Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education

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By Jeffrey S. Lubbers*

As the Alternative Dispute Resolution (ADR) movement made its way from the courts to the agency hearing rooms in the 1980s, negotiated rulemaking (sometimes called “regulatory negotiation” or simply “reg-neg”) also emerged on a parallel track as an alternative to traditional procedures for drafting proposed regulations.

This exemplar of “regulatory reform” was based on two insights: (1) that the usual Administrative Procedure Act (APA) process of written notice-and-comment rulemaking has an intrinsic limitation because stakeholders engaged in it do not interact with each other or with the agency, and (2) in certain situations it is possible to bring together representatives of the agency and the various affected interest groups to negotiate the text of a proposed rule. If stakeholders are able to negotiate a consensus on a draft proposed rule, the resulting final rule is likely to be issued more quickly, easier to implement, and less likely to be subsequently challenged in court. Moreover, even in the absence of consensus on a draft rule, the process may be valuable as a means of better informing the regulatory agency of the issues and the concerns of the affected interests. For these reasons, negotiated rulemaking was seen as an appropriate application of ADR principles to the rulemaking process.

After its development in recommendations by the Administrative Conference of the United States (ACUS), its use was codified by the Negotiated Rulemaking Act (NRA), enacted in 1990 and made permanent in 1996. Both the ACUS recommendations and the NRA make clear that its use is only advisable in certain circumstances—after the agency concerned used a “convener” to explore whether the proposed rulemaking lends itself to a successful negotiation. The NRA established a basic statutory framework for agency use of negotiated rulemaking. It serves to supplement the rulemaking provisions of the APA, largely codifies the practice of those agencies that had previously used the procedure, and incorporates relevant ACUS recommendations.

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1 As prescribed in 5 U.S.C. § 553.


4 See supra, note 2. See also Administrative Conference of the United States, NEGOTIATED RULEMAKING SOURCEBOOK (2d ed. 1995).
does not require use of the technique; rather it was intended to clarify agency authority and to encourage agency use of the process, allowing each agency the discretion whether to employ it.

There was an initial groundswell of agency interest in the 1990s, but as I have lamented, its use has waned in the 2000s. Nevertheless, Congress has continued to require its use in certain narrow areas of regulation through specific legislation. One of those areas is Section 492 of the Higher Education Act, as amended by the Higher Education Amendments of 1998, which requires that all Title IV regulations promulgated after the enactment of the Amendments of 1998 be subject to a negotiated rulemaking process. The process mandated by this legislation differs in some significant ways from “classical reg-neg” envisioned by ACUS and the Negotiated Rulemaking Act. This paper will explore how it is has worked at the U.S. Department of Education (ED) and suggest some ways of making it work better.

Overview of “Classical” Negotiated Rulemaking

As mentioned above, when an agency goes forward with a negotiated rulemaking, the agency, with the assistance of its convener, assembles a committee of representatives of all identifiable affected interests willing to negotiate the proposed rule. The goal of the process is to reach consensus on a text that the agency and all the stakeholders can accept. The agency is supposed to be represented at the table by an official who is sufficiently senior to be able to speak authoritatively on its behalf. Negotiating sessions, however, are chaired not by the agency representative, but by a neutral mediator (“facilitator”) skilled in assisting in the resolution of multiparty disputes.

Although the NRA sets forth some basic public notice requirements, most of the language is permissive. It sets forth several criteria to be considered when an agency determines whether to use reg-neg. These include (1) whether there are a limited number of identifiable interests—usually not more than twenty-five, including any relevant government agencies—that will be significantly affected by the rule; (2) whether a balanced committee can be convened that can adequately represent the various interests and negotiate in good faith to reach a consensus on a proposed rule; (3) whether the negotiation process will not unreasonably delay issuance of the rule; (4) whether the agency has adequate resources to support the negotiating committee; and (5) whether the agency—to the maximum extent consistent with its legal obligations—will use a committee consensus as the basis for a proposed rule. These criteria are based on the ACUS recommendations and actual agency experience using the process.

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7 Much of this initial overview is adapted from Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 190-94 (5th ed.) (American Bar Ass’n 2012).

8 See Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 327 (5th Cir. 2001) (“The plain language of the statute undermines the notion that the NRA’s procedures are mandatory.”).

In “regular” rulemaking, absent special circumstances, the APA requires an agency planning to adopt a rule on a particular subject to publish a proposed rule in the Federal Register and to offer the public an opportunity to submit written comments.\(^{10}\) However, the APA does not specify who is to draft the proposed rule nor any particular procedure to govern the drafting process. It is purely an institutional decision; ordinarily agency staff performs this function, with discretion to determine how much opportunity for public input to allow. Any agency contacts with regulated parties or the general public while the agency is considering or drafting a proposed rule are usually informal and unstructured, and some agencies bar such “ex parte” contacts after the issuance of the notice of proposed rulemaking.\(^ {11}\) Typically, there is no opportunity for interchange of views among potentially affected parties, even where an agency chooses to conduct an oral hearing.

The dynamics of the normal rulemaking process tend to encourage interested parties to take extreme positions in their written and oral statements—in pre-proposal contacts as well as in comments on any published proposed rule. They may choose to withhold information that they view as damaging. A party may appear to put equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. There is usually little willingness to recognize the legitimate viewpoints of others. This adversarial atmosphere often contributes to the expense and delay associated with regulatory proceedings, as parties try to position themselves for the expected litigation. What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems. This is what reg-neg is intended to provide.

However, it should be remembered that negotiated rulemaking is a supplement to the rulemaking provisions of the APA. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule. In some instances, renewed negotiations may be appropriate at a later stage of the proceeding. But negotiated rulemaking does not reduce in any way the agency’s obligations to follow the APA process, to produce a rule within its statutory authority, or to adequately explain the result.

The Classical Negotiated Rulemaking Process

The Negotiated Rulemaking Act authorizes use of a convener to report on the feasibility of undertaking a negotiated rulemaking.\(^ {12}\) If the agency decides to go forward, its public notice announcing its intent to use the procedure is supposed to provide an opportunity, for at least 30 days, for members of the public who believe they are inadequately represented on the negotiating

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\(^{10}\) See 5 U.S.C. § 553.

\(^{11}\) See, e.g., Department of Transportation Order No. 2100.2 (1970). Ex parte communications are discouraged after the end of the comment period. After the notice of proposed rulemaking is published, all communications must be reduced to writing and promptly placed in the public docket. Summaries should include list of participants, summary of discussion, and statement of commitments made by Department of Transportation personnel.

committee to apply for membership or better representation, though the agency retains discretion as to whether to grant such requests. If, after considering the public responses to the published notice of intent to establish a negotiating committee, the agency determines not to do so, the agency should publish a notice of that fact and the reasons for the decision.

The agency must comply with the Federal Advisory Committee Act (FACA) in establishing and administering the negotiating committee, although other agency procedural actions relating to establishing, assisting, or terminating the committee are not subject to judicial review. However, the otherwise available judicial review of a rule is not affected by the fact that it resulted from a negotiated rulemaking, and the Negotiated Rulemaking Act even specifies that a reviewing court is not supposed to accord such a rule any greater deference merely because of the procedure followed.

It is assumed that the agency will be represented on the committee, but committee meetings are to be chaired by an impartial “facilitator” who assists the committee in its deliberations. If the committee reaches consensus on a proposed rule, it transmits to the agency a report containing the proposal. Consensus is defined as unanimous concurrence among the interests represented, unless the committee agrees on a different definition. If the committee does not reach consensus on a rule, it may transmit to the agency whatever information, recommendations, or other material it considers appropriate. The agency may keep a negotiating committee in existence until promulgation of the final rule, but earlier termination is permitted if the agency or the committee so chooses.

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14 Id. § 565(a).
17 5 U.S.C. § 570. See also Ctr. for Law & Educ. v. Dep’t of Educ., 396 F.3d 1152 (D.C. Cir. 2005) (denying an advocacy group standing to challenge final rule on the basis of an alleged defect in the composition of a negotiated rulemaking committee).
18 5 U.S.C. § 570. However, courts obviously know that a rule has been a product of negotiated rulemaking. See, e.g., Steel Joist Inst. v. Occupational Safety & Health Admin., 287 F.3d 1165, 1166 (upholding a rule and noting that it was “based on a consensus document submitted by a rulemaking advisory committee in a negotiated rulemaking”); Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1544 (9th Cir. 1993) (upholding a negotiated sulfur dioxide emission rule designed to improve visibility at the Grand Canyon).
19 5 U.S.C. §§ 565(b), 566.
20 Id. § 566(f).
21 Id. § 562(2).
22 Id. § 566(f).
23 Id. § 567. But see Jody Freeman & Laura I. Langbein, Regulatory Negotiation and the Legitimacy Benefit, 9 N.Y.U. ENVTL. L.J. 60, 135 (2000) (recommending “that agencies maintain negotiating committees through rule promulgation, rather than disbanding them upon reaching consensus,” and suggesting “that agencies experiment with keeping committees intact, or recalling them periodically, for post-promulgation consultation, perhaps through the implementation period”).
Agencies may contract with private parties or may use government employees to act as facilitators, or to assist the agency in the “convening” process.\textsuperscript{24} Agencies are authorized to pay expenses of certain committee members in accordance with the FACA, and agencies are authorized to accept outside funds and use them in planning or conducting negotiated rulemakings if no conflict of interest is created.\textsuperscript{25}

For reg-neg to be successful there should be a number of diverse issues that participants can rank according to their own priorities, so that each of the participants may be able to find room for compromise on some of the issues as an agreement is sought. However, it is essential that the issues to be negotiated not require compromise of principles so fundamental to the parties that meaningful negotiations are impossible. Parties must indicate a willingness to negotiate in good faith, and no single interest should be able to dominate the negotiations.

The existence of a deadline for completing negotiations, whether imposed by statute, by the agency, or by other circumstances, has been found to impart a degree of urgency that can aid the negotiators in reaching a consensus on a proposed rule. On the other hand, where the participants feel that they have a strong “BATNA” (best alternative to a negotiated agreement),\textsuperscript{26} such as hope of obtaining a better result from the agency or Congress through the political process, the chances of an agreement are reduced.

If a consensus is achieved by the committee, the agency ordinarily would publish the draft rule based on that consensus in a notice of proposed rulemaking—and the agency would have committed itself in advance to doing so. Such a commitment is not an abdication of the agency’s statutory responsibility, for there would not be a consensus without the agency’s concurrence in the committee’s proposed rule.\textsuperscript{27} Even negotiations that result in less than full consensus on a draft rule can still be very useful to the agency by narrowing the issues in dispute, identifying information necessary to resolve issues, ranking priorities, and finding potentially acceptable solutions.\textsuperscript{28}

\textsuperscript{24} 5 U.S.C. § 568.

\textsuperscript{25} Id. § 569, amended, Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873. This provision was modified to take account of the then-recent (but later rescinded) closure of ACUS, which previously was authorized to accept and pay out such funds. See Administrative Conference of the United States, Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act—A Report to Congress (1995).

