



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
Senate Committee on Higher Education  
and

Senate Committee on Judiciary  
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by

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### SB 44 SD1 – RELATING TO HIGHER EDUCATION

Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and members of the committees:

Thank you for the opportunity to testify on SB 44 SD1, which would repeal the authority of the Board of Regents of the University of Hawai'i (BOR or Regents) to appoint or retain attorneys to represent the university who are independent of the attorney general. The university **strongly opposes** this bill.

**Notwithstanding the university's constitutional and statutory autonomy for the last twenty years, this bill would shift responsibility for the university's legal matters to a State official who reports to the Governor and has no direct responsibility or accountability to the President or the BOR, who are legally charged with managing and overseeing the university operations.**

The bill provides no justification or rationale for this drastic change, which would set back every aspect of the university's mission of service to the people of Hawai'i. Neither from a governance perspective nor an efficiency perspective can the Office of General Counsel's (OGC) service to all ten campuses and System be replaced by the Department of the Attorney General (ATG). The university has functioned for 20 years with OGC as our legal partner. OGC is independent from the ATG and 100 percent focused on advancing the mission of public higher education for Hawai'i. Whatever the unstated benefits intended by this legislation, if any, they will be far outweighed by the costs.

The university's authority to hire counsel accountable to its leadership and focused solely on university legal matters was an important element of the 1998 legislation and the 2000 constitutional amendment. After twenty years of experience with in-house counsel, this capability has become essential to agility of operations with accountability in an environment with increasingly complex compliance requirements.

### **Autonomy is Intended for the Benefit of the State of Hawai'i**

The Legislature authorized the BOR to appoint or contract for its own counsel in Act 115, Session Laws of Hawaii 1998, (codified in what is now Section 304A-1005, Hawaii Revised Statutes). Act 115, which grew out of the work of an economic revitalization task force convened by the governor, president of the senate, and speaker of the house, granted substantial authority to the university to manage its own operations. The task force's conclusion, which the legislature endorsed through its actions, was that autonomy would "materially enhance the university's performance of its constitutional responsibilities and thereby contribute significantly to economic revitalization." Autonomy was then and continues to be an important consideration of the University's accreditors, as it is for public higher education throughout the nation.

The university's authority to hire counsel accountable to its leadership and focused solely on university legal matters was an important element of the 1998 legislation and the subsequent 2000 constitutional amendment that was intended to solidify autonomy and agility of operations for the benefit of the State. And again, notwithstanding the university's constitutional and statutory autonomy for the last twenty years, and with no justification offered, this bill would shift responsibility for the university's legal matters to a State official who reports to the Governor and has no direct responsibility or accountability to the President or the Regents; the Regents and the President are legally responsible for management of the university, an institution responsible for annual expenditures of some \$1.5 billion and over 10,000 professional employees (including through its research enterprise), making it one of the largest and most impactful organizations in the state.

### **Autonomy Has Worked**

Following are just a few highlights of the outcomes UH has been able to achieve for Hawai'i over the past 20 years through the flexibility and efficiency that autonomy has enabled.

- In Fiscal Year (FY) 99, the university's total expenditures were approximately \$730 million, of which over half (\$380 million) were state general funds. In FY19, total expenditures have more than doubled -- far beyond the limited although much appreciated increase of state general funds by less than one third (under \$500 million).
  - UH Economic Research Organization (UHERO) estimated in 2013 that each dollar of state general funds expended translates into \$9.61 of total business sales, \$2.91 of employee earnings, and \$.52 in tax revenues returned to the state.

- In FY01 the total extramural awards to UH totaled \$216 million. For FY18 that number was \$386 million, an increase of approximately 80%. When the State needed the economic stimulus most, UH was able to leverage in FY11 the federal stimulus act (ARRA) to bring over \$488 million in extramural funding into Hawai'i. Many of the most complex contracts have required the specialized assistance of OGC.
- In 2000, UH awarded 7,238 degrees and certificates. In the 2017-18 academic year, UH awarded 11,215 degrees and certificates, an increase of 55% since 2000. On average nationally, a bachelor's degree recipient earns approximately \$1,000,000 more in lifetime earnings than someone with only a high school diploma and an associate degree recipient earns \$600,000 more. It is clear that the impact of these additional degrees to our people, families and communities is substantial, as is the positive tax revenue. Under its own authority, UH has created innovative programs to advance student success including: a degree audit system that works across multiple campuses, the development of multi-campus degree pathways, reverse transfer, automatic admission, and the nationally renowned "15 to Finish" program. And even in the face of declining enrollments across the country, UH Mānoa has now turned around years of declines with two consecutive semesters of year-over-year growth. OGC has substantively assisted in engaging external assistance to effectuate and further accelerate this turnaround.
- Since 2000, UH has undertaken at least two billion dollars in major construction, stimulating economic activity across the state. UH is now pioneering modern construction practices with the support of our general counsel, which involved new kinds of contracts.

