THE JOURNAL OF
COLLEGE AND UNIVERSITY LAW

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NACUA

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NACUA

NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

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ESSAY

A Turbulent Forecast: Navigating Choppy 2019–20 Higher Education Public Policy Waters

Terry W. Hartle
Jon Fansmith pg 130

Colleges and universities are faced with a new and potentially more complicated environment for federal policy than ever before. The political reordering underway in national politics is more than just the predictably volatile nature of representative government. It is instead a remarkable moment in which shifts in the voting population, policy debates and legislative imperatives are colliding, with potentially profound consequences for higher education.

ARTICLES

Understanding The Drug-Free Schools and Communities Act, Then And Now

Bradley D. Custer
Robert T. Kent pg 137

Defining what he called "Compliance U," Peter Lake commented that "higher education has entered an era of rapidly increasing regulatory activity at both the federal and the state levels." In this era of intensified responsibility for federal compliance, administrators struggle to balance the demands of implementing new and longstanding regulations. The Drug-Free Schools and Communities Act of 1989 ("DFSCA") requires that administrators invest considerable energy in implementing substance abuse prevention programs, distributing written policies, and evaluating program outcomes. Ill enforced, the DFSCA slipped off the radar of many institutions in the decades following its enactment. For those institutions that remained vigilant, few resources exist from which to derive best practices in compliance. Complicating matters, existing interpretations of the law have changed over time. The Department of Education's recent investigation of Pennsylvania State University provides timely insight into important issues of DFSCA compliance. Penn State, and many others, have been found to violate the DFSCA in the past five years resulting in fines of up to $35,000. In this article, we conduct a comparative analysis of primary sources related to the DFSCA to offer higher education practitioners the best available advice on how to comply with the DFSCA.

Facilitating University Compliance Using Regulatory Policy Incentives

James T. Koebel pg 160

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. 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. 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.

The University Lawyer As Collaborator And Facilitator: A Study In Work-Integrated Learning

Craig Cameron pg 210

This article explores the roles of the university lawyer as collaborator and facilitator, based on a case study of risk management by Australian university lawyers in work-integrated learning programs. Despite the Australia-centric nature of the study, the literature reveals clear parallels between the prevalence, organizational structure, issues, and work of university lawyers in Australia and the USA. As such, it is argued that the findings can be applied by university lawyers in the USA to evaluate, articulate and promote their roles as collaborators and facilitators in higher education.

The role of university lawyers has been a source of academic interest since the 1970's. Roderick Daane, writing in this journal in 1985, argued that "an examination of the way law is now practiced on campuses will illustrate the changed role of the campus attorney and suggest further evolution is likely," and that the effectiveness of university lawyers in executing their role "will be keyed in part to their skill in knowing how to operate on campus – an often unnoticed common denominator of a successful university practice." Robert Bickel revisited the role of university lawyers in 1993, expressing concern that it may be misperceived or criticized by university stakeholders, and stressing the importance of university lawyers to institutional management as experts in higher education law.

A TURBULENT FORECAST: NAVIGATING CHOPPY 2019–20 HIGHER EDUCATION PUBLIC POLICY WATERS

TERRY W. HARTLE, JON FANSMITH*

Abstract

It is vital to the well-being of colleges and universities to maintain and, if possible, increase federal support for student aid and scientific research while establishing a fair, reasonable and effective regulatory regime. But the public policy stakes and the uncertainty facing higher education in a turbulent, polarized, and partisan political and civic environment are as high as they have ever been, creating a complex and diverse set of challenges that will confront all institutions.

Colleges and universities are faced with a new and potentially more complicated environment for federal policy than ever before[1]. The political reordering underway in national politics is more than just the predictably volatile nature of representative government. It is instead a remarkable moment in which shifts in the voting population, policy debates and legislative imperatives are colliding, with potentially profound consequences for higher education.

Underlying this moment is a generational shift in the relationship between higher education and the voting public. It is hardly novel to say that American politics has undergone a seismic reordering in the last few years and it is easy to frame the 2018 midterm elections simply as a response to the first two years of the Trump presidency. While correct, that view obscures the bigger picture, which in fact, shows the driving forces of this transformation extending back decades. The growing partisan divide reflects an accompanying gap between Americans based on their age, ethnicity, gender, geography and education.

This is more than an academic matter. The federal government plays a massive role in the day-to-day operations of American colleges and universities, particularly in the areas of student aid and scientific research. In 2018, the federal government made $95 billion available to students and families in student loans. Another $30 billion was distributed through the Pell Grant program and $15 billion was provided under the GI Bill. NIH research funds—most of which will be used on college campuses—totaled more than $39 billion. Just these four sources of funds add up to roughly $180 billion. Imagine what higher education would look like if these funds were significantly reduced.

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* Terry W. Hartle is Senior Vice President, American Council on Education (ACE). Jon Fansmith is Director, Government and Public Affairs, American Council on Education (ACE)

1 The data referred to in this essay are derived from publicly available sources such as the U.S. Department of Education, Pew Research Center and 2018 election exit polls.

The central premise of democracy is that the public, through their votes, determine the values that will be at the heart of public policy. Changes in the electorate can easily—and indeed are likely to—reshape what the public wants and expects the federal government to do. Such changes could be good, or bad, for higher education.

There have been immediate repercussions from the 2018 mid-term elections, of course, most notably the Democrats gaining forty seats in the House of Representatives and retaking the majority of that chamber for the first time since 2010. The political implications of that change have already been endlessly analyzed in the media. But what is more important than the day-to-day political squabbling is what this election tells us about how deeply polarized the electorate really is. In virtually every demographic group—education, race, age, and even college graduates—American voters are bitterly split.

Geography

Voters from urban areas, who represent 32 percent of the electorate, favored Democrats 65% to 32%. Conversely, voters from rural areas, reflecting 17 percent of the electorate supported Republicans 56% to 42%. The urban versus rural divide along partisan lines remains alive and well in American politics. One telling example is that after the 2018 elections there are no Republican representatives from the 25 largest metropolitan areas, for the first time in American history. The majority of voters live in suburban areas, though, and those voters split evenly between the two parties, with each party garnering 49 percent of their votes. The net effect is a political climate in which Democrats own the cities, Republicans rule the country, and the suburbs are a political battlefield.

Race and Gender

America is also divided by gender and race. While men were more closely split between Democrats (47%) and Republicans (51%), women overwhelmingly voted for Democrats by a margin of 19% (59% to 40%). Similarly, while white voters favored Republicans by 54% to 44%, Black (90%), Hispanic (69%) and Asian voters (77%) overwhelmingly voted Democratic.

Age

Finally, the traditional split among voter preferences by age hardened in the 2018 midterms. Voters aged 18–29 (67%) and 30–44 (58%) disproportionately supported Democrats, while older voters narrowly preferred Republicans, with voters aged 45–64 voting for Republicans 50% to 49% and voters aged 65 and older supporting the GOP 50% to 48%.

Higher Education

In and of itself, the data are not especially surprising. Historically, women, minorities, the young and urban voters have predominantly supported the Democratic Party, with the inverse being true for Republicans. These numbers,

however, are far more pronounced than we have seen in the past. A far bigger change reveals itself when we look at the voting behavior based on college education. America is now a country that also is separated politically by who has a college education.

According to data from the Pew Research Center, a college degree is one of the strongest indicators of party affiliation, regardless of race, ethnicity, gender, geography or age. In 2017, Pew found that 58 percent of people with a college degree identified as Democrats, compared to only 36 percent who identified as Republicans. This is not just a recent phenomenon, and one not specific to the current administration. Instead, it reflects a growing inversion of electoral demographics over the last twenty-five years. Pew found that in 1993, 49 percent of those with a college degree identified as Republicans, compared to 45 percent who identified as Democrats. In 2004, around the time of the Iraq War, Pew found voters with college degrees were equally likely to identify with either party, but since that election the gap has steadily widened.

Significantly, shifting voter identification is seen among adults without a college degree as well. Traditionally, the Democratic Party was seen as the party of the working class, unions, and blue-collar employees. The numbers in 1993 bore that out, with 53 percent of voters without a college degree identifying as Democrats, relative to only 39 percent who identified as Republicans. While Democrats maintained the majority of support from voters without a degree over the ensuing decades, starting in 2012, the gap narrowed significantly, to the point that in 2017, voters without a college degree are equally likely to identify as Republicans as they are to identify as Democrats.

Why is this meaningful? There are any number of ways to answer that question, but the focus here is on what it means for how the federal government approaches higher education. Elected officials tend to follow, and act upon, the views and priorities of their constituents. Historically, support for the importance of a higher education has been bipartisan, and strong bipartisan support has enabled the development of policies intended to provide access to postsecondary education for low- and middle-income families.

Part of the reason for that bipartisan support was a belief that a college education represented a central form of economic opportunity. College enabled individuals to move up the economic ladder. Parents, and therefore politicians, assumed that a college degree meant that their children would enjoy more economic prosperity than they would.

But that view may be changing. Increases in the price of college, the growth of student loan debt, a tight labor market and widespread (if inaccurate) stories in the media featuring college graduates living in their parents' basements playing video games have seriously undermined the long-standing narrative that a college degree is a passport to financial well-being.

This shift in the public narrative, modest as it currently may be, could have profound implications for how colleges and universities operate. The last two years have been generally positive for higher education, with a few caveats. Federal funding for student aid, scientific research and institutional support increased, in

some cases substantially. Efforts to reduce regulatory burden on institutions have been undertaken by the Department of Education, and while some of these efforts are ongoing, the general result has been to eliminate or reduce a number of existing reporting and regulatory requirements, while avoiding the creation of new ones. More federal spending and less regulation is, for the most part, a positive scenario.

But the gains have been somewhat offset by other federal policy initiatives that are problematic. For the second year in a row, there has been a decline in the number of foreign students applying to American colleges and universities, with other countries such as Canada and Australia seeing sizable increases. While there are several factors contributing to this, the Trump administration's approach, and the rhetorical tone it takes, toward countries such as China, undoubtedly affects the perception of the United States as a welcoming destination for international students. Similarly, the administration's termination of the Deferred Action for Childhood Arrivals (DACA) program, has created legal uncertainty for hundreds of thousands of students, known as Dreamers, who were brought to the United States illegally as children. The harsh and uncompromising tone of the immigration debate has contributed to the lack of a permanent legislative solution, even as multiple efforts to resolve the status of Dreamers have been attempted.

Looking forward, the situation grows increasingly complex. Divided government sharpens partisan rhetoric and limits the ability of the government to act. This often results in increased exercise of executive authority through regulation, and as we write this, that process appears to be underway. The Department of Education recently concluded the public comment period for its proposed regulations on the handling of sexual assault on college campuses under Title IX. This effort, which received greater public attention than any other rulemaking process in the agency's history, resulted in over 107,000 public comments being submitted, roughly twenty times the number of comments it usually receives.

While many of these comments represent thoughtful critiques of the Administration's proposed rules, many are nothing more than vituperative personal attacks on Secretary of Education DeVos and her team. In such an environment, a nuanced, careful discussion of how colleges should address the enormously complex issues related to campus sexual assault becomes impossible. If ever there was a regulatory issue where we need to be able to seek common ground, this is it. Whether we can have that conversation in the current environment seems highly unlikely.

Most colleges and universities have grave concerns about the overall approach of the regulatory proposal offered by the Department of Education. More generally, we fear, the proposed rule represents an unfortunate step away from the administration's stated goal of giving institutions the flexibility to handle sexual assault complaints in the ways that best fit their unique mission and circumstances. This is particularly true in the proposed rule's mandate that institutions adopt quasi-courtroom proceedings for the handling of sexual assault complaints.

As the Department works to address the voluminous public feedback it received on its Title IX regulations, it is simultaneously undertaking a separate

rulemaking focused on accreditation and innovation. While many of the proposals the Department has shared in these early stages are clearly well-intentioned, there are serious problems in how they attempt to address them. This process was still in the early stages as this was written, so we remain hopeful that better approaches will come to the fore.

The future of the regulatory efforts related to Title IX and accreditation is, for now, in the hands of the Department of Education. That is not the case with previous regulations, such as those on Gainful Employment (GE) and Borrower Defenses to Repayment (BDR). To recap: the Obama administration put in place regulations designed to limit the eligibility of occupationally-oriented programs to those that demonstrated that they provided participants with a solid economic return (GE), and another set of regulations to specify the circumstances under which a borrower could refuse to repay student loans because they had been defrauded (BDR). The Trump administration killed both regulations and has not yet moved to replace them. Democrats in Congress have protested and, at least in the House, plan to investigate.

Indeed, regardless of where the Department lands on regulations regarding colleges' handling of sexual assault and accreditation, there will be intense scrutiny of previous regulatory efforts by the Democratic majority in Congress. Democrats are eager to use their oversight authority, and already five separate House committees have announced they intend to hold hearings into various aspects of the Department of Education's work. Certain committees, such as the Education and Labor Committee (previously the Education and the Workforce Committee) plan to hold multiple hearings and it has already made numerous requests for documents and answers on the record targeting the actions of Department leadership over the past two years. The Department will undoubtedly slow walk any response. Such oversight always exacerbates partisan disagreement, and with a presidential election looming, the political posturing will be even greater than normal.

Heightened rhetoric over higher education will add another obstacle to Congress reauthorizing the Higher Education Act (HEA) before the 2020 elections. Rewriting this law, the most significant piece of federal legislation governing the relationship between colleges and universities, is already six years overdue to be reauthorized. As we enter 2019, there is momentum in the Senate, where the last two years witnessed a deadlock in discussions between the members of the Health, Education, Labor and Pensions (HELP) Committee. Sen. Lamar Alexander (R-TN), chairman of the committee, announced he will retire in 2020, and he would like to reauthorize the HEA before he does.

Beyond heated partisan rhetoric, there are a number of challenges that complicate the path to passing a comprehensive HEA bill. A presidential election year always shortens Congress's work schedule, with little meaningful legislation passed after July of an election year. More meaningfully, significant gaps exist between Republicans and Democrats in the Senate on issues like the handling of sexual assault, Public Service Loan Forgiveness, the cost of student aid programs and how for-profit institutions are handled in the law.

These gaps were very clear in the respective reauthorization bills offered in the House in the last Congress. The House Republican PROSPER Act, introduced in December of 2017, eliminated a number of student aid programs and made student loans more expensive for most borrowers. In all, the PROSPER Act would have cut nearly $15 billion from student aid programs, while greatly loosening existing accountability measures and greatly expanding the number and types of organizations that could access federal financial aid. The AIM HIGHER Act, introduced by Democrats last July, went in exactly the opposite direction, massively increasing funding for student aid programs while adding new and more stringent accountability measures and regulatory and reporting requirements. Early estimates placed the cost of the AIM HIGHER Act above $700 billion in additional federal spending over the next ten years.

In fact, partisan differences are more easily overcome in the House where the majority can (and often, does) simply outvote the minority party. That does not work in the Senate. Bills can, of course, be approved a committee on a party-line basis, but they rarely are considered on the Senate floor. Still, a House bill that sharply expands federal support for college would, eventually, need to be reconciled with whatever the Senate has passed, and any Senate bill is unlikely to sharply increase federal spending.

These proposals come against a backdrop of greater uncertainty for federal spending overall. In February 2019, Congress finally approved the federal 2019 budget, for a fiscal year that started almost five months earlier. While this agreement resolves one hurdle, the year ahead could easily see several more to overcome. The last two years have seen a sharp increase in the deficit, as spending increased and massive tax bill reduced government revenues. Concern about the deficit by the administration and Republican members of Congress has not yet been matched with concrete action, but an emphasis on reducing spending could easily set up a bitter partisan clash as Democrats seek to expand domestic programs they support. Hanging over all of this, the debt ceiling limit is set to expire on March 2, requiring new action to raise it, or risk the United States defaulting on its obligations. The use of so-called "extraordinary measures" will most likely push the effective deadline back to the fall, but in an election cycle with divided government, and a renewed concern by Republicans with government spending, lifting the debt limit could prove to be, well, a big lift.

It should be clear by now that both the stakes and the uncertainty facing colleges and universities in this environment as are as high as they have ever been. Navigating those waters and the changes they portend will test the ability of institutional leadership as never before. The bottom line is that the federal policy environment creates a complex and diverse set of challenges that will confront all colleges and universities. Maintaining and, if possible, increasing federal support for student aid and scientific research, and establishing a fair, reasonable, and effective regulatory regime while dealing with a toxic partisan atmosphere in Washington and an increasingly divided electorate is a tall order. But given how central the federal government is to the well-being of every institution of higher education, this is vital to our well-being. To paraphrase Bette Davis in the film *All About Eve*: Buckle up. It's going to be a bumpy ride.

UNDERSTANDING THE DRUG-FREE SCHOOLS AND COMMUNITIES ACT, THEN AND NOW

BRADLEY D. CUSTER, ROBERT T. KENT*

Abstract

Higher education institutions are known to have been lax in their compliance with the Drug-Free Schools and Communities Act Amendments of 1989 (DFSCA), and until recently, the U.S. Department of Education did not seem to notice. Now, the Department regularly investigates colleges and issues hefty fines for violations. No case provides better insights into the pitfalls of DFSCA compliance than the Department's review of Penn State University published in 2016. In this article, we analyze the Penn State and other recent program reviews against the DFSCA's original statute, regulations, Department handbooks, and guidance letters. We find that over time, DFSCA compliance has grown increasingly complex, and the stakes for institutions are higher than ever. To higher education attorneys and administrators, we offer advice on how to improve compliance with the Drug-Free Schools and Communities Act.

I. Introduction

Defining what he called "Compliance U," Peter Lake commented that "higher education has entered an era of rapidly increasing regulatory activity at both the federal and the state levels."[1] In this era of intensified responsibility for federal compliance, administrators struggle to balance the demands of implementing new and longstanding regulations. The Drug-Free Schools and Communities Act of

* Bradley D. Custer is a PhD candidate in higher, adult, & lifelong education at Michigan State University. He holds a M.A. in student affairs in higher education administration from Wright State University. Robert T. Kent is Interim Associate Vice President, Office for Civil Rights and Title IX Education and Compliance at Michigan State University. He holds a J.D. from Wayne State University Law School. Contact Information: custerbr@msu.edu The authors are appreciative of the insights gained from conversations with Dr. Beth DeRicco, Mr. Rich Lucey, and Dr. Michael DeBowes. We also thank Jacquelynn Kittel for editorial assistance.

