

Standards for  
**Organizational  
Integrity**  
of AHQA  
Institutional Members

**The American Health Quality  
Association**

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## Executive Summary

### Introduction

Today's Medicare Quality Improvement Organization (QIO) program is dramatically different from the first Medicare utilization review and quality control peer review program established by Congress in 1972. The most significant change in the past twenty years was spurred by the 1990 publication of a report by the National Academy of Sciences, Institute of Medicine (IOM), *Medicare: A Strategy for Quality Assurance*. IOM recommended that Medicare refocus the program on assisting providers, practitioners, and health plans to improve the quality of care. These recommendations led Medicare officials Gail Wilensky and Stephen Jencks to announce in JAMA in 1992 Medicare's decision to adopt the IOM's new approach.

Since then, Congress and Medicare officials have given Medicare's quality contractors a new name, Quality Improvement Organizations (QIOs), and a broader purview. The Medicare work of the QIOs now extends far beyond the original task of retrospective case review of care in selected hospitals to include cooperative face to face assistance to many thousands of nursing homes, home health agencies, and physician offices. Other new assignments have increased the scope of QIO services directly to beneficiaries. This new work includes mediation assistance for beneficiaries dissatisfied with the quality of care or service they receive, as well as rapid independent adjudication of Medicare managed care and fee for service coverage appeals filed by beneficiaries.

Looking ahead, the emerging new tasks of facilitating financial incentives for quality and promoting public reporting will demand that each QIO is trusted not only by physicians and health professionals, but also by payers and the public. The need for a broad base of trust beyond the

health care community also stems from the public policy trend toward greater accountability of private firms, which began with the Sarbanes-Oxley Act of 2002 and continues with a series of reforms targeting tax-exempt organizations.

Anticipating the need for change, in August 2005 the President of AHQA appointed the ad hoc Committee on Organizational Integrity (hereafter “the Committee”) to marshal the experience and judgment of the AHQA community and develop recommendations for adoption by the QIO community. AHQA’s Board of Directors believes that the principles underlying these requirements represent prudent governance and business practices will strengthen its Institutional Members. Accordingly, the Board has adopted as policy this set of standards that all AHQA Institutional Members are asked to embrace and promptly implement.

### Compensation of Governing Body Members

All members of AHQA should adopt board compensation policies consistent with the following principles, and implement such policies effective no later than December 31, 2006.

- a) Board members should be compensated only in those instances where the board has clearly defined the role and responsibilities of the board member(s) to be compensated, identified circumstances where compensation is deemed necessary due to the complexity of the responsibility, the time commitment involved in board service, and the skills required for the particular assignment.
- b) Board members should only be compensated if the board satisfies the conditions set forth by the IRS as necessary to qualify for a “rebuttable presumption” of reasonableness:
  - 1) the compensation arrangement must be approved in advance by an “authorized body” of the tax-exempt organization composed entirely of individuals unrelated to and not subject to the control of the [board member] involved in the compensation arrangement;

- 2) the authorized body obtained and relied upon “appropriate data as to comparability” of compensation; and
- 3) the authorized body must adequately document the basis for its determination concurrently with the making thereof.

- c) The QIO evaluates board member performance, not merely attendance, in terms of contributions expected to justify any stipend, and have a mechanism to remove, before any applicable term limits would take effect, board members whose contributions are no longer sufficient.

### Executive Compensation

Every QIO should institute policies and actions necessary to qualify for the rebuttable presumption of reasonableness of executive compensation under IRS regulations, effective no later than December 31, 2006, and adhere to the following principles.

- a) Each Institutional Member should incorporate into its bylaws, articles, charter, or other appropriate governing documents a requirement that the full board or a duly authorized and constituted committee thereof (i.e., compensation committee) must approve, annually and in advance, the compensation (including bonus compensation and benefits) of “disqualified persons” (as defined by IRS) on the staff, except for years in which a multi-year contract remains in force or there is no change in the compensation except for a cost-of-living adjustment. If the governing body has authorized the CEO to make such determinations with respect to senior staff who may be “disqualified persons”, the CEO shall follow appropriate procedures to qualify for the rebuttable presumption that compensation for such staff is reasonable.
- b) If an Institutional Member’s board of directors chooses to use a compensation consultant or service to evaluate the compensation of senior executives then, the consultant or service should be independent and should be

hired by and report to the board or designated board committee.

- c) Each Institutional Member's governing board, or the compensation committee of the board, should review the organization's staff compensation program periodically (e.g., every five years) including the salary ranges for particular positions and the benefits provided.

### **Travel Expenses**

Each Institutional Member should adopt policies consistent with the following principles by no later than December 31, 2006.

