STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 11, 2022

Lisbeth Landsman-Smith
California Department of Insurance
300 Capitol Mall, 16th Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-21-119

Dear Ms. Landsman-Smith:

This letter responds to your request for advice on behalf of the Department of Insurance regarding the conflict of interest code provisions of the Political Reform Act (the "Act").[1] Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Must the Department of Insurance designate officers, directors, and other employees of Maximus Federal Services, Inc. ("Maximus") in the Department's conflict of interest code, as designated consultants pursuant to Section 87302, considering the Department's contract with Maximus for independent medical review services under Insurance Code Sections 10169-10619.5?

CONCLUSION

With the primary responsibility for medical review recommendations under the contract with the Department of Insurance, Maximus' chief officers and directors, who serve in a staff capacity for the Department and participate in making governmental decisions related to Maximus's recommendations to the Department, must be designated in the Department's conflict of interest code. However, other Maximus employee's including independent medical professional reviewers are not required to be designated.

---

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS AS PROVIDED BY REQUESTOR

The IMRS Statute

In order to better evaluate disputes over medical treatment decisions made by disability insurers, a state law was enacted in 1999 that established an "Independent Medical Review System" within the Department of Insurance. (Stats. 1999, ch. 533.) This state law (the "IMRS Statute"), requires the Department to contract with one or more "independent medical review organizations" ("IMROs") to review disability insurers' medical treatment decisions regarding disputed health care services.

The IMRS Statute requires every disability insurance contract to provide an insured with the opportunity to seek an independent medical review of the insurer's medical treatment decision regarding whether a disputed health care service is medically necessary. An insured's grievance involving a disputed health care service is eligible for review under the Independent Medical Review System if the grievance meets the IMRS Statute's requirements. Because the Insurance Commissioner is required to immediately adopt an IMRO's determination and to promptly issue a written decision to the parties that is binding on the disability insurer, the IMRO's determination of whether the disputed health care service at issue is medically necessary is dispositive of whether the insurer must provide that service.

The IMRS Statute requires an IMRO to retain medical professionals to conduct the IMRO's independent medical reviews. An IMRO's medical professional reviewer must analyze and determine whether the disputed health care service at issue is medically necessary. These reviewers must be physicians or other appropriate medical professionals and must meet other minimum requirements. The IMRS Statute requires an IMRO to keep the names of the IMRO's medical professional reviewers confidential in all external communications except in response to court orders or in cases where the reviewer is required to testify.

The IMRS Statute includes multiple provisions intended to prevent conflicts of interest in the administration and management of the Independent Medical Review System. An IMRO, as well as its officers, directors, employees, or medical professional reviewers, are prohibited from having any material professional, familial, or financial affiliation, as determined by the Insurance Commissioner, with any of the following:

- The insurer.
- Any officer, director, or employee of the insurer.
- A physician, the physician's medical group, or the independent practice association involved in the health care service dispute.
- The facility or institution at which either the proposed health care service, or an alternative service, if any, recommended by the insurer, would be provided.
- The development or manufacture of the principal drug, device, procedure, or other therapy proposed by the insured whose treatment is under review, or the alternative therapy, if any, recommended by the insurer.
- The insured or the insured's immediate family.

An organization must meet certain requirements and conditions to be eligible to serve as an IMRO. An IMRO cannot be an affiliate or subsidiary of, nor in any way be controlled by, a disability insurer or a trade association of insurers; an IMRO board member, director, officer, or employee cannot serve as a board member, director, or employee of a disability insurer; and a board member, director, or officer of a disability insurer or a trade association of insurers cannot serve as a board member, director, officer, or employee of an IMRO.

The IMRS Statute also requires an IMRO to demonstrate it has a quality assurance mechanism in place that ensures:

- Medical professionals retained are appropriately credentialed and privileged.
- Reviews provided by the medical professionals are timely, clear, and credible, and that reviews are monitored for quality on an ongoing basis.
- Method of selecting medical professionals for individual cases achieves a fair and impartial panel of medical professionals who are qualified to render recommendations regarding the clinical conditions and the medical necessity of treatments or therapies in question.
- Confidentiality of medical records and the review materials, consistent with the requirements of this section and applicable state and federal law.
- Independence of the medical professionals retained to perform the reviews through conflict-of-interest policies and prohibitions, and ensures adequate screening for conflicts of interest.

The IMRS Statute authorizes the Insurance Commissioner to establish additional requirements that an organization must meet to become an IMRO, including conflict of interest standards, consistent with the purposes of the IMRS Statute. Pursuant to this authority, the Insurance Commissioner, in the Department of Insurance's Request for Proposal No. 21001 relating to the recruitment of potential IMROs, required an organization seeking to be an IMRO to show the capacity to provide and maintain independent reviewers including:

- Availability and range of specialists without prohibited conflicts of interest.
- A conflict of interest screening process.
- Systems and procedures used to ensure all parties remain neutral and free of influence from insurer, enrollees or treating physicians.

The Contract

You are a Senior Attorney with the Department of Insurance. On December 13, 2021, you advised that the Department currently contracts with a single IMRO, Maximus, for the provision of all independent medical reviews conducted under the IMRS Statute. The current contract commenced and July 1, 2021, and expires June 30, 2024. That contract provides that Mr. Thomas C. Naughton, President of Maximus' Health Division, would serve as Maximus' "Engagement Director" for the project, and that Mr. Robert Nydam, a Senior Director for Maximus, would serve as the "Project Manager." The contract also provides that Mr. Nydam the "Project Representative," and that all inquiries should be directed to him. Mr. Naughton and Mr. Nydam are the first two of 13 Maximus employees listed as "key personnel" in the contract.