### **The Work of the University Requires Specialized Legal Expertise**

Current law (HRS Section 28-8.3) provides expressly for the university to have the ability to retain independent counsel, as do many other departments, offices and commissions, including the Office of Hawaiian affairs, the Hawai'i Health Systems Corporation, and the Division of Financial Institutions. Like UH, the above-named entities have specialized missions and require unique expertise. According to the National Association of College and University Attorneys (NACUA), only 4 out of 50 states (Washington, Ohio, Virginia, and Maryland) use their state AG directly, which is an indication of the specialization required in the higher education sector. And even in those states, there are separate divisions of the AG to support higher education, The Office of the AG in Washington has a Division for the University of Washington (16 attorneys and 10 professional staff) and Washington State University (5 attorneys and 2 professional staff). The Education Section of the Ohio AG coordinates with the work of in-house attorneys and does not fully replace them. The Education Section under the Virginia AG contains 45 attorneys. And in Maryland, like Ohio, higher education institutions have in-house counsel to coordinate with the Educational Affairs Division of the Office of the AG.

In addition to generalized transactional and litigation practices, the day-to-day work of our UH attorneys centers on issues and areas of the law unique to higher education:

- University faculty matters, such as academic freedom, grievances, faculty governance, and UHPA collective bargaining and contract administration
- University research and innovation, including technology and materials transfer, federal grants and contracts, intellectual property ownership and management, compliance with federal and state laws and regulations affecting research activities, and issues related to unique facilities and operations in astronomy, marine sciences, and agriculture, to name a few
- Intercollegiate athletics, including NCAA compliance, issues relating to student athletes, and contractual and other issues related to athletic venues and contests
- Student matters, including discipline and judicial affairs, FERPA, Title IX compliance, privacy, and housing
- Legal and contract issues arising from the university's medical school, cancer center, and other health sciences programs; includes contractual relationships with hospitals, providers, our clinical practice partner, and our residency program partner, as well as issues concerning federal health care laws, regulations relating to medical education and related facilities.

And while the ATG can assist other departments in issues pertaining to land use development, OGC has hired substantive expertise in the last few years to assist the UH with its unique land development and P3 priorities, which have been urged and supported by the Legislature. This bill would severely cripple those initiatives.

### **Efficiency in Operations**

OGC currently has a total of twelve authorized attorney positions serving the ten campuses and UH System offices, which collectively comprise one of the largest, most complex and most influential enterprises in the State. With an annual operating budget of approximately \$2 million (FY19), the **OGC office expenditures represents approximately 1/8 of one percent (0.13%) of the university's total annual expenditures.**

Comparing OGC to other government law offices:

#### City and County of Honolulu

Annual Operating Expenditures (FY18): ~\$2.5 billion

Employees: ~10,000 – O'ahu only

Office of Corporation Counsel: 51 attorneys, \$9M budget

Ratio of Budget to Annual Expenditures: 0.36%

#### State of Hawai'i

Annual Operating Expenditures (FY 18): ~\$6.7B (without UH)

Employees: ~40,000 - Statewide (executive branch without UH)

Department of the Attorney General: 180 attorneys, \$103.65M (FY18 budget)

Ratio of Budget to Annual Expenditures (FY18): 1.55%

#### University of Hawai'i System

Annual Expenditures: ~\$1.5 billion

Employees: ~10,000 - Statewide

Office of General Counsel: 12 attorney positions, \$2M (FY 18 budget)  
Ratio of Budget to Annual Expenditures: 0.13% (0.15% including 2 externally funded attorneys)

The City and County of Honolulu is the most comparable in terms of the size of the institution, and OGC serves the same client base with one-fourth the number of attorneys.

According to a survey done by NACUA, the average number of FTE attorneys in the office of general counsel at institutions with annual budgets \$1 billion or more is 14.1; the average number of FTE attorneys in the office of general counsel at institutions with enrollment of 35,000 or more (like UH) is 14.9. See Attachment 1 with relevant portions of “Results of NACUA’s 2018 Compliance Survey”, at p. 3, showing national trend of increasing numbers of in-house attorneys in university counsel offices.

### **Use of Outside Counsel**

Every public (and private) in-house counsel team also uses outside counsel where need arises, including the ATG, OHA, and all county corporation counsel offices. This provides for even more specialized expertise when specifically required without overstaffing. The university retains outside counsel only when necessary: (1) patent attorneys (none in OGC), (2) complex, high stakes litigation/disputes, (3) highly specialized matters in areas outside the expertise of OGC attorneys, (4) conflict situations, and (5) lack of capacity. In no instance since VP Okinaga started has outside counsel been retained because of “lack of capacity”, as shown below, and OGC attorneys know that although new matters are coming in constantly, the work will be absorbed in-house unless extenuating circumstances exist.