- a) Institutional Members that pay for or reimburse travel expenses of board members, officers, employees, consultants, volunteers, or others traveling to conduct the business of the organization should establish and implement policies that provide clear guidance on their travel rules, including the types of expenses that can be reimbursed and the documentation required to receive reimbursement.
- b) Travel on behalf of the organization is to be undertaken in a cost-effective manner. The travel policy should be provided to and adhered to by anyone traveling on behalf of the organization.
- c) Institutional Members should not pay for nor reimburse travel expenditures (except for de minimus expenses of those attending an activity such as a meal function of the organization) for spouses, dependents, or others who are accompanying individuals conducting business for the organization unless they, too, are conducting business for the organization.

### **Structure, Composition, and Independence of Boards**

Regarding QIO board composition and independence, Institutional Members of AHQA should adopt policy no later than December 31, 2006 consistent with the following principles:

- a) Each QIO board should adopt mechanisms to continuously infuse board deliberations with new and different perspectives.
- b) Each QIO should adopt policies that will ensure a high level of consumer and other stakeholder representation and diversity on its governing board by the end of the 8<sup>th</sup> Medicare Statement of Work.
- c) Each QIO board should adopt policy ensuring that at least one-third of its members are not compensated as employees or contractors of the company.
- d) Each QIO board should adopt and enforce reasonable performance standards for attendance and contributions by board members.

### **Conflict of Interest**

Institutional Members of AHQA should establish a written conflict of interest policy consistent with the following principles no later than December 31, 2006.

- a) Each board member attests in writing they have received and understood the policy;
- b) The policy establishes each board member has a duty to disclose a financial interest;
- c) In determining whether a board member's declared financial interest constitutes a conflict with the firm's interests, the policy provides the board member must recuse himself and not participate in deliberations and voting, other than to declare and describe the nature of their financial interest; and
- d) In determining the board's action to mitigate a conflict it has identified, the board must consider "non-conflicted" transaction alternatives before approving a transaction involving a conflict with a board member's financial interest.

## AHQA POLICY

### Standards for Organizational Integrity of AHQA Institutional Members

Adopted by the Board of Directors, December 20, 2005

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#### Section 1: The Context for Board Policy

A History of Adapting to Changed Responsibilities. Today's Medicare Quality Improvement Organization (QIO) program is dramatically different from the first Medicare utilization review and quality control peer review program established by Congress in 1972. The most significant change in the past twenty years was spurred by the 1990 publication of a report by the National Academy of Sciences, Institute of Medicine (IOM), *Medicare: A Strategy for Quality Assurance*. IOM recommended that Medicare refocus the program on assisting providers, practitioners, and health plans to improve the quality of care. These recommendations led Medicare officials Gail Wilensky and Stephen Jencks to announce in JAMA in 1992 Medicare's decision to adopt the IOM's new approach. After picking up support for these reforms in Congress during the health reform debate of 1993-1994, Medicare and their quality contractors, then known as Peer Review Organizations (PROs), formally initiated the Health Care Quality Improvement Program about ten years ago.

Since then, Congress and Medicare officials have given Medicare's quality contractors a new name, Quality Improvement Organizations (QIOs), and a broader purview. The Medicare work of the QIOs now extends far beyond the original task of retrospective case review of care in selected hospitals to include cooperative face to face assistance to many thousands of nursing homes, home health agencies, and physician offices. The nature of the work no longer consists solely of judgments of care decisions based on chart review, but now includes front line, real

time responsibility for providing proactive quality improvement assistance, promotion of public reporting of quality data, and speeding the pace of adoption of health information technology. Today the QIOs work more closely than ever with physicians, but now also operate in domains run primarily by other health professions, such as nursing and pharmacy. To serve their communities effectively as they have acquired new responsibilities, QIOs have constantly adjusted to keep pace. Several studies published in peer-reviewed journals attest to the effectiveness with which QIOs have adapted to their expanded responsibilities.

Other new assignments have increased the scope of QIO services directly to beneficiaries. This new work includes mediation assistance for beneficiaries unhappy with the quality of care or service they receive, as well as rapid independent adjudication of Medicare managed care and fee for service coverage appeals filed by beneficiaries.

Looking ahead, the emerging new tasks of facilitating financial incentives for quality and promoting public reporting will demand that each QIO is trusted not only by physicians and health professionals, but also by payers and the public.

Changes in Staff and Governance. The increasing sophistication of QIO responsibilities over the past decade have been reflected in changes in the staff and governing bodies of QIOs. From a staff dominated by nurses trained in reviewing medical records, the typical complement of QIO staff now also includes physicians and nurses trained in clinical quality improvement precepts, epidemiologists, biostatisticians, public health

professionals, health informatics experts, and pharmacists. Individuals employed by QIOs now typically have experience working in hospitals, nursing homes, home health agencies, physician offices, pharmacy practice, , and public or corporate communications.

