THE NEW ETHICS OF TRUSTEESHIP: HOW PUBLIC COLLEGE AND UNIVERSITY TRUSTEES CAN MEET HIGHER PUBLIC EXPECTATIONS

DAVID LESLIE AND TERRY MACTAGGART

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MISSION
The mission of the Richard T. Ingram Center for Public Trusteeship and Governance is to strengthen relationships between state government and public higher education by enhancing the effectiveness of citizen governing boards and their trustee members. The Center accomplishes its mission by forging partnerships with state government and higher education associations, conducting policy analysis and research, and working directly with AGB member boards and chief executives. The Center is dedicated to helping all stakeholders improve the governance and trusteeship of public colleges and universities. In addition, the Center is committed to promoting enlightened public policy that contributes to a healthy independent higher education sector.

CENTER STAFF
For inquiries concerning consulting services, board education programs, requests for proposals, or new media requests, please call or write:

Richard Novak
AGB Vice President, Public Sector Programs and Ingram Center Executive Director
202/776-0825
richn@agb.org

Terry MacTaggart
Ingram Center Senior Fellow
202/296-8400

Gregory Ogle
Assistant for Policy Analysis
202/776-0853
greg@agb.org

Valeria Moore
Administrative Assistant
202/776-0828
valeriam@agb.org

ABOUT AGB
The Association of Governing Boards of Universities and Colleges (AGB) strengthens and protects this country’s unique form of institutional governance through its research, services, and advocacy. AGB is committed to citizen trusteeship of American higher education.

AGB works to strengthen higher education’s governance and the conduct of citizen trusteeship by articulating and promoting effective practices. It is a continuing education resource for nearly 35,000 trustees, chief executives, senior administrators, and board professional staff from more than 1,800 institutions of all types— independent and public, two-year and four-year—as well as statewide coordinating boards and foundation boards affiliated with public institutions. AGB encourages healthy working relationships between boards and their chief executives and between higher education and state government.

This publication is intended to inform discussion, debate, and action, not to represent or imply endorsement by AGB or its members.
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A GB’s Ingram Center for Public Trusteeship and Governance has long advocated a reform agenda for public institution citizen trusteeship—an agenda that includes greater consideration of merit in trustee selection; stronger orientation and education programs that clarify board service and expectations; a diminution of politics in board selection, reappointments, and deliberations; and trustee terms of sufficient length. Not surprisingly, board ethics has emerged as an integral part of our reform agenda.

In this new Center publication, David Leslie and Terry MacTaggart examine recent state laws and executive orders regarding ethics and conflicts of interest affecting public college and university governing boards. While many of these changes stem from heightened state and federal interest in corporate abuses, others are a result of ethical lapses at public colleges and universities that have led to calls for greater accountability, public trust, and transparency.

The paper outlines several examples of new state policies that raise the bar for boards of trustees. The authors urge boards to take self-regulatory steps to strengthen policies that ensure internal resolution and compliance regarding ethics and conflicts of interest. Leslie and MacTaggart examine several suggested practices from public institutions that could help boards conform to new expectations and changing norms. Finally, the authors encourage states to refrain from enacting legislation that inadvertently places too many restrictions on public governing boards or discourages citizens from serving on them. The authors’ work was informed by a survey of public board professional staff conducted by Greg Ogle, the Ingram Center’s assistant for policy analysis.

To serve effectively, board members must understand conflict of interest, disclosure, board and institutional ethics, educational effectiveness, and their full fiduciary responsibilities to the college, university, or university system, and to state citizens. To do so is becoming ever more important to our states and communities.

Richard Novak
AGB Vice President, Public Sector Programs
Executive Director, Ingram Center for Public Trusteeship and Governance
INTRODUCTION

Expectations of trustees have undergone a dramatic change in the wake of the Enron debacle, the new strictures of the Sarbanes-Oxley Act, and several new state policies, laws, and executive actions. Additionally, well-publicized examples of inadequate trustee oversight have affected the public’s and policymakers’ perceptions of higher education. As a result, it is increasingly clear that the public and their representatives expect college and university trustees not to merely avoid irresponsible behavior, but to take positive, systematic actions in the interest of the institutions they oversee. This “new ethic of trusteeship” continues the trend of expecting boards to be more deeply engaged in their governance role.

This paper summarizes the time-honored fiduciary responsibilities of trustees and suggests how the world of trusteeship has changed since Congress passed the Sarbanes-Oxley Act in 2002. Although the law does not apply to nonprofits, which includes colleges and universities, virtually all boards are aware of its implications, especially how it influences the interpretation of fiduciary responsibilities.

The cumulative effect of public concern over failures of boards, both corporate and academic, to honor their fiduciary obligations should lead trustees to pursue a proactive agenda. While this paper focuses primarily on actions by states and public college and university governing boards, many of its suggestions also apply to independent college and university boards.
American higher education is unique in its reliance on boards of trustees to provide direction and oversight to the nation’s colleges and universities. Trustees govern in a long-standing tradition, that of fiduciary on behalf of a greater social purpose.

