

REDUCED DISCRETION IN CORPORATE GOVERNANCE AS APPLIED TO THE PHARMACEUTICAL INDUSTRY IN NEVADA

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I. INTRODUCTION

Healthcare regulation is an important public issue due to the massive expenditures that flow to the industry coupled with the sector's perceived lack of transparency. In 2007, healthcare spending in the United States reached a colossal \$2.2 trillion, or 16.2% of the gross domestic product.¹ This figure amounted to a 6.1% increase in spending compared to 2006.² In a time of rising healthcare costs,³ many consumers are cynical about the industry's regulatory and economic structures. To be sure, physicians, corporations, insurance companies, and other entities all make decisions that affect the quality, quantity, and cost of patient care. As consumers may not understand or be able to control these costs, they understandably seek government intervention to prevent wrongful conduct by the healthcare industry.

This predicament is visible in the context of pharmaceutical marketing. Pharmaceutical corporations engage in several activities to promote their products.⁴ For example, in the practice known as "detailing," pharmaceutical corporations market directly to doctors through a professional sales force.⁵ The purpose of detailing is to persuade physicians to prescribe more of a given product to patients.⁶ Naturally, consumers worry that healthcare professionals and pharmaceutical corporations may engage in conduct that influences physicians to prescribe products that either cost more than equally effective generic drug counterparts, or that are unnecessary for the patient. Consequently, con-

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¹ HEALTH & HUMAN SERVS., NATIONAL HEALTH EXPENDITURES 2007 HIGHLIGHTS 1 (2007), <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/highlights.pdf>.

² *Id.*

³ Amanda Gardner, *U.S. Health-Care Costs to Top \$4 Trillion by 2016*, WASH. POST, Feb. 21, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/21/AR2007022100524_pf.html.

⁴ See Puneet Manchanda & Elisabeth Honka, *The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review*, 5 YALE J. HEALTH POL'Y L. & ETHICS 785, 785-86 (2005).

⁵ *See id.*

⁶ *See id.* at 787.

sumers ask the government to intervene to resolve their concerns through legislation.⁷

Legislation that circumscribes the marketing activities of corporations forces these entities to develop more restrictive decision-making processes than required under the classical and modern approaches to corporate governance. The classical approach compels corporate directors and officers to take actions to maximize shareholder profitability so long as the actions are lawful, “without deception or collusion.”⁸ Modern constituency statutes, as adopted in several states including Nevada, have modified the traditional approach to corporate governance by allowing corporations to consider parties other than the shareholders when making decisions.⁹ In the context of the pharmaceutical industry, these other parties may include patients who use a corporation’s pharmaceutical products. Prior to 2007, Nevada law permitted corporations to consider the interests of other constituencies so long as they acted in the best interest of the corporation.¹⁰ Although this constituency standard departed from the classical approach, corporations had no affirmative duty to act in the best interests of other constituencies.¹¹ In October 2007, however, the Nevada Legislature mandated that pharmaceutical corporations act in a way that promotes the best interests of the patient, thereby chipping away at corporate discretion.¹² Although laudable, the wisdom of this legislation is suspect.

Accordingly, this Note focuses on an education-based alternative to promote effective interactions between pharmaceutical corporations and physicians that benefit patients while allowing these corporations to exercise business discretion. Specifically, educational programs that teach physicians how to interact with pharmaceutical corporations most effectively may maximize the benefits for all parties involved. Although many of the arguments presented may be extended to corporations that sell or market medical devices or appliances, their application in that context is beyond the scope of this Note. In Part II, this Note discusses the background of corporate decision-making and its application in the pharmaceutical industry in Nevada. Part III analyzes the pertinent Nevada statutes, and how they apply in a practical context. Then, in Part IV, this Note offers alternative approaches to promote the best interests of patients while maintaining corporate autonomy in decision-making functions. Part V concludes with some final thoughts.

⁷ See, e.g., *Minutes of the Meeting of the Assem. Comm. of Commerce and Labor: Hearing on Assem. B. 128*, 74th Sess. 6 (Nev. 2007), available at <http://www.leg.state.nv.us/74th/Minutes/Assembly/CMC/Final/465.pdf> (statement of Diana M. Glomb-Rogan, representing The League of Women Voters of Nevada) (stating in regard to legislation to restrict the marketing efforts of drug companies that “it is good consumer protection legislation and an important way to cut the cost of pharmaceuticals. We urge passage of this bill.”).

⁸ Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 708 (2002).

⁹ See NEV. REV. STAT. § 78.138 (2007).

¹⁰ See *id.*

¹¹ See *id.*

¹² NEV. REV. STAT. § 639.570 (2007).

II. BACKGROUND OF CORPORATE DECISION-MAKING IN NEVADA'S PHARMACEUTICAL INDUSTRY

The pharmaceutical industry is important to our economy. In the United States, prescription drug expenditures equaled \$227.5 billion in 2007,¹³ representing approximately ten percent of annual health care spending.¹⁴ To increase revenues and maximize profits, pharmaceutical corporations engage in substantial marketing activities,¹⁵ including: giving samples to physicians, placing advertisements in medical journals, and sponsoring physician meetings and events.¹⁶ Moreover, pharmaceutical corporations subsidize the cost of continuing medical education programs that allow many healthcare professionals to remain certified in their respective fields.¹⁷

In addition, professional sales representatives market directly to physicians by engaging in face-to-face meetings,¹⁸ an activity known as “detailing.”¹⁹ Pharmaceutical corporations spend between \$12-\$18 billion annually in detailing and make approximately 60 million visits to healthcare professionals per year.²⁰ These activities are important to promote stockholder profitability, and to create the revenues necessary to support technological improvements.

A. Impact of Detailing on Healthcare Professionals

Although physician attitudes toward pharmaceutical representatives are mixed, their prescribing patterns appear to correlate with detailing efforts.²¹ A wide group of studies demonstrates that physicians' feelings about pharmaceutical companies range from negative to neutral.²² This lukewarm attitude is consistent with some of the reasons healthcare professionals report as to why they interact with representatives, such as the desire to be polite, and pressure to interact with the representatives who appear in person at their offices.²³ Furthermore, as members of a sales force, pharmaceutical representatives likely carry many of the same negative inferences that attach to other sales professionals. Generally, people perceive salespeople to be pushy, profit-obsessed, and ambivalent to the needs of the client.

