INTRODUCTION:

Academic program closures raise among the most serious and divisive risk management issues that institutions of higher learning can confront. Most frequently, closures occur for financial reasons, but institutions may also decide to reduce, sell, or eliminate programs -- sometimes, entire schools -- due to programmatic or strategic concerns. In what may be a worst-case scenario, institutions may even find that they are forced to close programs upon losing or failing to gain expected accreditation. Regardless of the specific circumstances, academic program closures inflict significant trauma upon an institution and its students, faculty, staff, alumni, and supporters.

Inherent in any academic program closure is the likely termination, or at best re-assignment, of program faculty, some or all of whom may be tenured. Also inherent is the possibility that students enrolled in the affected program(s) may be unable to obtain their chosen degrees, despite having already expended significant time and tuition. Consequently, every academic program closure carries with it substantial legal risk; and every decision to close a school, program, or even department must be evaluated with this in mind. Moreover, the risk extends beyond litigation. A divisive program closure can jeopardize an institution’s reputation, and threaten its strategic planning and mission, for years to come.

The recent economic downturn has seen a substantial increase in the number of academic program closures and curriculum adjustments; this trend is likely to continue. In particular, the continuing economic difficulties afflicting state institutions may result in a new and disruptive wave of program or institutional closures. Even those institutions not presently facing the prospect of program closure should review their policies, procedures, and decision-making processes to ensure that they have adopted workable closure policies, aligned with developing best practices, before any such policies are needed.

This NACUANOTE outlines the primary legal risks associated with program closure; offers strategies and “best practice” recommendations for reducing risk; and concludes by identifying additional, more detailed resources available to institutions facing the challenge of potential program closure.

DISCUSSION:

I. What are the Primary Legal Risks Associated With Program Closure?

A. Student Claims
Although many administrators assume that tenured faculty issues present the most serious legal risk in a program closure, most lawyers with experience in program closure instead identify student claims as equally, if not more, difficult risk management issues. Students often argue that, whatever the reason for the decision, the institution is legally required to continue offering a program up to and through the expected graduation date of matriculated students. The institution may also be accused of fraud if it admits students into what is later pronounced a “doomed” program. Courts and agencies find these arguments very appealing. In general, student closure claims are difficult to defend, inasmuch as students may be perceived (with some justification) as “innocent victims” of decisions that they cannot control.

In short, many institutions find that they face their most substantial litigation risk whenever a program closure decision threatens to delay or interfere with students’ completion of a course of study. Typical student claims include:

- Violation of express contractual commitments found in admissions materials or student bulletins;
- Violation of implied contractual requirements of good faith and faith dealing and related claims of detrimental reliance or estoppel;
- Denial of due process at public institutions;
- “Educational malpractice”;
- Common law fraud, statutory consumer fraud, or “unjust enrichment”; and
- Injunctive actions or class actions pursuing the above theories and seeking, among other relief, compensatory, punitive, or treble damages [4].

### B. Faculty Claims

Program closure also raises a significant risk of faculty claims. Judicial decisions [5], as well as the recommendations of the American Association of University Professors (AAUP) [6], have confirmed the right of academic institutions to terminate faculty appointments in selected circumstances arising from program closure. But this does not, by any means, eliminate the many risks associated with faculty employment termination during program closure. One thing that is clear from case law and commentary is that institutions failing to comply scrupulously with their internal procedures and the applicable law face significant potential liability in faculty closure litigation [7]. It is equally clear, however, that compliance with the various legal requirements can pose a significant challenge under the difficult circumstances of most closures.

Most faculty handbooks include policies and procedures applicable where the institution seeks to terminate faculty employment consequent to program closure. But some such procedures are obsolete; they may have been adopted years ago without ever having been applied (or, in some circumstances, even discussed) by those within the institution. When these procedures are finally tested, they often prove unworkable, unrealistic in their time constraints, or utterly incomprehensible in light of organizational changes within the institution since the procedures were adopted. Other institutional policies are modeled on the “financial exigency” or “program discontinuance” recommendations of the AAUP. Such policies may therefore frustrate decision-makers who seek to address financial or other concerns before a program’s difficulties have become serious enough to meet the AAUP’s restrictive recommendations [8]. Still other institutions lack any applicable faculty termination procedures whatsoever. They may find themselves in the unenviable position of having to adapt “termination for cause” procedures (or even implement new procedures) while closure deliberations are already underway.