Pursuant to identified services provided in the Department of Insurance's contract with Maximus, the steps of the independent medical review process include:

- An insured requests an independent medical review from the Health Claims Bureau.
- The Health Claims Bureau will review the application and determine its eligibility for independent medical review.
- The necessary information is forwarded to the contractor, Maximus.
- The contractor, Maximus, will obtain the review by assigning to qualified medical reviewers.
- The Health Claims Bureau will adopt the determinations made by the contractor, Maximus.

ANALYSIS

The Act requires public officials to "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.) Consequently, every agency must adopt and promulgate a conflict of interest code. (Section 87300.)

A conflict of interest code must be formulated at the most decentralized level possible (Section 87301); enumerate the positions within the agency, including consultant positions, that involve making or participation in the making of decisions which may have a reasonably foreseeable material financial effect on any financial interest (Section 87302(a)); and set forth the specific types of investments, business positions, real property interests, or sources of income which are reportable for each enumerated position (*ibid*).

The term "public official" includes "every member, officer, employee or *consultant* of a state or local government agency." (Section 82048 [emphasis added]; and Regulation 18700.) The issue here is which positions, if any, with an IMRO are "consultants" under the Act. Regulation 18700.3(a)(2) defines a "consultant" to include an individual who, pursuant to a contract with an agency, does the following:

> Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

The existence of an ongoing relationship between the contractor and the public agency is significant. We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed "over more than one year" on "high level" projects (*Ennis* Advice Letter, No. A-15-006; see also *Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438); where the relationship between the contractor and the agency would last only 12-16 months with no

ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239); and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

Maximus Officer and Directors

We first consider whether Maximus' officers and directors serve in a staff capacity with the Department of Insurance. Pursuant to its contract with the Department, Maximus has a three-year contract and is tasked with assigning independent medical reviews to the appropriate reviewers and submitting a recommendation to the Department that must be adopted. Based upon these tasks and the term of the contract, Maximus is tasked with the primary responsibility in making binding recommendations to the Department of Insurance for the three-year term of the contract. As such, Maximus, and those officers and directors who take part in making the recommendations to the Department of Insurance, are serving in a staff capacity for the Department.

In addition to serving in a staff capacity, a "consultant" must "participate in making a governmental decision, which includes a public official's authorization or direction of any action by an agency." (See Regulation 18704(a).) "Participating in a decision" occurs when the official "provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Regulation 18704(b).) "Significant intervening substantive review" has been interpreted to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the official. (*Greenwold* Advice Letter, No. I-90-349.)

In this case, Maximus, and those officers and directors who take part in making the recommendation to the Department of Insurance, are participating in a decision as they have the primary responsibility in making binding recommendations to the Department based upon the findings by the independent reviewers Maximus has assigned. Based upon these facts, the officers and directors for Maximus, who take part in the recommendations, are consultants participating in making a governmental decision and must be designated in the agency's conflict of interest code accordingly.

We note that the information provided identifies Mr. Naughton and Mr. Nydam as key personal in the Department of Insurance's contract with Maximus. Mr. Naughton is President of Maximus' Health Division and holds the title of "Engagement Director" in the contract between the Department of Insurance and Maximus. Mr. Nydam is a Director at Maximus and holds the titles of "Project Manager" and "Project Representative" in that contract. Based on this information, both Mr. Naughton and Mr. Nydam are consultants participating in the making a governmental decision and must be specifically designated in the agency's conflict of interest code.[2]

[2] We note that we reach no conclusions in regard to other Maximus officers and directors as this determination is based on the specific duties assigned to the individual. If you need additional assistance determining whether any other officer or director must be designated, you should seek further advice detailing the individual's specific duties under the contract.

Other Maximus Employees and Medical Reviewers

Under the IMRS Statute and the contract between the Department of Insurance and Maximus, the medical professional reviewers are selected by the contractor, Maximus, assigned by Maximus, and work under the supervision of Maximus. Additionally, while the IMRS Statute requires an IMRO's medical professional reviewer to analyze and determine whether the disputed health care service at issue is medically necessary, a medical professional reviewer's determination is not always dispositive of the outcome of the insured's grievance.[3] Based upon these facts, the medical professional reviewers are not serving as consultants of the Department of Insurance but as employees of the contractor, Maximus. Accordingly, the independent medical professional reviewers are not required to be designated in the agency's conflict of interest code.

Supporting this determination, the statutory scheme is intended to ensure independence from the governmental agency in making the medical determinations and the confidentiality of the medical professional reviewers. The scheme itself evidences that fact that the medical professional reviewers are not consultants of the agency and addresses the potential for conflicts of interests outside of the Political Reform Act by imposing distinct conflict of interest rules on IMRO's and the independent medical professional reviewers.

Similarly, there is no indication that other employees of an IMRO would qualify as consultants of the Department of Insurance.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

Brian G. Lau

By: Brian G. Lau
Assistant General Counsel

BGL:dkv

[3] An IMRO may select multiple medical professional reviewers to review a case. (See Ins. Code § 10169.3, subd. (a).) If multiple reviewers review a case, the recommendation of the majority of those reviewers prevails; if the reviewers are evenly split on whether the disputed health care service is medically necessary, the IMRO's determination must be in favor of providing the service. (Ins. Code § 10169.3, subd. (d)