

Higher Education Newsletter

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New Regulation of Credit Cards On Campus

By James A. Keller and Kristyn L. Byrnes

On May 22, 2009, President Obama signed the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the "Act"), Pub. L. No. 111-28. In a White House press release, President Obama remarked that the new law gives "consumers ... the strong and reliable protections they deserve," and promised to "press for reform ... built on transparency, accountability, and mutual responsibility."

The Act takes effect on February 22, 2010. Sections 304 and 305 of the Act amend portions of the Truth in Lending Act and create specific protections for college students. In preparation for the effective date, institutions of higher education should review any current agreements with a card issuer or creditor and any current policies regarding credit card marketing on campus directed toward students. In doing so, schools should focus on the following three key portions of the Act to ensure compliance:

1. DISCLOSURE OF AGREEMENTS WITH CARD ISSUERS OR CREDITORS

Under the Act's new provisions, institutions of higher education must "publicly disclose" any contract or agreement between the institution and a card issuer or creditor for the purpose of marketing a credit card to college students. These include College Affinity Card agreements whereby the card issuer and the institution (or a related alumni organization or foundation) agree that credit cards will be issued to students and (1) the issuer has agreed to donate a portion of the credit card proceeds to the institution or alumni organization; (2) the issuer has agreed to offer discounted terms to students; or (3) the credit card bears "the name, emblem, mascot, or logo" of the institution or organization or other "words, pictures, or symbols readily identified with such institution."

2. INCREASED RESTRICTIONS ON MARKETING

The Act prohibits card issuers or creditors from offering tangible items or giveaways designed to induce college students to apply for and obtain credit cards in three specific instances: (1) when the offer is made on campus; (2) when the offer is made "near" the campus, with proximity to be

determined by the Board of Governors of the Federal Reserve System; or (3) when the offer is made at any event sponsored by or related to the institution.

3. INSTITUTIONAL POLICYMAKING

Congress is encouraging institutions of higher education to adopt formal policies restricting the activities of credit card issuers and educating students regarding credit card debt, as follows:¹

(a) Marketing Notification Requirements:

The policy should require that card issuers intending to market on campus specifically notify the institution of the location where marketing will take place.

(b) Limitation of Marketing Opportunities:

The policy should limit the number of marketing locations on campus.

(c) Programs on Credit Card and Debt Education:

The policy should establish credit card and debt education programs and counseling services as a regular part of orientation programs for new students.

Please also note that the Act requires credit card issuers to submit annual reports to the Board of Governors of the Federal Reserve System. These reports must include disclosure of all marketing agreements, promotional agreements, affinity card agreements, and other contractual arrangements the issuer has with institutions of higher education, alumni organizations, and foundations. The Board will submit these annual reports to Congress and make them available to the public.

Not every aspect of the Act is clear, and advisory opinions or additional guidance almost certainly will follow. The following key issues are left open under the Act:

¹ As stated in the Act, it is "the sense of the Congress that each institution of higher education should consider adopting" the policies outlined in this update. Adopting such policies is therefore currently optional, but could become mandatory in the future.

1. "PUBLIC DISCLOSURE" UNDEFINED:

The nature of the public disclosure requirement is not clearly set forth in the Act. At this time, it remains to be seen what actions (internet postings, written handouts, etc.) will satisfy an institution's obligation to publicly disclose agreements it has with card issuers.

2. "TANGIBLE ITEM" RESTRICTION:

The scope of the prohibition on offering "tangible items" to induce students is unclear. While handing out an iPod would clearly violate the restriction, what about a system of bonus or reward points, or airline miles?

3. PENALTIES FOR NON-COMPLIANCE

It is unclear what consequences, if any, the institutions themselves will face if they or card issuers on their campus fail to adhere to the Act, or if an institution declines to adopt the "suggested" policies restricting credit card distribution on campus.

The Board of Governors of the Federal Reserve is authorized to issue rules to carry out the provisions of the Act, and it is likely that more detailed guidance on these outstanding issues will follow in the coming months. The Higher Education Practice Group will provide further updates as warranted in the future.



