

# Hot Topics in Healthcare Governance

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One of the primary roles of The Governance Institute's advisors is to provide education for boards of hospitals, health systems, and physician groups regarding "hot topics" in not-for-profit governance. Below are some of the most popular topics that the advisors have been asked to focus on during board retreats over the past couple of years.

## 1. Healthcare Reform Implications

All the board retreats facilitated by the advisors during the past year have included a discussion of the potential ramifications of healthcare reform. This is appropriate, since the March 2010 enactment of the Patient Protection and Affordable Care Act (PPACA) could dramatically change the way in which healthcare is delivered and reimbursed. Forward-thinking boards recognize that in this changing environment, they have a heightened responsibility to carry out the mission, set strategic direction, and achieve financial stability. As a result, many more boards are working in partnership with management to assess their situation and discuss strategic

options. Some board/management teams have concluded that they should pursue new strategic affiliations (including mergers) to ensure that their community continues to have access to high-quality, low-cost healthcare. Other organizations will build closer relationships with existing partners (including physicians) to coordinate and improve care. Each of these strategic-level decisions requires the board to demonstrate careful attention to the fiduciary duties of care (to be knowledgeable of all reasonably available information and act with appropriate prudence and care), obedience, and loyalty (to the mission).

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## 2. Tax-Exempt Status Justification

The PPACA also calls on the hospital board to help justify the organization's tax-exempt status through overseeing the implementation of a community health needs assessment and the execution of financial assistance policies (among other things). In addition, the IRS has clearly stated that it is using the Form 990 to help determine which organizations might not be complying with practices that the IRS believes are consistent with retention of tax

exemption (e.g., community benefit efforts). Some boards are responding by creating a community benefit committee to help assess the community's health needs, set standards, and track the organization's performance vis-à-vis those goals.

## 3. Conflicts of Interest and Independence

Regulators and legislators continue to find insufficient conflict-of-interest management and some question the independence of board members involved in key decisions. The increased employment of physicians and the development of clinical integration models have exacerbated the already complicated issue of physician board members. Best practices in this arena include developing clear definitions of independence and ensuring board conflict-of-interest policies address both financial and non-financial relationships. Some boards require that its members do no business with the organization so the integrity of their decision making regarding the public's assets is "beyond reproach."

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## 4. Executive and Physician Compensation

The intense scrutiny of executive compensation practices continues, in part, because cases of excessive compensation and rich retirement benefits keep coming to light (e.g., the BlueCross BlueShield of Vermont board allegedly paid excessive compensation to its former CEO). In a separate trend, clinical integration has resulted in over 55 percent of physicians now being employed by hospitals and health



systems. Advanced boards are ensuring that their compensation committees are composed entirely of independent members (to pass the rebuttable presumption of reasonableness standard), and they are overseeing both executive and employed physician compensation.

## 5. Compliance, Audit, and Risk Management

The Health and Human Services Office of Inspector General and the U.S. Sentencing Commission, among others, have been strongly encouraging boards to be more involved in overseeing corporate compliance. This is partly because of the increased number of fraud and abuse-related cases. Well-functioning boards are now ensuring that compliance plans are effective; that the corporate compliance officer has a direct and unrestricted reporting relationship to the board; and that whistleblower policies are updated and utilized. The audit function is also receiving increased attention. One noteworthy trend is that not-for-profit boards are following the New York Stock Exchange requirement that everyone overseeing the audit be independent and that the audit committee must include individuals with public accounting expertise. Given the increased uncertainty in the external and internal environments, enterprise risk management

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is being utilized to monitor business risk and preserve charitable assets. Some boards are following the Security and Exchange Commission's new rules that mandate the description of the board's role in overseeing risk.

### 6. The Board's Role in Quality, Safety, and Service

Over the last five years, board members have begun to embrace the fact that they are ultimately accountable for the quality of clinical care, patient safety, and service. The recent movement toward clinical integration and value-based payment has accelerated the board's need to learn how best to work with physicians and management to ensure high-quality care. As a result, the advisors are now routinely asked to help boards understand how to oversee quality without micromanaging administration or becoming inappropriately involved in clinicians' decision making on behalf of their patients. The best boards are engaging physicians and management in helping to set quality, safety, and service goals, ensuring improvement plans and processes are being utilized, monitoring the organization's progress toward the goals, and linking executive compensation to the achievement of the quality goals.

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### 7. Oversight of Senior Management

Given the expectations of deeper board involvement in strategy, compensation, compliance, quality, community benefit monitoring, and more, some boards have become confused about the role of governance versus the role of management. At the same time, some attorneys general have declared that a few not-for-profit boards were excessively deferential to the CEO and lacked independent board oversight (e.g., Beth Israel Deaconess Medical Center Board allegedly did not pay sufficient attention to a whistleblower concern regarding the CEO). High-performing boards and their

CEOs are devoting extra time in orientation sessions, ongoing education sessions, and off-site retreats to candid conversations about honoring the distinction between governance and management while also performing the fiduciary duty of oversight. These conversations are critical because each situation is unique—there is no “one-size-fits-all” answer to the perennial question of how to distinguish governance and management.<sup>1</sup>

### 8. Board and Committee Structures

The increased demands on boards have caused many to revisit the way in which they are structured. Many hospitals and health systems are launching comprehensive governance restructuring initiatives aimed at enhancing the effectiveness of governance by decreasing redundancy and clarifying the roles, responsibilities, and authority of boards and committees. Boards of all sizes are asking if they have the correct number and type of committees (e.g., separate audit and compliance committee; board committee on quality; community benefit committee). Ideally, this analysis includes decisions about the percentage of committee and board members that must be independent.

### 9. Competency-Based Governance

A growing number of organizations have published corporate governance guidelines (e.g., the Business Roundtable, the Independent Sector, The Governance Institute, National Association of Corporate Directors, Harvard University). Many of these documents emphasize the importance of determining what competencies (skills, perspectives, and experience) the board needs as a whole to oversee the organization in these complex times. This trend is consistent with the SEC's rules regarding the disclosure of the qualifications, experience, and attributes of publicly traded boards. Great boards are taking this a step further by also identifying the competencies required for board leaders. This information forms the basis for decisions about recruiting, developing, and electing officers and committee chairs.



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### 10. Board Dynamics and Culture

The real key to effective oversight is a healthy board culture in which members feel comfortable engaging in candid discussion among themselves, asking tough questions, and holding management accountable for the performance of the organization. This requires open and honest interactions among board members who understand the healthcare industry, have sufficient information, and are clear about their governance role. Boards and CEOs must work together to create this positive dynamic. ●



<sup>1</sup> See “Advisors’ Corner: A Chronic Condition: Distinguishing Governance from Management,” *BoardRoom Press*, Vol. 21, No. 4, The Governance Institute, August 2010.