BYU

# January 2019 Risk and Compliance News

Following are excerpts from news articles having a risk management or compliance impact. The full article may be seen at the referenced source. Topics for this month include the following:



## Accreditation


### Cutting Oversight of Accreditation Will Spur Innovation, Says Education Dept. Critics Say Not so Fast.

The federal law governing much of higher education is some five years past its expiration date, with little chance that Congress will reauthorize it before the 2020 elections. Instead, the U.S. Department of Education has begun a broad regulatory overhaul to reshape core issues under the statute, known as the Higher Education Act.

On Monday the department released its recommendations for major changes in the rules regarding accreditation and how colleges qualify for federal financial aid. Approval by a federally recognized accrediting agency is a key condition for colleges to receive federal student-aid dollars — the lifeblood of most colleges.

Possible rule changes also include lowering requirements for colleges to operate online across multiple states, setting rules for distance learning, amending how religious colleges are treated by accreditors, and shifting the administration of federal grants for students who plan on classroom teaching, called Teach Grants.

Negotiated rule-making on all of those recommendations, which will involve representatives of various interested groups, are to begin in the middle of January. To handle the unusually wide range of topics, the department has formed a main committee and three subcommittees, which will meet over the next three months. If the groups do not reach consensus on new rules, the department will formulate its own regulations.

The proposed changes would largely reduce the level of federal oversight for accrediting agencies, would give those agencies more flexibility in approving colleges and programs to receive financial aid, and are meant to encourage colleges to develop more-affordable and innovative models for educating students.

Accreditors would have more time and resources to focus on what happens in the classroom, Diane Auer Jones, the department's principal deputy under secretary, said in a call

with reporters on Monday. The proposed changes were only starting points for the negotiations, she said.

Julie Peller, executive director of Higher Learning Advocates, a nonpartisan advocacy group, said the department was raising some of the right questions about higher education.

But without a strong focus on the outcomes for individual students, she said, there is no way to know if the recommended changes are effective.

"They are saying, Let's let accreditors and institutions innovate," Peller said, "but without a way to measure quality and outcomes."

Some of those changes, however, will be welcomed by accreditors, said Judith S. Eaton, president of the Council for Higher Education Accreditation. One such change involves reducing accreditors' responsibility to confirm that a college is complying with various federal requirements.

Accrediting groups and the accreditation council also support the department's proposal to remove the federal definition of the credit hour, which links learning to time in class for the purpose of determining federal aid, and limiting the definition of "regular and substantive interaction" between students and faculty members in distance-education courses.

**Improvement or Overreach?**

But several proposals are also certain to get pushback during the negotiations.

One example is the department's effort to have nonprofit colleges, most of them overseen by one of seven regional accreditors, accept more transfer credits from for-profit colleges, which are accredited largely by one of several national agencies.

The goal, said Jones, at the Education Department, is to eliminate the perception that regionally accredited institutions are superior to those that are nationally accredited. Students who earn credits from a for-profit college may have difficulty transferring those credits or going on to earn a graduate degree at a public or private nonprofit college, she said.

Eaton argued otherwise. "We've long called for accreditor neutrality," she said in an interview, "but this is not a place the federal government needs to be."

Another suggested change would limit the geographic scope of the regional accreditors to three to 10 states. That would affect the size of two accrediting agencies — the Higher Learning Commission, which oversees colleges in 19 north-central states, and the Southern Association of Colleges and Schools' Commission on Colleges, in 11 states.

But Eaton again questioned whether such a measure was appropriate for federal regulation at all: "How is it going to improve things?" she asked.

The question raises a deeper one, about whether the recommended changes really address the problems that the department is trying to solve. Those problems, such as claims of an increase in less-rigorous majors and the declining value of a college credential, were laid out in two white papers released by the department in December.

Source: *The Chronicle of Higher Education*—January 7, 2019

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## Education Dept. OKs Federal Funds for Western Governors U., Suggesting Rule Changes for Online Programs

For Western Governors University and the U.S. Department of Education, what amounts to "regular and substantive interaction" between a professor and students was a $713-million question. Now, as the department begins the negotiated rulemaking process to reach agreement on proposed changes in regulations for higher education, that question is on the table again.

Last week the department restored its approval for Western Governors, a nonprofit online institution that uses competency-based education, to receive federal financial aid for its students.

This was after a blistering 2017 audit by the department's inspector general, requiring the university to return $713 million in aid. It was deemed not eligible for that aid because students lacked the necessary level of interaction with instructors.

The department now says Western Governors does not have to pay back the money.

Federal regulators have yet to come up with a clear definition for what constitutes as a "regular and substantive interaction." As more colleges use online courses, that definition is increasingly important.

Competency-based education courses have become increasingly popular among a variety of institutions, from

online institutions to digital learning programs crafted by research universities.

A major challenge facing policy makers is to ensure that the new regulations will offer a good education for students, in addition to providing them with significant protection from predatory programs, said Van L. Davis, who is with Foghlam Consulting, a higher-education advisory firm.

"They're trying to have enough parameters for protection, but not enough to prevent higher education from being innovative and developing programs that will make it more accessible and affordable for students and taxpayers," he said. "That's probably why the language isn't there yet, because it's really hard to do."

Some experts want more flexibility in rules outlining student-instructor interaction, while others believe there should be stronger oversight, to protect students from fraud.

Innovative teaching methods in online classes, like a faculty model with multiple instructors in one course, could potentially put some institutions at risk of losing federal financial student aid policies under current law, especially for those that offer competency-based education, Davis said.

"There still is not any legal definition of competency-based education," he said. "There is really no regulatory guidance."

Competency-based programs allow students to learn course materials at their own pace, as opposed to a traditional learning environment with scheduled classroom time. Whether these online programs can receive federal student funds largely depends on a clause in the Higher Education Act that requires "regular and substantive interaction" between instructors and students.

And how that clause is interpreted got more complicated with Western Governors' audit.

Western Governors ran into trouble when its accrediting agency found that it did meet the "regular and substantive" standard, but the Education Department's inspector general determined that it did not. The department proposes reducing accreditation oversight as part of negotiated rulemaking, to encourage more affordable and innovative learning models.

Source: *The Chronicle of Higher Education*—January 16, 2019

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## Athletics/NCAA

### Female Rowers File Civil Lawsuit against SMU

Kelly McGowan used the assistance of crutches to get her to her seat. Jessica Clouse tried to hold back tears while explaining her physical pain, and concern for her future. The women are connected by their roles as players on the SMU rowing team.

For over two decades, SMU has had a women's only rowing crew competing in matches against other colleges.

Clouse and McGowan are now part of a team of eight current and former SMU rowing team players suing the university on claims of negligence and discrimination. "I stand before you unable to walk or sit without pain. Poor coaching, training technique and inadequate supervision led us to this place," McGowan said Friday morning.

The eight women claim SMU violated Title IX rules, requiring equal treatment for men and women in college athletic programs based on the school's investment in coaching, training and medical oversight.

"SMU had the opportunity and ability to correct this, to provide equality to its rowers. It chose not to," attorney Alex Zalkin said during a news conference for four of the eight women listed in the suit.

The women described sustained injuries during training, practice or competition, and pointed to designated trainers provided by SMU who had no or little background in the sport of rowing.

The women said they shared a weight trainer from the SMU football program. "The female rowers here were not afforded equal access to competent medical care or qualified athletic trainers and coaches. And this wasn't a secret," Zalkin claimed.

Zalkin said SMU systematically discriminated against female rowers in particular with inequality funding and second class resources.

The lawsuit alleges the women were subject to inadequate rowing and weightlifting techniques, and were told to "deal with it." Zalkin said SMU treated the rowing program as an afterthought, for the purpose of complying with Title IX.

Instead, the suit alleges SMU violated federal rules.

SMU officials issued a statement Friday after the lawsuit was filed on federal district court.

> *SMU's foremost concern is always for students' health and well-being. For student-athletes, in particular, our goal in our training programs is to emphasize and support health, fitness and injury prevention. While the University does not comment on pending litigation, SMU is committed to complying with Title IX in its athletic programs and throughout the campus.*

Source: *CBS DFW*—January 19, 2019

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## Campus Security & Safety

### Emergency Blue-Light Phones Are a Symbol of Safety. Is Symbolism Worth Thousands?

The fluorescent, candy-blue boxes and towering poles labeled "Emergency" in long black letters pepper almost every college campus. They're a part of the campus landscape, as easy to overlook as cracks in the sidewalk. It's hard to picture a college campus nearly 30 years ago, when the boxes didn't exist.

In 1989 the University of Illinois at Chicago, along with many other universities, faced a renewed call to keep its students safe.

Two years later, the Clery Act, which requires that institutions make campus incident reports public, was signed into law after Jeanne Clery, a 19-year-old student at Lehigh University, was raped and murdered on campus.

