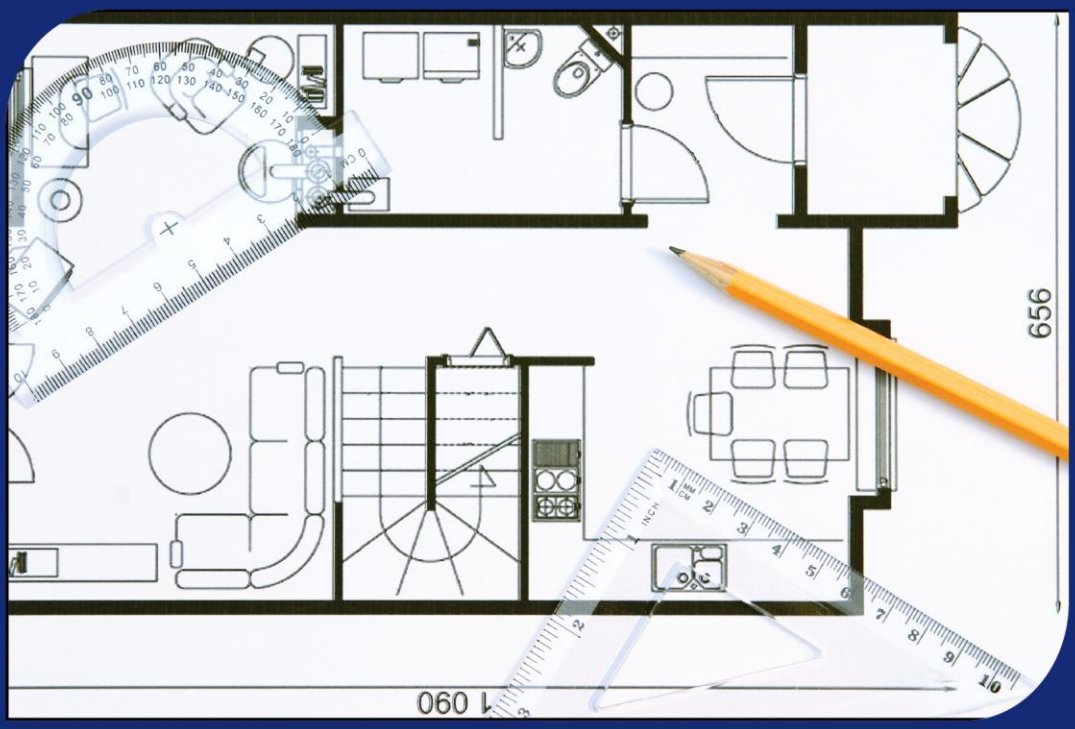
GETTING OUR HOUSE IN ORDER

Transforming the Federal Regulation of Higher Education as America Prepares for the Challenges of Tomorrow



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New Directions was developed with the support of Lumina Foundation at the request of the American Council on Education as part of its work with the Task Force on Government Regulation of Higher Education, made up of 16 higher education leaders appointed by a bipartisan group of U.S. Senators. The Task Force report contains several thoughtful recommendations on streamlining federal requirements for institutions of higher education, information about the current costs of compliance, and proposals for larger-scale regulatory reform.

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EXECUTIVE SUMMARY

American higher education presents greater opportunities but faces greater demands than ever before. Growth and diversity are present everywhere from student populations, program offerings, and institutions themselves. With a history of changing to meet new student demand and needs since the early days of the republic, American higher education once again must evolve to provide meaningful postsecondary opportunities for the diverse and growing population of 21st century students.

Effective regulation is an essential foundation for the American higher education system – particularly because of the emphasis placed on students' ability to select from a wide variety of postsecondary programs in the higher education marketplace. The federal government plays an essential role in providing meaningful information to help students make sound enrollment decisions. Moreover, the federal government has the primary responsibility to ensure that taxpayer investments in federal financial aid programs are not wasted on low-quality programs with poor records of student outcomes or value. As that investment continues to grow, it is even more important for federal regulatory regimes to be both effective and efficient.

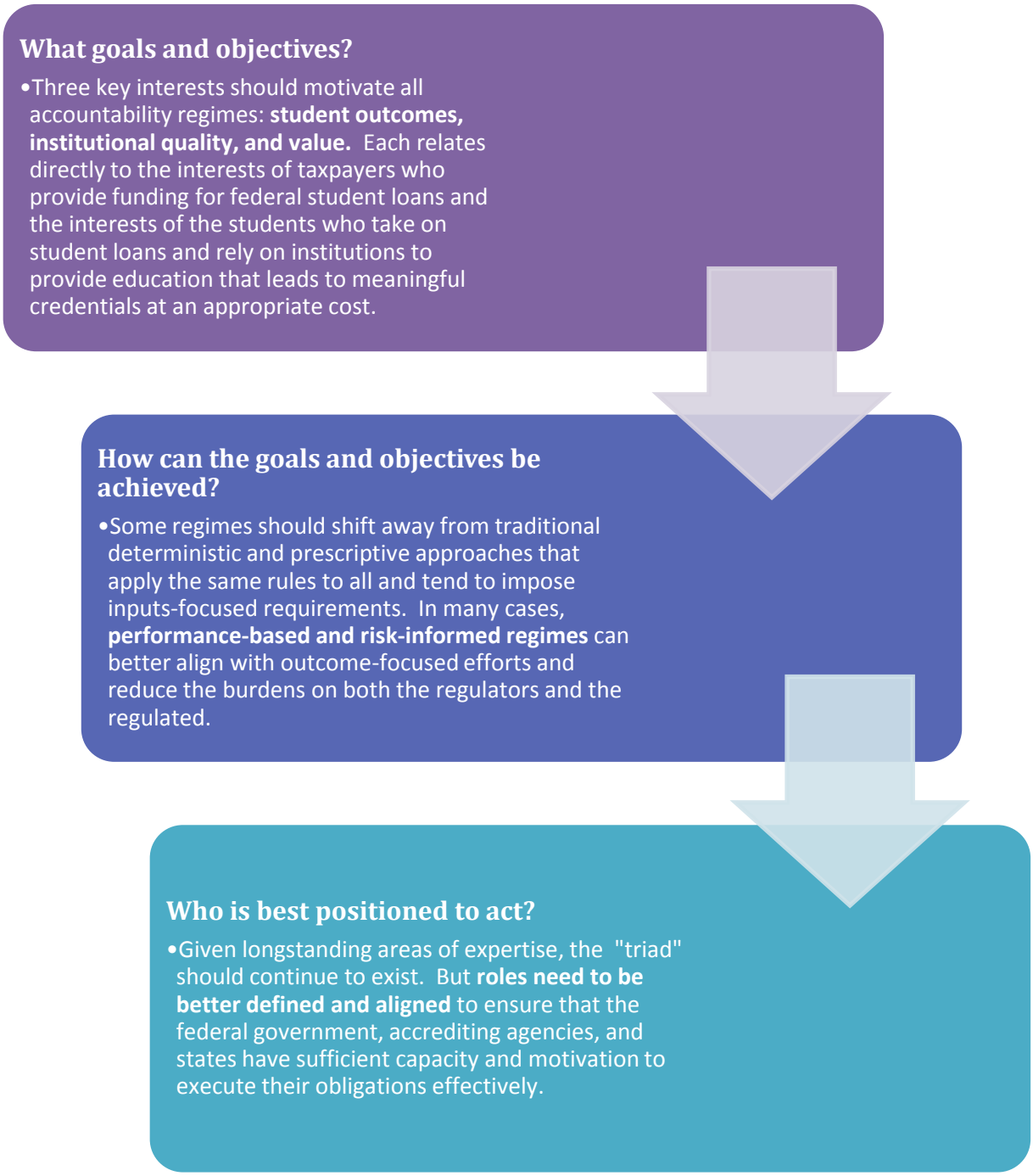
But, at a time when higher education in America is more important than ever, the federal regulatory regime is, simply stated, broken. Multiple regimes with overlapping, often changing requirements necessitate significant investments of time and resources by institutions of higher education, federal regulators, and regulatory partners such as accrediting agencies and states. Navigating this regulatory thicket creates significant compliance costs, stretches regulatory capacity too thin, and – most importantly – blurs institutions' focus on their fundamental missions of educating and supporting students.

These challenges are widely acknowledged by the regulatory and higher education communities alike. Indeed, federal actors, states, accrediting agencies, and institutions have already taken some meaningful steps toward addressing these challenges. And many national organizations and individual thought leaders have provided essential research and analysis to create proposals for additional changes. But many of the changes and proposals to date focus on discrete areas or on issues that are important to a particular sector. Missing from much of the current dialogue is a coherent framework regarding the regulatory system as a whole, in which core goals and interests can serve as foundations for driving consensus, clarifying regulatory aims, and striving for effective and efficient regimes to advance those goals. We hope that this paper can fill some of that gap.

As the Higher Education Act reaches its 50th anniversary, regulatory regimes must be re-examined so that unnecessary or duplicative requirements can be cut away and new regulatory approaches can be designed and implemented. To start, the overarching purpose, function, and responsible actors within regulatory regimes must be confirmed. Centered on the theory that the federal government should take limited *but* effective action – and that all action should relate directly to making American higher education better for students – this paper poses three central questions to assess the state of regulation today and how it should evolve.

1. ***What*** goals and objectives should be achieved by the regulatory regime?
2. ***How*** can those goals most effectively and efficiently be achieved in regulatory design?
3. ***Who*** is best positioned to achieve those goals?

Though this approach may be applied to many areas of regulation, this paper focuses on one critical area of policy: accountability for institutions of higher education. The graphic below provides an overview of the paper's recommendations for framing the accountability dialogue.



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I. INTRODUCTION

The 50th anniversary of the Higher Education Act of 1965 (HEA) arrives at a key moment in the evolution of American higher education. There is general agreement that postsecondary credentials are essential for success in the 21st century American economy and workforce – and that our higher education community has many strengths that are the envy of the world. Without question, higher education provides the most reliable opportunity for individuals to enhance lifelong opportunities and increase expected lifetime earnings.[1] This, in turn, builds our nation's financial health through, for example, increased tax revenues, reduced social program spending, and reduced incarceration spending[2] – not to mention the broader civic and societal benefits that flow from a well-educated population.

The great diversity of institutions and remarkable growth in the sector mean that students have more options than ever for where they can enroll, what credentials they can earn, and how they can earn them. Indeed, demand for higher education has never been higher, as the need for postsecondary credentials to get and keep a living-wage job becomes a growing reality.[3] And the population of postsecondary students is increasingly diverse, given significant demographic changes and dramatic enrollment increases among "non-traditional" students.[4]

Similarly, the federal investment of taxpayer dollars and corresponding student loan burdens are enormous. In 2014, $133.8 billion in federal student aid was delivered to 12.9 million students at 6,142 institutions.[5] And student loan burdens are unprecedented: over the last decade, the total number of federal student loan borrowers has increased by 69 percent and the average amount per borrower has increased by six percent.[6] And costs are not well understood or anticipated by students. In a study of undergraduates at a selective public university, only half were able to estimate accurately how much they paid for their first year of college.[7]

American higher education has always been an evolving enterprise. But the complexity of today's dramatic change is heightened by a Leviathan of overlapping, frequently changing rules and responsibilities related to Title IV eligibility for institutions. Indeed, there is not even a single regulatory "system." Rather, multiple systems and regimes created by Congress and the U.S. Department of Education (USED) coexist – sometimes together, sometimes separately.[8]

Broadly speaking, these (and other) regimes may make sense conceptually but have, in practice, become convoluted and incoherent over time. For example, given American history and our emphasis on local control of education, the "triad" for postsecondary accountability – USED, accrediting agencies, and states –is an entirely appropriate structure. But, over time, lines between triad members have blurred and federal expectations have increased. The result is a system that, at best, extends triad members beyond their core mission or motivations and, at worst, stretches their capacity for effective oversight to its breaking point. Even with significant regulation, too much is slipping through the cracks.

Moreover, ineffective, inefficient regulation creates significant compliance costs and disincentives to innovation. These burdens siphon away resources that could be available for teaching and learning, student services, and investments in research. They also foster a mentality of minimal compliance rather than creating one focused on achieving high standards and ensuring continuous improvement. And significant gaps in institutional performance and federal enforcement have failed at times to address major issues that affect student and taxpayer interests, such as institutions that regularly leave

the majority of their enrolled students with no credential and significant debt burden or credentials that are worth significantly less than the high price paid for them.

Growth and innovation in higher education cannot be effectively incentivized or sustained with a lumbering federal regulatory regime that adds requirements without subtracting outdated ones, usually treats all institutions the same, and does not adapt in ways that keep pace with the changes that define the higher education sector.

So what should be done?

