

A NATIONAL DIALOGUE:
The Secretary of Education's Commission
on the Future of Higher Education

ISSUE PAPER

*Fifteenth in a series of Issue Papers released at the request of Chairman Charles Miller
to inform the work of the Commission*



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Date: April 21, 2006

To: Charles Miller, Chair
U.S. Commission on the Future of Higher Education

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Re: Some observations on the Federal regulation of higher education

Thank you for the opportunity to provide a few observations to the Commission regarding the current state of federal regulation of higher education. Ensuring that necessary regulatory burdens are fair and limited only to the scope necessary to achieve a legislative goal will allow campuses to use their resources to focus on their central educational mission.

Introduction.

Federal regulations at their best are a significant mechanism by which important human values are played out on our campuses – the right to privacy and confidentiality, the protection of intellectual property and academic freedom, access to education, the safety and dignity of each

person and equal opportunity to participate in campus life. Regulatory compliance is an important support to help these values flourish in our institutional cultures. A campus “culture of compliance” helps to preserve the core values underlying federal regulations. This includes, of course, preserving integrity in the administration by institutions of public funds. An example of a good regulation is the Campus Security Act requirement to post Campus Crime Alerts. This has not been unduly burdensome on our campus, yet it provides the most important information about campus security to students and employees in a timely way.

At their worst, however, regulations can absorb huge amounts of time and waste scarce campus financial resources with little tangible benefit to anyone. The same Campus Security Act’s requirements for publication of crime statistics are burdensome yet of dubious value, with no substantial evidence to support that the information is used by prospective students and parents to make college choices.

Our recommendations are based on the belief that the goals of most federal campus regulations are worthwhile, if a bit awkward, burdensome or overreaching from time to time in their implementation. We also believe that America’s campuses support these general goals and should be viewed as supportive partners in their implementation. Penalties, fines, litigation and institutional embarrassment, while important, are not the main reasons most schools attempt to achieve compliance. They do so because it’s the right thing to do.

Our perspective on federal regulation is in the context of our website *The Campus Legal Information Clearinghouse (CLIC)*.¹ A difficult problem that exists for every college and university in the country is how to track, understand and comply with the ever-growing mountain of federal regulations that govern higher education.² The Catholic University of America Office of General Counsel began to collect information on federal higher education regulations in 1996 and post it on a freely available website. In 2002, the American Council on Education entered into collaboration with Catholic University to promote the *CLIC* website to the broader higher education community as a freely available, web based collection of user-friendly compliance materials.³ The purpose of *CLIC* is to help all American college and university campuses enhance compliance with most major federal regulations applicable to higher education institutions. The *CLIC* website is maintained entirely by Catholic University.⁴ Several recent articles from The Chronicle of Higher Education describing our website are attached.

¹ Online at <http://counsel.cua.edu>

² The broad definition of “federal legal compliance” in higher education includes annual Campus Security Act reports, training programs for research staff and other research regulation, FERPA student records regulations, the Americans With Disabilities Act, immigration, environmental law, copyright, trademark and patents, sexual harassment, employment, safety, equal opportunity, student conduct, taxation and computer use.

³ Materials on the *CLIC* website include things such as “Frequently Asked Questions,” plain English explanations of the law, sample publications, videos and web tutorials from other institutions.

⁴ Participating institutions whose compliance materials presently appear on or are linked from *CLIC* include Washington and Lee University, University of North Carolina, University of Rochester, University of Texas System, Ohio State University, University of Idaho and others

We offer the observation that there may already be more federal regulation of higher education than in most other industries. American campuses:

- have the burden of all laws applicable to any employer (ADA, I-9, HIPAA, nondiscrimination regulations, affirmative action); and
- are regulated by environmental rules as much as most American industries; and
- are regulated as “Internet Service Providers” (Digital Millennium Copyright Act) and by copyright rules in their libraries, publishing and course materials; and
- are regulated in research including human subject research, animal regulations, foreign export rules, classified research, federal contracts and patent law; and
- are regulated as financial institutions under Gramm-Leach-Bliley, and the Antiterrorist Financing rules; and
- are regulated for tax purposes, including charitable giving; and
- are also regulated in ways that are unique to education in general (and in some cases only college campuses) including extensive immigration regulations for students and scholars; comprehensive financial aid and student data reporting rules under IPEDs; campus safety under the Campus Security Act, Drug Free Schools acts and other laws; student records under the Family Educational Rights and Privacy Act (FERPA); Title IX, Sexual Assault Victim Bill of Rights; and the Equity in Athletics Act.

