

SCCE HIGHER EDUCATION COMPLIANCE CONFERENCE FINANCIAL RISK MONITORING IN HIGHER EDUCATION JUNE 3, 2020

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GOALS OF THIS PRESENTATION

- Financial Risk in higher education overview
- Scan of current environment
- Compliance officer role and risks
- Massachusetts leads the way
- 5 issues to take back

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Preliminary Matters

Disclaimer: Views and tips are my own and not necessarily those of the AGO, do not constitute official guidance from the AGO and are not intended to serve as a statement of the law or as an official AGO opinion, but rather advice based on my experience and offered to help board members and potential board members. Many official guidance documents are available on the AG Website: www.mass.gov/ago/charities

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PRELIMINARY MATTERS - JIM

Disclaimers: I could be wrong or change my mind with new information. Your state laws may vary. This is a developing area of the law, and professional advice should address your institution's issues. Official New York statutes, regulations, guidance documents, webinars, and forms are available on the AG Website: CharitiesNYS.com

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COMPLIANCE IN FINANCIAL HARD TIMES

- What do you need to know?
- What compliance issues should you anticipate?
- What role should compliance function play in reporting, risk assessment, strategic planning, decision-making at board and c-suite level?
- Risk identification, process involvement, review vs. ownership
- What expertise do you need (or need access to)

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COMPLIANCE REGULATORS - HARD TIMES

- US DOE
- State educational agencies
- State charities regulatory agencies (Attorney General, Department of State)
- Accreditation agencies (Higher Learning Commission, regional agencies)
- Media
- Private counsel

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FINANCIAL RISK IN HIGHER EDUCATION – THE FUTURE IS HERE (Fire at the Waldorf)

- Forbes August 2017 College Financial Grades: How Fit is Your School? Grades A plus to D- (Nobody gets an F)
- Edmit study 2019 : 946 private colleges studied based on USDOE IPEDS data 2002-2017: Prior to Corona, 235 private colleges and universities in significant danger of closing in next six years. Edmit Now 345, if school stays on current path. Boston Globe 5/8/2020
- Edmit: consumer reports for students and parents
- Edmit: four variables -
 - Investment return on endowment (higher is better)
 - Tuition prices (revenue generation, competitive position)
 - Tuition discounting (revenue loss)
 - Faculty and staff salaries

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WHAT HAPPENS TO OFFICERS, DIRECTORS, COMPLIANCE OFFICERS, WHEN SURVIVAL AND MISSION ISSUES ARE IDENTIFIED?

- Board and senior leadership of College of New Rochelle
- Miriam Nelson, President of Hampshire College
- Jeb Spaulding, Chancellor of Vermont State Colleges
- Susan Scrimshaw, President of Russell Sage colleges
- Kevin Quigley, President of Marlboro College
- James Jones, President and Board Chair Paul Rice of Sweet Briar College

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STATE, ACCREDITING AGENCY, AND FEDERAL EXPECTATIONS – SCHOOLS AT RISK NEED AN ESTATE PLAN (34 CFR 600.2)

- Teach-out agreement means a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study.
- Teach-out plan means a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.
- https://www2.ed.gov/admins/finaid/accred/accreditation_pg12.html

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FINANCIAL RISK IN HIGHER EDUCATION – THE FUTURE IS HERE

- Pre-Corona Basis: geographic distribution; declining number of 18 year olds; pricing; loan shock; tuition discounting for enrollment
- Now: loss of foreign student enrollment; declining public support for public subsidy; value of residential education given technological alternatives (Scott Galloway, NYU); Zoom boom.
- Even for those institutions who survive, uncertainty, difficult decisions about which programs to continue; mergers; affiliations; acquisitions
- Delays in required approvals

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FINANCIAL RISK IN HIGHER EDUCATION – THE FUTURE IS HERE

- Characteristics of colleges often at risk:
- Low endowments/tuition dependent
- Rural locations or local student body
- Significant percentage of first-in-family students, financial challenges
- HBCUs
- Traditional single sex education institutions

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Massachusetts Leads the Way

- Boston Metro-highest percentage of private college students in US (CityLab)
- Colleges with significant issues
- Regulatory analysis and response
- Model for other states in protecting students
- Preventing self-fulfilling prophecies

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Mass. AGO Role: Oversight of Public Charities

- AGO Jurisdiction:
 - “Public Charities” & Professional Fundraisers
- AGO Role:
 - Due Application, Proper Administration of Funds
- Fiduciary Duties
 - Duty of Care
 - Duty of Loyalty

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Mass. BHE/DHE Role: Oversight of Degree-Granting Institutions

- Board of Higher Education
 - Members are appointed
 - BHE confers degree-granting authority on higher education institutions
- Department of Higher Education
 - DHE staff support the efforts of the BHE
 - DHE handles all aspects of institutional closures
 - Reviews closing plans, including teach-outs and curriculum mapping
- Institutional Closures
 - Closing institutions must provide the DHE with notice of their intent to close “as far as possible in advance,” see 610 CMR 2.07(3)(f)(2)
 - DHE provides submission template for Notice of Closure

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Coordination Between AGO and BHE/DHE

- Institutional closures: close coordination
- BHE/DHE has primary authority
 - Coordinate with institutions on closing plans
 - Focus on securing appropriate transfer opportunities
 - Also includes review of merger plans
- AGO role
 - Review significant asset sales
 - Fiduciary duty concerns
 - Student outcomes/consumer protection
 - Judicial request to modify and/or transfer restricted funds

