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DATE: December 11, 2017

TO: Lisa Hoferkamp, Chair, Faculty Alliance

FROM: James R. Johnsen, President 

SUBJECT: Establishment of a Faculty Regent

I am writing in response to your November 20, 2017, memo to the Board of Regents regarding the Faculty Alliance's interest in promoting legislation to establish a faculty regent. I appreciate your sharing this interest with me and, in turn, the opportunity to communicate with you my thoughts on the matter.

Because I believe a number of problems would be created by requiring an employee-regent, and because the mere introduction of such legislation quite possibly will have unintended negative consequences, I am writing to ask that Faculty Alliance carefully consider the following issues before proposing or supporting such a bill. These issues include creation of constituencies or special interests on the Board, employee-board member conflicts of interest,¹ and constitutional concerns. These are explained in turn.

Creating Board Constituencies/Special Interests - Historically the Board has expressed concern about efforts to create specific constituencies on the Board of Regents. In 2016 the Governor vetoed HB 107 after considering Board concerns. That legislation would have created regional constituencies by requiring that the governor appoint six of the 11 member Board of Regents from specified geographic areas of the state.² The Board's concern regarding creating regional constituencies was expressed as follows:

The different constituencies served by each of the three separately accredited universities (UAA, UAF, UAS) and their community campuses make collaboration a challenge in the best of times. Yet collaboration on the board and among these components of the UA System is critical to making the best use of limited resources and serving the public effectively. The Board of Regents has committed itself and tasked the entire UA system to collaborate to create a cost-

¹ A 2010 article from the Association of Governing Boards of Universities and Colleges states: "AGB generally doesn't support the inclusion of students or faculty as voting board members because of the inherent conflict of interest, especially for an employee, in serving on his or her own institution's board."

<https://www.agb.org/trusteeship/2010/julyaugust/board-composition-student-and-faculty-trustees>

² At present all but one (the student seat) of 11 board seats are appointed at large by the governor, subject to Legislative confirmation.

effective, integrated, state-wide system of higher education that works for students and the public. Because regents have focused on serving the broad interests of the entire state, the board has been united in support of that overarching interest. As a result, the three universities are making important strides in areas including common academic calendars and general education requirements. President Johnsen's Strategic Pathways framework will require even greater collaboration across the system. We fear that in mandating representation of specific regions, HB 107 will create regionalism on the board that may pose additional barriers to collaboration.³

Legislative efforts to add an employee-regent, who represents a specific constituency - faculty, seems likely to provoke renewed efforts to provide geographic representation on the Board. The legislators who passed HB 107 likely would find it unacceptable to provide employee representation while not addressing geographic representation. This issue is not posed by the student regent for the reasons discussed below as well as the fact that that legislation adding the student regent has been in place for many years.

Conflicts of Interest - Employee-regents, whether faculty or staff, would have broad and pervasive financial and political conflicts of interest. Employee interests will be negatively affected by many of the difficult decisions the Board is called upon to make in fiscally challenging times. While some may argue that the student regent has a similar conflict, the student regent represents students, the University's primary reason for being. UA's broad interests must largely align with those of the students it serves. A faculty-regent who is expected to represent faculty interests and perspectives, will find it difficult to support difficult decisions that negatively impact faculty.

Employee regents also would create structural conflicts. They would at least indirectly be supervised by the president⁴ and chancellors, awkward at best should performance or conduct problems arise; they would have some measure of supervisory authority over the president; and would arguably need to be excluded from executive sessions and action on difficult decisions to reduce University programs/employees, the very issues in which their constituents would most want them involved. Finally, adding even one more regent means that it will take seven votes to make difficult decisions.⁵

Constitutional Issues – Legislation requiring the governor to appoint employee-regents may create constitutional disputes that would leave the Board in limbo and unable to take effective action.⁶ Article 7, § 3 of Alaska's Constitution requires that the governor's appointments to the

³ July 15, 2016, letter to Governor Walker.

⁴ I note that the president is not a member of the board.

⁵ AS 14.40.200 requires a majority of the full board to approve any action.

