Regulatory Reforms for Higher Education

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Colleges and universities that receive Title IV aid operate under a web of rules and regulations. In light of the $150 billion in grants, loans, and tax credits that the federal government hands out, some regulation of how institutions disburse that money, and the information they must publish about their product, is reasonable and inevitable. As with many areas of federal policy, however, both the density and reach of federal rules governing participating colleges and universities have grown tremendously since the birth of the programs in the 1960s and 1970s. Some of this growth has been productive; greater transparency around student outcomes and the implementation of basic fiduciary standards have helped to reduce fraud and abuse and target policy responses to poorly performing institutions.

But much of the growth reflects the fact that each reauthorization of the Higher Education Act layers new requirements on the higher-education system but rarely subtracts any existing requirements that may have outlived their usefulness (if they were ever useful to begin with). The Department of Education then writes rules to execute those new statutory requirements or, as is increasingly the case, initiates rulemaking that is not related to recently enacted legislation but is designed to promote the administration's priorities. Add in the sub-regulatory guidance that inevitably follows the regulatory process, and the end result is a system that imposes significant costs on colleges and universities, often with questionable benefits.

Hard and fast estimates of regulatory burden are hard to come by given the wide range of institutions and opaque institutional budgeting practices, but colleges who have conducted self-studies have found that they invest significant time and money in complying with federal

requirements.[295] Many of those costs are then passed on to the consumer in the form of higher tuition. For its part, the department tends to underestimate the administrative burden associated with new regulations.[296]

And because agency officials can effectively make policy through new regulations and sub-regulatory guidance — and have considerable discretion in targeting institutions for regulatory action — the system is also plagued by uncertainty and overreach. When control of the executive branch changes, colleges are left to wonder whether sub-regulatory guidance issued by one administration is still in effect under a new one. All of this leads to risk aversion and a compliance mentality on the part of institutions, which increases the amount of time and money they spend to ensure that they are not running afoul of federal policy.

Efforts to cut through the thicket of federal regulation are not new; every few years another task force or commission publishes a study of federal requirements and proposes changes.[297] But new requirements continue to accumulate, and the Department of Education continues to push policy goals through the regulatory process whether or not those goals reflect legislative intent. Needed is an effort to not only reduce and streamline existing rules and requirements, but to reform the processes by which such requirements become policy. With some exceptions, this paper focuses mainly on reforms to the regulatory process rather than the reform or repeal of specific regulations. For more on specific regulations that merit attention, see the report of the 2015 Senate Task Force on federal regulation of higher education.[298]

THE STATUS QUO IN REGULATION

In order to participate in federal student-aid programs, institutions must comply with thousands of pages of statute, regulation, and sub-regulatory guidance on everything from financial aid to file sharing to campus crime. As the Senate Task Force report pointed out:

> The Department's 2013-14 Federal Student Aid Handbook, a guidebook for administering student aid that amplifies and clarifies the formal regulations, is more than 1,050 pages. The Department's Handbook for Campus Safety and Security Reporting (also known as the "Clery Handbook") contains approximately 300 pages, and will soon expand significantly in light of new regulations issued in 2014.[299]

Many of these requirements are embedded in statute, while others are the result of subsequent regulation. The Obama administration issued new rules governing federal loan programs, gainful employment, incentive compensation, state authorization, teacher-preparation programs, campus crime, credit hours, and other topics. Department officials also put out hundreds of "Dear Colleague" letters, some of which have often imposed on colleges new requirements that are not rooted in statute or existing regulation.

Given the amount of taxpayer money at stake, it is not surprising—indeed it's reasonable—that the feds impose some rules on how aid is awarded and disbursed. To be eligible to receive federal grant and loan dollars, institutions must be certified as eligible by Department of Education and must sign onto a Program Participation Agreement (PPA) with the Office of Federal Student Aid (FSA), under which the institution pledges that it will abide by all laws, rules, and requirements related to the administration of aid programs and will act as the fiduciary responsible for administering aid funds. Eligibility depends on accreditation, state authorization, and suitable performance on cohort default rate measures. Certification and recertification also require that institutions fulfill administrative-capability and financial-responsibility requirements.[300]

Once certified, the rules governing aid disbursement are especially burdensome.[301] Studies of federal regulation have highlighted verification of FAFSA and a requirement called Return to Title IV as especially complicated.

