

**CONFLICT OF INTEREST FOR THE ASPECTS OF CONTRACTING FOR SHARING
OF HEALTH-CARE RESOURCES (HCR)**

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) Handbook contains guidance, procedures, and responsibilities regarding avoidance of prohibited conflicts of interest by Department of Veterans Affairs (VA) employees involved in contracting for sharing of Health Care Resources (HCR).

2. SUMMARY OF MAJOR CHANGES: Changes in this VHA Handbook have been made to:

a. Clarify application of conflict of interest laws to VA employees involved in contracting for HCR contracts, especially to those employees who have appointments at institutions affiliated with VA.

b. Delete reference to Scarce Medical Services and its authority under Title 38 United States Code (U.S.C.) 7409 in order to be consistent with current policy, which uses 38 U.S.C. 8153 as the authority. Section 8153 is broader than section 7409 and section 8153 includes all contracts that would otherwise fall under section 7409.

c. Delete references to Fee Basis, Intergovernmental Personnel Act Agreements (IPA), Enhanced Use Leasing and VA Form 10-210009 (NR) in Appendix A.

3. RELATED ISSUES: VA Directive 1663 and VHA Handbook 1660.01.

4. RESPONSIBLE OFFICE: The VHA Procurement and Logistics Office Medical Sharing/Affiliate Office (10NA2) is responsible for the contents of this Handbook. Questions may be referred to the Medical Sharing/Affiliate Office mail group at [VHA CO MSO GROUP](#).

5. RESCISSIONS: VHA Handbook 1660.03, dated September 22, 2008, is rescinded.

6. RECERTIFICATION: This VHA Handbook is scheduled for recertification on or before the last working day of November 2020.

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CONFLICT OF INTEREST FOR THE ASPECTS OF CONTRACTING FOR SHARING OF HEALTH-CARE RESOURCES (HCR)

1. PURPOSE

This Veterans Health Administration (VHA) Handbook provides guidance, procedures, and responsibilities regarding avoidance of conflicts of interest by Department of Veterans Affairs (VA) employees involved in contracts or agreements for sharing of health care resources (HCR). **AUTHORITY:** 18 U.S.C. 208(a), 38 U.S.C. 8153, 5 CFR 2635.402, 2635.502.

2. BACKGROUND

The Government Accountability Office (GAO) and Office of Inspector General (OIG) investigations have repeatedly documented violations of conflict-of-interest law by VA employees in connection with VA contracting for HCR with affiliated medical schools or non-government entities, especially by those VA employees with appointments at the affiliate universities. Despite remedial measures taken by VA, OIG has continued to find such conflicts. This Handbook clarifies the criminal conflict of interest prohibitions so that VA employees who are dually-appointed at the affiliate or otherwise have a financial interest in a contract or agreement have a better understanding of the ethics law's limitations on their involvement in procurement with affiliated institutions and other non-Government entities with which they have a relationship.

3. SCOPE

Based on 18 U.S.C. 208(a), a Federal employee may not participate personally and substantially in a HCR procurement in which the employee has a financial interest, or if the procurement involves an entity outside the Federal Government with which that employee has a disqualifying relationship. Thus, if a VA employee has a financial interest in an outside entity such as through ownership or stock ownership, or serves the outside entity (such as the university affiliate, physician practice group, scientific testing company, or corporation) as an officer, trustee, general partner or employee, or if the VA employee is negotiating or has an agreement for prospective employment with the outside entity, the VA employee may not participate on behalf of VA in a HCR procurement involving that outside entity. Additionally, if the VA employee earns consulting or contracting fees from the outside entity, the VA employee may not participate in a HCR procurement involving that entity if the procurement will directly and predictably affect the ability or willingness of the outside entity to continue to pay the employee's fees. VA is committed to adhering to and enforcing all applicable laws and regulations concerning employee conflicts of interest.

