

ACADEMIC COMPLIANCE PROGRAMS: A FEDERAL MODEL WITH SEPARATION OF POWERS

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V. CONCLUSION23

In a recent survey, two-thirds of academic institutions recognized that compliance and regulation are among the top three most challenging legal issues on their campuses.¹ A majority of the institutions also agreed on the nature of the legal threats that they face. Nevertheless, one-third of institutions reported that they have no formal compliance function planned or developed.² Eighty percent of the institutions have no chief compliance officer with responsibility for overall compliance.³ With respect to the compliance programs already deployed, the most frequently reported structure was totally decentralized without designated compliance officers,⁴ enforced by disaggregated academic bodies related to different schools, departments, or divisions.

Decentralization and age-old institutional norms related to independent inquiry and scholarship, in addition to budgetary cut-backs, are at the crux of the postsecondary compliance deficit. Just a few decades ago, colleges and universities were essentially unregulated entities. Their independence, and that of their faculty, was itself a hallmark of the academic enterprise. But in the intervening years, academic institutions have begun to accept millions in federal funds in the form of student financial aid, research grants, Medicare, Medicaid, and direct appropriations.⁵ The potential for administrative, faculty, and student negligence, and misconduct in the use of those funds and interactions with students has now become plenary.

Postsecondary institutions have no real choice but to adapt to the new regulated environment. The extent to which state and federal authorities and private litigants have ramped up civil and criminal enforcement of enhanced laws and regulations to combat misconduct is now widely known. From False Claims Act (FCA) and Title IX lawsuits to simple negligence and privacy lawsuits, there has never been a time more important than this to have an effective and comprehensive compliance program. This Article suggests that the best way for postsecondary institutions to accommodate their historic academic character and norms to the new regulatory environment is to incorporate the familiar concepts of federalism and separation of powers into their compliance programs. In this context, the federal elements are academic departments and the branches of the academy include administration, faculty, and students.

1. NAT'L ASS'N OF COLL. & UNIV. ATTORNEYS [hereinafter NACUA], 2013 NACUA COMPLIANCE SURVEY 12 (2013).

2. *Id.* at 13.

3. *Id.* at 12.

4. *Id.* at 14 (35.4%).

5. See Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 752–55 (2010).

I. COMPLIANCE THREATS

A recent survey by the National Association of College and University Attorneys (NACUA) reveals a remarkable consensus among postsecondary institutions, public and private, about the greatest compliance risks that they face. As a whole, they identify their highest risks as human resources (HR), information security, Title IX, athletics, public safety (i.e., Clery Act), financial aid, research, the Americans with Disabilities Act (ADA), grant administration, and environmental health and safety.⁶ After human resources, priorities shift among postsecondary institutions by Carnegie classification, size of operating budget, and student enrollment, but this appears to be primarily related to the additional activities undertaken by larger institutions, rather than any disagreement over the importance of the risk categories per se.

A. Human Resources

HR is a paramount risk for most types of postsecondary institutions. Former and disgruntled employees may state claims under federal, state, and local discrimination laws including sexual harassment and ADA claims, which are separately prioritized in the NACUA survey, not to mention whistleblower, tenure, and promotion claims.⁷ Associate and baccalaureate colleges and universities were the only two types of postsecondary institutions to rank HR as a secondary or tertiary concern. The reason may be that associate colleges and universities typically have predominately part-time and adjunct professors, and baccalaureate colleges and universities ordinarily have a relatively small, homogenous workforce.⁸ Regardless, HR is one of the few areas that most colleges and universities address through some type of centralized compliance effort, reaching across all institutional departments and functions under central oversight in an HR-related or legal office inclusive of input from units of the institution, as in a federal style of government.

One reason may be that, beginning in 1998, the U.S. Supreme Court began to recognize the existence of the “effective compliance” affirmative defense in sexual harassment cases.⁹ The defense allows an employer to avoid punitive damages when the employer has adopted and implemented

6. NACUA, 2013 NACUA COMPLIANCE SURVEY 46 (2013).

7. After *Garcetti v. Ceballos*, 547 U.S. 410 (2006), First Amendment claims are less of a problem for public institutions because they may be dismissed if adverse action is taken against a public employee speaking out within the scope of employment.

8. NACUA, 2013 NACUA COMPLIANCE SURVEY 37–8 (2013).

9. D. Frank Vinik et al., *The “Quiet Revolution” in Employment Law & Its Implications for Colleges and Universities*, 33 J.C. & U.L. 33, 34 (2006) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

effective policies and procedures to address complaints of workplace harassment and discrimination.¹⁰ Since 1998, several more defenses have arisen. Therefore, in HR, like many other areas, a compliance plan can cabin or even avoid discrimination claims when it incorporates strong anti-discrimination policies, regular training of staff, and reporting and investigation protocols.¹¹

B. Athletics and Title IX Compliance

Postsecondary institutions with the largest operating budgets (\$1 billion or more) prioritize athletics and information security as the next threats, and then grant administration and, related to HR, sexual harassment.¹² Institutions classed by Carnegie classification as doctorate-granting colleges and universities share basically the same concerns.¹³ The prominent placement of athletics is not surprising. Some of the most serious ethical lapses in colleges and universities in recent years have occurred in NCAA athletic programs. Child sex abuse in the locker room at Pennsylvania State University is the most tragic.¹⁴ But reports are now commonplace that tutors complete work and exams for players, athletes receive unexplained grade changes and cash and sexual inducements, directly or indi-

10. *Faragher*, 524 U.S. at 806 (declaring the defense established if the plaintiff unreasonably failed to avail self of “a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense”); *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001).

11. Naturally, compliance planning cannot eliminate all HR risks. As an example, whistleblowers can earn protected status in some states by reporting conduct to a fellow employee that never occurred which even if it had occurred would not have been illegal, as long as the whistleblower subjectively believed the conduct occurred and violated the law. Colleges and universities cannot guard against this type of imagined unlawful conduct. Under federal law, colleges and universities have more guardrails in place, including a requirement that the would-be whistleblower: (1) undertake some level of due diligence into the alleged unlawful conduct, (2) demonstrate that the claimed conduct objectively violates the law, and (3) report to a person with authority to remedy the problem. But even federal courts have become more permissive. In these circumstances, the best colleges and universities can do is require HR to be notified of all reports of claimed wrongdoing and approve any adverse action against staff members.

12. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

13. *Id.* at 35.