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ONLINE EDUCATION: *New Opportunities ... and New Questions*

By Amy C. Foerster and Kristyn L. Byrnes

DO ONLINE COURSE OFFERINGS EXPAND THE BOUNDARIES OF PERSONAL JURISDICTION?

Does the fact that a school educates online mean that it is exposing itself to lawsuits anywhere from Tacoma to Tallahassee? The Third Circuit's opinion in *Kloth v. Southern Christian University*, 2008 WL 3165902 (3d Cir. 2008), provides some insight.

The plaintiff in *Kloth* lived in Connecticut when she enrolled in a Southern Christian University ("SCU") distance learning program culminating in the award of a dual masters degree in Marriage and Family Therapy and Professional Counseling. Although SCU's main campus is located in Montgomery, Alabama, the coursework portion of the program was to be completed online, followed by a clinical component arranged by the student.

After completing her coursework, Kloth began searching for a clinical site in Connecticut. She could not find a site that would accept her and moved to Delaware to continue her search. Kloth was no more successful in Delaware. She eventually brought suit against SCU in the District of Delaware for breach of implied contract to provide her with a complete education and discrimination on the basis of her religion.¹ The District Court granted SCU's subsequent motion to dismiss for lack of personal jurisdiction.

Kloth and SCU did not dispute the scope of SCU's contacts with Delaware. For purposes of Kloth's claim, those contacts included: (1) SCU's globally-accessible website; (2) Kloth's temporary residence in Delaware; and (3) the fact that one additional SCU student resided in Delaware.

The Court addressed specific jurisdiction first. Kloth argued that because SCU used interactive "Blackboard" software to facilitate

correspondence between Kloth, her professors and her classmates, it had purposefully availed itself of doing business with Delaware residents. In affirming the District Court's dismissal, however, the Third Circuit noted that the lower court "properly considered whether SCU's website was specifically designed to interact with residents of Delaware and concluded that [SCU] had not purposefully availed [itself] of doing business with Delaware citizens." *Id.* at *3. The Court stated that Kloth must show more than "mere interactivity; she must also show that, by using software that facilitates distance learning, SCU intended to engage in business with student citizens of Delaware." *Id.* The Court further noted that there was no evidence that SCU targeted its website to potential students in Delaware. Rather, the interactive software demonstrated only that SCU "intends to allow its students to attend classes and communicate with their classmates and professors when they are not at SCU's physical campus." *Id.* The Court further found that even if SCU could have foreseen that Delaware residents would participate in its program, that does not satisfy the purposeful availment requirement of specific personal jurisdiction.

The Court also noted that Kloth could not establish general personal jurisdiction over SCU. The school's maintenance of a website which "posts information about the school and is accessible to potential students in foreign jurisdictions," including Delaware, was deemed inadequate to subject an Alabama defendant to general jurisdiction in Delaware. *Id.* at *4.

Questions of personal jurisdiction will continue to be decided on a case-by-case basis, using a sliding scale to measure contacts with the forum state. In the Third Circuit's eyes, however, it appears that the mere offering of an online distance education program in which residents of the forum state are enrolled is not sufficient to confer jurisdiction. Evidence of specific contacts with citizens of a state or targeted efforts by the school in that state, however, may ease the jurisdictional restraints identified in *Kloth*. In establishing new online programs, colleges and universities are well-counseled to prospectively establish boundaries — including ensuring that

¹ Kloth was a member of the Jewish faith.

their online efforts do not target or advertise to potential students in a particular jurisdiction — that will help to offset claims of purposeful availment in the event of litigation.

WHAT DOES THE HEOA REQUIRE FOR ONLINE STUDENT AUTHENTICATION?

The Higher Education Opportunity Act (“HEOA”) requires that institutions offering online education have processes in place to establish that the student who registers for a distance education course is the same student who participates in the course. Since the HEOA was signed into law in August 2008, institutions have been awaiting guidance from the U.S. Department of Education regarding how they are to authenticate the identity of students enrolled in online programs. The concern has been that schools will have to invest significant sums of money into new high-tech authentication systems.