Since the last HEA reauthorization took place between 2006 and 2008, some meaningful, if limited, changes have been made by the regulator and regulated communities to better align goals and resources around 21st century learning goals and to shift to a continuous improvement mindset. Thoughtful proposals have been put forward by both sides of the political aisle and by many of the sectors and stakeholder populations that have potential to improve the higher education system and to create better opportunities and results for students.[9]

Policymakers now face the challenge – and the opportunity – of considering proposals and existing requirements holistically and comprehensively. There is no panacea for the challenges of American higher education, but an essential – but largely missing – element of current dialogue is an effort to fit the different proposals and points of view together to create a coherent sense of direction and purpose. Discrete policy proposals will have ripple effects (intended and unintended) and should be understood and evaluated in light of the collective whole. A hard look at federal regulatory regimes is needed to develop a comprehensive, strategic focus for the HEA's regulatory goals and theory of change. A primary area of attention should be evaluating all current regulatory regimes and proposed changes in light of the potential positive or negative impact on students' ability to access, complete, and benefit from higher education. These efforts will serve as a foundation for understanding the key regulatory design principles that should inform federal policy deliberations about higher education, including (but not limited to) the next HEA reauthorization.

We hope that this paper can serve as a resource to the many policymakers and stakeholders who will participate in these conversations. Its central purpose is to return to the "first principles" associated with the federal regulation of the higher education sector through the HEA, focusing on the core goals and strategies that should inform issue- and program-specific regulatory proposals.[10] To illustrate, we apply those principles to the federal accountability system (and its many moving parts) for institutions.

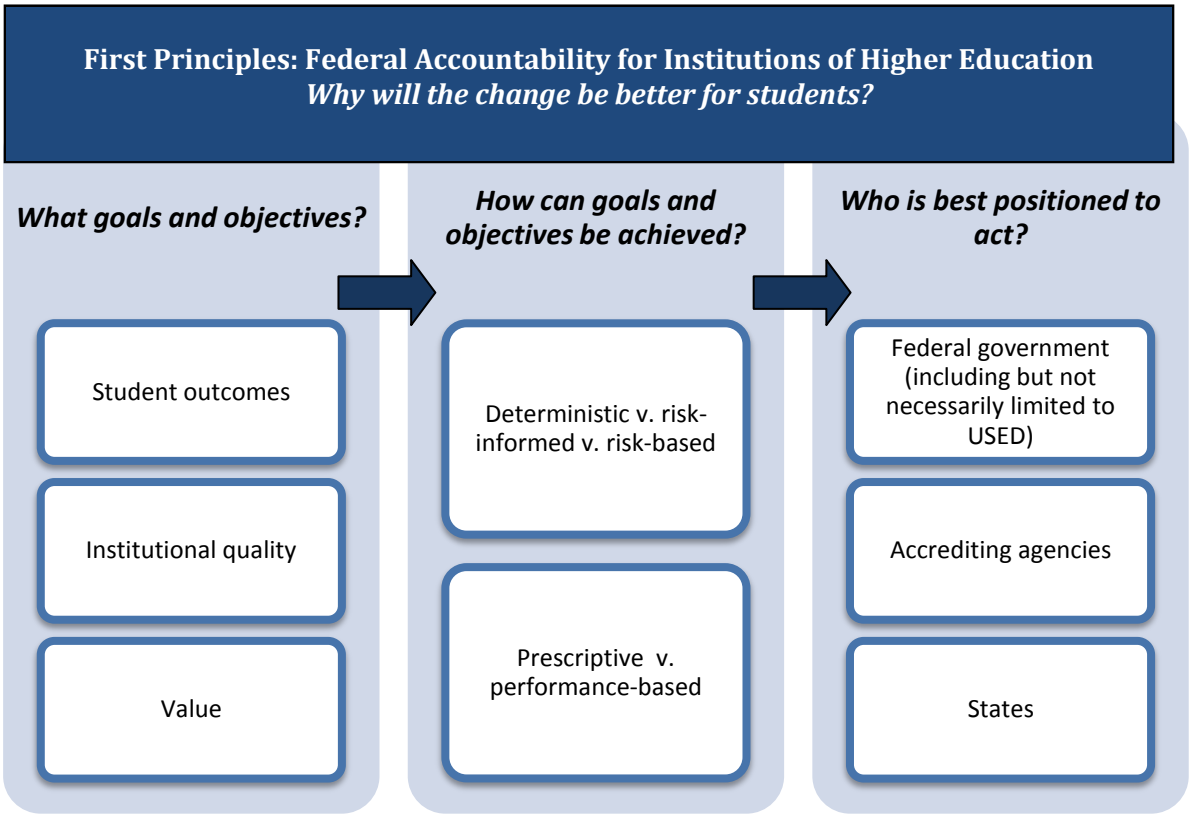
These first principles – centered on the theory that the federal government should take effective but limited action – call for a federal government that executes well on those core responsibilities and functions that it is uniquely positioned to execute. And, correspondingly, the federal regime must reflect best practice in systems design, including oversight and enforcement design principles that directly incent desired outcomes in cost-effective and capacity-attentive ways.[11]

This paper starts with the conviction that the "why" for transforming the higher education regulatory system is to create a better higher education system for students. Anchored by that overarching purpose, we propose the following three questions to guide our proposed approach:

1. ***What*** goals and objectives should be achieved by the federal regulatory regimes governing higher education?

2. ***How*** can those goals most effectively and efficiently be achieved in regulatory design?
3. ***Who*** is best positioned to achieve those goals?

Though conceptually simple, these questions implicate complex answers. To effectively set the stage for building a smarter governance regime into the 21st century, policymakers must be willing to cut through the web of existing regulation and address these core questions anew. Although this approach may be applied to many areas of higher education regulation, this paper focuses on one critical area of higher education policy to demonstrate this approach: accountability for institutions of higher education.[12] The graphic below illustrates from a high level how this approach could be applied to the federal accountability system for institutions of higher education.



With respect to accountability for institutions of higher education, this paper:

- Orients the "what" inquiry around three areas: student outcomes, institutional quality, and value. Each relates directly to the interests of taxpayer investors who provide funding for federal financial aid and of the students who take on student loans and rely on institutions to provide meaningful credentials at an appropriate cost.
- Argues that the "how" inquiry requires a significant shift away from predominantly deterministic and prescriptive approaches that apply the same rules for all institutions and tend to impose inputs-focused requirements. Instead, some performance-based and risk-informed regimes may better align with outcome-focused efforts and reduce the significant regulatory burden for many institutions on both sides of the equation (i.e., the regulators and the regulated).[13]

- Allows that the "who" inquiry may still be answered by the triad, but that the preservation of core roles should correspond with better definitions and alignment to ensure that the federal government, accrediting agencies, and states have sufficient capacity and motivation to execute governance obligations effectively.[14]

Federal regulation must be grounded in current realities and open to innovative strategies and approaches. After all, a significant role of the federal government is to incent positive actions by colleges and universities, essential agents of change in our system. Federal regulatory regimes must protect students and taxpayers from losing their investment to insufficient institutions but also must ensure that regulation does not stifle innovation and growth needed in the sector. Striking the right balance will be a delicate, difficult task – but one essential to ensure that systems meet the needs of today and tomorrow.

II. TODAY'S HIGHER EDUCATION LANDSCAPE: GROWTH, CHANGE, AND COMMON CHALLENGES ASSOCIATED WITH REGULATION

A. Significant growth and change among students, institutions, and the workforce

If explaining the current higher education environment to the original HEA architects, one word might suffice: bigger. The system supports an astoundingly larger and more diverse group of students, institutions, and programs than ever before – and federal expenditures have grown along with them. At the same time, expectations of what students should be able to do when entering the workforce is changing, with employers demanding that students have the certifications, skills and experiences to allow them to contribute to the 21st century economy.

One purpose of the federal investment in postsecondary financial aid programs has clearly been advanced: enrollment has dramatically expanded since the original passage of the HEA in 1965. In the fall of 2012, there were 17.7 million undergraduate students and 2.9 million graduate students attending degree-granting U.S. institutions[15] – an enormous increase compared to the 5.9 million students enrolled in postsecondary programs when the HEA was originally passed in 1965.[16] In fact, enrollment in degree-granting institutions increased 32 percent between 2001 and 2011,[17] and the U.S. Department of Education expects enrollments to increase by another 14 percent by 2022.[18]

Increased enrollment means that the federal investment in higher education is enormous – and growing. Since the 1982-83 school year, total federal aid has grown from $29 billion (in 2012 dollars) to $170 billion in 2012-13.[19] Today, the federal government funds more than 70 percent of all financial aid and 41 percent of all grant aid to postsecondary students.[20] Increases in student loans lead directly to increased debt burdens on students. Over the past decade, the total number of federal student loan borrowers increased by 69 percent, from 5.9 million in 2002-03 to almost 10 million in 2012-13.[21] There are more than 38 million student loan borrowers with over $1.1 trillion in outstanding debt.[22] Student debt is now the second largest component of household debt (behind mortgages).[23]

Just as student enrollment has expanded and diversified, institutions have become more numerous and diverse. More than 7,000 institutions of higher education (approximately 4,600 of them degree-

granting) were operating in 2010-11 – an increase of more than 500 over a decade.[24] Most institutions are also expanding internally, establishing new campuses and creating new programs.

With access to more information than ever before, students are using new technologies to learn anytime and anywhere. There is strong interest and growth in new models for learning, promising more personalized programs as well as greater efficiencies and cost savings. Distance learning and online programs, for example, have grown tremendously. In fall 2012, 7.1 million students – 33.5 percent of all higher education students – took at least one online class; just 1.6 million did in fall 2002.[25] Competency-based learning and prior learning assessments (PLAs) have also garnered significant attention. Models pioneered by Western Governors University and Southern New Hampshire University, among others, have demonstrated that institutions can orient themselves around student-centered learning progressions and credit awards, though these concepts are not yet mainstream practice.[26] Notably, USED is using new experimental sites projects to evaluate how these innovative practices related to student outcomes.[27] It is likely that change will continue at a brisk pace, and accountability systems need to be strong but flexible enough to have relevance for tomorrow and today.

But the expansive growth in enrollment has not been accompanied by increases in completion of postsecondary credentials, "primarily because a consistently large population of students who start college fail to finish."[28] Of the more than 70 percent of Americans who matriculate at a four-year college, only about 59 percent finish within six years.[29] This failure to obtain the sought-after credentials, skills and knowledge represents a dangerous burden of debt without diploma for many students, as well as a missed opportunity for taxpayer investment.

All of this comes at a time when 21st century workforce expectations of college graduates are becoming more demanding – with clear gaps in the skills of college graduates and those demanded by employers. Nearly 88 percent of American employers agree that the challenges their employees face within their organization are more complex today than they were before; 90 percent acknowledge that they are asking their employees to take on more responsibilities and to use a broader range of skills than in the past; and 93 percent agreed that skills development (e.g., critical thinking, communication, complex problem solving) is more important than a student's choice of undergraduate major.[30] When asked whether "higher education institutions in this country are graduating students with the skills and competencies that my business needs," about a third of business leaders agree, a third disagree (17 percent strongly), and a final third are neutral.[31] In contrast, 96 percent of chief academic officers at institutions say they are somewhat or very effective at preparing students for the world of work.[32]

B. Problems in the regulation of higher education

Like the higher education sector itself, federal regulation of higher education has also grown in scope and complexity since the HEA's original passage. This is due to the major growth and diversity in providers as well as the growing federal investment in financial aid, which demands a commensurate oversight regime to ensure the responsible investment of taxpayer dollars. Statutory and regulatory changes over time have created a thicket of requirements that require time and attention – and can blur institutions' focus on their fundamental missions of educating and supporting students. Kevin Carey of the New America Foundation has described it as a "kludgeocracy" where short-term fixes for immediate problems build up over time without attention to larger design principles, such as clear goals aligned

with regulatory strategies.[33] Though federal regulation is intended to protect both student and taxpayer interests, it has become too complex and drifted too far from this core purpose to achieve it effectively.