The concept of “fiduciary” is well established in law and practice. It refers to one charged with acting beneficently on behalf of those whose welfare depends on the trust. Trustees must therefore realize their fiduciary responsibility goes well beyond ensuring the fiscal health of the institution they serve. In fact, federal and state laws defining the standards for fiduciary responsibilities are increasingly explicit and far-reaching.

Over the past few decades, ethics laws governing public officials have tightened. Most states now require board members to disclose their assets, liabilities, income, business or professional commitments, and gifts. They do so to prevent obvious conflicts of interest. Although states define “conflict of interest” in varying ways, it essentially means an individual serving on a board has a personal interest in, or may personally benefit from, a decision in which he or she takes part.

It is important to recognize, however, that the board’s fiduciary responsibility encompasses more than avoiding conflicts of interest. Fiduciary responsibility rests on four well-established pillars:

- The duty of loyalty
- The duty of care
- The duty of obedience
- The duty to act in good faith

The duty of loyalty requires board members to put the interests of the trust before all others. A conflicted board member obviously may be tempted to put personal interests first. The duty of care requires full attention to one’s duties as a 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. Finally, the duty to act in good faith, while more encompassing and less specific than the other duties, requires board members to exercise diligence, competence, and objectivity in executing the role to which they have been appointed.

NEW LAWS AND REGULATIONS, HIGHER STANDARDS

Recent developments have begun to redefine these pillars. Several trends in corporate governance and public policy as well as increased state concern about the public trust and accountability now require diligent boards to reassess their own standards and expectations. Some examples include:

- The Sarbanes-Oxley Act and related developments, which have spread from the governance of publicly held corporations to other areas, raising standards for “good faith” behavior and imposing increasingly strict standards of accountability on boards.
- Executive orders and legislation, which governors and state legislators have used to heighten the expectations of public boards and employees and are increasing the scrutiny to which they are subject.
- Stricter transparency (or “sunshine”) laws in the states, making records and data more available than ever. Institutions must now pay closer attention to the evidentiary basis for actions that might otherwise be perceived as arbitrary and capricious—or worse.
- New developments in regional accreditation standards—the result of public and governmental pressures—that demand institutions adopt a “culture of evidence.” In other words, colleges and universities must set standards for their graduates, collect evidence showing that outcomes are commensurate with the institution’s public assertions, and generally be more transparent regarding their educational effectiveness.

In light of these expectations, trustees must take formal, systematic, and proactive steps to ensure the highest standards of fiduciary responsibility.

WELL-PUBLICIZED LAPSES. When public boards (and those of independent institutions as well) perform poorly, the result is eroded public trust and increased governmental restrictions. The most egregious lapses in trustee behavior involve self-dealing or outright criminality. Fortunately, these instances are rare.

Most lapses appear to involve simple failure to “care,” one of the four pillars of fiduciary responsibility. Recent cases of financial mismanagement have highlighted extensive failures in board oversight. In one case, a special committee appointed by the governor recommended that the board be “reconstituted” and that the governor’s office, the legislative audit committee, and the state auditor supervise the financial affairs of the institution closely. In another case, the Southern Association of Colleges and Schools (SACS), a regional accrediting body, put an institution on probation as a direct result of mismanagement. Among other issues, SACS cited the university’s violation of its Core Requirement 2.2, which reads in part:

The board is an active policy-making body for the institution and is ultimately responsible for ensuring that the financial resources of the institution are adequate to provide a sound educational program. The board is not controlled by a minority of
board members or by organizations or interests separate from it. Both the presiding officer of the board and a majority of other voting members of the board are free of any contractual, employment, or personal or familial financial interest in the institution.2

Boards may also become so dysfunctional that they threaten a university’s accreditation status. SACS reportedly put an institution on probation because its board had split into factions that refused to meet with each other.

Lapses at independent colleges and universities also contribute to the calls for increased regulation of board ethics and behavior. Problems with executive compensation and the apparent lack of full board participation in setting pay policies for presidents at American University and Adelphi University, for example, garnered significant media attention and sparked state and federal intervention.

These worst cases indicate that boards must assert their fiduciary roles and establish clear safety-net policies and procedures to address potential lapses in collective or individual responsibilities. The University System of Maryland board, reviewing a case involving one of its own regents, concluded that “ambiguities in the board’s ethics policy must be resolved and the board must clarify the policy’s scope and meaning of certain terms.”3 If a board cannot agree on the meaning of its own policies as applied to a particular case, it will have to undertake a self-examination of those policies.

**POST-ENRON STANDARDS AND NONPROFITS.** The federal government has taken an active interest in corporate ethics because of its responsibility to regulate financial markets and oversee the federal tax code. Criminal charges resulting from the collapse of Enron and other corporations prompted Congress to pass the Sarbanes-Oxley Act in 2002.

The impact of Sarbanes-Oxley on boards of publicly held corporations is well understood, but how it might affect boards of other kinds, like those of public colleges and universities, is perhaps less clear. Simply stated, the law requires:

- Financial expertise among some board members;
- Establishment of standards for management, audits, and ethics;
- Reliance on registered and independent audit firms;
- Executive testaments to the accuracy and completeness of financial reports.