The FAFSA verification process begins each year with FSA selecting a number of students for verification of the information they provided on their FAFSA.[302] Institutions are required to conduct this verification, which entails working with individual families to provide necessary documentation within a particular time frame. The items that an institution may be asked to verify are published in the *Federal Register* each year (for 2017-18, the list includes 12 items).[303] The verification process is burdensome and costly for institutions; a study of 13 community colleges found that these schools together spent around $2 million on verification efforts during the 2007-2008 school year.[304]

Under Return to Title IV (known as "R2T4"), institutions must return a portion of the Title IV money awarded to a student who withdraws before completing 60% of the semester.[305] Institutions must pro-rate the amount returned by the amount of aid money that the

student "earned," which is proportional to the amount of the semester the student actually attended. Of course, if a student drops out but does not formally withdraw, and if the institution does not take attendance, school officials must do their best to calculate the amount to be returned. Schools also have to complete the calculations even if it is known at the outset that no refund will be due to the government. The resulting regulations are quite complex, clocking in at over 6,500 words.[306] Institutional representatives that took part in Government Accountability Office (GAO) focus groups said that the complexity of R2T4 regulations made it difficult to return the money on required timelines and that the complexity increased the risk of audit findings.[307]

In addition to the detailed rules that govern the disbursement of student aid, the Higher Education Act also requires colleges to collect and report data on dozens of different areas. Some of that data must be reported to the federal government, while other pieces of information must be disclosed to current students, current employees, prospective students, and/or the public at large. The latest reauthorization of the Higher Education Act (in 2008) contained 40 separate disclosures (nine of which had to be disclosed only to loan borrowers).[308] Since then, new "gainful employment" regulations from the Department of Education require institutions to disclose more than 30 pieces of information for each eligible program.[309]

Some of these required disclosures are excessively burdensome, and of dubious value, to consumers or policymakers. When the GAO asked experts and higher-education representatives about the most burdensome federal regulations, the most frequently cited consumer disclosures were the Clery Act campus-security and crime-statistics disclosure requirements.[310] The crimes that institutions are required to report do not match the definitions used by other government agencies, which causes confusion. In some cases, institutions must solicit crime statistics from other cities and foreign governments to adequately cover facilities that the institution leases to house students.[311]

Colleges are also obligated to report "placement of, and types of employment obtained by, graduates," as well as the "types of graduate and professional education in which graduates of the institution's four-year degree programs enroll."[312] Because the federal government does not collect such data systematically, and because there is no agreed-upon definition of job placement, the methods campuses use to provide such

information range from alumni surveys to administrative data supplied by a state agency.[313] Therefore, students cannot use the disclosed data to compare colleges.[314]

The Department of Education issues both formal regulations and sub-regulatory guidance. In issuing new regulations, the department is required to use "negotiated rulemaking," a process designed to allow stakeholders from different areas of higher education to come together and develop a proposed rule. The department typically announces that it is going to have a negotiated rulemaking, hosts a series of hearings to solicit opinions on the issue, and posts a notice in the *Federal Register* calling for nominations for committee members. The department then selects negotiators from those nominations, and the "neg-reg" committees can be quite large. The negotiated-rulemaking committee must come to a unanimous consensus across all of the issues under consideration in order to compel the department to adopt the committee's proposed rule; in the absence of unanimity, the department writes its own proposed rule. That proposed rule then goes through the standard notice and comment process.[315]

Outside of traditional rulemaking, department officials regularly release sub-regulatory guidance—so-called "Dear Colleague" letters—to clarify, and in some cases re-interpret, existing regulations. Unlike with formal rulemaking, stakeholders do not have an opportunity to comment on guidance documents before they are released. Though letters do not technically have the force of law, institutions that depend on federal aid programs feel forced to comply for fear of department sanctions.

