

AGB Board of Directors' Statement on the
Fiduciary Duties
of Governing Board Members





This statement was approved on July 24, 2015, by the Board of Directors of the Association of Governing Boards of Universities and Colleges. The following principles are intended to educate board members about the elements of their fiduciary responsibilities and how to translate their fulfillment of those responsibilities into effective board conduct and oversight

The “AGB Statement on the Fiduciary Duties of Governing Board Members” encourages all governing boards and chief executives to remember that governance is significantly improved when board members and presidents share a mutual understanding of the standards that define their fiduciary obligations.

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Preface

AGB Board of Directors' Statement on the Fiduciary Duties of Governing Board Members

Governance of American colleges and universities is at a crossroads. The governing bodies of these institutions face critical challenges to methods of operation and oversight that have

been in common use for decades, but which are underperforming in satisfying current stakeholders and protecting future generations. At the same time, they are under greater scrutiny than ever before, with their members increasingly held accountable for the success or failure of their institutions. These members hold a unique position with regard to stewardship of the institutions they serve, a position not shared with students, faculty, alumni, donors, regulators, or others in the community. They are fiduciaries.

The concept and practice of being a fiduciary cannot and should not be reduced to a legal principle with no real-world impact on a board member's behavior. Fiduciary principles and duties are at the heart of effective governance and AGB's work with its members. The fiduciary duties described in this statement can seem, at first glance, to be a matter of common sense. What could be more essential for a board member than to act with good-faith and care, with loyalty to the institution, and in compliance with its mission and the law? And yet, behind nearly every failure of governance and leadership at higher education institutions is a breach of the principles of fiduciary duty.

While governing boards act as a body, the fiduciary duties applied by law and best practice fall on individual board members. Each has a personal responsibility to ensure that he or she is up to the task and fulfilling his or her obligations. Effective board members must be more than names on a masthead. They must be fully engaged. They must attend meetings, read and evaluate the materials, ask questions and get answers, honor confidentiality, avoid conflicts of interest, demonstrate loyalty, understand and uphold mission, and ensure legal and ethical compliance. Those who cannot do so must step down and allow others to take their place. The success and sustainability of the institution and the protection of board members from personal liability require nothing less.

This AGB board statement is designed as a tool to orient board members to the elements of fiduciary duty and to recommend proven practices for translating those duties into effective board conduct. It comprises a discussion of governing board members and officers as fiduciaries of their institutions, an explanation of the three fiduciary duties that apply to them, and principles for translating these duties into effective board conduct. Integrated throughout the statement are illustrative questions for members of governing boards to consider.

Principles of Fiduciary Duty

FIDUCIARY DUTIES IN GENERAL

Under state statutory and common law, officers and board members of corporations (including nonprofit corporations and public bodies that operate colleges and universities) are *fiduciaries* and must act in accordance with the fiduciary duties of care, loyalty, and obedience. What is a fiduciary? Legally, a fiduciary relationship is one of trust or confidence between parties. A fiduciary is someone who has special responsibilities in connection with the administration, investment, monitoring, and distribution of property—in this case, the charitable or public assets of the institution. These assets include not just the buildings and grounds and endowment, but also intangibles, such as the reputation of the institution and its role in the community. A college or university board member or officer has duties to the institution under the law that a faculty member, a student, or an administrator does not.

A fiduciary owes particular duties to the institution he or she serves. They are commonly known, as described above, as the fiduciary duties of care, loyalty, and obedience. Taken together, they require board members to make careful, good-faith decisions in the best interest of the institution consistent with its public or charitable mission, independent of undue influence from any party or from financial interests. These duties may be described in and imposed by a college or university's bylaws, governing board policies, standards of conduct, or code of ethics. In the case of a public institution, state law may describe or apply these standards of conduct differently (for example, under particular rules applicable to regents or public bodies); however, adherence to these principles remains a key governance best practice at both independent and public colleges and universities.



ILLUSTRATIVE QUESTIONS FOR GOVERNING BOARDS TO CONSIDER

1. Does the board understand the elements of the duty of care, the duty of loyalty, and the duty of obedience? How is our board educated on these principles?
2. Do board members understand how their fiduciary duties relate to their particular responsibilities in overseeing the college or university? How does our board discuss these matters?
3. Do board members understand the ways in which they could be exposed to personal liability for breaching their fiduciary duties? What areas of liability exposure are of greatest concern to our board members?

