Conflict of Interest Implementation Policies

# Introduction

This document sets forth draft procedures for implementing the conflict of interest policies adopted by Medicaid and CHIP Payment and Access Commission (MACPAC), as voted on by MACPAC and published online. These procedures cover the following elements:

1. disclosure of reportable interests;
2. identification of conflicts of interest;
3. advisory opinions from the conflict of interest committee (COIC) regarding recusal; and
4. prohibited activities
5. Disclosure of reportable interests

Under MACPAC’s conflict of interest policy, Commissioners “are required to report certain interests to the

U.S. Government Accountability Office (GAO) at the time of their candidacy and on an annual basis thereafter using the GAO disclosure form.” In addition, Commissioners “are required, at the time of their consideration for appointment or reappointment to MACPAC or to a leadership position within MACPAC to report information concerning their involvement in litigation and political activities using the GAO supplemental disclosure form.” Reportable interests inform the basis of the information to be evaluated in order to determine if any conflicts of interest may exist with respect to a vote.

Commissioners also are required to notify the executive director of any “material” change in the information reported to GAO as soon as possible but in any event no later than 30 days after the material change. Notification will take the form of a written e mail to the executive director disclosing material changes. The executive director will use Commissioners’ written notice to update the profile of interests and affiliations, described in paragraph (1)(f) as necessary and appropriate.

1. Who must report?
   1. For new commissioners, both GAO forms should be submitted to the executive director as soon as their appointments are announced.

For existing Commissioners, the GAO financial interest form should be submitted to the executive director when updates are due to GAO. Commissioners will be asked to confirm annually whether there have been any changes to the GAO political activity form.

* 1. If a Commissioner is appointed chair or vice chair, both GAO forms should be updated if necessary and re-submitted to the executive director at the time the Commissioner is named to a leadership position.

1. When must reporting occur?
   1. Reporting should occur at the time of initial appointment to MACPAC and annually thereafter, on the anniversary of a Commissioner’s appointment.
   2. In addition, as noted in paragraph (1), notification of material changes should occur promptly, not more than within 30 days of the material change.
2. What form does “reporting” take?
   1. Reporting means filing both reports required by GAO (i.e., the disclosure form and the supplemental disclosure form)
3. What is a “leadership” position for reporting purposes?
   1. A leadership position is chair or vice chair
4. What is a “material change” for purposes of updating reports and a Commissioner’s profile of interests and affiliations?
   1. The concept of a “material change” is one that, had it existed at the time of the original filing of the report in question, would have been included in the filing. The term “material” includes a change in employment, a change in financial interest exceeding $50,000, a change in formal affiliations (such as board memberships), or other changes in a Commissioner’s activities that reasonably would merit disclosure in light of the nature of MACPAC’s work.
   2. Commissioners are expected to use their best judgment in deciding whether a change is material and may ask for a consultation with counsel if they believe consultation is necessary. When in doubt, Commissioners should err on the side of amending their filings, and the default approach should be to amend.

Note: The following examples are included here for discussion purposes only:

*Example: Commissioner A is a litigating lawyer. At the time of the annual filing of the report Commissioner A had disclosed all litigation involving a federal health care program that would have been required by GAO. In the middle of the year, the Commissioner files a new lawsuit on behalf of a client that involves a federal health care program. This would be a material change.*

*Example: Commissioner B is a sitting Medicaid director at the time of her appointment. In the middle of the year, the Commissioner retires from her position and becomes CEO of a safety-net owned and operated health plan. This would be a material change.*

*Example. Commissioner C is a senior evaluator at a major consulting organization and has disclosed all research involving federal health care programs and supported by federal funding. In the middle of the year, Commissioner C completes and files with the federal government a final evaluation in a major study involving CHIP. No additional filing would be required because it is simply the completion of work that already was reported.*