Our recommendations for modest improvements to the federal regulatory process in higher education include the following for your consideration. Please note that these recommendations are the responsibility solely of the authors, although we are grateful to colleagues who contributed suggestions.

Recommendation 1. Develop compliance materials involving more cooperation with the higher education associations as well as schools directly.

Our principal recommendation is that the regulatory process should require closer cooperation between the government and the higher education community, including the leading national higher education associations as well as individual schools, to develop compliance materials contemporaneously with the issuance of new regulations. These associations have mechanisms in place to get input from their members and already make substantial efforts to help institutions achieve regulatory compliance. One example is the support of the American Council on Education (ACE) for our web page. Another is the invaluable assistance we’ve received from the National Association of Independent Colleges and Universities (NAICU) (and its member general counsels who serve on NAICU’s Legal Services Review Panel) in trying to untangle federal data collection rules and other regulations. Our office has worked with associations (EDUCAUSE, ACE, NAICU, NACUBO, NAFSA: Association of International Educators; and the National Association of College and University Attorneys) as well as numerous individual universities.

The need for better information exchange.

Institutions in many cases haven’t found efficient and low cost ways for sharing “what works” in achieving campus compliance, as evidenced by the support we’ve found for our humble attempts to share compliance information. The consequences of this failure are that schools are re-inventing the wheel on compliance materials and small schools that don’t have the resources to

develop good materials simply do without them. Thus, there is less compliance than there would be with a better system for sharing helpful information.

Faced with confounding legal regulations, an added problem is that most schools don't have economical access to lawyers, especially lawyers with higher education law expertise. Only a minority of colleges and universities in America are members of the excellent National Association of College and University Attorneys. Most schools rarely use lawyers in a preventive law mode but rather, as noted by Prof. William Kaplin, they seek a lawyer "only when the patient is sick."⁵

Three decades of experience with federal regulation of campus records, disability, employment, environment, safety, equal opportunity, student conduct, taxation, immigration, copyright, computer use and other matters shows that there are still major failures in achieving compliance, especially at smaller and poorer institutions. Yet, compliance is central to student and institutional success.

Government / education partnership works.

A partnership between the government and the experts available in higher education institutions as well as in the national associations is the best way to make high quality compliance materials available immediately to everyone. Providing understandable information about legal rules, distributing proven models to reach compliance with those rules and supporting ongoing attention to new and amended rules can be achieved through better cooperation and also through better use by the government of information distribution technology such as the Internet.

One small example of government and university compliance cooperation is Catholic University's experience with the Department of Education's Family Policy Compliance Office (FPCO). The FPCO staff has a well-deserved reputation in the higher education community for tireless efforts to work with the "regulated community" to improve protection of student record privacy and security. In our case, they provided technical support as we developed FERPA training materials for our faculty and staff and we in turn made all our materials available to them for use in federal training efforts led by FPCO.

An example of delegating compliance responsibility to campus.

A variation of the partnership approach is what we call the "delegation" approach. An example of this is the regulations proposed several years ago for the research community called the "Responsible Conduct of Research" (RCR) program. RCR was a regulatory philosophy that every research campus should be required to develop and implement training for students, staff and faculty in research areas of a campus that would cover all the major legal and compliance areas of federal involvement in research on campus. These areas included patents and intellectual property, contract administration, human subject research, conflict of interest, hazardous materials, laboratory safety and like topics.

⁵ "(t)reatment law is aimed at curing legal diseases, whereas preventive law seeks to maintain legal health." *The Law of Higher Education*, 3rd Ed., Kaplin and Lee, 1995, Jossey-Bass Publishers, San Francisco.

While potentially burdensome, RCR was put forth in a very positive and pro-active fashion and research schools responded positively.⁶ While providing “broad brush” guidance on the material to be included, the details of content, method of delivery of information and similar matters were left to each school to work out. This approach recognized that the serious research institutions already dedicate many dollars to safety and compliance on their campuses and are an enormous source of expertise for training.

