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ORGANIZATIONAL PERFORMANCE

Flawed by design: Why Penn State's recent governance reforms won't work and what should be done instead

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Abstract By 2017, higher education is expected to be a $2 trillion industry worldwide. Within this huge economic engine, the boards of trustees that provide governance to universities and colleges face a complex challenge in that they must serve a variety of stakeholders. Without effective governance, an academic institution's performance is likely to suffer. Penn State University is plagued by an ineffective board of trustees. As a complement to past work that has documented this board's unwise and costly decisions, we examine how five design issues—board size, board composition, fiduciary responsibility, term limits, and transparency—helped create a culture in which poor choices were more likely to occur. We discuss why the board's recent self-imposed reforms are inadequate. We then offer more substantive reforms that could fix the Penn State board's flaws. In particular, we recommend that academic boards should be (1) small enough to allow full participation of all members, (2) composed such that no one stakeholder group can dominate decision making, (3) designed to eliminate actual and perceived conflicts of interest, (4) governed by term limits, and (5) appropriately transparent in their strategic decision making and communications. We leverage these principles to propose a reduction of the Penn State board from 30 voting members to 19. More broadly, other academic boards might benefit from undergoing a self-analysis based on the Penn State case.

"By the time [a new president] gets here in 2014, [the Sandusky scandal] will be just a distant memory."

— Penn State trustee Karen Peetz
November 2012

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1. Built to fail

The November 2011 indictment of former Penn State assistant football coach Jerry Sandusky for child sex crimes sent shock waves across the United States. Two high-ranking Penn State administrators, Tim Curley and Gary Schultz, were criminally charged for allegedly failing to report child abuse allegations against Sandusky to law enforcement in 2002 and for allegedly committing perjury in 2011 when testifying to a grand jury that was investigating Sandusky. A few days later, President Graham Spanier and legendary football coach Joe Paterno were fired by the university's board of trustees in a hastily called special meeting. Later, Spanier was also charged with failure to report child abuse and perjury. Paterno was not considered a suspect in the Sandusky case, but he died in January 2012 with his once-sterling reputation in tatters.

The Penn State board of trustees tried to fill the leadership void created by the departure of President Spanier, but by most any metric the board's handling of the Sandusky scandal was woeful. The scandal was listed by *BusinessInsider* as one of the nation's top public relations fiascos of 2011 and as the biggest fiasco of 2012. In a 2013 survey, only 16% of Penn State alumni expressed a high level of trust in the board. More recently, crisis management expert Steven Fink described the board's handling of the situation as "a series of calamitous decisions, seemingly without considering likely consequences, each one leading to another blunder" (Ketchen, 2014, p. 675).

Sadly, the above-quoted prediction by Karen Peetz, then-chair of Penn State's board of trustees, did not come anywhere close to being accurate. In early 2014, Dr. Eric Barron, a former Penn State faculty member and administrator, was hired to serve as Penn State's president. By then, Sandusky was serving a long prison sentence for his crimes, but the fallout from the scandal remained a fixture in the headlines.

Some observers have wondered if Penn State's board was simply incompetent. This seems unlikely given that the board included several chief executive officers of major corporations as well as other highly accomplished individuals. Instead, a lack of crisis management skills and an insular culture appear to be the major causes of the board's poor performance. Ultimately, people in top leadership positions are responsible for their decisions, and the board's failings in this regard have been well documented (Fink, 2013; Ketchen, 2014; Snow, 2014). In this article, we complement those discussions of managerial malfeasance by examining the role of the governance system in the fiasco. Specifically, we suggest that flaws in the design of Penn State's board created a context wherein failure in a time of crisis was likely. In recognition of this possibility, Penn State's board has self-imposed a number of governance reforms. As we discuss, however, these reforms are minor and will not fix the flaws in the board's design. We suggest practical reform steps that could solve the board's underlying problems.

More generally, boards of other academic institutions need to carefully consider whether their existing structures and processes would be adequate to cope with a tremendous challenge. Any board member who believes "It can't happen here" is playing a dangerous game. Indeed, our suspicion is that many university boards would be ill-prepared for a crisis like the one that unfolded at Penn State. To the extent that this is accurate, the ideas we offer could be of value to those boards' efforts to prepare for the unknown.

