

Association of Governing Board (AGB) Board of Directors' Statement on Conflict of Interest

Introduction

This AGB Statement on Conflict of Interest was occasioned by increasingly frequent requests for policy guidance and clarification from presidents, board chairs, trustees, and other leaders of American colleges and universities. Because boards are responsible for institutional autonomy in our unique governance system, and in light of a number of high profile conflict of interest violations across the not-for-profit sector, there is a pressing need for boards to conduct thorough and periodic reviews of their conflict of interest policies and to ensure adherence. Additionally, boards are facing increased external scrutiny of governance by government agencies, such as the enactment of the revised Internal Revenue Service Form 990, which sets up new expectations regarding financial accountability. Also, faculty are subject to increased external and institutional regulation of conflicts of interest related to research, and can be expected to question whether institutional boards set similarly high standards for themselves. In response to these and other challenges, and given that boards must monitor their own governance standards, AGB's Board of Directors authorizes this statement to inform board discussions on conflicts of interest.

To begin work on this initiative, AGB's Board of Directors requested that a panel of experts lead a consideration process and develop a draft set of principles that might be broadly applicable to boards. This process included a thorough review of the literature and a review of conflict of interest policy provisions from approximately 30 colleges and universities, as well as governmental agencies, including the Internal Revenue Service, the National Institutes of Health, and the Legislative and Judicial branches of the United State government. While this statement is intended to provide guidance for boards, AGB understands that these principles must be translated into practice diplomatically and consistently. Historically, AGB has not prescribed a specific set of principles for board management of conflicts of interest, but during this time of heightened calls for accountability, the association offers this guidance on standards and practices. This statement is not intended to be prescriptive; rather it serves as a template and resource for discussion of good governance policies related to issues of conflict of interest.

Adoption by the AGB Board of Directors of this "Statement on Conflict of Interest" reflects a prevailing set of conditions. As originally stated in the AGB "Statement on Board Accountability" (2007), the incidence of "lapses and failures in the integrity and governance of certain participants in the nonprofit and higher education communities--particularly in such areas as conflict of interest, executive compensation, and financial oversight--has raised troubling questions."

While financial conflicts tend to dominate board conflict of interest discussions, the subjects of political gain, unmerited preference in hiring, student admissions decisions, and other conflicts can compromise the integrity that boards should hold in trust. Examples of potential areas of

conflict can include backlash from board approvals of excessive executive pay packages; and institutional foundation boards providing loans to former board members.

For sound reasons, no one template or single policy on board member conflicts of interest can well serve all colleges and universities. For instance, law on trustee conflicts varies among the states, and fiduciaries of public institutions typically are governed in legally irreducible respects by particular requirements of conflict of interest laws applicable to state government personnel. Also, the experience, needs, and administrative structures of institutions vary considerably and counsel against a "one size fits all" approach.

AGB believes, however, that guiding principles in a number of areas can be recommended that are likely to be generally applicable and useful to college and university governing boards as they address how best to update their conflict of interest policies and practices to meet the contemporary environment and the challenges ahead. Those principles are identified here. Although the recommended principles do not exhaust considerations relevant to formulation and administration of board conflict of interest policy, they address the most sensitive issues boards in higher education face on this topic today.

As a response to growing pressures on boards, changes in governance priorities, financial regulations, and legal matters, and after careful consideration and review, this report and the following 12 recommendations are presented for consideration by AGB's Board of Directors.

Conflict of Interest Principles

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.

Conclusion

These principles were approved by the Board of Directors of the Association of Governing Boards of Universities and Colleges. They are intended to guide boards in their governance of colleges, universities, and systems. This statement informs boards of their roles and responsibilities, and provides clarifying recommendations regarding board management of conflicts of interest.

The values of truth and knowledge are at the heart of institutions of higher education and goals for an educated citizenry. The governance of America's public and private colleges and universities depends upon the work of the lay citizen governing boards that hold these valuable institutions "in trust." With a deep care and concern for the work before them, board members have a duty to act in the best interests of the institution and to serve the trust of all stakeholders and constituents. As such, and with many eyes upon their decisions, board members should maintain a sense of integrity and ethical awareness in all actions.

Illustrative questions for boards to consider:

- Has your board clearly defined what constitutes a conflict of interest for a member of the governing board?
- What is your board's process for board member disclosure of all pertinent conflicts?
- Is each trustee required to disclose all pertinent conflicts before a board vote?
- What--apart from any applicable legal requirement--is the standard your board uses to gauge whether a trustee's conflict of interest is permissible (with or without institutional management of the conflict)?
- Does your board's policy require recusal of a trustee with a conflicting interest, and if so, is the recusal effected by absence, or by non-participation in discussion?

Adopted by the AGB Board of Directors on November 20, 2009.