

“Education Regulations: Weighing the Burden on Schools and Students”

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Chairman Kline, Ranking Member Miller, and members of the committee, I appreciate having the opportunity to appear today to discuss the regulatory burden on colleges and universities. I am Christopher Nelson, president of St. John’s College in Annapolis, MD, and I have served in that capacity for twenty years.

St. John’s College is a co-educational, four year liberal arts college known for its distinctive curriculum grounded in the study of seminal works of the Western tradition. St. John’s is a single college located on two campuses, one in Annapolis, Maryland, and another in Santa Fe, New Mexico. The campuses share an identical curriculum and a single governing board. Each campus is limited to fewer than 500 students, and the faculty-student ratio is 1 to 8. We have no majors and no departments; all students follow the same program. Students study from the classics of literature, philosophy, theology, psychology, political science, economics, history, mathematics, laboratory sciences, and music. No textbooks are used. The books that form the core of our study are read in roughly chronological order, beginning with ancient Greece and continuing to modern times. All classes are discussion-based. There are no class lectures; instead, the students meet together with faculty members to explore the books being read.

We are a community dedicated to liberal education, which seeks to free men and women from the tyrannies of unexamined opinions and inherited prejudices. It also endeavors to enable them to make intelligent, free choices concerning the ends and means of both public and private life. The books we read are timeless and timely; they not only illuminate the persisting questions of human existence, but also have great relevance to contemporary problems. They change our minds, move our hearts, and touch our spirits.

St. John’s is one of the over 1,000 members of the National Association of Independent Colleges and Universities (NAICU), an organization that represents the diversity of private, non-profit higher education in the United States. Some years ago, I was involved with a NAICU group that looked broadly at the responsibilities of independent higher education. Our conversations about these responsibilities offer a general framework for illustrating the many different ways to look at regulatory burden on colleges.

Briefly, this burden can be viewed from three vantage points:

- (1) Responsibilities under the Higher Education Act;

- (2) Regulation by agencies outside the Department of Education; and
- (3) The quasi-regulatory conferred on accreditors by virtue of an institution's participation in Title IV programs.

I'll talk about each of these points in a bit more detail, but start by observing that—whatever the vantage point—the regulation of colleges and universities is massive. Various efforts have been made in the past to quantify it, but no one has managed to come up with a definitive number.

One of the more ambitious efforts to compile this information as a means to assist with compliance has been undertaken by the general counsel's office of the Catholic University of America. Among other things, they have compiled an A-to-Z list of laws (<http://counsel.cua.edu/fedlaw/A-Z.cfm>) that apply to colleges that covers nearly 9 single-spaced pages. They have kindly let me borrow the three large notebooks on the table before me that contain just the summaries of the laws on the A-to-Z list. That doesn't even include the regulations or sub-regulatory guidance—which for the Department of Education alone takes up three large file boxes.

When I step back from the mass of the more mundane record-keeping, reporting and compliance environment, I try to see what the effect of all this is on our principal task, fulfilling our educational mission for the sake of our students. Every diversion or distraction from these primary purposes weakens our best attempts to achieve those ends. Most especially, we all need to keep in mind the immortal words of Justice Felix Frankfurter in a 1957 Supreme Court case, when he tried to lay out clearly the essential functions of a college our university that should be protected from governmental intrusion:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation...an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Higher Education Act

An outgrowth of the NAICU group I mentioned was a categorization of three types of regulation that are related to the Higher Education Act. These categories included:

- (1) regulations directly related to the administration of HEA programs;
- (2) regulations providing for appropriate accountability of recipients of HEA assistance; and
- (3) regulations that are not related to program administration or accountability, but that are applied by virtue of the fact that Title IV assistance is provided.

It is the third category where most concerns about regulatory burden have been raised. It is not a question of the good intentions behind these requirements, but that they continue to accumulate with no paring back or review of what is already on the books. Just a couple of examples—

- ✓ Colleges have been required to include in their annual campus crime reports “arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and weapons possession. (HEA Section 485(f)(1)(F)(i)(IX). Under the Higher Education Opportunity Act (HEOA), enacted in 2008, colleges now have to include similar (but not quite identical) information in a biennial drug and alcohol abuse prevention report. (HEA Section 120(a)(2)).
- ✓ Likewise, colleges have long been required to certify compliance with restrictions on lobbying at the time of applying for federal support and after receiving it. However, under HEAO, an institution must annually “demonstrate and certify” to the Secretary of Education that it has not used any HEA funds to attempt to influence a member of Congress in connection with any Federal grant, contract, loan, or cooperative agreement, or to secure an earmark.

