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**GOVERNING BOARD ISSUES:
WHAT SHOULD ADMINISTRATORS KEEP IN MIND?**

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I. Introduction – Board and Administrative Roles

Transparency and accountability are pervasive buzz-words for standards of best practices and assessment of performance at all levels of higher education. In the current climate of close scrutiny of corporate governance, transparency and accountability are especially tied to the activities of governing boards, including boards of trustees with the fiduciary responsibility for control and management of private¹ colleges' or universities' affairs and property.

Generally, a governing board should be focused on the broad issues effecting successful implementation of an educational institution's mission. A wide range of issues affect and effect an institution's mission and present significant challenges to trustees. They must exercise their substantial powers and responsibilities in conformity with numerous laws and regulations. A board's partners in navigating complex governance environments are college and university administrators – from the CEO and the CEO's executive cabinet of administrators to department level administrators in

¹ For the purposes of this paper, private colleges and universities refers to non-profit institutions. Governing boards for proprietary colleges and universities have many of the same concerns that non-profit boards have. However, they also have some very different concerns because of the for-profit nature of their institutions. Those differences are not discussed in this paper.

academic as well as student support, administrative, financial and other non-academic departments.

The CEO's role as the primary administrative contact person with the board of trustees cannot be overstated. Wise administrators follow their president's or chancellor's lead in their interaction with trustees. Furthermore, college and university administrators must, of course, perform the primary functions of their positions – be they academic affairs, student affairs, financial and budgetary matters, information technology management, advancement, research administration or other responsibilities. An administrator's role is to lead and to execute the mission, goals and objectives for the college or university. Executive level administrators have special responsibility to lead by identifying the vision and plans for attaining institution-wide goals. However, administrators at all levels must always be aware of and sensitive to issues which are and/or should be important to their governing boards. Administrators who are aware of such issues can better perform their duties in ways that are helpful to the board, to the college or university and to themselves.

As an administrator assesses his or her relationship with the board and the role he or she should play in board relations, it is important to remember the legal environment in which the board functions. A college or university board's powers and responsibilities are broad and are defined by external and internal legal requirements. External requirements include an institution's corporate charter filed with state government (the charter is also an internal requirement established by the institution's incorporators to establish the institution's legal existence in conformity with state law), corporate law, state educational licensing law, federal law, and case law. Internal requirements include a private institution's by-laws and institutional policies and procedures. Boards of private higher educational institutions must function within these parameters to fulfill their duties of care and loyalty to private colleges and universities.

This paper discusses several issues which are current hot topics for boards as well as some recurring issues of importance for governing boards and administrators' roles in assisting boards to effectively perform their duties.

II. Keep the Board Informed

A current mantras is that colleges and universities are highly regulated. This is very true – on the federal, state and local levels. Members of governing boards for private institutions are volunteers – usually knowledgeable volunteers who are leaders in their communities. However, they must rely on administrators to keep abreast of the laws and regulations applicable to the institution and, correspondingly, its board. As stated above, the primary administrative contact person with the board is, of course, the chief executive officer – the president or chancellor of a college or university. But other administrators are essential team members to support the CEO's efforts to advise the board and lead the institution.

All administrators must remember their relationship with the board in their daily activities. Indeed, administrators have a recurring role in advising trustees of their responsibilities – especially when it is time to orient new board members, to inform board member of significant changes in their responsibilities and to advise them of risks and risk management for the institution.

Keeping the Board informed requires a proactive planning and communication approach. Crises will occur and some legal requirements change quickly. However, much change can be anticipated and administrators who engage in thoughtful planning, goal-setting, project management of action plans and appropriate communication of plans can prepare for everyday challenges and crises in ways that build trustee confidence and can reduce legal risks for the institution. Indeed, trustee confidence and trust in the advice received from administrators is at the core of a positive and constructive relationship between trustees and administrators.

In order to keep the board appropriately informed, administrators must keep their CEO informed. This is a challenge which all administrators face – how to keep the CEO informed without engaging in information overload. But it must be done. Astute administrators learn their CEO's style for learning about important changes and discipline themselves to provide succinct strategic information to their CEO while identifying information that the board will also need to know. It is easy to forget to keep the CEO and board informed in the midst of daily administrative responsibilities, but the administrator who disciplines him or herself to inform the CEO of matters of importance to the board in a timely fashion performs a necessary service for the institution as well as the CEO and board.

Listed below are several issues which should be important to administrators at colleges and universities and have high visibility to governing boards when the issues have negative effects on the college or university.