And, of course, internal procedures are not the only legal, political, or practical limitations upon an institution’s ability to terminate faculty employment. Institutions must also comply with applicable federal and state laws, collective bargaining agreements, and limitations imposed by entities as diverse as accrediting agencies, founding religious organizations, and financial institutions. At the
same time, emergency situations – such as accreditation difficulties or urgent budgetary shortfalls – may place intense pressure upon decision-makers to short-cut or ignore internal procedures or legal requirements perceived as time-consuming or onerous.

For all of these reasons, program closure presents a myriad of opportunities for faculty-related claims, the most serious of which usually focus upon compliance with internal termination regulations or applicable laws. Faculty closure-related claims may include:

- Breach of tenure contract for failure to honor internal deliberative requirements, including requirements that the faculty be consulted as part of the decision-making process;
- “Arbitrary or capricious” decision-making in deciding to close a program or selecting individual faculty members for termination;
- Constitutional or statutory violations, including alleged due process violations in deciding to close a program or selecting individuals for termination;
- Alleged violation of collective bargaining agreements regarding priorities in termination or in rehiring of terminated faculty;
- Discrimination, fraud, or “consumer fraud” actions; and
- Injunctive and class action lawsuits premised on these theories [9].

C. Staff and Administrators

Risks that are often overlooked during program closure decision-making are those relating to staff members, including administrators. All employees have the right to institutional compliance with applicable constitutional requirements, laws, collective bargaining agreements, and internal procedures. Staff claims arising out of program closure may therefore include:

- Discrimination or failure to follow applicable statutory notice laws (such as the Worker Adjustment and Retraining Notification (WARN) Act or the Older Workers Benefit Protection Act (OWBPA) mass layoff release requirements;
- ERISA or contract claims arising out of loss of benefits;
- Violation of collective bargaining agreements;
- Breach of individual employment agreements with staff who may have been recruited from elsewhere to work in the closing program; and
- Claims of estoppel or reliance where the staff member has relocated or otherwise relied upon the program’s continued operation [10].

D. Patients or Beneficiaries of Clinical Programs

Closure of programs that offer clinical services to the public as a curricular component may also result in patient or client claims where a clinical program is eliminated. These claims may include:

- Interruption of patient care;
- Breach of contract claims by patients or clients seeking continuing service;
- Fraud or consumer fraud claims arising from the specific circumstances and timing of the decision to close; and
- Class action and injunctive actions to force continued provision of patient care or clinical service.

E. Other Claims and Accreditation Concerns

Closure decisions affect so many constituencies that lawsuits by alumni, donors, and other “supporters” of the institution are far from unknown. Such claims, while seldom successful, may include attempted injunctions to block a closure; attempted injunctions to force sale of the program
to another institution (or to a cohort of investors) in lieu of closure; or actions by disgruntled donors relating to endowments or donations originally restricted to the closing program [11].

Legal risk that does not necessarily involve litigation, but that can be equally or more serious, arises from the need to comply with accreditation requirements regarding a closing program or a program being downsized or moved. Particularly during the past few decades, regional accrediting agencies, as well as professional school accrediting bodies and licensure organizations, have been extremely active in promulgating regulations addressing issues arising from program closure and in enforcing those requirements [12]. Failure to observe the limitations or adhere to the regulations of regional accreditors or professional associations may jeopardize the institution’s ability to disburse federal student funding and threaten the continued accreditation of programs being phased out.

II. How Do Institutions Reduce Risk When Considering Program Closure?

Managing the risks inherent in program closure can be extremely challenging. In part, this stems from the exceptional variety of risks catalogued above. But an additional challenge is posed because of an inherent tension between the various risks being “managed.”

For instance, in considering potential program closure, an institution will want to engage in a thoughtful, procedurally proper deliberative process. Not only does this approach tend to result in the best decisions but it is also the best defense against charges that the institution engaged in “arbitrary or capricious” conduct that violated student or faculty contract rights.