The pace of growth and change has stretched the regulators and their partners beyond their capacity. The smallest of Cabinet-level federal agencies, the USED, lacks the staff and expertise to do everything well and in a timely manner. Indeed, while the federal aid programs have grown six-fold since the early 1980s, the number of USED employees remains quite close to its levels in the late 1970s, before it was a Cabinet-level agency.[34]

Effective delegation of duties is also a challenge. For example, USED's efforts to delegate additional responsibilities to accrediting agencies has created new burdens that accrediting agencies – limited, volunteer-depending enterprises – are not always readily equipped to undertake. There are simply too many institutions and not enough accrediting agencies to assess every minutia that might pertain to institutional quality. USED recognizes only about 60 agencies to accredit nearly 7,000 institutions either through full-institution or program-specific review.[35]

These capacity challenges often result in uneven federal action. The regulatory regime is doing too much in some areas and too little in others. On one hand, USED is churning out regulatory rules and guidance at a brisk pace, causing the regulatory landscape to shift more frequently than it may have in the past. In 2012 alone, through electronic announcements and Dear Colleague letters, USED issued at least 270 regulatory updates or modifications – more than one change per workday.[36] Digesting and applying these changes takes time, and institutions have struggled to keep up with USED's pace of change. On the other hand, USED does not always use its enforcement tools in a timely way. In 2013, for example, the Department announced it would levy fines on institutions for alleged violations that occurred nearly two decades earlier, in 1995.[37]

Regulatory complexities, inconsistencies, and confusion mean that institutions must spend significant cost, time, and energy to ensure compliance. And these burdens have a direct impact on institutions' ability to serve students well. For example, regulatory burdens can chill the efforts of institutions to innovate and improve outcomes for students by directing time and resources toward regulatory compliance rather than continuous improvement of services and programs. Calculating the cost of federal regulatory compliance is challenging – largely because requirements implicate a wide range of administrative staff, institutional leaders, and faculty members – but a few data points exist:

- Hartwick College, a liberal arts college, determined in 2012 that it spent about seven percent of its operating budget (nearly $300,000) annually on federal compliance related activities.[38]
- A study of financial aid officers found that about two thirds reported that their financial aid office was facing a moderate or severe resource shortage that affected their ability to provide adequate personnel for administering Title IV programs and to provide adequate financial aid counseling for students.[39] Eighty percent of respondents identified greater regulatory / compliance workload as a "major" factor behind the shortage.[40]

Though every concern and challenge may never be fully addressed, the scale of American higher education and the pace of change require the federal regulatory system to prioritize and focus on addressing problems posed by significantly underperforming institutions. Otherwise, the pressure to avoid immediate harm to students by removing Title IV eligibility from institutions may drive against needed and effective action. Ultimately, however, inaction can harm students even more by allowing

low-performing institutions to continue to be eligible for federal financial aid even though their programs saddle students with debt without providing meaningful, marketable credentials.

In short, it is time to stop "kludging" and to probe what the federal regulatory system for higher education is intended to accomplish, how it can best accomplish those goals, and which actors (with what authority) should be responsible for managing regulatory regimes.

III. A RETURN TO FIRST PRINCIPLES FOR FEDERAL POSTSECONDARY POLICY

The largely outdated, burdensome regulatory system stands in contrast to the dramatic growth and innovation within the higher education sector, where new models and ways of doing business abound. Given this change, and its pace now and moving forward, we cannot realistically hope to establish relevant, effective, and efficient regulation by tweaking existing requirements or assuming that the current system can hold indefinitely.

But this is not a call for simply eliminating regulation. Regulation serves an essential purpose: ensuring that the federal investment in higher education is made responsibly and effectively. But, given the realities of American higher education today and the problems in the current system, new regulatory approaches are necessary to address changes that have taken place in recent years. To start, this paper suggests that all regulatory regimes pose three simple but critical questions: the "what," the "how," and the "who" of regulation. Again, each of these questions should be anchored in a fundamental commitment to making those changes that will have the greatest positive impact on students.

A. *What* goals and objectives should be achieved by the regulatory regime?

Any legislative or regulatory regime should have a clear purpose, and a focus on this question – however simple it may appear – is an important first step. Part of the problem in the HEA's evolution has been the tendency to expand goals and expectations of the federal system over time without ensuring that sufficient regulatory capacity exists to monitor and enforce those goals. As a result, the system, at best, is not performing optimally and, at worst, is creating unsustainable burdens that threaten the system's viability.[41]

Clear goals and objectives should be articulated with direct reference to the precise interests implicated in each federal regulatory regime. Those interests could range from protection of students' civil rights and safety to return on the significant taxpayer and student investment in financial aid programs. Stakeholders must engage thoughtfully with policymakers on clearly defining the "what" of each source of regulatory burden so that the requirements can be pared down to those most essential and effective. And care should be taken by regulators to stay true to these purposes over time and not to expand a regime beyond its intended purpose.

In a system that is as large, wide-ranging, and diverse as America's higher education system, and in an era in which change is one of the few constants, it is essential to ensure that clear purposes drive of regulatory design and operation based on knowable, verifiable, and (where possible) measurable elements.

Potential key questions within the "what" inquiry:

- **What is the intended purpose of the statute or regulation? What need(s) does it fulfill?**
- **Is the requirement operating as intended?**
- **Does the original purpose still have relevance for today's higher education landscape?**

B. *How* can those goals most effectively and efficiently be achieved in regulatory design?

Once the goals of a regulatory regime are determined, a legislative and regulatory framework aligned to those goals should be developed. Regulatory regimes can range from prescriptively detailed regarding inputs and processes to exclusively outcome-oriented. The regime should allow for meaningful distinctions that recognize differences among institutions (a singular power and defining characteristic of America's higher education system) and focus limited regulatory resources on those institutions that do not meet expectations.

Ideally, regulators can use outcome-oriented metrics to make meaningful distinctions among regulated entities and use these distinctions to drive differentiated regulation. This approach avoids attempting to regulate everyone for everything with equal rigor and attention. Generally, those with stronger performance should be regulated less, while those with weaker performance should expect to be regulated more (or at least at the same level as today). And the regime should contemplate a focus on continuous improvement, in addition to compliance, so that the regulation is driving positive change. Examining regulatory regimes that include risk-informed requirements and/or use performance-based compliance assessments may be an important way to link regulatory efforts more tightly to the goals they seek to accomplish. The Appendix explores options for prescribing requirements and assessing compliance.

1. What is required?

The first element of the "how" of a regulatory regime involves determining which requirements are imposed on regulated entities.[42] All regulatory systems seek to define problematic behaviors or conditions ("risks") and consequences when those problems arise. Not all systems, however, consider the *likelihood* of risk when developing requirements and tailor regulatory responses accordingly.

Though exceptions exist, the vast majority of HEA rules and regulations employ a "deterministic" approach that establishes the same rules and consequences for all IHEs, regardless of the level or likelihood of risk presented.[43]

Alternatives to this "one size fits all" approach should be considered. At the opposite end of the spectrum from deterministic models are "risk-based" regimes, pursuant to which regulatory decision-making occurs solely on an assessment of risk. In other words, a fully risk-based system sets a threshold for acceptable risk and only subjects entities to regulation if they cross the risk threshold. As a result, those deemed "not risky" can bypass the entirety of oversight and enforcement.
At a midpoint on this spectrum are "risk-informed regimes," a hybrid approach. In this kind of regime, all regulated entities must follow certain baseline rules, but the regulatory burden and response will

differ based on the degree of risk. Risk-informed systems commonly involve targeting enforcement resources on the basis of assessment of risk that a regulated entity poses to the regulator's objectives – which may be paired with additional requirements for supplying information on those entities that pose greater risks. Under this type of approach, strong performers are likely to be regulated less, and weaker performers and/or those with more at stake (such as greater federal funding levels compared to others) regulated more. (For additional discussion of risk-informed and risk-based systems, see the Appendix.)

Risk-informed and risk-based systems have their origins in the 1980s and 1990s, when the governments of industrialized nations became more interested in deregulation initiatives and implementing private sector-style management methods, including the use of cost-benefit analyses. Since then, several risk-based and risk-informed regimes have been implemented, both in the U.S. and abroad. Many of these regimes have been expanded and revised over time.[44]

- The **Nuclear Regulatory Commission** (NRC) has incorporated risk assessments into its regulatory systems since the late 1970s.[45] Current NRC policy requires that that the risk of cancer fatalities of people living near a nuclear power plant cannot exceed 0.1 percent of the sum of cancer fatality risks from all other sources; the NRC only awards licenses to power plants that meet this risk threshold and present an acceptably low level of risk to the public.[46]
- The **Food and Drug Administration (FDA)** has used a risk-based approach since 1976 to classify more than 1,700 medical devices according to risk, using the degree of control necessary to assure a device's safety and effectiveness as a risk barometer.[47]
- The **Australian Tertiary Education Quality Standards Agency (TEQSA)** began operating in 2012 as the national quality standards agency for Australian institutions and other providers.[48] TEQSA uses risk assessments to identify potential risks of non-compliance (or "leads" that warrant additional consideration by TEQSA case manager) – *not* to draw conclusions about compliance with regulatory or other legal standards.[49] TEQSA defines risk in four key areas: (1) regulatory history and standing; (2) student profiles and outcomes (measured by student load, student attrition rate, progress rate, completions, student satisfaction, and graduate destination); (3) academic staff profile (measured by qualifications of senior academic leaders, student to staff ratio, and academic staff on casual work contracts); and (4) current and historical financial viability. TEQSA has developed a list of specific risk indicators for each area and, using a simple tri-part rating system (high, moderate, or low risk, represented by traffic colors), makes a judgment about the risks of the provider against the identified threshold.[50]
- The **British Higher Education Funding Council for England (HEFCE)** is moving toward a risk-informed system in which regulators will conduct fewer and less frequent reviews on institutions that have long records of quality in higher education and more thorough and frequent review of institutions with short records or records lacking quality.[51] As a basis for this regulatory change – and as a conditions of institutions receiving government funding – HEFCE has started to conduct confidential risk assessments of institutional performance.[52] It plans to judge an institution to be "at higher risk" when, on the basis of all available evidence, it (1) faces threats to the sustainability of its operations, either immediately or in the medium term; (2) has serious problems relating to value for money, propriety or regularity (that is, whether funds are used for the purpose intended); or (3) has materially ineffective risk management, control, or corporate governance.

2. How is compliance assessed and determined?

With requirements in place, regulators must also decide how to assess and determine compliance.[53] On one end of the spectrum, "prescriptive" regimes focus on inputs, or very specific actions or behaviors at the outset. This approach is common in current HEA regulation. In contrast, "performance-based" regimes typically establish performance goals and assess performance over time to determine compliance, without specifying any actions or behaviors required along the way. Performance-based systems provide more flexibility in regulatory design and tend to align better with underlying goals of the regulated entity. And they serve as key foundations for regimes designed to promote continuous improvement, which incentivizes institutions to evaluate their performance on key metrics and to use research and best practice to shift policies and practices accordingly. Focusing on continuous improvement is an especially important goal in this era of significant and widespread change in the postsecondary landscape.

In the more complex setting of the regulatory environment for American colleges and universities, these different regimes are not necessarily mutually exclusive. Indeed, many combinations may be developed and may coexist within the broader system. Once the "what" of each federal regulatory area within higher education has been clarified, an appropriate combination of methodologies and regimes can be developed to minimize unnecessary regulatory burden, while also avoiding significant risk. Further, these regimes and methodologies can be developed in such a way as to purposely shift much of the interaction between regulators and institutions of higher education away from compliance and toward data-driven continuous improvement. Institutions falling in "yellow zones" should most clearly be engaging in continuous improvement efforts with the partnership and support of the regulating entity.

Potential key questions within the "how" inquiry:

- **How does the current regime prescribe requirements? How does it assess compliance?**
- **Are there meaningful distinctions that should be made among regulated entities that are not addressed by the current regime?**
- **Is the burden imposed by the current regime worth the benefit? How could those burdens be reduced?**
- **How might risk-informed and/or performance-based design features enhance the effectiveness and efficiency of the current regime?**

C. *Who* is best positioned to achieve those goals and objectives?

For a complex regulatory system (like that governing American institutions of higher education), two key factors inform the question of roles and responsibilities: (1) capacity and expertise to regulate effectively; and (2) ultimate interest in regulatory goals being achieved (in part, what some have termed "skin in the game").[54]

Regulatory regimes should be sensitive to available capacity within potential regulatory actors and should take into account historical, present, and prospective roles and responsibilities. The expanding scale of American higher education – both in the numbers of students and institutions involved – and the relatively limited capacity within USED, accrediting agencies, and states make this capacity assessment particularly important. Regulators should be able to identify weak performers (for technical assistance and/or enforcement actions), while trying not to monitor every activity of every institution.

An effective analysis of capacity does more than a simple assessment of staffing and budget. Expertise and appropriate decision-making authority should also be taken into account. Given the historical development of American postsecondary regulatory systems and the long tradition of academic freedom for institutions, the federal government should not be the automatic choice for all decisions, even though it has staff with expertise about institutional quality and comprehensive data sets about institutional performance. Accrediting agencies and states both have important roles to play as members of the triad (along with USED) for higher education regulation.

At the same time, ultimate regulatory responsibility must lie with the actor with a direct interest in regulatory goals being achieved. In other words, the final decision-maker must have "skin in the game." One reason why state authorization rules have been challenging, for example, is that federal rules make states responsible for developing oversight systems for purposes of Title IV eligibility – but ultimately the consequences for state non-compliance fall not on states but on the institutions (particularly the privates) that may lose eligibility.[55] Further, while states have significant interest in ensuring that institutions in their state remain eligible for federal financial aid, they have less incentive to protect federal taxpayer dollars by cracking down on those institutions.

The federal government is ultimately responsible for protecting its investment in financial aid programs and for advancing national interests related to higher education. Nonetheless, the federal government should undertake only those roles and responsibilities on which it has the capacity and expertise to deliver effectively. And it is very likely that USED will need to shift the expertise of its staff to manage new regimes and functions. At the same time, because the federal government is the single largest investor in the American higher education system, it must be prepared to step in if other actors fall short. This is particularly true because federal law establishes the triad structure for federal accountability, through which it assigns some rights and responsibilities to other actors.

