Congress of the United States
Washington, DC 20510

June 11, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, D.C. 20202

Re: Notice of proposed rulemaking; Docket ED-2018-OPE-0041-0001

Dear Secretary DeVos:

We write in response to the Notice of Proposed Rulemaking (NPRM) indicating the Department of Education's (Department's) intent to delay implementation of the final Program Integrity and Improvement regulations by two years. Specifically, we oppose the proposed delay of these regulations, which govern how distance education is authorized in states and the authorization needed for American schools with branch campuses in other countries, and we urge the Department to permit this rule to take effect on July 1, 2018, as originally planned.

Delaying these regulations will impede the ability of not only states to protect their residents, but also students to access key consumer protections and disclosures. The proposed delay also improperly bypasses negotiated rulemaking as required by the Higher Education Act (HEA),[1] without satisfying criteria for an exemption from such rulemaking as articulated by the Administrative Procedures Act (APA).[2]

State authorization is one of the longest standing eligibility requirements for institutions of higher education seeking to receive federal financial aid. Originally included in the National Defense Education Act of 1958 and preserved in the HEA of 1965, the state's role has been explicitly stated in law for 60 years. States provide critical oversight and play a vital consumer protection role as part of the program integrity triad, along with the federal government and accrediting agencies. However, it has not always been clear to colleges and universities operating distance education programs in multiple states how they should meet state authorizing requirements.

The state authorization of distance education rule, found in the Program Integrity and Improvement regulations, clarified that institutions offering such programs must be authorized in any state that requires them to do so, regardless of whether the college is physically headquartered in that state. Fundamentally, the rule is about respecting states' authority to protect their own residents and regulate online programs operating within their borders if they choose to do so. Delaying the rule threatens to weaken the program integrity triad by undermining the role of states in their oversight of higher education.

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[1] 20 USC 1098a(b)(2)
[2] 553(b)(3)(B) of title 5, United States Code

The Program Integrity and Improvement regulations prescribe key consumer protection disclosures to warn students about any adverse actions taken against institutions and programs and whether the program meets state licensure requirements. Additionally, the rule requires student disclosures to include information related to refund policies and how to seek assistance with complaints, including the contact information for appropriate state authorities, such as the attorneys general offices.

Brazenly, in the NPRM, the Department acknowledges negative consequences the proposed delay will have on students by stating: "Access to such information could help students identify programs that offer credentials that potential employers recognize and value, so delaying…may lead students to choose suboptimal programs."[3] The Department goes on to assert that the proposed delay will primarily benefit for-profit colleges, noting that 70 percent of students at proprietary institutions had enrolled in some or exclusively distance education courses, as compared to just 32 percent of students overall.[4]

Additionally, the regulations stipulate state and federal oversight of American institutions receiving federal financial aid but operating in foreign locations, thereby ensuring core protections for students enrolled in campuses abroad. The Department offers no rationale for delaying this component of the rule, which is troubling, particularly as we are unaware of any concerns raised by stakeholders. The Department instead delays the foreign locations component without consideration for the importance of ensuring that a clear process is in place for basic authorization of institutions at which students study abroad and for which they can still receive taxpayer-funded federal financial aid.

To ensure compliant and responsive rulemaking and robust stakeholder participation, the Department under the Obama Administration held four sessions of negotiated rulemaking[5] and provided stakeholders an additional opportunity to submit comments for 30 days after no consensus was reached by the negotiators.[6] The Department carefully considered 139 comments over a four-and-a-half-month period, which included consultation with the Department of Defense, before publishing the final rule in December 2016.

In contrast to the deliberative process of the previous Administration, the Department is providing the general public no more than 15 days to comment on the proposed delay. This abrupt proposal comes just one month before the rule's effective date and would impose a two-year delay without negotiated rulemaking.

