

# **COMPLIANCE BY AFFILIATED FOUNDATIONS AND OTHER RELATED ENTITIES**

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**Paul J. Ward\***

**Vice President for University Administration and General Counsel  
Arizona State University**

## **I. University Affiliated Entities**

### **A. Purposes**

#### **1. Development Foundations**

The most prevalent affiliated entity to a public university is a foundation that engages in fundraising, investment and management of the university's endowment, and perhaps commercial land development.

#### **2. Research Foundations and Technology Transfer Organizations**

- a. Research foundations may be organized to limit institutional liability for technology transfer activities and to avoid constraints of state law, e.g. the inability to take equity as consideration for a license to intellectual property. Elizabeth L.R. Donley and Barbara C. Wingo, "Research Foundations: Establishment, Activities, and Affiliated Entities," NACUA CLE (November, 2004).
- b. Intellectual property resulting from research endeavors at the university may be assigned to an affiliated entity or a related research foundation as part of the university's technology transfer program.
- c. Also, LLC's as university start-ups are favored due to limited liability of its members as well as flexible governance and pass-through tax treatment. Kathryn A. Donohue and Christopher F. Wright, "The University Becoming a Shareholder: Negotiating Equity Licenses," NACUA CLE (November, 2004).

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3. Alumni Associations

Alumni organizations are maintained as independent organizations at widely diverse education institutions. [Clotfelter, “Independent,” Currents, (October 1987)]

4. Athletic or Booster Organizations

“The institution’s responsibility for the conduct of its intercollegiate athletics program includes responsibilities for the actions of its staff members and for the actions of any other individual or **organization** engaged in activities promoting the athletics interests of the institution.” [NCAA Constitution, Article 2.1.2, 2006-07 Division 1 Manual] The role of a separate athletic or booster support organization necessarily raises the issue of institutional control and compliance with the rules of the National Collegiate Athletic Association and applicable conference.

B. Rationale

1. The affiliated foundation is often organized to engage in purposes outside of the scope of authority (enabling legislation or policy statement) of a host university, e.g. scholarship programs, classified research projects, commercialization of technology, etc.
2. The organization of university-affiliated foundations creates additional opportunities to involve alumni and friends in the affairs of the university.
3. Private contributors may be unwilling to make contributions to a public university if their contributions supplant rather than supplement state appropriations. Some individuals and organizations wish to ensure that funds contributed for specific purposes are not commingled with state funds.
4. The affiliated foundation is generally able to handle administrative tasks more expeditiously and it offers operational flexibility. See Hopkins, “Foundations Supporting Colleges and Universities: Unrelated Business Income Taxation,” 40 S.C.L. Rev. 597 (1989).

**Practice Tip:**

Maintain files in the university legal office for each affiliated entity that includes current copies of the following: articles of incorporation, bylaws, tax-exempt determination letter, annual report to state corporation department, audit report, IRS form 990, insurance documents, and any contract or similar document between the university and the affiliated entity.

## II. Relationship of the Private Support Organization to a Public University

### A. Recognition of Affiliated Entity.

The affiliated entity should be officially recognized by the university in order to receive university services and permission to use the name of the university and use of any university logo/ trademark or derivative thereof. See Oregon Administrative Rules, 580-46-005.

### B. Personnel

1. The composition of the board of directors of the foundation must recognize the fine line between separate legal existence and control by the host university. Indeed, if the charter and bylaws provide that the purpose of the foundation is to further the aims of the host university, then the foundation's board should include appropriate cross representation from the university to university trustees, administrators, faculty and students as well as representatives from the community. Whether the majority of the foundation's directors are "academic" or "lay" members depends on statutory, tax, and political considerations. But, the presence of interlocking directorships has corporate law implications, viz. duty of loyalty, in connection with contracts between the foundation and host university.

Also, "when there is a lack of distinction or separateness between the University and the Affiliated Entity" there is a serious risk for piercing the corporate veil. Paul Shaprio and Hank Traeger, "All in the Family: Affiliated Entities – Some Practical Considerations," NACUA Annual Conference (June, 1998).

#### **Practice Tip:**

The affiliated entity must take appropriate actions to assure that third parties understand whether they are dealing with the university or the affiliated entity. This includes making clear to third parties dealing with the affiliated entity that the affiliated entity is an independent, separate legal entity. Some appropriate steps include separate business cards, letterhead, appropriate identification of the entity when answering the telephone, signs on buildings and on offices within buildings, separate filings systems, etc. See ASU Policy on ASU-ASU Affiliated Entity Relationships June 30, 2004 – Exhibit A.

2. The foundation's corporate officers, executive director, and staff are often employees of the host university. This raises the potential issue of whether or not such an arrangement confers a grant of public money or illegal benefit upon a foundation in violation of a state constitution or statute. [See Maryland Board of Ethics Opinion 1973-45, stating an

employee of a university whose salary was paid by the state may devote some time to foundation efforts. See also Connecticut Attorney General Opinion, April 3, 1995, authorizing university employees to also work in the Foundation. But see, Texas Attorney General Opinion No. MW-373, October 5, 1981, stating the university lacks authority to place foundation employees on its payroll and provide the fringe benefits provided to state employees.]

#### C. Physical Facilities

1. The authority of public universities with regard to ownership and control of physical facilities varies considerably from state to state. For the most part, constitutionally-autonomous universities enjoy greater authority in this regard than statutorily-based universities. The provision of office space, furnishings, utilities, computer service and equipment by the university to the university-affiliated foundation is dependent on the authority of the university in the first instance and then the willingness of the institution to dedicate space and equipment for this purpose. The former is often addressed if not the raison d'être for a policy statement or contract. [See Texas Attorney General Opinion No. MW-373, October 5, 1981, (the university may provide the foundation with office space and other assistance without violating the constitution where a public purpose will be served).] See also Connecticut Attorney General Opinion, April 3, 1995, authorizing the university to provide certain services, including computer support to the Foundation at no cost.
2. The Oregon State Board of Higher Education adopted administrative rules on relations with affiliated organizations that, among other things, provide that institutional support, including the cost of utilities and janitorial services may be provided to the foundation pursuant to a written contract which also describes the consideration given by the foundation for the receipt of such support. Oregon Administrative Rules, 580-46-035(7). See James Casby, "All in the Family: Affiliated Entities: The Public/Private Entity Relationships," NACUA CLE (March 1991).

#### D. Use of University's Name and Logo

Since the university-affiliated foundation is organized and operates exclusively for the benefit of, to perform the functions, or to carry out the purposes of its host university, from time to time it is appropriate for the foundation to represent its association with the university by use of the university's name, symbol or logo(s). If the logo(s) is a registered trademark under state and/or federal law, then such use may be accomplished by means of a nonexclusive, nontransferable, royalty-free license agreement. If such a logo(s) is not registered, then it is recommended that such use be permitted by written agreement. See Operating Agreement between UNC-X and UNC-X Foundation, Inc. - Exhibit B.

**Practice Tip:**

The affiliated entity may not use itself or authorize the use by other persons or entities of any ASU Marks, or any similar marks, without the prior written approval of the University. The ASU Marks include without limitation, all marks containing the words or initials Arizona State University, ASU or Sun Devil(s) or depictions of Sparky Sun Devil. A full list of the ASU Marks, including the stylized form and associated design elements may be obtained from the University. The affiliated entity may use only those ASU Marks that have been specifically approved for such use in writing from the University.

- The affiliated entity shall not apply for or own any trademark, service mark or trade name registrations for any of the ASU Marks, or any similar names or marks.
- When using the ASU Marks, affiliated entity will place immediately adjacent to the ASU Marks, the following notice of ownership of trademark or service mark registration: “®.”
- Any services provided under the ASU Marks will be of high standard so as to be adequate and suited to the protection and enhancement of the ASU Marks and to the related goodwill. The University retains and reserves the right to monitor the quality of the services being provided by the affiliated entity.
- The affiliated entity recognizes the great value of the goodwill associated with the ASU Marks, acknowledges that all rights and goodwill pertaining to the ASU Marks belong exclusively to University. Use of the ASU Marks shall inure to the benefit of the University.
- The affiliated entity agrees not to challenge the title or any rights of University in and to the ASU Marks. In the event of any such challenge, whether direct or indirect, all permission to continue use of the ASU Marks shall be withdrawn immediately.
- As to use of the ASU Marks on goods, the University already has extensive license agreements with certain duly authorized manufacturers (“Merchandise Licensees”) for shirts, sweatshirts, hats and other merchandise that bear or depict certain of the ASU Marks and that are intended for sale to others (“Merchandise”). The affiliated entity will purchase all Merchandise for use or resale only through or from Merchandise Licensees, except where the affiliated entity has prior written permission from the University on a limited basis to do otherwise. If the affiliated entity determines that there is no Merchandise Licensee for a particular use that the affiliated entity may wish to make on things related to its providing of services, it may make a written request to the University to see if the University might arrange on a limited basis for such items at the affiliated entity’s cost.

E. Accountability

1. Clearly, the affected entity must use sound fiscal and business practices and follow generally accepted accounting principles.
2. The affiliated entity should be required to maintain its legal status as a non-profit corporation and as a tax-exempt organization under applicable state and federal laws and to report any change in its status to the university immediately.
3. The university should require the affiliated entity to be audited on an annual basis by an independent CPA firm approved by the university. Copies of the audited financial statements, the audit report, the management letter, and the responses to the management letter should be provided to the university by the affiliated entity. The university must cooperate with the affiliated entities' auditors by providing any information needed for performance of the audit. Likewise, the affiliated entity must cooperate with the university's auditors in carrying out their auditing function for the university.
4. In November, 2003, NACUBO issued Advisory Report 2003-03, "The Sarbanes-Oxley Act: Recommendations for Higher Education." This report included a checklist addressing issues of particular relevance to higher education and a section-by-section analysis of SOX.