In late May 2009, educators breathed a collective sigh of relief upon learning that their student authentication procedures need not rival those of the CIA or FBI. The Negotiated Rulemaking Committee on Accreditation has clarified that it believes the processes and procedures currently in place at most schools will comply with the HEOA requirements. Specifically, accrediting agencies can satisfy this requirements if they:

- (1) require higher education institutions to “verify the identity of a student ... by using methods such as — (i) [a] secure login and pass code, or proctored examinations; and (ii) [n]ew identification technologies and practices as they become widely accepted;” and
- (2) “[m]ake clear in writing that institutions must use processes that protect student privacy and notify students, before enrollment, of additional costs, if any, associated with verification.”²

While this language is not yet final, it appears that secure logins and passwords or proctored examinations will satisfy the authentication requirement for now. It should be noted that as technology develops, these requirements may become more burdensome. Although compliance is not an immediate issue for most institutions, best practice standards will undoubtedly evolve, and regulatory requirements increase, over the coming years.



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² Negotiated Rulemaking Committee, Proposed Regulatory Language, Team III – Accreditation, available at <http://www.ed.gov/policy/highered/reg/hearulemaking/2009/accred-session3-issues.pdf>.

Negotiated Rulemaking Committee Makes Significant Progress on Clery Act Regulations

By Jodi Furr Colton

As part of the Higher Education Opportunity Act (“HEOA”) signed into law on August 14, 2008, Congress included several significant amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the “Clery Act”).¹ Although the amendments went into effect on August 14, 2008, institutions have not yet had the benefit of any regulatory guidance

from the U.S. Department of Education (“USDE”). That will soon change.

¹ 20 U.S.C. § 1092(f), with implementing regulations at 34 C.F.R. §668.46.

The USDE has established five negotiated rulemaking teams that have been working to develop proposed regulations implementing the HEOA. After several meetings, the team working on the Clery Act regulations has reached a consensus. The proposed regulations, however, which will not be published by the USDE for public comment until sometime this summer, could vary somewhat from the current draft.² The final regulations are to be published by November 1, 2009, with a July 1, 2010 effective date. Here is what is being proposed:

HATE CRIME REPORTING REGULATIONS

The amendments to the Clery Act expand the list of crimes that institutions must include in hate crime statistics reported to the USDE to encompass larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism. The proposed regulations add these crimes to those listed in 34 C.F.R. §668.46(c)(3) and define the newly added crimes in a separate appendix to §668. The additional crimes are defined consistent with the FBI Hate Crime Data Collection Guidelines.

EMERGENCY RESPONSE AND EVACUATION POLICY REGULATIONS

The HEOA amendments to the Clery Act also require that each institution include in its annual security report its “policies regarding immediate emergency response and evacuation procedures.” These policies must describe how the institution will “immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff” on campus. The proposed regulatory language reiterates this mandate and provides a detailed outline of the elements required to be addressed in the statement of policy, including the following:

- (1) Procedures to immediately notify the campus community upon confirmation of a significant emergency or dangerous situation;

- (2) A description of the process the institution will use to (i) confirm there is an emergency or dangerous situation; (ii) determine the appropriate segment or segments of the campus community to receive a notification; (iii) determine the content of the notification; and (iv) initiate the notification;
- (3) A statement that the institution will, without delay – and taking into account the safety of the community – determine the content of the notification and initiate the notification system, unless doing so will compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency;
- (4) The titles of the person(s) or organization(s) responsible for notification;
- (5) Procedures for disseminating emergency information to the larger community surrounding the campus; and
- (6) Procedures to test emergency response and evacuation procedures.

It should be noted that pursuant to the draft language, an institution does not necessarily need to notify the entire campus community of an immediate threat. Rather, the institution may have a policy in place in accordance with which it identifies the segments of the community impacted by the immediate threat and, therefore, requiring notification.

The Negotiated Rulemaking Committee’s draft also clarifies the distinction between a “timely warning” under the statute and an “emergency notification.” An emergency notification is required any time there is “an immediate threat to the health or safety of students or employees on campus.” A timely warning is to be given in the event of a non-immediate threat. If an institution follows its emergency notification procedures, it does not also have to issue a timely warning based on the same circumstances. However, it must provide adequate follow-up information to the community as needed.