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

1989 ("DFSCA")[2] requires that administrators invest considerable energy in implementing substance abuse prevention programs, distributing written policies, and evaluating program outcomes. Ill enforced, the DFSCA slipped off the radar of many institutions in the decades following its enactment. For those institutions that remained vigilant, few resources exist from which to derive best practices in compliance. Complicating matters, existing interpretations of the law have changed over time. The Department of Education's recent investigation of Pennsylvania State University provides timely insight into important issues of DFSCA compliance. Penn State, and many others, have been found to violate the DFSCA in the past five years resulting in fines of up to $35,000 [3]. In this article, we conduct a comparative analysis of primary sources related to the DFSCA to offer higher education practitioners the best available advice on how to comply with the DFSCA.

Practitioners involved in DFSCA compliance understand that it is tedious, often thankless work. Before getting into the technicalities of compliance, we wish to point out one observation. While enforcing drug laws was the original intent of the DFSCA, the Department of Education also recognizes that complying with the DFSCA presents an opportunity to invest in substance abuse prevention efforts. While the former may seem outdated and uninspiring, the latter is important, impactful work. We encourage readers to think about complying with the DFSCA as a means to achieve safer, healthier campuses. Although this shift in thinking may not make any difference in terms of the required tasks for compliance, it may bring clarity and meaning to the work of campus administrators involved in alcohol and drug programming and policy enforcement. In other words, complying with the DFSCA can be about more than compliance itself. As we describe in our recommendations, doing it well can mean implementing strong programs and policies that yield reductions in harmful substance abuse and campus violence.

We begin by providing a historical analysis of the Drug-Free Schools and Communities Act, including a description of the political context from which it came, its path to passage and amendment, and its purpose in U.S. higher education. Next, we review available research and reports that document how institutions have complied with the law and how the U.S. Department of Education has enforced compliance. We then analyze primary sources of information on the DFSCA in search of both the consistent and the varying interpretations of the regulations. Based on the primary sources, and recognizing the high stakes for compliance, we offer recommendations on meeting the Department of Education's standards for complying with the DFSCA.

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2 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

3 *See* Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action,* StanleyCSS.com (2016), https://info.stanleycss.com/rs/692-VCY-483/images/Resurgence-of-the-Drug-Free-Schools.pdf?aliId=11153710.

II. Legislative History

On June 17, 1971, President Richard Nixon declared drug abuse "public enemy number one" in the U.S.[4] The War on Drugs, as it would be called, was a campaign aimed at eliminating illegal drugs, characterized by "law and order" political rhetoric, federal policy proliferation, intensified and militarized law enforcement, eroded civil liberties, burgeoning prison populations, and international turmoil, costing tens of billions of dollars.[5] The Anti-Drug Abuse Act of 1986,[6] sponsored by Texas Democratic Congressman James C. Wright, Jr., and signed into law on October 27, 1986 by President Ronald Reagan, was the most significant War on Drugs legislation of the 1980s. Its purpose was:

> To strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.[7]

The legislation established harsh mandatory minimum prison sentences for drug offenders, especially targeting crack cocaine users, and is widely criticized for yielding the disproportionate incarceration of people of color.[8] It also created the Drug-Free Schools and Communities Act of 1986.[9] The legislation authors cited that "drug use and alcohol abuse are widespread among the Nation's students," and "the use of drugs and the abuse of alcohol by students constitute a grave threat to their physical and mental wellbeing and significantly impede the learning process."[10] As such, the Act established grant funding for drug prevention and education programs in elementary and secondary schools, community organizations, and colleges. For higher education institutions, funding was allocated "to establish, implement, and expand programs of drug abuse education and prevention (including rehabilitation referral) for students enrolled in colleges and universities," to research and develop programs for schools, and to train pre-service and in-service school teachers, administrators, and others on delivering model programs.[11]

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4 Richard Nixon, President of the U.S., *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, The American Presidency Project (June 17, 1971), http://www.presidency.ucsb.edu/ws/index.php?pid=3047&st=&st1=.

5 *See* Alfred W. McCoy & Alan A. Block, War on Drugs: Studies in the Failure of U.S. Narcotics Policy 1-18 (Alfred W. McCoy & Alan A. Block ed. 1992).

6 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-125 (prior to 1988 amendment).

7 *Id.*

8 *See* Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 Fordham L. Rev. 2531 (2010).

9 Drug-Free Schools and Communities Act of 1986, Pub. L. No. 99-570, §§ 4101-4144, 100 Stat. 3207-125 (prior to 1988 amendment).

10 *Id.* at § 4102.

11 *Id.* at § 4103.

Congress, apparently, did not feel the 1986 DFSCA went far enough to address drinking and drug use on college campuses. The 1988 Anti-Drug Abuse Act amendments created the Office of National Drug Control Policy, and in the first National Drug Control Strategy released on September 5, 1989, Director William Bennett criticized higher education institutions, calling for mandated alcohol and drug abuse prevention programs and policies as a condition of receiving federal funding.[12]

Only months after the report's release, Congress amended the 1986 DFSCA to enhance program requirements. The amending bill was authored by California Democratic Congressman Augustus F. Hawkins and was cosponsored by 14 other Democratic Congressmen.[13] The DFSCA bill, most of which expanded K-12 drug-free programs and funding, contained a section for higher education, titled "Drug-Free Schools and Campuses."[14] The bill saw a speedy enactment; it was introduced on November 8, 1989 and became law on December 12, 1989 with President George H. W. Bush's signature. It amended the Higher Education Act of 1965 by adding section 1213, called "Drug and Alcohol Abuse Prevention." In summary:

> [Institutions of higher education] receiving federal funds or financial assistance must develop and implement a program to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees. The program must include annual notification of the following: standards of conduct; a description of sanctions for violating federal, state, and local law and campus policy; a description of health risks associated with [alcohol and other drug] use; a description of treatment options; and a biennial review of the program's effectiveness and the consistency of the enforcement of sanctions.[15]

The amended DFSCA requires institutions of higher education (IHEs) to certify their compliance[16] and to take a proactive approach to drug and alcohol education and enforcement, thereby formalizing the responsibility of IHEs to foster the health and safety of college students and employees. Complying with the law ensures that IHEs are controlling illegal alcohol and drug crimes, distributing policies ("annual notification"), providing drug and alcohol abuse prevention programs, and evaluating their programs ("biennial review"). In their handbook on the DFSCA, Carolyn Palmer and Donald Gehring argued IHEs "have an *ethical*

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12 U.S. Office of National Drug Control Policy, Executive Office of the President, Pub. No. 040-000-00542-1, National Drug Control Strategy (1989), *available at* http://files.eric.ed.gov/fulltext/ED313602.pdf.

13 Drug-Free Schools and Communities Act of 1989, H.R. 3614, 101st Cong. (1989).

14 *Id.* at § 22.

15 Higher Education Center for Alcohol and Other Drug Abuse and Violation Prevention, Office of Safe and Drug-Free Schools, U.S. Dep't of Educ., Pub. No. ED-04-CO-0137, Complying with the Drug-Free Schools and Campuses Regulations [EDGAR part 86]: A Guide for University and College Administrators at 3 (2006).

16 Presently, certification of compliance with DFSCA and many other federal regulations is achieved through the Program Participation Agreement, which college presidents sign to receive federal student financial aid. See 20 U.S.C. § 1094 (2017).

and legal obligation to develop and disseminate policies prohibiting the unlawful use, possession and distribution of drugs and alcohol" and to provide treatment and intervention programs to protect the healthy development of college students.[17] Enforced by the U.S. Department of Education (the Department), IHEs face penalties for noncompliance, the most extreme being the forfeiture of federal funding. Although Congress did not specify fines in its list of penalties for noncompliance with the Higher Education Act, the Department has the authority to issue civil monetary penalties to any institution that "has engaged in substantial misrepresentation of the nature of its educational program"[18] In 2018, the Department increased the maximum possible penalty to $55,907, adjusting for inflation.[19]

III. Compliance & Enforcement

Recognizing that IHE federal funding, including student financial aid, is contingent on DFSCA compliance, one might expect a high rate of compliance. However, we next review reports suggesting many IHEs have not complied with the DFSCA over the past nearly 30 years. Then, we examine the evidence that points to an abrupt shift in the enforcement practices of the Department of Education.

A. Compliance

The first evidence of DFSCA non-compliance was documented in news reports in October 1990, which was the original deadline to certify compliance. It was reported that 700 colleges had missed the deadline to send in forms signed by presidents acknowledging the regulations, and some had erroneously sent in forms related to the Drug-Free Workplace Act of 1988.[20]

Several reports and studies in the past two decades have cast doubt on whether most higher education institutions comply with the DFSCA. In the first DFSCA handbook written for administrators, the results of a survey of 75 campus administrators found only 46% reported full compliance.[21] Another series of surveys of college administrators at 4-year universities found low rates of alcohol and drug program evaluation.[22] In 1994, only 36% of responding institutions (n=211) reported conducting a formal assessment of the effectiveness

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17 Carolyn J. Palmer & Donald D. Gehring, A Handbook for Complying with the Program and Review Requirements of the 1989 Amendments to the Drug-Free Schools and Communities Act 3 (Carolyn J. Palmer & Donald D. Gehring ed. 1992) (emphasis added).

18 Program Participation Agreements, 20 U.S.C. § 1094(c)(3)(B) (2017).

19 Adjustment of Civil Monetary Penalties for Inflation, 83 Fed. Reg. 2062 (Jan. 16, 2018) (to be codified at 34 C.F.R. pt. 36).

20 Christopher Meyers, *Ed. Dept. Deluged with Forms on Drug-Abuse Strategies,* Chron. Higher Educ., (Oct. 11, 1990), http://www.chronicle.com/article/Ed-Dept-Deluged-With-Forms/86509.

21 Victoria L. Guthrie, *Research Implications for Complying with the Drug-Free Amendments*, Handbook for Complying with the Program and Review Requirements of the 1989 Amendments to the Drug-Free Schools and Communities Act 19-32 (Carolyn. J. Palmer & Donald D. Gehring eds., 1992).

22 David S. Anderson & Glenn-Milo S. Santos, *Results of the 2015 College Alcohol Survey* (2015), https://caph.gmu.edu/assets/caph/CollegeAlcoholSurvey2015FinalResults.pdf.

of its drug and alcohol prevention program.[23] By 2012, that percentage among the same sample of institutions (n=176) rose to 53%, and by 2015, the rate of program evaluation stood at just 54% (n=178).[24] While this survey item did not explicitly address DFSCA compliance, evaluating program effectiveness is one of the two required activities of the biennial review. Assuming this sample is representative of U.S. 4-year institutions, as many as half may be noncompliant with DFSCA.

A recent study of DFSCA compliance at Michigan's 28 community colleges found only two colleges satisfied the minimum requirements for the biennial review, annual notification, and alcohol and drug prevention program.[25] Twenty-one colleges were partially compliant, and five were found to be noncompliant.[26] In particular, most of the Michigan community colleges failed to conduct a substantive biennial review and offered weak prevention programs.[27] Finally, the most complete evidence of widespread noncompliance comes from a review of 263 Final Program Review Determinations; between January 2014 and September 2015, 57 institutions were found in violation of the DFSCA, but the review did not explain the reasons for the violations.[28] Together, these findings from various reports and studies spanning most of the law's history suggest that many, if not most, institutions have long failed to comply with DFSCA. Noncompliance may have gone unnoticed for the first two decades of DFSCA implementation, but as discussed next, the Department has taken a new approach to DFSCA enforcement.

B. Enforcement

According to the 1990 regulations, "The Secretary [of Education] annually reviews a representative sample of IHE drug prevention programs,"[29] but it is not clear if or how the Department has conducted these annual reviews. During the Obama Administration, the Department expressed a renewed commitment to enforcing the DFSCA. In a 2011 "Dear Colleague" letter to IHE administrators, the Department, in partnership with the Office of the National Drug Control Policy, reminded IHEs of their obligations under the DFSCA and acknowledged the Department would enhance monitoring of IHE compliance with DFSCA regulations.[30] Soon after, a 2012 Office of Inspector General report regarding the

23 *Id.*

24 *Id.*

25 Bradley D. Custer, *Drug-Free Schools and Communities Act Compliance at Michigan Community Colleges*, 42 Community Col. J. Res. & Prac. 258 (2018), http://DX.DOI.ORG/10.1080/10668926.2017.1285731.

26 *Id.* According to Custer, partially compliant meant that a college met the minimum requirements for one or two (but not all three) of the mandates (i.e., annual notification, biennial review, drug-prevention program). Non-compliant meant that a college achieved none of the three. This classifying framework (i.e., compliant, partially compliant, non-compliant) was a useful scheme for academic analysis, but it is not likely how the Department analyzes compliance. Rather, the Department simply identifies violations.

27 *Id.*

28 DeBowes, *supra* note 3.

29 Drug and Alcohol Abuse Prevention, 34 C.F.R. § 86.101 (2017).

30 Letter from Arne Duncan, Sec'y, U.S. Dept. of Ed., R. Gil Kerlikowske, Dir., Off. of Natl. Drug Control Policy, to Inst. of Higher Ed. Administrators, *2011 National Drug Control Strategy for*

Department's enforcement of the DFSCA found that the Department had not performed any oversight of IHE DFSCA compliance between 1998 and 2010 and provided ineffective oversight between 2010 and 2012.[31] In an attachment to the inspection report, the Federal Student Aid Chief Operating Officer expressed an intent to amend IHE DFSCA review procedures to provide training for DFSCA program reviewers, require complete documentation of IHE DFSCA compliance reviews, require program reviewers to document DFSCA non-compliance within program review reports, and assure that the Department monitors all IHEs covered by the DFSCA.[32]

The shift in enforcement practices appears to have directly led to an increase in findings of violations. As mentioned above, a recent report found 57 cases of DFSCA violations in letters issued by the Department to colleges under investigation, and many of the violations resulted in fines ranging from $10,000 to $35,000.[33] In 2017 alone, the Department issued nine more letters to colleges resulting in a combined $190,000 in fines for DFSCA violations, though no letters have yet been released in 2018.[34] Given this evidence of institutional non-compliance paired with enhanced federal enforcement, there is a clear need to offer campus administrators and attorneys information on how to comply with the DFSCA. We respond to that need by analyzing the DFSCA over time, which provides readers with a historical understanding of the DFSCA as well as an explanation of current compliance standards.

IV. Methods

Previous widespread noncompliance paired with sudden changes in enforcement create a pressing need to better understand the DFSCA. We analyze the DFSCA by comparing primary sources spanning nearly 30 years: the 1989 statute,[35] the 1990 entry in the Federal Register,[36] the 1990 federal regulations,[37] the 1997 administrative handbook,[38] the 2006 administrative handbook,[39] the 2016

Inst. of Higher Ed. (Sept. 23, 2011) (copy on file with Obama White House Archives).

31 Letter from Wanda A. Scott, Asst. Inspector Gen., U.S. Dept. of Ed. Office of Inspector Gen., to James W. Runcie, Chief Operating Officer, U.S. Dept. of Ed., Federal Student Aid, *Institution of Higher Education Compliance with Drug and Alcohol Abuse Prevention Program Requirements*, 3-5 (Mar. 14, 2012), *available at* https://www2.ed.gov/about/offices/list/oig/aireports/i13l0002.pdf.

32 *See id.* at attachment 2.

33 *See* DeBowes, *supra* note 3.

34 Letters published on U.S. Department of Education website: https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports.

35 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

36 Drug-Free Schools and Campuses Regulations, 55 Fed. Reg. 33581 (Aug. 1, 1990) (to be codified at 34 C.F.R. pt. 86).

37 Drug and Alcohol Abuse Prevention, 34 C.F.R. pt. 86 (2017).

38 U.S. Dep't of Educ., Pub. No. ED/OPE97-2, Complying with the Drug-Free Schools and Campuses Regulations [EDGAR part 86]: A Guide for University and College Administrators (1997).

39 U.S. Dep't of Educ., Pub. No. ED-04-CO-0137, Complying with the Drug-Free Schools and Campuses Regulations [EDGAR part 86]: A Guide for University and College Administrators (2006).

Penn State University investigation letter,[40] and the nine program review letters published in 2017.[41] These sources were selected because they were authored by federal agencies, and each provides direct insight into contemporary interpretations of the DFSCA at different times. After carefully studying each document, we analyzed their suggestions for compliance with each of the DFSCA's requirements. Some elements have held constant across these sources over time, but other elements appear to have evolved, which may lead to confusion among practitioners when implementing the regulations. We pay attention to these changes in our analysis of what the DFSCA aims to achieve and how colleges can fully comply. To begin, we provide a description of each source.

A. 1989 Statute

As described above, the text of the 1989 amendments constitute what is now known as the DFSCA.[42] In the session law, the text pertaining to higher education appears at Section 22 under the title "Drug-Free Schools and Campuses."[43]

B. 1990 Federal Register

Under the title "Drug-Free Schools and Campuses Regulations," the DFSCA regulations were first published in the *Federal Register* on August 16, 1990, after going through the rulemaking and public comment process beginning on April 24, 1990.[44] The rules and regulations define the purpose of the law, responsibilities of IHEs, procedures for sanctioning IHEs for violations, and appeals procedures.[45] The *Federal Register* entry also contains responses to public comments, including a useful explanation of the differences between the DFSCA and the Drug-Free Workplace Act of 1988 and why the certifications for the two laws could not be conveniently consolidated.[46]

C. 1990 Federal Regulations

The finalized regulations are codified in the Education Department General Administrative Guidelines ("EDGAR") and took effect on October 1, 1990.[47] Since implementation, the regulations have only been amended once. The Improving America's Schools Act of 1994 removed language from the DFSCA regulations that

40 Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Team, to Eric J. Barron, Pres., Pa. St. U. (Nov. 3, 2016), (OPE-ID 00332900), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCFPRD10327991.pdf.

41 We thank a reviewer for alerting us to these newly published letters, and we encourage readers to monitor the Department's website as they continue to publish new ones, *see supra* note 34.

42 Drug-Free Schools and Communities Act of 1989, 20 U.S.C. § 1011i (2017).

43 Drug-Free Schools and Communities Act of 1989, Pub. L. No. 101-226, 103 Stat. 1938.

44 Drug-Free Schools and Campuses Regulations, 55 Fed. Reg. 33581 (Aug. 1, 1990) (to be codified at 34 C.F.R. pt. 86).

45 *Id.* at § 86.1 *et seq.*

46 *See* supra note 44 at 33592-33593 ("Relationship to Drug-Free Workplace and Other Certifications").

47 *See* supra note 37.

applied to "state educational agencies" and "local education agencies," leaving the DFSCA to apply only to higher education institutions.[48]

D. 1997 Handbook

Noting that some time had passed for colleges to get experience with DFSCA compliance, the staff of the Department's Higher Education Center for Alcohol and Other Drug Prevention–established in 1993 and defunded in 2012–produced a nearly 40-page handbook for administrators.[49] The front half contained information on the DFSCA and recommendations for complying with the certification, annual notification, and biennial review requirements. The back half contained an appendix with compliance checklists and sample text for the annual notification.