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2. SACS, Principles of Accreditation, 15.
3. Ann Moultrie, “USM Board of Regents.”
Sarbanes-Oxley requires boards of publicly held corporations to assert responsibility for the financial management of the entity under their control and bear the consequences of any failures—even when those failures may be those of management and not the board. Both major U.S. stock exchanges have independently responded to Sarbanes-Oxley with governance expectations for boards of listed corporations. They include:

• A board majority of independent directors, who meet in executive session outside the presence of management on a regular basis;
• Independent board oversight of executive compensation and board nominations;
• Codes of conduct applicable to all directors, officers, and employees;
• A set of corporate governance principles.4

Sarbanes-Oxley also heightened expectations of nonprofit governing boards. The alleged lapses by governing boards at the Red Cross, Smithsonian Institution, and American University raised interest in the potential application of a federal Sarbanes-Oxley-type law for nonprofit organizations. Senator Charles Grassley (R-Iowa)—former chairman and now ranking minority member of the Senate Finance Committee, which has primary jurisdiction in nonprofit matters—developed a keen interest in all three cases. Targeting the board’s pattern of behavior and its policies, in a harshly worded letter to the American University board of trustees, Senator Grassley demanded copies of all board policies and minutes going back several years.

Sarbanes-Oxley has so altered the norms of corporate management that individual boards may find it useful to adopt their own version of its reforms. Indeed, some have done so and may preempt their state’s later application of “one size fits all” regulations. The National Association of College and University Business Officers issued an advisory report, “The Sarbanes-Oxley Act of 2002: Recommendations for Higher Education,” that outlines changes universities should consider. The University of Texas and Texas A&M University, along with Drexel University on the private side, are among the vanguard of institutions that have analyzed the changes Sarbanes-Oxley may require of them.5

Sarbanes-Oxley requires the following practices of corporations, some of which may also be required by regional accrediting agencies:

• Having an independent external audit;
• Having an independent audit committee;
• Rotating audit firms and/or lead partners every five years;
• Having a written conflict of interest policy;
• Having a formal process for employees to report complaints without retaliation (whistleblower policy);
• Having a document destruction and retention policy.6

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5. University of Texas System, Implementing the Spirit of the Sarbanes-Oxley Act
TIGHTENED STATE STANDARDS. This shifting climate, as well as the occasional public scandal, has prompted governors in many states to establish standards of ethical conduct for all state employees and appointees, including appointees to public governing boards. In fact, many new governors delineated ethical standards for their administrations as their first executive order. Within the past few years, governors such as John Baldacci of Maine, Phil Bredesen of Tennessee, Don Carcieri of Rhode Island, Jon Corzine of New Jersey, Charlie Crist of Florida, Jim Douglas of Vermont, Jon Huntsman of Utah, Sonny Perdue of Georgia, M. Jodi Rell of Connecticut, Bill Richardson of New Mexico, and Ted Strickland of Ohio have issued executive orders setting clear guidelines for good practice.

Governor Baldacci of Maine issued an executive order in 2006 that outlines what are becoming standard ethical expectations for board members and other public officials, some of which follow:

CODE OF ETHICS AND CONDUCT

- Be guided by the highest standards of honor, personal integrity, and fortitude in all public activities in order to merit the respect of other officials, employees, and the public. Strive to inspire public confidence and trust in Maine State Government and its related institutions.
- Serve the citizens of the State with respect, concern, courtesy, and responsiveness, recognizing that government service means service to the people of Maine; keep the Legislature and public informed on pertinent issues.
- Avoid any interest or activity which is in conflict with the conduct of official duties. Serve in a manner as to avoid inappropriate personal gain resulting from the performance of official duties.
- Respect and protect the privileged information to which there is access in the course of official duties.
- Use discretionary authority to promote the public interest.
- Accept as a personal duty the responsibility to be informed of emerging issues and to administer the public’s business with professional competence, fairness, impartiality, efficiency, and effectiveness.
- Respect and value the work done by the employees of Maine State Government and its related institutions.

This and the many similar executive orders may read like standard bromides, but their very number and that they emerged as these new governors’ first order of business argues that higher ethical standards for trustees is a major public concern.

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RAISING THE BAR FOR TRUSTEES.

The content and application of public ethics laws “vary considerably” from state to state, but as a whole they represent heightened expectations for trustees. The need for such laws and executive orders is made clear by too frequent reports of malfeasance by public officials.

Most state ethics laws and orders are aimed at preventing conflicts of interest. Public officials and employees are expected to serve the public interest and to avoid any appearance of benefiting personally from their offices or jobs. With varying degrees of detail, these laws and orders require disclosure of assets, liabilities, income, business and professional interests, and gifts. The more exacting the detail, the more constraining the standard appears to be. Beyond disclosure of highly detailed personal finance information and business or professional interests, state ethics laws may also have broader requirements that prohibit any appearance or suspicion that one is acting in other than the service of the public.