To enforce its regulations, the department has a few monitoring mechanisms at its disposal (see the Accountability section for more details on accountability measures and corresponding sanctions). Each institution is subjected to an annual audit by a third-party auditor that assesses the institution's financial statements and compliance with Title IV rules. The department can choose to target institutions for sanctions or corrective action on the basis of those audit results.

The secretary also has the power to conduct "program reviews" designed to assess an institutions' ability to administer federal student-aid programs with fidelity. The statute lists a number of ways an institution can trigger a program review, but FSA has considerable discretion in choosing which institutions to review.[316] FSA conducts the program review and allows the institution a chance to respond and correct errors,

after which the department can issue a provisional certification, take "corrective action," or impose sanctions. The institution must work to fix any problems identified in a program review.

The department has a number of enforcement mechanisms to use when institutions break federal rules, fail to abide by their PPA, or misrepresent their offerings. The department can levy fines of up to $35,000 for each violation.[317] It can also limit its access to Title IV funds or suspend the institution for a set period of time. Eventually, it can revoke an institution's eligibility entirely, after which the institution cannot reapply for Title IV for 18 months.[318]

room for improvement

The problem of regulatory burden is not only that some regulations are particularly burdensome, but that the incessant layering of new regulations on top of existing ones adds up over time. The findings of a 2013 GAO study "indicate that the burden reported by school officials and experts not only stems from a single or a few requirements, but also from the accumulation of many requirements."[319] These requirements are rarely revisited. The accumulation of rules is not just a Department of Education problem; Congress also bears some responsibility. The disclosures are a case in point; the number of required disclosures grew significantly with the 2008 reauthorization, but it is not clear that Congress evaluated the value of the new disclosures or the utility of the disclosures already on the books.

In addition, colleges are required to do a number of things unrelated to education, finance, or campus safety. Students must be registered with Selective Service to receive Title IV aid; if their status is unclear, it falls on the institution to verify that registration. Schools must also provide students with voter-registration forms within a specified time frame, must report on foreign gifts, must educate students about peer-to-peer file sharing, and must ensure that they have an alcohol- and drug-abuse program in place.[320] These requirements have little to do with education or safety, but colleges must comply or risk losing access to Title IV.

This disparate list of responsibilities reflects, in part, the fact that there are few incentives for agencies to review existing rules. A 2011 executive order tried to create one, calling on federal agencies to conduct retrospective reviews of their regulations.[321] The Department of Education's final review plan described its goal of identifying regulations "that may be

outmoded, ineffective, insufficient, or excessively burdensome, as well as regulations that can be modified, streamlined, expanded, or repealed to be more effective and efficient, achieve better outcomes for students, and be easy to understand."[322] Unfortunately, the department's final review plan for higher education focused mostly on "expanded" regulations, touting a handful of *new* rules (gainful employment, state authorization, and incentive compensation) as evidence of their retrospective efforts. The plan also included changes to FAFSA filing and verification that did streamline processes and reduce burden. But the net effect of the changes cited in the review was an increase in regulation.

Furthermore, many of the last administration's regulatory efforts in higher education failed to reach a consensus during the negotiated-rulemaking phase. Administrative law expert Jeffrey Lubbers cites a number of reasons that neg-reg processes often fail to reach consensus.[323] First, the Department of Education has tended to bundle several issues together even if they are not related to one another. In 2010, one neg-reg committee was asked to consider 14 different issues in the third round of negotiations under the broad umbrella of "Program Integrity."[324] This bundling makes it difficult to choose a panel that is expert across all issues and makes it difficult to come to a unanimous conclusion.

