National Association
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August 2, 2010

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, NW, Room 8031
Washington, DC 20006-8502

RE: Docket ID ED-2010-OPE-0004

Dear Ms. Finkel:

I am writing on behalf of the National Association of Independent Colleges and Universities (NAICU) in response to the notice of proposed rulemaking dealing with program integrity issues, published in the June 18, 2010, *Federal Register*.

With more than 1,000 member institutions and associations nationwide, NAICU reflects the diversity of private, nonprofit higher education in the United States. NAICU members enroll 85 percent of all students attending private institutions. These institutions include traditional liberal arts colleges, major research universities, church- and faith-related institutions, historically black colleges, Hispanic-serving institutions, single-sex colleges, art institutions, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

At the outset, let me say that we commend the Department for taking the initiative to review current regulatory practices with a view towards assuring program integrity. Over time, practices can develop that serve neither students nor the taxpayers. Taking a fresh look is useful in identifying new problems and adopting new solutions. The Department proposes many positive steps in dealing with issues ranging from incentive compensation to high school "diploma mills" to ability-to-benefit.

This regulatory package is a complex and ambitious undertaking. While applauding the overall effort, we want to highlight two areas where we feel strongly that the Department has missed the mark. Specifically, we urge that proposals to define a "credit hour" and to expand existing regulatory language with respect to state authorization be stricken from the proposal. Our concerns about these two proposals are outlined in greater detail below.

Federal Definition of Credit Hour

We urge that the definition of "credit hour" proposed in §602.2 be removed. Having a federal definition of "credit hour" puts the federal government squarely and inappropriately in the middle of an academic decisionmaking process. Defining and awarding academic credit is a fundamental function of colleges and universities. Moreover, this process makes possible the qualities—diversity, flexibility, and innovation--that epitomize the American system of higher education.

During the negotiated rulemaking process, the private, non-profit college representative argued persuasively that there should not be a federal definition of credit hour. The negotiators reached consensus on this point. So we were both disappointed and alarmed to see that a definition was reinserted in the proposed regulation.

Setting a federal definition will have the effect of boxing in a dynamic process that has served American higher education remarkably well. The beauty of the system is that a diverse array of courses offered by an equally diverse array of institutions functions with a common understanding of the work required to perform at a postsecondary level.

Credit hour determinations are academic judgments made with active faculty participation and are adjusted as advancements or innovations are discovered. These decisions don't follow a rigid step-by-step template, but rather are guided by consensus achieved by academic experts. This process may appear untidy, but it has been remarkably effective in sustaining both the diversity and the quality of American higher education.

We risk losing these critical attributes with a federal definition, as federal regulation inevitably leads to greater standardization. In fact, the Department's interest in defining a "credit hour" is motivated by a desire to devise a standard measure for a unit of federal aid. However, even if standardization were desirable, this proposal would not accomplish that purpose. The reasoning is simply flawed. Just as credit hours are not the sole measure for a unit of tuition, they are not the sole basis for determining the level of federal student aid awards. A student taking 12 credit hours qualifies for the same amount of aid as he/she would receive if taking 18 credit hours.

More importantly, the use of the credit hour, even as some portion of student aid considerations, does not change its core purpose as an academic--not a fiscal--unit. Determination of its key components must remain an academic decision.

Accrediting agencies do examine credit hour determinations as part of the peer review process. Therefore, we are not objecting to the inclusion of additional regulatory language dealing with accreditation reviews of credit hour determinations. We do

believe that such reviews should be consistent with current practices, and we support the alternative proposal put forward by the higher education community which attempts to achieve this goal. (The text of the alternative proposal is attached for ease of reference.)

State Authorization

We urge that the provisions relating to state authorization proposed in §600.9 be stricken in their entirety.

There is well established law in the states dealing with the authorization of institutions to offer programs of postsecondary education, as such authorization has been required since the inception of the Higher Education Act. NAICU member institutions are operating well and offering a quality higher education to their students. And they have done so for decades. The need for additional regulatory language in this area with respect to our institutions has not been demonstrated, and such language should not be included in the final regulations.

The negotiated rulemaking discussions and the explanation included in the preamble to the proposed regulation cited only the example of the elimination of an agency in California with authority over private proprietary postsecondary institutions as the justification for needing further regulation in this area. Evidence of widespread problems was not presented. Yet, the proposed regulations open the floodgates to a chaotic array of interpretations with respect to how well-established state arrangements should be altered—or whether they even need to be.

Moreover, institutions function under a wide variety of authorizing authority, both within and among the various states. Special provisions were included in the proposed regulation to deal with certain institutions authorized by the Federal government or an Indian tribe and to address certain religious institutions. However, the regulations were developed with virtually no information about the range of methods by which states have exercised their authorizing responsibilities. As a result, special consideration and clarification was provided only with respect to a few arrangements that happened to be known by participants in the rulemaking process.

