

The following developments from the past month offer guidance on corporate law and governance law as they may be applied to nonprofit health care organizations:

1. THE BOARD AND *BURWELL*

As widely reported in the media, the United States Supreme Court is expected to rule by early summer in the case of *King v. Burwell*. Most general counsel are aware that this case involves the legality of federal tax credits under the Affordable Care Act, the preservation of such is seen by many as critical to the long term sustainability of the ACA. With this schedule, health system general counsel may want to work with senior leadership team colleagues to develop a near term board briefing on the implications of a *Burwell* decision invalidating the tax credits, and possible options for the health system depending on the outcome of the decision turns. (Board members are likely alert from recent media coverage to the pending decision and its possible impact on the ACA.) Under these circumstances, a briefing would help position board/key committee members to work with senior management in exercising informed oversight and decision-making, as may be necessitated by the Court's decision.

2. BOARD COMPLIANCE OVERSIGHT

The Compliance Committee should be briefed on the new publication, "**Practical Guidance for Health Care Governing Boards on Compliance Oversight**", released on April 20 by HHS/OIG, AHLA, HCCA and the Association of Healthcare Internal Auditors. While the 'Guidance' doesn't break new ground, it does serve as a valuable reminder of the board's critical compliance oversight obligation. Yet, because it seeks to address a broad cross section of health care providers, it is limited in its ability to address the **more complex issues** concerning board oversight that are currently challenging sophisticated health care systems. These include the appropriate level of board scrutiny; the competence and qualifications of compliance committee members; the vigor by which risk information is provided to the board; and the proper coordination between legal, compliance and internal oversight—and the related need to preserve the attorney-client privilege in internal investigations. Contrary to the public comments of some compliance industry leaders, the Guidelines **do not** contain a change in OIG's views on compliance officer-general counsel reporting relationships.

3. BOARD CYBERSECURITY OVERSIGHT

Several new developments impact the board's emerging fiduciary obligation to monitor organizational approach to cybersecurity. For example, the **FBI recently announced** that cybercriminals are pursuing a variety of illegal hacking schemes against health care organizations, with the goal of monetizing personal health information and exploiting that information for other health related frauds. The Department of Justice's "Cybersecurity Unit" has developed a **compilation of 'best practices'** to be used by organizations in preparing a cyber-incident response plan and, more generally, in preparing to respond to a cyber-incident. In addition, the National Association of Corporate Directors has published a list of **five "boardroom imperatives"** with respect to cybersecurity oversight: (i) view cybersecurity as an enterprise-wide risk issue; (ii) identify critical organization assets; (iii) ensure the availability of adequate resources for IT staffing (e.g., is there a need for a chief information security officer in addition to a chief information officer?); (iv) remove technical "jargon" barriers to board oversight; and (v) assure that cyber issues are incorporated into strategic planning and business decisions.

4. SWEET BRIAR AND HEALTH SYSTEMS

The intersection of nonprofit corporation law and charitable trust law is on full display in the interesting dispute surrounding the decision of the Board of Directors of Sweet Briar College to close the school for financial reasons. This controversial decision has been challenged not only by third party interests, but also by the Virginia Attorney General and the Amherst (Va.) Attorney General—both of whom claimed jurisdiction. **In a recent decision**, an Amherst County Judge ruled that the County Attorney had standing to bring action against the College to enforce the state's "Solicitation of Contributions Act". (The Attorney General had argued that the County's authority was superseded by the authority of the Attorney General.) However the Judge also ruled that the College is a corporation rather than a charitable trust, which limits the County Attorney to proceeding on the basis of "misuse of charitable funds" allegations, as opposed to "violations of trust" arguments. The County Attorney also obtained a **temporary 60-day injunction** to stop Sweet Briar from closing. This controversy can be viewed by health system general counsel as a very

relevant example of the highly **complex corporate law and charitable trust controversies** that can arise when state and local officials seek to challenge business decisions of nonprofits—particularly those that relate to facility closure, sale or conversion.