Second, the department has tended to "stack the deck" with negotiators who fall on one side of the particular policy debate (the side that political appointees at the department sympathize with). In the 2016 borrower defense-to-repayment neg-reg, 10 primary and alternate panel members represented various consumer interests (from student groups, lawyers that represent students, state attorneys general, military student groups, and consumer advocates), while two primary and alternate negotiators represented for-profit colleges.[325] Stacking the deck makes consensus harder to come by.[326]

Third, the department has tended to rely on practitioners like financial-aid directors who have specific expertise that may not translate to other issues under consideration. One former department official argued that having representation from business officers, academic officers, risk officers, and legal counsel would enhance the rulemaking process.[327]

Though the process has its flaws, rulemaking at least provides opportunity for public input. "Sub-regulatory guidance," which regulators are supposed to use to clarify the meaning of existing regulations, is often used to make policy despite lacking the public input required under the

Administrative Procedures Act (APA). When complex regulations take effect, institutions often have questions about how to implement them in a way that complies with the law. Sub-regulatory guidance is one tool that regulators can use to make such clarifications (they can also post a "clarification and additional information" in the *Federal Register*).

But so-called "Dear Colleague" letters often go beyond clarifying existing regulation to actively making policy. And because they are not subject to the public-notice and comment requirements of the APA, Dear Colleague letters are issued directly from department officials and essentially have the force of law. Stakeholders do not have any say before the change takes effect, and they are difficult to challenge in court.[328] This grants considerable power to unelected bureaucrats. In addition, the repeated use of Dear Colleague letters creates significant uncertainty. Institutions are left to wonder when political appointees will change the rules again. The volume of Dear Colleague letters has increased over time; as the American Council on Education has noted, "In 2012 alone, through electronic announcements and Dear Colleague letters, the Department issued no less than 270 regulatory updates or modifications — more than one change per work day."[329]

The Department of Education's certification and program-review processes also lack transparency. The department has considerable discretion over a number of its monitoring and enforcement mechanisms, and agency decision-making is not sufficiently transparent. It has the freedom to grant some institutions a "provisional certification" to participate in federal aid programs; such a certification lasts for up to three years and imposes other restrictions on institutions. Provisional certification is always granted when a school is applying for the first time, is reapplying after its certification has lapsed, or is undergoing a change in ownership. But the department may impose a provisional certification at its discretion for a number of reasons, including if the institution has an open program review, the timing of which is controlled by the department itself.[330]

It has a similar level of discretion in launching program reviews. While the statute lists the types of institutions that the department should prioritize in conducting its program reviews, there is no set of transparent triggers that prompts a program review, and the department's decision-making is not transparent. As one group of observers wrote in 2015, "[the Department of Education] currently does not publish how it selects the

institutions to undergo program reviews."[331] As such, institutions are left to wonder whether they will be one of the hundreds of program reviews conducted each year. The lack of a transparent, risk-based process creates uncertainty and may allow regulators to target particular types of institutions to promote their political agenda.

In short, the density of federal rules and requirements placed on colleges and universities increases year in and year out, and the processes by which it does so are less transparent and accountable than they should be. The following reform ideas focus on changing specific regulations and making changes, where possible, to the regulatory process.

SUGGESTIONS FOR REFORM

A first set of reforms a new administration might consider would make sensible changes to the existing rules. Many of these ideas are drawn from the report of the Senate-appointed Task Force on Federal Regulation of Higher Education. See their report, *Recalibrating Regulation of Colleges and Universities*, for more detail.

First, Congress should eliminate requirements that have crept into the Higher Education Act that really have nothing to do with education, financial responsibility, or student safety. Those requirements include Selective Service, peer-to-peer file sharing, voter registration, foreign gifts, and drug- and alcohol-abuse programs.

Next, Congress should require that any proposed reporting requirement or consumer disclosure be subjected to an independent review by the National Center for Education Statistics (NCES). A parallel effort should study existing disclosures and reporting requirements to identify those that are not currently used so that they can be improved upon or eliminated. In general, Congress should limit the number of disclosures it adds to the law and focus instead on ensuring that institutions report on a much smaller number of important items related to education, financial responsibility, and student safety.