4. DEFINITIONS

a. **Conflict of Interest.** A conflict of interest exists when an employee participates personally and substantially in a particular matter, e.g., a contract, that would have a direct and predictable effect on the employee's own financial interest, or the financial interest of the employee's spouse, minor child, general partner, any person or entity

whom the employee serves as an officer, director trustee or employee, or any person with whom the employee is negotiating or has an arrangement for prospective employment.

b. **Health Care Resources Contracts.** Health care resources contracts are contracts or agreements entered into between VA and a non-Federal entity for the acquisition of HCR, which is broadly defined to include hospital and ambulatory care, mental health services, medical and surgical services, examinations, treatment, rehabilitative services and appliances, preventive health care, home care, hospice, blood products, health care support resources, and administrative resources.

5. RESPONSIBILITIES

a. **Under Secretary for Health.** The Under Secretary for Health is responsible for ensuring receipt of an annual certification from each medical facility Director that an annual reminder of the requirements of this Handbook, including any significant changes to policy, has been sent to all employees specified by paragraph 5.b.(1).

b. **VA Medical Facility Director.** Each VA medical facility Director is responsible for ensuring that:

(1) Each Chief of Staff, physician, clinician, researcher and allied health supervisor or manager, and any individual who assumes these duties in the future receives a copy of this Handbook, and Conflict of Interest Acknowledgment (see Appendix A). A copy of the signed acknowledgment must be placed in the employee's electronic Official Personnel Folder (eOPF). In addition, the medical facility Director will ensure that all employees in these positions receive an annual reminder of the requirements of this Handbook, including any significant changes to policy.

(2) An annual certification is sent to the Under Secretary for Health confirming that the annual reminder of the requirements this Handbook including any significant changes was sent to all affected employees.

c. **Contracting Officers.**

(1) Contracting Officers must ensure that any member assigned to an acquisition team has sought counsel from an Office of General Counsel (OGC) Ethics Official prior to acting for VA on contracts or agreements for sharing of HCR involving entities with which the member has a disqualifying relationship or in which he or she has a financial interest (see paragraph 6.a.) to ensure that the member does not have a conflict of interest.

(a) If the procurement for HCR services involves the affiliate and a VA employee holds an academic appointment, but receives no remuneration or benefits of significant value from the affiliate and is not subject to direction or control by the affiliate, such VA employee may be eligible to participate in the procurement under the direction of the contracting officer. The contracting officer must ensure that such a VA employee requests and receives a written opinion from an OGC Ethics Official approving

participation in the procurement (see paragraph 9 for discussion of what constitutes remuneration or benefits of significant value from the affiliate)

(b) All written legal opinions must be included in the official contract file.

(2) Include a copy of the signed Conflict of Interest Acknowledgment in the official contract file.

d. **Employees.** Employees actually involved in HCR procurements are responsible for providing the Contracting Officer a copy of the signed Acknowledgement form or alternatively will review this Handbook and sign a new Acknowledgement form for the contract file.

6. EXPLANATION OF FEDERAL LAWS

a. Federal laws prohibit any Federal employee, whether full-time or part-time, with or without compensation, or any special government employee, from participating personally and substantially in a particular matter in which the employee, to the employee's knowledge, has a financial interest, if the particular matter would directly and predictably affect that financial interest (see 18 U.S.C. 208(a) and 5 CFR 2635.402). These laws impute to the employee as a personal financial interest the financial interests of the employee's spouse, minor children, general partner(s), an organization for which the employee serves as officer, Director, trustee, general partner, or employee, or an organization with which the employee is negotiating or has an arrangement for prospective employment.