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College Closures and Mergers: 2018 as Case Study

- Merger: Wheelock College and Boston University
 - Smooth transition, minimal AGO role
- Precipitous Closure: Mount Ida College
 - First phase: review of asset sale (see letter of 05/15/18)
 - Second phase: investigation (see letter of 03/13/19)
- Closure with Notice: Newbury College
 - Closure announcement one semester prior to closing
 - Significant work with DHE to smooth student transitions

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BHE and Legislative Response

- Post-Mount Ida: BHE forms THESIS Working Group
 - THESIS Report recommends enhanced financial monitoring
 - Contingency planning and student notification
- Legislative Response
 - Enhanced financial monitoring
 - Board training requirements
 - Clearly defined DHE authority
 - Final legislation signed November 14, 2019

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Mandatory Board Training

- Legislation requires training for Board members
- Public Institutions:
 - Training every four years
 - Topics covered include: open meeting law, public records law, conflicts of interest, state procurement, state finance law, fraud prevention, and fiduciary responsibilities
- Private Institutions:
 - Training every four years
 - Topics covered include: higher education financial metrics, fiduciary responsibilities, applicable accreditation standards

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WHAT ARE THE RESPONSIBILITIES OF OFFICERS, DIRECTORS, COMPLIANCE OFFICERS?

- State Charities expectations:
- Look to your charter and IRS 990-
- College of New Rochelle: “dedicated to the education of women and men in the liberal arts and professional studies. Building upon its original commitment to women, the College also reaches out to those who have not previously had access to higher education. . . .”
- Charitable mission-providing education to charitable beneficiaries
- Acting in best interest of that charitable mission
 - Stewardship of assets
 - Risk assessment
 - Potential harms to students
 - Planning for the mission to continue if the institution or program cannot
 - Avoiding run on the bank-public projection may be self-fulfilling

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WHAT ARE THE RESPONSIBILITIES OF OFFICERS, DIRECTORS, COMPLIANCE OFFICERS?

- NECHE STANDARD FOR ACCREDITATION SEVEN: INSTITUTIONAL RESOURCES
- The institution has sufficient human, financial, information, physical, and technological resources and capacity to support its mission. . **The institution demonstrates, through verifiable internal and external evidence, its financial capacity to graduate its entering class.** The institution assures effective systems of enterprise risk management, regulatory compliance, internal controls, and contingency management.

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NECHE STANDARDS FOR ACCREDITATION

- **7.17 annual audit-** Board policies and institutional practices ensure the independence and objectivity of the auditor and the appropriate consideration of the audit by the governing board.
- **7.18 fundraising efforts** conducted in accordance with policies that stipulate the conditions and terms under which gifts are solicited and accepted. The institution accurately represents itself and its capacities and needs to prospective donors and accurately portrays the impact that their gifts can reasonably be expected to have. Gifts are promptly directed toward donors' intentions.
- **7.19 All fiscal policies clearly stated in writing**, including those related to budgeting, investments, insurance, risk management, contracts and grants, internal transfers and borrowing, fundraising, and other institutional advancement and development activities, consistently implemented
- **7.20 Mechanisms to evaluate its financial status** including fiscal condition, working capital, capital projects, cash flow requirements, and financial management

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CHARITIES COMPLIANCE ISSUES

- Meeting payroll risks
- "Gift instrument" (includes "institutional solicitation")
- Payroll tax payments (zero is a bad number)
- Prudent Management of "Institutional Funds"- Investment policy, board oversight
- "Restricted Assets"- identification and "appropriation"
- Restricted Assets – "borrowing" from endowment
- Restricted Assets - cy pres and removal of restrictions

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CHARITIES COMPLIANCE ISSUES

- Deaccessioning - selling off assets in collections (museum, library, art)
- Fisk University, Berkshire Museum
- Regulatory thicket - education regulators, charities regulators, museum regulators, professional associations, provenance verification
- If you decide to sell, what restrictions do you put on the buyer

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Five Compliance Officer Financial Monitoring Takeaways

- The independent audit process - state law, accreditation standards, reporting and disclosure, warning signs (going concern opinion, management letters)
- The IRS 990 process - Mission Statement, Governance Standards (Section VI); financial statements; conflicts of interest statements (Schedule O); signers; board review and filing.
- The endowment/institutional funds process - identification of restricted assets; return and appropriation of funds; investment and management policies (See Mass. Guidance)
- The accreditation process - preparation and submission of materials-are you a participant
- The teachout process - “The institution demonstrates, through verifiable internal and external evidence, its financial capacity to graduate its entering class. “-you need to see the demonstration. If in doubt, you need to participate in teachout planning.

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Resources

- AGO website: www.mass.gov/ago/charities
- BHE/DHE website: www.mass.edu
- DHE forms (distributed)
- 2019 Legislative Enactments (distributed)
- 610 CMR 13.00 (distributed)
- AGO Mount Ida College letters (distributed)

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NY CHARITIES BUREAU INFORMATION

- AG.NY.GOV “Guidance on Coronavirus Resources”
 - Select a Topic drop down menu
- CHARITIESNYS.COM - Guides and Publications-
 - NYPMIFA Guidance
 - Audit Committee Requirements and Responsibilities
 - “Guidance for Charitable Nonprofit and Religious Corporations Facing the Challenges of the COVID-19 Pandemic”
 - Ongoing influential emails - send us your email address, we will put you on the list
 - James.Sheehan@AG.NY.GOV

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