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## Establishing a Culture of Compliance: Applying Corporate Compliance Principles to a University Setting

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# ESTABLISHING A CULTURE OF COMPLIANCE: APPLYING CORPORATE COMPLIANCE PRINCIPLES TO A UNIVERSITY SETTING

## I. INTRODUCTION

Suppose you are an administrator at a college or university. A student has successfully brought a Title VII sexual harassment lawsuit against your university for its deliberate indifference and failure to respond to complaints of unwanted sexual advances by a coach or professor.<sup>1</sup> Suppose a university employee pursues and wins a similar lawsuit for a department chair's sexually abusive behavior in the workplace.<sup>2</sup> Alternatively, suppose substantial federal funds normally made available to the university have been suspended because university employees have wrongfully disclosed confidential information of students in violation of federal statutes,<sup>3</sup> or that because of your university's discriminatory admissions practices, it is liable in a class action suit for substantial compensatory damages and injunctive relief.<sup>4</sup> How could you have prevented these events and what steps can you take to ensure that they do not continue?

These scenarios are merely a sampling of the significant legal questions and consequences of noncompliance associated with increasing requirements of the law in the university setting. As one commentator aptly noted, the "[l]aw's presence on the campus and its impact on the daily affairs of postsecondary institutions have grown continuously . . . . Litigation has extended into every corner of campus activity."<sup>5</sup> From providing equal access to scholarship funds to providing

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1. See *Zimmer v. Ashland U.*, No. 1:00CV0360, 2001 U.S. Dist. LEXIS 15075, at \*19 (N.D. Ohio Sept. 5, 2001).

2. See *Campbell v. Kan. St. U.*, 780 F. Supp. 755, 757 (D. Kan. 1991) (mem. opinion).

3. See *Gonzaga U. v. Doe*, 536 U.S. 273, 278–279 (2002); 20 U.S.C. § 1232g(b)(1) (“No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . . ) of students without the written consent of their parents to any individual, agency, or organization.”).

4. See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

5. William A. Kaplan & Barbara A. Lee, *The Law of Higher Education*, 1 (3d ed., Jossey-Bass Publishers 1995).

access to student organizations, universities must be cautious of possible liability at every turn. In addition, universities assume many important roles including, but not limited to, employer, landlord, researcher, and provider of goods and services. Such roles and activities, if not performed in compliance with the law, provide fertile ground for lawsuits resulting in costly litigation and increased regulatory scrutiny.

In consideration of their immense legal obligations to students, faculty, and third parties, and in response to recent landmark changes in the law, some universities, like their counterparts in the corporate world, have found answers by engaging in preventative measures. Specifically, they have established compliance programs based upon similar regimes existing in the corporate realm. Unfortunately, however, there is very little literature providing specific information on compliance programs in the university context.

This comment provides a guide to colleges and universities that are considering establishing compliance programs by applying governing corporate law. It discusses the relative merits of establishing a compliance program, concluding that, in light of the risk and costs of liability, universities should create and implement a compliance program carefully tailored to their respective needs. Part II discusses recent developments in the law that has caused universities to implement systems of compliance. Part III describes the best practices for developing an effective compliance program. Part IV weighs the policy advantages and disadvantages that a compliance program presents. Part V offers a brief conclusion.

## II. BACKGROUND

Much of the recent attention to compliance programs arises out of three major changes in the law: Federal Sentencing Guidelines criteria,<sup>6</sup> the landmark case *In re Caremark International Inc. Derivative Litigation*,<sup>7</sup> and the passage of the Sarbanes-Oxley Act.<sup>8</sup> Although these changes directly affect corporations, they are relevant in university settings because universities encounter similar problems and have similar roles as corporations.

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6. 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k) (2003).

7. *In re Caremark Intl. Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (hereinafter *Caremark*).

8. *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (2002).

### A. Federal Sentencing Guidelines

In 1991, the United States Sentencing Commission enacted corporate sentencing guidelines, designed to establish a uniform set of sanctions for corporations convicted of violating federal criminal statutes.<sup>9</sup> According to these guidelines, a sentencing court is to impose fines based on the severity of the criminal conduct and the culpability of high-level personnel in circumstances where there was “tolerance of the offense.”<sup>10</sup> In addition, a corporation can also be penalized with years of probation, thus permitting the court to reduce the likelihood of further criminal conduct by intrusive monitoring of day-to-day operations.<sup>11</sup>

These guidelines provide a way for a corporation to mitigate its sentence and significantly reduce fines and penalties.<sup>12</sup> As a part of sentencing, the guidelines instruct a court to examine a corporation’s compliance efforts and investigate whether an organization exercised due diligence in seeking to “prevent and detect criminal conduct by its employees and other agents.”<sup>13</sup> The guidelines also provide the minimum requirements for an “effective program to prevent and detect violations of law.”<sup>14</sup> By combining harsh penalties with the opportunity to mitigate, these guidelines “offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”<sup>15</sup> This compliance-based approach has been carefully emulated in other legal fields.<sup>16</sup>

### B. The Caremark Decision

In *Caremark*, shareholders of Caremark International, a healthcare business, brought a derivative lawsuit against the corporation after it was criminally charged for employees’ violations of federal and state laws

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9. See 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k); John F. Fatino, *Corporate Compliance Programs: An Approach to Avoid or Minimize Criminal and Civil Liability*, 51 Drake L. Rev. 81, 88 (2002).

