

**OPERATING AGREEMENT  
BETWEEN  
MONTANA STATE UNIVERSITY BILLINGS  
AND  
MONTANA STATE UNIVERSITY BILLINGS FOUNDATION**

THIS AGREEMENT (“Agreement”), entered into as of this \_\_\_\_ day of January, 2018, is by and between Montana State University Billings and the Montana State University Billings Foundation, a nonprofit corporation, and is valid through December 31, 2020. The agreement supersedes the operating agreement between Montana State University Billings and the Montana State University Billings Foundation for the twelve month period ending June 30, 2018.

**RECITALS**

WHEREAS, Montana State University Billings (“MSUB”) is a unit of the Montana University System; and

WHEREAS, the Montana State University Billings Foundation (“Foundation”) is a separately incorporated entity, organized under Section 501(c)(3) of the Internal Revenue Code (“IRC”) and is registered with the State of Montana to conduct business as the Montana State University Billings Foundation; and

WHEREAS, MSUB recognizes the Foundation as its sole affiliated foundation for the purposes outlined in Section 901.9 of the Montana Board of Regents of Higher Education Policy and Procedures Manual; and

WHEREAS, MSUB desires an association of alumni and friends and the Foundation agrees to operate an association for MSUB alumni and friends:

WHEREAS, MSUB desires the financial support of private constituencies, and the Foundation desires to provide donor services designed to identify, inspire, secure, steward, and renew philanthropic support of private third parties including individuals, corporations, foundations, and other private entities that seek to support MSUB; and

WHEREAS, the Foundation desires to provide prudent and professional asset investment and management services of private philanthropic gifts; and

WHEREAS, MSUB desires the advocacy and support of private constituencies, and the Foundation desires to provide constituent related services; and

WHEREAS, the Foundation is uniquely positioned to provide the aforementioned services in an efficient and cost-effective manner as it retains professionals experienced in these areas; and

WHEREAS, the services aforementioned are consistent with the missions of MSUB and the Foundation;

## TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and commitments of MSUB and the Foundation (“Parties”) contained herein, the mutual benefits to be gained by the performance hereof, and other good and valuable consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

### Section 1 – MSUB Name, Seal and Logotype

Consistent with its mission to help advance the plans, priorities, and objectives of MSUB, the Foundation is granted the use of the name Montana State University Billings and is granted the use of MSUB’s logo under MSUB’s applicable graphic identity and branding policy until such time as the Montana State University Billings Foundation dissolves, the Foundation ceases to be recognized as a tax exempt organization, and/or the MSUB Chancellor withdraws recognition of the Foundation.

### Section 2 – The Foundation’s Relationship to MSUB

2.1 Alumni Association and Alumni Relations. The Foundation is responsible for various programs, services, and initiatives to strategically enhance and expand alumni engagement with the University (“alumni relations”). As part of this responsibility, the Foundation will oversee the operation of the MSUB Alumni Association.

2.2 Asset Management. The Foundation Board of Trustees is responsible for the control and management of all assets of the Foundation, including the prudent management of all gifts made to the Foundation consistent with donor intent and according to all applicable laws.

2.3 Operations Oversight. The 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 legal and ethical guidelines and policies.

2.4 Staffing. The Foundation is responsible for the employment, compensation, and evaluation of its employees.

2.5 Representation. The Foundation President and CEO shall be included as a member of the MSUB Chancellor’s cabinet.

### Section 3 – MSUB’s Relationship to the Foundation

3.1 Representation. The MSUB Chancellor shall be an ex-officio, non-voting member of the Foundation’s governing board and committees.

3.2 Communication. The MSUB Chancellor is responsible for communicating MSUB’s priorities and long-term plans to the Foundation on a regular basis.

3.3 Confidentiality. MSUB recognizes that the Foundation is a private corporation with the authority to keep all records and data confidential to the extent allowed by law. As such, MSUB will create, maintain,

enforce, and adhere to policies and procedures that protect the confidential nature of the Foundation's data and foster the individual reasonable expectation of privacy attendant to that data as allowed by law.

