Balance Accountability Against Regulatory Burden

Challenge:

Institutions should be held accountable for the responsible use and management of federal funds – whether received directly or provided to their students. Also appropriate are requirements relating to the operation of programs, as well as requirements for institutions to provide accurate information to the federal government and to students.

Federal requirements become unduly burdensome, however, when:

- They don't relate directly to federal program activities or performance, but instead are imposed simply because an institution participates in federal student aid programs;
- Similar, but not identical, requirements are imposed by different agencies;
- Requirements conflict with one another;
- The expense of compliance exceeds the benefit received;
- The requirements are ineffective in achieving their stated goals;
- Federal expectations aren't clearly articulated;
- The requirements become so numerous that they become impossible to manage; or
- They attempt to micro-manage academic decisions.

Regulatory burden has been a concern for many years, and NAICU is aware of 17 studies of the issue conducted over the past 20 years. On several occasions, Congress has called on various agencies to review the regulatory burden facing colleges. These reviews have either not been conducted, or have failed to lead to any significant relief. Ultimately, though, the agencies themselves are the only entities capable of sorting through the unintentional "build-up" of regulations in particular program areas over the years.

However, it is only at the individual institution level that the cumulative effect of these competing and overlapping regulations can be truly seen. A few institutions have attempted to assemble a regulatory overview – the most recent being Hartwick College. With an enrollment of about 1,500 undergraduates, Hartwick is regulated by 28 federal agencies as well as by various state and local governments and private organizations. In an impressively detailed study issued in December 2012, Hartwick identified 247 separate compliance items "that require the College to file reports, report data, provide notice to constituents or perform some other specific action."

Another aspect of the problem with federal regulation is that institutions are often given unreasonable time frames in which to meet new disclosure or reporting requirements. In some cases, they in fact have to retroactively gather data that they previously had not been required to collect. In other cases, reporting time frames are too brief to accommodate the necessary establishment of new collection systems, reformatting data, or creating or revising forms.

Finally, additional burdens are being imposed on colleges via indirect federal regulation – most notably the Department of Education's micromanagement of accreditation through the recognition process. Likewise, substantive policy changes are being issued via policy guidance rather than through formal regulations.

Recommendations:

1. **Regulatory Burden Reviews.**

    - **Federal** – Require a serious review of regulatory requirements by the Department of Education, focused on untangling the build-up of requirements in particular program areas.

    - **Institutional** – Establish a small grant program to give mini-grants to institutions to review their own compliance activities, and to report back on those that are unduly burdensome, duplicative, or unnecessary.

    Since the publication of the Hartwick study, NAICU has explored the possibility of having other institutions replicate the study – building in features that the Hartwick researchers felt would have been useful. For example, they would have asked campus staff not only the time it took to complete a particular task, but also whether the task was duplicative, excessively burdensome, or without an obvious use or purpose. Such information is easier to elicit when the work is "fresh."

    What we have found is enormous institutional interest in exploring regulatory burden, but serious concerns about the costs of doing so. Providing mini-grants to institutions, or groups of institutions, to undertake this effort would be a cost-effective way to address regulatory burden questions that have proven so difficult to assess. Such grants could support several different review models: a replication of the Hartwick model; a more intensive study of just Department of Education requirements; or a "deep-dive" into narrowly-defined campus activities subject to regulation by multiple federal agencies, for example.

    Note: Also see our related recommendations in the HEA proposal on empowering students as consumers in higher education. Our recommendations in that area are focused on providing information to students that is useful and is sufficiently, but not overly, detailed. As a byproduct, streamlining consumer information requirements would also reduce the reporting and disclosure burden on institutions.

2. **Establish a master calendar for reporting requirements.** Such a calendar for new disclosure or reporting requirements might be modeled on the master calendar currently established for student aid regulations.

    An integral part of such a calendar should be a minimum of 270 days' notice to institutions from the time final regulations or guidance on new disclosure or reporting requirements are published, before institutions are required to start collecting the data related to the new requirements. This would permit adequate time for data collection, analysis, and report preparation. It also would avoid situations in which institutions must compile the required information retroactively.

3. **Establish priorities for program reviews.** In conducting program reviews and enforcement activities, the Department of Education should give priority attention to serious violations of the law.

4. **Repeal state authorization.** The state authorization regulations (34 CFR §600.9), issued in 2010, exemplify the serious problems that are created when the Department's requirements and expectations are not clearly articulated and when the guidance that is provided is inconsistent.

