

**AGB-CASE Illustrative
Memorandum of Understanding
Between a Foundation and Host Institution or System**

Note: AGB and CASE commend this illustrative Memorandum of Understanding to their members for consideration when drafting or revising their own such documents. The following illustrative document includes examples of best practice that each foundation and host institution or system should consider based upon their own needs and relationship. Foundations and institutions are encouraged to consult with legal counsel when developing an MOU to ensure that the final document conforms with federal and state laws and policies. Please contact AGB or CASE to receive a current version including comments on its content and application.

THIS AGREEMENT, entered into as of this _____ day of _____, 200__, by and between the _____ [name of institution or system] and the _____ [name of foundation].

The foundation was organized and incorporated in _____ [year] for the purpose of stimulating voluntary private support from alumni, parents, friends, corporations, foundations, and others for the benefit of _____ [name of institution or system].

The _____ [name of foundation] exists to raise and manage private resources supporting the mission and priorities of the _____ [name of institution or system], and provide opportunities for students and a margin of institutional excellence unavailable with state funds.

The foundation is dedicated to assisting the university in the building of the endowment and in addressing, through financial support, the long-term academic and other priorities of the university. *[Note: The MOU should reflect the specific responsibilities assumed by the foundation in addition to or in lieu of fund-raising responsibilities].*

As stated in its articles of incorporation, the foundation is a separately incorporated 501 (c) (3) organization and is responsible for identifying and nurturing relationships with potential donors and other friends of the _____ [name of institution or system]; soliciting cash, securities, real and intellectual property, and other private resources for the support of the _____ [name of institution or system]; and acknowledging and stewarding such gifts in accordance with donor intent and its fiduciary responsibilities.

Furthermore, in connection with its fund-raising and asset-management activities, the foundation retains personnel experienced in planning for and managing private contributions and works with the university to assist and advise in such activities. *[Note: Not all foundations retain personnel; in such instances personnel conducting foundation business report to other institutional staff].*

In consideration of the mutual commitments herein contained, and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

Foundation Name, Seal and Logotype

Consistent with its mission to help to advance the plans and objectives of the university, the foundation is granted the use of the name, _____ [name of institution or system] however, the foundation will operate under its own seal and logotype and shall not use the university seal or other identifying marks in the promotion of its business and activities. *[Note: it is not unusual for foundations, upon mutual agreement, to have the authority to use the institution's seal and marks].*

Institution or System Governance

- The _____ [name of the governing board] of the _____ [name of institution or system] is responsible for overseeing the mission, leadership, and operations of the university.
- The _____ [name of the governing board] is responsible for setting priorities and long-term plans for the _____ [name of institution or system].
- The _____ [name of the governing board] is legally responsible for the performance and oversight of all aspects of _____ [name of institution or system] operations.
- The _____ [name of the governing board] is responsible for the employment, compensation, and evaluation of all _____ [name of institution or system] employees, including the president [or chancellor].

The Foundation's Relationship to the Institution

- The _____ [name of foundation] is a separately incorporated 501 (c) (3) nonprofit organization created to raise, manage, distribute, and steward private resources to support the various missions of the university. *[Note: language should be added to clarify the exact entity the foundation supports—e.g., a systemwide university, a single campus, an academic unit within university, or a campus within system.]*
- The _____ [name of foundation] board of directors is responsible for the control and management of all assets of the foundation, including the prudent management of all gifts consistent with donor intent.
- The _____ [name of foundation] is responsible for the performance and oversight of all aspects of its operations based on a comprehensive set of bylaws that clearly address the board's fiduciary responsibilities, including expectations of individual board members based upon ethical guidelines and policies.
- The _____ [name of foundation] is responsible for the employment, compensation, and evaluation of all its employees, including the foundation chief executive. *[Note: MOU language should clarify whether the foundation has its own employees or relies on university employees to fulfill its responsibilities.]*
- The _____ [name of foundation] may earmark a portion of its unrestricted funds to a discretionary fund for the president or chancellor of the university and will either transfer a percentage of those funds annually to the institution in compliance with state law and university policies or reimburse appropriate presidential expenditures. *[Note: All such expenditures must comply with the I.R.S. 501 (c) (3) code and be consistent with the*

foundation's mission. Such funds will be audited as part of the foundation's annual independent audit].

