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GOVERNING HEALTH UPDATE from Michael W. Peregrine

For Board Nominating and Strategic Planning Committees

RE: INTERLOCKING BOARDS AND THE INTERSECTION OF ANTITRUST AND GOVERNANCE LAWS

The intersection of corporate governance and antitrust laws was recently highlighted by the April 4, 2022 comments of Assistant Attorney General Jonathan Kanter, Chief of the Antitrust Division of the U.S. Department of Justice. The company's Chief Legal Officer will want to share Mr. Kanter's comments with the board committees and executive leadership team members involved in the director nomination process, as well as with strategic and transaction planning initiatives.

Kanter's comments touched on prosecuting anticompetitive interlocking directors and officers among competitors. The use of interlocking directorships between a health system and other organizations has long been a popular low-integration, non-financial collaboration model by which the health system may create short-of-merger links and other relationships with companies offering strategic value.

However, Section 8 of the federal Clayton Act "prohibits not only a person from acting as officer or director of two competitors, but also any one firm from appointing two different people to sit as its agents as officers or directors of competing companies, subject to a few limited *de minimis* exemptions." Notably, Section 8 is a strict liability statute; i.e. once prohibited interlocks are established these violations are regarded as per se unlawful and are not dependent on evidence of actual harm to competition. Some state laws contain similar prohibitions.

Historically, Section 8 has not been aggressively enforced by the government, outside of the transactional setting. A possible shift in enforcement posture was, however, signaled by a series of blog posts over the last several years from representatives of the FTC's Bureau of Competition. Mr. Kanter's comments alert CLOs and key board committees to a higher level of enforcement risk:

- *I want to say clearly that we are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur by imposing a bright-line rule against interlocking directorates.*
- *For too long, our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates.*

This warning of enhanced Section 8 enforcement should be carefully considered by health care systems as part of their non-organic strategic planning—especially given the dramatically increased antitrust enforcement against traditional change of control transactions.

Absent coordination with the CLO, well-intentioned corporate officials may unintentionally create or negotiate interlocking directorships without giving full consideration to the potential anticompetitive consequences. This risk includes scenarios where an official makes her own determination of whether the interlocking directorship involves an actual competitor, without consulting the CLO. Kanter's comments offer a useful example of the intersection of corporate governance and the antitrust laws, and why the CLO should be consulted in major corporate governance initiatives.

Thank you to my McDermott antitrust partners Stephen Wu and Ashley Fischer for their help in preparing this memo.

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