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**Regulatory Oversight of Student Financial Aid Through Accreditation of Institutions of Higher Education**

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The Department of Education ("ED") oversaw the distribution of $136 billion in federal funding in fiscal year 2013 to help more than 14 million students go to colleges, universities, and career education schools.\(^1\) Accreditors, and the review of their work by ED, help form the regulatory system that aims to ensure this funding is well spent.

The rise in enrollment in for-profit higher educational institutions, increasing more than 225 percent between 1998 and 2008,\(^2\) has stimulated legislative, regulatory and enforcement efforts, as well as a robust debate over the appropriate role of federal oversight in higher education.\(^3\) Much of this debate has focused on the best way to ensure the integrity of federal student financial aid programs, supporting students taking on debt, completing programs and then finding employment that enables them to repay the debt they have taken on.

These oversight efforts are often driven by concerns that for-profit higher education institutions are serving a large number of low-income students and federal student aid recipients, but have a profit motive that incentivizes them to enroll more students regardless of whether they can offer those students a high quality education that puts them on a path to success.\(^4\)

Many of the issues raised by advocates for these students are intrinsically tied to the question of whether or not the education provided by these for-profit institutions meets minimum standards of quality, and how ED could enforce such standards as a condition of these schools receiving federal student financial aid funds.\(^5\) Although students getting federal student financial

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\(^5\) Id.
aid might assume that if a for-profit school is accredited it has been found to meet a minimum standard of quality, unfortunately that is sometimes not the case.

This paper will explore the current state of for-profit education, the history of accreditation, current accreditation process and ED oversight of that process. In order to evaluate whether accreditation acts as an effective gatekeeper for federal funding, the paper first looks at strengths and weaknesses of third-party programs in general and then how the accreditation process and ED oversight over accreditors compares to other programs. Finally, this paper suggests ways to make federal oversight over the accreditation process more effective.6

Part I: Current State of For Profit Education

Originally, federal student financial aid funding, such as that authorized by the Higher Education Act ("HEA"), could only be used for education at public or private non-profit schools.7 For-profit colleges and universities did not get access to HEA student loan funds until the law was amended in 1972.8 Since then, the for-profit education industry has developed from “loosely affiliated, independently operated vocational schools to … [a] streamlined, highly sophisticated, and investor-focused” industry.9

For-profit institutions have taken on an increasing role serving students that have been underrepresented in higher education, and such as “students who are older, women, Black, Hispanic, or with low incomes… [s]ingle parents, students with a certificate of high school

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9 Matthew A. McGuire, Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid, 62 Duke L.J. 119, 129 (2012)
equivalency, and students with lower family incomes.”¹⁰ For-profit institutions argue that they are helping achieve the goal of the HEA, to expand access to higher education, by educating students that were not being served by more traditional schools.¹¹

For-profit colleges have not only dramatically increased enrollment over the last decade, they have also disproportionately increased their share of federal student financial aid funding. From 2000 to 2013, the share of federal student loan funds going to for profit colleges rose from 13 percent of all funding under Title IV of the HEA to 19 percent.¹² About 13 percent of all people pursuing higher education attend for-profit schools, but those students take out about 31 percent of all student loans.¹³ More concerning is that students attending for profit colleges are responsible for nearly half of defaults on student loans.¹⁴

The higher cost of attending for profit schools, as compared to public and private non-profit institutions, has helped drive this disproportionate use of federal student financial aid funding. While supporters argue that for-profit colleges have comparable costs when other public support for public and private non-profit schools is taken in to account, after reviewing the research ED determined that “average tuition and required fees at…for-profit institutions” range from more than double to as high as four times “the average cost at … public institutions.”¹⁵

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¹¹ Matthew A. McGuire, Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid, 62 Duke L.J. 119, 133 (2012)
¹⁴ Id.
In addition, much of the money paid to for-profit schools does not go to cover the cost of education. For-profit schools spend more money on recruiting and marketing (about 23 percent of revenues) than on student instruction (about 17 percent of revenue). An investigation by the U.S. Senate Committee on Health, Education, Labor & Pensions found that top for-profit schools employ 35,202 recruiters compared with 3,512 career services staff and 12,452 support services staff.

In an effort to rein in some of the problems perceived with these for-profit schools, recently issued regulations requiring career education programs receiving federal funds to prove that graduates of their programs are attaining “gainful employment.” In the regulation, ED outlined specific concerns that these programs are (1) failing to train students in the skills they will need to get and keep the jobs for which the program claims to be preparing them, (2) the low wages of the jobs that the programs will help graduates get fail to justify the high cost of completing the program, (3) large numbers of students enrolling and the failing to complete the program and then defaulting on their loans, and (4) “growing evidence, from Federal and State investigations and qui tam lawsuits… that aggressive and deceptive marketing and recruiting practices…” result in students “being pressured and misled” into investing in educational programs that are not in their best interest.

The Department of Education has responded to these concerns in a variety of ways, including: trying to end incentives for recruiters to use potentially abusive tactics to enroll

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17 Id.
19 Id. at 64890.
students and basing the eligibility on their graduates’ rate of loan repayment.\textsuperscript{20} The Department has also looked to strengthening the standards for accreditation, the process through which institutions and programs to become eligible to receive federal student financial aid funding.\textsuperscript{21}

**Part II: History of Accreditation**

The federal government has relied on accreditation to prevent fraud, and ensure federal student financial aid funds are well spent since the reauthorization of the GI Bill in 1952 for Korean War veterans.\textsuperscript{22} In response to fears that returning veterans would be duped by diploma mills and defrauded out of their educational benefits, the GI Bill reauthorization required that an educational program be accredited by an accreditor recognized on a list published by the U.S. Commissioner of Education in order to receive GI Bill funding.\textsuperscript{23} In this way, the GI Bill aimed to draw on the expertise of accreditors to weed out the good schools from the bad.

When the Higher Education Act (“HEA”) was passed in 1965, Congress built on this history by conditioning students’ use of federal student financial aid funds on their educational institution being accredited by a so-called “triad” of institutions: (1) the Department of Education which recognized and published a list of “responsible” higher education accreditors, (2) those accreditors recognized as “responsible”, and (3) state education agencies that authorized the operation of higher education institutions within their territory.\textsuperscript{24}


\textsuperscript{23} Id.

