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**GOVERNANCE OF NON-PROFITS—  
COMPLIANCE AND ACCOUNTABILITY**

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**Introduction**

In recent years, governance of non-profit organizations has come under increased scrutiny from the government and the public. Budgetary pressures continue to squeeze institutions, and demands for accountability and assessment of educational outcomes, efficiency and effectiveness are increasing. In this climate, the breadth and depth of the fiduciary responsibilities of college and university governing boards have expanded significantly. This session will explore the sources of these pressures in higher education and discuss resources and best practices for higher education institutions. It will include discussion of the management and disclosure of conflicts of interest, especially as institutions explore new and entrepreneurial partnerships and collaborations with corporations and other outside entities.

Public and private institution governing boards vary widely in terms of their size, composition, scope of authority, and selection processes. The Association of Governing Boards of Colleges and Universities (“AGB,” [www.agb.org](http://www.agb.org)) is the leading national higher education organization focused on higher education governance and is a wonderful resource on higher education governance and leadership issues for academic governing boards.

**Governing Board Responsibilities**

Crises and scandals in the for-profit and non-profit contexts in recent years have led to the creation of higher standards of fiduciary responsibility for board members. Although board members in non-profit higher education typically serve as volunteers, they are expected more than ever to oversee and understand a wide variety of institutional decisions, policies, and processes. In a recent overview of governing board responsibilities, Rick Legon, President of the AGB) set forth several basic tenets of a board member’s fiduciary responsibilities, as follows:

- **The Duty of Care**—requires full attention to one’s duties as trustee, setting aside competing personal or professional interests insofar as possible;
- **The Duty of Obedience**—refers to trustees’ obligation to promote the mission of the organization within legal limits; and
- **The Duty of Loyalty**—requires board members to put the interests of the trust before all others.

Legon, Richard D., *Some First Principles*, Trusteeship at 8 (Nov./Dec. 2011). Legon also mentions “**The Duty to Act in Good Faith**” (requiring “board members to exercise diligence, competence, and objectivity”) and “**The Duty to Serve the Public Interest**” as other, broad but less specific responsibilities. *Id.* In addition to Legon’s helpful overview, this most recent edition of Trusteeship magazine also contains an interesting discussion of major issues that could be on the horizon for college and university governing boards and that will merit their attention. See “What’s the Next Big Thing for Boards?,” Trusteeship (Nov./Dec. 2011).

While the tenets of good governance laid out by Legon are widely cited, they are often given short shrift in light of the many immediate issues at hand for most governing boards. Board orientation for colleges and universities is essential for colleges and universities to help board members understand what their roles are and are not. Many board members come from other contexts (law, business, politics, etc.). They may have served on (or have other familiarity with) for-profit boards and therefore have different governance models in mind (e.g., Sarbanes-Oxley requirements that apply to corporations) with regard to how institutional decisions are made, how compliance is handled, etc. If they are serving as board members at public institutions, they must also be cognizant of their particular responsibilities under constitutional and state law.

Academic values and norms can also be confusing to individuals whose primary areas of expertise are outside higher education. Thus, it may be helpful to provide board members with an overview on issues such as academic freedom, shared governance, tenure, and due process. It can also be helpful to provide board members with presentations about evolving trends and best practices on other legal and policy issues in higher education so that they have a sense of context when making decisions.

### **Board Orientation and Education**

In addition to the general concepts discussed above, here are some other possible topics to include in board orientation or continuing education sessions:

- The institution’s legal/statutory structure and foundation and relationship to the state (for public institutions)
- The institution’s status under federal tax law (e.g., is it a 501(c)(3) tax-exempt organization)

- The relationship with the institution’s foundation/development function (e.g., whether the foundation is separately incorporated and subject to separate governance)
- Open public meetings act requirements (for public institutions), such as:
  - What constitutes a quorum?
  - How and when can board meetings be called?
  - What can be discussed in “closed” sessions?
  - What is the role of committees and committee meetings?
  - How and when must the board allow for public comments?
- Board bylaws and other governance documents
- The fiduciary responsibilities of board members (as set forth in statutes and more generally)
- Conflict of interest rules that apply to board members; financial disclosures; recusal policies and processes; etc. (e.g., the Rutgers statute includes a rule that prohibits board members from being compensated by the institution for other forms of service such as teaching)
- Personal liability of board members; indemnification policies; applicable insurance
- How the institution issues bonds/debt
- The sources of institutional policy (e.g., Rutgers has an online and searchable “University Policy Library” that compiles policies on a wide range of academic and administrative issues; *see* <http://policies.rutgers.edu>)
- How to treat confidential information (note any applicable statutory obligations)
- What types of decisions must be reviewed and/or approved at the board level (e.g., certain contracts, employment arrangements, etc.)
- Open public records acts (for public institutions) and their impact on the communications of board members (e.g., will their e-mails be considered “public records” subject to possible disclosure)
- Communications/attorney-client privilege (when it does and does not apply)
- How and when outside counsel are hired

## **Board and Committee Roles and Charges**

Governing board members will be more likely to understand and exercise their roles well if the specific charges and responsibilities of the boards and board committees are clearly articulated. Board and committee charges can provide examples of the types of transactions and decisions that require committee or board review or approval.

