NASFAA

NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS

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September 11, 2017

Thank you for the opportunity to suggest areas of regulation that need revision, as requested in the *Federal Register* on June 22, 2017.

We have long since reached a point where regulations too tightly control institutional processes and administrative options. Micromanagement and over-standardization inhibit innovation, prevent customizing services to the needs of different missions and the characteristics of an institution's student body, and increase the cost of Title IV participation to the detriment of students as well as institutions. Pressure to hold down the cost of higher education combined with higher cost of participation due to over-regulation and overly prescriptive regulation has the inevitable result of reducing vital services such as counseling.

Our comments address three areas we recommend that ED consider in its initiative to reform regulations:

- Current burdensome regulations that should be revised;
- Format of regulations; and
- Process by which regulations are promulgated.

While our surveys of NASFAA member institutions consistently identify several areas of strong concern, many of them are statutory in nature. We can assess reasons why the law has become so detailed, but the fact remains that the specificity of many areas of the Higher Education Act restrict our ability to improve their implementation in regulation. We would welcome the opportunity to work with ED to identify sections of law that should be revised to allow the negotiated rulemaking process freer rein in an environment that recognizes the need for simplicity and flexibility. We believe it would benefit both schools and students to find mutually agreeable proposals to provide general guidelines and clear intention in the law rather than step-by-step processes.

To provide additional context for this regulatory reduction initiative, we would point out that one consideration for revision in the President's Executive Order 13777 is whether a regulation eliminates jobs or inhibits job creation. For purposes of assessing HEA, Title IV program rules, NASFAA believes that principle also translates into regulations that create barriers to student application, enrollment, and completion, or that inhibit innovation on the part of educational institutions.

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Current burdensome regulations

Given that ED has already announced its intention to revisit gainful employment and borrower defense rules, we will not repeat here our comments related to those sets of regulations. Certain other areas of regulation always arise in any discussion of regulatory reform as complex, costly, burdensome, or ineffective. Chief among these are:

- *Return of Title IV funds after a student withdraws*
  Return of Title IV funds (R2T4) regulations are highly complex and heavily detailed. The original underlying concept is simple and straightforward. We recommend that ED keep the concept, but scrap the current rules. ED should establish a negotiated rulemaking committee dedicated *only* to R2T4, with the goals of minimizing specificity and complexity, and maximizing school options. Over many years, R2T4 regulations have been changed to try to account for every last dollar unearned by a student, without regard to the amount of institutional expense in tracking down the moment a student withdraws. In some instances, the current R2T4 model simply doesn't work for certain nontraditional programs, but still requires schools and students to jump through multiple administrative and costly hoops in a misguided attempt to track every cent a student has not earned. This philosophy is pennywise and pound foolish, and misses the tradeoffs and diminished returns that come from such an overly prescriptive mindset.

  The guiding principle of R2T4 should be to allow students to keep an acceptable amount of earned aid based on reasonable approximations that do not invite error by their complexity, recognizing that other parameters such as satisfactory academic progress, loan limits, and restricted periods of eligibility for grants and loan subsidies also maintain program integrity.

  The return of funds section of law contains some explicit provisions that would need amending to effect maximum simplification. Many aspects, however, are regulatory, such as the definition of withdrawal, the definition of "required to take attendance," the treatment of modules, and some deadlines.

  R2T4 consistently appears in lists of the top audit and program review findings. As one NASFAA member stated: "NO ONE with modules gets this thing right." Schools do not aspire to fail tests of compliance. Any area of regulation, including but not limited to R2T4, that consistently trips up schools should be reviewed for reasonableness, complexity, and effectiveness.

  In response to a recent series of articles NASFAA posted to its membership asking for input on ED's regulatory relief solicitation, R2T4 was mentioned more than twice as often as any other area. A common comment is to drop the current rules on modules, and revert to ED's

prior policy that completion of any class in payment period negates withdrawal, such that only changes in enrollment status (full-time to half-time, for example) must be addressed.

- *Subsidized usage limits (SULA)*
  In response to articles asking for input on ED's regulatory relief solicitation, the number of comments on SULA was second only to R2T4.

  Although the limitation on loan subsidies is statutory, the regulations that implement it are the result of interpretation. Many of the comments we have received complain about the complexity of these regulations and the difficulty of explaining their effect to students. ED should review its interpretation of the law, especially with regard to basing a student's limit on his or her current program as opposed to the longest program in which the student has been enrolled. NASFAA recommends that ED hold a limited negotiated rulemaking session just on SULA.

  ED should also revisit the efficacy of required reporting of SULA-related fields to COD (e.g. CIP code) by schools not participating in the subsidized loan program or for students enrolled in programs that are not eligible for subsidized loans, such as graduate level programs. NASFAA understands the need for basic data to understand funding distribution, but collecting data that is not needed to meet specific congressional mandates or requests may create unnecessary burden. This principle is not limited to SULA.