The Chicago university put out an all-call to inventors: Create something that will extend our safety network past our walls, and we'll buy.

In January 1990, the university received the first prototype from a company that sold coin-operated newsstands. It was medium-sized call box with the iconic blue light on top. With the push of a red button, the caller would be connected in two-way communication with campus or city police. By midyear, more than 100 blue-light safety phones were installed on campus. The company behind the box, News-Time, branched off into Code Blue Corporation. It's now the lead manufacturer for emergency phones, according to David Fleming, chief design officer for Code Blue.

Almost 30 years later, some universities are turning their lights out. Students now have cellphones, phones have emergency apps, and emergency phones aren't used as frequently anymore.

Despite the obvious advances in communications technology, many institutions have kept their call boxes.

The devices are costly, though, and some argue that they're becoming obsolete. Still, some experts and university officials say the light boxes give the campus the feeling of safety, a sentiment that is sometimes much more important than how often the boxes are actually used.

The University of Georgia removed its blue-light call boxes in 2004 because students were not using the phones for emergencies — but rather for pranks — according to *The Red & Black*. Since then, students have pushed the administration to bring back the emergency phones on a few occasions.

Kaley Lefevre, a senior at the University of Georgia, said this peace of mind is worth the money.

"When something bad happens, it sparks the conversation of bringing the blue lights back again, but then it dies out again," Lefevre said. "I guess the university has made the decision that they don't want to appropriate the funding to that. It hasn't been talked about enough to elicit a response from the university."

Cellphones are an improvement on the call boxes because they allow people to keep moving while on the phone with police, the UGA Police department said in 2015.

Fleming, of Code Blue, said no matter how far technology advances, the safety assurance the boxes can give the campus — or the idea that the phones are inanimate guards standing over students — keeps them relevant.

Eric Plummer, associate vice president of public safety at the University of North Dakota, said prospective parents and student who tour the campus appreciate seeing the emergency phones.

**Expensive and Seldom Used**

The University of Connecticut system still has about 330 phones, with about 275 at the Storrs flagship campus, according to Stephanie Reitz, a university spokeswoman.

The number of emergency calls from the blue-light phones has surely decreased at Connecticut, but the institution has no way of knowing how many were made from the blue-light phones because all 911 calls are funneled into the same line, said

Andrew Fournier, deputy police chief. For Fournier, one call is worth keeping the phones running.

The University of Nebraska at Lincoln removed all of its devices in 2017. The campus spent more than $1.7 million on installation and maintenance in the 15 years before removing almost all of the devices, *The Daily Nebraskan reported.*

But when students get to campus, they don't typically pick up the stationary phone for help. For example, campus police at Ohio University do not remember the last time the phones were used in emergency situations, the campus newspaper, *The Post*, reported last year.

**Pepper Spray and Personal Alarms**

On another side of the debate, the University of Colorado at Boulder got rid of its emergency phones in 2015 but replaced them with the LifeLine app, free for students to put on their phones. More than 90 percent of the calls from the emergency phones were hang-ups or pranks, Melissa Zak, chief of police, wrote in a letter to students.

"That leaves just a handful of legitimate non-emergency calls for minor crimes, liquor law violations, facility maintenance, and open-door assistance," Zak wrote.

At Indiana University at Bloomington, students have started taking security into their own hands even though 56 emergency phones are still available, according to the *Indiana Daily Student.* Some students use personal alarm systems and pepper spray for safety, the newspaper reports. Calls from the emergency phones are accidents 99 percent of the time, according to an Indiana police officer.

Still, some administrators feel that if a campus does not have the boxes, it's missing something.

"One of the concerns is a lawsuit for a lack of security," said Bob Mueck, director of public safety at St. John's College, in Maryland. "Would that feed into that? Would there be more money paid on the other end if someone sued the institution?"

St. John's College has only a handful of phones, and it will not consider adding any more because of budget constraints and the availability of other safety measures, like the LiveSafe app, Mueck said. The calls on the blue phones have drastically decreased, but the institution will keep the phones they have in working order.

Source: *The Chronicle of Higher Education*—January 25, 2019

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## Extreme Winter Weather Triggers Wave of College Closures across the Midwest

It's not run-of-the-mill winter weather.

Winter Storm Jayden is projected to drop more than a foot of snow and historically low temperatures on the Midwest in the coming days. The weather is expected to be so harsh that even colleges accustomed to the elements are facing the reality that sometimes it's just too cold to stay open.

Until Tuesday, officials at the University of Michigan at Ann Arbor assured the campus that it would operate as normal for the rest of the week, even as they warned students not to be outside for more than 10 minutes at a time, or risk frostbite.

A group of students started a petition in response to the university's decision to delay canceling classes on Wednesday and Thursday. Students said they were "deeply disturbed" by the refusal to close after a campus bus full of passengers spun out and crashed into a tree.

"Not canceling classes is not only a careless move," the petition says, but "it spells ignorance on the administration's part to the plight of many of its marginalized community members."

For example, students and workers without transportation would have to trudge through the subzero weather, and those who are not able-bodied would face worse challenges in getting to work or class, the petition says.

On Tuesday the university decided to cancel classes after all, for only the third time in 40 years.

Michigan is far from the only institution to make that call. The University of North Dakota decided to close with temperatures headed for 25 degrees below zero Fahrenheit and more than a foot of snow smothering the campus. The University of Minnesota-Twin Cities also closed; it will receive up to 12 inches by the end of the night, according to the National Weather

Service. Northwestern Medicine at Northwestern University went on Twitter to discuss skin protection against frostbite.

Closing a campus in a region equipped for very cold weather — where the assumption is that it will stay open — takes a lot of communication, said Bobby Fleischman, associate vice president for strategic partnerships at Minnesota State University at Mankato.

More than 10 inches of snow fell on the campus of 14,000 students at the start of the week. But first and foremost, he said, the university considers the safety of students, faculty members, and the staff.

"It is very rare that we cancel classes — maybe once or twice a year," Fleischman said. "Closing the campus, which is separate from canceling classes, rarely happens."

The university decided to close for the first time since 2014 when the wind-chill effect drove temperatures to between 25 and 65 degrees below zero on Sunday.

By the time blankets of white cover the campus's 10 miles of sidewalks, Fleischman said, campus administrators have been planning for days. He gets up at night over and over to check the weather, look out for road closures, and more. Closing the Mankato campus requires communication among other campuses in the Minnesota State system, public-safety officials, city administrators, and public-transportation agencies, among others.

Dining halls stay open for residential students — all 3,000 of them — when the campus is closed, and there are backup systems if the storm were to cut power in the dormitories, Fleischman said.

"Eliminating confusion and being clear in messaging," he said, "is of critical importance, as you can imagine."

He said the university does its best to have a plan that can be reported on the 10 p.m. news, before students, faculty members, and staff members go to sleep.

Source: *The Chronicle of Higher Education*—January 29, 2019

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## Finance/Accounting

### 49 Attorneys General Announce Half Billion Dollar Multistate Settlement with For-Profit Education Company

On January 3, 49 state attorneys general announced a settlement with Career Education Corporation ("CEC"), a for-profit education company, to resolve claims that CEC engaged in unfair and deceptive practices. The settlement requires CEC to forgo any collection efforts against $493.7 million in outstanding loan debt held by nearly 180,000 former students. It also imposes a $5 million fine on the company. California was the only state not participating.

CEC operates online courses through American InterContinental University and Colorado Technical University. CEC's other brands include Briarcliffe College, Brooks Institute, Brown College, Harrington College of Design, International Academy of Design & Technology, Le Cordon Bleu, Missouri College, and Sanford-Brown. According to the attorneys general, CEC used "emotionally-charged language" emphasizing the pain in prospective students' lives to encourage them to enroll in CEC's schools, deceived students regarding the total costs of enrollment, misled students about the transferability of their earned credits, misrepresented job prospects for graduates, and deceived prospective students about post-graduation employment rates. The attorneys general contended that students who enrolled in CEC classes incurred substantial debts that they could not repay or discharge, when they otherwise would not have done so absent the misrepresentations. CEC denied the allegations, but entered into the settlement agreement to resolve the AGs' claims.

The settlement agreement requires CEC to make improved disclosures to students, including anticipated total direct costs, median debt for completion of CEC's programs, program default rates, program completion rates, transferability of credits, median earnings for graduates, and job placement rates. CEC must also improve students' ability to cancel their

enrollment, allowing students no fewer than seven days to cancel and receive a full refund, and up to 21 days for students with fewer than 24 credits from online programs. In addition, the AGs are requiring CEC to inform all qualifying former students that they no longer owe money to CEC.