Louisiana’s ethics law is particularly strong, because it essentially prohibits board members from participating in decisions if they have knowledge of or relationships with a relatively wide circle of associations, both personal and business. Moreover, Louisiana law does not provide for a board member’s recusal from individual decisions; rather, it requires the board member to resign from the board if faced with a vote involving a conflict as defined by statute. An unfortunate side effect of such stringent laws is increased difficulty attracting competent, prospective board members. Higher education boards may differ from many others, as they reach out to some of our most accomplished citizens—people with extensive experience in corporate, financial, government, and citizenship affairs.

In many cases, the degree of exposure required of individual board members is extensive and burdensome, and can intimidate potentially good board candidates from agreeing to serve. North Carolina strengthened its “statement of economic interests” requirement in 2007, resulting in the resignation of a board member who was reportedly unwilling to meet its requirements. The nine-page form requires detailed reporting on personal, spousal, or immediate family assets and liabilities valued at $10,000 or more, including: real estate, personal property, rental property, holdings in public or private corporations, vested trusts, roles in contracting or charitable entities, each source of income over $5,000, interests in professional practice, gifts over $200, and any lobbying. Florida’s ethics law is also highly detailed. It requires reporting of assets (including household goods) and liabilities of more than $1,000, and covers issues such as those related to one’s employment or offices in public bodies, any representation of clients before public bodies, and lobbying activities (which are prohibited to board members).

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8. Alexander Dreier and Martin Michaelson, Guide to Updating the Board’s Conflict of Interest Policy, 4.
12. Florida Statutes, chap. 112, Part III.
In many states, university governing boards are “covered” under broad ethics codes, such as those in Massachusetts and Illinois. Unfortunately, universities and their boards sometimes cross the boundaries of ethical behavior, making public censure and regulation unavoidable. Such a case unfolded recently in New Jersey, where the 2007 legislative session produced new ethics legislation in response to a succession of state scandals that ensnared public officials and the state’s health sciences university. In addition, New Jersey’s State Commission of Investigation, an independent state agency, has recommended enacting Sarbanes-Oxley-type legislation for all the state’s public colleges and universities, which would be enforced by the state’s higher education agency.

Florida has also enacted statutes that apply directly and specifically to public college and university boards of trustees, explicitly prohibiting them from lobbying:

No citizen member of the Board of Governors of the State University System, nor any citizen member of a board of trustees of a local constituent university, shall have or hold any employment or contractual relationship as a legislative lobbyist requiring annual registration and reporting pursuant to s. 11.045.13

The University System of Maryland has also approved a similar stricture in its own bylaws regarding outside lobbying. Such laws and self-regulatory initiatives address trustee behavior when appearing before legislative bodies and representing clients other than the university.

**INCREASED EXPOSURE FROM OPEN RECORDS LAWS.** Newcomers to public boards must accustom themselves to working under public scrutiny. In recent decades, open records, or “sunshine,” laws have become the norm across state governments. In fact, states continue to broaden the public’s access to records and meetings. In Nevada alone, the 2007 legislative session passed new sunshine laws that broaden access to tax commission hearings and to government records.14 Pennsylvania has also just passed legislation that will dramatically expand its open records law to shift the burden of proof from the public to government. The current law presumes records will be closed unless the public can prove otherwise; the new law will put the burden on government to prove that records should not be open.15

Hearn, McLendon, and Gilchrist documented the impact, both positive and negative, of sunshine laws on public university boards. In general, they found boards felt increased transparency had improved their performance and enhanced the public’s trust in their work. Still, they noted the collateral costs in terms of board cohesion, the need to respond to frivolous inquiries, and the potential expense of defending lawsuits.

The principle of transparency ties logically to standards for fiduciary behavior. Decisions are made transparent in a democracy because those decisions are made in the name of and in the interest of the public. The public’s right to know gives citizens the ability to assess the care—the diligence and objectivity—exercised by those who decide. Transparency exposes the facts, logic, and integrity behind a public body’s decisions.

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14. Assembly Bill 433 and Senate Bill 123, respectively.
THE DUTY TO EDUCATE

The most important “trust” placed in care of boards is the duty to educate. Citing “unfulfilled promise,” the recent federal Spellings Commission report on the future of American higher education laments the “lack of clear, reliable information about the cost and quality of postsecondary institutions, along with a remarkable absence of accountability mechanisms to ensure that colleges succeed in educating students.”

Such concerns have been raised before by other commissions, by the public, as well as by prominent figures inside and outside of higher education. The National Center for Public Policy and Higher Education recently interviewed leaders from government, media, foundations, and the corporate sector, concluding, “The leaders we interviewed called for greater accountability and productivity from their state higher education institutions.”

Regional accrediting bodies have responded to growing public demand for more and better information by heightening their focus on institutional effectiveness. For example, SACS asserts that colleges and universities have “an overriding obligation ... to offer ... students a sound education.” Accordingly, “accreditation is a public statement of an institution’s continuing capacity to provide effective programs and services.” To be accredited, institutions must document the quality and effectiveness of their operations. For schools accredited by the SACS, for example, such documentation includes an evidence-based assessment of “whether [the institution] achieves [promised] outcomes; and ... evidence of improvement based on analysis of those results.”

