AGB Board of Directors’ Statement on Conflict of Interest with Guidelines on Compelling Benefit
This Statement and the related Guidelines were approved on November 20, 2009, and April 12, 2013, respectively, by the Board of Directors of the Association of Governing Boards of Universities and Colleges. They are intended to guide boards in the governance of colleges, universities, and systems; inform them of their roles and responsibilities; and clarify their relationships with presidents, administration, faculty, and others involved in the governance process.
In response to requests for policy guidance from presidents, board chairs, trustees, and other higher education leaders, in 2009 the AGB Board issued AGB’s “Statement on Conflict of Interest.” As the introduction to the Statement noted, “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.” The Statement, drafted after a careful deliberative process guided by a distinguished panel—and with input from presidents, trustees, and other higher education leaders—recommended 12 principles to inform board decisions and discussion on conflict of interest. Those principles can be found on pages 4 and 5. However, because the document was a Statement of high-level principle, it intentionally did not extensively “drill down” into details of implementing those principles.

The companion “Guidelines on Compelling Benefit,” issued by the AGB Board in 2013, provides more specific, sometimes technical, guidance to boards seeking to implement the 2009 Statement. The Guidelines, listed on pages 6 to 9, focus on one important aspect of the Statement—the recommendation that transactions involving conflict of interest should be approved only if the board finds that the transaction would bring compelling benefit to the institution. The purpose of the Guidelines is to help boards, advised in appropriate situations by institutional counsel, apply the compelling benefit standard to a wide range of circumstances in which conflicts may figure. Informed by nearly four years of institutional experience with the 2009 Statement, the Guidelines resulted from a collaborative process that took input from presidents, trustees, and legal experts including institutional counsel. In the process, an effort was made to identify many kinds of conflicted transactions that boards review and to provide guidance on how the compelling benefit standard should apply in each. As institutions gain more experience with the 2009 Statement, AGB may periodically review and revise these Guidelines.

Richard D. Legon
President
April 2013
Introduction to the 2009 Statement

This AGB “Statement on Conflict of Interest,” adopted by the AGB Board of Directors in 2009, 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 authorized 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.
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.
Guidelines on Compelling Benefit Needed for Approval of any Board Member Conflict of Interest

In its 2009 “Statement on Conflict of Interest,” AGB’s Board of Directors recommended this standard for boards to determine whether a board member’s conflict of interest should be permitted:

—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.

The standard connotes that permissible conflict transactions will be rare, and provides that the board in no event should approve a conflict of interest transaction unless the transaction (1) would bring compelling benefit to the institution, and (2) is subjected to warranted carefully defined conditions that assure propriety and the appearance of propriety. This guidance pertains to the first condition, by addressing the meaning of “compelling benefit.”

The compelling benefit standard pertains to conflicted transactions. It does not pertain to non-transactional situations involving institutional policy or personnel decisions—such as whether to raise tuition or close an academic program—but, in accord with AGB’s 2009 Statement, conflicted board members should have no involvement in such decisions.

We assume that when conflicted transactions are proposed, institutions will prohibit them in the great majority of cases. The proposer of the transaction will have the burden of persuading the board that the transaction would bring the institution compelling benefit. The board will subject that assertion to searching examination in accordance with the principles described here. ¹

¹ Although, under AGB’s 2009 “Statement on Conflict of Interest” as well as applicable law, the board is ultimately accountable for decisions involving conflicts of interest of its members and their covered family members, boards often delegate review of such matters to a board committee or other group of board members, who may be advised, as may the board, by designated administrative personnel. Where such delegation occurs, recourse to the full board is appropriate should the subordinate body’s decision or recommendation be contested.
Conflicts of interest can be challenging to regulate because the risks and costs they entail, although major, are often hidden. A perception that board members benefit inappropriately from their association with an institution erodes public trust in the institution. Higher education institutions depend on that trust. Donors, government, and the public presuppose that institutional fiduciaries serve solely in the institutions’ best interest. That understanding also influences the institutions’ interactions with government and other regulators. Too, faculty and staff, who are expected to comply with conflict of interest standards, devalue those standards if board members are not held to them. Board member conflicts of interest thus can corrode institutional culture and perniciously undermine basic institutional aims.  

Although application of the “compelling benefit” standard may or may not in a given situation correspond to performance of a legal duty, we believe the standard prudent. It is different than standards prescribed by state conflicts of interest laws, and different than IRS standards such as the intermediate sanctions rules for tax-exempt organizations. Some of those standards require the board or a committee of disinterested board members to make a finding, which may be based on consideration of comparable transactions, that a conflict of interest transaction is fair, reasonable, and in the organization’s interest. The standard this document addresses requires the board to find as well that the proposed transaction brings the institution compelling benefit.

In light of the risks and costs that conflicts of interest entail, a plausible conclusion might be that board member conflicts of interest should never be tolerated. Yet board members have a fiduciary duty not to dismiss out of hand transactions of great benefit to the institution. Accordingly, the risks and costs of conflicts of interest may be tolerated only where countervailing benefit to the institution is compelling.