III. Compliance Reporting

Private colleges and universities have monthly reporting requirements under various laws and regulations. The reports which are most likely to attract the attention of the board are those with significant risk management implications and/or the reports with public relations interest, that is, interest to students, employees, parents and the press. Private institutions are not subject to the broad scope of sunshine laws which apply to public higher education institutions. Nevertheless, private institutions which receive federal funding [e.g. financial aid reporting under Program Participation Agreements and the Integrated Postsecondary Education Data System (IPEDS), 20 U.S.C. § 1094 (a) (17), 34 C.F.R. §100.6, 29 C.F.R. §§ 1602.48-50] or are otherwise subject to federal laws and regulations [e.g. Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 654, 29 C.F.R. 1904.32] must submit timely and accurate reports to federal agencies. Portions of these reports are then accessible to the public under the federal Freedom of Information Act (FOIA).

No board member likes to be surprised by articles in the media about reports which administrators submitted to a government agency, but did not inform the board about possible legal liability and/or negative publicity. Some annual reports that administrators should discuss with Board members include:

- A. Under the Higher Education Act, 20 U.S.C. §1011f², a college or university must disclose gifts of \$250,000 or more from a foreign source³ by January 31 or July 31, whichever is sooner. Clearly this reporting requirement has added significance as war in Iraq, military conflict in Afghanistan and the war on terror continue. Board members should not read about foreign gifts or foreign contracts, no matter how positive or innocuous, in the press. Trustees should hear about such matters from the administration before the report is submitted to the appropriate agency.

- B. OSHA⁴ requires that employers with more than 11 employees annually post a summary of the total job-related injuries or illnesses that occurred during the prior calendar year. The summary must be posted with other employee notices. This is another one of those reports that board members should receive from the college or university as an informational item – not via the press. The report has more significance if the number of job-related injuries or illnesses is on the rise or the number is higher than would be expected with good safety practice.

² **(a) Disclosure report**

Whenever any institution is owned or controlled by a foreign source or receives a gift from or enters into a contract with a foreign source, the value of which is \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year, the institution shall file a disclosure report with the Secretary (of the U.S. Department of Education) on January 31 or July 31, whichever is sooner. Parenthetical insert added.

³ **(h) Definitions**

For the purpose of this section—

(2) the term “foreign source” means—

- (A) a foreign government, including an agency of a foreign government;
- (B) a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states;
- (C) an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof; and
- (D) an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source.

⁴ 29 U.S.C. § 654; 29 C.F.R. 1904.32

- C. The pass rate for state teacher certification examinations taken by graduates must be reported annually to the applicable state government and the public under the Teacher Education Program Reporting Requirements.⁵ Given the No Child Left Behind Act and various state education initiatives, teacher test passage rates can be very politicized. Board members should hear about this from administrators first. If the pass rate is not good, then the prudent administrator should simultaneously submit to the CEO and then the board the pass rate report and a plan for improving the performance of graduates who take future examinations.
- D. Various toxic substances such as PCBs⁶ which are located on institutional property and hazardous materials which college or university representatives transport⁷ must be reported annually. This can be well below the radar level for the board until there is an accident. Consider mentioning this to the board in an appropriate forum as an information item when there is good news to report.
- E. Colleges and universities in states with voter registration requirements must comply with federal law⁸ requiring that institutions make voter registration forms available to each student enrolled in a degree or certificate program and who physically attends the college or university. Colleges and universities have been through several iterations of this requirement. Administrators just need to keep the requirement on their checklist so that institutions comply in a timely fashion. This is a political issue and board members should be informed that the college or university is fulfilling its responsibilities as federal elections loom in fall 2006.
- F. The annual Campus Security Act⁹ annual report on crime statistics has existed for over a decade. Clearly, Board members should receive advance notice of the report and its contents as an information item before it is released to students and

⁵ 20 U.S.C. §1027 (f)

⁶ Toxic Substance Control Act, 15 U.S.C. §2607, 40 C.F.R. 761.180

⁷ Hazardous Materials Transportation Act of 1994, 49 U.S.C. §5108; 49 C.F.R. §107.608

⁸ Voter Registration Provision in the Higher Education Amendment of 1998, 20 U.S.C. § 1094 (a)(23)(A)

⁹ 20 U.S.C. § 1092(a)(1)(O) and §1092 (f)(5), C.F.R. §668.46 and §668.42

employees by October 1 of each year and to the Secretary of the U.S. Department of Education by October 15 of each year. The annual reporting requirements for the Campus Sex Crimes Prevention Act [42 U.S.C. § 14071j and 20 U.S.C. § 1092(f) (1) (I)], signed into law in 2000 and effective in 2002, may be combined with the annual Campus Security Act filing. Circumspect administrators will inform members of the governing board of the contents of this report as well.