The investigation was led by the Maryland Attorney General's Office. "CEC's unscrupulous recruitment and enrollment practices caused considerable harm to Maryland students," said Maryland Attorney General Brian Frosh. "The company misled students. It claimed that students would get better jobs and earn more money, but its substandard programs failed to deliver on those promises. The school encouraged these students to obtain millions of dollars in loans, placing them at great financial risk. Now CEC will have to change its practices and forgo collection on those loans."

A copy of the settlement agreement is available here.

Source: *Troutman Sanders, LLP*—January 7, 2019

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## Massachusetts' Highest Court Narrows in Pari Delicto Defense

The Massachusetts Supreme Judicial Court has recently narrowed the scope of corporate imputation in the context of the *in pari delicto* defense, which will impact corporations' ability to rely on their third-party consultants.

***Merrimack College v. KPMG LLP***

**Background**

In 2011, Merrimack College ("Merrimack"), a small private college in Massachusetts, discovered that between 1998 and 2004, its financial aid director had been fraudulently issuing Perkins Loans to students without their consent. Merrimack uncovered more than 1,200 invalid Perkins Loans. After discovering the misconduct, Merrimack wrote off the fraudulent loans and repaid students, which cost Merrimack more than $6 million.

While the fraud was ongoing, Merrimack had engaged KPMG LLP ("KPMG") as its independent auditor. During its annual audits, KPMG noticed discrepancies between Perkins Loans that had been recorded in Merrimack's system and loans that had been actually issued. But KPMG still issued unqualified opinions that Merrimack's financial statements did not contain material misrepresentations and that Merrimack was in compliance with federal loan requirements.

Merrimack sued KPMG to recover some of the $6 million it had lost due to the fraud that had gone unchecked by KPMG. The Superior Court granted KPMG's motion for summary judgment on the grounds that Merrimack's claims were barred by the *in pari delicto* doctrine. Relying on traditional agency principles, the judge held that the financial aid officer's conduct should be imputed to Merrimack and that the case should be dismissed with prejudice.

**SJC Holding**

On direct appellate review, the SJC vacated the grant of summary judgment to KPMG. The court held that only the conduct of senior management—which includes officers with primary responsibility for corporate management, directors, and controlling shareholders—may be imputed to a plaintiff corporation under the doctrine of *in pari delicto*. The court reasoned that a corporation's "moral responsibility" is measured only by the conduct of its agents who lead the corporation. The court held that the financial aid director was not a member of senior management.

**Implications**

**Traditional Agency Principles**

The *Merrimack* decision departed from traditional agency principles largely on public policy grounds. Corporations in Massachusetts can now more comfortably rely on their third-party consultants, such as auditors and law firms, to monitor the conduct of their mid-level employees, knowing that they can sue these "gatekeepers" if the mid-level employees commit some kind of corporate wrongdoing. Such gatekeepers should also have a heightened awareness of their potential liability if they fail to bring potential employee misconduct to the attention of senior management.

However, it is important to note that the *Merrimack* holding does not extend to the context of vicarious liability. Where a mid-level employee's conduct harms an innocent third party, that employee's conduct will still be imputed to the corporation for purposes of determining liability.

Other states' courts have refused to make the same distinction between mid-level employees and senior-level management under the *in pari delicto* doctrine. In the case of *Kirschner v. KPMG LLP*, 15 N.Y.3d 446 (2010), the New York Court of Appeals did not differentiate between "senior management" and a corporation's broader pool of "agents." Instead, New York generally applies traditional agency principles in the context of *in pari delicto*. Delaware's Chancery Court took the opposite approach of Massachusetts in *In re American Int'l*

*Group, Inc., Consol. Derivative Litig.*, 976 A.2d 872 (Del. Ch. 2009), explicitly stating that even where a corporation's wrongdoing involved the conduct of mid-level, rather than senior, management, a co-conspirator may still assert the *in pari delicto* defense.

**Gatekeeper Responsibility**

The *Merrimack* decision also reflects a trend in some jurisdictions to increase the burden on corporate "gatekeepers," such as accountants, financial advisers, and lawyers, to identify corporate wrongdoing. Many states have established some form of an "auditor exception" to *in pari delicto*, which limits the extent to which corporate gatekeepers can assert the defense to avoid liability. For example, in *NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353 (2006), the New Jersey Supreme Court adopted a relatively broad auditor exception, allowing corporations to bring negligence claims against third-party gatekeepers to recover losses from corporate fraud. Such a gatekeeper may assert an *in pari delicto* defense only where a shareholder has engaged in the fraud, where an official should have been aware of the fraud by virtue of his or her position, or where a stockholder had a large enough stake in the company to have been able to exercise oversight.

Pennsylvania adopted a different formulation of the exception in *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PricewaterhouseCoopers*, 605 Pa. 269 (2010). There, the Pennsylvania Supreme Court prevented auditors from asserting the *in pari delicto* defense if they had not "dealt materially in good faith with the client-principal." And while both New York and Delaware have refused to create a "blanket" auditor exception, the Delaware Chancery Court did adopt an exception to *in pari delicto* as recently as 2015 though, as noted above, it did not go so far as Massachusetts. Noting the "gatekeeper" role of the auditor defendants, the Chancery Court held that an auditor may not assert an *in pari delicto* defense to bar a plaintiff corporation's aiding and abetting claim. *Stewart v. Wilmington Trust SP Servs., Inc.,* 112 A.3d 271, 318–20 (Del. Ch. 2015). Because Delaware law prohibits the use of *in pari delicto* against a trustee or derivative plaintiff suing a corporation's own fiduciaries for breach of their fiduciary duties, the Chancery Court reasoned that the law should do the same where an auditor or other gatekeeper aids and abets such a breach.

Source: *Jones Day*—January 14, 2019

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## Governance & Ethics

### Campus Reckons with a President Turned Defendant

In her more than 40 years at Michigan State University, Lou Anna K. Simon has had many titles.

Professor.

Provost.

First female president.

But a year after she resigned the presidency in the wake of a sexual-abuse scandal involving a former university sports doctor, Simon has a new title: defendant.

She was charged in November with four counts of lying to investigators about what she knew of the crimes of Larry Nassar, who is serving a minimum-40-year prison sentence for sexually assaulting women and girls under the guise of medical treatment.

Now there's a real possibility that Simon, too, could be put behind bars. Among the charges are two felony counts, each punishable by up to four years in prison, alleging that she knowingly misled the police.

Simon, who is 72, has pleaded not guilty. Her lawyer describes the case as a ridiculous act of prosecutorial overreach, an effort to pin the actions of a monster on a model citizen who ought to be able to live out her post-presidential years in peace.

For professors who have known Simon principally as an administrator, her transition into the role of an accused felon is jarring. The image of Simon at her recent arraignment, looking gaunt and vexed behind a plaque that read "Defendant," is difficult to square with her well-established identity as a loyal Spartan leader.

As Simon winds her way through the justice system, more is at risk than her own fate. For Michigan State, bonds of trust and community are under threat. An institution that for generations has been a beacon of pride now presents a more complex story, forcing professors and alumni to reckon with the notion that their beloved university — like Simon herself — may have failed in its most sacred duty to protect young people.

For colleges and universities, tragedies of this scale more commonly take the form of fatal accidents or mass shootings. In such cases, campus communities tend to pull together rather than split apart. The failure of a leader as a moral actor, however, elicits a different kind of grieving. This is an angry grief, a confusing sorrow that tempers enthusiasm for the institution with a kind of quiet shame. It is a phenomenon that finds its singular historic parallel at Pennsylvania State University, where top administrators were criminally charged with covering up the crimes of a serial sexual predator.

As at Penn State, where Graham B. Spanier served for 16 years as president before he was fired and later convicted of endangering the welfare of children, Michigan State struggles to come to grips with what the Simon era means now. Her prosecution brings that struggle to the fore in ways that her long-serving colleagues had not fully anticipated, opening a dam of emotion and ambivalence.

**Living in an Alternate Reality**

Many professors at Michigan State would prefer not to talk about Simon at all. Let the justice system sort it out. Focus on your job. Be vigilant so this never happens again.

That might be possible if not for the incessant reminders. Every day, it seems, brings a new local news article about the fate of the past president. There's a new photo of her in court. There's a mug shot of William D. Strampel, Nassar's dean in the College of Osteopathic Medicine, whose own litany of alleged misdeeds includes failing to enforce the protocol that Nassar, after having been investigated by the university's Title IX office, wear surgical gloves during examinations.

It's all enough to make Douglas D. Buhler think that he's living in an alternate reality, where people he has long trusted and respected may have done horrible things. Buhler, who served two terms as dean of the College of Agriculture and Natural Resources during Simon's tenure, says he lurches from confusion to sadness. He had traveled internationally with Simon. He goes back years with Strampel. Now the world is presenting Buhler with another picture — and it's grotesque.

"It's a very different type of experience," he says, "to see somebody that the whole world is passing judgment on that you knew as a human being."