5. ATTORNEY GENERAL ENFORCEMENT

The sweeping authority of the state attorney general to regulate nonprofit corporations (and their officers and directors) is prominently demonstrated by a series of **enforcement actions** recently undertaken by the New York Attorney General. These include separate actions against nonprofit officers and directors, alleging a broad range of financial and governance improprieties. Also included is a **\$1.025 million settlement** with the trustees and former trustees of a private foundation for the benefit of underprivileged children. The Attorney General had alleged a breakdown in governance practices that allowed foundation purposes to be shifted to serve insider interests and which led to a waste of foundation assets. Notably, the settlement included bans (of various degrees) on future nonprofit fiduciary service by the named trustees. In a separate action, the Attorney General is reported to be **investigating the actions** of the governing board of the prestigious Cooper Union for the Management of Science and Art, with respect to the management of certain endowment and other financial matters.

6. DIRECTOR & OFFICER ACCOUNTABILITY

The Department of Justice is placing **increased emphasis** on the benefits a corporation may gain from cooperating with the federal government in the context of an investigation. This is part of a broader DOJ effort to provide greater transparency for its approach to pursuing the prosecution of corporations, including factors it will consider in determining whether to decline prosecution. According to **recent speeches by senior DOJ officials**, a key element of the “transparency” effort is to provide greater clarity on conduct that constitutes “corporate cooperation” with the government. The government places importance on corporate efforts to identify evidence implicating culpable individuals. Such a “throw your employees under the bus” approach places unique pressure on the board concerning structuring proper D&O and indemnification protection for executives, and other measures intended to retaining the loyalty and morale of senior executives on a day-to-day basis. It also underscores the importance to the general counsel providing “Upjohn warnings” to individual officers and directors as may be necessary. The subject of corporate cooperation should be pro-actively considered by the board’s executive committee in consultation with the general counsel.

7. GENERAL COUNSEL AND “REPORTING OUT”

Ongoing Pennsylvania Supreme Court litigation (***Redacted v. Redacted***) may have important implications with respect to the “reporting out” obligations of nonprofit health system general counsel under Rules of Professional Responsibility 1.6 (“Confidentiality”). The specific issue presented is whether (and if so under what circumstances) an in-house attorney who has reason to believe that the client corporation is effecting diversion of charitable assets to private interests may report the corporation to the state attorney general. Interestingly, the petitioner’s claim appears to be framed more in the context of the fiduciary duty owed by counsel to the attorney general as the representative of the ultimate charitable beneficiary (the general public), corporate client, and less directly as an application of Rule 1.6. Another issue presented by the litigation is whether the “reporting out” and fiduciary obligations of clients are heightened in the context of a public charity. The case presents a timely opportunity for the general counsel to discuss with executive and board leadership the scope of her professional and fiduciary obligations to the client with respect to “reporting up” and “reporting out”.

NOTE: Michael Peregrine and Anne M. Murphy (Rush University Medical Center) will discuss this case at the June 28 AHLA In House Counsel Program.

8. BOARD COMMITTEES AND DIVISION OF LABOR

An interesting **new published article** addresses the distribution of labor between the members of key standing board committees, and the board as a whole. This critical, yet under-emphasized, governance concern encompasses the proper balancing of duties across—and communications between—standing committees. It also encompasses the more subtle consideration of whether some directors, who do not serve on a standing committee or on “one-off working groups” of the board, are properly integrated into the entirety of board discourse. That is, in essence, the question of the “left behind director” and her ability to retain a proper level of engagement consistent with her fiduciary obligations. The article also raises a similarly important concern as to the proper level of “staff support” for standing committees. Do the increasing workloads of particular committees require an increased level of dedicated commitment from administrative and executive staff in support of committee activities? Issues of committee authority, administrative support to committee leadership and the “left behind” director can in certain internal circumstances be controversial. However, they are essential to assuring a foundation of effective governance, and are valid subjects for consideration by the CEO and the board’s governance committee, working in consultation with the general counsel.

For additional information on any of the developments referenced above, please contact Michael at +1 312 984 6933 or at mperegrine@mwe.com; or visit his publications library at www.mwe.com/peregrinepubs.

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