#### **Section 4 – MSUB Responsibilities**

MSUB shall provide services to the Foundation as outlined below:

4.1 Funding Priorities. The MSUB Chancellor will present the Foundation President and CEO with a list of MSUB's current private funding priorities. MSUB shall rely upon the Foundation, or its President and CEO, to assess the priorities and the private funding feasibility of each.

4.2 Donor, Alumni and Constituent-Related Activities. MSUB shall support the Foundation's coordination of all philanthropic, alumni and constituent-related activities that seek and solicit private support and advocacy to benefit MSUB. Additionally, MSUB recognizes the Foundation as taking the lead role for the philanthropic-related activities described in this Agreement, on behalf of MSUB. The MSUB Chancellor, deans, directors, administrators, other MSUB officials, and MSUB-selected or MSUB-sanctioned volunteers shall work in conjunction with the Foundation administration and staff to develop and steward philanthropic support, constituent engagement, and advocacy of MSUB priorities. MSUB will promptly notify the Foundation of gifts, bequests, and other private charitable support accepted by MSUB.

4.3 Provision of Data. When allowed by law, MSUB shall provide to the Foundation data reasonably requested by the Foundation and deemed necessary by the Foundation for the maintenance and support of the Foundation's efforts under this Agreement.

4.4 Other Services. MSUB will also provide other services at a mutually agreed upon rate. Those services include, but are not limited to, information systems and technologies, property security, custodial services, and facility maintenance.

4.5 Funding. MSUB will provide compensation to the Foundation for Alumni Relations.

#### **Section 5 – Foundation Responsibilities**

The Foundation shall provide services to MSUB as outlined below:

5.1 Alumni, Donor and Prospective Donor Engagement. The Foundation shall be responsible for various programs, services, and initiatives to strategically enhance and expand alumni and donor engagement with, and private support for, MSUB and shall employ, compensate, and evaluate one or more staff member to plan, direct, and implement these efforts.

5.2 – Communications Services. The Foundation shall provide alumni, donor and prospective donor communications related to its efforts and activities. The University's University Relations department will support the Foundation's media relation efforts.

5.3 Gift Acceptance and Acknowledgment. The Foundation shall establish, adhere to, and periodically assess its gift acceptance and fund management policies and procedures. The Foundation will acknowledge and issue receipts for all assets given to the Foundation and provide appropriate

recognition and stewardship of such support. If assets are received by MSUB rather than the Foundation, the Foundation will provide appropriate recognition for such gifts when properly notified by MSUB.

5.4 Constituent Records. The Foundation shall establish and make reasonable efforts to maintain electronic records of donors, alumni and other MSUB constituents. The Foundation shall enforce policies and procedures to comply with all applicable laws and regulations and to protect the confidentiality of Foundation records and the reasonable expectation of privacy attendant to constituent data.

5.5 Accounting Principles. The Foundation shall maintain financial and accounting records in accordance with generally accepted accounting principles or other comprehensive basis of accounting, as approved by an independent auditor.

5.6 Asset Management. The Foundation shall establish and, from time to time, modify asset allocation, disbursement, and spending policies and procedures that adhere to all current and future applicable federal and state laws including the Uniform Prudent Investor Act (UPIA) and the Uniform Prudent Management of Institutional Funds Act (UPMIFA).

The Foundation shall, in compliance with applicable laws and Foundation policies, receive, hold, manage, invest, and disburse contributions of cash, securities, and other forms of property, including the immediate investment of gifts and deferred gifts that are contributed in the form of planned- and deferred-gift instruments.

5.7 Fund Administration and Distribution. The Foundation shall administer private gifts to benefit MSUB and will transfer funds to the designated entity within MSUB in compliance with applicable laws, Foundation policies, MSUB policies, and fund agreements. The Foundation's disbursements on behalf of MSUB must be for reasonable expenses that support MSUB and its programs, are consistent with donor restrictions and intent, and do not conflict with any applicable laws and regulations.

When establishing a new account, the Foundation shall disclose any terms, conditions, or limitations legally imposed by the donor or legal determination on the gift. MSUB will abide by such restrictions and provide appropriate acknowledgement of such terms, conditions, or limitations and documentation of compliance.

5.8 Funding of the Foundation Operations. The Foundation is responsible for establishing a financial plan to pay the costs of the Foundation programs, operations, and services. In addition to the consideration for the services provided under this Agreement, the Foundation has the right to impose reasonable fee assessments on funds established with the Foundation.