The duty to educate implies that an institution does so purposefully and rationally, and that it has evidence to show it does, indeed, educate effectively. The public’s trust, which accreditation is supposed to safeguard, depends on an institution’s commitment to this duty. Implicitly, a board’s most fundamental fiduciary responsibility is just this: to protect the public’s trust in effective education. Peter Ewell helps clarify this important board duty by urging governing boards to consider five principles that ensure academic quality: (1) Understand that running the curriculum is the faculty’s responsibility, while it is the board’s duty to remind the faculty of that responsibility; (2) Stay focused on strategic (mission-critical) issues; (3) Expect and demand a culture of evidence; (4) Recognize that evidence about academic quality raises issues but rarely gives final answers; and (5) Make reviewing evidence of academic quality and improvement a regular and expected board-level activity.

A board may expect to be challenged if evidence surfaces that questions whether the institution is effectively educating its students. One public university was recently reported to have a six-year graduation rate of 15.8 percent. Another, currently under scrutiny by its state’s legislature, has a six-year graduation rate of 16.1 percent. Peer groups for these institutions have much higher rates near or above 50 percent. These rates may or may not mean failure to educate if, for example, the institutions’ missions justify them. Boards have the responsibility to decide whether this kind of evidence puts their institutions at risk for failure.

17. John Immerwahr and Jean Johnson, Squeeze Play, 28.
18. SACS, Principles of Accreditation, 22.
20. Some universities carry liability insurance against just such a risk.
WHAT BOARDS SHOULD DO

Trustees should take purposeful action to ensure that, collectively and individually, they perform their full fiduciary responsibilities. Failure here could jeopardize the good name of the board and the institution, invite further government intervention, and erode public confidence in higher education.

Individual boards may assess their commitment to ethical norms and adopt an affirmative code that exceeds the often rudimentary requirements of their state’s ethics laws. Such self-regulation may preempt the kind of heavy hand Governor Corzine of New Jersey felt compelled to wield when one of the state’s public universities became entangled in a scandal. And, of course, it may also anticipate and preempt a state’s actions on Sarbanes-Oxley regulation of boards. University board leaders and presidents can lead the way by asserting their own commitments to ethical standards.

Specifically, boards should discuss, draft, and adopt statements of expectations that embody a proactive understanding of ethical behavior. Boards should also have policies covering disclosure of real and potential conflicts of interest; processes for voluntary recusal where conflicts may exist; options for resolving disputes over these issues; and responsibilities of a chief ethics officer. An ethics audit of policies and practices is helpful in sorting out the board’s ethical obligations.

Several public governing boards have adopted general “statements of expectations” for their members. In addition to expectations about time commitments, preparation, knowledge, and skills, these statements—and in some cases, bylaws—incorporate new language on ethics to guide trustees in their comportment. (See the Appendix for examples of such statements from various public universities.) Generally speaking, these broad normative statements set the tone for what individual boards expect of themselves—above and beyond the letter of their states’ laws. A board that self-regulates—and holds its members and others accountable—is in a far better position to preempt its host state from imposing one-size-fits-all ethics requirements.

DISCLOSURE POLICIES AND VOLUNTARY RECUSAL.
Board and state ethics policies typically rely on disclosure, which is public to some extent, though not automatically so in all cases. Varying degrees of disclosure are required of board members at most public institutions, with some states requiring extensive reports of trustees’ financial and professional interests and even those of immediate family members. Board policies at the universities of California, Florida, Minnesota, and Vermont as well as those used at Florida State University and Illinois State University offer sound guidelines for disclosure.
Voluntary recusal on the part of individuals is also predominant in most board ethics policies. Most policies provide for active or passive reviews by counsel or board committees. State laws may supersede board procedures, however, and require either disclosure prior to assuming board responsibilities or recusal prior to potentially conflicted decisions. Boards themselves typically state in their own bylaws and rules how ethics standards will be enforced. Clemson University’s board policies incorporate South Carolina law by reference and require recusal in case of a conflict:

All Trustees must abide by the Ethics Law of South Carolina.

Because Clemson University’s programs in education, service and research touch almost every aspect of life in South Carolina, an individual Trustee may be involved in business relationships that create a potential conflict of interest.

If an affiliation in a profession or with an organization that touches on some aspect of the University were to exclude one from service, the University would lose the benefits of the contribution of time, talent, and energy from a number of qualified individuals.

It is most important that a Trustee recognize where any potential conflicts are possible, acknowledge them publicly, and abstain from voting or influencing the decision on any matters on which such affiliation could conceivably bias his or her vote. The Trustee concerned will notify the Chairman of any conflicts of interest or any situation that might appear to be a conflict.21

The University of Vermont Board of Trustees approved its own detailed conflict of interest policy in 2005. The policy requires each member of the board to file a “conflicts disclosure form” and amend it annually. The policy delegates to the university’s general counsel the obligation to review these forms in advance of board votes and to notify members and the board chair of any potential conflicts.22

Self-regulation is the overriding operational principle to which most boards and their members subscribe. For example, the survey undertaken to support this report included a request for examples of ethical violations. Only three respondents indicated any such incident. Boards also may self-regulate in the sense they formulate their own conflict of interest policies—some of which may be stricter than the relatively narrow Hatch Act constraints provided in state law.