It is important to recognize that although the federal government has chosen to use accreditors as so-called “gatekeepers” to federal student financial aid funds, the creation of these accreditors pre-dates this federal role and accreditors’ history continues to shape their relationships with the federal government and the institutions they accredit.\textsuperscript{25}

Accreditors were created to meet a need produced by the “hands-off approach by federal and state government” that left American colleges and universities with a lack of oversight compared to foreign countries where ministries of education took responsibility for ensuring the quality of higher education.\textsuperscript{26} Historically in the United States, because federal authority over education was not enumerated in the Constitution, setting standards for higher education was considered a state rather than a federal responsibility.\textsuperscript{27} For example, public opposition to federal oversight over higher education prompted President Taft to halt a U.S. Bureau of Education proposal to “take on the task” of overseeing or setting standards for colleges and universities\textsuperscript{28} and opposition to strong federal oversight and standards-setting has continued.\textsuperscript{29}

In the absence of national leadership, educational institutions came together to create voluntary associations that built on the models of shared governance used to manage institutions of higher education, and aimed to recognize academic quality and support its improvement.\textsuperscript{30} For example, the Association of American Universities (“AAU”), a membership organization of research universities, was founded in 1900 and by 1912 the University of Berlin and other

\textsuperscript{25} Matthew W. Finkin, \textit{The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education}, 57 Law & Contemp. Probs. 89 (Autumn 1994).

\textsuperscript{26} Judith Areen, Accreditation Reconsidered, 96 Iowa L. Rev. 1471, 1474 (2011)

\textsuperscript{27} Matthew W. Finkin, \textit{The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education}, 57 Law & Contemp. Probs. 89 (Autumn 1994).

\textsuperscript{28} Judith Areen, Accreditation Reconsidered, 96 Iowa L. Rev. 1471, 1478 (2011)


\textsuperscript{30} Matthew W. Finkin, \textit{The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education}, 57 Law & Contemp. Probs. 89 (Autumn 1994).
European institutions had begun to refuse to recognize to any degrees awarded by institutions in the United States not accredited by AAU.  

As the AAU stepped away from taking on a role as a national accreditor for the United States, a series of other non-governmental associations came forward and eventually colleges and universities came together in six principle, voluntary, regional associations to take on the role of primary accreditors of higher education institutions in the United States, basing membership in their associations on merit. From 1936 to 1952, these regional accreditors developed a qualitative approach to judging schools based on their mission and overall “pattern” as institutions, allowing an institution with deficiencies in one area to make up for it with strengths in another, and still get accredited; this “self-study … remains the dominant process used for accreditation to this day.”

Despite concerns that federal funding from the 1944 GI bill went to diploma mills that failed to provide veterans with adequate education, opposition to fundamentally changing the hands-off role the federal government had taken to higher education remained strong. The federal government's initial relationship with accreditors from 1952 through 1974 (the first decade of the HEA) was one that trusted accreditors as reliable indicators of educational quality. When the 1952 reauthorization of the GI Bill required the U.S. Commissioner of Education to “publish a

32 Sarah Molinero, *Reexamining the Examiners, the Need for Increased Government Regulation of Accreditation in Higher Education* 51 Duq. L. Rev. 833 (Summer 2013)
34 Id.
list” of accreditors that would be a “reliable authority as to the quality of training offered by an educational institution,” the original six regional accreditors were all named.\textsuperscript{36}

However, when passage of the HEA in 1965 made a “massive and permanent expansion of federal funding,” higher education institutions had a new incentive to become accredited—to get access to federal student financial aid funds.\textsuperscript{37} Accreditors, however, did not see their role as changing just because of their new responsibility as gatekeepers of federal funds. As one accreditor official said, “We’ve never liked to view what we’ve been doing as being regulators.”\textsuperscript{38}

Although accreditors did not see their primary role as changing from one of promoting institutional improvement to safeguarding federal funding, the federal government gradually began to expand its administrative oversight of accreditors from 1974 to 1992, a period of “quasi-regulation.”\textsuperscript{39} This was driven by high student loan default rates and allegations of fraud and abuse, which helped “give rise to the accountability movement in the mid 1980s.”\textsuperscript{40} While accreditors tried to respond to these issues with voluntary measures to improve academic quality, in 1992 a new regulatory regime began, involving more intense federal oversight of accreditation.”\textsuperscript{41}


\textsuperscript{37} \textit{Id}.

\textsuperscript{38} \textit{Id.} at 11.


\textsuperscript{41} Matthew W. Finkin, \textit{The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education}, 57 Law & Contemp. Probs. 89, 93 (Autumn 1994).
The period from 1992 to the present has been seen more efforts to increase transparency and federal influence over the accreditation process, and opposition by accreditors trying to retain their traditional independence and primary authority over assessing academic quality. In response to concerns that the ED “recognition process does not assure that the accrediting agencies use appropriate and effective policies to accredit schools,” the House of Representatives version of the 1992 legislation reauthorizing the Higher Education Act proposed ending the link between accreditation and access to federal student financial aid funding. The final HEA reauthorization in 1992, instead of ending the role of accreditors as gatekeepers, created new regulations for accreditors, such as: limiting the scope of institutions to receive federal student loans for distance learning, banning incentive pay for recruiters of students, and limiting to 85 percent the amount of an institution’s budget that could come from federal student loan funds. Implementation of these rules succeeded in closing the some of the sub-par schools.

Most recently, in the Higher Education Opportunity Act of 2008, Congress rejected recommendations made by ED in 2006 to require accreditors to assess student achievement as a condition of continuing to be able to serve as gatekeepers to federal funds. However, ED has continued to use its role in setting criteria and making evaluations of accreditors to try to

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42 Kathleen Negri, Mortgaging the American Dream: The Misplaced Role of Accreditation in the Federal Student Loan System, 82 Fordham L. Rev. 1905, 1937 (2014) (“Accreditors are concerned that increasing government involvement could lead to the USDE acting as a “co-accreditor,” challenging accrediting bodies’ decisions and increasing control over the assessment process.”).

43 Jeffrey C. Martin, Recent Developments Concerning Accrediting Agencies in Postsecondary Education, 57 Law & Contemp. Probs., at 121, 139.


45 Matthew A. McGuire, Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid, 62 Duke L.J. 119, 157 (2012) (“After the implementation of the cohort default rate and the 90/10 rules in the early 1990s, many of the worst-offending schools were driven out of business and student defaults declined.”).

influence the accreditation process and the academic quality of institutions that are receiving federal student loan funds. In the latest effort, gainful employment regulations recently promulgated by ED use quantitative measures to enforce certain minimum standards on higher educational institutions, but may be ineffective if institutions continue to creatively find ways to game the system.47

Part III: Current State of the Accreditation Process

Regional accreditors, considered the “gold-standard” of higher education accreditation, generally accredit nonprofit, two- and four-year degree-granting institutions.48 These regional accreditors are responsible for accrediting higher education institutions within their geographic area, and base their accreditation on “standards are voted upon by the membership and are applied through commissions they designate.”49

In addition to these regional accreditors, there are national accreditors which generally are responsible for accrediting for-profit colleges, or trade specific colleges, and lastly programmatic accreditors that either accredit specific programs such as health care professional training programs, or specific types of professional schools, such as the American Bar Association accreditation of law schools.50 In general, because institutional rather than programmatic

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47 79 Fed. Reg. 64889 Program Integrity: Gainful Employment (Oct. 31, 2014). An example of institutions working to meet the letter but not the spirit of regulations is for-profit schools meeting the 90 percent cap on the share of their revenue that comes from federal student financial aid funds, but using a loophole that allows GI Bill education benefits as part of the last 10 percent (Jaclyn Patton, Encouraging Exploitation of the Military by for-Profit Colleges: The New GI Bill and the 90/10 Rule, 54 S. Tex. L. Rev. 425, 426 (2012) (“leaving GI Bill funds on the 10% side of the 90/10 Rule … leaves military members ripe for exploitation”).


accreditation governs access to federal funds, in this paper the term “accreditors” refers to institutional accreditors.

