

University Officers as Corporate Directors
Office of the General Counsel
Guidance on Conflicts Management and Disclosure Requirements

Background.

“The University not only permits but expressly encourages faculty to pursue outside professional activities including interactions with industry, with or without compensation, which will enrich a faculty member's academic contributions to the University.” Section 3.4.5 of University of Nebraska Board of Regent Bylaws. University employees are also encouraged to engage in professional activities outside the University “as a means of contributing to the economic growth and development of the state as well as broadening their experience and keeping them abreast of the latest developments in their specialized fields.” Such activities cannot interfere with the employee’s regular duties at the University, or represent a conflict of interest. These opportunities are consistent with and anticipate that University officers may serve as members on corporate boards or as corporate directors.

Media reports have focused on high profile board members, such as Stanford University president John L. Hennessy’s board membership on Google.¹ A 2005 Chronicle of Higher Education survey found that about a third of presidents at four-year universities served on at least one outside board.²

This guidance is a resource for University administrators considering service on a corporate or non-profit board consistent with the encouragement of University policy and within the parameters allowed by law.

Many senior University administrators hold board memberships in entities affiliated with the University by virtue of their employment with the University. These are customarily appointments based on the appointment held with the University, such as President or Chancellor. These board memberships are part of the duties undertaken as a University employee, and are not regarded as “outside professional activities.” As a result, conflicts management issues are primarily concerned with any official actions that might result in a financial benefit to the employee. Likewise, serving in an official capacity as a representative of the University on a board of an outside organization such as a peer/professional organization, athletic conference or academic organization are not “outside activities” when undertaken as a part of your duties as a University employee.

The following are examples of permissible outside professional activities related to service on a corporate or non-profit board and the recommended best practices for due diligence and related approvals.

¹ <http://online.wsj.com/article/SB117226912853917727.html>. Last accessed Oct. 11, 2011

² <http://chronicle.com/article/College-Presidents-on-Company/2783/> Last accessed Oct. 11, 2011
(Subscription Required)

Paid and Unpaid Board Memberships.

A University official considering appointment as a paid or unpaid board member of a corporation (either for-profit or non-profit) must be cognizant of both University and Nebraska Political Accountability and Disclosure Act (NPADA) requirements for disclosing and managing outside income and potential conflict of interests. The NADC has consistently stated that the definition of “business” and “business association” within the Nebraska statutes do not distinguish between for-profit and non-profit entities.³

Nebraska Political Accountability and Disclosure Act (NPADA)

The NPADA has two pertinent forms of disclosure: 1) the annual financial interest disclosure, (C-1) and 2) the transactional “Potential Conflict of Interest” form (C-2). The annual C-1 disclosure is based on a list of University officers determined by statute and the NADC from time to time, including most of the senior campus and University administrators in addition to the UNL head football and basketball coaches. If a Board membership includes fees or compensation, most often reported on a W-2 or 1099 form, that financial interest would typically be reported on the annual C-1 disclosure form when it exceeds \$1,000 annually. The C-1 disclosure reflects the financial interests during the calendar year that precedes the date of filing, similar to an annual tax return.

The NPADA also requires that a C-2 Potential Conflict of Interest Statement form be filed for C-1-listed University employees facing “any action or ... decision in the discharge of his or her official duties that may cause financial benefit or detriment to him or her ... or a business with which he or she is associated.” The C-2 filer must also follow the Commission’s advice for removing him or herself from any action or decision related to the matter.” Neb. Rev. Stat. § 49-1499.03(1) (a)-(c) (Cum. Supp. 2010).

The NPADA also generally prohibits the use of public office for financial gain (Neb. Rev. Stat. § 49-14,101.01 (Cum. Supp. 2010)) or for someone to offer that official or his or her immediate family or business association anything of value in exchange for influence over an official action. Neb. Rev. Stat. § 49-14,101.

University Policies and Procedures

The NADC reporting tracks alongside with Board of Regents policies requiring a University official with a significant financial interest to complete a campus-specific disclosure form, disclose outside activities to the proper University authorities, and recuse or be absent from any funding or other decisions (i.e. contracts) that would otherwise create a conflict of interest. Sections 3.2.8 (8), (10) & 1.1.2 (2) (c) of University of Nebraska Board of Regents Policies. As with the NADC management, the usual process is for employees to recuse themselves from any involvement in the action or decision and to find an appropriate University employee to act instead. Board Policies Section 1.1.2 (2) (e).

Any University official who also serves on a corporate or non-profit board should disclose the same as outside employment to the cognizant office in all instances, regardless of duration. *See* Board Bylaw Section 3.4.5 (b); Board Policies Section 3.2.8. This disclosure and

³ *See* NADC Advisory Opinion No. 187 <http://nadc.nol.org/AdvisoryOpinions/OPINION187.htm> Last accessed Oct. 11, 2011.

approval by the cognizant University officer suffices to satisfy the requirement that outside activities should not interfere with obligations the employee has to the University. *See* Board Bylaw Section 1.10.1 (b). Indeed, department chairs or heads and deans or directors have the authority to deny approval of an activity that would interfere with normal duties to the University. Board Policies Section 3.2.8 (8).