Good governance practice mandates that all board members be informed of the legal meaning and obligations of their fiduciary role and provided practical examples of issues that the board is likely to face and that require careful attention to the balancing of interests necessary to carry out the fiduciary role. In addition, board members and officers must understand that while they hold fiduciary duties individually, they act collectively as a board. Absent a particular designation of authority by the board to an individual board member or officer (such as the authorization of a board chair to enter into an employment agreement with the president on behalf of the institution), no single board member or officer has authority to bind the institution or determine its course of action, even those who may be appointed by a state governor or through a political process.

A question that often arises is: To whom are fiduciary duties owed? By law, these duties are owed by governing body members and officers to the institution. However, in the court of political and public opinion, fiduciary duties are commonly extended (erroneously) to other beneficiaries: students (and those who may pay the tuition for them), faculty, alumni, donors, and the community at large, particularly where the institution has a direct and material impact on the livelihood of its community and the beneficiaries of its research and scholarship. In a given case, governing board members may comply faithfully and with integrity with their legal fiduciary duties in overseeing their institutions and yet still run afoul of regulators, politicians, and stakeholders who believe a different result should ensue. It may even cost a board member his or her seat. Still, fidelity by board members and officers to their legal fiduciary duties is the essence of good governance.

FIDUCIARIES WITHIN A SHARED GOVERNANCE SYSTEM

In the American higher education system of shared governance, governing boards share governance duties with the president and the faculty, while respecting academic freedom and soliciting input from a broad campus constituency. However, under the law, only governing board members and officers hold fiduciary responsibility. Nevertheless, the governance principles ingrained in the fiduciary duties discussed in this statement have clear application to the efforts of the administration and faculty, as well. All participants in the system of shared governance would do well to adhere to these principles and practices.

The Three Duties

The following three duties of governing board members and officers, which are established by law and are well-accepted principles of good governance, are set forth for board members to thoughtfully consider and apply.

THE DUTY OF CARE

The duty of care generally requires officers and governing board members to carry out their responsibilities in good-faith and using that degree of diligence, care, and skill which ordinarily prudent persons would reasonably exercise under similar circumstances in like positions. Accordingly, a board member must act in a manner that he or she reasonably believes to be in the best interests of the institution.

Determining what is in the best interests of the institution is left to the governing board's sound judgment under the duty of care. It will necessarily involve a balancing of interests and priorities appropriate to the institution's mission and consistent with its strategic priorities. This should include explicit attention to the tradeoffs inherent in achieving balance among employees' interests (maintaining quality of education and protecting the institution's assets), student interests (maintaining affordability), physical assets (buildings and grounds), fiscal assets (endowments and fund balances), consumer value of the degree (cost of degree attainment versus future job earnings), and community interests in the institution (jobs, economic development).

Under the duty of care, governing bodies of colleges and universities are responsible for both the short- and long-term financial health of the institution and achievement of the goal of preserving the institution and its resources for future generations. At the same time, governing boards have the obligation to develop and protect the quality of the institution's academic programs and to become appropriately engaged in the oversight thereof.

There can be no single, succinct statement of specific actions required by the duty of care, since different circumstances will inevitably require different acts. However, the proper exercise of the duty of care requires a board member to regularly attend meetings; to read and evaluate the meeting materials prepared for the board in advance of the meeting; to ask questions and participate actively in board discussions; and to be knowledgeable of the institution's purposes, operations, and environment.

Also interwoven in the duty of care is the responsibility of board members to maintain the confidentiality of matters brought before the board, both during and after their board service. This is particularly the case with respect to personnel concerns and sensitive business matters. In some cases, board members may be asked to sign an oath of confidentiality or a binding agreement that sets forth their duties and responsibilities

to the institution. Such instruments may be useful, but they may also seem heavy-handed to some, and the duties will apply to board members who have been duly elected and have consented to service whether or not an oath or agreement exists. At the same time, board members must balance their obligation to maintain confidentiality with the core governance principle and public-policy objective of promoting transparency in board operations.

The duty of care does not require professional expertise, extensive consideration, or full knowledge of the matter at hand by every board member. Instead, the duty generally requires board members to be reasonably well informed of the relevant issues. Officers and board members may rely upon expert advice in making their determinations. For example, a board member may rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by: (a) one or more officers or employees of the institution whom the board reasonably believes to be reliable and competent in the matters presented; (b) legal counsel, public accountants, or other persons as to matters the board reasonably believes are within the person's professional or expert competence; or (c) a committee of the governing board of which he or she is not a member if the board member reasonably believes the committee's report merits confidence. Any reliance on information provided by others must be reasonable under the circumstances, considering such factors as the source from which the information was obtained, whether the information relied upon is a brief summary or an extensive analysis, whether the matter is routine or exceptional, and the time frame in which a decision must be made.



