FACILITATING UNIVERSITY COMPLIANCE USING REGULATORY POLICY INCENTIVES

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Abstract

Internal compliance programs have proliferated at colleges and universities in response to the federal government's regulatory expansion within higher education. Institutions increasingly utilize these programs in order to manage their myriad compliance obligations and the attendant increase in risk. Yet, even properly designed programs possess many areas of potential weakness that hinder their effectiveness. Concurrently, calls for regulatory reform have grown louder. Although several viable options have been proposed and should be taken seriously, none adequately leverage the compliance function so many universities have recently adopted.

Institutional policies are an inseparable component of an effective compliance program and their status as such justifies their inclusion as a central feature of higher education regulatory reform. In lieu of issuing mere affirmative or prohibitive compliance obligations, Congress and the Department of Education should strategically incentivize the development of university-level policies that address regulated issues in order to encourage the internal collaborative processes that lead to effective compliance outcomes.

In addition to examining the practical aspects and effects of compliance programs and institutional policies, this Article draws from institutional theory to demonstrate that the higher education sector benefits from the open exchange of policies and best practices among peer institutions. The federal government's use of regulatory policy incentives or mandates can facilitate this exchange and similar modeling behaviors, which in turn can increase efficiencies at the institutional level. In sum, this Article contends that a legal compliance mandate is more likely to be included within the scope of a university's compliance program (formal or informal as it may be) and implemented effectively if it takes the form of a policy disclosure obligation originating in statute or regulation.

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Introduction

As the scope and complexity of higher education regulation has expanded over the years, universities[1] wrestle with managing compliance. Borne out of this struggle, and the escalating risk of liability, are increasingly formal programs intended to track, manage, and otherwise bring order to universities' broad range of compliance obligations.

Congress has recognized the need for organized compliance monitoring in higher education in light of the vast number of obligations imposed. The Higher Education Opportunity Act of 2008 amended the Higher Education Act to require the Department of Education to compile and make public a calendar of all institutional reporting and disclosure requirements.[2] Although they represent a significant portion of institutional compliance obligations, myriad other day-to-day obligations exist elsewhere in the Higher Education Act and in Department regulation. The Department has demonstrated its interest in facilitating compliance with its regulations through the issuance of various forms of sub-regulatory guidance.[3] However, the current approach of supplementing statute and regulation with sometimes-extensive sub-regulatory guidance is an inefficient method that creates uncertainty and extra compliance burdens.

In light of the higher education sector's embrace of the formal compliance function and its associated processes and tools—akin to models found in the corporate world and encouraged by the Federal Sentencing Guidelines for Organizations—it deserves to shape the way the Department regulates. The compliance function, together with the regulation to which it has attempted to adapt, should exist symbiotically enough so that all major compliance requirements can be captured within a typical program's scope. The Department should make additional efforts to facilitate that relationship.

Policies are a well-established and valuable component of university governance and compliance. What's more, they are an essential aspect of the Organizational Guidelines' definition of an effective compliance program. Policies disseminate essential information throughout the university and create its "internal law" by defining and delegating the university's internal authority and responsibilities to its constituents.[4] Additionally, policies often recite ethical values held by the university, which contribute to a culture of integrity and compliance. Given their generally public and visible nature, policies reach beyond the university to create norms within the higher education sector, which spread and are adopted by peer institutions.

As a regulatory method, Congress and the Department have required universities to adopt policies addressing certain regulated areas. Statutory and regulatory policy mandates range from those merely requiring the disclosure of a policy on a particular subject, which allow universities the autonomy to establish

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1 This article will use the term "universites" to refer to colleges and universities generally.

2 Pub. L. No. 110-315, § 482(a)(2), 122 Stat. 3078, 3271-72 (2008) (codified at 20 U.S.C. § 1089(e) (2012)).

3 *See* discussion *infra* Section IV.

4 William A. Kaplin & Barbara A. Lee, The Law of Higher Education 26 (5th ed. 2014).

an individual stance, to requirements so specific that they leave little to no discretion to universities. Some have criticized the Department's latter approach for its prescriptiveness. The Department's less prescriptive approach, on the other hand, has been recognized as a catalyst for university administrators to engage in "innovative" and "novel thinking" to develop compliance solutions.[5]

In response to the increasing volume, scope, and complexity of higher education regulation, lawmakers and members of the higher education industry have proposed several workable constructs for reform. In the present, the approaching reauthorization of the Higher Education Act presents a prime opportunity for lawmakers to consider and implement the best of any proposed reform measures. Congress and the Department of Education should heed calls for regulatory reform that reduce the volume and layers of regulation and sub-regulatory guidance and take the guesswork out of compliance. The use of regulatory policy incentives or mandates—either directed by statute or adopted by the Department independently as a rulemaking strategy—stands as an alternative or complementary approach to the reduction of regulation or withdrawal from particular substantive areas, as well as one that strategically leverages the institutional compliance function. Policy processes successfully utilized by universities have the potential to allow universities to achieve compliance while maintaining their autonomy and developing solutions that further their educational missions.

This Article examines the role of policies in achieving and enhancing universities' compliance with federal regulation. Part I surveys the state of higher education regulation and the challenges universities face. Part II examines university compliance programs, their weaknesses, and the role of policies in achieving compliance. Part III discusses recent calls for reform in higher education regulation. Part IV discusses the potential benefits of regulatory policy mandates or incentives to university compliance. This Article concludes that a regulatory mandate is more likely to be included within the scope of a university's compliance program (formal or informal as it may be) if it takes the form of a required policy disclosure. In sum, this Article argues that Congress and the Department of Education should strategically incentivize or require universities to maintain policies that address regulated areas, in lieu of issuing mere affirmative or prohibitive compliance obligations, because effective university policies are more likely to improve compliance, preserve institutional autonomy, and shape norms within the higher education sector.

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5 Lara Kovacheff Badke, *Beyond Compliance: A Multi-Case Study Analysis of University Behavior and Policy Negotiation in Response to the Dear Colleague Letter on Campus Sexual Violence*, 88 (2016) (Ph.D. dissertation, University of Michigan), *available at* https://deepblue.lib.umich.edu/bitstream/handle/2027.42/135851/larakov_1.pdf?sequence=1&isAllowed=y.

I. Federal Regulation of Higher Education

Few aspects of higher education go unregulated.[6] Each of the fifteen cabinet agencies regulates university operations and transactions.[7] Laws often attach to universities upon their acceptance of federal money, such as student loan assistance or research grants.[8] Although the specific laws applicable to any given university depend on its mission, size, and research agenda, all universities that accept funds administered under Title IV of the Higher Education Act are subject to its attendant "General Provisions" and other sections, from which many compliance requirements originate.[9] Penalties for noncompliance can be stiff; some violations carry the potential for fixed fines or loss of Title IV eligibility.[10]

A. Scope and Recent Increase

University Counsel Stephen S. Dunham groups higher education laws into four general categories. First are laws administered upon receipt of funding that relate to the government's interest in the funded activities,[11] such as Title IV financial aid program participation and the many issues attendant to research operations, including misconduct, conflicts of interest, human and animal subjects, export controls, and effort-reporting. Second are laws administered upon receipt of funding that further some other government policy objective,[12] such as anti-discrimination measures in the educational and employment settings.[13] Third

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6 *See generally* Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope,* 36 J.C. & U.L. 649 (2010) ("Colleges and universities today are probably the most heavily regulated organizations in the United States in terms of the number and types of statutes and judicial precedents with which they must comply.").

7 *See* Task Force on Fed. Regulation of Higher Educ., Recalibrating Regulation of Colleges and Universities 4 (Feb. 12, 2015), http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf. Despite legitimate concerns about the extent of this regulation, the higher education sector generally recognizes its necessity "given the major financial investment that [the federal government] makes through student grants and loans, research grants, and other subsidies." Vanderbilt Univ., The Cost of Federal Regulatory Compliance in Higher Education: A Multi-Institutional Study 1 (2015), http://news.vanderbilt.edu/files/Regulatory-Compliance-Report-Final.pdf.

8 *See* Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 753-754 (2010); *see also* Art Coleman et al., Educ. Counsel, LLC, Getting Our House in Order 1 (2015), http://www.educationcounsel.com/docudepot/EducationCounsel-Getting_Our_House_in_Order.pdf ("In 2014, $133.8 billion in federal student aid was delivered to 12.9 million students at 6,142 institutions.").

9 *See* 20 U.S.C. §§ 1088-1098g (2012).

10 *See, e.g.*, § 1094 (rendering institutions "ineligible" for Title IV participation for violations); Adjustment of Civil Monetary Penalties for Inflation, 82 Fed. Reg. 18,559 (Apr. 20, 2017) (to be codified at 34 C.F.R. pt. 36) (listing civil monetary penalties for violations of various Higher Education Act provisions). *See also* Nat'l Ass'n of Coll. & Univ. Attorneys [hereinafter "NACUA"], Building an Effective Compliance Program: An Introductory Guide 9-10 (2015), http://www.nacua.org/docs/default-source/legacy-doc/resource-pages/compliance-and-risk-management/bldngeffectivecomplianceprgm.pdf (membership req'd) (listing the various "significant potential consequences for any university that fails to meet its compliance obligations").

11 Dunham, *supra* note 8, at 767-785.

12 *Id.*

13 *Id*.

are general laws that apply to various entities, but have unique application to universities.[14] Fourth are laws governing non-profit institutions specifically, which include the large majority of universities,[15] such as those that affect tax-exempt status. All told, the federal government's regulation of higher education reaches deeply into universities' operations—so deeply that many regulated areas are probably unfamiliar to individuals outside of academia.

In recent years, the pace of federal regulatory activity has been on an uptick.[16] Possibly originating with the Department's promulgation of the Program Integrity regulations,[17] it progressed as the Office for Civil Rights (OCR) issued the April 2011 Dear Colleague Letter on Title IX and the Department engaged in further regulatory activity addressing "college cost and affordability, accreditation, lending, disability accommodation, college safety, alcohol and drug prevention, and academic records management."[18] The pace and frequency of the Department's rulemaking and interpretive activities have been of great concern to the higher education community, creating what professor and higher education scholar Peter Lake describes as a "regulatory panic."[19] That reaction is understandable in light of the surge of university compliance responsibilities and attendant opportunities for error.

The increase in regulatory activity has occurred despite the absence of significant legislation that would necessitate such rulemaking.[20] Even so, federal regulations and interpretive rules comprise the most voluminous, if not the most complex, sources of higher education law. Although OCR's 2011 Dear Colleague Letter was sub-regulatory agency guidance, it nonetheless imposed new Title IX compliance requirements, such as institutional policy provisions and misconduct

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14 *Id*. at 751. *See also* Lee, *supra* note 6, at 680 (internal citations omitted) ("[C]olleges and universities, as places of 'business,' are subject to the same federal laws that regulate businesses, such as a variety of environmental protection laws and the Occupational Health and Safety Act.").

15 Dunham, *supra* note 8, at 751.

16 *See* Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 7 (describing federal requirements placed on higher education institutions as growing 56 percent between 1997 and 2012); *id.* at 10 ("[T]he HEA contains roughly 1,000 pages of statutory language; the associated rules in the *Code of Federal Regulations* add another 1,000 pages. Institutions are also subject to thousands of pages of additional requirements in the form of sub-regulatory guidance issued by the Department."); *id*. at 64 ("In 2012 alone, through electronic announcements and Dear Colleague letters, ED issued at least 270 regulatory updates or modifications – more than one change per workday."); *see also* Lee, *supra* note 6, at 651 ("The speed and complexity of the new sources of regulation have increased . . . and have forever changed the role of the attorney who represents colleges and universities.").

17 *See* Program Integrity Issues, 75 Fed. Reg. 66,832 (October 29, 2010).

18 Peter F. Lake, *Welcome to Compliance U: The Board's Role in the Regulatory Era*, Trusteeship, July/Aug. 2013, at 10, *available at* https://www.agb.org/trusteeship/2013/7/welcome-compliance-u-boards-role-regulatory-era.

19 *Id*. *See also* Derek Bok, Higher Education in America 388 (2013) ("[T]he growing importance of higher education to a host of interested groups has led to increased regulation and demands for greater accountability. Although the new rules and restrictions have rarely sought to control academic policies, the burden of compliance has grown heavier and the points of friction have multiplied.").

20 *See* Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 13.

hearing procedures.[21] That letter was the beginning of a series of agency guidance documents clarifying—or, as critics describe it, expanding—OCR's interpretation of Title IX and implementing regulations.[22] The Department's reliance on Dear Colleague letters and other sub-regulatory guidance to expound on formal regulations has not been limited to Title IX; the Department has issued hundreds of guidance documents on a variety of topics in the previous decade.[23]

B. The Higher Education Act

The specific laws applicable to any given university depend on its mission, size, and research agenda. Universities are subject to many federal regulations by choice, such as by electing to operate an academic medical center and engaging in billing procedures that subject it to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH Act).[24] However, virtually all universities are subject to the Higher Education Act and its implementing regulations by virtue of their acceptance of funding in the form of student assistance authorized by Title IV of the Act, which represent the common denominator of higher education regulation and compliance mandates.[25]

The HEA authorizes billions of dollars in student and institutional aid programs[26]; accordingly, major provisions of the Act are devoted to the implementation of those programs through the Department of Education and other federal agencies.[27] As conditions on the receipt of federal aid dollars, however, the

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21 Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Colleague (Apr. 4, 2011) [hereinafter 2011 DCL], *withdrawn* Sept. 2017, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

22 *See, e.g.*, Questions and Answers on Title IX and Sexual Violence, U.S. Dep't of Educ., Office for Civil Rights (Apr. 29, 2014), *withdrawn* Sept. 2017, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Colleague (Apr. 24, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf; Q&A on Campus Sexual Misconduct, U.S. Dep't of Educ., Office for Civil Rights (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

23 *See Laws & Guidance*, U.S. Dep't of Educ., https://www2.ed.gov/policy/landing.jhtml (last visited Sept. 4, 2018).

24 Pub. L. No. 104-191, 110 Stat. 1936 (1996); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §§ 13001-24, 123 Stat. 115 (containing the HITECH Act).

25 Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232 (codified as amended in scattered sections of 20 U.S.C. §§ 1070 to 1099d, 42 U.S.C. §§ 2751-2756b (2012)). Other laws, such as Title IX of the Education Amendments of 1972, also apply by virtue of acceptance of federal financial assistance. 20 U.S.C. §§ 1681-1688 (2012).

26 *See* Kaplin & Lee, *supra* note 4, at 1708-1709 ("The act's various titles authorized federal support for a range of postsecondary education activities . . . . The act has been frequently amended since 1965 and continues to be the primary authorizing legislation for federal higher education spending."); Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 7 ("In 1970-71, what was then the U.S. Office of Education awarded roughly 1.6 million grants and loans to low- and middle-income families. In 2013-14, the U.S. Department of Education reported nearly 20 million such awards. The amount of money disbursed grew from $1.6 billion to more than $160 billion.").

27 *See, e.g.,* Title IV, *supra* note 25.

HEA directly regulates other areas of higher education at the campus level, among them public safety and student disciplinary proceedings.[28] The HEA also veers into grayer territory with laws that address peer-to-peer file sharing and other seemingly unrelated—or tangential—matters of university operations.[29]

The challenges associated with HEA compliance loom large over higher education administrators. In a 2013 survey of over 200 member institutions administered by the National Association of College and University Attorneys (the "2013 NACUA survey"), respondents as a whole identified HEA compliance as the third highest area of institutional risk.[30] The sheer breadth of compliance obligations contained in the HEA is likely one contributing factor to the risk perceived by universities. Another may be the variety of ways in which those compliance obligations are presented. Although only a fraction of the HEA's provisions directly regulate universities, others empower the Department of Education to regulate a particular subject matter area.[31] These provisions sometimes direct the Department to regulate universities in a particular manner, but often do not provide that level of detail.[32]

With respect to the way in which HEA statutes and Department regulations mandate institutional compliance, they can be grouped into five general categories: (1) Affirmative obligations (requiring universities to perform some task)[33]; (2) Prohibitions (prohibiting universities from engaging in certain activities)[34]; (3) Permissible activities (permitting universities to engage in certain activities subject to certain standards)[35]; (4) Benchmarks (conditioning program eligibility on the attainment of certain standards)[36]; and (5) Safe harbors.[37]

Several distinct types of requirements exist within the category of affirmative obligations. One type requires universities to file reports to the Department or other agencies, such as annual Integrated Postsecondary Education Data System (IPEDS)

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28 *See* 20 U.S.C. § 1092(f) (2012).