Accreditation serves four main purposes: quality assurance for academic institutions, controlling access to state and federal funds, fostering employers’ confidence in the quality of higher education credentials when considering job applicants, and enabling the transfer of credits between institutions of higher education.51 The Department of Education describes the accreditation process as ensuring “education provided by institutions of higher education meets basic, acceptable levels of quality.”52

Accreditation is based on a core set of values that shape the relationship between accreditors and the institutions that they accredit: that educational institutions are the leading authorities on, and bear primary responsibility for, academic quality; that the mission of an institution and institutional autonomy is “essential to sustaining and enhancing academic quality”53; that academic leadership fosters academic freedom; and that decentralization and diversity among higher education institutions and their missions help higher education thrive.54

The process of accreditation involves institutional “self-review and peer review” every three to 10 years which includes: “self-study by an institution or program” based on the standards of an accreditor; “peer review of an institution or program” that gathers evidence; and a decision by an accreditor “to accredit, accredit with conditions or not accredit an institution or program.”55 Peer-review is conducted primarily by faculty and administrators from the accreditor’s other

54 Id.
member institutions, and peers make up the majority of members of the commissions or boards that lead accreditors. Over time, standards that accreditors use to evaluate their member institutions have “moved away from a rigid application of quantitative measures, including admissions criteria and minimal academic standards.” Instead, accreditors assess their members qualitatively based on their educational mission and how well it is being accomplished.

In addition to being qualitative, the accreditation process as it stands now is fact-specific, and relies on subjective judgments rather than bright-line rules. That said, accreditors have sanctioned their member institutions for failing to meet their standards in areas including: academic quality, administrative capability, financial compliance, fraud, governance issues, or the institution’s long term plans for academic achievement.

Accreditors are generally funded through the dues of the institutions and programs that they accredit and have been recognized by courts, despite their role as gatekeepers of federal funds, as being non-governmental organizations. However, some concerns have been raised that adapting the accreditation process to better fit a gatekeeping role makes it more likely that

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56 Judith S. Eaton, Accreditation in the United States 145 New Directions for Higher Education at 82.
61 Judith S. Eaton, Accreditation in the United States 145 New Directions for Higher Education at 81.
62 Sarah Molinero, Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education, 51 Duq. L. Rev. 833, 844 (2013) (“Moreover, at least one federal court involved in accreditation litigation has been quick to recognize that accrediting agencies are not “arm[s] of government.”)(quoting Parsons Coll. v. N. Cent. Ass’n of Colls. & Secondary Sch., 271 F. Supp. 65, 70 (N.D. Ill. 1967)); cf. Auburn Univ. v. S. Ass’n of Colls. & Sch., 489 F. Supp. 2d 1362, 1370 (N.D. Ga. 2002) (Courts “have felt compelled to apportion some kind of public attribute to these agencies presumably because the agencies have become the gatekeeper to federal financial aid funds without which schools would be unable to function.”).
accreditors’ decisions will be treated as a kind of “state action,” which could impose additional, constitutional limitations on accreditors.63

Department of Education Process of Overseeing Accreditors

A college or university can only get access to federal student loan funds if they are accredited by an accreditor that has been recognized by the Secretary of Education as a “reliable authority as to the quality of education or training offered,” being able to meet the requirements of the HEA.64 To conduct this recognition process, the Secretary has published regulations that build on the process and criteria outlined in the HEA.65 Every five years or less, in order to maintain the status of the accreditor as a gatekeeper for federal student financial aid funds, an accreditor must be reviewed and continued to be recognized as “reliable.”66

The recognition process for accreditors mirrors the accreditation process itself.67 First, the accreditor submits an application (like the self-study) to ED, whose staff then conducts a review of the accreditor’s activities.68 The applications seek a particular scope of recognition, which includes the types of degree programs (two or four-year), distance learning or other programs for which the accreditor is applying for ED’s recognition.69 There is also a notice to the public in the Federal Register of the review, and an invitation for the public to submit comments on whether the Secretary should continue to recognize the accreditor.70 This is often done as part of the notice for the hearing of the National Advisory Committee on Institutional Quality and Integrity

64 20 U.S.C.A. §1099b.
65 Id.; 34 C.F.R. §602.
68 34 C.F.R. §602.32(a)
70 Id.
NACIQI was authorized in the 1992 amendments to the HEA “to assess the process of accreditation and the institutional eligibility and certification of institutions of higher education.”\textsuperscript{72} The NACIQI members are nominated by ED, the U.S. Senate and U.S. House of Representatives, and the current NACIQI includes faculty and administrators from higher education institutions, officials from accreditors, and other experts in academic accreditation—which makes the NACIQI review similar to the peer-review process of accreditation.\textsuperscript{73}

Department staff prepare a draft report regarding each application to which the accreditor is allowed to respond, and then a final report and recommendation which is shared with NACIQI and the Department’s decision-making official. NACIQI then meets publicly to take comments and make a separate NACIQI recommendation on whether or not to recognize the accreditor. Both the staff conducting the review and NACIQI may make a recommendation to “approve, deny, limit, suspend, or terminate recognition, require the submission of a compliance report…approve or deny a request for expansion of scope, or revise or affirm the scope” of an accreditor’s recognition.\textsuperscript{74} The Secretary of Education must then evaluate whether an accreditor “failed to apply effectively” the standards set out in the HEA statute and regulations.\textsuperscript{75}

It is important to note there are statutory limits on the Secretary’s authority that reflect the traditional independence of accreditors, and limit the authority and ability of ED to use the recognition of accreditors to directly set standards for academic institutions through the


\textsuperscript{72} 20 U.S.C.A. § 1011c (West)

\textsuperscript{73} Department of Education website, available at \texttt{http://www2.ed.gov/about/bdscomm/list/naciqi.html} last visited 1:00 p.m. January 2, 2015

\textsuperscript{74} 34 C.F.R. § 602.32; 34 C.F.R. § 602.34.