**DISPUTE RESOLUTION.** Some boards have provided for internal resolution of issues or disputes related to conflict of interest. The University of Minnesota, for example, relies on an ad hoc group of regents to determine if a conflict exists and recusal is required. Coastal Carolina University refers conflict of interest issues to its full board. Others may refer the dispute to an external body. New Jersey’s Executive Commission on Ethical Standards may supplant a board’s discretion to determine conflicts of interest, should a board member choose to seek the commission’s advice.

More likely, boards place responsibility in the hands of their own executive committee or a committee on ethics established in their bylaws. At the University of Tennessee, for example, the Governance Committee is charged to “monitor, oversee, and review compliance with the Code of Ethics for Trustees.” The University of Connecticut board charges its Joint Audit and Compliance Committee to “[e]xamin[e] the University’s and Health Center’s system of internal controls over financial reporting, resource protection, operational efficiency, legal compliance and ethics that management and the Board have established.” Meanwhile, the University System of Maryland Board of Regents, which recently reviewed a case involving its own chair, delegated responsibility to a special subcommittee of its Audit Committee. However, this panel was charged with reviewing only those issues related directly to the board’s own ethics policies, not those covered by state ethics laws.

**CHIEF ETHICS OFFICER.** Some boards appoint ethics officers or delegate responsibility for interpreting, managing, and training in the ethics arena. For example, the University of North Florida identifies its general counsel as its “ethics office.” This trend is reinforced by increased ethical concerns affecting research on human subjects. The growth of ethics concerns and delegation of the function have become so specialized, there is now an Ethics and Compliance Officer Association.

   Coastal Carolina University, “Board of Trustees Bylaws,” http://www.coastal.edu/boards/bylaws.html.
25. University of Tennessee, “UT Board of Trustees Bylaws,” http://bot.tennessee.edu/bylaws.shtml, article III, sec. 5;
   article I, sec. 4b; Ann Moultrie, “USM Board of Regents.”
   See also the University of Illinois’ Ethics Office Web site at http://ethics.illinois.edu/.
27. See the organization’s Web site at http://www.theecoa.org/.
BEYOND COMPLIANCE

Simply disclosing one’s interests—meeting the letter of the law—only begins to address the spirit of trusteeship in the evolving landscape of corporate ethics. One accepts the fiduciary responsibilities of trusteeship with the implicit agreement to put aside competing interests. The duties of loyalty, care, obedience, and good faith require that trustees act first on behalf and in the interest of those they have agreed to serve. Trustees are expected to devote time, attention, knowledge, and skill to their fiduciary responsibilities. Furthermore, they must understand their duty is a voluntary act of social responsibility, not a way to enhance their own wealth, stature, or vested interests.

The new expectations of boards require more attention—meaning more time and energy, as well as a higher level of independence—than have been typically expected of board members. Boards today are responsible for the full range of corporate behavior. They are not merely ceremonial or honorific bodies, nor is it acceptable to equate ethics with disclosing conflicts of interest and recusing oneself where they exist.

Board members can expect to receive increasingly detailed information about their institutions’ finances and management. In the post-Sarbanes-Oxley environment, they may also be responsible for requesting such information. Board members must educate themselves on the meaning of information they receive, and they must prepare themselves for decisions. More than before, boards can expect to account for their decisions—decisions that must be based on information and reason—while assuring the public they are sufficiently informed to fulfill their fiduciary responsibilities.

ETHICS AUDIT. An ethics audit is a good place to start when trustees want to thoroughly review their ethics policies and practices. A rigorous self-examination of the board’s policies and behaviors regarding ethics should be a regular habit. The full board could charge an ad hoc committee, the executive committee, or a committee on trusteeship to report responses to questions, such as:

1. Does board policy define the four duties of fiduciary responsibility each member assumes—that is, loyalty, care, obedience, and good faith?
2. Does the board have additional expectations for members’ conduct? (See Minnesota’s commitment to excellence, discovery, diversity, integrity, and academic freedom in the Appendix.)
3. Does the board make explicit how it expects to function as a community with values? (See Maine’s emphasis on participatory process and consensus in the Appendix.)
4. Are these policies and value statements made public, and does the board renew its own commitments to them publicly?
5. Does the board continuously monitor and adapt to or shape state policies regarding ethical conduct and conflict of interest?
6. Does the board provide training to keep members abreast of new developments in ethics laws, norms, and best practices?
7. Does the board’s committee structure effectively allow the board its own independent review of the university’s governance and financial responsibility?
8. Has the board appropriately defined and delegated procedures for handling ethics cases? Does it encourage internal resolution before referring any necessary recommendations to the appropriate state authorities?
9. Are the institution’s formally recognized, affiliated groups—such as a foundation, alumni, and athletic associations—managed consistently with the board’s ethical, governance, and financial principles? Are they managed in ways that serve the institution’s fundamental purposes? Are they audited annually and independently?
10. Are board polices and practices consistent with standards of open records and open meetings laws?
11. Do the board’s policies satisfy the public’s expectations regarding its duty to educate, that is, its responsibility to ensure the institution fulfills its academic mission and substantiates learning and quality outcomes? Does the board request and receive appropriately detailed data that corresponds to accreditors’ requirements for evidence-based assessment and continuous improvement?
12. Are all board members fully committed, attentive, knowledgeable, and active? Does the board have and use effective mechanisms for handling cases of trustee incapacity, excessive absence, disengagement, incompetence, or abuse of office?
13. Does the board actively scan governance and ethics sources for best practices and seek ways to incorporate them into its own policies and procedures?
14. Are the best qualified of the state’s leading citizens and/or the institution’s alumni willing and able to serve, notwithstanding existing ethics constraints? If not, what changes (including prescreening procedures, such as those recommended by AGB) would help attract them?
CONSIDERATIONS FOR STATES