- *Disclosures*
  According to two law scholars, "'Mandated disclosure' may be the most common and least successful regulatory technique in American law."[1] A whole book follows that opening statement, substantiating the claim across all fields of consumer experience. Education law and regulations seem determined to bear it out especially well. The authors point out that "disclosures are unreadable and unread because you can't describe complexity simply."

  Our members consistently complain that mandated consumer disclosures are, in fact, unread, for all the burden in time and cost that it takes to assemble and disseminate them. We do not suggest that all disclosures are irrelevant, but the sheer mass of them makes it impossible to tease out information that truly affects enrollment decisions. Disclosure requirements need to be thoroughly assessed from the point of view of what most applicants are actually interested in learning and will use to make decisions, and the limits of the average applicant's attention span with regard to reading, comprehending, and using the disclosed data.

[1] Omri Ben-Shahar and Carl E. Schneider. (2014). *More than You Wanted to Know: The Failure of Mandated Disclosure*. Princeton University Press.

Beyond burden, danger lurks in complex and voluminous disclosures: mistakes subject a school to charges of misrepresentation, which carries quite drastic ramifications. Not only is content an issue, but timing, appropriate recipients, delivery method, format, and presentation all need to be reviewed and updated.

Many mandated disclosures are statutory in nature, and this is an area where ED, schools, associations, and researchers can all provide Congress with a united front in reducing ineffective and burdensome requirements. Other disclosures, or the form and format of them, are regulatory and need to be thoroughly vetted for effectiveness and relevance, including rigorous consumer testing.

In 2014, a NASFAA task force on consumer information made several recommendations to better target and focus disclosure requirements.

- *Verification*
  Well-designed verification is essential to program integrity; however, its implementation is usually high on the list of burdensome regulations that affect student access to higher education.

  The last overhaul of verification regulations in 2010, effective in 2012-13, was based on sound principles. ED sought to combine positive results from the Quality Assurance Program (QAP) with technological advances to better target selection of applicants and identification of items to be verified. The concept, while still worth pursuing, seems to be more difficult to implement than perhaps originally believed. What we understood to be a transitional approach fitting selected applicants to groupings of data to be verified ("verification tracking groups") rather than a truly targeted selection of data elements for each applicant, has persisted for 6 years now[2]. We would like to see more advances in truly targeted selection.

  We appreciate the approach to regulating that builds in responsiveness to data analysis, and that allows ED to drop requirements that are shown to be ineffective. However, adding data elements to the list of items subject to verification impacts both schools and applicants, and gathering data to demonstrate effectiveness once an element is in place takes at least a few years. We encourage ED to maximize its analysis and consult with institutions before adding any new elements to verifiable data elements.

[2] GEN-12-11: "The Department's long-range goal for verification is to develop a customized selection approach based on the data provided by each applicant on the FAFSA. When fully implemented, this process will identify, for a selected applicant, only the FAFSA information that requires verification based upon that applicant's data. A transition period to move to this customized verification process started in the 2012-2013 verification selection process, and will continue into the 2013-2014 process. Transition to a customized verification process is expected to continue over multiple award years."

We also question whether the QAP should have been so precipitously eliminated. If valuable lessons were learned from that program, could it not have continued to contribute to the improvement of verification efforts for all institutions? Perhaps ongoing QA efforts would minimize the addition of data elements subject to verification that later prove to be only marginally effective. There is widespread concern amongst the NASFAA membership that ED canceled the QA program because of the administrative burden it may have caused the Department, which in turn created a significant amount of additional work on institutions.

We understand that certain issues with the IRS DRT are beyond the scope of ED to control, but we believe a concerted effort to safeguard and maximize use of this technology is the key to reducing burden for students (in terms of application completion), reducing burden for schools (by eliminating the need for verification), and strengthening the integrity of the need-based student aid programs. We encourage ED to continue its efforts to restore and expand access to IRS data, without loss of transparency to students and schools.

Our members are also concerned that they have become responsible for knowing and enforcing certain IRS rules, such as filing status. IRS should enforce its rules; financial aid administrators should be allowed to rely on IRS records, data, and forms as received.

- *Nontraditional program formats and distance education*
  Perhaps the greatest areas for innovation in higher education are distance education and nontraditional program formats. Multiple attempts have been made over many years to refine regulations so they are more appropriate to nontraditional program formats. We believe it is time to try again.

  Likewise, distance education is constricted by rules designed to apply to traditional modes of learning at brick and mortar schools. Rules should instead help to facilitate what can be a significantly lower cost alternative and innovative approach to higher education. In 2015, a NASFAA task force on innovative learning models developed several recommendations to help eliminate barriers and encourage success for students in nontraditional learning formats.

  ED should work with schools and associations with a stake in these areas to identify regulations that inhibit innovation and success.