The Higher Education Opportunity Act alone added well over 200 pages of language to the Higher Education Act and well over 200 pages of the *Federal Register* devoted to regulations to implement it. And that is without counting the Federal Reserve regulations issued to cover the Truth in Lending Act provisions included in the HEOA or any of the additional IPEDS survey questions and guidance.

One observation I would make about federal regulations is that there is a section in each final regulation that calculates estimated “burden hours” for institutions and students to comply with the regulations. For example, the general and non-loan programmatic issues regulations issued in October 2009 estimated the addition of 8,541 burden hours for the reporting of information about retention rates, placement rates, and post-graduate employment. Various other burden estimates in this particular regulation ranged from 1 hour to 109,645 hours.

This is just one regulatory package. These hours add up to a point where compliance becomes onerous for institutions of all sizes—but particularly so for those as small as St. John’s College. We have no office of institutional research or staff to support that function. This means that literally dozens of people on our campus, including myself, assume a portion of the reporting and compliance burdens in our daily work. But what is just as troubling is that, although there is a law that requires agencies to calculate estimated burden, no one really seems to pay much attention to what that burden is.

We see a similar phenomenon with data collection. The Higher Education Act requires institutions to provide data to the Department of Education through the Integrated Postsecondary Education Data System (IPEDS). No one would argue with the need to have good data about institutions of higher education. However, to me, good data means data that people want and will use. Over the years, the amount of data collected under IPEDS has continued to grow without any real review of whether it’s useful. I understand that the Human Resources survey (http://nces.ed.gov/ipeds/surveys/2008/pdf/HR_2008.pdf) is one of the more onerous of the nine IPEDS surveys (http://nces.ed.gov/ipeds/resource/survey_components.asp), and it is not clear that much of the information collected on it is ever used. (I have with me a copy of this one. The questions and instructions cover 137 pages.)

Finally, I would observe that there are occasions where regulations collide in ways that lead to nonsensical results, and I'll just give just one example. Several years ago, a women's college wanted to offer a post-baccalaureate pre-med program. The institution was told that—unless men were admitted to the program—they would be in violation of Title IX regulations because the program enrolled only students who already had BA degrees, even though the program itself did not offer a higher degree. Consequently, the institution opened the program to men; and the highest number of men who have enrolled since that time is 4. Nevertheless, this school was told two years ago that it would need to fill out a detailed Equity in Athletics Disclosure (HEA Section 485(g)) form because it was a “coeducational” institution. (Speaking of that form, we at St. John's are sent that form despite our having no intercollegiate sports, intra-mural teams that include both men and women, and an entire athletic budget that pales in comparison with a single Assistant Coach's salary at some universities.)

Regulation by Other Agencies

The NAICU group I mentioned also looked at the many different hats we wear and the wide variety of bodies to which we must be accountable. Broader regulation of colleges comes as part of our roles as property owners, landlords, financial agencies, laboratories, and the like.

Again, appropriate regulation related to carrying out those functions is not the problem. Where we often run into difficulty is when we find ourselves having to deal with regulations that were not really intended for us.

A couple of recent examples—

- ✓ Just last week, more than a dozen higher education organizations joined efforts in submitting comments to the Securities and Exchange Commission (SEC) on proposed rules that would require individuals who fit the broad definition of “municipal advisor” to register with the SEC, and comply with new record-keeping requirements.

The SEC proposal is part of the ongoing implementation of the Dodd-Frank Wall Street Reform Act, signed into law this past summer. This act was never intended to regulate colleges and universities, and our institutions are not even mentioned in the bill or law. The intent was to regulate “market professionals” and “market participants.” However, the SEC proposals – if implemented – could require tens of thousands of college and university officers and employees to register with the SEC and adhere to new reporting requirements.

In addition, while the definition of “municipal advisor” expressly excludes elected trustees and employees of public colleges and universities, it does not expressly exclude appointed trustees of public universities or trustees and employees of private colleges and universities. Yet, employees and officers of private colleges and universities perform the same functions as employees and officers of public institutions.

- ✓ There is currently a great deal of confusion about the application of the Federal Trade Commission's “red flag rules.” These rules require the development and implementation

of written identity theft prevention programs and are primarily targeted to financial institutions and creditors. Last December, Congress passed legislation to limit the entities required to develop these programs and some college officials thought they might not be covered under this new law. However, it now appears unlikely that most colleges will be excused after all. The legislation provides three definitions of a creditor, and the exemption applies only to the third of the three.