29 *See* Dunham, *supra* note 8, at 782 (describing the Act's implementing regulations as "scattershot").

30 NACUA, 2013 NACUA Compliance Survey 22 (combining all respondents' responses, showing Human Resources receiving 15.2%, Financial Aid 9.4%, and HEOA Compliance 6.8%).

31 *Compare* § 1092(a) (requiring eligible institutions to carry out specified information dissemination activities), *with* § 1099c (delegating responsibility to Department of Education to determine eligibility of institutions for participation in Title IV programs).

32 *See, e.g.*, 20 U.S.C. § 1015a(l) (2012) ("The Secretary is authorized to issue such regulations as may be necessary to carry out this section.").

33 *See, e.g.*, 20 U.S.C. §§ 1015-1015a (2012) (requiring universities to provide expenditure information to the National Center for Education Statistics and cost of attendance information to the Department).

34 *See, e.g.*, § 1011 (general antidiscrimination provision); § 1015d (prohibiting the charging of tuition greater than the in-state rate for active duty service members and qualified family).

35 *See, e.g.*, § 1070a-24(b) (permitting recipient entities to use grant funds for enumerated activities).

36 *See, e.g.*, § 1022a (establishing application criteria for teacher quality partnership grants).

37 *See, e.g.*, § 1091(h) (limiting enforcement actions against universities that determine a student to be eligible for federal aid based on citizenship or immigration status, if due to one of several enumerated reasons).

surveys and data submission to the National Center for Education Statistics.[38] A second type specifies the processes a university must use to achieve compliance, such as the exacting "R2T4" procedures for determining a student's last date of attendance and subsequently calculating unearned financial aid funds.[39]

A third type of affirmative obligation requires universities to disseminate information to other parties—namely, students, employees, and/or the public. The HEA contains a section devoted to "information dissemination" tied to participation in Title IV programs,[40] though numerous other disclosure requirements exist elsewhere throughout the Act.[41] The disclosure requirements broadly fall into two categories: One for information that relates to education loans disbursed to students, and one for information that does not.[42] The HEA requires information disclosures via means such as publication on the institutional website,[43] targeted distribution of a report,[44] or publication of a university policy.[45]

Disclosure requirements via university policy possess additional variation. For example, some HEA policy disclosure requirements mandate specific content to be included in the university policy, such as the provision that requires universities to disclose their policies and sanctions related to copyright infringement and peer-to-peer sharing.[46] Other policy disclosure requirements mandate the disclosure of various policy statements that address particular subject matter areas, but stop short of dictating precise policy provisions to be included.[47] Some HEA policy disclosure requirements expressly prohibit the Department from issuing regulations that "require particular policies."[48] One result of this variation is that universities may have more or less autonomy in establishing responsive policies, depending on how prescriptive an HEA policy disclosure requirement is. Another result is that some policy disclosure requirements establish quite clearly whether a university policy would be compliant, while others necessitate the issuance of sub-regulatory guidance to divine their meaning.

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38 §§ 1015-1015a.

39 § 1091; 34 C.F.R. § 668.22 (2017).

40 § 1092(a).

41 *See, e.g.*, § 1015a(i)(1)(V) (requiring university's website to disclose information related to student activities, services for individuals with disabilities, career and placement services, and transfer credit policies); §§ 1022d-1022g (requiring disclosure of an annual report card that includes information related to teacher certification program).

42 *See* Nat'l Postsecondary Educ. Coop., Information Required to Be Disclosed Under the Higher Education Act of 1965: Suggestions for Dissemination A-3 (2009), https://nces.ed.gov/pubs2010/2010831rev.pdf.

43 *See, e.g.*, § 1092(a)(1)(E) (requiring disclosure of cost of attendance on website).

44 *See, e.g.*, § 1092(f)(1) (requiring distribution of an Annual Security Report).

45 *See, e.g.*, § 1092(f)(8)(A) (requiring development and distribution of policy regarding programs addressing and responses to domestic violence, dating violence, sexual assault, and stalking).

46 § 1092(a)(P).

47 *See, e.g.*, § 1092(h) (requiring disclosure of transfer of credit policies).

48 § 1092(f)(2); *accord* § 1093a(b)(3).

Safe harbor provisions "protect from any liability or penalty as long as set conditions have been met."[49] In other words, a safe harbor contained in a statute or regulation will spare a university from enforcement action for noncompliance if the university concurrently acted in strict accordance with the terms of the safe harbor.[50] From an institutional perspective, a safe harbor provides a specific compliance mechanism to satisfy a requirement that may be vague or otherwise possesses so much nuance that makes compliance difficult to achieve with any certainty.

At the sub-regulatory level, the Department of Education has additional methods for clarifying—and creating—compliance mandates. The Department, like other cabinet agencies, may issue, amend, and repeal interpretive rules without utilizing the notice-and-comment procedures required of formal rules under the Administrative Procedure Act.[51] Although interpretive rules do not have the force and effect of law,[52] guidance issued by the Department's enforcement units is often the source of specific university compliance obligations and carries great weight.[53]

Interpretive rules, which may appear in the form of a "Questions & Answers" document, a "Dear Colleague Letter," a "Handbook," or other document, provide agency guidance regarding implementation of, and compliance with, formal regulations.[54] OCR, which enforces several civil rights laws prohibiting discrimination at universities receiving federal financial assistance, has described its issuance of guidance documents as for the benefit of institutions. Specifically, OCR has explained that those documents "assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance (absent resolution by voluntary means) under existing regulations."[55]

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49 *Safe Harbor Definition*, TheLawDictionary.org, https://thelawdictionary.org/safe-harbor/ (last visited Sept. 4, 2018).

50 *See, e.g.*, § 1091(h) (prohibiting enforcement actions against universities for certain errors in decisions related to students' citizenship or immigration status, so long as the university made its decision in accordance with, or due to, enumerated factors); § 1161l-4(a) (requiring the Secretary of Education to provide guidance clarifying that a university shall not be liable for making certain good faith disclosures of protected information in accordance with applicable statute).

51 5 U.S.C. § 553(b)(A) (2012). *See also* Perez v. Mortg. Bankers Ass'n, 135 S.Ct. 1199, 1206 (2015).

52 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995).

53 *See* Badke, *supra* note 5, at 30 ("[U]niversities continue to recognize the 2011 DCL and its subsequent clarifications as the law they are required to follow.").

54 *See, e.g.*, U.S. Dep't of Educ., Federal Student Aid, Gainful Employment Operations Manual (2015), *available at* https://ifap.ed.gov/GainfulEmploymentOperationsManual/GainfulEmploymentOperationsManual2015.html [hereinafter "Gainful Employment Operations Manual"] ("Within this manual, you will find guidance regarding implementation and compliance with each aspect of the gainful employment regulations."); U.S. Dep't of Educ., Office of Postsecondary Educ., The Handbook for Campus Safety and Security Reporting (2016), *available at* https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf [hereinafter Campus Safety Handbook] ("This handbook reflects the Department's interpretations and guidance, as of the date of publication, and was written to assist you, in a step-by-step and readable manner, in understanding and meeting the various HEA requirements."). *See also* Kaplin & Lee, *supra* note 4, at 1711 ("[A]gencies may supplement their regulations with program manuals, program guidelines, policy guidance or memoranda, agency interpretations, and 'Dear Colleague' letters.").

55 Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S.

The Office of Postsecondary Education (OPE), on the other hand, has issued guidance that it explains is for use by OPE staff, "who are responsible for evaluating an institution's compliance with the requirements," in addition to universities.[56]

Resolution agreements are another sub-regulatory method utilized by the Department and its enforcement units for establishing compliance measures. Resolution agreements are voluntary undertakings between the enforcing unit and an allegedly non-compliant university, which describe "specific remedial actions that the [university] will undertake to address the area(s) of noncompliance identified by" the unit in lieu of administrative enforcement proceedings.[57] Unlike interpretive rules, however, resolution agreements are unique to a single university. And although resolution agreements occupy a separate space from enforcement proceedings, they are often perceived as overlapping.[58] In this way, higher education administrators may perceive similar remedial actions applied to multiple institutions via resolution agreements as either *de facto* compliance mandates or measures that can stave off unwanted attention by the Department. As such, resolution agreements provide valuable insight into the Department's regulatory interpretations and enforcement objectives and priorities.

C. Regulatory Burdens

Federal regulations create substantial financial and administrative burdens on universities. Coinciding with the recent uptick in federal regulation, discussed *supra*, various professional associations, agencies, and individual universities have compiled detailed data on the impact and cost of those regulations.[59] In 2015, Vanderbilt University conducted perhaps the most comprehensive study

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Dep't of Educ., to the Honorable James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., U.S. Senate Comm. on Homeland Sec. & Gov't Affairs (Feb. 17, 2016), http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf.

56 Campus Safety Handbook, *supra* note 54, at 1-4.

57 *How the Office for Civil Rights Handles Complaints*, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/complaints-how.html (last visited Sept. 4, 2018).

58 *See* Geoffrey P. Miller, *The Compliance Function: An Overview*, *in* The Oxford Handbook of Corporate Law and Governance 981, 983 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) ("Corporations faced with compliance problems are sometimes better described as supplicants seeking mercy from their regulators rather than as equal adversaries."); Badke, *supra* note 5, at 30 ("There is considerable pressure on universities not to antagonize the Office for Civil Rights, who, until the ambit and authority of the DCL are resolved, remain subject to the Office for Civil Rights' investigative and enforcement authority.").

59 *See, e.g.*, Nat'l Sci. Bd., Reducing Investigators' Administrative Workload for Federally Funded Research (Mar. 10, 2014), https://www.nsf.gov/pubs/2014/nsb1418/nsb1418.pdf (identifying federal and institutional requirements that contribute most to administrative workload in research); Nat'l Acads. of Scis., Optimizing the Nation's Investment in Academic Research: A New Regulatory Framework for the 21st Century (2016), https://www.nap.edu/login.php?record_id=21824&page=https%3A%2F%2Fwww.nap.edu%2Fdownload%2F21824 (login req'd); Gerhard Casper, Stanford Univ., A Discussion with Members of the National Commission on the Cost of Higher Education (Oct. 16, 1997), http://web.stanford.edu/dept/pres-provost/president/speeches/971016collegecost.html (estimating in 1997 that it incurred approximately $20 million annually in compliance costs); Kelly Zack-Decker, Hartwick Coll., Compliance at Hartwick College: A Special Report to the President of the College (Dec. 2012), http://naicu.edu/docLib/20130315_Compliance-HartwickColl-12-12.pdf (estimating $300,000 annual cost, or 7% of non-compensation operating budget).

of the cost of federal regulatory compliance to the higher education sector.[60] Vanderbilt surveyed thirteen universities across the country to report compliance cost estimates for three categories of regulation: 1) Research-specific; 2) Higher education-specific; and 3) "All-sector" regulations that apply to colleges and universities, but not exclusively.[61] The survey asked universities to report labor, non-labor operating, and labor-indirect costs.[62] The study found that the true cost of federal compliance made up three to 11 percent of institutional nonhospital operating expenditures, depending on a university's research activities and scale of expenditures.[63] Sector-wide, the estimated cost of federal compliance was $27 billion for the fiscal year.[64]

The 2013 NACUA survey revealed that over "98 percent of chief legal officers rated compliance as 'the most challenging issue' their offices face, 'among the top three most challenging issues,' or 'just as challenging as any other legal issue.'"[65] University financial aid officers have expressed a similar sentiment, identifying their regulatory compliance workload as a "major" reason for current resource shortages in their units.[66] Although the surveys do not uncover specifically what legal and financial aid officers find challenging about compliance, it is fair to assume that ensuring the maintenance of adequate and knowledgeable staff to track, interpret, and satisfy compliance obligations ranks among a university's top challenges.[67] Still, additional external factors and circumstances certainly contribute to the challenges and create risk.

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60 Vanderbilt Univ., *supra* note 7. The study also included regional and specialized/programmatic accreditation costs. *Id*.

61 *Id*. at 4. Research-specific regulations included compliance requirements for federal grants and contracts management, human subjects research, research-related environmental health and safety, animal research, export controls, conflict of interest, technology transfer, and research misconduct. *Id*. Higher education-specific regulations included non-research requirements including accreditation, financial aid, FERPA (student privacy), Title IX (sexual misconduct and athletics), Clery Act, drug and alcohol prevention, IPEDS reporting, gainful employment, state authorization, and equity in athletics data analysis. *Id*. All-sector requirements included finance, immigration, disability, anti-discrimination, human resources, non-research environmental health and safety, and FISMA. *Id*.

62 *Id*. at 5. Labor costs included various activities such as regulatory reporting, trainings, policy development, organizational management and operations, reading and interpreting compliance requirements, and other daily activities related to regulations. *Id*. Non-labor costs included outsourcing compliance activities, external trainings and conference travel, equipment and materials needed for compliance activities, and various fees associated with compliance. *Id*. Indirect labor costs included various categories of overhead. *Id*.

63 *Id*. at 2.

64 *Id*. at 3.

65 Building an Effective Compliance Program, *supra* note 10, at 18 (citing 2013 NACUA Compliance Survey, *supra* note 30).

66 Nat'l Ass'n of Student Fin. Aid Adm'rs, Findings from the 2010 NASFAA Administrative Burden Survey (2011), http://www.nasfaa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3903.

67 *See* Bok, *supra* note 19, at 110 ("The growth of government regulation in matters ranging from laboratory safety to environmental rules and affirmative action has forced universities to hire more people to ensure compliance with the rules.").

In a statutorily mandated review of higher education regulations, the Advisory Committee on Student Financial Assistance surveyed universities to determine which regulations they perceive as the most burdensome.[68] The findings portray an industry that understands the need for regulation but is frustrated with the regulatory methods employed.[69] An overwhelming majority responded that they perceived HEA regulations—taken as a whole—to be burdensome or overly burdensome.[70] Responders also perceived inefficiencies and redundancies in the regime, noting substantial overlap between federal and state regulations.[71] The findings also revealed that many responders found the Department's regulatory burden calculations to be inaccurate estimates of the actual resources required to operationalize and administer a given requirement.[72]

Recent federal regulations have been the subject of disputes that complicate universities' ability to comply. Several rules within the Department's Program Integrity regulatory suite, for example, have been beset by legal challenges since their issuance in October 2010. The "state authorization" rules caused enough confusion to warrant the issuance of two Dear Colleague Letters prior to their effective date, one of which delayed enforcement by three years.[73] Months later, a federal court vacated a portion of the rules on the basis that the Department failed to abide by notice-and-comment rulemaking procedures,[74] a ruling which was later upheld on appeal.[75] The Department's four-year delay in issuing revised final regulations resulted in a lack of clarity regarding universities' compliance obligations, especially in light of a patchwork of state laws that regulate similar

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68 *See* 20 U.S.C. § 1098 (2012). The Advisory Committee defined "burdensome" as when "time, effort, and costs necessary to administer the regulation exceed the intended protections," and as being "overly prescriptive." Advisory Comm. On Student Fin. Assistance, Higher Educ. Regulations Study: Final Report 16 (Nov. 2011), http://www.chronicle.com/items/biz/pdf/HERS%20Final%20Report.pdf [hereinafter "HERS"]. The Advisory Committee identified the 15 most commonly cited regulations and then proposed methods for reform, with the aim of not reducing the regulations' effectiveness. *Id*.

69 HERS, *supra* note 68, at 10.

70 *Id*. at 10-11. Despite the existence of sometime-overlapping state requirements, most respondents named HEA regulations as most burdensome. *Id*. at 14.

71 *Id*. at 12.

72 *Id*. at 22.

73 Letter from Eduardo M. Ochoa, Assistant Sec'y for Postsecondary Educ., U.S. Dep't of Educ., Office of Postsecondary Educ., to Colleague, GEN-11-11 AMENDED (May 6, 2011), https://ifap.ed.gov/dpcletters/attachments/GEN1111.pdf; Letter from Eduardo M. Ochoa, Assistant Sec'y for Postsecondary Educ., U.S. Dep't of Educ., Office of Postsecondary Educ., to Colleague, GEN-11-05 (Mar. 17, 2011), https://ifap.ed.gov/dpcletters/attachments/GEN1105.pdf [hereinafter "Mar. 17, 2011 DCL"].