E. 2006 Handbook

Nine years later, the handbook was revised and expanded by 20 pages.[50] The 2006 handbook includes much of the same content with updated recommendations based on new technological methods for distributing the annual notification and new resources for conducting the biennial review. The appendix is expanded with the inclusion of the full text of the federal regulations, a model policy, and additional compliance checklists. There are also notable changes from the 1997 handbook that have important practical significance, described below, which handbook author Dr. Beth DeRicco attributed to evolving interpretations of the law.[51] This handbook remains the primary source of guidance for administrators today.

F. 2016 Penn State Letters

In early November 2011, just days after Pennsylvania State University (PSU) assistant football coach Jerry Sandusky, athletic director Timothy Curley, and vice president Gary Schultz were served with felony charges related to Sandusky's sex crimes, the Clery Act Compliance Team initiated an investigation into PSU's compliance with the Clery Act[52] and DFSCA.[53] After a nearly two-year investigation of PSU's policies, programs, and campus environment from 1998-2011, the Department uncovered eleven "serious findings of noncompliance,"[54] resulting in

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48 Drug and Alcohol Abuse Prevention, 61 Fed. Reg. 66225 (Dec. 17, 1996) (to be codified at 34 C.F.R. pt. 86).

49 *See* supra note 38.

50 *See* supra note 39.

51 Personal Communication, Mar. 22, 2017 (interview notes on file with first author).

52 The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, passed in 1990, 20 USC § 1092(f), requires IHEs to collect information on campus crime activity, describe campus crime prevention mechanisms, and publish an annual report describing the same. Known as the Clery Act, it has become a staple of IHE regulatory compliance.

53 *See* supra note 40.

54 *Id.* at 16.

a historic fine of $2,397,500.[55] Of the eleven findings, one addressed violations of DFSCA, which carried a fine of $27,500.[56]

The results of the investigation are documented in two letters: the Final Program Review Determination (FPRD) letter to PSU President Eric Barron dated November 3, 2016 authored by James L. Moore, III of the Clery Compliance Team[57] and the accompanying fine letter authored by Susan D. Crim of the Federal Student Aid Enforcement Unit.[58] The FRPD letter opens with a review of the Clery Act and DFSCA, followed by a brief description of institutional characteristics. Next comes a summary of the events related to the Sandusky case and a detailed accounting of the football program's influence on institutional policy and politics, especially asseen in the cases of student-athletes being shielded from the university's disciplinary process. The subsequent 145 pages address ten major violations of the Clery Act, and the eleventh finding, DFSCA violations, begins on page 164.[59] The 13 pages covering DFSCA provide important insight into contemporary interpretations of the DFSCA. No other investigative report has provided such rich guidance about how the Department enforces the DFSCA. Thus, we examine this report closely and draw from it practical recommendations on improving compliance with the DFSCA.

G. 2017 Letters

In the wake of the PSU investigation, the Department issued Final Program Review Determination letters to at least nine other higher education institutions.[60] Though we draw most of our insights from the PSU case, there are several important points that we highlight from these newest letters, including the letters for University of Jamestown,[61] Occidental College,[62] and Cottey College.[63]

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55 Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U. (Nov. 3, 2016), (OPE-ID 00332900), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf.

56 *Id.* at 34.

57 *See* supra note 40.

58 *See* supra note 55.

59 *See* supra note 40 at 164.

60 None have yet been issued in 2018. *See supra* note 34.

61 Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Division, to Robert S. Badal, Pres., Univ. Jamestown (Dec. 20, 2016), (OPE-ID 00299000), https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports#uofj.

62 Letter from Candace R. McLaren, Dir., Clery Act Compliance Division, to Jonathan Veitch, Pres., Occidental Col. (Aug. 11, 2017), (OPE-ID 00124900), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/Occidental_College_8_11_17_FPRD_Redacted.pdf.

63 Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Jann Weitzel, Pres., Cottey Col. (June 13, 2017), (OPE-ID 00245800), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/0261_001.pdf.

V. Tracing Changes in the DFSCA

In this section, we examine how the critical elements of the DFSCA are described across the sources, making special note of instances when rules (or interpretations of the rules) were changed, expanded, deleted, or when they were in conflict. For each subject, we move chronologically through the source materials, starting with the statute and ending with the recent program review letters.

A. Annual Notification

The annual notification of policies is a familiar feature of federal statutes in higher education,[64] but each has different requirements. Under DFSCA, institutions must deliver written information about their alcohol and drug policies and programs to each employee and student. While the content requirements of the DFSCA annual notification have remained stable over time, it appears there are differing interpretations regarding to whom, how, and how often the materials should be distributed.

1. Content

Arguably, the most prescriptive component of the 1989 statute is the content requirements of the annual notification, including:

> (A) standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities; (B) a description of the applicable legal sanctions under local, State, or Federal [sic] law for the unlawful possession or distribution of illicit drugs and alcohol; (C) a description of the health risks associated with the use of illicit drugs and the abuse of alcohol; (D) a description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and (E) a clear statement that the institution will impose sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph [(A) of this section].[65]

In the *Federal Register* entry and in both the 1997 and 2006 handbooks, descriptions of the five required components are provided as well as sample policy language. Despite there being no observed changes across the sources, PSU reportedly omitted two of these required elements from its annual notification.[66] PSU did not provide a description of legal sanctions between 1998 and 2010 and did not provide a description of the health risks of alcohol abuse in 2010.[67] Other

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64 *See* Family Educational Rights of Privacy Act of 1974, 20 U.S.C. § 1232g (2017); Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f) (2017).

65 20 U.S.C. § 1011i(a)(1) (2017).

66 *See* supra note 40.

67 *Id.*

institutions have also been found in violation for omitting required statements.[68] IHEs must be careful to provide complete information on each of the required points. In addition, all the required elements must be published in "a single, fully-compliant document,"[69] indicating that institutions cannot satisfy the notification requirements through piecemeal policy distributions.

2. Recipients

Interpretations of who must receive the notification have differed across sources. First, the 1990 regulations state that the written annual notification must be delivered: "to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study."[70] This definition is particularly important for community colleges and other institutions that offer a wide array of courses. Further, public comment led the Department to clarify in the *Federal Register* that:

> An IHE must distribute the materials each year to each student and employee, not just to new students and employees. If new students enroll or new employees are hired after the initial distribution in the academic year, these students and employees must also receive the materials.[71]

The 1997 handbook reiterated this point.[72] Importantly, this means that IHEs are responsible for not only an annual notification but also for notifying each new employee and student, which is not an explicit requirement in the law or the regulations. Curiously, this statement was removed from the 2006 handbook, and there is no other reference to notifying new students and employees in it. It is not clear why this change occurred, but findings from the PSU case indicate that the Department followed the 1997 handbook's guidance on this point.

In addition to the errors in content, PSU was found to have inadequately distributed the annual notification. Specifically, it did not ensure that all students and employees received the materials. PSU erroneously merged its DFSCA annual notification into its Annual Security Report (ASR) under the Clery Act, which follows a different distribution schedule. As such, the notification was only sent once per calendar year. The Department found this to be inadequate because any new student or employee who arrived at PSU after the annual distribution of the ASR in October did not receive the DFSCA notification. Further, the Department described hypothetical scenarios in which new students, adjunct instructors, or visiting professors came to campus in the summer term. These individuals, who may not have returned to PSU after summer term, would have never received the DFSCA notification, which constitutes the violation. The Department argued that

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68 For example, the University of Jamestown excluded descriptions of legal sanctions, health risks, and counseling programs from its notification materials. *See supra* note 61.

69 *Id.* at 39.

70 34 C.F.R. § 86.100.

71 *See* supra note 44 at 33595.

72 *See* supra note 38 at 11.

by not delivering the required information to them, PSU left these individuals vulnerable to drug policy violations because they were not yet familiar with PSU's policies. As a result, PSU was required to:

> Develop and implement procedures for ensuring that the required DFSCA materials are distributed to every current student who is enrolled for academic credit as well as every employee of Penn State. Penn State must make provisions for providing a copy of the drug and alcohol prevention program to students who enroll after the initial distribution and for employees who are hired at different times throughout the year.[73]

Though PSU claimed only a small number of new students enrolled in the summer, the reality is that most institutions of all types now accept new and transfer students throughout the year, not to mention the continuous hiring of employees. IHEs must develop strategies for distributing the notification to all new students and employees–at any point in the year–in addition to the distribution of the notification once per year thereafter.

3. Methods for Distribution

Distribution of the notification has been one of the most debated issues of DFSCA compliance. First, the statute only states that the required materials must be distributed to students and employees.[74] In the regulations, the Department added the words *in writing*, to which "numerous IHEs protested" pointing out "the phrase 'in writing' does not appear in the Act."[75] In response, it was explained: "the Secretary believes that in order to ensure that each student has access to and can refer to the required materials, they must be in writing."[76] Thus, the issue of the medium for distribution–via written materials–was settled early on. This means, for example, that information about alcohol and drugs presented orally at new student orientation cannot suffice as the DFSCA annual notification.

The method for distributing the notifications has evolved with technological advances. Sending the materials in the mail or including them with other required handouts in new student or employee orientations were commonly employed early methods, but even in the 1997 handbook, email was acknowledged as a feasible option.[77] The 2006 handbook, however, took a more cautious approach to email:

> The Department of Education has not developed official policy on allowing electronic dissemination in fulfillment of the requirement that IHEs must distribute their [alcohol and other drug] annual notification in writing. That is not to say that colleges and universities cannot use electronic dissemination, however; if they choose to do so, they must ensure they can provide reasonable assurance to the Department (if audited) that

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73 *See* supra note 40 at 169.

74 20 U.S.C. § 1011i(a) (2017).

75 *See* supra note 44 at 33595.

76 *Id.*

77 *See* supra note 38 at 11.

this method of dissemination ensures distribution to all students and employees.[78]

Though the PSU letter did not address the email issue, a letter to Occidental College in 2017 did:[79]

> An institution may distribute the annual disclosure by electronic mail if it wishes to do so. The method for such a distribution would require the institution to post program materials on its website and then send an e-mail message to each mandatory recipient that includes a direct link to the document.[80]

This statement by the Department may be the first to provide clear instructions on how to use email to deliver the annual notification.

A related subject of confusion is what it means to "ensure" distribution to students and employees– "ensure" being a term used repeatedly in both handbooks.[81] It was acknowledged that while IHEs must ensure that students and employees *receive* the notification, IHEs do not have to ensure that recipients *read* the materials. Instead, both handbooks offer advice on how to encourage students and employees to read the policy notice. Nowhere in the PSU letters did the Department require that PSU ensure that recipients read the notification. What is clear, however, is that IHEs must actively distribute the notification in some form such that each person receives the policies. Institutions cannot use a passive approach in assuming that all students or employees will seek to find the information of their own volition. As the 1997 handbook states: "The Department of Education has stated that merely making the materials available to those who wish to take them does not satisfy the requirements of the Regulations."[82] Therefore, IHEs cannot satisfy the distribution requirements by putting the notification on websites,[83] bulletin boards, or in handbooks, [84] alone.

B. Biennial Review

The biennial review constitutes the largest administrative task for IHEs. Generally, it entails a review of policies and programs every two years, and as shown next, the Department has expressed increasingly high expectations for the quality of biennial review reports.

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78 *See* supra note 39 at 10.

79 See supra note 62.

80 *Id* at 52.

81 *See* supra notes 38 & 39.

82 *See* supra note 38 at 11.

83 "Cottey College posted the DAAPP on its website, but did not ensure that it was actively provided to all of its students and employees..." *See* supra note 63, at 3.

84 "While Jamestown chose to embed portions indicative of DAAPP disclosures in student and staff handbooks, this decision failed to meet the Federal requirement…" *See* supra note 61 at 39.

1. Content

The biennial review is a mandated evaluation process that requires IHEs to track the drug-related violations that occur on campus and to study the effectiveness of its programs. The DFSCA statute requires that each IHE conduct a biennial review to:

> (A) determine the program's effectiveness and implement changes to the program if the changes are needed;
>
> (B) determine the number of drug and alcohol-related violations and fatalities that—
>
> (i) occur on the institution's campus … or as part of any of the institution's activities; and (ii) are reported to campus officials;
>
> (C) determine the number and type of sanctions … that are imposed by the institution as a result of drug and alcohol-related violations and fatalities on the institution's campus or as part of any of the institution's activities; and
>
> (D) ensure that the sanctions … are consistently enforced.[85]

Paragraphs (A) and (D) are original to the 1989 statute, but (B) and (C) were added by the 2008 Higher Education Opportunity Act,[86] which was after the 2006 handbook was published. The federal regulations were never updated with this amendment,[87]so no guidance has been promulgated for (B) and (C).

Concerning paragraph (A), on the definition of effectiveness, the Federal Register entry states: "the Secretary does not specify particular criteria or measures to gauge program effectiveness beyond requiring that evaluations of program effectiveness do not rely solely on anecdotal observations."[88] While the 1997 handbook reiterates this point and encourages IHEs to determine their own measures for evaluating program effectiveness,[89] the 2006 handbook offers specific standards. The handbook outlines "principles of effectiveness" established in 1998 by the Department's Office of Safe and Drug-Free Schools.[90] These principles are considerably more specific and increase the level of sophistication required of an IHE's program:

- Design programs based on a thorough needs assessment of objective data.
- Establish a set of measurable goals and objectives linked to identified needs.
- Implement prevention activities that research or evaluation have shown to be effective in preventing high-risk drinking or violent behavior.

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85 20 U.S.C. § 1011i(a)(2) (2017).

86 Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, 122 Stat. 3093.

87 34 C.F.R. § 86.100 (b) (2017).

88 *See* supra note 44 at 33597 ("Meaning of 'Effectiveness'").

89 *See* supra note 38 at 15.

90 *See* supra note 39 at 19.

- Use evaluation results to refine, improve, and strengthen the program and refine goals and objectives as appropriate.[91]

The Department seemed to follow these more stringent guidelines in its review of PSU. Though PSU submitted some documentation of its programs, including compliance checklists, the Department concluded the university "did not conduct a single biennial review that meets the requirements of the regulations."[92] The required action statement for PSU reflects the need for rigorous evaluation and data collection methods:

> Conduct a biennial review to measure the effectiveness of its drug and alcohol prevention programs. Penn State must describe the research methods and data analysis tools that will be used to determine the effectiveness of the program as well as the responsible official or office that will conduct the review. The biennial report must address how Penn State University will ensure consistency of its enforcement of its disciplinary sanctions.[93]

Paragraph (A) also requires institutions to implement changes based on the results of the program evaluation. Thus, the evaluation is not a passive task that can be completed, documented, and shelved. Rather, the strengths, weaknesses, and recommendations for changes should be described in the biennial report.[94] Over the following two years, administrators should then implement the program and policy recommendations and highlight improvements in the next biennial report.

The newer requirements of paragraphs (B) and (C) require the collection of statistics. IHEs must track the number of alcohol or drug related fatalities and document it in the biennial report. In addition, IHEs must track all employee and student disciplinary incidents related to alcohol or drug policy violations, such that the number and type of sanctions administered in response to those violations or fatalities can be documented in the biennial report.

Finally, regarding paragraph (D), ensuring that sanctions against policy violators are consistently enforced is arguably the clearest signature of the policy's original intent. In the spirit of cracking down on drug crimes, IHEs must "treat similarly situated offenders in a similar manner,"[95] suggesting that two employees, or two students, of similar status at a university should receive similar sanctions for similar policy violations. It is, therefore, the task of the program evaluators to collect the necessary data that would reveal any disparities in the consistency of sanctions enforcement. Post-enactment guidance is short on details regarding how IHEs can measure enforcement consistency. The 1997 and 2006 handbooks designate less than one half page on the subject, giving divergent examples that range from a detailed case-by-case analysis to a broad report documenting

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91 *Id*.

92 *See* supra note 40 at 168.

93 *Id.* at 169.

94 *See* supra note 39 at 16.

95 *See* supra note 44 at 33597.

departmental IHE efforts, staff levels of expertise, and an accounting of percentages of time and budget the IHE spent on enforcement.[96]

In addition to the four objectives of the biennial review stated in the regulations, the handbooks suggest that a "thorough" report should also contain several other elements, [97] which are reflected in the Department's instructions for PSU:

> [T]he University must ensure that its next biennial review is a comprehensive and substantive assessment of the [Drug and Alcohol Abuse Prevention Program's][98] effectiveness. The review must include an evaluation of the *goals and objectives* of Penn State's substance abuse programs. University officials must also carefully consider the *strengths and weaknesses* of the program as well as the efficacy of the policies and procedures that underlie it. Care must be taken to ensure that the review process does not become a conclusory ratification of existing policy. The content of Penn State's reports must be *sufficiently detailed* and all findings and recommendations must be supported by *valid evidence*.[99]

In summary, the biennial review is a complex program evaluation process requiring considerable data collection efforts and careful evaluation of outcomes. Over time, the sources seem to show growing expectations for the quality of biennial reviews.

2. Records

After an IHE conducts its biennial review, it must produce a record of its findings. There has been debate over whether this record must be in the form of a report. Though neither the statute nor the regulations contain the word "report," the term "biennial report" was introduced and used throughout both handbooks. Furthermore, the Department declared in the PSU letter: "The IHE must prepare a report of findings and maintain its biennial review report and supporting materials and make them available to the Department upon request."[100] It seems, therefore, that IHEs must create a written report of the biennial review findings.

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96 *See* supra note 39 at 19.

97 *See* supra note 38 at 14.

98 "DAAPP" (Drug and Alcohol Abuse Prevention Program) is the Department's short-hand term for an institution's alcohol and drug policies and programs. In the Department's language, the DAAPP is what must be evaluated for effectiveness every two years, and the DAAPP must be distributed to all students and employees annually. The full term comes from the DFSCA statute, though the Department appears to have begun using the acronym in its letters to colleges around 2013. *See* Letter from Douglas Parrott, Dir., School Participation Div., Fed. Stud. Aid., to Sylvia Jenkins, Pres., Moraine Valley Com. Col. (Dec. 6, 2013), (OPE-ID 00769200), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/MorainevalleyCC_IL_007692_12_06_2013_FPRD.pdf.

99 *See* supra note 40 at 175 (emphasis added).

100 *Id.* at 164.