States have overriding interests in the integrity of all public servants and the agencies or institutions supported by government. Assuming individuals voluntarily understand and follow the highest ethical standards, state ethics codes and attendant requirements (or opportunities) for training and refreshers should be sufficient to prevent the worst abuses. But norms and standards are changing quickly, and states’ existing codes of conduct for public servants may focus too narrowly on conflicts of interest. Public officials and boards should understand the growing importance of emerging ethical norms and take steps to ensure their own compliance. Undoubtedly, the spreading influence of Sarbanes-Oxley norms and the related changes in corporate governance necessitate a broader and more proactive ethics agenda.

In the case of college and university governing boards, states may want to recognize the experience and stature of individual members who (in many cases) serve on other boards or in highly responsible civic or business positions. By encouraging governing boards to ensure their own ethical behavior, independent of narrowly written conflict of interest codes, states may find models of good practice for many public bodies and agencies. Such preventive and voluntary measures empower governing boards, strengthen internal governance reforms, and improve relationships between higher education and state government.

Statutorily mandated and defined regulation costs more and may require stricter enforcement than what is necessary. The kinds of disclosure and sanctions required by many states’ conflict of interest laws may discourage service by otherwise superbly qualified prospective board members. It is precisely those individuals who may provide the wisdom and perspective to help public boards adapt to a challenging and fluid ethical environment.

CONCLUSION

Boards must recognize that passively exercising their fiduciary responsibilities or narrowly defining their obligations as exclusively financial is no longer an acceptable standard. Each trend or development noted in this paper requires boards to accept more highly engaged and substantive service to their institutions than ever before. Evolving concepts of the fiduciary role, more exacting standards for corporate responsibility, tightening scrutiny of ethical conduct, broadening requirements for transparent governance, and public pressure to account for effective education combine to raise the bar for ethical trusteeship.
SELECTED BIBLIOGRAPHY


APPENDIX

An excerpt from the University of Wisconsin System’s Statement of Expectations of the Members of the Board of Regents reads:

[Board] expectations are as follows:

To adhere to high standards of ethical conduct and to comply fully with laws relating to conduct of public officials and boards. This includes, but is not limited to:

1. Avoidance of any conflict of interest and adherence to the standards of conduct for public officials, as set forth in the Code of Ethics. In the case of any potential conflict of interest, the Board member is expected to seek clarification. Where a conflict of interest is found to exist, the Board member must abstain from participating in the discussion and from voting on the matter in question.

2. Timely filing of annual financial disclosure statements as required by the Code of Ethics.

3. Full compliance with the Open Meetings and Public Records laws.

4. Maintenance of confidentiality when appropriate.28

The University of Maine System has adopted a broad statement, “Ground Rules for Trustees,” which states in part:

Having been nominated and confirmed as members of the Board of Trustees, we affirm and abide by the following principles:

• The board acts as one to exercise the authority it has to develop policy for the university and to carry out its duties.

• The board uses and respects a participatory process and develops consensus collectively. On major policy decisions—hiring a president, approving the budget or a tuition increase, altering the university mission, for example—we act only after a thorough process has been followed. All trustees are represented in our deliberations and all views are respected.

• The board of trustees acts in accordance with the state's open meeting and open records laws as well as their own bylaws when conducting its business. Trustees action/votes must be done in public physically present to have their votes counted. The trustees act in accordance with principles of openness at all times including when using the phone, email or other means of communication.

• Trusteeship requires a substantial commitment. Trustees read all materials, come to meetings prepared and make every effort to attend all board meetings and the meetings of committees to which they have been assigned. Trustees make the commitment necessary to be effective board members and respect the commitment they have made when making decisions about the use of their time.