During such a deliberation, however, the “life” of the program goes on. Students are admitted and faculty recruited and hired, usually without any mention of the possibility of program closure. Ironically, an institution announcing closure may therefore find itself bitterly criticized precisely because it has engaged in thoughtful decision-making. Institutions may be accused of “fraudulent concealment” for having admitted students or recruited faculty while considering program reduction or closure. In such circumstances, the institution’s very legitimate explanation -- that reasoned decision-making is necessary and appropriate to such a serious decision -- may further anger students or other constituencies who feel misled.

In this manner, institutional decision makers considering closure options run the risk of being “whipsawed” as they try to manage competing risks. They may even face the difficult decision of deciding which risk to manage. While there is no perfect solution to this challenge, the following strategies may help the institution manage the deliberative process to balance these competing risks:

A. Identify The Procedures, Limitations, and Laws Governing the Deliberative Process

Because of the unique shared governance model applicable to higher education, closure decisions may require consultation and involvement of “outsiders” in the usual Board and administrative decision making processes. Sometimes, creditors, corporate members of the institution, faculty, or even students have the right to participate in financial exigency or closure deliberations. Any consideration of possible program closure must therefore begin with a diligent effort to identify all sources of procedural and substantive obligations on the part of the institution. Sources to be consulted may include:

- Institutional constitutions, bylaws, and statutes;
- Federal, state, and local constitutional provisions, laws, administrative procedures, and agency regulations;
- Policies of regional accrediting or professional associations;
- Debt instruments or other documents reserving decision-making power to outside entities, such as a founding religious order;
Faculty handbooks that reserve certain consultation or governance rights to faculty in closure situations;
- Uncodified policies, board resolutions, or other “informal” reflections of past practice; and
- Collective bargaining agreements.

In addition, major sources of potential contractual or other obligations to individual constituencies should be reviewed at the outset of any closure deliberation. The most typical sources, some of which are referenced above, include:

- Faculty handbooks;
- Student handbooks, and admission and financial aid materials;
- Staff handbooks, benefit plans, and benefit descriptions;
- Institutional, department or program websites; and
- Endowments, donations, and grants restricted to the unit being considered for closure [13].

B. Decisions Should Be Made (and Documented) Consistent with Applicable Law

Notwithstanding the competing and conflicting risks involved, the institution’s interests can best be served, and its legal risks best managed, by employing a planned, thoughtful deliberative process that complies with internal procedures and applicable law. Courts will generally uphold a closure decision that reflects a rational exercise of business judgment. By contrast, decisions made without sufficient information or in derogation of applicable procedures are highly vulnerable to legal challenge and also may be difficult to justify to accrediting agencies, alumni, or the public.

While a comprehensive discussion of the closure decision making process is beyond the scope of this NACUANOTE, recommendations for managing the process to minimize risk include the following (some of which may in fact be required by existing institutional policies or agreements):

- At the outset, (i) evaluate whether institutional decision makers have before them all available substantive information necessary to consider potential closure scenarios (such as program reviews, personnel information, enrollment assessments, and financial information), and (ii) obtain any additional financial or expert input needed to make a well-informed decision;
- Set a realistic timeline for decision making, “roll-out,” and implementation of any decision, which (i) allows the institution to comply with all applicable procedural requirements and statutory notice obligations, but also (ii) minimizes the number of students admitted or employees hired while internal closure deliberations are underway;
- Educate decision makers at all levels (including the Board) about the need for confidentiality and appropriate documentation (as well as about the likelihood that any resulting decision will be unpopular and hotly debated on campus, in the media, and perhaps in court);
- Depending upon the specific circumstances, consider departing from the usual approach of “strict confidentiality” and, instead, communicating pro-actively with campus constituencies (such as admitted students) before they rely upon the continued operation of the program and incur expense or lost opportunities as a result;
- Communicate with accrediting agencies or associations as soon as possible after a closure decision is made, and design a closure plan that complies with all applicable accreditation requirements;
- If time permits, consider involving faculty and students in review of potential reduction plans or curriculum realignments, in order to enhance campus “buy in” of any eventual decision;
- Follow all internal policies that require consultation or involvement of faculty and other constituencies;
- If strict compliance with the institution’s internal procedures or timelines is impossible (as when handbook procedures are obsolete or unworkable), (i) comply as closely as possible with applicable procedures; (ii) document, and be prepared to justify, any deviations; and (iii)
consider offering affected faculty or students alternative procedures that, in substance, afford them the same level of process contemplated by the unworkable procedures; and

- Document all phases of the institution's deliberation, consultation processes, and rationale for the closure decision.