**Practice Tip:**

Review the NACUBO Checklist or the Arizona Board of Regents Sarbanes-Oxley Steering Committee Implementation Status Report updated January 23, 2007 for best practices relevant to affiliated entities.

5. In 2005, the Independent Sector published a Checklist for Accountability with the following recommendations:
  - Develop a culture of accountability and transparency
  - Adopt a conflict of interest policy
  - Ensure that the board of directors understands and can fulfill its financial responsibilities
  - Conduct independent financial reviews, particularly audits
  - Ensure the accuracy of and make public your organization's form 990
  - Be transparent
  - Establish and support a policy on reporting suspected misconduct or malfeasance
  - Remain current with the law

Retrieved March 25, 2007 from:

<http://www.independentsector.org/issues/accountability/Checklist/index.html>

See also Katherine David, “Non-Profit Governance in the Wake of Sarbanes - Oxley,” Practical Tax Lawyer (Winter 2007).

F. Acceptance of Gifts by Affiliated Entity.

1. The criteria for determining which gifts are directed to the university and which gifts are directed to the affiliated entity should be clearly established.

**Practice Tip:**

Clearly indicate the name of the organization to which any gift received will be deposited, e.g. “Your contribution to support KAET is administered by Channel Eight’s Membership Department and deposited with the Arizona State University Foundation.” See, ASU Policy FIN 301-02 revised March 1, 2007 – Exhibit A, Attachment 2.

2. If a prospective gift to the affiliated entity imposes a commitment, obligation or responsibility on the university, the affiliated entity must consult with the university and not accept the gift until the university approves the gift or the prospective donor withdraws the university commitment, obligation or responsibility.
3. The university and affiliated entity should agree on an appropriate protocol for acknowledgment of gifts to the affiliated entity and on a reasonable arrangement for periodic reporting of all gifts to the affiliated entity.

G. Protection or Disclosure of Donor Information

1. A number of states provide some measure of protection regarding disclosure of donor information. See, e.g., Arizona, ARS § 15-1640(A)(3); Florida, Fla. Stat. § 1004.28(5); Michigan, Mich. Comp. Stat. § 15.243; Minnesota, Minn. Stat. § 13.792; and Ohio, Oh. Rev. Code § 149.43(A)(1) and (6).
2. For an example of a situation where a court has ruled that the names of donors to a university-affiliated foundation must be disclosed, see The State ex rel. Toledo Blade Co. v. University of Toledo Foundation, 602 N.E. 2d 1159 (Ohio 1992).
3. In Nevada, however, while a university-affiliated foundation is expressly subject to the state’s open meetings and public records laws, it “is not required to disclose the name of any contributor or potential contributor to the university foundation, the amount of his contribution or any

information which may reveal or lead to discovery of his identity. The university foundation shall, upon request, allow a contributor to examine ... any record, document or other information of the foundation relating to that contributor.” NRS § 396.405.

4. In Hawaii, the Office of Information Practices has opined “that disclosure of individual donors’ names and amounts donated to the UH Foundation could reveal the “financial activities” of these individuals....” Pursuant to state statute, individuals have a significant privacy interest in information or records describing their financial activities. It should be noted that this opinion assumed *arguendo* that the UH Foundation is a government agency under the Uniform Information Practices Act. OIP Op. Ltr. No. 97-3.

### **III. Freedom of Information Laws**

- A. Gannon v. Board of Regents of the State of Iowa, 692 N.W.2d 31 (Iowa Sup.Ct. 2005).

The Iowa Supreme Court held that a foundation affiliated with Iowa State University charged with the responsibility to solicit, receipt, and maintain records of gifts on behalf of the university was performing a government function and as a result its records are public records subject to examination under the Iowa FOIA. Petitioners had requested, among other things, the foundation’s tax returns, audited financial statements, an abstract of investments of endowment and non-endowment funds, minutes of meetings, records relating to the distribution of funds by the foundation to the university or its affiliates, including documents showing the source of the funds and restrictions on their use and disposition, a listing of all contributions greater than \$25,000, and a list of perquisites provided to university employees paid for with foundation funds. The district court granted defendants’ motion for summary judgment holding that the foundation was not a government body in spite of its history, purpose, activities and close ties to the university. The district court also held that “funds donated directly to the Foundation in trust for ISU are Foundation funds and thus records relating to these private funds are not a matter of public record until they are dispersed to ISU.”

The Iowa Supreme Court observed that “a consensus has not emerged (regarding application of public records laws to university-affiliated entities) perhaps because of differing statutory schemes and the fact-intensive nature of open-records challenges” citing Cal. State Univ., Fresno Ass’n, Inc. v. Superior Ct., 90 Cal.App.4th 810 (2001); State Bd. Of Accounts v. Ind. Univ. Found., 647 N.E.2d 342 (Ind.Ct.App. 1995); Frankfort Publ’g Co. v. Ky. State Univ. Found., Inc., 834 S.W.2d 681 (Ky. 1992); State ex rel. Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159 (1992); 4-H Road Comm’n v. W. Va. Univ. Found., 388 S.E.2d 308 (1989). *Id.* at 38.

Iowa courts, like most states, have previously held that the right to view public records is to be liberally construed and exceptions to the general rules of disclosure are to be narrowly construed. In addition, it must be noted, the Iowa FOIA expressly provides that a “government body shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions.” Iowa Code § 22.2(2).

The Supreme Court reversed and remanded holding that the foundation was performing a government function by virtue of its service agreement with the university.

- B. Weston v. Carolina Research and Development Foundation, 401 S.E.2d 161 (SC 1991).

The South Carolina Supreme Court held that a foundation affiliated with the University of South Carolina was a public body under the South Carolina FOIA and as such subject to the disclosure provisions of the FOIA. The SC FOIA provides that “a ‘public body’ means any department of the State, any state board, commission, agency, and authority ... or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds....”

In this case, the Court found that four transactions brought the foundation within the FOIA’s definition of public body. The first transaction involved a gift of \$2 million to the foundation which was deemed to be partial consideration for the purchase of a facility from the university. The second transaction involved a federal grant to the university “acting through” the foundation in connection with the construction of an engineering research facility on campus. The third transaction involved a conveyance of certain real estate from the City of Columbia and monetary grants from the City and Richland County in connection with the construction of a performing arts facility at the university. The fourth basis involved administration of certain research and development contracts by the foundation for which an administrative fee was retained. The Court found that each transaction was a sufficient basis to find the foundation had received public funds and was therefore subject to the FOIA.

The Court also opined that “this decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis.”

- C. For a thoughtful analysis and categorization of which states favor access and which states limit access to the records of private entities including university-affiliated organizations, see Feiser, “Protecting the Public’s Right to Know: The Debate Over Privatization and Access to Government Information under State Law,” 27 Fla. St. U.L. Rev. 825 (2000); see also Geevarghese, “Looking Behind the Foundation Veil: University Foundations and Open Records Laws,” 25 J. L. & Educ. 219 (1996), and Reinardy and Davis, “A Real Home Field Advantage: Access to Public University Foundation Records,” 34 J. L. & Educ. 389 (2005).

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## ASU POLICY ON ASU-AFFILIATED ENTITY RELATIONSHIPS

June 30, 2004

### ASU “Recognition” of Affiliated Entity

- Recognition by ASU. The affiliated entity must be officially “recognized” by ASU in order to (i) receive certain ASU-provided services, (ii) use “Arizona State University”, “ASU” or any other registered ASU name in the name of the affiliated entity or in carrying out the activities of the affiliated entity, and (iii) use any ASU logo/trademark or derivative thereof.

If “recognized” status is terminated by ASU, the affiliated entity will immediately cease using any and all ASU names, logos and trademarks, except that the affiliated entity may continue to use ASU names, logos and trademarks for a reasonable time not less than ninety days to provide an orderly transition.

- Abide by this Policy. In order to obtain ASU “recognized” status, the affiliated entity must formally agree to abide by this policy regarding ASU’s relationship with affiliated entities, including, without limitation any additional policies attached or referred to in this policy (collectively, this “**ASU Affiliated Entity Policy**”). Generally, it is the position of ASU that its affiliated entities are not subject to the State of Arizona public records act (Arizona Revised Statutes Sections 39-101 through 39-161), the Arizona Board of Regents Policy, audit by the State of Arizona Auditor General, State of Arizona conflicts of interest laws (Arizona Revised Statutes Sections 38-501 through 38-511), or any other laws, regulations or policies applicable to ASU because of its status as a State of Arizona entity.
- Periodic Review of “Recognized” Status. The “recognized” status will be reviewed periodically by ASU for compliance with this ASU Affiliated Entity Policy. The review will be in accordance with procedures established by ASU. The “recognized” status may be terminated by ASU if the affiliated entity is not complying with this ASU Affiliated Entity Policy and fails to come into compliance within a reasonable time not less than ninety days and not more than one hundred twenty days after notice from ASU. The time intervals for these reviews will be every ten years.
- Non-Compliance With This Policy. If in the interim between periodic reviews, ASU becomes aware that the affiliated entity is not complying with this ASU Affiliated Entity Policy, ASU may give notice to the affiliated entity and the affiliated entity will bring itself into compliance within a reasonable time not less than ninety days and not more than one hundred twenty days after notice from ASU. If the affiliated entity fails to do so, ASU may terminate the “recognized” status of the affiliated entity.
- Adverse Reputational or Financial Events. If an event occurs relating to the affiliated entity that in the reasonable judgment of ASU has a significant adverse reputational effect or a significant adverse financial effect on ASU, ASU may elect to terminate the “recognized” status of the affiliated entity. Termination may be immediate or may be after a period of time as reasonably determined by ASU.

