

LIEBERT CASSIDY WHITMORE

MEMORANDUM

CONFIDENTIAL AND ATTORNEY-CLIENT PRIVILEGED

DATE: November 11, 2015 **CLIENT-MATTER NO.:** MA090/016
TO: David Wain Coon, Ed.D., Superintendent/President
FROM: Christopher M. Fallon
RE: Process to Convert an Independent Foundation into an Auxiliary Organization

You asked us to set forth the process the Marin Community College District should follow to convert the College of Marin Foundation into an auxiliary organization. It is our understanding that the Foundation is a non-profit public benefit corporation which is currently independent from the District. (Corp. Code §§ 5110-6910.) The Foundation may choose to seek affiliation with the District by becoming an auxiliary organization.

Auxiliary status requires a non-profit foundation to enter into a contractual relationship with the District, under which the Foundation agrees to comply with the rules and regulations specified in the Education Code and Title 5. The agreement to comply with these rules and regulations must also be incorporated into the foundation's governing documents.

The Education Code and Title 5 requirements provide a community college district with a limited amount of oversight, responsibility, and control over an auxiliary foundation. This is a stark difference from the requirement that community college districts exert no control over independent foundations. Auxiliary organizations are still, however, non-profit corporations. Their activities and affairs are under the direction of its board of directors.

The following chart provides a side-by-side comparison of requirements and limitations between auxiliary and independent foundations.

AUXILIARY FOUNDATION	INDEPENDENT FOUNDATION
Purpose must be to promote or assist a community college. (Title 5 § 59250(a); Ed. Code § 72670(d)(1).)	Purpose can be for any charitable purpose consistent with IRC Code 501(c)(3).
Gifts, funds, and property received must be used for the benefit of the community college. (Title 5 § 59250 et. seq; Ed. Code § 72670(d)(1).)	Expenditures may be for any purpose not prohibited by the Internal Revenue Code and not prohibited by the organization's bylaws.

Can perform only those functions authorized in Title 5, section 59259: providing activities that are an integral part of the community college educational program, e.g., scholarships, alumni activities, and public relations.	Can carry on any activities not prohibited under the Internal Revenue Code.
Audit must meet Title 5, California State Department of Finance, and IRS regulations and standards. Must provide audit report to district. (Ed. Code, § 72672.)	Audit must meet IRS standards. Not required to provide audit report to district.
Auxiliary's board members are subject to approval of the district's governing board. (Ed. Code § 72670(d)(2).)	Selection of board members governed solely by organization's bylaws.
Required to have the services of a CPA and an attorney. (Ed. Code §§ 72672, 72674.)	No requirement for CPA or legal services.
CEO of district is responsible for ensuring that all expenditures are in accordance with policies of the district governing board, the propriety of all expenditures, and the integrity of financial reporting. (Title 5; Ed. Code § 72672(b).)	Expenditures subject to approval of foundation's governing board.
Auxiliary foundation must fully reimburse district for services performed by district employees. Up to 50 percent of the reimbursement may be in the form of non-monetary benefits that the auxiliary provides to the district, such as increased community awareness. (Title 5, § 59257(j)(6).)	District cannot provide publicly funded financial support (or services provided by district employees) to independent foundations. (Cal. Const. Art. XVI, § 6.) District can enter into a contract with an independent foundation that provides for a quid pro quo exchange of consideration between the parties.

Once a foundation is recognized as an auxiliary organization, it may provide only the following functions or services to a community college district:

- (a) Student association or organization activities;
- (b) Bookstores;
- (c) Food and campus services;

- (d) Student union programs;
 - (e) Facilities and equipment;
 - (f) Loans, scholarships, grants-in-aid;
 - (g) Workshops, conferences, institutes, and federal projects;
 - (h) Alumni activities;
 - (i) Supplementary health services;
 - (j) Gifts, bequests, devises, endowments and trusts; and
 - (k) Public relations programs.
- (5 CCR §§ 59259 & 59255, subd. (c).)

Moreover, the Superintendent/President of a community college district must ensure that all of the auxiliary organization's expenditures are proper and in accordance with the community college district's policies. The Superintendent/President must also determine the integrity of the auxiliary organization's financial reporting. (Ed. Code, § 72672, subd. (b).)

