Contents

Lessons from the (Sweet) Briar Patch

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Introduction

Sweet Briar College's story shocked the higher education world. Certainly, no one was more shocked than the faculty, staff, and students at Sweet Briar, but everyone interested in American higher education has found the Sweet Briar College experience to be troubling. At the time of this writing, the ultimate fate of Sweet Briar will be in the hands of a newly constituted board and a new president, and despite the celebration of the mediated outcome among the alumnae who had opposed the proposed closure, the outcome at Sweet Briar is uncertain.

However, regardless of what may ultimately happen at that institution, the lessons already learned from Sweet Briar are instructive for all of higher education. There are few better examples of how legal considerations impact the day-to-day operations of financially distressed institutions than the Sweet Briar College story, much of which is being put on public display as a consequence of both pending litigation and extensive media coverage. Using Sweet Briar's experience, institutions around the country can gain insight about how to proceed through the briar patch of sticky legal issues that confront a college or university[1] when cash and financial resources are in short supply.

The Sweet Briar story is multifaceted. Multiple aspects of that story lend themselves to analysis far beyond the scope of this article. Nevertheless, when viewed as a whole, Sweet Briar's recent history provides insight about how legal and financial issues are balanced by administrators, board members, and, in some cases, faculty members as they grapple with decisions about an institution's future. For the benefit of administrators, faculty members, and board members, this article attempts to crystallize the Sweet Briar lessons so that others can avoid Sweet Briar's current predicament.

I. Administrative Options

While board members and faculty members have significant roles in dealing with financial challenges, both of those groups have other responsibilities. Board members have

[1] Hereafter, references to "colleges" or "institutions" include institutions of higher education known as either a "college" or "university."

businesses and lives to run off campus, and faculty members are primarily concerned with teaching. Administrators' primary responsibility is the day-to-day management of the college. They are the ones in the best position to see financial trouble looming on the horizon, and it is their obligation to sound the alarm when the financial indicators show negative trends. In simple terms, it is the administrators' job to identify ways to increase revenue, reduce expenses, or both in order to maintain the institution's financial viability. At the same time, administrators have the primary responsibility for maintaining positive working relationships with accreditors and other external overseers as the institution seeks to navigate the troubled financial waters.

A. Increasing Revenue

Increasing or at least maintaining a strong revenue stream is the paramount concern for every institution of higher education, and Sweet Briar's inability to consistently achieve that goal ultimately led to the board's decision to close the institution. In today's higher education environment, maintaining revenue is far more easily said than done.

1. Enrollment

The *sine qua non* for every college is maintaining and expanding enrollment. At most private colleges, enrollment-based revenue—tuition, room, and board—constitutes 85-90 percent of the total revenue. If students decide to enroll elsewhere or to not attend college at all, the colleges they decide not to attend suffer because, as will be described later, colleges have extraordinarily limited ability to reduce expenses to accommodate for the lost revenue. At its core, Sweet Briar's proposed closure was attributable to its inability to attract enough students to its women-only campus.

Whatever emotional appeal there may be to the concept of single-sex campuses, the marketplace of students and their parents has not looked favorably on single-sex campuses for years. The will of Indiana Fletcher Williams, which provided the assets for the creation of Sweet Briar, limited it to being a school for women.[2] For whatever reason, the institution did not attempt to obtain court approval to modify the charter to permit the enrollment of male students.[3] While the outcome of such a judicial procedure is difficult to predict, the outcome of not pursuing such an approval is certain.

Once the institutional decision was made to continue as a women's college, the faculty

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[2] Commonwealth's Memorandum in Support of Its Motion for Temporary Injunction, *Commonwealth of Virginia v. Sweet Briar Institute*, Amherst County Circuit Court, Case No. CL15009373-00 [hereinafter "Commonwealth Memorandum"], Exhibit A, pp. 3-4.

[3] Commonwealth Memorandum, p. 9.

and, ultimately, the board had to develop a curriculum that would appeal to enough financially capable students. While attracting adequate numbers is important, numbers alone would not solve Sweet Briar's financial problems. In fact, court documents reflect that Sweet Briar had several successful recruiting years based on the number of enrolled students.[4] However, for financial success, the students who enroll must bring with them enough external financial resources to provide the college with adequate cash to fund operations. External financial resources include personal funds from the student and the student's family or other sources of support from outside the college, such as scholarships awarded to the student from sources off campus. However, Sweet Briar's student body became increasingly dependent on internal sources of financial support at Sweet Briar. As a result, Sweet Briar's discount rate soared to 63 percent in 2013 as compared with the national average of 46 percent in 2013.[5]

Sweet Briar's unfortunate experience reflects the overwhelming significance of maintaining enrollment and the strong student-based revenues necessary for long-term financial viability. Institutions must keep the curriculum fresh and distinctive enough to appeal to large numbers of prospective students. They must successfully recruit students who have the financial wherewithal, from personal or external sources, to pay the tuition, room, and board with little or no institutional assistance. While all would acknowledge that such tasks are far easier said than done, Sweet Briar's enrollment experience demonstrates the considerable challenge facing many colleges in the current environment.