\textsuperscript{75} Matthew W. Finkin, \textit{The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education}, 57 Law & Contemp. Probs. 89, 106 (Autumn 1994).
accreditation process.\textsuperscript{76} For example, under the Department of Education Organization Act of 1980, ED is prohibited from making “determinations on curriculum and educational quality.”\textsuperscript{77} ED is also not permitted to “establish criteria” for accreditors that are “not required by” the statute, while accreditors are explicitly allowed to adopt “additional standards not provided for” in the law.\textsuperscript{78} In addition, ED may not “establish any criteria that specifies, defines, or prescribes the standards that accrediting agencies or associations shall use to assess any institution’s success with respect to student achievement.”\textsuperscript{79} The HEA also prohibits the agency or NACIQI from requiring “particular policies, procedures, or practices by institutions of higher education with respect to transfer of credit” or ED from “direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any institution of higher education, or over any accrediting agency or association.”\textsuperscript{80}

Substantively, under the recognition review process, the agency requires accreditors to demonstrate that they use criteria for “appropriate measure or measures of student achievement”\textsuperscript{81} and reliably evaluate whether an accreditor applies standards that respect the mission of an institution while ensuring the education offered is “of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered.”\textsuperscript{82}

Under the criteria that ED uses to evaluate their work, accreditors must, in their assessment of institutions, look at student achievement in relation to the institution’s mission;

\textsuperscript{76} 20 U.S.C.A. §1099b(g)
\textsuperscript{79} 34 C.F.R. § 602.32.
\textsuperscript{80} 20 U.S.C.A. § 1092 (West)
\textsuperscript{81} 20 U.S.C.A. §1099b(a)
curricula; faculty; facilities and equipment; whether fiscal and administrative capacity is appropriate to the scale of operations; student support services; admissions and recruiting practices, academic calendars, grading and advertising; program length and degrees or credentials offered; record of student complaints; and the institution’s record of compliance with requirements under the HEA. 83

**Part IV: Strengths and Weaknesses of Third Party Programs**

Looking to other third-party regulatory programs in which agencies have been directed by Congress to delegate (as in the HEA) or have chosen to delegate some oversight to non-governmental organizations can help evaluate the strengths and weaknesses of the current accreditation process and ED oversight over accreditors. Such an evaluation must consider the consequences of the delegation: the reliability of the program, the efficiency and effectiveness of accreditors in ensuring federal student financial aid programs meet their goals, and the impact on the government, higher education institutions and students.

The Administrative Conference of the United States (“ACUS”) has recommended that agencies design third-party programs to be rigorous in proportion to the risk of harm that could result from regulatory failures, incorporate existing standards to foster efficiencies for agencies and regulated entities, ensure public access to information, and exercise oversight to ensure the program fulfills its purpose. 84

The ACUS recommendation describes potential benefits of third-party programs such as: helping agencies regulate “increasing number of entities” without increasing regulatory resources; using non-governmental resources and expertise to regulate more effectively and at

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lower cost to the government; enabling more frequent and complete review of regulated entities; and helping agencies stretch their regulatory reach from domestic to global activity.\(^\text{85}\)

For example, in response to concerns about the low rates of inspection of foreign food facilities, a third party program was created under the Food Safety Modernization Act to enable the Food and Drug Administration (“FDA”) to ensure the safety of imported foods.\(^\text{86}\) In addition, when a GAO investigation found that self-certification under the Environmental Protection Agency’s (“EPA”) Energy Star program was subject to fraud and abuse, EPA used a third-party program to improve the reliability of Energy Star ratings.\(^\text{87}\)

However, the benefits of third-party programs are paired with potential risks that could “undermine the achievement of regulatory goals and impose unnecessary costs on agencies and regulated entities.”\(^\text{88}\) These risks relate to the “competence and independence of third-party actors, the extent of governmental control and oversight, and the management and coverage of third-party program costs.”\(^\text{89}\)

The third-party program that the FDA relied on in the past to audit food safety is an example of a third-party program subject to such risks, and failing to meet the goals of the regulatory program when a salmonella outbreak was found at the Peanut Corporation of America, which a third-party inspector gave a “superior rating,” and questions were raised about the reliability of the program.\(^\text{90}\) Financial audits, such as the scandal of Arthur Andersen or the credit ratings of debt instruments implicated in the subprime mortgage scandal, provide examples of the risks of

\(^{85}\) Id. at 2942.
\(^{87}\) Id.
\(^{90}\) Id.
third parties compromising their independence by relying on the entities they regulate to pay them for favorable reviews.\textsuperscript{91} These cases illustrate the risks of third parties with business interests in common with the entities that they regulate compromising the overall integrity of a regulatory program.

A third-party program can also be weakened by enforcement efforts based on the ease of the review rather than the relevance of the information. One study of third-party reviews of food safety found that “what are mostly audited are not the practices of suppliers, but their records.”\textsuperscript{92} This is an example of third-party review failing to meet its goals (in this case food safety) because its focus was misdirected to records rather than the actual practices of the entities it is supposed to help regulate.

\textit{Making Programs Rigorous in Proportion to their Risk}

Designing a third-party program proportional to the underlying risk means, for example, that serious risks to public health and safety correspond with rigorous assessment, whereas less serious risks might allow an agency to achieve its goal with a less rigorous program.\textsuperscript{93} Making a more rigorous program could include training and competency standards for third parties; rules to prevent or disclose conflicts of interest; specific requirements for third-party assessments; and reporting requirements.\textsuperscript{94}

One example of a rigorous third party program is the Food and Drug Administration (“FDA”) program conducting safety certification of medical device manufacturers under the


\textsuperscript{94} Id. at 2942-43.
Medical Device User Fee Modernization Act ("MDUFMA"). The program protects public health and safety by requiring accreditors recognized by FDA as Accredited Persons ("APs") to meet the conflict of interest restrictions, reporting requirements and competency standards, and for employees of an AP to get “complete classroom training conducted by the Association for the Advancement of Medical Instrumentation (AAMI) and the FDA” and complete joint inspections with the FDA, to demonstrate their competency.\(^95\)

This process also provides an example of conflict of interest rules that help make a third-party program rigorous, including preventing APs from being owned, operated or controlled by a manufacturer, supplier or vendor of any article regulated under MDUFMA, prohibiting their inspectors from providing consulting services, prohibiting inspectors or their families from having financial interests in regulated products, and prohibiting APs from accepting fees contingent on their report.\(^96\) FDA even keeps track of manufacturers’ requests to use a particular AP, and can stop inspections by an AP if their financial dependence on a manufacturer’s contract, or some other business relationship, creates a financial conflict of interest that is “cause for withdrawal of the AP’s accreditation.”