In addition, institutions are required to publicize their emergency response and evacuation procedures to students and staff in conjunction with at least one test of the procedures per calendar year. The Committee defines the term “test” as “regularly sched-

² The Committee’s draft may be found on the USDE website: <http://www.ed.gov/policy/highered/reg/hearulemaking/2009/gen-program.html>.

uled drills, exercises, and appropriate follow-through activities, designed for assessment and evaluation of emergency plans and capabilities.” Tests may be announced or unannounced, but institutions are required to document the date and time of each test, a description of the exercise, and whether it was announced or unannounced.

Again, it is anticipated that the USDE will publish draft regulations for public comment sometime this summer so that the regulations can be finalized by the November 1, 2009 deadline. While the final regulations will likely be similar to the current proposed draft, institutions should be prepared to reevaluate and revise their

emergency response and evacuation policies and procedures after the anticipated November 1, 2009 publication date.



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Second Circuit Refuses to Apply Cat's Paw Rule to Save Title VII Claim

By Amy C. Foerster

Title VII discrimination cases are always fact-specific. Tenure denial cases — where dozens of individuals have had a say somewhere along the road — are not just fact-specific, but are fact-intensive.

Recently, the Court of Appeals for the Second Circuit did a commendable job sorting through the facts in *Qamhiyah v. Iowa State University of Science and Technology*, 566 F.3d 733 (2nd Cir. 2009), holding that Plaintiff's claims of national origin, religion and gender discrimination arising from the denial of her tenure application could not be saved by the application of the Cat's Paw Rule, which “refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action.” *Id.* at 472. When the Rule is applied, an employer can be liable even when the decision-maker is not the person who harbored an unlawful motive to terminate the employee. In other words, a subordinate's discriminatory motive can be imputed to the decision-maker and, hence, the employer.

Plaintiff, Dr. Abir Qamhiyah, is Palestinian and a member of the Islamic faith. Iowa State University of Science and Technology (“ISU”) hired her into a full-time tenure track position in 1996. According to ISU's faculty handbook, non-tenured faculty members typically apply for promotion and tenure during their sixth probationary year. The tenure review process at ISU includes several layers of evaluation, including at the Department, College and University levels. Although several committees and individual administrators make recommendations, the Board of Regents makes the ultimate decision on promotion. *Id.* at 735.

Qamhiyah asserts that she encountered discrimination within her Mechanical Engineering Department immediately upon joining the ISU faculty. She does not, however, allege that anyone outside (or “above”) the Department discriminated against her.

Qamhiyah underwent annual evaluations conducted by her Department Chair throughout her probationary years. Her early

evaluations were generally positive, focusing on her teaching capabilities. Throughout this time, however, Qamhiyah received numerous evaluations commenting that her level of external financial support was below average and that her scholarly activities needed to improve, specifically with increased publication.

Qamhiyah submitted her tenure application and dossier materials in the fall of 2003, having had her probationary period extended for two years, one year each for the births of her younger two children. Qamhiyah's initial Tenure Review Committee voted 2-1 to recommend promotion, although the dissenting voter was permitted to submit a minority report. The Department as a whole voted 16-3 against tenure. Qamhiyah's application moved on to the broader College of Engineering review, where it was evaluated by the Dean, the Chairs Committee, and the College's Tenure Committee, all of which rendered separate recommendations that tenure be denied. Qamhiyah's application then proceeded to the University level, where it was to be reviewed by the Provost and President. When the Provost informed Qamhiyah that he was recommending against tenure, she appealed directly to the Faculty Senate and then the Board of Regents.

The Board of Regents remanded Qamhiyah's application all the way back to the Department level, because the Department Chair committed a procedural error by not providing Qamhiyah with a written explanation of the reasons underlying her decision to recommend against tenure. Qamhiyah's tenure application then began the entire process anew – through the Department, College of Engineering and University levels, with no substantive difference in the result. Ultimately, the Board of Regents refused to grant tenure.

Qamhiyah sued ISU and the Board of Regents under Title VII. ISU moved for summary judgment, which the District Court granted.