10. See H. Lowell Brown, *The Corporate Director’s Compliance Oversight Responsibility in the Post Caremark Era*, 26 Del. J. Corp. L. 71, 80–81 (2001).

11. See *id.*; Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 Bus. L. 617, 653 (1994).

12. Kimberly D. Krawiec, *F. Hodge O’Neal Corporate and Securities Law Symposium: After the Sarbanes-Oxley Act: The Future Disclosure System: Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U.L.Q. 487, 499 (2003) (noting that the presence of internal compliance structures can reduce fines by up to sixty percent).

13. See 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k).

14. *Id.*

15. *Caremark*, *supra* n. 7, at 969. See also Brown, *supra* n. 10, at 86–87.

16. See Brown, *supra* n. 10, at 86–87.

applicable to health care providers.<sup>17</sup> As a part of a plea agreement in the criminal suit, Caremark was required to pay over \$250 million in reimbursements to private and public parties and payment of civil and criminal fines.<sup>18</sup> In the shareholders derivative suit which followed, Caremark's board of directors was charged with breaching a fiduciary duty of care to Caremark by not preventing its employees from committing violations of state and federal laws.<sup>19</sup> The court held that boards of directors are responsible for establishing reporting mechanisms that will ensure awareness of violations, misconduct, and other compliance issues.<sup>20</sup> In addition, "a sustained and systematic failure of the board to exercise oversight . . . will establish the lack of good faith that is a necessary condition to [director] liability."<sup>21</sup> The court also wrote that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system exists" that is "reasonably designed to provide senior management and to the board itself timely, accurate information sufficient to allow management and the board . . . to reach informed judgments concerning both the corporation's compliance with the law and its business performance."<sup>22</sup>

The landmark *Caremark* decision has had a profound effect on the corporate world. As one commentator noted, in the wake of *Caremark*, seminars and workshops were conducted where "corporate counsel and private practice attorneys learned how directors [could] avoid this newly expanded liability for their company's compliance with a host of local and global regulations."<sup>23</sup> Corporations began adjusting current governance plans or implementing compliance programs to be in line with the *Caremark* decision.<sup>24</sup>

*Caremark's* impact has also been felt in the courts<sup>25</sup> and in opinions

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17. *Caremark*, *supra* n. 7, at 960.

18. *Id.* at 960–961.

19. *Id.* at 960.

20. *See id.* at 970.

21. *Id.* at 971.

22. *Id.* at 970.

23. *Caremark Impact Continues to Grow, Board Oversight Duty Expands*, 13 Corp. Officers and Dirs. Liab. Litig. Rptr. 18 (June 22, 1998).

24. *See id.*; *Experts Identify Necessary Features of Effective Corporate Compliance Plans*, 67 The United States L. Week 2559 (1999).

25. *See e.g. In re Abbott Laboratories Derivative Shareholders Litig.*, 325 F.3d 795, 809 (7th Cir. 2003) (Relying on the logic of *Caremark*, the court found that "the facts support a reasonable assumption that there was a 'sustained and systematic failure of the board to exercise oversight,' in this case intentional in that the directors knew of the violation of the law, took no steps in an effort to prevent or remedy the situation, . . . result[ing] in substantial corporate losses, establishing a lack of good faith."); *McCall v. Scott*, 239 F.3d 808, 817 (6th Cir. 2001) (holding that directors' sustained failure to act against a corporation's systematic health care fraud offered sufficient facts "to present a

issued by federal agencies. The United States Department of Justice ratified the *Caremark* decision, counseling prosecutors responsible for federal prosecution of business organizations to consider whether a corporation established effective corporate compliance mechanisms.<sup>26</sup> In addition, the U.S. Office of the Inspector General (OIG) issued compliance program guidelines for the healthcare industry that tracked the *Caremark* ruling.<sup>27</sup>

### C. Sarbanes-Oxley Act

The Sarbanes-Oxley Act “significantly expands the importance of internal auditing compliance structures in securities laws.”<sup>28</sup> Enacted in 2002 in response to the Enron and World-Com corporate accounting scandals, this Act establishes new regulations for the public accounting profession and creates new criminal penalties for corporate finance-related crimes of publicly traded companies.<sup>29</sup> The Act also establishes corporate responsibility rules and procedures for corporate executives, boards, and legal counsel.<sup>30</sup> The main purposes of the Act are three-fold: (1) to improve the accuracy and reliability of corporate disclosures; (2) to promote corporate compliance with federal, state, and local laws; and (3) to prevent similar scandals from occurring in the future.<sup>31</sup>

These purposes are embodied in three important requirements. First, the Act requires a company’s board of directors to establish auditing, quality control, and ethical standards to be used in preparation and issuance of audit reports.<sup>32</sup> When formulating these standards, protecting the public interest and investors is paramount.<sup>33</sup> Second, the board is required to establish an audit committee.<sup>34</sup> Each member of the committee must be independent and have no other affiliation with the firm besides acting in his or her capacity as a member of the board.<sup>35</sup> The

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substantial likelihood of liability”).