74 *See* Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108, 132-135 (D.D.C. 2011), *aff'd sub nom.* Ass'n of Private Sector Colls. v. Duncan, 681 F.3d 427, 462-463 (D.C. Cir. 2012).

75 *See* Ass'n of Private Sector Colls. v. Duncan, 681 F.3d 427.

activities.[76] The "incentive compensation"[77] and "misrepresentation"[78] rules faced similar legal challenges and spent their first three years of existence being litigated in federal court.[79] The litigation ultimately resulted in various aspects of each rule being remanded to the Department for correction.[80] In the course of the litigation, the Department issued several clarifications of universities' responsibilities under the rules and to respond to the courts' holdings.[81] Universities have been caught in this years-long swirl of uncertainty while making substantial and earnest efforts to comply in the interim.

Interpretive rules that ostensibly clarify universities' compliance obligations have also been the source of significant difficulty. OCR has faced significant scrutiny for issuing Dear Colleague Letters and similar guidance documents that possibly exceed its regulatory authority.[82] On the one hand, universities ignore OCR guidance at their own peril, but on the other hand, they may be better off addressing more concrete compliance obligations if there is a need to prioritize staff time and resources.

Finally, universities may be subject to underestimations of the breadth and scope of their legal and compliance obligations. Professor and higher education scholar Barbara Lee argues that there is no true "body" of higher education law.[83] Perhaps for that reason, universities suffer from the perception that they operate in a separate sphere from "heavily regulated industry," such that their legal obligations are "less elaborate and create smaller information needs."[84] This notion

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76 *See* Devrim Ozdemir & James Goodlett McDaniel, *Evaluation of the State Authorization Processes for Distance Education*, Online J. of Distance Learning Admin., Spr. 2013, http://www.westga.edu/~distance/ojdla/spring161/mcdaniel_ozdemir.html (concluding that "there is still much confusion surrounding the authorization process for distance education in the United States"); Program Integrity and Improvement, 81 Fed. Reg. 92,232 (Dec. 19, 2016) (to be codified at 34 C.F.R pts. 600 & 668) (final state authorization regulations).

77 Program Integrity Issues, 75 Fed. Reg. 66,832, 66,950-66,951 (October 29, 2010) (to be codified at 34 C.F.R. § 668.14(b)(22)).

78 *Id*. at 66,958-66,960 (to be codified at 34 C.F.R. pt. 668 subpt. F).

79 *See* Career Coll. Ass'n, 796 F. Supp. 2d 108, *rev'd sub nom.* Ass'n of Private Sector Colls. v. Duncan, 681 F.3d at 449-452; Ass'n of Private Sector Colls. v. Duncan, 681 F.3d 427; Ass'n of Private Sector Colls. v. Duncan, 70 F. Supp. 3d 446 (D.D.C. 2014).

80 *See* Ass'n of Private Sector Colls. v. Duncan, 681 F.3d at 448-452, *remanded to* Dep't of Educ.; Ass'n of Private Sector Colls. v. Duncan, 70 F. Supp. 3d 446, 455-457 (D.D.C. 2014), *remanded to* Dep't of Educ.

81 Mar. 17, 2011 DCL, *supra* note 73; Program Integrity Issues, 76 Fed. Reg. 20, 534, 20,536 (April 13, 2011) (to be codified at 34 C.F.R. pt. 668 (revising definition of "misleading statement" in misrepresentation regulation); Program Integrity Issues, 78 Fed. Reg. 17,598 (March 23, 2013) (issuing revisions to the preamble to the final incentive compensation rule in accordance with remand); Program Integrity Issues, 78 Fed. Reg. 57,799 (Sept. 20, 2013) (to be codified at 34 C.F.R. pt. 668) (amending several provisions of misrepresentation regulation); Program Integrity Issues, 80 Fed. Reg. 73,991 (Nov. 27, 2015) (clarifying and re-interpreting portions of the incentive compensation regulation).

82 *See* Badke, *supra* note 5, at 30.

83 Lee, *supra* note 6, at 689.

84 Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 Emory L.J. 1113, 1144 (1997).

may be a relic of a bygone era before the proliferation of regulation applicable to universities and their ever-expanding suite of pursuits. Consequently, universities often lack the resources and legal staff of their corporate counterparts.[85] Today, however, universities exists in anything but "low demand setting[s],"[86] and are subject to an array of legal obligations that are as diverse and disjointed as their business operations.

II. University Compliance Programs

Many universities have responded to the recent regulatory expansion with the introduction of internal compliance programs.[87] Universities increasingly utilize a formal compliance function in order to manage their obligations and the accompanying increase in risk.[88] More specifically, formal programs provide a proactive system to reinforce institutional values, raise awareness of compliance obligations, assign responsibilities, and ensure accountability.[89] This section describes the impetus behind many university compliance programs, their intended purposes, and their inherent weaknesses. This section also examines the role of policies as a compliance component and surveys the sources from which they originate.

A. Origin of Higher Education Compliance Initiatives

The surge of higher education compliance initiatives coincides roughly with the rapid expansion of corporate compliance programs over the past three decades.[90] This wave of compliance initiatives can be traced to 1991 revisions to the U.S. Sentencing Commission's Sentencing Guidelines for Organizations ("Organizational Guidelines").[91] The current iteration of the Organizational

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85 *See* Lee, *supra* note 6, at 684 ("[I]t is very likely that the legal staff at the college or university is considerably smaller than that of its corporate counterpart.").

86 Gruner, *supra* note 84, at 1144.

87 *See* Dunham, *supra* note 8, at 786 (observing "the growth of formal compliance plans and programs at colleges and universities is a relatively recent phenomenon").

88 *See* Building an Effective Compliance Program, *supra* note 10, at 17; Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 11 ("[T]he number of individuals in higher education with the title of 'compliance officer' has grown by 33 percent in the past decade."); Miller, *supra* note 58, at 1 ("The compliance function consists of efforts organizations undertake to ensure that employees and others associated with the firm do not violate applicable rules, regulations or norms.").

89 *See id*.

90 *See* Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. Corp. L. 769, 788 (2014).

91 *See, e.g.*, *Our Compliance Program*, Univ. of Ill. Sys., https://www.ethics.uillinois.edu/office/our_compliance_program (last visited Sept. 4, 2018) ("Each of the [Organizational Guidelines'] elements is set forth below, together with a description of University Ethics and Compliance Office activities associated with each element."); *Seven Elements of an Effective Compliance Program*, Univ. of Tex. at Dall., https://www.utdallas.edu/compliance/resources/seven-elements-of-an-effective-compliance-program/ (last visited Sept. 4, 2018) ("The following are ways the UT Dallas Compliance Program has addressed the seven elements . . . ."). *See also* Stucke, *supra* note 90, at 770; Todd Haugh, *The Criminalization of Compliance*, 92 Notre Dame L. Rev. 1215, 1228 (2017) ("The Organizational Guidelines spurred a massive increase in corporate compliance efforts.").

Guidelines was borne out of the Sarbanes-Oxley Act of 2002,[92] which itself was a response to prominent corporate scandals in the early 2000s.[93] The Sarbanes-Oxley Act directed the Sentencing Commission to revise its standards for issuing criminal sentences to organizations so that they served to "deter and punish organizational criminal misconduct."[94] Accordingly, the Organizational Guidelines now provide that the implementation and maintenance of an effective compliance program is a mitigating factor for courts to consider in order to reduce criminal penalties for convicted organizations—including non-profit organizations, governments and political subdivisions.[95]

The Organizational Guidelines specify seven attributes of an effective program:

1. Standards of conduct and internal systems designed to prevent and detect criminal conduct;[96]

2. Organizational governing authority and senior management that are knowledgeable about the program, exercise reasonable oversight, assume responsibility for program effectiveness, and receive periodic reports from individuals with day-to-day operational compliance responsibility;

3. Exclusion of individuals who have engaged in illegal activities or unethical conduct from the organization's substantial authority personnel;

4. Periodic training and compliance education at all levels of the organization;

5. Monitoring, auditing, and periodic evaluation of the program, with a system in place for reporting misconduct;

6. Incentives to conform to compliance standards and disciplinary measures for misconduct, applied consistently throughout the organization; and

7. Appropriate response upon detection of misconduct.[97]

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92 Pub. L. No. 107-204, 116 Stat. 745 (2002).

93 *See* Dunham, *supra* note 8, at 780; Jonathan Alger, Conference Materials, The Ctr. for Excellence in Higher Educ. Law and Policy, Higher Education Law and Policy 2.1—The Rise of the Compliance University (Feb. 20, 2012) (on file with author).

94 U.S. Sentencing Guidelines Manual § 8B2.1 cmt. Background (2013) [hereinafter "USSG"].

95 *Id*. at § 8C2.5(f)(1) (2010). "Organizations" include "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." *Id*. at § 8A1.1 cmt. n.1 (1991).

96 Many university compliance programs recognize these standards and systems to include policies. *See, e.g.*, *Our Compliance Program*, Univ. of Ill. Sys., https://www.ethics.uillinois.edu/office/our_compliance_program (last visited Sept. 4, 2018) (listing "Standards of Conduct, Policies and Procedures" as an essential element); Duke Univ., Duke University Compliance Program Elements (Dec. 2015) https://oarc.duke.edu/sites/default/files/documents/Duke%20University%20Compliance%20Program%20Elements.pdf (listing "Compliance Policies and Procedures" as an element of internal compliance program based on Organizational Guidelines' elements); *Program Initiative*, Office of Audit and Compliance, Princeton Univ., https://oac.princeton.edu/compliance/initiative (last visited Sept. 4, 2018) (listing "Develop and effectively communicate policies and procedures" as a minimum component of an institutional compliance program).

97 USSG § 8B2.1 (2013).

In addition, the Guidelines establish periodic risk assessment (and taking appropriate action to modify the compliance program based on the assessment) as an integral component of an effective program and deterring criminal conduct.[98] Although the Guidelines do not require an organization to maintain a compliance program, the potential for a reduced penalty and widespread industry adoption offer powerful incentives for universities to do so and incorporate the seven elements.[99]

The Organizational Guidelines define a "compliance and ethics program" as one "designed to prevent and detect criminal conduct."[100] Publicly traded companies are at greater risk of criminal liability than universities, which are governed primarily by laws that provide only for administrative and/or civil remedies and penalties.[101] To be sure, universities are subject to several laws with criminal penalties and the use of similar compliance models is apt; courts have increasingly eroded the distinction between universities and other business entities.[102]

Unlike publicly traded companies, which are subject to federal statutory and industry requirements for the adoption and disclosure of codes of ethics, codes of conduct, and accompanying compliance standards,[103] universities have no such enterprise-wide obligations at the federal or industry level. Moreover, the general absence of criminal liability imposed against universities has greatly limited the Organizational Guidelines' direct application to them by the courts.[104] Still, the Organizational Guidelines' seven elements are readily applicable as best practices to guard against conduct that could result in administrative penalties and other non-criminal consequences.

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98 *Id*.

99 The same is true in the corporate world, where "'most companies today with serious compliance/ethics programs carefully calibrate their programs to the Guidelines compliance/ethics program criteria.'" Stucke, *supra* note 90, at 798 (citing Ethics Res. Ctr., The Federal Sentencing Guidelines for Organizations at Twenty Years: A Call to Action for More Effective Promotion and Recognition of Effective Compliance and Ethics Programs 29 (2012), http://www.ethics.org/files/u5/fsgo-report20l2.pdf).

100 USSG § 8B2.1 cmt. n.1 (2013).

101 *See generally* Kaplin & Lee, *supra* note 4, at 105, 1719-1722, 1771-1777. *See also* Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability* at 22, Duke Law Scholarship Repository (2013), https://scholarship.law.duke.edu/faculty_scholarship/3205 (noting that about 200 corporations annually were convicted criminally in federal court between 2007 and 2012). Still, even corporations have been more likely to receive deferred prosecution agreements and other "administrative responses" than criminal prosecution. *See id*. at 1.

102 *See* Lee, *supra* note 6, at 653 (internal citations omitted) ("Today, courts in most lawsuits treat a college or university defendant just as they would any other business entity. The law has evolved in many respects from treating institutions with deference, to either ignoring the differences or proclaiming that there are none.").

103 *See* Allan Dinkoff, Weil, Gotshal & Manges LLP, Corporate Compliance Programs After Dodd-Frank 1-6 (2011), https://www.weil.com/~/media/files/pdfs/corporate_compliance_post_dodd-frank_aelc_oct.pdf ("The Sarbanes-Oxley Act of 2002 required complaint procedures for accounting issues, and disclosure with respect to codes of ethics for certain senior executives. Publicly traded companies listed on the NYSE or Nasdaq have been required for some time to have codes of conduct for all employees, directors and officers, including effective complaint procedures and compliance standards to facilitate the effective operation of those codes.").

104 *See also* Haugh, *supra* note 91, at 1227-1228 (noting the Department of Justice's use of deferred and non-prosecution agreements "has limited the Organizational Guidelines' direct reach" to corporations).

Case law has further reinforced the advantages of maintaining an internal compliance program. In *In re Caremark International, Inc. Derivative Litigation*,[105] the Delaware Chancery Court suggested that the duty of oversight owed by corporate directors to their firms includes ensuring an adequate compliance function exists.[106] Later Delaware case law affirmed this standard of liability,[107] and other courts throughout the country "have recognized a cause of action against boards for failing to take minimal steps to achieve legal compliance."[108] The Eighth Circuit has specifically considered a university's compliance program in relation to its liability.[109] In *Grandson v. University of Minnesota*, the court held that the existence of a compliance program served to preclude a finding of deliberate indifference to the university's legal responsibilities under Title IX, thus barring the award of money damages to the plaintiff.[110]

B. Compliance Program Purposes and Common Models Employed

1. Purposes

Generally speaking, compliance programs are intended to demonstrate and bolster a university's existing commitment to ethical conduct, as well as establish effective mechanisms to prevent, detect, and respond to potential violations of law.[111] Organizations often design programs to accomplish these goals by improving coordination, consistency, and enforcement of compliance obligations across different units.[112] Moreover, some universities seek to motivate compliance and ethical behavior, and thereby improve the effectiveness of their programs, through training, disseminating institutional policies, and communicating operational roles and responsibilities.[113]

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105 698 A.2d 959 (Del. Ch. 1996).

106 *Id*. (holding that directors are personally liable for failure to exercise this duty).

107 Stone v. Ritter, 911 A.2d 362 (Del. 2006).

108 Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 272 (2008).

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

110 *Id*. at 576.

111 *See* Miller, *supra* note 58, at 2 ("[C]ompliance delegates responsibility for norm enforcement to the organization . . . ."); Haugh, *supra* note 91, at 1220 (internal citations omitted) ("[C]ompliance is a set of processes companies use to ensure that employees do not violate applicable rules, regulations or norms.").

112 *See generally* Miller, *supra* note 58.

113 *See* Nathan A. Adams IV, *Academic Compliance Programs: A Federal Model with Separation of Powers*, 41 J.C. & U.L. 1, 13 (2015) ("[E]ffective compliance programs . . . conduct periodic training and dissemination of the compliance policies by communicating compliance standards, roles, and responsibilities to all institutional agents, and motivating compliance."); Haugh, *supra* note 91, at 1222-1224 (describing the principal role of "policy-setting" in compliance); Gruner, *supra* note 84, at 1157-1158 (describing "expanding the legal sophistication of individual employees about the specific legal standards that are relevant to their job duties" as a technique for improving compliance); Penn. State Univ., Ethical Decision Making (Jan. 2016) https://universityethics.psu.edu/sites/universityethics/files/135437_b_pennstatevalues_decisionmakingflyer_and_questions.pdf.

In some cases, universities implement limited compliance programs as required by law. For example, the Federal Trade Commission's Red Flags Rule requires universities that act as creditors to develop, implement, and administer an identity theft prevention program.[114] The regulation contains a number of required components of the program.[115] Similarly, HIPAA requires universities subject to its information security provisions to conduct a periodic risk assessment of technical and non-technical safeguards.[116]

Compliance programs often utilize internal policies and processes to align organizational decisions and behaviors with external regulatory requirements and industry standards.[117] Although there is structural variance across universities, the tools used in different compliance models are often the same. Common compliance tools include: compliance calendars that organize obligations by responsible units, due date, and/or subject matter area; a catalog of policies that direct compliance in response to various laws; and a reporting hotline for suspected violations of the law or ethical standards.[118] Each of these tools contributes to the ongoing and uninterrupted fulfillment of all compliance obligations, and some, such as policies, match attributes of the Organizational Guidelines' definition of an effective compliance program.