From time to time, the Foundation may agree to undertake, for a fee, at the request of the MSUB Chancellor, a major fund-raising campaign extraordinary to the established day-to-day activities of the Foundation.

Except as outlined herein or as otherwise agreed, the Foundation, at its own expense, will provide office space, computers and telephones, adequate personnel, office supplies, and other such equipment and services that may be necessary to fulfill its responsibilities and obligations. In fulfilling this requirement, the Foundation, at its sole discretion, may lease the necessary space and/or equipment from MSUB or another entity.

5.9 Provision of Data. The Foundation shall engage an independent accounting firm annually to conduct an audit of the Foundation's financial records and will provide MSUB with a copy of the annual audited financial statements no later than October 1<sup>st</sup> of each year, as required by Section 901.9 of the Montana Board of Regents of Higher Education Policy and Procedures Manual. Other data shall be provided from time to time to enable MSUB to complete its audited financial statements and fulfill information requests by credit rating agencies. Such information includes, but is not limited to, the Foundation's asset allocation breakdown and investment performance, as well as an annual listing of payments made from the Foundation to MSUB.

5.10 Other Responsibilities. With the explicit approval of the Foundation Board of Trustees, the Foundation may, from time to time, serve as an entrepreneurial instrument for MSUB for purposes including, but not limited to, the purchasing, developing, or managing of real estate for lease by MSUB.

The Foundation may accept licensing agreements and other forms of intellectual property, or engage in other activities to increase Foundation revenue consistent with its mission.

5.11 Salary Supplement. No salary supplements for an MSUB Chancellor will be underwritten by the Foundation without the approval and public disclosure by the Board of Regents. The Foundation may provide an automobile and memberships for the MSUB Chancellor.

5.12 Compliance. In fulfilling these obligations, the Foundation shall comply with applicable state and federal law and its own policies and procedures, including maintenance of by-laws, a conflict of interest policy approved by the Board of Regents and a whistleblower policy for board members, staff, and volunteers and adherence to the requirements of Section 901.9 of the Montana Board of Regents of Higher Education Policy and Procedures Manual.

## **Section 6 – Confidentiality and Access to Information by Other than Foundation Employees**

6.1 Public Documents. The Foundation shall provide access to all public documents of the Foundation including gift acceptance policies, investment and distribution policies, articles of incorporation and corporate bylaws, audited financial statements, and Form 990 Return of Organization Exempt from Income Tax.

6.2 Confidential Information. The Parties agree that confidential information which is not available for public inspection includes, but is not limited to, the following:

- a. Contact information including, but not limited to, addresses, phone numbers, and email addresses for donors or prospective donors;
- b. Records that disclose a donor's or prospective donor's personal, financial, estate planning or gift planning matters;
- c. Records received from a donor or prospective donor regarding such donor's prospective gift or pledge;
- d. Records containing information about a donor or a prospective donor in regard to the appropriateness of the solicitation and dollar amount of the gift or pledge;
- e. Records that identify a prospective donor and/or that provide information on the appropriateness of the solicitation, the form of the gift or dollar amount requested by the solicitor, or the name of the solicitor;
- f. Records disclosing the identity of a donor or prospective donor, including any specific form of gift or pledge that could identify a donor or prospective donor, directly or indirectly, when

- such donor has requested anonymity in connection with the gift or pledge. This does not apply to a gift or pledge from a publicly held business corporation;
- g. Information relating to fundraising plans and/or strategies;
  - h. Trade secret information or information relating to the business of the Foundation which, if released, could create a competitive disadvantage;
  - i. Individual employee information other than name and title;
  - j. Individual student information not otherwise exempted;
  - k. Information relating to trusts and/or annuities administered by the Foundation, except as to the amount of actual gifts to the Foundation from such a trust or annuity; and
  - l. Other information protected by law.

