

Policies in Practice: Complying with the CSBG Organizational Standards  
**Webinar Three: Conflict of Interest Policy**

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**Webinar One:**  
**Whistleblower Policy**  
Thursday, February 13, 2020



**Webinar Two:**  
**Procurement Policy**  
Thursday, April 30, 2020



**Webinar Three:**  
**Conflict of Interest Policy**  
Today's Webinar



**Webinar Four:**  
**Record Retention Policy**  
Thursday, June 4, 2020



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## Agenda

- Why does my CAA need a conflict of interest policy?
- What is a conflict of interest?
- What does CAPLAW's Sample Conflict of Interest Policy cover?
- How should I use CAPLAW's Sample Conflict of Interest Policy?



## Why Does My CAA Need a Conflict of Interest Policy?

## Why Have a Conflict of Interest Policy? It's Required!

### CSBG Organizational Standard 5.6

#### Nonprofit

Each governing board member has signed a conflict of interest policy within the past 2 years.

#### Public

Each tripartite board/advisory body member has signed a conflict of interest policy, or comparable local government document, within the past 2 years.

## Why Conflicts Matter

- Funder rules
- IRS “excess benefit” rules (a.k.a. “intermediate sanctions”)
- IRS Form 990
- State law
- Governance best practices
- Public perception—public, press, donors



## What is a Conflict of Interest?

## The Bad, The Good and The Ugly



## The Bad, The Good and The Ugly

### The Bad: Prohibited Conflicts

- Basic definition: a situation in which a **covered person** or one of their **family** members has a **personal or financial interest** that compromises or could **compromise** the covered person's **independence** of judgment in exercising their responsibilities

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## The Bad, The Good and The Ugly

### The Bad: Prohibited Conflicts

- Actual financial conflict of interest (*Board w HS*)
- Compensation and employment (*All Boards*)
- Board membership (*All Senior Staff*)
- Loans (*All*)
- Participation in contracts (*All*)

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## The Bad, The Good and The Ugly

### The Bad: Prohibited Conflicts

- Organizational Conflicts of Interest (*All*)
- Gifts (*All*)
- Federal Employees (*All Boards*)
- Diversion of CAA Resources (*All*)

## The Bad, The Good and The Ugly

### The Good: Not a Conflict

- Provision of services to covered person or family member in charitable class
  - Must meet all eligibility criteria
  - No preferential treatment; similar services to others
  - Interested party not involved in decisionmaking
- Expense reimbursements
  - Reasonable, necessary, documented
  - Pursuant to an approved plan

## The Bad, The Good and The Ugly

### The Ugly: Cleansable Conflicts

- Actual Financial Conflict of Interest Exception
  - Board Member or Immediate Family has existing or potential compensation arrangement with entity that transacts with CAA; and
  - Transaction does not affect the compensation arrangement or the individual's prospect of employment or promotion
- Interested board member should disclose and recuse themselves from discussions and votes on the transaction

## The Bad, The Good and The Ugly

### The Ugly: Cleansable Conflicts

- Other conflicts of interest
  - Not explicitly prohibited under CAA policy or other laws, regulations, rules
  - Process:
    - Disclosure
    - Decision-maker review, excluding interested party
    - Determination that conflict not prohibited
    - If transaction, comparability analysis
    - Documentation
    - Reporting to grantor

## Ambitious Amy

Amy serves as a private sector representative on Local CAA's tripartite board. When Local CAA's Executive Director, Edgar, announces he will be retiring next month, Amy wonders whether she should throw her hat in the ring. She looks at Local CAA's conflict of interest policy but can't find anything in it requiring board members to wait before applying for jobs at the agency. However, since her niece works as a teacher in the Head Start program, she decides it would be best to ask her Board Chair what to do.