2. Five ways that Penn State's governance—and governance reform—have fallen short

2.1. Board size

In a corporation, ownership and control are separated. The stockholders that own the corporation are not involved in its actual operation; that responsibility is delegated to the chief executive officer (CEO) and his or her top management team. Although executives are expected to take actions that serve the interests of the corporation's owners, in some cases executives may make moves that serve their own interests but are detrimental to the owners. To guard against self-serving behavior by executives, a corporation's owners appoint a board of directors. The board monitors the CEO's decisions, evaluates the CEO's performance, manages the CEO's compensation, removes the CEO if necessary, and appoints subsequent CEOs.

The board of trustees of a public university such as Penn State has a similar role. The trustees who constitute the board must collectively make judgments about the decisions, performance, compensation, and retention of the university's president. A key difference, however, is that there is no direct equivalent of a corporation's owners in a university. Rather than serving stockholders' interests, a university's board must make decisions that support the university's mission as well as serve the interests of various stakeholders such as students, faculty, staff, alumni, and taxpayers. As the American Council of Trustees and Alumni (2014a) has stated: "Exercising final legal responsibility, trustees are in a position to be independent arbiters who can balance competing institutional demands with public interests in mind.''

A board's size can either assist or detract from the board's ability to effectively serve its purpose. As shown in Table 1, Penn State's board in 2011, prior to the Sandusky scandal, consisted of 32 voting members, including the university's president and Pennsylvania's governor. Reforms enacted by the board after the scandal removed voting privileges from the president and the governor, resulting in a board with 30 voting members.

One way to gauge the adequacy of this reform lies in comparing the resulting board size with the boards of peer universities. Penn State is a member of the Big Ten Conference, which consists of large public research universities in the eastern and midwestern United States, with the exception of Northwestern University: a smaller, private school. As of mid-2014, the largest boards among the other 12 public universities in the Big Ten each have 18 voting members (the Ohio State University and the University of Wisconsin). Comparatively, Penn State's post-reform board remains more than three times the size of the nine-member boards governing

Table 1. Designing a better academic governance system for Penn State University

Issues and Guiding Principles	The Penn State Approach: Pre-Scandal	The Penn State Approach: Post-Scandal	Recommendations for Penn State's Board of Trustees
Board Size Boards should be big enough to handle workload, but small enough that a power bloc cannot seize control Board size should be benchmarked against the boards of peers and aspirants	32 voting members, including the university president and Pennsylvania's governor	30 voting members; president and Pennsylvania governor removed. Despite this slight reduction, Penn State remains as the only one of the 20 largest American universities that has a board larger than 19 members	19 members
Board Composition No interest group should control enough seats to dominate the board No trustee should be in charge of agencies whose interests conflict with his/her board responsibilities The amount of government representation on the board should mirror the level of state financial support provided Board selection of some new members can help fill the need for certain skills, but the selection process must be open and transparent	10 members controlled by governor (6 appointees, 3 state secretaries, and the governor) 9 elected by alumni 6 self-selected business and industry representatives 6 elected by agricultural societies The university president	9 members controlled by governor (6 appointees and 3 state secretaries) 9 elected by alumni 6 self-selected business and industry representatives 6 elected by agricultural societies	2 governor appointees 7 elected by alumni 8 appointed by the board 1 student trustee 1 faculty trustee

Table 1 (*Continued*)