QIO governing bodies have also changed significantly since the early 1970s, when most of the organizations or their corporate predecessors were created as Medicare Professional Standards Review Organizations (PSROs). By law, PSRO grantees were required to be either physician sponsored organizations (whose board answers to a physician membership) or physician access organizations (those utilizing a corps of local physicians to conduct review as contractors to the PSRO). In fact, Medicare law and contracting policies dating back to the 1970s explicitly favor selection of “physician sponsored” contractors that answer to a membership of physicians.

Not surprisingly, most PSROs were governed by boards of directors comprising only physicians. However, despite the Medicare program’s continued requirement that QIOs maintain their primary relationship with the physician community in each state (and prohibition of more than a minority of board members from provider organizations subject to QIO review), today’s QIO boards reflect their transition from local PSROs to statewide organizations, and their need for relationships with a broader array of stakeholders. Today, while 79% of QIO boards have a physician majority, over one-third of QIO board members are non-physicians, and the next generation of board members promises to be more diverse: 60% of all board members with 6 or fewer years of tenure on QIO boards are non-physicians.

New Demands for a More Accountable Health System. Following the enactment in 2002 of the Sarbanes-Oxley legislation, imposing financial and governance accountability reforms that primarily apply to for-profit businesses, influential leaders in Congress began to propose reforms to strengthen accountability of non-profit organizations, as well. Public polls and media investigations have supported the movement for more

accountable and transparent non-profit businesses. In response to calls for reform, large and small charities, hospitals, and other non-profit organizations have agreed that change is necessary and have proposed a mix of toughened voluntary and regulatory standards to reassure regulators and the public that non-profit entities need and deserve their tax-favored status to serve their communities. The Independent Sector, a national coalition representing over 500 non-profit organizations, has worked closely with Members of Congress to address these concerns over the past few years, convening a Panel on the Non-profit Sector to develop recommendations for greater transparency and accountability for the sector.

In the health care sector, the public policy trend toward greater accountability of private firms intersects with calls by congressional leaders for a more accountable health care system, and for stronger oversight of quality by organizations such as QIOs. On December 1, 2005, the National Academy of Sciences, Institute of Medicine (IOM) issued the first of three reports to Congress. The first IOM report sets forth a vision of a national health care system in which clinical quality is routinely assessed using standardized measures, and performance continuously improves. Many stakeholders will have to undergo change to realize the IOM’s vision; all stakeholders will be expected to adhere to the highest standards of fiduciary responsibility, transparency, and accountability to the public. QIOs too must adapt themselves in order to participate fully in the evolving system, either making or adapting to changes in national, state, and internal attributes of the QIO infrastructure.

Development of AHQA Standards for Organizational Integrity. Anticipating the need for change, in August 2005 the president of AHQA appointed the ad hoc Committee on Organizational Integrity (hereafter “the Committee”) to marshal the experience and judgment of the AHQA community and develop recommendations for adoption by the QIO community. The charge to the Committee included a broad range of issues and questions. Its initial focus was on issues that are of greatest salience to policymakers and opinion leaders, such as the compensa-

tion of QIO boards and executives, management of travel expenses, board independence and managing conflicts of interest. The Committee was unanimous in its judgment that prompt and significant change is merited to demonstrate a commitment to the highest standards of the public and the public officials to whom they are accountable.

The Committee recognized that QIOs are incorporated as different types of organizations, including not-for-profit entities incorporated under both IRC sections 501(c)(3) and (c)(6), as well as four for-profit entities. Most of the safeguards recommended in this report were developed for non-profit organizations organized under sections 501(c)(3), such as the standards for meeting the IRS “rebuttable presumption” of reasonable compensation under the Intermediate Sanction regulations. The Committee agreed that safeguards developed for these non-profits can and should be applied by all QIOs, even if the IRS does not *require* all QIOs to comply with these high standards. Inasmuch as the public and policymakers want non-profit charities to meet the highest standards, it is not unreasonable for non-charitable entities with fiduciary responsibilities to the Medicare Trust Funds to also adhere to those standards.

AHQA is now part of the national movement supporting increased accountability of for profit and non-profit businesses. The members of AHQA’s Board of Directors believe that the principles underlying these requirements represent prudent governance and business practices will strengthen its Institutional Members. Accordingly, the Board has adopted as policy this set of standards that all AHQA Institutional Members are asked to embrace and promptly implement.