Despite these negative associations, healthcare professionals report that pharmaceutical representatives do provide a useful service by conveying practical prescribing information for treating patients.²⁴ One study indicated that approximately seventy-one percent of third-year medical students believe that materials dispersed by pharmaceutical corporations provide “a useful way to

¹³ HEALTH & HUMAN SERVS., *supra* note 1, at 1.

¹⁴ *See id.*

¹⁵ Manchanda & Honka, *supra* note 4, at 785.

¹⁶ *Id.* at 785-86.

¹⁷ Mark R. Tonelli, *Conflict of Interest in Clinical Practice*, 132 CHEST 664, 667 (2007).

¹⁸ *See* Manchanda & Honka, *supra* note 4, at 785.

¹⁹ *Id.* at 785-86.

²⁰ Frederick S. Sierles et al., *Medical Students' Exposure to and Attitudes About Drug Company Interactions: A National Survey*, 294 JAMA 1034, 1034 (2005).

²¹ Manchanda & Honka, *supra* note 4, at 787.

²² *Id.*

²³ *Id.* at 790-91.

²⁴ *See id.* at 793.

learn about new drugs.”²⁵ Pharmaceutical representatives continue to thrive mainly because they provide information to healthcare professionals in an inexpensive and convenient manner.²⁶ Consequently, effective healthcare professionals who know how to utilize these representatives as informational tools may provide better service to their patients.

Regardless of physician attitudes or additional restrictive legislation, pharmaceutical representatives will likely remain an integral part of the industry’s marketing model because their efforts influence physicians to prescribe costly products based on emotion rather than reason.²⁷ Specifically, healthcare professionals are more likely to prescribe irrationally due to their interaction with pharmaceutical representatives.²⁸ Furthermore, healthcare professionals are more likely to prescribe fewer generic drugs and more costly drugs due to the influence of pharmaceutical representatives.²⁹

Several factors explain why pharmaceutical representatives affect prescribing patterns.³⁰ First, representatives give gifts and promotional material to doctors, such as samples and informational resources, thereby creating an expectation of reciprocity.³¹ Thus, physicians feel bound to prescribe a particular drug upon receiving samples from pharmaceutical representatives.³² Although healthcare professionals may be unaware of this effect, it nonetheless exists. Second, representatives use social validation claims to persuade doctors to prescribe certain medications.³³ This tactic utilizes the bandwagon effect to influence prescription patterns. Third, pharmaceutical representatives ask physicians to commit to prescribing certain drugs for their patients.³⁴ Finally, detailers utilize expert authority to motivate doctors to prescribe a medication.³⁵ Although doctors receive benefits from detailing, they may become subject to sales tactics that affect patients negatively. These four factors create major dilemmas for pharmaceutical marketing.

In an ideal world, doctors would prescribe medications based on objective medical information as applied to a patient’s individual condition. However, several studies confirm that the world does not operate in an ideal setting. In one study, McKinney et al. observed physician attitudes regarding detailing practices and potential ethical issues.³⁶ These researchers found that many physicians believe that the pharmaceutical industry’s gift-giving practices, such as giving small trinkets, expensive meals, books, travel packages, or sham consultancy fees to physicians, do not influence their prescribing decisions.³⁷ However, these same physicians believe that they are less susceptible to the

²⁵ Sierles, *supra* note 20, at 1036, 1037 fig.1.

²⁶ Manchanda & Honka, *supra* note 4, at 787.

²⁷ *See id.* at 788.

²⁸ Sierles, *supra* note 20, at 1034-35.

²⁹ *Id.*

³⁰ *See* Manchanda & Honka, *supra* note 4, at 800.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Tonelli, *supra* note 17, at 666, 669 n.27.

³⁷ *Id.*

pressures associated with the gifts than their colleagues.³⁸ This research suggests that physicians underestimate their level of bias. Additionally, another study noted that expensive gifts lead to a greater potential for undue influence.³⁹ According to the Aldir et al. study, which examined how physicians perceive pharmaceutical company gifts, most doctors believe that gifts worth over \$100 are inappropriate.⁴⁰ However, another author asserts that gifts of any amount are inappropriate, and therefore physicians should not accept any such gift.⁴¹

Notwithstanding the potential for undue influence that attaches to costly gifts, health-care professionals believe that manipulative representatives are not nearly as effective as those who take another approach.⁴² The Andaleeb and Tallman study on physician attitudes concluded that health-care professionals view a “manipulative and aggressive selling style” in a negative light.⁴³ The study also found that “[t]he more informational and educational [the] support [provided by the] sales representatives and the higher the number of patients [that a physician treats], the more favorable were physicians’ attitudes toward sales representatives.”⁴⁴ Nonetheless, profit incentives motivate pharmaceutical corporations to enlist a sales force to promote their products regardless of any dilemma presented or the unpopularity of the sales force. The question then becomes the following: what powers do these corporations have to pursue profit motives, and should the government seek to restrain these powers?

B. *The Background of Corporate Director and Officer Duties*

Scholars, such as prominent law professors Adolf Berle and Merrick Dodd, have debated the proper role of corporations in society since the 1930s.⁴⁵ Specifically, Berle asserted that corporations owed a high duty to shareholders because they are the owners of the business.⁴⁶ Furthermore, Berle believed that “managers as agents, or trustees . . . owed a fiduciary duty to the shareholders to maximize shareholder profits.”⁴⁷ Dodd, on the other hand, opined that corporations should take into account the interests of shareholders, employees, customers, and members of the public when making decisions.⁴⁸

The shareholder-maximization model is rooted in a particular historical perspective of corporate history. At the end of the nineteenth century, according to the “standard story” of corporate law academics, business began to

³⁸ *Id.*

³⁹ See Manchanda & Honka, *supra* note 4, at 791-92.

⁴⁰ *Id.* at 792.

⁴¹ See generally Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 JAMA 252 (2003).

⁴² See Manchanda & Honka, *supra* note 4, at 793.

⁴³ *Id.* at 793.