While the implementation of the RCR regulations was suspended and has never been re-enacted, many research institutions recognized the need for such an effort and have gone forward to put an RCR program or similar compliance-training effort in place. An example of this effort is the Responsible Conduct of Research Education Consortium (RCREC), online at <http://rcrec.org>. While noting that federal regulatory efforts in the research sphere “have often been unfortunately inadequate or problematic,”⁷ RCREC nonetheless represents a collaboration between the Department of Health and Human Services and the large research institutions to improve compliance training, including as to the exchange of RCR education programs between schools to avoid re-inventing the wheel.

Finally, a variant on the “delegation” approach could be a process for certification of on-campus experts by a government process, ideally a process approved by the government but administered by the higher education community. A university that had a “certified compliance officer” in a particular area – for example environmental compliance or campus safety – would have reduced reporting burdens, relying instead on a more summary report by the certified expert that all required compliance obligations had been met. This would provide an incentive to schools to enhance their compliance and get better trained, “certified” staff, a side benefit for the institution being reduced reporting obligations.

Recommendation 2. Establish a process for regular follow up between the government and the higher education community to modify regulations in the first year or two of their implementation.

A repeating pattern over the past several decades is the struggle to iron out kinks in new regulations. The lack of a clear process for communicating between “the regulators” and “the regulated” means that there is much more delay and much more confusion in modifying regulations than there needs to be. One example is FERPA – shortly after the law was implemented, it became clear that the restrictions on communication by colleges to parents about students at risk, even for drug, alcohol and weapons arrests, were excessive, impractical and contrary to the intent of the government’s overall efforts in these areas. Nonetheless, it took many years and ultimately a study by the state of Virginia to bring these problems to the level to get change.

Another example is the Campus Security Act. It took a decade with much unclear guidance from the federal government before a compliance handbook was finally produced.⁸

⁶ See for example the RCR training materials developed by Northern Illinois University, online at <http://www.niu.edu/rcrportal/>

⁷ From the RCREC webpage section “About RCREC – History”, at <http://rcrec.org/about.htm>.

⁸ Online at <http://counsel.cua.edu/Security/publications/handbook.pdf>

There is no reason that handbook could not have been made available when the law was initially promulgated.

An example of positive follow up between the government and the regulated sector is the Environmental Protection Agency's (EPA) outreach to the higher education community. See for example the [College and University Sector Policy Analysis: Definition of Facility, Final Report, April 6, 2006](#).⁹ This report was prepared for the EPA to analyze how regulations could be modified to ease the regulatory burden on colleges and universities. The purpose of this report is to analyze the regulatory and policy issues specific to the college and university sector. This particular report evaluates the existing definition of facility under various environmental regulations; explores how those definitions impact colleges and universities; and provides options for a revised definition of facility that could streamline environmental compliance.

A simple example of the need for follow up in order to keep pace with changing technology are the Department of Labor (DOL) recruitment requirements for university employers in the Labor Certification process for obtaining green cards. The rules require that the employer place print ads (20 CFR 656.17(e)(1)(i)). This applies even in cases such as in higher education where all professional recruitment is no longer done through print journals, but now routinely is done through electronically published journals. In the case of teaching positions, the regulations at 20 CFR 656.18(b)(ii)(3) require an ad in a national professional journal but don't specifically say at print ad is required, though DOL maintains that standard. Better communication between the regulators and the regulated community would provide for updating the regulation to reflect changes in industry practice and the reality is that the government needs to take the first step in developing a better process for that dialogue, as the EPA has done, for example.

Recommendation 3. Notify schools if they are covered by a new law or a new regulation.