## **Conflicts of Interest**

One of the most critical issues facing governing boards today is how to identify, disclose and manage potential conflicts of interest. As colleges and universities become more entrepreneurial and engage in new and complex forms of partnerships with for-profit entities, the opportunities for conflicts of interest are becoming greater than ever (and perhaps harder to recognize in some instances).

Administrators who help to manage and oversee major transactions and business relationships may need to work with the board secretary's office to monitor possible conflicts of interest of board members. This work requires familiarity with the agendas of board and committee meetings as well as with the employment and other relationships of board members. Institutions may have formal recusal policies and procedures, and it is helpful if any possible conflicts can be identified well in advance of meetings so that board members know that they should not participate in certain discussions or matters. Board leadership should also be apprised of such conflicts if and when they are identified.

In 2009, the AGB Board of Directors adopted a statement on conflicts of interest with a set of generally applicable recommendations (taking into account the fact that no single policy on this subject can serve all colleges and universities in light of differences in their structures, histories, legal status, etc.). *See* AGB Board of Directors' Statement on Conflict of Interest (Dec. 2, 2009), <http://agb.org/print/402>. *See also* Fain, Paul, *Q&A: A Governance Expert Describes the Challenges of Avoiding Conflicts*, *The Chronicle of Higher Education* (March 14, 2010).

These are the conflict of interest principles set forth in that report:

1. Each board must bear ultimate responsibility for the terms and administration of its conflict of interest policy. Although institutional officers, staff, and legal counsel can assist in administration of the policy, boards should be sensitive to the risk that the judgment of such persons may be impaired by their roles relative to the board's.
2. We believe that the following standard properly gauges whether a board member's actual or apparent conflict of interest should be permissible, with or without (as the situation warrants) institutional management of the conflict: (a) If reasonable observers, having knowledge of all the relevant circumstances, would conclude that the board member has an actual or apparent conflict of interest in a

matter related to the institution, the board member should have no role for the institution in the matter. (b) If, however, involvement by the board member would bring such compelling benefit to the institution that the board should consider whether to approve involvement, any decision to approve involvement should be subject to carefully defined conditions that assure both propriety and the appearance of propriety.

3. (a) When a board member is barred by actual or apparent conflict of interest from voting on a matter, ordinarily the board member should not participate in or attend board discussion of the matter, even if to do so would be legally permissible. (b) If, however, the board determines that it would significantly serve the interests of the board to have the conflicted board member explain the issue or answer questions, the board, if legally free to do so, may consider whether to invite the board member for that limited purpose. Any resulting invitation should be recorded in the minutes of the meeting.

4. A board should not confine its conflict of interest policy to financial conflicts, but should instead extend that policy to all kinds of interests that may (a) lead a board member to advance an initiative that is incompatible with the board member's fiduciary duty to the institution, or (b) entail steps by the board member to achieve personal gain, or gain to family, friends or associates, by apparent use of the board member's role at the institution.

5. Board members should be required to disclose promptly all situations that involve actual or apparent conflicts of interest related to the institution as the situations become known to them. To facilitate board members' identification of such conflicts, institutions should take affirmative steps at least annually to inform their board members of major institutional relationships and transactions, so as to maximize awareness of possible conflicts.

6. Board members should be required to disclose not less often than annually interests known by them to entail potential conflict of interest.

7. At institutions that receive substantial federal research funding, financial thresholds for mandatory disclosure of board members' conflicts of interest should not be higher than the thresholds then in effect that regulate conflicts of interest by faculty engaged in federally sponsored research. Boards of institutions that do not receive substantial federal research funding should take into account the federal sponsorship-related thresholds in determining thresholds for mandatory disclosure of board member conflicts of interest.

8. Interests of a board member's dependent children, and of members of a board member's immediate household, should be disclosed and regulated by the conflict of interest policy applicable to board members in the same manner as are conflicts of the board member.

9. Institutional policy on board member conflicts of interest should extend to the activities of board committees and should apply to all committee members, including those who are not board members.

10. Boards should consider whether to adopt conflict of interest policies that specifically address board members' parallel or "side-by-side" investments in which the institution has a financial interest.

11. Boards should also consider whether to adopt especially rigorous conflict of interest provisions applicable to members of the board investment committee.

12. To the extent that the foregoing recommendations exceed but are not inconsistent with state law requirements applicable to members of public college and public university boards, such boards should voluntarily adopt the recommendations.

*Id.*

In order to keep track of the information required to effectuate such a policy, an institution will need to set up and maintain a system that keeps track of board members' disclosed business and financial relationships (including relationships of their immediate family members, if applicable) and compares that information against pending items on the agendas of board and committee meetings. At Rutgers, the institution's vendor list (maintained by purchasing/procurement staff) is regularly shared with board members for their review so that the board members can identify entities in which they or their family members might have an interest. Depending on whether and how board materials are shared electronically, new technology may be available to block access of board members to particular materials to ensure that there is no question that they have been involved in discussions or deliberations on a particular matter in which they might have an actual or perceived conflict.