As noted in the Office of General Counsel guidance on outside employment, under certain circumstances, a University official must seek Regental approval to serve on a board.⁴ A University official must obtain Board approval before accepting professional employment outside the University requiring more than two days per month on average during the assigned work week or for a duration longer than 2 years. Board Bylaw Section 3.4.5 (a), (b); Board Policies Section 3.2.8 (8) (3). This bylaw's history shows that the "on average" language is flexible—for example, 12 days spent on outside employment in a 6-month span would merely require administrative approval, not Board approval.

A proposed outside professional activity involving the acceptance of retainer fees or other remuneration on a permanent or yearly basis requires prior approval from the Board of Regents as well. Board Policies Section 3.2.8 (8) (2). Though this subsection expressly mentions only "professional consultant[s]," a business relationship in which the administrator is obligated at the beginning of the professional relationship with a client to provide professional services for a period of one year or longer requires Board approval.

Finally, University administrators considering a directorship should be mindful that they cannot disclose the University's information beyond that of general practice given to the public at large. Board Bylaw Section 1.10.1 (f). Also, special inducements to University personnel that might be construed as providing a financial benefit to the giver cannot be accepted. Board Policies Section 1.1.2 (2) (e). Here, the outside entity's gifts to the University are a consideration. For example, NASDAQ's standards for independence limit contributions to a non-profit entity where the director is an executive officer by prohibiting a director from being considered independent if the company makes payments that exceed the greater of \$200,000 or five percent of the recipient's gross revenues. *See* full rules at NASDAQ.com.

Independent Directors

University administrators may be asked to serve as "independent directors" on corporate boards to meet NASDAQ governance standards. Independent directors must approve director nominations, either by independent nominating committee or by a majority of the independent directors. Independent directors also have a key role in reviewing CEO and key employee compensation. Independent Directors are often tasked with Conflict of Interest, Code of Ethics and Audit or Compensation Committee roles. These assignments should not be undertaken lightly, and may present confidentiality and conflict issues that board membership alone does not. The General Counsel's office may be consulted on issues related to University employment, bylaws and policies. Other issues, including liability and insurance related to service on an outside board are best advised through individual legal counsel.

⁴ <http://www.nebraska.edu/docs/legal/GCGuidanceOutsideEmployment-3-4-5.pdf>
Last accessed Oct. 11, 2011.

Family Owned or Closely Held Corporations

Family owned and closely held corporations present a different set of issues. By design the accountability structures and practices are different for these companies. Impartiality and the board's integration with management are necessarily different and conflicts are resolved with the expectation that significant and even controlling ownership in the company is expected among board members. While it is possible to serve as an "independent" director on such a board, most University officers considering service on this type of corporation are likely to have an ownership connection to the company through their family or acquaintances outside the University. If that is the case, there are potentially two reporting instances for the income, if any, from the ownership in the company and a separate instance for income as a board member. Separating the ownership/income from the employment or service issues is a helpful device to recognize the potential for organizational or institutional conflict.

Coordination and Planning

University administrators considering service on a corporate or non-profit board are also highly encouraged to coordinate with the entity they wish to serve to address potential conflict of interest issues. There may be steps that the private entity can take to shore up best management practices for both the outside entity and the University employee. For example, on the private company side, there should be enforceable policies covering such things as: maintaining independent status, ensuring he or she or an immediate family member is not also employed by the company or its subsidiary and does not have a material relationship with a charity the company donates to or another company that is a creditor or debtor to the employee's current company. In addition some or all of the financial gains from corporate directorship could be in the form of unexercised options or deferred stock that will not vest for a number of years. The California Board of Regents in 2007 passed a policy that limited university officials to serving on the boards of no more than three for-profit entities for which their service is compensated.⁵

University administrators need to take special consideration in order to maintain their primary fiduciary responsibility to the University. University administrators remain individually responsible for ensuring that board activities and related compensation, if any, do not violate conflict of commitment and/or conflict of interest standards of the University. In general, the proposed activity must be compatible with their University duties. Other important factors for consideration include whether board service will render the University administrator:

- unable to make key decisions or render impartial assistance or advice
- impaired in their objectivity in performing their duties, or
- give the outside company an unfair competitive advantage.

⁵ <http://www.universityofcalifornia.edu/regents/policies/7707.pdf> Last Accessed Oct. 11, 2011

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Conclusion

The overall goal for University employees accepting a role as a corporate director or officer is to enable the University employee to enrich their contributions to the University as a whole, including the ability to observe industry practices and to see things the University might do better. Early consultation with the Office of General Counsel is recommended as legal analysis and related conflict management in this area are highly dependent on specific facts and details.