The federal government needs to establish a clearer process for notifying institutions of higher education if covered by a new federal law or a new regulation promulgated under that law. An example of the ambiguity that can exist is seen with the promulgation of the security regulations under The Financial Services Modernization Act of 1999 (aka Gramm-Leach-Bliley or GLB). This law, which serves a very important purpose, regulates the disclosure of non-public personal information by financial institutions. However, it was very unclear as of the spring of 2003 that this law was even applicable to institutions of higher education (IHEs).¹⁰ The final rules on

⁹ Online at <http://counsel.cua.edu/Environment/index.cfm>

¹⁰ This question was posted anonymously on the listserv of the National Association of Colleges and Universities (NACUA) on February 20, 2003:

"The FTC adopted safeguards rules under the Gramm Leach Bliley Act on May 23,2002 that are effective on May 22, 2003. 16 CFR 314. The FTC in its earlier implementing rules for Gramm Leach Bliley exempted colleges and universities which comply with FERPA even though they may be "financial institutions" under Gramm Leach Bliley (eg, student loan programs). The American Council on Education had asked the FTC to exempt colleges and universities compliant with FERPA from the Gramm Leach Bliley safeguards rule. What happened? Are colleges and universities covered under the safeguards rule or are they exempt?"

Safeguarding Customer Information contained at [67 Fed. Reg. 36484 \(May 23, 2002\)](#) do not exempt educational institutions, but nowhere in this lengthy federal regulation is this explicitly stated. Since the law was directed at banks, it is easy to see how schools could have overlooked this law. NACUBO published a Jan. 13, 2003 advisory report that the safeguarding rules did apply to IHEs but a number of schools seemed to be unaware of the regulatory requirement until right before the May 2003 deadline. It should be noted that officials at the FTC, when contacted, were very helpful and did take the time to meet (in June 2003) with the newly regulated community to answer some of their questions.

There was recently a question on a higher education listserv asking whether the newly enacted Data Accountability and Trust Act would apply to institutions of higher education. Non-profit organizations, including IHE's, fall outside the scope of this law, but once again, it would be helpful to have explicit guidance from the federal government on the scope of coverage, perhaps a checklist of what regulated communities are covered under the law.

Recommendation 4. Make training materials and compliance aids more easily and freely available to regulated institutions.

There are a number of instances in which compliance could be eased by the simple provision of charts, graphs, or checklists.

Example 1. Final regulations governing the disclosure of institutional and financial assistance information provided to students under Title IV student financial assistance programs were published at 64 Fed. Reg. 59059 (Nov. 1, 1999). The regulations implement the changes made by the Higher Education Amendments of 1998. In the comment section the following comment was made:

Comments: The Department should provide a chart listing all information that institutions must disclose under these regulations and the persons to whom they must disclose the information.

The answer provided was as follows:

Discussion: We believe that Sec. 668.41 adequately provides the information sought by this comment. However, we will provide continuing technical assistance, including the requested chart, to institutions to help them understand and comply with these regulations.

Many years have gone by and the chart still has not been produced. The chart was apparently drafted within a year after the regulations were adopted, but never released.

We would also note that less frequent changes to financial aid regulations in particular would be helpful. It is well nigh impossible for most schools to keep up with the constant stream of Dear Colleague letters and other regulatory material. As was demonstrated in the U.S. Senate earlier this year, during debate on reauthorization of the higher education act, the statutes, regulations, Dear Colleague letters and other enforcement rules for Title IV financial aid, *for only a one year period*, filled four file boxes.

Example 2. The Financial Services Modernization Act (aka Gramm-Leach-Bliley or GLB) required that colleges and universities be treated as “financial institutions” for purposes of developing information security systems for their computerized data. One problem with this law is that like many federal rules applicable to higher ed, the enforcing agency is not the Department of Education. In the case of GLB, it is the Federal Trade Commission. Developing model policies and compliance materials was left to an extremely *ad hoc* process put together by several universities and national associations, including EDUCAUSE and the National Association of College and University Business Officers.

In hindsight, it would have saved much effort and time to have simple model compliance materials made available from the start. For example, excellent materials to help a school complete the complex first task under GLB, to assess what data on its campus is covered by the law, were eventually made available by the University of Minnesota for use by other schools. Having such materials available earlier would have been particularly easy in the case of GLB because the regulations provided for delegation of most of the details of policies and procedure to the individual institutions. It was left to Catholic University and Baylor University to essentially draft model policies that were adopted by many other campuses nationwide.

