Standing Advisory Board Meeting
Minutes

Date:	**Wednesday, April 24, 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: 730 248 392**

Members Present: Dave Chandrasekaran**,** Kevin Dougherty, Chris Gardiner, Laurie Kuiper, Claire McAndrew
Members Absent: Jill DeGraff, Billy MacCartee, Dania Palanker

I. **Welcome, Opening Remarks and Roll Call**, *Chris Gardiner, Chair*

Mr. Gardiner called the meeting to order at 4:10 p.m. A roll call of members confirmed that there was a quorum of the Standing Advisory Board (SAB) with five members present.

Mr. Gardiner announced that our colleague Chile Ahaghotu, who has served with us on this Standing Advisory Board for a number of years, has had to resign his position as he has moved outside of the District. Chile is a doctor and he has been a valuable and thoughtful participant on our Board. We thank him for his service and wish him well.

HBX staff will be moving forward to fill the vacancy and will share the vacancy announcement when it is available so that we can help spread the word.

Today's meeting is our third to review and consider changes needed to the HBX enabling legislation. As a reminder, the HBX Executive Board Ad Hoc Committee on Legislation asked for our input on this proposal.

This meeting will continue the discussion from our April 1st meeting regarding the conflict of interest provisions. As planned at our last meeting, HBX staff has returned with options to consider regarding the specific conflict of interest restrictions for Board members and staff related to health professionals, health facilities, and health clinics.

II. Approval of Draft Agenda, *Chris Gardiner, Chair*

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

III. Approval of Minutes, April 1, 2019 meeting – *Chris Gardiner, Chair*

It was moved and seconded to approve the minutes of the April 1, 2019 meeting. The motion passed unanimously by voice vote.

IV. Discussion Item

a. Continued Discussion Regarding Clean Up of the DC Health Benefit Exchange Authority Legislation, Conflict of Interest Provisions -- *Purvee Kempf, general Counsel & Chief Policy Advisor*

Ms. Kempf presented options related to section (a) of the current conflict of interest statute, for members to react. Section (a) deals with prohibitions related to Board members and staff and their affiliation with specific entities like insurers, brokers and agents, health care professionals, health facilities, and health clinics and the trade associations.

Ms. Kempf first presented baseline changes that would be useful for cleaning-up the legislative language regardless of whether the other options were considered or adopted. The baseline changes include: striking out "affiliated with" and "otherwise a representative of" since these terms are not defined. Also, there is no clear mechanism for a Board member or staff to determine whether they will run afoul of this statute with any outside activity or trying to join the organization and would be prohibited from doing certain activities. This particular topic is not within the jurisdiction of the Board of Ethics and Government Accountability (BEGA) so it has no authority to interpret. BEGA is the agency that generally provides binding ethics advice. In situations that have arisen for people with this issue, staff has sought input from the Office of the Attorney General (OAG). In one particular case, OAG had difficulty with defining "affiliated with" and there was only one case defining "affiliated with" that was not applicable, and OAG just applied the definition found in the Black's Law Dictionary. The term "otherwise a representative of" did not come up as an issue in that particular case. Additionally, OAG does not have a mechanism for interpretation that would be binding.

Since the terms are vague and there are no processes to define them, unless we come up with a definition, one suggestion is to delete these phrases and replace with terms to address the concern and intent of the terms with "lobbyist." The term "lobbyist" is defined in District law and lobbyists are required to be registered; there is a bright-line that everyone can discern and would be clearly understood.

Ms. Kempf indicated the other language in the statute would remain under this option. She also clarified the term "consultant" is also not defined, but still included in the option as the term is easier to discern than the term "affiliated with, or otherwise a representative of" is replaced with "a lobbyist for." Mr. Chandrasekaran inquired whether or not it would make sense to add "paid" before the word "consultant." Ms. Purvee stated that it would clarify the meaning and added that if OAG looked into this issue, it would likely look into the type of consultation.

Mr. Chandrasekaran also suggested "paid representative" or having "financial interest in" or "substantial financial interest in" for people that may have health care as part of their mutual fund. Ms. Kempf reminded everyone that the BEGA conflict of interest still applies. There are financial conflicts that would make being on staff or the Board a conflict. There are requirements for Board members and certain staff to file financial disclosures to ascertain if there will be specific conflicts. This is the process to ascertain if there are conflicts.