\textsuperscript{26} See Roger Fisher, William Ury, & Bruce Patton, Getting To Yes 97-106 (2d. ed. 1991) (describing the concept of BATNA).

\textsuperscript{27} Nor would such an agreement undercut the agency’s authority to make changes at the final rule stage. See Natural Res. Def. Council v. EPA, 859 F.2d 156, 194-95 (D.C. Cir. 1988).

\textsuperscript{28} There remains a lively debate on the pros and cons of negotiated rulemaking. See generally, Symposium, Twenty-Eighth Annual Administrative Law Issue, 46 DUKE L.J. 1255 (1997). Several critics have argued that negotiated rulemaking allows agencies to transfer too much control to private parties. See William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 DUKE L.J. 1351 (1997); Susan Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 DUKE L.J. 1206 (1994); William Funk, When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards, 18 ENVTL. L. 55 (1987) (arguing that EPA’s negotiated woodstove emissions rule went beyond the bounds of the Clean Air Act). Cary Coglianese has challenged empirically the basic assumption that regulatory negotiation has produced faster and less litigated rules. See Cary Coglianese, Assessing the Advocacy of Negotiated
Department of Education Negotiated Rulemaking

Statutory Requirements

Section 492 of the Higher Education Act, as amended by the Higher Education Amendments of 1998, requires that, absent good cause for not doing so, all Title IV regulations promulgated after the enactment of the Amendments of 1998 be subject to a negotiated rulemaking process. This represented an expansion of the statutory mandate to use reg-neg (introduced for some aspects of Title IV in the 1992 Amendments) to all of Title IV. In place of the convening activity that would precede a decision to undertake a classical reg-neg, the statute mandates a consultation process.

More specifically, before engaging in the actual negotiation of a proposed regulation, the Secretary must first “obtain advice and recommendations from individuals and groups involved in student financial assistance . . . such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies” and must provide for a comprehensive discussion and exchange of information concerning the implementation of Title IV of the HEA. This requirement “to obtain advice and recommendations” has been implemented in practice by the Department through a series of “pre-reg-neg” public hearings that are held before proposals are put before a negotiating committee.


On the other hand, the authors of several empirical studies have strenuously rebutted the critics. See Philip J. Harter, A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow’s Essay on Deliberative Democracy, 5 NEV. L.J. 379 (2004-05) (summarizing his arguments in response to critics of regulatory negotiation); Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U. ENVTL. L.J. 32 (2000) (rebuttering Professor Coglianese); Laura I. Langbein & Cornelius M. Kerwin, Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000) (finding that participants felt negotiated rules were superior, and more likely to be implemented, than conventional rules); Jody Freeman & Laura I. Langbein, Regulatory Negotiation and the Legitimacy Benefit, 9 N.Y.U. ENVTL. L.J. 60 (2000) (finding significant legitimacy benefit); see also Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Choosing How to Regulate, 29 HARV. ENVTL. L. REV. 179, 195-202 (2005) (finding good arguments on both sides, but generally siding with Coglianese on empirical debate with Harter).


30 See 20 U.S.C. § 1098a(b)(2), specifying that negotiated rulemaking is not required if “the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within the meaning of section 553 (b)(3)(B) of title 5).”

31 I note that this paper covers ED rulemaking under the Higher Education Act. The Department is also required to use reg-neg by a special provision of the No Child Left Behind Act, 20 U.S.C. § 6571(b). The Department failed to achieve consensus in its one reg-neg under this Act, and only held one committee session. Its attempt was criticized in Danielle Holley-Walker, The Importance of Negotiated Rulemaking to the No Child Left Behind Act, 85 NEB. L. REV. 1015 (2007) (arguing that the Department improperly implemented the reg-neg requirement). The Department’s reg-neg practices in that rulemaking were challenged in Ctr. for Law & Educ. v. Dep’t of Educ., 315 F. Supp. 2d 15 (D.D.C. 2004) (dismissed on standing grounds). I was told by one former ED official in the Higher Education Office that “we briefed them on how we did it, but they didn’t follow our advice very well.”

32 See 20 U.S.C. § 1098a(a)
According to the statute, all published proposed regulations must conform to any agreements resulting from the negotiated rulemaking process unless the Secretary reopens the negotiated rulemaking process, or provides a written explanation to the participants in that process why the Secretary has decided to depart from the agreements.

The Act is quite detailed concerning the selection of members of the reg-neg committee:

Participants in the negotiations process shall be chosen by the Secretary from individuals nominated by groups described [above], and shall include both representatives of such groups from Washington, D.C., and industry participants. The Secretary shall select individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity in the industry, representing both large and small participants, as well as individuals serving local areas and national markets.

In addition, the Department must operate under several strict time constraints in issuing regulations. It is supposed to issue regulations implementing statutory changes within 360 days of enactment,33 and, accordingly, the Act specifies that the “negotiation process shall be conducted in a timely manner in order that the final regulations may be issued by the Secretary within the 360-day period.”34 Even more significantly, the Department is also subject to a “master calendar” requiring that any final rules containing regulatory changes must be published by November 1 in order to be effective by July 1 of the following year.35 This means that a rule that misses the November 1 date may not go into effect for 19 months. These two requirements combine to put a lot of time pressure on the Department to complete the required negotiating phase of the process.

Unlike other agencies’ reg-negs, the Department of Education’s are exempted from the requirements of the Federal Advisory Committee Act;36 nevertheless the Department opens the negotiating meetings to the public.37

The Department’s Negotiated Rulemaking Practice

After the 1992 Amendments but before the 1998 Amendments, the Department of Education had used negotiated rulemaking several times,38 but after the 1998 amendments, its use

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34 20 U.S.C. § 1098a(b)(1). It should be noted that the Department’s violation of these deadlines does not negate its ability to issue rules after the deadline.
35 See 20 U.S.C. § 1089(c) (November 1 deadline for rules applying to next award year), and 20 U.S.C. § 1088(a) (defining “award year” as beginning on July 1).
36 20 U.S.C. § 1098a(c).
38 I found five reg-neg committees in that period:
   • Office of Postsecondary Education; The Higher Education Amendments of 1992; Negotiated Rulemaking, 34 CFR Chapter VI, 57 Fed. Reg. 62,533 (Dec. 31, 1992);
   • Office of Postsecondary Education; Direct Student Loan Regulations Negotiated Rulemaking Advisory Committee and the Guaranty Agency Reserves Regulations Negotiated Rulemaking Advisory Committee; 34 CFR Chapter VI (establishing two negotiated rulemaking committees), 58 Fed. Reg. 68,619 (Dec. 28, 1993);
took off, and the Department has averaged about one negotiated rulemaking package (some containing numerous issues) every year.\textsuperscript{39} After 1998, many of these rulemakings were legislation-directed, e.g., 1999 and 2000 (1998 Amendments to HEA), 2006-07 (Higher Education Reconciliation Act), 2007-08 (College Cost Reduction and Access Act), Spring 2009 (2008 HEA reauthorization), and 2014 (implementing changes made to the Clery Act by the Violence Against Women Reauthorization Act of 2013). But in recent years there have been several ED-initiated rulemakings as well—in 2002 (the “FED-UP” initiative), 2006-07 (accreditation), and various program integrity issues, such as “gainful employment,” and “teacher preparation” program issues beginning in the Fall 2009 and continuing. A list of ED’s reg-negs from 2007 to the present, and whether or not they achieved consensus, is in Appendix A.

The Department describes its practices for conducting its negotiated rulemakings on its website.\textsuperscript{40} Interviews with federal and non-federal participants provide the following picture of how reg-negs have been, and are conducted. It was interesting to note how little these procedures have changed over the years.

The process begins when the Department decides that new regulations or changes in existing regulations are needed—either due to a directive in legislation or due to a policy decision by the Department. In any given year, of course, there may be more than one such triggering event, and then the Department must decide whether it can bundle issues (the more related the better) into one rulemaking proceeding. Timing exigencies may lead to somewhat unrelated issues being bundled together, a practice that can obviously make it harder to negotiate the entire package.

But except for rare instances of good cause for avoiding the process, the Department must follow the statutorily mandated reg-neg process. To meet the needs of the master calendar, which requires a final rule by November 1, the initial public hearings with stakeholder groups are normally held in the previous fall. After the committee members are selected and the facilitator is hired, the committee typically meets three times in January, February and March. If consensus is achieved on the text of the proposed rule, the Department drafts the preamble (after providing it to the committee for its comments), publishes the proposed rule for comment in the Federal Register sometime in late spring or early summer, digests any comments received, and then publishes the final rule in the Federal Register usually on or just before November 1. If the committee reached consensus, this task is made easier because the participants agree in advance not to comment negatively on proposal.\textsuperscript{41} If the committee was unable to reach consensus, the Department retains

\begin{itemize}
  \item Office of Elementary and Secondary Education; Title I—Helping Disadvantaged Children Meet High Standards; Request for Advice and Recommendations on Regulatory Issues Under Title I of the Elementary and Secondary Education Act, 34 CFR Parts 200, 201, 203, and 212, 59 Fed. Reg. 54,372 (Oct. 28, 1994);
  \item Office of Postsecondary Education; Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee; Establishment, 60 Fed. Reg. 11,004 (Feb. 28, 1995).
\end{itemize}

\textsuperscript{39} See the Department’s archived information on its reg-negs in 1999, 2000, and 2002 at http://www2.ed.gov/about/offices/list/ope/policyarchives.html, and from 2006-07 to the present, at http://www2.ed.gov/about/offices/list/ope/policy.html.


\textsuperscript{41} It is unclear whether participants who disagree with the preamble comment on that aspect, even if they feel bound not to comment on the proposed rule text. As explained above, the preamble is not negotiated although the Department solicits comments on it from the committee members.
the option of drafting the text of the proposed rule (and preamble) itself, to suit its own predilections, which might delay the publication of it in the Federal Register, and would likely lead to more numerous and more contentious comments and a concomitant delay in publishing its final rule.

It is apparent from this schedule that unless the Department is willing to plan at the outset for a more distant effective date—something that it rarely willing to do—the November 1 deadline can compress the available time so that not much leeway is present for extended negotiations.

Public Hearings

The public hearings at the beginning of the process, used by the Department to allow the statutorily listed stakeholders to make oral statements to Departmental officials are typically held both in Washington and in a couple of other cities. Because of the travel, and the practice of having them transcribed by a court reporter, they are rather costly. The main benefit of having these hearings from the Department’s standpoint is to get a better handle on the sub-issues that might be involved in the upcoming reg-neg. But they don’t seem to provide much useful new input on who should be named to the reg-neg committee. Moreover, the out-of-Washington hearings are often sparsely attended, and in some cases only Washington-based people appeared in those hearings anyway. One facilitator told me that when he was hired to do his first reg-neg for the Department he eagerly sat down with the transcript of the public hearings only to discover that it was relatively useless in that most of the testimony was irrelevant to the issues actually to be negotiated. The consensus among my interviewees was that normally the hearing could be held in Washington only (perhaps with video technology allowing out-of-towners to participate) and that the money saved could be better spent elsewhere in the program. I should also point out that the Department is not statutorily obligated to hold these public hearings—only to “obtain advice and recommendations” from the named stakeholders, so perhaps the Department should take advantage of that flexibility and experiment with other ways of obtaining the public’s views.