In addition, regulation by agencies other than the Department of Education results in the same type of accumulated burden. Again, it is not a question of whether any one of these regulations supports a good end, but of how these things pile up. The substantial expansion of the information to be provided under the IRS Form 990 is one such example. [Additional information attached.]

Accreditation, Autonomy, and Academic Integrity

What concerns me most, however, is the extent to which the regulatory process has ripple effects that intrude into the very essence of the academic undertaking, effects that challenge the independence of our schools to determine what may be taught, to whom, by whom, and how. This goes beyond the question of the amount of staff time and institutional resources that are devoted to compliance activities.

I cannot measure the amount of time I have spent personally defending the essential strength and good effects of the peer review process that underlies the accreditation of our colleges. This defense has been required continuously over my entire 20-year period of service as a president against efforts, some less successful than others, of Federal and State agencies to dictate to us or to our accrediting agencies what our standards ought to be for a core curriculum in the classroom, for student assessment, for institutional accountability, for inter-collegiate comparisons of measures of success according to wildly diverging institutional missions and purposes, and on-and-on.

Some of this regulatory reaction is in the interest of consumer protection. Of course none of us would defend fraud or deceptive practices, but too often the attempts at regulation have rested on a consumer metaphor that is not well suited to many, if not most, of our institutions. People do not buy diplomas, they earn them. Knowledge is not poured into students like milk from a bottle; it is undertaken through an activity of learning that belongs to the students. Students must work at their education. So, while educational opportunity may be fairly claimed by them as a right, the education they might acquire is not. Better the government help encourage and support access to our institutions than seek ways to have us alter our many and diverse visions of what an education ought to look like! This diversity of mission and purpose is the greatest strength of American colleges and universities. In reviewing the regulatory environment for higher education, it would be good if this truth might be kept in mind: that institutional autonomy is a strength, and that where institutions abuse their public trust, correction ought to be aimed at the institution that has abused that trust rather than at the rest of us through another general wide-ranging regulation.

Conclusion

As is so often the case, it is easier to describe problems than to implement solutions. However, I do have a few thoughts about steps I'd encourage you to take as you deal with regulatory burden.

#1 – As new requirements are created, get rid of some of the old ones at the same time. The concept would be something along the lines of a “pay-go” system for regulations. This concept could be applied both to regulatory requirements and to data collection. Remember too that all of us are regulated by another huge apparatus of State regulatory agencies (and I have attached a list of forms St. John's must file with both federal and state agencies.)

#2 – Recognize that the accumulation of layers and layers of regulatory activity can't be addressed simply by picking a few selected regulations to be abolished or modified. A good start would be to provide funding for section 1106 of the Higher Education Opportunity Act (P.L. 110-315) [full text attached], which provides for a review by the National Research Council of the National Academy of Sciences to determine the “amount and scope of all Federal regulations and reporting requirements with which institutions of higher education must comply.” However, funding for this study has not been provided, and so it has not been initiated.

I realize that funds are limited, but—at the same time—would point out that over the past several years the federal government has provided some \$500 million for the development of state systems to have educational institutions to collect piles of unit record data. The Administration's FY 2012 budget request includes an additional \$100 million for this purpose. This committee wisely took the lead in preventing the development of such a data system at the national level. Rather than continuing to support activities that lead to even more form-filling and paperwork by educational institutions, why not stop funding State efforts to do just that and use those resources to figure out how to pare down unnecessary burden?

#3 – Finally, please be mindful of the ripple effect that legislative action can have. I know this can be tedious, but it is critical.

I understand that today's hearing is but one of a series of oversight hearings your committee intends to conduct. Thank you for taking the time to look at the huge regulatory apparatus that is in place and for giving me the opportunity to appear before you.

ADDITIONAL INFORMATION

IRS Form 990

The Internal Revenue Service issued final new Form 990 and instructions in January 2009, for 2008 tax-year filings and beyond. The new form was designed to report much more detailed information in a variety of areas, but most specifically information regarding compensation, governance and endowment.

The additional disclosure of compensation information on certain employees and officers and certain compensation practices go far beyond what the tax-exempt community has ever been accustomed to providing. The new disclosures are more closely aligned with those required of publicly traded companies.

The new Form impacts the way tax-exempt organizations, including colleges and universities, must report the details of compensation arrangements. They are complex and require cost estimates that have previously been used for internal reporting only.

For example: Part II of Schedule J specifies that all nonprofits must now report details of respective compensation plans in a tabular form that provides information on each named official – including all officers, directors, trustees, up to 20 key employees, and highest compensated employees – a breakdown of the following...

