AASCU American Association of State Colleges and Universities
Delivering America's Promise

May 27, 2014

Ashley Higgins
U.S. Department of education
1990 K Street NW, Room 8037
Washington, DC 20006-8502

Re: Program Integrity: Gainful Employment
Docket ID ED-2014-OPE-0039

Dear Ms. Higgins,

I write on behalf of the American Association of State Colleges and Universities (AASCU) to submit comments on proposed regulation of certain postsecondary programs subject to "gainful employment" provisions of Sections 101 and 102 of the Higher Education Act of 1965, as amended (HEA). Notice of the proposed rule was published in the *Federal Register* on March 25, 2014

The proposed regulations were subject to requirements of Section 492 of the HEA, in compliance with which the Department solicited broad public input and subsequently convened a negotiated rulemaking committee charged with developing draft regulations through consensus. AASCU was pleased that the Department selected its nominee as a member of negotiating committee, and I would like to take this opportunity to thank the Department for that decision. While the negotiations ended without consensus, we believe the discussions were helpful to all parties, hopefully including the Department. In accordance with the protocols that govern the negotiated rulemaking process, the committee's failure to reach consensus cleared the way for the Department to draft the proposed regulations entirely on its own, which it has done by producing the document we address below.

General Observations

As we indicated in our July 2013 application letter for inclusion in the negotiating committee, AASCU was and remains committed to development of effective and workable regulations that reasonably balance public expectations of program accountability with legitimate institutional concerns about compliance burdens. Realizing the complicated analytical issues involved in this particular effort, we approached the task of developing a proposed regulatory framework with the modest goal of drafting a rule that would prevent egregiously abusive programs from gaining or maintaining eligibility for participation in Title IV federal student aid. We assumed that targeting outright fraud, as opposed to attempting to make federal judgments about relative merits of various programmatic offerings of participating schools, would be a broadly agreeable and more pragmatic goal that would steer the Department clear of legal or policy troubles. We were also convinced that a more modest definition of success—weeding out fraud and egregious abuse—would allow for a less complex, less burdensome, and less controversial rule. I regret to say that the draft rule we are commenting on falls short of our expectations in its substance, and that it exceeds our worst fears in terms of complexity and compliance burdens. Specifically, the proposed rule's effectiveness is undermined by the following features:

- It does not provide upfront processes to exclude predatory programs *before* they victimize students and taxpayers, but relies instead on a retroactive determination of programmatic compliance, and uses documented cases of adverse outcomes for multiple cohorts of former students as the basis for the *post facto* loss of eligibility. This aspect of the proposed rule's design is the exact opposite of the underlying statute's intent, as we argued during the negotiations.

- While using multiple cohorts of borrowers as guinea pigs to assess programmatic compliance with its metrics, the proposed regulation fails to address the plight of aid recipients who have been ill-served by programs *the proposed rule itself designates as underperforming*. The proposed rule inexplicably retracts even the modest relief that previous drafts offered to victims of the Department's inadequate gatekeeping practices. Not only should the proposed rule *fully* mitigate the burden of educational debt for students who were enrolled in such worthless programs, their lifetime Pell eligibility should be restored by excluding any Pell grants disbursed for study at predatory programs that lose eligibility.

- The proposed rule's metrics, while conceptually based on solid research, have been uniformly twisted beyond recognition in the direction of greater leniency toward programs and therefore toward much harsher treatment of students. The Department's modification of research-based metrics—essentially "fudge-factors" that inflate the upper limits by 50 percent for both the debt-to-earnings and the debt-to-discretionary earnings metrics—is presumably intended to pacify the predictable opposition from the worst actors that offer the least defensible programs. But in changing these empirically derived limits, the Department exposes the rule to charges of arbitrariness. And, needless to say, by so significantly and unrealistically inflating the regulatory definition of manageable debt-service for borrowers, the proposed rule undermines the very purpose of the statute it seeks to interpret.

- Beyond the anemic substance of the metrics themselves, the rule further accommodates predatory programs by prolonging the periods during which they are allowed to operate before they lose eligibility. Even for programs that abjectly fail to meet the Department's low-threshold expectations of performance, for example, there is no immediate loss of eligibility, but a gratuitous second chance during which many more students would be harmed, regardless of whether the program ends up losing eligibility or ekes out a marginal improvement to evade that penalty. The failure to act decisively is further manifest in the proposed rule's epicycles of entry into and exit out of the "zone," which will allow predatory programs to manipulate the regulation's simplistic metrics at will and maintain continued eligibility despite catastrophically adverse outcomes for students and taxpayers.

- The rule suffers from a one-size-fits-all design flaw that renders it at once ineffective against the worst programs *and* intrusive and unworkable for low-risk ones. This issue was discussed at great length during the negotiations, and remains unaddressed in the proposal pending before the public now. Smart regulations would allocate the Department's finite oversight and enforcement resources to the riskiest programs with a documented history of bad outcomes. But this proposed rule makes no such distinctions, and fails to offer safe harbors to programs that pose very little risk to students and taxpayers, either because few of their students borrow, or because they are offered by institutions with stellar performance indicators such as extremely low default rates. The proposed rule's failure to target attention on where the problems are most prevalent saps the resources of both the Department and the low-risk, good-faith providers while reducing the likelihood of meaningful action against predatory operations.

- The proposed rule's inherent weakness and its inadequacies are matched by its unnecessary complexity and compliance burdens, again uniformly imposed on all providers regardless of past performance and present indications of risky conduct. We realize that some measure of compliance burden is inevitable in any new regulatory activity, but the proposed rule's substantive ineffectiveness and its overwhelming compliance burdens make it one the more egregious examples of how an indiscriminate regulatory approach can overburden legitimate institutions.

We believe that these shortcomings are not insurmountable, and that an effective and workable rule can still be crafted through a series of modifications proposed by a number of student and taxpayer advocacy groups. I would like to specifically endorse the comments submitted by the Institute for College Access and Success, by the Center for Responsible Lending, by the National Consumer Law Center, and by Ms. Margaret Reiter, who was also a member of the committee. Incorporating their comments into the final rule would correct the shortcomings of the proposed draft and provide a sound regulatory approach to the issues. Failure to improve this rule would result in a costly, but purely decorative, regulation that would impose significant burdens on all participants, but allow rampant waste fraud and abuse by predatory providers to continue.

Sincerely,

Edward Elmendorf

Edward M. Elmendorf
Senior Vice President
Government Relations and Policy Analysis