2. Giving

A major challenge facing financially distressed institutions is how to balance the need to raise money with the need to be candid with prospective donors. Sweet Briar's commencement speaker, Teresa Pike Tomlinson, a 1987 alumna and the mayor of Columbus, Georgia, signed a letter of intent to leave a $1,000,000 bequest to Sweet Briar on February 11 of this year—just weeks before the institution announced its closure on March 3.[6] In January, Sweet Briar accepted a major scholarship from an alumna in memory of her deceased son, and Sweet Briar declined the donor's request to return the gift after the closure was announced.[7] Further, just weeks before the closing, a broad-based solicitation of its alumnae for unrestricted gifts was initiated.[8]

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[4] Commonwealth Memorandum, Exhibit F.

[5] Nancy H. Keuffel and Elizabeth H.S. Wyatt, *Two Board Members Make the Case: Sweet Briar Had to Close*, The Washington Post, May 22, 2015.

[6] Commonwealth Memorandum, Exhibit Q.

[7] Commonwealth Memorandum, Exhibit O.

[8] Commonwealth Memorandum, Exhibit P.

Trustees and senior staff members have a fine line to walk. Total candor about the precarious financial condition would undoubtedly cause some donors to refrain from contributing to the college. The lack of candor subjects the solicitor to a claim of fraud for failing to disclose material information to the donor at the time the gift is made. Moreover, the fluid nature of both the institution's financial condition and the trustees' thinking makes it difficult for development officers to discern exactly what should be said at any given time.

In their defense, Sweet Briar's board members publicly disclosed their decision in a prompt fashion. After the February 28 vote to close, a public announcement was made on March 3. However, Sweet Briar officials were negotiating tentative teach-out agreements at the same time they were soliciting gifts, and certainly, there were more than a few red flags flying when the institution accepted the large gift and the large bequest described in the complaint.[9]

Had the judicial proceedings gone forward, they would have shed considerable light on the disclosure duties of staff members when they are soliciting funds for a financially distressed institution. Until those issues are adjudicated, institutions whose continuation is questionable must be very cautious in their dealings with prospective donors. To avoid allegations of fraud or violations of consumer protection laws, general solicitations should be avoided. Solicitations of major donors should be undertaken only after those donors are made aware of the severity of the institution's financial condition. The reality is that such disclosures will cause some prospective donors to decide not to donate, but the alternative is to leave advancement officers, presidents, and the institutions themselves subject to claims that they defrauded the donors—claims that most likely will not be covered under any institutional insurance policy. The risks of those claims are simply not worth the benefit of the contribution.

3. Repurposing Endowment Funds under UPMIFA

The value of the Sweet Briar endowment has been placed somewhere between $80 million and $95 million. On its face, one might believe an institution with an endowment that large should have no reason to shut its doors. However, the management of those funds in most states, including Virginia, is governed by the state's version of the Uniform Prudent Investment of Institutional Funds Act (UPMIFA), principles of state trust law, and the nonprofit corporation act. UPMIFA, as its names suggests, details how a college can manage those funds in its control.[10] Trust law specifies the capacity in which colleges hold those funds.

Sweet Briar has restricted endowment funds of approximately $60 million.[11] Donors

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[9] Commonwealth Memorandum, p. 6.

[10] http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf (May 23, 2015).

[11] Keuffel and Wyatt, *supra* note 5.

who specified how Sweet Briar would use the funds contributed those funds. Those funds are tantamount to a trust fund with the donor being the grantor of the trust, the college being the trustee, and the public good, as reflected in the institution's nonprofit charter, being the beneficiary. Thus, while the entity has the legal title to the endowment funds, the equitable ownership of those funds belongs to the public, not the institution, and the institution can only use those funds to benefit the public in a fashion consistent with the donor's specifications.

UPMIFA provides the standards by which endowment funds are invested and otherwise managed for the public good.[12] UPMIFA defines an "endowment fund" as "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis.[13] The term does not include assets that an institution designates as an endowment fund for its own use."[14] An "institutional fund" is a fund held by a charitable organization exclusively for charitable purposes.[15] Thus, Virginia's version of UPMIFA governed the restricted assets given to Sweet Briar over the years but not the funds in the endowment that Sweet Briar had deposited into the endowment.

The public record provides some evidence that the Sweet Briar board used endowment funds to support ongoing operations.[16] The nature of those funds is unclear from publicly available documents, but if any of the funds were restricted endowment funds, UPMIFA would provide the standard by which the board's decisions would be measured.[17]

UPMIFA provides methods by which colleges can repurpose endowment funds subject to restrictions that are no longer possible or practical to enforce.[18] Thus far, media reports and court documents do not indicate whether any endowment funds were capable of being repurposed, if such efforts were made by the Sweet Briar administration to repurpose any of the endowment funds, or whether the value of funds eligible to be repurposed was material to Sweet Briar's survival. However, had the litigation continued, the endowment management decisions by the board would have been scrutinized under the standards established by UPMIFA.

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12 UPMIFA, §3.

13 *Id.*, §2(2)

14 *Id*.

15 *Id.*, §2(4) and (5).

16 Keuffel and Wyatt, *supra* note 5. According to the two board members, Sweet Briar used endowment funds for operations at a rate two to three times the national average during the 1990s and the early 2000s. Recently, the board used in excess of 5 percent of the endowment for operations.