The inevitable result is either that the Department will need to add an endless parade of further special provisions as other unique arrangements and situations arise or states will find themselves engaged in endless battles over what constitutes sufficient "authorization."

Longstanding arrangements have worked well in the overwhelming majority of cases. It is inappropriate and unnecessary for the federal government to require states to

second guess the explicit decisions they have already made about meeting their authorization responsibilities.

In addition, there are several other areas of the proposal where we would suggest clarifications or modifications.

Misrepresentation

We strongly support efforts to protect students from misrepresentation in higher education. However, some of the language in the proposed regulations may invite unwarranted problems for colleges. For example, creating a new definition of "misleading statement" is unnecessary, as even the Federal Trade Commission does not define this term. We are particularly concerned about the phrase in the definition referring to the "capacity, likelihood, or tendency to deceive or confuse." There is a difference between providing accurate information that is simply misunderstood and making an intentional effort to deceive or confuse. Institutions provide information on a variety of complex issues that students and others may find confusing and this distinction could easily be lost.

The proposal would make institutions responsible for misrepresentations made by anyone with whom the institution has an agreement. Colleges and universities have a myriad of contracting agreements, and institutions should not be held liable for all statements made by those contractors. We urge the Department to incorporate traditional agency principles into the final rule and clarify that the institution is responsible only for those statements made by individuals who are authorized to speak for their institution. We believe this could be accomplished by adding the following phrase, shown in italics, to the definition: "or any ineligible institution, organization or person with whom the eligible institution has an agreement *and who has representative authority for the institution concerning the subject of the misrepresentation . . . .*"

We also encourage the Department to maintain language authorizing the Department to seek a correction in the case of a minor and readily correctable misrepresentation. Given the expanded scope of the regulations, inadvertent and minor misrepresentations may well occur, and we believe that institutions should be provided an opportunity to correct minor infractions. It would likely save time and money all around.

Finally, we are concerned by changes that would eliminate due process protections for institutions in the case of a substantial misrepresentation. Under the proposal, the Secretary is permitted, based solely on his or her determination, to (1) revoke an institution's program participation agreement; (2) impose limitations on Title IV participation; or (3) deny participation applications made on behalf of the institution—all without providing notice, hearing or appeal to the institution. We urge the inclusion of

language that would require the Secretary to proceed through the current due process procedures outlined in Subpart G, which action is noted in the proposed rules. Subpart G provides the Secretary with several courses of action including, in Section 668.83, "emergency powers" to take immediate action against institutions for a serious misrepresentation if necessary to prevent misuse and loss of Title IV funds.

Incentive Compensation

We believe it is appropriate for the department to do away with the twelve safe harbors for incentive compensation. In many cases, safe harbors have become loopholes for the types of activities the Department sought to prevent. While we support the Department's efforts to strengthen the ban on incentive compensation, we would ask that additional clarification be provided in a couple of areas.

Click-through Payments : We appreciate the Department's explanation that the proposed language would not prohibit "click-through" payments, where a third party is paid based on those who "click," and not on the number of students who enroll. We ask that this clarifying language from page 34819 of the preamble, or similar language, be included in the explanation or the "response to comments" section of the final rule.

Merit Payment: In addition, we hope that salaried employees who provide outreach, recruit for an institution, or manage enrollment can be paid for doing their jobs responsibly. In the preamble to the proposed rules, the Department states that merit pay may be provided to financial aid or admissions staff, but that pay cannot be based upon securing student enrollments or the award of financial aid or institutional goals to increase enrollment--even if this were only one factor among many. During the Department's webinar on July 26, the opposite seemed to be stated--i.e., that such employees should be able to carry out their jobs, as long as they were not judged solely on the number of students recruited.

Clearly, high pressure sales techniques aimed at continually increasing enrollments are unacceptable. However, we encourage the Department to consider how to address such techniques so as to allow reasonable evaluation and compensation of employees whose jobs are related to obtaining an appropriate level of enrollment for a college. It seems that there should be a way to distinguish between these two types of activities.

Gainful Employment

We are supportive of the Department's efforts to protect students from unscrupulous schools that sell expensive job training for occupations for which there are no jobs, where the jobs available are so low-paying that students are unable to repay their

student loans, or where the training received is inadequate or inappropriate to qualify the student for the desired occupation. We also support and appreciate the department's proposal to exclude degree-granting programs at private and public institutions from requirements appropriate to job-training programs.

Reporting and Disclosing Information: We agree that the information required under Section 668.6 (a) and (b) would be helpful to both the department and prospective students, and would help protect taxpayer investment in higher education. However, these reporting and disclosure requirements are added responsibilities and will entail additional costs. In addition, schools may not be to obtain portions of the requisite information.