⁴⁴ *Id.*

⁴⁵ Martin L. Hirsch, *Side Effects of Corporate Greed: Pharmaceutical Companies Need a Dose of Corporate Social Responsibility*, 9 MINN. J. L. SCI. & TECH. 607, 620 (2008).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

advance toward the modern construct of a corporation.⁴⁹ Technological advancements required tremendous capital contribution.⁵⁰ Investors who were willing to engage in such ventures sought to diversify their investments.⁵¹ Accordingly, the corporate form allowed each investor to own a small piece of the enterprise and maintain a diversified portfolio.⁵² However, investors tended to lack the necessary understanding and incentive to monitor corporate directors and officers, thereby rendering these managers substantially free from oversight.⁵³ As a result, investors need a way to ensure that directors and officers used investor capital wisely. The shareholder-maximization approach solved this problem by imposing a duty on directors and officers to promote shareholder economic interests.⁵⁴

The private nature of the corporation in the United States also explains the development of the shareholder-maximization model. Historically, American academics have viewed corporations as private economic entities with strong duties to their shareholders.⁵⁵ Under this view, increasing shareholder wealth benefits society on a macro-economic level because it benefits individual investors while promoting social objectives. In particular, when corporations succeed at creating jobs and providing goods and services, they also benefit society through paying taxes that disperse to society in general.⁵⁶

Although this viewpoint encourages corporations to act in a selfish manner, it does not propose that corporations operate without regulation. The profit-maximizing efforts of corporations still must comply with the law, “without deception or collusion.”⁵⁷ As the late Milton Friedman once noted, “[in a free economy] there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”⁵⁸

Although the classical theory of corporate decision-making has defined the shape of corporations, the approach adopted by Dodd is making inroads. Modern terminology exemplifies a dichotomy between the shareholder-oriented model, as advocated by Berle, and the stakeholder model, as proposed by Dodd.⁵⁹ In modern terms, the stakeholder model of corporate decision-making now allows corporations to address economic, environmental, and social interests as well as those of shareholders,⁶⁰ while the shareholder model asks corpo-

⁴⁹ Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 *YALE L.J.* 1927, 1933 (1993).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Williams, *supra* note 8, at 712-13.

⁵⁵ *Id.* at 708.

⁵⁶ *Id.* at 714.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Hirsch, *supra* note 45, at 620-21.

⁶⁰ *Id.* at 623.

rations to operate within the confines of the law. Several states, including Nevada, have adapted to these competing views of corporate governance.⁶¹

C. Corporate Governance in Nevada

Nevada allows corporations to operate under either the shareholder-oriented approach or the stakeholder approach. Nevada Revised Statutes (“NRS”) section 78.138 states, “Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.”⁶² Thus, the key issue revolves around what the interests of the corporation may be. Section 4 of the statute states:

Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may consider:

- (a) The interests of the corporation’s employees, suppliers, creditors and customers;
- (b) The economy of the State and Nation;
- (c) The interests of the community and of society; and
- (d) The long-term as well as short-term interests of the corporation and its stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.⁶³

Finally, the statute remarks, “Directors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.”⁶⁴ Thus, the statute allows corporate officers and directors the discretion to pursue the interests of the corporation. The term “may consider”⁶⁵ is indicative that the directors or officers may comply with either the stakeholder approach or the shareholder model.

D. A More Constrictive Model for Pharmaceutical Marketing

Although NRS section 78.138 governs corporate governance in Nevada, the State Legislature has created a less-flexible standard for pharmaceutical marketing in light of social and economic pressures.⁶⁶ Conflicts arise from the relationship among pharmaceutical corporations, physicians, and the public.⁶⁷ There is a growing concern that doctors may over-prescribe medications to patients because of their interaction with these companies.⁶⁸ Rising prescription costs have raised worries over the role that pharmaceutical companies play in this ubiquitous phenomenon.⁶⁹ Furthermore, there are ethical implications

⁶¹ See NEV. REV. STAT. § 78.138 (2007).

⁶² *Id.* § 78.138(1).

⁶³ *Id.* § 78.138(4).

⁶⁴ *Id.* § 78.138(5).

⁶⁵ *Id.* § 78.138(4).

⁶⁶ See *infra* note 96 and accompanying text.

⁶⁷ See *supra* Part II.A.

⁶⁸ See Dan Stockman & Michael Schroeder, *Rx For Pain*, J. GAZETTE (Fort Wayne, Ind.), December 28, 2008, <http://www.journalgazette.net/apps/pbcs/dll/article?AID=/20081228/LOCAL10/81228030> (reporting that Purdue Pharmaceuticals recently paid \$19.5 million in settlements due to allegations that it asked doctors to recommend overly-aggressive medication schedules for patients).

⁶⁹ See *Minutes of the Meeting of the Assem. Comm. of Commerce and Labor: Hearing on Assem. B. 128*, *supra* note 7, at 6 (statement of Jon L. Sasser).

regarding the business of pharmaceutical marketing. According to statistics presented to the Nevada Assembly, pharmaceutical corporations spend ninety percent of marketing dollars on physicians,⁷⁰ a figure suggesting an undue influence on physicians. Although the Assembly later learned that pharmaceutical corporations spend a majority of those marketing dollars on samples that physicians give to their patients,⁷¹ the Assembly nonetheless sought to pass a bill that would lead to the imposition of additional, and potentially onerous, duties on corporations that market pharmaceuticals to doctors.⁷²

Before 2007, the main requirement for pharmaceutical corporations operating in Nevada was to obtain a state license to distribute pharmaceutical drugs.⁷³ In most other respects, the State regulated pharmaceutical marketing without enforcing industry-specific requirements. Thus, NRS section 78.138 governed pharmaceutical corporations operating in Nevada.⁷⁴

In 2004, however, California adopted legislation to regulate pharmaceutical marketing.⁷⁵ Subsequently, Nevada modeled its pharmaceutical marketing legislation on the California statute. In pertinent part, the California legislation states:

- (a) Every pharmaceutical company shall adopt a Comprehensive Compliance Program that is in accordance with the April 2003 publication "Compliance Program Guidance for Pharmaceutical Manufacturers," which was developed by the United States Department of Health and Human Services Office of Inspector General
- (b) Every pharmaceutical company shall include in its Comprehensive Compliance Program policies for compliance with the Pharmaceutical Research and Manufacturers of America (PhRMA) "Code on Interactions with Health Care Professionals," dated July 1, 2002. The pharmaceutical company shall make conforming changes to its Comprehensive Compliance Program within six months of any update or revision of the "Code on Interactions with Health Care Professionals."⁷⁶

The code further mandates that pharmaceutical companies establish monetary limits on "gifts, promotional materials, or items or activities" provided to healthcare professionals in compliance with the two publications mentioned in sections (a) and (b) of the legislation.⁷⁷ However, the code specifically exempts drug samples, "financial support for continuing medical education forums, and financial support for health educational scholarships" from these limitations.⁷⁸ Furthermore, in California, pharmaceutical corporations can make payments to physicians for "legitimate professional services."⁷⁹

The reasons for adopting rigorous regulation of the pharmaceutical industry are intimated in the Legislative Counsel's Digest.⁸⁰ Specifically, the Cali-

⁷⁰ *Id.* at 4 (statement of Assemb. Heidi S. Gansert).

