



## Addressing Issues of Board Size at Pediatric Hospitals

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**A**n ongoing governance challenge for pediatric hospital boards is to balance competing but valid interests in order to arrive at workable solutions for proper board size.

These competing interests reflect, on the one hand, the extraordinary value donors and others place on board service with a pediatric hospital. This includes the almost intense desire to participate in the good work performed at the hospital, as well as the personal prestige that is typically associated with such board service in the community. There is also a special interest of clinicians and researchers serving on the pediatric hospital board.

All in all, these are very good problems to have! This unique level of service interest helps ensure a deep resource of potential board and committee candidates. It can often serve to facilitate a level of diversity on the board that readily incorporates not only matters of race and gender, but also of experiences, perspectives, competencies, backgrounds, and age. Again, all “good things.”

But on the other hand, accommodating such high levels of interest can lead to a board of unusual (and possibly unwieldy) size, presenting some significant governance and legal challenges. These are matters that have a direct impact on both the effectiveness of the board and of board functions. This is especially the case for boards that exceed 25–30 members. As such, they require the serious consideration of the board governance committee.

### Key Board Takeaways

Pediatric hospital boards tend to be large in size. While there are many benefits associated with having large boards (e.g., greater diversity in skills, backgrounds, and experience), there are also several governance barriers that can arise. Some governance and legal concerns that should be addressed by the board and governance committee include:

- The challenge to satisfy requirements for establishing a quorum.
- Difficulty taking advantage of statutory provisions that allow for informal action by directors.
- The greater expenditures of time needed to fully address oversight and approval matters coming before the board.
- A tendency to default to “governance by executive committee” as a “workaround” to the practical problems presented by the board’s size.

### Legal Concerns for Large Boards

The legal issues surrounding board size are four-fold—three of which are relatively straightforward and the fourth, somewhat nuanced. First, with a very large board, it can be difficult to satisfy requirements for establishing a quorum. Even though many pediatric corporation bylaws provide for a low-quorum standard, state laws frequently establish an absolute minimum number of directors necessary to establish quorum (e.g., no less than one-third of the directors *then in office*). In these large board situations, “get out the vote” takes

on a new governance meaning—the effort necessary to ensure a quorum to allow the board to take formal action. This is a particularly acute concern when major items are on the board agenda, or there is need to call a special meeting of the board on short notice.

Second, very large boards make it more difficult to take advantage of statutory provisions that allow for informal action by directors. Such provisions can provide a valuable governance “shortcut” in certain situations. They usually allow that any action to be taken at a meeting of the board of directors of the corporation or a committee thereof may be taken without a meeting, if certain conditions are satisfied. The most relevant is that the action must be approved in writing by *all of the directors and all of any non-director committee members* entitled to vote with respect to the subject matter thereof. This is, of course, a potentially daunting challenge for large boards.

Third, very large boards by their nature require much greater expenditures of time to fully address oversight and approval matters coming before them. Presentations and discussions about agenda items tend to be longer in order to accommodate the legitimate interests, perspectives, and concerns of a large number of directors.

Fourth, many very large boards tend to default to “governance by executive committee” as a “workaround” to the practical problems presented by their size. While there is no absolute legal prohibition to doing so, such practice does present two potentially significant legal issues. One is that most state non-profit corporation statutes specifically limit the authority of an executive committee to certain powers, and the policy intent of executive committee practice is usually to address important matters that cannot wait for the next regularly scheduled board meeting.

The more nuanced concern arising from reliance on executive committee practice is the potential for those (many) directors who do not serve on the executive committee to be disengaged from important governance considerations. There is the possibility for them to become less informed; have less ability to interact with officers, management, and advisors; and be less aware of the scope of the board agenda. This can create significant risk with respect to the ability of the non-executive committee directors to exercise informed oversight and decision making (with resulting long-term exposure to the board). Emerging policy concepts that would provide a solution to this concern (the so-called “bifurcated board”) have not achieved widespread adoption within state non-profit corporation laws to date.

### **Additional Considerations Related to Board Size**

To be sure, there is no best practice as it relates to board size—no one-size-fits-all standard. Neither of the two most recent and widely recognized statements of governance principles (i.e., Business Roundtable and Commonsense Principles) adopt a black-letter approach to board size.<sup>1</sup> Rather they recommend consideration of the nature, size, and complexity of the corporation, and its stage of development, when fixing size.

These statements recognize that larger boards often offer the “upsides” of accommodating a greater combination of skills, backgrounds, and experience, and the ability to more effectively manage required board processes. They perceive

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<sup>1</sup> *Principles of Corporate Governance*, Business Roundtable, 2016 (available at <https://businessroundtable.org/sites/default/files/Principles-of-Corporate-Governance-2016.pdf>); and *Commonsense Principles of Corporate Governance* (available at [www.governanceprinciples.org](http://www.governanceprinciples.org)).

smaller boards as often being more cohesive and thus more facile in addressing major agenda items.

Three popular alternatives to this “size” concern are:

- Gradually reduce the size of the board.
- Use well-developed and managed advisory boards, in order to satisfy those interested constituents who do not wish to be involved with material governance issues.

- Greater population of committees with non-board members, where allowed by state law.

All of these have their advantages and disadvantages, which should be thoroughly explored before implementing changes.

The pediatric hospital’s governance committee may thus find value in revisiting the issue of board size, and considering ways to reduce the governance challenges arising from very large boards.

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