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Assistant General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Room 6E231
Washington, DC 20202

September 19, 2017

**RE: EVALUATION OF EXISTING REGULATIONS/ Enforcing the Regulatory Reform
Agenda (Executive Order 13777)
DOCKET No. ED-2017-OS-0074**

Dear Assistant General Counsel:

The Committee for Economic Development (CED) appreciates the opportunity to comment on regulations related to higher education that may be appropriate for repeal, replacement, or modification. As a nonprofit, nonpartisan, business-led public policy organization that provides reasoned solutions in the nation's interest, CED is a strong advocate for education and has long supported a balanced approach to government regulation.

In keeping with our balanced approach to regulation, our comments focus on three themes:

1. Providing transparent and useful information to students and families to improve the functioning of higher education markets
2. Promoting innovation in higher education by ensuring a level playing field for all types of higher learning providers
3. Enhancing quality assurance by improving the accreditation system for higher education, including greater emphasis on student outcomes

Provide transparent and useful information to students and families

Markets and consumer-driven choice can do much to ensure that consumers receive high-quality services of the type they desire at the best possible price. However, markets require informed consumers to deliver these outcomes. For these reasons, we recommend that the Department reconsider and restructure the required consumer information disclosures for institutions of higher learning. Current consumer information disclosures include, but are not limited to, the net price calculator, the shopping sheet, the College Scorecard, College Navigator, and a plethora of requirements in college catalogs from the Student Right to Know Act. It is unclear how helpful this overwhelming abundance of information is to students looking to make informed college choices. While much of the information that institutions must report is mandated by legislative law, the department should revise how it requires institutions to report this information so that it is of the greatest benefit to students.

Remove restrictions on the form and mode of learning in higher education

Like all sectors of our economy, the higher education market is evolving to meet the demands of the 21st century. How students learn, the pace at which they learn, and where they learn are changing, sometimes dramatically. Yet many of our regulations still reflect traditional models of delivering higher education. Our regulations need to reflect these changes in how students receive education to better serve the needs of those students, particularly those who are pursuing their educations with the help of non-traditional institutions of higher learning.

- **Eliminate regulatory requirements that are intended to disadvantage particular sectors or learning models.** As a country we should be encouraging students to pursue their education through whatever delivery model best fits their individual needs, so long as they are acquiring the right skillsets and competencies. The Department should modify existing regulations to remove distinctions between face-to-face, online, and assessment-based learning and should support each in a non-discriminatory manner. As just one example, the Department should update its interpretation of “regular and substantive interaction with an instructor” to reflect innovations in how education is delivered in the 21st century, including technology-enhanced online learning.
- **Eliminate course and program duration minimum requirements.** Shorter duration to completion of degrees or credentials should be encouraged, not prohibited. The focus should be on the attainment of student learning outcomes rather than time in seat.
- **Do not require time-in-seat (credit hour) as a measure of academic sufficiency.** Regulation defining the credit hour in terms of hours in and out of class stifles innovation by relying on time as a proxy for learning, rather than promoting the measurement of actual learning outcomes. Use of the credit hour perpetuates the myth that students all need the same time to master a course. Even many institutions don’t trust the credit-hour as a good measure of whether students have mastered a given set of material, as demonstrated by the fact that students often have difficulty transferring credits between schools. Similarly, many employers report that recent college graduates lack necessary workforce skills despite having earned a requisite number of credit hours.
- **Base “satisfactory academic progress” (which serves as a criterion for continued student eligibility for federal financial aid) on whether a student meets measurable learning objectives, not credits earned/attempted.** Regulation should also be modified to disregard bona fide remedial programs in calculating a student’s time-to-completion.
- **Encourage reciprocity agreements between states by clarifying regulatory guidance on the definition of such agreements.** States have voluntarily worked together to develop and implement [State Authorization Reciprocity Agreements \(SARA\)](#) that govern recognition of distance learning across state lines, thereby reducing the regulatory burden on such providers, who would otherwise need to seek state approval in every state where their students reside. The Department can reaffirm its support for collaborative efforts among states, such as SARAs, by clarifying its regulatory guidance on the definition of state authorization reciprocity agreements.

Eliminate distinctions based on institutional ownership and control

To foster innovation and increase access to the widest possible variety of high-quality educational experiences, the government should avoid discriminating in law or regulation based on type of institution – public, non-profit, for-profit; campus-based or online; credit-based or competency-based. Except for standards or measures that require a distinction (e.g., financial measures), the Department should eliminate distinctions between public, non-profit and for-profit institutions. The same quality measures and standards (including measurement of student learning) should apply to all institutions regardless of their ownership, tax status, or mode of instructional delivery. Specifically, the Department should:

- **Eliminate restrictions on sources of revenues (e.g., the “90/10” Rule) as discriminatory against both low-income students and institutions.** The “90/10” rule, which limits for-profit institutions from receiving more than 90% of their revenues from federal student aid, has led to the unintended consequence of some institutions raising their tuition and keeping it higher than needed to meet the requirements of the regulation. The rule should either be eliminated or broadly applied to all types of institutions regardless of ownership. (In the latter case, many public and non-profit institutions would exceed the 90% ceiling.)
- **Modify the accreditation process for competency-based programs to match those of traditional credit-hour programs.** Competency-based programs currently must be both accredited and then separately approved by the Secretary, whereas all other programs are eligible for financial aid based solely on accreditation by a recognized accreditor. The development of new models of learning to help students acquire the skills they need to succeed in the workforce should be encouraged, not discouraged by creating barriers to entry in the form of increased burden on institutions.
- **Modify the “gainful employment” rule.** The rule has gone through multiple versions, but targets for-profit institutions with requirements for employment of their graduates that many public and private non-profit universities currently do not meet. This may result in fewer programs for non-traditional students. This rule should either be eliminated or broadly applied to all types of institutions.
- **If Borrower Defense to Repayment (BDTR) is to be retained, the regulations should be written to strike an appropriate balance between the need to protect students and due process for institutions.** Current BDTR regulations create a slippery slope to costly litigation for all types of institutions, not just the for-profit sector. The implementation of current BDTR would likely contribute to tuition hikes. Any BDTR rule should include appropriate and balanced definitions of what constitutes a breach of contract, the statute of limitations for claims, a material standard for what constitutes “substantial misrepresentation,” who may put forward a group claim, and due process protections for institutions, among other important details.

Modify the accreditation process for institutions of higher learning

The Department of Education should preserve the principle of non-governmental assurance of quality for higher education institutions that our current system of voluntary accreditation

achieves. However, a review of existing regulations governing *how* this voluntary accreditation system is organized is long overdue. Specifically, the Department should:

- **Modify accreditor approval regulations to move from a geographically-based accreditation system to one based on type of school.** Current regulation provides for a system in which accreditors operate within a geographically-defined space. This lends itself to regional differences in how schools are accredited and which schools receive accreditation. This, in turn, can lead to regional differences in institutional quality and limits students' ability to transfer academic credit across regional boundaries. The quality of education received at a four-year institution in Texas should be the same as the quality of education received at a four-year institution in Maine. A better system would be one in which accreditors specialize based on the educational mission or academic delivery model of the schools they are accrediting rather than where a school happens to be located.
- **Require accrediting agencies to assess institutional performance on the basis of clearly described outcome measures that are related to the nature of the program and the population served.** Improved outcomes for students are the ultimate goal behind the requirement that institutions meet certain baseline quality standards. Learning outcomes related to the specific purposes of the instructional program should be the real basis for determining accreditation, with careful consideration given to controlling for exogenous factors (e.g., labor market conditions; population of students served) when gauging the net impact of a given program or institution on meaningful student outcomes, such as learning and employment.
- **Ensure full transparency for institutions undergoing accreditation review.** Accreditors are government approved, but act independently of the government. Accreditors invariably have different standards and metrics that they use to evaluate and accredit institutions. Unfortunately, this information is not usually made available to the public. Existing federal regulations related to government approval of accrediting agencies should be modified to require that accreditors make publicly available the standards by which they are evaluating institutions and how each institution they accredit performs on the metrics used in determining accreditation status.
- **Establish a truly independent mechanism for assessing the performance of accrediting agencies, independent of the Department of Education.** In order for the accreditation system to work properly and engender both consumer (i.e., student) and institutional trust, accreditors themselves must be thoroughly vetted and held accountable. Existing regulations should be modified to require promulgation of clear and concise regulations for assessing the performance of accrediting agencies and should establish strict requirements for avoiding conflict of interest in accreditation decisions. These requirements should include an examination of "peer-review" in the context of addressing inherent conflict. The Department should also establish an independent mechanism for the prompt appeal of accreditation decisions and provide for effective penalties against accrediting agencies for violations of institutions' rights.

- **Revise the “negotiated rule-making” process used by the Department of Education and introduce prospective and retrospective cost-benefit analysis and review.**

The negotiated rule-making process should be modified to require that 1) the committee include a majority of representatives from the institutions that will be directly affected by the proposed rule-making, and 2) a 2/3-majority recommendation of the committee is required to move a proposed rule forward. This will prevent the current situation where the Department is free to promulgate its own rules if the negotiated rule-making committee does not reach unanimity. In addition, proposed rules put forward for public comment should be required to include a prospective cost-benefit analysis in advance of the proposed new regulation(s). The Department should also introduce retrospective review of the costs and benefits of major regulations after they have been in place for a specified number of years (e.g., 5 years) and make the results publicly available, since prospective cost-benefit analyses conducted before a rule has been implemented are necessarily speculative.

On behalf of CED and its Members, we thank you for this opportunity to comment on the important issue of regulations governing higher education. Please contact us with any questions regarding the comments in this material.

Sincerely,

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