⁷¹ *Id.* at 9 (statement of Jim Morgan) (stating that sixty-three percent of pharmaceutical corporation marketing dollars pay for samples that physicians give to patients).

⁷² *See id.* at 3.

⁷³ NEV. REV. STAT. § 639.233 (2007).

⁷⁴ *See id.* § 78.138.

⁷⁵ *See* CAL. HEALTH & SAFETY CODE § 119402 (2007).

⁷⁶ *Id.* § 119402 (a)-(b).

⁷⁷ *Id.* § 119402 (d)(1).

⁷⁸ *Id.* § 119402 (d)(2).

⁷⁹ *Id.* § 119402 (d)(3).

⁸⁰ *See* S. 1765, 2003-04 Sess. (Cal. 2004).

ifornia Legislature concurred with the position of the Pharmaceutical Research and Manufacturers of America (“PhRMA”) that, “[w]e are . . . concerned that our interactions with healthcare professionals not be perceived as inappropriate by patients or the public at large.”⁸¹ Moreover, the Legislature also agreed with the Office of the Inspector General’s position that “[a] comprehensive compliance program provides a mechanism that addresses the public and private sectors’ mutual goals of reducing fraud and abuse; enhancing health care provider operational functions; improving the quality of health care services; and reducing the cost of health care.”⁸² Being sensitive to societal pressures, the California Legislature sought to enact legislation that the public would perceive as a remedy to illegitimate business practices between pharmaceutical corporations and healthcare professionals.

E. Pharmaceutical Marketing Regulation Comes to Nevada

The Nevada Legislature followed California’s example by enacting a statute to regulate pharmaceutical marketing to healthcare professionals. Previously, the Legislature attempted to enact a regulation package with Assembly Bill 66, but failed to garner enough support for passage.⁸³ Assembly Bill 66 sought to codify the PhRMA standards as well as those of the American Medical Association in order to regulate how pharmaceutical companies provided information to doctors.⁸⁴ To revive this attempt at regulation, the Legislature presented Assembly Bill 128 in February of 2007 as “the next generation of drug detailing legislation.”⁸⁵ After conducting some revisions, the Nevada Assembly and Senate passed the bill in May 2007.⁸⁶ Thereafter, Governor Jim Gibbons signed the bill into law in June 2007.⁸⁷

The Legislature confronted several tensions as it made changes to the proposed bill. Early versions of the bill demonstrated the Legislature’s concern that economic incentives from pharmaceutical corporations may influence prescribing patterns.⁸⁸ For example, one version stated that gifts with “no direct benefit to a patient” that exceed \$100 should be reported by the manufacturer or wholesaler.⁸⁹ In addition, the earlier bill sought to force pharmaceutical corporations to report the names of physicians and other individuals who received gifts in the aggregate of more than \$1000 during a reporting period.⁹⁰ Similar to the California legislation, the early version of the bill exempted samples, scholarships, and reasonable compensation for physician services from

⁸¹ *Id.* § 1(c).

⁸² *Id.* § 1(d).

⁸³ See *Minutes of the Meeting of the Assem. Comm. of Commerce and Labor: Hearing on Assem. B. 128*, *supra* note 7, at 3 (statement of Assem. Marcus Conklin).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Nev. Legis. Counsel Bureau, AB 128, <http://www.leg.state.nv.us/74th/reports/history.cfm?id=309> (last visited Sept. 10, 2009).

⁸⁷ *Id.*

⁸⁸ See Assem. 128 § 1, 2007 Leg., 74th Sess. (Nev. 2007) (Assem. Amendment 140).

⁸⁹ See *id.* § 1(1)(b)-(c).

⁹⁰ See *id.* § 1(2)(a)(1).

that amount.⁹¹ Furthermore, the Legislature was not concerned with gifts with a value less than \$100.⁹²

As the bill progressed through the legislative process, its language loosened considerably. Indeed, during an early hearing in the Assembly, Assemblyman Conklin stated:

The California statute as I read it is looser than this. It requires the pharmaceutical companies only to have a positive affirmation that they have a policy in place to deal specifically with this issue. There is no reporting mechanism other than the pharmaceutical company has to put some affirmation of that policy on its website.⁹³

After the Legislature revised the bill and before it passed the proposal into law, Assemblyman Conklin stated that, “[t]he bill before you now is a compromise bill that probably makes no one happy, but makes no one unhappy.”⁹⁴ Echoing this statement, Barry Gold, the Director of Government Relations for AARP, Nevada, stated, “[t]his bill is a compromise representing a step in providing the public with knowledge that their pharmaceutical industry has a code of conduct and their accountability to that code of conduct and provides information on their compliance.”⁹⁵ These statements suggest that the purpose of the bill was to provide a mechanism to improve transparency between pharmaceutical corporations and the public.

F. *The Nevada Statute—NRS Section 639.570*

The Legislature codified the end product of Assembly Bill 128 as NRS section 639.570, which became effective on October 1, 2007. The first section states:

A wholesaler or manufacturer who employees a person to sell or market a drug, medicine, chemical, device or appliance in this State shall:

(a) Adopt a written marketing code of conduct which establishes the practices and standards that govern the marketing and sale of its products. The marketing code of conduct must be based on applicable legal standards and incorporate principles of health care, including, without limitation, requirements that the activities of the wholesaler or manufacturer be intended to benefit patients, enhance the practice of medicine and not interfere with the independent judgment of health care professionals.⁹⁶

The first requirement of the statute states that pharmaceutical corporations must adopt a “marketing code of conduct.”⁹⁷ NRS section 639.570 provides

⁹¹ See *id.* § 1(2)(b).

⁹² See *id.* § 1.

⁹³ *Minutes of the Meeting of the Assem. Comm. of Commerce and Labor: Hearing on Assem. B. 128, supra* note 7, at 5 (statement of Assem. Marcus Conklin).

⁹⁴ *Minutes of the S. Comm. of Commerce and Labor: Hearing on Assem. B. 128, 74th Sess.* 6 (Nev. 2007), available at <http://www.leg.state.nv.us/74th/Minutes/Senate/CL/Final/1392.pdf> (statement of Assem. Marcus Conklin).

⁹⁵ *Id.* (statement of Barry Gold).

