Testimony
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Senate Committee on Health, Education, Labor and Pensions

Recalibrating Regulation of Colleges and Universities:
A Report from the Task Force on Government Regulation of Higher Education

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Chairman Alexander, Ranking Member Murray, Members of the Committee, thank you for inviting me to testify before you today in my capacity as the co-chair of the Task Force on Federal Regulation of Higher Education. It has been my privilege to serve in this capacity, and I am honored to be here with my co-chair and esteemed colleague, Chancellor Kirwan, to discuss ways we might improve the regulatory structure for colleges and universities.

Let me echo what Chancellor Kirwan stated in his remarks. The underlying premise of our work is the belief that smart regulations protect students and families and hold colleges and universities accountable for the considerable public dollars they receive. Tax payers and the government have the right to know these funds are being spent appropriately, thus we embrace the need for federal regulations. We are not here to ask you to de-regulate higher ed. Rather, we want to bring attention to the fact that, over time, oversight of higher education has expanded in ways that undermine the ability of our institutions to serve students and accomplish our missions. As we conclude in our report, many of the Department's regulations are unnecessarily voluminous and too often ambiguous, and the cost of compliance has become so unreasonable that it is having a real impact on college costs and tuition. Even more troublesome, some regulations are a barrier for students' access to a college education.

For years, colleges and universities have complained to policymakers about the burdensome nature of federal regulations—we've gotten quite good at it. And we have often found sympathetic ears on Capitol Hill. But the higher education community has not been as transparent – until now – in presenting data in support of our position and proposed solutions. This report provides concrete suggestions for reform.

Recommended Improvements in the Regulatory Process

As an administrative lawyer, I know that simply revising existing regulations is not sufficient to address the underlying problems with the process by which the Department promulgates regulations. Change is needed to address how the Department develops, implements and enforces regulations. Our report offers recommendations to improve each phase of the regulatory process; some of those recommendations follow.

- ***The negotiated rulemaking process should be reformed to ensure it achieves its purpose. Unrelated issues should not be bundled together. Facilitators should be permitted to serve as arbiters in reaching consensus.***

The "bundling" of unrelated issues for consideration during a single negotiated rulemaking has become a serious problem. More specifically, the Department has too often grouped a host of unrelated issues into a single panel, choosing negotiators on a disparate set of issues and thus

creating situations in which only a small number of negotiators are knowledgeable enough to engage on any given issue. In such cases, a very small number of negotiators may determine the outcome of rules with broad public policy implications.

The February-May 2014 negotiated rulemaking on "Program Integrity" illustrates this point. A single negotiating committee was tasked with reaching consensus on, among other issues, "cash management" of Title IV funds; state authorization of distance education programs; state authorization of institutions with foreign locations; "clock-to-credit-hour" conversion; the definition of "adverse credit" for borrowers in the PLUS Loan Program; and the retaking of courses. Given the range of individuals needed for such a panel, it was not surprising that most negotiators were knowledgeable about a limited number of these issues. It was even less surprising that no consensus was reached on the regulatory package.

Another serious obstacle to successful negotiated rulemaking panels in recent years has to do with the panels' facilitators. As the individuals charged with running the negotiating sessions, facilitators should serve as guardians of the process. Unfortunately, that is not the case. In recent years, the Department has given facilitators a limited role, with little authority to resolve differences that arise. This part of negotiated rulemaking should also return to its original purpose, which involved facilitators who served as arbiters of fairness and who use their skills to help achieve consensus not by encouraging a particular substantive outcome, but by being more active in exploring areas of agreement.

The result of these practices is that the Department exercises an extremely high degree of control over the entire process, not only selecting all the committee members and limiting the role of the facilitators, but also doing all the drafting and taking a very strict view of what constitutes a consensus. These and additional concerns about the Department's process for negotiated rulemaking and other ways to improve the process are explored further in the report, including in an appended white paper.

- ***The Department should provide clear regulatory safe harbors to help institutions that abide by certain standards to meet their compliance obligations. Such safe harbors exist in other areas of law that pertain to universities.***

The Department's requirements are so complicated in many areas that it is impossible for colleges and universities to be certain they are in compliance, even when they take carefully considered steps they believe are necessary. Clear safe harbors—provisions in the law that will protect institutions from liability as long as certain conditions have been met—should be established to help institutions meet their compliance obligations.[1]

Safe harbors currently exist in other areas of law that apply to institutions of higher education. For example, colleges and universities hiring foreign nationals through the H-1B visa program must pay those individuals wages that are equal to or higher than the prevailing wage in the occupations for which they were hired. If an institution uses Department of Labor-determined prevailing wage levels, it has a safe harbor against challenges to its prevailing wages. The federal "deemed export" rules prohibit certain individuals from receiving controlled information and/or controlled technologies without the required license(s), exception, or exemption, even if those individuals are otherwise authorized to work within the United States. However, the "fundamental research

[1] Definition adapted from *Black's Law Dictionary Free Online Legal Dictionary,* 2nd ed., available at: http://thelawdictionary.org/ safe-harbor/.

exclusion" creates a safe harbor from such requirements.[2] In addition, under the terms of a government-wide policy, entities that receive federal funds above a certain amount must undertake an independent audit annually. This process, commonly referred to as an A-133 audit, was designed as a safe harbor against excessive audits by federal agencies.