How long an IHE must maintain that record is the subject of some confusion. The statute makes no mention of records retention, but the regulations state that an IHE must maintain its records of the annual notification, the biennial review report, and "any other records reasonably related to the IHE's compliance with the [DFSCA]"[101] "for three years after the fiscal year in which the record was created."[102]

In its investigation of PSU, the Department requested copies of biennial reports dating back to 1998. When the Department determined that none of the documents provided by PSU were sufficient, PSU cited the three-year records retention policy and asserted "that it was only responsible for records from 2008 to 2010."[103] Calling this assertion "incorrect," the Department cited the DFSCA regulation that states:

> If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.[104]

This response, though, is somewhat puzzling. If IHEs are only required to maintain records for three years, how can the Department in 2011 have expected PSU to have kept records dating back to 1998? Apparently, PSU "informed the Department in 2011 that it possessed records from the early 1990's and provided some data back to the 1980's."[105] This admission appears to have made PSU accountable for its biennial review reports for the entire period of review, despite the records retention policy.

C. Purpose

A final subject of analysis relates less to compliance tasks and more to variation in expressions of the DFSCA's purpose. As described in the legislative history section, the DFSCA was one of many federal policies that sought to crack down on illegal drugs–in this case, on college campuses. The 1989 amendments were triggered by the Bush Administration's accusation that "most colleges pay lip service to the war on drugs,"[106] thus asserting: "The thirteen million students at our institutions of higher learning should know…that society will not tolerate the use of drugs."[107]

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101 34 C.F.R. § 86.103(b)(1)(ii) (2017).

102 34 C.F.R. § 86.103(b)(1) (2017).

103 *See* supra note 40 at 171.

104 34 C.F.R. § 86.103(b)(2) (2017).

105 *See* supra note 40 at 171.

106 *See* supra note 12 at 52.

107 *Id*.

The drug-war language all but disappeared in the handbooks, opting instead for a broader approach to the DFSCA: "Complying with the spirit, and not just the letter, of the law provides significant benefits for the school and its students."[108] The 2006 handbook conspicuously presents the DFSCA not as anti-drug crime policy but instead as substance abuse intervention policy by "recognizing the serious effects of [alcohol and other drug] abuse on the academic performance and, more generally, on the well-being of [IHE] students."[109] While both the anti-crime and pro-wellness missions of DFSCA can coexist, the difference in tone is striking.

A final expression of purpose in the PSU letter adds a contemporary flavor to the DFSCA. The concluding paragraph on the section about noncompliance contains a poignant assertion about the relevance of DFSCA in today's higher education environment:

> Failure to comply with the DFSCA's [drug and alcohol abuse prevention program] requirements deprives students and employees of important information regarding the educational, disciplinary, health, and legal consequences of illegal drug use and alcohol abuse. Failure to comply with the biennial review requirements also deprives the institution of important information about the effectiveness of its own drug and alcohol programs. Such failures may contribute to increased drug and alcohol abuse as well as an increase in drug and alcohol-related violent crime.[110]

Reading between the lines, "alcohol-related violent crime" appears to be a reference to the burgeoning sexual assault crisis in higher education. Though no supporting evidence is cited, this statement suggests that when IHEs fail to comply with the DFSCA, the unintended consequence may be an increase in sexual assaults. Compliance with the DFSCA, therefore, may no longer be just about curbing drug crimes; it may be also about preventing sexual violence.

VI. Compliance

This comparative analysis of sources on the Drug-Free Schools and Communities Act between 1989 and the present revealed shifts over time in the interpretation of the law's requirements for higher education institutions. These shifts have immediate practical implications for the campus administrators responsible for implementing the DFSCA, especially given the most substantive guidance from the case of PSU. An updated compliance manual from the Department of Education is greatly needed, which we hope is a near-future possibility. In the meantime, we offer the following recommendations on complying with the DFSCA:

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108 *See* supra note 38 at 1.

109 *See* supra note 39 at 1.

110 *See* supra note 40 at 169. This statement has become a boilerplate that the Department commonly inserts in its program review letters, including those of Occidental College, South Carolina State University, University of Jamestown, and University of St. Thomas, all published in 2017, available at https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports

1. Writing a complete notification that contains descriptions of the required components is the first step in improving compliance. This information, as suggested in the handbooks, should be easy to read, informative, and engaging to encourage readership. To avoid conflating the Clery Act's Annual Security Report with the DFSCA's annual notification, institutions should create separate, complete notifications.[111] The annual notification content should be included in the biennial review, either as part of the text of the report or as an appendix.[112]

2. Once the content is written, a plan is needed for distributing the notification. This plan must ensure that all new employees and students receive the notification at the point they join a campus, followed by annual distribution thereafter. Following the PSU case, the annual notification should be distributed separately from and on a different schedule than the Clery Act Annual Security Report. The problem of annual notification delivery is a technical one, and campuses are encouraged to consult with information technology professionals for electronic messaging solutions. For example, an institution might deliver the initial notification to all new employees automatically via email upon the creation of their institutional email account, at any time during the year. Then, another email might be sent to all employees on a selected date once per year to serve as the subsequent annual notification. For students, a new student might receive the initial notification email automatically after enrolling in courses for the first time in a given academic year. This ensures that students who enroll throughout the year get the notification. At the beginning of the next academic year, the process begins again, and any student, new or returning, would receive the notification upon enrolling. The simpler option may be to send the notice to all students at the beginning of every semester, though this is not required and risks deluging students with emails. Whatever the method, a detailed description of distribution methods should be included in the biennial review.[113]

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111 The Clery Act (*see* supra note 52) also requires that a description of alcohol or drug abuse education programs be provided in the Annual Security Report. The Clery Act handbook states that institutions can cross-reference their DFSCA materials for this section of the Annual Security Report. In practical terms, this likely means that institutions may copy the description of programs from the DFSCA annual notification into the Annual Security Report, assuming the description meets the standards of both laws. It does *not* mean that a description of alcohol and drug programs in the Annual Security Report will satisfy the DFSCA's notification requirements for that element. *See* U.S. Dep't of Educ., The Handbook for Campus Safety and Security Reporting, 2016 Edition at 7-8 (2016), http://www2.ed.gov/admins/lead/safety/handbook.pdf.

112 *See* supra note 39 at 16.

113 *Id.* In addition, a reviewer wondered about whether institutions should keep track of the lists of individuals to whom the annual notification emails were sent. This point has not been addressed in previous guidance materials or program review letters. Perhaps saving the email lists and comparing them to lists of registered students and employees is an efficient and precise way for the biennial reviewers to determine whether everyone received the annual notification. After all, as the reviewer pointed out, an all-college listserv likely changes daily as employees and students come and go. This is an issue that deserves some thought, and to reiterate, whatever methods are chosen should be documented in the biennial report.

3. The biennial review is a complex research task that requires considerable planning. As recommended in the handbooks, assembling a committee of qualified campus professionals may be the best way to accomplish the task. An interdisciplinary committee ensures a mixture of expertise in handling complex compliance tasks, including writing policies, distributing policies, implementing effective alcohol and drug programs, conducting evaluations, and ensuring legal compliance. Campus administrators would likely benefit from enlisting the support of faculty from the fields of public policy, health sciences, or behavioral sciences to lead the evaluations of programs and sanctions enforcement. Improving the quality of the biennial review entails: collecting better data on sanctions administered to employee and student offenders; conducting a more thorough inventory of programs and policies; designing rigorous evaluations that yield evidence of program outcomes; thoroughly analyzing the strengths and weaknesses of programs and policies; and committing to implementing the recommended changes.

4. After conducting the biennial review, a comprehensive, written report on the findings should be prepared, dated,[114] and signed by the institution's president. It should be made readily available to auditors from the Department of Education and to any person who requests to see it.[115] The report should be kept at least three years, but it may be wise to maintain the record longer.[116] Though not required by law, posting the report on an institutional website demonstrates institutional transparency.

5. As campuses struggle to manage the increasingly complex task of Title IX compliance, an opportunity for cross-campus collaboration is presented. If improved compliance with the DFSCA is one solution to reducing campus sex crimes, the merger of Title IX and DFSCA compliance efforts could be beneficial. Title IX coordinators and DFSCA administrators should work together to find policy and program solutions that fulfil both purposes. For example, the implementation of evidence-based alcohol and drug prevention programs that reduce substance-involved perpetration and victimization is an accomplishment for both camps.

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114 *See* supra note 40 at 168.

115 34 C.F.R. § 86.103(a) (2017).

116 We hesitate to give definitive advice on whether to keep the biennial review report for longer than three years. There are many overlapping issues that should be considered. First, institutions may be subject to institutional or state records retention policies that compel the maintenance of the biennial report for longer than three years. Second, in the spirit of continuous improvement, biennial reports are historical records that can be used in future reports when considering longitudinal trends and progress. On the other hand, an institution may not want to keep the reports longer than required if they contain evidence of non-compliance for which they may be found in violation. Campus attorneys must think through these issues, and others, when deciding for how long to keep the biennial report.

VII. Limitations

This paper addresses in detail several of the major requirements for DFSCA compliance, but it did not, however, present all of them. Readers are encouraged to learn more about program certification, drug and alcohol abuse prevention program requirements, penalties for violations, and the administrative procedures for appealing penalties. The analysis presented above relies on the primary sources, other sources, and the authors' professional experience working with DFSCA compliance. The advice presented should not be construed as legal advice, and readers should consult their institution's legal counsel when making decisions about how to comply with the DFSCA. Finally, this analysis is limited by time and context. If the Department of Education continues its pace of investigating institutions for DFSCA compliance, each new decision letter could offer new guidance that affects the conclusions drawn in this paper. Readers should carefully watch how the new administration handles DFSCA enforcement.

VIII. Conclusion

The Drug-Free Schools and Communities Act of 1989 requires higher education institutions to implement and evaluate a drug and alcohol abuse prevention program. Many institutions do not comply with the federal statute, reports show, but the U.S. Department of Education has recently engaged in increased enforcement efforts. No case provides more timely insight into this topic than the investigation of Pennsylvania State University. For higher education administrators, it is time to learn more about the DFSCA and to improve compliance.

In this paper, we conducted a comparative content analysis of DFSCA sources to understand how interpretations of the original statute evolved over time. Specifically, we found conspicuous shifts in expressions of the statute's purpose – from drug war policy to substance abuse intervention policy. Regarding the annual notification, we uncovered debates about who must receive the notification, when they must receive it, and how it should be distributed. Regarding the biennial review, we found burgeoning expectations for the quality of the program evaluation and written report. Taken together, the misunderstandings resulting from these ever-changing interpretations might help to explain why so many colleges are shown to be noncompliant.

This analysis offers a then and now perspective on the Drug-Free Schools and Communities Act, which has gone largely unstudied in the legal and higher education literatures. For the campus professionals who must implement its requirements, we recommended compliance strategies based on the most defensible position of the available sources. Interpretations of the law have changed and will continue to change, and higher education practitioners must stay current on how each subsequent U.S. Department of Education chooses to enforce it.

FACILITATING UNIVERSITY COMPLIANCE USING REGULATORY POLICY INCENTIVES

JAMES T. KOEBEL[+]

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.

[+] James T. Koebel is Assistant General Counsel at the University of North Carolina at Wilmington. The views expressed herein are the author's own and do not necessarily reflect those of his employer.

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).

THE UNIVERSITY LAWYER AS COLLABORATOR AND FACILITATOR: A STUDY IN WORK-INTEGRATED LEARNING

CRAIG CAMERON*

Abstract

This article explores the roles of the university lawyer as collaborator and facilitator, based on a case study of risk management by Australian university lawyers in work-integrated learning (WIL) programs. The case study supports a redefinition of role to incorporate not only what university lawyers do (practices), but how they do it (methods) and why they do what they do (strategies). Collaboration is conceptualized as a risk management method of university lawyers, and facilitation as a risk management strategy. Collectively, the risk management practices, methods, and strategies of university lawyers represent their risk management framework. In particular, the case study findings suggest that articulating the roles of collaborator and facilitator may quash misconceptions of university lawyers, and thereby have the potential to improve stakeholder relationships and legal service delivery on the college or university campus.

I. Introduction

This article explores the roles of the university lawyer as collaborator and facilitator, based on a case study of risk management by Australian university lawyers in work-integrated learning programs. Despite the Australia-centric nature of the study, the literature reveals clear parallels between the prevalence, organizational structure, issues, and work of university lawyers in Australia and the USA.[1] As such, it is argued that the findings can be applied by university lawyers in the USA to evaluate, articulate and promote their roles as collaborators and facilitators in higher education.

The role of university lawyers[2] has been a source of academic interest since the 1970's.[3] Roderick Daane, writing in this journal in 1985, argued that "an examination

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* Craig Cameron is a Senior Lecturer in Corporations Law at Griffith University, Australia, and Corporate Counsel for the Dental Services Network. Dr Cameron received his PhD from Griffith University.

1 See Craig J. Cameron, *Work Integrated Learning: A Study of Risk Management by University Lawyers* (Dec. 2016) (unpublished Ph.D. dissertation, Griffith University) (on file with author).

2 University lawyers are also known as college counsel/attorney, university counsel/attorney, and campus attorney.

3 See, e.g., Rufus J. Bealle, *Delivery of Legal Services to Institutions of Higher Education*, 2 J.C. & U.L. 5 (1974); Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J. L. & Educ. 73 (1974); John E. Corbally, *University Counsel: Scope and Mission*, 2 J.C. & U.L. 1 (1974); Norman L. Epstein, *The Use and Misuse of College and University Counsel*, 45 J. High. Educ. 635 (1974); William F. McCarty & William N. Thompson, *The Role of Counsel in American Colleges and Universities*, 14 Ablj. 287 (1977); Herman I. Orentlicher, *The Role of College or University Legal Counsel: An Added Dimension*, 4 J. L. & Educ. 511 (1975);

of the way law is now practiced on campuses will illustrate the changed role of the campus attorney and suggest further evolution is likely,"[4] and that the effectiveness of university lawyers in executing their role "will be keyed in part to their skill in knowing how to operate on campus – an often unnoticed common denominator of a successful university practice."[5] Robert Bickel revisited the role of university lawyers in 1993, expressing concern that it may be misperceived or criticized by university stakeholders,[6] and stressing the importance of university lawyers to institutional management as experts in higher education law.[7]

The university lawyer's role in higher education activities may be undermined by negative perceptions of university lawyers. Clients, acting on behalf of the institution, may react negatively when university lawyers raise legal problems,[8] or consider the university lawyer obstructive by raising questions about processes, procedures and commitments when colleagues require more immediate action.[9] For instance, Corbally recalled an academic administrator who complained that he could not find a "can do" lawyer.[10] This criticism was unfounded given the author's experience that university lawyers share a common objective with academic administrators to "get things done" on behalf of the institution.[11] According to Bickel, such "lawyer-bashing," based on a perception that lawyers may "debilitate the decision-making process," is concerning because it devalues the role of the university lawyer as a facilitator of sound decision-making by university management.[12] Nevertheless Thomas acknowledged that these negative perceptions may be justified if the university lawyer is "unnecessarily cautious, confrontational, or domineering, or who is a mismatch with the institution's culture and needs."[13] As a consequence, clients may not access legal services in the future if they encounter university lawyers who do not collaborate with clients, or fail to appreciate the importance of facilitating activities which achieve institutional goals. Clients who do not access legal services may expose the institution to legal risks which could have been managed in collaboration with university lawyers.

A case study of Australian university lawyers reported in this article supports a redefinition of role to incorporate not only *what* university lawyers do (practices), but *how* they do it (methods) and *why* they do what they do (strategies). Collaboration is

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Richard J. Sensenbrenner, *University Counselor: Lore, Logic and Logistics*, 2 J.C. & U.L. 13 (1974).

4 Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U.L. 399, 400 (1985).

5 Id. at 409.

6 Robert D. Bickel, *A Revisitation of the Role of College and University Legal Counsel*, 85 Ed. Law Rep. 989, 989 (1993).

7 Id. at 998.

8 Nancy L. Thomas, *The Attorney's Role on Campus: Options for Colleges and Universities*, 30 Change 34, 35 (1998).

9 Corbally, supra note 3, at 4.

10 Id.

11 Id.

12 Bickel, supra note 6, at 997.

13 Thomas, supra note 8, at 35.

conceptualized as a risk management method of university lawyers, and facilitation as a risk management strategy. Collectively, the risk management practices, methods and strategies of university lawyers represent their risk management framework. In particular, the case study findings suggest that articulating the roles of collaborator and facilitator may quash misconceptions of university lawyers, and thereby have the potential to improve stakeholder relationships and legal service delivery on the college[14] or university campus.

The remainder of this article is structured as follows. Part II defines risk management and work-integrated learning, providing context to the case study and the roles of the university lawyer as collaborator and facilitator. Part III reviews the literature that describes and analyses the role of university lawyers in higher education. Two roles which emerge from the literature – the university lawyer as collaborator and facilitator – suggest that role is not confined to the practices of university lawyers, but may involve a broader framework of practices, methods and strategies. Part IV provides a brief description of the case study design employed, including scope, interview design, case selection, data collection and data analysis. Part V describes and analyses the experiences of university lawyers as collaborators with various university stakeholders, as well as facilitators in relation to WIL programs. Facilitation operates on two levels. University lawyers facilitate the delivery of WIL placements[15] for students and facilitate risk management by WIL disciplines.[16] Part VI is a discussion which situates the university lawyer as facilitator and collaborator in the literature, before concluding (Part VII). In particular, the author argues that the recognition and promotion of these roles as part of the university lawyers' risk management framework may improve client relationships and the delivery of legal services.

II. Risk Management by University Lawyers in WIL

This article examines the roles of the university as collaborator and facilitator through a lens of risk management, as it applies to one higher education activity: work-integrated learning (WIL). The meaning of the term WIL can be a source of semantic confusion. It is a term used by different disciplines, and in different countries, to describe similar processes of combining practical work and learning within a curriculum.[17] Other terms used to describe WIL include internship, cadetships, cooperative education, placement, practicum, clinical rotations / program / internship / clerkship, sandwich course / year, professional practice, service learning and experiential

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14 The author refers to university, and not college, throughout this article because the lawyers studied were selected from Australian universities. Notwithstanding this, it is important to acknowledge that the case study findings apply equally to colleges, college stakeholders and lawyers involved with colleges.

