

February 7, 2017

U.S. House of Representatives Committee on Education and the Workforce
“Challenges and Opportunities in Higher Education”

**Testimony of William E. “Brit” Kirwan
Chancellor Emeritus of the University System of Maryland and
Co-Chair of the Senate Task Force on Federal Regulation of Higher Education**

Good morning. I am Brit Kirwan, chancellor emeritus of the University System of Maryland (USM) and co-chair of the Senate Task Force on Federal Regulation of Higher Education. I want to thank Chairwoman Virginia Foxx and Ranking Member Bobby Scott for the opportunity to speak to the committee about the need to streamline and refocus federal regulations impacting higher education today.

In late 2013, HELP Committee Chairman Alexander (R-TN) and Senator Barbara Mikulski (D-MD), along with Senators Burr (R-NC) and Bennet (D-CO), appointed a task force of 16 college and university presidents and chancellors from across all sectors of higher education to study federal regulation of higher education broadly and provide specific recommendations for improvement. For purposes of my testimony today and for purposes of the task force report, we use the word “regulation” in its broadest sense to include not only formal agency rulemaking but also agency guidance and requirements stemming from statutory authorities. I was pleased to serve as a co-chair this effort along with my colleague Nick Zeppos, chancellor of Vanderbilt University.

Our charge was to study and recommend ways to reduce the federal regulatory burden on colleges and universities, while maintaining important protections for students, families, and taxpayers. That last phrase bears repeating—***while maintaining protections for students, families and taxpayers***. It was not an effort to simply slash regulations in the name of reducing burden. Our goal was to find ways to reduce unnecessary burden while maintaining our obligation to provide high quality and safe learning environments and ensuring effective stewardship of taxpayer dollars. In short, our goal was ***smarter*** regulation.

The task force spent more than a year engaged in extensive consultations and information gathering with campus officials, higher education associations, and other stakeholders. The task force staff visited nearly 60 campuses to hear directly from officials about the impact of regulations on their institution. In early 2015, we delivered our final report to the senators.

We in higher education fully understand—**and support**—the important role that federal regulations play. Students and colleges and universities across this country benefit from the strong federal investment in higher education, including significant funding for student aid programs such as Pell Grants for low-income students, the Federal Work-Study program, TRIO programs, federal loans, and funding targeted to historically black colleges and universities, not to mention federal funding and grants for university-based research

and development. We in higher education recognize with gratitude the extraordinary fiscal commitment the federal government makes to our enterprise. Therefore, we recognize and embrace our obligation to be transparent, responsible, and accountable stewards of taxpayer money.

Through the task force's work, we learned that many regulations are well developed, address critically important issues, and provide appropriate measures of institutional accountability. On the other hand, we have also discovered that too many regulations are poorly framed, confusing, overly complex, ill conceived, or poorly executed. Some are even wholly unrelated to the mission of higher education. The problem is exacerbated by the sheer volume of mandates—more than 2,000 pages of text—and the reality that the Department of Education issues official guidance to amend or clarify its rules at a rate of more than one document per work day. Over time, requirements have been layered upon requirements, resulting in a tangle of regulations that too often has a harmful effect on higher education's ability to serve students. Some regulations even restrict rather than contribute to student access to higher education, limit our ability to focus resources on student success, impede organizational efficiencies, and constrain innovation. And, quite frankly, the costs associated with compliance are one of the factors driving rising tuitions and harming affordability efforts.

This last point is very important. For the past several years, our nation has been engaged in a conversation on college affordability. Clearly, all colleges and universities—public and private—need to tighten their belts, reduce costs wherever possible, and emphasize efficiency in their operations. And this is precisely what has been happening at institutions across the country.

But when it comes to costs associated with federal regulations, we are largely powerless. It is all too easy for policymakers to think of regulation as a free good. The reality is that the costs of regulation are almost always passed on to consumers in the form of higher prices. When these costs are not passed on, consumers can expect to see a reduction in services as resources are redirected toward greater regulatory compliance efforts.

This is why this task force report is so important and why I, once again, want to thank the committee for inviting me to testify about our work. The pending reauthorization of the Higher Education Act (HEA) provides a propitious opportunity to not only identify the most burdensome, costly, and confusing federal regulations, but also to develop clear recommendations on how Congress and the Department can streamline and simplify the process by which regulations are made while maintaining—even strengthening—accountability.

Specific Regulations of Concern

The task force report highlighted 10 of the most problematic regulations identified through our conversations with stakeholders. I am pleased to report that the House supported and the Department moved forward to address one of our recommendations, namely, the student aid verification process. The move to allow the use of prior-prior year tax data for

populating the FAFSA has the potential to drastically reduce the verification burden—a burden felt not only by institutions but also by the students and families selected to provide additional information. It also has the benefit of allowing students to receive information about available student aid much earlier in the process. While this change is still in its first year of implementation, we believe it will be a positive one.

Aside from this change, other regulatory challenges remain, and I would like to take a few minutes to highlight some of them. It is our hope that these specific concerns can be addressed by Congress as part of the HEA reauthorization or through further action by the Department.