- *Preferred lender arrangements*
  Rules surrounding the definition and formulation of preferred lender arrangements discourage institutions from providing guidance to students and families about certain loan options. Schools are reluctant to offer any advice or assistance on finding reputable lenders

from whom past students have received good service, because of the burdensome rules surrounding preferred lender arrangements. The rules require schools to describe details of loan products that should be the responsibility of the lender. Further, the rules are still based on issues encountered under the FFEL Program, which has long since ceased to make loans. Students consequently lose the benefit of the school's experience and counseling. Those regulations should be reviewed in a negotiated rulemaking setting. It is not our intent to allow lender lists to be created in obscurity, but it is worth revisiting some of the requirements surrounding them, including some that were never implemented by ED.

- *FSEOG awarding criteria*
  Although it is a small program, awarding criteria for FSEOG make packaging a challenge. Priority to Pell recipients is statutory; the law also requires that FSEOG be awarded to the lowest EFCs at the institution. Regulation translates that into awarding in lowest EFC order. An institution should be allowed an alternative approach to set an EFC cutoff that reasonably represents the likely upper limit of EFCs that, from experience and analysis, the institution's FSEOG allocation will support under its packaging policies. For many schools, the cut-off may well be 0. Even if the cut-off is 100 or 200, the neediest students would still be served.

- *Pell Grant*
  A number of NASFAA members have questioned whether the Pell Grant calculation formulas realistically reflect current program formats, or whether they should be revisited. Some members have also suggested simplifying the payment and disbursement schedules by using larger ranges of EFCs to determine award amounts. Those aspects of Pell Grant regulations largely predate negotiated rulemaking for the program.

- *Generally outdated rules*
  Rules that were put in place before significant changes in technology or improved reliability of data sharing should be surveyed for relevance, such as the rules governing confirmation of citizenship status.

Format of new or revised regulations

To the extent possible, regulations should provide clear goals and guidelines. The details of how those goals are achieved should be up to schools as much as possible. NASFAA has long supported an approach to rulemaking that outlines objectives and establishes a framework for institutionally-specified procedures. The satisfactory academic progress regulations are a model of such an approach to rulemaking: the elements of institutional policy are identified, but the specifics of the requirement are left to the school to design. We encourage ED to reformulate regulations that currently have a high degree of specificity and few options, into more flexible options for attaining the underlying objectives.

To be sure, questions about acceptable practices have contributed to more detailed rules. Policy determinations made by ED in response to requests for clarification about rules and procedures sometimes find their way into regulations, creating more specificity; that is one reason R2T4 rules have become voluminous. These questions are partially motivated by fear of audit exceptions and threat of punitive program reviews. Provision of safe harbors and more identification of good or model practices can reassure institutions that their policies and procedures are on the right track, while still maintaining options and the flexibility to tailor compliance with regulatory objectives to the school's mission and population. Any change in regulations that allow more flexibility to schools must be accompanied by audit and program review practices that place less emphasis on punitive measures and liabilities and more emphasis on helping schools improve their administration of Title IV funds.

Process by which regulations are promulgated

Negotiated rulemaking is still the best approach to formulating regulation, but history has shown that the negreg process is undermined when the wrong people are at the table. Participation by ED's most experienced career professionals assures some degree of continuity of policy and the benefit of historical knowledge. Practicing professionals and association representatives should also be included. It is important that the rulemaking process recognizes institutional differences, and that implementation options be included in regulations that accommodate those differences.

Negotiated rulemaking can only be successful if the number of issues included are reasonable for the negotiating committee to develop thoroughly. Requiring consensus on a package of completely unrelated issues has also been a major criticism. More focused rulemaking that focuses exclusively on one topic, such as R2T4, would result in more thorough analysis and better drawn rules. If multiple topics are included, ED should consider modifying past protocols to accept consensus on individual issues as binding.

NASFAA looks forward to working with ED to implement regulatory reform, and to provide relief for students as well as institutions and other stakeholders while continuing to safeguard program integrity.

Surveys and Other Resources on Regulatory Burden and Reform

Listed below are reports and resources that the NASFAA membership has produced, or that NASFAA has found helpful in discussions on regulatory improvement and reform.

Administrative Burden Survey (NASFAA, 2015)

Task Force Report: Innovative Learning Models (NASFAA, 2015)

Task Force Report: Consumer Information (NASFAA, 2014)

On the Sidelines of Simplification: Stories of Navigating the FAFSA Verification Process (TICAS, based on NASFAA survey, 2016)

Recalibrating Regulation of Colleges and Universities: Report of the Task Force on Federal Regulation of Higher Education (Sen. Alexander, Mikulski, Burr, Bennet, February 2015; hosted by the American Council on Education)

Higher Education Regulations Study (HERS) [Advisory Committee (ACSFA), November 2011]

Higher Education Compliance Matrix (NACUA, 2017)

Regards,

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