On appeal to the Second Circuit, Qamhiyah argued that summary judgment was inappropriate "because she presented direct evidence that national-origin, religious, gender, and pregnancy discrimination affected the decision to deny her tenure." *Id.*

Although Qamhiyah presented no evidence relating to the Board of Regents, she argued that discrimination in the lower levels of her review tainted her entire tenure review process so that the Board of Regents' final decision was biased. In other words, she relied on the Cat's Paw Rule to argue that discrimination at the Department level resulted in the Board denying her tenure application.

Noting that Qamhiyah's tenure application was reviewed by dozens of people on several levels — twice in light of the Board's remand — the Court determined that the Cat's Paw argument could not save Qamhiyah's claim, "because, even assuming discrimination existed at the lower-levels of her review, there is simply no evidence that the Board of Regents served as the conduit, vehicle, or rubber stamp by which another achieved his or her unlawful design." *Id.* at 743. In other words, the Board exercised its own discretion in evaluating Qamhiyah's application.

The Second Circuit's decision in this case underscores how important it is for colleges and universities to adhere to their established, documented tenure review processes. In *Qamhiyah*, it was that process that allowed the Court to conclude that the Board exercised its own discretion independent of any discrimination at a lower level.



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Changing of the Guard: From Souter to Sotomayor

By Jennifer L. Beidel

President Obama's recent nomination of Judge Sonia Sotomayor to the United States Supreme Court promises to be a catalyst for change in many areas of law, perhaps including higher education. If approved, Judge Sotomayor will replace Justice David H. Souter, who has been attuned to issues impacting higher education during his tenure on the Court. In contrast to Justice Souter's developed record on higher education, Judge Sotomayor's record is relatively sparse, and her impact on higher education remains to be seen.¹

During his eighteen years on the Court, Justice Souter has demonstrated a unique understanding of colleges and universities as autonomous entities. For example, in *Board of Regents of the University of Wisconsin System v. Southworth*,² a group of students challenged the University's mandatory student activity fee as violating their First Amendment rights because the fee supported certain activities with which the students disagreed. The Court held that the fee was constitutional *provided that* its proceeds were allocated in a viewpoint neutral manner. In his concurring opinion, Justice Souter expressed a concern with imposing a viewpoint-neutral requirement in a university setting. He noted that university students "are inevitably required to support the expression of

personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach."³

In the companion cases of *Grutter v. Bollinger*⁴ and *Gratz v. Bollinger*,⁵ Justice Souter expressed a liberal view on the use of affirmative action programs by universities. Justice Souter voted with the *Grutter* majority to uphold a qualitative affirmative action program that was designed to advance educational purposes. In contrast, he dissented from the *Gratz* majority's decision to strike down a quantitative affirmative action program. In Justice Souter's view, "it is hard to see what is inappropriate in assigning some stated [numerical] value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race."⁶

While limited to the context of affirmative action, the *Grutter* and *Gratz* decisions further illustrate Justice Souter's inclination to defer to university decision-makers on issues of school administration.

In *Garcetti v. Ceballos*,⁷ Justice Souter turned away from issues of administration and focused on free speech. In *Garcetti*, the Court limited Constitutional protections for speech expressed by government employees pursuant to their "official duties." Writing in dissent, Justice Souter expressed concern about the implications of the majority's decision on higher education faculty members. He stated:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'⁸

Given that *Garcetti* did not arise in the university setting, Justice Souter's concern over its implications for faculty members illustrates his consideration of the world of academia in his judicial decision-making.

1 For additional information, see Steve Sanders, [David Souter, a Friend to Academics](#), Chron. of Higher Educ., June 3, 2009, and Eric Kelderman, [Supreme Court Nominee Was on the Side of Minorities in Key Case](#), Chron. of Higher Educ., May 27, 2009.

2 529 U.S. 217 (2000).

3 *Id.* at 243.

4 539 U.S. 306 (2003).

5 539 U.S. 244 (2003).

6 *Id.* at 295.

7 547 U.S. 410 (2006).

8 *Id.* at 438.