## **Section 2: Policy on Compensation of Governing Body Members**

Compensation of the members of governing bodies of profit and non-profit organizations has been widely debated in the past few years. In approaching this subject, the ad hoc Committee

reviewed IRS requirements and reports by BoardSource and other organizations involved in the subject, particularly information provided in the Panel on the Non-profit Sector’s “Final Report to Congress and the Non-profit Sector: Strengthening Governance, Transparency, and Accountability” (June 2005, hereafter referenced as “Report to Congress”).

The Internal Revenue Code prohibits all charitable organizations from providing excessive compensation “directly or through contracts and transactions that give excessive economic benefits to board members and other disqualified persons” (Report to Congress, page 62). “Excessive economic benefit” will be judged by the IRS in enforcing the law, and the agency holds boards responsible for making judgments as to when board compensation is appropriate. Unless the non-profit firm has taken the steps necessary to establish the “rebuttable presumption” of reasonableness of compensation, in an enforcement action the burden falls on the organizations to demonstrate that the level of compensation is reasonable – rather than on the IRS to show the compensation is unreasonable.

AHQA conducted a brief national survey of QIOs to inventory their incorporation status, board composition, and compensation policy. Ninety-one percent (91%) of QIOs are incorporated as tax-exempt non-profit organizations, and nine percent (9%) are taxable for-profit organizations. Sixty-three percent (63%) of all QIOs qualify for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, and twenty-eight percent (28%) of QIOs qualify under Section 501(c)(6). Current board compensation practices among organizations holding QIO contracts cover a wide spectrum. Four QIO boards are entirely voluntary, without any compensation being paid for board service other than incidental expenses for travel to meetings of the board. Thirty-nine (91%) QIO boards pay one or more board members some compensation beyond expenses. Twenty-eight QIOs (65%) compensate board members an average of \$1,000 a year or more.

With regard to compensation of 501(c)(3) charitable organization board members, the Independent Sector’s Report to Congress states:

Although some charitable organizations reimburse expenses related to board work, the vast majority of board members serve without compensation...A few charitable organizations, however, do compensate board members for their services. Charities and foundations are permitted under current law to pay reasonable compensation for services provided by board members. Reasonable compensation is defined as the amount that would ordinarily be paid for like services by like enterprises (whether tax-exempt or taxable) under like circumstances [see Treasury regulations, Section 53.4958-4(b)(1)(ii)].

The Independent Sector reflects the view of its members, predominantly charities whose boards are an important source of financial contributions for the organization. QIO boards, however, are not typical of the fund-raising boards of organizations commonly incorporated under Section 501(c)(3) of the Internal Revenue Code. QIOs generate the operating revenue to pursue their mission purposes from service contracts, rather than donations. Many QIOs recruit their governing board members based on their specialized expertise and abilities to help oversee and understand QIO work. Moreover, many QIOs have multiple business lines, and in these non-QIO business lines QIOs must compete with large for-profit companies such as Maximus, First Health, Mercer Government Human Services Consulting, and National Health Services.

AHQA's legal counsel, the Independent Sector report cited above, and compensation specialists at the Hay Group have all advised that comparable for-profit and non-profit organizations are the appropriate benchmark for QIO compensation practices. To get a better sense of the practices of firms more comparable to QIOs than typical charitable organizations, AHQA commissioned The Hay Group, board and executive compensation specialists, to benchmark QIOs against non-profits that are as comparable as possible to the QIOs, as well as to comparable for-profit entities with which QIOs must compete for business. The Hay Group reported that board compensation for both for profit and non-

profit firms has been growing rapidly in recent years, due to newly imposed accountability responsibilities on boards and board members of both types of firms. Compensation amounts paid to board members by firms judged comparable to QIOs ranged from zero to \$7500 per director per year in the 2003-2005 period.

The Hay Group recommended that all QIOs adopt the practices that IRS requires of 501(c)(3) and (c)(4) firms to establish the "rebuttable presumption" of reasonableness of compensation. For purposes of board deliberations as to the appropriate level of compensation at a particular QIO, The Hay Group identified a variety of factors that should be considered, including the factors enumerated by IRS as well as additional ones, such as the organization's ability to afford board member compensation. The Hay Group acknowledged that an QIO could find, after applying these factors to their organization and their market, that reasonable compensation for one or more board members might exceed the \$7500 figure.

There is a wide range of time commitments required for QIO board service, both within a given board (i.e., some board members may be required to commit significantly more time to the governance function than others, such as audit committee members), and among the QIOs. There may also be a range in required time and activity due to the wide range in size and complexity of QIOs, with some having subsidiaries and multiple lines of business, and others focusing almost entirely on faithful execution of the Medicare QIO contract.. Some are not much larger nor more complex than they were as PSRO grantees in the 1970s, when measured by number of customers and number of employees. Yet some AHQA members have more than 250 employees, numerous customers and contracts, and maintain multi-state operations for customers under the Medicare and Medicaid programs as well as the private sector.