There was a time not long ago, Buhler says, when his wife asked him a troubling question: Was he certain that in all of his years of administration he hadn't done something that could come back to haunt him? Think of all the documents that flow in the course of a week, a month, a year. Was there anything that he had overlooked or couldn't defend? He lives now with that kernel of doubt.

"When you go through something this traumatic, there's going to be a price to pay," says Buhler, who now directs AgBio Research and serves as assistant vice president of research and graduate studies. "The reality is, this is a very serious thing, and we've got to make sure nothing like this happens again. That's going to take some time and some effort, and that's going to make us uncomfortable — and I think we need to be uncomfortable."

Source: *The Chronicle of Higher Education*—January 4, 2019

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## Georgia Tech President to Retire after Controversy over Administrators' Ethical Lapses

G.P. (Bud) Peterson oversaw several administrative departures at the Georgia Institute of Technology over the course of last year, following investigations that revealed employees' ethical lapses. On Monday the university's president announced the latest resignation — his own — saying he felt the university had "turned a corner."

"The opportunity to serve as president of Georgia Tech for the past 10 years has been one of the highlights of my career," Peterson wrote in a letter to the campus on Monday. "While we have faced several challenges, I believe we are on a very positive trajectory, a trajectory that has characterized Georgia Tech and served it well for many years."

This past summer, an audit revealed that three officials in the university's campus-services division had improper relationships with vendors and did not properly use Georgia Tech time. A fourth official, the university's finance chief, did not properly disclose his paid position on the board of a software company with which Georgia Tech did business, an investigation found.

In an interview on Monday, Peterson attributed his decision to retire this summer to his age, 66. He said the revealed ethical

lapses hadn't cut short his tenure — if anything, they extended it, he said.

"I made it pretty clear at the very start, when they first came up, that I wanted to work through those and try to put the mechanisms in place to make sure that we didn't have any additional or further problems," he said. "We've turned a corner. I feel good about where we are and where we're headed."

**Leadership Insights: Innovation**

The investigations and their findings kicked off a summer and semester of staff changes, surveys, and soul-searching at the Atlanta institution. Implicated employees resigned or were dismissed. Georgia Tech temporarily staffed up its investigators to examine a wave of new allegations of unethical conduct. The university also reviewed the compliance of its purchasing policies and procedures with system and state rules.

The university also surveyed faculty, staff, and some graduate students on their perceptions of ethics in the university's culture. In a letter promoting Ethics Awareness Week, Peterson urged everyone on the campus to ask themselves, "Will our actions reflect positively on us as individuals and on Georgia Tech?"

In an August conversation with Chancellor Steve W. Wrigley of the University System of Georgia, Peterson recognized he needed to follow advice on management weaknesses at Georgia Tech, and to raise his expectations of senior officials, according to a letter from Wrigley to Peterson that the university shared publicly.

"Lax management and unethical behavior at Georgia Tech have resulted in misuse of resources and a failure to hold staff accountable, and, as president, you are ultimately responsible," Wrigley wrote.

Wrigley would later praise Peterson's execution of changes over the course of the semester. "While there is still much work to be done to ensure real and permanent change, I am pleased with Georgia Tech's progress and appreciate you making ethical management a top priority for your leadership team and the institution," he wrote in November.

Source: *The Chronicle of Higher Education*—January 7, 2019

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## Chicago State U. Will Pay $650,000 in Legal Settlement over Faculty Blog

A four-year legal battle between the administration at Chicago State University and two of its professors has ended in a $650,000 settlement of a lawsuit over faculty members' First Amendment rights to publish a blog criticizing administrators.

The university's settlement covers the professors' claims, lawyers' fees, and legal damages, in addition to revising the speech policies challenged in the initial lawsuit, according to a settlement agreement published by the Foundation for Individual Rights in Education, which supported the lawsuit as part of its effort to protect campus free-speech rights.

The case was filed in 2014 by Phillip Beverly, an associate professor of political science and the Faculty Senate president, and Robert Bionaz, then an associate professor of history. It accused university leaders of seeking to restrict faculty members' speech on the independent CSU Faculty Voice blog. The blog, which started in 2009, is critical of the university's leadership and discusses concerns about the administration's accountability.

The lawsuit was brought after the university sent a cease-and-desist letter to the site, requiring its managers to "immediately disable" the blog "to avoid legal action." Chicago State also stated that the blog had used university "trade names and marks" without permission and had violated decorum policies expected of faculty members.

In a new blog post, Bionaz, who has since retired from Chicago State, criticized the settlement as another "unnecessary and costly" defense of Wayne D. Watson, the university's former president, who stepped down in 2016 after a string of controversies.

"So the university must once again pay the price for Wayne Watson's incompetence, his vindictiveness, his mendacity," Bionaz wrote. "Hopefully, the settlement indicates that at least

someone responsible for administering this school will actually put the university's interests first."

Under Watson's leadership, Chicago State administrators had a tense relationship with faculty members. University administrators used Illinois's public-records law to get information from the Faculty Senate in 2014, after the group refused to release details of a faculty vote to administrators.

In response to a request for comment about the settlement and Bionaz's statements, a university spokeswoman, Sabrina Land, said, "We worked with our insurance company to reach the best settlement, and now the university is moving forward."

Source: *The Chronicle of Higher Education*—January 8, 2019

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## Information Security & Privacy

### U.S. Department of Education Addresses Criticism of FERPA Enforcement

The U.S. Department of Education issued new guidance on December 20 addressing the efficiency and enforcement of the Family Educational Rights and Privacy Act (FERPA).

The guidance follows the November release of an audit report undertaken by the Office of the Inspector General addressing the Office of the Chief Privacy Officer's handling of complaints brought under FERPA. The audit determined the Privacy Office did not have proper controls to ensure it timely and effectively processed FERPA complaints, and included corrective action recommendations:

- The Privacy Office should allocate appropriate resources to eliminate the current unresolved complaint backlog so that it can resolve complaints in a timely manner going forward. The Privacy Office should also work to resolve FERPA policy issues that affect its ability to resolve certain complaints.

- To eliminate control weaknesses, the Privacy Office should ensure its policies and procedures are appropriate and comprehensive to effectively guide staff that resolve complaints as well as managers that oversee their work. The Privacy Office should also implement an effective complaint tracking process to ensure it can maintain reliable and complete information on the status and outcome of all complaints received. In addition, the Privacy Office should develop meaningful performance standards for the complaint resolution function and for staff that resolve complaints. The Privacy Office should also avoid putting complaints that warrant an investigation into an "inactive" status. Finally, the Privacy Office should ensure it communicates timely and effectively with complainants and develop a process for evaluating the risk of incoming complaints to ensure that high-risk or high-impact complaints are assigned the highest priority.

A month after the audit, the Department of Education has issued new guidance:

> *The Department will continue to conduct full, formal investigations where necessary and appropriate to enforce rights and resolve violations under the statute and regulations. In making these determinations, we will adopt the Office of Inspector General's recommendation to prioritize the highest risk complaints for formal investigation based on "the severity of risk to student privacy, the number of students affected, [and] other relevant factors."*

The department has added a four-page summary of the anticipated changes on its website.

Source: *JD Supra*—January 2, 2019

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### Pennsylvania High Court Decision Regarding Data Breach Increases Litigation Risk for Companies Storing Personal Data

On November 21, 2018, the Supreme Court of Pennsylvania ruled in *Dittman v. UPMC d/b/a The University of Pittsburgh Medical Center* that an employer owes a duty to employees to use reasonable care to safeguard what the court described as the employee's "sensitive" personal data when storing it on an internet-accessible computer system. As the first state Supreme Court decision formally recognizing such a duty, the decision could increase the risk for companies facing potential class action litigation arising out of a data breach. The court also held that a negligence claim based on the breach of this duty is not barred by Pennsylvania's economic loss doctrine, a defense frequently asserted by defendants in such lawsuits.

On June 25, 2014, Dittman and several others filed suit against the University of Pittsburgh Medical Center and UPMC McKeesport ("UPMC") on behalf a class of employees. The

employees alleged that a data breach had occurred whereby their personal and financial information was stolen from UPMC's computer systems, and were used to file fraudulent tax returns. Asserting a negligence claim, among others, the employees contended that UPMC breached its duty to exercise reasonable care to implement security measures to safeguard the information against unauthorized access by third parties. The employees further contended that such duty existed because UPMC required that the employees provide the information as a condition of their employment.

UPMC filed preliminary objections, claiming that the employees' claim was barred by the economic loss doctrine, which disallows recovery for purely economic damages. The parties also filed supplemental briefs addressing the issue of duty. The trial court dismissed the employees' negligence claim, finding that factors weighed against recognizing a common law duty in safeguarding data collected, and that the claim was barred by the economic doctrine. On appeal, the Superior Court agreed with the trial court on both issues and sustained the dismissal.