Another third-party program is the National Organic Program (NOP), administered by the Department of Agriculture’s Agricultural Marketing Service ("AMS"), which relies on third parties accredited by the AMS. The AMS accreditation standards prevent conflicts of interest by not allowing third parties to certify entities in which they have a commercial interest, preventing third parties’ employees from working on certification in which they have a commercial interest, prohibiting those employees from accepting any gifts or providing consulting services to entities they certify, requiring yearly reports disclosing any conflicts of interest, and preventing the


\(^{96}\) *Id.*
decision to certify an entity from being made by the same person who worked on previous certifications.\textsuperscript{97}

**Incorporating Existing Standards into Third Party Programs**

In addition, ACUS’ recommendation supports agencies’ incorporation of existing standards, to “avoid unnecessary duplication” and reduce costs for the agency and the entities it regulates.\textsuperscript{98} Using existing standards could allow the agency to rely on international recognition of third parties rather than making evaluations itself.\textsuperscript{99} For example, the AMS program mentioned above may accept a foreign government’s accreditation of foreign certifying agents in lieu of directly accrediting a third party to participate in the organic program.\textsuperscript{100}

In the absence of a standard articulated by Congress, the standard that some agencies identify as appropriate is the “national consensus standard.”\textsuperscript{101} The White House Office of Management and Budget Circular A-119 “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” directs federal agencies to use voluntary consensus standards instead of standards specifically set by the government unless those voluntary consensus standards are impractical or inconsistent with the law.\textsuperscript{102} Recently, the OMB proposed changes to Circular A-119 that would reflect the experience of federal agencies, new laws, Executive Orders on efforts to reduce regulatory burdens and

\textsuperscript{97} Id.
\textsuperscript{100} Id.
improve regulations, as well as implement trade agreements with foreign countries. The revisions would urge agencies to draw on criteria, adopted in part from the ACUS Recommendation 78-4, as to whether the voluntary consensus standard being considered from adoption substantively meets the agencies’ needs, and procedural considerations, regarding how the standard is developed.

Transparency and Information Reporting in Third-Party Programs

ACUS also recommends agencies ensure the government and the public have access to information about the third-party program, including opportunity for public notice and comment, and information about third parties’ identities and roles in the program. Reporting requirements help the agency exercise oversight, and ensure the integrity of the program.

For example, the FDA program to ensure the safety of medical devices requires APs to publically report their compliance with conflict of interest requirements. And the AMS requires third parties working with the NOP to make records of their certifications available on request.

Conducting Oversight, Setting Expectations

Lastly, ACUS recommends that agencies state how they will exercise oversight of third-party programs, for example through audits or market surveillance, and establishing clear consequences for third parties’ failure to comply with the agency’s requirements, such as suspending or ending participation in the program.

For example, the FDA may withdraw recognition of an AP participating in the 510(k)
medical device program if the agency finds that the AP has failed to comply with the “standards
of accreditation, such as failing to prevent a financial conflict of interest between the AP and an
entity that it has inspected for the agency.\textsuperscript{108}

\textbf{Strengths and Weaknesses of Accreditation and the Accrerator Oversight Process}

In James Q. Wilson’s \textit{The Bureaucracy Problem}, creating a bureaucracy appropriate to
achieve a particular goal includes defining that goal and balancing the need for general rules that
provide equity with the need for responsiveness that helps support and achieve the goal of the
program.\textsuperscript{109} According to ED, the goal of the accreditation program is ensuring that student
financial aid funds only can be used at higher education institutions that “meet[] acceptable
levels of quality.”\textsuperscript{110} Because academic quality has, for the past century and more, been judged
largely by qualitative rather than quantitative standards, evaluating the success of accreditors in
meeting this goal, and the success of ED in exercising its responsibility to oversee accreditors, is
challenging. However, the ongoing concerns over the perceived failure of accreditors and ED to
ensure quality of education (particularly at for-profit institutions) meets minimum standards,
indicates that the process needs improvement.\textsuperscript{111}

A recent Government Accountability Office (“GAO”) report questioned whether
accreditation ensures institutions meet an adequate level of quality, and protects the integrity of
federal student aid programs.\textsuperscript{112} In looking at accredditor oversight of institutions over four and a

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\textsuperscript{108} Lesley K. McAllister \textit{Third-Party Programs to Assess Regulatory Compliance} Administrative
\textsuperscript{110} Department of Education, website, \textit{available at}
\textsuperscript{111} See Part I.
\textsuperscript{112} Government Accountability Office “Education Should Strengthen Oversight of Schools and
half years, GAO found that accreditors sanctioned about 8 percent of their members for failing to meet standards, but that “schools with weaker student outcomes were, on average, no more likely to have been sanctioned by accreditors than schools with stronger student outcomes.” In addition, the GAO found a broad variation between accreditors that had taken action against as little as 2 percent of their members, compared to at least one accreditor that issued sanctions against 41 percent.  

Overall, accreditors of higher education institutions, unlike the several rigorous third party programs explored above, appear to lack independence, and bear inherent conflicts of interest in their decisions to accredit their members and give them access to federal financial aid funds. In addition, because accreditors historically grew out of voluntary associations making qualitative evaluations to help institutions improve, rather than regulatory institutions holding schools accountable for meeting minimum standards, accreditors “sometimes have difficulty in drawing a bright line for requirements.” Unfortunately, that is essentially ED’s goal for the program recognizing accreditors, to ensure institutions “meet acceptable levels of quality.”

Conflicts of Interest and Lack of Independence

The accreditation process of higher education institutions is “riddled with conflicts of interest and divergent incentives.” First, unlike the FDA, AMS and EPA programs described above,
which require third parties to remain independent of the entities that they help regulate, accreditors are membership organizations, and the higher education institutions that they are responsible for accrediting are their members.\textsuperscript{119} This means that the institutions that are subject to review by an accreditor also participate in the development of that accreditor’s standards, in that accreditor’s enforcement of those standards on fellow members, and in the overall leadership of the accreditor as an institution.\textsuperscript{120} One regional accreditor’s board, for example, draws 83 percent of its board members from employees of its member institutions.\textsuperscript{121}

Because accreditors’ members are reviewing each other’s institutions, there is a “high degree of collegiality in the [accreditation] process.”\textsuperscript{122} The teams of reviewers that help conduct the peer-review part of the accreditation “often know each other and have a desire to stay on good terms” which creates an incentive for people participating in the accrediting process to accredit and renew accreditation for their fellow member institutions.\textsuperscript{123} Whereas other agencies such as FDA have dealt with this kind of re-accreditation bias by limiting the ability of regulated entities to rely on the same accreditor for repeated evaluations, higher education accreditors generally have permanent relationships with their member institutions, and do not have a limit on re-accrediting institutions.\textsuperscript{124}

\begin{footnotes}
\item[119] See notes 95-97 and accompanying text, and Parts II & III.
\item[121] Andrew Gillen et. al., \textit{The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation} Center for College Affordability and Productivity at 9.
\item[123] \textit{Id}.
\end{footnotes}
Accreditors also have financial conflicts of interest.\textsuperscript{125} Because accreditors depend on the dues of members that they accredit for funding, and withdrawing accreditation will deprive the accreditor of funding, accreditors have a financial disincentive against terminating their members’ accreditation.\textsuperscript{126} Furthermore, in the case of national accreditors that serve for-profit colleges that can choose between competing accreditors, if an accreditor were to “crack down” and try to increase the standards that it held institutions accountable for meeting, the accreditor may risk losing the membership of institutions to a competitor.\textsuperscript{127}