- a. base salaries
- b. bonus and incentive compensation
- c. longevity and severance payments
- d. deferred compensation
- e. cost of nontax benefit plans (medical, disability, housing, education, etc.)
- f. any compensation that was previously reported in a prior year Form 990

There are additional new disclosure requirements relating to endowments on Schedule D, including...

- a. beginning and end of year balances
- b. contributions to endowments
- c. investment earnings and losses
- d. grants or scholarships from the endowment
- e. expenditures for facilities and programs
- f. administrative expenses
- g. percentage of endowment held as board designated, permanent or term endowments
- h. whether or not endowment funds are held by other organizations, related or unrelated
- i. description of intended uses of endowment funds

SEC. 1106. ANALYSIS OF FEDERAL REGULATIONS ON INSTITUTIONS OF HIGHER EDUCATION.

The Secretary of Education shall enter into an agreement with the National Research Council of the National Academy of Sciences for the conduct of a study to ascertain the amount and scope of all Federal regulations and reporting requirements with which institutions of higher education must comply. The study shall be completed not later than two years after the date of enactment of this Act, and shall include information describing--

(1) by agency, the number of Federal regulations and reporting requirements affecting institutions of higher education;

(2) by agency, the estimated time required and costs to institutions of higher education (disaggregated by types of institutions) to comply with the regulations and reporting requirements described in paragraph (1); and

(3) by agency, recommendations for consolidating, streamlining, and eliminating redundant and burdensome Federal regulations and reporting requirements affecting institutions of higher education.

St. John's College List of Reports filed with Federal and State Agencies

The following is a list of reports coordinated by our Registrar and completed by various St. John's employees over the course of a typical academic year. It is by no means complete as to reports prepared by other offices. They are in addition to reports to and surveys by non-Federal and non-State agencies, e.g., reports to admissions guides, foundations, and the like.

The first part of the list includes reports requiring input from more than one office. The latter part of the report includes surveys completed largely by one office.

Multi-Office Reports:

1. IPEDS (the Integrated Post-Secondary Education Data System) Annual Collections
IPEDS is run by the Department of Education and participation is mandatory for schools receiving Title IV funds.

Offices with input:

Business Office (finance survey)

Financial Aid (annual awards)

Registrar's Office (enrollment; degrees awarded; graduation/retention rates)

Personnel Office (faculty information)

2. MHEC (Maryland Higher Education Commission) Annual Collections
Maryland's state reporting requirements, which are also mandatory for schools receiving Maryland state aid (like the Sellinger Grant).

Offices with input:

Financial Aid (student aid file—FAIS; S5 report)

Registrar's Office (enrollment; degrees awarded; complete student data file; etc.)

3. MICUA (Maryland Independent College and University Association) Surveys undertaken to meet collective reporting by the MICUA to the Higher Education Commission.
 - Accountability Survey (Admissions; Business Office, Financial Aid; Registrar's Office)

Single-Office Reports:

1. Advancement

- National Endowment for the Humanities
 - We the People Endowment fund financial information
 - Effects of We the People Expenditures
 - Details of We the People Expenditures
- Maryland State Arts Council (interim and final reports)
 - Mitchell Art Gallery budget and fundraising figures
 - Information about exhibitions, programs, and visitors
- Maryland Cultural Data Project
 - Mitchell Art Gallery budget and fundraising figures
 - Information about exhibitions, programs, and visitors
- Arts Council of Anne Arundel County (interim and final reports)
 - Mitchell Art Gallery budget and fundraising figures
 - Information about exhibitions, programs, and visitors

2. Business Office

- Form 990, 5500, 5527, W-3, 1099, to internal revenue service
- Report unclaimed property to state of Maryland
- Annual property tax return
- Quarterly Line of Credit covenant test to PNC bank
- NACUBO annual endowment survey
- Provide information for annual insurance audit
- Provide inputs to annual FISAP report (federal financial aid)
- Provide inputs to Middle States Survey for accreditation
- Provide inputs to American Academy of Liberal Education Survey for accreditation

3. Financial Aid

- FISAP (Fiscal Operation Report and Application to Participate)
- College Board
- MICUA

4. Library (generally needed for accreditation purposes)

- ACRL (Association of College and Research Libraries) Trends and Statistics
- National Center for Education Statistics, Academic Libraries Survey
- Miscellaneous surveys such as the ALA-APA Library Salary Survey

5. Personnel Office

- Workers Compensation
- BLS – Department of Labor
- CUPA
- HEDS/AAUP

6. Registrar's Office

- Solomon Lists to Armed Services
- Middle State's Institutional Profile
- Open Doors Survey (international students)