Mr. Chandrasekaran clarified that adding a "substantial financial interest in" would capture people that own, for example, 49% of stock of the entities we are discussing. Ms. Kempf noted that was a new requirement, bot modifying an existing requirement. Mr. Chandrasekaran indicated that his suggestion is to replace "affiliated with, or otherwise a representative of" with "substantial financial interest" and keep the remaining language. He indicated that this would be a front end prohibition for owners or those with a substantial financial interest. Ms. Kempf asked what he considered "substantial." Mr. Chandrasekaran indicated that adding subjective language is not ideal, but it is language that is being used and would capture the original intent for the two terms to be stricken. Debbie Curtis, HBX staff, said she thought it was a stretch to interpret "affiliated with, or otherwise a representative of" to mean stock ownership.

Ms. Kempf provided the Black Law Dictionary's definition of "affiliated with" under the OAG opinion. She said the definition did not encompass stock ownership. Unless stock ownership brings governing authority, which would make the person "affiliated with," it is not captured within the definition. In certain circumstances, Board members would have to recuse themselves from votes. Mr. Chandrasekaran indicated the does not feel comfortable with the current recusal process and his preferred notion is to have it clear cut on the front end and minimize someone having a conflict and having to recuse. To simply remove "affiliated with, or otherwise a representative of" and replacing with "a lobbyist for" does not capture those with a financial interest and including the "substantial financial interest" term would capture the concept of the

original language, while making it more narrow and thus opening up the potential pool of appointees.

Pedro Briones, HBX staff, provided BEGA's *Ethics Manual* language (p. 37) on stocks and other business interests and conflicts of interest. Ms. Kuiper indicated that adding Mr. Chandrasekaran's proposed language because of his issues with the recusal process is not a reason for adding the "significant financial interest" term. Mr. Chandrasekaran said that the *Ethics Manual* language was clear. He opined that regardless of the recusal process, he is suggesting a cleaner way for prohibiting individuals we are suggesting not be on the Board. He indicated that adding "significant financial interest" is relevant and he is more comfortable with adding this term than the option presented.

Ms. Kempf provided some clarifying points - the statute was created when a comprehensive code of conduct did not exist and there was no baseline. There is now some overlap with the code and HBX statute. The clean-up language is to have a clear way for people to have guidance and way to get binding advice so they will not get in trouble down the line. Ms. Kempf indicated that it is not just about Board members, but also employees. They get questions about these terms; for example if someone participates in a Kaiser Permanente fundraiser running event, does this mean you are affiliated with a carrier? She said it is the term "affiliated with" has raised the most questions, such as the example given.

Ms. McAndrew asked if there was anyone that is not on the Board or staff now that would be able to serve if the language was changed. Ms. Kempf responded that it is uncertain under the OAG definition. Ms. McAndrew asked whether owners would already be prohibited based on the comprehensive code of conduct. Mr. Briones indicated that an owner would have an interest in the business and is encompassed within guidance regarding the comprehensive code of conduct. Ms. Curtis indicated that the plain reading would not allow any owner of an insurance carrier to be on the Board.

Mr. Briones indicated that "affiliated with" under the definition of Black's Law Dictionary is broad and would be a facts and circumstances test every time. Mr. Chandrasekaran questioned the concern about adding "substantial financial interest" because it would encompass those with financial interests but not the person running in a fundraiser.

Ms. Kempf indicated that the language in the comprehensive code of conduct is clear and uses defined terms. The problem is adding a new term, "substantial." She recommended trying to avoid another undefined term and they would look to see if there was a current definition. Another option is to add the definition of the Black's Law Dictionary of "affiliated with" but the facts and circumstances test does not go away. Mr. Chandrasekaran indicated that the code of conduct definition is adequate and referential, but the option presented does not solve adequately

or narrow down the substantial financial interest, or ownership, concerns. Right now, he feels the option presented is a significant change and removes some significant protections that are in the HBX statute.

Jenny Libster, HBX staff, provided language in the implementing BEGA regulations that prohibits maintaining a financial interest in outside entities if any likelihood of influencing government action exists. Mr. Briones provided the comprehensive code of conduct language around interests of employees in real estate, stocks and other property. Mr. Gardiner asked about owning mutual fund shares and Ms. Libster responded that in past BEGA interpretations, mutual funds have not been considered a prohibited financial interest.

Mr. Chandrasekaran indicated that interpretation would appease his concerns and recommended referencing this language. He clarified he would be okay with the suggested edit of striking "affiliated with" and "otherwise a representative of" and referencing the BEGA regulation language and also adding "a lobbyist.