\textit{Difference in Goals Between Accreditors and the Department of Education}

One of the reasons that the conflicts of interest outlined above are so problematic is that the goal of the federal program, to ensure that student financial aid funds go to schools that “meet adequate levels of quality” is different from the accreditors’ goal of supporting higher education institutions in their diverse missions and pursuit of academic improvement. Accreditors are not solely responsible to ED for their accreditation decisions; they are also influenced by other accreditors, other higher education institutions, and the public.\textsuperscript{128} One accreditor official told the

\begin{footnotesize}
\begin{enumerate}
\item[125] Patrick F. Linehan, \textit{Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations}, 89 Geo. L.J. 753, 785 (2001) (“[A]ccreditors [do not] have the same degree of financial interest in Title IV’s administrative integrity as the federal government does. As a result, the regulatory regime’s dependence on their involvement allows for some degree of lax enforcement.”)
\end{enumerate}
\end{footnotesize}
GAO that an accreditor that makes sanction or termination decisions may face “negative reaction from the public in the affected region, and a view that the accreditor is being too punitive.”

Lack of Reliability of the Accreditation Process

An ED review of higher education policy in 2006 found that accreditation has failed to put forward “solid evidence, comparable across institutions, of how much students learn in colleges or whether they learn more at one college or another.” In addition to the conflicts of interest discussed above, the accreditation process also has potential weaknesses in the competency of accreditors, particularly their peer-review teams. Compared to the FDA medical device safety program that requires APs to get training from the agency, accreditors’ reliance on peer-review reflects an attitude that “experience of working in the academy, in itself” is enough to prepare reviewers for their role, and the statute merely requires that accreditors’ review teams be “well-trained and knowledgeable with respect to their responsibilities.”

In addition to the procedural weaknesses in training and conflicts of interest, there are also substantive weaknesses and inconsistencies that undermine the reliability of the accreditation recognition process. Because of the historical independence of accreditors, continued opposition to a strong federal role in the regulation of academic quality, and statutory limits on the authority of ED, accreditation recognition requirements generally lack clear, substantive standards that accreditors could be held responsible for meeting.

130 Andrew Gillen et. al., The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation Center for College Affordability and Productivity, at 10.
131 Andrew Gillen et. al., The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation Center for College Affordability and Productivity, at 44.
133 Government Accountability Office “Education Should Strengthen Oversight of Schools and Accreditors” GAO 15-59, p. 8 (“However, the Higher Education Act does not dictate the specific content of the standards and prohibits Education from promulgating regulations with respect to such standards….
As a result of the lack of national standards, stemming from the historical development of accreditors as regional institutions, standards vary amongst accreditors, meaning that access to the same federal student financial aid funding could be enforced in different parts of the country or for different types institutions in different ways. Because “[b]ias thrives wherever there is the possibility of interpreting information in different ways” accreditors’ use of inconsistent, subjective standards means that accreditors (or their reviewers) conflicts of interest, such as the bias to reaccredit, could undermine the reliability of accreditation. In effect, accreditors have created a regulatory review with broad administrative discretion.

Accreditors do not even share the same definition of the types of corrective actions that they take, such as termination or probation, in the event that a member institution fails to meet an accreditor’s standards; regional accreditors came together to define different sanctions, but national accreditors have not yet done so. This means that even if these sanctions are reported to ED, as required under the HEA, the same sanction from different accreditors may have a different meaning.

In addition, similar to the food safety oversight issue in which the focus of third-party review was misdirected to the records rather than the practices of companies, a recent GAO review of accreditors found that the most common sanctions are for “financial rather than

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It also prohibits Education from establishing criteria to specify, define, or prescribe standards accreditors use to assess any school’s success with respect to student achievement.”); Patrick F. Linehan, Note Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations, 89 Geo. L.J. 753, 785 (2001) (“Department regulations provide little guidance as to the proper criteria that accrediting agencies should meet to be considered legitimate. Instead, the regulations focus on the procedures accrediting agencies should use in granting accreditation.”).  
134 See Part II.  
137 See note 92 and accompanying text.
academic problems.”

Accreditors themselves have acknowledged that evaluating academic quality has “more challenges” than monitoring financial health of institutions because of “limitations in currently available information on academic quality.”

GAO, in their recent report, went so far as to say that their “findings suggest that accreditors may be more likely to accredit schools that have stronger financial characteristics, even if they have weaker student outcomes.”

An example of a lack of substantive and consistent standards for accreditors leading to poor academic quality is the results of a recent investigation by the Department of Education Office of the Inspector General ("IG") into the standard for a “credit hour.” The “credit hour” is the basis for a student’s amount of federal student financial aid, but has not been standardized across accreditors. Despite a previous IG recommendation to standardize the definition of “credit hour,” such as by setting a requirement in statute for hours of instruction and classwork included in a “credit hour,” current law largely leaves that standard up to the discretion of accreditors and, as the IG found, many accreditors allow the institutions they accredit to define “credit hour” for themselves. Unfortunately, in addition to making it difficult to hold accreditors accountable for ensuring that a “credit hour” reflects an appropriate amount of instruction, the IG found that at least one regional accreditor had accredited an institution despite a “credit hour” definition well outside the norm.

142 Id. at 7.
143 Id.
The IG also found, as part of its review into “credit hour” standards, that the Higher Learning Commission (HLC, a regional accreditor) had accredited American InterContinental University (AIU) “despite its identification of problems with AIU’s assignment of credit hours,” such as 9-credit bachelor’s degree courses, and similarly inflated graduate courses.\textsuperscript{144} HLC decided to accredit AIU despite the peer-review team that evaluated the institution identifying problems with the “assignment of credit hours.”\textsuperscript{145} In response to the IG’s report, the Secretary of Education required HLC to take corrective action in order to continue to be recognized as a “reliable” accreditor.\textsuperscript{146} HLC objected to the IG report, maintaining that “the credit hour was always a fluid measure in higher education” and that HLC’s work as an accreditor was based on the “premise that faculty members and administrators…not representatives of state or federal government auditors, bring the appropriate expertise necessary for voluntary self-regulation….”\textsuperscript{147}

**Reporting Requirements and Lack of Transparency**

Reporting helps hold third parties participating in regulatory programs accountable for their work, and assists the agency in exercising oversight of the program. As a consequence of accreditors continuing to view their role as quality improvement rather than as regulatory, accreditors generally have insisted on keeping their records secret, rather than disclosing or reporting them to the government or public.\textsuperscript{148} Some accreditors argue that increased disclosure would chill the willingness of their member institutions to participate in robust self-review and


\textsuperscript{145} Id.