Issues and Guiding Principles	The Penn State Approach: Pre-Scandal	The Penn State Approach: Post-Scandal	Recommendations for Penn State's Board of Trustees
Fiduciary Responsibility Trustees must avoid actual and perceived conflicts of interest	Allowed a revolving door of cronyism whereby trustees could immediately become university employees and employees could become trustees 3 years after employment	The rules on most trustee-to-employee transitions were tightened, but a loophole was created to allow a trustee to immediately become an employee if the board approves the exception	Create a strict separation between board membership and university employment by imposing a 5-year waiting period that cannot be waived before a person can move from trustee to employee or vice versa
Term Limits Impose term limit of no more than 9 or 10 years, depending on the length of terms When creating term limits, fully count time served against the term limit	In 2003, 15-year term limits were imposed, but prior service did not count toward the limit	New trustees limited to 12 years of service; some incumbents allowed to serve another term regardless of how long they have served already	Limit trustees to three terms of 3 years each, including time served
Transparency in Strategic Decision Making and Communications Internal and external transparency must be a priority	Board members expected to publicly support decisions reached by the board, regardless of their own opinions	The board granted itself the ability to remove trustees who do not meet a vague definition of 'fiduciary responsibilities.' This could be used to stifle debate and remove dissenters who simply disagree with the majority	All trustees should be involved in important decisions Dissenting trustees must have the explicit right to speak publicly about their concerns so that other stakeholders can be aware of potential landmines

Indiana University, Michigan State University, the University of Iowa, and the University of Michigan (Wagner, 2012, p. 100). Penn State is also one of the 20 largest public universities in the United States in terms of student enrollment, yet as of 2012, Penn State was the only university among this group whose board was larger than 19 members (Wagner, 2012). In sum, Penn State's board is more than 50% larger than the next-largest board among its Big Ten peers and among the largest American public universities.

To determine the proper size of its board, a university needs to develop a 'Goldilocks solution:' not too small, not too big, but just right. If a board is too small, for example, the amount of work required of individual trustees is burdensome. Some Penn State trustees believe that Penn State's board should remain at 30 voting members, or perhaps even increase in size, to adequately staff the board's various committees (Snyder, 2014). Indeed, in July 2014, board chair Keith Masser asserted that Penn State's board size of 30 is "in a sweet spot" (Carroll, 2014). On the other hand, if a board is too big, full participation and engagement by all members is difficult to achieve. In August 2014, a blue-ribbon panel assembled to study effective higher education governance asserted that "boards need to be a workable size: while there is no magic number, an effectively functioning board should generally not exceed 15 members. Too often, larger numbers of trustees mean the whole board ceases to be involved in policy decisions" (American Council of Trustees and Alumni, 2014b). Within such a setting, a prevailing coalition can tightly control information and dominate the board's decision making. This has happened at Penn State. . .with disastrous consequences.

In late October 2011, a small group of trustees was warned in advance that Jerry Sandusky and two Penn State officials, Tim Curley and Gary Schultz, were going to be charged with crimes. Rather than alert their colleagues on the board, none of these trustees "spoke to the remaining board members about the impending charges until after the charges were filed against Sandusky, Curley, and Schultz on November 4, 2011" (Freeh Sporkin & Sullivan, LLP, 2012, p. 91). Not surprisingly, the ill-informed board was caught off-guard when a media firestorm erupted after the indictments were announced. The resulting public relations debacle severely damaged Penn State's strong international reputation.

While in our opinion the Penn State board remains too large, determining exactly how much it should shrink is difficult. No two universities are identical, so it would be foolish for Penn State—or any other institution—to simply copy what a peer university is doing. Although we believe that Penn State's board should be no bigger than the largest board among its Big Ten brethren (i.e., 18 voting members), two proposals that account for Penn State's idiosyncrasies recommend slightly larger boards. Specifically, a bill introduced in the Pennsylvania state senate in 2013 (Senate Bill 1240) proposed a 23-voting member board while former Auditor General Jack Wagner suggested a board composed of 21 voting members. Both of these proposals were grounded in significant background research and benchmarking. As described next, however, we believe that a board of 19 members would be a Goldilocks solution for Penn State.

2.2. Board composition

Setting the composition of an academic board is a difficult issue. Ideally, trustees are accountable to an outside entity. Accordingly, the American Council of Trustees and Alumni recommends that all trustees of public universities be appointed by the state's governor (Neal, 2013). All 17 members of The University System of Maryland's board, for example, are appointed by the governor of Maryland. Similarly, Wisconsin's governor selects 16 out of 18 members of the University of Wisconsin's board. This approach creates a chain of accountability—trustees answer to the governor, who in turn answers to the state's voters—that is intended to ensure that trustees serve the university's mission and stakeholders.