C. Structure and Implement Closures to Minimize Disruption to Students and Faculty

In light of the potential for one risk management strategy to generate a different variety of claims -- as well as the undeniably sympathetic position of students impacted by closure decisions -- institutions should structure and implement closure decisions with a primary focus upon minimizing student disruption and related litigation risk. Minimizing the risk of faculty litigation is another critical component of any closure plan. Specific strategies will differ depending on the circumstances but may include the following:

- If at all possible, commit to “teach out” students who are already admitted to a closing program (that is, to phase out the program over time, so as to allow current students to finish their studies without needing to transfer);
- Comply with accrediting agency requirements, which may require a “teach out agreement” as a condition for maintaining accreditation of closing programs or campuses;
- If students cannot be “taught out,” aggressively seek transfer opportunities for students affected by the closure, and provide financial assistance for students forced to transfer; also consider offering to pay selected relocation or transition costs as part of the plan; and make these offers part of the initial announcement regarding the closure plan;
- Time the announcement and implementation of any program closure to minimize disruption to the matriculated students (and, if possible, avoid admitting new classes of students once closure deliberations are well underway);
- Consider re-assignment of affected faculty members to other schools or departments, consistent with qualifications;
- Strictly comply with any procedural rights afforded to faculty, including appeal rights, rights to reassignment within the institution, or other handbook obligations; and, again, time the announcement to minimize disruption to faculty members and to avoid, as much as possible, hiring new faculty members at the same time internal closure deliberations are well underway.

III. Which Additional “Best Practices” May Help Reduce Future Risk?

The discussion above demonstrates that many of the risks arising from program closure find their roots in outdated policies, communications strategies, or governance practices. These may not be identified as problems until they are tested -- and found wanting -- during the “crisis” atmosphere of an imminent program closure. Some of these potential challenges can and should be addressed before closure becomes a possibility. Even institutions without any foreseeable need to close programs can benefit from addressing the following three issues:

- **Exercise caution in opening or expanding programs -- particularly those that recruit students on the promise of later accreditation or those that train students for competitive professions.** While the majority of program closures arise from strategic or financial pressures upon established academic programs, some of the “worst-case scenarios” arise where an institution has recently opened a program that it was not prepared to operate or for which it could not ultimately obtain accreditation. Those students may lose not only tuition and wages but also, in the most disturbing cases, any realistic opportunity to train for a particular profession. The resulting liability of the institution may be very significant.

  Historically, this risk was most frequently seen in connection with competitive professional
programs requiring special accreditation or certification (such as dental or physical therapy programs). In the current economic climate, however, the risk is also significant with respect to non-traditional programs, such as online offerings. These may be instituted on an expedited basis by schools seeking a quick improvement to their competitive standings or economic circumstances. Ironically, the effect may be just the opposite. Where an institution rushes to recruit students into new programs that require accreditation or certification that the institution is not able to obtain, the institution may find it has no choice but to close a program that should never have been opened in the first place – and the institution will pay, both financially and in terms of its reputation.

A detailed discussion of the challenges posed by the process of opening programs is beyond the scope of this NACUANOTE. But it is important to stress that, particularly with respect to programs awaiting accreditation, the best protection against serious closure risk is prudent and thoughtful decision-making at the outset of program implementation.

- **Review information given to students, to ensure accurate communication regarding program offerings and the possibility of program changes.** A related matter to be reviewed before program closure ever becomes an issue is the manner in which the institution communicates with current and potential students about the nature and expected duration of programs and coursework. This includes not only "formal" communications made in admissions materials and college catalogues but also personal communications to students made through institutional representatives.

Nearly all student closure lawsuits include some allegation that individual institutional representatives – or written materials distributed by the institution -- made promises that the institution was not prepared to keep.

Consequently, every institution could benefit from a discussion with representatives who communicate with students (including admissions, student affairs, academic affairs, and academic counseling) about (i) who is authorized to answer questions regarding the nature and duration of academic programs and (ii) what they are authorized to say. Likewise, materials posted on the institutional website or distributed to current or potential students should be reviewed on a regular basis to ensure accurate descriptions of programs and coursework. In particular, the institution needs to ensure that no promises are being made about accreditation, certification, or continuation of a program, other than promises that the institution is fully prepared to keep.