The Institution's Relationship to the Foundation

- The university _____ [title of the chief executive] is responsible for communicating _____ [name of institution or system] priorities and long-term plans, as approved by the board, to the foundation.
- The _____ [name of institution or system] recognizes that the foundation is a private corporation with the authority to keep all records and data confidential consistent with the law.
- The chief executive of the foundation shall be included as a member of the university chief executive's cabinet and senior administrative team. *[Note: If the foundation is totally independent, the chief executive should have regular access to this group, and language in this document should reflect this.]*
- The _____ [name of institution or system] shall include the foundation as an active and prominent participant in the strategic planning for the university.
- The president or chancellor of the university shall serve as an ex-officio member of the foundation board and shall assume a prominent role in fund-raising activities. *[Note: This can be with or without vote. Consult legal counsel for the most appropriate structure, and factor that into the language.]*
- In consideration for foundation services including but not limited to [list primary foundation services] the _____ [name of institution or system] will provide the foundation with fair and reasonable compensation or payment for services. The amount of compensation will be negotiated on an annual basis by _____ [date] of the preceding year. In consideration of foundation services, the _____ [name of institution or system] will also provide in-kind support including [list major in-kind support such as staff, office space, and technology]. *[Note: Institution support for foundation services may be detailed in a separate contract for services. Also, if the foundation does not receive any funding from the institution or system, then language should specify this.]*
- The _____ [name of institution or system] shall establish and enforce policies that support the _____ [name of foundation]'s ability to respect the privacy and confidentiality of donor records.

Foundation Responsibilities

1. Fund-Raising

- The _____ [name of foundation] shall create an environment conducive to increasing levels of private support for the mission and priorities of the _____ [name of institution or system].
- The _____ [name of foundation], in consultation with the university _____ [title of the chief executive], is responsible for planning and executing comprehensive fund-raising and donor-acquisition programs in support of the institution's mission. These programs include annual giving, major gifts, planned gifts, special projects, and campaigns as appropriate. *[Note: When there are shared responsibilities for fund-raising, or if the university is responsible for all fund-raising activities, language should be added that clarifies each entity's roles and responsibilities. For example: The university desires to hire the expertise of the*

foundation to provide coordination and assistance in the operation, development, accounting, management, and marketing activities of the university development office. Or: The foundation desires to provide such services, not as an employee or agent of the university, but as an independent organization.]

- The _____ [name of foundation] will establish, adhere to, and periodically assess its gift-management and acceptance policies. It will promptly acknowledge and issue receipts for all gifts on behalf of the foundation and the university and provide appropriate recognition and stewardship of such gifts.
- The _____ [name of institution or system] recognizes that the foundation bears major responsibility for fund-raising. University representatives will coordinate fund-raising initiatives including major gifts solicitations with the foundation.
- The university [title of the chief executive] will work in conjunction with the leadership of the foundation board and the foundation chief executive to identify, cultivate, and solicit prospects for private gifts.
- The _____ [name of foundation] shall not accept grants from state or federal agencies, except in special circumstances that are approved by the foundation board of directors and the governmental agency. *[Note: Some foundations, such as those serving in support of university health centers, can be called upon to accept and manage governmental grants].*
- The _____ [name of foundation] shall establish and enforce policies to protect donor confidentiality and rights.

2. Asset Management

- The _____ [name of foundation] will establish asset-allocation, disbursement, and spending policies that adhere to applicable federal and state laws including the Uniform Prudent Investor Act (UPIA) and the Uniform Management of Institutional Funds Act (UMIFA).
- The _____ [name of foundation] will receive, hold, manage, invest, and disperse contributions of cash, securities, patents, copyrights, and other forms of property, including immediately vesting gifts and deferred gifts that are contributed in the form of planned and deferred-gift instruments.
- The _____ [name of foundation] will engage an independent accounting firm annually to conduct an audit of the foundation's financial and operational records and will provide the _____ [name of institution or system] with a copy of the annual audited financial statements, including management letters. *[Note: Management letters, designed to affect management procedures, are typically shared with institutional presidents or chancellors in those cases where the foundation is dependent or interdependent].*

3. Institutional Flexibility

- The _____ [name of foundation] will explore current opportunities, including acquisition and management of real estate on behalf of the _____ [name of institution or system] for future allocation, transfer, or use.
- The _____ [name of foundation] may serve as an instrument for entrepreneurial activities for the university and engage in such activities as purchasing, developing, or managing real estate for university expansion, student housing, or

retirement communities. It also may hold licensing agreements and other forms of intellectual property, borrow or guarantee debt issued by their parties, or engage in other activities to increase foundation revenue with no direct connection to a university purpose.

- When distributing gift funds to the university, the _____ [name of foundation] will disclose any terms, conditions, or limitations imposed by donor or legal determination on the gift. The _____ [name of institution or system] will abide by such restrictions and provide appropriate documentation.