- G. The Annual IRS Form 990 return¹⁰ is generally available to the public on-line. Board members should be apprised of its contents before the form is submitted because it provides information about them, compensation they may have received from the institution and other information about a non-profit's revenue, expenses and highly compensated staff. This form addresses the public's transparency expectations. Given concerns about the implications of the Sarbanes-Oxley Act for the governing boards of non-profits including higher education institutions (see discussion later in this paper), the board should see the form before it is filed.
- H. Federal contractors and subcontractors must file an annual Federal Contractor Veterans' Employment Report. The form is from the U. S. Department of Labor.¹¹ Given the increased numbers of veterans returning from active service who are seeking employment back home, it is important for board members to see that the college or university is sensitive to this issue.
- I. Annually colleges and universities that receive federal funds must also comply with the reporting requirements of the Equity in Athletics Disclosure Act of 1994 and report how much they spent on men's and women's sports as a way of monitoring compliance with federal gender equity laws. In late 2005, *The Chronicle of Higher Education* reported a USA Today article asserting their investigation of data from the reports "revealed that one-third of the 2003-4

¹⁰ 26 U.S.C. § 6033, C.F.R. §1.6033-2

¹¹ The Veterans' Readjustment Benefit Act, See 41 C.F.R. §61-250.10

revenue and expense reports from colleges in Division I-A of the National Collegiate Athletic Association contained errors”¹² Time will tell what the implications of this report will be. However, board members should receive annual updates on the data the college or university is submitting to the U.S. Department of Education.

The list above highlights some of the annual reporting requirements which are likely to be of interest to board members, particularly from the perspective of potential legal risk and public relations. A helpful and more extensive list of annual required federal reports – listed on a monthly basis -- is on the site for Office of General Counsel, Catholic University of America, <http://counsel.cua.edu/thebasics/compliance.cfm>.

IV. Examples of the Impact of War in Iraq, military action in Afghanistan and the War on Terror

There are many implications for college and university boards and administrators arising from the war on terror. In December of 2005 we saw the acquittal of a University of South Florida tenured faculty member who had been under surveillance pursuant to the provisions of The Patriot Act.¹³ His dismissal from his tenured position raised academic freedom issues which are being debated because the university has not reemployed him since his acquittal. The AAUP and other faculty organizations are considering this case because of its implications for other faculty who may be prosecuted for alleged terrorist affiliations. While the University of South Florida is a public institution, private higher education institutions’ boards and administrators must be mindful of statutes and regulations which are very much in effect, apply to colleges and universities, and are being enforced because the United States is engaged in deadly armed conflict in the Middle East. Moreover, broad governmental activities associated with the war on terror and efforts to protect American interests around the globe also have significant implications for higher education. Institutional policies and procedures and decisions

¹² *The Chronicle of Higher Education*, October 28, 2005, Volume 52, Issue 10, Page A54

¹³ “Al-Arian Acquitted of 8 Terrorism Charges,” *The Chronicle of Higher Education*, December 16 2005, Volume 52, Issue 17, Page A11.

must balance the democratic interests of college and university constituents – including students, faculty, staff, alumni, donors and administrators -- with grave health and safety concerns. As the governing board, the board of trustees has an important role, in partnership with the CEO and other administrators, to guide the institution through complex situations while safeguarding the institution’s educational mission, individual rights, institutional resources, and campus health and safety.

At the current time, laws more rigorously regulate many issues related to potential terrorist activity that could affect Americans at home or around the globe. In addition to the Patriot Act, which is being reviewed, some example of such laws and regulations include, but are certainly not limited to the following:

- A. Foreign exchange students. The Student and Exchange Visitor Information System (SEVIS) is a web-based system for maintaining information on international students and exchange visitors in the United States. A division of the U.S. Immigration and Customs Enforcement (ICE), the Student and Exchange Visitor Program (SEVP), administers SEVIS.

- A. The Uniformed Services Employment Reemployment Rights Act of 1994 (USERRA), rules as amended 12/19/05 and effective January 18, 2006. The federal interpretation of this law was updated at the end of 2005, no doubt because of the increase in veterans returning to their jobs in the U.S.

