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New Focus on Corporate Purposes and the Implications for Health Care Corporations

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The Business Roundtable's August 19 Statement on the Purpose of a Corporation[1] (Statement) is an important corporate governance development, to the extent that it provides a strong endorsement of the principles of corporate social responsibility and the important role that corporations can play in improving society. While the Statement is directed primarily at public companies, it has significant implications for charitable, tax-exempt nonprofit organizations, including health systems.

The Business Roundtable

As many health lawyers know, the Business Roundtable (Roundtable) is a Washington, D.C.-based nonprofit association that promotes public policy initiatives intended to support business initiatives and interests. Its membership consists of CEOs of major American companies. The Roundtable is particularly well known for its Principles of Corporate Governance (Principles) monograph that as updated periodically (most recently in 2016) provides companies with guidance on governance standards. While focused primarily on issues affecting public companies, the Principles is an important governance resource for large private and not-for-profit companies as well.

Each version of the Principles issued since 1997 has supported the traditional concept of shareholder primacy; i.e., that corporations exist principally to serve shareholders. In a major shift that has attracted significant controversy, the new Statement supersedes previous statements in the Principles on corporate purposes and outlines a modern standard for corporate social responsibility.

The Statement

The Statement itself is remarkably short (barely 300 words) for an initiative that proposes a sharp turn from decades of reliance on the concept of shareholder primacy. This shift is grounded in a recognition that society increasingly is turning to the private sector and asking that companies respond to broader societal and economic challenges that government has failed to address.

It also reflects a concern that "the American Dream is alive, but fraying" due to growing economic inequity.[2] As such, it seeks to redefine corporate purpose away from concepts of shareholder primacy towards promotion of "[A]n economy that serves all Americans."[3]

The essence of the Statement is a call for corporations to adopt corporate purposes to more fully incorporate a stakeholder, as opposed to shareholder, orientation. These purposes include commitments to (i) "deliver value to customers," (ii) "invest in employees," (iii) "deal ethically and fairly with suppliers," (iv) "support the communities in which [they] work" and (v) "generate long term value for shareholders, who provide the capital that allows companies to invest, grow and innovate."[4]

In this regard, the Statement is the latest application of the corporate social responsibility movement, and a more-than-subtle nod to the public advocacy of Blackrock CEO Laurence Fink, that "[P]urpose is not the sole pursuit of profits but the animating force for achieving them."[5]

A Possible Corporate Response

Of course, the Statement is neither law, nor does it have the force of law. While it is signed by 181 CEOs, it may be aggressive to describe the Statement as "best practice." But, given the Roundtable's prominence, the Statement cannot be ignored or fully discounted.

Given all this, a logical response for most corporations will be a thoughtful board-level conversation on corporate purposes generally; the extent of the corporation's engagement to date with social responsibility principles; and how that engagement is affected by the Statement and the social and economic concerns that prompted the Roundtable to act.

There are many complexities and unintended consequences associated with the Statement and its implementation, none the least of which is its impact on directors' fiduciary duties and to whom and what they are owed.

Implications for Not-for-Profit Health Care

Yet there are more notable consequences for the health care sector, where for-profit and not-for-profit companies often directly compete. Greater focus on the societal elements of a corporation's purpose may ultimately serve to narrow the existing distinction between for-profit health care companies and not-for-profit, tax-exempt health care companies, particularly in the minds of the media, consumers, regulators, and legislatures.

Without further steps to clarify and document their charitable nature and activities, not-for-profit health care systems may face increased pressures in this regard as for-profit companies alter their purposes to focus more on achieving societal goals and meeting the needs of all stakeholders, including customers, employees, suppliers, and communities, as well as shareholders.

This comes at a time when the rapid evolution of the delivery of care model is placing significant pressure on the "elasticity" of a health system's charitable purposes. Indeed, some state attorneys general are reflecting concern with the potential for "mission drift"; i.e., the pursuit by not-for-profit health systems of business initiatives that may be beyond the scope of their traditional charitable purposes.

As a result, the Statement is a useful prompt for not-for-profit health system leadership to invest greater effort towards (a) evaluating the sufficiency of existing statements of charitable purposes; and (b) communicating the worth of their charitable purposes and activities for both internal and external audiences. The key will be how the delivery of health care services through a tax-exempt, nonprofit model is distinguishable from the delivery of such services in a proprietary model. This is an essential challenge for the near term.

This challenge can be addressed in a series of tangible ways: emphasizing the achievement of charitable purposes through the strategic plan; including language in board resolutions about how specific actions serve charitable purposes; highlighting emphasis on research and education; greater focus on the requisite community health needs assessment process; confirming compliance with the various Section 501(r) requirements for charitable hospitals; and negotiating provisions in key service agreements, joint venture agreements, and major transaction documents that preserve the tax-exempt organization's control over exempt purposes and prevent unreasonable benefits to private parties.

Summary

Regardless of its individual structural orientation and tax status, all health care corporations should evaluate the potential implications to them from the Business Roundtable's Statement on the Purposes of a Corporation.

Even setting aside its ultimate application on an individual corporation basis, all boards of directors would benefit from a fulsome discussion of corporate purposes, corporate social responsibility, and their related impact on fiduciary duty. Not-for-profit, tax-exempt health care systems are particularly motivated to consider the implications of broad acceptance by their for-profit competitors of corporate social responsibility.

The corporation's chief legal officer is well-suited to lead the board and the executive leadership team through such a discussion.

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Endnotes:

[1] The Business Roundtable's Statement on the Purposes of a Corporation, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Laurence Fink, 2018 and 2019, Letters to CEOs, https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter and https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.