b. A contract is a "particular matter" that could result in conflict of interest. Individual payment vouchers on the contract are also particular matters. A financial interest is "directly and predictably affected" by a particular matter whenever there is a close causal link between any official decision or action to be taken in the matter and any expected effect (i.e., gain or loss, regardless of amount) on the financial interest. "Personal and substantial" participation is a direct action that is of significance to the matter. This statute applies to all VA employees, all particular matters, and all covered financial interests. **NOTE:** *The conflict of interest restriction here is given in the context of contracts or agreements for sharing of HCR because these areas have produced concerns in the past. The prohibition summarized in the previous paragraph may arise in other VA contracts as well. Other laws and regulations, such as the procurement integrity statute (41 U.S.C. 2101-2107) and the Executive branch Standards of Ethical Conduct (5 CFR Part 2635), may apply to specific conduct.*

c. If a VA employee has a direct or imputed financial interest in a contract or agreement for sharing of HCR between VA and an affiliate (or other non-government entity), due to employment or negotiation for prospective employment, or ownership or stock ownership, the statute prohibits that employee from participating personally and substantially in the contract as part of the employee's official duties as a VA employee. Additionally, if the VA employee earns consulting or contracting fees from the non-government entity, the VA employee may not participate in the contracting process

between VA and the entity, if the contract will have a direct and predictable effect on the ability or willingness of the entity to pay the employee the fees. This prohibition applies even though the individual may not personally gain or lose financially from the contract or agreement for sharing of HCR between VA and the affiliate, but rather because the financial interest of the affiliate or non-government entity (which is imputed to the employee by law) is affected by the contract or agreement for sharing for HCR. **NOTE:** *Even if a VA employee does not fall into any of the categories so described under the criminal conflict of interest statute, the employee may, nevertheless, have a relationship with the outside entity, e.g. consultant, contractor, that would prohibit participation in the contracting process under the Standards of Conduct regulations. An employee with a relationship to an outside entity should seek advice from an OGC Ethics Official before participating in the contracting process involving that outside entity.*

7. SPECIFIC ACTIVITIES PROHIBITED

For contracts or agreements for sharing of HCR, VA employees with direct or imputed financial interests in the contract or agreement for HCR as discussed in paragraph 6.a. or interests giving rise to the appearance of a conflict of interest as discussed in paragraph 6.c. are prohibited from:

- a. Drafting specifications or solicitations.
- b. Acting as a Contracting Officer Representative (COR).
- c. Negotiating any parts of the contract, including price.
- d. Evaluating proposals.
- e. Selecting or recommending the contractor.
- f. Reviewing, certifying, or approving the contract itself, or any award, modification, extension, specification, bid, proposal, payment voucher, time record, or any other document of significance to the contract.
- g. Evaluating contractor performance.
- h. Reviewing or reporting time and attendance for contract administration purposes.

8. SPECIFIC ACTIVITIES PERMISSIBLE

The following specific activities are permissible by a VA employee (to the extent applicable) who has a direct or imputed financial interest in the contract as discussed in paragraph 6.a. (including the imputed interests of the outside entity involved in the contract) or interests giving rise to the appearance of a conflict of interest discussed in paragraph 6.c.

- a. Directing the professional services provided under the contract solely for purposes of ensuring quality of care.

b. Developing workload projections, so long as such projections are developed independently of the contract for purposes of operating the VA medical facility or contract for research tasks and not developed for purposes of contract specification or for contract renewal.

c. Developing specific tasks to be obtained outside the VA medical facility for a research project, so long as such descriptions of research needs are developed independently of the contract or agreement for sharing of HCR.

d. Providing direct patient care within the employee's VA responsibilities.

e. Performing oversight and administration within the employee's VA responsibilities, including record keeping and quality assurance activities conducted as part of VA medical facility operations.

f. Participating in any manner in any "particular matter" in which neither the employee nor the non-Government entity (including the affiliate) with whom the employee has a relationship has a financial interest (e.g., acting as COR in another contract that does not involve the physician's, clinician's, or researcher's outside employer or any entity the physician serves as an officer, Director, trustee or general partner or in which entity the physician otherwise has a financial interest).

g. Engaging in permissible outside activities, such as approved teaching by a full-time employee.