Dittman appealed to the Supreme Court of Pennsylvania, raising two questions of law:

1. whether an employer has a legal duty to use reasonable care to safeguard allegedly "sensitive" information of its employees when it chooses to store such information on an internet-accessible computer system, and
2. whether the economic loss doctrine permits recovery for purely pecuniary damages resulting from the breach of an independent legal duty arising under common law, instead of a contractual duty.

A majority of the court ruled on both issues in favor of the employees. On the first question, the court held that the employer had a duty to use reasonable care to safeguard its employees' "sensitive" information against a potential data breach. The court reasoned that a duty arises when an actor's affirmative conduct creates an unreasonable risk of harm to others, and that UPMC's collection of data as a condition of employment and subsequent storage allegedly without adequate security precautions constituted affirmative conduct on its part. On the second question, the court determined that Pennsylvania's economic loss doctrine did not bar the employees' claim, because the employees established the breach of a common law duty independent of any contractual duties.

This decision could precipitate increased data breach class action litigation against companies that retain personal data. No state Supreme Court had previously recognized the existence of a negligence-based duty to safeguard personal information, other than in the narrow context of health care patient information. *See, e.g.*, *Byrne v. Avery Center for Obstetrics & Gyno*., 175 A.3d 1, 572-73 (Conn. 2018) (recognizing duty under particular facts in context of disclosure of patient information, given the physician's duty of confidentiality to patient). In general, state and federal courts handling data breach litigation across jurisdictions have been divided on the issue of duty. *Compare, e.g.*, *Cooney v. Chi. Pub. Sch.*, 943 N.E.2d 23, 28-29 (Ill. App. Ct. 2010) (no duty under Illinois law); *with Hapka v. Carecentrix, Inc.*, No. 16-2372-CM, 2016 WL 7336407, at *5 (D. Kan. Dec. 19, 2016) (finding duty under Kansas law to exercise reasonable care to protect employee personal information where harm is foreseeable).

The *Dittman* court's interpretation of Pennsylvania's economic loss doctrine also manifests an expansive view of the range of recoverable damages for negligence claims. Previous state and federal court decisions in the data breach context have reached varying outcomes on this question depending on the contours of the economic loss doctrine in the states at issue.

Source: *Ropes & Gray*—January 8, 2019

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## HHS Issues Voluntary Cybersecurity Guidelines for the Healthcare Industry

On December 28, 2018, the U.S. Department of Health and Human Services (HHS) released "Health Industry Cybersecurity Practices: Managing Threats and Protecting Patients," a detailed set of voluntary guidelines illustrating best practices that healthcare providers may employ to combat five common and significant cyber risks. Those risks are: (1) phishing; (2) ransomware; (3) loss or theft of equipment or data; (4) insider, accidental, or intentional data loss; and (5) attacks against Internet of Things medical devices. The four-volume publication aims to provide voluntary cybersecurity practices to healthcare organizations of all types and sizes, ranging from local clinics to large hospital systems.

The Guidelines are the result of a two-year effort involving over 150 cybersecurity and healthcare experts from private industry and the government under the Healthcare and Public Health Sector Critical Infrastructure Security and Resilience Public-Private Partnership. The Guidelines highlight system vulnerabilities, potential impacts, and recommended best

practices for each cyber risk. They also highlight 10 practices, along with approximately 88 "sub-practices," that healthcare providers may employ in cybersecurity programs to better mitigate against the risks of the identified threats. Those practices are:

- E-mail protection systems
- Endpoint protection systems
- Access management
- Data protection and loss prevention
- Asset management
- Network management
- Vulnerability management
- Incident response
- Medical device security
- Cybersecurity policies

The Resources and Templates volume accompanying the Guidelines provides an evaluation methodology to assist companies to identify which sub-practices would work best to address identified cybersecurity threats. The Guidelines' two additional Technical Volumes discuss recommendations for implementing recommended cybersecurity practices and sub-practices for small, medium, and large-sized companies. All three volumes also provide charts for mapping the sub-practices within the National Institute of Standards and Technology Cybersecurity Framework. The Technical Volumes are written for healthcare providers' IT or IT security professionals, and to guide organizations as to what to ask of their IT professionals and vendors. The Resources and Templates volume serves as a supplement for both the Guidelines and the Technical Volumes.

Finally, HHS states that the Guidelines are intended to provide a starting point for cybersecurity practices, with goals of achieving a cost-effective reduction of cyber risks, providing further support for voluntary adoption and implementation of the Guidelines' recommendations, and providing actionable recommendations to healthcare providers of every size and resource level. However, although the Guidelines are voluntary, there is some concern that they will be used to measure reasonable duties of care in data breach litigation, or may be used to audit healthcare providers by regulators.

Source: *Cyber News*—January 11, 2019

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## Phishing Scheme Targets Professors' Desire to Please Their Deans -- All for $500 in Gift Cards

Rachel E. Brenner was in her apartment one Thursday morning when she got the urgent email. Jason E. Lane, her interim dean, needed help on "something very important right away."

Brenner, an assistant professor of counseling psychology at the University at Albany's School of Education, hurried out the door and drove to campus, her mind abuzz. Maybe it was about her research, which they'd discussed the day before. As soon as she walked into her office, she wrote back: "I'm free!"

It was then that she got the dispiriting reply. He wanted Brenner to buy iTunes gift cards for his cousin's birthday. *What an abuse of power directed at a young female professor*, she thought, and so out of character for Lane, whom she knew to be a good guy.

That's because it wasn't Lane. Brenner quickly realized she was the target of a phishing scam — one that has targeted faculty members at more than a dozen universities and perhaps unknowingly exploits academe's power dynamics for some quick cash.

Phishers have posed as deans and department chairs, asking professors to purchase and send photos of gift cards for iTunes or Amazon. The scam has been employed nearly identically at departments from Harvard University to Appalachian State University, from the University of Houston to the University of Iowa.

Early in the exchange, the scammers often say they are "in a meeting"— what dean or department chair doesn't have long meetings? — but promise to reimburse the professor soon. The sender's email address doesn't raise red flags because, in many cases, the scammers have created a fake email account that includes the name of the person they impersonate.

Laugh it off as an attempt to make a quick buck off university employees, but the scam hits many faculty members in an especially vulnerable spot: their desire to please their bosses.

Brenner now feels she can laugh at herself, but she realizes that the structure of academe meant she was motivated to respond to even unusual requests.

"The words 'power differential,'" she said, "keep coming to mind."

Lane — the real Lane — said he found the scam to be creepy and a bit scary. His immediate concern, he said, was worrying that his faculty or staff would be hoodwinked as the scammer used his name, down to the middle initial, to create a Gmail address. He had started as interim dean just that semester and noted that faculty members may not be familiar with how he writes.

**Public Listings, Public Vulnerability**

Joel W. McGlothlin was catching up on email after holiday travel when he saw a note flash across his phone screen. "Hello. Are you available right now?"

It appeared to be from Robert Cohen, his new department head in biological sciences at Virginia Tech. McGlothlin, who responded to the email because he wasn't yet familiar with Cohen's communication style, said he soon realized it was a scam and ultimately doubted other professors would fall for the scheme.

Still, he's spun out possible scenarios. Maybe the scammers were targeting departments with new leadership. Maybe they were testing which email addresses were active. "Maybe I'm giving them too much credit," he said.

The real Cohen told *The Chronicle* in an email that it was lucky no one was fooled or harmed. University staff members alerted other professors about the attempt.

Public listings of department faculty and contact information, though common at many colleges, can be a security vulnerability, said Jason Davis, director of information-technology systems and services at the University of Minnesota at Duluth. Davis said his office has warned professors of these attacks through newsletters and in department meetings.

All the scammers need is to catch a small percentage of targets on an off day because they reach out to so many people, Davis said.

Davis said the scammers have assumed the identity of one particular staff member at Duluth about 15 times.

When Joshua S. Goodman, a pre-tenure associate professor of public policy at Harvard University's Kennedy School, saw the email at an academic conference a few months ago, he wanted to be helpful to Bridget Terry Long, the dean of Harvard's Graduate School of Education, whom he thought was contacting him.

It felt like an honor to get a note from Long, a scholar he has long admired. He was about to respond before he realized the email wasn't from her official university address.

Source: *The Chronicle of Higher Education*—January 23, 2019

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## Intellectual Property

### Graduate Student Research Lands University of California in Copyright Lawsuit

MMAS Research, LLC and its founder, Dr. Morisky, are suing the University of California for, among other claims, copyright infringement based on the unauthorized use of a proprietary medication-adherence test known as the MMAS. Dr. Morisky, a former UCLA professor, claims multiple infringing uses involving PhD student Linda Park and medical research co-author Selena Zuo.