In addition to fulfilling their primary purpose of satisfying specific legal requirements, effective compliance programs have several ancillary benefits. One such benefit is the assurance self-policing efforts provide senior university administration against the risk of litigation, fines, and agency investigations, each of which carries financial and reputational risk.[119] This assurance complements any separate risk management function and better enables strategic planning. Another benefit is that it provides a university greater leverage to condition potential business relationships upon the vendors' adoption of policies or practices that align with

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114 16 C.F.R. § 681.1(a) (2018) (including a "creditor" within the scope of the regulation). Similarly, the Occupational Safety and Health Administration operates "Voluntary Protection Programs" whereby it reduces compliance auditing of organizations that adopt "safety and compliance systems exceeding minimum standards set by OSHA." Gruner, *supra* note 84, at 1131-1132.

115 16 C.F.R. § 681.1(d)(2) (2018).

116 45 C.F.R. § 164.308(a)(1)(ii)(A) (2017).

117 *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075, 2082 (2016) ("All firms exist within a nexus of legal, regulatory, and social norms. The contemporary compliance function is the means by which firms adapt their behavior to these constraints. More concretely, compliance is the set of internal processes used by firms to adapt behavior to applicable norms."); Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 Am. Bus. L.J. 203, 213 (2016).

118 *See* Leanne M. Shank & Justin H. Smith, Conference Materials, NACUA, Developing and Implementing a Compliance Calendar and Other Tools (Nov. 11-13, 2009), http://www.nacua.org/docs/default-source/legacy-doc/conference/november2010/developing-and-implementing-a-compliance-calendar.pdf (membership req'd).

119 Stucke, *supra* note 90, at 778. Additionally, enforcement agencies may look to the existence of an effective compliance program as a reason for declining to pursue charges against an organization accused of wrongdoing. *See id.* at 773 (describing DOJ and SEC stance towards corporate compliance programs under the Foreign Corrupt Practice Act (citing Criminal Div. of the U.S. Dep't of Justice & Enforcement Div. of the U.S. Securities & Exch. Comm'n, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 56 (2012), *available at* http://www.justice.gov/criminal/fraud/fepa/guide.pdf).

the university's.[120] Alternatively, the university can extend its compliance program by incorporating by reference its own written policies and practices into business agreements. In any case, several laws and regulations require extension to vendors, and written policies would facilitate compliance with those provisions.[121] Finally, a compliance program comprised of well-documented policies and processes can assist in the onboarding and training of new staff.

Because the law of higher education is so vast, no single individual realistically can be operationally responsible for satisfying all existing compliance obligations and monitoring legal developments for future requirements, regardless of the compliance model used. At their core, all formal compliance models rely upon a network of individuals—often comprised of subject matter experts—to perform institutional compliance responsibilities or funnel information to a central coordinator.[122] Some compliance tasks, however, are better suited to interdepartmental cooperation than others.[123] Indeed, many obligations remain the purview of a single department with sufficient expertise, which may be challenging to incorporate into a compliance model dependent on centralized coordination.

2. Common Models Employed at Universities

The Organizational Guidelines assure organizations that they need not independently design a compliance program to demonstrate sufficient commitment to ethical conduct and legal compliance.[124] For smaller universities, creating a program from scratch may well be unrealistic due to fewer resources and personnel. Instead, the Organizational Guidelines encourage small organizations to model their programs "on existing, well-regarded compliance and ethics programs and best practices of other similar organizations."[125] Indeed, the Guidelines warn that failing to "incorporate and follow industry best practice" shall weigh against the finding of an effective program.[126] In addition to modeling other established

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120 Yet another benefit is that a university can compare its compliance structure and standards with those of vendors when evaluating a potential business relationship. This practice is widespread in the corporate realm. *See generally* Gruner, *supra* note 84, at 1138.

121 *See, e.g.*, Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Jeanne-Marie Pochert, Deputy Assistant Gen. Counsel, Clark Co. Sch. Dist. Legal Dep't (June 28, 2006), *available at* https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html (reiterating institutions' responsibility for vendors' compliance with FERPA); Incentive Compensation Ban, 34 C.F.R. § 668.14(b)(22) (2017).

122 *See* Dunham, *supra* note 8, at 783 (observing that efforts to coordinate compliance with the "disparate and unconnected" set of requirements imposed on higher education institutions involves "many different areas across many different college or university functions"); Miller, *supra* note 58, at 4 (describing the "Three Lines of Defense" concept of internal control and compliance, which utilizes various layers of the organizational hierarchy to prevent violations).

123 *See* Lake, *supra* note 18, at 12 ("In light of recent regulatory directives . . . many institutions have been forced to organize and focus their Title IX compliance efforts. . . . Now human resources, athletics, and discipline administrators coordinate compliance efforts and operate with one vision.").

124 USSG § 8B2.1 cmt. n.2(C)(iii) (2013).

125 *Id*.

126 USSG § 8B2.1 cmt. n.2(B) (2013).

programs, a university should incorporate applicable regulatory directives.[127] The Guidelines explicitly consider governmental regulatory standards in determining whether an organization has an effective compliance and ethics program.[128]

Yet to be seen is the influence on university compliance programs of evaluation criteria utilized by the U.S. Department of Justice's Fraud Section when it assesses the effectiveness of corporate programs in criminal investigations.[129] The recently published criteria, in the form of a series of questions, probe common programmatic components, resources, cultural attributes, and organizational policies and procedures.[130] Although the criteria are not intended to be prescriptive, they reflect best practices and would serve well as guideposts in any internal evaluation or design process.

Although university compliance programs serve similar purposes and are often modeled on one another, programs are not one-size-fits-all. Indeed, many universities have no formal compliance function at all. In the 2013 NACUA survey, almost one-third of responding universities disclosed that they did not have, and were not planning, such a function.[131] There are various reasons a university may utilize a particular compliance structure, including those necessitated by its resources, size, and governance culture.[132]

One model often used by universities with the largest operating budgets and enrollments is the centralized model.[133] A typical representation of this model utilizes a single compliance officer (*e.g.*, a chief compliance officer position) who coordinates and/or delegates operational responsibilities.[134] The compliance officer has relationships with liaisons throughout the university who collectively manage all major compliance obligations. Alternatively, the compliance officer may chair a committee of senior administrators who are individually responsible for compliance within their departments, yet report to the compliance officer via the committee for purposes of handing off coordination and reporting duties.[135] The compliance officer may report to the university president or to another senior administrator, and may be responsible for providing reports to the university's governing board.[136]

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127 USSG § 8B2.1 cmt. n.2(A)-(B) (2013).

128 *Id*.

129 U.S. Dep't of Justice, Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 2017), https://www.justice.gov/criminal-fraud/page/file/937501/download [hereinafter "US DOJ, Evaluation of Corporate Compliance Programs"].

130 *Id*.

131 2013 NACUA Compliance Survey, *supra* note 30, at 13.

132 *See* Adams, *supra* note 113, at 16 (arguing that "the fiercely independent norms of academic freedom and institutional autonomy" are the primary reasons for the absence of a formal compliance program at some institutions).

133 *See* 2013 NACUA Compliance Survey, *supra* note 30, at 56-58.

134 *See* Jennifer E. Kirkland, Conference Materials, NACUA, Creating an Effective Compliance Program at a Small Institution on a Limited Budget: One Size Does Not Fit All! (Nov. 11-13, 2009; updated Jan. 28-29, 2011) (on file with author).

135 *See id.*

136 *See id.*

A more commonly used model is the decentralized model.[137] This model may utilize compliance officers (or administrators with other responsibilities) who are responsible for department- or unit-wide compliance.[138] This network of independent compliance officers may liaise with each other or another senior administrator, such as an internal audit official, via committee in order to facilitate information sharing, best practices, and reports to the governing board.[139]

Various hybrid models exist, which generally utilize decentralized ownership of compliance obligations throughout the university.[140] In fact, compliance programs without designated compliance officers were the most frequently reported type of program used by responders to the 2013 NACUA survey.[141] These models may include a central administrator or office responsible for coordinating the network of compliance owners, disseminating information, and reporting to the board and senior administrators.[142] Alternatively, centralized compliance coordination may be project-based (*e.g.*, in response to new regulation) or limited to certain units with a broader set of obligations (*e.g.*, athletics).

The above structural descriptions merely scratch the surface. The crux of a compliance program is its ability to drive compliant behaviors. Two common methods bear mentioning.[143] Some programs stress rules-based compliance, which relies on "rules, punishment, training, and reporting" to enforce desired outcomes.[144] Others are values-based, which ask employees to "engage with and adopt the values of the organization as their own."[145] There is extensive research that explores the efficacy of each, including how they motivate employee behavior (and the types of behaviors they motivate). In general, rules-based programs seek to deter unlawful behaviors[146] out of concern for *respondeat superior*, civil, and administrative liability.[147] Under a values-based program, on the other hand,

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137 *See* 2013 NACUA Compliance Survey, *supra* note 30, at 15 ("The most frequently reported compliance function structure was decentralized without designated compliance officers (35%).").

138 *See* Kirkland, *supra* note 134, at 2.

139 *See id.*

140 *See* Building an Effective Compliance Program, *supra* note 10, at 18.

141 2013 NACUA Compliance Survey, *supra* note 30, at 15 (35% reporting compliance programs without designated compliance officers).

142 *See* Kirkland, *supra* note 134, at 2.

143 There are at least a dozen distinctly named approaches to compliance. *See generally* Haugh, *supra* note 91 (referencing active compliance, legitimacy-focused, command-and-control oriented, and evidence-, value-, principles-, deterrence-, integrity-, rules-, norm-, and guidelines-based approaches); Surendra Arjoon, *Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach*, 68 J. Bus. Ethics 53 (2006) (referencing risk-based and trust-based approaches).

144 Tom Tyler, et al., *The Ethical Commitment to Compliance: Building Values-Based Cultures*, 50 Cal. Mgmt. Rev. 31 (2008).

145 *Id*. at 32.

146 *See* Arjoon, *supra* note 143, at 58.

147 *See* Haugh, *supra* note 91, at 1220-1221.

employees internalize institutional values and are thus more apt to engage in ethical, compliant behavior even in the absence of monitoring or prescriptive rules, assuming the institution's values have solid moral grounding.[148]

C. University-Level Policies

Policies are a well-established component of university operations and an essential element of what Kaplin and Lee describe as "internal law."[149] In this way, policies define and delegate the university's authority and responsibilities to its various constituencies.[150] Policies also bridge applicable legal standards to a university's cultural norms and assigned responsibilities.[151] Due to the varied and important purposes they serve, policies are a critical aspect of an effective compliance program.[152]

1. Purposes of Policies

Policies disseminate essential information to university constituents. Information consists of affirmative obligations, processes, and standards of conduct for employment, academic, and other matters.[153] In this way, policies create a shared set of expectations as to what the university and/or constituent must do, how they should do it, and what will happen if they do not. Because of their capacity for memorializing and disseminating information and other institutional knowledge, universities may utilize policies for substantive staff trainings and orientation materials.

Policies that establish clear expectations and responsibilities carry significant implicit value as part of a compliance program. Arguably, they make it more difficult for organizations or individual departments to sweep non-compliant behaviors

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148 *See* Tyler, *supra* note 144, at 32.

149 Kaplin & Lee, *supra* note 4, at 26.

150 *See id*.

151 *See* Griffith, *supra* note 117, at 2093-2095 (describing this function as creating a "structural nexus" and arguing that a structural nexus is one of four functional elements of organizational compliance).

152 One state flagship university, for example, defines the attributes of policies and types of issues they address as:

> (1) Support[ing] the university's mission, vision, and values; (2) Apply[ing] across the institution; (3) Establish[ing] the university's position across a range of matters; (4) Endur[ing] across time and administrations; chang[ing] infrequently; set[ting] the course for the foreseeable future; (5) Supporting equity, integrity, and simplicity in practices across the institution; (6) Promot[ing] quality and operational efficiency, reduc[ing] bureaucracy, and provid[ing] guidance for managing the institution; (7) Ensur[ing] compliance with applicable laws and regulations; (8) [Maintaining consistency] with university bylaws, rules, and regulations; [and] (9) Manag[ing] institutional risk.

Policy Development, Office of Univ. Compliance and Integrity, Ohio State Univ., https://policies.osu.edu/policy-development.html (last visited Sept. 4, 2018) [hereinafter "Ohio State Office of Univ. Compliance and Integrity"]. *See also* Bird & Park, *supra* note 117, at 212 (observing that the "compliance function is primarily responsible for implementing and managing the compliance policies for the organization").

153 *See* Kaplin & Lee, *supra* note 4, at 26 ("[I]nternal law establishes the rights and responsibilities of individual members of the campus community and the processes by which these rights and responsibilities are enforced.").

under the rug, because violations are more likely to be detected internally and trigger corrective and enforcement responsibilities.[154] Policies permit a university "to achieve fairness and consistency in its dealings with the campus community."[155] Without such policies, no baseline standard of conduct would exist and non-compliant behavior would not trigger any well-defined internal response.

Although universities often maintain policies in response to legal mandates with which they must comply, effective policies do more than simply restate legal requirements. Policies often recite ethical and aspirational values that reflect or can drive a culture of integrity and compliance.[156] Achieving harmony between organizational and employee values is an important precursor to policy buy-in and sustaining a culture of ethics and compliance.[157] On a more practical level, effective policies concentrate "primarily on the efficacy of a particular course of action" within a compliant legal framework.[158] This framework further serves to reduce risk and legal disputes.[159]

There are also strong external incentives to maintain a robust and effective policy catalog. For example, workplace anti-discrimination policies that establish a system for filing and responding to complaints provide an affirmative defense against sexual harassment allegations.[160] Such policies can establish that the university exercised reasonable care in preventing and correcting harassing behavior, thus lowering the risk of punitive damages.[161] Courts may also look to whether a university complied with obligations contained in its own policies, interpreting those obligations as contractual between the university, its faculty, and its students.[162] As such, a university may be held liable under contract law

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154 *See, e.g.*, Rachel Marshall, *Will it Really SaVE You? Analyzing the Campus Sexual Violence Elimination Act*, 6 Legis. & Pol'y Brief 271, 285 (2014) (arguing that the policy requirements under Campus SaVE, which include a requirement that campuses define "consent," allow students "to more clearly recognize an incident that warrants reporting and potential legal action").

155 Kaplin & Lee, *supra* note 4, at 37.

156 *See id*. at 90.

157 *See* Tyler, *supra* note 144, at 33.

158 *Id*. at 86. *See also* Gruner, *supra* note 84, at 1156 (describing the importance of "standard operating procedures" in ensuring compliance, reducing risk, and guiding employee behavior).

159 *See* Kaplin & Lee, *supra* note 4, at 163.

160 *See* Vance v. Ball State, 133 S. Ct. 2434, 2442 (2013) ("[A]n employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided.").

161 *See* 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)).