15 WIL placement is the time when students are in the workplace as part of a WIL program.

16 The WIL discipline is the academic discipline responsible for delivering the WIL program.

17 See, e.g., Phil Gardner & Kenneth R. Bartkus, *What's in a Name? A Reference Guide to Work-Education Experiences*, 15 Asia-Pac. J. Coop. Educ. 37 (2014); Janice Orrell, *Work-integrated Learning Programmes: Management and Educational Quality*, in Quality in a Time of Change: Proceedings of the Australian Universities Quality Forum 2004; Carol-joy Patrick et al., The WIL [Work Integrated Learning] Report: A National Scoping Study., www.altc.edu.au.

learning and fieldwork.[18] WIL, unlike the other terms, makes explicit the purpose of the curriculum, distinguishing WIL from other forms of work-based learning that do not entail the integration of university study and practice.[19] For the purpose of this article, WIL is a curriculum design which combines formal learning with student exposure to real professional, work or other practice settings.[20] Although the role of university lawyers is studied in the specific context of WIL, it is argued that the research findings can apply to any higher education activity which involves university lawyers.

WIL is of strategic value to the university. Employers and students demand WIL because it offers an authentic learning environment which can improve students' professional awareness and generic skills (or 'work-readiness').[21] In fact, many Australian universities have formally recognized the strategic value of WIL by incorporating the expansion of WIL opportunities to students in their strategic plans.[22] Despite its strategic value, WIL poses a variety of legal risks to the university before, during and after the student's time in the workplace.[23] For the purpose of this article, a legal risk is defined as an event or circumstance that exposes the university to the possibility of liability or non-compliance with external or internal rules and regulations. The manifestation of these risks can have significant legal, financial and reputation consequences for the university.[24] University lawyers are engaged by the university to manage legal risks as part of their delivery of legal services. Risk management by university lawyers supports university goals associated with higher education activities, which in the context of WIL is to maximize the strategic value of WIL but minimize the legal risks that WIL entails.[25]

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18 See Australian Workforce and Productivity Agency, Work Integrated Learning: AWPA scoping paper (2014); Lesley Cooper et al., Work Integrated Learning: A Guide to Effective Practice (2010).

19 Calvin Smith, *Evaluating the Quality of Work-Integrated Learning Curricula: A Comprehensive Framework*, 31 Herd. 247, 247.

20 The definition is adapted from Id. at 247 and Denise Jackson, *Employability Skill Development in Work-Integrated Learning: Barriers and Best Practice*, 40 Stud. High. Educ. 350 (2015).

21 Craig Cameron, *The Strategic and Legal Risks in Work-Integrated Learning: An Enterprise Risk Management Perspective*, 18 ASIA-PAC. J. COOP. EDUC. 243 (2017), 245, 246

22 Id. at 245.

23 For a table of legal risks in WIL programs derived from the literature, see Id. at 254-255. University lawyers have identified legal risks, also described as contract risks and program risks, in relation to WIL programs: Craig Cameron, *The Contract Risks to Universities of Work-Integrated Learning Programs*, 45 A. Bus. L. Rev. 405 (2017); Craig Cameron et al., *The Program Risks of Work-Integrated Learning: A Study of Australian University Lawyers*, 40 J. High. Educ. Pol. Manag. 67 (2018); Craig Cameron and Christopher Klopper, *University Lawyers: A Study of Legal Risk, Risk Management and Role in Work Integrated Learning Programmes,* 37 J. High. Educ. Pol. Manag. 344 (2015).

24 For example, Cameron identified 12 reported Australian cases between 1998 and 2016 involving student action against the university in relation to WIL programs. The reported decisions would only be a fraction of the complaints that are received by the university: See Id. at 246-247, 256; There are also reported cases in the USA with respect to WIL. This includes the widely reported Florida Supreme Court decision of *Nova Southeastern University v Gross* 758 So.2d 86 (Fla. 2000) which examined the university's duty of care to a student who suffered harm during a postgraduate psychology internship, as well as cases involving academic dismissals and disciplinary dismissals from WIL programs: see Pamela Bernard, *Academic dismissals of students involved in clinical, internship or externship Activities*. Paper presented at the 16th Annual Law & Higher Education Conference (1995).

25 See Part V Section B and Figure 1.

For the purpose of this article, risk management is the practices, methods and strategies used by university lawyers to address legal risk. The risk management practices of university lawyers are the services, delivered to representatives of the university, which are designed to manage legal risk, whereas risk management methods are how university lawyers approach their risk management practices. For instance, how do university lawyers go about advising and educating campus staff and drafting and reviewing instruments such as agreements, policies and other resources? The risk management strategies of university lawyers are the overall plans for risk management that are aligned to university goals, namely why university lawyers engage in risk management. It is argued that the role of the university lawyer as a collaborator is a risk management method and their role as a facilitator is a risk management strategy with respect to higher education activities.[26]

III. Roles of the University Lawyer

University lawyers have described the various roles they play which support institutional goals related to teaching, research and service, as well as the type of legal service delivered to fulfil their roles. Daane originally identified the university lawyer as an advisor-counsellor, educator-mediator, manager-administrator, draftsperson, litigator, and spokesperson.[27] Quantitative studies measuring the work of university lawyers support these traditional and visible roles of the university lawyer.[28] Bickel and Ruger then suggested the emergence of two additional roles in higher education: the university lawyer as an insulator and dispatcher.[29] The university lawyer serves as an insulator (or buffer) in legal matters between campus staff and third parties such as external counsel, government agencies and parents, so as to minimize disruption on campus, and dispatches (or handles) legal matters received from campus staff, who may not know how to respond, in a timely manner.[30] More recently, Dunham argued that university lawyers' work in drafting and reviewing programs to assure and enforce compliance with regulations has created a role which is distinct from counselling and advocacy: the university lawyer as a regulator.[31]

University lawyers fulfil their role by practicing 'treatment law' and 'preventive [or preventative] law'.[32] A university lawyer practices treatment law when resolving

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26 See Part III, Section C.

27 Daane, supra note 4.

28 Dennis E. Gregory, *The Role of College and University Legal Counsel as Defined by Operational and Policy Making Responsibilities* (Aug. 1987) (unpublished D Ed. dissertation, University of Virginia (on file at University of Virginia); Frank B Manley & Co, Provision of Legal Services: A Survey of NACUA Primary Representatives (1992).

29 Robert D. Bickel & Peter H. Ruger, *The Ubiquitous College Lawyer*, 50 Chronicle of Higher Education B1 (2004).

30 Id.

31 Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 788-789 (2010).

32 See Bickel, supra note 3; Corbally, supra note 3; Daane, supra note 4; Sensenbrenner, supra note 3; William A. Kaplin & Barbara A. Lee, The Law of Higher Education (5th ed. 2013).

an actual legal process such as litigation by or against the university, or non-compliance with internal regulations, whereas a university lawyer practicing preventive law takes action before legal problems arise.[33] Risk management, an evident component of preventive law, is made explicit in the various roles of the university lawyer. Two additional roles of the university lawyer, that appear to support risk management, also emerge from the literature – the university lawyer as collaborator and the university lawyer as facilitator.

A. Collaborator

The university lawyer may perform the role of collaborator when providing advice, educating university management, and drafting and reviewing documents. The literature emphasizes the importance of collaboration in three relationships: university lawyers and academic administrators; university lawyers and the operational division responsible for insurance and risk related matters at the university (insurance-risk); and among university lawyers. University lawyers collaborate with their colleagues from other universities. Fleming acknowledges that, in the Australian context, networks with lawyers at other universities are a valuable resource in a legal office with limited resources, and describes the nature of the collaboration:

> Apart from meeting on a quarterly basis, we often e-mail each other to "bounce" ideas, or alert each other to problems. For example, university lawyers across Australia recently co-operated to insist (successfully) on changes to some rather unacceptable terms of a contract to which all Australian universities were a party.[34]

Ruger argues that legal practice in higher education is collaborative, that the National Association of College and University Attorneys (NACUA) has contributed to fostering a sense of community among university lawyers, and that this spirit is evident in most university legal offices.[35] Glick provides some empirical evidence of collaboration between university lawyers, having interviewed 20 university lawyers about how institutions learn from each other when responding to the law, as part of a broader research project. Findings included that universities collaborated to solve legal problems, with one university lawyer acknowledging that "'there is a lot of sharing and we probably end up with a lot of policies that look very similar.'"[36]

University lawyers also collaborate with insurance-risk about insurance coverage to alleviate university staff concerns about personal liability,[37] and to ensure that the

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33 Kaplin & Lee, supra note 32, at 163.

34 Helen Fleming, *A most peculiar practice? The role of the university in-house lawyer: Challenges for the new millennium. Paper presented at the Association for Tertiary Education Management Conference* (1999).

35 Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 Stretson L. Rev. 175, 192-193 (2007).

36 David M. Glick, *Learning by Mimicking and Modifying: A Model of Policy Knowledge Diffusion with Evidence from Legal Implementation*, 30 J.L. Econ. & Org 339, 362 (2014).

37 Kaplin & Lee, supra note 32, at 165.

university receives the maximum benefit from its insurance policies.[38] Insurance personnel deal with insurance-related matters, including the adoption and variation of policies and the handling of claims made by or against the university, whereas university lawyers educate, advise and prepare and review documents designed to prevent the manifestation of legal risk. Nevertheless, university lawyers and insurance personnel have been described as "natural allies": they are both in the business of risk management and both wanting to protect the university from a litigious environment.[39] University lawyers collaborate with insurance-risk when reviewing and finalizing insurance policies, particularly coverage of risks, by combining their expertise in insurance, risks to the university, legal interpretation, and knowledge of settlements and judgements concerning the manifestation of legal risks.[40] The legal knowledge of university lawyers and knowledge of the insurance market and customs retained by insurance-risk can be complementary. A university lawyer working closely with insurance-risk can understand the fundamentals of insurance coverage and can apply their legal and insurance knowledge to improve university insurance programs.[41]

University lawyers collaborate with academic administrators to achieve university goals. Collaboration entails the merging of legal and academic expertise as part of a maturing relationship.[42] In particular, collaboration requires the university lawyer to understand the administrator's purpose of the activity within the broader context of achieving institutional objectives, to apply their legal knowledge and to work with the administrator to manage the legal risks.[43] Collaboration equips university lawyers with an intimate understanding of university operations, thereby assisting them in anticipating legal risks and identifying university areas which require greater allocation of legal resources because of their higher risk.[44] The importance of collaboration is supported by recent empirical research. A study by Hustoles included open ended questions which invited university lawyers to recommend ways in which department chairs could deal more effectively with legal risk and risk management. The prominent themes in the responses of university lawyers included the recognition by department chairs of the university lawyer as a resource, as well as greater university lawyer involvement with department chairs in terms of legal advice, education, and other relationship building activities.[45]

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38 Howard Ende, Eugene R. Anderson & Susannah Crego, *Liability Insurance: A Primer for College and University Counsel*, 23 J.C. & U.L. 609, 716-717 (1997).

39 Id. at 716.

40 See Ende, Anderson & Crego, supra note 38; John F. Adams & John W. Wall, *Legal Liabilities in Higher Education: Their Scope and Management*, 3 J.C. & U.L. 215 (1976).

41 Ende, Anderson & Crego, supra note 38, at 717.

42 See Bickel & Ruger, supra note 29.

43 Id.

44 See Bickel, supra note 3, at 76.

45 Carol L J Hustoles, *Through the Eyes of Higher Education Attorneys: How Department Chairs are Navigating the Waters of Legal Issues and Risk Management* (Jun. 2012) (unpublished Ph.D. dissertation, Western Michigan University (on file with ProQuest Dissertations & Theses Global).

B. Facilitator

The university lawyer may also execute the role of facilitator when providing advice. The primary objective of providing advice is to facilitate activities which achieve institutional objectives. Scaduto succinctly describes the facilitative approach in this way: "A counsel's role is not to tell people what they cannot do, but to help them accomplish what they want to do."[46] Corbally, drawing on his experiences with university lawyers as an academic administrator, initially alluded to the facilitative approach of university lawyers. The university lawyer tends to be a "conservative voice in the management team," raising questions of university management about processes and procedures.[47] Whilst others perceive the university lawyer to be obstructive, Corbally's experience was that university lawyers worked with management to achieve a common objective.[48] Daane refers to Corbally and expands this initial conception by analogizing the university lawyer as a facilitator:

> There will be times, for example, when the lawyer's advisory role will be to flash a red stop signal and thus to prevent a statutory violation or some other problem. Much more often, however, the lawyer's role is to facilitate the accomplishment of an institutional objective in a way consistent with the law. The red light function is important, but the green light should shine more often.[49]

More recently Ward and Tribbensee relied on the 'facilitator university' model originally devised by Bickel and Lake[50] and further developed by Lake[51] to argue that the goals and mission of the university, as well as legal issues should be considered by university lawyers when advising the client.[52] They argue that "the facilitator model is one in which the university and members of the campus community share responsibility for managing risks."[53] According to Lake, the facilitator university is a social and legal model which can strike an appropriate balance between university control and student freedom to provide a fair allocation of legal rights and responsibilities between university and student that maximizes student safety and promotes the mission of the university. Students and the university share the responsibility for student safety. The facilitator university accepts reasonable risk as part of its mission because students can learn from risky activities. Students have the freedom to participate in the activity which creates risk, but the university is responsible for ensuring the risk is reasonable through appropriate planning as well as providing guidance, warning and instruction to

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46 Sara Lipka, *The Lawyer Is In*, 51 Chronicle of Higher Education A19 (2005).

47 Corbally, supra note 3, at 4.

48 Id.

49 Daane, supra note 4, at 409.

50 Robert D. Bickel & Peter F. Lake, The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life? (1st ed. 1999).

51 Peter F. Lake, The Rights and Responsibilities of the Modern University (2nd ed. 2013).

52 Paul Ward & Nancy Tribbensee, *Preventive Law on Campus*, 35 Change 16 (2003).

53 Id. at 19.

the student so that they can make an informed decision about the activity and its attendant risks. Legal rules can formalize this shared responsibility by requiring universities to take reasonable care to prevent foreseeable risks and for students to accept the responsibility of obvious risks.[54]

Ward and Tribbensee appear to focus solely on the university mission component of the facilitator university model to make the same point as Corbally and Daane – the significance of institutional objectives when university lawyers work with university management. For instance a university lawyer taking a facilitative approach does not simply advise an academic administrator that a proposed activity is illegal or possesses obvious risk, but asks questions to understand the goal of the activity or its relationship to the mission of the university.[55] The lawyer may suggest alternatives that minimize risk or that achieve the goal, thereby giving an activity the 'green light'. A recent dissertation study of three university lawyers by Block suggests that some university lawyers perceive their role as someone who facilitates, but does not make a decision, on a course of action. As one university lawyer put it: "'you just realize that this deal's not going to get done unless … you, as the attorney, put together the building blocks to make a deal happen.'"[56]

C. Conceptualizing the Roles within a Risk Management Framework

The literature intimates that risk management by university lawyers is not confined to their practices but may involve a broader framework of practices, methods and strategies. The roles of the university lawyer as advisor, educator, drafter and reviewer of documents are examples of risk management practices: the services that are designed to manage legal risk, delivered by university lawyers to representatives of the university. However, collaboration with outside university lawyers, university management and insurance-risk, as well as the facilitation of activities that achieve university objectives, are not risk management practices of university lawyers. Collaboration may be a risk management method, that is, how university lawyers approach their risk management practices; facilitation may be characterized as a strategy, employed by university lawyers, which is aligned with the university goals associated with the higher education activity (in this case, WIL). University lawyers may not only facilitate the delivery of activities that can meet institution objectives; they may also facilitate risk management by other members of the university community who share responsibility for risk management. Collectively, the various roles of the university lawyer can be described as the risk management framework of university lawyers.

Collaboration and facilitation appear in the literature as roles which support the advice, education, drafting and review of documents by university lawyers as part of their risk management framework. However, there are no empirical studies that describe and analyze the roles of collaborator and facilitator in a systematic

54 Lake, supra note 51.

55 Ward & Tribbensee, supra note 52, at 19.

56 Jason A. Block, *The Law Comes to Campus: The Evolution and Current Role of the Office of the General Counsel on College and University Campuses* (Oct. 2014) (unpublished Ph.D. dissertation, University of Kentucky (on file with University of Kentucky).

way. The study reported in this article addresses this empirical gap, examining the roles of the university lawyer as collaborator and facilitator through a lens of risk management, as it applies to WIL. A qualitative research design was selected because of its compatibility with the research purpose. The case study provides a rich description of university lawyers' experiences as facilitators and collaborators, which can deepen understanding about the phenomenon being studied, being the role of university lawyers, and enable readers to assess the transferability of the research findings to their circumstances, and to higher education activities other than WIL.

IV. Research Design

This research is part of a multiple instrumental case study[57] of 13 Australian university lawyers. The author has previously reported on the legal risks that university lawyers manage with respect to WIL programs,[58] as well as their risk management practices.[59] The research question relevant to this study is: *how do university lawyers manage legal risk with respect to WIL programs?* Collaboration and facilitation emerged as the dominant roles of university lawyers which underpinned their risk management methods and strategies respectively. A summary description of the study scope, interview design, case selection, data collection and data analysis are provided in the sections which follow.

A. Scope

The university lawyers selected for the case study were in-house counsel only, namely a qualified lawyer, employed by the university, who delivers legal services to the university. Conversely, external counsel represents a law firm engaged by the university to deliver legal services. Compared to their external counterparts, the literature suggests that in-house counsel is more accessible to university staff;[60] specializes in higher education law; is immersed in and familiar with the cultural and strategic nuances of the institution; is focused on the one client (the university) and develops experience in addressing recurring legal problems.[61] Familiarity, accessibility, focus and expertise have the potential to promote preventive lawyering.[62] For these reasons, it was thought that in-house counsel was likely to be more involved with overall risk management in relation to WIL programs and thus could provide a richer understanding of their experiences.

Although the study was specific to university in-house counsel, it is argued that the findings can apply to external counsel practicing higher education law,

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57 Robert E. Stake, The Art of Case Study Research (1995).

58 Cameron supra note 23; Cameron et al., supra note 23.

59 Craig Cameron, *Risk Management by University Lawyers in Work Integrated Learning Programs*, 45(1) Mon. Ulr. (forthcoming).

60 See Jonathan Peri, *The Wisdom of Employed General Counsel in Higher Education*, 18 Widener. LJ. 191 (2008).

61 See Bealle, supra note 3; McCarty & Thompson, supra note 3; Sensenbrenner, supra note 3.

62 See Bealle, supra note 3.

and lawyers representing other tertiary institutions such as colleges. All lawyers involved with higher education can apply the roles of collaborator and facilitator as a means of promoting access to and improving the delivery of legal services.

B. Interview Design

The interview design, which received university ethics approval,[63] began with structured interview questions to gather demographic information about the university lawyer and their legal office. This was followed by more open-ended questions about legal risk and risk management by university lawyers. A list of template questions for each interview is outlined at Table 1. The interview also incorporated follow up questions not included in the list, as well as prompts and probes derived during the interview.

