

University Compliance Programs Need 3 Lines Of Defense

By **Bradley Dizik and Robert Roach** (November 14, 2022)

Recently, Michigan State University president Samuel Stanley Jr. prematurely resigned after pressure from the university's board of trustees in response to ongoing criticism of his handling of the university's Title IX compliance program.[1]

For the third time in four years, Michigan State University will conduct a search for a new president. What needs to change to make this new president avoid the same criticisms?

Michigan State University needs an independent ethics and compliance program consistent with U.S. federal sentencing guidelines for organizations[2] and U.S. Department of Justice guidance.[3]

This is a strategy that is not only applicable to Michigan State University, but an effective tool that universities throughout the U.S. need to implement, if they have not done so already.

In recent years, all across the U.S., universities and their related academic medical centers have struggled with allegations of sexual misconduct and relationship violence on campus.

News headlines have, with unfortunate regularity, reported numerous sexual misconduct and relationship violence instances, perpetrated not only by students, but also faculty, university employees and administrators, coaches, physicians and even executive leaders, with the alleged misconduct frequently occurring over many years.

One approach several universities are taking to address these issues is to change campus culture through the development of effective independent ethics and compliance programs.

For many decades, organizations of all types across the U.S. — corporations, partnerships, labor unions, pension funds, trusts, nonprofit entities and governmental units, as well as academic medical centers and universities — have developed and implemented ethics and compliance programs.[4] These programs have typically followed the federal sentencing guidelines for organizations and the DOJ's guidance.

Over the years, the standard for determining what is an effective and independent ethics and compliance program has grown and strengthened.

At first, ethics and compliance programs took a command-and-control approach. Ethics and compliance duties were assigned by management to an existing department, almost as an afterthought, with efforts focused almost exclusively on regulatory compliance with applicable state and federal laws, such as Title IX of the Education Amendments of 1972.[5]

Eventually, thanks to more enlightened organizations and thought leaders, ethics and compliance programs evolved away from a focus on simple regulatory compliance toward a values-based approach,[6] with an understanding that an organization's ethics and compliance program will be most effective when it reflects the positive shared values of the organization, its members and stakeholders, and the diverse communities the organization



Bradley Dizik



Robert Roach

serves.[7]

Accordingly, a growing number of universities have recognized that eliminating sexual misconduct and relationship violence on campus required a change in the entire campus culture from one that tolerates sexual misconduct and relationship violence to one that embraces positive values, protects people from retaliation, and creates an environment that promotes high ethical standards based on a community's shared values such as mutual respect, understanding and inclusivity.

Likewise, ethics and compliance programs have evolved from optional to mandatory. For many years, it has been recognized as a matter of well accepted law that institutional boards have a fiduciary duty to ensure that the organizations they oversee have effective ethics and compliance programs based on federal guidance.[8]

As a result, we have seen the vast majority of leading research universities that are members of the American Association of Universities, or AAU, appointing chief ethics and compliance officers with specialized professional experience in ethics and compliance.

These officers' primary day-to-day responsibility is to develop, implement, manage and oversee the institutions' ethics and compliance programs — with the understanding that an organization's ethics and compliance program will be most independent when it directly reports to the university's board or to an appropriately empowered board subcommittee.

The ethics and compliance programs developed and implemented with these two fundamental principles tend to be nimbler and more capable of adjusting themselves to the changes in ethics and compliance risk profiles over time, ensuring they reflect the diverse needs, values and culture of their communities.

For example, we have seen more ethics and compliance programs have a Title IX office that is supported, assisted and assessed for effectiveness by an independent ethics and compliance office and officer, such as Ohio State University's Office of University Compliance and Integrity and the University of Wisconsin's Office of Compliance and Integrity.[9]

This structure is designed to help ensure a university culture that is respectful of the diverse needs of the university community, and it works to eliminate sexual misconduct and relationship violence on campus.

Some universities have gone even further by recreating their ethics and compliance programs to place particular emphasis on culture, ethics and compliance.

For instance, at the University of Southern California, an independent vice president of culture, ethics and compliance is leading a so-called culture journey designed to ensure that the university's programs address the needs of diverse communities and take steps to address significant ethics and compliance risks, such as sexual misconduct and relationship violence on campus.[10]

Despite these trends, some universities have not been as proactive in developing effective and independent ethics and compliance programs or bringing about an appropriate change in campus culture without one in place.

This brings us to the case of Michigan State University. Like many academic medical centers and universities, Michigan State University has faced a crisis with sexual misconduct and relationship violence on its campus.

In the wake of Larry Nassar's sexual abuse of young athletes and other reports of sexual misconduct and relationship violence on its campus, the university set up an office to handle its day-to-day Title IX compliance tasks called the Civil Rights and Title IX Education and Compliance Office.