17 UPMIFA, §4.

18 *Id.*, §6.

B. Reducing Expenses

According to the latest publicly available IRS Form 990 information, for the fiscal year ending 2013, Sweet Briar reported revenue of $41,469,487 and expenses of $44,461,761 for an operating loss of $2,992,274.[19] Normally, when institutions encounter operating losses, substantial cost-cutting measures are implemented in order to avoid the erosion of the institution's assets. However, for reasons that have yet to be clarified, Sweet Briar appears to have had numerous opportunities to engage in cost cutting that it did not initiate.

1. Reductions in Force

Like most institutions of its nature, personnel cost is the largest expense on campus. In the fiscal year ending June 30, 2013, salaries and other benefits comprised $18,228,326.[20] Notably, that amount reflected a substantial reduction from the prior fiscal year's total of $18,899,217—a cost savings of $670,891 or 3.5 percent from the prior fiscal year. Given the existential threats facing the college, that cost reduction was not sufficient to stem the adverse financial tide confronting Sweet Briar. While reductions in force are never easy, several reasons may have entered into the decision to not cut personnel expenses more deeply.

A. Faculty

Tenured faculty members' rights are typically spelled out in the college's faculty handbook. To this point, the Sweet Briar faculty handbook has not made its way into the public domain, but if it is like the overwhelming majority of faculty handbooks, it permits the termination of tenured faculty members only for cause, in the event of a financial exigency being declared by the institution, or in the event that a program is eliminated. In short, the circumstances under which tenured faculty members can be removed from the payroll are typically quite limited, but there are opportunities to reduce tenured faculty positions when financial circumstances dictate.

At Sweet Briar, a decision to maintain faculty staffing levels yielded a remarkable 7:1

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[19] 2012 Form 990 [hereinafter 2012 Form 990] available at http://www.guidestar.org/FinDocuments/2013/540/534/2013-540534105-0a6921c5-9.pdf (May 24, 2015). More extensive financial information about Sweet Briar from 2000-2001 can be found online: http://watchdog.wpengine.netdna-cdn.com/wp-content/blogs.dir/1/files/2015/05/WatchDogSBCFinancialStatements2000_2014.pdf. The primary sources of the online financial information are not clear, and for purposes of this article, the Form 990 data is sufficient.

[20] *Id.*

student-to-faculty ratio—a level of faculty staffing far in excess of national averages.[21] In due time, perhaps Sweet Briar board members will explain why programs were not eliminated or a financial exigency was not declared in order to reduce operating costs and to save the institution. In the meantime, financially distressed institutions must evaluate their options to reduce tenured faculty staffing. To do otherwise would be tantamount to ignoring the opportunity to reduce one of the largest expense items at any college.

B. Other Employees

At most colleges, virtually all non-tenured employees are employees at will. At some institutions, collective bargaining agreements govern the relationship between employers and non-managerial employees. In either event, colleges have far greater ability to terminate non-tenured staff than tenured faculty, and non-tenured staff members are usually the first to feel the effects of the financial distress. However, institutions have some significant constraints on their ability to eliminate even non-tenured staff positions.

First, there are some staff jobs that simply must be done. Meals have to be prepared at the cafeteria. The campus IT system has to be tended. Grass has to be mowed. The payroll checks have to be written. Countless maintenance and housekeeping duties have to be performed in order for the institution to function.

Second, regulatory compliance obligations must be met regardless of the institution's financial circumstances. Title IX complaints must be investigated. Clery Act reports have to be filed. Financial aid reports have to be meticulously submitted to the Department of Education. If any of these or other compliance functions are not appropriately discharged, student safety may be compromised, significant liability may be incurred, and regulatory penalties may be encountered.

So, despite the significance of personnel costs to the overall expense burden, there are significant limits on the ability of college administrators to control staffing levels. Sweet Briar's publicly available financial data suggests that Sweet Briar probably encountered many of these concerns. The fact that only 3.5 percent of the personnel costs were eliminated between June 30, 2012, and June 30, 2013, suggests that it took only limited steps to reduce personnel costs. In time, the litigation process will most likely shed additional light on why personnel costs were not more significantly reduced. For whatever reason, Sweet Briar opted to make a limited effort to reduce personnel expenses. Thus, the college had to consider an assortment of other cost-saving measures.

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[21] Keuffel and Wyatt, *supra* note 5.

2. Facilities

Facilities consume significant resources, especially when a college is operating a physical plant as large as that of Sweet Briar. Sweet Briar's campus consists of 3,250 acres.[22] As any farmer can attest, the cost of maintaining 3,250 acres is enormous. In most instances, a board would be in a position to consider selling, shuttering, or, at the least, deferring maintenance until such time as financial resources are more plentiful. Sweet Briar's situation, however, severely limited the board's flexibility in addressing its real estate assets.

A. Selling

The circumstances under which Sweet Briar was created and held title to the property are unique. The corporate entity was created by the Virginia General Assembly to hold the property as directed by the will of Indiana Fletcher Williams.[23] The nature of the corporation's role relative to the real estate was addressed in litigation that occurred in 1967.[24] In short, the court concluded that the corporation was the trustee of a testamentary trust established under Ms. Williams' will. The terms of that trust precluded the sale of the property, although some real estate was sold during the 1960s pursuant to a legislative act.[25]

Whether a sufficient case could be made to substantiate a request for court authorization to sell a portion of the real estate assets is unknown. However, the board made no effort to obtain such an authorization.[26] Thus, the undergraduate institution was saddled with the cost burden associated with maintaining thousands of acres of real estate. In an era where making financial ends meet at all is difficult, expecting an undergraduate institution to bear the additional burden of large land holdings was optimistic—even at an institution with a rich equestrian heritage.

