

May 2, 2023

The Honorable Miguel Cardona
U.S. Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Dear Secretary Cardona:

I write this letter to express the serious concerns of the Association of Governing Boards of Universities and Colleges (AGB) over recent guidance that could require individual board members of nonprofit colleges and universities to assume personal liability for financial losses that the federal government may incur. This guidance upends the centuries-old tradition and expectations of higher education nonprofit volunteer trusteeship in the United States and will have a chilling effect on the ability of nonprofit institutions of higher education (IHEs) to attract and maintain high-quality and effective board members.

On March 1, 2023, the U.S. Department of Education (ED) issued guidance (GEN-23-11) that would create a process to establish personal liability for individuals who exercise “substantial control” over an IHE as defined in Section 498 of the Higher Education Act of 1965. While the statutory language sets forth the possibility for ED to hold such individuals personally liable under certain circumstances, the Department’s own press release admits that prior to this guidance, “[t]he Department did not have a practice—even for the riskiest colleges—of requiring individuals to assume personal liability.” The press release further emphasizes that ED seems focused on those who can benefit financially from owning a college—referring to “owners and executives” and to “[i]ndividuals who control schools and reap substantial profits.” As volunteer trustees of nonprofit institutions, the individuals who serve as board members of nonprofit IHEs do not meet this definition under applicable state nonprofit corporation law, or under traditional governance principles or common expectations.

Despite ED’s professed focus on the owners of for-profit institutions, the guidance applies the personal liability provisions equally to board members of nonprofit IHEs—making a clear public statement to all current and potential board members that they are but one calamitous event away from significant personal financial loss. Board members of nonprofit institutions act on behalf of the public to further the best interests of colleges and universities and their students, and are not seeking personal gain or profit.

This new guidance will no doubt cause current and future board members—especially those with more limited financial means—to weigh whether this risk of exposure to personal liability is too great to justify their volunteer service. Implementing this guidance will chill the ability to attract and maintain the highest-quality board members at nonprofit IHEs, and in the end, may reduce the effectiveness of board governance and oversight of America’s private colleges and universities. Most troubling, this guidance comes at a time when many nonprofit IHEs are already facing numerous reporting and other compliance requirements from ED. As such, this proposal seems likely to produce exactly the opposite of what it intends to accomplish.

AGB is the premier organization that strengthens higher education governing boards and supports the consequential, strategic roles they serve within their organizations. AGB serves more than 1,300 member governing boards representing more than 2,000 institutions and 40,000 board members. As fiduciaries, board members are ultimately accountable for fulfilling institutional missions, ensuring academic quality and financial health, and reviewing and ensuring the continuing effectiveness of their institutions’ policies and procedures. The exemplary volunteer service of trustees of nonprofit IHEs should not be threatened in the same manner as those who have failed to faithfully steward for-profit institutions’ compliance with federal law and ED’s guidance.

We urge further consideration regarding whether ED should be promoting a personal liability obligation for nonprofit IHE governing board members when the focus of this guidance clearly should remain elsewhere. Thank you for your attention to our concerns.

Sincerely,

A handwritten signature in black ink that reads "Henry Stoeber". The signature is written in a cursive, flowing style.

Henry Stoeber
President and CEO
Association of Governing Boards of Universities and Colleges