The first item I will highlight is the impact of regulations that unnecessarily stifle innovations in distance education. Historically, the federal requirements for state authorization of distance education programs were limited to the state where the institution was physically located. However, several years ago, the Department fundamentally altered that landscape by notifying institutions that they would need to meet the state authorization laws of every state in which even just one of their students was physically located. As online education continues to cast aside geographical impediments to learning, it is counterproductive to frustrate colleges' efforts by erecting walls of regulation. Congress should clarify the historical and long-standing interpretation of the HEA state authorization provisions so that resources that go to attorneys, compliance officers, and tuition surety bonds to obtain authorizations in state after state can be redirected to target access, affordability, and educational innovations. Institutions can and should be responsible for complying with state laws, certainly. But there is no need for the federal government to be involved with these matters. Nor is there any justification for dictating to states requirements for what their own state laws must address.

Since issuing our report, the Department has continued regulatory efforts in this area, releasing a new distance education rule on December 19, 2016. This new rule has expanded from two sentences in the 2010 regulation to nearly two pages, along with 30 more pages of explanatory text. On top of that, the Department has found it necessary to issue a letter “clarifying” the rule, even though it is not set to take effect until July 2018.

Admittedly, institutional compliance with the web of different state laws affecting distance education has been challenging. Thankfully, many institutions will have an easier compliance process under the National Council for State Authorization Reciprocity Agreements (NC-SARA), a new voluntary process of state oversight for distance education. But I think we need to seriously question whether the federal efforts have yielded a benefit worth the cost. I would argue, they have not.

The next item I will highlight is the inordinate amount of information and data that colleges and universities are required to collect and disseminate. Some of this information is, of course, very useful for students and families to consider, but some of it is not. For example, higher education institutions must report on the number of supervised fire drills they hold in a given year. They have to produce more than **30** “gainful employment disclosures” *for each covered program offered*. They are required to counsel departing student borrowers

on seven different federal loan repayment programs even though the vast majority use either the standard 10-year or the extended 30-year program. Providing all this data makes it difficult to separate the wheat from the chaff. To prevent an overload of information, we recommend that Congress and the Department of Education work together to winnow this list down to require only the information most useful to students and their families. Rather than assume that information will be useful to consumers, we recommend using focus group testing to guide policymakers in determining the information most helpful to making informed decisions and that institutions should be required to provide.

Finally, our report identified a number of requirements placed upon higher education that have nothing to do with our mission. These include enforcing Selective Service registration, monitoring Title IV eligibility for students with drug-related convictions, combating peer-to-peer file sharing, distributing voter registration forms in a *federally specified* timeframe and format, and other actions that divert time and resources. These may all be worthy goals, but using colleges and universities as the mechanism to achieve them is costly and inefficient. It is our task force's hope that Congress will use the upcoming HEA reauthorization as an opportunity to review all of the Act's provisions, identify the federal purpose behind their inclusion, and strike requirements that are not clearly related to the core mission and responsibilities of higher education.

Recommended Improvements in the Regulatory Process

In addition to looking at specific regulations of concern, the task force also examined ways to improve the process by which regulations are developed and implemented. When examining process concerns, I stress that the issues identified in the report are not unique to any particular administration or party. All the more reason to find ways to improve the regulatory process and ensure that it is a consultative and collaborative one. Our report contains several ideas for reforms in this area, and I will highlight just a few of them.

First, the negotiated rulemaking process used by the Department should be improved to ensure it achieves its intended goals. It is critical that negotiators are chosen who can speak for the constituency they are chosen to represent. Too often, the Department appoints negotiators who may be sympathetic to their policymaking goals, but do not and cannot represent the views across a wider sector (e.g., an administrator from a large public institution does not represent the views of all public institutions).

Furthermore, negotiators must have the expertise necessary to meaningfully contribute to the topics under consideration. 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 domestic institutions with foreign locations; “clock-to-credit-hour” conversion; the definition of “adverse credit” for borrowers in the PLUS Loan Program; and the effect of retaking courses on student aid eligibility. 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, a fact that allowed the Department to write the proposed rules as it saw fit.

Similarly, during the first session of the 2016 borrower defense to repayment neg-reg, the Department added financial responsibility standards to the list of negotiating topics. Despite the complexity of this issue, the long-standing concerns expressed by the higher education community about the Department’s application of rules, and objections raised at the table, the Department proceeded to draft changes to these standards without a single non-profit accountant, college financing expert, college or university business officer, or other negotiator with expertise on the subject.

Another 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 difference that arise. This part of negotiated rulemaking should be returned 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 and other practices is that the Department exercises an extremely high degree of control over the process, not only selecting all the committee members and limiting the role of the facilitators, but also doing all the drafting and taking a strict view of what constitutes a consensus. These and other concerns about the negotiated rulemaking process and suggestions for improvement are explored further in the report, including an appended white paper.

Second, the Department should limit its reliance on sub-regulatory guidance. Significant changes in policy should not be made 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. 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.

Third, 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. Because the Clery Act does not require the reporting of larceny, 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. Both statute and regulation should ensure that the Department has the flexibility to recognize good faith mistakes by institutions and to mitigate penalties as appropriate.

Fourth, the Department should be required to act in a timely manner when conducting program reviews and investigating and resolving complaints.

Under the HEA, 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.

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. Taking over 10 years to complete a program review and issue fines should not be considered acceptable.

Conclusion

In 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 report concludes with the following list of 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. We hope the committee will find these principles useful as you move forward with reauthorizing the HEA.

Again, thank you for the opportunity to present some of the task force’s 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. Universities and colleges have served as drivers of the national interest by promoting education and innovation that provides solutions to challenges we face. We are hopeful that the task force recommendations will advance these goals while maintaining appropriate safeguards for students and for taxpayer money. I look forward to your questions.