Process to Convert a Nonprofit Foundation into an Auxiliary Organization

The District and Foundation must take the following steps to convert the Foundation into an auxiliary organization:

- 1) College of Marin Foundation Board should meet and vote to propose to the District's Board of Trustees that the COMF become an auxiliary of MCCCD
- 2) Marin Community College District Board should meet and act on COMF Board's recommendation
- 3) District must prepare and adopt Implementing Regulations
- 4) Chancellor's Office must approve Implementing Regulations
- 5) Foundation must update its governing documents
- 6) District and Foundation must enter into a written Master Agreement
- 7) District Board must recognize Foundation at public hearing
- 8) District must submit Master Agreement and revised Foundation governing documents to the Chancellor's office.

We provide the following details regarding these six steps:

1) Implementing Regulations

The District's Board must establish and adopt Implementing Regulations applicable to auxiliary organizations prior to recognizing any auxiliary organizations. (5 CCR §§ 59255, subd. (a) & 59257; Ed. Code, § 72672, subd. (c).) Implementing Regulations must include provisions which do the following:

1. Establish the District's method for recognizing an auxiliary organization, which must include a public hearing prior to the recognition. (5 CCR § 59257, subd. (a).)
2. Establish an accounting and reporting system for the management and operation of auxiliary organizations, including retaining a certified public accountant to perform annual and publicly distributed audits in accordance with the procedures prescribed by the Board of Governors of the California Community Colleges. (Ed. Code, §§ 72672, subd. (a) & 72675, subd. (b); 5 CCR § 59257, subd. (d).)
3. Establish financial standards and recordkeeping responsibilities that will ensure the fiscal viability of auxiliary organizations, including professional management, adequate working capital, and adequate reserves. (Ed. Code, § 72675, subd. (b); 5 CCR § 59257, subd. (g).)
4. Establish procedures to ensure that transactions of the auxiliary organizations are within the educational mission of the District. (Ed. Code, § 72675, subd. (b).)
5. Limit auxiliary organizations to performing permitted and recognized functions and services. (5 CCR §§ 59259, 59255, subd. (c), & 59257, subd. (b).)
6. Provide for the periodic review of the auxiliary organization by the District for compliance with Education Code and Title 5 requirements, District regulations, the written agreement with the District, and the auxiliary organization's Articles of Incorporation and Bylaws. (5 CCR §§ 59257, subd. (h) & 59265, subd. (d).)
7. Prohibit the District from transferring funds from sources other than gifts to auxiliary organizations for the purpose of avoiding laws or regulations that constrain community college districts or provide the District with an unfair advantage with respect to any state funding mechanism. (5 CCR § 59257, subd. (i).)
8. Establish the function of the auxiliary organization, state the reason for the auxiliary to perform the function instead of the District, and specify the respective areas of authority and responsibility of the auxiliary organization and the District. (5 CCR § 59257, subds. (j)(1)-(j)(3).)
9. Establish District facilities to be made available, if any, to the auxiliary and the charge to be paid by the auxiliary organization for use of the facilities. (5 CCR § 59257, subds. (j)(4) & (j)(5).)
10. Require auxiliary organization to reimburse the District fully for services performed by District employees under direction of the auxiliary organization. No more than 50 percent of the reimbursement may be made in the form of non-monetary benefits. Non-monetary

benefits shall be assigned a good-faith reimbursement value by the District. (5 CCR § 59257, subd. (j)(6).)

11. Require the auxiliary organization to pay for maintenance and operating expenses. (5 CCR § 59257(j)(8).)

12. Establish a method to determine the extent the auxiliary organization is liable for indirect costs related to federally-sponsored programs. (5 CCR § 59257, subd. (j)(7).)

13. Require a designee named by the auxiliary organization's board of directors to file a statement with that board on the auxiliary organization's policies on accumulation of public relations funds, the purposes for which the funds will be used, and the procedures for control over expenditures of the funds. (5 CCR § 59257, subd. (j)(9).)