Each organization must strike its own balance to ensure proper and cost-efficient board functioning so that the governing body is not in a position of either relegating its duties and responsibilities to executive management or the board's

executive committee (as evidenced by meeting infrequently), nor assuming a level of operational responsibility that should rightfully be assumed by the management (as may be evidenced by a relatively high frequency of meetings).

In addition, AHQA found that between four and nine QIOs (10-22%) are compensating more than one-third of their board members for services other than board service. These payments are usually hourly consulting payments for physician review of medical records, paid to a wide variety of physician reviewers as part of a QIO's case review responsibilities. QIOs that retain board members for case review work argue that this practice keeps board members aware of quality issues in their state, which in turn enriches the deliberations of the board. This is not a prohibited practice under law; the Independent Sector's Report to Congress recommends that one-third of directors be independent, that is, that they not receive payments as consultants or employees from the company.

**POLICY:** All members of AHQA should adopt board compensation policies consistent with the following principles, and implement such policies effective no later than December 31, 2006.

- a) **Board members should be compensated only in those instances where the board has clearly defined the role and responsibilities of the board member(s) to be compensated, identified circumstances where "compensation is deemed necessary due to the complexity of the responsibility, the time commitment involved in board service, and the skills required for the particular assignment" (Report to Congress, page 62).**
- b) **Board members should only be compensated if the board satisfies the conditions set forth by the IRS as necessary to qualify for a "rebuttable presumption" of reasonableness:**
  - 1) **the compensation arrangement must be approved in advance by an "authorized body" of the tax-exempt organization composed entirely of individuals unrelated to**

**and not subject to the control of the [board member] involved in the compensation arrangement;**

- 2) **the authorized body obtained and relied upon "appropriate data as to comparability" of compensation; and**
  - 3) **the authorized body must adequately document the basis for its determination concurrently with the making thereof.**
- c) **The QIO evaluates board member performance, not merely attendance, in terms of contributions expected to justify any stipend, and have a mechanism to remove, before any applicable term limits would take effect, board members whose contributions are no longer sufficient.**

### **Section 3: Policy Regarding Executive Compensation**

Background. AHQA's Institutional Members, as Medicare contractors, must comply with federal regulations requiring that only reasonable executive compensation may be billed to the federal Medicare contract. Every QIO is audited by an independent government agency every year to ensure that these rules are closely adhered to and that the Medicare program is protected from excessive compensation or other costs.

In addition, non-profit organizations are obligated under the law to ensure that certain individuals employed by or involved with the organization do not receive excessive compensation. Any compensation paid to officers, directors and many categories of executives that is deemed to exceed reasonable compensation will be subject to the imposition of significant excise taxes on both the individual receiving such excessive compensation and on members of the board responsible for deciding such compensation, and, moreover, shall require repayment of compensation deemed to be excessive (Internal Revenue Code Section 4958, i.e., the "Intermediate Sanction" provisions).

IRS requirements regarding executive compensation state, “Charitable organizations are permitted under current law to pay reasonable compensation for services provided by ... chief executive officers and other staff. Reasonable compensation is defined as the amount that would ordinarily be paid for like services by like enterprises (whether tax exempt or taxable) under like circumstances” (Treasury regulations, Section 53.4958-4(b)(1)(ii)).

IRS regulations confer a “rebuttable presumption of reasonableness” of executive compensation when such compensation is based upon appropriate data that helps determine comparability or fair market value and documents the basis for its determination at the time it makes its decision. “Federal regulations define comparable data needed to determine the reasonableness of compensation or other transactions with disqualified persons as including (1) compensation paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions; (2) the availability of similar services in the geographic area; (3) current compensation surveys compiled by independent firms; and (4) actual written offers from similar organizations competing for the disqualified person” (Report to Congress, page 68).

**POLICY:** Every QIO should institute policies and actions necessary to qualify for the rebuttable presumption of reasonableness of executive compensation under IRS regulations, effective no later than December 31, 2006, and adhere to the following principles.

