

**33rd ANNUAL NATIONAL CONFERENCE ON LAW AND HIGHER
EDUCATION**

**The Center for Excellence in Higher Education Law and Policy
Stetson University College of Law**

February 20, 2012

**HIGHER EDUCATION LAW AND POLICY 2.1—
THE RISE OF THE COMPLIANCE UNIVERSITY**

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Introduction

In the past few years, college and university officials of all sorts have become increasingly preoccupied with compliance responsibilities. While compliance is now a major concern of higher education attorneys, they are not the only ones who are focused on these issues. The increased focus on compliance reflects and is directly related to a number of other trends in higher education today—such as the increased focus on accountability and measurable learning outcomes, budget pressures and concerns with efficiency and affordability, increased pressures on accreditation processes and standards, and financial and management scandals in both corporate and non-profit contexts. While some people still cling to the notion of higher education as the isolated ivory tower that somehow is set apart from the rest of society, the reality is that higher education is one of the most highly regulated sectors of the American economy.

Although the spotlight on compliance has become much brighter in the past few years, compliance obligations are not new to higher education. For many decades, colleges and universities have been subject to laws and regulations from the federal, state and local levels that have carried with them compliance responsibilities (e.g., requirements for training or reporting, or for establishing and maintaining particular structures, policies or procedures, etc.). Compliance essentially entails an institution's obligations to abide by this myriad of laws and regulations, and to set up structures and processes to ensure that these obligations are met. The subject matter covered by compliance is as broad as the enterprise of higher education itself, including areas such as discrimination and affirmative action, health and safety, environmental issues, research, athletics, privacy and security, ethics, conflicts of interest, construction, taxation, zoning, etc. While lawyers help to educate their institutional clients about these obligations, the expertise and responsibility for ensuring that compliance obligations are met are by necessity spread throughout the organization.

There has been a great deal written (and considerable debate) about compliance functions and organizational structures. Some institutions have asked legal offices to oversee compliance efforts, while others (including many institutions with medical schools and health systems) have set up separate offices for compliance—in part to avoid possible conflicts of interest in terms of roles on campus. Different types of structures and staffing patterns continue to evolve as compliance becomes a more recognized field of specific expertise.

Resources for Compliance in Higher Education

Resources and information on compliance issues in higher education have increased significantly in recent years. The National Association of College and University Attorneys (NACUA) has taken a leadership role in working with other organizations to provide resources and educational programs on compliance. NACUA has sponsored several workshops on compliance, and is also helping to coordinate a new Higher Education Compliance Alliance. The idea for the Higher Education Compliance Alliance grew out of a survey NACUA conducted of college and university general counsel, asking which issues were of greatest concern and constituted key trends. The answers overwhelmingly indicated that general counsel were deeply concerned about compliance with an ever-growing body of federal regulations. As noted above, federal (as well as state and local) regulations reach almost every facet of college and university operations—e.g., admissions, financial aid, human resources, environmental health and safety, athletics, tax issues, research, export controls, and international programs, among others.

At the same time, dozens of national higher education associations monitor these regulations and produce resources and materials designed to help their members achieve compliance in their particular area of concentration—the College and University Professional Association for Human Resources (CUPA-HR) for HR professionals, the National Association of College and University Business Officers (NACUBO) for business officers, and NACUA for attorneys, to name just a few. Yet for the typical higher education professional, it is often difficult to locate these myriad materials in an effective or efficient manner. With this in mind, NACUA endeavored to create the Higher Education Compliance Alliance—a free, online compliance resource website—as a service to its members and to the larger higher education community.