26. See Memo. from Larry D. Thompson, Dep. Atty. Gen. of the U. S., to Heads of Dept. Components U. S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) <[http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm)>.

27. See *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. 8987 (Feb. 23, 1998).

28. Krawiec, *supra* n. 12, at 502.

29. Michael Peregrine & Howard Zweig, *Sarbanes-Oxley, Corporate Responsibility, and Colleges and Universities*, 1 NACUA Notes (Dec. 18, 2002) (available at <[http://www.nacua.org/nacualert/docs/sarbanes\\_oxley\\_note\\_121702.htm](http://www.nacua.org/nacualert/docs/sarbanes_oxley_note_121702.htm)>).

30. *Id.*

31. *Sarbanes-Oxley Act of 2002*, H.R. 3763, 107th Cong. § 1(a) (2002).

32. *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, §103(a)(1), 116 Stat. 745 (2002).

33. *Id.*

34. *Id.* §205(a).

35. See *id.* §301; Brian Kim, *Recent Development: Sarbanes-Oxley Act*, 40 Harv. J. on Legis.

purpose of the committee is to oversee the firm's accounting and financial reporting processes and to audit its financial statements.<sup>36</sup> It should also discuss the corporation's fundamental risks and evaluate its policies for managing those risks.<sup>37</sup>

A third important requirement of the Act involves the disclosure of information related to internal controls and the certification of reports. A corporation's principal officers are required to investigate annual and quarterly reports and certify that, "based on the officer's knowledge, the report does not contain any untrue statement of material fact or omit to state a material fact necessary in order to make the statements . . . not misleading."<sup>38</sup> Failure to certify can result in severe fines up to \$5 million, imprisonment of not more than twenty years, or both.<sup>39</sup>

In response to these landmark changes in the law, and recognizing their own complex and diverse legal duties, colleges and universities, especially those with large research and medical branches, have recently focused on establishing effective compliance programs.<sup>40</sup> For example, the University of Texas System, composed of nine academic universities and six health institutions,<sup>41</sup> has implemented a system-wide compliance program, training over 70,000 of its employees "to do the right thing, conducting risk assessments, and monitoring operational activities to reduce risk."<sup>42</sup> As a result, its "institutional compliance programs are dramatically improving the compliance culture" throughout the University of Texas System.<sup>43</sup> Due to the program's enormous success, the University of Texas System has been recognized as a model compliance program, receiving awards, publishing its methodologies, and conducting annual national conferences on the topic of effective compliance systems.<sup>44</sup>

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235, 243 (2003).

36. See Pub. L. No. 107-204 at §205(a).

37. R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 Mercer L. Rev. 829, 866 (2003).

38. Pub. L. No. 107-204 at §302 (a)(2).

39. *Id.* §906(c).

40. See e.g. The U. of Tex. Sys., *System Wide Compliance Program* <<http://www.utsystem.edu/compliance/about/aboutpgm.htm>> (accessed Feb. 28, 2004); U. of Vanderbilt, *Compliance Program* <[http://www.vanderbilt.edu/compliance/html/office\\_main.htm](http://www.vanderbilt.edu/compliance/html/office_main.htm)> (accessed Feb. 28, 2004).

41. The U. of Tex. Sys., *UT System Fast Facts* <<http://www.utsystem.edu/News/FastFacts.htm>> (last updated May 2003).

42. The U. of Tex. Sys., *System Wide Compliance Program* <<http://www.utsystem.edu/compliance/about/aboutpgm.htm>> (accessed Feb. 28, 2004).

43. *Id.*

44. See *id.*

## III. BEST PRACTICES

Although there is no single formula for an effective compliance program, colleges, universities, and commentators have established minimum standards for compliance. These standards are based upon three models for compliance programs: Federal Sentencing Guidelines criteria;<sup>45</sup> Defense Industry Initiative on Business and Ethics and Conduct,<sup>46</sup> which govern compliance programs for Defense Department contractors; and the Office of Inspector General Compliance Program Guidance for Hospitals.<sup>47</sup> Regardless of which model is followed, the hallmark of an organization's effective compliance program is due diligence in seeking to prevent and detect unlawful conduct of its employees and other agents.<sup>48</sup> By adhering to the following six elements, which draw on both corporate and university compliance regimes, university officials can ensure that the university community is substantially complying with all applicable state and federal laws, therefore avoiding increased regulatory scrutiny, costly liability, and a tarnished reputation.<sup>49</sup> These six elements are: selecting a compliance officer, establishing a code of conduct, training, establishing an independent reporting mechanism, monitoring and auditing, and enforcement.

A. *Selecting a Compliance Officer*

The first element necessary to create a successful compliance program is the selection of the compliance officer, endowed with a reporting regime and an advisory body such as a compliance committee.<sup>50</sup> University officials must decide whether to select someone within the university community or hire an outside person with compliance officer expertise. The advantage of hiring someone internal to the university is that he or she would be familiar with the university, its programs, and its employees.<sup>51</sup> However, an external candidate has the advantage of bringing a fresh approach to the community, and may

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45. *Id.* 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k) (2003).