162 *See* Kaplin & Lee, *supra* note 4, at 37; Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972) ("The basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract."); Vurimindi v. Fuqua Sch. Of Bus., 435 F. App'x 129, 133 (3d Cir. 2011) (per curiam) (finding that, under state law, the "allegations must relate to a specific and identifiable promise that the school failed to honor"). *But see* Giuliani v. Duke Univ., No. 1:08CV502, 2010 U.S. Dist. LEXIS 32691, at *23-24 (M.D.N.C. Mar. 30, 2010) (dismissing plaintiff's claim that defendant university's publications, combined with oral statements, created legally enforceable contract rights in the absence of a contract specifically incorporating handbooks and policy

if "shown that the institution has breached one or more of the policy's terms."[163] Finally, the Organizational Guidelines instruct courts to view the existence of policies "designed to prevent and detect criminal conduct" as a component of an effective compliance program and mitigating factor against criminal penalties.[164]

2. Sources of University Policies

University policies originate from many different external and internal sources. One public university lists four primary sources of its policies: (1) Issues that "emerge as a result of federal, state, or local legislation or regulation;" (2) "[I]ncidents or trends that emerge within or outside of the university;" (3) Changes "in university values or priorities;" and (4) "[C]oncerns raised by the university community."[165]

Federal statutes and regulations represent a major source from which university policies are derived. Universities that participate in Title IV aid programs are bound by the full suite of accompanying statutory and regulatory requirements contained in the program participation agreement each institution enters into with the Department of Education.[166] Some of those provisions require a university to establish policies or procedures on particular issues, such as campus security[167] and peer-to-peer file sharing.[168] Other federal statutes and regulations also condition the receipt of federal monies on the establishment of various policies, such as non-discrimination in hiring or enrollment.[169] Still other federal statutes and regulations that more generally govern university activities require policies specific to those activities. For example, HIPAA requires covered entities to implement policies that comply with specific data security standards.[170]

Regional accreditors require universities to implement policies as part of their standards for initial and continued accreditation. Among those are policies

manuals); Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D.N.C. 1991) (holding that an academic bulletin is not a binding contract between a school and its students).

163 KAPLIN & LEE, *supra* note 4, at 91.

164 *See* discussion *supra* Section II.A.

165 OHIO STATE OFFICE OF UNIV. COMPLIANCE AND INTEGRITY, *supra* note 152.

166 *See* Program Participation Agreement, 34 C.F.R. § 668.14(b) (2017) ("By entering into a program participation agreement, an institution agrees that . . . [i]t will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA . . . .").

167 *See* 34 C.F.R. § 668.14(c)(2)(i) (2017).

168 *See* 34 C.F.R. § 668.14(b)(30) (2017).

169 *See, e.g.*, 34 C.F.R. § 104.8(b) (2017) (requiring inclusion of a statement of policy of non-discrimination on the basis of handicap in recruitment materials).

170 45 C.F.R. § 164.316(a) (2017). Another federal regulation that requires policies is the Federal Trade Commission's Red Flag Rule. 16 C.F.R. pt. 681 (2017).

on personnel appointments,[171] intellectual property rights,[172] ethical behavior[173] and conflicts of interest,[174] grievances,[175] admissions standards,[176] and the faculty's role in institutional governance.[177]

State laws and agencies may require policies.[178] Likewise, public university systems may issue policy requirements for constituent institutions in order to ensure the consistent application of state or system-wide requirements. For example, the University of North Carolina requires each institution's board of trustees to adopt a policy addressing employees' engagement in political activities, which must be consistent with the UNC Board of Governors' own system-wide policy on political activities.[179]

At the institutional level, a university's governing board and chief executive officer may issue internal regulations and require certain institutional-level policies. Generally, policies that originate at the institutional level relate to business processes surrounding otherwise regulated areas, student codes of conduct and attendant disciplinary proceedings, terms of employment, grievance and investigation methods, and academic degree requirements.[180]

Finally, external industry standards or contracts may require the maintenance of particular university policies. For example, insurance companies may require universities that wish to purchase cyber security insurance to maintain policies on data privacy and incident response in order to reduce the risk and financial impact of any adverse events.[181] Similarly, universities that accept credit card payments must comply with the Payment Card Industry (PCI) Security Council's proprietary

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171 S. Ass'n of Colls. and Schs. Comm'n on Colls., Principles of Accreditation: Foundations for Quality Enhancement 16 (2018), *available at* http://www.sacscoc.org/pdf/2018principlesofacreditation.pdf [hereinafter "SACS-COC Principles of Accreditation"].

172 New England Ass'n of Schs. and Colls., Comm'n on Insts. of Higher Educ., Standards for Accreditation 9.2 (July 1, 2016), *available at* https://cihe.neasc.org/standards-policies/standards-accreditation/standards-effective-july-1-2016 [hereinafter "NEASC-CIHE Standards for Accreditation"].

173 Higher Learning Comm'n, Policy Book 26 (Nov. 2017), *available at* http://download.hlcommission.org/policy/HLCPolicyBook_POL.pdf [hereinafter "HLC Policy Book"]

174 Middle States Comm'n on Higher Educ., Standards for Accreditation and Requirements of Affiliation 3 (13th ed. 2015), *available at* https://www.msche.org/publications/RevisedStandardsFINAL.pdf [hereinafter "MSCHE Standards for Accreditation"].

175 *Id*. at 5; NEASC-CIHE Standards for Accreditation, *supra* note 172, at 6.8.

176 SACS-COC Principles of Accreditation, *supra* note 171, at 24; MSCHE Standards for Accreditation, *supra* note 174, at 9; NEASC-CIHE Standards for Accreditation, *supra* note 172, at 4.3.

177 SACS-COC Principles of Accreditation, *supra* note 171, at 23; HLC Policy Book, *supra* note 173, at 24.

178 *See, e.g.*, N.C. Gen. Stat. § 116-11(3a) (2017) (requiring the University of North Carolina Board of Governors to "direct" constituent institutions to adopt a policy allowing students excused absences for religious observances).

179 *Political Activities of Employees*, The UNC Policy Manual 300.5.1, http://www.northcarolina.edu/apps/policy/index.php?pg=dl&id=331&format=pdf&inline=1 (last visited Sept. 4, 2018).

180 Universities may also incorporate these types of policies into contracts with affected constituents. *See* Kaplin & Lee, *supra* note 4, at 91.

181 Without such policies, the insurance premiums may be commensurately higher if coverage is granted.

standards, which include a requirement to maintain an information security policy that applies to all institutional personnel.[182] More generally, universities may codify accounting standards and financial controls as they apply to particular departmental functions.[183]

Irrespective of the source, policy directives grant varying levels of discretion to the university. Some policy requirements are so general as to merely require a university to possess a policy on a particular topic. For example, an insurance company may inquire whether a university maintains data privacy and information security policies as part of the application process for cyber security insurance.[184]

In this case, the insurance company does not mandate how the university must address data privacy and information security.[185] Instead, the insurance company may simply evaluate the policy and determine whether to award coverage, or how high to set the premiums for coverage, based on its strength.[186]

Other policy requirements specify aspects that must be addressed, but still permit the university the autonomy to establish its own stance. The Higher Education Act's requirement that universities disseminate their policies regarding copyright infringement directs that the policies describe disciplinary sanctions to be taken against students found to have engaged in copyright infringement using the university's information technology systems, in particular peer-to-peer file sharing.[187] The Department of Education's implementing regulation further

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182 PCI Sec. Standards Council, PCI Quick Reference Guide 23, (Mar. 2009), *available at* https://www.pcisecuritystandards.org/pdfs/pci_ssc_quick_guide.pdf.

183 *See, e.g.*, *Financial Management of Property, Plant and Equipment*, Fin. Policy Office, Harvard Univ., https://policies.fad.harvard.edu/pages/facilities-and-equipment (last visited Sept. 4, 2018) (requiring expenditures in accordance with Generally Accepted Accounting Principles).

184 *See, e.g.*, Application, Hartford Fin. Servs. Grp., Inc., Cyber Insurance Application, (2017) https://s0.hfdstatic.com/sites/the_hartford/files/cyber-choice-application.pdf; Application, Phila. Ins. Cos., Cyber Security Liability Application, (Nov. 2017) https://www.phly.com/Files/Application%20-%20Cyber%20Security%20Liability%20-%20Countrywide31-7726.pdf.

185 *See id*.

186 *See* Luis J. Diaz, Maria C. Anderson, John T. Wolak & David Opderbeck, *The Risks and Liability of Governing Board Members to Address Cyber Security Risks in Higher Education*, 43 J.C. & U.L. 49, 73 (2017) ("[B]y keeping IT security and data policies up-to-date and ensuring that third party cloud vendors adhere to those updated policies . . . institutions can minimize the costs of cyber insurance coverage while also lowering potential exposure.").

187 20 U.S.C. § 1092(a)(P) (2012). Specifically, that provision requires:

> [I]nstitutional policies and sanctions related to copyright infringement, including—
>
> (i) an annual disclosure that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject the students to civil and criminal liabilities;
>
> (ii) a summary of the penalties for violation of Federal copyright laws; and
>
> (iii) a description of the institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions that are taken against students who engage in unauthorized distribution of copyrighted materials using the institution's information technology system.

requires universities to maintain "written plans" to combat peer-to-peer file sharing over their networks.[188] The regulation specifies that the written plans must include at least one technology-based deterrent, but explicitly states that universities may select whichever such deterrents they wish, and that they "retain the authority to determine" how to comply with the remainder of the regulation.[189]

On the other end of the spectrum are prescriptive policy requirements, which leave considerable less discretion to the university. They specify not only the topic to be addressed by university policy, but also the exact contours of the policy and what the university's stance must be. For example, universities that accept military tuition assistance funds must abide by the Department of Defense Voluntary Education Partnership Memorandum ("DOD MOU").[190] The DOD MOU requires universities to maintain a policy that bans incentive compensation paid to recruiters and admissions personnel.[191] More specifically, the DOD MOU requires the policy to comply with applicable Department of Education regulation.[192] That regulation is an outright ban on incentive compensation paid to specific employees and agents, includes various definitions and exceptions, and is subject to additional sub-regulatory guidance issued by the Department.[193] As such, the university's policy largely will constitute a restatement of federal regulation.[194]

3. Creating and Implementing Effective University Policies

Universities employ various methods for creating policies.[195] Generally, once campus administrators identify a need, they will commence drafting policy language and consult with legal counsel and the office(s) that will implement the policy to ensure that it is legally compliant, incorporates the university's operational needs, and reflects the university's chosen stance.[196]

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188 34 C.F.R. § 668.14(b)(30) (2017).

189 *Id*.

190 32 C.F.R. § 68.1(b) (2017).

191 32 C.F.R. pt. 68, app. A.

192 *Id*.

193 34 C.F.R. § 668.14(b)(22). *See* Mar. 17, 2011 DCL, *supra* note 73.

194 *See, e.g.*, *Policy 210.13 Recruitment and Enrollment*, Univ. of Md. Univ. Coll., https://www.umuc.edu/administration/policies-and-reporting/policies/academic-affairs/recruitment-and-enrollment.cfm (last visited Sept. 4, 2018) (banning incentive compensation payments, citing the DOD MOU and federal regulation as the reason for the ban, and employing regulatory definitions and language).

195 Kaplin and Lee identify the following phases in the policy-making process: (1) Problem identification and scoping phase; (2) Policy proposal, evaluation, feedback, and tentative design phase; (3) Drafting phase; (4) Approval phase; (5) Dissemination and implementation phase; and (6) Evaluation phase. Kaplin & Lee, *supra* note 4, at 88-89.

196 *See generally id.* at 86-88 (explaining that university lawyers and administrators serve complementary roles in the internal policy making process). *See also* Badke, *supra* note 5, at 99-141 (describing essential institutional actors and interplay between them during decision making and policy creation).

Ultimately, a draft policy requires approval from senior administration or other institutional governing bodies.[197] The approval authority for a policy, and the process required for its development, may depend on its subject matter.[198] For example, policies with a more limited scope may be created and approved at the department level, while others with university-wide impact may require president and/or cabinet approval. Yet others may require approval from an institutional or system-level governing board.[199]

The creation of effective policy has the potential to be a time consuming and resource intensive process.[200] As such, some universities utilize policy committees or a dedicated policy office to ensure that constituents throughout the university are able to provide feedback prior to approval and implementation. In some cases, this may be an intentional effort to reflect the university's traditional shared governance structure[201] or comply with accreditation standards.[202]

Researcher Lara Kovacheff Badke studied three universities' policy development processes in response to the Office for Civil Rights' 2011 Dear Colleague Letter.[203] Each university assembled teams comprised of faculty and staff from various disciplines and units to develop policy addressing the compliance requirements established by the Letter.[204] The specific configurations of the teams varied among universities, as did the amount of feedback sought from constituents external to the development teams.[205] Members of teams reported dissatisfaction with their universities' initial interim policy responses, which were developed behind closed doors by campus administration.[206] In contrast, the transparent processes later adopted by some of the teams resulted in much higher levels of engagement with campus communities.[207]

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197 *See generally* Kaplin & Lee, *supra* note 4, at 86 ("Internally, the educators and administrators, including the trustees or regents, make policy decisions that create what we may think of as 'institutional policy' or 'internal policy'.").

198 *See generally id.* at 87-88 (explaining that "different types of policy-making processes for different types of policies" may exist).

199 For example, a state university system may vest authority over all policies in a particular topic area with institutions' boards of trustees.

200 *See generally* Badke, *supra* note 5, at 93 (noting that "[a]ll of the [university policy] review teams in the subject study took longer than anticipated to revise the institution's relevant policies and make recommendations for future action").

201 *See Policy Development and Approval Process*, Iowa State Univ., http://www.policy.iastate.edu/about/plac.html (last visited Sept. 4, 2018) (providing a "multi-perspective review" and listing over a dozen committee representatives from faculty, staff, and students).

202 *See* NEASC-CIHE Standards for Accreditation, *supra* note 172, at 3.7 (requiring policies to be developed "in consultation with appropriate constituencies").

203 Badke, *supra* note 5.

204 *Id*. at 88-89.

205 *Id*. at 88-93.

206 *Id*. at 87.

207 *Id*. at 90-93.

Badke's research revealed the intense and far-reaching discussions initiated by the review teams over a years-long period.[208] She noted that many team members perceived the 2011 Letter's ambiguous requirements as an opportunity to engage in "innovative" and "novel thinking."[209] Leadership emerged at many different levels within the teams, each form of which contributed distinctly to the overall success of the policy efforts.[210] The development teams reported viewing the balance of legal and non-legal representation as critically important in developing policy that furthered the universities' educational missions, rather than mere minimal compliance with the Letter.[211] Ultimately, Badke's research concluded that diverse and cross-departmental collaboration, combined with the leadership roles assumed by members within the teams, were the keys to achieving meaningful campus policy development.[212]

Regardless of the procedural methods used for their creation, effective and well-written policies share many common attributes. Kaplin and Lee identify a number of such attributes:

1. Identification of campus constituencies to whom the policy applies and how they will be made aware of its existence and substantive content;

2. Clearly written, adequate specificity, and accessible to affected constituencies[213];

3. Identification of the problem or issue that it is intended to address, and any intended goals;

4. Identification of who is responsible for its implementation and operationalization, what that responsibility entails, and timelines for those processes;

5. Alignment with other university policies;

6. Establishment of enforcement mechanisms and responsibilities, when applicable;

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208 *Id*. at 80-98, 125-139.

209 *Id*. at 88.

210 *Id*. at 99-122.

211 *Id*. at 133.

212 *Id*. at 139-141.

213 The trending corporate practice known as "policy simplification" reflects this attribute. Firms make intentional efforts to simplify compliance and ethics policies and procedures by reducing "policy proliferation, jargon, and complexity." Susan Divers, *Policy Simplification: Making Ethics and Compliance Real and Accessible for Everyone*, Medium (Jan. 11, 2016), https://medium.com/@LRN_Insights/policy-simplification-making-ethics-and-compliance-real-and-accessible-for-everyone-8531b952aae3. Supplementary materials, such as single-page guides or visual accompaniments, further improve clarity and readability of policies. *See* Integrity and Compliance, Gen. Elec. Co, http://www.gesustainability.com/how-ge-works/integrity-compliance/ (last visited Sept. 4, 2018).

7. Identification of a contact person for questions related to its content, implementation, or enforcement;

8. Identification of records maintenance procedures and confidentiality requirements; and

9. Inclusion in an accessible policy repository or catalog.[214]

The Southern Association for Colleges and Schools (SACS), a regional accreditor, recommends that universities utilize many similar characteristics when developing policy.[215] SACS also recommends online publication, listing implementation and revision dates, and publishing accompanying procedural documents related to policy development, implementation, and review.[216] SACS and other regional accreditors require a number of specific policies as a stipulation of accreditation, each imposing additional conditions to promote their effectiveness.[217] For example, the accreditor may require policies to be developed collaboratively and disseminated to affected stakeholders.[218]

The operation of a university's overall policy function plays a significant role in the effectiveness of its written policies. Regional accreditors further establish a number of standards for university policy functions, such that its governing board have policy-making authority[219] or otherwise exercise adequate oversight of policies,[220] that institutional administration retain responsibility for administering and implementing policy,[221] and that the university publish an organizational structure that delineates policy administration authority.[222] Additionally, one accreditor requires that the policy-making function involve consultation with university constituents[223] and that the university support its policies with resources sufficient for their implementation.[224]

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214 Kaplin & Lee, *supra* note 4, at 89-90. The U.S. Department of Justice's Fraud Section assesses corporate policies for similar attributes in the course of criminal investigations. *See* US DOJ, Evaluation of Corporate Compliance Programs, *supra* note 129, at 3-4.