In late 2011, NACUA spearheaded a partnership with almost 20 other national associations to create the Higher Education Compliance Alliance: a centralized repository of information and resources for compliance with federal laws and regulations. The Compliance Alliance site will also be linked to Catholic University's Campus Legal Information Clearinghouse site (<http://counsel.cua.edu/>), which is a rich resource for compliance-related information to help campus administrators navigate the laws that affect higher education. NACUA's hope is that the Compliance Alliance will:

- Respond to the need for resources on the multitude of federal laws and regulations with which colleges and universities must comply

- Centralize selected resources that will benefit administrators and others on college and university campuses in their pursuit of compliance
- Consolidate and share helpful compliance resources from a wide variety of higher education associations as a service to the higher education community
- Serve not as an advocacy vehicle, but as a central repository for information and resources on federal laws and regulations

NACUA staff is working with staff representatives from each association to identify and provide high-quality, compliance-related resources from that association’s library of materials, and to continuously monitor the resources for necessary updates or additions as regulations change. By late February, the site is expected to be up and running and should serve as a valuable resource to the entire higher education community.

Current members of the Compliance Alliance include the following organizations:

- ACPA – American College Personnel Association
- ACE – American Council on Education
- AGB – Association of Governing Boards of Universities and Colleges
- APLU – Association of Public and Land Grant Universities
- CHEA – Council for Higher Education Accreditation
- CUPA-HR – College and University Professional Association for Human Resources
- EDUCAUSE
- HACU – Hispanic Association of Colleges and Universities
- NACAC – National Association for College Admission Counseling
- NACUA – National Association of College and University Attorneys
- NACUBO – National Association of College and University Business Officers
- NAFEO – National Association for Equal Opportunity in Higher Education
- NASFAA – National Association of Student Financial Aid Administrators
- NASPA – Student Affairs Administrators in Higher Education
- UPCEA – University Professional and Continuing Education Association
- URMIA – University Risk Management and Insurance Association

(The author gratefully acknowledges the contributions of Joshua Dermott, Assistant Director for Legal Resources—Information at NACUA, with regard to this summary regarding the Higher Education Compliance Alliance.)

Another useful resource on compliance issues is the Society of Corporate Compliance & Ethics (SCCE) (see <http://corporatecompliance.org>), which has a number of programs relevant to colleges and universities—most especially an annual Higher Education Compliance Conference in Austin, Texas. *See*

<http://www.highereducationcompliance.org>. Individuals (lawyers and non-lawyers alike) can become certified compliance and ethics professionals by attending educational sessions and taking special exams. As compliance functions and offices continue to grow, the need and demand for certified professionals is likely to increase.

Sample Institutional Background Materials for a Compliance Program

Here is a basic mission statement that has been adopted for the Rutgers compliance initiative, along with a brief background description of the legal basis for the compliance initiative.

Mission Statement

The mission of the University Compliance Initiative is to provide support, coordination and assistance to University-wide compliance efforts regarding all federal and state laws as well as internal policies. The Compliance Initiative also seeks to encourage the highest ethical standards of conduct for those who represent the University, and act on its behalf.

Primary responsibility for compliance remains in the individual units of the University (e.g., athletics, public safety, financial aid, procurement, student affairs, etc.). The Compliance Initiative will work closely with each unit to build on existing compliance structures such as reporting, establishment of policies and procedures, training, and taking corrective actions where necessary. These efforts will identify and help to mitigate financial, operational, strategic and reputational risks to the University. The University Compliance Initiative will be housed in the Office of the Senior Vice President and General Counsel. Senior Vice President and General Counsel Jonathan R. Alger serves as Chief Compliance Officer.

The Compliance Initiative will provide support in several areas, including:

- Promoting a culture of compliance and ethics at Rutgers from the top administration and throughout the University;
- Coordination of compliance efforts and information, including reporting requirements, University policies and procedures, and contact information for those with primary compliance responsibilities;
- Assisting various units in the University with providing appropriate training in the relevant areas of compliance;
- Reviewing changes in external laws and regulations, both state and federal, with our compliance liaisons, and supporting efforts to respond to those changes;
- Assisting in identifying gaps in University policies, and aiding the appropriate offices with efforts to address deficiencies;

- Advising that any violations are addressed by appropriate corrective action.