14. Require a covenant of the auxiliary organization to maintain its existence throughout the period of the written Master Agreement and to operate in accordance with Education Code and Title 5 requirements, and the District's implementing regulations regarding auxiliary organizations. (5 CCR § 59257, subd. (j)(12).)

15. Establish the size and meetings of the auxiliary organization's board of directors and that directors are either appointed or nominated by, or subject to the approval of, the governing board of the District, an official of the District, or selected ex officio from the membership of the student body or the faculty or the governing board or the administrative staff of the District. (5 CCR § 59257, subd. (c); (Ed. Code §§ 72670, subd. (d)(2) & 72674.)

16. Establish the disposition of the auxiliary foundation's net earnings from operation of facilities, provisions for reserves, and the disposition of net assets upon cessation of operations. (5 CCR § 59257, subd. (j)(10) & (j)(11).)

17. Establish that the auxiliary organization must comply with District regulations requiring the auxiliary organization to provide salaries, working conditions, and benefits for its full-time employees comparable to those provided by the District for its employees performing similar services. (5 CCR § 59257, subd. (e); Ed. Code, § 72672, subd. (c).)

18. Establish that all auxiliary organization expenses must be approved by the auxiliary organization's board of directors; however, expenditures outside of the normal business operations of an auxiliary organization must be approved by a District officer designated by the District's Board of Trustees. (5 CCR § 59257, subd. (f); Ed. Code, § 72675, subd. (a).)

2) Chancellor Approvals of Implementing Regulations

The Implementing Regulations must be reviewed and approved by the State Chancellor's Office before the District may recognize an auxiliary organization. (5 CCR §§ 59255, subd. (b), 59257; Ed. Code, § 72672, subd. (c).) The Chancellor's office will approve or deny the implementing regulations no later than 60 days after receipt. (5 CCR § 59272.)

3) Foundation's Revised Governing Documents

The Foundation must revise its Articles of Incorporation and Bylaws to reflect that its specific purpose is to advance the interests and promote the welfare of the District. The Bylaws must also provide that upon dissolution, liquidation, or winding up of the Foundation, its remaining assets, after settling its debts and liabilities, will be distributed to the District's Board to be used for the benefit of the District.

The Foundation will need to file a certificate of amendment of its Articles of Incorporation with the Secretary of State. This certificate must set forth the amended Articles of Incorporation and that the Foundation's Board approved this amendment. (Corp. Code, § 5184.) The Foundation does not need to submit amended bylaws to the Secretary of State.

4) Written Master Agreement

After the Chancellor has approved the District's Implementing Regulations, and the Foundation has revised its Governing Documents, the District and the Foundation must enter into a written Master Agreement. (5 CCR § 59251, subd. (b).) The Master Agreement will set forth any required Implementing Regulations provisions which require additional detail or were not included in those regulations. This agreement will establish the relationship between the parties and the District's authority and control over the Foundation, including selection the Foundation's directors. This agreement will also identify the specific functions and services the Foundation will provide the District.

5) Board Approvals

The District's Board must set a public hearing to recognize and approve the establishment of any auxiliary organization. (5 CCR §59255, subd. (d).) At this public hearing, the Board must announce its decision concerning the recognition of the Foundation as an auxiliary organization. The Board must also ratify and approve the written Master Agreement.

6) Submission of Documentation to the Chancellor's Office

After the District's Board has recognized the Foundation as an auxiliary organization, the District must submit the written agreement and copies of the Foundation's Articles of

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Incorporation, Bylaws, or other governing documents to the State Chancellor's Office. (5 CCR §§ 59255, subd (e).)

District's Next Steps

In the short term, the District must do the following to convert the Foundation into an auxiliary organization:

- 1) Prepare Implementing Regulations;
- 2) Revise the Foundation's Articles of Incorporation and Bylaws; and
- 3) Prepare a written Master Agreement.

Please let us know if we may be of assistance in preparing or revising these documents for the District and the Foundation. As you know, we have assisted other districts with similar conversions. Our experience will prove beneficial. In addition, the Community College League of California's Policy and Procedure service has a template for the implementing regulations. Since your District subscribes to that service, that template will significantly reduce the work required for that step.