Other institutions may find the Sweet Briar experience to be instructive. If confronted with tight financial times and excess real estate, consideration must be given to selling surplus real estate to both generate cash and to minimize expenses associated with maintaining the property. To continue to hold "acres and acres" of land may well be a luxury that a financially distressed institution cannot afford.[27]

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[22] http://sbc.edu/about/our-campus-%E2%80%94-acres-and-acres (May 24, 2015).

[23] Commonwealth Memorandum, Exhibit C.

[24] *Sweet Briar lnst. v. Button*, 280 F. Supp. 312 (W.D. Va. 1967)

[25] Commonwealth Memorandum, pp. 4-5.

[26] *Id.* at p. 9.

[27] http://sbc.edu/about/our-campus-%E2%80%94-acres-and-acres (May 24, 2015).

B. Leasing

While selling real estate may or may not have been approved by the court system, leasing some of the real estate was an option that had been routinely employed by Sweet Briar.[28] In many theoretical respects, leasing could potentially bring many of the benefits of selling—reduced operating expenses and income resulting from payments under the lease. However, the practical challenge of leasing is finding a lessor who needs the property in rural Virginia and who has the financial wherewithal to make consistent payments for an extended period. Despite the practical challenges, financially distressed institutions can look for ways to lease surplus property, just as Sweet Briar did to a limited degree.

C. Shuttering

If a sale or lease is not feasible for any reason, such as the limitations imposed on Sweet Briar by Ms. Williams' will, an alternative course of action is to shutter facilities that are no longer to be used. While the obvious downside of shuttering is that the institution does not derive the benefit of getting the much-needed cash that a sale would generate, the college would at least save the operating costs associated with keeping the facility open. The upside of shuttering a facility is that, if circumstances change such that the facility can once again contribute in a positive way to the college's mission, it is still available. While there is no indication that Sweet Briar employed a shuttering strategy or that such a strategy would have saved significant sums of operating capital, shuttering may well prove to be a tactic that can be employed if efforts to keep Sweet Briar open are successful. A new administration may well find the temporary shuttering of some facilities to be a necessary part of an effort to put Sweet Briar on sound financial footing.

D. Deferring Maintenance

Deferring maintenance on real estate assets can be used for a short while, but buildings and infrastructure can only go so long without requiring attention. Nevertheless, many institutions, including Sweet Briar, have viewed maintenance expenses as one of the budget variables that can be cut during tough times in order to preserve faculty and staff jobs.[29] To the extent this tactic is employed, colleges must be mindful that deferring maintenance can give rise to legal issues.

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[28] Sweet Briar had leased "several acres" to the Virginia Center for the Creative Arts as noted recently in http://www.newsadvance.com/news/local/bonds-spelled-trouble-as-financial-problems-mounted-at-sweet-briar/article_e12245e4-f1fe-11e4-849d-477891ca990b.html?mode=print (May 26, 2015).

[29] Elizabeth H.S. Wyatt, *We Tried Hard, but Sweet Briar's Problems Are Terminal*, The Wall Street Journal, June 3, 2015.

At the simplest level, deferred maintenance decisions can give rise to an assortment of general liability issues. Poor lighting, loose tiles, or degraded concrete on steps can lead to falls and result in injuries for which the college may be liable. However, some forms of deferred maintenance can lead to even more severe consequences for the college and its leadership.

Maintenance expenses in support of health and safety measures should never be deferred. Aside from the fact that fire marshals and OSHA inspectors can impose significant fines and penalties against institutions that fail to maintain health and safety equipment, the potential liability for such failures is almost limitless. Conscious decisions to not maintain sprinkler systems, emergency exits, and similar facilities can subject the college and the individuals involved in such decisions to punitive damages, which are not covered by liability insurance carriers. In extreme cases, violations of this nature can give rise to criminal prosecutions.

Deferred maintenance can also indirectly precipitate a variety of health-related concerns for employees. For instance, if a college defers maintenance on its heating, venting, and air conditioning systems, mold and other allergens can infiltrate campus buildings and create workers' compensation claims and missed work as a result of allergies caused by poor air quality inside those buildings. In the worst case, sustained exposure to carcinogenic materials can lead to higher incidences of cancer and death claims.

For both moral and legal reasons, decisions to defer maintenance must be scrutinized to ensure that no health or safety concerns are ignored, even in tough financial times. If colleges are incapable of maintaining facilities at the minimum levels necessary to protect the safety of the students and staff using those facilities, they should close. The risks of continued operations are far too great.

E. Redevelopment Opportunities

In light of the restrictions on the sale of property, the Sweet Briar board was presented with the concept of redeveloping a portion of the campus that had been the subject of a long-term lease.[30] While the scope of the redevelopment opportunity remains unclear in the record, at least one dissenting board member raised the prospect of finding a higher and better use for the real estate assets owned by Sweet Briar.