14. See FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (July 12, 2012) [hereinafter FREEH REPORT], available at http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf. Alleged misconduct with minors has not been limited to college and university athletic programs either. See Jon Lender et al., *UConn Professor Subject of Sexual Misconduct Investigation*, HARTFORD COURANT, July 16, 2013, http://articles.courant.com/2013-07-16/community/hc-uconn-investigation-0716-20130715_1_law-firm-sexual-misconduct-investigation-allegations (music professor).

rectly, and colleges and universities design specialized courses for athletes. A wide spectrum of schools are allegedly involved from Division I schools¹⁵ to Division III schools.¹⁶

Title IX compliance, prioritized separately from athletics by some schools, shows up as a top-three risk for even the smallest postsecondary institutions because it impacts both competitive and intramural sports programs. The U.S. Department of Education recently leaked a list of fifty-five colleges and universities under investigation for Title IX violations.¹⁷ An effective compliance program provides schools with a defense against Title IX liability, which includes injunctive relief and even damages.¹⁸ Thus, as an example, a federal appeals court denied relief to plaintiffs who sought class-wide injunctive relief over and above a university compliance program that the Office of Civil Rights of the United States Department of Education considered adequate.¹⁹

C. Information Security

Likewise, information security is a primary concern of postsecondary and other types of institutions. Employee misconduct and criminal activity have led to major privacy breaches at colleges and universities. For example, the University of Connecticut notified patients in November 2013 that employees inappropriately accessed the medical records of 164 patients.²⁰

15. See Paul Myerberg, *Report: Serious Academic Misconduct was Common at Oklahoma State*, USA TODAY, Sept. 11, 2013, <http://www.usatoday.com/story/sports/ncaaf/2013/09/11/oklahoma-state-sports-illustrated-report-part-2-academic-misconduct/2797433/>; *Report: SI Documents Misconduct in OSU's Football Program*, TAHLEQUAH DAILY PRESS, Sept. 8, 2013, http://www.tahlequahdailypress.com/sports/osu_sports/report-si-documents-misconduct-in-osu-s-football-program/article_a34affbf-23b3-5552-817d-d4709a64e58c.html; Brett Friedlander, *UNC Admits to "Academic Misconduct" in Football Program*, ACC INSIDER (Aug. 26, 2010), <http://acc.blogs.starnewsonline.com/15121/unc-admits-to-academic-misconduct/>; Brad Wolverton, *Alleged Academic Fraud at U. of North Carolina Tests NCAA's Reach*, CHRON. OF HIGHER EDUC., Sept. 7, 2012, <http://chronicle.com/article/Alleged-Academic-Fraud-at-U/134270/>; Steve Eder, *N.C.A.A. Admits Mishandling Miami Inquiry*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/sports/ncaa-admits-misconduct-in-miami-investigation.html>; Randy Ludlow et al., *Ohio State Football: NCAA Penalties Could be Severe*, COLUMBUS DISPATCH, Apr. 25, 2011, <http://www.dispatch.com/content/stories/sports/2011/04/25/0425-ohio-state-faces-severe-sanctions.html>.

16. *Report: E&H Athletic Department under NCAA Investigation*, TIMES NEWS (Feb. 27, 2014), <http://www.timesnews.net/article/9073833/report-eandh-athletic-department-under-ncaa-investigation>.

17. For a list of colleges and universities under Title IX investigation, see <http://images.politico.com/global/2014/05/01/list.html>.

18. See *Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001).

19. *Id.* at 573.

20. *Patients Notified of Privacy Breach*, UCONN HEALTH, <http://www.uhc.edu/>

Several college and university medical centers have experienced similar breaches.²¹ Data breaches on campuses involving personal information for students and staff are also commonplace.²² Some data privacy breaches are even linked to grade changes; for example, at Santa Clara University data breaches led to grade changes of at least sixty undergraduate students from 2000–2011.²³ Both large and small institutions are subject to data privacy breaches involving staff, students and donors, but the type and amount of information available to research and medical institutions is obviously more substantial.

D. Research, Grant Administration, and Medical Billing

Research, grant administration, and medical billing are primarily, if not exclusively, concerns of colleges and universities and affiliated hospitals of research institutions. State and federal authorities have in recent years filed a multiplicity of lawsuits against them, claiming that they violated the conditions of research grants,²⁴ and Medicare and Medicaid.²⁵ A number of these lawsuits have resulted in sizable recoveries for the federal government; for example, against the University of Medicine and Dentistry of New Jersey (\$8.3 million),²⁶ Yale University (\$7.6 million),²⁷ Northwest-

breach/ (last visited Nov. 5, 2014).

21. See, e.g., Jeff Goldman, *University of Pittsburgh Medical Center Acknowledges Privacy Breach*, ESECURITY PLANET (Nov. 29, 2013), <http://www.esecurityplanet.com/network-security/university-of-pittsburgh-medical-center-acknowledges-privacy-breach.html>; Patrick Ouellette, *Saint Louis University Notifies 3,000 Patients of Data Breach*, HEALTHIT SECURITY (Oct. 8, 2013), <http://healthitsecurity.com/2013/10/08/saint-louis-university-notifies-3000-patients-of-data-breach/>; *University of Pittsburgh Medical Center Privacy Breach Prompts Warning to Patients*, PHIPRIVACY.NET (Nov. 27, 2013), <http://www.phiprivacy.net/university-of-pittsburgh-medical-center-privacy-breach-prompts-warning-to-patients/>.

22. *Worst "EDU" Privacy Breaches of 2011–2012*, N.C. STATE UNIV. (June 29, 2012), <http://oit.ncsu.edu/unit-sc/worst-edu-privacy-breaches-of-2012>; *Chronology of Data Breaches*, PRIVACY RIGHTS CLEARINGHOUSE, http://www.privacyrights.org/data-breach-asc?order=field_breach_date_value_1& (last visited Nov. 5, 2014).

23. Graham Cluley, *FBI Investigates Santa Clara University Hack Which Changed Exam Grades*, NAKEDSECURITY (Nov. 16, 2011), <http://nakedsecurity.sophos.com/2011/11/16/fbi-investigates-santa-clara-university-hack-draft/>; see also David F. Carr, *Hacking Higher Education*, INFORMATIONWEEK (Apr. 24, 2013), <http://www.darkreading.com/security/hacking-higher-education/d/d-id/1109684?>.

24. See, e.g., Isaac Arnsdorf, *Yale to Pay \$7.6 Million to Settle Grant Investigation*, YALE DAILY NEWS, Dec. 23, 2008, <http://yaledailynews.com/blog/2008/12/23/yale-to-pay-7-6-million-to-settle-grant-investigation/>.

25. *United State ex rel. Erickson v. Univ. of Wash. Physicians*, 339 F. Supp. 2d 1124 (W.D. Wash. 2004); *Complaint, Pollak v. Bd. of Trs. of the Univ. of Ill.*, No. 1-99-cv-00710, 2003 U.S. Dist. Ct. Pleadings 8199, at *5 (N.D. Ill. Nov. 25, 2003).