## **Organizational Requirements for Affiliated Entity**

- Benefit ASU. The affiliated entity must be organized and operated for the purpose of (i) supporting ASU, and/or (ii) conducting activities that are in furtherance of the mission of ASU. The purposes must be included in the articles of incorporation or other organizational document of the affiliated entity. The affiliated entity will deliver to ASU a copy of its articles of incorporation or other organizational document, a copy of its by-laws and any amendments thereto. As a condition precedent to “recognition” by ASU, the affiliated entity must submit to ASU a statement of the affiliated entity’s purposes.
- Arizona Nonprofit Corporation. Unless otherwise agreed by ASU, the affiliated entity must be organized and maintained as an Arizona nonprofit corporation.
- Tax Exempt Status. Unless otherwise agreed by ASU, the affiliated entity must apply for, receive and maintain both federal and state income tax exempt status.
- Dissolution of Affiliated Entity. The articles of incorporation or other organizational documents of the affiliated entity must include a provision that upon dissolution of the affiliated entity, all assets will be transferred to ASU or to another “recognized” affiliated entity approved by ASU for receipt of the transfer.
- No ASU Control of Affiliated Entity - ASU Representative(s) on Board of Affiliated Entity. ASU’s involvement in composition of the affiliated entity’s board of directors or other governing body and in selection of the affiliated entity’s executive director or chief executive officer and other senior staff may vary from affiliated entity to affiliated entity, will respect the independence of the affiliated entity, will be consistent with applicable legal requirements and the mission of the affiliated entity and will be based on achievement of effective communication and cooperative action between ASU and the affiliated entity. At a minimum ASU will have at least one representative as an *ex officio* (either voting or non-voting) member of the affiliated entity’s board of directors or other governing body.

## **Financial and Accounting Controls**

- Sound Accounting and Business Practices. The affiliated entity must use sound fiscal and business practices and follow generally accepted accounting principles.
- Annual CPA Audit. The affiliated entity must be audited on an annual basis by an independent CPA firm approved by ASU. Copies of the audited financial statements, the audit report, the management letter, the responses to management letter, etc will be provided to ASU by the affiliated entity. Provided that the affiliated entity can meet the date for delivery to ASU specified below, the affiliated entity may elect to hold delivery of the management letter until management’s responses can be sent. Prior to the annual audit, the affiliated entity will ask ASU if there are any matters that ASU would like the auditors to look into. If so, the auditors will do so and will include the matters in their management letter. ASU will cooperate with the affiliated entities’ auditors by providing any information

needed for performance of the audit. Likewise, the affiliated entity will cooperate with the ASU auditors in carrying out their auditing function for ASU.

ASU is required to include financially related organizations in its annual audited financial report. In order for ASU to assure timely issuance of its financial report, the completed, audited financial statements from each related organization must be delivered to the ASU Financial Services Office in early September of each year and by a date that is set each year by the ASU Financial Services Office. Accordingly, the affiliated entity is required to deliver its completed, audited financial statements to the ASU Financial Services Office on or before the date specified by that office for the respective year.

- Annual Budget. The affiliated entity must create on a timely basis an annual budget in such detail as is appropriate for its scope of operations. The affiliated entity will deliver to ASU a copy of the annual budget promptly after its board of directors or other governing board adopts the final annual budget.
- Affiliated Entity Compensation. All compensation paid by the affiliated entity to its directors and officers must be approved by the board of directors or other governing board.
- Affiliated Entity - ASU Monetary Transfers. All transfers of funds between the affiliated entity and ASU must be pursuant to written policy. Except for transfers for appropriate consideration and other transfers permitted by law, there will be no transfers of funds by ASU to the affiliated entity.
- ASU Employees Opening Accounts at the Affiliated Entity, Depositing Funds to the Accounts and Making Disbursements from the Accounts. The procedures in **Attachment 1** will be followed by ASU and the affiliated entity when an ASU employee requests to open an account at the affiliated entity on behalf of ASU or an ASU unit and when an ASU employee desires to make a disbursement from an account with the affiliated entity. The procedures in **Attachment 2** will be followed by ASU and the affiliated entity when an ASU employee desires to deposit funds to an account at the affiliated entity.

## **Insurance and Indemnification**

- Indemnification of ASU. The affiliated entity will indemnify ASU and hold ASU harmless from any damages or liabilities that ASU may incur as a result of the affiliated entity's acts or omissions.
- Insurance. The affiliated entity must obtain and maintain commercial general liability insurance, property casualty insurance and commercial/business automobile liability insurance in an amount determined reasonable by the affiliated entity's board of directors or other governing board. The affiliated entity should have directors' and officers' liability insurance in an amount determined reasonable by the affiliated entity's board of directors or other governing board. Unless otherwise approved by ASU, the general liability insurance and the automobile liability insurance will be not less than \$1,000,000 per occurrence and the property casualty insurance will be not less than \$100,000 per occurrence. ASU will obtain

and maintain general liability insurance and automobile liability insurance in an amount of at least \$1,000,000 per occurrence and property casualty insurance in an amount of at least \$100,000 per occurrence.

### **Provision of Administrative and Other Services by ASU for the Affiliated Entity**

- ASU Services for Affiliated Entity. In consideration of the activities of the affiliated entity on behalf and for the benefit of ASU, ASU will provide certain services for the affiliated entity as ASU determines to be reasonable and appropriate and as agreed by ASU and the affiliated entity from time to time. Services may include use of personnel, premises, equipment, furniture and other items.
- Conflicts of Interest. ASU personnel are subject to State of Arizona conflicts of interest laws and ASU conflicts of interest policies. If an actual or potential conflict of interest involving the affiliated entity arises for an ASU employee, the ASU employee will advise his or her ASU superior of the matter and the matter will be resolved by ASU and the affiliated entity

### **Acceptance of Gifts by Affiliated Entity**

- Restricted Gifts Require ASU Approval. If a restricted gift to the affiliated entity imposes a commitment, obligation or responsibility on ASU, the affiliated entity will consult with ASU and will not accept the gift until ASU has approved the gift or the prospective donor withdraws the gift or withdraws the ASU commitment, obligation or responsibility.
- Coordination with ASU Development Office. In soliciting and accepting gifts the affiliated entity will consult and coordinate with the ASU Development Office.
- Reports of Gifts. The affiliated entity will agree with ASU on a reasonable and appropriate arrangement for periodic reporting to ASU of gifts to the affiliated entity.
- Fund Raising Solicitations. All fund-raising solicitations by the affiliated entity must clearly indicate that the affiliated entity is the intended recipient of funds. Please refer to **Attachment 2** for additional requirements.
- Receipt of Gifts. The criteria for determining which gifts go to ASU and which gifts go to the affiliated entity are in **Attachment 2**.

### **Conflicts of Interest Policies**

- Policies Required. The affiliated entity must have in place conflicts of interest policies covering (i) relationships between the affiliated entity, on the one hand, and its directors, officers and employees, on the other hand, and (ii) relationships between the affiliated entity's directors, officers and employees, on the one hand, and persons doing business with the affiliated entity, on the other hand.

- Payments to ASU Employees. The affiliated entity may not make any compensation payments to an ASU employee for services within the scope of the ASU employee's employment by ASU unless approved in advance by ASU. The affiliated entity may reimburse an ASU employee for expenses incurred in activities on behalf of the affiliated entity. The procedures for such ASU approval, for such reimbursement and for any other matters relating to payments by the affiliated entity to an ASU employee will be in an operating agreement between ASU and the affiliated entity or in a procedural memorandum between ASU and the affiliated entity.
- Non-involvement in Decisions. An affiliated entity director, officer or employee having a personal interest in an affiliated entity transaction may not be involved or participate in the decision whether the affiliated entity should enter into the transaction.
- Transactions Between the Affiliated Entity and Its Directors, Officers and Employees. All transactions between the affiliated entity and its directors, officers and employees must be approved by the affiliated entity's board of directors or other governing board.
- Affiliated Entity Scholarships. No affiliated entity scholarship or fellowship award may be made to any relative of a person participating in the selection process.

**Reports to be Submitted by the Affiliated Entity to ASU**

- The affiliated entity must file reports with ASU covering the following items:
  - Annually, a list of the members of the affiliated entity's board of directors or other governing board and of the officers of the affiliated entity.
  - Annually, a copy of the affiliated entity's Form 990 (except portions that the affiliated entity is permitted to withhold from public disclosure under the Internal Revenue Code and regulations thereunder).
  - As specified above, copies of materials relating to the annual CPA audit of the affiliated entity, provided in any event, that the audited financial statements of the affiliated entity covering the affiliated entity's fiscal year ending on each June 30 and accompanying audit report shall be delivered to ASU no later the next following September 1.
  - Periodically as agreed by ASU and the affiliated entity but at least annually, a reconciliation of all monetary transfers between ASU and the affiliated entity, including, without limitation, a list of all monetary transfers from ASU to the affiliated entity.
  - Copies of the minutes of all regular and special meetings of the affiliated entity's board of directors or other governing board after approval of the minutes by the board.
  - Copies of amendments to articles of incorporation, by-laws or other organizational documents. Copies of annual reports to the Arizona Corporation Commission. Copies of any other filings required to maintain the legal existence of the affiliated entity.