Further, the Department of Education is the only cabinet agency that is legally required to engage in negotiated rulemaking. Unfortunately, that requirement does not seem to have played out as planned, with the bundling of topics and one-sided committee recruitment leading to deadlocked decision-making. The failure to effectively use neg-reg to build a consensual proposed rule wastes time and effort. Rulemaking expert Lubbers recommends two reforms: first, Congress should relax

the requirement that the department use negotiated rulemaking in almost all circumstances. Second, Congress should direct the department to disaggregate issues by topic when engaged in rulemaking. If negotiators were allowed to vote topic by topic, negotiators would reach consensus far more often, producing regulations with adequate buy-in from regulated entities.[332]

further steps

Bolder reformers who want to push further should consider two steps. First, the borrower defense-to-repayment rule (BDTR), published in the last months of the Obama administration, needs revision to limit the risk to taxpayers. Second, Congress should establish more transparent criteria for launching program reviews.

The Department of Education's BDTR regulation is an attempt to provide a process for borrowers to discharge their loans based on misconduct by their former colleges and to provide certain financial protections for the taxpayer to shield it from losses stemming from discharged loans.[333] This rule, which is based on a brief provision in statute, is an attempt to apply the Federal Trade Commission's Holder Rule to direct loans.[334] The little-used provision came to the fore after federal sanctions precipitated the sudden closure of Corinthian Colleges in 2015.

Former Department of Education deputy general counsel Dennis Cariello sums up the problems with the final rule as follows:

> The established process for borrower defense suffers from two main flaws. First, the department's use of its "substantial misrepresentation" regulation would make colleges liable for inaccuracies provided to students that students "reasonably rely on," even if provided by accident.[335] Second, the proposed "group process" creates a class-action procedure without any of the procedural trappings of more typical class actions (like Rule 23 in the federal court system).[336] Indeed, the secretary can include everyone that went to a college—without regard to how long ago—within a group if the secretary believes common facts would make up the borrowers' cases. Worse, the borrowers would not even have to fill out forms letting the department know they want to proceed with the matter, and they wouldn't have to assemble the facts of their cases.

> The result of all this will be that plaintiff's lawyers and "debt counselors" will find "group representatives" and file suits in court against schools on behalf of large groups based on dubious "misrepresentations" (such as problems in misreporting of annual crime statistics or slight deviations in job-placement reporting), while maintaining a group process with the Department of Education. The department will then do the work of certifying the group and making the determination on the alleged misrepresentation, and, when complete, the lawyer will take the decision to the court and settle the action in order to get a fee.[337]

The likely result: a deluge of lawsuits against colleges that subject taxpayers to great risk. And because the rule taps Department of Education officials to adjudicate borrower defense claims, there will be significant pressure to make decisions that reflect the preferences of political leadership.[338]

Cariello suggests three changes. First, the department should recognize borrower defenses that require the institution to have affirmatively done something for which it is culpable. Requiring some intent—whether intentional behavior or recklessness—will ensure institutions do not face closure over honest mistakes or training failures. Second, the department should not have a group process; at most, it should have a group process only to determine facts that are common across the group. Once determined, however, individuals attempting to assert a defense to repayment must file a separate form requesting relief and stating the nature of their defense to repayment. Third, borrowers should be questioned in a proceeding before an administrative-law judge who is not an employee of the Department of Education and, as such, would not be subject to pressures within the department—or political pressures from Congress and activists.[339]

The BDTR regulation arose, in part, because the department's existing processes for detecting problems are inadequate. In the next reauthorization of the Higher Education Act, Congress could specify in more detail the conditions that trigger a program review from the Department of Education. The triggers should be based on objective measures: loan defaults, fluctuations in loan or grant volume, persistently low graduation rates, complaints and corrective action by state regulatory agencies, and accreditation sanctions. The colleges that entail

the most risk to taxpayers should receive the closest scrutiny from regulators. Making the triggers more transparent and predictable would help institutions avoid review and would prevent the department from using program-review power inappropriately.

For its part, the department should also be obligated to make public its reasoning in launching a program review so that policymakers and other institutions can see the kinds of scenarios that trigger a review.

REGULATORY OVERHAUL

A new administration will be in a rare position to truly reform the regulatory system that guides higher education if it so chooses (see the sections on Accountability and Innovation for more on regulatory reform). Three opportunities stand out: taking steps to rein in the use of sub-regulatory guidance, launching a true retrospective review of existing regulations, and revising the bankruptcy provision in the Higher Education Act.