26. News Release, U.S. Dep't of Justice, *UMDNJ to Pay More than \$8 Million to Settle Kickback Case Related to Cardiology Program* (Sep. 30, 2009),

ern University (\$3 million),²⁸ Weill Medical College at Cornell University (\$2.6 million),²⁹ and New Jersey University Hospital (\$2 million).³⁰ But an even greater concern for institutions with total operating budgets of \$500 to \$999 million are animal and human subject research regulations.³¹

The False Claims Act (FCA) prohibits a person from “knowingly present[ing], or caus[ing] to be presented [to an officer or employee of the United States Government], a false or fraudulent claim for payment or approval.”³² The FCA provides for damages equal to “3 times the amount of damages which the Government sustains,” in addition to a “civil penalty.”³³ In several cases, courts have ruled that the damages sustained equal “the full amount of grants awarded to the defendants based on their false statements.”³⁴ With literally thousands of students, researchers, research assistants, professors, and administrative staff as potential relators of receiving and administering federal assistance, there could hardly be a more challenging compliance environment. A compliance plan enables institutions to rebut claims that they reacted recklessly or possessed the requisite intent to violate the FCA and, thus, is a critical defense.³⁵ The very existence of a

<http://www.justice.gov/usao/nj/Press/files/pdf/files/2009/umdnj0930%20rel.pdf>.

27. Arnsdorf, *supra* note 24.

28. Joe Carlson, *Northwestern to Pay Nearly \$3 million to Settle Claims against Cancer Researcher*, MODERN HEALTHCARE (July 30, 2013), <http://www.modernhealthcare.com/article/20130730/NEWS/307309966>.

29. Paul Basken, *Cornell’s Medical College Pays \$2.6-Million in Federal Fraud Case*, CHRON. OF HIGHER EDUC., Mar. 11, 2009, <http://chronicle.com/article/Cornells-Medical-College-Pays/42548/>.

30. John Commins, *Feds Settle \$2 Million Medicaid Fraud Case with NJ Hospital*, HEALTH LEADERS MEDIA (June 10, 2009), <http://www.healthleadersmedia.com/content/LED-234328/Feds-Settle-2-million-Medicaid-Fraud-Case-with-NJ-Hospital.html>; *see also* Jacques Couret, *Emory University to Pay \$1.5 Million to Settle False Claims Act Case*, ATLANTA BUS. CHRON., Aug. 28, 2013, <http://www.bizjournals.com/atlanta/news/2013/08/28/emory-university-pays-15m-to-settle.html>; Kelsey Volkmann, *Updated: Saint Louis University to Pay \$1M to Settle Fraud Case*, ST. LOUIS BUS. J., July 9, 2008, <http://www.bizjournals.com/stlouis/stories/2008/07/07/daily29.html?page=all>; Jon Campisi, *DOJ, Univ. of Pittsburgh Medical Center Settle False Claims Act Allegations for \$957K*, PA. REC. (Aug. 2, 2013), <http://pennrecord.com/news/10934-doj-univ-of-pittsburgh-medical-center-settle-false-claims-act-allegations-for-957k>; *Baylor University Medical Center to Pay \$907,000 to Settle False Claims Act Charge*, CORP. CRIME REP. (Nov. 27, 2012), <http://www.corporatecrimereporter.com/news/200/baylorfalseclaims11272012/>.

31. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

32. False Claims Act, 31 U.S.C. § 3729(a)(1)(A) (2014).

33. *Id.* at § 3729(a)(1)(G).

34. *See United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 88 (2d Cir. 2012).

35. Roberto Braceras, *The False Claims Act and Universities: From Fraud to Compliance*, C. & U.L. MANUAL § 8.6.1 (Mass. Cont’g Legal Educ. 2012); *accord* Kathryn Ehler-Lejcher, *The Expansion of Corporate Compliance Guidance for Health*

compliance plan also shows good faith that may affect the government's decision whether to pursue a case.³⁶

E. Financial Aid and HEOA

After HR, postsecondary institutions with the smallest operating budgets (less than \$100 million) identify financial aid as the next biggest threat, followed by the ADA, accreditation, and, related to financial aid, Higher Education Opportunity Act (HEOA) compliance.³⁷ Institutions classed as baccalaureate colleges and universities have similar priorities,³⁸ and even the largest postsecondary institutions are concerned about financial aid and HEOA compliance further down their priority list. In between are institutions with \$200 million to \$499 million operating budgets and institutions classed as AA colleges and MA colleges. These institutions prioritize (besides HR) financial aid, HEOA compliance, ADA, Title IX, and accreditation.³⁹ By size of student enrollment, a roughly similar pattern emerges, except that the largest schools worry more about financial aid and the smallest institutions about HEOA compliance.

In recent years, state and federal authorities have aggressively prosecuted claimed violations of financial aid laws, such as Title IV under the FCA, "little [state] FCAs," and other statutes,⁴⁰ leading to sizable recoveries especially against for-profit institutions and, most recently, the bankruptcy and forced sale of Corinthian Colleges.⁴¹ In many lawsuits, state attorneys general and students have claimed that they were misled with false promises about placement rates and salaries in their prospective fields of employ-

Care Entities, 25 WM. MITCHELL L. REV. 1339, 1379–80 (1999).

36. Ehler-Lejcher, *supra* note 35, at 1380.

37. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

38. *Id.* at 34.

39. *Id.* at 34, 58.

40. See *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006) (false certification of compliance with regulation forbidding higher education institutions to pay contingent fees to recruiters to qualify under Title IV); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (false promises of compliance with incentive compensation ban to qualify under Title IV); *United States ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 646 (C.D. Cal. 2007) (false statements made to accreditation agency to qualify under Title IV); *United States ex rel. Gatsiopoulos v. Kaplan Career Inst.*, No. 09-21720-CIV, 2010 WL 5392668, at *1 (S.D. Fla. Dec. 22, 2010); *United States ex rel. Powell v. Am. Intercontinental Univ., Inc.*, No. 1:08-CV-2277-RWS, 2010 WL 2245574, at *3 (N.D. Ga. June 2, 2010).

41. Dawn Gilbertson, *Apollo Group Settles Suit for 78.5 Mil*, ARIZ. REPUBLIC, Dec. 15, 2009, <http://www.azcentral.com/business/articles/2009/12/14/20091214biz-apollo1215.html>; Kevin Carey, *Corinthian Colleges is Closing. Its Students May be Better Off as a Result*, N.Y. TIMES, July 2, 2014, http://www.nytimes.com/2014/07/03/upshot/corinthian-colleges-is-closing-its-students-may-be-better-off-as-a-result.html?_r=0.

ment.⁴² In reaction, the United States Department of Education issued new “gainful employment,” misrepresentation and omission, and incentive compensation rules.⁴³

The HEOA also requires institutions to take steps to curb the illegal distribution of copyrighted materials and illegal file sharing. In 1983, the Association of American Publishers shocked the academy when it sued New York University, nine of its professors, and a local copy center for violating the Copyright Act by copying large sections of books for their courses without obtaining the permission of the authors.⁴⁴ Colleges and universities hurried to implement compliance protocols, but the advent of e-learning, electronic file sharing, and e-publishing has led to new types of alleged violations. For example, three academic publishers sued Georgia State University, claiming extensive copyright infringement in the posting of book excerpts to e-reserves and learning management systems.⁴⁵ HEOA requires institutions to certify to the Secretary of Education that they have developed plans to effectively combat the unauthorized distribution of copyrighted material.