Congress should instruct the Department to make use of safe harbors whenever possible.

- ***The Department should not make significant changes in policy without following the Administrative Procedure Act's (APA) notice and comment procedures.***

The APA's notice and comment procedures are a valuable, time-tested tool for developing good regulations.[3] Soliciting public comments and incorporating this feedback ensures that the agency has considered a wide range of viewpoints and allows for the opportunity to address unanticipated consequences before the regulation is finalized. When developing formal regulations, the Department is usually careful to follow the APA's requirements. However, as it increasingly turns to sub-regulatory guidance to pursue its policy goals, the agency often imposes significant new requirements without the benefits afforded by the notice and comment process. The Department should always use the notice and comment process. If, in rare circumstances, it determines it cannot, it should articulate a reasonable basis for dispensing with it.

The Department's policies would be better informed and more effective with the benefit of formal comments from all interested parties. In addition, when there is a full and public vetting of policy choices, the chances of good policy being upheld in any future litigation will be greatly increased. Therefore, it is critical that Congress ensure that agencies follow the procedures set forth in the APA so that the public is given a meaningful opportunity to comment before new mandates are imposed.

- ***Congress required the Department in 2008 to produce an annual compliance calendar. They have yet to do so.***

Institutions of higher education have an obligation to comply with regulations that the Department of Education is obligated to enforce. Compliance is enhanced and the need for audits and fines is greatly reduced if institutions are made clearly aware of the requirements they face. That was the rationale behind the compliance calendar created by Congress in the 2008 HEA reauthorization legislation.

Under that legislation, Congress mandated that the Department of Education publish an annual "compliance calendar" that lists all compliance requirements and their corresponding deadlines. The goal is straightforward: Institutions should receive a clear checklist of regulatory and information collection deadlines that documents their regulatory obligations. Armed with this information, institutions—especially small, thinly staffed ones—will be in a much better position to comply than they are at present. Given that regulations and requirements continue to grow, the

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[2] Fundamental research means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons. See: http://www.ucop.edu/ethics-compliance-audit-services/compliance/international-compliance/on-campus-re- search-with-foreign-nationals.html.

[3] The "notice and comment" process has been adopted by a number of other countries, including China. Jeffrey S. Lubbers, "Notice-and-Comment Rulemaking Comes to China," *Administrative and Regulatory Law News* 32(1): 5-6, fall 2006, available at: http://www.law.yale.edu/documents/pdf/Intellectual_Life/ch_Lubbers-Administrative_comment.pdf.

compliance calendar should be updated annually and made easily available to institutions. This will allow institutions to know what is expected of them instead of playing catch up and defense.

- ***The Department should recognize when institutions are acting in good faith.***

Very few violations of federal regulations are deliberate or reflect negligence by institutions. Nor are all violations equally serious. At present, minor and technical violations are not acknowledged as such by the Department. We believe that the Department ought to recognize when institutions have clearly acted in good faith.

In the summer of 2014, for example, the University of Nebraska at Kearney was fined $10,000 for mistakenly misclassifying a 2009 incident involving the theft of $45 worth of goods from an unlocked custodian's closet as a larceny rather than a burglary.[4] Because the Clery Act does not require the reporting of larceny,[5] the university did not report the incident on its Annual Security Report. In an audit, the Department ruled that the incident was a burglary and fined the institution for failing to report it. We believe that this is an example of an institution being overly penalized for a relatively minor technical violation. In such cases, the size of the sanctions imposed by the Department does not appropriately reflect the weight of the infraction involved. Fines that fail to distinguish the important from the trivial undermine the Department's credibility.

Some agencies, including the Internal Revenue Service and Securities and Exchange Commission, utilize voluntary correction programs. Under those programs, regulated entities identify instances of non-compliance and report them to the agency. The agency then reviews the self-report, collects evidence of correction, and issues a confirming letter. Congress and the Department should consider the benefits of developing a similar voluntary program in appropriate circumstances—for example, in cases involving technical violations where an institution was acting in good faith.

- ***There should be a statute of limitations for enforcement of Department regulations. Taking over 10 years to complete a program review and issue fines should be unacceptable.***

Under the Higher Education Act, colleges and universities are required to submit documents and other records requested by the Department within a prescribed amount of time. While institutions are required to adhere to strict time lines in terms of responding to the agency's requests, there are no time limits imposed on the Department in terms of issuing a final determination after a program review.[6] By way of example, in May 2013, Yale University was ordered to repay financial aid funds based on a Department of Education audit undertaken in 1996. The University of Colorado received a similar demand based on a 1997 audit. Even though the universities appealed in a timely fashion, it took 17 and 16 years, respectively, for the Department to take action.

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[4] According to one article, the stolen items were a bag of potato chips, Little Debbie Nutty Bars, and a set of walkie-talkies. Ben Miller, *Roll Call,* August 25, 2014, available at: http://www.rollcall.com/news/how_unnecessary_data_reporting_requirements_ turned_a_44_theft_into_a_10000-235831-1.html?pg=1&dczone=emailalert.