• Trustees will strictly comply with the Conflict of Interest policy of the board and be cognizant of any potential conflicts that may arise. They understand that the appearance of conflict of interest is as significant as actual conflict of interest.29

Four boards’ ethics policy statements affirm the centrality of legitimacy and integrity (as defined by Kirk). Florida State University’s Board of Trustees Ethics Policy outlines the dual obligation to the public and the institution:

The Florida State University Board of Trustees is ... obligated to serve the public trust. As a member of the Board, each Trustee agrees to keep the welfare of the University at all times paramount, putting aside any and all personal, parochial, and business conflicts of interests thereby assuring that a Trustee’s independence of judgment is not compromised, that the public’s and the University’s confidence and respect in the integrity of the Board are preserved, and that The Florida State University’s public mission is protected and well served.30

A similar statement outlines the obligations of University of California regents:

The responsibility of individual Regents is to serve as trustees for the people of the State of California and as stewards for the University of California, acting to govern the University in fulfillment of its educational, research, and public service missions in the best interests of the people of California.31

29. University of Maine System, board training materials provided to authors.
Western Kentucky University's Code of Ethics states:

Regents…will adhere to the following principles ... To make judgments always on the basis of what is best for the institution as a whole and for the advancement of higher education rather than to serve special interests, including:

a. insuring that any relationship that could be perceived as conflicts of interest are to the distinct and obvious advantage to the University;

b. refraining from those actions and involvements that might prove embarrassing to the University; and,

c. resigning from the Board if such actions or involvements develop.32

Finally, the University of Minnesota System board adopted a policy on ethical conduct that applies to:

- members of the board of regents;
- faculty and staff;
- students;
- any individual employed by the university, using university resources or facilities, or receiving funds administered by the university; and
- volunteers and other representatives when speaking or acting on behalf of the university.

The policy’s broad value statement reads:

**COMMITMENT TO ETHICAL CONDUCT.** Community members must be committed to the highest ethical standards of conduct and integrity. The standards of conduct in this Code, supported through policies, procedures, and workplace rules, provide guidance for making decisions and memorialize the institution's commitment to responsible behavior.33

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AUTHORS

DAVID LESLIE
David Leslie, Chancellor Professor of Education at the College of William and Mary, received his B.A. from Drew University, M.Ed. from Boston University, and Ed.D. from Pennsylvania State University. He has served on the faculties of the University of Virginia, University of Illinois, and Florida State University. He sat on the board of directors of the Association for the Study of Higher Education and served as the association’s vice president and president. His research has been supported by the National Science Foundation, the Exxon Education Foundation, the National Institute of Education, the National Center for Education Statistics, TIAA-CREF, the Lilly Endowment, and the Alfred P. Sloan Foundation. He has served as a consultant to state postsecondary coordinating agencies in Illinois, Florida, and Virginia, legislative committees in Florida and Maryland, the Association of Governing Boards, the National Center for Education Statistics, the American Accounting Association, and the Southern Association of Colleges and Schools. He is a member of Phi Kappa Phi, was named an alumni fellow of Pennsylvania State University in 2000, and received the Research Achievement Award from the Association for the Study of Higher Education in 2002. He is an honorary member of Kappa Delta Pi (2003) and has served as a TIAA-CREF institute fellow (2004-2006).
TERRY MACTAGGART

Terry MacTaggart is an experienced leader and scholar in higher education. He recently completed a one-year return assignment as the Chancellor of the University of Maine System, which comprises 7 universities, 10 campuses, 13 centers, 100 learning sites, and a distance education network. His consulting and research work focuses on higher education leadership and policy, strategic planning, turning around troubled institutions, trustee development, and leadership evaluation. He has served as a faculty member and administrator at several public and independent colleges and universities where he has led or participated in substantial institutional turnarounds. He has held the chancellor’s position at the Minnesota State University System and the University of Maine System.

Among the institutions he has served as a consultant and seminar leader are: the University of Connecticut, Rutgers University, the University of Nebraska System, the University System of Maryland, the University of North Carolina at Chapel Hill, East Carolina University, the Oregon University System, the University of Alaska System, the University of Northern British Columbia, the University of Victoria in British Columbia, the University of Houston System, Texas Southern University, the Texas Tech University System, Massachusetts Maritime Academy, Johnson & Wales University, New England College, Endicott College, Fielding Graduate University, and others.

He has served as chair of the Commission on Institutions of Higher Education (CIHE) of the New England Association of Schools and Colleges (NEASC). He also led multiple visiting teams for several regional accrediting associations. He has served as a Fulbright scholar to Thailand and to Vietnam as an expert on accreditation and quality assurance.

His research and publications focus on governance, improving relations between institutions and the public, and restoring institutional vitality. His most recent book, published by ACE/Praeger in 2007, is titled *Academic Turnarounds: Restoring Growth and Vitality to Challenged American Colleges and Universities*. With James Mingle, he authored *Pursuing the Public’s Agenda: Trustees in Partnership With State Leaders*. In 1996, he served as the editor and lead author of *Restructuring Public Higher Education—What Works and What Doesn’t in Reorganizing Public Systems*. Two years later he produced *Seeking Excellence Through Independence*, which focuses on rebalancing campus autonomy and accountability to achieve better results. In 2000, he and Robert Berdahl coauthored a study of the partial privatization of public institutions entitled *Charter Colleges: Balancing Freedom and Accountability*.

His academic credentials include a doctorate and master’s degree in English Literature from Saint Louis University, a master of business administration degree, and an honorary doctor of law degree from the American College of Greece. He is a member of Phi Beta Kappa.