Selection of the Committee Members

The Department controls the selection of committee members. The statute, with its emphasis on regulation of financial matters in the world of higher education, dictates that individuals and groups “such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies” be selected. But the use of the phrase “such as” gives the Department more leeway in selecting committee members—which, of course is necessary when the rulemaking has little to do with financial matters (e.g., the Violence Against Women Act). Nevertheless, the Department feels it has to be faithful to this statutory directive, so this can potentially lead to a large number of committee members. The Department relies on nominations (including self-nominations) of persons to serve on the committee. It solicits these nominations in a Federal Register notice in which it identifies the constituencies it believes will be significantly affected.

The self-nomination process can create some issues. One association member complained that “Stakeholders don’t get to ‘choose’ a representative; nominations are made and ED picks, so people who are nominated by groups representing hundreds of institutions now seem to have no leg up on people who nominate themselves.” Another said, “Everybody and their uncle would like to have a seat at the table, but many participants don’t have the resources, the time, the knowledge, or sometimes even the desire to be actively engaged. They see appointment to a reg-
neg committee as a ceremonial honor, and are frequently net negatives in terms of their uninformed participation in discussions that they sometimes don’t fully understand.”

Moreover, the Department feels it is necessary to select an “alternate” member for each “primary” member—who has all the privileges of membership except that (s)he cannot vote unless the primary is absent. The alternates do not sit the main table, but have the same rights to speak, and in fact are treated as members in all other respects.\textsuperscript{42} It is notable that the Department selects the alternate, and doesn’t rely on the primary to do so unless there are no nominations for that position. This can lead to the anomalous situation where the primary and the alternate are representing different constituencies or even hold opposing views.

The selection of committee members by the Department and the related issue of the make-up of the negotiating committees are quite controversial. Selection of committee members is obviously a crucial aspect of reg-neg more generally, and the normal convening process is designed to produce a committee with optimum balance, qualifications and ability to negotiate. ED’s process lacks the convening stage and the Department does the selection in a rather opaque way, although its defenders point out that anyone can be nominated and that the committee itself can add new members (assuming everyone on the committee agrees). In addition ED representatives also aver that “We do pay attention to how well a person performed in a previous negotiation when we are deciding whether to choose him or her.” But my interviews identified a number of issues, in addition to problems with primaries and alternates who don’t agree with each other:

- I was told that during both the Bush II and Obama Administration there has been a preference for appointing individuals with practical experience, over people who work for associations. This may make sense for some topics where it’s better to have a practicing financial aid officer or registrar at the table, but when the issue is a broad policy one like the Violence Against Women Act (VAWA), it is problematic not to have someone with a breadth of historical or industry-wide knowledge.

- One member was told (s)he was representing “all associations.” Other times a particular official (e.g., a financial aid officer or a campus security officer) was supposed to represent his or her entire institution, or, worse, all such institutions. Too often a segment of the industry is “represented” by a “surprise” selectee who is unfamiliar with the relevant association’s policy development process and often cannot represent smaller schools’ interests well. One upshot is that affected groups may not feel bound by a consensus formed by such non-representative members.

- Partly because of the “doubling” created by the status given to alternates, and partly due to the statutory enumeration of members, some proceedings become imbalanced with a surfeit of consumer-oriented representatives. For example, in rulemakings dealing with for-profit institutions there were multiple consumer representatives (state attorneys general, students, consumer protection organizations) compared to a few representatives of the institutions. This problem was compounded, according to one of my interviewees, who felt “chilled” by the presence of law enforcement personnel (state AGs) on the committee who had the

\textsuperscript{42} Indeed recent meeting summaries listed them all without even distinguishing between primary and alternates. See, e.g., U.S. Department of Education, Program Integrity and Improvement Negotiated Rulemaking Committee, Meeting Summary (April 23-25, 2014) (listing 31 non-federal members without affiliation or status as primary or alternate).
power to investigate the institutions or associations of such institutions if something was said in the committee meeting that might imply some sort of wrongdoing. Whether or not that person would have really behaved differently without the State AGs present (since the meetings are public anyway), it does seem clear that one side of the “ledger” should not be overloaded.

- In proceedings with multiple bundled issues, there were too many single-issue members selected for the committee who didn’t know or care about most of the other issues. This can make achieving consensus impossible.
- The facilitators (even experienced ones) are not consulted by ED officials about the selection of representatives.

**Bundling of Issues**

Due to the ever-present Master Calendar and resource constraints, the Department has a great incentive to try to combine as many issues as it can into a single rulemaking, which of course means one reg-neg (albeit sometimes with separate subcommittees). This can make consensus more elusive as the sheer number of issues to negotiate (normally in three meetings) can make it difficult to give enough attention to all the issues. Moreover, it can lead to the selection of more “single issue” members who might not know or care about many of the issues and may become more dug in on their issue.

For example, in November 2013 the Department announced its intent to do a negotiated rulemaking on the broad topic of “Program Integrity and Improvement,” and in the notice listed the following issues to be negotiated:

- Cash management of funds provided under the title IV Federal Student Aid programs, including the use of debit cards and the handling of title IV credit balances.
- State authorization for programs offered through distance education or correspondence education
- State authorization for foreign locations of institutions located in a State.
- Clock to credit hour conversion.
- The definition of “adverse credit” for borrowers in the Federal Direct PLUS Loan Program, an issue of special concern to Historically Black Colleges and Universities (HBCUs).
- The application of the repeat coursework provisions to graduate and undergraduate programs.\(^4\)

Given the diversity of issues in this rulemaking, it is not surprising that the notice listed 20 separate “constituencies as having interests that are significantly affected” by these topics.\(^4\)

Ultimately the Department selected “primary” representatives (and with one exception, alternates) for 16 of these constituencies—still leading to an unwieldy group of 31 members of the

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\(^{4\text{a}}\) 78 Fed. Reg. 69,612, 69,613 (Nov. 20, 2013).

\(^{4\text{b}}\) Id. at 69,614,
committee. Not surprisingly, although quick agreement was reached on several issues, and the committee did reach consensus on the issues of concern to HBCUs, consensus was not reached on the cash management or state authorization issues.

An even larger committee was necessary in the 2009 “Negotiated Rulemaking for Higher Education—Team V—General and Non-Loan Programmatic Issues.” The protocol listed 46 members. It also included an unusual provision: “Single-issue members will participate for the purpose of determining consensus only for the single issue that they have been chosen to negotiate.” This seems to be an acknowledgement by the Committee that some members should not vote on the whole package—which is certainly a significant departure from the normal type of ED reg-negs, much less classical reg-negs. But even this unusual provision failed to produce consensus.47

Ideally, the Department should take steps to break up these bundles into separate, but narrower, severable proceedings. One way to do that would be to try to identify those issues where time is not of the essence that might be broken off into a proceeding that could end after November 1. I realize that this may require more staffing of these spin-off reg-negs, but it would certainly increase the chance of achieving more consensus outcomes.

Selection and Use of Facilitators

The Department has, over the years, used a relatively small number of facilitators. In the beginning it hired facilitators who believed in being pro-active in terms of achieving consensus through their own communications with committee members. For example, one anecdote I heard about that took place in the early days of the program was a situation where one of the more active facilitators successfully defused a rancorous morning discussion by inviting a few people on each side to have lunch with him. They ordered pizza, readily agreed on the toppings, proceeded to have convivial lunch, and the afternoon sessions were much more collegial and productive. This was told to me by someone who had been at the Department at the time and felt it was an example

45 See http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html. The list was:

1. Students
2. Legal assistance organizations that represent students
3. Consumer advocacy organizations
4. State attorneys general and other appropriate State officials
5. Financial aid administrators
6. Business officers and bursars at postsecondary institutions
7. Minority serving institutions
8. Two-year public institutions
9. Four-year public institutions
10. Private, non-profit institutions
11. Private, for-profit institutions
12. Institutional third-party servicers
13. Distance education
14. Business and industry
15. Lenders, community banks, and credit unions
16. Accrediting agencies


of a skillful facilitator at work. But I have reason to doubt that the Department would encourage that sort of behavior by its facilitators now.

There is at least a perception among some participants that the Department now prefers more passive and less independent facilitators. In 2006, one potential facilitator was told by ED’s subcontractor, which was soliciting potential facilitators, that he could not even count on having free communications with members of the committee but would have to go through the Department’s political officers. He declined the offer. In 2009 he was solicited again by the same contractor and was then given assurances that he could have such communications. However, another facilitator told me he thinks he that some of his (post-2009) activism in resolving acrimony and urging a little more time for negotiations may have annoyed the Department so much that he has not been asked back despite some successful results.

Indeed several of the recent facilitators I spoke with told me they were aware of this perception and took pains to be neutral, to be equally “tough” on the Department’s representative, and to be careful to avoid any actions that might give rise to a feeling that they were overly chummy with the Department. Nevertheless one participant said “They need to be Switzerland—with a great deal more independence from the Department than recent facilitators have shown. In the last 10 years, the Department has chosen facilitators that defer to the Department far too much.” On the other hand, former or current Departmental officers said that the real problem was that the former facilitators simply became too expensive, given the Department’s increasingly severe budget constraints.

ED reg-neg facilitators have another handicap—the lack of a convening stage. Because ED reg-neg is mandatory, the only pre-negotiation phase is the public hearing stage, but I was told that in some proceedings facilitators were hired not only after the public hearings, but less than three weeks before the first committee meeting. This is not enough time to allow the facilitator to get sufficiently up to speed on the issues or to talk intelligently to the committee members before the first meeting.

In this connection, I spoke to a retired agency regulator who was involved with negotiated rulemaking at his Department and is now engaged in facilitating reg-negs for another Department (not ED). In his first one, he had the benefit of an extensive convening report written by a separate convener and he told me he learned a lot from it and from his conversations with the convener. He was also able to call the committee members before the meeting. In the second one, due to special circumstances there was no convening report, and although he said he was well briefed by Department staff, he felt his lack of prior knowledge about the issues and the participants made him uncomfortable, reduced his stature in the eyes of the participants, and made it harder to understand the areas of disagreement within the committee.

Obviously the skill of the facilitators is crucial to a successful negotiation. I would hope that the Department could afford to pay for the best facilitators, although most participants I talked to were not overly critical of most of the recent ones. But, regardless of their facilitating “style,” it also seems clear that the Department could make better use of its facilitators. To be more specific:

- Facilitators should be given more time to prepare, and should be hired before the public hearing if possible.
If the Department wishes to maximize the chances of achieving consensus, it should encourage facilitators to use their skills to attempt to achieve consensus, not by encouraging any particular substantive result, but by being more active in exploring areas of agreement.