The copyrighted tests created by Dr. Morisky (the MMAS-4 and the MMAS-8) consist of patient surveys with either 4 or 8 questions designed to assess a patient's degree of adherence to the medication regimen prescribed to him or her by a physician in the treatment of a specific diagnosis. The test questions themselves have associated copyright registrations, as do the translations, codings, and scorings of the test results.

During the years 2014 to 2017, Park and Zuo used and referenced the MMAS tests in connection with medication-adherence research and, later, publication. Morisky claims this use was unauthorized and constitutes copyright infringement, among other violations. Park participated in research efforts analyzing the effectiveness of text messages in promoting patient adherence to medication treating coronary artery disease while Zuo's research focused on medication non-adherence in patients with end-stage liver disease. Both authors referred directly to their use of the Morisky tests in the publications resulting from their respective areas of research.

The complaint was filed in federal court against the authors as well as the Regents of the University of California in late November of 2018. Plaintiffs are demanding a jury trial and request injunctions, attorney's fees, and compensatory and punitive damages.

Source: *BYU Copyright Licensing Office*—January 9, 2019

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## International

### For American Colleges, China Could Be the New Travel Ban -- but Worse

Anxiety has been rampant about the "Trump effect," the idea that the president's travel ban and anti-foreigner rhetoric could discourage — or prevent — top students and scholars from coming to the United States and damage the standing of American higher education globally.

But perhaps American colleges should be bracing for something even more ominous on the horizon — call it the "China effect."

Consider this: The Trump administration in recent months has tightened rules for Chinese visa-holders in some STEM fields and reportedly has considered barring all Chinese students. Public officials, including the director of FBI, have warned of universities' vulnerability to Chinese espionage, and Congress has threatened to withhold certain federal grants from colleges with Confucius Institutes, the Chinese-funded language centers. Amid heightening geopolitical tensions, some institutions are reconsidering their research ties in China.

And a potential economic slump in China should be raising alarms in American admissions offices, threatening to turn off the spigot of Chinese students who have flooded American campuses and buoyed bottom lines for the past decade.

To be sure, the travel ban and a number of Trump-administration changes in visa rules have complicated colleges' efforts to recruit and hire abroad. Since the 2016 election, the number of new international students coming to the United States has fallen.

Still, the Trump effect could pale next to a chilling of the relationship between Chinese and American higher education. The connections — student enrollments, joint degree programs, and research partnerships, among others — are deep, numerous, and, often, lucrative. One in three international students in the United States is from China. A recent American Council on Education survey of colleges' global efforts found that China was far and away the top priority.

"Institutions have gone all in on China," says Kevin Kinser, head of education-policy studies at Pennsylvania State University and an expert in international education. He points to a number of colleges that have been reassessing their ties with Saudi Arabia in the wake of the killing of Jamal Khashoggi, a journalist and dissident. But their partnerships with China are too broad and diffuse to be easily severed, he says.

"It's almost the classic example of too big to fail," Kinser says. "With China, the relationships are existential."

**Security and Naïveté**

But it will be equally hard for higher education not to get sucked into the showdown between Beijing and Washington, says Robert Daly, director of the Kissinger Institute on China and the United States at the Woodrow Wilson International Center for Scholars. While the two countries disagree on much, both see innovation and knowledge as central to 21st-century power. "Universities," Daly says, "can't sit this one out."

An initial target of the U.S. government has been Confucius Institutes, the language and cultural centers, funded by the Chinese government, on about 100 American campuses. Federal lawmakers have accused the centers of being hubs for espionage and propaganda arms of the Chinese government, and have pressed for them to register as foreign agents. A defense spending bill enacted last summer prohibited colleges with Confucius Institutes from using federal funds for Chinese-language training.

In the past year, more than a half dozen universities have announced they will shutter their Confucius Institutes. One of the most recent, the University of Rhode Island, directly linked the decision to close to the potential loss of federal dollars.

Not all of the closures, however, have been responses to pressure from public officials. The University of Michigan at Ann Arbor announced it would not renew its Confucius Institute in December, after months of deliberation. The reason was academic freedom, says Mary E. Gallagher, a professor of political science and director of the university's Center for China Studies. The structure of the institutes gives the Chinese government too much control over their programming, Gallagher says.

A recent report from the Hoover Institution, written by some of the foremost China experts in the United States, also criticized the Confucius Institutes, calling for more transparency in the contracts establishing them and for adherence to American academic standards.

Daly, who was part of the working group that wrote the report, says he expects more institutes to close. While they do fill gaps in language training on many campuses, administrators may decide they are not worth the headache, he says.

Meanwhile, Christopher Wray, the FBI director, has said universities are susceptible to Chinese spying — and suggested that higher education is not doing enough about it.

"The level of naïveté on the part of the academic sector about this creates its own issues," Wray said during a congressional hearing last year. "They're exploiting the very open research and development environment that we have, which we all revere. But they're taking advantage of it."

Sarah Spreitzer, director of government and public affairs at the American Council on Education, says college leaders are aware that U.S. intelligence officials have concerns. But in meetings the officials have not gone into specifics, making it difficult for universities to shore up particular vulnerabilities, she says.

ACE and other higher-education organizations have called on Kirstjen M. Nielsen, the secretary of homeland security, to convene new meetings of the Homeland Security Academic Advisory Council, a group of college presidents and academic leaders set up during the Obama administration to offer advice on student-visa and other security-related issues. The council had fallen dormant but was re-established last year by Nielsen. It could provide a forum for higher-education and security officials to discuss such issues, Spreitzer says.

"We want to know how we can proactively address specific concerns without having broad policies mandating" colleges' action imposed by Congress or the Trump administration, she says.

Educators are also worried that intelligence agencies' unfamiliarity with college and university operations and complex research could lead to overreach or mistakes, such as when federal prosecutors wrongly charged a Chinese-born Temple University professor with selling scientific secrets to China.

But Daly suggests that some of the security officials' and lawmakers' discomfort stems not from Chinese students' and researchers' gaining access to research secrets — foreign nationals have long been prohibited from working on classified projects and other sensitive research — but rather from their acquiring information that could help advance Chinese national and economic interests. Higher education's fundamental openness is at odds with a worldview that sees China as a zero-sum competitor.

"They think, Why should American universities be training China's top minds in things like AI when they will then just compete with the U.S. globally?" Daly says. "After all, during the Cold War, we weren't training Soviet scientists in nuclear physics."

Trump-administration officials could set rules that would bar Chinese students from certain fields deemed important to American interests, Daly says. That step could be disastrous for American universities. China is the largest source of doctoral students from abroad, many of whom are concentrated in critical scientific fields that attract few Americans. And, notes Daly, such a move would do little to prevent China from gaining the restricted knowledge, which is available by reading scientific journals or hiring graduates from other countries.

**Feuding Governments**

Still, the threats to Sino-American higher-education partnerships aren't coming from just one side.

Under President Xi Jinping, the Chinese government has increased oversight of its universities, mandating a more nationalist curriculum and cracking down on dissident scholars. Some professors who regularly work in China or with Chinese colleagues say they have noticed a more restrictive environment there, and monitoring of foreign researchers may have increased. China also is taking a harder look at overseas collaborations. Last summer the Ministry of Education ended 234, or one-fifth, of its international university partnerships, including more than 25 with American colleges.

While the government cited academic standards and quality as the reason for the closures, there's no reason it couldn't shut down such partnerships for ideological reasons or as part of a diplomatic stand-off with the United States.

Source: *The Chronicle of Higher Education*—January 3, 2019

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## Groups Seek to Clarify Foreign Gift Reporting Rules

The American Council on Education and five other presidential higher education associations sent a letter to the Department of Education seeking guidance on compliance with Section 117 of the Higher Education Act, which requires institutions to publicly report high-value gifts and contracts from foreign sources. The letter, available here, notes "several questions about how to interpret the law correctly," including questions about whether a university foundation must comply with the reporting requirements and how specific universities must be in identifying donors.

Source: *Inside Higher Ed*—January 25, 2019

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## Online, the U. of Farmington Looked Real. Behind the Scenes, It Was a Federal Sting Operation.

If you know students hoping to earn a degree in mechatronics, do not send them to the University of Farmington.

Yes, the institution has an encouraging Twitter feed that flaunts royal-blue diplomas for a batch of Winter 2018 graduates. Yes, its Facebook page shares posts about the importance of observing Martin Luther King Jr. Day and articles from *The Chronicle*. And yes, its website dives into the university's rich history, dating to the early 1950s, when "returning soldiers from the Second World War were seeking a quality and marketable education."

But behind that online facade, there's nothing there. Unlike the real University of Maine at Farmington, "the University of Farmington" is fake. Lurking behind the charming Facebook posts wishing students a "successful and fruitful 2019," *The Detroit News* reports, is an effort by federal agents to lure undocumented immigrants and people who may be helping them obtain student visas.