Ms. Kempf indicated that staff would work with this suggestion for the SAB's consideration.

Ms. Kempf presented the next option with adding "third party administrator" (TPA). Adding this term is consistent with Maryland's conflict of interest and recognizing the role that TPAs have in this Maryland, Virginia, and District area. TPAs sit between the brokers and carriers and generally have the same financial interest as carriers and brokers, and is the reason to include this term. Ms. Libster added that TPAs frequently stand in the stead of an insurance carrier or self-funding employers and TPAs do the same functions as an insurance carrier. Ms. McAndrew and Mr. Chandrasekaran agreed with adding "third party administrator" and no members indicated any opposition to this change.

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Ms. Kempf presented the remaining clean-up suggestion in 2) with deleting "a member" to capture situations in which professionals such as nurses or doctors retain membership in organizations to get access to continuing education or other membership benefits, but are no longer working in a professional capacity or are retired. Mr. Chandrasekaran agreed with the change, but also suggested capturing senior leadership positions in associations that are not employees of trade associations. Mr. Dougherty indicated that we would want people to reveal they were a member, but it may not preclude them from serving on the Board or being on staff. Mr. Chandrasekaran added that elected presidents may not be on a board or be paid, but would have a substantial conflict of interest. Mr. Dougherty clarified that transparency is key and knowing people have memberships through Board applications, but that it would not necessarily preclude someone from serving on the Board being on staff. Mr. Dougherty indicated he aligns with much of Mr. Chandrasekaran's points. Ms. Kempf will look into finding the appropriate term.

Ms. Kempf turned to additional areas related to retaining prohibition on all health professionals, health facilities, and health clinics. In the last call, there were viewpoints of where to loosen or keep the existing language. Based on this conversation, Ms. Kempf is presenting some options to have further conversation. She also clarified that any changes discussed in one or two above would be made to these options and would not require another discussion related to the "affiliated with" issue.

The first option is differentiating between the financial drive and financial influence versus a mission driven organization by adding "for profit" in front of facility and clinics. Mr. Gardiner indicated that this change may be cutting out a lot of people that may be helpful as members of the Board. Ms. Curtis indicated that this potential change would narrow who is being cut out. Ms. Kempf clarified that the change would allow affiliation with a not-for-profit facility or clinic to serve; the current language prohibits any affiliation with a facility or clinic from serving on the Board or staff.

Ms. Kempf presented option two to allow health professionals and health clinics to serve on the Board or be on staff. The comprehensive code of conduct would still apply. This drafted change was to address the SAB's concern with large hospital health systems in the District.

Option three was to address the SAB's comments related to job titles and this change would continue the prohibition on people running organizations versus people who do not. This option retains the prohibition against carriers, brokers, and TPAs. In the second one with health professionals, health facility, and health clinics, we are continuing the prohibition on employment and whatever we come up with for financial conflict of interest, we are allowing consultants and board members. Mr. Chandrasekaran indicated that "governing boards" are already defined in the IRS Code. Ms. Kempf indicated that staff will look into this definition as a way to make the terms clearer.

Ms. Kempf indicated that these options are based on previous SAB conversations and ways to have more health care expertise on the Board, but not allow individuals with conflict of interest to serve.

Ms. McAndrew indicated that she prefers the original language because of the financial conflicts when providers sit on the Board. She indicated there is a body of research about issues in non-profit hospitals and the conflicts that arise. She would be unable to support any of these options.

Mr. Chandrasekaran thinks having a health care expertise make sense, but the easiest way it for them to join this SAB, but for the Executive Board there may be a way to navigate any conflicts of interest. He provided his personal experience of an unpaid board member of a nonprofit health

care provider as an example of no financial interest but with whom he still has concerns. After going through this thought exercise, he was uncertain as to any situation allowing for this because Executive Board-adopted policies around QHPs would apply to any health care provider.

Staff will contact members regarding dates for a meeting next week. Mr. Gardiner indicated that the goal is to make recommendations to the Executive Board at its May 8 meeting if possible.

Staff may look at two meeting dates because the SAB will need to discuss the next open enrollment period for next year and this issue is something that the SAB will want to provide to the Executive Board.

V. **Closing Remarks and Adjourn**, *Chris Gardiner, Chair*

The meeting was adjourned at approximately 5:22 p.m.