The current staff in OGC has been hired or retained because of their strong work ethic and willingness to “do the cases” themselves, as well as their passion for the University of Hawai‘i and commitment to public service. Since a new lead litigator was hired in July 2016, 26 new lawsuits have been filed against UH, and all are being handled in-house except for conflict counsel and one construction litigation matter. In fact, 4 additional litigation cases were brought back in-house and the outside counsel contracts have been closed. The pay scale for associate attorneys is in line with county deputy corporation counsel pay scales (Maui, City & County, and Hawai‘i).

At the beginning of VP Okinaga’s tenure in 2015, there were 107 open outside counsel contracts; currently, there are 49, broken down as follows:

- 27 are specialized and funded by research revenues
  - 21 patent counsel – UH is working to increase revenue and impact of the intellectual property and filing more patents is the critical first step.
  - 6 other research-related matters requiring specialized expertise and/or complex litigation.
- 22 are funded by the risk management special fund or other special funds
  - 9 litigation matters + 1 conflict counsel
  - 12 specialized matters (Federal Communications Commission, design build and construction agreement templates, P3 development, PUC

and energy contracts, eviction, and graduate medical education matters)

OGC is accountable to the President and BOR for containing the university's outside counsel spend, and the direction is positive.

### **Request for Assistance from ATG**

In October 2015, before asking for funding or positions to rightsize OGC staffing (at that time, 8 attorney positions), VP Okinaga tried to ascertain whether other options existed. UH is authorized under HRS Section 304A-1005(b) to request assistance from the AG, and did so, in three areas: (1) litigation, (2) responding to HRS Chapter 92F requests, and (3) contract review. Then-AG Doug Chin kindly agreed to assist with certain types of litigation, and in fact did provide litigation assistance on one matter, but declined to assist in the other two areas and conveyed his belief that UH attorneys would be best equipped to do this work.

While the university consults frequently with and is grateful for the assistance of the ATG on matters of shared interest, it is not practical nor reasonable for the university to rely on the Attorney General to meet all of the specialized legal needs of an institution that is large, unique, and that employs a substantial portion of the State workforce.

We note that the bill does not address the fiscal impact on the ATG of assuming responsibility for legal matters that are currently handled by the university's attorneys, nor does it address the treatment of current university personnel in attorney and staff positions that would no longer be lawful if this bill were enacted. These fiscal, personnel, and personal impacts would be significant to both UH and the Department of the Attorney General.

For these reasons, the University of Hawai'i **strongly opposes** SB44 SD1.

Thank you for this opportunity to testify.

 **NACUA**

**2018 Annual Conference**

Hilton Minneapolis · Minneapolis, MN  
June 24 – 27, 2018

**09 | The Results of  
NACUA's 2018  
Compliance Survey**

## SUMMARY OF RESULTS OF NACUA'S 2018 COMPLIANCE SURVEY

June 24-27, 2018

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### **I. Introduction**

- A. In the spring of 2018 NACUA conducted its second survey of chief legal officers at NACUA member institutions to gather data on current and planned compliance programs, the structure of those programs, and their perceived effectiveness. More than 200 member institutions responded. The survey also provides useful data on the make-up of offices of the general counsel and their responsibility for compliance matters.
- B. NACUA conducted an initial compliance survey in the spring of 2013. The 2018 survey followed the same format as the initial 2013 survey so the results would be comparable. The 2018 survey results were compiled in an 87-page report distributed to respondents earlier this month. The full report on the 2018 compliance survey is available [here](#). The report on the 2013 compliance survey is available [here](#).
- C. This summary highlights the key findings of the 2018 summary and compares those with the findings from the 2013 survey. One caveat: the universe of respondents in the two surveys was not the same; this should be considered when reviewing the results of the two surveys.

### **II. Responding Institutions**

- A. NACUA invited Chief Legal Officers of 606 member institutions to participate in the 2018 compliance survey and 213 completed the survey, an excellent response rate of 35%. A list of the institutions who responded is on pages 5 and 6 of the survey report. The 2013 survey was completed by 210 institutions.
- B. As was the case with the 2013 survey, the 2018 survey provides data on a disaggregated basis for several discrete subgroups of respondents:
  - 1. Type of entity (single-unit, institution within a multi-campus system, and central office of a system).
  - 2. Public institutions and private institutions.
  - 3. Carnegie classification.
  - 4. Size of institutional annual operating budget (ranging in size from less than \$100 million to \$1 billion or more).



5. The number of full-time-equivalent students enrolled at the institution (from fewer than 5,000 to more than 35,000).

Reporting in this disaggregated way facilitates comparisons by individual institutions with institutions that have similar characteristics.