⁹⁶ NEV. REV. STAT. § 639.570(1)(a) (2007). Some requirements of the statute will receive little attention because they are beyond the scope of this Note. They include requirements for annual audits to monitor compliance, identifying a compliance officer, submissions to the State Board of Pharmacy, and the requirement to “[a]dopt policies and procedures for investigating instances of noncompliance with the marketing code of conduct” *Id.* at § 639.570(1)(c)-(e).

⁹⁷ *Id.*

pharmaceutical corporations with the option of developing their own codes of conduct or adapting an existing code.⁹⁸ However, the law provides minimal guidance, and gives no measurable standard to corporations that wish to create their own codes of conduct.⁹⁹

Instead, NRS section 639.570 merely references a code of conduct that meets the Legislature's approval.¹⁰⁰ In pertinent part, the statute states, "Adoption of the most recent version of the Code on Interactions with Healthcare Professionals developed by the Pharmaceutical Research and Manufacturers of America satisfies the requirements"¹⁰¹ As with the California pharmaceutical marketing statute, the Nevada statute approves the use of the PhRMA code. The PhRMA code represents a voluntary compliance program intended to improve interactions between pharmaceutical representatives and healthcare professionals, and to improve the public's perception of the industry.¹⁰² Although the PhRMA measures were previously voluntary, the PhRMA measures (or other regulations that comply with the statute) became mandatory for pharmaceutical corporations with the passage of NRS section 639.570.

The purpose of the code of conduct requirement is to establish standards and principles to regulate pharmaceutical corporations.¹⁰³ According to the statute, pharmaceutical corporations must take actions that are "intended to benefit patients, enhance the practice of medicine and not interfere with the independent judgment of health care professionals."¹⁰⁴ Once the code of conduct is in place, the statute instructs that pharmaceutical corporations must "[a]dopt a training program to provide regular training to appropriate employees, including, without limitation, all sales and marketing staff, on the marketing code of conduct."¹⁰⁵ The Legislature surely intended to ensure that pharmaceutical corporations paid more than lip service to this statutory enactment by imposing statutory requirements on company infrastructure. However, as the next section discusses, the Legislature's lack of regulatory direction leaves pharmaceutical corporations with no clear standards, and consequently with no indication as to whether liability will attach to their actions. Furthermore, pharmaceutical corporations may experience increased costs without conveying any clear benefit to patients or the public.

This Note will analyze corporate governance under this statute as if pharmaceutical corporations have adopted the PhRMA code. As the Legislature has specifically mentioned that the PhRMA code is compliant with the statute, the Legislature evidently agreed with the principles and regulations contained therein.¹⁰⁶ According to the PhRMA code, its purposes are several fold. First, the legislature, the public, pharmaceutical corporations, doctors, and patients

⁹⁸ See *id.* at § 639.570(1)(a).

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² See PHARM. RESEARCH & MFRS. OF AM., CODE ON INTERACTIONS WITH HEALTHCARE PROFESSIONALS 2 (2008), available at <http://www.phrma.org/files/PhRMA%20Marketing%20Code%202008.pdf>.

¹⁰³ NEV. REV. STAT. § 639.570(1)(a).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 639.570(1)(b).

¹⁰⁶ See *id.* § 639.570(1)(a).

desire positive interactions between pharmaceutical corporations and physicians.¹⁰⁷ Specifically, the PhRMA code states, “Ethical relationships with healthcare professionals are critical to our mission of helping patients by developing and marketing new medicines.”¹⁰⁸ The question then becomes one of perceptions: What creates an ethical relationship? According to the PhRMA code, “[a]n important part of achieving this mission is ensuring that healthcare professionals have the latest, most accurate information available regarding prescription medicines, which play an ever-increasing role in patient healthcare.”¹⁰⁹ Thus, ethical relationships consist of providing value-adding information to assist doctors in making prescription decisions.

Second, the PhRMA code seeks to enable doctors to do that which is best for their patients. In particular, the PhRMA code states, “[A] healthcare professional’s care of patients should be based, and should be perceived as being based, solely on each patient’s medical needs and the healthcare professional’s medical knowledge and experience.”¹¹⁰ To this end, the pharmaceutical representative should “inform healthcare professionals about the benefits and risks of . . . products to help advance appropriate patient use, provide scientific and educational information, support medical research and education, and obtain feedback and advice about . . . products through consultation with medical experts.”¹¹¹

Additionally, the PhRMA code controls specific activities between physicians and pharmaceutical companies. The code governs the following: meals, entertainment and recreation, pharmaceutical corporate support of continuing medical education, pharmaceutical corporate support for third-party educational or professional meetings, doctors as consultants, speaker programs, educational items that pharmaceutical corporations give to physicians, prescriber data, guidance regarding physician decision-making, and training of pharmaceutical corporate representatives.¹¹²

III. ANALYSIS OF THE IMPLICATIONS OF NRS SECTION 639.570

At first blush, the new duties encapsulated in NRS section 639.570 do not appear alarming. The PhRMA code denotes that pharmaceutical corporations should provide services to healthcare professionals to help patients.¹¹³ However, this language codifies the duties of pharmaceutical companies regarding their corporate governance. Whereas previously the directors and officers of corporations could take one or many factors into account when making corporate decisions, they must now consider the interests of patients and the judgment of doctors. Although the language may have been a benign and symbolic gesture aimed at appeasing a hostile constituency, it creates a possible conflict of interest for pharmaceutical companies that customarily made decisions

¹⁰⁷ PHARM. RESEARCH & MFRS. OF AM., *supra* note 102, at 2-3.

¹⁰⁸ *See id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (bullets omitted).

¹¹² *See generally id.*

¹¹³ *See id.* at 2.

purely according to the best interests of their shareholders. Consequently, there are several perils that accompany this new statutory position.

The implementation of NRS section 639.570 presents a potential conflict for pharmaceutical companies that seek to pursue maximum profits for their shareholders, an activity that the Legislature allows under Nevada's corporate governance statute.¹¹⁴ Under a shareholder-oriented model, pharmaceutical companies have a duty to maximize investor profits. Although many modern statutes allow corporations to take actions with other interests in mind in addition to shareholder profits, the Nevada pharmaceutical marketing statute drastically reduces the ability of pharmaceutical companies to operate solely to maximize investor returns.¹¹⁵ First, this Note will analyze how the general rule of corporate governance in Nevada would apply in this situation, and how NRS section 639.570 creates a conflict. Next, this Note will discuss efficiency considerations that lead to the conclusion that the law should revert to the general corporate governance rule.