Staffing a board entirely with a governor's appointees raises serious concerns, however. The governor's interests and a university's interests can be at odds, especially during the annual budgeting process. In such cases, university stakeholders cannot tell if trustees are being loyal to the governor or to the institution. A governor might award board seats based on political payback (e.g., as a reward for large campaign donations) rather than based on individuals' knowledge, expertise, and ethics. A board stacked with a governor's cronies might function adequately during stable periods, but could prove disastrous when daunting challenges confront the university.

We believe a better approach entails designing the board in a way that minimizes its potential for cronyism. The University of Minnesota provides a good example. The two houses of the Minnesota state legislature jointly elect the 12 members of this board. To ensure that different areas of the state are represented, each of Minnesota's eight congressional districts provides one member. The remaining four members can live anywhere in the state, but one of these four at-large members must be a student at the university. The University of Michigan has even stronger protections against cronyism: the eight members of its board are elected entirely by Michigan voters. A key advantage of this approach is that the board "theoretically operates with complete independence from the legislative, judicial, and executive arms of state government" (Bentley Historical Library, 2014). On the other hand, a significant disadvantage of both of these systems is that they do not ensure that the needed mix of expertise exists among the trustees.

The design of Penn State's board lies somewhere between these approaches. Blocs of seats are allocated to represent different key stakeholder groups. This creates checks and balances, and ensures that a diversity of perspectives is represented. How the occupants of these seats are selected varies across groups. As part of its self-imposed post-Sandusky scandal reforms, the board reduced its size to 30 by removing the university president and the governor as voting trustees; this positive step eliminated two potential conflicts of interest. Currently, nine of the 30 board seats are controlled by the governor: six appointees and three state secretaries. Traditionally, a student is selected as one of the six appointees.

Nine trustees are elected by alumni. This is not a common selection mechanism, but Penn State is in good company: all members of Harvard University's governing board are elected by alumni. Alumni election of Penn State trustees benefits the university in at least two ways. First, the process is a bastion of transparency and accountability within a board that is generally shrouded in secrecy. Candidates must campaign just like contenders for political office. This forces candidates to publicly state and defend their views on key issues. After trustees are elected, alumni voters can hold them accountable for their decisions in future elections. Second, as at most universities, alumni are a tremendous resource for Penn State: they donate money, connect graduates with jobs, mentor current students, and provide volunteer labor. Research has shown that people are more committed to an organization when they have a voice in how the organization is operated (Kotter & Schlesinger, 2008; Lines, 2004). Thus, the chance to directly participate in university governance likely strengthens the commitment of alumni to the university.

Six trustees represent the state's business and industry interests. New members of this group are selected by a five-member committee consisting of three business and industry trustees and two other trustees, which has fueled critics' concerns that the group is self-perpetuating.

Owing to Pennsylvania's land grant status and strong agricultural heritage, six trustees are elected by the state's agricultural societies using a process that is shrouded in mystery and largely unchanged since the university was founded in 1855 as Farmer's High School of Pennsylvania, one of the nation's first agricultural colleges. The board's bylaws state that six trustees shall be elected by delegates representing county agricultural societies or associations. Although the election process is managed by the board, it is unclear what body has oversight for the process of selecting delegates who vote for agricultural trustee seats. According to Penn State, over 350 organizations are eligible to participate in trustee elections. Few, if any, outsiders understand the mechanisms used to translate the decisions made by these organizations into three votes per county as required by board bylaws. It is not surprising that such arcane procedures would result in confusion and, potentially, improprieties. Following the most recent election, one candidate filed a lawsuit against Penn State, charging voting irregularities.

More broadly, the governance system created in 1855 does not fit today's reality. Whereas farming accounts for approximately $6 billion in Pennsylvania's yearly economy, the contribution of agribusiness—including such areas as food processing and distribution, and sales of seeds, fertilizer, and tractors—is ten times larger, at over $60 billion. Yet only farmers are represented by the agricultural societies, with the result that the great majority of those involved in agricultural enterprises are disenfranchised from the electoral process for Penn State agricultural trustees. Meanwhile, Penn State's College of Agricultural Sciences is now one of the smallest colleges within the university, with less than one-third the number of students than are enrolled in the College of Engineering.