Title IX is one of many ethics and compliance requirements with which Michigan State University must comply to prevent, mitigate and respond effectively to reports of sexual misconduct and relationship violence.

However, as indicated repeatedly by internal and external audit reports,[11] establishment of this office alone has been proven far insufficient for the university's effective compliance with Title IX.[12]

If universities are truly committed to bringing about positive change in their organizational culture, then they should follow the example set by many AAU and Big Ten research universities by establishing an independent ethics and compliance program led by a professionally trained and experienced chief ethics and compliance officer who is independent of internal audit and reports directly to the board on a regular, ongoing basis.[13]

Three Lines of Defense

There will be three lines of defense in an ethics and compliance program that is appropriately designed to ensure both the overall effectiveness of the ethics and compliance program and the professional objectivity of its internal audit department.

Where the organization is a university or academic medical center, primary responsibility for ethics and compliance lies with the first line of defense, which includes the university president, provost, faculty and management leadership, such as the leader of Michigan State University's Civil Rights and Title IX Education and Compliance Office.

Positioning university leadership as the first line of defense reflects the importance of tone at the top in advancing and protecting the university's ethics and compliance culture that is based on a diverse community's shared values.

The second line in a well-functioning ethics and compliance program is a program led by an independent chief ethics and compliance officer and an appropriately staffed office, which is forward-looking and proactive, assisting the first line in developing and implementing the program and reports to the board on a regular basis regarding the status of the program, the key ethics and compliance risks the university is facing, and management's progress in mitigating these risks, along with any significant reported violations of the law or the university's shared values or policies.

This structure emphasizes the need for an independent ethics and compliance program that not only assists university leadership in promoting a culture of ethics and compliance based on a diverse community's shared values, but assists the board in fulfilling its fiduciary oversight responsibilities by reporting regularly, directly and freely to the board on matters related to the university's ethics and compliance culture and programs — including measurements of the effectiveness of a Title IX program, e.g., investigations, education and training.

The third line is an internal audit program which is primarily backward-looking and reactive.

The third-line auditor must retain the necessary objectivity to independently test that the university's overall ethics and compliance programs, as well as related policies and controls that were developed and implemented by the first line and second line, are effective and functioning as intended.

To preserve the necessary objectivity and independence, the internal auditor cannot participate in developing, implementing, managing and overseeing the ethics and compliance programs and internal controls it reviews.

Internal Audit

The role of the internal audit, and the requirement that it remain professionally objective, is set by the Institute of Internal Auditors in its globally accepted professional standards for internal auditors and International Professional Practices Framework, which includes specific implementation standards designed to assist internal auditors fulfill their professional obligations under the IIA code of ethical conduct.[14]

One key professional requirement is that internal auditors scrupulously maintain their objectivity when conducting audits.[15] Standard 1130 — "Impairment to Independence or Objectivity," Subsection 1130.A1 — provides that

internal auditors must refrain from assessing specific operations for which they were previously responsible. Objectivity is presumed to be impaired if an auditor provides assurance services for an activity for which the auditor had responsibility within the previous year.[16]

Thus, under IIA principles and rules, an internal audit department cannot be responsible for developing and implementing[17] an ethics and compliance program and, at the same time, objectively audit or monitor the program under generally accepted IIA standards and the IIA's code of ethical conduct.

At many AAU and Big Ten research universities that have established independent ethics and compliance programs, their internal audit department charters and mission statements specifically preclude them from engaging in developing and implementing management programs or policies for the departments or processes they audit.[18]

While universities like Michigan State University may have in place the first and third lines of defense, it is imperative that an effective proactive and forward-looking second line exists — an independent, empowered ethics and compliance office, officer and program.

This is the common root cause of a university's failure to develop and promote an overall university culture of ethics and compliance and the broader weakness in its Title IX program, resulting in repeated Title IX compliance lapses.

Conclusion

As recently as Sept. 15, Deputy Attorney General Lisa Monaco delivered remarks and released a DOJ memo outlining updates to its corporate criminal enforcement policies.[19]

In the memo, the DOJ reaffirmed its enforcement goal of ensuring that organizations are truly committed to creating and fostering an organizational commitment to ethics and compliance with the law.

Programs such as Michigan State University's that fail to properly adhere to DOJ guidance face enhanced enforcement risk, particularly where, as articulated by the DOJ memo, repeated misconduct "reflects broader weaknesses in [the] compliance culture or practices" and where there are common "root causes for misconduct."^[20]

The best advice that can be offered to university leaders, including the new leader at Michigan State University, is to quickly erect an effective and independent ethics and compliance office, led by an experienced professional that reports directly to its board consistent with U.S. federal sentencing guidelines for organizations and DOJ guidance.

Only then can the university end its continued, systemic Title IX compliance lapses and succeed in fostering a culture of ethics and compliance that reflects the values of its diverse community.