F. Public safety

Public safety, including Clery Act compliance, is not the priority that it was in the immediate aftermath of the tragic events at Virginia Tech,⁴⁶ but institutions with operating budgets in the range of \$500 to \$999 million still rank it as the next biggest threat.⁴⁷ The Clery Act requires institutions that participate in federal financial aid programs to (1) collect and report to the campus community and federal government statistics for certain campus-related crimes, (2) publish and enforce certain policies regarding crime and safety, and (3) have policies in place requiring institutions to take specific

42. See Gayland O. Hethcoat II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1, 2–3 (2011), available at <http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1024&context=lclr>; Complaint, *Casey v. Fla. Coastal Sch. of Law, Inc.*, Case No. 12-03990CA40, at *3–*5 (Fla. Cir. Ct. Feb. 1, 2012); Alan Feuer, *Trump University Made False Claims, Lawsuit Says*, N.Y. TIMES, Aug. 24, 2013, <http://www.nytimes.com/2013/08/25/nyregion/trump-university-made-false-claims-lawsuit-says.html>.

43. Student Assistance General Provisions, 34 C.F.R. § 668 (2011).

44. *NYU Professors Charged with Copyright Law Violation*, HARVARD CRIMSON, Feb. 16, 1983, <http://www.thecrimson.com/article/1983/2/16/nyu-professors-charged-with-copyright-law/>.

45. Jennifer P. Lorenzetti, *Recent Copyright Cases: What You Need to Know*, FACULTY FOCUS (June 20, 2013), <http://www.facultyfocus.com/articles/distance-learning/recent-copyright-cases-what-you-need-to-know/>.

46. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2013) [hereinafter Clery Act].

47. NACUA, 2013 NACUA COMPLIANCE SURVEY 58 (2013).

actions when incidents occur.⁴⁸ Revised regulations are expected in November 2014, in light of statutory changes affecting the content of annual security reports (ASRs).⁴⁹

G. General

A summary of the risk priorities that postsecondary institutions report is set forth in **Table 1a** and **Table 1b**. There are obviously dozens more compliance risks that postsecondary institutions must confront from governance, health care, and insurance to export controls, conflicts of interest, and public ethics violations. This Article aspires not to identify all of the subject matter for compliance planning, but only the most important ones as far as colleges and universities are concerned. We turn next to the compliance program elements that should be deployed to meet these challenges.

Table 1a. Compliance Threats

Aggregate	Large Institutions	Ph.D. Institutions	Medium Institutions
HR	HR	HR	HR
Financial aid	Athletics Information security	Athletics	Financial aid HEOA compl
HEOA compl	Grant admin. Sexual harassment	Grant admin.	Title IX
Athletics	Financial aid Envtl health & safety Medical billing Research Time & effort reporting	Information security Research	Accreditation Athletics
Title IX Information security		Financial aid	Conflicts of interest Envtl. health & safety
Grant admin Research		Sexual harassment HEOA compl. Envtl health & safety	
Accreditation			

48. Clery Act, 20 U.S.C. § 1092(f) (2013).

49. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to the Staff of U.S. Dep't of Educ. (Oct. 26, 2010), *available at* <http://www.ed.gov/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter].

Table 1b. Compliance Threats

AA Colleges	MA Colleges	Small Institutions	BA Colleges
Financial aid	HR	HR	HEOA compl
HR/ADA	Title IX	Financial aid	Title IX
Accreditation HEOA compl Title IX	Financial aid	ADA Accreditation HEOA compl.	Financial aid HR Accreditation
	Accreditation HEOA compl ADA	Donors & gifts Governance Grant admin Information security Program integrity rules Title IX	Donors & gifts Information security Student finances ADA Tax
	Information security		
	Sexual harassment		

II. COMPLIANCE PROGRAM ELEMENTS

Postsecondary institutions agree on their compliance risks. Consensus about the essential elements of an effective compliance program also exists following the publication of influential protocols and rules such as the *Federal Sentencing Guidelines for Organizations*.⁵⁰ These elements include: (1) clear compliance objectives; (2) clearly demarcated responsibilities; (3) adequate resources and technology; (4) ongoing internal auditing, monitoring, and investigations; and (5) consequences for violations. A compliance program that materially fails in one or more of these areas is unlikely to prevent the types of scandals that they are intended to address and may not qualify an organization under the *Federal Sentencing Guidelines* for downward departure from standard sentences or fines.

A. Clear Compliance Objectives

Effective compliance programs begin with a set of brief compliance objectives, prepared through a collaborative effort that incorporates input

50. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL Ch. 8 (2012); *see also* Draft OIG Compliance Program Guidance for Recipients of PHS Research Awards, 70 Fed. Reg. 71,312–71,320 (Nov. 28, 2005) [hereinafter Draft OIG Guidelines], *available at* <http://www.gpo.gov/fdsys/pkg/FR-2005-11-28/pdf/E5-6548.pdf>; Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2012); DIV. OF GRANTS COMPLIANCE AND OVERSIGHT, NAT'L INSTS. OF HEALTH, A FEDERAL PERSPECTIVE ON COMPLIANCE, *available at* http://grants1.nih.gov/grants/compliance/compliance_2003_regional_seminar.ppt (presentation); COUNCIL ON GOVERNMENTAL RELATIONS, MANAGING EXTERNALLY FUNDED RESEARCH PROGRAMS: A GUIDE TO EFFECTIVE MANAGEMENT PRACTICES (July 1, 2009), *available at* http://www.cogr.edu/Pubs_EffectiveManagement.cfm; UNIV. RISK MGMT. & INS. ASS'N, ERM IN HIGHER EDUCATION (Sept. 2007), *available at* http://www.urmia.org/library/docs/reports/URMIA_ERM_White_Paper.pdf.

from all levels of the organization, and applies generally to all personnel.⁵¹ Balkanized codes of conduct developed in isolation cannot influence the fabric of an institution's culture in the same way. Broadly, the purpose of a compliance program is to ensure compliance with federal and state laws, industry regulations, and private contracts into which an institution has entered.⁵² But consistent with these broad purposes, the compliance team should articulate the compliance objectives in a manner most conducive to the institution's mission, providing examples of best practices, so that a "values-based compliance structure" is built.⁵³ Then, the various departments of an institution must be held accountable to apply them in a manner that makes sense for that program and the college or university's various interest groups, so that there is no question whether anticipated conduct within a department is permitted.