Currently, across the country, institutions that have offered high-quality postsecondary education for decades, and that are clearly acknowledged as institutions of higher education, are now uncertain as to whether or not they are authorized to be what they are. What is particularly frustrating is that some states have taken action that all thought met the standard, but are now being told otherwise by state officials.

5. **Repeal the federal credit hour definition.** This definition (found in 34 CFR §600.2), also issued in 2010, is an example of the regulatory problems created when the Department of Education attempts to micromanage academic decisions.

   Credit hour decisions are appropriately made in an academic – not a regulatory – setting. The commonly accepted and long-standing concept of a credit hour has been remarkably resilient over time. It establishes a common understanding of what is required in coursework across a wide range of programs and levels. Credit hour decisions are largely made by faculty members, and require informed judgment.

   By its very nature, a regulatory requirement seeks standardization and conformity. It simply cannot provide the kind of breadth and adaptability that current practices have provided. No amount of "clarification" by the Department can surmount the inherent problem of imposing the rigidity of federal regulation on a dynamic process – a process that has allowed our system of higher education to grow, improve, and respond to changing circumstances.

6. **Require cost-benefit analyses of new regulations.** All new regulations should be subject to an accurate and objective cost-benefit analysis. Further, the accuracy of the analysis should be formally reviewed in Years 1 and 5 following the effective date of the regulation.

7. **Establish a formal comment procedure for significant guidance.** Develop a formal means by which the public can comment on significant guidance issued by the Department, and require the Department to respond to those comments.

   On several occasions, the Department has implemented major policy changes, not through the normal regulatory process, but rather through the issuance of guidance that is not subject to formal rulemaking procedures. There is no opportunity for public comment on such guidance, nor is the Department required to respond to any comments that are made.

8. **Financial Responsibility Standards.**

   - Establish a formal appeals process as part of the federal financial responsibility procedures.

   - Create an advisory board of independent accounting experts to assist the Department of Education in keeping abreast of changes in, and interpretations of, accounting standards for nonprofit colleges.

   - Strengthen the current legal requirement under Section 498(c)(3)C) of the HEA, to ensure the Secretary steps back and examines the "total financial circumstances" of institutions that fail the ratios test before assessing penalties.

   Following a two-year study, a NAICU task force in November 2012 produced a report recommending a number of changes in procedures the Department of Education uses in carrying

out its financial responsibility regulations. The report, which was forwarded to the Department, did not recommend changing the financial responsibility formula, but rather pointed to various accounting problems in the Department's approach. Because the Department has since declined to work on resolving the problems identified, NAICU proposes that the processes noted above be included in statute.

These changes would reduce the instances of institutions being improperly designated as failing the financial responsibility standards. They also would give institutions the ability to contest failing scores before they are made public, and before institutions must spend precious resources on additional reporting and the purchase of letters of credit to insure their federal student aid funds.

As an example on such accounting problem, when the market fell in 2008, the endowments of most colleges lost value. However, the methodology used by the Department was inconsistent with Generally Accepted Accounting Practices, causing the Department to view the decreases in endowment portfolio value as a current operating loss. A number of schools requested a correction, but the Department refused to reconsider its practice. Finally, the Secretary should be forced to follow Section 498(c)(3)C) of the HEA, which requires that the Secretary step back and examine the "total financial circumstances" of institutions that fail the ratios test before assessing penalties.

9. **Simplify and target gainful employment requirements.** Simplify the current requirements and target them more appropriately on areas of high risk.

   Specifically, certificate programs should be screened under a "first-test" standard (such as the newly formulated repayment standard) that does not require any additional reporting by institutions. Programs that meet this standard should be exempted from the burdensome collection, reporting, and disclosure requirements currently imposed on all gainful employment programs.

   Under this framework, only colleges that fail the "first test" would be required to gather additional information or meet additional standards – such as a minimum debt-to-earnings level – in order to avoid negative action. This would be a simple way to deregulate satisfactorily performing institutions, while at the same time targeting enforcement on programs that are performing under par.

10. **Avoid proposals intended to use accreditation for enforcement.** Accreditation agencies must not be repurposed as an enforcement arm of the federal government.

    Accreditation is not perfect, but it has made possible the development of a diverse and robust system of higher education unequalled in the world. Yet every legislative change affecting accreditation in recent years has made for more stringent federal control and prescriptiveness over the activities of accreditors.

    There also has been an alarming trend over the past several years to deputize accreditors as federal law enforcement officials. Accreditors are being required to single out one aspect – credit hour determinations – of comprehensive accreditation reviews for all institutions. Furthermore, they are increasingly being asked to undertake compliance work for agencies such as the Department of Homeland Security.