New Compliance Challenges in Higher Education

Coping with a Hyper-Regulated Environment

Gregory Ferenbach, Dow Lohnes, PLLC and Robert F. Roach, New York University

SESSION OVERVIEW

• Introduction and Background
• Case Study – Coping with the Program Integrity Rules
  • Client Strategies and Role of Outside Counsel
• Case Study - Coping with Globalization
  • Using Business Processes and Technology in Compliance
• Summary – Best Practices for Coping with Common Obstacles to Effective Compliance
• Roundtable Discussion – Compliance Topics of Your Choice
INTRODUCTION & BACKGROUND

Hyper-regulation is here to stay – get used to it!

UNDERLYING CAUSES & TRENDS

• Importance of Higher Education
• Cost of Higher Education
• Increased Complexity of Institutions
• Increased Involvement of Government at All Levels
• Increased Enforcement
• Increased Risks of Non-Compliance
IMPORTANCE OF HIGHER EDUCATION

• Survey Results:
Higher education is perceived by most people as the necessary admission ticket to good jobs and a middle-class lifestyle.

• Empirical Data:
In addition to financial and other benefits, people who have a bachelor's degree or higher live about nine years longer than those who don't graduate from high school, according to a 2012 annual report from the Centers for Disease Control.

COST OF HIGHER EDUCATION

College debt is soaring. Last year, students took out $117 billion in new federal loans, pushing the total outstanding to above $1 trillion.
COMPLEXITY OF HIGHER EDUCATION

Changes in the nature of Higher Education, such as increasing globalization, advances in technology, and new sources of revenue (e.g. scientific research, big-time sports, international ventures) have made Colleges and Universities much more complex to administer.

INCREASED GOVERNMENT INVOLVEMENT

Increased governmental regulation of Higher Education at all levels – federal, state and local – has made compliance more challenging; and it is unlikely to become easier in the future.
SOURCES OF HIGHER EDUCATION’S GROWING REGULATORY BURDEN

- Congress—Higher Education Act and amendments; other federal statutes
- Department of Education—HEOA rules, the “Program Integrity” rules
- Executive Orders—most recently, educational benefits for military and veterans
- Other Federal agency rules—IRS, Labor/EEOC, DHS/Defense/Veterans etc.
- States and accrediting bodies
- Conditions on government contracts and grants

SOURCES OF HIGHER EDUCATION’S GROWING REGULATORY BURDEN

- See NACUA compliance site at http://www.higheredcompliance.org/
- Approximately 30 legal/regulatory issues listed include:
  - Accounting
  - Accreditation
  - ADA
  - Athletics
  - Campus safety
  - Conflicts of Interest
  - Copyrights and fair use etc.
FEDERAL POLICY TRENDS SUGGEST EVEN MORE REGULATION

• Growing importance of higher education to the US economic competitiveness (e.g. Obama Administration’s graduation goals)
• Growing governmental role in financing education (e.g. direct lending, bigger programs/more aid programs)
• Student debt “crises”; and
• Policy goal of requiring greater accountability for federal investment in higher ed (e.g. Spellings Commission, Obama administration)

INCREASED RISKS – NON-COMPLIANCE

• Criminal Prosecution:
  • \textit{UCLA lab accident, 2012 indictments;}
  • \textit{Professor Roth export control conviction.}
• Agency and State Attorney General Enforcement:
  • \textit{Medicare/Medicaid University of Medicine and Dentistry of NJ;}
  • \textit{Student lending practices.}
• Adverse Publicity and Reputational Damage:
  • \textit{Congressional hearings on private college tuition and lending practices; GAO report on proprietary schools}
  • \textit{Penn State, UVA etc.}
• Qui Tam and Private Lawsuits:
  • \textit{Federal False Claims Act recoveries exceeded $4 billion in 2011;}
  • \textit{March 2012 in VA Tech case jury issued verdict of $4 million per family.}
HYPER REGULATION

Get Used To It - Develop Better Coping Strategies

COPING WITH THE PROGRAM INTEGRITY RULES: Client Strategies and the Role of Outside Counsel

Gregory Ferenbach; Partner, Higher Education Practice, Dow Lohnes PLLC

- State Authorization of Online Learning
  - Steps and strategies used by traditional institutions
- Federal Misrepresentation Rule
  - Steps and strategies used by proprietary institutions
Case Studies From the Program Integrity Rules

• October 2010, the U.S. Department of Education unveils 14 new “program integrity” rules
• Most went into effect on July 1, 2011.
• The new rules affect operations at all types of educational institutions -- public, for-profit and private non-profit
• There are several important areas where the new regulations impact all schools, including state authorization of online programs

State Authorization Rule

• Schools are generally required to be licensed in all states where they have a “physical presence”
• New federal rules required proof of state authorization in any jurisdiction where any student lives: significant “new” burden for all institutions that provide online programs.
• Last July, the U.S. District Court for the District of Columbia invalidated parts of the new federal rules on procedural grounds
• But, online operations must still comply with any state regulatory requirements.
The Compliance Problem

- The definition of “physical” presence can vary greatly from state to state.
  - A location in the state
  - Advertising in the state
  - Faculty in the state

- Some states require licensure even without “physical presence”

The Compliance Problem (Continued)

