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MEMORANDUM

Start-Up Company Activities in Dartmouth College Space

Background

Dartmouth College faculty members (including faculty of the graduate and professional schools) participate in a wide range of outside activities related to their scholarly interests, such as lecturing, consulting, serving on dissertation committees, government panels and scientific advisory boards, and participating in start-up ventures. Such activities can advance the search for knowledge, enhance the information and insights imparted to students through classroom instruction, and serve broader societal interests by making new discoveries available for public benefit. They can also enhance the College's ability to recruit and retain faculty members who have an interest in these endeavors. For these reasons, Dartmouth encourages participation by faculty members in such outside activities, including the commercialization of research-based discoveries, provided that such activities are consistent with faculty members' primary commitment to campus-based teaching and scholarship.

At the same time, certain legal restrictions -- including several stemming from Dartmouth's status as a non-profit, tax-exempt organization -- affect the use of College facilities for such activities. In particular:

- As a corporation that is exempt from income tax under IRS Code Section 501(c)(3), the College is prohibited from providing space, equipment, or services to a for-profit entity at less than fair market value.
- Buildings that have been financed through government grants or tax-exempt bonds are subject to limitations on use for commercial activity.
- In order to qualify for real estate tax exemption under New Hampshire law, facilities must be "owned, used and occupied" for charitable purposes.

The use of College facilities by start-up businesses is one area where these and other limitations are likely to come into play. Accordingly, set forth below are guidelines intended to help faculty members avoid individual or institutional legal problems when they participate in start-up activities.

Guidelines

Below are a set of guidelines with information to explain each issue. In addition to these guidelines, individual Faculties or Departments may elect to adopt further limitations.

[1] In general, because of the legal restrictions pertaining to the use of non-profit, tax-exempt property, the use of College facilities to conduct activities of a start-up venture is inadvisable and is strongly discouraged. Members of the faculty should not use College facilities to conduct start-up business activities without prior approval by the responsible Dean.

It is important to distinguish between outside business activity and industry-sponsored College research. These guidelines concern only the former activity.

Example 1: AquaTech, Inc., a new company that is developing medical uses for seaweed, enters into a sponsored research agreement with Dartmouth College. Professor Jones, a professor of biological sciences, will serve as principal investigator. Professor Jones has no financial interest in AquaTech, but has occasionally done consulting for the company. The research will follow the plan outlined in the sponsored research agreement. Two graduate students will participate in the project as part of their dissertation research. There is a project budget, including the usual lines for equipment, supplies, a portion of the faculty member's salary, and overhead. The Dartmouth faculty member and the graduate students involved in the project are free to publish the results of their research. Any inventions arising out of the research are assignable to Dartmouth, in accordance with Dartmouth's patent policy, although AquaTech will have a first option to negotiate an exclusive license agreement. The project is a sponsored research project rather than a start-up business activity, and the guidelines contained in this memorandum do not apply.

Example 2: Professor Smith of Dartmouth College personally holds the patent on a process to enhance the flexibility of plastic. Professor Smith joins together with a venture capitalist and a business executive to form FlexTech, Inc. Professor Smith owns 20% of the stock in the new company. The patented process is in a very early stage of development and requires further work before it can be commercialized. Dartmouth College owns specialized equipment that is ideally suited for this development work.

Professor Smith, on behalf of FlexTech, approaches her Dean about the possibility of using space at Dartmouth to “incubate” the new company. All persons participating in the work would be officers or employees of FlexTech, FlexTech would own all intellectual property arising out of the work, and neither Professor Smith nor anyone else involved in the work would be free to publish the results of the work without FlexTech’s permission. The proposed project is a start-up business venture and is subject to these guidelines.