These principles should guide a board’s consideration of whether a benefit is compelling:

1. A paramount concern should in all cases be the institution’s integrity and reputation. The board may well conclude in a particular situation that a conflict should be prohibited even if the financial benefit to the institution would be great.

2. If there is only slight benefit to the institution—for instance, if the transaction involving the board member is not significantly more valuable to the institution than sound alternatives, or there is an equally good or better alternative—the conflict of interest should not be permitted.

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2 Board member interests referenced in this document include interests of covered family members.
3. In gauging whether the benefit is compelling, a board may consider the degree to which the conflict would affect the institution’s procedural regularity and businesslike dealings. For example, a decision to pursue a transaction that resulted from the institution’s established procurement policy could be considered differently.

4. In gauging whether there is compelling benefit, availability of means to manage a conflict, while relevant, is not sufficient to permit a conflicted transaction. The board should not permit the transaction absent a separate determination that the transaction would bring the institution compelling benefit.

5. Compelling benefit is not limited to financial benefit. For example, if a proposed hiring would result in significant advancement of a key aspect of the institutional mission, such as recruitment of a nationally eminent person, the proposal could be considered under the compelling benefit standard.

6. Whether institutional resources should be taken into account in gauging compelling benefit is not an easy question. For example, a college with a modest endowment may find that a transaction involving a board member brings compelling benefit, and an institution with a very large endowment may find that a transaction which brings the same value does not.

7. A board may differently analyze the cost of losing an existing arrangement than the benefit of entering into that same arrangement. For example, an institution that has a longstanding relationship with a bank may determine that the benefit of retaining that relationship, at least during a transition period, is compelling, when an executive officer of the bank joins the institution’s board.

8. A benefit replaceable without heavy burden is presumptively not compelling. On the other hand, a benefit that is unique or irreplaceable may possibly be compelling. For example, if a college purchases its electricity from the only electric utility in the area, the college may permit the relationship even when an executive officer of the utility is a board member who has a conflict of interest.

9. Speculative benefit will rarely be compelling.

10. Compelling benefit should be subject to independent confirmation by the non-conflicted board members. A conflicted board member’s assurances regarding the benefit of the transaction should be independently verified. The board should engage expert advice as needed and appropriate, but the final decision should be made by the board.

11. In situations that do not meet the definition of conflict of interest under the AGB Statement (i.e. where reasonable observers, having knowledge of all the relevant circumstances, would not conclude that the board member has an actual or apparent conflict of interest in a matter related to the institution)—such as a board member who votes for himself or herself for board chair—neither compelling benefit nor non-involvement of the board member is required.
12. Conflicts that arise from a board member’s fiduciary or other non-remunerative relationship with an institutional affiliate or a charitable organization, such as membership on the board of an affiliated hospital, will generally meet the compelling benefit standard.

13. Compelling benefit should not take into account threats, quid pro quos, or actual or anticipated negative or inappropriate conduct by a board member. For example, a board member’s overt or implicit threat to resign from the board or withdraw support if a transaction is not approved, or the board’s anticipation of such action, should not drive analysis of compelling benefit.

14. A transaction involving a board member should not be considered compelling unless it is compared to alternatives. Usually, such comparison will entail a rigorous effort to gauge the market for similar transactions and a subsequent conclusion that the terms the board member offers are so much more valuable to the institution than any sound alternative as to be compelling.

15. The compelling benefit standard applies to institutional investments. When considering whether the board should approve a proposed investment transaction in which a board member has a conflict of interest, the board should take into account such considerations as the uncertain nature of the benefit to the institution, available alternatives, and the benefit to the board member. The board should rely on independent information and, as needed, independent advice and should not rely on unconfirmed advice of a conflicted board member.

16. Professional services relationships between an institution and a board member or his or her firm present special conflict of interest concerns, related to such factors as the potential for adversity following provision of advice that leads to bad results, and the difficulty of identifying objective measures of quality and value of service. In addressing compelling benefit in this context, the board should weigh such factors as whether the relationship between the institution and the firm is longstanding, the cost and quality of services and reputation of the firm relative to sound alternatives, the conflicted board member’s role in the relationship, and financial and other benefits to the institution, firm, and board member. The board may consider that the firm may be perceived to benefit from its known association with the institution, even if it provides services at reduced rates or without charge.

17. For each conflicted transaction the board approves, the reasons for approval, including the compelling benefit to the institution, should be memorialized. These principles are not intended to vitiate any obligation under applicable law.
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The Association of Governing Boards of Universities and Colleges 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. For more information, visit www.agb.org.
AGB Resources

The following publications and others concerning trustee and board engagement are available at www.agb.org/bookstore:


The AGB Board of Directors has issued other statements that discuss important board responsibilities:

“AGB Statement on External Influences on Universities and Colleges” (2012)

“AGB Statement on Board Responsibility for the Oversight of Educational Quality” (2011)

“Statement on Board Responsibility for Institutional Governance” (2010)

“AGB Board of Director’s Statement on Conflict of Interest” (2009)

“AGB-CHEA Joint Advisory Statement on Accreditation & Governing Boards” (2009)

“AGB Statement on Board Responsibilities for Intercollegiate Athletics” (2009)

“AGB Statement on Board Accountability” (2007)