

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics



VIA EMAIL TO:

September 3, 2014

[REDACTED]
Producer Relations Manager
D.C. Health Benefits Exchange Authority
[REDACTED]

Dear [REDACTED]

This responds to your request for advice concerning clarification on the laws governing outside employment and financial interests with regard to earnings as an independent broker. Based upon the information you provided in your email of June 19, 2014, I conclude that continuing to receive earnings from your previous position as an independent broker is permissible.

You state that on April 6, 2014, you joined the D.C. Health Benefit Exchange Authority (“HBX”) as the Producer Relations Manager. Prior to joining HBX, you were an independent broker. As an independent broker, you were licensed in the District, Maryland, Virginia, and Florida, and sold Disability, Life, Hospital, Accident, Supplemental and Major Medical insurance products in both the individual and group markets. You have the following licenses: life and health.

You are appointed by the following insurance carriers in the District: Aetna, Aflac, CareFirst, Combined, Delta Dental, Dominion Dental, Kaiser, United Healthcare, United Concordia and Unum. You are appointed by the following insurance carriers in other jurisdictions: Anthem & Golden Rule (as well as the carriers listed above). You had a website, [REDACTED], which served as one avenue of generating business. That website now exists only as a shell, meaning that it still exists on the internet, but no business can be transacted on the website. The links to purchase, as well as every other active part of the website, have been disabled.

In August of 2012, you registered as a D.C. Health Link broker, which required specific training. Nearly all of your major medical business for individuals and small businesses in D.C. was through D.C. Health Link. Your experience with D.C. Health Link was a critical asset in securing the position of Producer Relations Manager at HBX. Your experience with D.C. Health Link was a critical asset to HBX due to your expertise with the D.C. Health Link software. Due to your expertise, you are able to serve HBX as a “Super User Trainer” for the D.C. Health Link software, disseminating information on its use and functions to other HBX staff.

Broker payments come in different forms. Some carriers pay a yearly lump sum for initial enrollment or renewals. Others pay a per-member per-month (“PMPM”) commission as the insured pays premiums. Others pay the PMPM plus a signing bonus when a new individual or business is enrolled. Some pay after a client has made the first two payments. Some payments are delayed simply because of a lag in the D.C. Health Link system. Some pay a lifetime of commissions. Although you will continue to receive commissions in multiple fashions for the services you provided, you will not continue servicing any clients. Servicing of clients will be transferred to another broker via a “block transfer.”¹

Your affiliation with clients as their broker of record will cease completely when the block transfer of your clients occurs. The block transfer will occur prior to the consent of the clients. You plan to write a letter to all your clients that will explain that you are no longer their broker of record, inform the clients about their new broker of record, and inform the clients that they may select a different broker of record if they choose. The letter will also explain to your clients that, due to your position with HBX, you can no longer provide any service to them, such as answering questions or resolving issues. That will now be the role of the broker of record who assumes the block transfer.

Since beginning with HBX, you have not sought or serviced any new or existing clients. You were under the impression that you were able to keep commissions on-going into the future for business you had already built. Specifically, due to a miscommunication, you were informed that the only prohibition on broker activities that you would face as an HBX employee concerned the origination of new broker business.

You learned there may be an issue through conversations with your supervisor when questions arose regarding assisting individuals and businesses for whom you continue to be the broker of record. You approached [REDACTED] General Counsel and Chief Policy Advisor for HBX, in the first week of June 2014. You immediately took down any link referencing you individually on the [REDACTED] website and you continue your practice of not providing any direct broker services to previous clients. You worked with HBX staff to determine what additional steps would be necessary. It became clear that this was a complex situation, and therefore you sought guidance from the Board of Ethics and Government Accountability (“BEGA”).

The applicable provision of the Code of Conduct that informs my decision is found in the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 (2014 Supp.)). Specifically, the Conflict of Interest provision in D.C. Official Code § 1-1162.23, reads, in part:

(a) No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a

¹ In a “block transfer,” the transferor broker transfers broker of record services to a transferee broker, who will then assume responsibility for servicing the client. You state that “block transfers” are a standard industry practice in the health insurance field.

manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

Additionally, HBX's own establishing legislation is implicated because it also contains a Conflicts of Interest provision. D.C. Official Code § 31-3171.10 reads as follows:

(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.

Because of the interplay between the two statutes, I sought guidance from the Office of the Attorney General ("OAG"). OAG concluded that nothing in the nature of your current situation brings you within the provisions of D.C. Official Code § 31-3171.10.

D.C. Official Code § 31-3171.10 prohibits a member of the HBX executive board or Authority staff from being: (1) employed by; (2) a consultant to; (3) a member of the board of directors of; (4) affiliated with, or; (5) otherwise a representative of, a health carrier/insurer, an agent or broker, a health professional, or a health care facility, while serving on the board or staff.

In OAG's opinion, none of the above terms apply to your situation. You are not now employed by, consultant to, a member of the board of, or otherwise representing the insurers you previously worked with. The only provision which gave OAG pause is the "affiliated with" provision, but OAG does not view receiving those payments from the various insurers as being "affiliated with" them.

Black's Law Dictionary defines "affiliate" as:

*"a condition of being united . . . in close connection, allied, associated or attached . . ." to a person, body or organization, while affiliation "imports less than membership in an organization but more than sympathy . . . a working alliance to bring to fruition the proscribed program of a proscribed organization, as distinguished from mere cooperation . . ."*²

OAG interprets "affiliation" as requiring some active, conscious cooperation toward a common goal, which is absent in your situation. This interpretation is reinforced by the legislative history of D.C. Official Code § 31-3171.10, which shows that the Council's focus was on preventing people with active or current ties with a health insurer/broker/facility from also serving on the board, and thereby potentially skewing agency policy in favor of a provider or an industry as a whole.³

Therefore, under OAG's interpretation, your receipt of payments for already-completed work as a broker does not mean that you are affiliated with a health carrier or other insurer, agent or broker. You are likewise not employed by, a consultant to, or a representative of a health carrier or other insurer, agent or broker. Accordingly, OAG does not view this provision as applying to your situation. I agree.

That said, you must not take any brokering actions now that you are an HBX employee. The brokering work for which you receive payments must have been completed prior to your employment with HBX.

Accordingly, I do not view your situation as implicating D.C. Official Code § 1-1162.23, the Ethics Act's Conflicts of Interest provision. Therefore, your continued receipt of earnings from your previous position as an independent broker is permissible.

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*), which empowers me to provide such guidance. This advice is binding.

² Black's Law Dictionary 37 (Abridged 6th edition, 1991).

³ Staff was not the focus of the Council's discussion and was not mentioned often in the legislative history of D.C. Official Code § 31-3171.10. Report of the Committee on Health on B-119-0002, the "Health Benefit Exchange Authority Establishment Act of 2011 (Council of the District of Columbia, November 10, 2011).

If you disagree with my conclusions herein, you may appeal this decision to the three-member Board of Ethics for reconsideration pursuant to D.C. Official Code § 1-1162.19.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,



DARRIN P. SOBIN

Director of Government Ethics

Board of Ethics and Government Accountability

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