



September 20, 2017

Hilary Malawar, Assistant General Counsel  
United States Department of Education  
400 Maryland Avenue SW  
Room 6E231  
Washington, DC 20202

Docket ID: ED-2017-OS-0074

Ms. Malawar,

On behalf of the higher education associations listed below, representing two- and four-year, public and private, colleges and universities, we write to submit our comments in response to the June 22, 2017, Federal Register notice for input on regulations that may be appropriate for repeal, replacement or modification, in accordance with Executive Order 13777 “Enforcing the Regulatory Reform Agenda.” Our comments are appropriately focused on regulations that the department has the ability to change through negotiated rulemaking or sub-regulatory guidance and do not include statutory provisions that are under congressional purview. We represent the full spectrum of U.S. higher education, thus the regulations we highlight may not equally impact all types of institutions.

Our members are committed to acting as careful stewards of federal funds. We believe that the federal government must ensure that institutions do not squander public resources and act to protect students and taxpayers. Regulatory oversight, exercised in a thoughtful and meaningful way, provides these essential protections, but unnecessary and complex regulations provide few, if any benefits. The same is true with regulations that have an excessive reach, are poorly framed, hard to comply with, or difficult to implement.

Such regulations thwart student access to college, impede the pursuit of institutional organizational efficiencies and constrain innovation. Because they increase administrative burden, they can also drive up institutional costs. We believe in the ability of the Department of Education to act as a gatekeeper for federal dollars, but regulations should be framed to target areas where the known abuses exist. Clear safe harbors—provisions in the law that will protect institutions from liability as long as certain conditions have been met—should be established to help institutions meet their compliance obligations.

In 2013, Senators Lamar Alexander (R-TN), Barbara Mikulski (D-MD), Michael Bennet (D-CO) and Richard Burr (R-NC) convened a taskforce of sixteen college and university presidents to identify specific federal regulations and reporting requirements that place undue burden on students, families and institutions of higher education. The taskforce, led by William E. Kirwan, chancellor of the University System of Maryland, and Nicholas Zeppos, chancellor of Vanderbilt University, as co-chairs, was given a three-part charge:

1. Provide specific recommendations to consolidate, streamline and eliminate burdensome, costly and/or confusing regulations, legislation and reporting requirements;
2. Review and quantify the extent of all federal reporting and regulatory requirements with which institutions must comply, including estimates of the time and costs associated with specific regulations and requirements; and

3. Provide recommendations for reform to ensure future regulations are promulgated in a manner that appropriately considers existing law and accurately examines the costs and benefits to taxpayers, institutions and students.

In February 2015, the taskforce issued its final report entitled “Recalibrating Regulation of Colleges and Universities: Report of the Task Force on Federal Regulation of Higher Education.” A copy of that report is attached. The report identified a number of broad problems facing institutions of higher education, including that regulations are unnecessarily voluminous and complex; compliance with regulations is inordinately costly; regulations can be a barrier to innovation; and some regulations are unrelated to education, student safety or stewardship of federal funds. Additionally, over the past few years the department has developed an increasing appetite for regulations and has not always acted in a timely manner.

Some of the issues identified in the report are statutory and need congressional action. However, many of them can be addressed by the department through regulatory rulemaking and reform. Since the publication of the 2015 report, Congress and the department have addressed several of the issues identified, including the use of prior-year tax return data in the Free Application for Federal Student Aid (FAFSA). We are grateful for those actions, but much more can still be done.

While the taskforce focused on regulations at the department, it is important to note that higher education is also touched by rules and regulations from almost every Cabinet-level agency, and some sub-Cabinet agencies, especially in the area of research regulations.<sup>1</sup> We continue to work with those agencies in the area of regulatory reform.

The 2015 taskforce report identifies specific regulations of concern, as well as recommended actions. Below we highlight three major issues: financial responsibility standards, return of Title IV funds when a student withdraws, and state authorization. We strongly urge the department to consider these issues as part of the regulatory reform agenda.

### **1. Financial Responsibility Standards**

*Summary:* The department is responsible for making accurate assessments of institutions’ financial well-being. Unfortunately, the existing financial responsibility regulations have not been updated since the mid-1990s and, in the case of non-profit colleges and universities, often provide an inaccurate and misleading picture of an institution’s financial health. This is not a small matter. Perfectly sound and viable non-profit private colleges that fall below a required “composite score” may be erroneously required to obtain an expensive letter of credit to satisfy federal requirements.

