

OPERATING AGREEMENT
between
MONTANA STATE UNIVERSITY BILLINGS
and
MONTANA STATE UNIVERSITY BILLINGS FOUNDATION, INC.

THIS AGREEMENT (“Agreement”), dated as of this _____ day of _____, 2022 by and between Montana State University Billings and the Montana State University Billings Foundation, Inc., a non-profit corporation. This agreement shall be effective upon the date indicated above through January 31, 2024.

RECITALS

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

WHEREAS, the Montana State University Billing Foundation, Inc., d/b/a the Montana State University Billings Foundation and Alumni, (“the Foundation”), is an independent corporation, incorporated in the state of Montana, organized under Section 501(c)(3) of the Internal Revenue Code, and governed by the Articles of Incorporation and Bylaws adopted by the Board of Trustees of the Foundation on June 19, 2019 for the sole purpose of providing support to advance the students, faculty and staff of Montana State University Billings, consistent with the mission and priorities of Montana State University Billings;

WHEREAS, the University recognizes the Foundation as its sole affiliated foundation for the purposes outlined in Section 901.9 of the Montana University System Policy and Procedures Manual: “Campus-Affiliated Foundations”; and

WHEREAS, the University desires an association with alumni and friends and the financial support of private constituencies, and the Foundation exists to cultivate lifelong relationships and secure private support to advance Montana State University Billings, the Foundation shall, for payment:

- Conduct its fundraising operations in a manner that is consistent with the mission and priorities of the University and the Foundation’s fiduciary duty to the University;
- Solicit, receive, hold, prudently invest, administer and manage funds (including both restricted and unrestricted gifts) consistent with the wishes of its donors, and to make expenditures to or for the sole benefit of the University, and with University consent, manage selected University funds and other University resources to the extent permissible by law, provided that such University funds and resources remain identified in Foundation and University records as University assets;

- Employ staff, including a Foundation President/Chief Executive Officer (“the Foundation CEO”), who shall, as a critical part of his or her duties and responsibilities, communicate effectively and regularly with the MSUB Chancellor to ensure clear understanding of the MSUB Chancellor’s funding priorities, and shall work cooperatively and diligently to advance those priorities, along with periodic requests for the campus made by the MSUB Chancellor, that can lawfully be fulfilled.
- Engage and nurture lifelong relationships with graduates, friends, parents, faculty, staff, retirees and other constituencies that seek a meaningful association with the University.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and commitments of the University 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 to the following terms:

1.0 University Name, Seal and Logotype

Consistent with its mission to help advance the plans, priorities, and objectives of the University, the Foundation is granted the use of the name Montana State University Billings and is granted the use of the University’s seal, core logo, affiliated logos and marks according to the University’s Graphic Identity and Branding Policy until such time as the Foundation dissolves, the Foundation ceases to be recognized as a tax exempt organization, or the MSUB Chancellor withdraws recognition of the Foundation consistent with Section 6.5.

At all times, the Foundation will operate under its own seal and logotype and shall not use the University seal in the promotion of Foundation business or activities unless separately approved.

2.0 Relationship Between the University and the Foundation

The University and the Foundation mutually agree that the relationship between the Parties is of paramount importance to the ongoing and future success of both the University and the Foundation. As such, the Parties are equally committed to developing and maintaining a close relationship through open communication, trust, and cooperation.

In furtherance of this relationship, the MSUB Chancellor and the Foundation CEO shall meet regularly and communicate frequently to ensure the University’s priorities, along with the duties and responsibilities outlined herein, are well-coordinated and achieved.

The MSUB Chancellor is responsible for communicating the University’s priorities and long-term plans to the Foundation on a regular basis. The MSUB Chancellor shall be provided an opportunity at least once per quarter to discuss campus needs and priorities

with the Foundation Board and CEO.

The Foundation shall support the University and respective programs through the services outlined in Section 4 (Foundation Responsibilities), to the extent allowed by law, unless the Parties agree otherwise and when modified by an attachment to this Agreement. The Foundation shall ensure that all fundraising activities are consistent with the stated goals and priorities of the University and the Foundation shall not solicit or accept gifts that are inconsistent with such goals and priorities. Likewise, the University will ensure that its fundraising activities do not compete with the Foundation's fundraising activities.