Facilitators should either draft or be closely involved in drafting the meeting agendas. In one instance the facilitator was in the dark about the Department’s agenda for the committee meeting session until the morning of the session.

Unless the matter is extremely sensitive, facilitators should be kept better informed about relevant aspects of a rulemaking, such as concerning Departmental policy or developments pertaining to the positions of OMB, the White House, or Members of Congress. If they are left uniformed about these matters, as has apparently happened, this undermines their ability to facilitate the meeting.

The Department should consult with facilitators early and often (especially experienced ones), because they may be able to provide useful substantive or procedural advice (e.g., who should be appointed to the committee, or whether it is worth having another meeting). At present the Department rarely if ever consults them on such matters.

The Department should diversify its roster of facilitators. Given some of the topics of recent reg-negs (e.g., HBCUs, VAWA) and the pervasiveness of social media, it is problematic that ED’s current facilitators are all white men in their 60s.

Departmental Negotiators

Departmental interviewees made clear that, with a few exceptions, the Department purposely chooses to assign the role of Departmental negotiator to a career (non-political) official—and usually a non-lawyer. Most interviewees who had been participants, in general, praised their capabilities. One said that “on the whole, the ED representatives are professional, knowledgeable, and handle their role with aplomb.” Several, however, did complain that they too often had to clear their positions with political officials not in the room. To my mind, that comes with having a career person as the negotiator. I suspect that many non-federal participants also have to check with their superiors before making commitments.

A more troubling concern was that with the departure of senior people, “in recent years, the quality has suffered and the Departmental representative lacked knowledge of the relevant policy and history.” This seems to largely be a function of resource and staffing concerns.

I would be open to using political appointees more often, especially in proceedings where it can be anticipated that there will be otherwise a frequent need to seek political guidance. Secondly, I suspect that there are some talented career lawyers who could be brought out from behind the curtain to take on this role—and this could make it more feasible for the Department is able to have more numerous narrower reg-negs in order to reduce bundling problems.

Definition of Consensus

Everyone I talked to agreed that the Department takes a firm position on what “consensus” means. Not only do the reg-neg protocols define it to mean unanimity in the sense of lack of dissent (as it is defined in many classical reg-negs too), Departmental practice is to require unanimity on every issue. Thus, to take an extreme example, if the proceeding had 50 issues and
the group agreed on the text of the proposed rule for 49 of the issues, with one member being a holdout on issue number 50, the Department would consider that consensus was not reached. The upshot would be that the Department would not feel bound to propose the language agreed to on the 49 provisions—even if number 50 could reasonably be seen as severable. This is not to say that the Department might not go ahead on the proposed text for some or all of the 49, but it does not feel obliged to do so. My impression is that it often does, but not always.

This stance has two ramifications—it tends to reduce the incentive on the Department to achieve full consensus, while perhaps putting more pressure on the non-federal participants to, say, agree to all 50. The last ramification may be somewhat salutary, but the problem is that any one participant can derail this. I did hear one complaint that in one of these mega-issue proceedings, the Department itself seemed to be moving the goalpost on one of the last issues in such a way that consensus could not be achieved. I also heard that in another proceeding, where a fourth (phone) meeting was added and it appeared that a little more time might get the group to the finish line, the Department “pulled the plug.” These anecdotal references hardly amount to an indication that the Department is playing games to avoid full consensus on any regular basis. Nor does the Department ever seem to be the lone hold-out in a negotiation, and I was assured by current and former officials that the Department highly values consensus, but there is still a perception that in some cases the Department is less interested in a full consensus than it might be. This may, of course, be a function of the fact that the Department has to use reg-neg in every rule and has limited time and resources to do so.

On the other hand, a former official pointed out that one important benefit of consensus was that OMB would let rules go through when a consensus was reached but might very well raise questions on a rule that was not founded on consensus. Moreover, I did hear a counter example in which a particular committee member who was the lone hold-out in a negotiation, and I was assured by current and former officials that the Department highly values consensus, but there is still a perception that in some cases the Department is less interested in a full consensus than it might be. This may, of course, be a function of the fact that the Department has to use reg-neg in every rule and has limited time and resources to do so.

A separate issue regarding consensus is the Department’s policy of requiring unanimity even on procedural matters, such as whether to add another constituency to the committee, to form a subcommittee, to bring an outside expert, or to make adjustments in the organizational protocols. Perhaps such procedural steps could be taken with a “consensus” amounting to a super-majority but short of unanimity.

**Caucuses/Subcommittees/Use of Outside Experts to Speak to the Committee**

Use of caucuses, subcommittees, and outside experts were relatively non-controversial aspects of ED’s reg-negs and my impression is that this aspect is relatively similar to the way it works in classical reg-negs, although ED’s time pressures may limit its ability to take advantage of these techniques. The facilitators I spoke to seemed to think that this was not a problematic area. With respect to use of experts, one did say that he thought ED tended to use more of its own experts from other parts of the Department than outside experts, due to cost considerations. One mentioned that officers from the Consumer Financial Protection Bureau came to a meeting and

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48 Under Executive Order, 12,866, the Office of Information and Regulatory Affairs (OIRA) in OMB, is charged with reviewing proposed and final significant rules of all executive agencies. ED takes pains to keep OIRA (and OMB’s budget side) apprised of the progress of negotiation of rules that are subject to such review.
provided useful information. A participant mentioned that a subcommittee on campus security and fire issues brought in several technical experts who were quite helpful.

As for caucuses, I received conflicting views. One Departmental person told me that they are used regularly, are mostly closed, but when the caucus members come back to the table they report in public. This conforms to classical reg-neg. Usually the Department representative is not included in the caucus, but occasionally a subgroup will ask to caucus with the Department. One participant opined that this was “an area of potential improvement and efficiency that hasn’t been utilized well, but that’s mostly the non-federal negotiators’ fault, not the Department’s.” However, one participant did complain that “During the teacher preparation negotiations, the federal negotiators, at the urging of Department officials, refused to allow non-federal negotiators to caucus with the associations representing the broad sectors. It undermined the caucuses’ purpose and outcome.”

**Logistics**

The Department currently uses its own conference room in the Office of Postsecondary Education at 1990 K Street, NW. It formerly used hotels, but this saves money—although I heard that in a few years this facility may not be available. I also heard a few relatively minor complaints about the room. It lacks a guest Wi-Fi network. There is no live or archived streaming of meetings or use of Skype. The temperature cannot be controlled by the facilitators or anyone else—this was an oft-expressed complaint. There apparently is no dedicated copy machine, so that when documents are introduced in the meeting, too often insufficient copies are provided, and attendees regularly complain about this to the facilitators. Finally, whether or not by design, the Department does not use a projector/screen to help the negotiators discuss draft language. This technique can be useful as demonstrated by an ongoing (classical) reg-neg of energy efficiency standards I learned about where the group worked on a set of PowerPoint slides throughout a series of meetings that resolved issues and formed the basis for agreements on regulatory language. 49 A secretarial assistant sat in the meeting and made the changes and highlighted relevant text as the discussion proceeded.

The Department would do well to upgrade these aspects of the process.

**Transparency**

Many meetings have a high degree of public interest, with investors and other policy mavens seated in the public seats (or the overflow room).

Because ED reg-negs are exempt from the Federal Advisory Committee Act, the Department can avoid formally chartering the committee, submitting data to the General Services Administration FACA database, or having a federal officer take minutes or recordings. Accordingly the Department made the decision early on not to have transcripts taken. As one former Departmental officer explained, “we didn’t want lots of ‘he said, she said.’” Nevertheless, in at least two instances the Department included provisions for a transcript in its draft protocol only to have it vetoed by a number of committee members.

Social media’s advance may be making this issue moot. A Departmental participant pointed out with some annoyance that observers were increasingly attempting to plug in their tape recorders into the room’s microphone system to aid in the production of a transcript after the

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committee rejected transcribing, but “it is unclear how that can be prevented completely as these are public meetings.” On the other hand, the Department may have good reasons to want a transcript. As one former official said, “Trade press routinely records the negotiations and can produce transcripts but ED can’t. This has caused problems in litigation. ED can’t produce a transcript or recording but, at least in theory, the other side could by seeking a court order to turn over the recording.”

The facilitators are tasked with writing meeting summaries, but they have almost no substantive content. One facilitator joked that “there is no ‘there’ there.” Participants invariably laughed when I brought up these summaries. But another facilitator stoutly defended the extremely barebones summaries as appropriate under the circumstances. He didn’t think it was a useful use of the facilitators’ time to write up detailed minutes, especially when attendees were tweeting out summaries anyway. Moreover, he felt if the facilitators did do that, it could just become another bone of contention at the next meeting.

A former ED official conceded that live blogging and “Twitter wars” have become a problem since he left. He said these are mostly being waged by those not at the table, and said he doesn’t know how you contain that. He pointed out that the producers of the PBS *Frontlines* piece, “College Inc.,” asked to film the negotiation. “We asked them not to because it would turn a negotiation into theater. They ultimately agreed not to film the negotiations and we negotiated an arrangement that satisfied them. But how do you negotiate with the Twitterverse?” As one participant concluded, “I think it’s too soon to know what the long-term effects will be although it seems to render the requirement of negotiators not to speak to the media obsolete.”

Personally, if the Department is unwilling to push for (and pay for) a transcript, I would like to see better summaries or minutes prepared, with an opportunity for members of the committee to review them and suggest changes before they are finalized and approved by the Committee. Facilitators should be in charge of this, and should be permitted to hire an assistant to help with this task.

**Overall Departmental Control of the Process**

It seems clear that the Department exercises a high degree of control over the reg-neg process. Not only does it choose the issues, the participants, the facilitator, and the agenda for the meetings, it also maintains firm control of the drafting. As one former official acknowledged,

The Department does all the drafting. In the first meeting, the Department brings its list of issues (already published in the *Federal Register*) and short briefing papers on each one. Occasionally additional issues are accepted, but not often. During the process Department will refine drafts, and then present them. The facilitator doesn’t participate in this, but can suggest language.”

Another former official agreed, that “ED is primarily responsible for writing the rule. Most of the writing is done in the program office (OPE) and not by lawyers. Lawyers review.”

One participant stated that “The Department exercises complete control over the initial draft (the negotiating document) and extends that control through the selection of negotiators who support its point of view.” Another characterized the control over the drafting as “enormous.” Another said the “other members can make suggestions and work on language but ED only takes what they want.” These complaints are not new; an early critique of the process complained that “by controlling and principally defending the text of the proposed regulations, the Department
assumed a dominant position and was not just one of the negotiating parties.”  This is certainly a different approach from that used by other agencies in classical reg-neg, where it is the committee (including, of course, the agency representative) that drafts the text of the proposed rule, often with the help of the facilitator.