The university was "opened" in Farmington Hills, Mich., in 2015 by the U.S. Department of Homeland Security and was used to identify student recruiters and others engaging in immigration fraud, according to the department. Agents began posing as university officials in February 2017, as a part of extreme efforts to crack down on illegal immigration just a month into Donald J. Trump's presidency. They came into contact with a small group of student-visa seekers who offered to recruit other students for pay, promising them they could obtain student visas without actually taking classes, according to grand-jury indictments released on Wednesday.

It was an elaborate scheme, and it resulted in eight arrests. The recruiters caught in the dragnet were charged with participating in a conspiracy to assist at least 600 foreign citizens to stay in the country, according to the Detroit newspaper.

The website, dressed in red and blue and decorated with the university's ostensible coat of arms, boasts undergraduate and graduate programs in accounting, finance, information technology, manufacturing engineering, mechatronics, supply-chain management, and — ironically — international business.

"Students from countries other than the United States are encouraged to apply to UF as first-time freshmen or transfer students," the website says.

The university's "Factoids" page goes on to make the case for the Farmington education experience. One hundred percent of students discuss classwork with a professor outside of class, it says. No classes are taught by teaching assistants, and the university's president speaks four languages.

The University of Farmington is not the Department of Homeland Security's first fake foray into academe. The University of Northern New Jersey, another purported for-profit institution, was also founded for the purpose of catching recruiters of undocumented immigrants and other groups that could be perpetrating immigration fraud.

In April 2016, *The Chronicle* reported, the department arrested 21 people on charges that they had recruited thousands of students with fraudulent pledges to obtain foreign-worker and student visas through the ersatz university.

And just as with the respected University of Farmington, the department played its act to the hilt. The institution maintained a constant Twitter presence, with weather updates and closings, and published Facebook posts about its push for brighter futures for its students.

Both websites are basic but enough to sell a small-budget, for-profit university seeking to recruit. Farmington's Twitter account, meanwhile, was deleted on Wednesday.

Source: *The Chronicle of Higher Education*—January 30, 2019

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## Sexual Misconduct

### What Does Higher Ed Have to Say about the Proposed Title IX Rules?

The Education Department's proposed regulations on Title IX, the federal gender-equity law, would provide colleges with some long-sought flexibility when responding to sexual-misconduct reports — but would make campus disciplinary proceedings far too legalistic and burdensome.

That's according to the public comments, compiled in a 33-page letter, submitted to the Department of Education on Wednesday by the American Council on Education, higher education's biggest lobbying arm. Sixty other associations signed onto the letter.

The letter runs through a long list of "serious concerns" that colleges have about the proposed regulations. On the whole, said Ted Mitchell, ACE's president, they "are a step in the wrong direction."

Terry Hartle, senior vice president for government and public affairs at ACE, told *The Chronicle* that the association spent more time on the Title IX letter than on any other public statement in the past five years.

"The draft regulation is like the world's biggest artichoke," Hartle said. "You see something and you start peeling off a layer, and there's another layer below that, and another layer, and they get finer and finer."

Higher-education groups have often argued that the Obama-era guidance — which significantly changed how colleges handle sexual-misconduct cases — was inflexible and often confusing for administrators. The groups criticized federal officials for choosing not to solicit feedback on their proposals through a regulatory process.

Betsy DeVos, secretary of education, announced in 2017 that the department would scrap that guidance and issue new Title IX regulations. The proposed rules were published in November, and the public-comment period for them ended on Wednesday.

Here are five of the main points in ACE's letter:

**Colleges are educational institutions, not court systems.**

Requiring live hearings and cross-examination for sexual-misconduct cases would effectively force colleges to create miniature courtrooms, which isn't appropriate, the letter says. It asks the department to abandon both mandates and give colleges the ability to choose between hearings or a nonhearing model, as long as each student involved in a case has the chance to test the credibility of the opposing party and witnesses.

The letter also notes that the department uses "due process" more than 30 times in the proposed rules and recommends that federal officials instead use a term like "fair process."

There's a presumption in the proposed regulations that every college should be able to "provide a court-like forum for one individual to press a case against another," the letter says. That doesn't take into account the realities for small and underresourced colleges.

The letter also predicts that the proposed regulations would bring about a cottage industry of lawyers who would bring an "adversarial" tone to campus disciplinary proceedings.

**Colleges should have the flexibility to "treat different cases differently."**

As long as institutions are running a fair process and following their policies, the letter says, administrators should be able to make judgment calls about what kind of approach makes sense for individual cases.

The letter praises the department's proposal for allowing informal resolution of cases — in other words, no investigation or hearing — if both the alleged victim and the accused student agree to it. That change, the letter says, "would provide survivors more flexibility to determine how they wish to proceed."

College leaders were also pleased to see the elimination of the "arbitrary and inflexible" requirement for resolving sexual-misconduct cases in 60 days, which had been part of previous Title IX guidance.

**When colleges act in good faith to comply with Title IX, don't second-guess them.**

The letter hints at colleges' frustration with the heavy-handed approach of the Obama-era civil-rights office, which opened hundreds of investigations into institutions for possibly mishandling sexual-misconduct cases.

The department should aim to work with colleges to prevent sexual harassment, the letter says, not against them.

"When institutions fail to live up to their obligations under Title IX, and clearly err, they should be held accountable," it says. "But when institutions act in good faith, after a careful and

deliberative process, they should not be second-guessed by the department."

**Colleges don't want to be let off the hook.**

Many observers have said the proposed Title IX rules would take some of the pressure off colleges for responding to cases of sexual misconduct, by scaling back the kinds of cases that administrators would be required to investigate.

The letter commends the department for providing an explicit definition of sexual harassment, and for clarifying that officials would have to investigate only those sexual-misconduct reports that the institution had "actual knowledge" of.

"However, institutions will also continue to act upon sexual harassment outside of or beyond the regulation's specific requirements," the letter says. "The regulations should be equally clear that they do not prohibit or inhibit such institutional response."

The letter takes issue with the department's suggestion that if a report doesn't fall within its proposed narrower definition of sexual harassment, colleges "must dismiss the formal complaint with regard to that conduct."

"This language implies that an institution is prohibited from moving forward under its own campus disciplinary procedures to address a violation of its own code of conduct for sexual misconduct if that conduct falls outside the boundaries of the proposed rule's definition," the letter says. "We believe this is a serious mistake."

**Many colleges would be forced to adopt a higher standard of evidence.**

The Obama administration told colleges to use a standard of preponderance of evidence — that is, more likely than not — to determine whether a sexual assault had occurred. Some state laws also require that standard. Critics charged that "preponderance" was unfairly low, resulting in the punishment of accused students even when the evidence was murky.

The proposed regulations would technically give colleges a choice of which standard to use — preponderance or "clear and convincing," a higher burden. But they would also require colleges to use the same standard for all campus disciplinary proceedings, including those for faculty and staff members.

Because of collective-bargaining agreements and institutional-governance policies, the letter says, many colleges would be forced to adopt "clear and convincing" for sexual-misconduct cases, "making this a *de facto* federally prescribed standard." The letter implores the department to drop that mandate.

Source: *The Chronicle of Higher Education*—January 30, 2019

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## Student Financial Aid

### The U.S. Did a Major Report on Campus Hunger. Here Are 3 Takeaways.

The most robust investment in ending campus hunger may be too complicated to accomplish its goals, according to a new report from the U.S. Government Accountability Office.

Responding to hunger and poverty on campuses has been a growing concern throughout higher education in recent years. The office's report, released on Wednesday, is sure to draw more attention to the problem — and provide details about its prevalence.

Here are three takeaways from the report:

**1. The government's main means of easing hunger is limited for college students — and poorly understood.**

The Supplemental Nutrition Assistance Program (SNAP) is the main federal program that helps low-income people buy food. But the report found that 57 percent of eligible students had not participated in SNAP, which provides food stamps, in 2016.

The office found that college officials had difficulty understanding SNAP rules to the point of believing that students were completely ineligible. A 1980 law did make college students broadly ineligible for SNAP, but there are exceptions. If students work 20 hours or more per week, or if they are single parents, they may be eligible.

But the reasons for the exemptions, like working part time or caring for a family member, may be counterproductive.

Researchers have found that such activities can have a detrimental impact on completing college, the report says.

**2. Changes in the Pell Grant and other financial aid might be adding to the students' hunger.**

Some students used to pay for daily expenses like food, books, and supplies with refunds from their financial aid or Pell Grants. As the Pell award has changed, the refunds have decreased, causing students to look elsewhere for money to use for basic living expenses.

According to the report, the average Pell Grant covers 37 percent of two-year college expenses and 19 percent of four-year college expenses — a 13 percentage-point decrease in coverage at two-year institutions and a 20 percentage-point decrease at four-year institutions compared with 40 years ago.