4. Transfer of Funds

- The _____ [name of foundation] is the primary depository of private gifts and will transfer funds to the designated entity within the institution in compliance with applicable laws, university policies, and gift agreements.
- The _____ [name of foundation]'s disbursements on behalf of the university must be reasonable business expenses that support the institution, are consistent with donor intent, and do not conflict with the law.

Foundation Funding and Administration

- The _____ [name of foundation] is responsible for establishing a financial plan to underwrite the cost of foundation programs, operations, and services.
- The _____ [name of foundation] has the right to use a reasonable percentage of the annual unrestricted funds, assess fees for services, or impose gift taxes, to support its operations. *[Note: The use of fees and taxes should be disclosed to donors and institution staff]*
- The _____ [name of foundation], at its own expense, will provide office space, computer and telephone systems, utilities, adequate personnel, office supplies, and other such services that may be necessary or required to fulfill its responsibilities and obligations. *[Note: Depending on the degree of independence of the foundation, and if state law permits, the institution may help the foundation by providing support that may include personnel, office space, utilities, and services, or it may contract with the foundation for the services it provides; language should take this into account. Language should also be added to clarify whether the institution or the foundation owns the computer server and the records on the server. Institution gifts-in-kind will be appropriately reported in the foundation's annual report.]*
- The _____ [name of foundation] shall maintain, at its own expense, copies of the plans, budgets, and donor and alumni records developed in connection with the performance of its obligations.
- The _____ [name of foundation] will provide access [to data and records] to the university on a need-to-know basis in accordance with applicable laws, foundation policies, and guidelines. The foundation will provide copies of its annual report, and other information that may be publicly released.

Terms of the Memorandum of Understanding (MOU)

This Memorandum of Understanding, made this ___ [day] of _____ [month], 20__ [year], by and between the board of the _____ [name of institution or system] and the _____ [name of foundation] (an Internal Revenue Code §501 (c) (3) nonprofit corporation), is intended to set forth policies and procedures that will contribute to the coordination of their mutual activities.

To ensure effective achievement of the items of the agreement, the university and foundation officers and board representatives shall hold periodic meetings to foster and maintain productive relationships and to ensure open and continuing communications and alignment of priorities.

Either party may, upon 90 days prior written notice to the other, terminate this agreement. Notwithstanding the forgoing, either party may terminate this MOU in the event the other party defaults in the performance of its obligations and fails to cure the default within a reasonable time after receiving written show cause notice.

Should the university choose to terminate this agreement the foundation may require the university to pay, within 180 days of written notice, all debt incurred by the foundation on the university's behalf including, but not limited to, lease payments, advanced funds, and funds borrowed for specific initiatives. Should the foundation choose to terminate this agreement the university may require the foundation to pay debt it holds on behalf of the foundation in like manner.

Consistent with provisions appearing in the foundation's bylaws and its articles of incorporation, should the foundation cease to exist or cease to be an Internal Revenue Code §501(c)(3) organization, the foundation will transfer its assets and property to the institution, to the university, to a reincorporated successor foundation, or to the state or federal government for public purposes, in accordance with the law and donor intent.

IN WITNESS WHEREOF, the parties have caused this Memorandum of Understanding to be executed by their duly authorized officers as of the day and date first above written.

Chair
Board of [name of institution or system]

Chair
Board of [name of foundation]

Date: _____

Date: _____

Chief Executive
[Name of institution or system]

Chief Executive
[Name of foundation]

Date: _____

Date: _____

**AGB-CASE Illustrative
Memorandum of Understanding
Between a Foundation and Host Institution or System**

Preamble

Public college and university foundations are incorporated 501 (c) (3) organizations affiliated with two-year or four-year publicly supported postsecondary institutions. Foundations exist to raise and manage private resources supporting the mission and priorities of public institutions, and provide opportunities for students and a margin of institutional excellence unavailable with state funds.

The basic foundation structure tends to be fairly consistent across higher education, although variations exist based on institutional setting (some foundations are related to a single campus, others to a system that has separate campus-based foundations) and the degree of foundation independence (fully *dependent* on institutional support; *interdependent*, with partial support emanating from the related institution; or fully *independent* or *autonomous*). Foundation responsibilities, operations, and funding vary from state to state and institution to institution. A foundation may support a single campus or an entire system. Individual institutions within a system may have separate foundations as may individual schools or divisions within an institution.