Bradley L. Dizik is executive vice president and the leader of the emerging issues and technology practice group at Guidepost Solutions LLC.

Robert Roach is a senior adviser at the firm. He served as the founding vice president and chief global compliance officer at New York University from 2006 to 2020.

Disclosure: In 2019, Dizik met with the Michigan State University's board of trustees and administration on best practices for ethics and compliance.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://www.nytimes.com/2022/10/13/us/michigan-state-president-resigns.html>.

[2] U.S. Federal Sentencing Guidelines Manual for Organizations, §8B2.1 - EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS, <https://guidelines.uscourts.gov/gf/%C2%A78B2.1>.

[3] See, e.g., DOJ's guidance on the "Evaluation of Corporate Compliance Programs" (Updated June 2020). <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

[4] See U.S. Federal Sentencing Guidelines Manual for Organizations §8A1.1. Commentary, Application Notes 1. <https://www.uscourts.gov/guidelines/2021-guidelines-manual/annotated-2021-chapter-8>.

[5] 20 U.S.C. §1681 et seq. Title IX is a Federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities. Under Title IX, discrimination on the basis of sex can include sexual harassment or sexual violence, such as rape, sexual assault, sexual battery, and sexual coercion.

[6] Lynn Sharpe Paine, Managing for Organizational Integrity, Harvard Business Review (March-April 1994) <https://hbr.org/1994/03/managing-for-organizational-integrity>.

[7] Id.

[8] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (1996).

[9] See <https://compliance.osu.edu/> and <https://www.wisconsin.edu/compliance/>.

[10] See <https://ooc.usc.edu/culture-journey/>.

[11] An independent external review of Michigan State University's handling of Title IX cases since 2019 — which was required by a resolution agreement entered into with the U.S. Department of Education Office for Civil Rights after federal officials found the University had failed to respond properly to reports of sexual misconduct by former sports physician Larry Nassar and former dean William Strampel — concluded that Michigan State University's Title IX program remained ineffective. In response to the independent external reviewers' conclusions, Michigan State University even hired an outside consulting firm in 2021 to assist it with managing and administering its Title IX program but to no avail. The outside consultant declared that even with the help of outside resources, Michigan State University's Civil Rights and Title IX Education restructured office was rarely fully staffed and plagued by a host of other problems including burnout, long investigative times and a lack of leadership which helped make Michigan State University's Title IX program ineffective less than five years after the University agreed to a \$500 million settlement with survivors of former physician Larry Nassar's sexual abuse.

[12] <https://www.freep.com/story/news/education/2022/09/11/msu-board-president-stanley-resignation/69485016007/>; <https://www.freep.com/story/news/local/2022/09/13/msu-president-samuel-stanley-jr-defends-handling-of-title-ix-reports/69493019007/>; <https://www.freep.com/story/news/education/2022/09/12/msu-board-chairwoman-byrum-backs-stanley/69486633007/>; <https://www.lansingstatejournal.com/story/news/2022/05/17/michigan-state-struggles-finish-title-ix-cases-quickly-firm-finds/9687862002/>.

[13] For example, oversight of Michigan State University's ethics and compliance program has been relegated to a unit under the supervision of Michigan State University's Internal Audit Executive. According to Michigan State University's Office of Audit, Compliance and Risk Management website, the Internal Audit Executive is ultimately responsible for "designing, implementing, and monitoring the compliance program." These combined responsibilities appear to be inconsistent with the professional "Objectivity" required by the Institute of Internal Auditors' ("IIA") internationally accepted Code of Ethical Conduct and its implementing standards. See <https://www.theiia.org/globalassets/documents/content/articles/guidance/implementation-guidance/implementation-guides-for-code-of-ethics-principles/ig-code-of-ethics-combined.pdf>.

[14] Id.

[15] Id. at IIA Code of Ethics Principle 2: Objectivity.

[16] Practice Advisory 1130.A1-1: Assessing Operations for Which Internal Auditors Were Previously Responsible https://www.interniaudit.cz/download/ippf/Practice_Advisory/PA%201130A1-1-AJ.pdf.

[17] <https://oarc.msu.edu/compliance/index.html>.

[18] See, e.g., Ohio State Internal Audit charter which provides, "Internal auditors will have

no direct operational responsibility or authority over any of the activities audited." https://busfin.osu.edu/sites/default/files/department_of_internal_audit_charter_05.20.21.pdf and University of Wisconsin Internal Audit charter which also provides, "Internal auditors will have no direct operational responsibility or authority over any of the activities audited. Accordingly, internal auditors will not implement internal controls, develop procedures, install systems, prepare records, or engage in any other activity that may impair their judgment ..." https://www.wisconsin.edu/internal-audit/download/IA-Charter_10.8.21.pdf.

[19] <https://www.justice.gov/opa/speech/file/1535301/download>.

[20] Id.