Example 3. One of the recurring struggles on all campuses is to keep new employees and administrators informed about the schools’ many responsibilities under various “non-discrimination” provisions of federal law applicable to college campuses. Using help from a law student, our office took the time to develop a chart organizing the required actions and laying them out for each different law. There are a dozen different such non-discrimination statutes.¹¹ When campus administrators learn about this chart, they are often stunned by what they’ve overlooked and amazed at how clear it becomes when presented in this straightforward fashion.

Example 4. A more recent example of the lack of this type of assistance is in the research area. On May 17th, 2005 HHS published new rules on how universities investigate research misconduct. The new regulations, at 42 CFR Part 93 became effective June 16, 2005. The new rules necessitate institutions updating their policies, even if they have never had a case of actual research misconduct. The Office of Research Integrity (ORI) of the U.S. Department of Health and Human Services, which is responsible for enforcement of the rule, actually has a very helpful web page. However, in April of 2006 the following message was still posted on the web page with regard to the model policy:

*ORI Model Policy and Procedures for Responding to Allegations of Scientific Misconduct
(Being revised to comply with the new regulation 42 C.F.R. Part 93.)*

In other words, nearly a year after it was required that campuses update their own policies, the government agency implementing the regulations was unable to update its own model policy. Today, there is still no updated model policy for schools to use as a guide. A follow up phone call to ORI revealed that ORI does indeed have a checklist on what must be included per the new regulations, but that it cannot be released in advance to a university administrator who might be attempting to update the school’s policy. It can only be released once a policy has been adopted by

¹¹ See the chart online at <http://counsel.cua.edu/Employment/resources/eeotable.cfm>

the school, submitted to ORI for review and has been found by ORI to be in error. This is not very practical, as typically at institutions of higher education such policies have time-consuming approval processes by faculty groups and others. If a policy is not technically correct the first time around, then the point of actual adoption of a compliant policy is delayed.

Example 5. A compliance calendar would be helpful. We were told recently that such a requirement was in the Senate version of the current reauthorization legislation. While we don't know what became of that proposal, we note that we produced a first attempt at such a calendar several years ago, available on our web page at <http://counsel.cua.edu>.

The calendar could be easily expanded to include simple technology to allow campus administrators around the country to subscribe to regular "email alerts" appropriate for their compliance responsibilities. For example, a campus safety director would automatically receive occasional emails advising of upcoming compliance deadlines, tips about enhanced compliance, information on new model training materials, etc.

Example 6. Clarify how notice is to be accomplished by the school. Many federal statutes involve issues of "notice", to students, employees, prospective students, job applicants, etc. See for example the many notification requirements in connection with Program Participation Agreements.¹² While the regulations address when electronic notice may be utilized,¹³ it is left up to the schools to sort out who, when, what and how. As mentioned above, a clear chart from the federal government (i.e. one that can be viewed as authoritative) would be very helpful.

Recommendation 5. Provide an easily accessible web based list of names, phone numbers and emails of government employees in each regulated area that college and university attorneys can contact with questions.

While new regulations provide a contact person and phone number for questions about the regulations, this data becomes less useful over time. The point person may no longer work at the agency that published the regulation, the phone number may have changed, or it may simply be impossible to reach them. To encourage and assist compliance, a list of contact persons within the federal government would be very helpful. An example of how this is well done now is the Family Policy Compliance Office. The FPCO hands out training materials to colleges and university officials that include an email address for those regulated to use to obtain quick responses to FERPA questions. If you are an attorney seeking to assist your institution in understanding and complying with a federal law, you should not have to call someone at one agency who might know

¹² Listed online at <http://counsel.cua.edu/fedlaw/Ppa.cfm>

¹³ See the text as follows from 64 Fed. Reg. 59059, Nov. 1, 1999. b) Disclosure through Internet or Intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for-- (1) Enrolled students or current employees by posting the information on an Internet website or an Intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and (2) Prospective students or prospective employees by posting the information on an Internet website.

someone (and be willing to give out a phone number) at the agency you need to contact. This is in reality the way the process functions now, at least in the many instances where the regulations are not clear.

Some Final Observations.

Some burdensome laws for the higher education community.