The University recognizes that the Foundation is a private, independent corporation with the authority to keep its records confidential from public records requests, conduct its affairs under the direction of the Foundation Board of Trustees, and fulfill its mission to support the University according to laws applicable to private, non-profit corporations. While recognizing this independence of operations, the Parties acknowledge that the conduct of the Foundation can have significant effects on the financial and reputational interests of the University. Therefore, and with the exception of information provided to the Foundation Board of Trustees in executive session, the MSUB Chancellor shall have access to all information otherwise available to the Foundation Board of Trustees in order to evaluate and anticipate potential impacts on the University. Following any executive session, the Foundation Board Chair shall provide a summary to the Chancellor regarding the nature of the discussion and any actionable outcome.

The Foundation President/CEO shall be included as a member of the Jacket Leadership Team. At the MSUB Chancellor's discretion, the Foundation President/CEO shall be included as a member of the Chancellor's executive cabinet, University council, and other appropriate teams as necessary to build, nurture, and maintain a deep and effective strategic partnership between MSUB and the Foundation.

Inclusion or and participation by the Foundation CEO in any MSUB councils, teams, or other groups by the MSUB Chancellor shall be for the purposes of strategic planning, communication, and cooperation between the Foundation and the University. Said inclusion and participation, shall not create an employment relationship, whether express or implied, between the Foundation CEO and the University. The University shall have no authority, express or implied, to hire, fire, or set the compensation for the Foundation CEO.

The Foundation CEO shall be accountable for effectively communicating with the MSUB Chancellor and campus leadership, timely and responsive reports on the University's funding priorities, including implementation plans and completion status, and alerting the MSUB Chancellor of significant decisions, relating to personnel or otherwise, that may impact the Foundation's work under this agreement.

The MSUB Chancellor shall serve as an ex-officio, non-voting member of the Foundation Board of Trustees and shall assume a prominent role in appropriate constituent-related activities. As an ex-officio, non-voting member of the Board of Trustees, the MSUB

Chancellor shall be provided an opportunity to provide input and recommendations for candidates for the Foundation Board of Trustees. The MSUB Chancellor will be provided the opportunity to provide regular and meaningful feedback on the performance of the Foundation through quarterly meetings with the Foundation CEO. The MSUB Chancellor will also be provided the opportunity to provide meaningful feedback on the performance of the Foundation CEO through the annual evaluation process set forth in the Foundation's Bylaws. Outside of the formal evaluation process, the Chancellor shall bring concerns to the Executive Committee of the Foundation Board of Trustees.

Except with respect to information provided to the Foundation Board of Trustees in executive session, all ex-officio members shall be provided with the same information and access provided to regular members of the Governing Board, including meeting notification, agendas, supporting documents, and the right to attend all meetings with the exception of executive session meetings.

The Foundation Board of Trustees is solely responsible for the control and management of all assets of the Foundation and is responsible to ensure that all gifts made to the Foundation are managed prudently, consistent with donor intent, and according to all applicable laws.

The Foundation is solely responsible for the performance and oversight of all aspects of its operations based on a comprehensive set of bylaws that clearly address its Board of Governor's fiduciary responsibilities, including expectations of individual board members based upon legal and ethical guidelines and policies.

The Foundation is solely responsible for the employment, compensation, and evaluation of its employees, including the Foundation CEO. The MSUB Chancellor shall be consulted as part of the normal evaluation process for the Foundation CEO. As part of the evaluation process, the Chancellor may make inquires of other University personnel to provide input as part of the Chancellor's evaluation.

The Foundation is responsible for various programs, services, and initiatives to strategically enhance and expand alumni engagement with MSUB ("Alumni Relations"). As part of this responsibility, the Foundation will oversee the operation of the MSUB Alumni events upon mutual acceptance of an operating agreement.

3.0 University Responsibilities

The University shall provide all services and attendant fees to the Foundation as outlined below:

- 3.1 **Funding Priorities.** At least annually, the MSUB Chancellor will communicate to the Foundation CEO the University's current private funding priorities. The University shall rely upon the Foundation, or its designee, to help assess the private funding feasibility of each. The Foundation shall diligently pursue the University's funding priorities and shall avoid activities that conflict with those priorities.

- 3.2 **Integrated Advancement.** The University will actively coordinate its communications, internal relations, and external relations activities with the Foundation to develop a culture within the University's students, faculty, alumni, and friends that encourages engagement and private support.
- 3.3 **Consideration.** In consideration for the Foundation's services including but not limited to the responsibilities listed in Section 4 (Foundation Responsibilities), the University will provide the Foundation with fair and reasonable payment for services as negotiated by the Parties. The consideration for this contract term is included as **Attachment A**.
- 3.4 **Donor, Alumni, and Constituent Related Activities.** The University shall support the Foundation's processes relating to philanthropic, alumni, and constituent related activities that seek and solicit private support and advocacy to benefit the University. The Parties shall coordinate to conduct these activities in compliance with each Party's applicable policies.

