirement and conflict of interest provisions may make it difficult to populate the board. Specifically, the report states that the

Committee is cognizant of the difficulties that these provisions may present in finding qualified individuals to serve. However, the Committee believes that these provisions are necessary for the Exchange in its formational years to make sure that the integrity of the Exchange is not questioned.

This discussion is significant because HBX's statute was enacted and became effective prior to the Ethics Act which established the Board of Ethics and Government Accountability (BEGA) effective Apr. 2012; and BEGA's post-employment provisions adopted in 2014.

The October 24 report also includes a number of written statements from interest groups, including:

- Families USA, which opposed having insurers, carriers and their representatives serving on the Board
- Brokers and Insurers who also supported representation on the Board; and
- UnitedHealth Group and CareFirst which testified in favor of broad representation on the Executive Board, including participation from health insurance carriers.

The report also included the American Health Benefit Exchange Model Act, prepared by the National Academy of Social Insurance.

November 10, 2011 Report from the Committee on Health

This report is noteworthy because it includes more discussion by Council Members themselves. The report cites a District-wide survey collected by the Mayor's Health Reform Implementation Committee (HRIC). The feedback from survey respondent included:

- Support for independent Executive Board with separate advisory board of stakeholders;
- Approximately 70% supported participation of primary care doctors and social service professionals in leadership roles;
- More than 80% said no insurance brokers on the Executive Board; and
- More than 90% no health industry lobbyists in leadership roles.

The report also includes the earlier written statements by the same interested parties from the October 24, 2011 Report of the Committee on Public Services & Consumer Affairs.

A key takeaways from the legislative history is that the majority of Council Members, especially Council Member Catania who chaired the Health Committee, believed the Executive Board should be independent and have no connection to the health insurance industry, including carriers, agents, and brokers. The legislative history also notes that HBX would be in its formative years and conflict of interest provisions were necessary.

Separately, at the same time, Council was considering a broad, District-wide Code of Conduct. However, this code had not been adopted when HBX was created.

Ms Kempf said it was important for the SAB to know the legislative history. The reason for discussing this topic is that now that HBX is no longer in its formative years, HBX wanted to revisit the conflict of interest provisions. The areas of discussion to focus on are: 1) are the five prohibitions on Executive Board membership based on affiliation with a health carrier or other insurer, an agent or broker, a health professional, and a health care facility or health clinic are still necessary; 2) whether the one year across the board post-employment restriction should be in place; and 3) whether the specific financial conflict of interest should be in place or changed in any way. Ms. Kempf said it is important to remember that now the District has a comprehensive code of conduct in place that applies to all Executive Board members and staff, which was not the case when our statute was enacted. The District comprehensive code of conduct includes provisions relating to financial conflict of interest and post-employment restrictions.

Ms. McAndrew thanked the staff for the background. She thought it was important to remember context and that stakeholder context had also changed so the discussion needs to be within the present context. She also asked what the ask was – was it to replace the conflict of interest provisions in our statute with the District Code of Conduct? Ms. Kempf said no, there was not a cut-and-paste proposal of legislative language on the table. The idea is to talk through the existing conflict of interest provisions in our statute and see if modifications are desired. Staff will also discuss what other states do on conflict of interest. With respect to our statute’s post-employment restriction, Ms. Kempf would recommend that they be replaced with what is in the Code of Conduct, as they are more precise, easier to understand, and enforceable. There is a question as to whether our statute’s post-employment restrictions are so broad they may not be enforceable, as expressed by our Office of Attorney General (OAG). For example, under our statute, a Board or staff member could not move to California and go work for a carrier that that sells through California’s exchange.

On the financial conflict of interest provision in our statute, which applies to Board members only, some of the language is inconsistent with the Code of Conduct and is hard to operationalize. No conflict of interest provision is useful unless it can be operationalized.

Jennifer Libster, HBX Attorney, reviewed the relevant provisions of the comprehensive District Code of Conduct, and how it is operationalized.

On the first provision in our statute with the broad prohibition regarding affiliations and membership, Ms. Libster said the Code of Conduct has provisions that employees and board members shall not have a financial interest that conflict with conscientious performance of duty, shall not take actions creating appearances they are violating law or ethical standard; shall not engage in outside employment or activity that is incompatible with full and proper discharge of duties and responsibility, and shall not maintain financial or economic interest if there is any likelihood that such entity might be involved in an official government action or decision taken or recommended by the employee. The Code of Conduct does not have an outright bar regarding any particular entity, but rather looks at the conduct engaged in the by the Board member or employee.

The Code also has provisions dealing with financial conflicts, such as annual filing and disclosure requirements. The disclosure requirements enable a comprehensive enforcement mechanism when Board of Ethics and Accountability (BEGA) discerns impermissible financial conflicts (and other conflicts as well). BEGA does not have jurisdiction over our statute’s conflict of interest provisions.

In response to a question from Ms. McAndrew, Ms. Libster said the Code of Conduct is under the jurisdiction of the BEGA. BEGA, an independent agency, has a Board, ethics officers and a

General Counsel. Ms. Kempf added anyone can self-report a violation, or anyone can file a complaint with BEGA that will be investigated. BEGA can render opinions, and they are published online. BEGA has the ability to impose civil penalties such as fines. Criminal matters must be referred to the OAG. Any employee or Board member can ask BEGA for an opinion with regard to a situation and get advice before deciding to proceed with any matter that might involve an ethical issue.