**Additional Affiliated Entity Activities on Behalf of ASU**

- The affiliated entity may pay for goods or services under a contract between ASU and a third party entered into on behalf of and in the name of ASU by an ASU employee acting as an ASU employee and on which ASU is obligated. In such cases, the ASU employee must comply with procurement policies and procedures applicable to ASU.
- The affiliated entity may transfer funds to ASU for use by ASU to pay for goods or services under a contract between ASU and a third party entered into on behalf of and in the name of ASU by an ASU employee acting as an ASU employee and on which ASU is obligated. In such cases, the ASU employee must comply with procurement policies and procedures applicable to ASU.
- When requested and approved by ASU, the affiliated entity may enter into a contract with a third party to purchase goods and services for the benefit of ASU using the affiliated entity's funds. These transactions will be in the name of the affiliated entity and not ASU. The contract will be executed by a person authorized to sign on behalf of the affiliated entity. The ASU request and approval must be in writing signed by an ASU employee that is authorized to direct the disbursement of funds from an affiliated entity account. The affiliated entity will be obligated to perform the contract and liable for a breach of the contract and for any claims arising out of the activities under the contract. The affiliated entity will enforce the obligations of the other party under the contract, for example, a failure to perform or a breach of warranty. The affiliated entity will include in the contract a provision that ASU is not a party to the contract and ASU has no obligation or liability relating to the contract. Some examples of the types transactions which ASU may request the affiliated entity to enter into are the following:
  - Hotel reservations and other expenses associated with national and international conferences hosted by ASU.
  - Expenditures for alcohol at ASU sponsored events.
  - Special expenses associated with the promotion and advancement efforts for academic programs (receptions, dinners, trips, etc).
  - Transactions and events associated with fund-raising activities.
  - Honoraria and other arrangements for speakers.
  - Expenditures that ASU is not permitted to make with ASU funds (e.g., first class travel).

**Miscellaneous**

- Affiliated Entity Courses and Seminars. The affiliated entity may not offer any course or seminar in which the name of ASU is used without first obtaining ASU's permission.
- Maintaining the Distinction Between ASU and the Affiliated Entity. The affiliated entity must take appropriate actions to assure that third parties understand whether they are dealing with ASU or the affiliated entity. This includes making clear to third parties dealing with the affiliated entity that the affiliated entity is a separate legal entity. Some appropriate steps include separate business cards, letterhead, appropriate identification of the entity when answering the telephone, telephone directory listings, signs on buildings and on offices within buildings, filing systems, files, etc. A complicating factor exists when an ASU employee is carrying out activities on behalf of the affiliated entity, especially if the same employee performs the same activities on behalf of ASU.
- Persons Authorized to Act for ASU and the Affiliated Entity Under this Policy. The formal arrangement between ASU and the affiliated entity will designate the persons authorized to act for ASU and the affiliated entity as to the formal arrangement and this ASU Affiliated Entity Policy.
- Lobbying and Political Activities. The affiliated entity may not engage in lobbying or any other political activity, except to the extent agreed by ASU. In any event, all lobbying and political activity must be in compliance with applicable law.
- No Agency or Partnership. The affiliated entity is not the agent of ASU. Although ASU has approved the nonprofit corporation as an affiliated entity and the purposes of the affiliated entity and ASU may pay the affiliated entity for services or make ASU goods or services available on an in-kind basis, the affiliated entity is not controlled by ASU and the affiliated entity has no authority to act for or to obligate ASU. All contracts and other relationships with third parties will be solely in the name of the affiliated entity. In addition, ASU and the affiliated entity are not partners or joint venturers. The affiliated entity will not represent or imply that ASU and the affiliated entity are partners or joint venturers.

Revised 6/30/04

ATTACHMENT 1**ASU Foundation**ARIZONA STATE  
UNIVERSITY  
FOUNDATIONPO Box 875005  
TEMPE, ARIZONA  
85287-5005(602) 965-37  
FACSIMILE  
(602) 965-24

April 28, 1998

Dear Arizona State University Provosts, Vice Presidents, Vice Provosts and Deans:

After several meetings over the last few weeks, certain ASU Foundation operating policies which relate to account activity with the ASU Foundation and which are described in the following comments should be brought to your attention. These policies are effective immediately. A similar letter will be sent to each Foundation account signer from Chuck Wagner, who will also forward to you, before the end of April, a list of the accounts for your campus/college/unit with a list of the signers.

Opening Foundation Accounts, Changing Account Signers, or  
Changing Account Purpose(s)

For academic areas, such as the College of Liberal Arts and Sciences, and  
for non-academic areas, such as the Department of Intercollegiate Athletics --

The Dean of the College or the Director of the area and the most-senior-in-title Development Officer, if one is partially or fully funded by the Office of Development, must sign their approval for opening a Foundation account on each Account Request Form, must approve the changing of any account signer, and must approve the changing of the purpose of any Foundation account.

- Note: - If there is no Development Officer partially or fully funded by the Office of Development, then the area's Business Operations Manager must sign with the Academic Dean or Non-Academic Director.
- The purpose of a Foundation gift account may only be changed if the donor(s) or the donor(s) restriction(s), if any, permit the change.
  - The President of the ASU Foundation must approve the opening of all Foundation accounts and must approve any change in account purpose.
  - No person can approve any change relating to his/her authority.

Processing of Deposits into the Foundation Accounts

Solicitation material must include the following two statements --

- (1) "Monies are being deposited into the ASU Foundation, not with Arizona State University." Alternative wording for the last five words could be the following -- "which exists primarily for the benefit of ASU, but remains an entity separate from ASU" or "which is a 501(c)(3) nonprofit organization which exists primarily to support ASU." Other alternatives probably exist and can be approved by Chuck Wagner, 965-3035.
- (2) "All checks must be made payable to the 'ASU Foundation'." An option is available to add some descriptive acronym, word or phrase to the 'ASU Foundation,' such as 'ASU Foundation/Friends of Music' or 'ASU Foundation/DAC' where DAC would stand for Dean's Advisory Council.

**BOARD OF DIRECTORS**DON ULLICH  
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SAMUEL MORGAN, JR.JIMMY PARRIS  
ALLEN RICHARDSONJERRY SANDERS  
RUE STAFF

ROBERT TANNER

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**Effective:** 10/1/1997**Revised:** 3/1/2007

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## **FIN 301–02: Deposits—ASU-Approved, Financially Related Organizations**

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### **Purpose**

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To properly collect and deposit the receipts of and properly expend funds in ASU-approved, financially related organizations

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### **Sources**

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*Arizona Board of Regents Policy Manual - 3-101*

University policy

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### **Applicability**

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Approved financially related organizations are the:

1. ASU Foundation
2. ASU Alumni Association
3. ASU Research Park
4. Sun Angel Foundation
5. Sun Angel Endowment
- and
6. Collegiate Golf Foundation.

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### **Policy**

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All solicitation material for gifts must:

1. Be preapproved, before printing, by the ASU Foundation's manager of Finance Administration, currently at 5-7252, to ensure that the wording relative to the deposit of the gifts, any benefits provided to the donor, and any tax deductibility of the gift is in compliance with ASU policy and IRS requirements.
2. Indicate the organization to which any gift received will be deposited, e.g., ASU, the ASU Foundation, or any one of the other financially related organizations. This must be clearly indicated in the solicitation material.
3. State that all checks are to be made payable to that organization, e.g., ASU, the ASU Foundation, or any one of the other financially related organizations.

For fundraising events or activities where the net proceeds are to be deposited with the ASU Foundation or one of the other financially related organizations, the event or activity publicity and related materials must state the organization into which the funds will be deposited and that the checks must be made payable to that organization. This must be clearly indicated in all event or activity material.

For seminars, conferences, noncredit courses and other nonfundraising event or activity revenue to be deposited with the ASU Foundation or any other financially related organization, all event or activity publication material relating to this event or activity must state the organization into which the funds will be deposited and that the checks must be made payable to that organization. This must be clearly indicated in all material relating to this event or activity.

ASU tuition and similar fees for credit courses may only be deposited with ASU.

The revenue for a seminar, conference, or noncredit course may be deposited with either the ASU Cashiering Services Office, the ASU Foundation, or any other approved related organization. If deposited with the ASU Foundation or any other related organization, the registration material must clearly state the organization into which the funds will be deposited. If online credit card processing and authorization is desired, all of the fees for that seminar, conference, or noncredit course must be deposited with ASU. If credit cards are being accepted, but are not being processed and authorized online with the financial institution, the funds for the specific seminar, conference, or noncredit course can be deposited with either ASU or the ASU Foundation, depending on the organization identified in the registration material, with there being preference to the funds being deposited with ASU. Also see Event or Activity Expenses for the handling of direct expenses for any event or activity, which would include a seminar, conference, or noncredit course.

If checks belonging to the ASU Foundation or another ASU financially related organization are received but are not payable to that organization (e.g., the check is payable to ASU), the check must either be (1) deposited to an ASU account or (2) returned to the donor or payer with the request that a new check be issued payable to the ASU Foundation or the other financially related organization. An exception to this procedure is any check of \$5,000 or less, which may be deposited to the ASU Foundation or any other financially related organization if the event or activity material that indicated that the funds are intended for deposit to the ASU Foundation or any other financially related organization is attached to each deposit form for that organization when the deposit is being made to that organization.