But it bears repeating that the mandatory nature and the other constraints on ED make this a different “animal” than classical reg-neg. As one of the facilitators opined, the mandatory model “produces some odd incentives and perhaps unintentional consequences, but it still produces benefits for the Department and the participants, notwithstanding its warts. It manages to force the Department to actually sit down with, learn from its stakeholders, and exchange views with them.” He also said that his view as facilitator is that “it is the Department’s process and he is there to try to make it work, or put another way, to help the parties pursue the best possible deal in the time available.” Ultimately, he also said that he obviously does not agree with every aspect of the way the Department does it, but he understands why they do it the way they do, and that he might not do it all that differently if he were given that statute to implement. He also thought it was best not to get involved with drafting the proposed rule text. He felt it was ultimately the Department’s rule and that it was appropriate for it to come out with its new draft seven days before each meeting, and that everyone had two cracks at the draft before the final Committee decision, plus an opportunity to comment on the draft preamble of the proposed rule before ED finalized it.

It is hard to disagree with this point of view, although committee members would undoubtedly feel better about the process if they thought they had more say in the final result.

We Must Remember the Constraints under which the Department is Operating

It is tempting to criticize the Department’s reg-neg process as “violating” the tenets of classical reg-neg. One participant went so far as to argue that the reg-neg label was a misnomer and that it was not really a true negotiation. It clearly is far from a classic reg-neg, but to some extent the Department’s has been dealt a difficult hand—in having to use reg-neg for every rulemaking, within difficult time and financial constraints—and is playing it in an understandable way.

As one former official pointed out, “Don’t forget, the Department has no dedicated resources for rulemaking activities. The funds used to negotiate come from the program administration account so the program office has to compete against other demands for funding to operate the application system and loan servicing.” Moreover, the Office of Post-Secondary Education is apparently losing staff, especially senior staff, at an alarming rate.

These constraints go far in explaining why the Department exercises as much control as it does over the process—why it tends to bundle too many issues into one rulemaking, limits the number of committee meetings, prefers cheaper and less active facilitators, does all the drafting, and may not be overly concerned when it doesn’t achieve full consensus.

50 See Mark L. Pelesh, Regulations Under the Higher Education Amendments, 57-AUT. LAW & CONTEMP. PROBS. 151, 154 (1994).

51 See an early criticism of this type in Pelesh, id. at 161 (“The negotiated rulemaking conducted by the Department was clearly flawed. It departed extensively from the ‘classic’ model of negotiated rulemaking that has evolved since [Philip] Harter’s article in 1982, and it failed to follow the precepts set forth in the Administrative Conference’s Recommendations as mandated by Congress.”).
Nevertheless, although these incentives are understandable, from a good government standpoint, there are improvements that can and should be made.

**General Feeling that the Process is Valuable in Many Rulemakings**

Given some of the complaints discussed above, I was surprised that nearly everyone believed the process was generally beneficial, at least as compared to regular notice-and-comment rulemaking, and would not want Congress to remove it. One former ED official stated, “Frankly when reg-neg was expanded to virtually all Title IV rulemakings, top officials at the department were not so supportive (didn’t want to “share” power), but I think staff will grudgingly admit that the process produces a better result. It does have costs of money, time and compression. But it’s worth it.”

The costs of doing these are not negligible. Another former official estimated the costs as follows: “My estimate is that it costs between $600,000 and $1 million or more to convene a committee when facilitators, non-federal negotiators, and staff time are considered than public comment rulemaking. ED has had to cut back some of those costs.” In addition the Department pays the expenses of student participants. Counting extra staff time may not be correct, since in regular rulemakings, staff must deal with more extensive drafting and review of comments than would normally be the case in a reg-neg. Still, given that the Department lacks a dedicated appropriations for rulemaking, these extra front-end costs are a significant concern.

Nevertheless, the process enjoys support among some current and past officials of the Department, although there was wide agreement that the mandatory nature of it deserves to be reconsidered. While the Department apparently does not have an official position whether or how the program should be continued, my talks led me to believe that Departmental officers who have worked with the program feel that it adds value to the regular rulemaking in several respects, both as to the merits of rules and in making the process visible to the stakeholders. At a minimum it gives the Department a window to see how a rule could work—what the consequences and problems might be in the field, and even if consensus is not achieved, it provides some confidence that there will be a high degree of tolerance in the field for what is being proposed.

Among the non-federal participants there was also a general feeling that the process was valuable, even among those who were critical of the Department’s practices. One association representative told me it was a misnomer to call it a negotiation or a true effort to achieve consensus, and suggested it should be eliminated in favor of a true consultation process. But that person was an outlier among the people I talked to. One association representative said,

> When we can participate (or are assured of appropriate participation by our college and university members) we feel it is worthwhile. Even in the current less-than-optimal negotiating environment, we have tended to feel that it is a useful way for the Department to gain insights into how campuses work, and what they can and cannot do.

Another suggested that even when consensus is not reached, “it appears to inform and make a positive contribution to rulemaking.” Another said, “I think the final rules are greatly improved by the [reg-neg] process and avoid implementation problems that might have occurred otherwise.” Another gave it “high marks”:

> I’ve been generally happier with regulations developed through reg-neg than those without. It has tended to be an educational experience for both the Department and
the stakeholders. In some cases the process is actually therapeutic. The participants gain a better understanding of each other’s positions. I’ve been through contentious reg-negs that, contrary to expectations, produced consensus and those that, contrary to expectations, didn’t. In both cases, I’d say that the outcome was better than it would have been without reg-neg.

In sum, it seems like both the Department and most stakeholders have come to appreciate the benefits of sitting down at the same table to discuss their concerns. And while stakeholders may not be thrilled with the substance of the ensuing regulations, and would like to see changes in some of the Department’s practices, they would not like to see reg-neg disappear from the Higher Education Act. For its part, the Department has learned to live with the process, and given its ability to control it, and the lack of “penalty” for not-achieving consensus, seems content to continue it—if they can obtain the resources to do so.

But Maybe an Opt-Out Provision for Certain Types of Rules or Circumstances Would be Beneficial

As mentioned, reg-neg under the Higher Education Act is mandatory for every rulemaking (including amendments to existing rules), unless there is good cause for not doing so. But the Act’s good cause exemption specifically invokes the similar exemption in the APA from notice-and-comment rulemaking—it must be shown to be “is impracticable, unnecessary, or contrary to the public interest.” This APA language has been very strictly construed by the courts—the rule has to be a true emergency or a very trivial one.

I was told that the Department’s Office of General Counsel has also felt constrained to interpret this provision narrowly and has only invoked this exemption once—in an interim-final rulemaking where the statutory deadline was really short, and even in that one a reg-neg group was convened to do the “final-final” rule.

But keeping in mind the basic tenet of classical reg-neg—that it should only be attempted when a convener determines that the circumstances are propitious, perhaps it is time to advocate an expanded opt-to provision.

The Negotiated Rulemaking Act itself, contains the classic factors, as recounted in the introduction of this paper, and it seems clear that in some of ED’s rulemakings, these factors will not all be present. There is also the more fundamental question of whether ED, virtually alone among all Departments and agencies, should have to do all of its rulemakings through negotiated rulemaking.

As one former ED official said:

While I think reg-negs have worked well in a number of circumstances, and I would choose to voluntarily do them perhaps more than some of my colleagues, I think it is fundamentally inappropriate for any agency to have to do them for all rules. I can think of a situation (9½ Rule) where it would have taken us a year and half to change a policy that was requiring us to pay excess subsidies if we had to go through reg-neg. Its rigors have prevented the Secretary from taking rapid action that could have saved the taxpayers money. . . . I think there should be an opt-out provision. That would be a legitimate recommendation.

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52 See note 30, supra.
When I broached this idea in my other interviews, no one disagreed with this, so long as the opt-out provision was properly drafted.

So I believe Congress should consider an opt-out provision that is broader than the current good cause provision. I think that the Secretary should have to certify that (and explain why) certain conditions are present (or not present) that makes the use of reg-neg inadvisable. One example might be an amendment to an existing rule that would not significantly increase the regulatory burden on affected institutions or significantly decrease the protections afforded to students. Another condition might be that a delay in the rulemaking would require significant expenditures of government funds. Another might be a rulemaking with an especially short statutory deadline. To avoid delays caused by judicial review of such certifications, I would prohibit or narrowly limit such review. Of course when opting out of using reg-neg, the Department would still ordinarily have to use regular notice-and-comment procedures.

RECOMMENDATIONS

The general approach of these recommendations (based on the preceding report) is to urge Congress to reduce the time and resource constraints on the Department of Education’s use of negotiated rulemaking (“reg-neg”) and to concomitantly urge the Department to cede a bit of its control to the negotiating committee.

Recommendation to Congress

1. If Congress wishes to retain the “master calendar” requirements currently applicable to rulemaking under the Higher Education Act, it should (1) eliminate the general 360-day time limit now applicable to some such rules, and (2) consider extending the master calendar deadline from November 1 to December 1.

2. Congress should amend the Act’s negotiated rulemaking provision to allow the Department to choose to use APA notice-and-comment rulemaking instead of negotiated rulemaking. This provision should be broader than the current “good cause” provision, but should require the Secretary to have to certify that (and explain why) certain conditions are present (or not present) that makes the use of reg-neg inadvisable. Congress should make clear that such an opt-out provision should not be used as a basis for not using reg-neg where the matter is of significant public concern, but instead would be used in circumstances such as:
   a. When the Department wishes to propose an amendment to an existing rule that would not significantly increase the regulatory burden on affected institutions or significantly decrease the protections afforded to students;
   b. When the Department certifies that a delay in the rulemaking would require significant expenditures of government funds;
   c. When there is a rulemaking with an especially short statutory deadline.
   Such certifications should not be subject to judicial review.

3. Congress should consider revising (and making more general) the list of stakeholders that are supposed to be invited to participate in negotiated rulemakings.
4. Congress should provide dedicated, adequate, funds in the Department’s appropriations to be used for the purpose of conducting negotiated rulemakings, including the use of a dedicated conference room for this purpose.

Recommendations to the Department of Education

Public Hearings

1. The Department should consider other ways than its current practice of holding several public hearings in Washington and in the field to meet its statutory obligation to “obtain advice and recommendations” prior to undertaking a reg-neg. It should experiment with using video conferencing to avoid the expense of field hearings and transcripts, and in some cases should try collecting written views instead of hearings.

Selection of the Committee Members

2. The Department should relax its control over the selection of committee members.
   a. It should make the initial selection of constituencies to be represented but should allow each constituency to nominate its own primary and alternate members, and should accept those nominations unless there is a good reason not to.
   b. It should use Federal Register notices to solicit additional interested constituencies, and ask the committee to suggest the absence of key constituencies.
   c. In any event, it should end its practice of choosing alternates for every “primary” committee members, who are now given all the privileges of membership except the vote. This creates either double representation or in some cases incompatible representatives. Alternates should be true alternates (who sit at the table only in the absence of the primary), and they and other attendees should be able to speak only with the permission of the committee (which should not be unreasonably withheld).
   d. It should strive for balance and a manageable number of members, without over-representing one “side” of the issue. In the event that similar groups seek to have their own representation, and that would create overloading, the Department should ask those groups to select a representative for the larger group.
   e. It should have no blanket preference for “practitioners” over association representatives. The elimination of the doubling effect of the current “alternate” policy should enable the selection of more of both practitioners and association representatives as the issues warrant.
   f. It should maintain its practice of taking into account the nominee’s negotiating behavior in previous reg-negs, and should also consult experienced facilitators in identifying constituencies and accepting nominations.