- B. The Export Administration Act (50 U.S.C. §2401, et seq.), Arms Export Control Act (50 U.S.C. §2751 and 22 U.S.C. §6701), The Export Administration Regulations (EAR) (15 C.F.R. §1710, et seq.), and International Traffic in Arms Regulations (ITAR) (22 C.F.R. §120) have limited application to higher education institutions. However, “export” has been defined to including showing specified scientific information to a foreign national. Therefore, administrators should be

aware of this law and its implications for their institutions – including federal sanctions.

Board members' confidence in administrators can be reinforced which appropriate reports on the institution's compliance with such laws and administrators' sensitively to the effects such laws may have on future programs and activities.

V. The Implications of Sarbanes-Oxley Legislation

Much has been written about the Sarbanes-Oxley Act (SOX) which was passed in 2002. Private colleges and universities are not subject to SOX's requirements. However, much has also been written about SOX's standards becoming standards for best practice in board governance and financial prudence. The National Association of College & University Business Officers (NACUBO) produced standards for best practices in financial governance based upon the standards in SOX.¹⁴ SOX as a guide for best management practices is also used as a basis for nonprofit financial ratings.¹⁵ Clearly this has significant implications for a college or university's bond rating and access to financing for institutional projects such as construction projects. Irrespective of an administrator's responsibilities, he or she should have general familiarity with SOX because it is of great importance to governing boards. Moreover, a negative assessment of an institution's voluntary compliance with SOX may have serious financial repercussions for a college or university. SOX standards to remember include the following:

- A. Assure auditor independence. Many institutions have created or revived and reorganized their audit committees to assure committee independence and expertise, thereby meeting this standard.

¹⁴ See, "Checklist for Higher Education" (based upon an analysis of business implications of SOX) and the NACUBO Code of Ethics, Advisory Report 2003-3, http://www.nacubo.org/documents/business_topics/SOXChecklist3.7%20112003.doc

¹⁵ "Sarbanes-Oxley Act Voluntary Compliance Viewed as a Best Management Practice," *FitchRatings Higher Education Special Report*, January 27, 2004.

- B. Assure truthfulness and accuracy of annual audit report.
- C. Each annual report should contain an internal financial control report.
- D. Adoption of a code of ethics for senior financial officers.
- E. The CEO should sign tax returns on behalf of the institution. Care must be taken to assure that the persons who are signing tax returns have the proper authority to represent the University.

The Sarbanes-Oxley Act has many more specific implications for governing boards and administrators. However, the list above gives an overview for administrators who should be able to discuss the general implications with board members, as appropriate. If an administrator knows that her or his institution's analysis of the effects of SOX on the institution has been cursory, then it is time to communicate with the CEO regarding a proactive risk assessment.

VI. Some Recent Federal Initiatives Affecting Higher Education

In 2005 both houses of Congress held hearings to consider the scope of exception from tax that non-profits enjoy. These hearings have raised concerns among higher education institutions that with escalating federal deficits, non-profit higher education as well as other sectors of the non-profit world may see changes in the requirements for tax-exempt status. See www.nonprofitpanel.org for information about U.S. House and Senate hearings about modifications to tax exempt status. Similarly, states with escalating budgets may consider changes to non-profit law that can bring in more revenue. Obviously, this issue bears close observation by colleges and universities and other members of the non-profit world because the financial effects could reduce resources available to non-profits. Administrators must continue to monitor changes and also appropriately represent college and university interests with policy makers. Moreover, board members must not only be informed about possible policy changes, but must be enlisted as allies to speak for college and university interests before local, state and national decision-makers.

Another example of a recent proposal with potentially sweeping implications for institutions that receive federal research grants are proposed HHS guidelines¹⁶ from the HHS inspector general. The proposal suggests that researchers with HHS grants should keep better tabs on their time. The suggested changes would modify part of OMB Circular A-21 containing regulations which set standards for higher education administration of federal grant costs.¹⁷ The implications for increased administrative costs are quite substantial. Again, administrators must not only be vigilant in keeping informed, they must also appropriately advocate for their institutions, properly administer grants to comply with federal, state and local regulations and must keep their governing boards in the loop as partners in protecting colleges' and universities' interests.