Potential key questions within the "who" inquiry:

- **Who has the capacity and expertise to oversee the regulatory regime?**
- **Do changes in the landscape or in the regulatory regime necessitate regulators with new or different skill sets?**
- **Who has the ultimate interest in regulatory regimes achieving their purpose? Is that actor ultimately responsible for the regime?**

IV. APPLYING FIRST PRINCIPLES TO THE FEDERAL SYSTEM OF ACCOUNTABILITY FOR INSTITUTIONS

The simple inquiries of ***what, how,*** and ***who*** can help clarify how to revisit and redesign existing regulatory regimes in many areas in higher education, ranging from civil rights to financial responsibility to Clery Act compliance, to name a few. To make this approach effective, policy leaders and stakeholders in each of these areas should engage deeply in deliberations on each of these inquiries.

To help illustrate the possible value and application of such a foundational framework, this section focuses on *the federal system of accountability for institutions* that flows from the federal government's significant investment in financial aid programs. This area of federal regulation pervades many aspects of federal oversight and compliance. Indeed, a significant part of regulatory burden on institutions – and the accompanying oversight efforts by USED and its partners – comes from accountability mechanisms. Moreover, numerous recent proposals from national organizations, various advocates, institutions, and the President himself have endeavored to "fix the system" of accountability by setting new performance goals and urging new metrics for federal compliance.

This section applies the core principles of what, how, and who to offer suggestions for the elements, strategies and design concepts that should be contemplated in regimes within the federal accountability system. Though it presents a vision of a renewed foundation for the federal accountability system, it stops short of proposing metrics, legislative language, and other specifics – those details will require significant engagement and collaboration among policymakers and stakeholders.

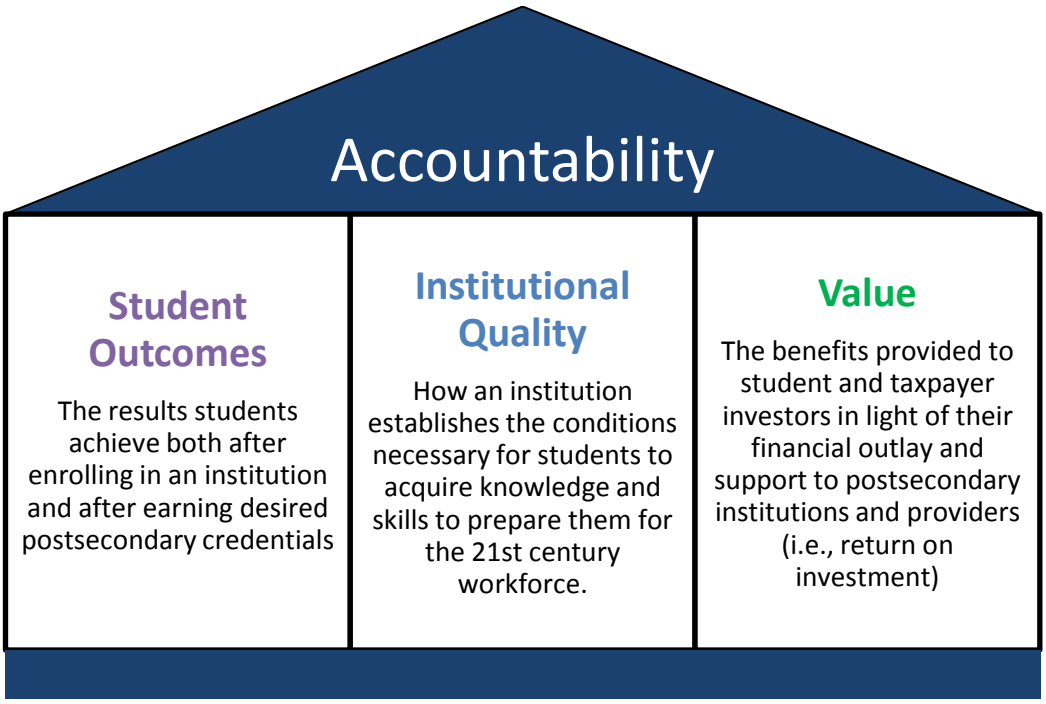
A. What should be the core interests served by the federal accountability regime for institutions of higher education?

The federal government's interest as the primary investor in student financial aid programs is an essential starting point in framing an optimal accountability regime. Its substantial role means that institutions must be held appropriately accountable for performing at levels that merit the taxpayers' investment and borrowers' student loan burdens. Postsecondary credentials supported by federal financial aid programs should be of sufficient quality and corresponding price to provide a reasonable return on investment for students and taxpayers alike.

Three pillars – student outcomes, institutional quality, and value – should be the principal drivers of the federal accountability regime for higher education. Together, these three pillars allow for an appropriately comprehensive, balanced assessment of institutional performance. Each provides a unique perspective on an institution's performance that relates directly to the federal government's interest as investor. Measures of student outcomes are essential, particularly as the federal government's interest in higher education has grown from an almost exclusive historical focus on increasing access to today's increasing attention to completion. Assessments of institutional quality have long served as a prerequisite to federal financial aid eligibility. And value measures provide an important new look at the relationship between federal dollars expended and returns realized.

The pillars also overlap and support one another, with student outcomes playing a particularly important role as a critical element of accountability on its own, but also as a foundational component of each of the other two pillars. Institutional quality measures that have traditionally relied on "inputs" such as facilities management, curriculum, and faculty qualifications should be paired with (or in many cases replaced by) outcome measures to ensure that an accurate, complete picture of institutional quality can be drawn. Similarly, value measures can be appropriately contextualized in light of student outcomes; for example, if an institution charges higher tuition but has strong student outcomes, a positive judgment on the value of those credentials can be made.

Within the accountability context, these pillars can guide the development of accountability metrics for institutions, the design of an accountability regime, and the assessment of appropriate roles and responsibilities. The graphic arranges the accountability "house" as this paper envisions, held up by the three pillars and potential metrics to assess individual institutions' progress against them (which would appropriately be determined with stakeholder engagement).



1. **Student outcomes**

Definition. Student outcomes are those results students achieve both after enrolling in an institution and after earning desired postsecondary credentials. In the context of accountability for an individual institution, student outcomes can be assessed through measures such as persistence, graduation, completion, transfer, and credit accumulation rates; employment and advanced degree enrollment rates; and current and projected income opportunities.

Context. Student outcomes have long been tracked and reported by the federal government – a function that the federal government is uniquely positioned to accomplish. Many outcome metrics are

currently available through the federal government's publicly available Integrated Postsecondary Education Data System (IPEDS) and National Student Loan Data System for Students (NSLDS).

Both in the aggregate and disaggregated for key demographic groups, student outcomes are essential in today's accountability systems in several ways: (1) as a foundation for public accountability provided by researchers and advocates who identify trends, opportunities, and concerns; (2) as a market influencer that informs students' enrollment decisions; and (3) as a factor in regulatory activities, particularly in risk assessments that can differentiate among institutions and help regulators (and their nongovernmental partners) systematize and prioritize their efforts.

Guiding Recommendations.

- **Incorporate completion metrics more fully.** Given the historical federal focus on increasing access to higher education (almost to the exclusion of other policy goals), accountability measures have not traditionally focused on representing the full complement of student outcomes. Though some changes have occurred, the scope and size of the population of students who do not complete their programs – particularly those who took on student debt in the process – requires policymakers to consider *completion* as a necessary complement to *access* as a value fundamentally driving the federal investment in higher education.
- **Refine measures to reflect different postsecondary contexts more accurately.** Measures need to be more nuanced and reflective of the diverse experiences in higher education today. For example, graduation rates only measure "first time, full time" students who graduate, leaving out part-time students and not factoring transfer rates into completion metrics (omissions that affect community colleges in particular). Moreover, metrics have not always given students an accurate picture of what outcomes to expect after enrolling – for example, an institution might have a generous projection of the average graduate's expected income, but if an institution does not have a strong graduation rate, those income projections are deceptive. Completion rates also might differ significantly for Pell grant recipients or minority students, which could reflect a lack of student supports offered by the institution.
- **Ensure that data sets are, to the extent possible, complete and verifiable.** To be most useful for accountability, student outcomes must be complete and verifiable. It is worth noting that current systems are forced to rely on incomplete and insufficient data sets because the U.S. does not have a student unit record database (which is prohibited by the HEA). Without the ability to track individual students from K-12 education to postsecondary education and into the workforce, student outcomes measures will necessarily depend on a patchwork of limited data.

2. Institutional quality

Definition. Institutional quality goes to the heart of an institution's primary purpose and function: how it establishes the conditions necessary for students to acquire knowledge and skills to prepare them for the 21st century workforce. Institutional quality is assessed mostly through the accreditation process that takes into account curriculum and instruction, faculty and leadership, student support services, and resource management – all in light of institutional mission.

Institutional quality can and should encompass many different measures, but this paper focuses squarely on the core elements essential to this determination in light of federal interests: academic

quality and institutional financial viability. (Other measures of institutional quality such as student safety, civil rights law compliance, and research and development investments can fit within the new architectural approach envisioned in this paper by attending to their own issues of *what, how* and *who*, but those examples fall beyond the scope of this paper.)

Context. Since 1952, the federal government has relied on accrediting agencies as a reliable, cost effective way to assess and monitor institutional quality to help determine eligibility for federal financial aid programs.[56] Accreditation is the primary benchmark for institutional quality for purposes of federal financial aid funding and serves as a useful peer review exercise for institutions to probe a wide range of their activities and services. At the same time, the accreditation process has become an increasingly complex (and expensive) process for all parties involved, and many questions have arisen about how accreditation can be refreshed to align better with today's priorities.

Guiding Recommendations.

- **Orient institutional quality determinations around student outcomes.** It is essential that traditional measures of institutional quality be linked directly to student outcomes measures. Many of the federal requirements focus on facilities management, data and information reporting, financial accounting, and other institutional functions that do not fundamentally impact institutional quality. Assessment of institutional quality must move from a focus on inputs to a first-order review based on outcomes, informed by an assessment of the conditions that lead to successful student outcomes. In cases where student outcomes do not meet expectations, a deeper examination may be appropriate that assesses elements such as curriculum and instruction, faculty and leadership, student support services, and resource management – all in light of the institution's unique mission.

3. Value

Definition. Value refers to the benefits provided to student and taxpayer investors in light of their financial outlay and support to postsecondary institutions and providers (i.e., the return on investment). In the context of accountability for an individual institution, value can be assessed through measures such as default rates, repayment rates, debt-to-income ratios, and evidence of civic participation.

Context. Though some moves have been made in HEA's history (e.g., the early-1990s change that requires maintaining a default rate under 30 percent), it has been a real challenge to set meaningful measures for value that take into account the diversity of providers, diversity of the student population, and respect for student enrollment choices. The ongoing debate over the proposed gainful employment metrics is a reflection of this difficulty. USED's effort represents an important attempt to infuse a measure of value into the accountability system and, although it has been controversial and difficult, it may offer an instructive example of how these factors can matter for all institutions.

More money than ever before is being poured into higher education through federal financial aid programs – investments that ultimately rest on taxpayers to front and student borrowers to repay. Given the challenges in ensuring institutional quality and the problems of completion, it is critical to assess which institutions and programs provide sufficient value to merit student and taxpayer investment.

Guiding Recommendations.

- **Embrace value as a central driver in accountability.** Value may be a less traditional pillar in the context of the federal accountability regime for higher education but is nonetheless appropriate because the primary role of the federal government in higher education is that of an investor.[57] There are two factors that matter from an investment perspective: (1) the decision to enroll and make the initial investment; and (2) the results that the investment produced. From a policy standpoint, we as a nation have decided that students have significant autonomy on the first factor – federal financial aid can go toward a plethora of programs in a host of institutions, provided that the student is eligible for enrollment and selected through the institution's admission process and that the institution qualifies for Title IV aid. The second factor, on the other hand, is a central and growing concern of policymakers.
- **Ensure that value measures reflect individual students' experiences.** Value measures that relate to individual students might impose greater scrutiny on institutions that take in more federal financial aid funding and/or that charge more for degrees and other credentials. By the same token, less scrutiny would be applied to institutions with minimal participation in federal financial aid programs and/or those that offer inexpensive degrees and credentials. An institution with strong value would deliver a strong "return on investment" both to the student who takes on debt to pay for his or her credential and to the federal government that backed the student through grants and/or loans.
- **Create opportunities for institutions to demonstrate value for the greater good.** Value measures related to the broader good of the country might provide some kind of "bonus" or special consideration for institutions that provide unique educational opportunities and/or contribute an outsized share of in-demand graduates to the workforce. Examples could include institutions in "education deserts" (i.e., the only postsecondary provider in a particular geographic region), institutions that produce significant numbers of minority teachers, and institutions that deliver unique programs in demand by employers. These factors cannot substitute for outcomes of institutional quality, but they may add important context to accountability decisions.

B. How should federal accountability regimes address student outcomes, institutional quality, and value effectively and efficiently?

To advance student outcomes, institutional quality and value, accountability regimes must better prioritize and focus on those factors most directly related to federal interests. Re-orienting at least some regimes to incorporate risk-informed and performance-based elements is one key strategy moving forward. These regulatory approaches provide structure but also allow for differences in context, including mission, governance structure, past performance, and other key factors.