9. DETERMINATION BY OFFICE OF GENERAL COUNSEL

a. A case-by-case determination is necessary to determine whether a VA employee has a financial interest in contracting for HCR services that disqualifies the employee from participating in such services. Generally, if a physician or clinician has a faculty appointment and receives any compensation for affiliate duties, such as teaching courses or conducting research, and is under the direction and control of the affiliate, the physician or clinician will be considered an employee of the affiliate and has at least an imputed financial interest in VA contracts with the school. An affiliated physician or clinician may only participate in the contract subject to a written opinion from an OGC Ethics Official. The permissible activities described in paragraph 8 are not "participation" in the contract for purposes of 18 U.S.C. 208(a). For purposes of this prohibition, compensation that will create the employer-employee relationship (in conjunction with an appointment and supervision by the affiliate) includes current and ongoing benefits of significant monetary value including, but not limited to, wages, salary and other taxable benefits such as affiliate contributions to life insurance, disability insurance, retirement plans and subsidized tuition benefits for employee or family members.

b. Perks and benefits that are not compensation, however, will not alone create an employer-employee relationship and, therefore, will not trigger the conflict-of-interest prohibition. Benefits that are not considered to be compensation include general faculty benefits that are given to all faculty members by virtue of their appointments and that

are not part of the individual's particular employment arrangement. These are usually of minimal value or are required by the faculty appointment, such as parking permits, library access, admissions to artistic and athletic events, access to online university resources, office space, and the like. Also excluded from compensation for university appointees for purposes of this prohibition are royalties and other payments earned from patents or copyrights, as well as the use of titles and honorifics associated with faculty membership and benefits to which an employee had previously accrued entitlement during prior employment with the affiliated institution, such as funds within a retirement account. A benefit was previously accrued if its receipt is not contingent upon continued current association with the affiliate. In addition, malpractice coverage for uncompensated clinical care duties is not compensation or a benefit to the clinician.

c. Where the VA employee has a name-only appointment at the affiliate without any compensation, he or she is not considered an employee of the affiliate for purposes of 18 U.S.C. 208(a). As a consequence, the university's financial interest is not imputed to the employee and the employee's work on the contract does not create any conflict of interest concern under 18 U.S.C. 208(a). **NOTE:** *Such a relationship may still create appearance issues under the Standards of Conduct regulations, and an employee should seek the advice of an OGC Ethics Official. See Appendix B for how to contact an OGC Ethics Official on the OGC Ethics Specialty Team for further explanation or advice.*

10. REFERENCES

- a. 18 U.S.C. 203, 205, and 208.
- b. 38 U.S.C. 8153.
- c. 5 CFR part 2635.
- d. VA Directive 1663, Health Care Resources Contracting – Buying Title 38 U.S.C. 8153.

**GOVERNMENT ETHICS OFFICIAL AT DEPARTMENT OF VETERANS AFFAIRS
(VA)**

Any concerns that involve criminal conflict of interest law or the Executive branch Standards of Conduct are matters for the VA Designated Agency Ethics Official (DAEO). The DAEO, Assistant General Counsel for Staff Group III, addresses issues involving the application of criminal conflict of interest laws (Title 18 United States Code (U.S.C.) Chapter 11) and the Standards of Ethical Conduct for Executive Branch Employees (Title 5 Code of Federal Regulations (CFR) Part 2635). The DAEO, the Alternate DAEO and the Deputy Ethics Officials on the OGC Ethics Specialty Team are the only sources of authoritative advice on criminal conflicts of interest and the legal questions relating to Standards of Conduct. These Ethics Officials can be contacted at GovernmentEthics@va.gov. Following the good faith advice of such ethics officials, based on full disclosure of the facts by the employee, provides the employee with meaningful protection from criminal or administrative sanctions. The imposition of criminal sanctions ultimately rests with the Department of Justice after receiving the matter from the Inspector General.

VA Central Office (VACO)

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OGCNorthEastEthics@va.gov for ME, NH, VT, MA, RI, CT, NY, NJ, DE, PA, OH, WV, MI, WI

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