Proposals to further shrink the board have suggested leaving the various blocs in place but reducing their size. Under SB 1240, a 23-voting member board would consist of eight members elected by alumni, five members appointed by the governor, five members representing agriculture, and five members representing business and industry. The latter set of trustees would be tapped by a selection committee consisting of the chair of the board and one member from each of the four groups (alumni-elected, governor appointees, agriculture, and business and industry). Under the Wagner plan, a 21-voting member board would consist of six members elected by alumni, four members appointed by the governor, four members representing agriculture, four members representing business and industry, and cabinet secretaries from the state departments of agriculture, education, and conservation/natural resources.

We believe the composition of Penn State's board should be based on five principles. First, no stakeholder group should control enough seats to dominate the board's decision making. Second, no trustee should play a significant role within any entity—such as state government agencies—whose interest conflicts with his or her board responsibilities. Third, the amount of government representation on the board should mirror the level of state financial support provided to the university. Fourth, selection of some new members by the board itself can help fill the need for particular expertise and skills, but the selection process must be open and transparent. Fifth, the board should be small enough to allow the full participation of all members while still remaining large enough for the board's work to be accomplished. Because these principles are grounded in sound management practices, they could guide the restructuring of other university boards as well. We propose that Penn State create a 19-member board as follows:

- Two members appointed by the governor. This reflects that state support has accounted for roughly 10% of Penn State's budget in recent years. In contrast to the Wagner (2012) plan, no state secretaries could serve as a trustee, thereby avoiding conflicts of interest.

- Seven members elected by alumni. This represents a reduction of two seats from the current nine.

- Eight members appointed by the board. This group of appointed members would replace the business and industry and agricultural blocs. The distinction between these two blocs has become blurred over time in that the agricultural trustees are almost all wealthy businesspeople from the agribusiness sector. Selection of these members by the board itself would allow the board to ensure that its membership ranks contain the needed mix of expertise. To ensure that a wide diversity of candidates and skill sets are considered, nominations would be offered to the board by the deans of each college within the university. Alumni and non-alumni alike would be eligible for selection. Expanding the range of expertise beyond agriculture and business/industry to include areas such as technology, science, and education would provide greater flexibility to meet the ongoing challenges facing higher education. The overall objective would be to select thoughtful, committed individuals who have knowledge and experience in areas that are relevant to the university's current operations and future opportunities.

- One member who is a student. This preserves the historical tradition of having this key stakeholder group represented on the board. Unlike in the past, however, the university's students should select their own trustee, thereby giving them a direct voice in governance and removing state politics from the process.

- One member who serves on Penn State's faculty. Penn State's removal of the university president as a voting trustee was a positive move overall, but one unfortunate by-product is that the board no longer contains anyone who is intimately familiar with the university's educational process. Adding a faculty seat to the board would create a formal mechanism to ensure that an educator's perspective is a part of the board's decision making and would provide the professorate with a stronger sense of shared governance.

2.3. Fiduciary responsibility

When making decisions regarding university affairs, university officials and board members have a responsibility to choose options that benefit the university. A conflict of interest exists when circumstances create risk that an administrator's decisions or a board member's votes will be swayed by anything other than what is best for the university. For example, if a board member owns a commercial construction firm, it would be a conflict of interest for that individual to participate in decisions about which contractor should receive the winning bid to construct a new building on campus.

According to the Association of Governing Boards (2009), board members need to avoid not just actual conflict of interest but also the perception of conflict. The mere appearance of conflict is damaging because it creates doubts about the board's integrity and erodes stakeholders' trust in the board. Whether a perceived conflict is worrisome can be judged using the 'reasonable observer' standard: if a reasonable observer would be concerned by a trustee's involvement in a particular situation, then that situation should be carefully avoided. If our hypothetical board member recuses herself from the decision about which construction company to hire, for example, a reasonable observer might still wonder if she wields behind-the-scenes influence over the outcome. Therefore, in board meetings and other public arenas, she should be clear about why she is not participating in discussions or voting on that matter.