As a starting place, Congress and the executive branch should rein in the use of sub-regulatory guidance to change policy. An incoming secretary of education should create an advisory board to determine whether any sub-regulatory guidance constitutes a substantive change to existing law or regulation and, if so, would submit such guidance through the Administrative Procedure Act's notice and comment process. Said policy should reflect the GAO's 2012 decision that what constitutes a "rule" under the Congressional Review Act "is expansive and specifically includes documents that implement or interpret law or policy."[340] Sub-regulatory guidance that fits this description should be open to public comment before publication. In fact, if the department receives a certain level of public comment about a given piece of guidance, such comments should serve as evidence of the substantive nature of the change. This sort of comment process could be part of a review process that evaluates proposed sub-regulatory letters according to this standard.

Congress should also assert its prerogatives here. Lawmakers could formally adopt the GAO's definition of "rule" and require that the department submit sub-regulatory guidance under the CRA and clarify that the APA applies to such guidance. Congress could also require the Department of Education to use the notice and comment process on guidance that fits the definition, and consider issuing a "Sense of Congress" resolution when it feels the department has changed policy

without providing the public with an opportunity to comment on the proposed change.[341]

Reining in the use of sub-regulatory guidance would help to slow the accumulation of new rules. But a true retrospective review of existing regulations, and ensuring that any new regulations include an explicit plan for retrospective review, is necessary to find the appropriate scope and scale for higher-ed regulation. The Senate Task Force has called on Congress to evaluate the Department of Education's compliance with Executive Order 1356, a worthwhile step. Higher-education reformers should also support proposals for government-wide regulatory review, like the bipartisan Regulatory Improvement Act introduced by Senators Roy Blunt (R-MO) and Angus King (I-ME) in 2015, which would create a blue-ribbon commission to evaluate existing regulations and make recommendations to Congress.[342]

In the absence of congressional action, though, the department should embrace the spirit of the Regulatory Improvement Act by appointing a series of special commissions to review existing regulations in specific subject areas—financial aid, quality assurance, consumer information and disclosures, and others. Each commission should include a bipartisan roster of subject-matter experts, administrative-law experts, and those with experience in regulatory cost-benefit analysis. These commissions could then recommend the repeal, replacement, or reform of specific regulations to Congress, preferably prior to the reauthorization of the Higher Education Act.

The secretary should also insist that any new regulations include explicit plans for review in the future. The Regulatory Studies Center at George Washington University has identified five criteria that new regulations should include to facilitate retrospective review once the regulation has been implemented: a clear statement of the regulation's expected outcomes, metrics to measure those outcomes, a plan to link those outcomes to the regulation, a commitment to collecting data necessary to assess those outcomes, and a timeframe for measuring those outcomes.[343] The center's analysis of 22 new significant regulations promulgated in 2014 found that none of them included more than three of the prerequisites (including two from the Department of Education). Going forward, the secretary should require that any new significant regulation include a plan for retrospective evaluation—including stated outcomes, metrics, and necessary data collection. The

Smarter Regs Act, introduced in 2015 by Senators Heitkamp (D-ND) and Lankford (R-OK), provides one possible model.[344]

Reformers should also consider revising the bankruptcy provision in the Higher Education Act. The 1992 reauthorization of the Higher Education Act revised the definition of "institution of higher education" to exclude any institution that has filed for bankruptcy or experienced involuntary bankruptcy.[345] As such, if an institution of higher education that relies on federal aid were to restructure through bankruptcy, it would immediately and permanently lose its eligibility for Title IV aid, which would essentially put that institution out of business.[346]

While there were good reasons for this provision to be enacted as part of the Higher Education Act in 1992, the rule has the effect of making debt restructuring in higher education exceedingly difficult. Observers have noted that the sanction—permanent loss of eligibility—puts bankruptcy on par with being convicted of fraud involving Title IV funds, which also carries a permanent ban.[347] For context, institutions who lose aid eligibility due to poor performance—high default rates or loss of state authorization—can re-apply for eligibility. The threat of a permanent ban after bankruptcy leaves institutions mired in debt with few options whether they provide a quality education or not.