B. Demarcated Responsibilities

Effective compliance programs assign responsibilities to management and staff for each institutional risk and require periodic reports from responsible persons about what has been done to mitigate risk.⁵⁴ The *Federal Sentencing Guidelines* anticipate that specific individuals within an organization with direct access to governing authority will be delegated day-to-day operational responsibility for the compliance and ethics program, and report periodically to high-level personnel.⁵⁵ For smaller organizations, the *Federal Sentencing Guidelines* alternatively recognize that the governing authority itself will discharge the organization's compliance and ethics efforts.⁵⁶ Regardless, all staff working for a college or university should clearly understand its compliance-related expectations.⁵⁷

51. Pamela Bucy Pierson & Anthony A. Joseph, *Creating an Effective Corporate Compliance Plan: Part II*, 72 ALA. LAW. 284, 286 (2001).

52. SOC'Y OF CORPORATE COMPLIANCE & ETHICS, THE COMPLETE COMPLIANCE AND ETHICS MANUAL § 8B2.1(b)(1) – (7) (2004); U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)–(7) (2006).

53. THOMAS A. BUTCHER & WILLIAM R. KAUFFMAN, COMPLIANCE: A PRACTICAL PROTOCOL FOR THE ENTIRE CAMPUS (AND BEYOND. . .) 6 (2008); NAT'L COUNCIL OF UNIV. RESEARCH ADM'RS & ATL. INFO. SERVS., INC., *Research Compliance*, in SPONSORED RESEARCH ADMINISTRATION: A GUIDE TO EFFECTIVE STRATEGIES AND RECOMMENDED PRACTICES 1505:5 (2010) [hereinafter NCURA GUIDE], available at http://www.utexas.edu/research/osp/resources/ncura_documents/research_compliance_chapter_1500.pdf.

54. See Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); NCURA GUIDE, *supra* note 53, at 1505:9, 1505:11.

55. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (2012).

56. *Id.* at § 8B2.1 cmt. n.2(C)(iii).

57. NCURA GUIDE, *supra* note 53, at 1505:4. Staff must also understand what data to include in their reports to management.

C. Reporting

Effective compliance programs require staff to report misconduct. Most academic institutions already satisfy at least this requirement of an effective compliance program.⁵⁸ For prevention and detection of violations to work, staff must know the proper avenues through which to ask questions and report possible problems or violations, be confident that the institution will investigate the warnings rather than ignore them, and be sure that they will not be retaliated against for their reports.⁵⁹ Avenues for anonymous and confidential reporting should be included.⁶⁰

D. Adequate Resources and Technology

Compliance programs that are little more than paper tigers, consisting of manuals on shelves or protocols in handbooks, are the worst kind. Enron had such a compliance program. Paper programs set the floor for the standard of care that the institution says it meets, but typically does not. In contrast, effective compliance programs are adequately resourced and complemented with sufficient technology to monitor compliance as benchmarked against similarly-sized institutions.⁶¹ They conduct periodic training and dissemination of the compliance policies by communicating compliance standards, roles, and responsibilities to all institutional agents, and motivating compliance.⁶²

Extensive training of employees is part of the *Faragher* affirmative defense against punitive damages.⁶³ Conversely, courts have considered the

58. LAWRENCE WHITE, BRIEFING: RESULTS OF NACUA'S 2013 COMPLIANCE SURVEY 16 (2013) (three-quarters of respondents maintain a "hotline" or similar mechanism for reporting compliance problems to the institution).

59. Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); NCURA GUIDE, *supra* note 53, at 1505:9.

60. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2012); BUTCHER & KAUFFMAN, *supra* note 53, at 13.

61. PETER HARRINGTON & TOM SCHUMACHER, ESTABLISHING AN EFFECTIVE COMPLIANCE PROGRAM, COMPLIANCE RISK ASSESSMENTS, AND THE ROLE OF GENERAL COUNSEL 6 (2006), *available at* ecommons.med.harvard.edu/ec_res/nt/A6963478-B33E-4576-BA7C-B16087604B93/Establishing_an_Effective_Compliance_Program.doc; UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(C) (2012).

62. HARRINGTON & SCHUMACHER, *supra* note 61, at 11; BUTCHER & KAUFFMAN, *supra* note 53, at 12; NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, MEETING THE CHALLENGES OF ENTERPRISE RISK MANAGEMENT IN HIGHER EDUCATION 7 (2007) [hereinafter NACUBO REPORT], *available at* http://www.ucop.edu/enterprise-risk-management/_files/agb_nacubo_hied.pdf; J. Derek Kearl, Note, *Establishing a Culture of Compliance: Applying Corporate Compliance Principles to a University Setting*, 2004 B.Y.U. EDUC. & L.J. 353, 364 (2004); Ehler-Lejcher, *supra* note 35, at 1403.

63. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

failure to train staff adequately as evidence of reckless disregard.⁶⁴ As an example, the Seventh Circuit criticized the University of Wisconsin for failing to train the two primary decision makers, a dean and associate dean, who laid off four employees over age forty in the basics of age discrimination law.⁶⁵ Affirming the liquidated damages award, the court stressed “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ from which a jury can infer reckless indifference.”⁶⁶ Likely, it did not help that colleges and universities have a unique advantage when it comes to training staff.

E. Auditing, Monitoring, and Investigating

No compliance program is complete without auditing, monitoring, and investigation.⁶⁷ Sarbanes-Oxley requires senior corporate officials to certify review of compliance reports on a quarterly and annual basis.⁶⁸ At least annually, postsecondary boards of trustees should receive an update on the compliance program, including Clery Act reports, audit reports, NCAA (financial and program self-assessment) reports, tax returns (including Schedule J), accreditation agency letters, reports of wrongdoing, reports of disciplinary action, and reports of new risk areas. Internal audits under the direction of compliance officers and external audits under the direction of counsel or state officials, such as the Auditor General, are also important to test the strength of internal controls.⁶⁹

Auditing and monitoring via financial and electronic means are important, but there is also no substitute for promptly and carefully investigating reports of suspected noncompliance when there is a specific, credible report of it.⁷⁰ When noncompliance is confirmed, institutions should evaluate any related gaps in their compliance protocols, and take corrective action.⁷¹ In this manner, investigations can lead to continuous improvement

64. Vinik et al., *supra* note 9, at 54.

65. *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 304 (7th Cir. 2002).

66. *Id.* (quoting *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 778 (7th Cir. 2001)).

67. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra* note 51, at 287, 291; Kearl, *supra* note 62, at 365; Ehler-Lejcher, *supra* note 35, at 1408.

68. Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2012); 17 C.F.R. § 229.601 (2014).

69. See HARRINGTON & SCHUMACHER, *supra* note 61, at 12; THE INST. OF INTERNAL AUDITORS, THE ROLE OF INTERNAL AUDITING IN ENTERPRISE-WIDE RISK MANAGEMENT (Sep. 29, 2004), available at http://www.ucop.edu/enterprise-risk-management/_files/role_intaudit.pdf; MATTIE & CASSIDY, *infra* note 83, at 11, 21.

70. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra* note 51, at 291.