A. *Benefit of Discretion for Corporate Directors and Officers*

Pharmaceutical companies operate on behalf of individual investors who expect corporate directors and officers to do everything in their power to produce a good return on their investment. Common investors lack the "information, skill, and incentive to monitor managers" to ensure that this wish is carried out.¹¹⁶ Consequently, it makes sense to allow officers and directors to act in a way that benefits those who provide the capital needed to carry out an enterprise.

The general rule in Nevada corporate governance law allows a corporation to focus on the interests of its shareholders.¹¹⁷ To be sure, directors and officers can consider other factors when making corporate decisions. Specifically, the statute allows directors and officers to consider the interests of employees, suppliers, creditors, customers, the economy, and the interests of community and of society.¹¹⁸ However, the statute also allows directors and officers to serve the interests of its stockholders.¹¹⁹ Consequently, the pharmaceutical corporation that wishes to maximize return for its shareholders would be able to do so without reserve if the general Nevada statute were to govern its activities.

A hypothetical provides an example of the full implications of this general rule. For example, suppose that a pharmaceutical company wishes to maximize shareholder profits. This corporation would likely enlist a sales force to engage in detailing to provide information to physicians due to the positive correlation between detailing efforts and product prescriptions.¹²⁰ Hence, the corporation would likely engage in detailing for the primary purpose of persuading doctors to prescribe its product because it is a profit-oriented corporation that is

¹¹⁴ See NEV. REV. STAT. §§ 78.138, 639.570 (2007).

¹¹⁵ See *id.*

¹¹⁶ Roe, *supra* note 49, at 1933.

¹¹⁷ See NEV. REV. STAT. § 78.138.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Manchanda & Honka, *supra* note 4, at 787.

accountable to its shareholders. Likewise, the shareholders purchase stock in the corporation with the hope of a return on their investment. If they did not think that the corporation would provide a healthy return, they probably would have invested in another corporation.

Accordingly, the relationship between the corporation and its shareholders places pressure on the directors and officers to provide infrastructure that maximizes shareholder returns. If the corporation wishes to engage in detailing efforts in Nevada under NRS section 78.138, then it may consider “[t]he long-term as well as short-term interests of the corporation and its stockholders.”¹²¹ This corporation could thus engage in profit-seeking behavior for the benefit of its shareholders.

Likewise, if the corporation believed that it was in its best interest to pursue another goal due to societal influence or shareholder preferences, it would be able to pursue such a goal under NRS section 78.138. The corporation could alter its detailing efforts to best suit “[t]he interests of the community and of society” if it so desired.¹²² For example, if the corporation were to receive backlash from concerned shareholders or the public about unethical marketing practices, the corporation could voluntarily change its marketing program and advertise these changes. Perhaps the corporation could gain a competitive advantage against other pharmaceutical corporations by engaging in such a campaign.

This does not mean, however, that the corporation is free from regulation. In particular, NRS section 78.138 states, “Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.”¹²³ Furthermore, directors and officers are individually liable for actions if it is proven that: “(a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; and (b) His breach of those duties involved intentional misconduct, fraud or a knowing violation of law.”¹²⁴ Consequently, a corporation cannot knowingly market an unsafe drug, give patently false information to physicians regarding a drug, or engage in any other fraudulent or illegal activity. As such, the law prior to the enactment of NRS section 639.570 provided sufficient safeguards to prevent misuse of corporate power, while at the same time allowing business to pursue the most efficient marketing practices.

B. The Effect of NRS Section 639.570

The enactment of NRS section 639.570 creates a different dynamic for pharmaceutical companies. Specifically, the voluntary aspect of programs to benefit interests outside of the corporation becomes mandatory. In adopting a marketing code of conduct, a pharmaceutical company must now base acceptable activities on the requirement “that the activities . . . be intended to benefit patients, enhance the practice of medicine and not interfere with the indepen-

¹²¹ NEV. REV. STAT. § 78.138(4)(d).

¹²² *Id.* § 78.138(4)(c).

¹²³ *Id.* § 78.138(1).

¹²⁴ *Id.* § 78.138(7).

dent judgment of healthcare professionals.”¹²⁵ Most people would agree that these goals are laudable. However, the language has a legal significance that reduces the discretion of pharmaceutical corporations.

The requirement that corporations must “intend[] to benefit patients”¹²⁶ forces corporations that solely seek to maximize shareholder returns to make marketing decisions based on benefits to patients. Corporations may try to maneuver around the system to avoid compliance. Conversely, the corporations may comply with the system and risk facing increased marketing compliance costs.

1. Adoption of a Code that “Satisfies this Requirement”

One of the most precarious aspects of NRS section 639.570 is that there is no clear standard to guide pharmaceutical corporations. The statement that “[t]he marketing code of conduct must be based on applicable legal standards and incorporate principles of healthcare, including, without limitation, requirements that the activities of the wholesaler or manufacturer be intended to benefit patients, enhance the practice of medicine and not interfere with the independent judgment of healthcare professionals”¹²⁷ is of little assistance. Pharmaceutical companies were already required to comply with applicable legal standards because compliance with the law is obviously a requisite to operating a business. Regarding principles of healthcare, the statute offers a generic standard that the code “be intended to benefit patients, enhance the practice of medicine and not interfere with the independent judgment of health care professionals.”¹²⁸ However, the statute offers minimal indication of how these additional duties apply to pharmaceutical corporations.

In fact, the only guidance the statute gives regarding this standard is that the PhRMA code satisfies the statutory requirements.¹²⁹ Although there is no indication that the PhRMA code is the only standard that meets the statutory requirements, there is little indication of an alternative standard that would definitively meet the requirements.¹³⁰ Moreover, the Nevada Administrative Code (“NAC”) provides little assistance. According to the NAC, a pharmaceutical wholesaler or manufacturer must indicate one of the following: (1) that it uses the PhRMA code without modification; (2) that it uses a modified version of the PhRMA code; or that (3) it uses its own marketing code of conduct.¹³¹ If the wholesaler or manufacturer creates its own code, it must demonstrate to the Board of Pharmacy that it has addressed nine vague topics in a sufficient manner.¹³² Failure to address these topics adequately will cause the code of conduct to be “incomplete” and “noncompliant.”¹³³ Certainly, the Board of Pharmacy will instruct a corporation as to how it may fix any deficiency that

¹²⁵ NEV. REV. STAT. § 639.570(1)(a) (2007).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ NEV. ADMIN. CODE §§ 639.616(1)-(3), 639.6053(1)-(3) (2007).

