



FOLEY
HOAG LLP

Financial Challenges and Opportunities Facing Higher Education Amid COVID-19

June 11, 2020

- **Explore Other Sources of Funding First – Can your institution . . .**
 - Raise new, unrestricted donations?
 - Access funding from government sources, such as the CARES Act, Small Business Recovery Loan Fund, or Economic Injury Disaster Loan Program?
 - Seek grants available through COVID-19 relief funds or private foundations?
 - Look for other financing or refinancing options, including through commercial banks?
- **Ask donors to agree in writing to release spending restrictions. M.G.L. c. 180A, § 5(a).**
- **Consider spending adjustments to institutional funds. M.G.L. c. 180A, § 3(a).**
 - Counsel can help Boards navigate/comply with statutory factors and develop investment management committee and spending policy.
- **Look for smaller, older funds that can be modified administratively by State Attorney General. M.G.L. ch. 180A, § 5(d) and S.J.C. Rule 1:23**
 - In Massachusetts, funds less than 75K and at least 20 years old.

- **Courts may modify certain endowment fund restrictions pursuant to two equitable doctrines:**
 - **Cy pres doctrine (M.G.L. c. 180A, § 5(c))** - modify an endowment fund's charitable purpose or use restriction if the purpose or restriction has become "unlawful, impracticable, impossible to achieve or wasteful."
 - **Doctrine of equitable division (M.G.L. c. 180A, § 5(b))** - modify a management, investment, or durational restriction on an endowment fund if it has become "impracticable or wasteful, if it impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund."
- **Attorney General's Office will be a necessary party to these actions. Court will ask whether AGO assents to the relief requested.**
- **Be prepared with:** (1) description of circumstances, steps taken to date, alternatives explored; (2) business plan for repayment and viability post-pandemic; (3) clear articulation of how request meets legal standards; (4) description of how request will further institution's mission; and (5) an agreement to make periodic reports to AGO regarding repayment and financial health.

- **Must** notify the Massachusetts Department of Higher Education (DHE) of their intention to close “as far in advance as possible.” 610 C.M.R. § 2.07(3)(f)(2).
- **Must** complete Independent Institution Notice of Closure and keep in direct communication with DHE during the closure process.
- **Must** notify and seek approval from the State Attorney General’s Office if more than 75% of institution’s assets are being disposed of no later than 30 days before closing of transaction. M.G.L. c. 180 § 8A(c).
- **Must** file dissolution complaint with the single justice of the Supreme Judicial Court for Suffolk County if institution plans to dissolve completely. M.G.L. c. 180, § 11A.
- In the wake of Mt. Ida, **notify** and **work with** counsel and the respective agencies as soon as possible in order to help **avoid** harm to students and families and an AGO investigation into whether Board members and/or senior administrators violated their fiduciary obligations under charities law.

Key Considerations for College and University Private Partnerships

- Limitations on Allocation of Risk
- Identification of Revenue Stream and Investor ROI
- Core vs. Non-core Functions and Services
- Transparency, Accountability, Standards and Reporting Requirements
- Termination Rights



Opportunities for Updated Evaluations of College and University Private Partnerships

- Real Estate Partnerships for Housing and Related Services (Childcare, Retail, Food Services)
- Energy Plant Management and Modernization with New Technologies
- Athletic Facilities and Services
- Private or Consortium for Transportation Services



Top Targets Areas for Private Partnership Interest and Investment In College and Universities

1. Ideas (IP, Research, Accelerators)

- Protection
- Access
- Inventory

2. Talent

- Pipeline
- Campus Access



Potential Opportunities: Institutional Asset Inventory

■ Campus physical plant

- Dormitories
- Classrooms
- Offices
- Laboratory space
- Parking facilities
- Theaters
- Athletic facilities

■ Ancillary real property assets (golf courses, off-site laboratories, forests, housing)

■ Real property assets currently leased to third parties

■ Personal Property

■ Faculty & Staff

■ Students

■ Endowment

■ Intellectual Property

■ Accreditation

■ Artwork



- **Larger institutions** – Pine Manor / Boston College | MFA School / Tufts | Wheelock / BU
- **Private secondary schools** – Marlboro College / Democracy Builders
- **State college systems** – Mount Ida / UMass Boston
- **Housing developers** – Newbury College / Welltower & Brookline
- **Entities needing additional space to meet social distancing requirements** – secondary schools, daycares, businesses



Asset Acquisition or Transfer: Issues to Consider

- **Legal requirements** (advance notice for closures or mergers, cy pres)
- **Board dynamics and approvals**
- **Financing and assumption of debts** (including ongoing construction costs)
- **Support and/or opposition from alumni, students, faculty, staff**
- **Impact on strategic vision and strategic plan**





Speakers



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