46. Defense Industry Initiative, *Principles* <<http://www.dii.org/Principles.htm>> (accessed Feb. 28, 2004).

47. See *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. 8987 (Feb. 23, 1998).

48. Brown, *supra* n. 10, at 108.

49. See David B. Crawford et al., *Effective Compliance Systems: A Practical Guide for Educational Institutions* 2 (2001) (weighing the consequences of noncompliance with the benefits of compliance).

50. Barbara E. Walsh et al., Natl. Assn. of College and U. Bus. Officers, *The Compliance Umbrella*, Bus. Officer 18 (Jan. 2000) <<http://www.nacubo.org/search>> (accessed Feb. 28, 2004).

51. See *id.*



be able to detect problems unseen by someone who has been at the university for years.<sup>52</sup> Regardless of whether the compliance officer is chosen externally or internally, the person selected must be someone who is highly ethical, trustworthy with sensitive and confidential information, and sufficiently influential with the faculty, staff, administration, and other members of the campus community to promote adherence to compliance standards.<sup>53</sup> University officials must also select someone who they are willing to include in the highest levels of university administration.<sup>54</sup>

The compliance officer must also have certain skills. For example, according to the University of Oklahoma's selection criteria, a compliance officer must have . . .

- (b) Effective analytical skills required to direct regulatory monitoring;
- (c) Effective public speaking skills and the ability to articulate complex regulatory information in understandable terms;
- (d) Effective interpersonal skills required to work with University officers and employees as well as government representatives;
- (e) Effective organizational and planning skills as well as the ability to handle multiple tasks simultaneously;
- (f) effective writing skills; [and] (g) Thorough understanding of the laws and regulations which apply to the areas covered by [the] Program and the ability to identify the legal issues and refer them to the Office of Legal Counsel.<sup>55</sup>

While this list of qualifications is neither exhaustive nor required by law, it aptly illustrates the highly-skilled, competent, and organized person a university should acquire to meet the demanding position of compliance officer.

University officials must also decide if overseeing compliance activities is going to be this individual's sole responsibility, or if it will be added to already existing management responsibilities.<sup>56</sup> This decision may depend on the size and complexity of the task and the resources available to the compliance program.<sup>57</sup>

Once university officials select a compliance officer, they must establish a reporting structure<sup>58</sup> "reasonably designed to provide management and the board of directors with timely and accurate

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52. *See id.*

53. *See id.*

54. *See id.*

55. U. of Okla., *University of Oklahoma Compliance and Quality Improvement Program* § 4.02 <[http://www.ouhsc.edu/compliance/compliance\\_program.htm](http://www.ouhsc.edu/compliance/compliance_program.htm)> (accessed Feb. 28, 2004).

56. *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8993.

57. *Id.*

58. Walsh et al., *supra* n. 50.

information sufficient to allow them to reach an informed decision regarding the [university's] compliance with the law."<sup>59</sup> In the corporate setting, the compliance officer reports to the vice president who in turn reports to the CEO or the board of directors.<sup>60</sup> In the university setting, reporting structures vary. The compliance officer may report to the board of trustees, the university president, the provost, the general counsel, or other senior officers of the administration.<sup>61</sup> Although reports need only be given periodically, commentators agree that it is critical that the compliance officer have day-to-day contact with top management.<sup>62</sup> Reportable items include conveying information on the operation and the progress of the compliance program, giving particular focus to "high risk" areas and to those instances of noncompliance that require executive action.<sup>63</sup>

In addition to being equipped with a reporting system, the compliance officer should also have an advisory body to support him or her and to provide input and feedback on the compliance program.<sup>64</sup> Experts suggest the committee be composed of six to twelve members and meet regularly, at least every other month.<sup>65</sup> Officials should carefully select committee members who will provide the compliance officer with the broadest base of information and resources.<sup>66</sup> The committee may include faculty, deans, department chairs, high-level administrators, as well as subject area experts in finance, internal audit, human resources, and regulatory compliance.<sup>67</sup> The committee should review the compliance program's activities; provide feedback on program initiatives, policies, and procedures; describe concerns of the campus community; and analyze program problems and challenges.<sup>68</sup>

### B. *Establishing a Code of Conduct*

The next step in creating an effective compliance program is establishing a written code of conduct or ethics.<sup>69</sup> This code "is important to provide an ethical framework for the compliance

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59. Memo. from Larry D. Thompson, *supra* n. 26.

