



**New Compliance Challenges in
Higher Education**

Coping with a Hyper-Regulated Environment

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and
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 NEW YORK UNIVERSITY  ATTORNEYS AT LAW

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

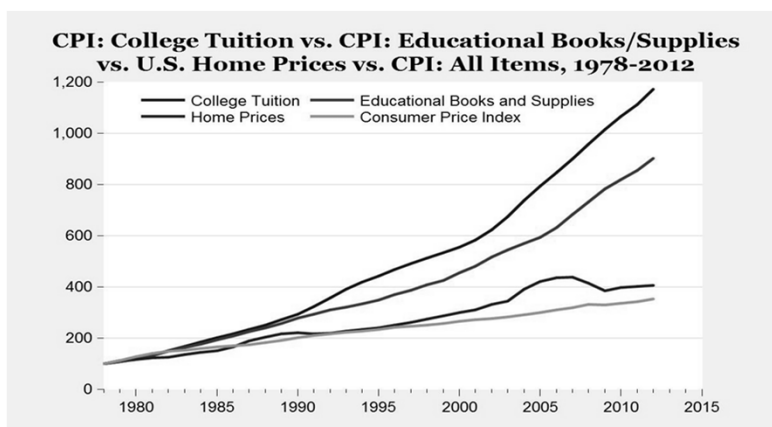
- **Survey Results:**

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:**
 - *UCLA lab accident, 2012 indictments;*
 - *Professor Roth export control conviction.*
- **Agency and State Attorney General Enforcement:**
 - *Medicare/Medicaid University of Medicine and Dentistry of NJ;*
 - *Student lending practices.*
- **Adverse Publicity and Reputational Damage:**
 - *Congressional hearings on private college tuition and lending practices; GAO report on proprietary schools*
 - *Penn State, UVA etc.*
- **Qui Tam and Private Lawsuits:**
 - *Federal False Claims Act recoveries exceeded \$4 billion in 2011;*
 - *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*

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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

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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.

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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”

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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)

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Varied Reactions

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

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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

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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.

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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

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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

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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)

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Questions?

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**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 factors that may affect 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;**

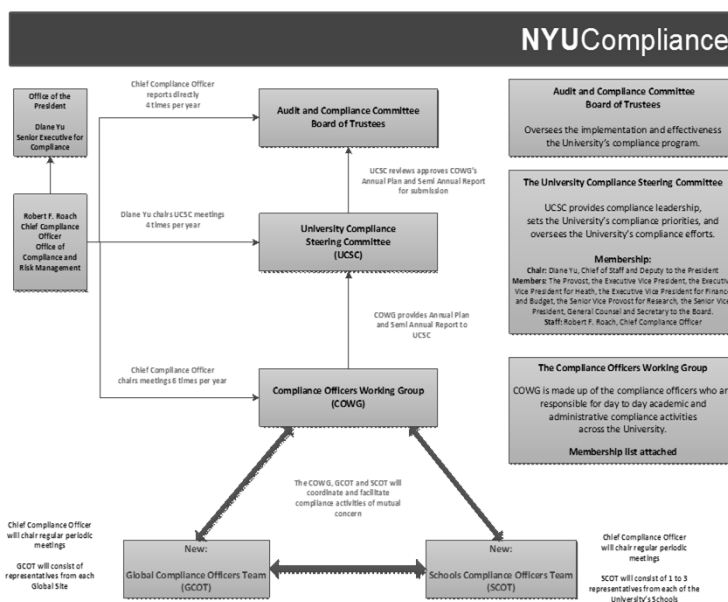
ASSESSING INTERNAL RISK ENVIRONMENT

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.

COMPLIANCE LINES OF COMMUNICATION



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

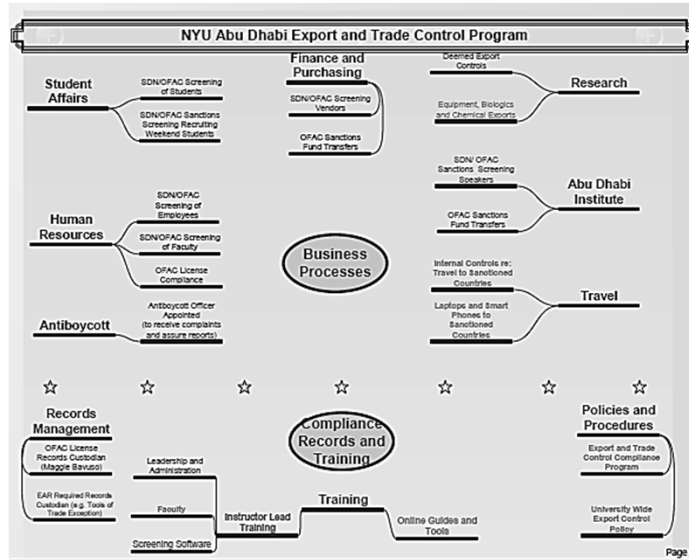
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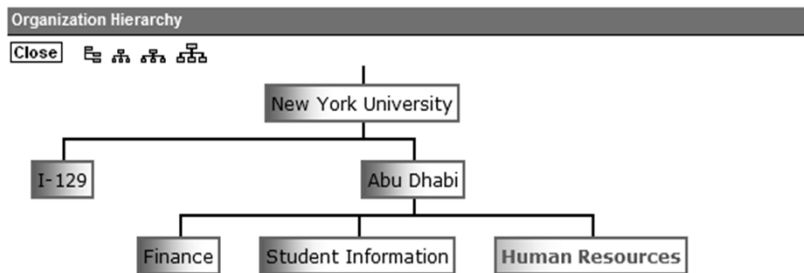
Using Business Processes And Technology To Assist In Compliance

- **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



Export On-Demand

SDN Screening and Deemed Export Management

TRADE CONTROL TECHNOLOGY

Partners | Trade Content | Admin | Content Manager

RPS Work Queue

Work Queue: Potential Matches (1) | Item 1 of 1

Screening Results

Save | Escalate | Stop | Name Configuration | Address Configuration

Screening Details

Status : Potential Match
 Match Score : 100%
 Embargo : No

Searched By : NYU_ADMIN
 Searched Date : 05/22/2010 14:39:46
 Add Note : (0)

Partner Information

Partner ID : N13754108
 Name : Berryberry, Carla
 Contact Name :
 Secondary Contact Name :
 Organization : HR

Address 1 : PO Box 27
 Address 2 :
 Address 3 :
 Address 4 :
 City : traA
 State / Province :
 Country :

Match Details

Save | Show Non Matches

Address Match Details (0)

Entity Id	List Name	Status Flag	Name	Match Score	Match	Notes
ENTTY310534 (4)						
ENTTY310534	EU-CFSP-C	⊞	P.O. Box 27 Nat. West Provinces TO	100%	Maybe	
ENTTY31464 (0)						
ENTTY31464	OFAC-SUDAN	⊞	P.O. Box 27 El Obeld SD	100%	Maybe	

Save

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