VII. Other Issues for Administrators to Consider in the Context of the Governing Board

Clearly, every aspect of college and university administration is under the purview of the governing board. It would be impossible, within the scope of this paper, to give an exhaustive list of areas of potentially great risk for colleges and universities. The discussion above highlights several issues that should be observed in the months to come. This section lists several other issues that administrators should consider in the context of what are considered best practices that may be standards for care and potential liability. Administrators should consider the impact of the following areas at their institutions and communicate in a proactive way to members of their boards whenever it is possible to appropriately involve the board in policy planning or modification before a crisis occurs:

¹⁶ Federal Register, November 28, 2006, U.S. Department of Health and Human Services proposed guidelines as reported in "Government Seeks to Track Research Time More Closely," *The Chronicle of Higher Education*, December 9, 2005, Volume 52, Issue, 16, Page A20.

¹⁷ OMB **Circular A-21**, Costing Principles for Educational Institutions http://www.whitehouse.gov/omb/circulars/a021/a21_2004.html. For other current regulations for federal contract administration see also OMB **Circular A-110**, Uniform Administrative Requirements for Grants and Other Agreements <http://www.whitehouse.gov/omb/circulars/a110/a110.html>; OMB **Circular A-133**, Audits of State, Local Governments and Non-Profit Organizations <http://www.whitehouse.gov/omb/circulars/a133/a133.html>; and OMB **Circular A-133 Compliance Supplement** http://www.whitehouse.gov/omb/circulars/a133_compliance/04/04toc.html.

- A. Disaster planning and preparedness. Prior to Hurricane Katrina many colleges and universities had created emergency plans. However the magnitude of the effect of that hurricane and others during the past hurricane season raised questions about emergency preparedness and recovery that had not been faced before. Higher education institutions responded quickly to assist their fellow higher colleges and university – public and private – that were devastated by the hurricanes. But it was, in many respects, a learn-as-you-go approach. Various national organizations, e.g. American Council on Education (ACE) and the National Association of College and University Business Officers (NACUBO), National Association of Student Financial Aid Administrators (NASFAA), were involved in the pressing administrative issues facing colleges and universities that were ravaged by the storms as well as higher education institutions that assisted them and their students during fall 2005. Best practices for disaster planning are being re-defined and administrators and their boards must work together to adopt and implement plans that best serve their institutions.
- B. Development, advancement, fundraising and grant development. This is an area that each administrator should know on at least a basic level. Even public institutions have had to focus more and more attention on fundraising. This has always been true for private institutions. In a recent commentary from a university fundraiser¹⁸, there is interesting discussion of how some college and university search committees are seeking in presidential candidates the fundraising experience and attributes which development officers must have and a development officer's musing about implications for himself and academic colleagues. Clearly, the issues raised in the article are of interest not only to administrators, but also to trustee search committees which must define the characteristics they believe their college or university needs in future presidents.

¹⁸ See, "A Presidential Predicament: An advancement career suddenly seems to be the perfect springboard to a college presidency," *The Chronicle of Higher Education*, December 2, 2005, Section: Chronicle Careers, Volume 52, Issue 15, Page C3, <http://chronicle.com/weekly/v52/i15/15c00301.htm>.

- C. Admission and Financial Aid Diversity and Illegal Discrimination. Public institutions are at the forefront of balancing college and university programs to increase diversity in the student body and assertions of discrimination because of their public nature. However, private institutions must take care that they evaluate the applicability of illegal discrimination laws to their programs. In 2005 The College Board publishes a thoughtful analysis of discriminations issues and how to address them in institutional programming. The College Board report, “Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid, and Outreach” 2nd edition¹⁹ written by Arthur L. Coleman and Scott R. Palmer of Holland & Knight LLP continues to be a useful resource for administrators and governing boards.
- D. Campus Safety and Security. This is an issue discussed above, but which will always resonate in the press, in the college community and among institutional constituents – especially students, parents and employees. An example of a public institution’s intense focus on campus safety is the Task Force on the Safety of the Campus Community for the University of North Carolina – Office of the President Final Report (December 14, 2004). It is a helpful model for cross-professional participation, data collection, findings and recommendations for safety in a university system. While the institution is public, issues raised and addressed in the document are readily transferable and adaptable to private college and university environments.

VIII. Conclusion

At the center of a good relationship between higher education governing board trustees and administrators is, as stated above, trust and confidence. Administrators who not only stay abreast of issues that offer opportunities to advance the institutional mission, present crucial academic, student affairs, administrative, technological and

¹⁹ http://www.collegeboard.com/prod_downloads/highered/ad/041624WODiversityHighrEdT.pdf

financial policy issues, and/or pose risks, but also communicate such matters effectively to their governing boards truly serve the best interests of their institutions.