215 S. Ass'n of Colls. and Schs. Comm'n on Colls., Developing Policy and Procedure Documents: Best Practices (June 2010), *available at* http://www.sacscoc.org/pdf/best%20practices%20for%20policy%20development%20final.pdf.

216 *Id*.

217 *See* discussion *supra*, Section II.C.ii.

218 *See* SACS-COC Principles of Accreditation, *supra* note 171, at 23.

219 *See id*. at 13

220 *See* HLC Policy Book, *supra* note 173, at 23; NEASC-CIHE Standards for Accreditation, *supra* note 172, at 3.7.

221 *See* SACS-COC Principles of Accreditation, *supra* note 171, at 13.

222 *See id*. at 14.

223 NEASC-CIHE Standards for Accreditation, *supra* note 172, at 3.7.

224 *Id*. at 5.17.

D. How Institutional Behavior Shapes Compliance

Institutional theory explains how the behaviors and decisions of organizations (and their actors) are impacted by peer organizations.[225] Analyses of universities using institutional theory contend that they "maintain legitimacy in the public's eyes by conforming to institutionalized norms and values."[226] These perceptions drive sector-wide changes and institutional compliance often conforms to new sector-wide norms.

In other words, this body of scholarship contends that universities are judged in relation to their peers. As such, many universities look to their peers for clues as to how to develop particular compliance and policy solutions and survey which organizational stances are represented. University leaders and other administrators involved in institutional decision-making and policy creation are able to leverage their professional connections to transfer relevant information and best practices, which are then absorbed at the organizational level.[227] Badke describes this process as it would play out in reaction to a new sector-wide development:

> [A]ctors begin to discuss a range of possible solutions. Leaders suggest new ideas, justifying and aligning them with normative structures. Where some degree of social consensus emerges, new norms take on a degree of legitimacy and diffuse across organizations. These stages result in change within an organizational field. Organizations within the field start to become more similar to each other because of regulative, normative, and cognitive convergence of practices perceived by the field as legitimate. Institutionalization occurs when these converging elements move from abstraction among the actors to constituting repeated patterns of interaction in fields.[228]

Badke contends that universities and their compliance activities are particularly suited to this form of sector-wide transformation and convergence due to the broad and ambiguous nature of many higher education laws.[229] She presents research to demonstrate that the process of convergence is further expedited through universities' tendency to mimic, or model, practices employed by their successful peers.[230]

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225 *See* Badke, *supra* note 5, at 34. Institutional theory is a subset of organizational theory, which "comprises a body of knowledge addressing how and why organizations function," including "how the external environment effects what goes on inside the organization." *Id*.

226 *Id*. at 38.

227 *See id.* at 40 ("In higher education, examples of these interorganizational relationships might include sharing proposed solutions with colleagues at other universities, disseminating new practices through professional organizations, and advising federal policy makers of emerging best practices.").

228 *Id*. at 40-41 (internal citations omitted).

229 *Id*. at 41-42 (citing the "creation of affirmative action offices and discrimination grievance procedures," which were gradually adopted by more and more universities and thus "socially [constructed] the meaning of civil rights compliance" and "became an expectation of compliance").

230 *Id*. at 44-45 (applying the term "institutional isomorphism" to this practice, with the result that "universities tend to be homogenous within their sector, striving to be like the peers they regard as elite").

Universities' modeling of the behaviors of others can be seen readily in policies. Universities regularly look to others' policies as a starting point for drafting and determining a course of action, and sometimes credit the originating university.[231] This strategy can help universities of all sizes cope with the resource-intensive policy development effort. Fortunately, as discussed *supra*, the Organizational Guidelines encourage small organizations to model the compliance programs adopted by their peers, warning that failure to employ industry best practices can negatively influence the effectiveness of a program.[232] Research has identified a similar practice among corporate firms' ethics codes.[233] A study found striking similarities among the ethics codes of S&P 500 firms, many of which contained identical sentences.[234] Although the danger of copycat compliance exists, this practice potentially increases universities' awareness of otherwise unfamiliar regulatory requirements.

E. Potential Compliance Program Weaknesses

Experts cite several essential components of effective compliance programs. One such component is a supportive and ethical workplace culture.[235] In its absence, organizations may become more susceptible to fraudulent activity.[236] Another component is the existence of mechanisms to detect, respond to, and enforce compliance failures and missteps.[237] Those mechanisms provide corrective adjustments and can contribute to the development of an appropriate culture.[238] Even properly designed programs intended to strengthen compliance and manage the burden of regulation, however, possess many areas of potential weakness that may hinder their effectiveness.

A compliance program is only as effective as the compliance responsibilities it manages. Due to the sheer scope of legal obligations managed and coordinated by a compliance program and the competing priorities that arise, tasks or issues may fall through the cracks or go unaddressed. Excess reliance on a compliance calendar may also result in the inadvertent exclusion of numerous compliance obligations that do not have a reporting or filing deadline.[239] Similarly, the failure to assign

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231 *See, e.g.*, *Incentive Compensation Policy*, Goucher Coll., https://www.goucher.edu/legal-counsel/documents/Incentive-Compensation-Policy.pdf (last visited Sept. 4, 2018) (acknowledging University of Vermont).

232 *See supra* notes 125-126 and accompanying text.

233 *See* Margaret Forster et al., *Commonality in Codes of Ethics*, 90 J. Bus. Ethics 129, 139 (2009).

234 *See id*. at 137.

235 *See* Cristie Ford & David Hess, *Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context*, 33 Law & Pol'y 509, 511-512 (2011). Workplace culture's relation to compliance is somewhat of a chicken and egg scenario: Without an ethical culture, can an effective compliance program thrive? Without a compliance program to memorialize ethical values, can such a culture be sustained?

236 *See id*. at 512; Haugh, *supra* note 91, at 1217 (describing how a corporation's culture led to its use of its compliance program to hide and contribute to employees' illegal and unethical behaviors).

237 *See* Haugh, *supra* note 91, at 1224 (internal quotations omitted) ("[A] compliance program will not be fully living and breathing unless it has teeth."); Gruner, *supra* note 84, at 1161-1162.

238 *See* Gruner, *supra* note 84, at 1161-1162.

239 *See* Lucien "Skip" Capone III, Conference Materials, NACUA, Creating Effective Compliance Programs at Smaller Institutions or on a Limited Budget: Models and Procedures (Nov. 11-13, 2009) (on file with author) (characterizing compliance calendar as "only a partial solution").

ownership of compliance responsibilities to appropriate units may result in a lack of ongoing monitoring, training, and reported concerns.[240] Decentralized models of compliance are particularly prone to these consequences due to fewer channels of oversight and the absence of coordinated compliance efforts.

Another potential weakness of compliance programs is their "tendency to subsume risks emerging from the crises *du jour*."[241] A compliance program that is reactive in this way may neglect pre-existing risks bubbling beneath the surface. Alternatively, the program may overlook new, but obscure, compliance requirements. In either case, there is potential to miss valuable opportunities for preventative risk management.[242]

Even with a compliance program in place, universities risk falling prey to what Peter Lake describes as "bystander-ism."[243] Several symptoms illustrate this condition. Individual staff or departments who parrot the language of compliance, but out of self-interest make no sincere efforts to assess themselves according to the standards in place, mark the first symptom.[244] This posture weakens the effectiveness of a compliance program and may be difficult to detect in decentralized structures. Attempts to manage compliance shortcomings departmentally rather than institutionally characterize the second symptom.[245] This extra-internal approach to compliance and risk management fails to account for related systemic issues belied by a seemingly unit-specific incident. Finally, redundant or inefficient compliance efforts due to a lack of, or ineffective, coordination characterize the third symptom.[246]

The potential for "bystander-ism"-like weaknesses demonstrates that a university should utilize university-wide efforts to reinforce its compliance program. Despite the existence of dedicated compliance administrators at universities, compliance-related duties exist throughout the institution. An attempt to consign compliance to a single job description or office can diminish the effectiveness of a compliance program by omitting necessary oversight and support roles.[247]

In the same vein, researchers criticize rules-based compliance programs for failing to establish the ethical behavioral norms often found in values-based programs.[248] Rules alone do not address the personal and organizational problems

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240 *See id*.

241 Griffith, *supra* note 117, at 2101 (citing "data privacy and retention" as receiving extra attention from compliance departments following high-profile corporate data breaches).

242 *See id.* at 2101.

243 Lake, *supra* note 18, at 12.

244 *Id*. ("posturing"). *See also* Miller, *supra* note 58, at 14 ("It is possible to establish a 'paper program' that includes state-of-the art compliance procedures but still operates ineffectively."); Haugh, *supra* note 91, at 1218 (warning against conditions that fuel the rationalization of corporate crime).

245 Lake, *supra* note 18, at 12 ("parochialism").

246 *Id*. ("lack of coordination").

247 *See* Bird & Park, *supra* note 117, at 209 (arguing that it is the sole role neither of counsel nor of compliance professionals to fulfill organizational compliance duties).

248 *See generally* Haugh, *supra* note 91; Tyler, *supra* note 144.

underlying unlawful or unethical conduct.[249] As such, compliance programs that depend entirely on rules do not seek or earn employee buy-in.[250] Nor are they designed to foster the kind of holistic commitment to compliance encouraged by the Organizational Guidelines.[251] The result can appear to be a framework of seemingly arbitrary or ultra-specific rules that lack ethical grounding. Researchers argue that these shortcomings encourage employees to act in order to avoid breaking specific rules and their consequences as opposed to in accordance with ethical norms.[252]

III. Calls for Reform

Many advocate for reform despite universities' substantial—and largely successful—efforts to manage the myriad compliance requirements created by federal regulation. This section describes several recently proposed methods. What each of these calls for reform have in common is their desire for the creation of a less burdensome regime with more flexibility or room for institutional autonomy.

A. Existing Checks and Criticisms

Although there is much concern about the increasing volume and complexity of federal regulation, checks on regulatory expansion do exist. First among them is the Administrative Procedure Act, which ensures public participation in the rulemaking process.[253] Further, Executive Orders issued by the Clinton and Obama administrations direct agencies to examine the costs and benefits of any available regulatory alternatives, and, if regulation is deemed necessary, opt for a method that utilizes the "least burdensome tools" and results in economic and other benefits.[254] These Executive Orders also direct agencies to perform retrospective analyses of existing regulations for possible modification or repeal.[255] Finally, the Congressional Review Act (CRA) permits Congress to review and, by joint resolution, overrule newly issued agency rules.[256] The CRA was essentially dormant until 2017, when the General Accountability Office issued a letter opining

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249 *See* Lynn Sharp Paine, *Managing for Organizational Integrity*, Harv. Bus. Rev., Mar.-Apr. 1994, at 106; Haugh, *supra* note 91.

250 *See* Tyler, *supra* note 144, at 31-33.

251 *See id*. at 42.

252 *See* Haugh, *supra* note 91, at 1260-62; Arjoon, *supra* note 143, at 58-60.

253 *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1312 (1992).

254 Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 13,563, 3 C.F.R. 215 (2011). The Senate Task Force on Federal Regulation of Higher Education, discussed *infra*, identified the Department of Education's implementation of Executive Order 13,563 as an area for improvement. Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 40.

255 Exec. Order No. 12,866, *supra* note 254; Exec. Order No. 13,563, *supra* note 254.

256 Contract with America Advancement Act of 1996, Pub.L. No. 104-121 §§ 251-53, 110 Stat. 847 (containing the Congressional Review Act).

that agency guidance qualified as a "rule" for purposes of the Act.[257] As such, the potential for a Congressional check—and other influence—on agencies' guidance issuance has grown considerably.

Despite these checks on executive authority, some proponents of higher education regulatory reform claim that the Department has overreached and its regulations have become far too prescriptive.[258] They argue that regulations should be repealed or pared back on a large scale.[259] Specifically, some propose limiting the federal government's role in financial aid and lending, which would remove much of the justification for federal regulation of higher education.[260] Some also assert that the federal government uses its regulatory powers to "wage culture wars" by taking positions on controversial social issues.[261] Ultimately, they argue, this overreach comes at a cost, causing universities to increase administrative staff and devote additional resources toward compliance at the expense of improving quality, research, and services.[262]

Other proponents of reform, like the Task Force on Federal Regulation of Higher Education, discussed *infra*, instead identify specific subject matter areas where regulation has strayed from its original objectives and advocate for a return to, or creation of, regulatory design principles and targeted reform.[263] Similarly, the majority of responders to the Advisory Committee on Student Financial Assistance survey, discussed *supra*, indicated a preference for modifying the current regulatory

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257 *See* Susan Dudley, *We Haven't Seen the Last of the CRA Yet*, Forbes (Oct. 31, 2017, 9:12 AM), https://www.forbes.com/sites/susandudley/2017/10/31/we-havent-seen-the-last-of-the-cra-yet/#1000f9632680.

258 *See, e.g.*, Sam Batkins et al., *Rising Tide of Education Rules Increase Costs*, American Action Forum (Apr. 30, 2014), https://www.americanactionforum.org/research/rising-tide-of-education-rules-increase-costs/; Mary Clare Amselem, *Cutting Red Tape: Four Higher Education Regulations that should be Eliminated*, Heritage Foundation (June 15, 2017), http://www.heritage.org/education/report/cutting-red-tape-four-higher-education-regulations-should-be-eliminated-0; Matthew Denhart, *Federal Overreach into American Higher Education*, Heritage Foundation (Nov. 4, 2010), http://www.heritage.org/education/report/federal-overreach-american-higher-education.

259 *See id*. Education Secretary Betsy DeVos has suggested that her preference is that the Higher Education Act and its implementing regulations be repealed in their entirety. *See* Adam Harris, *Landmark Law on Higher Education Should Be Scrapped, DeVos Suggests*, The Chron. Of Higher Educ., June 21, 2017, *available at* http://www.chronicle.com/article/Landmark-Law-on-Higher/240412.

260 *See* Preston Cooper, *Five Higher Education Reform Ideas for the New Congress*, Forbes (Jan. 3, 2017, 8:09 AM), https://www.forbes.com/sites/prestoncooper2/2017/01/03/five-higher-education-reform-ideas-for-the-new-congress/#647986649788; Richard Vetter, *Mr. Trump: 12 Ways to Reform Higher Education*, Forbes (Dec. 20, 2016, 10:02 AM), https://www.forbes.com/sites/ccap/2016/12/20/mr-trump-12-ways-to-reform-higher-education/#42a892403a89 (calling for reduction in federal administration of Title IV loans and arguing that they should be privately granted with a federal guarantee).

261 *See* Preston Cooper, *How the Department of Education Uses Student Loans as a Weapon*, National Review (Nov. 1, 2016, 8:00 AM), http://www.nationalreview.com/article/441639/obama-pressures-colleges-cancel-student-debts (referring to social and political stances represented in recent federal guidance addressing sexual misconduct and bathroom choice on college campuses); Cooper, *supra* note 260.

262 *See* Batkins, *supra* note 258; Bok, *supra* note 19, at 33-34 ("Universities are involved with more and more regulatory agencies, laws, and oversight bodies. . . . Gradually, provosts, deans, and even heads of centers and programs find themselves diverted by administrative chores from attending to the core activities of education and research.").

263 *See* discussion *infra*, Section III.C.

regime.[264] The responders specifically called for regulatory changes that take into account institutional type ("sector-specific" regulation) or that reward certain performance outcomes ("performance-based" regulation).[265]

B. Recent Executive Orders Aimed at Reform

Most recently, a pair of Executive Orders issued by the Trump administration aims to strengthen existing checks and reduce the volume and burden of existing regulation.[266] Executive Order 13771 directs agencies to identify regulations for repeal in conjunction with any new rulemaking activity.[267] Executive Order 13777 requires agencies to designate an official and task force to oversee regulatory reform initiatives.[268]

In a May 2017 progress report on its implementation of Executive Order 13777, the Department of Education described its "initial canvass" of all regulations and guidance documents it administers and identified two "burdensome, significant, and complex regulations for repeal, replacement, or modification."[269] In an October 2017 report, the Department detailed its engagement with higher education associations for their views on regulatory reform.[270] Additional steps taken by the Department to implement the Executive Order include: publication of a notice seeking public input on regulations appropriate for potential repeal or reform[271]; announcing its intent to commence negotiated rulemaking for the two "burdensome" regulations identified in its progress report[272]; announcing the

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264 HERS, *supra* note 68, at 25-31.

