COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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WASHINGTON, DC 20515-6100

August 2, 2010

The Honorable Arne Duncan
Secretary
U.S. Department of Education
400 Maryland Ave, S.W.
Washington, DC 20202

Dear Secretary Duncan:

Thank you for this opportunity to comment on the proposed program integrity regulations included in the Notice of Proposed Rulemaking published in the *Federal Register* on June 18, 2010.

We share your goal of strengthening accountability and integrity among the institutions that participate in the federal student aid programs and agree a number of the issues included in the package warrant additional clarification through updated regulations. For example, we appreciate clarification of the regulations surrounding administration of the "ability-to-benefit" test. We also support the changes governing the verification of income data on the Free Application for Federal Student Aid (FAFSA). Allowing institutions to disperse student aid earlier is also a welcome effort to enable low-income students to purchase necessary books and supplies in advance.

Finally, we appreciate articulation of the additional disclosures related to whether or not a program is training students for "gainful employment." We strongly believe providing additional disclosures to students will arm them with the information necessary to make informed decisions about their postsecondary education. In fact, the disclosures required here, such as on-time graduation rates, program costs, the careers for which the program prepares students, and job placement rates for each program, are all important considerations a student must weigh when selecting any institution. We therefore find it unfortunate that these disclosures will only be required from certain institutions.

We are deeply concerned by a second regulation that would define "gainful employment" through a confusing and complex set of metrics. This new regulation will harm students,

particularly those non-traditional students who are returning to school to update their skills or who may be unable to pursue an education at a traditional four-year institution. We believe measures such as on-time graduation rates and career placements are just as important as loan repayment rates and student debt levels in examining program quality. Unfortunately, this regulation limits the evaluation of certain training programs to a narrow set of financial measures. Rather than rushing ahead with this regulation, we believe the Department should have first required institutions to offer additional disclosures to students on a variety of measures, and then analyze the situation and craft a narrowly targeted solution, if necessary, only after the collection of additional data. We hope the Department will reconsider this ill-advised regulation.

The proposed regulation regarding incentive compensation is also troublesome. Under current law, institutions are prohibited from making any commission, bonus, or other incentive payments based directly or indirectly on the success of securing enrollments or financial aid to any person involved in student recruitment or admissions.[1] The current regulation restates the statute and provides 12 "safe harbors," or activities an institution may pursue without violating the prohibition against incentive compensation. One of the purposes of federal regulation is to clarify and further explain the meaning of federal law so that entities affected by the law understand what activities are permitted and what activities are forbidden. We have significant concerns that the proposed regulation moves away from this, and actually inserts greater uncertainty for institutions because it lacks clarity as to what activities are permitted and what are forbidden.

We agree that some of the safe harbor provisions in current regulation may have led to questionable activities and should be scaled back or eliminated. There were some safe harbors, however, that simply provided practical clarifications, such as the provision permitting recruiters to recruit non-Title IV eligible students. Although the Department argues this provides an incentive to steer students away from federal aid programs, it provides no evidence this has occurred. Consider also the safe harbor that permits incentive payments to managerial and supervisory employees not involved in recruiting, admissions, or awarding of financial aid to students. While the Department argues that senior management drives institutional culture and could create undue pressure to increase student enrollments, under this thinking any bonus given to an institution's president for increasing enrollment – for example, an increase that came as a direct result of improved program quality attracting more students – would be in violation of the proposed regulation. This is not the intent of the law and should not be prohibited through regulation either.

By removing all 12 safe harbors, simply restating statutory language in regulation, and defining only a handful of terms, we fear a new boutique market will arise for lawyers to interpret and litigate this regulation for individual institutions. This legal confusion is exacerbated by the Department's decision not to provide any guidance to individual institutions with specific questions on the regulation. We believe such guidance is a fundamental purpose of the

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[1] HEA § 487(a)(20)

Department and urge it to ensure that there is a transparent process to provide guidance to institutions in their operations, recruitment, and enrollment.

We also have significant concerns with the overreach of the federal government in further defining the requirements states must have in place to meet the statutory requirement for state authorization.[2] Current regulations do not further define or describe the statutory requirement. The Department justifies its departure from the historical approach by pointing out problems that existed in a single state. As a result of the Department's overreach, as many as 37 states may need to legislate in order to comply with this proposed regulation. A delicate balance exists between federal accountability and states' rights. We believe this regulation disrupts that balance. States must have the freedom to determine how postsecondary institutions are allowed to serve students within their boundaries. Each state should be permitted to authorize an institution of higher education as it deems appropriate to the best interest of its residents. As such, we recommend that the Department maintain current policy on this particular issue until it can demonstrate significant and national harm has occurred through the lack of a federal regulation.

Like state authority, institutional authority is a longstanding principle of American higher education. Historically, institutions of higher education have defined their credit hours and assigned a specific number of credit hours to each course. Accrediting agencies, which are responsible for assessing institutional quality, review the process used by institutions in defining and assigning credit hours.

Negotiators agreed some aspects of the credit hour regulations merited adjustment. For example, negotiators were open to clarifying the processes accrediting agencies review when examining credit hour determinations at individual institutions. In fact, negotiators reached "tentative agreement" on the credit hour issue during negotiated rulemaking. This agreement did not include a federal definition of credit hour, a concept that drew opposition from some negotiators. However, the Department disregarded the negotiators' agreement and pushed forward with a federal definition of credit hour. The Department argues this federal definition will not impede institutional flexibility because of the new "paragraph (3)", a provision that permits institutions to provide equivalencies to the federal definition based on the intended learning outcomes and evidence of student achievement.

We disagree with the Department and do not believe that any sort of federal definition of a "credit hour" should be included in the proposed regulation. Despite the good intentions of its inclusion, paragraph (3), as currently drafted, requires Departmental "sign off" on the alternative formulation. This gives the Department, rather than the institution, the ultimate say in an inherently academic matter. The federal government must oversee its investment in federal student aid flowing to students, but it must not overstep in the federal role by dictating how institutions operate. This proposal deprives institutions of any true flexibility to innovate in course delivery to changing student populations. A more appropriate action would be to

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[2] HEA § 101(a)(2)

eliminate the federal definition and maintain the clarifications to the role of accrediting agencies in monitoring institutionally determined credit hour definitions.

We urge you to reconsider portions of the proposed regulations in light of these concerns. We appreciate your consideration of our views in these important matters.

Sincerely,