These same principles may also apply to administrators who have decision-making authority or influence with regard to particular transactions, matters, or vendors.

### **Signatory Authority Policy and Procedures**

In light of questions about how institutional funds are spent and growing concerns with accountability and efficiency in higher education, board members are likely to take an increasing interest in contracts entered by the institution, especially those that are large in scope, have a potential to be controversial, or are high in visibility or risk. For many public institutions, bidding and contract review processes may be spelled out in state law. Other institutions may have carefully articulated policies and procedures of their own.

As a matter of good governance, it is helpful for an institution to be clear with regard to who (and at what level) various types of contracts need to be reviewed and signed. Such a policy can also define what constitutes a contract, since there are many other titles

given to documents which can essentially constitute legally enforceable contracts (e.g., memoranda of understanding, letter agreements, etc.). Delegations under such a policy can be clearly set forth in writing and can be continually updated as needed. If such a policy and delegations of authority are clearly articulated and made available and accessible for people both in and outside the institution, it can help reduce potential liability for cases in which outside parties might otherwise claim that someone with whom they negotiated in good faith had “apparent authority” to act on behalf of the institution. For an example of such a policy, *see* Rutgers University Signatory Authority Policy, University Policy Library Section 50.3.13, <http://policies.rutgers.edu/PDF/Section50/50.3.13current.pdf>.

### **Confidential Information**

One of the most critical things for board members to understand is the extent to which information that is shared with them in their fiduciary capacities must be kept confidential. For public institutions, these obligations may be set forth in state law. Of course many board actions are taken in public sessions and are hence public, but often information is shared with board members regarding litigation, contract negotiations, possible real estate transactions, personnel situations, etc. (perhaps in board or committee sessions that are closed to the public).

### **Communications with Board Members on Legal Issues**

Institutional counsel may communicate with board members frequently between meetings to provide updates on legal matters and cases. At some institutions, the president or chancellor lays down rules about communications with board members—thus it is important for institutional counsel to know the rules and expectations before contacting a board member. The board secretary should also be kept apprised of contacts with board members. Given their fiduciary responsibilities, board members should be apprised of important legal matters and aware of what they should or should not say publicly about such matters. At Rutgers, for instance, our general practice is not to comment publicly on pending litigation. Board members are aware that requests for comments on legal matters should be referred to the General Counsel’s office.

Given all the demands on the time of board members and their meeting agendas, it may be challenging to provide board members with updates on all the legal matters of which you would like them to be aware. Some legal offices prepare confidential written reports for the governing board. Others have special committees that discuss legal issues so that a subset of board members (often but not always consisting of lawyers themselves) can help to oversee and comment on legal matters. The committee may then identify particular matters that need to be brought to the attention of the full board. At Rutgers, we have a Legal Affairs Subcommittee that receives bi-annual written reports covering the full range of legal issues affecting the University (highlighting high-profile cases and issues, trends in outside counsel use and spending, etc.). This group is also convened by conference call, and receives separate notifications on time-sensitive matters on an as-needed basis.

Board members who are lawyers must understand the difference between their role as a board member and the role of an attorney for the institution. Legal advice and services should be coordinated centrally through the general counsel's office to avoid confusion.

Board members should also be apprised of how and when their own communications related to the institution will be treated legally. Given their fiduciary responsibilities, board members have special obligations when speaking in their capacity as board members. The rules should be clear about who speaks on behalf of the institution for various topics and matters. In general, individual board members should not speak on behalf of the institution without explicit authorization. Given their visibility, board members may sometimes be approached by government agencies, the press, or other outside entities that are aware of the board member's role at an institution. In such instances, board members should report the outside contact and seek guidance before responding (often such contacts should be referred to the board chair or administration for response). In conjunction with the secretary's office, the counsel's office can serve as a resource for board members who receive such contacts to ensure that such communications are handled appropriately (especially when the contact relates to legal issues).

New forms of technology may be helpful in managing confidential communications. For example, Rutgers has a secure portal that is password-protected on which board members and administrators can review documents, share comments, etc.

### **Compliance**

Governing boards are increasingly interested in compliance issues in higher education. At Rutgers University, the General Counsel is also currently designated as the Chief Compliance Officer for the University. In that capacity, the General Counsel reports annually to the Audit Committee on compliance initiatives and issues. This role requires coordination with all of the academic and administrative units with compliance responsibilities (e.g., athletics, health and safety, environmental, research, privacy, etc.). Some institutions have separate compliance offices that play this role. As compliance concerns become increasingly prominent, there is an opportunity for the general counsel to demonstrate proactive leadership by discussing (in conjunction with other university leaders) areas of evolving risk where policies and procedures may need to be developed to respond to new legal and regulatory requirements. These conversations can also shed light on where resources may be needed for the future to ensure that compliance responsibilities can be met. (*See materials for conference session on "Higher Education Law and Policy 2.1—The Rise of the Compliance University."*)