\textsuperscript{148} Andrew Gillen et. al., The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation Center for College Affordability and Productivity, at 14.
would be “a disincentive for colleges to speak openly with accreditors about their problems.”

In response to a proposed draft reauthorization of the HEA released by then-Chairman Harkin of the Senate Health, Education, Labor and Pensions (HELP) Committee, the Council for Higher Education Accreditation, in addition to expressing such concerns, also claimed that “current experience provides little evidence that the public reviews accreditation documents.”

This is important to keep in mind because some information that accreditors are already required to report is not currently being used even by the Department in its oversight, let alone the public. Accreditors are required to report to ED information about actions taken against member institutions, such as sanctions and terminations of accreditation. Unfortunately, the GAO recently found that ED does not systematically look at the information reported by accreditors, despite the records of “terminations, probations, warnings, and show cause orders” generally being included in the agency’s “database of accredited postsecondary schools.” In addition, GAO found instances in which ED failed to share notices about an accreditor sanction of an institution with the staff responsible for overseeing that institution’s compliance with the conditions of HEA. Looking at sanctions in 2012, in 36 of the 93 cases GAO found “no indication of follow-up activities” by Department staff.

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149 Id.
152 Government Accountability Office “Education Should Strengthen Oversight of Schools and Accreditors” GAO 15-59, at 36 (“According to Education officials who oversee accreditors, this database was created in response to a GAO report on diploma mills in 2004 to help the public identify accredited schools. It contains information on the frequency and type of accreditor actions, which may provide insight during recognition reviews…”)(citations omitted).
154 Id. at 33.
It is important to note that the problem with HLC accreditation of AIU was discovered by the IG as part of a special, unrelated investigation into the standard for a “credit hour,” rather than a regular review of the accreditor as part of the recognition process. In response to GAO’s recommendation to use sanction records as part of the accreditor recognition process, ED claimed “the department does not have the resources to undertake this effort.” The 300 studies of institutions currently planned by ED are dwarfed by the 3,134 regional accreditor member schools and 3,719 national accreditors members. Given ED’s limited resources in reviewing the work of accreditors, and the span of as many as five years between reviews, additional disclosure of information to the public and government could help make the most of limited oversight resources.

Effectiveness of Department of Education Recognition of Accreditors

Effective oversight over third-party programs depends on setting clear standards and consequences for violating those standards. While some of the procedure for reviewing accreditors is similar to other third-party programs, such as the allowance for ED staff to make site visits to and with accreditors, the Department’s review of accreditors is based in large part on standards developed by the accreditors themselves. In addition, the review process for recognizing accreditors is also based on information provided by the accreditors. The GAO noted that because ED lets “accreditors to demonstrate that they appropriately issue sanctions by selecting...examples,” accreditors are able to pick and choose the best examples to share with

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157 Id. at 40.
158 Id. at 6-7.
159 See note 105 and accompanying text.
ED as part of the review process. While ED has access to the records of all the sanctions issued by accreditors, which could provide a more comprehensive sample for evaluating the work of an accreditor, Department staff reviewing the recognition of accreditors do not currently use information from records of sanctions against member institutions, because such a consideration is not included in their regulatory review criteria.

Difficulty Accreditors Face Evaluating For-Profit Institutions

The leader of a regional accreditor testified to Congress that accreditors were “behind the curve” when it came to the increased entry of large private equity funded for-profit schools into higher education.

While accreditors have faced challenges in adequately monitoring for-profit schools, GAO recently reported that 80 percent of institutions whose accreditation was terminated by their accreditor, and “63 percent of schools placed on probation were for-profits, even though for-profit schools make up only about 38 percent of all schools participating in federal student aid programs.” Accreditors might argue this demonstrates that accreditation is working to close poor quality schools, but GAO found that national accreditors, 80 percent of whose members are for-profit institutions, were much more likely to issue sanctions based on financial issues, whereas regional accreditors, only 4 percent of whose members are for-profit, are more likely to issue sanctions based on academic quality. Similarly, for-profit institutions were more likely to

receive financial-related sanctions rather than academic sanctions.\textsuperscript{165} This suggests that there may be an enforcement bias, either because of the standard, method or competency of national accreditors, that focuses on financial rather than academic problems at institutions, compared to regional accreditors which are more likely to take action against members that are performing poorly on measures of student achievement, such as dropout and default rates.\textsuperscript{166}

For-profit colleges and universities pose a different challenge to the accreditation process because the nature of accreditation as a peer-review process depends on the mission of the institution, and the accreditors’ goal to improve academic quality can be incompatible with the goals of “companies that are more concerned with their bottom line.”\textsuperscript{167} In addition, because accreditors are membership organizations, even if an accreditor has been built around a mission, goals and standards shaped by the public and non-profit higher education institutions, the membership of for-profit institutions in the accreditor, and their subsequent participation in accrediting decisions as well as the leadership and policy development of accreditors, means that the for-profit goals of those companies have an opportunity (as well as an interest) in working to relax their accreditors’ standards.\textsuperscript{168}

One example of how for-profit schools have disrupted established accreditation processes and standards is that, because accreditation was serving as a “barrier to entry” to for-profit schools, some companies chose to purchase non-profit institutions in order to gain their

\begin{itemize}
\item \textsuperscript{165} Id. at 7-21.
\item \textsuperscript{166} Id. at 24.
\item \textsuperscript{167} S. Health, Educ., Labor & Pensions Comm., 112th Cong., \textit{For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success} 10, 144 (2012).
\item \textsuperscript{168} Patrick Linehan, Note, \textit{Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations}, 89 Geo. L.J. 753, 785 (2001) (“[A]ccrediting agencies [have been permitted] to evolve from independent regulatory entities to associations representing the interests of proprietary schools.”).
\end{itemize}
accredited status. This change in ownership generally does not trigger a full review by an accreditor, so a for-profit school could enter the market without going through the accreditation process as a new institution.

The scope of accreditors’ reviews has also been difficult to adapt to for-profit institutions. In some cases, for-profit colleges have a number of campuses in different locations, or provide distance education to a larger number of students than an accreditor has experience in evaluating. For example, HLC’s accreditation of American Intercontinental University discussed above, in which the accreditor provided allowance for AIU to put in place later corrective action to address egregious “credit hour” inflation, was an example of a traditional, regional accreditor that represented the “gold-standard” of higher education accreditation applying its same standards to an online, for-profit institution. Rather than being reassured by the improvement goals HLC put in place, the Department demanded immediate action and argued that allowing the inflated credits to stand, even as AIU underwent reforms over a period of years, was a failure of accreditation.