60. Walsh et al., *supra* n. 50.

61. *See id.*

62. *See id.*

63. Crawford et al., *supra* n. 49, at 31.

64. Walsh et al., *supra* n. 50.

65. *Id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *Id.*; *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8989.

activities.<sup>70</sup> It should define the compliance program and the related roles and responsibilities of those involved.<sup>71</sup> It should also include formal ethics requirements and a formal compliance statement by the institution itself.<sup>72</sup>

According to one commentator, an ideal code of ethics in a business setting includes: (1) a statement of the company's commitment to comply with all applicable federal, state, and local laws in conducting its business activities; (2) guidelines for company employees to follow in business dealings; (3) a statement warning employees that immediate discipline will follow known violations of applicable laws, regulations, standards of professional ethics, and the code of conduct; (4) a statement that encourages employees to report or inquire about any act or practice that may be ethically questionable or otherwise against applicable laws, regulations, or the code of ethics; and (5) information offering alternative methods of reporting compliance violations, including anonymous reports.<sup>73</sup>

Applying these elements to the university setting, Vanderbilt University provides an excellent example of an ideal code of ethics.<sup>74</sup> First, the *Standards of Conduct* provide that the university "is committed to compliance with all applicable laws, rules, and regulations. It is the responsibility of each member of the University . . . to follow, in the course and scope of their employment at Vanderbilt, all applicable laws, rules, regulations, and University policies . . ." <sup>75</sup> Second, the university outlines specific guidelines regarding research and health care services, discrimination, environmental protection, and conflicts of interest for employees to follow.<sup>76</sup> Third, the *Standards* warn that employees who engage in known violations of the law, approve improper acts in a supervisory role, or fail to report such acts and violations will be subject to disciplinary action or termination.<sup>77</sup> Fourth, the *Standards* encourage "all faculty, staff, and representatives . . . to report violations of any law or policy to a supervisor or a Compliance Officer."<sup>78</sup> Employees desiring to make a report of a violation may call the University Compliance Office

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70. Walsh et al., *supra* n. 50.

71. See e.g. Wake Forest U., *Wake Forest Office of Compliance: Key Roles and Responsibilities* <<http://www.wfubmc.edu/compliance/staff.html>> (last updated May 7, 2002).

72. See Brown, *supra* n. 10, at 130.

73. *Id.* at 120.

74. Vanderbilt U., *Vanderbilt University Compliance Program and Standards of Conduct* <[http://www.vanderbilt.edu/facman/ComplianceProg\\_StandCond.pdf](http://www.vanderbilt.edu/facman/ComplianceProg_StandCond.pdf)> (accessed Mar. 23, 2004).

75. *Id.*

76. See *id.*

77. See *id.*

78. *Id.*

directly or use an anonymous, confidential helpline.<sup>79</sup>

At the university level, many of these policies may already be in place and need only be summarized in a compliance office mission statement.<sup>80</sup> Drafters of the code of ethics should be careful to avoid redundancy, ambiguity, and conflict with current policies.<sup>81</sup>

### C. Training

Once a code of standards is completed, the university community must be trained to understand the program's requirements.<sup>82</sup> Federal Sentencing Guidelines require an organization to use due care to effectively communicate its standards and procedures to all of its employees.<sup>83</sup> The compliance officer accomplishes this step by requiring employees to participate in training programs that notify employees of their legal and ethical obligations and the standards of conduct by which their behavior will be measured.<sup>84</sup> The officer should also emphasize the university's commitment to compliance with the law.<sup>85</sup> New employees especially should be trained early in their employment.<sup>86</sup> Training may be conducted through a variety of methods, including live workshops, videotapes, and online training sessions.<sup>87</sup> Regardless of the chosen method, effective training should be conducted on a regular basis.<sup>88</sup>

The compliance officer should also disseminate the code of conduct to the university community, informing all employees of the compliance program via announcements in faculty and staff meetings, memoranda, newsletters, email alerts, and/or the official campus web site.<sup>89</sup> As one commentator notes, the "visibility of the program leads to its success."<sup>90</sup>

Commentators also suggest that education programs should not only provide employees notice of the requirements, but also expertise in

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79. *See id.*

80. Crawford et al., *supra* n. 49, at 40.

81. *Id.*

82. *See* Barbara E. Walsh et al., *A Model Operating Process*, Bus. Officer 42 (Mar. 2000) <<http://www.nacubo.org/search>> (hereinafter *Model*).

83. 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k)(4) (2003).

84. Brown, *supra* n. 10, at 121.

85. *See Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8997.

86. *See id.* at 8994.

87. *See* Kirk S. Jordan & Joseph E. Murphy, *Compliance Programs: What the Government Really Wants*, in *Practicing Law Institute & Carole L. Basri et al., Corporate Compliance 2001* vol. 1, 127, 151 (Practicing L. Inst. 2001).

88. *Model, supra* n. 82.

89. *See* Walsh, *supra* n. 50.

90. *See Model, supra* n. 82.

complying with them.<sup>91</sup> As a result, the compliance officer should develop a curriculum of general compliance training tailored to the university's different activities.<sup>92</sup> If compliance with a rule or regulation requires expertise beyond that of the compliance officer, the officer should find an expert in the subject area to conduct the training.<sup>93</sup> To accomplish this, the compliance officer will need the support of the deans of the colleges and department chairs.<sup>94</sup> The compliance officer is encouraged to document any training that occurs.<sup>95</sup>