Working with a national task force, the Association of Governing Boards of Universities and Colleges (AGB) and the Council for Advancement and Support of Education (CASE), have jointly developed an illustrative Memorandum of Understanding (MOU) for institutions and foundations. It is presented for consideration at a time when many public institutions and foundations are reviewing or redrafting their current working agreements. It is not intended to serve as a formal document recommended for adoption by all institutions or systems and their related foundations. Rather, the illustrative MOU is designed to enumerate elements that “best practice” suggests need to be considered for inclusion. History, campus culture, and legal dictates ultimately will affect the contents of particular MOUs.

In some states foundation status is determined by state legislation. State court rulings have established various interpretations of foundation independence. Institution and foundation counsel should be consulted in all instances where the MOU (the legal contract that defines the working relationship between an institution or system and its related foundation) is being reviewed. Special attention should be paid to governance, use of state funds, staffing, and other issues that have a significant bearing on foundation independence.

The MOU should not be lengthy, but it should include the following elements:

- An introduction that summarizes the overall relationships between the foundation and its host institution or system. This statement should broadly define the foundation’s responsibilities and clarify the foundation’s standing as an independent public trust. The introduction should provide the foundation with the appropriate authority to use its own name and service marks and the name and service marks of the institution in the conduct

of its work. It should specify that the assets the foundation holds are dedicated to support the mission of the host institution or system.

- A description of the governance and leadership selection process of the institution or system and the foundation.
- An outline of the responsibilities and mutual expectations of the institution or system and the foundation.
- A statement on foundation and institution or system accountability.
- A brief overview on how funds shall be transferred between the foundation and the institution or system.
- A description of donor and alumni records owned either by the institution or foundation and policies governing the use and sharing of such records.
- A description of foundation administrative structure and how the foundation is financed.
- Definitions of terms and conditions, including circumstances for terminating the relationship or the dissolution of the foundation and distribution of the assets it holds.
- A formal adoption of the MOU by the institution's and/or system governing board's leaders and the foundation board's leadership.

Not all MOUs will contain each of these elements; however, to facilitate a favorable and productive relationship between the two parties, the agreement should at least consider these issues for inclusion. MOUs should demonstrate to the many constituencies of a public higher education institution or system that a formal set of understandings exists with the related foundation. In today's litigious society, a clearly articulated MOU is a useful instrument in establishing and reinforcing the foundation's legal standing.

AGB and CASE recognize that despite similar responsibilities and structures, foundations and institutions have nuanced missions and relationships, with special issues that require careful consideration.

These two are especially important:

- **Institution - Foundation Relationship.**

The MOU should clearly define the relationship between the institution or system and the foundation. A fully *autonomous* or *independent* foundation should clearly articulate its relationship with the host institution. An *interdependent* foundation should clearly articulate its standing as a separate 501(c)(3) organization serving a public trust; such a statement may help protect the foundation's donor-privacy policy from challenging litigation. In crafting the MOU, foundation officials should pay close attention to those areas that they consider important to remain confidential.

- **Compensation of the Institution or System Chief Executive and Other Senior University Administrative Staff.**

While it is fairly common practice for a foundation to supplement the compensation of an institution or system chief executive (and other senior university administrative staff), AGB and CASE encourage governing boards to assume full responsibility for providing for the compensation of institutional leaders. When private support is necessary, institutions and

foundations should structure such supplements in ways that limit the foundation's influence in presidential selection or oversight.

AGB and CASE commend this illustrative Memorandum of Understanding to their members for consideration when drafting or revising their own such documents. Both organizations welcome reactions and suggested improvements to the document.

Task Force:

Mr. James Lanier (chair) president, East Carolina University Foundation

Mr. David Bahlmann, president and chief executive officer, Ball State University Foundation

Mr. Brad Barber, assistant vice president for institutional advancement, University of California System

Mr. Roger Blunt, chair, University of Maryland Foundation and president and chief executive officer, Blunt Enterprises, LLC

Mr. Louis Friedrich, former board chair, University of Illinois Foundation and managing director, Bernstein Investment Research and Management

Mr. Richard Imwalle, president and chief executive officer, University of Arizona Foundation

Mr. Richard Legon, executive vice president, AGB

The Honorable Diana Murphy, chair, University of Minnesota Foundation; Board of Directors, AGB; U.S. Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit

Dr. Robert T. Tad Perry, executive director, South Dakota Board of Regents

Dr. Gary A. Ransdell, president, Western Kentucky University

Mr. Thomas A. Roha, partner, Roha and Flaherty law firm

Dr. Charles Steger, president, Virginia Tech

AGB/CASE Staff:

Ms. Doreen Knapp Riley, director, foundation programs, AGB

Mr. David Bass, director, National Center for Affiliated Foundations, CASE