Additionally, the University recognizes the Foundation as having sole responsibility for the constituent related activities described in this Agreement, on behalf of the University. The MSUB Chancellor, deans, directors, appropriate administrators, other University officials, and University-selected or University-sanctioned volunteers shall work in conjunction with the Foundation administration and staff to cultivate relationships, coordinate efforts, and secure private support.

- 3.5 **Provision of Data.** When and to the extent allowed by law, the University shall provide to the Foundation any constituent or other data reasonably requested by the Foundation and upon demonstration of necessity by the Foundation for the maintenance and support of the Foundation's efforts under this Agreement.
- 3.6 **Other Services.** The University will also provide other services at a mutually agreed upon rate. If the Foundation requires additional or external services, the University and the Foundation may agree to terms relating to such services under a separate agreement. Those services include but are not limited to, information systems and technologies, property security, custodial services, facility maintenance, and special events.

4.0 Foundation Responsibilities

- 4.1 **Alumni and Volunteer Relations.** The Foundation shall be responsible for various programs, services, and initiatives to strategically enhance and expand alumni engagement with the University ("alumni relations") and to enhance and expand volunteer advocacy in support of the University ("volunteer relations").
- 4.2 **Donor Relations.** The Foundation shall be responsible for various programs, services, and initiatives to strategically enhance and expand donor engagement with and private support for the University ("donor relations").

- 4.3 **Event Services.** The Foundation shall provide event planning and management services in support of the Foundation's programs. The Foundation may coordinate events planned by and/or hosted by other University-related offices when those events are in support of alumni engagement or donor relations.
- 4.4 **Withdrawal of funding.** Any potential withdrawal of funding for an ongoing campus activity will be discussed with the MSUB Chancellor and Foundation CEO prior to the Foundation making a final decision on any potential withdrawal of funding.
- 4.5 **Communications Services.** The Foundation shall provide constituent-related communications services to the University upon request and when related to the Foundation's efforts and activities.
- 4.6 **Gift Acceptance and Acknowledgment.** The Foundation will establish, adhere to, and periodically assess its gift acceptance and fund management policies and procedures. The Foundation will promptly acknowledge and issue receipts for all assets given to the Foundation and provide appropriate recognition and stewardship of such support. The Chancellor will also be informed within a reasonable time of when gift acceptance and acknowledgment occur.
- 4.7 **Constituent Records.** The Foundation shall establish and enforce policies and procedures to comply with all applicable laws and regulations and to protect the confidentiality of the Foundation information and the reasonable expectation of privacy attendant to constituent data.
- 4.8 **Asset Investment.** When the University deposits funds with the Foundation for investment purposes, the Foundation may comingle those funds with the Foundation's funds and other funds held by the Foundation in a pooled investment portfolio ("pooled investments"). In doing so, it is mutually understood that:
- A. the University retains ownership of University funds;
 - B. the Foundation is authorized to invest the University funds in the same manner as other Foundation funds;
 - C. University funds are subject to the Foundation's administrative fees in accordance with the Foundation's fund administration policies;
 - D. University funds may be pooled with the Foundation's institutional funds and other funds for the purpose of participating in the pooled investments;
 - E. there is no trust relationship between the University and the Foundation, express or implied;
 - F. pooled investments are invested in accordance with the Foundation's investment policy;
 - G. there is an inherent risk involved with investing that is beyond the control of the Foundation, including the potential for loss of the University's principal in the initial investment, loss of subsequent deposits, loss of interest or

- appreciation, and loss of other financial gains;
- H. neither party is obligated to offer or accept investment advice to or from the other party;
- I. the Foundation has not and does not hold itself out as an investment advisor or as a professional investment corporation; and
- J. the University representative for all matters relating to the investment of University funds by the Foundation is the MSUB Chancellor or his or her designee.

For all University funds invested by the Foundation, the Foundation shall provide periodic summaries and confirmations of balances of University funds as may be requested or required. The Foundation shall make its fund administration and investment policies publicly available and provide the University an opportunity to provide feedback on any proposed policy change.

Upon written notice from an authorized University administrator requesting withdrawal of University funds from the pooled investments, the Foundation will withdraw the funds within a reasonable length of time such that removal of the funds may be completed without adversely affecting the remaining investment portfolio.

- 4.9 **Asset Management.** The Foundation will 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), as amended or modified from time to time.

The Foundation will 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.

- 4.10 **Fund Administration and Distribution.** The Foundation will administer private gifts to benefit the University and will transfer funds to the designated entity within the University in compliance with applicable laws, University policies, fund agreements, and donor restrictions.