*Recommendation:* Our request here is simply that the department review these regulations in light of current financial practices and update them, especially as they affect non-profit, private colleges, and provide a fair and equitable solution to institutions who are plainly not in danger of precipitous closure, while strengthening protections against precipitous closure of high-risk institutions. We are concerned, however, with the department’s proposal to address this important topic in a subcommittee setting as a subsidiary issue in its yet-to-be-organized negotiated rulemaking committee on the tenuously related borrower defense regulations.

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<sup>1</sup> The Higher Education Compliance Alliance, Compliance Matrix: <http://www.higheredcompliance.org/matrix/>.

## **2. Return of Title IV Funds (R2T4)**

*Summary:* Current regulations do not dictate an institutional tuition refund policy when a student withdraws. Instead, a school is required to determine the date the student ceases attending and his or her “earned” and “unearned” Title IV aid amounts. “Earned” amounts are directly proportional to the time the student attended. “Unearned” Title IV funds are returned to the government.

Unfortunately, the regulations needed to implement this simple mandate are extraordinarily complex. The R2T4 calculation is exceedingly difficult for three main reasons. First, many students who withdraw fail to inform their institutions, but schools must make good faith efforts to determine when such students withdrew. For schools that do not take attendance, this means documenting when the student last participated in an academically related activity. Second, the wide variety of program configurations, including credit and clock hour, non-term, and non-standard term programs, greatly complicates the calculation. Third, the calculation includes all Title IV amounts disbursed to the student, including amounts for which the student was eligible *after* he or she ceased attendance. Finally, the current rules do not encourage students to return to complete the programs they started.

*Recommendations:* While the basic concept underlying a prorated approach is certainly valid for R2T4, the details need to be simplified, and the meaning of “required to take attendance” should recognize the challenge that proposes to schools that do not take attendance. Students who simply leave without notifying the institution should be subject to institutional policy, as long as that policy is made clear to enrolling students.

Given the complexity of this issue, it may be desirable to consider a dedicated R2T4 negotiated rulemaking session—limited to only that topic—with a view to starting over and striving for simpler interpretations and more discretion for schools.

## **3. State Authorization**

*Summary:* The state authorization regulations were a part of a broad package of program integrity regulations issued by the department in October 2010. The intent of the regulations was to crack down on unscrupulous higher education providers via an expansion of the state authorization process. This expansion included new rules for colleges offering distance education programs. Unfortunately, the state authorization regulations have created confusion about the legal status of many well-established colleges and universities—many of which face changing requirements by the department to demonstrate legitimate state authorization. The state authorization of distance education regulations, scheduled to be implemented on July 1, 2018, layer additional complexities on top of the existing state authorization requirements.

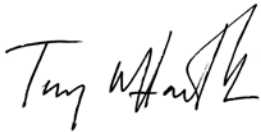
*Recommendation:* While the final regulations resolved many of our concerns, the department’s implementation of state authorization continues to cause issues due to the confusion and uncertainty that the department’s administrative practices are causing. The regulatory effort on state authorization remains incomplete. At a minimum, the regulations should be complemented with clear, timely and reasonable procedures for compliance by regulated institutions. As the regulator charged with ensuring that institutions have the information they need to comply with its rules, the department has been unusually unhelpful on this particular topic. We ask that the department respond in a timely manner to questions of state

authorization from institutions and that the department clarify and provide further compliance guidance in the area of state authorization of distance education.

Beyond these issues, we have attached the entire 2015 report and we call your attention to the 59 specific regulations that the department can and should address. They are listed in the “regulations matrix” included at the end of the report along with specific actions the department can take to reform or sunset those 59 specific regulations. We encourage the department to consider these regulations while undertaking regulatory reform.

We look forward to working with the department as it undertakes this important evaluation of existing regulations.

Sincerely,



Terry W. Hartle  
Senior Vice President

TWH/ldw

Attachment

On behalf of:

American Association of Collegiate Registrars and Admissions Officers  
American Association of Community Colleges  
American Association of State Colleges and Universities  
American Council on Education  
Association of American Universities  
Association of Community College Trustees  
Association of Governing Boards of Universities and Colleges  
Association of Jesuit Colleges and Universities  
Association of Public and Land-grant Universities  
Council for Christian Colleges and Universities  
Council for Higher Education Accreditation  
Council of Graduate Schools  
EDUCAUSE  
NASPA - Student Affairs Administrators in Higher Education  
National Association for Equal Opportunity in Higher Education  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators  
UNCF