During her sixteen years on the federal bench, Judge Sotomayor has penned few, if any, decisions on issues directly related to higher education.⁹ She has, however, issued several opinions in cases involving allegations of discrimination – a recurring litigation issue for postsecondary institutions. For example, in *Ricci v. DeStefano*,¹⁰ the City of New Haven, Connecticut decided to discard the results of its firefighters' examination when it discovered that the test yielded increased failure rates among minorities. Several individuals who had passed the test sued the City. Writing for the Second Circuit, Judge Sotomayor stated that the City had acted appropriately when confronted with test results that had a disparate racial impact. The United States Supreme Court recently reversed the Second Circuit's decision, finding insufficient evidence of disparate impact.¹¹ The *Ricci* decision

suggests that Judge Sotomayor may be more sympathetic to issues of discrimination than is the current majority of the Supreme Court.

In *Tolbert v. Queens College*,¹² Judge Sotomayor was a member of a three-judge Second Circuit panel that upheld a trial court's award of \$50,000 in punitive damages to a plaintiff who alleged that he had been discriminated against in the grading of his final examinations. The panel found sufficient evidence to suggest that the College had "intentionally injected considerations of ethnicity into its exam-grading decisions and applied a more rigorous standard to [the plaintiff] than to students of other ethnicity."¹³

The impact that the Court's changing of the guard will have on higher education is something we will be watching for years to come as new cases make their way onto the Court's calendar.

⁹ Although Judge Sotomayor would not bring a long track record in higher education jurisprudence to the Court, she would bring significant practical experience, having held faculty positions at Columbia Law School and New York University School of Law for nearly a decade.

¹⁰ 530 F.3d 87 (2d Cir. 2008).

¹¹ See 2009 WL 1835138 (2009).

¹² 242 F.3d 58 (2d Cir. 2001).

¹³ *Id.* at 73.



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The University / Public Interface, Part I: Technology Transfer

By Kurt L. Ehresman, Gregory S. Bernabeo and Theodore R. West

Generation and dissemination of knowledge are at the core of a research university's mission. In fulfilling this purpose, university research produces new discoveries and technologies. In this first of a two-part series, we discuss bringing new technologies out of the university research setting and into the public marketplace. In our October 2009 Newsletter, we will address issues relating to public sponsorship of research within the university.

THE OFFICE OF TECHNOLOGY TRANSFER

The central mission of a University Office of Technology Transfer ("OTT") is to facilitate the introduction of new discoveries and

technologies to the outside community. While a "publish or perish" theme remains important in many settings, publication of new discoveries relating to, for example, pesticides, telecommunications, biotechnology, medical devices, and pharmaceuticals will not necessarily in and of itself result in

these discoveries reaching their full potential. Investment is required.

While the profit motive is an inducement to an investor to license technology from the University, it is our experience that a successful OTT is not motivated by profit, but rather by the goal of exporting the University's discoveries into the marketplace. Typically any financial gain realized by the OTT is reinvested in the OTT itself. As such, the OTT should be regarded as a University service for counseling researchers, coordinating investment opportunities from the public, and encouraging innovation within the University.

Upon setting up a new OTT, two significant issues should be considered: First, how can the discovery or technology be embodied in an intellectual property asset that can be licensed to the public? Second, what policies should the OTT have for dealing with potential licensees, as well as the University community?

While licensed technology may be in the form of know-how, trade secrets, copyrights, and other types of intellectual property, patents are by far the preferred vehicle for exporting technology from the University. Patents include "claims," – deed-like statements which precisely define the scope of the protected technology. By compartmentalizing discoveries into patents, it is relatively simple to define the scope of the technology that is the subject of any license agreement — the patent's claimed subject matter is the licensed technology. More significantly, however, patents provide a limited monopoly (20 years or less) on their claimed technologies, which an investor may use to obtain a competitive advantage in the marketplace. This monopoly provides a strong motivation for commercial use that helps to drive technologies from the University into the community at large for the benefit of all.