#### *D. Establishing an Independent Reporting Mechanism*

The fourth element of an effective compliance program is establishing an independent reporting mechanism that allows members of the university community to report potential violations of law or university policy.<sup>96</sup> The mechanism should make it possible for employees to make reports without fear of retribution or retaliation.<sup>97</sup> As a result, many universities and companies have implemented toll-free "hotlines" whereby employees may anonymously report suspicious behavior or inquire about the compliance program.<sup>98</sup> Commentators recommend that the compliance office carefully document each call's subject matter and have a "triage" process to assess whether the call requires immediate attention.<sup>99</sup> Additional training, increased oversight, or general communication can address minor instances of non-compliance.<sup>100</sup> Allegations of behavior that would expose the university to criminal or civil liability should be immediately referred to the university's general counsel for investigation and analysis.<sup>101</sup> Experts agree that a hotline benefits the university by causing compliance problems to surface before they become the subjects of lawsuits, regulatory actions, government audits, or negative publicity.<sup>102</sup>

Regardless of whether the university makes a hotline available, an open line of continuous communication must exist between the

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91. *See id.*

92. *See Crawford et al., supra n. 49, at 42.*

93. *See Model, supra n. 82.*

94. *Id.*

95. *Id.*

96. *See Brown, supra n. 10, at 141.*

97. *Id.*

98. *See Crawford et al., supra n. 49, at 97* (Other suggested methods include providing a P.O. Box specifically for written complaints.).

99. *See id.*

100. Walsh et al., *supra n. 50.*

101. *See Brown, supra n. 10, at 138.*

102. *See id. See also Crawford et al., supra n. 49, at 100.*

compliance officer and the university community.<sup>103</sup> Employees should be able to contact the compliance office with questions or concerns with regard to university policies or legal requirements.<sup>104</sup>

### *E. Monitoring and Auditing*

In addition to developing reporting mechanisms, the compliance officer should establish a monitoring and auditing system.<sup>105</sup> A consistent evaluation process is essential to a successful compliance program.<sup>106</sup> The purpose of monitoring is “(1) [t]o determine if policies and procedures have been communicated and are understood; (2) [t]o determine if training was effective; [and] (3) [t]o determine if current practices are in compliance with regulations.”<sup>107</sup>

One of the ways monitoring is achieved is by periodic, yet rigorous compliance audits conducted by internal or external auditors.<sup>108</sup> These audits should focus on the university’s degree of compliance with its own policies and procedures and examine the effectiveness of the compliance program.<sup>109</sup> For example, the auditor’s review “should include general awareness of the policies and procedures, the comprehensiveness of training, availability of individual assistance with respect to ethical or compliance issues, and the employees’ awareness and utilization of internal reporting mechanisms.”<sup>110</sup> An effective audit will also identify risk areas.<sup>111</sup>

Another way the compliance officer can monitor is by conducting periodic reviews to determine if the compliance program is meeting its desired results.<sup>112</sup> These reviews should occur, at a minimum, annually.<sup>113</sup> The reviews should verify that the university community is conforming to the code of conduct while exposing any deficiencies in the compliance program.<sup>114</sup> As a part of the review process, the compliance officer should consider a number of techniques, including on-site visits, review of relevant documentation of transactions and compliance efforts,

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103. See *Model*, *supra* n. 82.

104. See *id.*

105. See *id.*

106. *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8996.

107. *Model*, *supra* n. 82.

108. See *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8996.

109. See *Brown*, *supra* n. 10, at 139.

110. *Id.*

111. See *Crawford et al.*, *supra* n. 49, at 60.

112. See *Brown*, *supra* n. 10, at 143.

113. See *id.* at 121.

114. See *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8997.

and interviews with deans, department chairs, and other personnel involved with university management.<sup>115</sup> Audit and review findings should be reported to the president of the university, the provost, the board of trustees, and university legal counsel.<sup>116</sup> Substantial issues of compliance should be timely and rigorously investigated and resolved.<sup>117</sup>

#### F. Enforcement

The final and most critical step in an effective compliance program is implementing adequate enforcement controls and corrective action plans.<sup>118</sup> According to Federal Sentencing Guidelines, an organization exercises due diligence in its compliance program when its standards "have been consistently enforced through appropriate disciplinary mechanisms, including . . . discipline of individuals responsible for the failure to detect an offense" and "[a]dequate discipline of individuals responsible for an offense . . ."<sup>119</sup> Conversely, "the apparent failure to apply consequences to identified instances of noncompliance . . . is a death sentence for any compliance program."<sup>120</sup>

In addition to adversely affecting the compliance program, failure to take prompt corrective action can result in university liability. For example, in *Gebser v. Lago Vista Independent School District*, a student who was allegedly sexually harassed by a teacher sued a school district under Title IX. The Supreme Court found that where a school acts with deliberate indifference to its knowledge of alleged sexual harassment and takes no remedial measures to address the kind of harassment upon which a complaint is based, it may be liable for damages under Title IX.<sup>121</sup> Although this case applied directly to a secondary education setting, the courts have also applied this standard in university settings. In *Zimmer v. Ashland University*, for example, the court held Ashland University was liable for sexual harassment perpetrated against a student by the university's swimming coach.<sup>122</sup> Although the university had adequate sexual harassment policies and compliance procedures in place, it failed to properly take corrective action against the coach to stop the

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115. See *id.*

116. Brown, *supra* n. 10, at 140.

117. See *id.*

118. Walsh et al., *supra* n. 50.

119. 18 U.S.C.S. app. § 8A1.2, cmt. n.3(k)(6) (2003).