Placement Rates: Subsection 668.6 (b)(4) requires institutions to disclose, on their websites, placement rates for each program falling under the "gainful employment" definition. We are concerned that colleges will not be able to get this information. While employer, tax, or social security data can be used to verify job placement, colleges do not have access to such information without the students' assistance, and, have neither the authority nor the ability to track students. If this requirement becomes final, will lack of data on placement be treated the same as "no placement?" How will students who have a job and have taken the course for advancement be treated? Must students who do <u>not</u> receive federal student aid also be tracked? This seems to go beyond the department's legitimate interest and responsibilities in the area of student financial aid and raises privacy issues.

Information on Private Loans: Subsection 668.6(a)(4) requires institutions to provide the amounts their students received from private educational loans and institutional financing plans. We suggest that the regulation specify that this reporting be limited to information that an institution knows or should reasonably be expected to know. Given that students are responsible for "self-certifying" private loans, schools may not always be provided this information. The regulation should also specify that institutions need only report the amount of debt incurred by the student for the gainful employment program(s) at the particular institution.

Definition of "on-time graduation": The term "on-time graduation" in subsection 668.6(b)(2) needs to be defined. This term has no reference in existing law or regulation, although "completion rate" is defined in 34 CFR 668.8(f). How would part-time attendance be handled? We recommend that the definition be structured to parallel time reporting requirements and allowances for 2- and 4-year degree programs, as appropriate, such as the "Student Right to Know" requirements (34 CFR 668.45).

Return of Title IV

We object to the proposal to include in the definition of "an institution that is required to take attendance" an institution that takes attendance voluntarily for a limited period of time or for certain classes or for certain students. This goes beyond what the law requires and will add confusion to an already enormously complex process. The problems that would occur in the implementation of this proposal far outweigh the minor savings that would likely accrue to the Department.

Full-time Student

We support the proposed language regarding the definition of a "full-time student" that enables a student enrolled in a term-based program to receive federal student aid for repeating a course for which the student will not receive additional credits. We understand that institutions would have difficulty tracking this type of information without doing program audits of individual students. However, it occurs to us that some schools might abuse this authority. It seems that providing aid to a student repeating a course without getting additional academic credits should be limited to one time per course, except in extraordinary circumstances.

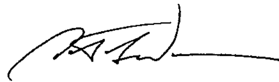
Satisfactory Academic Progress (SAP)

The proposed regulation would clarify some terms but would also add new and specific elements that must be included in an institution's satisfactory academic progress policy, including: a description and specific treatment of transfer credits; a description of financial aid warning and probationary statuses (if applicable); and the pace at which a student must progress, that must be measured at each evaluation. It also requires schools that put students on financial aid probation to develop and evaluate the success of an academic plan for each of those students.

It seems unfair to pressure schools to increase SAP assessment frequency by giving students more favorable treatment in cases where the assessment is made each payment period, rather than once a year. While we understand that some institutions have not conformed to the current SAP requirements, and the time periods are different, coercing institutions into assessing SAP multiple times a year seems an unnecessary requirement and expense at institutions which have stable student populations and good graduation rates. Students at such schools should also be allowed to receive a financial aid warning and an automatic extension of Title IV eligibility for their next period of attendance, rather than having to appeal and be granted probationary status and an extension of Title IV eligibility.

We appreciate having the opportunity to state our views about these proposed regulations.

Sincerely,



David L. Warren
President

Attachment: Higher Education Community Alternative Proposal

§602.24 Additional procedures certain institutional accreditors must have.

(f) Credit-hour policies. The accrediting agency, as part of its review of an institution for initial accreditation or preaccreditation or renewal of accreditation, must conduct an effective review and evaluation of the reliability and accuracy of the institution's assignment of credit hours, consistent with the provisions of §602.16(f).

(1) The accrediting agency meets this requirement if it—
(A) Reviews the institution's application of the institution's policies and procedures to its programs and coursework; and
(B) Determines whether the institution's assignment of credit hours is consistent with commonly accepted practice in higher education.

(2) The accrediting agency may use sampling or other methods selected by the agency in the review.

(3) The accrediting agency must take such actions that it deems appropriate to address any deficiencies that it identifies at an institution as part of its review and determination under paragraph (1), as it does in relation to other deficiencies it may identify, subject to the requirements of this part.

(4) If, following the institutional review process under paragraph (f), the agency has reason to believe the institution is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, the

agency must notify the Department, as required by the provisions of §602.27(a)(6).

(5) Nothing in this section shall be construed to permit the Secretary to establish any criteria that specifies, defines, or prescribes the procedures that accrediting agencies or associations shall use to assess any institution's credit hour policies or procedures.