

Guidelines and Criteria for Legal and Risk Reporting to the Penn State Board of Trustees

The Charter and Operating Guidelines for the Committee on Legal and Compliance includes a list of legal subject matter areas which may be brought to the Committee for discussion and oversight. The Charter envisions a similar list for Compliance. The Charter also states that “the Committee will develop a set of guidelines and criteria for deciding when legal and compliance matters are sufficiently significant to warrant or require that they be brought to the Committee for discussion.”

In addition, the Audit and Risk Committee receives regular reports from the University’s Risk Officer about the University’s enterprise risk management program including, specifically, the highest priority risks for oversight by a Board Committee. Further, the University’s Director of Internal Audit reports to the Chair of the Audit and Risk Committee about individual matters that come to him through the University’s hotline or otherwise and also reports to the Audit and Risk Committee about the categories of issues and allegations that come to Internal Audit through the hotline or otherwise. Internal Audit also has established Procedures for Investigating Allegations Concerning High Level University Officials which include informing the Chair of the Committee on Audit and Risk.

Against this background, these Guidelines and Criteria have been developed to help guide the administration’s decision making as to which legal, compliance and risk matters are sufficiently significant or otherwise appropriate to warrant notification and/or discussion with the Board.

Ultimately, this is an issue of good judgment. The General Counsel, Director of Ethics and Compliance, Director of Internal Audit, Risk Officer, Senior Vice President for Finance and Business and other University officials annually encounter literally thousands of matters that pose legal, financial, reputational and other risks to the University. The challenge is to decide which among these are sufficiently important or are most likely to develop into a major crisis such that briefing the Board or a Board Committee is appropriate. There is also a question of timing – when in the course of a matter is notice to the Board warranted? And there is an issue of who the matter should be reported to – Board leadership, a Board Committee, Committee Chair or the full Board?

The purpose of these Guidelines and Criteria is not to “answer” these questions, but to provide criteria and guidelines to help frame the question and guide the exercise of judgment. Just because a matter meets one or more of these criteria does not mean it should be reported to the Board of Trustees. For example, many matters generate press attention (see Item 13) but do not warrant a special report to the Board of Trustees. These are factors to consider, not rules or requirements. These issues also change with the times and circumstances, so what is important to report today may not be the same as what is important tomorrow. This document must therefore be flexible and is necessarily always a work in progress. The criteria listed here are illustrative and not listed in order of importance.

1. The matter relates to a subject that is reasonably understood to be part of the fiduciary duty of board members. (This might include a threat to the mission of the institution, protection of financial assets, oversight of or misconduct by the president or other senior official, misconduct or breach of duty by a board member, or a matter that otherwise relates to important oversight and governance functions for which a board of trustees would typically be responsible).
2. The matter relates to a subject that the Board is required by law to approve. (The matter relates to a policy or contract that the Board is required by law to adopt or a decision only the Board can legally make.)
3. The Board was involved in an earlier stage of the matter. (A contract approved by the Board is now in litigation; there is a problem with a personnel decision the Board approved; there was a Board briefing at an earlier stage of the matter).
4. The matter relates to a subject that is addressed in the Bylaws or Standing Orders or reserved to the Board for decision. (Conflicts of interest, delegations of authority, and other topics which the Standing Orders require to go to the Board for information or action).
5. The matter relates to an issue of major reputational significance. (This may be the hardest to predict and define, but it requires consideration of the likelihood of more than local press interest, whether the matter goes to the heart of the University's mission, how the Penn State name will be used, or an issue that raises a substantial question of integrity or misconduct by an institutional leader).
6. The matter is of a nature that it will be important to external and internal constituencies that the Board of Trustees has been informed. (Will government or community leaders expect the Board to be informed? Does the matter relate to a core governance function such that notification to the Board is important for the credibility and integrity of University decision making?).
7. The matter relates to topics that are regularly discussed with the Board such that the Board has knowledge and expertise that may be helpful and the Board may expect that they will be informed. (Major issues relating to the budget, admissions, major physical plant projects, athletics).
8. The matter relates to a serious and substantial issue of institutional liability or compliance. (Serious investigations or claims by the federal or state governments; allegations of widespread violations of the law; criminal conduct that could implicate the University; a major compliance audit; loss of data that causes serious privacy concerns; whistleblower complaints and lawsuits).
9. Significant lawsuits and substantial settlements "not in the normal course" where either the amount involved or the issue presented implicates one or more of the other factors listed here in a significant way.

10. Unusual employment decisions “not in the normal course” that implicate one or more of the other factors listed here in a significant way.
11. Has the administration briefed the Board as to this type of issue in the past such that it may not be necessary to alert the Board now to the particular case? (The more the Board has been briefed on generic risks and legal issues, the less need there may be to brief the board on a particular “example”).
12. The matter is such that Board members are likely to be called by important constituents.
13. The matter is likely to generate substantial public and media attention.
14. For all of the above, the appropriate administrator must consider whether the matter is ripe for reporting to the Board, or is it premature to do so; and whether reporting to Board leadership, a Board Committee Chair or a Board Committee is sufficient. In most situations reporting through normal channels, such as to the Chair or a Committee at a regular meeting, is more appropriate than an immediate report to the full Board.