120. Crawford et al., *supra* n. 49, at 94.

121. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998). See also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644 (1999).

122. See *Zimmer v. Ashland U.*, No. 1:00CV0360, 2001 U.S. Dist. LEXIS 15075, at \*21 (N.D. Ohio).

harassment, and therefore it was found liable under the *Gebser* rule.<sup>123</sup>

Enforcement plans and corrective action procedures in cases of noncompliance should be documented and approved by the advisory committee, high-ranking university officials, and legal counsel.<sup>124</sup> Corrective action could take the form of additional training.<sup>125</sup> It could also be manifested by disciplinary action, measured on a case-by-case basis, restitution, or revising the compliance program to ensure that violations are not repeated.<sup>126</sup> Regardless of what measures are taken, the compliance officer must take prompt steps to investigate conduct and determine if a material violation of the law or the requirements of the compliance program has occurred.<sup>127</sup> Proper enforcement is crucial because the compliance officer must be able to demonstrate that neither the administration nor the faculty will condone misconduct.<sup>128</sup> Proper enforcement also ensures that changes in the university community are not merely cosmetic but are a direct result of the compliance program.<sup>129</sup>

#### IV. PROS AND CONS OF IMPLEMENTING A COMPLIANCE PROGRAM

With these six elements of a successful compliance program in mind, university officials should weigh the policy advantages and drawbacks of implementing a compliance program.

##### A. Advantages

The foremost concern of most universities may be the startup and maintenance costs associated with adopting and supporting an effective compliance program. These costs include employing a university compliance officer and support staff, creating a compliance office, and designing and implementing an effective compliance program. However, these costs may not be as expensive as they initially appear. Many universities may already be engaged in compliance activities and have compliance structures in place. For example, most universities have administrative departments devoted to: (1) risk management and safety;

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123. *Id.* at \*19. See also *Campbell v. Kan. St. U.*, 780 F. Supp. 755, 757 (D. Kan. 1991) (mem. opinion) (holding Kansas State University liable for failing to follow its own sexual harassment policy and neglecting to discipline a male employee who sexually harassed a female employee).

124. See *Model*, *supra* n. 82.

125. See *id.*

126. See *id.*; Memo. from Larry D. Thompson *supra* n. 26.

127. See *Compliance Program Guidance for Hospitals*, 63 Fed. Reg. at 8996.

128. See *Model*, *supra* n. 82.

129. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 Vand. L. Rev. 1343, 1408 (1999) (arguing that ethical reform in the corporate realm is largely cosmetic).



(2) equal employment; (3) preventing and responding to sexual harassment; and (4) effective and safe research methods. Because such regimes already exist and have experience with promoting compliance with the law, creating and implementing a centralized compliance program using these existing departments will be a relatively small burden.

Although universities will bear some increased costs for compliance programs, such costs are small in comparison to the huge explicit and implicit costs of noncompliance and illegality.<sup>130</sup> Explicit costs include substantial criminal and administrative penalties and fines for misconduct, civil damage awards or settlements from private lawsuits, and legal fees.<sup>131</sup> For example, in *Mota v. University of Texas Houston Health Science Center*, the Fifth Circuit affirmed the district court's award of over \$500,000 in compensatory damages, back pay, and attorney's fees to a university professor based on his claims against the university for sexual harassment and retaliation.<sup>132</sup> The court held that the university was liable because, in spite of university policy, it failed to exercise reasonable care to prevent and promptly correct the harassment, failed to reprimand and discipline the perpetrator, and deliberately engaged in retaliation against the professor.<sup>133</sup>

There are also many implicit costs of misconduct in the absence of an effective compliance program. For example, publicized misconduct could irreparably tarnish a university's reputation, resulting in a loss of thousands of dollars from public and private donors. Misconduct could also result in the withdrawal of federal funds.<sup>134</sup> Under the Family Education and Right to Privacy Act (FERPA), for example, a university that engages in a policy or practice that permits the release of education records or personally identifiable information to any individual or organization without written consent of the student or his parents is denied federal funds.<sup>135</sup> Other implicit costs may include heightened governmental scrutiny and accountability, lost employee productivity due to addressing legal problems, disruptions to university operations,

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130. See e.g. *In re Caremark*, *supra* n. 7, at 967.

131. See Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 Wash. U. L.Q. 375, 377 (1993).

132. *Mota v. U. of Tex. Houston Health Sci. Ctr.* 261 F.3d 512, 519 (5th Cir. 2001).

133. See *id.* at 526.

134. See e.g. U.S.C. §§ 2000d, 2000d-2 (denying federal funds under Title VI of the Rights Act to entities who engaged in discrimination on the basis of race, color, or national origin in federally assisted programs); 42 U.S.C. §§ 12132-12133 (2000) (denying federal funds under the Americans with Disabilities Act to entities who discriminate based on an individual's disability).

135. See U.S.C. § 1232g(b)(1) (2000).

and damaged employee morale.<sup>136</sup> Therefore, from a cost-benefit standpoint, implementing a compliance program in the university setting makes sense.