On the post-employment prohibition, the Code of Conduct has comprehensive provisions on the issue that provide for either a one, two year or lifetime prohibition on acting on certain matters. The Code of Conduct does not prohibit anyone from taking a particular type of job. The Code of Conduct addresses “particular matters” that an employee or Board member worked on that triggers the cooling off period. A lifetime prohibition would apply, for example, to work on litigation before the agency. The employee or Board member that worked on such a case could never work for the opposite side of that case. Also, there is a cooling off period for the employee or Board member to come before the agency in a representative capacity.

BEGA renders opinions that delineate what an employee or Board member cannot do when moving to another job, for example in our case, going to work for a navigator or vendor.

The Code of Conduct also has provisions dealing with employees who are in transition to working, for example, one of our vendors, which prevent the employee’s participation in certain things that might create a financial conflict.

On financial conflicts in general, the Code of Conduct has provisions that apply to the Board. As noted, they are not the same as what is in our statute.

With respect to gifts, the Code of Conduct allows nominal gifts of \$10. Our statute allows up to \$250, an obvious conflict.

Ms. McAndrew asked about the Code of Conduct’s applicability. It applies to HBX at all times.

There was a discussion as to whether the Code of Conduct more or less strict than our statute’s conflict provisions. In the gift case, the Code of Conduct was much stricter. Ms. Kempf said that the obvious place where our statute is stricter was in the first class of or state’s broad prohibition on membership in or affiliation with health care professionals, health care facilities, or health care clinics. She noted that in many states, there is a similar prohibition because it is based on a model law.

- MD - prohibits membership and affiliations with carrier, brokers, and third-party administrators, but not health care professionals, health care facilities, or health care clinics.

- CT, CA – similar to DC
- RI, OR – their exchanges are within larger state agencies so their state code applies
- MA – prohibits carrier, plus state code applies
- MN – prohibits navigators, carriers, and brokers
- NV – state Code of Conduct

Ms. Kempf said that obvious entities that we need to exclude are carriers and brokers, because we certify them to participation on the exchange. For carriers that do not participate on the exchange, we assess them for our operational dollars.

Ms. Kempf said because of the expertise we desire, our prohibition on health care professionals, health care facilities, or health care clinics is problematic. When you bar all these entities, we are left with a slim pool of potential Board members. Our Board is unpaid; most members have day jobs.

Second, the post-employment bar may have recruiting implications, particularly for staff. Also, the existing provision creates litigation risk.

Last, the financial conflict provisions differ from the Code of Conduct and causes confusion. The HBX ethics counselor, or the General Counsel, could give her or his opinion as to whether any particular situation is acceptable. However, HBX is not the final arbiter of these matters. A BEGA opinion would be required to be safe. And, BEGA has a structure that is fully operational that also is able to ensure that its opinions are consistent over time. Ultimately, the OAG may be in charge.

She invited discussion by SAB members.

Mr. MacArtee said he understood. Ms. DeWitt said while she understood the revolving door issue, she was concerned about our statute creating a situation that makes us miss out on an effective pool of talent. She wondered how other states handled attracting good talent for public service, but not constrain their ability to earn a living after that service. With respect to health care professionals, she thought it was hard to get any provider's voice heard in many forums due to time issues and we should not create extra barriers to their participation. Generally she thought providers wanted to open access to coverage. To inform the discussion, she thought having other points of view regarding conflict of interest would be beneficial.

Ms. McAndrew said the discussion was theoretical for her. She asked for examples of problems filling Board openings. If that was an issue, it should be addressed and SAB members should use their time and energy, and networks, to help fill any openings. She was reticent to change the conflict of interest provisions. She thought the landscape had changes since the ACA, and many

issues facing consumers today are due to the high cost of both health care and insurance. Providers, including health care systems, as well as individual or group practitioners, and insurers often are pulling against one another over regulation and money. Having one side of the equation (providers) without the other one (insurers) participating was not as good as having neither participate. With respect to the post-employment bar, our statute says the only entity one could not work for was insurers. Other related lines of work are available. If the only reason people are coming to HBX to work is to work for an insurer later that concerned her.

Ms. DeWitt thought we should not have policy made by people who are not immediate stakeholders. She did not want to see the DC Health Link become a proxy in the payments wars. On the other hand, but she thought we had an opportunity for constructive engagement; she did not want to discourage public service.

Ms. Palanker said it was vital that government entities have conflict of interest provisions. It is clearly not desirable to have insurer participation on the Board where self-interest could be at play. She thought that insurers were obvious to exclude. Also, we live in a city where there is ample talent available that is devoid of conflicts. With respect to providers, she noted the CEO of a large hospital is very different from a small provider. And, we are about coverage and access to care, not health care.

Ms Kempf said she heard for more information that would help the SAB discussion:

- What are the functions of HBX? What types of decisions do Board members make?
- Board member and our experiences; what issues have we seen? Who is barred?
- Other jurisdictions and how they handle the issue.
- General idea of revolving door and one year bar.

Ms. Kempf said staff would drill down and get more information. There are a lot of parts to this discussion; staff would try to structure the discussion piece by piece. The discussion now is about the conflict issue and not the other pieces Ms. Kempf presented at the beginning of the meeting.

Next week's meeting would be further discussion and there would not be any voting.

Ms. McAndrew thought it might be helpful to talk to California and Connecticut how they deal with the conflict issues and practicing health care professionals.

V. Public Comment

No public comment was proffered.

VI. Closing Remarks and Adjourn, *Claire McAndrew, Vice Chair*

The meeting was adjourned at 5:37 p.m.