265 *Id*. at 27. Responders expressed dissatisfaction with the "unwieldy volume and expansive scope" of the HEA's disclosure requirements, which include policy disclosures. *Id*. at 37. They expressed that the mandated disclosures do not provide useful information to students that would affect their choice of college. *Id*. They also expressed that some of the disclosure requirements were irrelevant to the financial aid programs to which they are tied. *Id*.

266 Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

267 82 Fed. Reg. 9,339.

268 82 Fed. Reg. 12,285.

269 U.S. Dep't of Educ., Regulatory Reform Task Force Progress Report (May 2017), https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf.

270 U.S. Dep't of Educ., Regulatory Reform Task Force Status Report (October 2017), https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report-2.pdf

271 Regulatory Reform; Public Hearings, 82 Fed. Reg. 40,518 (Aug. 25, 2017).

272 Negotiated Rulemaking Committee; Public Hearings, 82 Fed. Reg. 27,640 (June 16, 2017). Other steps include the Department's postponement of the implementation of the Borrower Defense Rule regulations and withdrawal of the 2011 DCL. *See* Press Release, U.S. Dep't of Educ., Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017), *available at* https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions; Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), *available at* https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

withdrawal of "nearly 600 out-of-date pieces of subregulatory guidance"[273]; and proposing the rescission of Gainful Employment regulations.[274]

C. Task Force on Federal Regulation of Higher Education

1. Purpose and Formation

In 2013, a bipartisan group of U.S. Senators initiated what is perhaps the most substantial of recent reform efforts. Along with appointed members from throughout the higher education sector, they formed the Task Force on Federal Regulation of Higher Education to study higher education regulation and recommend methods to reduce its volume, complexity, and burden.[275] The Task Force cited the pending reauthorization of the Higher Education Act as an opportunity for regulatory reform[276] and identified as its goal to "foster more effective and efficient rules that still meet federal objectives."[277] The Task Force approached its work through a set of "guiding principles" that it urged the Department of Education to adopt, including that regulations be clear, conform to legislative intent, and remain traceable to higher education policy objectives.[278]

2. Report

The Task Force issued a report on its work, which identified overall regulatory challenges in higher education, highlighted problematic regulations, and offered recommendations for solutions and improving the Department's rulemaking process going forward.[279] It recommended that the Department's "overarching goal" in regulating universities "be the creation of a regulatory framework and specific mandates that ensure full institutional accountability in a way that facilitates campus compliance."[280]

Chief among the Task Force's concerns were that regulations are "unnecessarily voluminous," impose costs that are difficult to predict, and have become increasingly complex.[281] The Task Force cited the information disclosure requirements of the HEA and its implementing regulations as particularly voluminous, noting that the Clery

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273 Press Release, U.S. Dep't of Educ., Department of Education Withdraws Outdated Subregulatory Guidance (Oct. 27, 2017), *available at* https://www.ed.gov/news/press-releases/department-education-withdraws-outdated-subregulatory-guidance.

274 Press Release, U.S. Dep't of Educ., U.S. Department of Education Proposes Overhaul of Gainful Employment Regulations (Aug. 10, 2018), *available at* https://www.ed.gov/news/press-releases/us-department-education-proposes-overhaul-gainful-employment-regulations.

275 Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 4. It defined "regulation" broadly to mean "any requirement placed on colleges and universities in order to participate in the federal student aid program." *Id.* at 5.

276 *Id*. at 4.

277 *Id*. at 5.

278 *Id*. at 5-6.

279 *Id*. at 5.

280 *Id*. at 9.

281 *Id*. at 10-12.

Act and accompanying guidance documents contain over 90 such information and policy disclosures.[282] In discussing the compliance costs incurred by universities, the Task Force lamented the difficulty of making accurate cost estimates, noting that many operational duties created by new regulation are simply absorbed by existing staff and added to their workloads.[283] Although independent organizations have attempted to provide estimates of the cost and time burdens of compliance with existing regulations, the report noted that these cost estimates fail to account for related compliance tasks, such as developing internal policies.[284] To illustrate the complexity of compliance, the Task Force described the layers of governance that may be associated with many provisions of the HEA, including Department regulation and guidance subsequently issued to clarify, or sometimes expand, those provisions.[285]

The Task Force identified specific regulations that demonstrate these and other concerns. For example, it noted the "extraordinarily complex" nature of return of Title IV funds ("R2T4") requirements, whereby a university returns funds to the Department upon a student's early withdrawal from a program.[286] In addition to substantial regulatory text, the complexity of R2T4 rules has necessitated additional guidance in the *Federal Student Aid Handbook* and a series of questions and answers posted to the Department's website.[287] The Task Force asserted that this guidance has, in effect, reduced "institutional discretion and flexibility" in administering Title IV funds and recommended that the rules be streamlined to increase institutional autonomy.[288] The Task Force proffered that one way to remove the inflexible burden of existing rules would be to permit universities to design—and distribute to students in a clear way—their own policies on refunds upon certain withdrawals.[289]

The Task Force further identified a pair of HEA policy requirements as problematic for their apparent detachment from higher education.[290] It noted that the requirement for universities to maintain policies on peer-to-peer file sharing has been rendered obsolete as a result of technological advances that no longer make peer-to-peer file sharing as attractive or prevalent as in its heyday.[291] It cited the requirement for universities to disclose vaccination policies as needless and probably serving no role in a potential student's matriculation decision, despite its ostensible relation to student health.[292]

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282 *Id*. at 10.

283 *Id*. at 10-11.

284 *Id*. at 11 (discussing a study conducted by the American Action Forum finding that "institutions spend 26.1 million hours annually completing Department of Education-mandated forms").

285 *Id*. at 12 (citing guidance documents issued under Title IX as egregious examples, including the 2011 Dear Colleague Letter and a later issued 53-page "Questions and Answers" document).

286 *Id*. at 19.

287 *Id*.

288 *Id*.

289 *Id*. at 19-20.

290 *Id.* at 30.

291 *Id.* at 30 (citing 20 U.S.C. §§ 1092(a)(1)(P), 1094(a)(29) (2012)).

292 *Id.* (citing 20 U.S.C. § 1092(a)(1)(V) (2012)).

3. Recommendations

Ultimately, the Task Force issued a number of recommendations to improve the Department's regulations and efforts to "facilitate compliance by institutions."[293] Among its recommendations to improve the development of regulation, the Task Force encouraged the inclusion of safe harbor provisions.[294] It cited laws applicable to universities containing safe harbors developed by other regulatory bodies, and asserted that they reduce challenges to business practices and the need for external audits.[295] The Task Force further encouraged the Department to regulate within the bounds of its statutory authority, citing as evidence of exceeding that authority the existence of a growing body of sub-regulatory guidance that oftentimes imposes compliance obligations not found in statute or regulation.[296]

To improve the implementation of Department regulation, the Task Force recommended that Congress enforce the HEA mandate for the Department to publish an annual compliance calendar.[297] It argued that a published calendar would enhance institutional compliance and therefore reduce the instance of audits and resulting fines.[298] The Task Force asserted that smaller universities with fewer resources would benefit the most from the calendar.[299]

Finally, to improve the enforcement of Department regulation, the Task Force recommended that the Department recognize universities' good faith efforts when conducting or reviewing audits, as well as distinguish minor or technical violations from those resulting from negligent or deliberate action, when considering enforcement action.[300] Noting that some enforcement activities take years before resolution, it also recommended that the Department pick up the pace.[301] The Task Force asserted that as a result of enforcement delays, subject universities receive no communication from the Department regarding desired changes, thus forestalling for years any efforts to improve their policies and practices.[302]

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293 *Id.* at 6.

294 *See* discussion *supra* Section I.B for an explanation of safe harbor provisions.

295 Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 34-35.

296 *Id.* at 35. The Task Force further cited the Department's standards for assessing the financial responsibility of institutions as overreaching their intended statutory purpose as a result of changes in accounting methods since their implementation, which the Department has not subsequently updated or incorporated in its methods. *Id.* at 20-21. Ultimately, the Task Force asserts, the misapplication of these standards harm otherwise financially healthy institutions and fall short of their intended purpose to ferret out those institutions in danger of failing. *Id.* at 21.

297 *Id.* at 37. *See supra* note 2 and accompanying text. The Department first published the calendar in 2015 and has provided annual updates. *See* U.S. Dep't of Educ., Fed. Student Aid, Federal Student Aid Handbook, Appendix F: Institutional Reporting and Disclosure Requirements (2017-2018), *available at* https://ifap.ed.gov/fsahandbook/attachments/1617FSAHbkAppendixF.pdf.

298 Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 37.

299 *Id.*

300 *Id.* at 37-38 (citing the Department's assessment of substantial fines against University of Nebraska at Kearney and Virginia Polytechnic Institute and State University for minor or technical Clery Act violations).

301 *Id.* at 38-39.

302 *Id.* at 39.

D. Risk-Informed Strategy

Another major reform proposal is the utilization of a risk-informed strategy. This strategy received tacit endorsement from the Task Force and has been promoted by other higher education research and policy organizations.[303] Risk-informed regulation is a convention of regulatory design, which would require all universities to comply with "baseline rules" established by the Department of Education.[304] Additional regulations would only apply when a preliminary assessment indicates risk to financial stability, academic quality, and so on.[305] Overall, this reform strategy would reduce the regulatory burden on well-performing and financially stable universities.[306]

Proponents of this approach claim that the current regulatory regime is ineffective and "foster[s] a mentality of minimal compliance" rather than incentivizing improvement and innovation.[307] They point to the Department's current method of regulating categories of universities in similar ways despite their multitude of differences.[308] A risk-informed approach, proponents claim, would allow the Department to develop and apply individualized standards and enforcement tools based on those differences.[309] They cite the potential efficiencies that can be achieved by reducing prescriptive baseline rules and employing a more targeted enforcement approach.[310] Similar to proponents of other reform methods, proponents of a risk-informed strategy cite the potential for reallocating university resources from compliance to activities that enhance the quality of academic programs and services.[311]

IV. Lawmakers Should Strategically Incentivize or Require University Policies

At present, the Higher Education Act's approaching reauthorization is an opportunity to realign Congress' and the Department of Education's higher education regulatory strategies. The Task Force's report establishes that there is Congressional recognition of the desire and need for reform. Likewise, stakeholders within the higher education sector share similar frustrations with the current regime and many generally agree on the need for reform. There are several viable options to improve the quality of higher education regulation and any meaningful efforts should be encouraged.

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303 *See* Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 61, n.2.

304 *Id.* at 67.

305 *Id*. In other words, "the approach provides an opportunity to realign regulatory requirements with the primary risks that rules and regulations are intended to prevent." *Id.* at 70.

306 *See* Coleman, *supra* note 8, at 3.

307 *Id.* at 1.

308 *See* Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 61-64 (criticizing it as a "one-size-fits-all reporting and enforcement regime").

309 *See id*. at 70.

310 *See* Coleman, *supra* note 8, at 7-10.

311 *See* Task Force on Fed. Regulation of Higher Educ., *supra* note 7, at 64-65; Coleman, *supra* note 8, at 6 (citing pace of Dear Colleague letters and electronic announcements and the staff time needed to interpret and operationalize them).

The Department of Education has just as much interest in establishing compliance requirements that safeguard the federal funds it oversees as it does in facilitating universities' compliance with those requirements. It has demonstrated its interest in facilitation in several ways, primarily by developing compliance resources such as its subject matter handbooks[312] and financial aid compliance calendar.[313] The Department also regularly uses quasi-enforcement measures, *i.e.*, voluntary resolution agreements, to conform university policies to its guidance and regulations. However, such methods create unnecessary layers of regulation and raise questions about the proper role of sub-regulatory guidance. Instead, the Department should look for ways to clear away stumbling blocks and make compliance the easiest path for universities.[314]

Policies are a well-established and inseparable component of university governance and compliance. Likewise, the Organizational Guidelines acknowledge their existence as a critical element of an effective compliance program. Policies' status as such justifies their inclusion as a central feature of higher education regulatory reform. Congress and the Department of Education should incentivize or mandate institution-level policies that address regulated issues. By doing so, universities' regulatory obligations would be more likely to be included within the scope of institutional compliance programs, as formal or informal as they may be.

A. Policies Enhance Institutional Compliance Generally

Despite the burdens and ever-changing requirements of higher education regulation, universities undertake the necessary efforts to comply. Still, given the myriad compliance requirements in existence, it is fair to say that universities are unlikely to perform above what is minimally required to comply with a regulated area.

Recent regulation illustrates this minimal performance pattern. In 2011, Department of Education regulations went into effect that prohibit the payment of incentive compensation to certain university employees.[315] Later that year, the Department issued guidance to clarify its regulations and universities' responsibilities thereunder.[316] Three years later, in 2014, the Department of Defense issued its MOU for institutions participating in military tuition assistance.[317] The DOD MOU contains an affirmative requirement that a signatory university must maintain a policy compliant with the Department of Education's prohibition on incentive compensation.[318]

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312 *See, e.g.*, Gainful Employment Operations Manual, *supra* note 54; Campus Safety Handbook, *supra* note 54.

313 *See supra* note 296.

314 *See* Bird & Park, *supra* note 117, at 28 (describing organizations' economic considerations when choosing whether to comply with a given requirement).

315 *See also* discussion *supra* Section II.C.ii; § 668.14(b)(22).

316 Mar. 17, 2011 DCL, *supra* note 73.

317 32 C.F.R. pt. 68, app. A.

318 *Id*.

Following the issuance of the MOU, several universities implemented policies addressing incentive compensation. It is apparent that some universities developed policies in direct response to the MOU's affirmative requirement—as opposed to the original regulation's prohibitive one—because the policies cite the MOU.[319] Other policies contain no direct reference to the MOU, but contain an effective date of 2014 or later, which is evidence that they were created either in direct response thereto, or indirectly as a result of modeling other universities' newly created policies.[320]

This situation does not demonstrate that the DOD MOU's affirmative policy requirement led to more compliant conduct than the original regulation. It is impossible for an external observer to know whether a university complied with the Department of Education regulation prior to the implementation of a policy in response to the MOU. Rather, this situation illustrates that some universities are inclined to comply minimally or follow another university's lead. More importantly, it suggests that some universities became aware of, or adopted compliant practices regarding, Department of Education regulation because of the affirmative policy requirement.

When universities are required to maintain and disclose policies, it is easier, as an observer, to determine whether the university is making efforts to comply. As such, the situation described above lends support to this Article's argument that regulatory policy requirements bring attention to more compliance obligations and protect against obscure regulations from going unnoticed. This effect benefits institutional compliance efforts, regulators, and the intended beneficiaries of the regulation.

Policy requirements or incentives have the potential to invite the collaborative development processes often utilized by universities, as unveiled by Badke.[321] Collaborative processes, when implemented effectively, may lead to more thoughtful and deliberate compliance strategies that generate norms and further universities' educational missions and societal good. Two types of Department regulation appear to be the best fit for this regulatory strategy. The first is regulation that affects multiple campus units, due to the inherent need for cross-departmental collaboration to achieve compliance. The second is regulation motivated by, or reflecting, public policy goals, due to its potential to spur the kind of "innovative" and "novel thinking"[322] that may create broader societal impacts than mere compliance. The Department should utilize regulatory policy mandates or incentives in the least prescriptive manner possible to encourage these processes and the development of innovative solutions that move "beyond minimal compliance" and produce "socially and institutionally desirable outcomes."[323]

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319 *See, e.g.*, *Policy 210.13 Recruitment and Enrollment*, Univ. of Md. Univ. Coll., https://www.umuc.edu/administration/policies-and-reporting/policies/academic-affairs/recruitment-and-enrollment.cfm (last visited Sept. 4, 2018) (banning incentive compensation payments, citing the DOD MOU and federal regulation as the reason for the ban, and employing regulatory definitions and language).

