

COMPILED WITH COMMENTARY
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Corporate Law & Governance Update

A monthly briefing for
the Nonprofit Health
Care General Counsel

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:

NEW EMPHASIS ON ANTITRUST COMPLIANCE

The Audit & Compliance Committee may wish to initiate steps intended to increase board, executive and organizational compliance with the antitrust laws. This, given the specific, **new Department of Justice focus** on prosecuting individuals for criminal antitrust violations. Recent speeches by senior DOJ Antitrust Division officials make it clear that the Division will vigorously apply the Yates Guidelines to criminal violations of antitrust laws, and may probe the corporate management structure to identify allegedly culpable individuals. Antitrust violations that typically risk criminal prosecution are price-fixing and market allocation; others are challenged in civil proceedings.

EXECUTIVE CONFLICTS IN "M&A" EVALUATIONS

The Yahoo Board recently decided to exclude both its CEO and CFO from Board M&A Committee deliberations. This decision highlights the value of sensitivity to potential conflicts of senior executives in health industry change of control situations. These may arise from retention agreements, severance rights and similar traditional benefits. They can also arise from equity interests in affiliates, job offers from the acquirer or unusual closing "incentives". **None** of these should preclude close executive involvement in the transaction. However, board oversight is useful to avoid significant attorney general scrutiny.

DOJ SAMPLE CORPORATE COMPLIANCE QUESTIONS

More information has become available concerning the Department of Justice's plan to release a list of questions that companies implicated in wrongdoing can expect to be asked by investigators concerning the effectiveness of their compliance programs. **According to a senior DOJ Fraud Division official**, the questions will address: (i) the perspective of employees on compliance program effectiveness; (ii) the compliance-based "tone at the top"; (iii) the extent to which compliance is a shared corporate responsibility; and (iv) the relative expertise of compliance staff. This information may be useful to the Audit & Compliance Committee as it evaluates compliance program effectiveness.

DIRECTOR TENURE

The debate on the relationship between director effectiveness and tenure continues at multiple levels. For example, CalPERS has been considering a **revision to its global governance policy** that calls for more rigorous board discussions on director tenure, evaluation and succession planning. CalPERS maintains that independent directors can be compromised after 12 years of board service. In addition, **a recent academic article** proposes the adoption of limitations on the amount of time a director could be considered "independent" for purposes of serving on key committees (e.g., the audit and compensation committees). This might be an option to formal board term limits.

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BOARD INVOLVEMENT IN STRATEGY

A new **KPMG governance analysis** discusses the evolution of the board's strategic planning role from "an annual review and concur with periodic involvement" to a continual dialogue that involves evaluating strategic options and challenging core assumptions. This evolution is prompted in large part by new levels of global uncertainty, technology developments and government regulation, all of which may affect business models and strategic plans. **The analysis encourages directors** to be sufficiently familiar with the premises on which the strategic plan is based, so that they may be better positioned to address material changes in the plan.

SURVEY: LEADING BOARD PRIORITIES

The new "**2015-2016 NACD Public Company Governance Survey**" provides substantial "fodder" for discussion by the governance committee of health system boards. The most relevant director priorities highlighted by the Survey include strategic planning and oversight; corporate performance; corporate growth/M&A; CEO succession; executive talent development; director turnover rate; overboarding and time commitment issues; the quality of information flow to the board, and board level cybersecurity knowledge. While not health-industry specific, elements of the NACD survey can serve as helpful examples in support of board and governance committee agendas and education.

DIRECTOR COMPENSATION

Recent media coverage of director compensation may increase the challenges associated with establishing and maintaining legally sustainable arrangements for health care boards. As a recent **The Wall Street Journal** article notes, increases in public company board compensation are attracting the attention of regulators, corporate constituents and the public. Some observers express concern about loss of independence of compensated directors. At the same time, there is a growing recognition that the duties, obligations—and risks—of board service have similarly increased. Well-crafted compensation plans will balance these various factors.

DIRECTOR CONFIDENTIALITY

The increase in highly proprietary information being discussed in health system board and committee meetings is attracting greater attention to fiduciary obligations associated with director confidentiality. The risk that sensitive corporate strategies could be exposed to competitors or other third parties is prompting many boards to consider formal,

comprehensive confidentiality policies applicable to all directors (even those who are advisory in nature). **As a recent article points out**, these policies are often supplemented by periodic reminders of confidentiality obligations, tutorials on what may constitute proprietary data, responding to confidentiality breaches, and similar measures.

BOARD-MANAGEMENT RELATIONSHIPS

A new **NACD publication** alerts governance committees to challenges arising from the evolving board/management relationship. The publication's premise is that the new, more volatile corporate environment serves to "blur" the **traditional distinction** between board and management roles. With their significantly increased responsibilities, board members are now much more engaged in corporate affairs; as manifested in a greater amount of time invested on both formal board matters, and on informal dialogue with management. Given this shift, the governance committee may wish to take steps to assure effective board-management dynamics, including role expectations and constructive interactions.

BOARD DIVERSITY

Matters of "diversity" continue to be a pressing board concern. For example, a **new GAO study** estimates that it could take more than four decades for women's representation on boards to be on par with that of men's. More recently, **SEC Chair Mary Jo White spoke** strongly in favor of the value of boardroom diversity; favoring a definition of diversity in certain SEC disclosure rules. These perspectives are increasingly difficult for boards to ignore, raise significant reputational risks, and thus commend a focused board nomination emphasis on diversity components.

NEWEST PUBLICATIONS:

- "Protecting the Compliance Officer: A Balanced Approach"
- "Who Is the General Counsel's Client? New Developments"

FOR MORE INFORMATION

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