Basis for Compliance Initiative

Caremark International, Inc. Derivative Litigation

A ruling by the Delaware Chancery Court reinforced the value of internal compliance programs by suggesting that good faith attempts to implement and monitor internal compliance programs should satisfy a board member's duty of care to oversee operations. Effective compliance programs reduce board members' exposure to claims of breach of the duty of care. *See In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

Federal Sentencing Guidelines

In 1991 Congress implemented the Federal Sentencing Guidelines for Organizations, which were intended to accomplish the twin goals of deterrence and punishment through the imposition of mandatory restitution, substantial monetary fines, and a variety of other measures. *See U.S. Federal Sentencing Guidelines § 8B2.1.*

Under the Federal Sentencing Guidelines, implementing and maintaining an internal compliance program to prevent, detect and facilitate the reporting of criminal conduct constitutes a mitigating factor that may justify a significant reduction in the applicable fine or other penalties. Elements of such a program include:

1. Adequate compliance standards and procedures
2. Effective compliance oversight by the governing body and senior personnel
3. Careful delegation and due care in hiring/screening employees
4. Effective training and education
5. Monitoring, auditing and help lines
6. Enforcement for violations
7. Corrective action
8. Promoting an organizational culture that encourages ethical conduct

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At Rutgers University, we now produce annual compliance reports for the Board of Governors' Audit Committee. These reports are also shared with the entire governing

board as well as with the University's senior administrative leadership. For each issue area discussed, the reports mention the primary offices involved, compliance requirements, compliance challenges, and compliance status. The reports also make clear that other offices with compliance responsibilities are identified as compliance partners, and provide lists of liaisons for various compliance issues.

Some of the sample compliance areas covered in these reports in recent years have included the following:

- State ethics requirements
- State contract law requirements
- Signatory authority for contracts
- Whistleblower policies
- Athletics compliance (NCAA requirements, Title IX, etc.)
- Issues related to research grants and contract accounting
- Privacy, data retention and information security
- Identity theft
- Genetic Information Non-Discrimination Act
- State licensing requirements for electrical contractors
- Higher Education Opportunity Act requirements on various fronts (e.g., textbook provisions)
- Health Insurance Portability and Accountability Act (HIPAA) requirements
- International programs and applicable regulatory requirements
- Gramm-Leach Bliley Act of 1999
- Campus safety and security reporting requirements
- Equal opportunity and affirmative action requirements
- Environmental health and safety requirements
- Export controls

- Disability law requirements
- Sexual harassment prevention and reporting
- Prevention and handling of bullying of employees or students
- Tax issues (e.g., compliance with tax-exempt bond requirements)

This list is by no means exhaustive and merely serves to illustrate some of the types of issues that can be included in such initiatives and reports.

Some Practical Suggestions

Here are a few modest thoughts and practical suggestions about compliance efforts in higher education.

1. **Don't let the perfect be the enemy of the good.** The topic of compliance can be overwhelming in an era of limited resources, when people have many different issues and challenges they confront on a daily basis. Each institution will need to identify for itself its most urgent compliance priorities and risks, and design programs that make sense in light of its history, budget, etc. When people think about the topic of compliance in general, they can be easily overwhelmed with the vast array of laws and regulations that apply to an institution. Thus, it's helpful to think about the subject in more manageable chunks or clusters of issues, and to set priorities in stages over time when developing new programs and policies. This is a subject where the law is constantly changing, and all compliance programs need to be flexible over time to take into account changing laws, evolving best practices, etc.
2. **It's everybody's job.** Sometimes when a new compliance office is set up, or when some particular office or individual is tapped to lead compliance efforts, the temptation for others in the institution is to assume that compliance is somebody else's job and that they no longer need to worry about it (if they ever did). The reality, however, is that successful compliance programs require everyone at the institution to be vigilant and to take responsibility for those compliance responsibilities that fall within their areas of expertise and responsibility. No one office or person can possibly be the expert in every compliance issue facing a college or university. At Rutgers, for example, the General Counsel's office is seen as a partner and coordinator for compliance efforts—but not as taking the place of the subject-matter experts around the institution whose roles naturally include particular types of compliance responsibilities.
3. **Lawyers play a key role, but not the only role.** In keeping with the point made above, institutional counsel can be extremely valuable to compliance efforts. They are experts in the law, after all, and can help others understand legal and

regulatory requirements. At the same time, the people on the front lines in various areas need to be the eyes and ears for compliance efforts in their specific areas. Regular, ongoing communication between lawyers and compliance officers and others around the institution is essential. The individuals involved in compliance must be able to speak each other's languages and to be able to work effectively in teams to spot and address compliance challenges as they arise.