Whether adoption of that proposal would have been prudent or imprudent for Sweet Briar, the issue of redeveloping college assets is one that other financially distressed institutions should consider. Just as boards should manage endowment investments in such a way as to maximize their values, so too should boards manage the institution's real estate assets so as to maximize their values.

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[30] Commonwealth Memorandum, Exhibit I.

Institutions are often ill-equipped to develop strategic plans for managing real estate assets, but that sort of expertise is easily found in the marketplace. In some instances, where institutions are located in urban areas, their surplus real estate may have significant value, and decisions about how to use those assets to the institution's maximum value can be extraordinarily complicated issues of finance, land use planning, zoning laws, and emotion. Nonetheless, the real estate assets may prove to be a key element in the effort to rectify the institution's financial distress, and other financially distressed institutions may learn how best to manage those assets as they learn from the Sweet Briar experience.

3. Reducing Debt Service Through Strong Creditor Relations

Sweet Briar's indebtedness was not disproportionately large. As of June 30, 2013, Sweet Briar had total liabilities of $30,729,670 as compared to total assets of $160,636,400.[31] Bondholders were owed $26,777,955 of the total liabilities.[32] Nevertheless, annual interest expense totaled $1,076,488, and it was one of the largest items of operating expense.[33] Consequently, even though Sweet Briar's asset-to-liability ratio was relatively strong, the debt burden created a cash flow problem as a result of principal and interest payments to creditors. Thus, one means of improving Sweet Briar's cash flow was a renegotiation of the debt structure with its principal creditor—the bondholders who are represented by their trustee.

According to one news account, to minimize the risk of default under the bond covenants, Sweet Briar made extensive efforts to renegotiate the bond payment structure.[34] The efforts continued for several years, and as recently as last September, some modifications were successfully made. However, in the end, efforts to renegotiate the college's debt structure on a broader basis proved unsuccessful. To a degree, colleges have more substantial constraints on their ability to negotiate with creditors than do entities operating in other sectors of the economy.

For instance, one of the most effective tools typically available to debtors during negotiations with their creditors is the threat of a bankruptcy filing. Unfortunately for colleges, bankruptcy is not a viable option. A bankruptcy filing automatically disqualifies a college from participation in the federal student aid programs offered through the United States Department of Education.[35] While bankruptcy proceedings are available to nonprofit corporations generally,

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[31] 2012 Form 990, *supra* note 19, at p. 11.

[32] *Id.*

[33] *Id.* at p. 10.

[34] http://www.newsadvance.com/news/local/bonds-spelled-trouble-as-financial-problems-mounted-at-sweet-briar/article_e12245e4-f1fe-11e4-849d-477891ca990b.html?mode=print (May 26, 2015).

[35] 34 CFR 600.7(a)(2).

the filing of a bankruptcy petition by a college is tantamount to going out of the higher education business. Thus, as a practical matter, colleges seeking to negotiate with creditors have to take a more creative approach than simply playing the bankruptcy card.

Different types of creditors require different kinds of approaches. For example, the local plumbing contractor with an account payable will need to be approached in a different fashion than the Wall Street trustee for the bondholders, and the local banker with an unsecured line of credit may require yet another approach. However, the common element for all creditors is that they need to have a legitimate reason to believe that they will be repaid. Thus, prior to negotiating with creditors for some modification of the existing debt structure, it is incumbent for the president and the chief financial officer to develop a credible plan to put the college back on solid financial footing in reasonably short order. Conservative financial projections for a three- to five-year period must be developed that show the elimination of operating deficits—at least from a cash perspective and preferably from an accrual perspective. While no reasonable creditor will require that all financial problems be fixed immediately, all creditors will be especially interested in detailed revenue and expense projections for the next twelve to eighteen months. If those projections present a plausible scenario for the institution returning to financial health, negotiations with creditors can prove productive.

One of the critical mistakes made by colleges is to base projections on substantial increases in enrollment. In the absence of a new academic program that is in high demand or some similar extraordinary event, creditors will look askance at revenue projections that materially deviate from historical trends. Thus, in the overwhelming majority of cases, efforts to rectify the financial problems must focus on the expense side of the college's budget. As noted above, those efforts quickly require staffing reductions since the majority of most institutions' expenses are costs related to personnel. Lenders understand the pain associated with staffing reductions, and in candid moments, they will acknowledge that the institution's willingness to make the painful cost reductions is the best indicator of the institution's ability to carry out the operational plans reflected in the financial projections.

Sweet Briar board members indicate they were unable to develop a plausible financial scenario for the institution.[36] Their judgment in that regard may well have been accurate, but it is that judgment that will be examined repeatedly as the new board and administration begin to operate the college.

4. The NAICU List

[36] Wyatt, *supra* note 29.

Sweet Briar board members have repeatedly argued that they looked for ways to cut costs at their campus. Perhaps in due time the record will reflect all of the cost-cutting measures that were considered and the rationale underlying the decisions to adopt some and reject others. In the meantime, the National Association of Independent Colleges and Universities (NAICU) has published a list of cost-cutting measures adopted by a number of institutions around the country.[37] Although the list was last updated in 2012, the ideas listed by NAICU's members may provoke thoughts about steps that can be taken by administrators to lower operating costs while preserving institutional quality. In addition, the NAICU list provides examples of academic consortia around the country that have initiated ways for colleges to collaborate in the provision of services or the acquisition of goods and services from vendors at reduced costs.