- C. The make-up of responding institutions in the two surveys across these characteristics are remarkably similar and they represent an excellent cross section of NACUA institutions, as the table below indicates:

<i>Characteristic</i>	<i>Percentage of Respondents</i>	
	<i>2018</i>	<i>2013</i>
Single unit institution	70.0%	67.0%
Institution within a system	19.5%	19.4%
System Office	10.5%	13.6%
Public	51.7%	50.2%
Private	48.3%	49.8%
Doctorate-granting universities	60.2%	56.0%
Master's colleges and universities	19.4%	26.8%
Baccalaureate colleges	9.5%	11.0%
Associate's colleges	8.5%	5.7%
Special focus institutions	1.9%	0.5%
Tribal colleges	0.5%	0.0%
Annual budget less than \$100 million	18.7%	16.5%
Annual budget \$100-200 million	20.6%	23.5%
Annual budget \$200-500 million	24.4%	22.5%
Annual budget \$500 million to \$1 billion	12.0%	15.0%
Annual budget \$1 billion or more	24.5%	22.5%
Enrollment of fewer than 5,000 students	27.4%	26.3%
Enrollment of 5,000 to 9,999 students	17.9%	20.3%
Enrollment of 10,000 to 15,999 students	16.9%	14.7%
Enrollment of 16,000 to 24,999 students	15.9%	14.2%
Enrollment of 25,000 to 34,999 students	8.5%	10.2%
Enrollment of 35,000 or more students	13.4%	14.3%

### III. Staffing in the Office of the General Counsel; Responsibility for Compliance

- A. In addition to providing information about institutional compliance programs, the survey also yields interesting information about the composition of offices of general counsel. **In general, there has been an increase in the number of attorneys and of full-time equivalent employees in the office of the general counsel at member institutions over the past five years. Of those institutions reporting an increase in the number of employees in the office of the general counsel, 76.2% said the increase is attributable in whole or in part to additional compliance responsibilities at the institution.** In the 2013 survey, 70.4% of institutions that reported an increase in OGC employees said the increase was attributable in whole or in part to additional compliance responsibilities.
- B. The reported average number of attorneys in the office of the general counsel increased by 1.1 since the time of the 2013 survey (from 4.1 to 5.2). The average, of course, varies by type and size of institution. In general, offices of the general counsel in system offices and at institutions with higher budgets and enrollments showed the most increase in the number of attorneys since 2013.

<i>Characteristic</i>	<i>Average number of full-time equivalent attorneys in the office of the general counsel</i>	
	<i>2018</i>	<i>2013</i>
All Institutions	5.2	4.1
Single unit institution	4.1	3.3
Institution within a system	5.2	5.0
System Office	13.6	7.5
Doctorate-granting universities	7.2	6.0
Master's colleges and universities	2.4	2.2
Baccalaureate colleges	1.6	1.3
Associate's colleges	2.0	1.4
Annual budget less than \$100 million	1.7	1.1
Annual budget \$100-200 million	1.6	1.6
Annual budget \$200-500 million	2.9	2.7
Annual budget \$500 million to \$1 billion	3.9	4.7
Annual budget \$1 billion or more	14.1	10.2
Enrollment of fewer than 5,000 students	1.6	1.5
Enrollment of 5,000 to 9,999 students	2.1	2.6
Enrollment of 10,000 to 15,999 students	4.8	4.9
Enrollment of 16,000 to 24,999 students	5.1	4.2
Enrollment of 25,000 to 34,999 students	9.4	5.1
Enrollment of 35,000 or more students	14.9	9.5

- C. Just under half of the respondents said the number of full-time equivalent employees in their office of the general counsel increased during the past five years; the average increase for those offices was two employees.
- D. **Offices of general counsel at institutions of higher education are all involved in institutional compliance efforts, some more directly than others:**
1. 99.3% of all Chief Legal Officers in both surveys responded that they provide support for their institution's compliance program.
  2. Just over 31% (in both 2018 and 2013) of Chief Legal Officers indicated they have responsibility for or oversight of a formal compliance program at their institution.
  3. For those institutions without a Chief Compliance Officer, 34.4% of respondents indicate that the general counsel has primary responsibility for compliance, up from 25% in 2013. Among institutions with a budget of less than \$100 million annually having no Chief Compliance Officer, 54.8% report that the general counsel has primary responsibility for the institution's compliance program.
  4. Those indicating that an attorney in the office of general counsel is assigned formal responsibilities for compliance increased from 29.1% of respondents in 2013 to 36.5% of respondents in 2018.
  5. Nearly 98% of Chief Legal Officers rated compliance as "the most challenging issue" (4.4%) their offices face, "among the top three most challenging issues" (67.6%), or "just as challenging as any other legal issue" (25.6%). This is essentially unchanged since 2013.