6.3 Access to Confidential Information. When necessary or beneficial to the efficient execution of the Foundation activities, the Foundation may provide access to Foundation data and records to select MSUB personnel on a limited, need-to-know basis in accordance with applicable laws and Foundation policies and guidelines. Such access will not be granted if the Foundation deems that the access will compromise the confidential nature of the Foundation's information and records or the classification of such information and records as trade secrets. Additionally, such access will not be granted if the Foundation deems that the access will compromise or undermine the reasonable expectation of privacy of donors or prospective donors with respect to the information provided to and/or maintained by the Foundation. Any non-Foundation employee with access to the Foundation information shall be held to the highest standard of confidentiality and sign a confidentiality agreement specifically governing such access. If additional licensure is needed to accommodate such access, MSUB will reimburse Foundation for applicable licensure fees.

6.4 If a public records request is made of any University official or employee for any information the Foundation deems confidential, even where there is a signed confidentiality agreement with the Foundation as outlined in section 6.3, the University will give the Foundation twenty (20) business days' notice of the request so that the Foundation can seek a protective order. If a protective order is not secured and the matter not resolved by the Foundation with the requestor, the University may release any relevant requested records without any legal liability to the Foundation.

## **Section 7 – Other Matters**

7.1 Statement of Coordination. This Agreement is intended to contribute to the coordination of the mutual activities of MSUB and the Foundation. To ensure effective achievement of the items of this Agreement, MSUB and the Foundation officers, professionals, and board representatives shall hold periodic meetings to foster and maintain productive relationships and to ensure open and continuing communications and alignment of priorities.

7.2 Implied Covenants. By entering into this Agreement, the Parties acknowledge and accept that this Agreement includes a covenant of good faith and fair dealing. Furthermore, the Parties agree that the responsibilities and duties set forth herein are to be completed in a professional manner and in accordance with applicable professional standards.

7.3 Dissolution. Consistent with the provisions of the Articles of Incorporation of the Foundation, should the Foundation cease to exist or cease to be an IRC Section 501(c)(3) organization, it will transfer its assets and property to MSUB, or its successor. For purposes of this section, a corporate reorganization, merger, or consolidation or renaming of the Montana State University Billings Foundation shall not

constitute a cessation of existence provided the Montana State University Billings Foundation, or its successor, is recognized as the affiliated foundation of Montana State University Billings for the purposes outlined in Section 901.9 of the Montana Board of Regents of Higher Education Policy and Procedures Manual.

7.4 Regent's Approval. This Agreement becomes effective when approved by the Montana Board of Regents. The Parties agree and understand that this Agreement will be reviewed and approved by the Board of Regents every two (2) years.

7.5 Liability Exposure. The Parties understand and agree that the liability of MSUB, its officials and employees, is controlled and limited by the provisions of Title 2, Ch. 9, MCA. Any provisions of this Agreement shall be controlled, limited and otherwise modified to limit any liability of the State of Montana and MSUB to that set forth in the above cited law.

7.6 Insurance. Each Party agrees to be responsible and assume liability for its own wrongful or negligent acts or omissions, or those of its officers, trustees, agents or employees, to the full extent required by law. Each Party agrees to maintain reasonable coverage for such liabilities either through commercial insurance or a reasonable self-insurance mechanism, and the nature of such insurance coverage or self-insurance mechanism will be reasonably provided to the other upon request.

7.7 Termination. This Agreement may be terminated at any time by the mutual written consent of the Parties or termination may be invoked by either Party upon six (6) months written notice to the other.

The Montana State University Billings Chancellor may withdraw recognition of the Foundation as the affiliated foundation of Montana State University Billings. The decision to withdraw recognition of the Foundation may be appealed to the Montana Board of Regents under Section 203.5.2 of the Montana Board of Regents of Higher Education Policy and Procedures Manual.

This Agreement supersedes all previous memoranda of understanding or operating agreements by and between the Parties, or other documents defining and/or controlling the relationship between the Parties.

The Parties have caused this Operating Agreement to be executed by their duly authorized officers as of the date set forth above.

**MONTANA STATE UNIVERSITY BILLINGS:**

\_\_\_\_\_  
By: Ronald Larsen, PhD  
Chancellor

\_\_\_\_\_  
By: Dr. Robert H. Hoar  
Provost & Vice Chancellor for  
Academic Affairs

**MONTANA STATE UNIVERSITY BILLINGS FOUNDATION:**

\_\_\_\_\_  
By: David Warne  
Chair, Board of Trustees

\_\_\_\_\_  
By: Bill Kennedy  
President and CEO