While administrators probably will not find one silver bullet to reduce costs across the board, the list may well serve to generate a variety of ideas that might have a material impact on the campus bottom line. As Sweet Briar's experience has shown, reducing expenses at a college has some unique challenges, and boards are well advised to consider all possible creative cost-cutting ideas when an institution is confronted with financial stress. When the litigation starts, board members will be expected to explain their cost-cutting efforts, and if the board can demonstrate that it thoughtfully considered a variety of creative ways to reduce expenses, both the board members and the institution will be well served.

C. Working with External Overseers

In addition to working with creditors and internal constituencies to develop a different business model, leaders at financially distressed institutions also must work with a variety of external overseers—all of which have legitimate and highly significant roles to play in supervising the institution. Among the overseers are regional accreditors, state licensing agencies, and attorneys general. At a time when dealing with creditors, faculty, staff, alumni, and donors can be overwhelming, finding time to reach out to the external overseers is challenging. However, for the reasons set forth below, efforts to initiate contacts can prove productive.

1. Accrediting Agencies

Regional accrediting agencies serve two critical functions: assessing academic quality and serving as the gatekeeper for federal student aid. The academic assessment is the function for which regional accreditors are best known. A part of that assessment consists of evaluating the institution's finances in order to be sure that the institution has the financial wherewithal necessary to fulfill its academic mission. In Sweet Briar's case, the Southern Association of

[37] https://www.naicu.edu/special_initiatives/affordability/news_room/ (May 13, 2015).

Colleges and Schools (SACS) issued no public sanctions against Sweet Briar.[38] In other words, the entity best situated to assess the institution's financial health saw no reason to warn the public that Sweet Briar was financially troubled. In this respect, the Sweet Briar experience is an aberration since most financially distressed institutions are subjected to sanctions by their regional accreditors for at least months or, more typically, years before they close their doors. Thus, a lesson from Sweet Briar is that the absence of an accreditor's sanction is not necessarily a reason to have comfort about an institution's financial health.

However, when accreditors do impose sanctions, the burden on the financially distressed institution can be significant. Competitors share information about the sanctions with prospective students and their parents. Donors start to ask questions. Faculty members become more anxious about their financial futures. Community leaders become anxious about a major employer. And financial aid auditors from the United States Department of Education (USDOE) become more suspect of what may be happening with the financial aid dollars that are going to the sanctioned institution. To add salt to the wound created by the accreditor's sanction, the USDOE may impose varying levels of cash monitoring on the institution and/or require the institution to obtain a letter of credit or other form of surety for its USDOE reimbursement obligations. [39]

2. State Licensing Agencies

In each state, there is at least one regulatory agency that oversees the licensing of colleges under state law. Typically, there is some element of financial capacity that is subjected to review during the course of the original licensing process and during each renewal of the original license. Depending on the state, the level of review varies, but it is common for state licensing agencies to be highly concerned when an institution in their state appears to be on the brink of closure. Essentially, these agencies are consumer watchdogs, and they attempt to ensure that no students lose their tuition funds as a result of an institution's closing in mid-semester or at any point when the institution takes tuition payments but fails to award credits.

Sweet Briar's approach was fundamentally different from the approach taken by most financially distressed institutions. Most institutions try to keep the doors open as long as possible, and in some instances, they cannot finish the semester before they run out of cash. Sweet Briar took the opposite approach and attempted to close in an orderly fashion—long

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38 http://www.sacscoc.org/details.asp?instid=71040 (May 27, 2015).

39 *See* https://www.insidehighered.com/news/2015/04/06/education-department-names-remaining-colleges-monitoring-list-%E2%80%98severe%E2%80%99-audit (May 27, 2015); https://www.insidehighered.com/news/2015/03/26/education-dept-keeps-secret-names-colleges-found-be-risky-students-taxpayers (May 27, 2015); and https://www.insidehighered.com/news/2014/03/10/can-us-government-tell-colleges-poor-financial-shape-those-are-not (May 27, 2015).

before the state licensing agencies would typically be concerned. Thus, whatever their critics may think about other decisions, the board deserves credit for attempting to wind down the institution in a manner that permitted students to be protected.

3. Attorneys General

The Amherst County Attorney, Ellen Bowyer, acting on behalf of the Commonwealth of Virginia, challenged the decisions by the Sweet Briar board. Under Virginia law, the county attorney, the state's attorney general, and attorneys for other state and local entities have the capacity to act to protect the public interest with respect to overseeing the activities of charities.[40] In most states, the oversight of charities is reserved for the attorney general, but regardless of the statutory provisions in any state, there is a public interest in ensuring that the charity is managed and operated for the public benefit.

That public interest entitles attorneys general to monitor the activities of the charities, especially in times of financial stress, to be sure that decisions by board members and officers are always made in the public interest.[41] The extent to which attorneys general engage in such monitoring activities often depends on the personal priorities of the attorney general and whether the attorney general has the budget capacity to fund the staffing necessary to monitor charities.