**3. Institutions and some states are taking the matter into their own hands.**

Colleges have started attacking the issue of hunger through educating faculty, staff, and students with cooking lessons, food-budgeting courses, and other campus programs.

In addition to classes, many institutions have been providing free food and emergency financial assistance. These efforts were spawned by studies that found that over 40 percent of students at some universities had gone hungry.

Source: *The Chronicle of Higher Education*—January 9, 2019

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## Think the Federal-Aid Process Is Crazy? Here's Some 'Bureaucratic Sanity'

The U.S. Department of Education on Wednesday made many people happy. No, really.

Financial-aid officers, college-access advocates, and education wonks all cheered the news that a vexing part of the federal-aid process had just gotten simpler.

Here's what happened. The Education Department released new guidance on recent changes in 2018-19 and 2019-20 verification requirements. Traditionally, those requirements have hindered many students who file the Free Application for Federal Student Aid. Why? They had to round up all the required documents in a world of red tape.

The guidance, effective immediately, essentially acknowledges that challenge, giving colleges more flexibility when verifying students' financial information. Colleges may now accept signed tax returns instead of tax transcripts, which often aren't easy to get.

Another change concerns students who don't file (and aren't required to file) tax returns. They still must obtain verification of their nonfiling status from the Internal Revenue Service, but those who are unsuccessful may now submit a signed statement explaining that they tried, along with a copy of their W-2.

"This is a moment of bureaucratic sanity," said Tyler Pruett, director of financial aid at Samuel Merritt University, in Oakland, Calif. "I'm usually pretty critical of the Education Department, but I need to give them props when they do something that's helpful for students."

All this might sound like way-too-nerdy minutiae. But verification is a high-stakes issue with real-world consequences, as *The Chronicle* has reported. For some students, it's a trap that can delay or derail their plans.

Each year, the Education Department selects one-quarter to one-third of all federal-aid applicants for verification. Most have something in common: financial need. Though the Education Department doesn't release verification numbers annually, it has revealed that 5.3 million students were selected for verification in 2014-15. About 5.2 million of them were eligible for federal Pell Grants, which help lower-income students pay for college.

But many of them never get that aid. In 2015-16, just 56 percent of Pell-eligible students selected for verification went on to receive the grants, compared with 78 percent of those who weren't selected.

There are probably a few reasons for that gap, but one is that verification deters some college hopefuls who are very much entitled to their aid. The National College Access Network estimates that verification kept one in five Pell-eligible students from receiving the grants that year.

Source: *The Chronicle of Higher Education*—January 9, 2019

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## Tax


# Tax Law's Effects on Colleges Unfolding

When President Trump at the end of 2017 signed a Republican-backed tax-reform package into law that included significant changes for colleges and universities, higher ed leaders were left waiting for answers.

They wondered about rules for calculating a new tax on endowments. They sought guidance regarding a tax on parking and transportation benefits for employees. Questions circulated about a new tax on highly compensated nonprofit employees that had drawn criticism while the tax law was still being drafted.

And leaders also wondered about the tax law's effects on human behavior. For instance, how would an increase in the standard deduction affect donor behavior? Would alumni newly covered by the larger standard deduction be less likely to give to colleges and universities because they wouldn't be itemizing their taxes?

About a year later, some answers have become clearer, while others remain clear as mud -- and still others can be addressed by mucking around with pages of guidance from the Internal Revenue Service.

The Treasury Department and IRS have been rolling out interim guidance giving colleges an idea of how to handle technical issues like how to group separate lines of business subject to a new unrelated business income tax or how to handle parking and transportation benefits subject to taxation.

Broadly, experts say the guidance is in many cases helpful, even though it hasn't addressed every question raised. So it is possible today to take stock of key developments on tax reform issues that captured attention.

The guidance issued so far could also prompt some interesting behavior and unexpected effects. For instance, don't be surprised if some colleges pull up signs designating parking spots for employees or redraw the lines in lots in order to dodge the parking tax.

In some cases, though, college leaders still have little choice but to wait for more information.

"It's still early days," said David Shapiro, a partner and tax chair at the law firm Saul Ewing Arnstein & Lehr in Philadelphia. "We won't really see how it shakes out until we're through at least one fiscal year."

Below are brief discussions about some of the major tax reform issues and how they have changed over the last year.

**Excise Tax on High Compensation**

As 2018 ticked toward its close, new interim guidance came out on a 21 percent excise tax that tax-exempt entities and their related organizations must pay on employee compensation of more than $1 million, spelling out what wages and benefits count toward the tax trigger. Experts are still digesting the guidance but flagged some notable developments.

Related organizations share the costs of an excise tax. So if a university and its foundation both pay a president who earns more than $1 million, they would each pay some tax.

An example given in the guidance document has one organization paying an employee $1.2 million, or 60 percent of his or her total compensation, and another paying $800,000, or 40 percent of total compensation. The total excise tax would be $210,000, or 21 percent of the compensation in excess of the $1 million tax trigger. The first organization would pay 60 percent of the tax bill and the second would pay 40 percent.

That's important because highly paid university employees sometimes receive compensation from more than one related entity. Think, for instance, of football coaches.

"It's not always the university president who's going to be affected here," said James Finkelstein, a professor emeritus of public policy at George Mason University who studies presidential compensation. "It may be the vice president of the medical center or the dean of the medical school. It could be the athletic director or football coach or basketball coach."

The new guidance also spells out that licensed medical professionals' compensation is not subject to the excise tax when it covers "direct performance" of medical services, nursing services or veterinary services. But compensation for other duties they perform, like administrative, research, teaching and management duties, generally is subject to the tax.

Some public colleges and universities have been recognized as 501(c)3 organizations, and some have not. Those not set up as 501(c)3s are not subject to the excise tax on compensation, and those that do have 501(c)3 status may relinquish it so the tax does not cover them.

"My guess is you're going to have public institutions that have at some time in the past elected to get their 501(c)3 status get rid of it," said Dan Romano, partner in charge of tax services, not-for-profit and higher education at the consulting firm Grant Thornton.

But 501(c)3 status comes with some benefits for institutions. For instance, giving money to a college from a donor-advised fund is easy to do if the institution has the status and is listed in the IRS master file. It's harder and requires more due diligence for others.

Also of interest, it appears institutions will need to track their five highest-paid employees regardless of whether they owe one cent under the excise tax on compensation -- and they will need to continue tracking those employees, plus anyone who displaces them in the top five, into the future. "Those employees continue [to] be covered employees in all future years and may be paid excess remuneration or excess parachute payments in a future year," according to the guidance.

The excise tax could leave some institutions with an unexpected tax bill for employees who receive "parachute payments" when they are terminated, experts say. Some also take issue with the fact that the tax allows for no grandfathering of employee contracts signed before it was passed into law. It is hard to plan for possible future tax payments when you don't know the rules under which those payments will be due, they point out.

Many think the excise tax will become just another cost of doing business, though. It will be folded into the already high cost of hiring top employees, along with search fees, salaries and benefits packages.

**Parking and Transportation Benefits**

Also in December, interim guidance addressed some key questions about parking and transportation benefits and costs that are being taxed as unrelated business income. Taxed parking benefits have received particular attention after reports emerged last year that churches and other tax-exempt organizations would have to pay a 21 percent tax on such fringe benefits to employees.

Notable among the new guidance were steps employers can use toward measuring employee parking expenses at lots colleges and universities own or lease. The first is determining the number of spots reserved for employees as a percentage of total parking spaces, according to the National Association of College and University Business Officers. That percentage is considered for unrelated business income that is taxable.

The second step is to count the remaining spots. If more than half of spots can be used by the public, none of the parking facility's expenses are taxable income. The third step is to count spots reserved for customers and other nonemployees, which are also not taxable.

Finally, spots left over after the first three steps must be checked for "employee use during normal business hours on a normal day."

Employers with reserved employee spots still have time to remove them before the tax kicks in. They have until March 31 of this year to remove the reservation and have the change be retroactive until Jan. 1 of 2018.

Experts hope Congress will pass legislation removing the parking tax entirely. In the meantime, they say institutions are likely to take action to avoid having to pay the tax at all. Some have joked that colleges will redraw lot lines to add more spaces.

"In the university world, unless it's a small institution with a limited number of students, they should have ample spots to prove it's primarily for student and other use," Romano said. "It may be a matter of them doing away with reserved parking."

NACUBO noted in December, however, that the guidance didn't address transit benefits.

**Endowment Tax**

The so-called endowment tax, a 1.4 percent excise tax on net investment income at private colleges and universities with at least 500 tuition-paying students and assets of at least $500,000 per student, has generated intense pushback, particularly from the wealthy colleges most likely to have to pay it.

No one is quite sure yet how many institutions will have to pay. Estimates anticipate dozens in early years. But the tax kicks in on the first tax year that starts after Jan. 1, 2018.

Source: *Inside Higher Ed*—January 9, 2019

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