- a) Each Institutional Member should incorporate into its bylaws, articles, charter, or other appropriate governing documents a requirement that the full board or a duly authorized and constituted committee thereof (i.e., compensation committee) must approve, annually and in advance, the compensation (including bonus compensation and benefits) of “disqualified persons” (as defined by IRS) on the staff, except for years in which a multi-year contract remains in force or there is no change in the compensation except for a cost-of-living adjustment. If the governing body has authorized the CEO to make such determinations with respect to senior staff who may be “disqualified persons”, the CEO shall follow appropriate procedures to qualify for the rebuttable presumption that compensation for such staff is reasonable.
- b) If an Institutional Member’s board of directors chooses to use a compensation consultant or service to evaluate the compensation of senior executives then, the consultant or service should be independent and should be hired by and report to the board or designated board committee.
- c) Each Institutional Member’s governing board, or the compensation committee of the board, should review the organization’s staff compensation program periodically (e.g., every five years) including the salary ranges for particular positions and the benefits provided.

#### **Section 4: Policy Regarding Travel Expenses**

Background. Travel expenses paid for by QIOs in their role as Medicare contractors can only be reimbursed if they satisfy the Federal Travel Regulation (“FTR”)(41 C.F.R. Chapters 300-304), which is incorporated in the 8<sup>th</sup> Medicare QIO Statement of Work contract. It is a detailed policy that implements statutory requirements and executive branch requirements for travel by federal civilian employees and others authorized to travel at government expense. Travel expenses incurred by staff, executives and board members of QIOs are reimbursable by CMS only if they meet the requirements for allowability and reasonableness as prescribed in the FTR. There may be situations in which a QIO incurs travel expenses in the ordinary course of business that are not allowable under the FTR. In those situations, it is recommended that a QIO follow the recommendations on travel expenses found in the Report to Congress and the Non-profit Sector on Governance, Transparency, and

Accountability. Consistent with the recommendations of the Report to Congress, the AHQA board has adopted the following policy.

**POLICY: Each Institutional Member should adopt policies consistent with the following principles by no later than December 31, 2006.**

- a) **Institutional Members that pay for or reimburse travel expenses of board members, officers, employees, consultants, volunteers, or others traveling to conduct the business of the organization should establish and implement policies that provide clear guidance on their travel rules, including the types of expenses that can be reimbursed and the documentation required to receive reimbursement.**
- b) **Travel on behalf of the organization is to be undertaken in a cost-effective manner. The travel policy should be provided to and adhered to by anyone traveling on behalf of the organization.**
- c) **Institutional Members should not pay for nor reimburse travel expenditures (except for de minimus expenses of those attending an activity such as a meal function of the organization) for spouses, dependents, or others who are accompanying individuals conducting business for the organization unless they, too, are conducting business for the organization.**

## **Section 5: Policy Regarding Structure, Composition, and Independence of Boards**

Background. Just as lawmakers, enforcement agencies, the courts and the media have criticized for-profit company boards for failure to supervise management, so they and mainstream non-profit advocacy groups have expressed concern with the level of engagement of many non-profit boards. According to the Independent Sector:

A knowledgeable, committed board of directors is the strongest protector of a charitable organization's accountability to the law, its donors, consumers of its products and services, and the public. Failures by boards of directors in fulfilling their fiduciary responsibilities may arise when a board leaves governing responsibility to a small number of people, some of whom may have conflicts of interest that can mar their judgment. Other problems emerge when a board disperses responsibility among many people, thereby lessening the obligations of each and by default, increasing the authority of the chief executive officer. Many board members do not have the training or information necessary to understand adequately their fiduciary responsibilities or common practices for the boards of charitable organizations. (Report to Congress, page 75).

AHQA believes that safeguards recommended for non-profits generally should apply to AHQA's Institutional Members.

Independence. Many individuals serving on QIO boards serve as paid consultants to the organizations, typically as physician reviewers. In its Report to Congress, the Independent Sector states that:

Independent board members should be defined as individuals (1) who have not been compensated by the organization within the past twelve months, including full-time and part-time compensation as an employee or as an independent contractor, except for reasonable compensation for board service; (2) whose own compensation, except for board service, is not determined by individuals who are compensated by the organization; (3) who do not receive, directly or indirectly, material financial benefits (i.e., service contracts, grants, or other payments) from the organization except as a member of the charitable class served by the organization; and (4) who are not related to (as a spouse, sibling, parent, or child) any individual described above.

Length of service/refreshment of board resources. QIOs are characterized by a wide array of practices with respect to tenure and refreshment of board knowledge and experiences through the exchanging of long-term members with new directors. Twenty-eight percent (28%) of QIO board members have served on their board for nine or more years; seventy-seven (77%) of those are physician members of their boards. To some extent, this simply reflects the history of these organizations, during which the federal government has consistently encouraged a strong relationship with the medical profession. Nonetheless, the value of fresh perspectives is likely to increase as federal and state governments and the private sector turn to QIOs to undertake new tasks such as validating claims for quality performance incentives, educating the public about public reporting of quality data, and working in partnership with a wide variety of health professions. Some QIOs have imposed term limits to assure current knowledge and responsiveness to changing conditions and demands in the organization's social and economic environment. There is no evidence that board service beyond a certain duration is predictably associated with lower value board service; however, in a rapidly changing environment such practices are a useful model for organizations looking for ways to become more nimble and responsive to new demands.