71. HARRINGTON & SCHUMACHER, *supra* note 61, at 12; Pierson & Joseph, *supra*

of the compliance program.⁷² Institutions should report back to employees on the results of investigations, as well as document them, so that they know their allegations were taken seriously. Without this feedback, the employees are more likely to initiate litigation against the school. Legal counsel plays a critical role in this process.⁷³

F. Consequences for Violations

Last, consequences for breaches of compliance programs are critical to their success.⁷⁴ According to the *Federal Sentencing Guidelines*, an organization exercises due diligence in its compliance program when its standards “have been consistently enforced through appropriate disciplinary mechanisms, including . . . discipline of individuals responsible for the failure to detect an offense” and “[a]dequate discipline of individuals responsible for an offense. . . .”⁷⁵ The only thing worse than not having a compliance plan is having one that is devoid of consequences.⁷⁶ Knowledge is a dangerous thing.⁷⁷ In recent years, this has been most evident in sexual harassment Title IX lawsuits when colleges and universities acted with deliberate indifference to knowledge of alleged sexual harassment and took no remedial measures to address it.⁷⁸ When individuals with assigned responsibilities violate compliance protocols, repercussions must follow swiftly, surely, and oftentimes publicly after due process to reinforce the message that the institution is serious about compliance.⁷⁹

note 51, at 291.

72. NCURA GUIDE, *supra* note 53, at 1505:10.

73. HARRINGTON & SCHUMACHER, *supra* note 61, at 13.

74. *Id.*; UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.5 (2012); Kearl, *supra* note 62, at 366–7; Ehler-Lejcher, *supra* note 35, at 1407.

75. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(k)(6) (2003).

76. *See* Ehler-Lejcher, *supra* note 35, at 1389.

77. *See* Kearl, *supra* note 62, at 366.

78. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 275 (1998) (noting that when a school acts with deliberate indifference to its knowledge of alleged sexual harassment and takes no remedial measures to address harassment, the school may be liable for damages under Title IX); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007) (describing evidence that university football coach knew of serious risk of sexual harassment and assault during college football recruiting efforts, that coach knew a prior sexual assault had occurred during recruiting visits, and that coach nevertheless maintained an unsupervised player-host program to show high school recruits a “good time”, creating a fact issue as to whether the risk of such an assault during recruiting visits was so obvious as to amount to deliberate indifference).

79. Due process requires providing the accused with the opportunity to respond to charges, confront witnesses, put on evidence, and appeal rulings.

IV. COMPLIANCE PROGRAM MODELS

We might have expected that consensus about the risks and elements of a compliance plan would lead to common postsecondary compliance programs. But with at least two-thirds of all academic institutions reporting that they have no formal compliance function, planned or developed, or chief compliance officer,⁸⁰ something else is obviously getting in the way. Divergence in resources and, relatedly, the size of postsecondary institutions are commonly mentioned reasons; these may certainly affect the character and sophistication of a compliance program, but its existence is another matter. The *Federal Sentencing Guidelines* do not excuse any institution from having a compliance plan, but recognize a difference between “small” and “large” ones, and state that the former may satisfy compliance objectives “with less formality and fewer resources than would be expected of large organizations.”⁸¹

The failure of institutions to implement compliance programs at all or successfully may have the most to do with the nature of the programs that they propose to implement. Common to most academic institutions, with the exception of for-profit institutions, are the fiercely independent norms of academic freedom and institutional autonomy. Interference with the pursuit of academic excellence even as it relates to the expenditure of research funds, internal governance (including the legislative role played by faculty) and the system of tenure raise raw sensitivities. Hierarchy is less pronounced or accepted in the academy than in the corporate setting. Administration and students commonly have different interests. We think this is at the root of opposition to postsecondary compliance programs. A compliance program that better accommodates traditional academic interests, norms, and structure by incorporating familiar aspects of separation of powers and federalism would stand the greatest chance of acceptance and success.

A. Separation of Powers

The three branches of power within the academy that any postsecondary compliance program must address are the administration, faculty/staff, and students. Pursuant to the classic separation of powers doctrine, constraints on the authority of each branch are critical to ensure that no branch supersedes another branch. A compliance program can provide for a type of separation of powers as shown in **Table 2**, consistent with faculty governance norms relating to academic policy and student input.

80. NACUA, 2013 NACUA COMPLIANCE SURVEY 12–14 (2013).

81. UNITED STATES SENTENCING COMMISSION SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.2(C) (2012).

Table 2: Separation of Powers

Administration	Faculty/Staff	Students
Proposes and vetoes compliance objectives, policies, procedures, and standards of conduct	Adopts compliance objectives, policies, procedures, and standards of conduct	
Budgets, appropriates, and spends compliance resources	Spends compliance resources	Spends compliance resources
	Reports non-compliance	Reports non-compliance
Investigates, monitors, audits, and prosecutes reports of non-compliance	Monitors noncompliance and participates in judicial review of those prosecuted.	Monitors noncompliance and participates in judicial review of those prosecuted.
Appoints institution-wide compliance officers	Appoints departmental compliance officers	Appoints student liaisons

1. The Administration

No postsecondary institution has an excuse for failing to involve the board of trustees and, its primary agent, the office of the president in compliance planning. Compliance protocols recognize that both are critical to ensuring postsecondary institutional compliance.⁸² For example, the Sarbanes-Oxley Act places responsibility for an institution's compliance program on senior management and the audit committee of the board of directors.⁸³ Likewise, the *Federal Sentencing Guidelines for Organizations* places overall responsibility for a compliance program on senior corporate managers. Moreover, multifarious causes of action, such as breach of fiduciary duty and the FCA, are powerful incentives in their own right for boards of trustees and the office of the president to implement effective compliance programs. In small institutions, their compliance roles will be even more direct than in large ones.

a. Board of Trustees and President

It is the president's job to regularly and effectively articulate compliance objectives and the importance of the compliance function to ensure trickle-

82. See, e.g., HARRINGTON & SCHUMACHER, *supra* note 61; BUTCHER & KAUFFMAN, *supra* note 53; NACUBO REPORT, *supra* note 62, at 10–12; JOHN A. MATTIE & DALE L. CASSIDY, ACHIEVING GOALS, PROTECTING REPUTATION: ENTERPRISE RISK MANAGEMENT FOR EDUCATIONAL INSTITUTIONS 1, available at <http://regents.universityofcalifornia.edu/regmeet/july08/a7a.pdf> (last visited Nov. 16 2014); NCURA GUIDE, *supra* note 53, at 1505:11, 1505:13, 1505:15.

83. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m) (2012).

down through the entire organization.⁸⁴ The president bears day-to-day responsibility to monitor, audit, and ensure that all of the school's departments are compliant. The president proposes the annual institutional budget, including the resources that will be spent on compliance, including compliance personnel. His office is ultimately responsible to prosecute non-compliance. In turn, the board of trustees has a responsibility to hold the president accountable for this by developing related metrics focused on compliance, and annually reviewing the president's performance against them. The board must assess whether management is appropriately exercising its judgment to avoid situations such as occurred at the Pennsylvania State University, where the school's four most powerful people concealed Gerald A. Sandusky's activities from the Board of Trustees.⁸⁵

a. Compliance Committee and Officers

Below the office of the president, consensus is hard to find about the proper executive organizational structure to promote compliance.⁸⁶ Large for-profit corporations seeking to comply with these requirements have turned to a compliance committee and individual compliance officers designated by substantive areas.⁸⁷ Under Sarbanes-Oxley, the qualified legal compliance committee, sometimes called the audit committee (1) consists of at least one member from the audit committee or, if none, a committee of directors who are not employed by the company and who are not "interested persons" and two or more members of the issuer's board of directors who are not employed by the issuer; (2) has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation; (3) has been authorized by the board of directors to inform the Chief Legal Officer and CEO of any reports of evidence of a violation (unless futile), to determine whether an investigation is necessary, to report information, where necessary, to the audit committee or to the full board, to initiate an investigation, and to retain expert personnel; and (4) is authorized to recommend implementation of an appropriate response and to vote to notify the SEC when the issuer fails to implement a

84. BUTCHER & KAUFFMAN, *supra* note 53, at 8.

85. FREEH REPORT, *supra* note 14, at 14; *see also* David Jones, *Report Recommends More Oversight of Rutgers Athletic Department after Scandal*, CHI. TRIB., July 22, 2013, http://articles.chicagotribune.com/2013-07-22/news/sns-rt-usa-rutgerscoach-20130722_1_mike-rice-athletic-director-tim-pernetti-rutgers-board.

86. *See, e.g.*, NCURA GUIDE, *supra* note 53, at 1505:13 ("[T]here are alternative ways of approaching the development of a research compliance program based on whether the institution is centralized or decentralized.").

87. Draft OIG Guidelines, 70 Fed. Reg. at 71,313 (Nov. 28, 2005); MATTIE & CASSIDY, *supra* note 82, at 17; HARRINGTON & SCHUMACHER, *supra* note 61; Ehler-Lejcher, *supra* note 35, at 1401-02.

recommended appropriate response.⁸⁸

An advantage of the compliance committee for corporations is that it provides an avenue for an attorney representing an issuer to fulfill her obligation to report evidence of a material violation.⁸⁹ The attorney can be satisfied that, once she makes the report, her ethical and statutory responsibility to report claimed wrongdoing is complete.⁹⁰ In this manner, the committee helps the company avoid unnecessary federal reporting to the SEC or other agencies, and ensures that the attorney does not gain undue influence over institutional decisions through up-the-ladder reporting.⁹¹ The attorney for the issuer typically prefers this arrangement because there is no need, or even pressure, to embarrass a client, no risk of alienating other clients, and no pressure to evaluate the response received from up the ladder to determine if it is an “appropriate response.”⁹² Similar advantages are available to the postsecondary compliance officer and/or lawyer and other reporters as a result of establishing a compliance committee.

Most research institutions have adopted something like an audit committee or multiple audit committees.⁹³ A postsecondary compliance committee typically is comprised of institutional stakeholders representing key departments or functions of the college or university.⁹⁴ The chair may be legal counsel, a provost/academic vice president, business officer, or some other professional.⁹⁵ Central committees should not be oversized and should be staffed by a chief compliance or risk officer with day-to-day responsibility for overseeing and coordinating the compliance program by working together with the unit compliance officers.⁹⁶ Naturally, this is the body that also ensures (at least indirectly) prosecution of compliance plan violations.

Postsecondary institutions that have not adopted a compliance committee often have a (1) centralized independent compliance officer (8.2%); (2) legal office as compliance office (11.8%); or (3) decentralized interdepend-

88. 17 C.F.R. § 205.2(k) (2014).

89. Jeffrey I. Snyder, Note, *Regulation of Lawyer Conduct under Sarbanes-Oxley: Minimizing Law-Firm Liability by Encouraging Adoption of Qualified Legal Compliance Committees*, 24 REV. LITIG. 223, 243 (2005).

90. *Id.*

91. *Id.* at 243–44, 247.

92. *Id.* at 245.

93. See Leah Guidry, *Research Compliance — Is This the Missing Piece in My Compliance Program?*, J. HEALTH CARE COMPLIANCE 5 (Mar.–Apr. 2010), available at http://www.huronconsultinggroup.com/Insights/Perspective/Life_Sciences/~/_media/Insights-Media-Content/JHCC_ResearchCompliance.pdf.

94. BUTCHER & KAUFFMAN, *supra* note 53, at 9.

95. *Id.*

96. See HARRINGTON & SCHUMACHER, *supra* note 61, at 6–7; see also NACUBO REPORT, *supra* note 62, at 11–12.

ent compliance officers (13.3%).⁹⁷ Even in the central committee model, the chief compliance officer and/or compliance officers engage in the day-to-day monitoring, education, feedback, execution, and enforcement.⁹⁸ Other than the president, the chief compliance officer should be the executive primarily responsible for advancing compliance efforts across the institution.⁹⁹ Accordingly, the chief compliance officer should have a reporting relationship to the compliance committee (if there is one), president, and board of trustees.¹⁰⁰

2. Faculty and Staff

The Administration, including the chief compliance officer and compliance committee, wields tremendous power. Faculty, staff, and students may come to resent the compliance team as inconsistent with academic freedom. If they do not actively oppose it, they may nevertheless undermine the compliance program by failing to make it relevant or to observe it. The compliance program may become largely irrelevant to the actual operation of the institution. Consequently, false claims may go largely undetected for long periods. Sexual harassment and discrimination may not be reported. Simultaneously, there will be under-reporting in this sense and over-reporting in the sense that faculty and staff may also tend to make specious reports of supposed violations of the plan outside designated reporting channels because they do not fully understand the compliance plan.

The antidote to this is turning to the faculty and staff in their ordinary legislative capacity to adopt compliance objectives, policies, procedures, and standards of conduct that they can support, tailor to their departments, and then help monitor for compliance. In this manner, the compliance plan may bolster morale, rather than undermine it.¹⁰¹ Institutions should also invite faculty to participate in the annual budgetary process to be sure that necessary and adequate compliance resources are brought to bear. They may identify departmental compliance positions that should be created for previously unknown liability risks. Departmental chairs will be in a position to spend compliance resources and are likely to do so more effectively if they have assisted on the front end of the budgetary cycle. To ensure that faculty members are satisfied that prosecutions under the compliance pro-

97. NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013); JENNIFER E. KIRKLAND, NACUA, CREATING EFFECTIVE COMPLIANCE PROGRAMS AT SMALLER INSTITUTIONS OR ON A LIMITED BUDGET: MODELS AND PROCEDURES 2 (2009), *available at* <http://www.higheredcompliance.org/compliance/resources/xv-09-11-11.doc>.