Bundling of Issues

3. The Department should avoid bundling unrelated issues into a single reg-neg. It is hoped that a relaxation of time and resource constraints would allow use of separate reg-negs for clearly separate issues.

Selection and Use of Facilitators
4. Facilitators should be given more time to prepare, and, if possible, should be hired before the public hearing—if those are to be continued.

5. If the Department wishes to maximize the chances of achieving consensus, it should encourage facilitators to use their skills to attempt to achieve consensus, not by encouraging any particular substantive result, but by being more active in exploring areas of agreement.

6. The Department should allow the facilitators to either draft or be closely involved in drafting the meeting agendas.

7. Facilitators should be kept better informed about relevant aspects of a rulemaking, such as applicable Departmental policy or developments, such as pertaining to the positions of OMB, the White House, or Members of Congress, unless such matters are extremely sensitive.

8. The Department should consult with facilitators early and often (especially experienced ones), because they may be able to provide useful substantive or procedural advice (e.g., who should be appointed to the committee, or whether it is worth having another meeting). At present the Department scarcely if ever consults them on such matters.

9. The Department should diversify its roster of facilitators.

Departmental Negotiators

10. The Department should consider using its political appointees as its negotiator in negotiations more often, especially in proceedings where it can be anticipated that there will be a frequent need to seek political guidance. When using career officials, it should also consider using its experienced lawyers in this role.

Definition of Consensus

11. If the Department is forced to continue its practice of bundling a number of unrelated, severable issues into one rulemaking, it should make clear that if a consensus is reached on some of these issues, the Department will agree to publish the agreed-upon text of those proposals in its proposed rule.

12. On procedural matters, such as whether to add another constituency to the committee, to form a subcommittee, to bring an outside expert, or to make adjustments in the organizational protocols, the Department should allow the Committee to take actions with a “consensus” amounting to a super-majority but short of unanimity.

Caucuses/Subcommittees/Use of Outside Experts to Speak to the Committee

13. The Department should continue to allow (and if resources permit, encourage) the use of caucuses and the bringing in of outside experts to educate the committee.

Logistics
14. The Department should strive to continue to use its own dedicated space for reg-neg meetings, but should upgrade the space and modernize the meetings by (a) installing a guest Wi-Fi network, (b) allow live and archived streaming of meetings or use of Skype, (c) installing a room thermostat to allow temperature control, (d) providing a dedicated copy machine, and (e) using a projector/screen to help the negotiators discuss draft language.

Transparency

15. The Department should consider requiring that either a transcript or better summaries/minutes are prepared of each meeting, with an opportunity for members of the committee to review them and suggest changes before they are finalized and approved by the Committee. Facilitators should be in charge of this, and should be permitted to hire an assistant to help with this task.

Drafting

16. The Department should consider experimenting with allowing the committee (aided by the facilitator) to play a greater role in drafting the text of the proposed rule—especially when the rulemaking is statutorily mandated.
Thank you to Susan Hattan of NAICU for pulling this information together.

This is a very rough, unofficial compilation of Department of Education negotiated rulemaking sessions since 2007. “No consensus” is generally the outcome when the negotiated rulemaking process does not stem from recently enacted legislation. Examples include Accreditation (2007), Program Integrity (2010), Teacher Preparation (2012), and Gainful Employment (2013).

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<td>[State authorization, PLUS loans, Cash management, clock-to-credit hour conversion, Retaking coursework]</td>
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Appendix B

List of Interviewees

Current or Retired Longtime Former Department of Education Officials

- David Bergeron, retired from ED after 34 years, at the Center for American Progress (CAP) for last 18 months.
- Daniel T. Madzelan, Associate Vice-President for Government Relations, American Council on Education (ACE). Retired from ED after 30 years in 2012.
- Jamienne S. Studley, Deputy Under Secretary of Education since September 26, 2013, deputy General Counsel and General Counsel of the Department in the Clinton Administration.
- Brian Siegel, Attorney, Office of General Counsel for 27 years.

Non-Federal Participants

- Maureen Budetti, National Association of Independent Colleges and Universities (NAICU).
- Sarah Flanagan, head of Government Relations, National Association of Independent Colleges and Universities (NAICU).
- Anne C. Gross, Vice President, Regulatory Affairs, Advocacy and Issue Analysis, National Ass’n of College and University Business Officers (NACUBO).
- Susan Hattan, National Association of Independent Colleges and Universities (NAICU).
- Leah Matthews, Executive Director at Distance Education and Training Council (DETC).
- Barmak Nassirian, American Ass’n of State Colleges and Universities (AASCU).
- Becky Timmons, retired from American Council on Education (ACE) in January 2014 after 40 years.

Facilitators

- Craig Bagemihl.
- Chip Cameron.
- Charles Pou, Jr.
- Also Neil Eisner—Retired DOT regulatory lawyer, active in some DOT reg-negs, and currently active facilitator for Department of Energy.
CASES AND ARTICLES DISCUSSING ED’S TITLE IV RULEMAKING SINCE 1992**

CASES


Facts. After the D.C. Circuit (in Ass’n of Private Sector Colleges & Universities v. Duncan, 681 F.3d 427 (D.C. Cir. 2012, below) instructed Department of Education to provide a reasoned explanation for two aspects of the incentive-based compensation regulation that affect for-profit colleges and universities, the Department supplemented the preamble to its regulations. Plaintiffs complain that the Department has once again failed to support its regulations with record evidence and substantiated assertions.

Holding. Plaintiff’s motion for summary judgment is granted.
- The Department has failed to explain and substantiate its wholesale ban on graduation-based compensation. In addition, the Department has not furnished an adequate response to the commenters’ concerns about the impact of its regulations on minority recruitment.
- The Department basically relied on arguments already promulgated that the court had rejected as insufficient. Further, the Department’s attorneys offered explanation during litigation, but those explanations were not in the preamble.


Facts. In 2012, Association of Private Colleges and Universities successfully challenged (in part and briefed below) Dept. of Ed.’s rule that tested compliance with “gainful employment” requirement by examining debt, earnings, and debt repayment of program’s former students and two related rules. After the rules were vacated, the Dept. of Ed. moved to amend.
- In earlier action, the court vacated reporting requirements and debt measure rule. In this action, the Department argues that the disclosures required by upheld regulations (34 C.F.R. § 668.6(b)(1)(v)) cannot be fully effective without the vacated reporting requirements (34 C.F.R. § 688.6(a)) and portions of the vacated debt measures (34 C.F.R. § 688.7(a)(2),(b)-(f)).
- The Department argued that 34 C.F.R. § 668.6(b)(1)(v) (upheld) required covered institutions to disclose to students the median loan debt incurred by graduated students as provided by the Secretary but the court vacated 34 C.F.R. § 668.6(a)(1)(i)(C)(2), which required the institutions to report to the Department the amounts that any graduated student received from private education loans and the amount from institutional financing plans that the student owes the institution. The Dept. argues that it needs both information to provide covered schools with the median loan debt data they are required to disclose.

Holdings.
- ED’s motion to amend is denied. ED could not expand the National Student Loan Data System (NSLDS) database to include detailed information about every student enrolled in a gainful employment program.

** Thanks to my research assistant, Rose Monahan, Washington College of Law, Class of 2015, for her compilation of this Appendix.
The court notes that the Department’s motion depends on the proper interpretation of 20 U.S.C. § 1015c which prohibits the development of federal databases storing personally identifiable information on individuals receiving assistance, except when it is necessary for the operation of programs authorized by subchapter II, IV, or VII.

Court finds that the data collection has not been authorized by Congress.


**Facts.** Three requirements for qualification for Title IV programs are at issue: (1) the school authorization regulation (2) agreeing not to provide commission or other incentives on the success in securing enrollments or financial aid; and (3) requirement not to engage in substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates.

- School authorization regulation: state must have a process to review and act on complaints and for online courses, authorization from all states in which students reside that requires authorization.
- Commission/Compensation Rule: Closes loophole where schools were providing incentive payments.
- Misrepresentation: redefined to mean any statement that has the likelihood or tendency to deceive or confuse plus providing the Department with more enforcement options.

**Holdings.**

- Compensation Regulations do not exceed the Higher Education Act’s (HEA) limits, but two aspects of regulations are remanded for want of adequate explanations.
  - Misrepresentation regulations exceed the HEA’s limits because: (1) allows enforcement without procedural protections; (2) proscribes misrepresentation to subjects not covered by the HEA; and (3) proscribes statements that are merely confusing.
  - State Authorization Regulations are valid but the online education regulation is not a logical outgrowth of the Department’s proposed rules.

_Ass’n of Private Colleges & Universities v. Duncan_, 870 F. Supp. 2d 133 (D.D.C. 2012)

**Facts.** Association of private colleges and universities brought suit against ED challenging rule that tested compliance with gainful employment requirement by examining debt, earnings, and debt repayment of program’s former students. To assess whether a program provides training that leads to gainful employment, ED proposed two tests: one based on debt-to-income ratios and the other based on repayment rates (“debt measures”).

- **Debt Measure Rule**
  - Plaintiffs argued that “gainful employment” simply means “a job that pay” and the Department’s attempt to define the phrase in terms of debt and income exceeds its statutory authority.
  - Plaintiffs also argues that the debt measure rule is not adequately explained, do not actually assess whether a program prepares a student for gainful employment, is arbitrarily or unconstitutionally retroactive, and lacks a reasoned basis.

- **Reporting requirements**
Plaintiffs challenge required reporting as in violation of the HEA which prohibits “the development, implementation, or maintenance of a Federal database of personally identifiable information on individuals receiving assistance under this chapter.”

- **Disclosure**
  - Plaintiffs challenged rule requiring disclosure to students of employment placement rates and median loan debt for students.

**Holdings.**
- Gainful employment regulations are a reasonable interpretation of an ambiguous statutory command.
- The debt repayment measure lacks a reasoned basis and is vacated as A&C. Because the debt-to-ratio measure and repayment measure were meant to work together, the court cannot sever one from the others. Therefore, the entire debt measure rule must be vacated and remanded to the Department.
- The reporting rule is also remanded because the Department was relying on the debt measures rule to satisfy the exception to the information collection prohibition when information collection “is necessary for the operation of programs authorized” by Title IV. Since the debt measures are remanded, the reporting rule has no authorized program to rely upon.
- Disclosure rule is upheld because it is within ED’s regulatory power to “make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.”