As a foundation for risk-informed and performance-based systems, however, most ***student outcomes***-oriented regulatory regimes must be determinative and prescriptive because they allow the federal government to collect the same data from all institutions and to provide comprehensive information to students, parents, policymakers, and the general public. Indeed, given the primacy of student choice in our higher education system, meaningful outcome information is essential to help students and parents make sound enrollment decisions and to help USED and its non-governmental partners make sound regulatory decisions. Opportunities to do so may include (but are not limited to):

- **Creating a New Federal Data Bank for Policymakers and Regulators:** USED should create and manage a data bank that captures, in one place, key measures of student outcomes, institutional quality, and value to be used by federal policymakers, accreditors, and states. Ideally, the data bank would streamline data reporting requirements placed on institutions, would increase the rigor used to identify data required to be reported, and would make available data more useable and approachable to regulatory decision-makers. The dashboard could serve as an important foundation for new risk-informed regimes by identifying: (1) institutions that are eligible for greater regulatory flexibility and the ability to innovate with new models and (2) institutions that warrant enhanced oversight and/or sanctions.
- **Aligning Federal Student Information Tools:** Multiple agencies within the federal government already provide tools such as net-price calculators and college scorecards for students and parents (e.g., USED's College Navigator, the Shopping Sheet, the White House's College Scorecard and the Consumer Financial Protection Bureau's Comparison Tool), but discrepancies exist among them because information on student borrowing is calculated differently and uses varying data sources for different institutional disclosures.[58] This recommendation is mirrored in a bill introduced by Representatives Foxx and Messer and passed in 2014 by the House Education and the Workforce Committee that would require the creation of a consumer-tested "College Dashboard" intended "to provide a more complete picture of all student populations, streamline existing transparency efforts at the federal level to reduce confusion for students, and require better coordination by federal agencies to avoid duplication and confusion."[59]

Institutional quality should be assessed in a more dynamic way by considering risk and orienting around performance measures. Opportunities to do so may include (but are not limited to):

- **Implementing Risk-Informed Accreditation:** For Title IV eligibility purposes, accreditation should start with a risk assessment focused on student learning measures and student outcomes. Those institutions with strong performance would not be required to do more than this "expedited review." Those institutions with some significant risk would then move to a deeper contextual review that considers the contextual factors such as mission, institutional planning efforts, facilities and resources, and leaders' and faculty members' qualifications. (Institutions could continue to engage in a deep peer review process for other purposes – but this change would reduce the number of accreditation requirements for Title IV eligibility for institutions with strong performance records.) Some accrediting agencies have already laid the foundations for these systems by designing tiered consequences based on accreditation reviews, including variations on the scope of a site team's review of an institution, the time between reviews, and necessary steps for institutions with identified performance issues.
- **Implementing Risk-informed Federal Recognition of Accrediting Agencies:** Current statutory requirements include more than 90 items for review of accrediting agencies, many of them extraneous and technical. Accompanying these statutory requirements are detailed guidelines from USED that create additional compliance burdens for accrediting agencies and institutions alike. These requirements prevent accreditors from placing a sharp focus on those elements that they most need to review to ensure institutional quality and hamstring accreditors from developing more nuanced, responsive systems. To improve current systems, USED should adopt a risk-informed approach to recognition that starts with a baseline assessment of agency performance – prioritizing student outcomes and value measures as an important benchmark. (This process would be similar to that described above for accrediting agencies' review of institutions.)

- **Redesigning USED's Program Reviews as a Risk-Informed Regime Focused on Institutional Quality:** The Federal Student Aid (FSA) office routinely conducts program reviews to confirm that a school meets requirements for institutional eligibility, financial responsibility, and administrative capability for purposes of Title IV eligibility.[60] The HEA identifies a few prospective triggers for a program review, but leaves significant discretion to USED.[61] In 2013 and 2014, FSA completed over 300 reviews of institutions but has never published how it selected institutions for review. Program reviews should become more systematic and strategic, and FSA could do so by incorporating a risk assessment at the outset focused on risk indicators related to institutional quality and student outcomes (not only financial accounting risk indicators, as appears to be current practice). Indeed, policymakers have already identified this area of USED's authority as ripe for potential risk-informed systems, as demonstrated, for example, in then-Senator Harkin's draft HEA reauthorization bill that would direct USED to build in "risk-based" program reviews annually for two percent of institutions participating in Title IV.[62]

- **Revising the Existing Risk-Informed Financial Responsibility System:** In the late 1990s, USED designed and implemented a risk-informed system for assessing private nonprofit and for-profit institutions' financial viability that includes a "financial ratios test," which draws on institutions' annual financial statements to create a ratio for each institution on a scale of -1.0 to 3.0.[63] This system was conceived as an "initial screening" through which USED could "appropriately allocate its limited resources to more financially at-risk institutions."[64] The current system is largely unchanged from what was established in the late 1990s, however, and needs to be updated to reflect current generally accepted accounting principles.[65] Though these issues have yet to be fully resolved, this experience illustrates the importance of regularly engaging with stakeholders and technical experts to ensure that risk-informed systems remain current and relevant over time. It also shows the difference between the viability of a risk-informed regulatory approach from challenges or problems that may be part of the implementation and continuous improvement of such an approach.

Value is still emerging as a concept within accountability structures, but opportunities exist to continue to explore and implement value-focused accountability regimes that include (but are not limited to):

- **Broadening Metrics Within Cohort Default Rate Calculations:** In the late 1980s and early 1990s when default rates reached over 20 percent, the federal government responded by establishing a threshold for cohort default rates (CDR) as a condition for Title IV eligibility; default rates declined sharply thereafter.[66] The original purpose behind CDR was to identify those institutions whose students were consistently taking on more debt and failing to be able to pay it back. Today, CDR measures the percentage of student borrowers who enter repayment and default within three years, but are of limited utility because they reflect only the worst outcome – default – rather than a complete picture of the relationship between a student's experience at an institution and his or her ability to repay debt taken on to finance that educational experience.[67] Several changes, in concert or individually, are likely to help provide a more complete indication of an institution's students' ability to repay their student loan debts, including:
    - Lengthening the CDR window beyond three years;
    - Accounting for students who receive frequent forbearances and/or deferments;

- Preventing institutions with multiple locations from combining all campuses into a single CDR calculation;
- Contextualizing CDR calculations within an institution's number of federal loan borrowers (if a school has a high default rate but an extremely low borrowing rate the risk of default to students enrolling could actually be quite low);
- Broadening metrics within CDR, including program CDR and loan repayment rates.

- **Continuing to Advance Gainful Employment Measures:** More recent efforts to establish metrics and a regime around "gainful employment" illustrate updated thinking about how value could be measured and used as part of a risk-informed regime. USED has a sound value-related purpose and goal for the gainful employment requirements: preventing the use of federal financial aid programs to fund degree and certificate programs that demonstrate no success in preparing students for gainful employment in a related field. During the development of these regulations, several prospective "value" metrics were identified as USED sought to define gainful employment: debt-to-earnings ratios, cohort default rates on a program (not institution-wide) level, and repayment rates.[68] Though not all of these metrics were included in the final rule,[69] they do provide important information about what value metrics and assessments might be taken into account – and the limitations and questions associated with implementing them. As measures and standards for gainful employment continue to be refined and improved, they may be able to be extended to all institutions to ensure that all institutions that benefit from federal financial aid programs are providing value both to students and to taxpayers. Such an expansion will require careful thought and collaboration – and may necessitate renaming the regime – but should be considered by policymakers.

C. Who is best positioned to oversee and enforce different regulatory regimes?

The American accountability system for institutions relies on partnerships between the federal government (within and beyond USED), accrediting agencies, states, and institutions themselves. Given the costs, necessary resources, and likely disagreements typically associated with creating an entirely new regulatory system, the most promising regulatory reform models will build on these existing relationships, rather than trying to start over again. Even so, it is possible that the significant pace of change calls for new actors or combinations of existing actors in new ways. Just as innovation is needed in higher education to drive better outcomes, it should also be a key value in designing a more effective accountability regime.

Today's unique context and the need to plan for a dramatically changing landscape require a careful reassessment of the roles played by the federal government, accreditors, states, and institutions within the federal accountability system. After all, the federal government not only has its own unique roles to play, but federal law also establishes the contours of the accountability-related roles of other actors in the triad. Roles and responsibilities governing the federal accountability system need to be reviewed and re-framed in light of capacity and ultimate interests in the regulatory goals being achieved as the system is re-built around the three accountability pillars and re-structured with new regulatory regimes.

As we revisit the roles and responsibilities of the triad and redefine the ***federal government***'s roles within it, we must be aware of limitations of capacity. Some degree of deference to the core functions and capacities of institutions, accrediting agencies, and states must be present; after all, the federal

government cannot and should not do everything. Further, the federal government should not attempt to substitute its own judgment for matters that are fundamentally within another's area of expertise. For example, institutions and accrediting agencies should make decisions on the appropriate means to determine institutional quality but should receive less deference from federal and state regulators on outcomes, particularly when performance sinks to unacceptable levels and significant risk is implicated.

The long history of the federal government's reliance on ***accrediting agencies*** as arbiters of institutional quality – and the resulting expertise, experience, and understanding of institutions that come through a peer review process – counsel that accrediting agencies should retain this function, even as accountability regimes are redesigned. But, in recent years, accrediting agencies increasingly have been asked to deal with "accordion-like policies on what [USED] expect[s] [them] to do."[70] This has included monitoring consumer protection concerns, such as the recent requirement for accrediting agencies to monitor institutional compliance with new federal "credit hour" requirements.[71] Such developments can detract from accrediting agencies' ability to fulfill their primary missions of assessing and improving institutional quality in an effective and timely way.

States grant institutions the basic authority to operate, either by establishing them as public institutions or by granting them the opportunity to lawfully charge students for providing education services in the state. Along with this authority come significant consumer protection responsibilities (e.g., investigating and resolving claims of waste, fraud, abuse). But many of the interests at play in states' consumer protection efforts originate from *state* law and statute, not the federal accountability regime. For this reason, states may not be appropriate stewards to protect taxpayer and student interests in the effective investment of *federal* dollars into *federal* financial aid programs. The recent controversy related to the state authorization provisions within USED's proposed "Program Integrity" rules provides an illustration of this problem. USED had proposed that states conduct an "active review" of institutions as a condition for federal financial aid eligibility for private institutions. This proposal met with opposition in part because it was likely to require a large majority of states to make statutory changes and to dedicate significant new resources to the process – but the ultimate responsibility to ensure that states made these changes fell on private institutions, not the states themselves.[72] Due in part to these challenges, the negotiated rulemaking process failed to reach consensus, though USED officials have indicated that proposed rules may be delivered by November 2015.[73]

New regulatory regimes implicated by the "what" and "how" inquiries must be accompanied by an examination of the roles and responsibilities in the current accountability regime to identify which entity is best positioned to manage the strengths and challenges that need to be addressed. Stakeholders should be involved in all stages of the design process, particularly with regard to setting measures, thresholds, and requirements. And, during implementation and continuous improvement of regimes, professional judgment will continue to play an important role in systems as a whole (e.g., setting "cut points") and in making determinations about individual institutions. In the broader context, judgment can help regulators understand how metrics may play out within a particular institutional sector, geographic area, or population of students. And, for an institution, professional judgment can allow for the appropriate assessment of the importance and relevance of conditions that lead to those outcomes, including its curriculum and methods for assessing learning. Even though the federal government may be where the "buck stops," stakeholder participation is essential to ensure that regulatory regimes are designed appropriately and are functioning as intended.

By the same token, it is worth noting that some of the greatest challenges presented by the 21st century postsecondary landscape may be solved outside the federal accountability regime. For example, the challenges presented by state authorization and distance education programs were resolved not through a federal rule, but through the efforts of a broad range of stakeholders to establish the State Authorization Reciprocity Agreements (SARA).[74] SARA is voluntary and allows states to opt into regional reciprocity agreements that use comparable national standards for interstate offering of postsecondary distance education courses and programs. Notably, a strong motivating interest in establishing SARA was to avoid the need for a burdensome, costly draft federal rule that would have required all distance education providers to be compliant with the state authorization rules of all states in which they enrolled students. Though the SARA model developed through a unique confluence of events, stakeholders, and champions, its story shows that – at least in some cases – the higher education community (rather than the federal government) can take the lead.

V. CONCLUSION

Throughout its history, the federal government's investment and involvement in higher education has evolved many times to meet the needs of the day. This history provides some measure of comfort as we face the challenges of today – our system has adapted before and can do it again. The Northwest Territories Act (1787), the Morrill Act (1862, 1890), the G.I. Bill (1944), and HEA itself (1965) all led to dramatic change in American higher education by creating new opportunities for an ever-expanding population of students.[75] But, over time, federal investments in financial aid (and, by extension, student debt) have grown enormously as a larger and more diverse population of students enrolls in a growing number of institutions of higher education that charge increasingly high prices for the education and credentials they provide.

