

Governance Streamlining: Legal Issues Checklist

Many nonprofit hospital and health system boards are reconsidering their current governance framework, in response to increased pressures on boardmember service and the need for more efficient fiduciary practices. Such “streamlining” initiatives can serve to enhance the decision-making process and reduce the burden on individual board members. They do, however, implicate a number of cross-disciplinary legal issues, which should be considered in the design and implementation of a streamlined board. The following is a summary checklist of some of those leading issues:

ACTION ITEMS

DONE?

1	<p>Basic Goal: preservation of the board as a body capable of exercising independent oversight of management and operations and informed business judgment—these standards as defined by state nonprofit corporate law.</p>	✓
2	<p>Independence (corporate law): satisfaction of state corporate law (if any) and/or governance best practices standards of director independence so that the board is controlled by a majority of members who meet the appropriate definition of “independence”.</p>	✓
3	<p>Exempt Organization Tax Law:</p> <ul style="list-style-type: none"> a. Satisfaction of relevant IRS standards of director independence (which may be different than the corporate law standards). b. Satisfaction of appropriate nonprivate foundation status test as it applies to board structure. c. Satisfaction of “disinterested director” definition for satisfaction of rebuttable presumption of reasonableness safe harbor under intermediate standards requirements (e.g., executive compensation decisions). d. Application of conflict of interest policy and procedures consistent with IRS template. e. Board size appropriate for needs of organization f. Attribution of activities of taxable affiliate arising from board overlap 	✓
4	<p>State Corporate Law:</p> <ul style="list-style-type: none"> a. Requirements, if any, regarding board size, composition/ independence, terms and qualifications b. Delegation of board authority to standing committees c. Ability to include non-board members as voting members of committees with board delegated powers d. Ascending liability issues (e.g., direct participant, alter ego) arising from overlapping director service e. Restrictions, if any, on ability to “bifurcate” responsibilities of board members (i.e., designate certain board members as specifically responsible for governance matters and allow others to contribute by other means, e.g., philanthropy) f. Other relevant issues re: officer and director conduct and participation, meeting requirements, etc. as may arise under state law g. Fiduciary duty standards of care and loyalty as interpreted by state courts h. State corporate law provisions addressing director compensation 	✓

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5	<p>Governance Best Practices:</p> <p>Application of leading corporate governance best practices (e.g., ABA, The Business Roundtable, Panel on the Nonprofit Sector) on issues such as:</p> <ol style="list-style-type: none">Board sizeQualifications of membersNumber and types of committees (e.g., size, structure, charter, composition as may be appropriate given the size and sophistication of the organization)Committee compositionBoard and committee meeting frequencyRole of executive officers serving as staff to the board and key committeesExecutive session practice of board and committeesLines of governance authority between board, committees and management	
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NOTE: Corporate governance structures are a byproduct of the application of specific state and federal tax laws. The specific details of any particular board streamlining should be examined in consideration with these and related laws. The above list is not intended as an all-inclusive list of applicable laws and regulations.