**Facts.** Plaintiffs challenged ED’s regulations prohibiting incentive-based compensation, the elimination of compensation “safe harbors,” the misrepresentation regulations, and the state authorization requirement as outside the scope of the Department’s statutory authority and the Constitution, and as arbitrary and capricious under the APA.

**Holdings.**
- Association had standing to pursue facial challenges, despite ED’s argument that, without any enforcement record, claims were not ripe;
- New compensation regulations did not violate the HEA through their restrictions on incentive payments or senior management compensation;
- New misrepresentation regulations did not contravene the HEA’s command that Secretary provide notice and opportunity to be heard prior to suspending or terminating school’s eligibility status for Title IV funding or prior to imposing fine;
- New misrepresentation regulations did not impermissibly expand scope and type of statement that could be sanctioned as substantial misrepresentation;
- New misrepresentation regulation did not, on their face, create chilling effect on school’s free speech rights;
- Secretary gave no prior notice of aspect of new state authorization regulations that would require distance educators to obtain authorization from every state in which they had students, and its adoption in final regulations violated the APA; and
- Association was not entitled to injunctive relief pending appeal.
American Ass ‘n of Cosmetology Schools v. Riley, 170 F.3d 1250 (9th Cir. 1999)

**Facts.** Plaintiffs challenge ED’s implementing regulations for 20 U.S.C. § 1085, concerning administrative procedures for hearing and appeal after notice of termination from eligibility for Federal Family Educational Loan (FFEL) participation, under Title IV. Ineligibility for FFEL is tied to an institution’s “cohort default rate” (CDR)—the percentage of current and former students that enter repayment on their loans during a given fiscal year who default before the end of the following fiscal year. ED promulgated regulations on calculating CDRs, and then amended those regulations in November, but stated that the calculation that was most favorable to individual institutions would be used in adjudication. Plaintiffs allege:

- The Secretary in fact has acted in accordance with his statement in only two CDR loan servicing appeal decisions and has otherwise applied only the standards of the November regulations.
- That the retroactive application of the November regulations without adequate notice violated due process.
- The Secretary’s failure to require uniformly a day-specific method of determining the repayment date of Stafford loans is in violation of 20 U.S.C. §§ 1078(b), 1232(c).
- The short and strict administrative deadlines do not give institutions that opportunity to review the loan servicing records of the affected borrowers in CDR appeals.

**Holding.** District court’s order granting the Secretary’s motion for summary judgment (made on the merits) is vacated, and case is remanded so that it may enter judgment dismissing the action for lack of jurisdiction.

- Relief plaintiffs were seeking were bared by the anti-injunction provision of 20 U.S.C. § 1082.

Mission Group Kansas, Inc. v. Riley, 146 F.3d 775 (10th Cir. 1998)

**Facts.** Nonprofit educational organization operating post-secondary vocation institution sought declaratory and injunction relief against the Sec. of Ed. to enjoin imposition of the 85/15 rule, requiring proprietary institutions of higher education to derive 15% of tuition revenues from nonfederal sources to be eligible for federally guaranteed financial aid programs. The district court agreed with Mission that the Secretary’s action contravened the plain language of the HEA, and granted the requested declaratory and injunctive relief against imposition of the 85/15 rule.

**Holding.**

- Contrary to the district court’s view, the statute does not plainly contravene the Secretary’s action in this case.
- But the administrative action taken by the Secretary here cannot be regarded as within the legitimate interpretive scope of the regulations upon which he purports to have acted. Therefore the Secretary is entitled to no deference under the Seminole Rock–Chevron standard.
- Even when evaluated under the less deferential Skidmore standard, the record before us appears insufficient to evaluate properly whether the 85/15 rule survives review as a valid statutory “interpretative rule.” We therefore remand to the district court for further proceedings.

Coalition of New York State Career Schools, Inc. v. Riley, 129 F.3d 276 (2d 1997)

**Facts.** Association of trade schools brought action challenging refund regulation promulgated by Sec. of Ed. under the HEA. The district court entered a permanent injunction barring enforcement
on the theory that it represented an impermissible modification of the refund formula set forth in the governing statute.

**Holding.** Regulation governing refund of federal aid money when student’s program of study ends prematurely was reasonable although it did not permit institution to retain amounts owed by student when calculating refund under state law or accrediting agency formula. Overturns district court: injunction vacated and complaint dismissed.

- 20 U.S.C. § 1091b set forth the *minimum* amount that must be refunded to a student in order for an institution’s policy to be considered fair and equitable. Nothing in the statute precludes the Secretary from determining that a larger amount must be refunded in certain instances. Nor does the statute dictate that the government, rather than the education institution, should bear the risk of student non-payment.
- Notes that this court is agreeing with the D.C. Circuit and not the 9th Circuit.

**California Cosmetology Coalition v. Riley,** 110 F.3d 1454 (9th Cir. 1997)

**Facts.** Association of cosmetology schools sought injunction against ED’s enforcement of amendments to tuition refund regulations under the HEA. Regulations governed the amount of tuition and other fees postsecondary schools must refund when a student receiving Title IV federal aid withdraws from classes before completing the term for which those fees have been charged. District court found that the regulations contradicted 20 U.S.C. § 1091b.

- Under the Final Regulations, the school would have to include in its reimbursement to the government the amount still owed by the student. The institution would then have to pursue the student for unpaid sums. For students receiving full grants, this turns grants into personal debt.

**Holding.** ED exceeded its authority in promulgating tuition refund regulations; district court affirmed.

- Congress was unambiguous when it listed three criteria for when an institution’s refund policy will “be considered fair and equitable.”
- Disagrees with the D.C. Circuit’s holding on the same issue because the D.C. Circuit assumed that Congress had inadvertently overlooked the problem of unpaid charges.

**Career College Ass’n v. Riley,** 74 F.3d 1265 (D.C. Cir. 1996)

**Facts.** Appellants raise five challenges to regulations promulgated by ED:

- (1) The regulations amending the Student Assistance General Provisions (34 CFR Part 668) is ineffective for the award year 1994-95 because it was not promulgated “in final form” by May 1, 1994 as required by the Master Calendar Provision.
- (2) The required refund of federal funds when a student withdraws from an institution prematurely (challenging two regulations).
- (3) The “Cohort Default Rate Rule” as exceeding the Secretary’s authority because it conflicts with various statutory provisions.
- (4) The “Thirteen Week Rule,” which required that institutions calculate the placement rate for any award year based on the number of students who, within 180 days of the day they received their degree obtained gainful employment and on the date of this calculate are employed or have been employed for at least 13 weeks following receipt of the credential from the institution. Challenged at arbitrary and capricious because it is “virtually impossible to meet.”
(5) The “Five Day Rule” which applies to non-term based, credit hour schools and defines a week of instruction time to be any week in which at least five days of regularly scheduled instruction, examinations, or prep for exams occurs. Challenged as unsupported by the record and unjustified due to the severe effect on evening students.

Holdings.
- Regulations were promulgated in proper form within time limit set by master calendar provision.
- Regulation pertaining to refund of “unearned tuition” upon withdrawal of student properly required institution to add to federal refund amount of student’s unpaid scheduled cash payment.
- Regulation that determined institution administratively incapable of administering financial aid program if institution had cohort default rate of more than 25% for any of three most recent financial years was proper.
- Secretary’s explanation for implementation of the 13-week rule was reasonable.
- Regulation that defined “week of instructional time” for purposes of vocation school eligibility in student aid program to be five days of class was not arbitrary or capricious.

_Career College Ass’n v. Riley_, 82 F.3d 476 (D.C. Cir. 1996)

**Facts.** Career College Association petitions for rehearing of court’s determination that the refund regulation (34 C.F.R. § 668.22(g)) is a reasonable interpretation of conflicting statutory mandates. The refund regulation puts the risk of non-collection on the institution, which must first pay the government and then seek money from the student.

**Holding.** Upon withdrawal of student during enrollment, school is to pay the government first and is not allowed to assume that government will be repaid indirectly by the student; and the Secretary’s explanation of regulations was not a post-hoc rationalization such as not to be entitled to deference.


**Facts.** State guarantee agency under the Guaranteed Student Loan Program brought declaratory judgment action challenging ED’s regulation requiring that loans be guaranteed at a rate of 98% of their total amount.

**Holding:** The agency had standing; the statute requiring agencies to insure loans at “no less than 98%” was ambiguous, and the regulation requiring guarantee at no less and no more than 98% was reasonable.


**Facts.** Plaintiffs sought injunctive relief arising out of final regulation ED promulgated on April 29, 1994, which defined a “proprietary institution of higher education” as requiring that institutions derive at least 15% of their revenue from sources that are not derived from funds provided under Title IV. Plaintiffs argued that the regulations violated the APA. Plaintiffs’ arguments:
- Secretary’s decision to apply the substantive requirements of the 85% rule with no lead-in time was arbitrary and capricious (A&C).
- Only allowing revenues to Title IV-eligible programs to be counted in the 85% rule was A&C.
- Requiring institutions to apply a cash method of accounting to report revenue in the denominator was A&C.
Holding. Injunction denied

- The 85% rule was not arbitrary and capricious.
- Congress granted the Secretary express discretion to implement the substantive requirements of the 85% rule and it was reasonable to give immediate effect.
- Secretary’s discussion of the possible limitations on what revenues could be considered provides an adequate basis for the choice he ultimately made.
- Congress left a clear gap as to which accounting method would be used in calculating the revenue formula and the Secretary’s cash method is reasonable.


Facts. Proprietary institutions brought action for injunction and declaratory relief challenging new regulations promulgated by ED for eligibility of Title IV loan funds. Plaintiffs argued that they received insufficient notice prior to publication of agency’s final rules, that the regulations were not a reasonable interpretation by the agency of Congress’ intent and therefore A&C. Plaintiffs also argued that a taking of both property and liberty without due process and violations of the Equal Protection Clause, the Contracts Clause, and the nondelegation doctrine.

- Like _Career Colleges Ass’n v. Riley_, plaintiffs were challenging the 85% rule [15% of revenues had to be from sources other than Title IV funds to qualify as a proprietary institution of higher education]. ED had to define “revenue.” Expert testimony at trial asserted that 14 of the 24 plaintiffs would not be able to comply with the Department’s 85% rule using the revenue definition in the regulations.

Holdings

- Regulations were not A&C.
- Regulations were finalized in accordance with notice-and-comment provisions.
- Secretary was not required to delay implementation date.
- Regulations did not constitute a taking of liberty and property interests under the Fifth Amendment.
- Amended statute did not violate Equal Protection Clause, Contract Clause, or nondelegation doctrine.


Facts. Plaintiffs seek to preliminarily enjoin ED from finding schools with high loan default rates ineligible to participate in a federal student loan program without pre-termination notice and review, alleging a violation of the plaintiffs’ Fifth Amendment due process rights. Plaintiffs also allege that disqualifying schools from participating in the program for more than one fiscal year violates the plain language of the statute.

Holding.