Institutions should also consider placing effective disclaimers in course catalogues and admissions materials, reserving the institution’s right to change not only course offerings but also the requirements for degrees and the programs being offered. State laws differ as to whether these disclaimers will defeat all claims of contract breach or fraud when an institution closes a program. It is clear, however, that these disclaimers do no harm as long as they are accurate, and they may offer the institution a strong source of legal protection. Particularly with respect to programs that are at risk of closure due to circumstances that the institution does not fully control (such as accreditation issues), a properly drawn and disseminated disclaimer may be critical to defending the institution against allegations of estoppel or even fraud.

- **Review and update faculty termination policies.** Finally, every institution should review and update its faculty termination policies relating to program closure before program closure is under consideration; as noted in Section I-B above, many such policies are unworkable or inappropriate to the particular institution. In particular, some institutions have incorporated the AAUP’s recommended regulations relating to financial exigency or program closure, which many observers view as unduly restrictive of the ability of a governing board
to close a faltering or undersubscribed program before that program threatens the continued existence of the institution as a whole [14].

In addition, an institution’s ability to address faculty employment issues in a fair and constructive manner can be equally threatened by procedures that are obsolete, unworkable, unwieldy or even absent – and many institutional policies exhibit one or more of these flaws. While the higher education community stands in general agreement that faculty appointments may be terminated due to program closure, including where financial exigency motivates the closure, institutional policies should not be silent on these issues. While AAUP policies are not binding upon institutions that do not adopt them, they are sometimes viewed, by courts and the AAUP itself, as authoritative evidence of academic custom and practice. Program closures that depart significantly from AAUP-recommended procedures – particularly where the institution’s policies are silent or unclear about an institution’s termination powers – are likely to inspire substantial controversy on campus and very significant challenge from litigants in court or from the AAUP itself [15]. Adopting workable, updated policies appropriate to the institution before closure becomes a possibility can, however, greatly reduce the risk that courts will look elsewhere for external criteria to “fill in the gaps.”

CONCLUSION:

Whatever the specific reason for a program closure, it will present significant risk management concerns for the institution. Unfortunately, these are usually intertwined with accreditation, public relations, and mission-based concerns that make the process extremely challenging. The above recommendations, and the more comprehensive resources listed below, are intended to help institutions refine their policies before any consideration of closure arises -- and successfully meet the challenge of program closure should it become a necessity.

FOOTNOTES:

FN1. For purposes of this discussion, the term “program closure” encompasses a decision to close a department, program or school within an institution while the larger institution continues to exist as an independent unit. Mergers, affiliations, and sales of programs raise many of the same legal issues as program closure, and they may be considered as alternatives to closure. Discussion of institutional ownership change is beyond the scope of this NACUANOTE, but many of the additional resources listed at the end of this NACUANOTE address institutional ownership changes as well.

FN2. The Chronicle of Higher Education devoted much of its March 28, 2010 online issue to a discussion of program closures and even included a chart of approximately 25 recent (or contemplated) program reductions or closures as of March, 2010. The Chronicle has also detailed the controversial closure plans of Dana College, which determined it was forced to close due to financial crisis after it was unable to consummate a transaction in which its accreditation status could be assumed by an acquiring, for-profit institution. See “Dana College Announces It Will Close, Blaming Accreditor's Decision Against New Owners,” Chronicle of Higher Education, July 1, 2010; see also “War of Words over Dana,” Inside Higher Education, July 12, 2010. For different reasons (apparent accounting errors and fiscal mismanagement), Birmingham-Southern College in Alabama recently found itself in the position of having to plan for unanticipated layoffs, furloughs, and potential

FN3. During mid-2010, the Chronicle of Higher Education detailed the financial woes of public institutions such as those in New York and Illinois, which are being so significantly threatened by their states’ economic difficulties that closure not simply of programs but of entire institutions is no longer impossible to imagine. See "Lawmakers in New York and Illinois Leave Higher Education in Limbo," Chronicle of Higher Education, July 16, 2010. See also "Rutgers U. Cancels Raises and Freezes Pay, Citing 'Extreme Fiscal Crisis,'" Chronicle of Higher Education, June 11, 2010. Recently, the Chronicle updated this information, detailing plans in four states to cut back public institutional course offerings. See “Program Cuts Loom at 4 Public Universities,” Chronicle of Higher Education, October 24, 2010.