Boards should be designed in ways that eliminate or at least minimize real and perceived conflicts of interest. This was certainly not the case at Penn State prior to the Sandusky scandal. Auditor General Jack Wagner (2012, p. 49) harshly criticized the university for maintaining a "revolving door" of cronyism. As part of this revolving door, high-level employees could take on trustee seats a mere 3 years after leaving employment. For example, Steve Garban ended a 33-year career as a Penn State employee in 1993 and then served as a trustee from 1998 to 2012. Meanwhile, trustees could be awarded influential positions in university administration with no waiting period. In one case, trustee David Joyner, an orthopedic surgeon by trade, was named acting athletic director in late 2011. He was then made the permanent athletic director 2 months later; no search for other candidates was conducted. In past decades, numerous trustees have benefitted financially or otherwise from having a position on Penn State's board.

Because oversight of a university's administration is the primary role of trustees, rapid rotation of an individual from employee status to trustee is worrisome. Can the new trustee put aside his relationships with former co-workers and effectively assess their performance? Can a new trustee escape her existing perceptual schemas and view situations through the lens of effective governance? Penn State's board of trustees was criticized for failing "to exercise its oversight and reasonable inquiry responsibilities" following incidents involving Sandusky and children in 1998 and 2001 (Freeh Sporkin & Sullivan, LLP, 2012, p. 97).

In moving from the role of trustee to employee, former trustees have confidential knowledge about the institution as well as close connections to current trustees. Co-workers might reasonably believe that former trustees retain influence at the highest level of governance and may therefore feel inhibited about expressing divergent viewpoints. Regardless of the former trustee's personal integrity, the possibility of bias stemming from insider knowledge and connections is sufficient to alter perceptions of his or her job performance.

Penn State opted for comparatively weak governance reforms in the wake of the Sandusky scandal. In May 2013, the board extended the waiting period before an employee could become a trustee from 3 to 5 years. The rules involving moves from trusteeship to employment were tightened, but a loophole was created whereby a trustee still can immediately become an employee if the board approves the exception. Stakeholders were left wondering whether this new policy was in the university's best interest or if it merely preserved the opportunity for trustees to gain lucrative employment as a function of their insider connections, as did Dr. Joyner.

When the boundaries between board and administration are blurred, stakeholders and other reasonable observers are left to consider the possibility that the university's interests are being sacrificed for personal gain. Ideally, this concern would be neutralized by creating a strict separation between board membership and university employment. Specifically, Penn State (and other universities) would benefit from imposing a minimum of a 5-year waiting period that cannot be waived before a person can move from trustee to employee or vice versa.

2.4. Term limits

In 1887, Lord John Acton famously observed that "power tends to corrupt, and absolute power corrupts absolutely." More than 125 years later it is clear that, in the absence of term limits, long-entrenched trustees can build an immense and unchecked base of power. Beyond inhibiting corruption, the imposition of term limits facilitates the introduction of fresh perspectives to a board, helps prevent the development of groupthink, and allows for the recruitment of individuals with different backgrounds to cope with emerging trends. The downsides of term limits—losing institutional knowledge and disengaging active volunteers—can be mitigated by the thoughtful use of emeritus trustee status whereby former trustees can serve as advisors but do not get to vote.

Because term limits for trustees are, on balance, a positive organizational design feature, it is not surprising that nearly two-thirds of private universities enforce term limits (Association of Governing Boards, 2010). Public universities are increasingly enacting term limits, too. As of 2010, 41% of publics had term limits, a 25% increase over 2004. Trustees who serve at public universities that enforce term limits are allowed an average of two consecutive terms, with each term lasting an average of 5.7 years (Association of Governing Boards, 2010).

In 2003, Penn State implemented a 15-year term limit. . .with a self-serving caveat. Because the term limit did not count prior service, incumbents—several of whom had served for decades—were provided the opportunity to serve an additional 15 years. Post-scandal, and under pressure from then-Pennsylvania Auditor General Jack Wagner, the term-limit policy was further adjusted. Term limits were reduced to 12 years for incoming trustees while remaining at 15 years for trustees whose service began in 2003 or earlier. As before, trustees whose terms commenced prior to 2003 were permitted to serve until 2018, regardless of their total length of service.