Table 1: Interview questions

Q	Interview Question
1	What is your position at the university?
2	How many university lawyers (total / full time equivalent) are employed at the university?
3	How many years have you been employed as a university lawyer (total / current university)?
4	Can you describe the organizational structure in which legal services are delivered?
5	Do you have a dedicated person in your office for handling legal work concerning WIL programs? (if yes) Is that person you?
6	Do you have a person recognized in your office who handles most of the legal work concerning WIL programs? (if yes) Is that person you?
7	How would you describe your current role in relation to WIL programs?
8	What are the legal risks that you manage in WIL programs?
9	What do you do to manage the legal risks in WIL programs?
10	Does risk management with WIL programs differ from risk management with traditional study programs? If so, how?
11	What are the challenges with managing legal risks in WIL programs?
12	What assists you to effectively manage legal risks in WIL programs?
13	What recommendations would you make to the university to improve risk management in the context of WIL programs? What would be the impact (if any) of each recommendation on your role?
14	Do you have any comments not covered by the interview questions that you feel would contribute to an understanding of your role, legal risk or risk management in the context of WIL programs?

A separate interview guide was kept for each university lawyer to ensure consistency and rigor in the interview process. The guide includes space for inserting the interview details as well as the university lawyer's unique ID for the case study, a script to introduce each interview, interview questions and a pre- and post-interview checklist. Each participant was assigned an ID number to promote anonymity and confidentiality, which has been converted to pseudonyms in this article for readability.

63 Griffith University Ethics Approval AFE/19/13/HREC.

C. Case selection

A limitation of this study is the sample size. Unlike quantitative research, the case study findings from a sample cannot be generalized to a population of university lawyers. Despite this limitation, several strategies were employed to promote the validity or 'accuracy' of the research, including rich description of university lawyers' experiences in the case study write up, and maximum variation sampling[64] to select university lawyers for the case study. These strategies were designed to garner and present multiple perspectives on risk management, so that a greater range of readers may identify with the university lawyers' experiences and apply the findings described in the research.

Maximal variation sampling was employed to gain diversity of universities, legal offices and university lawyers. 13 university lawyers were selected from 12 university sites and stratified according to the following demographic characteristics: university lawyer length of experience and position; State and Territory of primary university site in Australia; university type; and size of legal office (total number). A case typology was maintained during case selection, with other demographic information collected during the interviews (university lawyer background, recognized WIL lawyer, and office structure) added to the case typology. A finalized case typology is at Table 2.

Table 2: Case typology of university lawyers

State or Territory of main campus	*N*	**University type**	**N**	**Legal office size (Number)**	*N*	**University lawyer experience**	*N*
New South Wales	3	GO8	5	2 to 5	6	2 to 4 years	4
Victoria	3	Technical	2	6 to 9	6	5 to 9 years	5
Australian Capital Territory or South Australia	3	New Generation	2	Greater than 9	1	Greater than 9 years	4
Western Australia	2	Regional	2				
Queensland	2	Gumtree	2				
Position	*N*	Recognized WIL lawyer	*N*	Office structure	*N*	University lawyer background	*N*
University lawyer	9	No	10	Flat	8	Mix	8
Manager	4	Yes	3	Hierarchical	5	Private sector	3
						Public sector	2

The two general categories of demographic information (as represented in the case typology) are university sites and university lawyers. There are 41 Australian universities, which are generally classified into five types based on age, origin and /

64 Maximal variation sampling is a qualitative sampling technique in which the researcher selects cases that have different demographic characteristics: John Creswell, Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research (3rd ed) (2008), 214.

or location: Technical;[65] Group of Eight (GO8);[66] Gumtree;[67] New Generation;[68] and Regional.[69] The five types, including the relevant universities that apply to each type, are adapted from a classification conducted by Moodie.[70] A recognized WIL lawyer is a dedicated person in the legal office for handling legal work concerning WIL programs or recognized in the legal office as handling most of the legal work concerning WIL programs. The legal office for each case was categorized as flat or hierarchical. A flat structure involves a maximum two lines of authority—university lawyers are supervised by and report to a General Counsel or Director. A hierarchical structure involves a General Counsel or Director of the legal office or multiple operating divisions (which includes the legal office), and a second-in-command (2IC) such as a deputy counsel, associate director or senior lawyer who has the formal responsibility for supervising university lawyers and reporting to the manager.

University lawyers had to possess experience in delivering legal services to WIL programs; and a minimum two years' experience as a university lawyer. It was assumed that university lawyers with lengthier periods of service would have more experience with WIL programs and hence provide richer descriptions of their experiences.[71] A mix of university lawyers who were General Counsel or Directors of the legal office was also sought. General Counsel and Directors have substantial experience with WIL as a university lawyer, but also may bring a different perspective on risk management, given that they have supervisory and reporting responsibilities. General Counsel and Directors are labelled 'Manager' in the case typology.

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65 Technical universities: Australian universities established as technical institutes in a capital city and formally designated a university after 1987: Curtin University, Queensland University of Technology, RMIT University, Swinburne University of Technology, University of South Australia, and University of Technology Sydney.

66 Group of Eight universities: The oldest Australian universities in their mainland capital cities: Australian National University, Monash University, University of Adelaide, University of Melbourne, University of New South Wales, University of Queensland, University of Sydney and University of Western Australia.

67 Gumtree universities: Australian universities, established from the mid-1960s to the mid-1970s, that were distinctively different from the older capital city universities: Deakin University, Flinders University, Griffith University, La Trobe University, Macquarie University, Murdoch University, University of Newcastle and University of Wollongong.

68 New generation universities: Australian universities based on former colleges of advanced education, designated as universities around 1987 or as private universities, with most of their student load in cities of more than 250,000 people: Australian Catholic University, Bond University, Edith Cowan University, Torrens University, University of Canberra, University of Notre Dame, Victoria University and Western Sydney University.

69 Regional universities: Australian universities with most of their student load in centers with a population of fewer than 250,000 people: Central Queensland University, Charles Darwin University, Charles Sturt University, Federation University Australia, James Cook University, Southern Cross University, University of New England, University of Southern Queensland, University of the Sunshine Coast and University of Tasmania.

70 Gavin Moodie, *Types of Australian Universities*, ACADEMIA (Aug. 10, 2018), https://www.academia.edu/310547/Types_of_Australian_universities.

71 See Table 2. G08 universities are over-represented in the case study due to the experience of university lawyers. G08 university lawyers tended to have more experience than their colleagues at other universities, providing a better opportunity to learn about risk management.

D. Data collection and Analysis

The data collected for the case study is based on 13 face-to-face interviews with university lawyers, e-mail communications with university lawyers, and documents referred to by participants during the interview. The data were analyzed in four stages: initial reflexivity; eclectic coding;[72] pattern coding;[73] and data representation. *Initial reflexivity* involved the author reflecting on each case and maintaining analytic memos about: the interview itself; potential codes, categories and themes; and the coding process adopted by the author, including decisions made about modifying codes. *Eclectic coding* techniques were then employed to create an initial code map for risk management by university lawyers. The initial codes relevant to the present study included: 'asking staff questions'; 'formal collaboration with WIL staff'; 'external validation of risk'; 'collaboration with insurance-risk'; 'outside university lawyers'; and 'facilitation'.

Pattern coding was then used to develop sub-categories and categories from the codes. The data from each university lawyer (or case) was categorized into 'risk management practices', 'risk management methods' and 'risk management strategies'. The risk management practices of university lawyers are discussed in a separate article,[74] and include advice, communicating directly with representatives of the host organization,[75] referring legal matters to a higher level of university management, drafting and reviewing WIL agreements,[76] educating WIL staff,[77] consulting during the development of WIL policies, reviewing WIL program documents[78] and preparing WIL resources.[79] The sub-categories attached to risk management methods were: 'asking staff questions', 'participation in formal WIL groups', 'external support for risk management practices', 'collaboration with insurance and risk personnel', 'communication with lawyers at other universities', 'accessibility in legal service delivery', and 'pragmatism in legal service delivery'.

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72 Eclectic coding is a mix of various coding strategies. The coding strategies applied in the case study included: structural, descriptive, attribute, in vivo, simultaneous, versus and sub-coding. See JOHNNY SALDANA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS (2ND ED) (2013).

73 See MATTHEW MILES AND MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK (1994).

74 See Cameron, supra note 59.

75 Host organization: A legal entity that accepts the student into the workplace as part of a WIL placement.

76 WIL agreement: A written agreement involving the university, host organization and/or student with respect to the WIL placement.

77 WIL staff: University employees involved with the management and/or delivery of WIL programs. They include WIL conveners, university supervisors (who may also be the WIL convener), WIL support staff (administrative, liaison or placement officers) and the management attached to a discipline delivering the WIL program. Collectively these persons are referred to as WIL staff and are members of a WIL discipline.

78 WIL program documents: documentation about the WIL program distributed to host organizations and students; these are commonly described as handbooks or guides.

79 WIL resources: resources for WIL staff about WIL agreements and risk management.

The two sub-categories of risk management strategies were 'facilitate risk management by WIL disciplines' and 'facilitate the delivery of WIL placements for students.' 'Collaboration' was the theme underpinning the risk management methods of university lawyers, and 'facilitation' was the theme that emerged from the risk management strategies of university lawyers. Both themes are reported in rich description and conceptualized as roles of the university lawyer in the case study findings and discussion which follows (*data representation*).

V. Results

A. The University Lawyer as Collaborator

University lawyers collaborate with WIL staff, insurance and risk personnel, and formal WIL groups to manage legal risk in WIL programs. University lawyers collaborate with WIL staff by asking questions about work-based activities for the purpose of eliciting the information necessary to manage various legal risks associated with WIL programs. Pragmatism and accessibility are two professional characteristics of university lawyers which underpin their collaboration with WIL staff. External parties including government authorities, private firms and lawyers at other universities also provide support for the risk management practices of university lawyers by advising, educating and validating university lawyers on WIL-related matters. Each relationship is discussed under the headings below.

Collaboration with WIL staff

University lawyers collaborate with WIL staff by adopting formal and informal methods of asking questions about the WIL program. A formal method of asking staff questions is a request for legal services form which staff complete and forward to the legal office. The form asks simple questions about the matter, what the staff member wants the university lawyer to do, and requests documentation (if applicable). The responses provide context about the activity so that the university lawyer can ask more targeted questions during the first conversation with staff. As Sue explained, the form:

> helps us get a couple of steps forward before we have that first conversation. We've already got at least some information about it which we can read, and then ask questions if there's anything that is unclear, as opposed to starting right at square one.

During the first conversation, an aspect often explored is whether student activities constitute work experience, a scholarship (with a work component), employment or a WIL placement. The first question that Emma and Jane ask is whether the work experience is a required part of the degree or part of a particular course that the student is enrolled in. Other questions include "what work are they actually doing, how long are they spending?" (Emma), "is it paid or unpaid?" (Jane), as well as a request for documentation already used by the academic discipline to gain a better understanding of the activity. The university lawyer can

then provide advice to structure the activity so that it meets the legal requirements which exempt students from being deemed employees under Australian labor law.[80] Asking targeted questions about student activities also enables the university lawyer to determine the appropriate agreement for managing risk, whether that is a scholarship, employment or WIL agreement.

University lawyers ask WIL staff questions about WIL programs for the purpose of assessing legal risk, solely or in collaboration with insurance-risk. Questions include the location of the WIL placement, any accreditation requirements attached to the WIL program, the responsibility for supervision, intellectual property (IP) created by students, the activities of the host organization and the proposed student activities during the WIL placement, the year level of the students, which is related to their level of knowledge and maturity, as well as the orientation/induction processes conducted by the university and the host organization. Sue will also ask WIL staff questions about the value or benefit of the activity to the university when a legal risk is identified. In this example, Sue recommended that a legal risk concerning insurance coverage of the host organization be transferred to the university's insurer because the value of the WIL experience outweighed the legal risk:

> … And you have to weigh up… we don't do this alone, we do it obviously with our academic or WIL staff colleagues... what is the benefit of this experience to the student? Does it really outweigh any risks? Is there anything we can advise the student to do to sort of mitigate what we might see as potential risk by agreeing to take a particular clause out? You know, an easy example is if the company says, 'we just don't have insurance for visitors...' (it would be very unlikely). We can then say 'well, we've weighed it up... this experience is so valuable, we'll actually buy an extra piece of insurance to cover this cohort of students, or this student', but it's about sort of making that assessment about the value, about the risk, and about the benefits …

Sue's line of questioning reflects the university lawyer's complementary roles as a facilitator and collaborator. Following collaboration with WIL staff, the strategic value of the WIL activity was such that Sue recommended additional insurance coverage to control and transfer the legal risk, which would thereby facilitate the WIL placement.

The purpose of the questioning at times is for WIL staff to think about the legal risks associated with the WIL program. For instance, Jess was approached about a nursing student with a latex glove allergy and a nursing student with dwarfism. This stimulated a number of questions in which Jess placed the onus on WIL staff to identify the risks and to provide solutions to address the risk: "I tried to get them to think through where the risks are, and what we can actually do. Is there a solution to it?" Jess not only advised WIL staff about anti-discrimination law, but also brainstormed with WIL staff to come up with practical ideas for making

80 See Fair Work Act (Act No. 28/2009) (Aus.). For a summary of Australian labor laws in relation to WIL, see Craig Cameron, *The Vulnerable Worker? A Labor Law Challenge for WIL and Work Experience*, 14 ASIA-PAC. J. COOP. EDUC. 135 (2013).

reasonable adjustments in the workplace. Jess suggested this solution-oriented approach is a skill possessed by lawyers:

> I find people who are trained lawyers, they're clear thinkers, and can think outside the square a bit, whereas I find that academics know their stuff, but you might suggest something that's quite common sense (to us), but they haven't thought about it...

Steve will ask WIL staff, "what's the worst-case scenario?" and "what could go wrong in this placement in your view?" In an IP context, Peter and Jane ask questions intended to promote WIL staff awareness about the legal consequences of students assigning their IP rights to the host organization. In this way, an informed decision can be made by the WIL discipline about the legal risk. For instance, Peter asked WIL staff, "do you realize what this means?" with respect to the proposed assignment of IP created by a postgraduate student before the WIL placement (known as background IP). Jane asks WIL staff whether they are aware of the general rule under university IP policy that the student owns the IP they create in the course of their studies, and asks whether WIL staff will need examples of the work for assessment purposes. Jane also has WIL staff think about whether assignment of IP to the host organization is essential, because the student may not appreciate the legal consequences of relinquishing their IP rights.

Accessibility in legal service delivery

Accessibility is a critical enabler of collaboration. The legal office can be unaware of WIL programs and the legal risks they may entail, unless WIL staff request legal services. For Sue, being accessible means that WIL staff can receive the right advice, which at times may be a simple reassurance that "yes what you're doing is fine." Jess explained the concept of accessibility and its importance in these terms:

> … I come from the school of thought that it is incumbent on me to make people feel comfortable enough with me to come and tell me scenarios so that I can protect the University if there is an issue. So I'm not a believer in the 'ivory tower'. I believe in being approachable, and actually building up really solid relationships, so someone can pick up the phone... so we've got an instruction mechanism where people will send an email and fill out forms ... some people find that just a pain in the backside if you want something really quick, now. My view is 'just pick up the phone and ask'… I'd rather be asked than not asked. So I'm trying to be inclusive, and trying to be included in things rather than not.

An interesting side issue here is the suggestion by Jess that for some WIL staff the request for legal services form, a formal method of asking WIL staff questions designed to improve service delivery, may deter WIL staff from accessing legal services. In the interests of accessibility, WIL staff have the option of contacting Jess direct.

University lawyers advocate and demonstrate their accessibility to WIL staff when educating WIL staff about risk management in WIL programs (a risk management practice) and collaborating within WIL groups. The legal office of

Peter is proactive in educating WIL staff, approaching an academic discipline to offer training on an issue that the legal office may be dealing with on a regular basis. Peter's experience is that conducting the training on the academic discipline's "home turf" encourages more WIL staff to participate in training, thereby appreciating that university lawyers are accessible. The notion of accessibility is clearly an important attribute of risk management for university lawyers. Further, training relieves the fear factor of university lawyers, particularly for lower level staff as demonstrated by this exchange with Peter:

> Peter: If we seem to be getting a flood of a particular thing... one of us, [name deleted] or I, will approach that area, and say, 'do you want us to come in to your next morning tea, and have it face to face so we're approachable?', because the lawyers are often seen as scary... and we're not very scary, but you know what I mean. Sometimes it's people that are lower level that don't feel they've got the right to come and ask us those things, so it would benefit a lot from us being out there as well.
>
> Interviewer: So availability is important, being seen to help…
>
> Peter: and going there on their turf. We used to do them here (downstairs), and I think the whole concept of even coming to [building name] puts people off. We go out to the areas, and we find it much more receptive.

A similar message of accessibility is promulgated by John when collaborating in a formal WIL group: "I'm your lawyer, I'm friendly... if you've got an issue, knock on the door." Accessibility appears to be a condition for achieving shared responsibility for risk management in WIL programs. University lawyers are responsible for delivering services that support risk management by WIL disciplines, but this support is contingent upon the WIL discipline approaching the legal office. University lawyers encourage collaboration in risk management by being accessible, as well as by being pragmatic.

Pragmatism in legal service delivery

University lawyers are pragmatic in their method when addressing legal risks. They appreciate the unavoidable legal risks associated with WIL, but also the strategic value of WIL to the institution, which may necessitate the acceptance of risk in order for the WIL placement to proceed. Tom explained the pragmatic approach taken by the legal office when advising WIL staff on risk:

> We're a fairly pragmatic team, so when we're explaining legal risk, we've always approached it on the basis that anything the University does carries a risk ... sometimes that can be legal. If we wanted no risk, we would do nothing. So we can't have a no-risk situation. What we have to do is understand the risk that we're going into, and if we accept it we accept it.

For the student with dwarfism and the student with the latex allergy, Jess collaborated with WIL staff to devise practical solutions which ensured that reasonable adjustments were made in the workplace. Jess also adopted a pragmatic approach when advising WIL staff about the appropriate disciplinary action to take against a nursing student who took selfies of a patient and posted them on Face Book, in potential breach of Australian privacy laws with respect to health

information.[81] Jess had WIL staff, who were "quite emotive," to think about the gravity of the student misconduct, and about the potential psychological and financial consequences for the student of being withdrawn from the program.

