

Ohio Department of Higher Education 2019 Annual Trustees Conference

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The Work of a Trustee as Fiduciary

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Fiduciary Duties of Trustees

What is a fiduciary?

- Duty of care
- Duty of loyalty
- Duty of obedience
- To whom are duties owed?

Fiduciary Duties of Trustees

What is a fiduciary?

- someone with special responsibilities in connection with the administration, investment, and distribution of property



Fiduciary Duty of Trustees

▪ Duty of Care

- requires officers and trustees to carry out their responsibilities in good faith and with that degree of diligence, care and skill which ordinarily prudent persons would exercise under similar circumstances in like positions
- requires informed, good faith decisions intended to further the organization's purposes

Fiduciary Duty of Trustees

▪ Duty of Care

- requires fiduciaries to be reasonably well informed of relevant issues
- may rely in good faith on information, opinions, reports, or statements provided by others, e.g., accountants, lawyers, consultants, advisors

Fiduciary Duty of Trustees

Case in point: Ensuring Financial Accountability of Ohio Institutions

▪ Ohio Senate Bill 6

- Enacted into law in 1997
 - Designed to increase financial accountability of Ohio colleges and universities by using a standard set of measures with which to monitor the fiscal health of campuses
 - ODHE annually applies these standards to monitor individual campus finances using audited financial statements and quarterly financial reports
 - Three ratios are computed to generate four scores: viability ratio, primary reserve ratio, and net income ratio
 - Expendable net assets, plant debt, total revenues, total expenses, and change in net assets are considered

Fiduciary Duty of Trustees

Case in point: Ensuring Financial Accountability of Ohio Institutions

▪ Ohio Senate Bill 6

- Each ratio is assigned a score from 0 to 5, with 5 indicating the highest degree of fiscal strength in each category
- Based on these scores, a composite score is determined which is the institution's primary indicator of fiscal health (5.0 is the highest composite score)
 - A composite score at or below 1.75 for two consecutive years results in an institution being placed on fiscal watch
 - When an institution is placed on fiscal watch, it will experience increased financial oversight and reporting at the state level. The governing board will be required to submit a recovery plan, e.g., 3-year forecast to leave fiscal watch, descriptions of financial difficulties and plans to remediate them.
 - The board would be asked to undergo increased monthly oversight and would be required to present an annual report to state officials

Fiduciary Duty of Trustees

Case in point: Ensuring Financial Accountability of Ohio Institutions

▪ Ohio Senate Bill 6

- Key takeaways for boards from SB 6 analysis:
 - Is debt managed strategically to advance the mission?
 - Do operating results indicate the institution is living within available resources?

Fiduciary Duty of Trustees

▪ Duty of Loyalty

- requires trustees and officers to act in good faith and in a manner that is reasonably believed to be in accordance with the best interests of the institution
- requires trustees and officers to faithfully pursue the interests of the institution and its nonprofit/public purpose rather than their own interests or the interests of another person or organization

Fiduciary Duty of Trustees

Case in point: Conflicts of Interest

- Compliance: state law, IRS rules, fiduciary duty
- Financial conflicts
- Duality of interest
- Appearance of conflict
- Need for policy
- Need for good disclosure form
- Whose job is this?

Fiduciary Duty of Trustees

Case in point: Conflicts of Interest

Duality of interest: A nonfinancial dual relationship that, if rising to the level of a conflict, prevents a trustee from acting in the best interests of the organization

Fiduciary Duty of Trustees

Case in point: Conflicts of Interest

A duality of interest is not necessarily a conflict of interest. In some cases, it may be to the advantage of the organization for a trustee to have a substantial leadership role with another organization. Under a conflict of interest policy, a person who has a dual interest may have a conflict of interest only if the appropriate board or committee or disinterested trustee decides that a conflict of interest exists.

- Violation of the Duty of Loyalty
- Strategies to fix

Fiduciary Duty of Trustees

- **Personal Liability for Trustees**
 - Breach of fiduciary duty
 - Fraud
 - Gross negligence
 - Tortious conduct
 - Violation of law
 - e.g., state corporation law on loans;
intermediate sanctions law; payroll taxes
 - Knowing and willful

Fiduciary Duty of Trustees

- **Protection from Personal Liability for Trustees**
 - Active participation
 - Acting in good faith
 - Business judgment rule
 - Statutory indemnification
 - Indemnification by the organization
 - Directors and officers liability insurance

Ten Basic Responsibilities of Boards

1. Determine mission and purposes.
2. Select the chief executive.
3. Support and evaluate the chief executive.
4. Ensure effective planning.
5. Monitor and strengthen programs and services.
6. Ensure adequate financial resources.
7. Protect assets and provide financial oversight.
8. Build a competent board.
9. Ensure legal and ethical integrity.
10. Enhance the organization's public standing.

Source: BoardSource

Key Governance Roles of Boards

1. To establish the mission, purposes, goals, and program priorities to be implemented by the institution's president and staff, through a strategic planning process
2. To ensure that appropriate governance and operational policies have been developed, adopted, and implemented by the institution to carry out its mission
3. To determine and set overall policy
4. To advocate the mission, values, accomplishments, and goals of the institution to its stakeholders and to the public at large

Key Governance Roles of Boards

5. To determine, monitor, and strengthen programs that are responsive to the needs of the institution and are central to its mission
6. To establish fiscal policy, including budget authorization and oversight
7. To develop adequate resources to ensure financial stability and accountability for the institution's activities
8. To select, retain, support, evaluate the performance of, and discharge the president of the institution

Questions?

Thank you



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