98. BUTCHER & KAUFFMAN, *supra* note 53, at 11.

99. *See* NCURA GUIDE, *supra* note 53, at 1505:15.

100. *Accord* NACUBO REPORT, *supra* note 62, at 12; Pierson & Joseph, *supra* note 51, at 286.

101. *See* Ehler-Lejcher, *supra* note 35, at 1382.

gram are just, it also makes sense to include them in the standard judicial process that the accused will receive.

3. Students

Students are the weakest leg of the academic power structure, but by no means irrelevant. The Student Council will have meaningful compliance proposals relevant to students that should cut down claims. Students are one of the populations that compliance plans are intended to protect (e.g., from sexual harassment and assault) and to protect against (e.g., hacking). They are natural monitors, and may be in the best position to identify certain public safety, athletic, financial aid, information privacy, intellectual property, and student handbook vulnerabilities and violations. Graduate students and research assistants are also privy to how federal grant money is expended. Student Councils will, typically, already appoint liaisons to recommend policies and receive student reports and complaints. This function should be expanded as part of an integrated compliance plan. Student Councils will also spend some compliance resources, making its involvement on the budgetary side also more likely to advance the compliance agenda. In many institutions, students also participate in the judicial review process when faculty and students are charged with negligence or misconduct.

B. Federalism

Federalism is another way to distribute power and avoid irrelevant compliance policymaking. The maxim “all politics is local” has some relevance even to compliance programs. Unless a compliance program has departmental relevance, it is unlikely to succeed. Many totally centralized compliance models fail here. For example, the centralized independent compliance officer (with or without a centralized compliance committee) or centralized compliance committee has institution-wide jurisdiction and most likely reports directly to the president and/or governing board or its audit committee, but risks becoming isolated if it lacks a representative component.¹⁰² The centralized independent compliance office is unlikely to reach to the grass roots to avoid false claims, copyright infringements, violations of export controls, scientific misconduct, or self-dealing; to appreciate bona fide differences between schools or departments; to address misconduct among students; or to adequately protect academic freedom. Due to its lack of representativeness, this office will have difficulty impacting the institution’s culture.¹⁰³ Yet NACUA reports that the centralized

102. NACUBO REPORT, *supra* note 62, at 8.

103. The legal office as compliance office model suffers from this same disadvantage. It accounts for about 12% of all deployed postsecondary compliance models.

model accounts for about 27% of all postsecondary institutions.¹⁰⁴

At the opposite extreme is a totally decentralized compliance program with or without designated compliance officers. NACUA reports this is the predominate postsecondary model (roughly 49%).¹⁰⁵ This decentralized model effectively diffuses power, as did the Articles of Confederation, but without any unifying governance structure it is also unlikely to succeed in many circumstances. When there are compliance officers as part of the decentralized compliance program (13.3%),¹⁰⁶ they are typically housed within independent departments reporting to their respective offices, the legal office, or a vice-president or provost.¹⁰⁷ Real collaboration is rare. The greatest divide ordinarily exists between a college or university hospital or athletic department and the main campus, followed by a divide between the hard sciences and social sciences.

Naturally, expanding the number of compliance officers risks inconsistency, failed cross-communication, independence, and accountability problems such as occurred at the Pennsylvania State University, which relied exclusively upon departments to monitor their own compliance issues.¹⁰⁸ In an interdependent compliance office model, the strength and autonomy of the office to which the compliance officers or other persons report will vary tremendously.¹⁰⁹ Whereas the medical school and financial aid office may be adequately protected in certain respects, other departments may have virtually no compliance protocols, monitoring, or audits. Moreover, the protocols are unlikely to have even the barest type of integration and will generally not deal with student misconduct.

The model with the best chance of ensuring effective compliance among all members of the college and university community must involve a representative element, yet with sufficient central oversight and authority to advance the institution's interests. A central committee complemented by compliance officers assigned by school, department, functional unit, and interest group (e.g., faculty and students) would best serve this purpose. The committee should report directly to the governing board or its audit

NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013). The legal officer model attempts to maximize the benefit of the attorney-client privilege, but may actually create conflicts of interest for the legal staff.

104. NACUA, 2013 NACUA COMPLIANCE SURVEY 14 (2013).

105. *Id.*

106. *Id.*

107. A permutation of this model is one involving decentralized compliance responsibilities without designated compliance officers. Instead, compliance officers are assigned to various deans, directors, committees, legal counsel, or others. KIRKLAND, *supra* note 97, at 2.

108. See JEFFREY M. KAPLAN, JOSEPH E. MURPHY & WINTHROP M. SWENSON, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 8.11 (1995); FREEH REPORT, *supra* note 14, at 31.

109. BUTCHER & KAUFFMAN, *supra* note 53, at 9.

committee and office of the president.¹¹⁰ In the event of multiple committees, all should have representation on a central oversight committee. Funding should come directly from the office of the president to avoid dependency on the departments that the committee oversees. The committee should meet regularly to review compliance activities across the campus, make recommendations for improvements, receive, review, and investigate compliance issues, and report to the governing board and president. Such a central committee has multiple advantages such as an institution-wide and comprehensive view of the school's primary goals and interests, a better vantage point to spot institutional risks that lower-level units or interest groups may subjugate to parochial concerns, the authority necessary to elevate matters, and the potential for constituent buy-in through the representativeness of the committee.

Naturally, college, school, departmental, and interest group input remain critical to an effective and balanced compliance program in a large institution. The trouble in postsecondary academic institutions is not that the input occurs, but that it too often eclipses central oversight and is not integrated. The various departments and offices within a college or university are closest to the regulatory and legal issues that they face. Faculty and students know best how the rules will impact them. A central committee is most apt to ensure coherent observance of institution-wide interests, but school units are best suited to apply those policies in independent disciplines. Faculty and staff are in the best posture to tease out the rules that will achieve the most beneficial results. Likely, both know their unit's particular weaknesses in areas as diverse as grant administration and medical billing, and have suggestions for the training and monitoring protocols that will best address them. Moreover, they are better positioned to protect academic freedom than a central entity. Accordingly, unit compliance officers should work together with a central committee to shape an institution's strategic compliance plan and enforcement mechanism, potentially utilizing common audit personnel.

V. CONCLUSION

Effective postsecondary compliance programs are now not merely advisable, but indispensable. They detect and avoid litigation; improve the speed and quality of responses to reports of negligence, misconduct, and even emergencies; deter governmental prosecution; minimize and avoid liability; and reduce fines and criminal violations. We might have expected that consensus about the importance of compliance plans and related risks and elements would lead to common postsecondary compliance programs, but most institutions continue to go without them and the programs that are

110. HARRINGTON & SCHUMACHER, *supra* note 61, at 6.

in place vary considerably in their effectiveness. To address the unique norms and characteristics of the academy, this Article suggests that a compliance program that is federal in character and incorporates separation of powers has the best chance of succeeding in the college and university context because it allows for the input of decentralized units and autonomous staff while assuring central oversight.