⁶ These concerns are reflected in a September 10, 2014, opinion of Legislative Council on HB 107 (Work Order No. 28- LS1798,) which states in part:

The constitutional authority of the legislature to restrict or otherwise control the qualifications of a regent is the subject of considerable debate and raises a possibility of a separation of Powers

Board of Regents be confirmed by the Legislature. However, the constitution does not limit whom the governor may appoint or make the governor's appointment authority subject to law. Requiring employee-regents responds to the concerns of a particular interest group,⁷ a group whose private interests may diverge from the public interest. By contrast, prior statutory provisions regarding regent appointments generally have provided broad and uncontroversial implementation details consistent with the constitutional provision.⁸

Employee-regent requirements that result in disputes may delay appointments. Delays alone could limit the Board's ability to act since by law six (or seven or eight, depending on the number added) votes are required for Board action. If rejection of a governor's appointees is based on employee requirements, litigation is likely. In either case, the existence of constitutional questions would have real world implications for the University and the state. Any uncertainty about the qualifications of appointees or composition of the Board could directly interfere with the University's ability to take action requiring Board approval. These include among other things selling bonds, hiring a president, conferring degrees, adjusting tuition, setting policy, adopting budgets, and selling or purchasing property.

The Board also must authorize any declaration of financial exigency and reduction or discontinuation of academic programs. These are actions that permit the University to reduce faculty and staff without the constraints or notice periods typically required. Parties dissatisfied with Board decisions in such areas will have significant incentive to seize on any uncertainty regarding Board authority, and use that uncertainty to delay or disrupt necessary actions. This is particularly problematic when budgetary pressures require decisive and prompt action.

Employee Participation in University Governance Is Robust Without Employee Regents –

The Board has created and supports a robust structure to provide for faculty and staff input in University decision-making. Active governance groups are as follows:

- Systemwide Governance Groups include:
 - Faculty Alliance
 - Staff Alliance
 - Coalition of Student Leaders
 - System Governance Council

challenge. The legislature has, however, established some qualifications in the past for the student regent and the citizenship requirements contained in AS 14.40.130 and 14.40.150.

Unlike boards and commissions controlled by art. III, sec. 26 of the Constitution of the State of Alaska, nothing in art. VII, sec. 3, which establishes the Board of Regents, provides for legislative control over the qualifications of a regent outside of the confirmation process.

⁷ The framers of Alaska's Constitution often expressed the need to insulate education and the University from politics. Employee representation seems inconsistent with that purpose. (2007 Alaska Op. Atty. Gen. 1, at p.2; 2007 WL 415809 (Alaska A.G.))

⁸ It is difficult to imagine a governor objecting to the requirement that he/she appoint a student regent given the congruence of student interests as a group with the interests of the University. Individual student regent conflicts are addressed on a case-by-case basis.

- Individual University-Based Governance Groups include:
 - UAF, UAA & UAS Faculty Senates
 - UAF, UAA, UAS & SW Staff Governance Groups
 - See <http://www.alaska.edu/governance/>
- Faculty and staff representation on numerous university-wide advisory councils including the Summit Team, Academic Council, Research Council, Business Council, and IT Council.
- Active participation by dozens of faculty members in the Strategic Pathways process.
- Regular meetings and other forms of communication between faculty leaders and me, which have most certainly influenced decisions.
- This is in addition to individual faculty member participation in such matters as development of academic courses, academic programs, hiring, promotion and tenure of faculty.

As you know, recent efforts to enhance faculty and employee input into University decision-making include the addition of an ex officio seat for the Chair of Faculty Alliance on the Board's Academic and Student Affairs Committee, and a literal seat at the table for governance leadership at Regents meetings.

In addition, to these ample opportunities for faculty and staff to have a voice in the administration of the University, faculty terms and conditions of employment are determined through collective bargaining. Adding a faculty regent would literally place faculty on three sides of the decision-making table, on the Board, in collective bargaining, and in faculty governance.

The Board of Regents at present is composed of individuals from across the state, many with ties to multiple regions. Members have experience in small and large businesses, government, the nonprofit sector and native organizations. They also reflect gender, age, ethnic, and geographic diversity. All members are open to feedback from faculty and staff, and have recently redoubled efforts to create more dialogue with employee governance groups.

While faculty do "develop and deliver the curriculum," which effectuates an important part of UA's mission, that role places faculty in a clear conflict position in terms of Board decisions regarding the breadth and scope of that mission.

Thank you for your careful consideration and your service to the University of Alaska.

JRJ

cc: Chair O'Neill and Members of the Board, VPASA, Chancellors, Provosts