In those states where the attorney general has adequate staffing to monitor charities, financially distressed colleges would be well served to develop strong working relationships with the attorney general and key staff members in the office of the attorney general who have day-to-day responsibility for charities. While those individuals are not likely to provide legal advice or guidance about what a board should or should not do, the dialogue with key staff members can often provide insights about the positions that the attorney general is likely to take in the event of post-closure litigation.

Finally, Virginia Attorney General Mark Herring served an extremely useful, albeit unusual, role of facilitating the mediation of the Sweet Briar litigation.[42] In light of that effort's apparent success, other attorneys general may initiate similar mediation efforts when disputes arise over the governance of colleges.

II. Faculty Options for Program Development and Refinement

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[40] Virginia Code §57-59(D).

[41] An example of the significant role of attorneys general in charitable matters can be found in UPMIFA. When institutions seek to repurpose endowment funds, the attorney general must be notified so that the public interest in the management of the institution's funds can be protected. UPMIFA §6(b) and (c).

[42] http://www.richmond.com/opinion/their-opinion/guest-columnists/article_dcfac3d8-ce3e-585a-8766-640958077fbe.html (May 28, 2015).

While college administrators have broad areas of responsibility, faculty members at most institutions, including Sweet Briar, play a key role with respect to academic programs. In the parlance of the private sector, academic programs are the college's "product," and the faculty is, in effect, the "product development department" for most institutions of higher education. If the institution's product is in high demand, revenues will be strong as customers (aka students) seek to buy the product. Conversely, if the product is not in high demand, revenue suffers. Thus, just as in the business world, the role of product developer is key to the success or failure of the organization.

A. Program Development/Refinement

One author recently noted that a college's people, and especially the faculty, are both the engine and the brake for the institution.[43] That statement is especially true when it comes to the development of new academic programs. If the faculty pursues new academic programs, which are attractive to prospective students, the faculty can be an engine for the college and can enhance the institution's financial standing. On the other hand, if the faculty puts on the brake, resists change, and declines to modify the curriculum in a way that is attractive to prospective students, enrollment declines or fails to grow, revenue declines, and the financial vigor of the college suffers.

Sweet Briar's enrollment challenges cannot be attributed entirely to curriculum content. In fact, much has been made of the administrative failure to promptly replace at least one key admissions official at the college—a decision that may have led to a negative impact on enrollment.[44] However, Sweet Briar's persistently low enrollment reflects, at least in part, a market judgment that Sweet Briar's academic programs were not attractive enough to cause students to enroll at Sweet Briar in numbers sufficient to sustain the institution. When that situation persists, the faculty has no choice but to change the curriculum in order to permit the institution to attract students at a level that permits the institution to prosper.

Further, new program development is not the only issue. When existing programs fail to attract enough students to be financially sustainable, they must be eliminated in the absence of some overwhelming compelling academic reason that merits the continuation of the financially unsustainable program. Decisions to eliminate programs are excruciatingly difficult for faculty members to make. They often impact colleagues in extraordinarily adverse ways. If a professor's program is eliminated, the professor is frequently required to change to an entirely different profession and is often required to relocate. In Sweet Briar's case, terminated faculty

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[43] Clayton M. Christensen & Henry J. Eyring, The Innovative University: Changing the DNA of Higher Education from the Inside Out 382 (2011).

[44] Commonwealth Memorandum, pp. 7-8.

members may well have been required to move from rural Virginia to another part of the country to find employment at another college or employment in an entirely different vocation.

However, faculty members have an enormous responsibility to their institutions when it comes to program development and refinement, and when the duty to the institution conflicts with the duty to friends, faculty members must remove themselves from the decision-making process to avoid the conflict of interest.

B. Financial Involvement

Having entrusted the academic programs to faculty members, colleges must give faculty members access to the financial information necessary for them to effectively manage the academic program. If the institution is suffering financially as the result of stagnant or declining enrollment, the faculty must know. If a program is failing to sustain itself, the faculty must know. As basic as the concept may be, no one can expect faculty members to make informed decisions about the financial viability of academic programs if they are not informed about finances. Had Sweet Briar faculty members been given access to financial information about the academic programs, the level of their surprise in the aftermath of the March closure would have been much lower, and one can hope that their decisions concerning academic programs might have avoided at least some of the financial challenges that have confronted the college.

III. Board Options

As Sweet Briar has demonstrated, board members play the most significant role at financially troubled institutions. They are responsible for managing the institution, and they serve as fiduciaries of the public interest served by the institution. In that regard, trustees owe their institutions the duties of loyalty, obedience to its rules, and due care in the exercise of the board's responsibilities. Ultimately, it is the state, typically acting through the attorney general (or in Sweet Briar's case, the county attorney), which enforces those duties on behalf of the public. Consequently, multiple parties often challenge board members' decisions at troubled institutions.