The Foundation's disbursements on behalf of the University must be for reasonable expenses that support the University and its programs, are consistent with donor intent, and do not conflict with any applicable laws, regulations or University Policy.

When establishing a new fund, the Foundation will disclose to the University any terms, conditions, or limitations legally imposed by the donor or legal determination on the gift. The University will abide by such restrictions and

provide appropriate acknowledgment of such terms, conditions, or limitations and documentation of compliance.

4.11 **Provision of Financial Data.** The Foundation will engage an independent accounting firm annually to conduct an audit of the Foundation's financial records and will provide the University with a copy of the annual audited financial statements no later than 01 October of each year, as required by Board of Regents' Policy 901.9. Other data shall be provided from time to time to enable the University 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, detailed listing of payments made from the Foundation to the University.

4.12 **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 gift and management fees. The Foundation shall provide the University with at least six (6) months' notice of any change in gift and management fees. Under no circumstances will the Foundation use net investment income or retained earnings from subsidiary organizations to pay for, or reimburse itself, for Foundation operating costs. All investment earnings, including those from real estate and all other asset classes, will be reinvested for the benefit of MSUB or disbursed to the University in accordance with any restrictions associated with that asset.

Except as outlined herein or as otherwise agreed, the Foundation, at its own expense, will recruit, employ, and retain personnel and provide office space, computer and telephone systems, utilities, office supplies, and other such services that may be necessary or required to fulfill its responsibilities and obligations.

4.13 **Other Responsibilities.** With the explicit approval of the Foundation Board of Trustees, the Foundation may from time to time serve as an instrument for entrepreneurial activities for the University including but not limited to the purchasing, developing, or managing of real estate for the University, as well as University-related improvements or expansion.

The Foundation may accept licensing agreements and other forms of intellectual property, borrow or guarantee debt issued by third parties, or engage in other activities to increase the Foundation revenue consistent with its mission.

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

Based on budget allocation, Foundation Grants will be awarded to MSUB

faculty/staff for student-centered projects. The Provost and Chancellor at MSUB will initially review and make recommendations to the Foundation Board subcommittee. Foundation Board of Trustees will then establish a sub-committee quorum and vote on funding approval. Final decision will incorporate application's merit, feedback provided by MSUB leadership, funding available, and Foundation mission and strategic initiatives.

- 4.14 **Subsidiaries and Separate Units.** The Foundation may, from time to time, establish subsidiaries and separate units for specific purposes consistent with this MOU. The Foundation will establish controls and/or management oversight to ensure the mission and goals of the Foundation are supported by all units and subsidiaries of the Foundation.
- 4.15 **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.
- 4.16 **Compliance.** In fulfilling these obligations, the Foundation shall comply with applicable state and federal law and its own policies and procedures, including maintenance of bylaws, 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.
- 4.17 **MSUB Foundation and Grants and Sponsored Programs.** Donors and gifts to MSUB are to be directed to the Foundation, while sponsored programs and grants are the responsibility of MSUB's Office of Grants and Sponsored Programs. **Attachment B** contains a description to assist in determining under which category a receipt of funds lies. In seeking external funding, university faculty and staff shall coordinate their activities with the appropriate entity. The Parties shall coordinate directing requests to the appropriate entity.

If there is a question regarding classification of external funding as to grant, contract, or gift and who should have primary responsibility for the management and reporting thereof, the MSUB Chancellor (or designee) will resolve the issue.

Gifts which are accepted by the Foundation are accepted and monitored in accordance with Foundation policies and applicable laws governing non-profit 501(c)3 entities. Gifts which are accepted by MSUB are accepted and monitored in accordance with University guidelines and Board of Regents' Policy 901.7 Donations. University leadership and staff must collaborate with the MSUB Foundation to ensure that funds are expended in accordance with donor intent, as required by law.

5.0 Confidentiality and Access to Information by Other than Foundation Employees

The Foundation will provide access to all public documents of the Foundation including:

- 5.1 Policies and procedures documentation, including:
 - A. Gift Acceptance Policy,
 - B. Investment Policy,
 - C. Disbursement Policy for MSUB and Affiliated Organizations, and
 - D. Other relevant accountability policies
- 5.2 Organizational documents, including articles of incorporation and corporate bylaws;
- 5.3 Audited financial statements; and Form 990, Return of Organization Exempt from Income Tax.