- 4. Education and training will continue to be critical to compliance efforts.** As educational institutions, we sometimes forget that our own employees need constant education and training to keep up with changes in the legal and regulatory landscape. Ongoing educational and training efforts are critical to successful compliance programs. Technology provides new ways to reach people with information and assistance in this regard (e.g., online training programs that are available when people need them).

There are also lots of ways now to keep up with new legal and regulatory requirements. The National Association of College and University Attorneys (NACUA), for example, issues brief NACUANOTES on hot and timely topics that are intended for a broad audience. NACUA and other organizations are also offering webinars and other educational programs that can be made available quickly and efficiently to broad audiences within colleges and universities. Institutions can create compliance websites that can be regularly updated as new requirements take effect, and which can identify to whom individuals can go with questions about particular compliance issues and areas.

- 5. Don't forget institutional policies.** Sometimes people assume that if they follow the letter of the law (federal, state, and/or local), then they don't need to worry any further about compliance. Institutional policies, however, can be another very important source of compliance responsibilities. It is helpful for those involved with coordination of compliance efforts to make information readily accessible about an institution's policies. At Rutgers, for example, the University maintains the University Policy Library—which provides comprehensive coverage of institution-wide policies, is online and fully searchable, and can be constantly updated as policies are added or amended. *See* <http://policies.rutgers.edu>.
- 6. Compliance requires coordination among various institutional offices.** Especially at larger institutions, there may be several offices with compliance responsibilities that might overlap (legal counsel, risk management, internal audit, etc.). These offices should find ways to communicate regularly to touch base about compliance issues and challenges, and to figure out how to use the resources and talents of each to address those challenges.
- 7. Leaders must set the tone from the top on compliance.** Institutional leaders have an important role to play in creating a culture of compliance, ensuring that compliance efforts on campus are treated with respect and urgency. It is vital that employees at all levels feel that they can speak up when they see potential

compliance issues and problems, without fear of retaliation. Indeed, by providing clear and accessible pathways for individuals to report compliance problems, institutions can help to manage potential liability while reducing possible whistleblower claims.

Leaders can also seek to ensure that individuals and offices with compliance responsibilities have adequate resources to perform their functions. Sometimes people feel that compliance obligations are a burden that simply gets in the way of the more fun and creative aspects of their jobs. At their best, however, compliance programs can be educational and enriching—and can be used to help individuals and units do their jobs more effectively. Compliance efforts must therefore be given the respect of other institutional priorities.

The governing board's audit committee can also play a key role in talking about the importance of compliance and getting updates on compliance issues and efforts as warranted.

- 8. A focus on compliance can reinforce ethics and values and thus help advance the educational mission.** While political and educational leaders often call for reductions in regulation, bureaucracy and red tape, the reality of our society is that compliance obligations are here to stay. The exact rules may continue to change, but the stakes in compliance are only getting higher as higher education is seen more and more as an industry that needs to be carefully managed and held accountable for results and cost-effectiveness. Given these circumstances, it makes sense to try to institutionalize compliance efforts so as to make compliance an ordinary and expected facet of conducting our work. Indeed, a positive focus on compliance can promote an ethical, values-based environment that is consistent with the mission of higher education. *See, e.g., Tyler, Dienhart, Thomas, The Ethical Commitment to Compliance: Building Value-based Cultures That Encourage Ethical Conduct and a Commitment to Compliance, California Management Review* (Feb. 2008) (describing the concept of procedural justice in management and organizational decision making).

At the same time, even as institutions build values-based compliance structures, they will continue to encounter rules and regulations that are outdated, create additional costs and personnel burdens with little benefit, are a poor fit when applied in a higher education context, or otherwise interfere with the educational mission. Colleges and universities, and their national higher education organizations, can and should bring such concerns to the attention of policy-makers. Compliance at its best will make sense to people, as rules and regulations will have obvious rationales and benefits that relate to and support the core educational mission.