This history also explains why laws and regulations today are so complex. These changes have added layer upon layer to the federal regulatory regime, resulting in a large and often inflexible system that is full of requirements that may have made sense in the past – but may not account for the challenges of today and tomorrow. Student completion rates remain middling to low in far too many places, tuition (and student debt) continues to skyrocket, and too many students who do graduate do not have the skills and experiences that will allow them to succeed in the 21st century workforce.

Cutting through layers of regulatory requirements that have built up over decades is a challenge that requires the involvement and commitment of a host of stakeholders. Federal policymakers and other key actors may be able to facilitate this process through their convening power, taking advantage of HEA reauthorization, as well as other legislative and rulemaking debates that will arise in the coming months and years.

Getting back to basics, as urged in this paper, is the only way that we will be able to transform regulatory regimes to "get our house in order" to meet the challenges of the 21st century. We must establish (or confirm) those goals that are most important to the federal interest in protecting the students' and taxpayers' investments in the federal financial aid system, must identify the regulatory regimes that will most effectively and efficiently achieve those goals (with a focus on prospective risk-

informed and performance-based models), and must assign roles and responsibilities for implementing those regimes with an eye on capacity and ultimate interest in regulatory goals being achieved.

Many different stakeholders and advocates will engage in conversations about transforming the regulation of American higher education. This paper urges policymakers and stakeholders to consider discrete proposals within the overarching context of federal regulatory systems, with an unflagging eye on creating positive conditions and meaningful results for students. The following key ideas are likely to guide and inform these discussions:

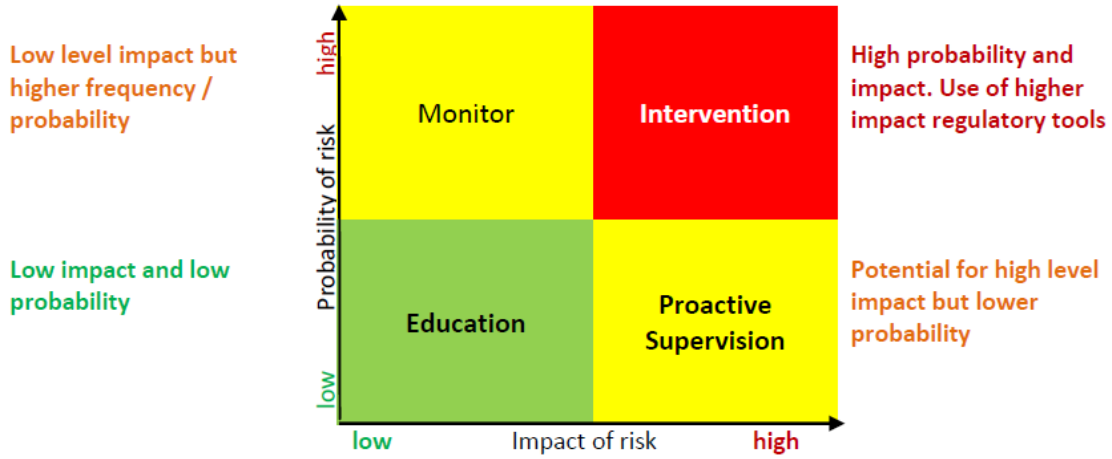
1. **All federal regulatory activities should tie directly to the federal government's interest as an investor in the higher education system on behalf of students and taxpayers.** With improved experiences and outcomes for students as the North Star, policymakers must take care to start with clarity around the purpose (or "what") of the regulatory regime and tailor the "how" and "who" of the regime to the most efficient and effective way of achieving that purpose.
2. **Federal requirements should set important standards and baselines, but also allow for flexibility as the higher education landscape continues to evolve.** Policymakers must strike the right balance between statutory and regulatory authority, including areas where USED may need to have greater latitude. And USED will need to be prepared – and empowered – to let go of some existing regulation to make way for more efficient and effective systems.
3. **Federal accountability systems should balance oversight authority appropriately among USED, states, accrediting agencies, and institutions themselves.** This includes appropriate allowances for institutions to exercise their own academic freedom to make decisions based on their mission. To accomplish this, clear, open channels of communication should be present among these various actors so that all can participate in a meaningful way.
4. **Changes to regulatory regimes should be made with an eye on the impact on the regulatory system as a whole.** Before new requirements are imposed, attention must be paid to the relationship between proposed and existing requirements and what impact changes will have on the overall cost and burden on institutions, regulators, and non-governmental regulatory partners.
5. **New regulatory approaches must be seriously considered and, when appropriate, should be adopted.** Risk-informed and performance-based elements are likely to enhance the effectiveness and efficiency of at least some regulatory regimes. Though these approaches are often intuitively attractive, they represent profound shifts that will require bold action and sustained commitment to succeed. Congress, USED, and other non-federal regulatory partners must engage with appropriate experts and key stakeholders to ensure that these new approaches are pursued only in those areas that are ripe – and that appropriate metrics, thresholds, and consequences are attached to the regimes.

These are not tasks for the faint of heart or the impatient, but they must be accomplished to ensure that all postsecondary students have the opportunity to reap the benefits of American higher education and move our country forward.

Appendix: Diving Deeper into Risk-Informed Regulation

The main text of this paper provided an introduction to risk-informed regulation, including illustrations of the concept in the U.S. and abroad. This appendix provides additional detail on the conceptual basis for risk-informed regulation and options for pairing it with performance-based compliance models. It draws from a deeper examination of risk-informed regulation, *New Directions in Regulatory Reform: Prospects for Reducing Regulation Through Risk-Informed Approaches in Federal Law Governing American Higher Education* (February 2015).

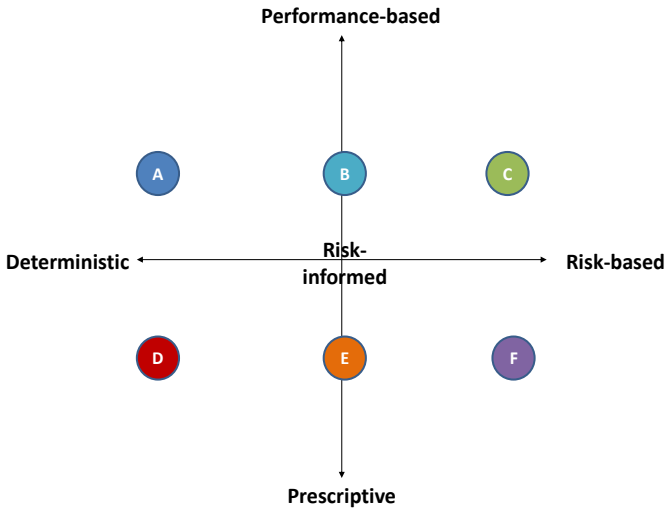
One key element of risk-informed systems involves pairing prospective regulatory responses to the degree of risk presented. (This is also a common exercise in the business and executive leadership communities.) The graphic below, originally developed by the Financial Services Commission of Ontario, was developed to show how impact and probability serve as guideposts for assessing the level of risk presented and the type of appropriate regulatory response.[76]



The FSCO defines "green" entities as those that present low probability *and* low impact risk. This group is required to support that determination, but – once that determination is made – need not do more. In such cases, FSCO only provides general updates and communications; no specific plan to engage individual entities within this category exists. For "yellow" entities that present low probability but high impact of risk, FSCO proactively supervises through ongoing monitoring, regular reporting, and possibly site visits. For the other "yellow" entities that present high probability but low impact risk, FSCO will monitor with less rigor than the low probability / high impact group (given that the impact of risk is lower), but will regularly monitor and engage on specific issues identified. "Red" entities present high probability and high impact risk. Because these entities present such a significant danger, they require the most FSCO time and effort through regular interactions, proactive measures to mitigate risks, site visits, and – in egregious cases – enforcement actions.

An example in a higher education setting might involve an assessment of student loan defaults. Risk assessments could incorporate both probability of student loan default (e.g., a high number of borrowers at the institutions makes it more likely that a default will occur) and the impact of student loan default (e.g., higher loan amounts would make the impact of default greater on the student). The results of the risk assessment would allow USED to target its oversight and enforcement resources to those institutions that present the highest probability and highest impact risks, and limit the regulatory requirements related to student loan defaults placed on institutions with low risk.

As discussed in the main text, regulators should also consider more innovative ways to determine compliance, with a special focus on performance-based (rather than prescriptive) compliance. The graphic to the right maps out the different combinations of the regimes explored in the main text**.** Options for prescribing requirements run along the x-axis; options for assessing compliance run along the y-axis. The colored bubbles in the graphic refer to the six possible combinations of these regulatory regimes that are illustrated in the chart that follows.



As a simple illustration of the concepts, imagine an obstacle course that a set of Army recruits must complete to be eligible for active duty. The "risk" here would be that recruits would fail to perform in active duty, putting themselves and their fellow soldiers in danger. The chart below explains how the recruits' performance would be assessed under the six different regimes.

A	***A deterministic, performance-based regime*** would: • Require all recruits to complete the obstacle course regardless of past performance or ability • Allow for some flexibility in what techniques were allowed to complete the course
B	***A risk-informed, performance-based regime*** would • Require all recruits to pass through a portion of the obstacle course, but require only those recruits with identified risk factors to complete a second portion (This portion would be optimally designed to test different levels of risk for different recruits, such as an extra climbing exercise for recruits with a fear of heights or an extra weight lifting exercise for recruits with less demonstrated strength.) • Allow for some flexibility in what techniques were allowed to complete the course
C	***A risk-based, performance-based regime*** would: • Require only those recruits with certain risk factors to complete the obstacle course, such as failure to complete prior physical tests or existing health conditions • Allow for some flexibility in what techniques were allowed to complete the course
D	***A deterministic, prescriptive regime*** would: • Require all recruits to complete the obstacle course regardless of past performance or ability • Require all recruits to complete the course using a specific set of techniques
E	***A risk-informed, prescriptive regime*** would: • Require all recruits to pass through a portion of the obstacle course, but require only those recruits with identified risk factors to complete a second portion (This portion would be optimally designed to test different levels of risk for different recruits, such as an extra climbing exercise for recruits with a fear of heights or an extra weight lifting exercise for recruits with less demonstrated strength.) • Require all recruits to complete the course using a specific set of techniques
F	***A risk-based, prescriptive regime*** would: • Require only those recruits with certain risk factors to complete the obstacle course, such as failure to complete prior physical tests or existing health conditions • Require all recruits to complete the course using a specific set of techniques

ENDNOTES

4847-0754-5890, v. 1

[1] The pay gap between college graduates and non-college graduates reached a record high in 2013: those with four-year college degrees made 98 percent more an hour on average than people without a degree (an increase from 89 percent five years earlier, 85 percent a decade earlier, and 64 percent in the early 1980s.) David Leonhardt, Is College Worth It? Clearly, New Data Say, N.Y. TIMES (May 27, 2014), http://mobile.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html.

Moreover, higher education represents a significant opportunity for social mobility: "Without a college degree, children born in the bottom income quintile have a 45 percent chance of remaining there as adults. With a degree, they have less than a 20 percent chance of staying in the bottom quintile of the income distribution and a roughly equal chance of ending up in any of the higher income quintiles." See also U.S. Dep'ts of Education and Treasury, The Economics of Higher Education 3 (Dec. 2012), http://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf ("The median weekly earnings of a full-time, bachelor's degree holder in 2011 were 64 percent higher than those of a high school graduate ($1,053 compared to $638). The earnings differential grew steadily throughout the 1980s and 1990s.").

[2] A 2009 study found that benefits to taxpayers in the extreme example of increasing educational attainment from high school dropout to college graduate range from $187,000 to $341,000 per individual, depending on the population group (with greater benefits for minorities and males), or – after subtracting the value of costs to provide the additional education ($47,000 per college graduate) – $123,000-240,000 average expected net benefits. Stephen J. Carroll & Emre Erkut, RAND Education, The Benefits to Taxpayers from Increases in Students' Educational Attainment 79-80 (2009), http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG686.pdf.

[3] E.g., Anthony Carnevale, Nicole Smith, & Jeff Strohl, , Center on Education and the Workforce, Georgetown University, Recovery: Projections of Job and Education Requirements through 2020 (June 2013), available at: http://cew.georgetown.edu/recovery2020 ("[By 2020], 35 percent of the job openings will require at least a bachelor's degree, 30 percent of the job openings will require some college or an associate's degree and 36 percent of the job openings will not require education beyond high school.").

[4] The Department of Education characterizes non-traditional students as those who show any of the following characteristics: delayed enrollment (any time after the first semester after high school graduation); part-time attendance for at least part of the academic year; full-time employment; financial independence from parents or guardians; single parenthood; has dependents other than a spouse; or earned a GED instead of high school diploma. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NONTRADITIONAL UNDERGRADUATES 2-3 (2002).

[5] Federal Student Aid, U.S. Dep't of Educ., Annual Report FY 2014 7 (Nov. 14, 2014), https://studentaid.ed.gov/sites/default/files/FY2014_FSA_Annual_Report_508.pdf.

[6] College Board, Trends in Student Aid 2013 4 (2013), https://trends.collegeboard.org/sites/default/files/student-aid-2013-full-report-140108.pdf.