A. Sources of Board Obligations

Generally speaking, board obligations emanate from three sources: state statutes governing institutions located or chartered in that state, the common law duties established by state or federal court decisions, and the body of institutional governing documents which are tantamount to the "campus law." Most colleges are incorporated under the nonprofit corporation act of the state in which the college is located. Although there are variations from state to state, most states follow the Model Nonprofit Corporation Act (MNCA) prepared by the American Bar Association's Business Law Section.[45] The MNCA provides general guidance as to the duties of nonprofit corporation directors, typically called "trustees," "governors," or "regents" at most colleges. Regardless of the name by which they are called, board members have the ultimate responsibility for the institution. Through their bylaws and institutional policies, boards typically delegate the responsibility for the day-to-day management of the college to the president and other officers of the college, and through the adoption of faculty handbooks, boards typically delegate the responsibility for academic matters to the faculty. Whatever authority is delegated to others, under state law, the board is responsible for ensuring that the college is operated for the public good.

The Sweet Briar board ultimately concluded that the most effective way to discharge those duties and to serve the public good was to close the institution in an orderly fashion rather than to continue to operate at a deficit, which would, in effect, deplete the accumulated endowment. By preserving the assets remaining in the endowment, the board sought to maximize the public good by making sure those assets were available for some yet-to-be-determined charitable purpose. That decision by the board was at the heart of the litigation pending in the Virginia court system. Despite the successful mediation of the dispute between the board and the alumnae, one of Sweet Briar's more significant lessons will be a better understanding of what board members must do to discharge their duties to serve the public interest.

B. Engagement

Through all of the turmoil at Sweet Briar in recent months, one thing is certain—all of an institution's stakeholders are best served when trustees are highly engaged. In recent months, there is no doubt that Sweet Briar's board members have been highly engaged. However, the engagement level of board members in prior years has already been subjected to scrutiny. At present, it is unclear whether that scrutiny will result in a conclusion that the board members were effectively engaged, but the board members who served Sweet Briar over the course of the last decade will have their decisions second-guessed by an assortment of interested parties. The same could happen to any trustee currently serving on any college board.

The future for any college is unpredictable, and no trustee wants to have his or her decisions evaluated by individuals who have the benefit of ten year's worth of hindsight. However, if that evaluation does occur, trustees who (a) stay abreast of trends in higher education, (b) attend meetings and campus events on a regular basis, and (c) monitor key indicators of the institution's financial health will be in the best position to defend their actions.

[45] http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/joint_fall/2008/black_letter.authcheckdam.pdf (June 5, 2015).

The Association of Governing Boards of Universities and Colleges has superb materials to assist board members in their efforts to be effective fiduciaries for the institutions they serve.[46] In addition, board chairs and presidents should work to ensure that board meetings regularly incorporate opportunities for board members to learn about current issues affecting institutions similar to their own.

IV. Conclusion

However tragic Sweet Briar's story may ultimately prove to be, an even greater tragedy would result if board members, administrators, and faculty members at other institutions fail to learn lessons from Sweet Briar's recent history. The story continues to unfold, but thus far, Sweet Briar's history has already provided individuals interested in American higher education with much to consider. So for now, here are the Top Twenty Lessons from the Briar Patch:

1. Keep the curriculum fresh and distinctive enough to appeal to large numbers of prospective students.
2. Recruit students who have the financial wherewithal, either personally or through external funding sources, to pay the tuition, room, and board with little or no institutional assistance.
3. When closure becomes a realistic possibility, refrain from general solicitations of financial support unless the severity of the financial situation is a matter of public knowledge.
4. Make full disclosures of the financial situation to major donors.
5. Constantly evaluate opportunities for repurposing endowment funds in a manner consistent with UPMIFA.
6. Utilize attrition, eliminate programs, and/or declare a financial exigency to make necessary reductions in faculty staffing so that student-faculty ratios are in line with national norms.
7. Even in financially stressful times, maintain adequate staffing to fulfill compliance obligations to avoid regulatory penalties and other adverse consequences of not following or obeying the laws applicable to higher education institutions.
8. Consider selling surplus real estate.
9. If otherwise prevented from selling, consider leasing real estate assets.

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[46] As two excellent examples, trustees should review "Consequential Boards: Adding Value Where It Matters Most" (http://agb.org/reports/2014/consequential-boards-adding-value-where-it-matters-most) and "The 10 Habits of Highly Effective Boards" (http://agb.org/trusteeship/2014/3/10-habits-highly-effective-boards) (June 1, 2015).

10. If selling or leasing is not feasible, consider shuttering real estate assets.
11. Never defer maintenance that impacts health and safety.
12. Otherwise, utilize deferred maintenance only for a short time.
13. Consider redevelopment opportunities for real estate holdings.
14. Avoid basing financial projections on increased revenues, or if increased revenues are a basis for a turnaround plan, be extremely conservative in revenue projections.
15. Explore creative cost-cutting measures used by other institutions.
16. Recognize that the absence of financial sanctions by accrediting agencies does not mean there are no financial problems at an institution.
17. Develop strong working relationships with accreditors, state licensing agencies, and the attorney general during good times.
18. Faculty members must work diligently to create, maintain, and/or expand academic programs that are attractive to prospective students and to eliminate programs that are a financial drain on the institution.
19. Administrators must provide faculty members with adequate financial information to enable faculty members to effectively administer the academic programs.
20. Board members must remain engaged with the institutions they serve by staying abreast of higher education issues, attending board meetings and campus events, and monitoring institutional finances.

The Sweet Briar story continues to unfold, and undoubtedly, more higher education insights will come to light in the months ahead, so as television announcers might say, “Stay tuned. There’s more to come!”