1. Beyond the reporting activity outlined above, will MACPAC publicly disclose some or all of the information contained in the GAO reports?
   1. Yes. For each Commissioner, a profile of financial interests and affiliations will be prepared and posted online at MACPAC’s website, following the model used by PCORI (Patient-Centered Outcomes Research Institute), established by Congress to oversee the development of comparative health outcomes research: [http://www.pcori.org/about-us/governance/board- governors](http://www.pcori.org/about-us/governance/board-%20governors). The presence of financial interests exceeding $50,000 will be disclosed on the website profile. Interests such as affiliations, editorships, and formal work on litigation and other advocacy-related materials will be included. The profile should be updated to reflect material changes, as the term is defined in this document.
2. Identification of conflicts of interest
3. The role of the COIC
   1. The COIC is appointed annually by the chair in consultation with the vice chair and consists of seven members The vice chair will serve as the chair of the COIC. The members are required to have “a mix of professions, backgrounds, and perspectives”.
4. When does the COIC act?
   1. The COIC is expected to act “in advance of” any meeting “in which a proposed recommendation will be put to a vote.” Typically MACPAC identifies meetings as voting meetings well in advance, since recommendations must be drafted. Because the job of the COIC is to review Commissioner reported interests for possible conflicts of interest, the COIC will need time. The executive director informs the COIC that a voting meeting will take place as well as the matter(s) that will be subject to vote; such notice should take place not later than 30 days prior to the date of the vote, or immediately after the public meeting prior to the voting meeting, whichever comes later The executive director also will notify Commissioners that a conflict of interest review will take place, and Commissioners will be expected to advise the executive director via a written e mail of interests and affiliations that should be a special focus of the conflict of interest review by the COIC.
   2. Each member of the COIC will be assigned between two and three Commissioner reports to review for possible conflicts of interest.
   3. Not later than 14 days before the voting meeting, the COIC will convene by telephone in order to review and discuss any reportable interests that appear to be a conflict of interest.
   4. To the extent that a potential conflict of interest is identified in the case of any Commissioner, the Commissioner shall be advised immediately following the COIC meeting. The Commissioner in question may discuss the results of the COIC deliberation with the chair of the COIC. If the Commissioner with the conflict of interest is the MACPAC vice chair, discussion will take place with another member of the COIC selected by the committee. If the Commissioner identified as having a conflict so desires, the advice of outside counsel can be sought.
   5. Conflicts that remain at the time of the voting meeting (that is, that have been identified by the COIC and remain so identified after any discussion and review) shall be made part of the public record at the outset of the meeting and prior to the vote.
5. What is the purpose of COIC conflict of interest review process?
   1. The purpose of the conflict of interests review process is to determine whether any “reportable” interests held by a Commissioner “are recognized as being more likely to constitute conflicts of interest, meaning an “interest that could interfere with or appear to a reasonable person to interfere with” a Commissioner’s judgment.
6. In performing the review, what standard does the COIC apply to determine when an interest rises to a conflict of interest level?
   1. The COIC makes the determinations under (B)(1) through (B)(4) of the COI policy. This review focuses on financial interests rather than viewpoints. Furthermore, it is not enough for a Commissioner to have any of the financial interests outlined in the policy. The COIC also must determine that the Commissioner’s financial interests will be particularly, directly, predictably and significantly affected by the outcome of the recommendation vote. In order to rise to a conflict level, a Commissioner’s interest must be distinctive to that Commissioner and not simply an interest that the Commissioner might share as one of a member of a much larger class. Furthermore, the interest can “directly” affect an interest only if there is a close causal link between the recommendation if adopted and the Commissioner’s financial interest. A predictable interest is one that is real, as opposed to speculative.

Note: The following examples are illustrative.

*Example: A Commissioner is CEO of a DSH hospital and the vote is on whether to alter the DSH formula. The Commissioner would not have a conflict of interest, because nothing about the vote will be distinctive to that Commissioner.*

*Example: A Commissioner owns stock in a nursing home company, and the vote is on a collection of recommendations aimed at incentivizing community based long term care and lowering federal funding for institutional care. The Commissioner’s interests place her in an affected class. Causation cannot be demonstrated, and the impact is speculative.*

*Example: The Commissioner is a civil rights lawyer representing beneficiaries, and the vote is on giving states flexibility to reduce eligibility. The Commissioner has no financial interest as the term financial interest is defined, since the Commissioner owns no health care stock or equity. However, if the Commissioner is a partner in a firm that engages in civil rights practice, the Commissioner’s practice could be affected. Nonetheless, the Commissioner’s interest would be those of any civil rights lawyer, there is no reasonable causal link between the vote and the effects if any of the policy recommendation, nor could any impact be considered more than speculative.*

In these three examples, it is hard to see a reportable conflict of interest. Any Commissioner, however, should be free to publicly report, as part of the meeting and on the public record, regarding any interest that could be viewed by reasonable people as a conflict of interest.

1. Advisory opinions on recusal
2. When is recusal advice given?
   1. Following the process outlined for conflict of interest identification, the COIC, during its discussion, will determine whether an identified conflict of interest is such that disclosure appears to be insufficient and recusal is advised. The standard is the same as that used for conflicts (i.e., particular, direct, predictable, and significant).
   2. Where a recusal is advised, the Commissioner will be able to consult with counsel.
   3. The Commissioner subject to recusal advice will make the decision as to whether to recuse herself during a vote, and the recusal advice shall remain private.
3. Prohibited activities
4. When does a prohibited activities review take place?
   1. The COIC will review Commissioners’ disclosure and supplemental disclosure reports at the time they are filed for prohibited activities. Such review will be completed within 30 days of the filing of new or annual disclosure and supplemental disclosure reports.
   2. If the COIC identifies one or more prohibited activities then it shall advise the Commissioner in question of their possible existence. The Commissioner may confer with the vice chair, chair, and with outside counsel. To the extent that the Commissioner engaged in one or more prohibited activities is the MACPAC vice chair, consultation shall be with another member of the COIC chosen by the COIC, as well as with outside counsel if desired.
5. What is a prohibited activity?
   1. In determining whether a case involving a federal health care program also involves a house of Congress as a named party under V(1) of the MACPAC conflict of interest policy, the question shall be answered based on the status of the case at the time of its initial filing. The mere fact that a house of Congress enters a case as an amicus for either side is not sufficient to render the case one in which a house of Congress is a named party.
   2. In determining whether a Commissioner’s relationship to a campaign is one that rises to the type of prohibited activity outlined in (V)(2) of the MACPAC conflict of interest policy, the COIC shall weigh the facts and circumstances of the Commissioner’s activities as reported by the Commissioner. Payment by a campaign shall be immediate evidence of prohibited activities, but the question of status in terms of sustained public involvement in policy formulation or formal spokesperson status may be less clear. Relevant evidence may include having one’s name posted at the campaign’s website, formal speaking engagements on behalf of a candidate, or being identified in press reports as a campaign advisor.