Board diversity. According to a 2003 survey by the Citizens Advocacy Center, diversity has been lacking on many QIO governing bodies. Diversity can be seen in terms of racial, gender and ethnic representation, and in terms of stakeholder representation (e.g., consumers and other professions). In light of constantly expanded QIO consumer protection responsibilities, strong consumer representation is essential.

While it is QIO staff, rather than board members, that conduct day to day outreach to vulnerable populations, it is also true that gender, racial, and ethnic diversity can be of benefit to boards in developing strategic relationships and developing strategies for meeting the needs of underserved populations. Some QIOs' governing by-laws require that board members must be politically influential physicians or other health profes-

sionals to serve on a QIO board. These rules may serve as a barrier to identifying and recruiting individuals from diverse racial and ethnic backgrounds to serve.

QIO boards should transition include other appropriate stakeholders who are *actively engaged* in related fields of endeavor. Professional knowledge of individuals who remain active in their respective fields of endeavor will provide wisdom to support informed board decisions. Examples of other professions to be considered include quality improvement experts, health plans, other providers, regional health information organizations, information technology, public health, pharmacy, and nursing. The expertise and commitment of the medical profession to quality care has been central to the culture and success of the PSRO, PRO, and QIO programs. Yet, the evolving nature of the work of the QIOs, as well as the successful experience of a growing number of QIOs with broadly constituted boards, suggests that the past practice of constituting boards with a majority of physicians is no longer the essential attribute for success it once was.

**POLICY: Regarding QIO board composition and independence, Institutional Members of AHQA should adopt policy no later than December 31, 2006 consistent with the following principles:**

- a) **Each QIO board should adopt mechanisms to continuously infuse board deliberations with new and different perspectives.**
- b) **Each QIO should adopt policies that will ensure a high level of consumer and other stakeholder representation and diversity on its governing board by the end of the 8<sup>th</sup> Medicare Statement of Work.**
- c) **Each QIO board should adopt policy ensuring that at least one-third of its members are not compensated as employees or contractors of the company.**
- d) **Each QIO board should adopt and enforce reasonable performance standards for attendance and contributions by board members.**

## Section 6: Policy Regarding Conflict of Interest

Conflict of Interest Provisions of the Medicare QIO Contract. The issue of conflict of interest is extensively addressed in each AHQA Institutional Member's standard QIO contract with CMS, and in the Federal Acquisition Regulations governing all federal agency contracts. The QIO contract provisions are particularly strict about conflicts of interest that may arise as a result of the structure of the governing body:

It is a prohibited organizational conflict of interest for a QIO to be owned by or affiliated with a Medicare health care facility, or association of facilities, payor organization or health plan, in the QIO area, through management, common control or ownership.

For the purposes of this contract, a Medicare health care facility is defined as an institution that directly provides or supplies health care services for which payment may be made in whole or in part under Title XVIII of the Act. A health care facility may be a hospital, skilled nursing facility, a health care agency, free standing ambulatory surgery center or outpatient facility or any other entity which provides or supplies direct care to Medicare beneficiaries.

For the purposes of this contract, a payor organization means any organization, other than a self-insured employer which makes payments directly or indirectly to health care practitioners or providers whose health care services are reviewed by the organization or would be reviewed by the organization if it entered into a QIO contract. Payor organization also means any organization which is affiliated with an entity which makes payments as described above, by virtue of the organization having more than 20 percent of the members of the governing body who are also governing body members, officers, partners, five percent (5%) or more owners or managing employees in a health maintenance organization or competitive medical plan.

For the purposes of this contract, a QIO is considered to be affiliated with a health care facility or association of facilities if more than 20 percent of the members of the governing body of the QIO are also a governing body member, officer, partner, five percent (5%) or more owners or managing employees in a health care facility or association of health care facilities in the QIO area. [8<sup>th</sup> QIO Statement of Work, Section H]

Conflicts Arising from Non-Medicare Business Relationships. In creating the utilization and quality control program, Congress explicitly encouraged the contractors to have other business relationships than the Medicare QIO contract. This was among the reforms contained in the 1982 statute that replaced the Professional Standards Review Organization (PSRO) program with the Peer Review Organization (PRO) program. It is one of the statutory functions of each QIO to offer its services to businesses that purchase health care:

- (11) The organization shall make available its facilities and resources for contracting with private and public entities paying for health care in its area for review, as feasible and appropriate, of services reimbursed by such entities. (Section 1154 (a)(11) of the Social Security Act)

This greater flexibility for firms serving as QIOs to provide services to purchasers other than Medicare is also reflected in the Medicare QIO contract:

CMS encourages QIOs to work with health care facilities, payor organizations and health plans cooperatively. This cooperation, even if beyond the scope of the QIO contract, can benefit the general community beyond the Medicare population. QIOs may enter into a contract, agreement or arrangement with health care facilities, payor organizations, health plans or other private or public entities for work relating to individuals who are not Medicare beneficiaries in the QIO's area, even if such work is similar or identical to the work which the QIO performs under its contract with CMS for the Medicare population.

If a QIO enters into a contract or agreement with a health care facility, payor organization, health plan, or other public or private entity, the QIO shall ensure that CMS does not reimburse it for work that is properly compensable under such other contract or agreement.

The Medicare contract language addresses conflicts that may arise due to the Medicare work of QIOs, but because of the congressional encouragement for QIOs to have other customers than Medicare, there is a need for the QIO to maintain conflict of interest policy and procedure to avoid and to mitigate conflicts that may arise in the course of the rest of its business relationships.

The IRS has promulgated a “Sample Conflict of Interest Policy” for continuing education purposes. The Sample Policy does not have the force of law. Compliance with it is not required nor does it create a “safe harbor” in the way the IRS intermediate sanctions regulations do under the “rebuttable presumption” provisions. But the Sample Policy is nonetheless a useful guide to AHQA Institutional Members in avoiding and managing conflicts. IRS states in the Sample Policy that:

The purpose of the conflict of interest policy is to protect the Corporation's interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Corporation. This policy is intended to supplement but not replace any applicable state laws governing conflicts of interest applicable to nonprofit and charitable corporations. [IRS Sample Conflict of Interest Policy, Article I, Purpose]

*Individual Director Conflict.* The IRS Sample Policy focuses on financial relationships that may give rise to a conflict:

A person has a financial interest if the person has, directly or indirectly, through business, investment or family—

- a) an ownership or investment interest in any entity with which the Corporation has a transaction or arrangement, or
- b) compensation arrangement with the Corporation or with any entity or individual with which the Corporation has a transaction or arrangement, or
- c) a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Corporation is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature.

A financial interest is not necessarily a conflict of interest. Under [Sample Policy] Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate board or committee decides that a conflict of interest exists. [IRS Sample Conflict of Interest Policy, Article II, Definitions]

The IRS Sample Policy recommends procedures for identifying financial interests and deciding whether they constitute a conflict of interest:

1. **Duty to Disclose.** An interested person must disclose the existence of his or her financial interest and must be given the opportunity to disclose all material facts to the directors and members of committees with board delegated powers considering the proposed transaction or arrangement.
2. **Determining Whether a Conflict of Interest Exists.** After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists. [IRS Sample Conflict of Interest Policy, Article III, Procedures]

The IRS Sample Policy recommends the following procedures for addressing a relationship which has been determined to create a conflict of interest:

- a) An interested person may make a presentation at the board or committee meeting, but after such presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement that results in the conflict of interest.
- b) The chairperson of the board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.
- c) After exercising due diligence, the board or committee shall determine whether the Corporation can obtain a more advantageous transaction or arrangement with reasonable efforts from a person or entity that would not give rise to a conflict of interest.
- d) If a more advantageous transaction or arrangement is not reasonably attainable under circumstances that would not give rise to a conflict of interest, the board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Corporation's best interest and for its own benefit and whether the transaction is fair and reasonable to the Corporation and shall make its decision as to whether to enter into the transaction or arrangement in conformity with such determination. [IRS Sample Conflict of Interest Policy, Article III, Procedures]

The AHQA board believes it is essential that there be no appearance of personal conflict of interest on QIO boards. The following policy is to ensure that executive management and governing bodies of AHQA Institutional Members are able to demonstrate their vigilance with respect to this issue.

**POLICY: Institutional Members of AHQA should establish a written conflict of interest policy consistent with the following principles no later than December 31, 2006.**

- a) Each board member attests in writing they have received and understood the policy;
- b) The policy establishes each board member has a duty to disclose a financial interest;
- c) In determining whether a board member's declared financial interest constitutes a conflict with the firm's interests, the policy provides the board member must recuse himself and not participate in deliberations and voting, other than to declare and describe the nature of their financial interest; and
- d) In determining the board's action to mitigate a conflict it has identified, the board must consider "non-conflicted" transaction alternatives before approving a transaction involving a conflict with a board member's financial interest.