It is also unclear what the bankruptcy prohibition in HEA accomplishes beyond what is already in the law. In 1990, Congress updated the Bankruptcy Code to create special exceptions for institutions of higher education. In particular, Congress revised the code so that the "automatic stay" that kicks in when an organization declares bankruptcy does not apply to sanctions from the Department of Education, accreditors, or state authorizers. In other words, by law a bankruptcy proceeding could not stay an action by the department; federal regulators could revoke Title IV eligibility whenever they wished, whether the institution was in bankruptcy or not. As law professor Scott Norberg has argued, "the provision barring eligibility of an institution that files for bankruptcy adds very little to the Code exemption, while altogether precluding a college or university from using bankruptcy to address other debt problems."[348] Perversely, Norberg notes, having to manage those other "debt problems" in the absence of bankruptcy protection may lead institutions to take steps that would compromise educational quality as they work to pay off mounting debts. If that institution winds up closing suddenly, students are eligible for loan forgiveness, leaving taxpayers holding the tab.

An increasing number of colleges are in financial trouble, creating potential for significant disruption and taxpayer liabilities in the future.[349] Bankruptcy protection would give institutions that have maintained program quality but took on too much debt a path forward, albeit a path under the watchful eye of a bankruptcy court and the Department of Education. The department (and accreditors and state governments) would reserve the right to step in at any time to protect taxpayer interests. And a revised bankruptcy provision could ensure that debts owed the Department of Education remain on the books even if an institution declares bankruptcy.

Congress should therefore consider revising the bankruptcy provision. Former Department of Education counsel Cariello has argued that such a revision be informed by key safeguards.[350] First, institutions that declare bankruptcy must be required to honor any debts owed to the Department of Education. Second, institutional leadership (or ownership in the for-profit context) at these colleges must change as part of the restructuring process. Lastly, students must be able to complete their educations without "delay, or significant hardship," due to a bankruptcy proceeding. In other words, institutions must meet their obligation to serve current students through graduation.

Without an option to restructure through bankruptcy, financially struggling institutions will work to stay afloat until they are forced to close suddenly, disrupting students' lives and leaving taxpayers on the hook for loan forgiveness. Revising the permanent ban while keeping important taxpayer protections in place will reduce the likelihood of such problems in the future.

Assurance: A Closer Look at State Oversight of Higher Education, American Enterprise Institute, August 2015, www.aei.org/wp-content/uploads/2015/08/Inputs-Outcomes-Quality-Assurance.pdf; Rooney Columbus, *Report and Disclose: State Oversight of Institutional Performance in Higher Education,* American Enterprise Institute, November 2016, www.aei.org/wp-content/uploads/2016/10/Report-and-Disclose-State-Oversight-of-Institutional-Performance-in-Higher-Education.pdf.

291. For more on Pay for Success, see U.S. Government Accountability Office, *Pay for Success: Collaboration among Federal Agencies Would Be Helpful as Governments Explore New Financing Mechanisms,* September 2015, www.gao.gov/assets/680/672363.pdf.
292. Others have called for setting a uniform cost of attendance for the purposes of federal aid eligibility, which would have a similar effect to capping reimbursements. See Andrew Gillen, *Introducing Bennett Hypothesis 2.0*, Center for College Affordability and Productivity, February 2012, http://files.eric.ed.gov/fulltext/ED536151.pdf.
293. Higher Education Innovation Act, S.2111, 114th Congress, 1st session, (September 30, 2015), www.govtrack.us/congress/bills/114/s2111/text/is.