320 *See Ban on Incentive Compensation Related to Student Services*, Ind. Univ., https://policies.iu.edu/policies/usss-17-incentive-compensation-ban/index.html (last visited Sept. 4, 2018) (established July 1, 2015).

321 *See* discussion *supra* Section II.C.iii.

322 Badke, *supra* note 5, at 88.

323 *Id*. at 97.

Once in place, policies have the potential to enhance compliance and increase operational efficiency. Because they memorialize the wide range of legal requirements to which a university is subject, they help transfer substantive knowledge among colleagues and successors and serve as training tools. Policies also reduce the need for substantive legal advice on an on-going basis and more generally reduce the strain on in-house legal staff.[324] Moreover, policies are a critical component of establishing an ethical workplace culture and preventing or minimizing legal disputes. By interpreting laws and conveying organizational values, policies act as the university's internal compass and establish a compliant and ethical course of conduct for organizational actors to follow.[325] In the absence of policies, a university would be compelled to make internal compliance decisions without established boundaries and without safeguards to ensure future consistency, both of which create unnecessary risk to the university.

B. Policy Requirements Would Create a Robust Marketplace

As universities developed and published policies in response to Department incentives and mandates, there would exist a robust public supply of examples from which other universities could draw. This "marketplace" of policies would help smaller universities, or those with fewer resources, to evaluate different options. These universities would not be required to expend the resources necessary to create specialized policies from scratch. Instead, a policy marketplace would enable them to spend less time devising and writing policy, yet achieve the same end of regulatory compliance.[326] Ultimately, it would permit universities to adopt and implement compliant policies by modeling existing examples. Eventually, less effective and poorly drafted policies would precipitate out of the marketplace because of enforcement actions and universities' adoption of better options during the process of diffusion and convergence, described *supra*.[327]

Modeling can also help strengthen a university's internal buy-in prior to adopting a policy. There is much comfort in knowing other universities have implemented a similar course of action, which Maurice Stucke dubs "safety in numbers."[328] This effect minimizes the risk that an enforcement agency or court will determine a particular policy as deviating from standard industry practice.[329] Moreover, the existence of a policy marketplace would fulfill the Organizational

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324 *See* Lee, *supra* note 6, at 684 (noting the likelihood that university legal staffs are "considerably smaller" than corporate legal staffs, despite university operations being "far broader").

325 *See* Kaplin & Lee, *supra* note 4, at 163 (describing the practice of preventive law as "setting the legal and policy parameters within which the institution will operate to forestall or minimize legal disputes"); Bird & Park, *supra* note 117, at 232 ("A culture of integrity must be disseminated with a thorough understanding of how compliance is achieved.").

326 *See* Stucke, *supra* note 90, at 803 (describing the "strong economic incentives" to model the compliance practices of other organizations).

327 *See* discussion *supra* Section II.D.

328 Stucke, *supra* note 90, at 822.

329 *Id*.

Guidelines' recommendation that small organizations model their compliance programs and practices "on existing, well-regarded compliance and ethics programs and best practices of other similar organizations."[330]

The practice of policy modeling has potential flaws. If universities merely copy one another's policies without adjusting them to their own individual needs and circumstances, those policies are less likely to be implemented or enforced appropriately, which can render them ineffective.[331] Nor would those policies reflect the particular shared values of the university and its employees. At its worst, this practice could lead to the "bystander-ism" described by Lake, *supra*.[332]

C. Policy Requirements Would Increase Transparency in the Regulatory Agenda

Because of the generally public nature of university policies, the utilization of policy mandates in regulation can make the federal government's ever-expanding public policy agenda more transparent.[333] Perhaps there is no higher education regulation—or resulting campus policy—in recent memory that has been so scrutinized as the Department of Education's policy mandates contained in VAWA regulations and OCR's Title IX guidance. Although universities have been responsible for addressing sexual discrimination and sexual violence on campus for decades, much of the recent scrutiny can be attributed to the Department's post-2011 policy mandates, both for how prescriptive they are and for the procedures they require universities to adopt.[334] Reasonable people can disagree about the value and efficacy of those provisions, but if nothing else, we must acknowledge that universities are keenly aware of their obligations. As such, a significant benefit of the Department's use of policy mandates is the resulting public discourse and sector-wide awareness.

Professor Sean Griffith makes a similar argument regarding the benefits of transparency in corporate compliance programs. He argues that requiring firms to disclose the structural details of their compliance functions would be an effective

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330 USSG § 8B2.1 cmt. n.2(C)(iii) (2013).

331 *See* Stucke, *supra* note 90, at 822 (describing the drawbacks to "copycat compliance"). Evidence of copying is apparent when several universities' policies on a particular topic contain a similar, distinct error. For example, many universities maintain a missing persons policy pursuant to a Clery Act requirement, found in 42 U.S.C. § 5779. As of this writing, several universities incorrectly cite the statute as 42 U.S.C. § 5579 (policies on file with author), indicating a possible "copycat" approach to policy drafting without exercising appropriate care.

332 *See* discussion *supra* Section II.E.

333 *See* Dunham, *supra* note 8, at 755 ("Many . . . laws and regulations that are the subject of certifications and assurances that are conditions to federal research grants and contracts have essentially nothing to do with the purpose of the contract or grant itself . . . [and are] simply a vehicle by which the government seeks to promote a particular public policy.").

334 Risa Lieberwitz et al., Am. Ass'n of Univ. Professors, The History, Uses, and Abuses of Title IX (June 2016), https://www.aaup.org/file/TitleIXreport.pdf (describing the evidentiary standard mandate in 2011 as "a shift of enormous significance"); Susan Hanley Duncan, *The Devil is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 452-453 (2014) (analyzing the additional procedural directives created by the Campus SaVE Act's policy requirements); Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 Md. L. Rev. 590, 598-600 (2016) (analyzing the changes in sexual misconduct adjudication created by the Campus SaVE Act and OCR requirements and responses, and noting that universities are "scrambling to change their policies" in response).

regulatory strategy, in that it "would enable professionals to study and understand those compliance mechanisms that work and those that do not."[335] Under Griffith's proposal, the enhanced transparency would permit investors to choose between firms based on quality of compliance and create incentives for firms to initiate improvements.[336] Analogously, under a rulemaking strategy wherein the Department of Education requires or encourages university policies, industry watchdogs, think tanks, and other sector professionals can better assess the quality and desirability of the underlying substantive regulation due to the transparency it creates. Moreover, increased regulatory transparency may reduce the need for sub-regulatory agency guidance to clarify the Department's objectives.

D. Options for Implementation

Utilizing policy mandates or incentives would provide the Department of Education an opportunity to exercise its regulatory authority in a way that improves the effectiveness of both its regulations and universities' compliance activities. The mandates need not be so broad as to permit total institutional autonomy, nor so prescriptive as to ignore institutional differences. Instead, the Department could incentivize or mandate a variety of elements of university policies that represent best practices. For example, the Department could require that universities specifically assign in university policy oversight or implementation responsibilities regarding a regulated area. Likewise, the Department could require universities to specify the frequency and audience of training on a particular regulated area. Promoting ownership of substantive and functional responsibilities in this way would assist university compliance programs in capturing compliance obligations and ongoing internal monitoring, training, and enforcement activities.

In some cases, a regulatory policy provision could constitute a safe harbor rather than a mandate. The Department could offer a model policy—even a prescriptive one—that a university could choose to adopt as a safe harbor. This option would incentivize universities to adopt the Department's preferred course of complying with a particular regulation, as well as provide universities the assurances associated with confirmed compliance.

Employing policy mandates or incentives in regulation would allow the Department to wield more proactive influence on university compliance. By contrast, OCR's current approach of utilizing resolution agreements to influence campus policy[337] only touches universities that OCR has deemed to be out of compliance

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335 Griffith, *supra* note 117, at 2138.

336 *Id.* ("It would also enable market professionals to distinguish between firms according to the quality of their compliance functions. If they invested accordingly, the capital market itself incentivizes firms to improve their compliance function.").

337 *See, e.g.*, Dep't of Educ., OCR Case Nos. 03-13-2328 and 03-15-2032, Resolution Agreement between Frostburg State University and the U.S. Department of Education, Office for Civil Rights (Sept. 6, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03132328-b.pdf; Dep't of Educ., OCR Case No. 03-15-2329, Resolution Agreement between Wesley College and the U.S. Department of Education, Office for Civil Rights (Sept. 30, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-b.pdf; Dep't of Educ., OCR Case No. 11-14-2282, Resolution Agreement between Mars Hill University and the U.S. Department of Education, Office for

following investigation. The impact of this approach on improving compliance is both piecemeal and limited, because resolution agreements are binding only upon the subject university, *ex post*.[338] Regulatory mandates, on the other hand, would apply to all regulated universities, rather than individual ones, and enable universities to develop compliant policies immediately rather than because of an enforcement mechanism. Universities would have the benefit of Department interpretation embedded in regulation, which ideally would reduce the need for additional sub-regulatory guidance documents. This is a better way to regulate in general, because resolution agreements, voluntary as they are, are used as quasi-enforcement tools and treated as compliance requirements by many universities.[339]

Moreover, the Department could use policy mandates in conjunction with other regulatory reform efforts. If paired with risk-informed regulation, discussed *supra*, a university's policies could serve as the basis for the Department's review or audit to determine risk. An inadequate policy, or proof that a policy was not being followed, may lead to additional review, enforcement action, or the imposition of additional standards that the university must satisfy. Alternatively, policy mandates could be combined with a performance-based regulatory approach.[340] Under this approach, universities with a sufficient policy on a particular regulated topic, combined with the achievement of certain measurable outcomes, would be exempt from further regulation.

E. Weaknesses and Criticisms of Regulatory Policy Mandates

The Department's previous uses of regulatory policy mandates have received substantial criticism. Similar criticisms of the expanded use of policy mandates or incentives, as proposed by this Article, can be expected. For the most part, critics view this regulatory method as heavy handed.[341] This perspective may stem from frustration with the Department's characterization of some of its policy mandates as mere information disclosures.[342]

The Campus SaVE Act's sexual misconduct adjudication provisions are prime examples of the Department's occasional doublespeak. Although Campus SaVE's authorizing statute states that the Department cannot require a university to

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Civil Rights (Nov. 25, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142282-b.pdf; Dep't of Educ., OCR Case No. 07142002, Resolution Agreement between University of Nebraska at Omaha and the U.S. Department of Education, Office for Civil Rights (Aug. 6, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07142002-b.pdf.

338 *See* Stucke, *supra* note 90, at 781 (describing this kind of approach in the private sector, when court-ordered, as "piecemeal").

339 *See* Badke, *supra* note 5, at 30 ("[U]niversities continue to recognize the 2011 DCL and its subsequent clarifications as the law they are required to follow.").

340 *See* HERS, *supra* note 68, at 29.

341 *See* discussion *supra* Section III.A.

342 *See* Jacob Gerson & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 906 (2016) ("Because the Clery Act creates an information-reporting regime, these regulatory requirements are fashioned as disclosure requirements.").

implement particular policies or procedures,[343] critics argue that the Department's implementing regulations do just that. For example, the regulations require a policy statement that all campus sexual misconduct investigations and adjudications will "include a prompt, fair, and impartial" proceeding.[344] The regulation then goes on to require various substantive components of such a proceeding.[345] In effect, these "policy statements" are so specific as to require the implementation of particular policies and procedures. Professors Jacob Gersen and Jeannie Suk make this argument succinctly, writing "[w]hat appears to be a disclosure requirement, however, is actually a substantive mandate to regulated parties to do something specific in order to be able to disclose it."[346]

In a similar vein, some critics may express concern that additional regulation in the form of policy mandates or incentives would reduce institutional autonomy and diversity.[347] Prescriptive policy mandates encourage minimal compliance and dictate processes that in many cases ought to remain within a university's discretion.[348] If the Department were to issue policy mandates as prescriptively as it has under the Campus SaVE Act, then this is certainly a risk. However, this Article has proposed alternate, less prescriptive methods of exercising this authority to assuage this concern.

Still, prescriptive policy mandates have their place and there is something to be said for using this regulatory power judiciously. For example, prescriptive policy requirements have compelled otherwise-distinct university departments to coalesce around Title IX compliance efforts. That potential exists in other regulated areas.[349] Moreover, prescriptive requirements make compliance a much more straightforward task with less need for clarifying sub-regulatory guidance. As a

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343 20 U.S.C. § 1092(f)(2) (2012).

344 34 C.F.R. § 668.46(k)(2)(i) (2017).

345 Components required by the regulation include that: (1) the proceeding is completed within a "reasonably prompt" amount of time; (2) the process permits extensions of time "for good cause with written notice" to both parties that identifies the reason for the extension; (3) it provides for "timely notice" of any meeting at which either party may be present; (4) it permits both parties equal access to information to be used during the process; and (5) it is managed by institutional officials without conflict of interest or bias. § 668.46(k)(3)(i). The regulation provides additional definitions of a "proceeding" and a "result." § 668.46(k)(3)(iii)-(iv).

346 Gersen & Suk, *supra* note 346, at 906. Professors Gersen and Suk go on to say:

> These components of a disciplinary proceeding may be wholly desirable, but they are not simply disclosure requirements. The Rule defines what must be disclosed in such a way as to impose substantive obligations. In order to report policies and procedures to satisfy the Rule, schools must adopt certain policies and procedures as the Rule defines them.

Id. See also James T. Koebel, *Campus Misconduct Proceeding Outcome Notifications: A Title IX, Clery Act, and FERPA Compliance Blueprint*, 37 Pace L. Rev. 551, n.50 (2017) (identifying conflict between law and agency guidance regarding the extent to which the Department may prescribe policies and procedures).

347 *See* Dunham, *supra* note 8, at 760 (arguing that regulation of higher education "standardizes operations and thus decreases diversity of institutions").

348 *See, e.g.*, Vetter, *supra* note 260 (characterizing certain Department of Education regulatory efforts as "promot[ing] a uniform, usually politically correct, approach to problems").

349 *See* Lake, *supra* note 18, at 12 ("In light of recent regulatory directives . . . many institutions have been forced to organize and focus their Title IX compliance efforts, for example. Now human resources, athletics, and discipline administrators coordinate compliance efforts and operate with one vision.").

rule, however, the Department should exercise its authority in the least prescriptive manner to encourage the development of novel compliance methods, diversity among universities, and values-based policies.[350]

Regulatory policy mandates and incentives are not, and never will be, a magic potion for compliance. The existence of university policies does not guarantee that they, or the overall compliance program, will be effective. As discussed, *supra*, effective policies are the result of campus buy-in at multiple levels, assignment and communication of ownership and implementation responsibilities, on-going monitoring and training, and consistent enforcement.[351] Ultimately, the burden of ensuring policy effectiveness and managing risks lies with the university.[352]

V. Conclusion

The manner in which the federal government regulates the higher education sector matters. Under the current regime, universities wrestle with an increasingly complex and broad scope of compliance obligations comprised of multiple and sometimes opaque layers of regulation and agency guidance. The periodic reauthorization of the Higher Education Act and growing calls for regulatory reform offer opportunities for Congress and the Department of Education to implement regulatory methods that better facilitate compliance and promote efficiencies.

The policy function plays an important and highly visible role in university compliance efforts. In lieu of issuing mere affirmative or prohibitive compliance obligations, Congress and the Department should strategically incentivize the development of university-level policies that address regulated issues in order to encourage the internal collaborative processes that lead to effective compliance outcomes. If issuing prescriptive policy mandates, the Department should utilize notice and comment rulemaking procedures rather than ensconce them in ostensibly non-binding guidance documents, enforcement measures, and other sub-regulatory material. The use of regulatory policy incentives or mandates—either directed by statute or adopted by the Department as a rulemaking strategy—stands as an alternative or complementary approach to the reduction of regulation or withdrawal from particular substantive areas, as well as one that leverages the institutional compliance function.

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350 *See* Badke, *supra* note 5, at 172-174 (positing that ambiguous regulatory requirements create organizational conditions for going "beyond minimal . . . compliance").

351 *See* Griffith, *supra* note 117, at 2094.

352 *See* Lake, *supra* note 18, at 12 ("Simply adopting new policies, making bold public statements about commitments to compliance, and hiring new personnel or consultants are not sufficient . . . ."); Stucke, *supra* note 90, at 827 (arguing that effective compliance does not arise from the mere existence of the program).