## Scenario Poll #1

- What should the Board Chair tell Amy?
  - A. She can apply for the ED position w/o creating a conflict of interest
  - B. If she resigns now, she can apply for the ED position
  - C. She can't apply for the ED position because she is a board member
  - D. She would have a financial conflict of interest if she became ED
  - E. Both C and D



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## Scenario Poll #1

- What should the Board Chair tell Amy?
  - *Each Head Start agency shall observe standards of organization, management, and administration that will ensure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism.*
  - Head Start Act, Sec. 644

## Ambitious Amy Variations

- What if Local CAA did not have Head Start?
- What if Amy was a CAA employee who wanted to apply for a board seat instead of the other way around?

## Intermediate Sanctions

- Designed to prevent sweetheart deals between nonprofits and disqualified persons
- Revocation of tax-exempt status and excise tax penalties
- Rebuttable presumption of reasonableness if organization demonstrates:
  - Transaction approved in advance by the board or committee
  - Board or committee was comprised entirely of independent directors
  - Board relied on appropriate data comparing transaction price to market values
  - Board documented basis for determination concurrently with decision

## Christy's Catering

Charles, an employee of CAP Agency, Inc., is putting together the agency's annual fundraiser. Using the appropriate procurement method, he selects Christy's Catering as the caterer for the event. Charles later finds out that Corey, the son of CAP Agency, Inc.'s Executive Director, Corinne, owns 10% of Christy's Catering.

## Scenario Poll #2

- Is there a conflict of interest? (CAP Agency, Inc. has Head Start)
  - A. Yes
  - B. No

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- Is there a conflict of interest? (CAP Agency, Inc. has Head Start)
  - A. Yes
  - B. No

## Christy's Catering Variations

- What if CAP Agency, Inc. doesn't have Head Start?
- What if Corinne were a board member instead of the Executive Director?

## The Franklin Foundation

- Freida is the CEO of Franklin County Community Action, or FCCA. FCCA recently heard about a new grant that The Franklin Foundation will be offering next year. The only problem is that one of FCCA's board members works for the Franklin Foundation.

## Scenario Poll #3

- Can Freida apply for the grant (FCCA has Head Start)?
  - A. Yes, start the application!
  - B. No
  - C. Yes, but only if she takes certain steps

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### The Franklin Foundation Variations

- FCCA plans to subaward its funds from the Franklin Foundation to another entity, but one of FCCA's board members also sits on the board of a potential subawardee. Do they need to be recused?
- Funds for Families, another Franklin County organization, is also applying for the grant. Turns out that their ED is also on the FCCA board. What should she do?



## What Does CAPLAW's Sample Conflict of Interest Policy Cover?

## What Does It Include?

- Purpose and Covered Individuals
- Definitions
- Prohibited Conflicts of Interest
- Permissible Exceptions
- Required Disclosures
- Addressing Conflicts + Documentation
- Consequences of Violation

## 4 Versions of Policy

1. Board of Directors (CAA with Head Start)
2. Senior Staff (CAA with Head Start)
3. Board of Directors (CAA without Head Start)
4. Senior Staff (CAA without Head Start)

**Senior Staff Member** means CAA officers who are not members of the CAA Board of Directors, [list or describe positions that comprise CAA's senior management staff], and any other employees or agents of CAA designated by CAA's Chief Executive Officer, including but not limited to employees and agents involved in procurement decisions.

## Questions to Ask to Address Conflicts Board and Senior Staff

1. **Is this situation a conflict?**
  - Financial interest?
  - Persons covered?
2. **Does this mean we cannot do it?**
  - Prohibited conflicts
  - Permissible conflicts
3. **If we can do it, what do we do to handle the conflict?**
  - Procedures
  - Disclosures (annual statement + ongoing disclosures)
  - Documentation and reporting



## Covered Individuals

- **Policies apply to:**
  - Covered person (board, senior staff member)
  - Related parties
    - Immediate family members
    - **Entity** “closely associated” with covered person or immediate family member
      - **Closely associated** means that the individual:
        - » Has a compensation arrangement with an entity
        - » Has an ownership interest in an entity
        - » Is applying for, negotiating, or considering acquiring a compensation arrangement or ownership interest in an entity