Pragmatism was particularly evident when university lawyers managed legal risks within the WIL agreement. In the process of drafting WIL agreements, Kate and Tom were concerned that a WIL placement may not proceed if the host organization was presented with a legally complex and lengthy WIL agreement. As Kate explained:

> If we couldn't be a bit practical in our approach, then organizations wouldn't want to take our students for placements, for example if we had a 30 page legal agreement for them to sign for every student they took, they would run a mile – hence we have tried to in our legal agreement (well not do the bare minimum) but do enough so that both [university name] and the student are protected.

Tom explained that there were two "flavors" of WIL agreement prepared by the legal office – "soft" and "legalistic." The university lawyer tailors the WIL agreement according to the flavor selected by the WIL discipline. A food metaphor also appears in Tom's explanation of the pragmatic approach to preparing a soft WIL agreement:

> Interviewer: You actually obtain instructions from your client about the "flavor" of the document that they want?
>
> Tom: Yes, because… again, it's that digestibility by the sector. If we create a document that scares the bejesus out of everybody... look, it's legally lovely, but it scares the bejesus out of every host, and no one will sign it, then it's not a useful document. So if the document can sound nicer, but still have all of those legal bells and whistles in there (but just in different language), that protects the University, they set the expectations, they protect the student, they do everything they're supposed to do, but they don't seem legalistic... that may be the preferred model.

The comments of Kate and Tom also reveal the balance between risk management and pragmatism. It is all very well to have a short agreement devoid of technical legal language so as not to deter host organizations, but both university lawyers are conscious that the agreement must ensure student and university interests are protected. University lawyers are mindful of both the strategic opportunity of securing the WIL placement and the legal hazards that the WIL placement may entail for the student and the university.

When reviewing WIL agreements, university lawyers are mindful of the practical consequences of rejecting provisions of a host WIL agreement,[82] or of not accepting amendments proposed by the host organization to a university WIL agreement,[83]

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81 See Cameron et al., supra note 23 at 75-76.

82 Host WIL agreement: A WIL agreement prepared by the host organization.

83 University WIL agreement: A WIL agreement prepared by the university, which is often a template for use by one or more academic disciplines.

that may pose a legal risk. A pragmatic approach is required by university lawyers; otherwise the WIL placement may not proceed. University lawyers acknowledged three practical truths with respect to WIL programs:

1. The university needs the WIL placements – "the business wants this to happen from the Vice Chancellor down" (Steve);

2. Risk is unavoidable – "if we wanted no risk, we would do nothing. So we can't have a no-risk situation" (Tom); and

3. The university may have to accept legal risks associated with the terms proposed by the host organization by virtue of truths 1 and 2 above.

Jess described the approach to reviewing WIL agreements as "exception-based." Unless the legal risk is a "deal breaker," Jess will advise WIL staff that the WIL agreement be accepted. Risk avoidance is the exception rather than the rule in approaching legal risk with respect to WIL programs. This pragmatic approach is reflected in the practices of Kate, Jane and Sue. Kate asks the question "'look, can we live with that?' As long as the roles and responsibilities and what they're asking of our students (and of [university name]) are not totally outrageous, then generally speaking we agree." Events or circumstances the university has no control over, such as agreement provisions that will cause the university to break the law or put the student at risk in some way, represent the legal risks that Sue will say to WIL staff, "can't live with this... you need to try and negotiate this." Jane described legal risks which should be avoided and cannot be changed through negotiation with the host organization as "deal-breakers," meaning that the student should not be placed with the host organization.

Jess used an excellent analogy of a Commonwealth Bank of Australia loan document to explain pragmatism when reviewing host WIL agreements. The reference to the Commonwealth Bank of Australia is poignant as the case study revealed it tended to be larger organizations retaining multiple students on WIL placements that prepare their own WIL agreements. The analogy also covers the three truths understood by university lawyers about the demand for WIL placements, the unavoidability of risk and risk acceptance:

> … The way I explain it to people is it's like a mortgage document. If I put a Commonwealth Bank mortgage document in front of you, you either take it or you don't take it, and you look like an idiot if you go back with a marked-up version of it. So you either sign it knowing the risks, or you don't … And so with the Commonwealth Bank scenario, you can either sit there and go, 'I never want to sign a mortgage in my life', but you'll never own a property. So everything has its risk.

Simply put, the university either accepts risk in the WIL agreement (mortgage document) or avoids risk and misses out on the WIL placement (property). The role of the pragmatic university lawyer is to ensure WIL staff understand the legal risks before a decision is made to accept the risks and proceed with the WIL placement.

A pragmatic approach also relieves a potential fear by WIL staff that university lawyers will complicate their work. Fear was evident in the initial reaction by WIL staff to the introduction of WIL agreements at the university associated with Sue:

> Initially because it was a big change, people thought, 'it's going to be so much more work, it's going to make our jobs harder, hosts won't want to take our students, they'll take them from other Universities where they don't have an agreement'.

Sue was responsible for drafting the agreement templates, in collaboration with a formal WIL group. Sue's approach to agreement-making was to make the WIL agreement templates as short and simple as possible. The fear of WIL staff has been replaced with "a realization that it is a good way of protecting the students."

Collaboration in WIL groups

Formal collaboration with university management and WIL staff arises from the university lawyer's participation on a project, working party or committee related to WIL programs (WIL group). University lawyers and WIL staff primarily collaborate during the review of existing university WIL agreements and the drafting of new WIL agreement templates. For instance Kate drafted a simple WIL agreement template that could be used across disciplines:

> So my role in the working party was to help establish a simplistic (when I say 'simplistic', it's not to take away from the importance of it) placement agreement, a template which [university name] could use without having to reinvent the wheel every single time a student went on placement.

The WIL group of Sue first conducted an audit of WIL programs across the university to identify their types, size and scope and then developed appropriate systems and structures required to support the programs. A catalyst for the group review of WIL programs was the attention paid by the Australian media and the Fair Work Ombudsman (FWO), a Federal government department which enforces Australian labor law, to work experience and WIL programs.[84] Sue drafted multiple WIL agreement templates tailored to the specific concerns of host organizations from the engineering and science disciplines, such as the ownership of IP and the protection of trade secrets and confidentiality. Like Sue, Chris drafted a series of WIL agreement templates as part of a new streamlined process for making and recording WIL agreements. Chris also advised the WIL group about the agreement templates, as it was each group member's responsibility to then present the agreements to the academic disciplines.

John is a current member of a WIL group. For John, the WIL group is valuable as a central point for communication of all WIL-related matters. This has enabled John to gather university WIL agreements from group members across disciplines, in order to understand the types of agreements WIL disciplines enter into, and to identify any legal risks. The ultimate aim is to standardize the WIL agreements and thereby minimize the legal risks. The WIL group is also a forum for John to advise WIL disciplines about various contractual issues and to promote the role and accessibility of the university lawyer to WIL staff.

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84 See Cameron, supra note 80.

Collaboration with lawyers at other universities

University lawyers are a collegial group, a fact at odds with the popular notion of lawyers as combatants in an adversarial environment. University lawyers communicate with their colleagues at other universities individually and as a group, through the Society of University Lawyers (SOUL). SOUL is the national association of university lawyers in Australia. SOUL administers an electronic list for discussion on topics of interest (SOUL discussion list). E-mails sent to the SOUL discussion list are forwarded to all SOUL members and saved in an archive for member-only access. As the SOUL discussion list is a 'closed shop', the electronic archive could not be accessed. Nevertheless, Peter did search the archive following the interview and noted that most of the topics relevant to WIL involved compliance and war stories on specific host WIL agreements. SOUL also holds regular regional meetings of university lawyers from Eastern, Southern and Central/Western Australia, and convenes an annual conference attended by university lawyers and external counsel. A previous SOUL conference in the Australian State of Tasmania (2010) included a presentation and subsequent discussion concerning the impact of Australian labor law on work-based activities, including WIL programs. However it appears that the more productive outlets for university lawyer collaboration on WIL-related issues are regional meetings and the SOUL discussion list.

Lawyers from other universities advise, validate and educate their colleagues, many of whom may work in small legal offices and have limited tertiary experience. The SOUL discussion list provides a forum for university lawyers to share an issue about a host organization or a WIL agreement, to check whether other university lawyers have had the same issue, and to seek responses about how the issue was dealt with. Whilst WIL may not be a frequently discussed topic, the feedback from other university lawyers in a WIL context assured Chris that "you're on the right page, and you're in the right space, and you're not barking up the wrong tree... and we're all pretty much doing the same thing." The e-mails sent and received on a topic are also an education resource for the time-poor university lawyer. In fact, Jack and Tom are in the habit of saving e-mail strings on a topic from the SOUL discussion list for possible future reference.

Lawyers from other universities also serve as a source of truth when negotiating with large host organizations that are involved in WIL placements with multiple universities across Australian States and Territories. For instance Jack was once concerned with insurance provisions in a WIL agreement. The relevant host organization insisted that the WIL agreement it proposed had been signed by other universities, thereby setting an apparent precedent for Jack to follow. Jack was able to e-mail colleagues on the SOUL discussion list to verify the truthfulness of this statement. Communication with other university lawyers "destroys the bluffing" by host organizations. Tom provided this example:

> Like a [host organization name] saying, 'everyone else has signed it, don't know what your problem is', and you ring around and they go, 'oh no, we've got a problem with it, we heard you signed it... no we didn't'. So it's dispelling those sorts of myths where it's been really useful.

University lawyers not only engage in myth busting but also form a collective voice that may strengthen the bargaining power of universities in contract negotiations. Jack noted that, through the SOUL discussion list, "sometimes you're able to hook up with some other unis, and then you can negotiate as a group of universities, and it's much more effective." Tom recalled a case involving a suite of host organization agreements. The suite included a WIL agreement which proposed the assignment of student IP rights to a host organization as part of a stipend/scholarship arrangement:

> There have been five emails go around about that from different universities that when the lawyers get to them, they go 'ooh jeez this is awful', and they send around an email saying, 'has anyone else had any... read this one... what were your thoughts... and did you get any concessions from [host organization name] on it?', because we try and use that collective bargaining as well..."

In this way the university lawyer may increase the negotiating power of its client, the university, by obtaining information from other universities and, in particular circumstances, by joining other universities in collective action.

Regional meetings also represent an excellent opportunity for university lawyers to discuss issues and developments related to WIL. The regional meetings provide an open forum for university lawyers to communicate with one another on WIL issues. Tom compared the freedom of communication at regional meetings with the SOUL annual conference in these terms:

> So when we have regional university lawyers meetings, for example, those are the meetings where we tend to talk freely about stuff that's been going on... so the national conferences we don't really get that chance to be in a room, and say, 'hey, did you guys know blah de blah', so when we're at those meetings people talk about what's being happening at the university...

Collaboration with insurance and risk personnel

University lawyers collaborate with insurance and risk personnel with respect to WIL programs, who themselves engage in risk management by conducting formal risk assessments[85] and dealing with insurance-related issues. Universities allied to the university lawyers studied generally delivered risk management and insurance services as part of a combined operating division (with other functions) or in separate divisions (collectively described as insurance-risk). A university employee may perform one or both functions. Two of the university sites employed an insurance officer but had no person with an explicit risk management function. Although they are fellow risk managers, the nature and extent of collaboration with insurance and risk personnel varied amongst university lawyers. All four managers indicated during interviews that they collaborate with insurance-risk, compared to six of the remaining nine university lawyers.[86]

85 A risk assessment involves quantifying the probability and consequences of the legal risk and making a recommendation about its treatment.

86 See Table 2.

This may be explained by the delegation practices of three managers, in which matters assessed as high risk or complex requiring the input of insurance-risk are retained by the manager, or the manager has a longstanding relationship with insurance and risk personnel.

Most university lawyers will refer WIL staff to and communicate directly with insurance-risk on WIL matters. Referral, communication or a combination of the two on a WIL matter is generally dependent on the nature of the legal risk. Sue refers clients directly to insurance-risk when a legal risk materializes, such as bullying, assault or student injury, or the risk of an activity during the WIL placement is assessed as high, whereas an insurance clause requested by the host organization, a potential legal risk, will result in direct contact with insurance-risk. Tom often approaches insurance-risk following a referral, to provide advanced warning about the impending request for advice, and later seeks feedback from insurance-risk about the advice, to ascertain its impact (if any) on current legal work for the client. Whilst general questions on insurance coverage are referred to insurance-risk, Tom approaches insurance-risk directly if an insurance issue arises during contract negotiations. Insurance-risk may also notify the legal office about matters requiring legal services in WIL programs. For Emma, risk management by university lawyers is often sparked by an enquiry about insurance coverage made to insurance-risk when an academic discipline proposes a new WIL program. Insurance-risk then share this intelligence with Emma about the new WIL program. Equipped with this information, Emma can approach the relevant WIL discipline and complete a review of the WIL program to ensure legal compliance.

The three primary matters which university lawyers refer clients to, and/or collaborate with insurance and risk personnel on, are the capping of liability in WIL agreements, unusual clauses in WIL agreements requested by the host organization and insurance coverage for indemnities in WIL agreements that are in favor of the host organization. The common objective of the latter matter is to determine whether the legal risk can be transferred by the university through insurance. For Jane and Steve, the process of addressing legal risk associated with indemnities is an informed one. The risk is identified by the university lawyer, quantified by risk personnel and transferred or avoided by recommendation of insurance personnel. Steve will not only refer WIL staff to insurance-risk following identification of the risk, but will also participate in discussions with the insurance broker, as well as insurance and risk personnel, before a final recommendation is made. Risk may be transferred by extending existing insurance coverage to meet the indemnity, known as a "reinstatement of insurance" (Jane). Steve, who appeared to have the closest professional relationship with insurance and risk personnel from the university lawyers studied, described why a close relationship is invaluable in terms of risk management. First, the university lawyer gains a greater appreciation of legal risk associated with WIL programs, so that an informed decision can be made on addressing risk. Second, legal risk can be dealt with very quickly through collaboration.

Collaboration with external parties

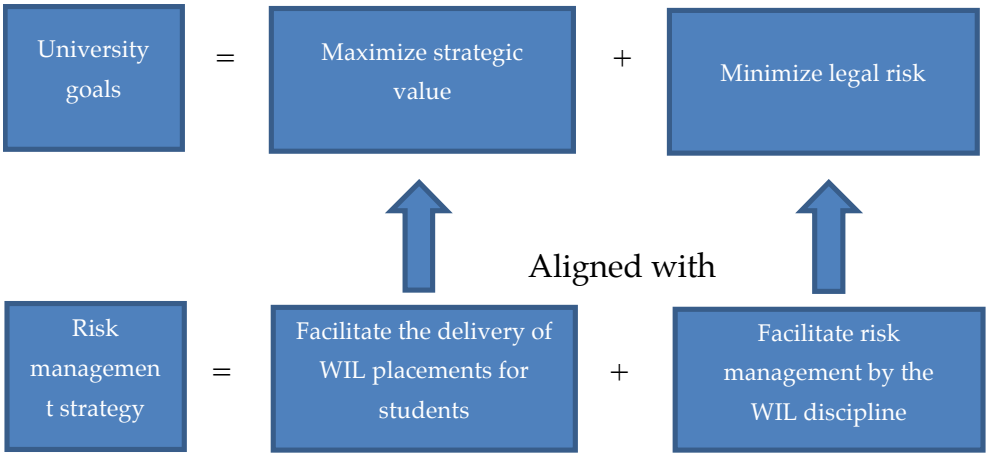
University lawyers also collaborate with external parties who provide support for their risk management practices. One particular legal risk in WIL programs is the

student being an unintended employee of the host organization.[87] Emma, Kate and Sue sought advice and clarification about this legal risk from the Fair Work Ombudsman (FWO), the Federal government agency responsible for enforcing Australian labor laws. University lawyers have also used information provided by FWO to draw the legal risk to the attention of academic administrators. FWO validated Emma's concerns to university management that an unintended employment relationship in WIL programs was a legal and/or reputational risk for the institution that needed to be managed. The only two instances in which university lawyers sought external counsel on a WIL matter related to the same legal risk. Chris obtained tax advice about scholarship arrangements which incorporated a WIL placement, whereas Kate received legal advice that any activities forming part of an unpaid WIL placement would be exempt under existing labor laws.

B. The University Lawyer as Facilitator

Facilitation is the risk management strategy of university lawyers. Figure 1 illustrates how facilitation by university lawyers is aligned to the university goals attached to WIL. Broadly, there are two goals of WIL – to maximize the strategic value of WIL as a higher education activity (positive risk or opportunity) but minimize the legal risks of WIL (negative risk or hazard).[88] Facilitation as a risk management strategy has two aspects. Firstly, university lawyers facilitate the delivery of WIL placements for students, which supports the university goal of maximizing the returns from WIL as a strategic activity. University lawyers also facilitate risk management by the WIL discipline, which promotes the university goal of minimizing the legal risks of WIL. Both aspects are addressed separately in the sections which follow.

Figure 1: Facilitation as a risk management strategy in WIL programs



87 Cameron, supra note 23, at 411-412.

88 The two university goals are conceptualized by the author as strategic and legal risks in WIL programs. Risk management involves balancing strategic and legal risks: See Cameron, supra note 27.

Facilitate risk management by WIL disciplines

The WIL discipline is responsible for implementing risk management in its WIL programs. University lawyers facilitate risk management by the WIL discipline through collaborating with WIL staff and providing advice to WIL staff which identifies risk, assesses risk and suggests risk management methods. The activities of university lawyers which also support risk management by WIL staff involve WIL agreements, resources, program documents, policy and education.

Emma and Tom asserted that the university lawyer establishes a "framework" for WIL staff to manage legal risk. The framework to which they refer includes the WIL agreements, program documents and resources drafted and reviewed by the university lawyer. University lawyers establish a framework for managing legal risk, but it is the responsibility of WIL staff to employ the framework because university lawyers are not, nor do they have the time, resources or expertise to be managing the day-to-day operation of the WIL program. Tom described the challenge of designing a framework for WIL staff which has an appropriate balance between minimizing risk and facilitating the placement or "not spooking hosts":

> We can't predict every problem. So all we can do is set up a framework that we think has the right balance, and then give instructions on how to apply that framework and let people get on with it. We don't have the resources to look over people's shoulders all the time... we don't have the resources to manage those programs. So the risk... the issue... the challenge for us is getting the system right, that we think is balanced, so we're not spooking hosts, but you've got all the bells and whistles you need whether it's in fluffy language or not. Everyone knows the expectations of the program, so there is a process for the implementer of the program to manage the expectations of each level appropriately, and then there is the process for notifying us of any issues when they come up and need legal management. So as long as you've got that structure in place, that's really all the legal team can do to manage that risk. They try and put in place a structure that minimizes the risk as best it can without killing the program.

University lawyers produce a range of risk management tools for the WIL discipline, including their advice on legal risk and various WIL instruments, but the responsibility for whether and how the tools are then implemented rests with the WIL discipline.