ILLUSTRATIVE QUESTIONS FOR GOVERNING BOARDS TO CONSIDER

1. Does the board invite discussion and questions regarding matters before it?
2. How does the board encourage full engagement by board members and enforce attendance requirements?
3. How does the board involve experts to facilitate and enhance its understanding of matters before it?
4. How does the board assess its own performance in fulfilling its fiduciary duties?

THE DUTY OF LOYALTY

The duty of loyalty requires officers and board members to act in good-faith and in a manner that is reasonably believed to be in the interests of the college or university and its nonprofit or public purposes rather than their own interests or the interests of another person or organization. The fiduciary must not act out of expedience, avarice, or self-interest. The requirement that officers and board members discharge their duties in good-faith is a subjective one that will vary depending on the facts and circumstances.

Under this duty, a college or university board member must be loyal to the institution and not use the position of authority to obtain, directly or indirectly, a benefit for him or herself or for another organization in which the board member has an interest. Accordingly, when evaluating a board member's conduct, the duty of loyalty considers both a board member's financial interests and the governance or leadership positions he or she holds with other organizations.

Board member independence is increasingly sought after by regulators and key stakeholders to ensure adherence to the duty of loyalty. In this context, independence means that the board member is not employed by and does not do material business with the college or university. This information is reported on IRS Form 990 and in other public record filings. In addition, the board member acts independently of any personal relationship he or she may have with the president or senior leaders of the college or university or with other board members. It is not required that every member of the board be independent (for example, some *ex officio* board members may not be), but, ideally, a majority of the board members should be independent.



ILLUSTRATIVE QUESTIONS FOR GOVERNING BOARDS TO CONSIDER

1. Does the board have a robust conflict-of-interest policy that also addresses dualities of interest? How do board members disclose conflicts and dualities and to whom?
2. Whose responsibility is it to review board conflict-of-interest disclosures and to report on potential conflicts to the board?
3. What does the board do when a conflict is identified?
4. How does the board determine what matters before it are confidential, and how does it enforce confidentiality by board members?

In addition, it is incumbent on board members to retain their independence from external and internal stakeholders in the conduct of their oversight and policy responsibilities. This applies to boards of independent institutions and especially to public boards whose members are most often selected for their service through some form of political appointment. It also applies in cases in which board members are appointed or elected by internal constituent groups such as faculty or staff. Public and internally appointed board members may be respectful of the views of appointing authorities but must not allow such influence to be determinative of board action. Governing board members of public institutions, while serving the public interest, must still adhere to the fiduciary duty of loyalty to the institution and, in so doing, must prioritize the interests of the institution over any other. It is essential that board members avoid a conflict of loyalty in meeting their fiduciary responsibilities to act on behalf of the institution(s) they hold in trust.

The most critical implementation of the duty of loyalty comes in a college or university's conflict-of-interest policy. Such a policy, when adhering to state law and best governance practices, requires board members to fully disclose financial interests and dual organizational relationships ("dualities of interest") that may affect their decision making on behalf of the institution. The policy will prohibit board members from participating in or unduly influencing decisions in which they have a material financial conflict of interest or an adverse duality of interest ("recusal") and may require the board member to eliminate the duality of interest. The 2013 "AGB Board of Directors' Statement on Conflict of Interest with Guidelines on Compelling Benefit" offers clarifying guidance on best practices for boards to consider in managing conflicts of interest within the board.



THE DUTY OF OBEDIENCE

A third fiduciary duty, which is arguably an element of the duties of care and loyalty, is the duty of obedience. This is the duty of board members to ensure that the college or university is operating in furtherance of its stated purposes (as set forth in its governing documents) and is operating in compliance with the law. The board should also periodically re-evaluate its purposes and mission and must be prepared to amend or change them when it is necessary and appropriate to do so under the law and the institution's governing documents. A governing body of a college or university must make reasonable efforts to ensure that the institution is both legally and ethically compliant with the law and applicable internal and external rules (for example, accreditation, environmental, research, labor, or athletics requirements) and that it has instituted effective internal controls to achieve compliance and to identify and address problems.



1. Has the board been impeded in fulfilling its fiduciary responsibilities by external influences such as government, corporate, political, social, athletic, or religious interests? How should the board respond under these circumstances?
2. Do our appointed public board members understand and abide by their fiduciary obligation to objectively evaluate the matters before them and to maintain their independent judgment, notwithstanding any potential effort by the appointing authority to influence their decisions?
3. By what process does the board determine whether proposed board action is consistent with the institution's mission and purposes?
4. How does the board oversee legal compliance in the institution?
5. What internal controls are applied to prevent legal violations such as fraud, theft of intellectual property, embezzlement, athletics infractions, use of gifts in violation of donor intent, and employment discrimination? Are they effective?