In addition to helping universities avoid severe consequences once misconduct has occurred, an effective compliance program equips university officials with a mechanism that provides early detection of misconduct. A compliance program establishes an infrastructure necessary to effectively gather information of possible misconduct through auditing, monitoring, reporting, and disbursing information pertaining to compliance with statutes, regulations, and policies.<sup>137</sup> As one commentator notes, this mechanism “allows an organization to address problems prospectively rather than reactively.”<sup>138</sup> University officials can contain the problem at its inception, preclude lawsuits, and otherwise minimize criminal or civil liability.

Even if lawsuits go forward, the courts have recognized that a compliance program can be used as a defense. For example, in *Kolstad v. American Dental Association*, an employment discrimination case, the Supreme Court held that where an employer makes a good-faith effort to comply with Title VII by implementing antidiscrimination policies, it may not be held vicariously liable for punitive damages for the actions of its agents contrary to such policies.<sup>139</sup> Indeed, “[w]here an employer has undertaken such good faith efforts at Title VII compliance, it ‘demonstrates that it never acted in reckless disregard of federally protected rights.’”<sup>140</sup>

### B. Disadvantages

Despite its many advantages, a compliance program is not without its drawbacks. Although it may be used as a defense in certain situations, it is important to note that a comprehensive and well-policed compliance program does not automatically guarantee favorable court treatment or immunity from suit.<sup>141</sup> In fact, compliance programs, if not followed by the members of the organization, can have the opposite effect. For

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136. See *id.*

137. See Kathryn Ehler-Lejcher, *The Expansion of Corporate Compliance: Guidance for Health Care Entities*, 25 Wm. Mitchell L. Rev. 1339, 1382 (1999).

138. Webb & Molo, *supra* n. 131, at 377.

139. *Kolstad v. Am. Dental Assn.*, 527 U.S. 526, 552 (1999).

140. *Id.* (quoting *Kolstad v. Am. Dental Assn.*, 139 F.3d 958, 974 (D.C. Cir. 1998) (J. Tatel, dissenting)). See also *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 983–984 (4th Cir. 1997) (“[I]n some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages.”).

141. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 663, 671 (1995).

example, in adhering to its compliance program, an organization will generate self-critical information and documentation about problems or risk areas.<sup>142</sup> Because many of these documents are not protected by attorney-client privilege or the work product doctrine, they are discoverable.<sup>143</sup> As a result, an organization “may collect and ultimately provide access to negative information that prosecutors, plaintiffs’ lawyers, competitors, and the media may use against it” in regulatory actions, civil lawsuits, or criminal trials.<sup>144</sup>

Because of this possibility, a university must ensure that once in place, its compliance program will meet its stated objectives. It also must be vigilant to initiate immediate corrective action and enforcement measures when problems come to its attention.<sup>145</sup>

## V. CONCLUSION

Recent changes in the law governing corporations and businesses have brought compliance structures and responsibilities to the forefront. Because they share many of the same characteristics and provide similar duties as corporations, colleges and universities would do well to establish effective compliance programs.

In creating and implementing such programs, university officials should consider the elements of an effective program. First, they should select and designate a compliance officer, endowed with an appropriate reporting structure and advisory body. Second, officials should develop a written code of conduct or ethics. Third, officials should ensure that the compliance office educates and trains the University community about the code of conduct and proper methods of compliance. Fourth, officials should establish an independent reporting mechanism, including maintaining a reporting hotline. Fifth, officials should ensure that the compliance office monitors and audits divisions of the University to identify risk areas. Sixth, officials should enforce corrective measures and, if necessary, take disciplinary action upon finding that the University or its employees are not in compliance with federal, state, or local laws. Some variation of these “essential building blocks of an effective [compliance] program” should be present in a university’s

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142. Webb & Molo, *supra* n. 131, at 379.

143. See *id.*; Edward S. Rapier, Jr., *The Federal Sentencing Guidelines for Organizations: How They Affect a Civil Practice*, 46 La. Bar J. 20, 22 (1998).

144. Webb & Molo, *supra* n. 131, at 380. See also Rapier *supra* n. 143, at 22; *Montgomery Ward & Co. v. Fed. Trade Comm.*, 691 F.2d 1322, 1325 n. 4 (9th Cir. 1982) (noting that Montgomery Ward’s own audits indicated a violation of its compliance program).

145. See Webb & Molo, *supra* n. 131, at 379.

compliance program.<sup>146</sup> University officials may want to observe how other universities who have already established compliance programs have implemented these elements.

Once a compliance program is established, commentators caution that in order to be effective, a compliance program “should not be a product of a formulaic checklist. Instead, a compliance program should be part of an overall culture of compliance”<sup>147</sup> devoted to “mak[ing] compliance a part of everyday activities at the institution.”<sup>148</sup> The program must instill in the university community an understanding that conformity with ethical and legal requirements is an integral part of the university’s mission and that deviation there from will not be tolerated.<sup>149</sup> Each element of an excellent compliance program will be most effective when it is performed with these objectives in mind.

*J. Derek Kearn\**

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146. Walsh et al., *supra* n. 50.

147. Brown, *supra* n. 10, at 129–30.

148. Crawford et al., *supra* n. 49, at 30.

149. *See id.*

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