¹³² NEV. ADMIN. CODE §§ 639.616(3)-(4), 639.6053(3)-(4).

¹³³ NEV. ADMIN. CODE §§ 639.616(5), 639.6053(5).

the Pharmacy Board perceives.¹³⁴ However, the State appears somewhat disingenuous in this effort, as it purports to allow corporations to create subjective and flexible codes of conduct while imposing a duty to patients that must, as a matter of effective jurisprudence, have an objective standard. As the State's procedure does not offer constructive guidelines to help corporations create a suitable code of conduct that meets an objective standard, it should be viewed with caution.

The only suitable standard that the State has offered is that of the PhRMA code. Pharmaceutical corporations are forced to apply the PhRMA code, or venture into unknown territory and potentially risk future liability by creating an original code. As there is no Nevada case law on the subject, a corporation would take a risk if it created an original code, even if it had the assistance of an administrative agency. Some may argue that the lack of guidance actually benefits pharmaceutical corporations as it allows them to determine their own standards with minimal government interference. However, by enacting a law that creates a new duty for pharmaceutical corporations without offering specific guidance regarding the application of that duty, the Nevada State Legislature may be forcing pharmaceutical corporations to spend money in an inefficient manner to avoid the specter of liability.

To apply the implications of this new statute, the aforementioned hypothetical pharmaceutical corporation exemplifies the statutory impact. Before the Legislature enacted the statute, the hypothetical corporation may have taken actions that complied with the law and were intended to maximize shareholder profits. After the state enacted the statute requiring a marketing code of conduct, the corporation may take the safest route and enact the PhRMA code.

As a result, the corporation now has the burden of setting up internal infrastructure to regulate its marketing activities.¹³⁵ Therefore, the corporation must ensure that meals provided to healthcare professionals abide by certain guidelines.¹³⁶ The corporation must regulate its gifts of entertainment and recreational items,¹³⁷ its continuing medical education program,¹³⁸ the manner in which the corporation provides financial support for educational and professional meetings,¹³⁹ and the manner in which the corporation interacts with medical consultants and speakers.¹⁴⁰ The corporation must worry about regulations regarding physician disclosures,¹⁴¹ and scholarships and educational funds.¹⁴² The corporation must also abstain from giving non-educational items to healthcare professionals,¹⁴³ and must restrict gifts of educational items.¹⁴⁴ These additional duties and consequent regulations place an additional cost on

¹³⁴ NEV. ADMIN. CODE §§ 639.619(2)-(3), 639.6057(2)-(3) (2007).

¹³⁵ See generally PHARM. RESEARCH & MFRS. OF AM., *supra* note 102.

¹³⁶ See *id.* at 4.

¹³⁷ See *id.* at 5.

¹³⁸ See *id.* at 6.

¹³⁹ See *id.* at 7.

¹⁴⁰ See *id.* at 7-10.

¹⁴¹ See *id.* at 11.

¹⁴² See *id.* at 11.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 12.

pharmaceutical companies to ensure compliance. As a result, the Nevada State Legislature has reduced the corporation's motivation to maximize its profits.

Drawing back from the hypothetical, it is clear that corporations may become responsible to third parties by mandate.¹⁴⁵ However, the context of this application is important. Specifically, because the pharmaceutical industry is like no other industry, it should not be subject to the same kind of controls that one would ordinarily find in such areas as consumer protection. First, society charges pharmaceutical corporations with an important social goal to create new medicines to cure illnesses. By engaging in profit-maximizing behavior, these corporations are able to fund new technologies to create new medicines. Second, healthcare professionals already have a high duty to treat their patients properly. Thus, individuals are already in place to protect patients in case the pharmaceutical industry becomes too greedy. Moreover, the proposition that the industry must put aside its focus on profit maximization simply to assuage worries about healthcare professionals who have the highest duty to their patients is insulting to physicians and to the traditional practice of corporate law. Third, the similarity of many drugs prompts directors and officers to use a sales force to gain a comparative advantage over other pharmaceutical corporations. Few people condone the lavish gifts that are impermissible under the code.¹⁴⁶ However, the heightened potential for a statutory violation may cause corporate directors and officers to scale back their operations even further out of fear.

2. *Efficiency Concerns with NRS Section 639.570*

One of the main concerns that NRS section 639.570 seeks to combat is increasing prices for pharmaceuticals. In theory, the statute limits a pharmaceutical corporation's ability to influence a physician's prescription patterns toward higher priced brand-name drugs. Notably, a representative of the AARP stated, "If [pharmaceutical companies] set a goal to increase sales for a particular drug, one way is through their drug representatives who visit physician's [sic] offices on a regular basis. The pharmaceutical companies provide the doctors' offices with many promotional items which provide a constant reminder of their products."¹⁴⁷ Thus, the corporations' tactic is to inundate the doctors with items in such a way that sales for the drugs will increase. It is logical to think that reducing the influence of pharmaceutical corporations would cause doctors to prescribe less costly drugs. As a representative of the League of Women Voters noted, "[I]t is good consumer protection legislation and an important way to cut the cost of pharmaceuticals."¹⁴⁸

However, the benefit to patients is unclear. In fact, Michael Karagiozis, a doctor in Las Vegas, noted that "[i]f 2 percent of all prescriptions were moved to generic by this legislation, the insurance companies in southern Nevada would save \$37 million off their pharmacy budget in the first year. This bill

¹⁴⁵ See NEV. REV. STAT. § 639.570 (2007); see also *supra* Part II.D.

¹⁴⁶ See Manchanda & Honka, *supra* note 4, at 791-92.

¹⁴⁷ *Minutes of the Meeting of the Assem. Comm. of Commerce and Labor: Hearing on Assem. B. 128*, *supra* note 7, at 6 (statement of Janet Cottrell, Volunteer, AARP, Nevada).

¹⁴⁸ *Id.* at 6 (statement of Diana M. Glomb-Rogan, representing The League of Women Voters of Nevada).

does not benefit physicians or patients as much as it does insurance companies.”¹⁴⁹ Furthermore, if patients were to move to generic drugs without a substantial reduction in their out-of-pocket prescription costs, then the patients would additionally suffer on the back-end from the lack of technological innovation that would have come from pharmaceutical companies investing their profits into research and development. Consequently, patients will not receive the aid of new medicines as quickly because pharmaceutical companies lost some discretion in establishing their business practices.