[7] Beth Akers and Matthew M. Chingos, Are College Students Borrowing Blindly?, Brookings (Dec. 10, 2014), http://www.brookings.edu/research/reports/2014/12/10-borrowing-blindly-akers-chingos.

[8] See, e.g., Molly Corbett Broad, American Council on Education, Comments on the Harkin Higher Education Act Reauthorization Discussion Draft (Aug. 29, 2014) (sent on behalf of 21 associations), http://www.acenet.edu/news-room/Documents/Letter-Harkin-HEA-Discussion-Draft.pdf.

[9] See, e.g., id.; Task Force on Federal Regulation of Higher Education, Recalibrating Regulation of Colleges and Universities (Feb. 2015), available at: http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf; Association of

American Universities, AAU Submits Comments on Draft HEA Bill to Senator Harkin (Aug. 26, 2014), http://www.aau.edu/policy/article.aspx?id=15447; Peter McPherson, Association of Public and Land-grant Universities, APLU Comments on HEAA Discussion Draft (Aug. 22, 2014), available at: https://www.insidehighered.com/sites/default/server_files/files/APLU%20HEAA%20Response%20Final%20082214 ; House Education and the Workforce Committee, Fact Sheets: Strengthening Transparency in Higher Education Act (June 26, 2014), http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=386105; H.R. 4983 (2014); Harkin HEA Reauthorization Discussion Draft (June 25, 2014), http://www.help.senate.gov/imo/media/doc/HEAA%20Discussion%20Draft%20Language%206.25.14.pdf; Lumina Foundation, Federal Policy Priorities 4 (May 2014), http://www.luminafoundation.org/publications/policy/Lumina_Federal_Policy_Priorities-full.pdf; Molly Corbett Broad, American Council on Education, Recommendations from 39 Higher Education Associations for the Reauthorization of the Higher Education Act (Aug. 2, 2013), http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf; Advisory Subcommittee on Student Financial Assistance, Higher Education Regulations Study: Final Report (Nov. 2011), available at: http://chronicle.com/items/biz/pdf/HERS%20Final%20Report.pdf.

[10] At the outset, it is worth noting that there has already been significant commentary and many different proposals on the subject of modern American higher education and the federal government's role in supporting it. Rather than attempting to write on a blank slate or reinvent the wheel, this paper draws from a variety of sources to present nonpartisan, grounded analysis, principles, and recommendations. At the same time, it should be noted that those authorities tend to focus on discrete issues or relatively narrow policy sets. By contrast, this paper seeks to provide a more comprehensive view of the relevant landscape. It discusses key principles that may have (near) universal applicability relevant to the design of legislative and regulatory solutions. As discussed in this paper, those principles are illustrated and applied in the particular context of college and university accountability.

[11] See note 43, *infra.*

[12] This structure has been developed with an eye toward potential applicability in multiple higher education policy and practice settings that are beyond the scope of this paper (for example, in regulating student safety and distribution of financial aid).

[13] Not all regulatory regimes can or should be risk-informed or performance-based, as defined in this paper. Federal civil rights laws and Clery Act provisions, for instance, establish individual student rights and protections as a matter of law, often grounded in constitutional principles and intractable requirements.

[14] For additional information on the history and current status of the triad, see, e.g., National Advisory Committee on Institutional Quality and Integrity (NACIQI), Report to the U.S. Secretary of Education: Higher Education Act Reauthorization – Accreditation Policy Recommendations 3-6 (April 2012); Terry Hartle, Senior Vice President, American Council on Education, The Triad: Promoting a System of Shared Responsibility (testimony before the Health, Education Labor, and Pensions Committee of the U.S. Senate) (Sept. 19, 2013), http://www.help.senate.gov/imo/media/doc/Hartle.pdf ("[During the 1992 reauthorization], As defaults skyrocketed, Congress turned greater attention to the triad and decided to strengthen its components dramatically. The history of the last 20 years has been one of continual tweaking of the triad largely in the direction of placing more and more responsibility on accreditors.")

[15] IPEDS, Condition of Education Report (updated May 2014), http://nces.ed.gov/programs/coe/indicator_csb.asp.

[16] Thomas D. Snyder & Sally A. Dillow, Inst. of Educ. Scis., Nat'l Center for Educ. Statistics, Digest of Education Statistics 2012 319, t.221 (NCES 2014-015) (2013).

[17] Id. at 307.

[18] U.S. Dep't of Educ., Projections of Education Statistics to 2022, NCES 2014-051 19 (Feb. 2014), http://nces.ed.gov/pubs2014/2014051.pdf.

[19] Id. at 7.

[20] College Board, Trends in Student Aid 2013, *supra* note 6 at 3. It is worth noting that this investment is significant, but far from the federal government's greatest expenditure. Education and training programs account for approximately 15 percent ($88 billion) of non-defense discretionary (NDD) spending in 2013. Higher education programs — the largest of which is the Pell Grant program— constitute about 25 percent of the education portion of NDD. (All NDD spending in 2013 totaled $576 billion, or 17 percent of total federal spending.) Center on Budget and Policy Priorities, Policy Basics: Non-Defense Discretionary Programs, http://www.cbpp.org/cms/index.cfm?fa=view&id=3973 (updated April 30, 2014).

[21] College Board, Trends in Student Aid (2013), https://trends.collegeboard.org/student-aid/figures-tables/total-number-undergraduate-graduate-federal-loan-borrowers-average-borrowed-over-time.

[22] Consumer Financial Protection Bureau, Student Loan Affordability: Analysis of Public Input and Solutions 5 (May 8, 2013), http://files.consumerfinance.gov/f/201305_cfpb_rfi-report_student-loans.pdf.

[23] U.S. Dep'ts of Education & Treasury, supra note 1, at 30.

[24] Nat'l Ctr. for Educ. Statistics, Fast Facts: Educational Institutions, http://nces.ed.gov/fastfacts/display.asp?id=84 (last accessed Oct. 26, 2014).

[25] I. Elaine Allen and Jeff Seaman, Grade Change: Tracking Online Education in the United States 15 (Jan. 2014), http://www.onlinelearningsurvey.com/reports/gradechange.pdf.

[26] Rebecca Klein-Collins & Elizabeth Baylor, Meeting Students Where They Are: Profiles of Students in Competency-Based Degree Programs, CAP & Council for Adult and Experimental Learning (Nov. 2013), http://www.wgu.edu/wgufile/pdf-cael-article-11713; Rebecca Klein-Collins, Council for Adult and Experimental Learning, Competency-Based Degree Programs in the U.S.: Postsecondary Credentials for Measurable Student Learning and Performance (2012), http://www.cael.org/pdfs/2012_competencybasedprograms.

[27] U.S. Dep't of Educ., Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiatives; Federal Student Financial Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended 44429-36 (July 31, 2014), http://ifap.ed.gov/fregisters/FR073114ExperimentalSites.html.

[28] ANDREW KELLY, GETTING TO GRADUATION (2012).

[29] The problems of completion are complex, and vary by institutional sector, institutional selectivity, race ethnicity, and income level:

- By institutional sector: The six-year graduation rate was 57 percent at public institutions, 66 percent at private nonprofit institutions, and 32 percent at private for-profit institutions.
- By level of institutional selectivity: At four-year institutions with open admissions policies, 33 percent of students completed a bachelor's degree within six years. At four-year institutions with an acceptance rate of less than 25 percent of applicants, the six-year graduation rate was 86 percent.
- By race or ethnicity: In 2013, approximately 40 percent of whites between the ages of 25 and 29 had a bachelor's degree or more, compared to about 20 percent of African-Americans, 15 percent of Latinos, and 58 percent of Asians. About 58 percent of whites, 69 percent of Asians, 39 percent of African-Americans, and 46 percent of Latinos who entered four-year colleges in 1996 graduated within six years. For the next cohort followed (entering in 2005), graduation rates for whites (62 percent), Asians (70 percent), and Latinos (50 percent) had increased slightly, but African-American graduation rates barely changed (40 percent). (These are the most recent data available.)
- By income level: Seventy five percent of adults who grow up in the top quarter of the income spectrum, one third of adults in the second highest quarter, fewer than one out of five for those in the third quarter, and fewer than one out of 10 in bottom quarter earn baccalaureate degrees by age 24.

NCES, Fast Facts: Graduation, http://nces.ed.gov/fastfacts/display.asp?id=40 (last accessed Sept. 29, 2014); Eduardo Porter, Dropping Out of College and Paying the Price, N.Y. Times (June 25, 2013), http://www.nytimes.com/2013/06/26/business/economy/dropping-out-of-college-and-paying-the-price.html?pagewanted=all&_r=0; Ben Casselman, Race Gap Narrows in College Enrollment, But Not in Graduation, Five Thirty Eight (April 30, 2014, 6:00 am), http://fivethirtyeight.com/features/race-gap-narrows-in-college-enrollment-but-not-in-graduation/; U.S. Dep't of Educ., Digest of Education Statistics 2013, t.326.10. Graduation rates of first-time, full-time bachelor's degree-seeking students at 4-year postsecondary institutions, by race/ethnicity, time to completion, sex, and control of institution: Selected cohort entry years, 1996 through 2006, http://nces.ed.gov/programs/digest/d13/tables/dt13_326.10.asp; Suzanne Mettler, College, The Great Unleverer, N.Y. TIMES (March 1, 2014), http://mobile.nytimes.com/blogs/opinionator/2014/03/01/college-the-great-unleveler/.

[30] Hart Research Associates, It Takes More Than a Major: Employer Priorities for College Learning and Student Success (April 10, 2013), http://www.aacu.org/leap/documeNts/2013_employersurvey.pdf;Hart Research Associates, Raising the Bar: Employers' Views on College Learning in the Wake of the Economic Downturn (Jan. 20, 2013), http://www.aacu.org/leap/documents/2009_EmployerSurvey.pdf.

[31] Preety Sidhu & Valerie J. Calderon, Many Business Leaders Doubt U.S. Colleges Prepare Students, Gallup (Feb. 26, 2014), http://www.gallup.com/poll/167630/business-leaders-doubt-colleges-prepare-students.aspx.

[32] Scott Jaschik & Doug Lederman, Inside Higher Ed, The 2014 Inside Higher Ed Survey of College & University Chief Academic Officers 12-13 (2014), http://www.insidehighered.com/download/form.php?width=500&height=550&iframe=true&title=Survey%20of%20College%20and%20University%20Chief%20Academic%20Officers&file=IHE_ProvostsSurvey-final.pdf.

[33] Kevin Carey, The Kludging of Higher Education, CHRON. OF HIGHER EDUC. (Nov. 25, 2013), http://chronicle.com/article/The-Kludging-of-Higher/143215/.

[34] USED currently has approximately 4,200 employees, compared with 3,000 in 1979 – far fewer than the 17,000 projected in 1980 when President Carter elevated USED to a Cabinet-level agency. White House, The Executive Branch, http://www.whitehouse.gov/our-government/executive-branch (last accessed Nov. 3, 2014); U.S. Dep't of Educ., An Overview of the U.S. Department of Education (Sept. 2010), http://www2.ed.gov/about/overview/focus/what_pg2.html; United Press International, Education Department Created, The Palm Beach Post (Oct. 18, 1979), available at: http://news.google.com/newspapers?id=0sZUAAAAIBAJ&sjid=ejsNAAAAIBAJ&pg=1984,3959160&dq=department+of+education&hl=en.

[35] There are 37 accrediting agencies currently recognized for Title IV purposes, including six regional accrediting agencies that perform full-institution reviews (with almost exclusively public and private nonprofit institutional members), several national accrediting agencies (with mostly for-profit and non-degree granting institutional members), and several specialized accrediting agencies that review only programs within a specific field (such as medicine, law, or teacher certification). U.S. Dep't of Educ., Accrediting Agencies Recognized for Title IV Purposes, http://www2.ed.gov/admins/finaid/accred/accreditation_pg9.html#TitleIVRecognition (updated Jan. 13, 2015); see also Council for Higher Education Accreditation, Databases and Directories, http://www.chea.org/Directories/index.asp (updated Jan. 2015).

[36] The gainful employment regulations alone spawned 43 separate Dear Colleague letters and electronic announcements further detailing institutional reporting and disclosure requirements. Molly Corbett Broad, ACE, Recommendations from 39 Higher Education Associations for the Reauthorization of the Higher Education Act 20 (Aug. 2, 2013), http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf.

[37] *Id.* at 16.

[38] This represents $192,874 in salary costs, $30,900 in direct costs, and $11,515 accreditation costs. Kelly Zack-Decker, Compliance at Hartwick College: A Special Report to the President of the College 4 (Dec. 2012), available at: http://www.naicu.edu/docLib/20130315_Compliance-HartwickColl-12-12.pdf.

[39] Nat'l Ass'n of Student Financial Aid Administrators, Findings from the 2010 NASFAA Administrative Burden Survey (2011), http://www.nasfaa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3903.

[40] Id.

[41] See, e.g., Senate Task Force Report, *supra* note 9.