Part V: Recommendations for Improvement

In maintaining independent roles as quality improvement rather than regulatory institutions, and refusing to change their process to accommodate their role as gatekeepers to federal funds, accreditors have created a kind of system of unstructured discretion. In

170 Andrew Gillen et. al., The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation Center for College Affordability and Productivity, at 19. However, the Higher Learning Commission “recently refused to transfer Dana College’s accreditation to a group of investors because the accreditor speculated that the owners would alter the school’s mission, effectively forcing the closure of the 126 year old private college.” (Id.)
172 Vasanth Sridharan, The Debt Crisis in for-Profit Education: How the Industry Has Used Federal Dollars to Send Thousands of Students into Default, 19 Geo. J. on Poverty L. & Pol'y 331, 343 (2012)
Discretionary Justice, Kenneth Culp Davis proposed a structured discretion that would “not try to replace discretion with rules but to locate the proper balance between rule and discretion.”\(^\text{173}\)

Accreditors’ opposition to substantive, objective standards of student achievement that would hold higher education institutions accountable for the outcomes of investments in higher education, leaves accreditors with dangerously broad discretion, and has served as a poor foundation for efforts to ensure the integrity of student financial aid programs.

The recommendations below look for ways to find a better balance. The weaknesses and lack of reliability of the current accreditation and accreditor oversight process has prompted proposals that range from doing away with accreditors as gatekeepers entirely, to reforming or creating new accreditors that would better serve that role.\(^\text{174}\) Because of the likely political and policy opposition to proposals at either extreme, this paper focuses on steps that the Department of Education could take under existing statutory and regulatory authority.

Leveraging Non-Governmental Resources to Inform Oversight through Public Comment

One way to increase the effectiveness of the Department’s recognition process is to leverage public resources through facilitating more robust public notice and comment in the current review process. While the Department lacks the resources to inspect every institution and gather detailed about individual higher education institutions that are members of an accreditor under review, consumer advocates and other public interest organizations may be able to aggregate information and, if presented as part of the process, help inform ED of mistakes made by the accreditor.

The current accreditor oversight process allows for input from the public, and draws on it to guide oversight of accreditation organizations when it is submitted. Unfortunately, the current


\(^{174}\) Andrew Gillen et. al., *The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation* Center for College Affordability and Productivity; *see also* note 44.
process fails to effectively engage advocates, teachers, students or parties in a position to report on the academic quality of an accreditor’s members. For example, the notices to the public inviting comment on an accreditor under review are currently published in the Federal Register under the title “Notice: National Advisory Committee on Institutional Quality and Integrity (NACIQI)” and are primarily announcements of upcoming NACIQI meetings.\(^{175}\) While the Department has provided a way for the public to submit comments, only four out of the last 31 reviews of regional and national institutional accreditors received public comments, and in many cases the comments were not tailored to effectively engage with the criteria ED uses to evaluate accreditors.\(^{176}\) If the Department increased its outreach activities to provide the public with clear notice of upcoming accreditor reviews and work to solicit rather than simply permit public comment, the agency could leverage public interest in student financial aid program integrity, and draw on non-governmental resources to help improve oversight of accreditors. This idea of public participation in the regulatory process draws on the “fire alarm” concept that Mathew McCubbins and Thomas Schwartz described as helping Congress exercise oversight over federal agencies, in which interest groups essentially sound and alarm when they observe something has gone wrong.\(^{177}\)

An example of how this could work in practice is the problem regarding the accreditation of programs that purport to prepare students for a career but, because the program lacks the recognition from the professional association that operates the licensing examinations, students find they are barred from taking the exam that will enable them to get a job in their chosen

\(^{175}\) See note 71 and accompanying text.

\(^{176}\) Review of records of accreditation decisions, available on Department of Education, Accreditation and State Liaison website, https://opeweb.ed.gov/aslweb/finalstaffreports.cfm (last visited Apr. 16, 2015 at 10:00 a.m.).

field. The criteria for accreditors include “student achievement in relation to the institution's mission…including, as appropriate, consideration of State licensing examinations, consideration of course completion, and job placement rates.” Engaging advocates concerned about this issue, gathering information regarding this criteria against which accreditors’ work is evaluated, could help increase public comments, ensure comments are relevant, and could be used as part of the accreditor recognition review process. Public engagement and information could also help the Department work with accreditors to end educational programs that leave students unable to get a job in their chosen profession.

This specific example of this potential reform will likely draw some opposition from accreditors. The Council for Higher Education Accreditation (a national association of accreditors and higher education institutions) recently wrote to Senator Harkin in opposition to a provision in his Higher Education Act reauthorization proposal that would require accreditors to ensure their members have the programmatic or specialized accreditation that will allow their students to sit for necessary licensing examinations, and get jobs in their chosen field.

Improving Oversight by the Department of Education

Since accreditors already report information about the sanctions that they have issued to member institutions, as GAO recommended, the Department could better use this information to target enforcement efforts of institutions and inform the review of accreditors. For example, data on accreditor sanctions, such as the frequency of sanctions, or the comparison of financial sanctions versus sanctions based on problems with academic quality, could help ED identify

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179 34 C.F.R. § 602.
previously overlooked issues in the accreditor review process.\textsuperscript{182} Increasing transparency by requiring accreditors to publish their findings regarding institutions they review would give the government and the public additional information, and provide an insight into the academic quality of an institution beyond simply whether or not it was accredited.\textsuperscript{183} Particularly since accreditors base their judgments on the mission of a particular institution, and the specific facts before peers conducting the review.\textsuperscript{184}

\textit{Increasing Competition Between Accreditors}

Focusing enforcement efforts on bringing the rigor of review by national accreditors up to the perceived level of review by regional accreditors could increase competition among accreditors, and provide institutions that have been locked into relationships with regional accreditors with another option. The Department of Defense (“DOD”) used a similar strategy in response to a GAO report that found lax oversight was allowing GI Bill educational funds to be used for low-quality education at for-profit schools.\textsuperscript{185} The DOD ended its contract with an accreditor that had been listed by ED and looked for an alternative accreditor that would “hold for-profit schools accountable.”\textsuperscript{186}

\textbf{Conclusion}

Although no regulatory system is perfect, the weaknesses of the current accreditation process clearly leave federal student financial aid funds vulnerable to waste, fraud and abuse, particularly at the hands of for-profit institutions. The origin of many of these weaknesses (such as the lack of independence, conflicts of interest, and lack of standards) lies in the history and

\textsuperscript{182} \textit{Id.}
\textsuperscript{183} Andrew Gillen et. al., \textit{The Inmates Running the Asylum?: An Analysis of Higher Education Accreditation} Center for College Affordability and Productivity, at 27.
\textsuperscript{184} See Parts II & III.
\textsuperscript{186} \textit{Id.}
development of accreditors over the last century. In order to forge a balanced path forward that protects students and the integrity of the federal student financial aid programs, as well as maintaining the academic quality and independence of higher education institutions, the Department of Education must help accreditors adapt. Incremental changes to the accreditor recognition process, such as public engagement and targeted enforcement based on sanction data can provide a continuing path forward for change while Congress continues to debate the next Higher Education Act reauthorization in the 114th Congress.