FN4. For a very recent example of a student injunctive action brought to forestall a campus closure, see the Memorandum Opinion issued by the Supreme Court of New York, Suffolk County, regarding the proposed closure of the SUNY-Stony Brook campus at Southampton. See Osiecki v. Stanley et al., No. 19244/2010 (Aug. 27, 2010)(vote to close campus “annulled” by trial court because Board failed to involve Stony Brook Council in consideration of closure decision, allegedly violating New York Education Law § 356). Other examples of student injunctive actions raising some or all of these theories include Eden v. Board of Trustees of the University of the State of New York, 374 N.Y.S.2d 686, 691-93 (N.Y. App. Div. 1975) (injunction ordering program to remain open granted on grounds decision to close was “arbitrary and capricious); compare Beukas v. Fairleigh Dickinson University, 605 A.2d 776, 783-84 (N.J. Super. Ct. Law Div. 1991), aff’d, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992) (injunction sought for alleged contract breach denied, on grounds that University complied with obligation of good faith and fair dealing). Other instructive student contract cases include Craig v. Forest Institute of Professional Psychology, 713 So.2d 967 (Ala. Civ. App. 1997)(students allowed to pursue action against school for closing one campus, on theories of contract breach, fraudulent inducement, and unjust enrichment); Aase v. State, South Dakota Board of Regents, 400 N.W.2d 269, 270 (S.D. 1987) (students had no enforceable contract right justifying damage action or injunctive action to force continued operation of one of institution’s campuses).

Cases involving allegations of fraud or consumer fraud include Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio Ct. App. 1990), Brody v. Finch University, 698 N.E.2d 257 (Ill. App. Ct. 1998), app. denied, 179 Ill.2d 578, 705 N.E.2d 434 (Ill. 1998), and Craig, 713 So.2d at 967-69. For a comprehensive, though dated, survey of student contract, fraud, and injunctive actions, see H.G. Beh, Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed? 33 Ga. L. Rev. 155, 159 (Fall 1998).


FN6. The AAUP’s 1940 Statement of Principles provides that any termination of faculty for reasons of financial exigency shall be “demonstrably bona fide” (AAUP, Policy Documents & Reports (10th ed. 2006). at 4); the AAUP’s Recommended Institutional Regulations later amplified this statement, setting forth recommended policies and procedures for financial exigency terminations and for terminations consequent to program closures for reasons other than exigency. See AAUP, Policy Documents & Reports (10th ed. 2006) at 24-25 (Recommended Institutional Regulations 4(c) and (d)).


FN8. For instance, and as further discussed in Section III below, the AAUP’s definition of “financial exigency” may be considered unduly restrictive because it requires a threat to the survival of the entire institution and also a showing that the emergency cannot be “alleviated by less drastic means.” See AAUP, Policy Documents & Reports (10th ed. 2006) at 24 (RIR 4(c)) (limiting definition
of “financial exigency” to circumstances in which "an imminent financial crisis . . . threatens the survival of the institution as a whole and . . . cannot be alleviated by less drastic means"). Or the institution may wish to terminate faculty as part of a program reduction; but, while the AAUP recognizes the legitimacy of faculty terminations consequent to the discontinuance of a program, its recommendations reflect its more narrow view that mere program reduction and changes arising from temporary enrollment fluctuations do not justify faculty employment termination. See Recommended Institutional Regulation 4(d), set forth in AAUP, Policy Documents & Reports (10th ed., 2006) at 24-25. See also S. Olswang et al., Retrenchment, 30 JCU L 47, 49-51 (2003) (discussing AAUP’s positions regarding termination consequent to program discontinuance and program reduction); A. Franke, Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives 3-4 (ACE Monograph, 2009) (discussing criticisms of AAUP recommendations and different institutional definitions of “financial exigency”).