[42] There does not appear to be a clear, universally accepted taxonomy of regulatory regimes, though a number of different individuals and organizations have developed theories and systems that have significantly informed this section on the "how" inquiry. Sources that have been especially instructive during the development of this paper include:

- Cary Coglianese, Jennifer Nash, and Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection*, Regulatory Policy Program, Center for Business and Government, Harvard University, John F. Kennedy School of Government (2002), http://www.hks.harvard.edu/m-rcbg/Events/Papers/RPPREPORT3.pdf.
- Financial Services Commission of Ontario, Risk-Based Regulation: Framework Document (2011), http://www.fsco.gov.on.ca/en/pensions/fsco_consultations/Documents/Framework_Final.pdf;
- Peter May, Performance-Based Regulation, Jerusalem Papers in Regulation & Governance Working Paper 2 (April 2010), http://regulation.huji.ac.il/papers/jp2.pdf.
- Peter Mumford, *Best Practice Regulation: Setting Targets and Detecting Vulnerabilities*, 7 POLICY QUARTERLY 36 (2007), http://igps.victoria.ac.nz/publications/files/f34b30a11f9.pdf;
- William D. Travers, Risk-Informed and Performance-Based Regulation (March 1, 1999), http://www.nrc.gov/reading-rm/doc-collections/commission/srm/1998/1998-144srm.pdf.

[43] Not all institutions share the exact same set of requirements, and some rules and regulations differ based whether an institution is public or private, nonprofit or for-profit, a minority-serving institution, and so on. Part of the problem in the current regulatory environment is that regulatory regimes fail to differentiate beyond these broad categorizations.

[44] All of these examples of risk-informed regulation are discussed in more detail in EducationCounsel's February 2015 publication, *New Directions in Regulatory Reform: Prospects for Reducing Regulatory Burden Through Risk-Informed Approaches in Federal Law Governing American Higher Education,* available as Appendix III within the Senate Task Force Report, *supra* note 9, and as a stand alone document here: http://www.educationcounsel.com/docudepot/appendix%20iiv.pdf/

[45] Jonathan Coburn and Greg Weddle, *Risk-Based Regulation: Learning from the Experience of Others*, BIOPROCESS INT'L 22-23 (Sept. 2006); Travers, *supra* note 42.

[46] U.S. Nuclear Reg. Comm'n, Fact Sheet on Nuclear Reactor Risk (June 30, 2014), http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/reactor-risk.html.

[47] The statutorily created device classes are: (1) Class I devices are generally low risk and are mostly exempt from premarket review and are subject – unless exempt – to the requirements for reporting of adverse events, manufacturing and design controls, registration and listing, and other "general" controls. Surgical apparel and surgeon's gloves are examples of Class I devices. (2) Class II devices implicate generally moderate or well-understood risks, are subject to general controls, are usually subject to premarket review, and subject to enumerated "special controls" that are closely tailored to the specific risks presented by that particular device type. Ear, nose, and chin prostheses are examples of Class II devices. (3) Class III: Devices that generally present high or poorly understood risks. In addition to general controls, Class III devices are subject to premarket approval

and certain other regulatory controls. A special injectable paste designed to augment or reconstruct a vocal chord is an example of a Class III device. Food and Drug Admin. (FDA), Overview of Device Regulation, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/default.htm (last updated June 26, 2014); FDA, Device Classification Panels, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/ucm051530.htm (last updated June 26, 2014); FDA, FCC, ONC, FDASIA Health IT Report: Proposed Strategy and Recommendations for a Risk-Based Framework 29, n.76 (April 2014), http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDRH/CDRHReports/UCM391521.pdf.

[48] Hon. Dr. David Kemp and Andrew Norton, Review of the Demand Driven Funding System – Final Report 77 (2014), http://docs.education.gov.au/system/files/doc/other/review_of_the_demand_driven_funding_system_report_for_the_website.pdf.

[49] Australian Government Tertiary Education Quality and Standards Agency, TEQSA's Risk Assessment Framework Version 2.0 2 (March 2014), http://www.teqsa.gov.au/sites/default/files/publication-documents/TEQSARiskAssessFramework2014_0.pdf.

[50] Id. at Appx. 1.

[51] UK DEP'T OF BUS., INNOVATION AND SKILLS, HIGHER EDUCATION: STUDENTS AT THE HEART OF THE SYSTEM 10 (2011).

[52] Id. at 20-21.

[53] This section was developed in light of experience and several scholarly works. Resources that were particularly instructive can be found *supra* at note 42.

[54] This section was developed in light of experience and several scholarly works. Resources that were particularly instructive include: NACIQI Report, *supra* note 14; Matthew Finkin, CHEA, Who Watches the Watchman? Thoughts on the Federal Relationship to Accreditation in Higher Education (Jan. 2009), http://www.chea.org/pdf/2009_AC_Who_Watches_the_Watchman_Finkin.pdf; David Longanecker, *Higher Performance Higher Education: The Federal Role,* NEA HIGHER EDUC. J. (April 11, 1995), http://www.nea.org/assets/img/PubThoughtAndAction/TAA_95Spr_03.pdf.

[55] Russ Poulin, Proposed State Authorization Regulations: The Good, the Bad, and the Ugly, WCET Blog (Mar. 24, 2014) ("At least 19 state regulatory agencies would definitely be affected and it is a good guess that at least another ten would need to change processes. For another handful, it is unclear. [Another writer estimated that] three-quarters of the states would need to make changes. An estimate of 25 – 40 states seems reasonable."), http://wcetblog.wordpress.com/2014/03/24/authorization-good-bad-ugly/.

[56] In 1952 – out of concern that federal dollars would go to "fly by night" schools and "blind alley" programs" – the then-named U.S. Office of Education published list of "nationally recognized accrediting agencies and associations [determined] to be reliable authority as to the quality of training offered by an educational institution." If an institution was included on the list, it was eligible to receive veterans enrolling with funds provided by the GI Bill. Susan B. Hannah, Finding the Balance: A Political Analysis of the 2008 Reauthorization of the Higher Education Act 21 (2010), http://opus.ipfw.edu/polsci_facpres/57; Finkin, *supra* note 54, at 12.

[57] For purposes of this paper, we focus on the federal government's investments through funding federal financial aid programs for students, though it should be noted that the federal government invests in higher education in other important ways, including through a variety of research and development funding programs.

[58] Molly Corbett Broad, ACE, Recommendations from 39 Higher Education Associations for the Reauthorization of the Higher Education Act 9 (Aug. 2, 2013), http://www.acenet.edu/news-room/Documents/HEA-Reauthorization-Recs-080213.pdf.

[59] House Education and the Workforce Committee, Fact Sheets: Strengthening Transparency in Higher Education Act (June 26, 2014), http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=386105; see also H.R. 4983 (2014).

[60] Federal Student Aid, Program Reviews, https://studentaid.ed.gov/about/data-center/school/program-reviews (last accessed Feb. 9, 2015).

[61] Triggers for a program review, as defined in the HEA, include a cohort default rate over 25 percent; a cohort default rate in the top 25 percent of all institutions; significant fluctuation in Stafford Loan, Direct Loan, or Pell Grant volume; identified deficiencies or financial aid programs identified by the relevant state or accrediting agency; high annual dropout rates; and any other condition that USED determines poses "a significant risk of failure to comply" with federal requirements. HEA § 498A, 20 U.S.C. § 1099c; see also Federal Student Aid, Program Review Guide for Institutions (2009), http://www.ifap.ed.gov/programrevguide/attachments/2009ProgramReviewGuide.pdf.

[62] Specific considerations may include large increases in funding over a five-year period, a large proportion of overall federal funding, significant fluctuation in federal funding, sharp increases in enrollment, high default rates, high student default risk, high proportion or rate of complaints, low graduation rates, poor financial health, large proportion of funding toward recruiting and marketing, large profit margins [for proprietary institutions], negative action by an accrediting agency, prior compliance problems, large amounts of federal funds returned, and change in ownership [for proprietary institutions]). The bill allows USED to determine the final specific criteria as well as the processes for conducting for such reviews. Harkin HEA Reauthorization Discussion Draft (June 25, 2014), Sec. 498A(b)(3), http://www.help.senate.gov/imo/media/doc/HEAA%20Discussion%20Draft%20Language%206.25.14.pdf.

[63] Those institutions with a score of 1.5 or above are considered financially responsible, and no other requirements apply. Institutions with scores between 1.0 and 1.4 may continue to receive federal funding, but are required to submit to additional monitoring and oversight requirements. Institutions with scores below 1.0 only remain eligible for Title IV funding if they provide additional surety, such as a letter of credit equal to a minimum of 10 percent of the Title IV aid received in the institution's most recent fiscal year.

[64] Federal Student Aid, Financial Responsibility Composite Scores, http://studentaid.ed.gov/about/data-center/school/composite-scores (last accessed Sept. 18, 2014); KPMG Peat Marwick (on behalf of USED), Financial Ratio Analysis Project Final Report 4-1 (Aug. 1, 1996), http://www2.ed.gov/finaid/prof/resources/finresp/ratio/full.pdf.

[65] After the financial downturn of 2008-09, more than 100 non-profit colleges unexpectedly "failed" the financial ratios test, due in large part to decreases in endowment funds. Many of these colleges were forced to obtain letters of credit to maintain their Title IV eligibility, which can be an expensive, time-consuming endeavor. Report of the NAICU Financial Responsibility Task Force 5 (Nov. 2012), http://www.naicu.edu/docLib/20121119_NAICUFinan.Resp.FinalReport.pdf.

[66] Id.; New America Foundation, Federal Education Budget Project, Federal Student Loan Default Rates (Sept. 25, 2014), http://febp.newamerica.net/background-analysis/federal-student-loan-default-rates; U.S. Dep't of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (March 14, 2014), http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca; Gov't Accountability Office, Supplemental Student Loans: Who Borrows, Who Defaults (Oct. 1989), http://gao.justia.com/department-of-education/1989/10/supplemental-student-loans-hrd-90-33fs/HRD-90-33FS-full-report.pdf.

[67] 20 U.S.C. § 1085(a)(2); 34 C.F.R. § 668, subparts M and N. If an institution's three-year CDR is 30 percent or greater for three consecutive years, it loses Pell Grant and Direct Loan eligibility for three subsequent years; if an its CDR is greater than 40 percent in one year, it loses Direct Loan eligibility for three subsequent years. Institutions have an appeal right under relevant statutory and regulatory provisions. See U.S. Dep't of Educ., Fed. Student Aid, 2.4 Cohort Default Rate Effects, http://ifap.ed.gov/DefaultManagement/guide/attachments/

CDRGuideCh2Pt4CDREffects.pdf. Note that state law may also establish CDR expectations. See, e.g., Cali. Student Aid Comm'n, Discussion of CDR Manipulation (Nov. 21-22, 2013), http://www.csac.ca.gov/comm/sppc/20131121/exh4.pdf.

[70] Finkin, *supra* note 54, at 18. Another observer has called accreditors "overloaded pack animals" that face collapsing under the a great number of pressures: "an accreditation system designed by institutions to meet institutional needs but cast in the large and growing role of serving public purposes; a guild-centric system imbued with regulatory responsibilities; a pass/fail process in a world that craves rankings; a duality of purpose that seeks compliance at the same time that it offers consultation; a series of national mandates for action (like standards) and a regional distribution system that eschews sameness (like standardization); a call for transparency in a field not easily understood; and a series of frugal initiatives that are woefully undercapitalized." Robert C. Dickeson, CHEA, Recalibrating the Accreditation-Federal Relationship 2-3 (Jan. 2009), http://www.chea.org/pdf/2009_AC_Recalibrating_the_Accreditation-Federal_Relationship_Dickeson_wp.pdf.

[71] Molly Corbett Broad, *supra* note 58, at 16.

[72] One observer estimated that 45 states would need to make at least some changes. Russ Poulin, State Authorization Negotiated Rulemaking: What Happened? What's Next?, WCET BLOG (May 29, 2014), https://wcetblog.wordpress.com/2014/05/29/state-auth-negreg-what-happened/.

[73] Sophia McArdle from the Department made statements to this effect at the Presidents' Forum Annual Meeting in Washington, DC, on October 23, 2014.

[74] See Nat'l Council for State Authorization Reciprocity Agreements, http://www.nc-sara.org (last accessed Feb. 9, 2015).

[75] Sources reviewing the political history of the HEA that have been especially instructive during the development of this paper include: Advisory Subcommittee on Student Financial Assistance, *supra* note 9; Susan B. Hannah, Finding the Balance: A Political Analysis of the 2008 Reauthorization of the Higher Education Act (2010), http://opus.ipfw.edu/polsci_facpres/57; David Longanecker, Getting What You Pay For: What State Policymakers Should Know About Federal Higher Education Policy (Nov. 2008), http://www.wiche.edu/info/gwypf/dal_fedPolicy.pdf; TG Research & Analytical Services, Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later (Nov. 2005).

[76] Financial Services Commission of Ontario, Risk-Based Regulation: Framework Document 4 (2011), http://www.fsco.gov.on.ca/en/pensions/fsco_consultations/Documents/Framework_Final.pdf.