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294. The views expressed here are those of the author and do not reflect those of his employer.
295. See Vanderbilt University, *The Cost of Federal Regulatory Compliance in Higher Education: A Multi-Institutional Study,* October 2015, https://news.vanderbilt.edu/files/Regulatory-Compliance-Report-Final.pdf.
296. See Carlo Salerno, "The Challenges of Information Collection Burden in Higher Education," in Appendix IV of Senate Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities, 2015*, www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.
297. See Table 1 in U.S. Government Accountability Office, *Higher Education: Experts Cited a Range of Requirements as Burdensome*, Report to Congressional Requesters, April 2013, www.gao.gov/assets/660/653663.pdf.
298. Senate Task Force on Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*.
299. Ibid., 10.
300. See 34 CFR 668.14, "Program Participation Agreement," www.law.cornell.edu/cfr/text/34/668.14.
301. U.S. Government Accountability Office, *Higher Education*.

302. See 34 CFR 668, Subpart E, www.law.cornell.edu/cfr/text/34/part-668/subpart-E.
303. U.S. Department of Education, *2017-2018 Federal Student Aid Handbook: Application and Verification Guide*, https://ifap.ed.gov/fsahandbook/attachments/1718AVG.pdf.
304. The Institute for College Access and Success, "Green Lights & Red Tape: Improving Access to Financial Aid at California's Community Colleges," December 2007, http://ticas.org/sites/default/files/pub_files/Green_Lights_Red_Tape.pdf; Recent improvements to the Data Retrieval Tool (DRT), which allows families to import data to their FAFSA directly from the IRS, have streamlined the process somewhat, and moving toward a model that eliminates the FAFSA and relies on the IRS directly would reduce this burden dramatically. See reforms discussed in the chapter on need-based financial aid. Also, see U.S. Department of Education, "Simple Steps to Transfer Tax Information Into Your FAFSA," https://studentaid.ed.gov/sa/resources/irs-drt-text. DRT has recently experienced issues around privacy and fraud, and is temporarily offline.
305. See 20 U.S.C. § 1091b, "Student Eligibility," www.law.cornell.edu/uscode/text/20/1091; and 34 CFR 668.22, "Treatment of Title IV Funds When a Student Withdraws," www.law.cornell.edu/cfr/text/34/668.22.
306. 34 CFR 668.22.
307. U.S. Government Accountability Office, *Higher Education.*
308. See U.S. Department of Education, National Center for Education Statistics, National Postsecondary Education Cooperative, *Information Required to Be Disclosed under the Higher Education Act of 1965: Suggestions for Dissemination*.
309. Senate Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*.
310. U.S. Government Accountability Office, *Higher Education*.
311. 34 CFR § 668.46 defines "noncampus building or property" as "any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution." See 34 CFR § 668.46, "Institutional Security Policies and Crime Statistics," www.law.cornell.edu/cfr/text/34/668.46.
312. See 34 CFR 668.41(d)(5) and 34 CFR 668.41(d)(6), "Reporting and Disclosure of Information," www.law.cornell.edu/cfr/text/34/668.41.
313. RTI International, "Technical Review Panel No. 34 Calculating Job Placement Rates — Final Actions," https://edsurveys.rti.org/ IPEDS_TRP_DOCS/prod/documents/TRP34_Final_Action.pdf.
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346. In 2012, despite warnings from the Department of Education, Lon Morris College (a private nonprofit four-year institution in Texas), declared bankruptcy and immediately lost Title IV eligibility. The institution challenged the Department's ruling but a judge upheld it. See Will Hueske, "School's Out Forever: Lon Morris College, Section 525(a), and Revocation of Title IV Eligibility for Institutions of Higher Education," Weil Bankruptcy Blog, April 2013, https://business-finance-restructuring.weil.com/government/schools-out-forever-lon-morris-college-section-525a-and-revocation-of-title-iv-eligibility-for-institutions-of-higher-education-in-bankruptcy/.
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which authorizes Congress to establish uniform laws on bankruptcy) to regain its financial stability under the supervision of a federal judge is treated in precisely the same way as a college or university that has been convicted of (or pled "no contest" to) committing fraud involving Title IV funds. Perfect symmetry." See Michael B. Goldstein and Jay Indyke, "Bankruptcy Benefits," *Trusteeship Magazine*, September/October 2016, www.agb.org/trusteeship/2016/septemberoctober/bankruptcy-benefits.

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