University lawyers provide advice to support the decision-making of WIL staff pertaining to risk management. University lawyers stressed during interviews that they were advisors, not decision-makers, in WIL programs. In fact Jane makes sure that WIL staff understand that they are better placed to make decisions because of the relationship they have with the host organization and their superior knowledge of the WIL program. The advisor role of the university lawyer is to identify and assess risk and to suggest actions to manage risk, but the final decision remains with WIL staff on behalf of the university. Tom explained the distinction between advice and decision-making in the context of reviewing a host WIL agreement:

> We provide a risk analysis to the University, and say, 'if we enter into this arrangement, this is the risk to the student, this is the risk to the University...

> so our recommendation is that we don't actually sign this agreement... that we sign one of ours', but you know, it's for the person who's got the delegation to make that decision.

WIL staff (with the appropriate authority) can elect to reject the advice and accept legal risks that the university lawyer disagrees with. As John put it, "they don't have a problem with us providing fearless and independent advice… but they also don't have a problem with choosing not to necessarily go with our recommendations as well." This recognizes the reality that a university lawyer can develop frameworks and provide advice to manage legal risk, but the ultimate decision, as well as the ultimate responsibility, for implementing risk management is with the WIL discipline.

Facilitate the delivery of WIL placements for students

Another strategy of university lawyers is to facilitate the delivery of WIL placements for students when they provide advice, communicate directly with the host organization on WIL matters, and deal with WIL agreements. Facilitation is evident when Tom communicates directly with legal representatives from the host organization. Tom may accept changes to a WIL agreement that he does not agree with but that involves no shifting of risk to the university. This enables the WIL placement to proceed and gives the host organization representatives what Tom described as "a pyrrhic victory." For Jess, facilitating the WIL placement means adding value to the WIL agreement and not being unduly difficult, even in circumstances when the WIL discipline has negotiated and finalized a deal with the host organization before approaching the legal office for advice. Jess explained the thought process in risk management and distinguished lawyers who facilitate from lawyers who obstruct:

> Generally I try to work through the parameters [of the situation] thinking about the relationship and what the real risk is. I mean, at one end of the spectrum you get some really anally retentive lawyers. I'm at the other end of the spectrum where we're here to not be an obstacle, we're here to keep a bit of an eye on things... and then jump in as necessary.

Emma operates on "a green light basis" with WIL placements if the risk associated with a WIL placement is low: "If risk is low, then I try to operate on a green light basis (for example, keep the contracts short and simple). No point trying to overcomplicate things or create roadblocks." Similarly, Chris facilitates the WIL placement by drafting short, plain English WIL agreement templates as revealed in this exchange:

> Chris: … there are a number of objectives [of the agreements]... one not to just have parties to the agreement, but two to make it user friendly for all parties (take out legal ease, make it as short as possible, but cover the essentials), and all the thingsthat were not imposing obligations... weren't obligatory came out of the agreement.
>
> Interviewer: Now why did you want to get rid of the legal ease and make the agreement shorter? Doesn't that put the host organization in a better bargaining position?

> Chris: No, because it made it easier for the WIL practitioners that it was coming from them, just to… not hold up the process by them [host organization] having to send it off to their legal departments.

The simplified WIL agreement templates prepared by Chris and the green light operation of WIL placements by Emma demonstrate the strategic focus of risk management by university lawyers.

Sue specifically referred to "facilitation" when discussing the creation of WIL agreement templates for engineering placements. For WIL agreement templates that made provision for the assignment of student IP, Sue explained that facilitation was part of a balancing act involving risk management and student awareness of their IP rights:

> We're not trying to rip the students off. We're trying to get a reasonable... middle ground that facilitates the placement, manages the risks (as the host perceives them and the University), but makes sure that they're aware.

The same theme of balance was previously identified by Tom, when designing a risk management framework for WIL staff which minimizes legal risk but does not "spook hosts." John expressed the balance as a challenge in terms of risk management. At the time of interview, John was in the process of gathering agreements from members of a formal WIL group for the purpose of standardizing the WIL agreements. University WIL agreements had already been developed with respect to the larger host organizations in the health discipline. John explained that small businesses "have no appetite to enter into a complex legal agreement." The challenge for the legal office will be "trying to come up with an agreement that covers our risk to our satisfaction, whilst not scaring off the provider and having them walk away from being willing to provide a placement."

Sue again referred to the balance when discussing the role of university lawyers. Sue acknowledged that risk management by university lawyers involves a balance between student learning outcomes (positive risk) and risk to the university (negative risk). Nevertheless, the legal office should not obstruct teaching and learning activities such as WIL programs: "It's a balance between risk to the University and the student outcomes... and we're here to do teaching and research, so... the legal office isn't meant to be an impediment to that." In both examples shared by Sue, the goal of the university lawyer when balancing the risk to the university and the promotion of student interests, whether that be awareness of their IP rights or achievement of student outcomes, is to facilitate the WIL placement. Emma also alluded to the balance between facilitation of WIL placements and management of legal risk. Emma was conscious of not putting in place roadblocks but also ensuring that the WIL program was compliant with the law:

> It's not something where we want to say 'look, it's a bad thing, it's dangerous, don't do it', it's something we want to encourage, so the less road blocks we put in place the better. We just have to make sure that we're doing that in the proper manner.

Facilitation is reflected in the exception-based approach by university lawyers to risk management. The university lawyer will facilitate the WIL placement unless

the legal risk is a "deal breaker" (Jess and Jane). A deal breaker is a legal risk that should be avoided because it cannot be controlled or transferred by the university. Some examples of deal breakers discussed by university lawyers included bullying by host organization representatives and agreement provisions which may cause the university to breach internal or external regulations. If the deal breaker cannot be resolved, the student should not be placed with the host organization. The facilitation strategy underpinning the exception-based approach was also evident when Kate discussed her role with respect to WIL programs: "I want to be able to assist it… I don't want to hinder... unless it's outrageously unacceptable."

Communicating the message of facilitation

University lawyers communicate a message of facilitation to address any negative perceptions which may otherwise discourage WIL staff from requesting legal services, and may expose the university to legal risk. University lawyers are not a "road block" (Emma and Jane) or an "obstacle" to WIL placements (Jess and Steve). Rather the risk management practices of university lawyers are designed to help WIL staff. Jane makes clear that the university lawyer is trying to help, enhance and build upon, rather than knock down and criticize, the work of WIL staff. For instance, Jane explained that WIL staff may be reluctant for university lawyers to intervene and make substantial changes to documents that they are familiar with and have been used for many years without incident. Jane placates the concerns of WIL staff around "throwing the baby out with the bathwater" by amending rather than replacing existing WIL agreements and program documents. According to both Kate and Jane, WIL staff are more open to approaching the university lawyer if they understand that the university lawyer is not a hindrance but can help them with delivering the WIL program. WIL staff can see that the university lawyer is aware of the strategic value of WIL to the institution. A shared vision attached to the risk management activity appears to facilitate a better relationship between WIL staff and university lawyers.

For Steve, there was a perception in the past that the legal office was "a stumbling block" to the pursuit of university activities. Steve has tried to change that perception over time by developing relationships with academic disciplines, built on trust, during which Steve has spread a message that the legal office is there to assist the discipline with university activities. As a result, Steve explained that "people don't see us as an obstacle, they see us as helping them, and I think the message has got through to them." Steve has built relationships by being proactive, visiting senior management within academic disciplines and university divisions, and being collaborative in the drafting of documents. Staff now trust the legal office to deliver legal services that facilitate, not obstruct, the pursuit of activities. Without a relationship built on trust, staff may not access legal services. Accordingly, a good relationship can promote access to university lawyers, as they become the 'go-to' person within the legal office for WIL staff and disciplines. Being the go-to person in an established relationship assists the university lawyer with managing legal risk, because WIL staff are more willing to pick up the phone or approach the university lawyer and ask questions. For instance, the relationship with the health discipline is such that David is used as a sounding board for addressing legal risks before they materialize during a WIL placement. Being able to address risks at an early stage can be effective preventive lawyering.

The language used by university lawyers is critical for ensuring WIL staff are aware that university lawyers are facilitators of WIL placements and not obstacles. The following passage in which Emma is advising WIL staff about the legal risks associated with Australian labor laws is instructive. Emma describes the difference between facilitative and obstructive language:

> I mean no one has actually resisted our intervention, and in most of the cases we're not saying to them, 'you can't do it, we need to shut it down', we're basically just saying 'look, you can do it, but you just have to make sure that you're across these things, and that we are not exploiting the student', and so when you put it that way, then they're fine with it.

Tom is also conscious about the language of facilitation whilst working with WIL staff in managing risk:

> It's not about 'we are legal, and we can tell you not to do something'. It is that 'we are here to help you get this off the ground. Let's just rethink this', rather than, 'that's really dumb because it breaches the law and you're going to put the university at risk, and I'm going to go dob you into the Vice-Chancellor you idiot!' We don't take that approach.

The preceding section revealed that facilitation of the WIL placement for students can be manifested in the words and actions of university lawyers. As a whole, facilitation represents the plan of university lawyers for risk management to achieve institution goals associated with WIL. The next part of this article is a discussion which situates the roles of the university lawyer as collaborator and facilitator in the literature.

V. Discussion

University lawyers provided new insight about their roles as collaborator and facilitator when managing legal risks in WIL programs. As such, the study provides a more complete picture of risk management by university lawyers. Collaboration and facilitation can be conceptualized as a risk management method and a risk management strategy of the university, and when combined with the traditional practices (or roles) of university lawyers, provides a coherent and comprehensive explanation of risk management by university lawyers in relation to WIL programs. The risk management strategy of university lawyers is to facilitate the delivery of WIL placements for students and risk management by WIL disciplines. To execute the strategy, university lawyers are pragmatic and accessible when collaborating with WIL staff, insurance-risk, lawyers from other universities and external parties. Whilst the study is specific to WIL programs, facilitation and collaboration are two roles of the university lawyer that can be applied to other higher education activities.

Table 3 categorizes the various roles, as identified in the literature, into risk management practices, methods and strategies. To define role as what university lawyers *do* to manage legal risk, that is, their risk management practices such as advice, drafting and education, would be simplistic. It is clear from the study that risk management is more than the 'end product' delivered by university lawyers and discernible to recipients of legal services. University lawyers also

have methods (*how* they manage legal risk) and strategies (*why* they manage legal risk) which underpin their risk management practices. The characterization of practices, methods and strategies as a framework recognizes the different elements that support risk management by university lawyers.

Table 3: A risk management framework of university lawyers

Practices	Methods	Strategies
Advising	Collaborating	Facilitating
Drafting	Insulating	Regulating
Mediating	Dispatching	
Educating		
Managing		
Litigating		
Speaking		

Some risk management strategies and methods have been identified when the role of university lawyers is discussed in the literature. For instance, collaboration with lawyers at other universities has been noted by Ruger[89] and Fleming[90], who suggests that university lawyer networks are a resource for sharing ideas, identifying problems and being a collective voice in contract negotiations. Collaboration amongst other university lawyers through groups such as SOUL (Australia) or NACUA (United States) may also redress the power imbalance between universities and host organizations, so that the collective has a greater say over acceptable and unacceptable agreement provisions, and may prevent the host organization from 'bluffing' in contract negotiations. It has also been recommended that university lawyers collaborate with insurance-risk[91] and academic decision-makers.[92] The case study extends the literature by describing the nature and extent of collaboration with insurance-risk, lawyers at other universities and staff. For instance, university lawyers collaborate with WIL staff by asking questions about the WIL program, and through their participation in formal WIL groups to create WIL agreements and resources. Evidence of pragmatism and accessibility support collaboration as a risk management method. University lawyers are pragmatic when addressing legal risk; they draft plain English WIL agreement templates that protect student and university interests and are conscious of not being an obstruction or a 'road block' to WIL placements. University lawyers also encourage collaboration by making explicit their risk management strategy of facilitating the delivery of WIL placements for students.

89 Supra note 35.

90 Supra note 34.

91 Ende, Anderson & Crego, supra note 38; KAPLIN & LEE, supra note 37.

92 Bickel & Ruger, supra note 42.

The cultivation of good relationships with WIL staff and disciplines is a theme which underpins collaboration by university lawyers. As WIL disciplines cultivate external relationships with host organizations, the university lawyer cultivates internal relationships which are designed to encourage WIL staff to access legal services. The importance of building relationships with WIL staff and WIL disciplines to minimize legal risk in WIL programs is reflected by the pragmatism and accessibility of university lawyers when delivering legal services. A pragmatic approach to risk management is required by university lawyers to facilitate the WIL placement and thereby support the university goal of maximizing the strategic value of WIL. Accessibility is demonstrated by WIL staff, a discipline or a faculty having a go-to lawyer that they can turn to in their time of legal need. Being accessible, being the go-to lawyer, and conveying a message of facilitation are relationship-building methods and strategies of university lawyers.

As a risk management strategy, facilitation of WIL placements is consistent with the primary role of the university lawyer – to support the institutional goals and objectives of the university related to teaching, research and service.[93] Facilitation has been used to describe the advisory role of the university lawyer. Corbally, Daane and Ward and Tribbensee argue that the role of the university lawyer, when providing advice, is to facilitate activities which achieve institutional objectives.[94] A related point is that the university lawyer's role is to advise and not make decisions about an activity the subject of the advice.[95] The case study provides an empirical basis for both propositions.

University lawyers facilitate risk management by WIL disciplines and the WIL placement, both activities, to achieve institutional objectives associated with minimizing legal risk and delivering WIL placements for students respectively.[96] The university lawyers who stressed that they were advisors and not decision-makers provide empirical evidence to support the argument that university lawyers facilitate risk management by WIL disciplines. The analogy by Daane when describing the university lawyer as facilitator – "the red light function is important, but the green light should shine more often"[97] – is reflected in UL1's 'green light' strategy for WIL placements and the exception-based approach by university lawyers to reviewing WIL agreements. University lawyers will facilitate the delivery of WIL placements for students unless there is a deal breaker, namely a risk that cannot be controlled or transferred by the university. The deal breaker is a risk that should be avoided and represents the 'red light'. Consistent with a strategy of facilitation, the university lawyer's advice is not simply to identify the legal risk and say "no" to the activity.[98] The university lawyer will advise WIL

93 See e.g. Daane, supra note 4; Orentlicher, supra note 3.

94 Corbally, supra note 47; Daane, supra note 49; Ward and Tribbensee, supra note 52.

95 See Bickel, supra note 6, at 995-996; See also William R. Kauffman et al., *The University Counsel: A Roundtable Discussion*, 87 ACADEME 26 (2001).

96 See Figure 1.

97 Daane, supra note 49.

98 Ward and Tribbensee, supra note 52, at 19.

staff to go back to the host organization and re-negotiate, often using strategies and amendments to contract terms, suggested by the university lawyer, that are designed to minimize the legal risk and give the WIL placement a green light.

In the specific context of WIL, the findings of this research can be applied by university lawyers, WIL disciplines and university management to evaluate and improve risk management at their own institutions and to educate themselves and their colleagues about risk management in WIL programs. More broadly, university stakeholders may better appreciate the work of university lawyers by understanding their roles as collaborator and facilitator in higher education, and risk management as a framework of practices, methods and strategies. Whilst the traditional risk management practices (or roles) of university lawyers are visible to university management and clients, the methods and strategy are two covert pillars of the risk management framework. This has the potential to create misconceptions about the university lawyer that may stop campus staff from accessing legal services. For instance, Corbally noted that some academic administrators perceive the university lawyer to be obstructive,[99] whereas authors in the WIL literature have been critical of university lawyers for their perceived lack of knowledge about WIL programs when: drafting agreements,[100] advising on student confidentiality issues[101] and handling student dismissals from WIL programs.[102] The risk management framework may dispel these preconceptions. Whilst other university lawyers may not be as informed or have the experience in the tertiary sector to appreciate the strategic value of WIL to the university, it is clear from the university lawyers interviewed that they do understand the purpose of WIL programs, and appreciate their importance to achieve institutional objectives. In fact, university lawyers communicate a message of facilitation to address any negative perceptions.

V. Conclusion

The study reported in this article is the first known systematic research exploring the roles of the university lawyer as collaborator and facilitator in higher education, and provides evidence-based support for formal recognition of these roles as part of the university lawyer's risk management framework. In particular, risk management by university lawyers is not confined to their practices but involves a broader framework of methods and strategies including collaboration with outside lawyers, university management, WIL staff and insurance and risk personnel, as well as facilitation of risk management by WIL staff and the delivery of WIL placements for students. University lawyers demonstrated that

99 Corbally, supra note 9.

100 Sheldon R. Gelman, *The Crafting of Fieldwork Training Agreements*, 26 J. SOC. WORK. EDU. 65, 69 (1990).

101 Linda Cherry Reeser & Robert A. Wertkin, *Sharing Sensitive Student Information with Field Instructors: Responses of Students, Liaisons, and Field Instructors*, 33 J. SOC. WORK. EDU. 347 (1997).

102 Norman H. Cobb, *Court-Recommended Guidelines for Managing Unethical Students and Working with University Lawyers*, 30 J. SOC. WORK. EDU. 18, 29 (1994); ROBERT G. MADDEN & NORMAN H. COBB, *Legal Issues Facing Social Work Academia*, in GATEKEEPING IN BSW PROGRAMS 171, 191 (2000).

collaboration and facilitation are the methods and strategy for not only managing legal risk in WIL programs, but connecting with WIL staff at a level deeper than their traditional roles (or risk management practices) of advice, education, drafting and review of documents. Relationship building through collaboration and facilitation may foster a deeper understanding, awareness and appreciation among stakeholders about the role of university lawyers, and thereby encourage access to legal services.

Negative perceptions of legal services will remain a challenge to the practice of higher education law. The author has spent the past 18 months advocating the role of university lawyers to audiences in Australia, Europe, Asia and North America, drawing on his PhD thesis exploring risk management in WIL programs[103] Audience reactions to university lawyers have ranged from 'lawyer bashing', to not knowing that they had a lawyer on campus, to positive stories about university lawyers helping them with advice, review and drafting of agreements. Given the author's experiences and those of university lawyers in this study, it is imperative for institutions to articulate a clear message that university lawyers and recipients of legal services (or clients) are allies who collaborate to facilitate activities that achieve university goals. University lawyers should not be seen as 'us' versus 'them' from the perspective of clients; instead the perception should be one of collaboration or 'we'. University lawyers also need to promote themselves as facilitators and collaborators in the delivery of legal services. The study demonstrates that articulating the *how* and *why* university lawyers deliver legal services can change the way the institution's stakeholders perceive university lawyers.

103 Cameron, supra note 1.