By university policy, all accounts with the title of "Friends of," e.g., Friends of Geology, are reserved solely for the ASU Foundation. There may be no "Friends of" accounts at ASU or any other financially

related organization. If the funds are intended for deposit to a “Friends of” account at the ASU Foundation, the solicitation or other event material may simply request that the checks be made payable to “Friends of XXX,” as long as it is also clearly indicated in the event or activity material that the funds are being deposited with the ASU Foundation. Under these circumstances, all “Friends of” checks may be deposited without a copy of the event or activity material attached to the deposit form of the ASU Foundation.

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### **ASU Excess Property**

Any ASU property considered by any ASU campus, college, or unit to be excess to its operation must only be disposed of through ASU Surplus Property. No excess equipment may be donated to any outside entity, including a charity. The funds from any sale of ASU excess property cannot be deposited with the ASU Foundation or any other financially related organization.

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### **Event or Activity Expenses**

If the proceeds from an event or activity are deposited with the ASU Foundation, or any other financially related organization, all direct costs of the event or activity need to be funded by that organization. For example, if an ASU department sponsors a fundraising and/or an educational banquet and plans to deposit the proceeds in an ASU Foundation account, the direct costs need to be funded from that ASU Foundation account, not from any of the department’s ASU accounts. If any funds are advanced from any of the department’s ASU accounts, then that ASU account must be reimbursed from the proceeds of the banquet. Direct costs of an activity include, for example, printing of invitations, postage, and meals. In regard to personnel costs, if faculty and professional-level personnel paid by ASU are assigned to any event or activity where the revenue is being deposited to the ASU Foundation or any other related organization, this personnel cost, including employer-related costs, on a reasonable prorated basis, is also to be reimbursed to ASU from the account at the ASU Foundation or the other related organization used to receive the proceeds of the event or activity. The cost reimbursement to ASU does not need to include, however, fixed overhead-type expenses, e.g., cost of space or administrative/secretarial support.

If rent is being charged by an ASU department to another ASU department for an event or activity, the rental proceeds received by the charging ASU department must be deposited into an ASU account and not into an account of any financially related organization, unless the facility or equipment being rented is owned by the financially related organization.

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### **Sales Tax Collection and Remittance**

Proceeds from the sale of tangible personal property or subscriptions must be deposited with ASU if the transaction requires that the department collect and pay sales tax to the State of Arizona. Proceeds from such sales cannot be deposited with the ASU Foundation or any other financially related organization.

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### **Use of Funds in ASU-Approved Financially Related Organizations by ASU Units for ASU Contracts, Purchases, and Transactions**

ASU departments must follow ASU procurement policies and procedures even when the related goods

or services will be paid for with funds at an ASU-approved financially related organization if ASU is a party to the related contract, purchase, or other purchasing transaction. Any contract, purchase, or transaction over \$5,000 must be signed or approved in writing by Purchasing and Business Services, even when the purchase is to be paid for with funds on deposit at an ASU-approved financially related organization.

Purchases that require a purchase order to be issued, or that are being paid for with an ASU-issued Purchasing Card, must be paid from ASU operating accounts, with the funding being transferred from the ASU-approved financially related organization to ASU in a timely manner. ASU accounts are not to be deficit if related funding is available in an ASU financially related organization. Purchasing and Business Services' standard practices will be used to determine if a purchase order is required.

When requested and approved by ASU, the financially related entity may enter into a contract with a third party to purchase goods and services for the benefit of ASU using the financially related entity's funds. These transactions will be in the name of the financially related entity and ASU. The contract will be executed by a person authorized to sign on behalf of the financially related entity. The ASU request and approval must be in writing signed by an ASU employee who is authorized to direct the disbursement of funds from a financially related entity account. The financially related entity will be obligated to perform the contract and liable for a breach of the contract and for any claims arising out of the activities under the contract. The financially related entity will enforce the obligations of the other party under the contract, for example, a failure to perform or breach of warranty. The financially related entity will include in the contract a provision that ASU is not a party to the contract and ASU has no obligation or liability relating to the contract.

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Operating Agreement

UNC-X  
and  
UNC-X Foundation, Inc.

This Operating Agreement (Agreement) is made between UNC-X (University)  
and UNC-X Foundation, Inc. (Foundation).

RECITALS

- A. UNC-X is an institution of higher education; and
- B. UNC-X Foundation is a North Carolina nonprofit corporation qualified under Section 501(c)(3) of the Internal Revenue Code [option: is an LLC of xyz which is a North Carolina nonprofit corporation qualified under Section 501(c)(3) of the Internal Revenue Code] and exists for the purposes of aiding and promoting educational and charitable purposes and lawful activities of UNC-X; and
- C. UNC-X has officially recognized UNC-X Foundation as satisfying the standards and eligibility requirements as a supporting associated organization set forth in UNC and UNC-X rules and regulations; and,
- D. The parties desire to formalize the relationship between UNC-X and UNC-X Foundation by setting forth the manner in which UNC-X is to provide support to UNC-X Foundation and in which UNC-X Foundation is to provide support for UNC-X.

TERMS

In consideration of the mutual covenants, promises and conditions herein contained, and for good and valuable consideration the adequacy of which is hereby acknowledged, UNC-X and UNC-X Foundation agree as follows:

1.0 UNC-X Foundation Support of UNC-X.

- 1.1 UNC-X Foundation's sole [or primary] purpose is to provide support to UNC-X, including its associated entities. In accordance with UNC-X Foundation's governing documents, that support includes, but is not limited to:
  - 1.1.1 [options: Raising, receiving, investing, and administering funds for UNC-X to use for its charitable, scientific, and educational purposes;
  - 1.1.2 Assisting the UNC-X Office of University Advancement in its fundraising, marketing, public relations and alumni outreach activities and development programs with individuals, corporations, foundations, and other organizations;

- 1.1.3 Soliciting funds for student scholarships, faculty support, facilities, programs, and supporting other educational, research, cultural, scientific, public service, charitable activities and lawful purposes of UNC-X;
- 1.1.4 Promoting the welfare and future development of UNC-X;
- 1.1.5 Performing other acts as may be deemed appropriate in carrying out the purposes of UNC-X; and
- 1.1.6 *or other designated activities that are in furtherance of the mission of UNC-X]*

## 2.0 Use of UNC-X Name.

- 2.1 UNC-X Foundation may, [option one: in connection with its lawful business and activities] [option two: in connection with *specified activities*], use the name of UNC-X as well as UNC-X's logo, informal seal, and other symbols and marks of UNC-X, provided that UNC-X Foundation clearly communicates that it is conducting business in its own name for the benefit of UNC-X. All correspondence, advertisements, and other communications by UNC-X Foundation must clearly indicate that the communication is by UNC-X Foundation and not from UNC-X. UNC-X Foundation shall use the name of UNC-X as well as UNC-X's logo, informal seal, and other symbols and marks of UNC-X only in connection with the services rendered for the benefit of UNC-X and in accordance with the guidance and directions furnished to UNC-X Foundation by UNC-X, or its representatives or agents, from time to time, and only if the nature and quality of the services in connection with which the aforesaid logo, seal, and other symbols and marks are used shall be satisfactory to UNC-X or as specified by it. UNC-X shall exercise control over and be the sole judge of whether or not UNC-X Foundation has met or is meeting the standards of quality so established.
- 2.2 UNC-X Foundation shall not delegate the authority to use UNC-X's name or symbols to any person or entity without the written approval of the Chancellor of the UNC-X.
- 2.3 UNC-X Foundation agrees to cease using UNC-X's name and symbols in the event:
  - 2.3.1 UNC-X Foundation dissolves;
  - 2.3.2 This Agreement is terminated as provided below (unless the parties agree otherwise); or,
  - 2.3.3 UNC-X Foundation ceases to be a nonprofit corporation or ceases to be recognized by the Internal Revenue Service as described in section 501(c)(3) of the Internal Revenue Code.
  - 2.3.4 The Chancellor revokes such authority for failure to conform with the requirements of section 2.1, above. Such revocation shall not occur until after UNC-X Foundation is provided notice of its failure to conform and a reasonable opportunity to cure such non-conformance.

2.4 Notwithstanding the provisions of section 2.1, UNC-X Foundation agrees that it will not offer any course or seminar using UNC-X University's name without first obtaining written permission from the Chancellor.

3.0 Relationship between UNC-X Foundation and UNC-X.

3.1 UNC-X agrees to encourage and maintain the independence of UNC-X Foundation and, at the same time, foster the cooperative relationship between UNC-X and UNC-X Foundation.

3.2 The Chancellor of UNC-X [*or the chancellor's designee, or another specified SAAO*] shall be an ex officio [non-voting] [voting] [or regular] member of UNC-X Foundation's governing board [and Executive Committee].

3.3 [optional] The following UNC-X employees also shall be ex-officio non-voting members of The UNC-X Foundation's governing board; Vice Chancellor For University Advancement, Associate Vice Chancellor for University Development, Associate Vice Chancellor for Advancement Services, Vice Chancellor for Finance and Business, and Treasurer of the University.

3.4 UNC-X Foundation agrees to cooperate with UNC-X Chancellor and/or the Chancellor's designee to allow UNC-X to monitor the relationship between UNC-X and UNC-X Foundation.

3.5 The Board of Directors of the UNC-X Foundation shall be responsible for control and management of all assets of UNC-X Foundation, including prudent management of all gifts to UNC-X Foundation consistent with donor intent.