[2] In exceptional cases, there may be compelling reasons to consider allowing the limited conduct of start-up activities in College facilities. In considering such requests, College officials should bear in mind the following:

- A. Prior to approving such a request, the Dean should consult with the office of the Executive Vice President for Finance and Administration to determine whether the facility in question is subject to specific limitations on use for start-up activity.**

Certain campus buildings have been funded through mechanisms that require the building to be used 100% for educational purposes. For example, certain additions to the Thayer School were financed with funds from the Economic Development Administration of the Department of Commerce under an appropriation that limits use of the funds to educational purposes. Other facilities, such as the Rubin Building housing the Norris Cotton Cancer Center, have been financed through tax-exempt bonds. Under IRS regulations, use of any more than a *de minimus* amount of these spaces for purposes that constitute a trade or business jeopardizes the bond funding and could adversely impact investors who bought the bonds, as well as the College.

- B. Members of the faculty should NOT be allowed to conduct start-up related activities in lab or office space assigned to them in connection with their faculty appointments.**

Conducting start-up activities in regular lab or office space increases the difficulty of monitoring and keeping the costs associated with those activities separate from the faculty members’ (and their students’ and postdocs’) activities on grants or contracts. To minimize the risk of commingling activities, start-up activities should take place outside the faculty member’s regular assigned College space -- preferably in a different building.

C. The start-up firm must rent the assigned space from Dartmouth at “fair market value,” including an appropriate charge for shared services.

As noted above, Section 501(c)(3) of the Internal Revenue Code prohibits the College from providing space, equipment, or services to a for-profit entity at less than fair market value. In addition to rent for the space used, the start-up must pay a fee for the use of any College services that it utilizes, such as Procurement or Environmental Health and Safety Department services, common equipment, use of the Animal Research Center, and computing service. Where there is already an established rate for off-campus users (e.g., for the services of the Electron Microscope Facility), that rate should be used for start-ups. Otherwise, the responsible department should charge the start-up a rate that covers the full, unsubsidized cost of the equipment or service involved.

D. Access to College equipment and services for start-up users should be on a space-available basis.

Regular College users will be given priority over start-up users in accessing College equipment and services.

E. Use of College space by a start-up should be subject to a time limit established at the start of the use of the College space. This time limit should never exceed one year.

Under New Hampshire law, in order to be exempt from property tax, property must be “owned, used, and occupied” for charitable purposes. Therefore, while certain measures (e.g., segregating space and receiving fair rental value) adequately deal with issues such as 501(c)(3) status and the requirements of tax-exempt bonds, the fact remains that when property is being used by a start-up company, it arguably is not being “used and occupied” for charitable purposes. In order to meet the needs of a start-up venture for a small amount of space while at the same time protecting the College’s property tax exemption, we recommend that start-up use of space never exceed one year’s duration.

- F. The start-up must enter into an agreement approved by the Office of the General Counsel. Among other things, the agreement will require the start-up to acknowledge that it is an independent entity separate from the College, that it has no authority to enter into any obligations on behalf of the College, and that it will hold the College harmless for any claims arising out of the company's activities on College premises.**

The start-up will be required to enter into a written agreement defining the respective rights and obligations of the College and the start-up. Among other things, this agreement will make clear that the start-up is a legally separate entity that has no authority to bind the College to any obligations. In addition, to protect Dartmouth from legal liability, the start-up will be required to indemnify and hold the College harmless from any contractual or tort liability arising out of the start-up's activities.

[3] Faculty commitment to a start-up venture is considered a consulting activity and thus must conform to the College's limits in this area.

Currently, for example, it is expected that faculty will not spend more than one day per week in outside consulting.

- a) If a faculty member's outside commitments exceed this one-day-per-week limit on consulting time, the faculty member must switch his or her appointment and responsibilities to part-time status. During this time, the faculty member will not have the right to use his or her assigned office or lab to conduct a business during the remaining days of the week, i.e., during the portion of the week they are not performing their Dartmouth faculty duties.
- b) In addition, this policy does not imply that a faculty member automatically has the right to switch to part-time status when necessary to accommodate his or her outside business or other involvements. The College -- as well as each faculty member's own School / Division -- has rules concerning the type of approval that must be obtained to convert from full-time to part-time status in light of departmental course teaching requirements, student advising loads, etc.