Creating continuity by staggering the exit dates of sitting trustees is accepted practice when introducing term limits, but Penn State allowed all incumbents to serve the maximum time. The effect was that those with the longest tenure—where, arguably, the need for turnover is greatest—were protected. Astonishingly, the six longest-serving trustees on the Penn State board remained eligible for total terms ranging from 24 to 57 years under the policy (Wagner, 2012).

Penn State's foray into imposing term limits on trustees is flawed in at least two ways. First, by not counting past service against the limits, the power of senior trustees is protected for years to come, in direct contrast to the spirit of term limits. In 2014, incumbent alumni-elected trustees Jesse Arnelle and Joel Myers announced their intention to run for another term, despite having served since 1969 (45 years) and 1981 (33 years), respectively. Following an outcry among alumni, Arnelle abandoned his candidacy. Myers pressed on, but he finished a distant seventh in the voting for three open seats. All three winners had been endorsed by Penn Staters for Responsible Stewardship, a large alumni activist organization devoted to fixing Penn State's governance problems.

Second, even the 12-year term limit for new trustees is out of step with best practice, as this is much longer than the range of 6 to 8 years recommended by The Association of Governing Boards of Universities and Colleges (Wagner, 2012). Of additional concern is the loophole in Penn State's term-limits policy whereby the limits do not apply to the board's chair and vice chair. One possible implication is that the chair and vice chair could serve indefinitely as long as they remain in their leadership positions. In order to avoid harmful trustee entrenchment and to create renewal within its board, term limits at Penn State and other public universities should be no more than 10 years, with no exceptions made for existing tenure or for officer status.

2.5. Transparency in strategic decision making and communications

In a corporate setting, maintaining secrecy around many board deliberations is vital. When a CEO decides to pursue a major strategic move such as a merger or acquisition, the CEO must obtain the board's approval. The board must then decide whether the proposed action is in stockholders' best interests. It would be foolish for the board to publicize the discussions that surround its decision-making process. Board members are likely to carefully debate the strengths and weaknesses of the acquisition candidate, for example. Suppose the board concludes that the company will be getting a tremendous discount and this opinion became public knowledge. The executives in charge of the acquisition candidate would almost certainly drive a harder bargain before finalizing a purchase price. Conversely, suppose the board has a spirited—and public—discussion of some serious flaws suffered by their target. This might lead the executives in charge of the acquisition candidate to question the wisdom of joining the organization. Further, if a pending acquisition becomes public knowledge after these deliberations end, a rival suitor might appear and outbid the firm before the acquisition agreement can be consummated. Thus, preserving the secrecy of board deliberations is a competitive necessity for corporations.

The situation is much different within a university board. Whereas a corporation's owners are its primary stakeholders, a university has a variety of important stakeholders—students, faculty, staff, alumni, and taxpayers—whose interests overlap but vary. Academic tradition holds that these stakeholders have the right to be informed about and to have their voices heard in relation to strategic decisions that affect them. Boards are thus expected to publicly discuss potential moves such as the merger of institutions, the construction of new buildings, tuition increases, the creation of new programs, and the termination of existing programs.

Penn State's board has stubbornly avoided transparency in its decision making. The concept of 'transparency' is usually directed at open communication between the board and its stakeholders. However, Penn State's board has been criticized for poor transparency *within* the board, where a small group of trustees have conducted business with minimal involvement of the majority. One example was mentioned earlier in this article: a small group of trustees withheld from the rest of the board their knowledge that Sandusky was being indicted. In another egregious example, President Rodney Erickson signed a consent decree with the NCAA in 2012 that encumbered the university for $60 million in fines, accepted crippling sanctions to the football program, and denounced "the culture exhibited at Penn State" as one in which "a football program was held in higher esteem" than "the values of human decency."[1] The president was advised by several trustees who did not consult the full board; the board learned the negotiations were completed after the fact, without being informed, without discussion, and without a vote.