3.6 [option one--major] UNC-X Foundation will maintain and audit committee which does not have any employees of UNC-X or UNC-X Foundations as a member. This committee will receive and review the annual audit of the UNC-X Foundation and relevant annual tax forms to be submitted by the UNC-X Foundation.

[Option two—minor] UNC-X Foundation will maintain a committee which has audit functions and does not have UNC-X employees as a majority of its members and does not have any employee of the UNC-X Foundation as a member. This committee will receive and review the annual audit of the UNC-X Foundation and relevant annual tax forms to be submitted by the UNC-X Foundation.

[Option three—special purpose entity] UNC-X Foundation will maintain an audit committee which does not have any employees of UNC-X or UNC-X Foundations as a member unless it is subject to independent audit at the request of one or more designated trustees, sureties, insurers, certificate holders, or bondholders. This committee will receive and review the annual audit of the

UNC-X Foundation and relevant annual tax forms to be submitted by the UNC-X Foundation.]

4.0 UNC-X Foundation's Obligation to UNC-X [for fundraising foundations; alternatives depending on the function of the entity].

- 4.1 UNC-X Foundation agrees, before accepting gifts of real estate, or gifts with any restrictive terms and/or conditions that impose an obligation on the UNC-X or the State of North Carolina to expend resources in addition to the gift, to obtain written approval from the Vice Chancellor for Finance and Business and the Vice Chancellor for University Advancement unless such gift otherwise complies with UNC-X's gift acceptance policy which may then be in force and effect. In addition, UNC-X Foundation agrees that it will not accept a gift that has any restriction that is unlawful. In soliciting and accepting gifts in the name of the University, UNC-X Foundation agrees to coordinate with UNC-X's Office of University Advancement.
- 4.2 UNC-X Foundation agrees to advise prospective donors of restricted gifts that acceptance of such gifts is conditioned upon UNC-X's approval if the gift requires UNC-X approval under section 4.1.
- 4.3 UNC-X Foundation agrees to coordinate with UNC-X Office of University Advancement or other appropriate UNC-X Office regarding funding goals, programs, and campaigns.
- 4.4 UNC-X and UNC-X Foundation agree to annually review existing guidelines regarding fund labeling and identification, so that the intended donee, whether UNC-X or UNC-X Foundation, receives the appropriate funds.
- 4.5 UNC-X Foundation [shall obtain, operate, and maintain its accounting, development activities, alumni records, and other information on UNC-X-compatible data processing equipment, peripheral hardware and software and] shall make its data reasonably available to UNC-X in accordance with existing UNC-X guidelines and UNC regulations and as otherwise required by applicable law. Notwithstanding the foregoing, UNC-X Foundation shall maintain ownership of and control access to any prospect and donor information it collects and these records shall constitute a trade secret under N.C. Gen. Stat. § 132-1.2. The Director/ Chair/ President [someone who is not a UNC employee] shall be the custodian of these records and employees of UNC-X will have access to them only for the purpose of providing services to the UNC-X Foundation. UNC-X Foundation agrees that it will establish and maintain a policy governing the retention and destruction of documents including electronic files and which prohibits destruction of documents if an investigation into wrongdoing or litigation is anticipated or underway.

- 4.6 UNC-X Foundation shall administer its funds and make distributions to UNC-X and its associated entities in accordance with policies and procedures established by the UNC-X Foundation from time to time, with advice and counsel from UNC-X. [UNC-X Foundation agrees not to provide funds from unrestricted sources to UNC-X programs except as requested by the Chancellor.] UNC-X Foundation agrees that all transfers of funds from UNC-X Foundation to UNC-X must be documented in writing or electronically in a form that has a retrievable transaction trail.

5.0 Limitations on UNC-X Foundation.

- 5.1 UNC-X Foundation agrees to operate using sound fiscal and business principles, to ensure that sound internal control structures are in place, and to follow generally accepted accounting procedures.
- 5.2 UNC-X Foundation will create an annual operations and capital budget.
- 5.3 UNC-X Foundation agrees not to make any payments to a UNC-X employee, except for approved expense reimbursements, without prior written approval from the chancellor of UNC-X. All salary and non-salary compensation of employees of UNC-X Foundations will be approved in advance by the Board of Directors of the UNC-X Foundation.
- 5.4 UNC-X Foundation officers and employees who have check signing authority or who handle cash or negotiable instruments must be bonded in an amount determined to be reasonable by the UNC-X Foundation board.  
[Option for minor entities: The Board of UNC-X will consider whether to require bonding of officers and employees who have check signing authority or who handle cash or negotiable instruments.]
- 5.5 [option one] UNC-X Foundation must obtain general liability and directors/officers insurance in an amount determined to be reasonable by the UNC-X Foundation board.  
[option two] The Board of Directors of the UNC-X Foundations will consider whether to obtain general liability and directors/officers insurance in an amount determined to be reasonable by the UNC-X Foundation board.
- 5.6 UNC-X Foundation must not engage in substantial lobbying activities and may not engage in any political activities.
- 5.7 UNC-X Foundation may not acquire debt in excess of [five hundred thousand dollars (\$500,000.00)] [one hundred thousand dollars (\$100,000)]--for minor associated entities] that is not to be publicly traded before consulting with the Chancellor of UNC-X and then the Vice President of Finance of the University of North Carolina.

6.0 UNC-X Support of and Obligations to UNC-X Foundation.

- 6.1 [Option one (specify services in agreement)] UNC-X shall provide UNC-X Foundation with office space under such terms and at such locations as are mutually acceptable, including utilities and janitorial services.
- 6.2 UNC-X shall provide an Employees Dishonesty bond in an amount determined from time to time by the parties for any UNC-X employee providing substantial services to UNC-X Foundation.
- 6.3 UNC-X shall provide support services to UNC-X Foundation of the type provided to UNC-X departments on a cost reimbursement basis including, but not limited to, access to UNC-X telephone system, maintenance from the Physical Plant, the services of the Printing Department, Computing Services, and University Mail System. UNC-X Foundation shall provide reimbursement for such services in accordance with normally established rates for UNC-X departments. The parties shall develop a budget annually based on projected services required by UNC-X Foundation.
- 6.4 [Option two, in the alternative to 6.1 through 6.3—specify services and payment in writing later] UNC-X will provide services to the UNC-X foundation as may be agreed to in writing before the services are provided. UNC-X Foundation will reimburse UNC-X for these services an amount that agreed to in writing before the services are provided.
- 6.5 UNC-X shall provide reasonable support to UNC-X Foundation including personnel services consistent with the support outlined above and based upon an annual budget plan agreed to by the parties.
- 6.6 When UNC-X receives funds from UNC-X Foundation for a specified purpose, UNC-X agrees to use such funds received for the specific purpose.
- 6.7 UNC-X Foundation agrees that when UNC-X personnel provide services for the UNC-X Foundation and there arises a conflict between UNC-X University and the UNC-X Foundation, the UNC-X employee must comply with the policies, regulations, and directives of the University; [provided that said employee shall notify the UNC-X Foundation in ample time to remedy the conflict or approve the intended action when feasible. If prior notification is not feasible, the UNC-X Foundation shall be promptly notified in writing of the conflict and action taken.]

7.0 UNC-X Foundation Audits, Legal Representation, and Reporting.

- 7.1 [option one]UNC-X Foundation agrees to select a certified public accounting firm, to serve as UNC-X Foundation's independent auditor and to complete a

full and complete annual audit of its finances and operations. UNC-X Foundation agrees to notify UNC-X within thirty (30) days if it selects a different auditor.

[option two: for minor entities] UNC-X Foundation agrees to have a complete annual audit of its finances and operations conducted by the internal auditor of UNC-X [or UNC-Y] and to pay \$xx for this service.

7.2 UNC-X Foundation agrees to provide to the Chancellor of UNC-X, annually on or before *specify date*:

7.2.1 The annual audit report, management letters and responses to management letters, and the [publicly disclosed portion of the] Foundation's IRS Form 990;

7.2.2 The list of UNC-X Foundation governing board, officers, and employees;

7.2.3 The names of the officers and governing board members of all UNC-X Foundation associated or affiliated entities.

7.2.4 An annual report of operations that shows actual versus budgeted revenues and expenditures [note: this may be included 7.3].

7.3 UNC-X Foundation agrees to allow UNC-X Chancellor, the chair of the UNC-X Board of Trustees, or the chair's or the Chancellor's designee, or to inspect and audit all foundation books and records [that are relevant to an articulated legitimate reason] at reasonable times, and to provide timely such other reports of and information on its financial status and operations as required by the Chancellor. [optional: spell out the documents listed in Regulation section I .2.]

## 8.0 Conflicts of Interest

UNC-X Foundation will establish and maintain conflicts of interest policies pertaining to its relationship with UNC-X, members of the governing board and persons doing business with UNC-X Foundation. Such policies shall provide that (a) all transactions (other than expense reimbursements set forth in 5.3), between UNC-X Foundation and an officer, director, or employee of UNC-X Foundation, must be approved by the UNC-X Foundation Board; (b) no UNC-X Foundation officer, director, or employee having a private business interest in an UNC-X Foundation business transaction may be involved in the decision with respect to whether the UNC-X Foundation should enter into such transaction; (c) no UNC-X Foundation scholarship or fellowship award may be made to an officer, director, or employee of the UNC-X Foundation or to a family member of such person unless the recipient of the award is determined by an independent awards committee.

