

CHANGES TO CATHOLIC ETHICAL AND RELIGIOUS DIRECTIVES IMPACT MERGERS AND PARTNERSHIPS BETWEEN CATHOLIC AND NON-CATHOLIC ENTITIES

Last month, the United States Conference of Catholic Bishops voted to approve the sixth edition of the *Ethical and Religious Directives for Catholic Health Care Services* (the "ERDs"). The approved revisions specifically relate to Part Six of the ERDs, which addresses "Forming New Partnerships with Health Care Organizations and Providers." The approved revisions entail a restructuring of the Introduction to Part Six and revisions to Part Six's Directives, which include the reordering of the existing Directives as well as the creation of several new Directives. This brings the total number of Directives in Part Six from 6 to 10.

BACKGROUND - WHAT ARE THE ERDS?

Catholics participating in health care have been looking to written ethical norms for almost 100 years to guide health-related decisions. Founded in 1915 to protect the rights of Catholic health care, the Catholic Hospital Association (now known as the "Catholic Health Association") conveyed the need for a written statement of ethical directives addressing serious moral issues. The first written set of directives was then compiled in 1921 for the Archdiocese of Detroit and concerned norms prohibiting surgical procedures that result in destruction of fetal life or sterilization. Building on these principles, a committee wrote the first uniform set of directives, which was published in 1949. There have since been six published editions of ERDs.

The ERDs instruct Catholic hospitals and others in the Catholic health care ministry how to operate in accord with Church teaching. The ERDs are composed of six parts that address issues ranging from the social, pastoral and spiritual responsibility of Catholic health care to issues in the clinical and spiritual care for the seriously ill and dying. Each part is divided into two sections. The first section is an introduction in expository form that provides the context in which concrete issues can be discussed from the perspective of the Catholic faith. The second section contains Directives written in prescriptive form that provide instruction and guidance on issues in Catholic health care. In the sixth edition of the ERDs, there are 77 Directives.

A copy of the sixth edition of the *Ethical and Religious Directives for Catholic Health Care Services* may be obtained [here](#).

REVISIONS TO PART SIX OF THE ERDS

The revised ERDs update the introduction in Part Six to include a description of the Catholic Church's views and approach to collaborative arrangements between Catholic and non-Catholic entities. In addition, they specifically address those collaborations posing challenges to "the Catholic moral tradition." The revised introduction states that collaborative arrangements that may pose moral challenges are not necessarily precluded, and further directs Catholic leaders "to undertake careful analyses" to ensure that new and existing collaborative arrangements abide by canon law. To that end, the revised ERDs reorganize the Directives contained in Part Six "to assist Catholic health care institutions in analyzing the moral consideration of collaborative arrangements."

Some of the new requirements set forth under the revised Directives include the following:

1. Under new Directive #69, for the first time, the ERDs establish a multi-jurisdictional review process that requires the diocesan bishops from all markets affected by a collaborative arrangement to consult with each other and try to reach a consensus about the morality of a merger, partnership or other collaborative arrangement.
2. Directive #73 requires each Catholic health care institution to ensure that neither its administrators nor its employees will "manage, carry out, assist in carrying out, make its facilities available for, make referrals for, or benefit from the revenue generated by immoral procedures." The United States Conference of Catholic Bishops has historically found immoral procedures to include abortion, euthanasia, assisted suicide and direct sterilization (Directive #70).
3. Directive #75 prohibits Catholic institutions from establishing "another entity that would oversee, manage, or perform immoral procedures." "Establishing" such an entity includes actions such as: (1) drawing up the civil bylaws, policies or procedures of the entity; (2) establishing the finances of the entity; or (3) legally incorporating the entity.

4. Directive #76 states that representatives of Catholic health care institutions who serve as members of governing boards of non-Catholic health care entities "should make their opposition to immoral procedures known and not give their consent to any decisions proximately connected with such procedures."
5. Under Directive #77, "if it is discovered that a Catholic health care institution might be wrongly cooperating with immoral procedures, the local diocesan bishop should be informed immediately and the leaders of the institution should resolve the situation as soon as reasonably possible."

PRACTICAL TAKEAWAYS

These revised ERDs create a number of issues for consideration by Catholic health care institutions, as well as those non-Catholic institutions, that currently participate in or are looking to engage in mergers or other collaborative arrangements, including the following:

- The revised ERDs raise questions about the future of carve-out arrangements designed to preserve access to health care services forbidden by Catholic doctrine, including post-partum tubal ligations, contraception services, gender transition and abortion. The revised ERDs instruct Catholic leaders to conduct a review of all current and future collaborative arrangements to ensure compliance with the "Catholic moral tradition," which could result in a decision to rescind existing arrangements and/or refrain from future arrangements.
- The new multi-jurisdictional review process could significantly slow the mergers and acquisitions process as health care institutions may now be required to obtain the approval of many different bishops across the country. Health care institutions considering entering into collaborative arrangements between Catholic and non-Catholic entities should factor in the time required to obtain diocesan approval of, or non-objection to, the arrangement in addition to the typical government antitrust agency approvals (e.g., the HSR waiting period).
- Although not a change, the ERDs vest the ultimate responsibility for analyzing, interpreting and applying the Directives to collaborative arrangements with the diocesan bishop. Each bishop has wide discretion in determining how to respond to arrangements and behavior that conflict with the ERDs. Merging or affiliating parties involving Catholic health care institutions should recognize that the local bishop is a reviewing authority with the ability to effectively block or reshape the transaction – just like the federal antitrust agencies – and should plan accordingly.

If you have any questions or would like additional information about this topic, please contact one of the following members of Hall Render's **Mergers & Acquisitions** or **Catholic Health Care** practices:

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