The benefits of the legislation face other shortcomings. Although detailing is a costly endeavor, sixty-three percent of pharmaceutical marketing costs come from samples that healthcare professionals give to patients.¹⁵⁰ Thus, patients benefit directly from detailing efforts. Furthermore, as stated in *IMS Health Inc. v. Ayotte*,¹⁵¹ the benefits of generic drugs to patients are not as high as one might think. First, generic drugs are not subject to the same study and testing standards as name-brand drugs.¹⁵² Second, the absorption rates of a generic drug versus a name-brand drug may be different, thereby causing potential adverse reactions when switching.¹⁵³

As the efficiency of NRS section 639.570 is debatable, there is no need to alter the corporate decision-making structure, particularly one that alienates directors and officers from their duties to shareholders. The benefits of changing the system do not outweigh the costs because the potential benefits from the change are uncertain.

IV. ALTERNATIVE APPROACHES

The solutions to the problem caused by the negative perceptions of pharmaceutical corporations and NRS section 639.570 can be resolved by: (1) reverting back to the former corporate governance statute; and (2) focusing on physician education. First, the Legislature could allow NRS section 78.138 to form the standard for pharmaceutical corporate governance. In this way, shareholders may hold directors and officers to the fiduciary duties that prevail in the majority of the corporate world. Furthermore, pharmaceutical corporations would have more discretion to engage in actions that lead to healthy business returns and improved medications for patients in the future.

Second, instead of regulating representative interactions with doctors, the State should focus on teaching physicians how to use the pharmaceutical industry's marketing tools to their patients' advantage. As physicians have a heightened duty to act in the best interests of their patients, they should be the focus of educational improvements in this area. Up to ninety percent of doctors believe they have not received enough training in working with pharmaceutical representatives.¹⁵⁴ Thus, although healthcare professionals believe that the

¹⁴⁹ *Id.* at 9 (statement of Michael Karagiozis).

¹⁵⁰ *Id.* (statement of Jim Morgan, representing PhRMA).

¹⁵¹ *IMS Health Inc. v. Ayotte*, 490 F.Supp. 2d 163 (D.N.H. 2007).

¹⁵² *Id.* at 169 n.5.

¹⁵³ *Id.*

¹⁵⁴ Michael A. Steinman, *Gifts to Physicians in the Consumer Marketing Era*, 284 JAMA 2243, 2243 (2000).

pharmaceutical industry provides helpful information regarding prescription decisions,¹⁵⁵ these professionals are subject to a potentially negative influence.

One way to promote the best interests of patients is to educate healthcare professionals on how to obtain helpful information from pharmaceutical representatives without sacrificing objectivity. A focus on education would lead to greater efficiency as doctors would know how to get useful information from pharmaceutical corporations without becoming subject to negative prescription patterns. As one author noted, physician education could focus on the following questions: (1) “What Would My Patients Think about This Arrangement?”¹⁵⁶ (2) “What Is the Purpose of the Industry Offer?”¹⁵⁷ (3) “What Would My Colleagues Think about This Arrangement?”¹⁵⁸ These are merely suggestions to help healthcare professionals properly manage their relationships with pharmaceutical representatives. As there appears to be a vacuum in this area of education, making a simple improvement to educate doctors makes more sense than shifting the corporate regulatory structure that may ultimately reduce the pharmaceutical industry’s incentive to provide valuable information to physicians for treating patients.

As pharmaceutical corporations operate with a motive to make profit, they are in a poor position to make business decisions based on patient interests. Focusing on physician education would allow pharmaceutical corporations to maximize their duties to their shareholders because potential liability regarding physicians’ patients would not constrain their conduct. Therefore, the pharmaceutical regulatory system would not have to sacrifice the interests of patients in the process.

Alternatively, the Legislature should define a pharmaceutical corporation’s duties to other constituencies in detail for purposes of transparency and predictability. At the very least, pharmaceutical corporations would be able to understand the full requirements of the law, and how the Legislature will impose liability. Although this alternative solution is unattractive, it is better than the current answer.

V. CONCLUSION

Government regulation of pharmaceutical companies has wrestled with the conflicting influences of the classical model of corporate governance and the modern approach to corporate decision-making. The classical model emphasizes the corporation’s duties to its shareholders, holding that directors and officers should take actions solely to maximize shareholder profitability. The modern approach, however, focuses on the corporation’s duties to external parties and obligates pharmaceutical corporations to act in the best interests of outside constituents, such as patients.

NRS section 639.570 complies with the modern approach, thereby reducing a pharmaceutical corporation’s ability to maximize profits for its sharehold-

¹⁵⁵ See Manchanda & Honka, *supra* note 4, at 793.

¹⁵⁶ Susan L. Coyle, *Physician-Industry Relations. Part 1: Individual Physicians*, 136 ANNALS INTERNAL MED. 396, 397 (2002).

¹⁵⁷ *Id.* at 398.

¹⁵⁸ *Id.*

ers.¹⁵⁹ By forcing the corporations to act in the best interests of patients, and not to interfere with the independent judgment of healthcare professionals, the Legislature has created an overly vague and burdensome requirement. Furthermore, the purported benefits of the legislation, namely a decrease in pharmaceutical costs, are both unproven and uncertain. The legislation provides an unclear solution to a perceived problem by changing the fundamental nature of corporate governance in the pharmaceutical industry. The Legislature should not take such drastic action in these circumstances.

Instead, the Nevada Legislature should restore the application of NRS section 78.138 to control the activities of pharmaceutical corporations. The State should place greater focus on improving educational opportunities for healthcare professionals to learn how to interact with pharmaceutical professionals. To be sure, this recommendation places an additional burden on healthcare professionals to learn how to interact with the pharmaceutical industry. The high duty placed on physicians to pursue the best interests of their patients makes them ideal candidates for controlling the flow of information as well as interactions between them and pharmaceutical representatives.

In the alternative, the Legislature should at least further define the regulatory limits of NRS section 639.570. The current legislation does not specifically define acceptable marketing conduct, and therefore reduces regulatory transparency. As a result, pharmaceutical corporations are unable to ascertain the scope of liability regarding third parties, and thus, must act in an overly cautious manner to avoid liability. This lack of information creates unneeded costs. By explaining the scope of liability, the Legislature can at least avoid this conflict and allow pharmaceutical corporations to fashion a regulatory scheme that is in line with the concerns of the public.

¹⁵⁹ See NEV. REV. STAT. § 639.570 (2007).