## 9.0 Compliance with UNC and UNC-X policies and regulations and UNC-X Foundation Bylaws.

Both UNC-X and UNC-X Foundation agree to comply with the policies and regulations of the University of North Carolina Board of Governors, the UNC-X Board of Trustees,

the President of UNC and the Chancellor of UNC-X pertaining to the relationship between UNC-X and associated entities, including amendments thereto. UNC-X shall provide UNC-X Foundation with proposed amendments to such policies and regulations as soon as possible but in no event less than fifteen days prior to their effective date. UNC-X Foundation agrees to provide UNC-X with a copy of its Bylaws and shall provide any proposed amendments as soon as possible but in no event less than fifteen days prior to the meeting of the Foundation at which they are considered for adoption.

10. Effect of Agreement; Modification.

This Agreement (and its attachments, if any) contains all the terms between the parties and may be amended only in writing signed by an authorized representative of both parties.

11. Confidentiality.

Neither UNC-X Foundation nor UNC-X shall disclose or use any private, confidential, proprietary, or trade secret information provided from one to the other except as required in and by the terms of this Agreement or as required by law. UNC-X Foundation recognizes the obligation of UNC-X to comply with North Carolina Public Records laws.

12. Indemnification [optional].

UNC-X Foundation shall indemnify and hold harmless UNC-X, its governing board, officers, employees, agents, and students in their official and personal capacities, from and against any and all claim, damage, liability, injury, expense, demands, and judgments, including court costs and attorney's fees, arising out of UNC-X Foundation's performance of this Agreement to the extent any such claim, damage, liability, injury, expense, demand or judgment is caused by the UNC-X Foundation or any UNC-X University employee acting at the direction of the UNC-X Foundation Board or the Chair of the UNC-X Foundation Board. This provision shall continue beyond termination or expiration of this Agreement.

13. Term and Termination.

The initial term of this Agreement shall be 5 [or x] years and shall be automatically renewed for successive 5 [x] year terms, unless and until either party gives notice in writing to the other party of its intent not to renew the Agreement at least 30 days prior to the beginning of a new term. [Either party shall have the continuing right to terminate this Agreement at any time without cause upon [90] days written notice to the other party.] UNC-X may terminate this agreement at any time if the UNC-X Foundation fails to abide by the policies or regulations of UNC-X or of the University.

of North Carolina which govern the relationship between UNC-X and the UNC-X Foundation.

14. Dissolution.

It is the intent of the UNC-X Foundation that it have perpetual existence. In the event of dissolution of the UNC-X Foundation, either voluntary or involuntary, all assets and property which remain after the discharge of the UNC-X Foundation's liabilities and unless otherwise designated by the donor of an asset shall be paid over or distributed by the Board of Directors to North Carolina State University or to any other nonprofit corporation or corporations organized to support the University or any of its Colleges, Schools, Departments, or affiliated organizations as determined by the Board of Directors in its sole discretion, and shall be used or distributed for no other object or purpose whatsoever; provided, however, that any such organization must be exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code, as amended and be an associated entity approved by UNC-X University pursuant to regulations of the University of North Carolina.

15. Compliance with Applicable Law and Non-Discrimination.

15.1 UNC-X Foundation agrees to comply with all executive orders, federal, state and local rules, regulations, and laws, applicable to UNC-X Foundation as currently in effect and as may be amended from time to time. UNC-X Foundation further agrees not to discriminate in any manner on the basis or sex, race, creed, age, color, national origin, religious belief, disability, status as a disabled veteran, or veteran of the Vietnam era, [sexual orientation,] and to comply with all non-discriminatory laws and policies that UNC-X promulgates and to which UNC-X Foundation is subject.

15.2 UNC-X Foundation will maintain a confidential and anonymous mechanism to encourage employees to report and inappropriateness within the entity's financial management and will not punish or retaliate against any employee for reporting problems.

16. Notice.

Any notice to either party hereunder must be in writing signed by the party giving it, and shall be deemed given when mailed postage prepaid by U.S. Postal Services first class, certified, or express mail, or other overnight mail service, or hand delivered, when addressed as follows:

To UNC-X:

UNC-X

Campus Box xyz

Somewhere, NC 28xyz

Attn: Vice Chancellor for University Advancement

To UNC-X Foundation:  
UNC-X Foundation, Inc.  
P.O Box xyz  
Somewhere, NC 27abc  
Attn: Chair of Board of Directors

Or to such other addressee as may be hereafter designated by written notice. All such notices shall be effective only when received by the addressee.

IN WITNESS WHEREOF, UNC-X and the authorized representative(s) of UNC-X Foundation have executed this Agreement on this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

UNC-x

UNC-X Foundation, Inc.

By \_\_\_\_\_  
John Doe, Chancellor

By \_\_\_\_\_  
Jane Smith., Chair

By \_\_\_\_\_  
John Roe, Vice Chancellor  
For Finance and Business

By \_\_\_\_\_  
Jane Roe, President

ATTEST:

ATTEST:

BY: \_\_\_\_\_  
xyz, Secretary

BY: \_\_\_\_\_

Secretary

xyz,

I L L U S T R A T I V E

Memorandum of  
Understanding  
Between a Foundation  
and Host Institution  
or System



Association of Governing Boards  
of Universities and Colleges

CENTER FOR EDUCATION TRUSTEESHIP AND GOVERNANCE



# 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 sepa-

rate 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

\* Pending endorsement by the CASE Board of Trustees



# 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 of this illustrative MOU 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, \_\_\_\_\_ [FULL 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) non-profit 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

### 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.

### 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].*

### 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.

### 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 foregoing, 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]

Date: \_\_\_\_\_

\_\_\_\_\_  
Chair  
Board of [NAME OF FOUNDATION]

Date: \_\_\_\_\_

\_\_\_\_\_  
Chief Executive  
[NAME OF INSTITUTION OR SYSTEM]

Date: \_\_\_\_\_

\_\_\_\_\_  
Chief Executive  
[NAME OF FOUNDATION]

Date: \_\_\_\_\_



Association of Governing Boards  
of Universities and Colleges

For more information, visit [www.agb.org](http://www.agb.org)  
or call 800-356-6317

Adopted 11/16/2005

### **Required Elements of University-Associated Entity Relationship**

The following requirements apply to any University Associated Entity.

#### **A. Definitions.** As used in these regulations:

1. An "Associated Entity" means any foundation, association, corporation, LLC, partnership or other non profit entity that was established by officers of the University, that is controlled by the University, that raises funds in the name of the University, that has a primary purpose of providing services or conducting activities in furtherance of the University's mission pursuant to an agreement with the University, or that has a tax exempt status that is based on being a support organization for the University.
2. "Approving Institution" means a constituent institution of the University of North Carolina or the General Administration that approves an Associated Entity.
3. "General Administration" means the Office of the President and the affiliated programs of the University that are not centers or institutes of a constituent institution.
4. "Major Associated Entity" means an Associated Entity which has annual expenditures of \$100,000 or more.
5. "Minor Associated Entity" means an Associated Entity which has annual expenditures of less than \$100,000.
6. "Specified purpose entity" means an Associated Entity, or an approved subsidiary or LLC of an Associated Entity, that is established by the officers of the University or is controlled by the University, has as its sole purpose the constructing or managing facilities for the University, and does not engage in fundraising activities.
7. "State" means the State of North Carolina.
8. "University" means the University of North Carolina, including its constituent institutions.
9. When "president or chancellor" is used in these regulations, it means the chancellor if the approving institution is a constituent institution and it means the president if the approving institution is the General Administration.

#### **B. Creation of University-Approved Associated Entities**

1. Associated Entity Must be Approved—An Associated Entity must be approved in writing by the president, the chancellor, or the president or chancellor's designee. An entity must be approved in order to receive University-provided services or to be able to use an institution's or the University's name or an institution's or the University's logo/trademark in fundraising. If an

approved entity establishes a subsidiary entity or an LLC, then the subsidiary entity or LLC must be separately approved.

2. Abide by Relevant University Policies– In order to obtain approved status, the Associated Entity must formally agree to abide by the policies or regulations established by the University and by the Approving Institution regarding the University's and the Approving Institution's relationship with related Associated Entities.

3. Periodic Review of Status– The Approving Institution may remove the approved status of any Associated Entity which fails to abide by the Approving Institution's or the University's policies or regulations which govern Associated Entities.

### **C. Organizational Requirements of an Associated Entity**

1. Purpose to Benefit University– The Associated Entity must be organized for the primary purpose of (i) supporting the University or one or more of its constituent institutions or programs, and/or (ii) conducting activities that are in furtherance of the mission of the University or of one or more of its constituent institutions or programs.

2. State Nonprofit Corporation– The Associated Entity must be organized on a nonprofit basis, and, if a corporation, be incorporated in North Carolina, and comply with the requirements of Chapter 55A of the North Carolina General Statutes. If a constituent institution proposes to establish or approve an associated entity on a for profit basis, it must receive approval from the Board of Governors before establishing the entity.

3. Tax Exempt Status– Except as provided in paragraph C.2., an Associated Entity must apply for, receive, and maintain both federal and State tax exempt status.

4. Dissolution of Associated Entity– The Associated Entity's articles of incorporation must include a clause which provides that, upon dissolution of the Associated Entity, all of its assets will revert to the University or the Approving Institution or another University approved Associated Entity unless otherwise designated by the donor of an asset.

5. University Representative(s) on Board–At least one Senior Academic or Administrative Officer of the Approving Institution or a designee of the president or the chancellor must sit as an ex-officio (either voting or non-voting) or regular member of the Associated Entity's governing board.