FN9. For a useful survey of faculty-related claims arising from financial exigency and retrenchment decisions, see S. Olswang et al., Retrenchment, 30 JCU L 47 (2003). A recent example of a faculty injunctive and damages action is that filed by a class of tenured professors at a campus of Antioch University that was scheduled to be closed in 2009. See Townsend v. Antioch University, 2009 WL 1522660 (Ohio Ct. App., May 29, 2009) (faculty injunctive request denied where campus already closed and faculty had adequate remedy at law). For an example of how faculty actions may play out at public institutions, see Board of Community Colleges Trustees for Baltimore County-Essex v. Adams, 701 A.2d 1113 (Md. Ct. Spec. App. 1997) (denying injunctive relief for faculty terminated consequent to financial exigency and affirming Board’s right to terminate faculty in exercise of business judgment, but remanding for consideration whether individually-terminated faculty were denied due process).

FN10. For a comprehensive discussion and checklist of risk management issues arising from staff layoffs, see M. Michaelson & L. White, “Staff Layoffs and Reductions in Force – Managing the Risks” (Joint ACE, NACUBO, and UE Monograph, 2008).


FN12. For instance, the Higher Learning Commission of North Central Association sets forth a series of policies and regulations providing for continued accreditation of a closing program to ensure that students can complete degrees and programs “without undue difficulty” (Policy Book, § 3.8, at 71 (2010)). Other regulations and policies require submission of “teach-out” plans or agreements in defined circumstances. Id., §§ 3.9 (a) through (c), at 72-73. Accreditors of professional school programs, such as dental, medical, or law programs, may regulate program closures as well.

FN13. In addition, the institution will need to conduct general “due diligence,” which is beyond the scope of this NACUANOTE. Useful information and checklists regarding the types of obligations and materials that need to be considered in any major closure, affiliation, merger, or dissolution situation are set forth in the “Additional Resources” section of this NACUANOTE.

FN14. As discussed in Note 8 supra, the AAUP’s definition of “financial exigency,” as well as its comparatively narrow view of the circumstances in which closure-related termination is appropriate, may be deemed unduly restrictive by governing boards or different institutions. See S. Olswang, et al., Retrenchment, 30 JCU L 47 (2003). For a useful discussion of different options for faculty handbook language that addresses financial exigency and program discontinuance terminations, see A. Franke, Faculty in Times of Financial Distress: Examining Governance, Exigency, Layoffs, and Alternatives 3-4 (ACE Monograph, 2009) (discussing different institutional definitions of
“financial exigency”).

**FN15.** For a vivid, recent example of the pitfalls of financial exigency terminations that do not comport with the AAUP’s view of proper procedure, see AAUP, *Special Report by Special Committee on Hurricane Katrina and New Orleans Universities* (2007). More recently, another AAUP Report criticized an institution’s termination of several tenured faculty members for failure to comply with recommendations of the AAUP. Although the institution had not incorporated AAUP recommendations into its faculty handbook procedures, the Association nonetheless condemned the institution for failing to adhere in several respects to the AAUP’s recommended procedures for faculty termination consequent to financial exigency. The alleged deficiencies included failure to adhere to the following AAUP recommendations: that the affected faculty members be afforded a faculty hearing; that the terminated faculty members not be replaced within a defined period of time after the termination; and that, before being terminated, the faculty members be placed, if possible, into other suitable faculty positions within the institution. See AAUP, Report, *Academic Freedom and Tenure: Bethune-Cookman University (Florida)* (October, 2010), at 13-14.

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**RESOURCES:**

In addition to some excellent NACUA outlines generally applicable to downsizing and employment termination (as well as the NACUA Resource page devoted to “Employment: Reduction-in-force, Retrenchment, Early Retirement”), we recommend the following additional resources that offer more detailed information useful in planning and considering program closure:

**General Guidance Regarding Program Closure:**

- B. Butterfield & S. Wolfe, *You Can Get There From Here: The Road to Downsizing in Higher Education* (College and University Personnel Association for Human Resources, 2d ed. 2008)
- J.P. O’Neill & S. Barnett, *Colleges and Corporate Change: Merger, Bankruptcy, and Closure*
Faculty Issues:

- S. Olswang & E. Babbitt, *Financial Distress and Faculty Issues* (NACUA Annual Conference Outline, 2009)

Student Issues:


Staff Issues:

- *Facing the Financial Downturn: Toolkit and Resources for Colleges and Universities*, (NACUBO, special online resources, 2009)

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