Translating Fiduciary Duty into Effective Board Conduct

In order to ensure that college and university board members are well prepared to effectively carry out their roles as fiduciaries, good governance tools may be developed to provide clarity as to expectations and strategies for action. Fiduciary duties will apply by law even if an institution does nothing more to implement them, but governance is improved when board members and presidents share a mutual understanding of the standards that define the fiduciary role, including the balancing of interests necessary to carry out the institution's mission and strategic priorities.

CORE PRINCIPLES FOR EFFECTIVE BOARD CONDUCT AS FIDUCIARIES

1. FULFILL THE FIDUCIARY DUTY OF CARE BY:

- ✧ Acting at all times in good-faith and with the appropriate diligence, care, and skill required under the circumstances.
- ✧ Acting in a manner reasonably believed to be in the best interests of the institution.
- ✧ Actively attending and participating in all board and committee meetings, reading and evaluating the materials presented, and asking questions about unexplained results and unfamiliar issues.
- ✧ Retiring from board service (or declining nominations) if one is no longer able to satisfy the time, effort, and attendance expectations for the institution's governing body members.
- ✧ Relying, when appropriate, on experts who serve the board by evaluating complex matters, while questioning their reports when their advice is inconsistent with expectations.

2. FULFILL THE FIDUCIARY DUTY OF LOYALTY BY:

- ✧ Faithfully pursuing the interests of the college or university and its charitable or public purposes rather than one's own interests or the interests of another person or organization.
- ✧ Actively disclosing existing or potential financial conflicts of interest and dual interests, and recusing oneself from board discussions and votes on transactions or policy matters, in accordance with the institution's conflict-of-interest policy.

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- ✧ Maintaining complete confidentiality about any matters presented to the governing board at all times, unless otherwise directed by the board and subject to state transparency laws applicable to public institutions.
 - ✧ Retaining the governing board's independence from external and internal stakeholders in the conduct of its oversight and policy responsibilities.

3. FULFILL THE FIDUCIARY DUTY OF OBEDIENCE BY:

- ✧ Ensuring that the institution is acting at all times in accordance with its mission and purposes.
- ✧ Ensuring that the college or university, in all of its activities, is acting in legal and ethical compliance with the law and applicable internal and external rules.
- ✧ Instituting effective internal controls to achieve compliance and to identify and address problems.

EFFECTIVE GUIDELINES FOR PUTTING THESE PRINCIPLES INTO PRACTICE

- ✧ Implement a year-round director-recruitment program in which a pool of prospective candidates is developed and vetted, and in which candidates have an opportunity to learn more about the institution and are educated as to the needs and expectations of the institution for their board service, and their prospective fiduciary responsibilities.
- ✧ Engage in thoughtful and advance planning regarding board development and composition to avoid conflicts of interest, ensure adequate independence of board members, and secure an appropriate balance of skills and experience among board members.
- ✧ Establish meaningful orientation programs for new board members (and a refresher for long-serving members) that include: an explanation of fiduciary duties; a discussion of the institution's mission, vision, and strategic plan; an explanation of related board policies, such as conflict of interest and confidentiality; an explanation of relevant portions of the college or university bylaws that pertain to board members' conduct; the expectations of board members as to active participation on the board and in board committees; an explanation of the potential for personal liability for board members in the event of a breach of fiduciary duty; and the identification of resources for further study.

- ✧ Develop and implement an up-to-date conflict-of-interest policy that: makes the disclosure and recusal process clear; identifies standards for materiality and compelling benefit; explains and addresses financial interests, dualities of interest, and rules of conduct when the interest is adverse; and includes an effective form for disclosing material financial and dual interests. The governing board or a board committee will establish a process for review of disclosures of interest and forwarding of identified conflicts to the board for appropriate action.
- ✧ Ensure appropriate communication between the governing board and college or university legal compliance officers and programs and provide orientation for all board members regarding their role in such programs, including whistleblower policies, investigations of allegations, and complaint resolution.
- ✧ Secure on a timely basis the advice of knowledgeable experts who can increase the level of understanding and competence of board members on key issues, which may include compensation of the president, strategic planning, academic quality, construction of new facilities and development of property, marketing and communications, advocacy, legal compliance, fundraising and endowment management, and risk management.
- ✧ Commission board committees to regularly assess, through self-evaluation and review of board-member conduct, the effectiveness of the board in adhering to its fiduciary duties. Such committees may include the executive committee, the governance committee, and the audit committee.

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