- Most traditional schools had (and have) made little effort to comply with these state laws
- State laws are a “crazy quilt” of different requirements, agencies, exemptions etc.
- Compliance is expensive and burdensome in some states, less so in others
- Feds “Kicked the Hornets Nest” with regulators: increased state enforcement
- And state laws evolving rapidly (2/3 changed in 2011)
Varied Reactions

- Rush to comply
- “Ostrich strategy”
- “Push back” in Congress through trade associations
- Litigation
- Effort to achieve multi-state reciprocity
- Methodical, strategic approach…

Institutional Coping Strategies

- Development of multi-functional internal teams
- Challenge to research “facts” /research “law”
- Help from trade associations
- Help from outside counsel--Dow Lohnes’ State Authorization Service
- Development of risk-weighted, multiple-year strategies
- Get buy-in in budgeting process
- Breaking down problem allows nuanced approach
Federal Misrepresentation Rule

• Response to aggressive recruiting practices and alleged wrongdoing at some for-profit colleges: “exposed” in Harkin hearings
• Department creates exceptionally broad, vague rule
• As now defined, “substantial misrepresentation” includes virtually any false or even confusing statement, even if inadvertent, made to virtually anyone.
• No materiality element nor any intent requirement built into the rule.

Federal Misrepresentation Rule

• Institutions found to have made a “substantial misrepresentation” can lose their access to Title IV federal funding, with limited due process
• A “death sentence” for most proprietary institutions
The Compliance Problem

- Strict liability for operations of very large, multi-state, multi-modal, publicly-traded corporations
- Inter-relates to other new, requirements not yet operationalized (state rule)
- Monitoring sub-contractors and agents

Institutional Coping Strategies

- High-level, multi-functional teams
- Independent "pre-publication review" of marketing and other public materials
- Comprehensive training and compliance programs for employees
- New controls over vendors
- Review and re-negotiation of vendor contracts (indemnification and insurance clauses)
COPING WITH GLOBALIZATION
Using Business Processes and Technology in Compliance

Robert F. Roach,
New York University

• Identifying Risks
• Establishing Lines of Communication
• Using Business Processes in Compliance
• Using Technology to Manage Compliance Risks
IDENTIFYING RISKS

• **Risk Environment:** While Colleges and Universities face similar risks, each institution must face its own unique risk environment. Risk environment includes internal and external risk environments.

• **Internal Environment:** An institution’s internal risk environment includes its mission, goals and objectives, culture, structure, risk history and risk appetite.

• **External Environment:** An institution’s external risk environment includes - the expectations of institutional stakeholders, government regulators, the economy, and other external factures that may effect the institution’s ability to achieve its mission, goals and objectives.

ASSESSING EXTERNAL RISK ENVIRONMENT

*(See Risk Identification Resources Handout)*

• The Higher Ed Compliance Alliance;
• Higher Ed News Services:
  • The Chronicle of Higher Education
  • Inside Higher Education;
• Higher Ed Organizations and List Serves;
• Compliance Organizations and List Serves;
• Compliance Websites and Blogs;
• Topical List Serves (e.g. Export Controls);
• Law Firm Advisory Services;
ASSESSING INTERNAL RISK ENVIRONMENT

**Compliance Structure:** Effective lines of communication are key to understanding your institution’s mission, goals and objectives, culture and business processes.

**Evolution:** An institution’s compliance structure should evolve as the institution changes over time in order to help ensure an ongoing and effective understanding of the institution’s compliance risks.

**Placement:** The Compliance Officer should have a “seat at the table” among the institution’s key decision makers to ensure a timely understanding of the institution’s ongoing goals, objectives, risk appetite and risks.
CASE STUDY – COPING WITH GLOBALIZATION
NYU ABU DHABI EXPORT AND TRADE CONTROLS
Using Business Processes And Technology To Assist In Compliance

• Compliance Structure
  • NYUAD Chief Compliance Officer and staff
  • NYUAD Compliance Committee

• Placement
  • NYUAD Chief Compliance Officer reports to NYUAD Vice Chancellor and NYU Chief Compliance Officer
  • NYUAD Chief Compliance Officer serves on NYUAD Audit Committee and Management Committee

CASE STUDY – COPING WITH GLOBALIZATION
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• External Environment
  • NYUAD is in close proximity to OFAC sanctioned countries: Iran, Syria, and Sudan.
  • UAE is a boycott country

• Internal Environment
  • Engaging with regional students and scholars, including nationals from sanctioned countries, is an important institutional goal.
  • Significant level of research activity is expected.
  • No ITAR research.
NYUAD EXPORT AND TRADE CONTROL BUSINESS PROCESS ANALYSIS

TRADE CONTROL TECHNOLOGY

Organization Hierarchy

New York University

I-129

Abu Dhabi

Finance  Student Information  Human Resources

Export On-Demand
SDN Screening and Deemed Export Management
TRADE CONTROL TECHNOLOGY

Export On-Demand
SDN Screening and Deemed Export Management

BEST PRACTICES FOR COPING WITH COMMON OBSTACLES TO COMPLIANCE IN HIGHER ED

- Cost/budgeting
- Organizational Infirmities and “Silos” Common to Higher Education
- Cultural attitudes towards regulation
- Regulation overload
- Follow up and accountability

See Whitepaper Handout: “The Case for Compliance Programs: The Legal and Policy Mandates.”
DISCUSSION