## Covered Individuals

- **Immediate Family Member** (OHS-PC-E-029)
  - Spouse/partner in a civil union
  - Partner in a committed, personal relationship
  - Parent
  - Child
  - Sibling
  - Father-in-law; mother-in-law
  - Brother-in-law; sister-in-law
  - Son-in-law; daughter-in-law
  - Grandparent
  - Grandchild

## Required Disclosures

- **Board**
  - At time of application to the board
  - Continuing obligation to disclose promptly when board member becomes aware of actual or potential conflict
  - Annual disclosure statement
- **Senior staff**
  - Continuing obligation to disclose promptly when staff becomes aware of actual or potential conflict
  - Annual disclosure statement

## Addressing Conflicts

- **“The Bad”**
  - List of specifically prohibited conflicts
- **“The Good”**
  - List of specific exceptions to the definition of Conflict of Interest

## Addressing Conflicts

- **“The Ugly”**
  - For everything else, the policy dictates a process for:
    - Disclosure of information by potentially conflicted party
    - A decision-maker (board, ED, etc.) to determine whether there is:
      1. **No conflict of interest**
      2. **A conflict of interest that is not prohibited**
        - » If so, decision-maker determines whether the terms of the transaction are fair and reasonable to and in the best interests of CAA
      3. **A conflict of interest that is prohibited**

## Who Gets to Review and Decide?

- **“The Ugly”**
  - Conflicts involving **board members**
    - Board, excluding conflicted member(s)
    - May establish or designate a committee to make recommendations to the board on how to proceed
  - Conflicts involving **senior staff**
    - ED, CFO, or other officer (non-board) → board
    - All other senior staff members → ED or designee

## Other Provisions

- **Documentation**
  - Board minutes for board conflicts
  - No prescription for senior staff conflicts
- **Reporting to Grantor**
  - Disclose in writing actual and potential conflicts involving federal funds, if funding source requires
- **Violations**
  - Disciplinary action (up to removal and termination)

## IRS and OMB Rules

- IRS “excess benefit” transaction rules
  - 26 U.S.C. § 4958
  - 26 C.F.R. § 53.458-0 through 53.4958-8
- IRS Form 990 ([www.irs.gov/charities](http://www.irs.gov/charities))
  - Asks:
    - Written conflict of interest policy?
    - Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?
- Uniform Guidance, 2 C.F.R. Part 200
  - Disclosures to funding source, 2 C.F.R. § 200.112
  - Conflicts of interest in procurement, 2 C.F.R. § 200.318(b)

## Head Start Rules and Guidance

- 42 USC §§ 9837(c)(1)(C); (c)(1)(E)(iv)(X)(aa) + 45 CFR § 1301.2
  - Conflicts of interest for board members
- 42 USC § 9837(c)(2)(C) + 45 CFR § 1301.3
  - Conflicts of interest for Policy Council members
- 42 USC §§ 9839(a)(1); (a)(3)(C)
  - Anti-nepotism
- Head Start Policy Clarification, HHS-PC-E-029
  - Definition of “immediate family member”

## Some HUD Rules

- Community Development Block Grant
  - 24 CFR § 570.611
- Home Investment Partnership Program
  - 24 CFR § 92.356
- Emergency Shelter Grant
  - 24 CFR § 576.57(d)
- Other HUD programs (such as Shelter + Care and Supportive Housing Program) have similar rules



## How Should I Use CAPLAW's Sample Conflict of Interest Policy?

### Use the Sample to Revise Your Existing Policy

- Modify based on unique needs of your CAA
  - State laws matter - consult a state attorney!
  - [Bracketed text] – Customize for your CAA and then delete brackets
  - Annotations<sup>1</sup>
- <sup>1</sup> Read them! – And then delete them

## Implementing the Policy

- Consider a committee to oversee policy development process
  - Works w/ staff via executive director
- Remember CSBG Organizational Standard 5.6
  - Board review and approval

## Implementing the Policy

- Establish tone at the top
- Disseminate, communicate and review policy with people it covers
- Require completion of disclosure form annually and when conflicts arise
- Designate someone to collect and review forms

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