The list of federal statutes which have some applicability to higher education is long, now more than 200 such laws and growing. We invite you to review a print out of the federal laws that currently regulate IHEs¹⁴ in order to obtain an idea of the current regulatory burden (and note that this is largely just an abstract of the statutes, not the full law and not the thousands of pages of regulations themselves). It is probably fair to say there is not one institution in the country that is able to be in complete compliance with all of these federal laws. The problem is not that institutions don't want to comply. The volume, complexity and constant change in the regulations make it impossible to do so completely.

At the same time, the "80/20" rule applies here as elsewhere – the bulk of complaints and regulatory compliance burdens come from perhaps 10 per cent of these laws. We have picked a few examples from our own experience that seem to represent unnecessarily burdensome regulations. We would caveat that:

- we do not have significant experience with financial aid regulations but as noted elsewhere herein those regulations seem to have grown like the federal income tax code, so as to be enormous and enormously incomprehensible; and
- similarly, we are not expert in the area of research regulation and government contracts but we note that for small schools, the burdens are extremely difficult because they can't afford the level of staffing necessary to assure substantial compliance, a goal that is attainable only by the very largest research institutions.

Example 1. The Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR)

Schools seem to be spending more time on training and compliance specifically related to trying to deal with "deemed export" rule and having to review what foreign nationals will be working on and trying to get systems in place to catch any changes. Schools would rather have the government police students/visitors as they come into the U.S. rather than putting this burden on schools. It would also help to have the regulations clearly state that the fundamental research exemption is still in place and make it clear that government sponsors will not restrict publication or dissemination of results (or restrict participation on such projects) unless the work is classified. The way the statutes and regulations in this area stand now, it is incredibly burdensome to comply and hampers the ability of American institutions of higher education to stay cutting edge and competitive in their research. If the rules become too impossible, compliance is actually discouraged.

¹⁴ <http://counsel.cua.edu/fedlaw/A-Z.cfm>

Example 2. Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Universities have spent an incredible number of hours and dollars, even if they do not hold “covered entity” status, trying to ascertain what must be done to achieve compliance with this law, or to avoid becoming a “covered entity” under the law. This law is one of the best examples of how not to adopt and draft federal regulations. The view of many is that the cost/benefit analysis of this law was not properly calculated.

Observations about Security and Privacy

One area to which schools have consistently devoted a high level of resources to is enforcement of privacy and security of student record data. If any one topic is discussed at great length on the National Association of College and University Attorneys email listserv exchange, it is FERPA, the law regulating student record privacy. Enforcing security has become increasingly more challenging over the years, as is evidenced by the rash of unintended data disclosures over the past few years in both the academic and corporate sector.

Collection, transmission and reuse of student record information raises substantial and serious privacy concerns and further complicates our ability to keep this data secure. A serious cost-benefit analysis is needed to determine whether each piece of student data reported is necessary given the risks of misuse or loss of the data and the potential harm to the student and her family. For example, the National Student Loan Clearinghouse already has in its database millions of names and social security numbers of students who have received student loans. Often the entire student record data base has been sent by a school to the National Student Loan Clearinghouse, *even if the student did not receive a loan*, due to difficulty of separating the data. How this data was then used by the National Student Loan Clearinghouse is not entirely clear, but in at least one instance it was found not to be in accord with federal law on student record privacy.¹⁵

If there are principles that should be followed in this area, it is that in attempting to follow best privacy practices, one should limit collection of student record data. In terms of security, one should protect what one has. Sharing with third parties creates more vulnerability. It is one thing to collect the data for your own use, but if you collect it to send it to someone else and do so, if the data is inadvertently released, both sides can say it was not their fault.

In terms of the issue of unit record data collection, the means are available to gather this data, but what are the risks? The Education Department may be able to provide a high level of security to attempt to prevent unauthorized access to the data, but they cannot guarantee that there will not be added mandates for expanded data collection and for additional uses of the data that will threaten student privacy rights. Each regulation that is promulgated sounds like a good idea at the time. In retrospect, some of them were bad ideas. Those responsible for generating these rules need to conduct an informed cost benefit analysis up front. We urge the Commission to give this issue serious consideration.

¹⁵ See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/auburnuniv.html>

Thank you for your consideration of our observations. Please let us know if there is any assistance we can provide.