AVOIDING PROBLEMS THROUGH GOOD POLICY

An effective OTT serves both the University and the public at large; however, the balance must be governed by well-considered policies. When dealing with University personnel, typical issues include who will "own" any intellectual property, and how costs and royalties will be allocated. Most of these issues should be addressed in a

written policy - piecemeal treatment of individuals could result in inequity and may lead to jealousies and low morale, or worse. An often-overlooked aspect of the OTT is that it also should educate the University community about itself and the services it provides. Professors are by their nature independent, but will cooperate when they perceive it in their best interests to work with the OTT. The OTT should act with this principle in mind.

Regarding ownership of intellectual property, OTTs generally find it most effective for the University to own any patents. To this end, a standard Royalty Sharing Agreement and an Assignment Agreement (by which inventors "assign" their discoveries to the University) should be in place. Special consideration should be given to discoveries made by undergraduates or tuition-paying graduate students versus research faculty and student research assistants who are receiving stipends. A genius undergraduate student who is paying tuition often cannot be fairly regarded as an employee of the University, and his inventions may be his own personal property. Each University should consult its legal counsel in order to establish ownership and royalty policies that are consistent with the school's charter, mission, and governance.

Perhaps the most important resource document that each OTT needs is a standard Invention Disclosure Form ("IDF"). The IDF is the form used to gather all pertinent information about new inventions for use by the OTT. Each OTT should also have a policy establishing an objective protocol for evaluating whether or not the invention merits the costs associated with filing a new patent application. OTTs must be objective: not all inventions will be a success. However, the OTT should be able to explain to potentially disappointed inventors a clear rationale for why the university has declined to pursue a patent. Additionally, in such declined cases, most universities find it reasonable to release or license the invention back to the inventor.

Further, when dealing with the public at large, each OTT should have in place a library of standard form agreements that are tailored to each OTT's needs, which will help to establish and enforce uniformity and consistency, as well as simplify day-to-day operations. If physical "stuff" might be exchanged between the public and the University, then a Materials Transfer Agreement ("MTA") should be signed by both parties. If merely information is

to be exchanged, then a Confidential Disclosure Agreement (“CDA”) should be signed. An effective CDA will allow both parties to speak freely without prejudicing any future patent rights. A standard License Agreement, including terms relating to royalties, cost sharing, and intellectual property ownership should also be considered. While the business terms of each License Agreement will vary, having a set form ensures that the legal terms will be consistent over time, allowing the OTT to proceed with certainty when commercializing future inventions.

The development of new technologies is a thriving industry on some campuses. The natural next step – benefiting the University and society at large – is to move that technology off campus and into the marketplace. The Office of Technology Transfer can be an

invaluable player in that process. Please join us again in October, when we discuss public sponsorship of University research.



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Update from the Higher Education Practice Group

We want to take a minute to update you on what has been a busy and exciting year for our Practice Group:

- In February, Jim Keller spoke at the Delaware Valley Student Affairs Conference in Lafayette Hill, Pennsylvania on the growth of virtual campuses in Second Life and related liability concerns for colleges and universities.
- In March, Amy Foerster presented a virtual seminar sponsored by the National Association of College and University Attorneys on the challenges electronically stored information and e-discovery present to postsecondary institutions.
- In June, Jim Keller, Amy Foerster and Allison Newhart hosted a reception at the 49th Annual Conference of the National Association of College and University Attorneys in Toronto. While attending the conference, Amy also had the opportunity to co-lead a discussion group on “Avoiding Pitfalls in E-Discovery: Litigation Holds in a Decentralized University Environment.”
- Recently, an article written by Allison Newhart entitled “FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information Under the Health and Safety Emergency Exception” was published in the 2009 URMIA Journal.

We are very pleased to have expanded our leadership team across several of the Firm's offices this year. Jim Keller, founder and Co-Chair of our Higher Education Practice Group remains located in our Philadelphia office. In May, Bill Manning joined our ranks as Co-Chair of the Higher Education Practice Group with Jim, resident in our Wilmington office. In June, Amy Foerster — whom you can find in our Harrisburg office — was named Vice Chair of the Group. With other core Group members located in our Washington, D.C., Baltimore and Princeton offices, we are happy to have the opportunity to work with schools throughout the Mid-Atlantic region and beyond.

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