6. Audit Committee Required–

(a) A major Associated Entity's by-laws must provide for an audit committee which has no University employee as a member. The audit committee must receive the report of the independent CPA firm that conducts the Associated Entity's annual audit and relevant tax forms to be submitted by the Associated Entity.

(b) A minor Associated Entity's by-laws must provide for a committee which has these audit functions and which has a majority of members that are not University employees.

(c) No employee of the Associated Entity may serve on an audit committee or a committee with an audit function. If practical, each audit committee or committee with an audit function should have a financial expert as a member.

(d) A Specified Purpose Entity is not required to have an audit committee provided that it is subject to independent audit at the request of one or more designated trustees, sureties, insurers, certificate holders or bondholders.

#### **D. Financial and Accounting Controls**

1. Sound Accounting and Business Principles— An Associated Entity must use sound fiscal and business principles, ensure that a sound internal control structure is in place, and follow generally accepted accounting procedures.

2. Annual CPA Audit— A major Associated Entity must be audited on an annual basis by an independent CPA firm. A minor Associated Entity must have an annual audit conducted either by the Approving Institution's internal auditor, another University internal auditor, or an independent CPA firm. A CPA firm providing an audit for a major Associated Entity may not provide non-auditing services to the Associated Entity other than tax preparation services that are pre-approved by the audit committee.

a. An Associated Entity of a constituent institution must provide copies of the audit report, management letters, and responses to management letters to the chancellor of the Approving Institution, through the chancellor to the governing board of the Approving Institution and the president, and through the president to the Board of Governors.

b. An Associated Entity of the General Administration must provide copies of the audit report, management letters, and responses to management letters to the president, and through the president to the Board of Governors.

3. Annual Budgets— The Associated Entity must create an annual operations and capital budget.

4. Officer and Employee Compensation— All salary and non-salary compensation provided by the Associated Entity to its officers or employees must be approved by the Associated Entity's governing board. The Associated Entity must comply with Board of Governors Policy §300.1.1 concerning the prohibition of payments to specified University employees. This requirement does not prohibit the Associated Entity from reimbursing its officers or employees for expenditures made on behalf of the Associated Entity.

5. Indemnification of University— The Approving Institution may require an Associated Entity to indemnify and hold the Approving Institution and the University harmless from any damages or liabilities that the Approving Institution or the University incurs as a result of the Associated Entity's actions.

6. University- Associated Entity Monetary Transfers— All transfers of funds from the Associated Entity to the University or to the Approving Institution must be documented in writing or electronically in a form that has a retrievable transaction trail.

7. Whistle Blower Protection—An Associated Entity must have a confidential and anonymous mechanism to encourage employees to report any inappropriateness within the entity's financial management and must prohibit punishment of or retaliation against any employee for reporting problems.

8. Chief Executive Officer-- The Chief Financial Officer of the Approving Institution may not be the chief executive officer of an Associated Entity.

9. Acquisition of debt—A Minor Associated Entity may not acquire debt in excess of \$100,000 that is not to be publicly traded without first notifying the president or the chancellor of the Approving Institution and then consulting with the Vice President for Finance of the University. A Major Associated Entity may not acquire debt in excess of \$500,000 that is not to be publicly traded without first notifying the president or the chancellor of the Approving Institution and then consulting with the Vice President for Finance of the University. In determining the level of scrutiny to give to the proposed transaction, the Vice President shall take into account the amount of the debt in relationship to the Associated Entity's assets and income and the extent of experience of the Associated Entity in entering into similar debt transactions. A Specified Purpose Entity that issues debt to construct facilities for the University must provide a financial or construction audit to the Vice President for Finance of the University at the Vice President's request or to the governing board of the Approving Institution at the request of the chair of the governing board.

10. Audit findings. Within 90 days of the issuance of the audit report with audit findings, the Associated Entity must demonstrate to the president or the chancellor of the Approving Institution and to the Vice President for Finance that satisfactory progress has been made to implement a corrective action plan. Failure of an Associated Entity to receive an unqualified audit opinion, to comply with the reporting requirements of this regulation, or to satisfactorily implement a corrective action plan in response to an audit finding may result in the Associated Entity's losing its approved status.

#### **E. Insurance and Bonding**

1. Bonding Required—Officers and employees of major Associated Entities who have check signing authority or who handle cash or negotiable instruments must be bonded in an amount determined to be reasonable by the Associated Entity's board. The Board of a minor Associated Entity should consider requiring bonding of appropriate employees.

2. Liability Insurance— The governing board of an Associated Entity must consider whether to obtain general liability and directors'/officers' insurance in an amount determined to be reasonable by the Associated Entity's board.

#### **F. Provision of Administrative and Other Services by University for Associated Entity**

1. Written Agreement Required— All services provided by the Approving Institution or the University for the Associated Entity (including use of University or constituent institution assets,

facilities, and personnel) must be pursuant to a written agreement setting forth the terms under which such services will be provided.

2. Reimbursement of Costs– Any reimbursement to the Approving Institution or the University for services the Approving Institution or the University provides to the Associated Entity must be made pursuant to a written agreement between the University or the Approving Institution and the Associated Entity entered into before the service is provided.

3. Control of University Personnel– When University personnel provide services for the Associated Entity and there arises a conflict between the University and the Associated Entity, the University's employee must comply with the policies, regulations and directives of the University.

#### **G. Acceptance of Gifts by Associated Entity**

1. Restricted Gifts That Require University Approval– An Associated Entity may not accept any restricted or conditional gifts that impose an obligation on the University or the State to expend resources in addition to the gift without first receiving the Approving Institution's approval. In addition, an Associated Entity may not accept a gift which has any restriction that is unlawful.

2. Notification to Donors of Restricted Gift Policies– An Associated Entity must advise prospective donors of all restricted or conditional gifts to the Associated Entity if acceptance of the gift is conditioned upon the Approving Institution's approval.

3. Coordination with University Development Office– In soliciting and accepting gifts in the name of the University, an Associated Entity must coordinate with the Approving Institution's development office.

#### **H. Conflict of Interest and Ethics Policies**

1. Policies Required–The Associated Entity must have in place conflict of interest and ethics policies pertaining to relationships between the Approving Institution, the Associated Entity, members of the governing board of the Associated Entity and persons doing business with the Associated Entity and establishing required ethical standards for the members of the governing board and employees of the Associated Entity.

2. Transactions Between Associated Entity and its Employees–All transactions (other than reimbursements as provided in §D.5.) between the Associated Entity and an officer, director, or employee of the Associated Entity must be approved by the Associated Entity's governing board.

3. Recusal from Business Decisions–No Associated Entity officer, director, or employee having a private business interest in an Associated Entity business transaction may be involved in the decision with respect to whether the Associated Entity should enter into such transaction.

4. Associated Entity Scholarships–No Associated Entity scholarship or fellowship award may be made to an officer, director, or employee of the Associated Entity or to a family member of such person unless the recipient of the award is determined by an independent awards committee.

## **I. Reports required to be submitted by Associated Entity to University**

1. The Associated Entity must file annual reports with the president or chancellor of Approving Institution covering the following items:

- a. A list of all members of the Associated Entity's board;
- b. A copy of the publicly disclosed portion of the Associated Entity's Form 990, or other series 990 form.
- c. A copy of the Associated Entity's CPA audit report and related management letters and responses to management letters

2. At the request of the chancellor, president, or the chair of governing board of the Approving Institution, for an articulated legitimate reason, the Associated Entity must meet with the requesting person, his or her designee, or the internal auditor of the Approving Institution and allow that person to inspect any of the following information that is related to the articulated reason:

- a. A description of all monetary transfers from the Associated Entity to the Approving Institution or the University;
- b. A description of all transactions entered into during the year between the Associated Entity and the Approving Institution or the University.
- c. A copy of the Associated Entity's operating and capital expenditure budget for the year and a comparison of actual expenditures to budgeted expenditures.
- d. A description of all real estate purchases, material capital leases, and investment/financing arrangements entered into during the year;
- e. Copies of the minutes of all regular and special meetings of the Associated Entity's board;
- f. The portions of the 990 forms that are not publicly disclosed and all other federal and state tax returns; and
- g. Any other documents and records which are relevant to the articulated reason.

## **J. Miscellaneous Requirements**

1. Associated Entity Communications-An Associated Entity must conduct business in its own name and all correspondence, advertisements, and other communications by the Associated Entity must clearly indicate that the communication is from the Associated Entity, and not from the Approving Institution or the University.

2. Lobbying and Political Activities-An Associated Entity must comply with all provisions of the Internal Revenue Code and all State laws regarding lobbying and political activity.

3. Associated Entity Courses and Seminars-An Associated Entity may not offer any course or seminar in which the University's name is used without first obtaining the permission the institution or institutions whose name will be used.

4. Destruction of Documents—An Associated Entity must have a policy governing retention and destruction of documents including electronic files and which prohibits destruction of documents if an investigation into wrongdoing or litigation is anticipated or underway.

#### **K. Waiver**

If the application of any of the requirements of these regulations to a particular Associated Entity in specific circumstances is of limited benefit and is unduly burdensome, the President may waive that requirement as to that specific Associated Entity under circumstances that are set out in writing. The Associated Entity shall notify the Chancellor of the Approving Institution prior to making a request for a waiver under this section.

#### **L. Effective Date**

Every Associated Entity shall be in compliance with these regulations no later than July 1, 2006.

