

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:

EXPANDING ROLE OF GENERAL COUNSEL

The April 12 [survey report](#), “[The Rise of the GC: From Legal Adviser to Strategic Adviser](#)” concludes that (a) the role of the corporate general counsel continues to expand and evolve; and (b) as this role shifts, the perspectives of the general counsel are “uniquely positioned” to advise the board and management team on risk management and strategic decisions. This is consistent with the perspectives of leading corporate responsibility commentators, that the role of the modern general counsel includes not only providing legal advice, broadly defined, but also serving as a member of the “business team” and offering business, ethics and risk management advice to leadership. | [Read more](#)

STATE AG ENFORCEMENT ACTION

According to [media reports](#), the Pennsylvania Attorney General has taken action to enforce provisions of a 2013 governance-based settlement negotiated with several Hershey School entities. That settlement concluded a lengthy investigation of controversial real estate transactions entered into by the charity. Reportedly, the Attorney General now seeks to (a) remove three long-serving (e.g., ten years or more) board members; (b) reduce board compensation; and (c) have the board members personally assume the costs associated with an internal conflict of interest investigation. | [Read more](#)

ENTREPRENEURS AS BOARD MEMBERS

A recent [article in The Wall Street Journal](#) speaks to the increasing interest of some companies in recruiting entrepreneurs to their governing boards. According to the article, this practice is often associated with a focus on performance and outcomes, the generation of ideas and improvement in morale, particularly in smaller companies. It can also result in an increase in long term value and a greater willingness to invest in research and development. Notably, though, some entrepreneurs may often be more willing to accept risks than directors from more mainstream corporate backgrounds, and may be less patient with the boardroom process associated with traditional governance structures. | [Read more](#)

BOARD OVERSIGHT OF COMPLIANCE

[Prepared comments of Assistant Attorney General Leslie Caldwell](#) provide a useful summary for boards of the Department of Justice’s health care fraud initiatives. Of particular relevance are Ms. Caldwell’s comments on the formation of the “Corporate Health Care Fraud Unit”—including DOJ’s commitment to investigating large scale corporate health care fraud; the standards (including but not limited to compliance failures) used to evaluate and support criminal health care fraud investigations; and its willingness to pursue health care fraud “into corporate boardrooms and executive suites”. Ms. Caldwell’s comments are well-suited for distribution to the Audit & Compliance Committee. | [Read more](#)

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COMPLIANCE PROGRAM METRICS

A recent, detailed “open letter” to DOJ’s new Compliance Counsel (published in the [Harvard Business Law Review](#)) underscores the current state of uncertainty on how that Counsel will guide DOJ prosecutors in evaluating the existence and effectiveness of individual corporate compliance plans. The “open letter” serves in part to provide recommendations on how DOJ should implement its previously stated goal of establishing industry specific benchmarks by which individual programs may be evaluated. In that regard, the “open letter” provides a useful overview of the categories of compliance program benchmarking that DOJ may ultimately apply; a topic of significant interest to the Audit & Compliance Committee. | [Read more](#)

“PROFITABILITY” OF NONPROFIT SYSTEMS

A [recent academic report](#) published in Health Affairs has attracted national attention to the “profitability” levels of nonprofit hospitals and health systems. The purpose of the report was to determine the characteristics of the most profitable hospitals. It concluded, among other matters, that seven of the top ten most profitable hospitals (from patient care services) in the country were nonprofit organizations. This report is likely to draw unwanted new attention to the special corporate law and tax classifications of health systems. It should thus prompt the board to increase its efforts towards supporting and demonstrating the core nonprofit, tax exempt mission of the health system. | [Read more](#)

“BEST IN CLASS” COMPLIANCE PROGRAMS

The Audit & Compliance Committee may wish to review the newly released report, [“Principles and Practices of High-Quality Ethics Programs”](#). The stated purpose of the Report is to identify specific principles and practices that characterize “high quality ethics and compliance programs”; i.e., those that transcend ‘minimum effectiveness standards’ such as those set forth in the Federal Sentencing Guidelines. Thus, the Report’s recommendations may prompt a useful discussion at the Committee level concerning the continued sufficiency of the core elements of the organization’s existing compliance program. | [Read more](#)

BOARD TENURE CONSIDERATIONS

The governance committee may wish to give some consideration to the [perspectives](#) of institutional investors, proxy advisory firms and governance activists on the subject of director tenure. While there remains no “best practice”, these perspectives reflect relevant-to-nonprofits concerns with the relationship of tenure to entrenchment and independence; the

utility of turnover to encourage board diversity and blend of necessary skills; the benefits of director evaluation; analyses supporting individual director renomination; and the correlation between length of service and corporate performance. | [Read more](#)

MANAGING EXPENSE REPORTS

Inappropriate use of expense accounts or reporting of expenses have long been a significant liability “trip wire” for corporate executives and some board members, and a prominent source of whistleblower complaints. In that context, a recent article from [The Wall Street Journal](#), [“CFOs Get the Darndest Expense Requests”](#), may be informative to corporate leadership. While styled in humorous manner, the article underscores the breadth of controversial or problematic expense reporting practices. As such, it serves as a useful reminder to corporate leadership to review the effectiveness of internal policies with respect to the incurrence, and conflict-free, reporting and review of executive and boardmember expenses. | [Read more](#)

WAIVING FIDUCIARY DUTIES IN PARTNERSHIPS

A recent Delaware decision provides a helpful example of how partnership terms can serve to protect conflicted transactions from judicial review. In [Dieckman v. Regency](#), the Court of Chancery upheld partnership terms that eliminated fiduciary duties and provided an explicit mechanism (i.e., approval by the general partner’s conflicts committee) for approving transactions between the limited partnership and its general partner (or the general partner affiliates). This decision -- including the benefits of waiving fiduciary duties -- may be particularly relevant for health systems that invest, directly or through affiliates, in limited partnerships that may give rise to potential conflicts of interest. | [Read more](#)

NEWEST PUBLICATIONS:

- “Reporting Up Obligations”
- “Managing Gatekeeper Anxiety”

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