- PI is denied because plaintiffs couldn’t show irreparable injury.
- Because denial of even “some kind” of pre-termination process violates plaintiffs’ due process rights, plaintiffs are entitled to judgment as a matter of law.
  - Although a full evidentiary hearing prior to termination is not required, some kind of process is required.

_Ass’n of Accredited Cosmetology Schools v. Alexander_, 979 F. 2d 859 (D.C. Cir. 1992)

Facts. Plaintiffs challenged ED’s regulations implementing the Student Loan Default Prevention Initiative Act. The regulations stated that institutions would lose their eligibility to participate in
the GSL programs if the institution’s cohort default rate, for each of the three most recent fiscal years, is equal to or greater than 35% (for years 1991 and 1992) or 30% (all fiscal years after 1992). Termination became effective eight days after official notice and terminated the school from eligibility for the next two subsequent fiscal years.

**Holding.**

- Interpretation of the Student Loan Default Prevention Initiative Act by the Secretary of Education as permitting application of 35% threshold default rate to fiscal years 1987-89 is a permissible one;
- Act and its implementing regulations are not impermissibly retroactive, even though future eligibility for participation in Guaranteed Student Loan (GSL) program depends on schools’ past default rates; and
- Congress has not waived its power to alter contractual terms with respect to program participation agreements entered into pursuant to the GSL program.

**ARTICLES**


- Addresses an array of inherent problems with the current student loan industry, particularly as the student aid system relates to the federal Parent Loan for Undergraduate Students (PLUS) loan program.
- Suggests certain best practices including
  - PLUS loan reform, specifically addressing minorities
  - Financial Aid Eligibility
  - Bankruptcy Protection


- This article specifically focuses how on for-profit educational institutions have engaged in manipulative and deceitful recruitment practices at the expense of student veterans.
- It does focus on educational funding programs, including Title IV of the Higher Education Act and ED regulations.


- Argues that the debt-burden on students graduating from for-profit institutions that have prompted ED regulation is not unlike the debt-burden of law graduates. For ED to fulfill its policy initiatives articulated in the most recent rulemaking, the new gainful employment-debt measures should be expanded to encompass law school institutions.

Article is organized into five parts: (1) historical emergence of for-profit universities; (2) current context and practice of for-profit institutions; (3) current legislation and regulatory context of the for-profit education industry and impetus behind increases in borrowing and default; (4) approach taken by ED to address for-profit institutions and the potential impact it could have had on the rise of student default, reduction of student loan debt, and improvement of institutional performance; (5) illustrate for-profit institutions contemplated when the industry was granted Title IV eligibility.

The article is addressing how the regulations would have played out if not vacated by the D.C. District Court.

Argues that regulatory reforms were unlikely to make much of a change. For instance, under the “gainful employment” regulation, it was expected that 97% of institutions were providing programs that lead to gainful employment. Only the worst actors would be addressed – making the game more fair but still substantially unfair.


This article focuses on the “Gainful Employment Rule” promulgated by ED. The author compares the bubbles in for-profit higher education and subprime mortgages, arguing that both involve federal encouragement of high risk taking to achieve the American Dream.

Spends time outlining the business model of for-profit colleges

Ultimately questions the policy of relying on for-profit higher education as a means to expand to universal higher education.

- Questionable whether they produce educated citizens with degrees at lower the cost than alternatives.
- Debt levels are prohibitively high, especially among for-profit institution graduates.


Examines the recent attempts at increased government oversight, on both federal and state levels, as well as the trends within the litigation involving for-profit colleges and universities.

Argues for more effective control measures concerning for-profit institutions, particularly greater transparency, stronger federal and state legislation and regulation, increased accreditation associations reform, and improved internal self-regulation

Examines the areas of concern that have become the most problematic for the for-profit educational industry: student recruitment methods, amount of loan debt their students accrue, and the future career prospects for graduates.

Specifically focused on ED’s recruiter compensation regulations, the misrepresentation regulations, and the gainful employment regulations.


Argues that existing legislative and regulatory policies directed at proprietary institutions due to allegedly disproportionally higher numbers of student borrowers and defaulters at
proprietary institutions have unwittingly restricted minority and at-risk students’ access to higher education

- Takes issue with two ED rules in particular: the new “gainful employment” rule and the “90/10” rule. “If, as the data and analysis suggest, it is the type of student enrolled, as opposed to the quality of the program offered or the institution offering it, that is the primary cause of low graduation rates, excessive debt, and student defaults, then it is pointless to shift these students from proprietary institutions to nonprofit and public colleges.” Argues for the elimination for both ED rules in favor of policies that will apply to all institutions and designed to ensure student access and success, require transparency and comparability, consider institutional mission where appropriate, measure student outcomes normalized against populations served, and treat at-risk students equitably no matter what institution they choose to attend.

- The article outlines Title IV of the HEA of 1965, the role of proprietary institutions, regulatory constraints for low-income and minority students, while focusing specifically on how ED rules make things worse.


- Specifically focuses on the “gainful employment” regulation, projecting likely impacts.

- Argues that the gainful employment rule will adversely affect low-income students and proposes a system wherein applicants take a placement exam and all institutions of higher education make a series of mandatory disclosures to allow applicants to make informed enrollment decisions.
  - The placement test would be required for all students seeking federal funding in order to gauge whether particular students are prepared for higher education. Further, there would be a section measuring individual strengths, in order to create a better fit between students and their chosen fields.
  - Current disclosure only allows students to compare failing to non-failing schools, which isn’t particularly useful. Average income ten years after graduation should also be disclosed (does not address collection issue).


- This article focuses on ED’s Title IV regulations and for-profit educational institutions.

- Examines the interaction between federal student-aid policy and for-profit institutions, arguing that the noble goals of modern federal student-aid policy enable the very practices that lead to negative outcomes for many students by creating a lucrative market for “subprime education.”

- Argues that the problems surrounding federal financial aid and for-profit organizations will only be resolved by de-emphasizing the student-oriented aid model in favor of an institution-center model that is focused on reducing the price of education.
  - The author supports direct federal funding to the institutions themselves.

The article is focused on how for-profit institutions have specifically targeted veterans. The author explores the 90/10 rule and how it incentivizes for-profit institutions to enroll the highest number of military members possible because for every service member a school enrolls, it may enroll nine students who pay for their education with nothing but federal student aid.

Ultimately argues that because for-profit schools have a fiduciary duty to their shareholders, they cannot act in the best interest of students or taxpayers. As a result, for-profit institutions should have minimum access to GI bill funds.

- The paper analyzes ED’s recent rule change regarding the definition of “gainful employment.”
- Addresses criticisms and critiques of the new rule and attempts to predict the rule’s real-world impact.

- This article focuses on ED’s regulations geared towards transparency and misrepresentations, particularly addressing: (1) misrepresentation and marketing; (2) fraud in connection with the value of the degree; and (3) fraud relating to financial matters
- Also addresses ED’s regulations which strengthen the ban on incentive compensation for admissions representatives for for-profit colleges.
- Notes that ED has not created a private cause of action to respond to misrepresentations and ED has discretion regarding enforcement, but is generally supportive of ED efforts to require disclosures and transparency

- Recognizing the regulatory reform enacted by ED in response to for-profit educational institutions, the article advocates for the use of the False Claims Act as another tool aimed at for-profit reform.
- Acknowledges that the question whether an institution that knowingly breaches its PPA can be liable for fraud under the False Claims Act has divided the courts.

- This article is focused on the student loan default rates at for-profit institutions of higher education, exploring the regulatory scheme and gaps therein. Regulatory issues discussed include:
  - ED’s failure, until recently, to define “gainful employment”
  - Problems with the calculation of the cohort default rate
  - Lack of job placement and graduation rate information
Loopholes in federal rules that generally prohibit incentive payments to loan enrollment officers based on the number of students enrolled

- Discusses ED’s recent regulatory efforts and makes recommendations to “plug the gaps,” mostly focusing on greater enforcement and information gathering.


- The paper focuses on whether the Department of Education has exceeds its statutory authority under the HEA concerning the following regulations:
  - The misrepresentation regulation – prohibits misleading statements by eligible institutions to students, prospective students, members of the public, any accrediting agency, a state agency, or to the Secretary.
    - Argues that the Department punishing eligible institutions for misrepresentation for even minor infractions without notice and hearing is not supported by the HEA.
  - The incentive compensation regulation – expands the kinds of compensation prohibited by the HEA and the class of compensated persons encompassed within those provisions.
    - The incentive compensation regulations bar payments that the HEA arguably permits.
  - The state authorization regulations – a specific framework for authorizing eligible institutions to provide a postsecondary program of study.
    - The effort to compel a specific authorization and enforcement scheme is without foundation in the HEA’s provisions governing state responsibilities.

Joseph Sipley, Note, *For-Profit Education and Federal Funding: Bad Outcomes for Students and Taxpayers*, 64 Rutgers L. Rev. 267 (2011)

- Argues that the “gainful employment” regulations do not go far enough and that several additional reforms are needed to rein in on for-profit institutions.
- The article spends time describing the history of federal involvement in higher education and the rise of for-profit schools
- The note mostly focuses on the current regulations, specifically the “gainful employment” regulation what more can be done.


- This piece has a historical purpose, spending much time discussing the development of higher education regulation.
- Discusses the costs and benefits of government regulation of higher education, suggesting that the industry may do better without regulation
- Also discusses in-house compliance at higher education institutions, arguing that the role of counsel is conflicting: advising and defending the institution on one hand and acting as an in-house regulator to ensure compliance from that same institution

- GAO report discussing undercover tests at fifteen for-profit colleges, finding that four colleges encouraged fraudulent practices and that all fifteen made deceptive or otherwise questionable statements to GAO’s undercover applicants, including:
  - Applicants encouraged to falsify their financial aid forms to qualify for financial aid
  - Exaggeration of potential salary after graduation and failure to provide clear information about the college’s program duration, costs, or graduation rate
  - Pressuring contracts for enrollment before the applicant had a chance to talk with a financial advisor


- Discusses 34 C.F.R. 668.164(d), ED’s financial aid disbursement regulation that allows institutions of higher education to require students living on campus to prepay an entire semester’s rental expenses.
- Argues that the common law—which generally supports the proposition that rent does not accrue as a debt until the tenant has enjoyed the use of the land for the period for which it is payable—prohibits ED’s regulation.
- Argues that Congress did not intend for ED to preempt state law.


- The article discusses the controversy that led Congress to amend the Higher Education Act in 1992 and discuss possible consequences of the Amendments.
- Focused on the accreditation requirements, particularly the relationship between the accrediting agencies and the federal government and the ambiguity regarding the Secretary’s authority to control accrediting agency standards.
  - Discusses the implications of the private accrediting agency relationship to the federal government (inherent tension) and legislative response for continued autonomy of accrediting agencies and future conflicts between ED and accrediting agencies over standards.
- Briefly discusses possible Establishment Clause problems with the allocation of federal funds through Title IV aid to religiously affiliated schools and the new “Religious Institution Rule.”