The Foundation maintains that confidential information, which is not available for public inspection includes, but is not limited to, the following:

- 5.4 Information relating to Foundation constituents:
 - A. Contact information including, but not limited to, addresses, phone numbers, and email addresses;
 - B. Records and portions of records that disclose personal, financial, estate planning or gift planning matters;
 - C. Records and portions of records regarding a prospective gift or pledge;
 - D. Records and portions of records regarding the appropriateness of a solicitation and/or dollar amount of a gift or pledge;
 - E. Record and portions of records disclosing the identity of an alumnus, donor, or prospective donor or that could identify an alumnus, donor, or prospective donor, directly or indirectly, when such donor has requested anonymity in connection with a gift or pledge. This does not apply to a gift or pledge from a publicly held business corporation.
- 5.5 Information relating to fundraising plans and strategies;
- 5.6 Trade secret information and information relating to the business of any the Foundation subsidiary which, if released, could create a competitive disadvantage;
- 5.7 Foundation employee information including, but not limited to, compensation and benefits, except as required by law;
- 5.8 Individual student information not otherwise exempted;
- 5.9 Information relating to trusts and annuities administered by the Foundation, except as to actual gifts to the Foundation from such a trust or annuity; and
- 5.10 Other information protected by law.

When necessary or beneficial to the efficient execution of the Foundation activities, the Foundation may provide access to the Foundation data and records to select University personnel on a limited, need-to-know basis in accordance with applicable laws and Foundation policies and guidelines. Providing such access shall not negate the confidential nature of the Foundation's information and records or the classification of such information and records as trade secrets. Additionally, providing such access does not undermine the reasonable expectation of privacy of donors, prospective donors, or any other individual or entity with respect to the information provided to and/or maintained by the Foundation. Any individual, including anyone not employed by the Foundation, with access to Foundation data, records, and information, shall be held to the highest standard of confidentiality, shall sign a confidentiality agreement specifically governing such access, and shall adhere to all relevant Foundation policies and processes regarding the acceptable use of data and information.

- 5.12 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 5.11, 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.

6.0 Other Matters

- 6.1 **Winding Up Upon Dissolution.** Consistent with the provisions of the Bylaws and Articles of Incorporation of the Foundation, should the entity cease to exist or cease to be an IRC § 501 (c)(3) organization, it will transfer its assets and property to the University or the assignee chosen by the University. Any transition to the University or its assignee will occur on an agreed upon reasonable timetable designed to minimize donor disruption and any potential tax issues. If a time table cannot be agreed upon within the first ninety (90) days of a termination notice as outlined in section 6.5 the matter will be resolved through mandatory mediation using a mediator from the American Arbitration Association. For purposes of this section, a corporate reorganization, merger, or consolidation or a renaming of the Foundation shall not constitute a cessation of existence provided the 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 University System Policy and Procedures Manual.
- 6.2 **Regent's Approval.** This Agreement is not effective until 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. The Parties agree and understand that this Agreement will be in effect from April 1, 2022 through January 31, 2024.

6.3 **Liability Exposure.** The Parties understand and agree that the liability of the University, its officials and employees, is controlled and limited by the provisions of Title 2, Chapter 9, of the Montana Code Annotated. Any provisions of this Agreement shall be controlled, limited and otherwise modified to limit any liability of the State of Montana and the University to that set forth in the above-cited law.

6.4 **Responsibilities of Parties**

- A. Each party agrees to be responsible and assume liability for its own wrongful or negligent acts or omissions, or those of its officers, agents or employees, to the full extent required by law.
- B. 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.

6.5 **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. In the event of termination, the University's financial obligation shall end six (6) months after the termination notice is received or on the last day of the fiscal year in which termination occurs, whichever is later. If termination results in dissolution of the Foundation, the parties shall follow the provisions of section 6.1, above. If necessary, to ensure a smooth transition of the assets, the former deadlines may be extended by the University as outlined in section 6.1. In the absence of termination notice, this Agreement shall be automatically renewed year to year under the same terms as set forth in this Agreement.

For reasonable cause, the Chancellor may withdraw recognition of the Foundation as the affiliated foundation of Montana State University Billings after consultation with the Commissioner of Higher Education and written notice to the members of the Montana Board of Regents. 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 the previous Memorandum of Understanding entered into by the Parties and approved by the Board of Regents in January 2020.

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

Signed and agreed to this _____ day of _____, 2022 by:

MONTANA STATE UNIVERSITY BILLINGS

**MONTANA STATE UNIVERSITY BILLINGS
FOUNDATION, INC.**

d/b/a Montana State University Billings
Foundation and Alumni

By: _____
Chancellor Stefani Hicswa

By: _____
Chairman of the Board Don Roberts