In terms of external transparency, because taxpayers invest hundreds of millions of dollars in public universities, many states have right-to-know laws that require universities—as well as other state entities—to reveal how their money is being spent. In 2009, a right-to-know law took effect in Pennsylvania. Although Penn State was fully included in the right-to-know bill when it was introduced, the university successfully lobbied to be exempt from most of its provisions (Wagner, 2012). Meanwhile, as of mid-2013, all 10 of Penn State's Big Ten peers that receive public funding were subject to right-to-know laws (Ketchen, Pope, & Prisby, 2013). Moreover, the Penn State board also cloaks its own internal processes in secrecy. Although the right to voice principled dissent is a core academic value, the board's bylaws dictate that votes are recorded as unanimous regardless of the actual tally. Further, board members are expected to publicly support the board's decisions regardless of their personal opinions.

In the wake of the Sandusky scandal, critics demanded greater transparency from Penn State's board. As part of its post-scandal changes, the board revised its bylaws in ways that actually encourage greater secrecy than before. The board gave itself the power to remove trustees who do not meet a vague definition of 'fiduciary responsibilities.' As Ketchen, Pope, and Prisby (2013) note: "While there should absolutely be a mechanism for removing irresponsible trustees, the new policy could be used to stifle debate and remove dissenters who simply disagree with the majority. Tellingly, none of [Penn State's] Big 10 peers have a similar policy."

Overall, Penn State's board appears to follow a corporate approach to transparency in decision

[1] http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf, page 4

making. The use of a corporate approach is not necessarily surprising given that many of the trustees are business executives, but it is inconsistent with the nature of academic institutions. Although public universities must protect some secrets (e.g., patented technologies they have developed), transparency within and around the board should be maximized. Formalizing this transparency in a board's bylaws and policies is a necessary but insufficient step. Ensuring transparency also requires key stakeholders—and perhaps the media—to ask hard questions when appropriate, and thereby hold trustees accountable.

3. Final thoughts

The first line of Penn State's school song is: "For the glory of old State." Unfortunately, the last few years for Penn State have been filled with anything but glory. Despite the poor performance of the university's board of trustees, however, Penn State's faculty and students have continued to excel at research, teaching, and learning. And therein lies reason for hope. If meaningful governance reforms are enacted, and Penn State's board begins to operate collaboratively, the glory of old State can be restored. More generally, the Penn State story offers a cautionary tale to other university boards. We recommend that university boards carefully examine and, where needed, adjust their approach to board size, board composition, fiduciary responsibility, term limits, and transparency.

Epilogue

Shortly after this article was written, the Penn State board of trustees' committee on governance and long-range planning approved a restructuring proposal and forwarded it to the full board for consideration. The ironically-named "A+ Plan" included 33 voting members: nine elected alumni, six gubernatorial appointments, six business and industry members, six agriculture representatives, three at-large positions, one student, one faculty member, and a representative of the Penn State Alumni Association (PSAA).

This proposal not only violated best practices by making the board larger, it promised to create a new conflict of interest. Structurally, the PSAA appears on the university's organization chart: it reports to the Department of Development and Alumni Relations, which in turn reports to the university's president. (http://www.psu.edu/provost/assets/Administrative.pdf) There is strong financial dependency as well. According to the PSAA's strategic plan, the PSAA expects to receive a subsidy exceeding \$3.2 million from the university in fiscal year 2015-6; 28% of its total budget. In essence, the A+ Plan promised to allocate a board seat to represent a division of the university, thereby allowing that division to participate in the oversight of itself — a clear conflict of interest.

More generally, Pennsylvania state senator John Yudichak expressed concern that the "committee violated state law" by moving forward with the A+ Plan. As Yudichak noted, "the public members of the board of trustees and the voting privileges they have are decided by statute, not by a committee of non-lawmakers" (Falce, 2014). As the Penn State board pursued a plan that contradicted best practices, created a new conflict of interest, and possibly broke the law, the board appeared likely to mire itself in needless controversy for the foreseeable future.

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