[5] To be precise, larceny is only reported under Clery when it occurs in connection with a hate crime.

[6] Federal Student Aid Programs, *Program Review Guide for Institutions,* 2009, available at: http://www.ifap.ed.gov/program-revguide/attachments/2009ProgramReviewGuide.pdf.

- ***Finally, we suggest Congress consider developing and implementing "risk-informed" regulatory approaches where appropriate.***

All colleges and universities are regulated in the same manner, regardless of the level of risk involved. This forces the Department to expend energy on institutions that should command relatively little attention, while simultaneously skimping on those where more oversight is warranted. Painting all institutions with the same broad brush does not serve anyone well.

A white paper the task force commissioned to look at this issue in greater detail is appended to our report. It includes the suggestion that a risk-informed regulatory approach could be applied to requirements for financial aid reporting; accreditation; and program reviews by the Federal Student Aid office.

While a risk-informed regulatory system is not appropriate for every issue, there is growing consensus that institutions with greater levels of risk to students and taxpayers should be regulated by the Department more closely. After extensive consultations with the higher education community, Congress should require the Department to develop and implement risk-informed regulatory systems wherever appropriate. A more risk-informed approach – rather than a one-size fits all – would represent a smarter way of regulating.

Compliance with Regulations is Costly

While government regulation can confer significant benefits and protections, the costs associated with heavy-handed and poorly designed regulations can be enormous. Unfortunately, calculating the precise benefits and costs of regulation is both difficult and time-consuming. One reason for this is that duties and functions associated with a new regulation are usually absorbed by staff who already perform other duties, simply adding to their workload. Similarly, estimates of the cost of complying with a new regulation may fail to take into account the complicated interplay between new and existing requirements. Regulations do not exist independently of each other, and the interplay of multiple requirements can add exponentially to the cost of compliance. For these and other reasons, attempts to systematically quantify these costs have been few and far between.

Over the course of six months last year, Vanderbilt conducted an in-depth analysis to look at the cost of federal regulatory compliance, excluding those related to our healthcare mission. We wanted to know not only the total cost but to identify areas where we could reduce our own internal costs. What we found is that regulatory compliance and costs are spread across the University.

We found that Vanderbilt spends approximately $146 million annually on federal compliance. That represents about 11 percent of our non-clinical expenses. Put another way, this equates to approximately $11,000 in additional tuition per year for each of our 12,757 students. As a major research institution with nearly $500 million annually in federally supported research, a significant share of this cost is in complying with research-related regulations. But we also calculated that we spend approximately $14 million annually in compliance with higher education-related regulations such as accreditation and federal financial aid.

We are now working with a number of other institutions across the country – from all sectors of higher ed – to measure and compare our findings. We will have conclusive data from these studies this spring. We are hopeful that our efforts will help inform the Committee's work in reforming regulations and the regulatory process.

Conclusion

Effective oversight can help colleges and universities keep costs down, keep students safe, focus on educating students, and be good stewards of federal funds. In that spirit, the Task Force developed the following Guiding Principles to help govern the development, implementation, and enforcement of regulations by the Department:

- Regulations should be related to education, student safety, and stewardship of federal funds.
- Regulations should be clear and comprehensible.
- Regulations should not stray from clearly stated legislative intent.
- Costs and burdens of regulations should be accurately estimated.
- Clear safe harbors should be created.
- The Department should recognize good faith efforts by institutions.
- The Department should complete program reviews and investigations in a timely manner.
- Penalties should be imposed at a level appropriate to the violation.
- Disclosure requirements should focus on issues of widespread interest.
- All substantive policies should be subject to the "notice-and-comment" requirements of the Administrative Procedure Act.
- Regulations that consistently create compliance challenges should be revised.
- The Department should take all necessary steps to facilitate compliance by institutions.

Apart from our interest in seeing that regulations are coherent and fair, these principles also reflect our belief that all stakeholders—students and taxpayers, as well as colleges and universities—reap the benefit of well-designed regulation. We want to keep costs down, keep students safe, focus on educating students, and be good stewards of federal funds. These principles will help us do that. Mr. Chairman, under your leadership we hope this Committee will also adopt these principles as you move forward with reauthorizing the Higher Education Act.

Again, thank you for the opportunity to co-chair this Task Force and to present our collective recommendations to you today. Regulatory reform seems to be an area where we can remove red tape and reduce costs while we continue our prudent stewardship of public dollars and provide students and families the information they need to make informed choices. I think you will agree that the recommendations in our report are common sense proposals that will benefit the greater good and society at-large. Historically, universities and colleges have served as drivers of the general national interest by promoting education and discovery that provides solutions to the challenges that face humanity. As a nation, we all benefit when federal funding is spent to further this national interest, when universities are good stewards, and more money is reinvested in our core mission of aiding and advancing society. Relief from some of the most burdensome or ill-founded regulations and a better process for developing new ones would help higher education advance these important goals. I look forward to your questions and to working with the Committee to implement our recommendations in the upcoming reauthorization of the Higher Education Act.