Through the HEA, Congress requires the Department to use negotiated rulemaking to promulgate rules for programs authorized by Title IV of the Act unless the Department determines that negotiated rulemaking is "impracticable, unnecessary, or contrary to the public

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[3] Docket ID ED-2018-OPE-0041
[4] Docket ID ED-2018-OPE-0041
[5] U.S. Department of Education. Negotiated Rulemaking 2013-2014 Program Integrity and Improvement. https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html
[6] Office of the Federal Register, dated July 25, 2016. Vol. 81, No. 142, page 48598. https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-17068.pdf

interest" as defined in the APA.[7] Such an exception is often called a "good cause" waiver. The Department acknowledges that it must go through a negotiated rulemaking process, but states that additional time is needed in order to fully execute this process before the effective date of July 1, 2018. The Department uses this reason as proof of having "good cause" to forego negotiated rulemaking. The notice of proposed rulemaking states:[8]

> *"The Department has not had sufficient time to effectuate this delay through negotiated rulemaking. Negotiated rulemaking requires a number of steps that typically takes the Department well over 12 months to complete. [...] The Department could not have completed the well-over 12-month negotiated rulemaking process, described in the previous paragraph, between February 6, 2018, and the July 1, 2018, effective date. Thus, the Department has good cause to waive the negotiated rulemaking requirement with regard to its proposal to delay the effective date of the final regulations to July 1, 2020, in order to complete a new negotiated rulemaking proceeding to address the concerns identified by some of the regulated parties in the higher education community."*

However, the courts have held repeatedly that "good cause" is narrowly tailored. In Natural Resources Defense Council (NRDC) v. Abraham, the U.S. Court of Appeals for the Second Circuit held that an impending effective date of a rule does not satisfy "good cause" and that there must be a threat of "real harm" to the public to justify any action without satisfying the appropriate process under the APA. Just a few months ago, in March of 2018, Pineros y Campesinos Unidos del Noroeste, et al. v. E. Scott Pruitt, et al., the U.S. District Court for the Northern District of California further solidified the limited use of "good cause" by ruling that the Environmental Protection Agency (EPA) illegally delayed implementation of key pesticide safety rules. The EPA stated that it did not provide the proper process under the APA because more time was needed, but the court held that lack of sufficient time was not a valid justification. The court stated:

> *"EPA justified this failure by relying on the "good cause" exception to the notice and comment requirements. See, e.g., California v. Health & Human Servs., 281 F. Supp. 3d 806, 824-25 (N.D. Cal. 2017) (discussing the good cause exception). EPA argued that "good cause" existed because more time was needed for "further review and consideration of new regulations" and confusion could result if the rule went into effect but was "subsequently substantially revised or repealed." (See AR 101, 103, 112.) The good cause, exception, however, is extraordinarily narrow and is reserved for situations where delay would do real harm. See, e.g., United States v. Valverde, 628 F.3d 1159, 1164-65 (9th Cir. 2010). A new administration's simple desire to have time to review, and possibly revise or repeal, its predecessor's regulations falls short of this exacting standard. Cf. Clean Air Council, 862 F.3d at 9 ("Agencies obviously have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the [APA], including its requirements for notice and comment.")."*

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[7] 20 USC 1098a(b)(2)

[8] Federal Register. Program Integrity and Improvement. https://www.federalregister.gov/documents/2018/05/25/2018-11262/program-integrity-and-improvement

It is clear courts have found that a lack of time fails to satisfy the "good cause" standard Congress requires of the Department to waive negotiated rulemaking under the HEA.

The Department states delaying the effective date of the regulations is necessary due to questions recently raised by certain regulated entities, such as requests to clarify how colleges should determine the state of student residency, the coverage of out-of-state institutions under student complaint systems, and the Department's preferred format for required disclosures.[9] Institutions have worked over the past 18 months to implement this rule, and their investments should not be wasted now by an unnecessary delay of these consumer protections and disclosures. We encourage the Department to respond to stakeholder requests for clarity and direction through additional sub-regulatory guidance. This can and should be done without delaying the rule's July 1 effective date and violating federal law.

In sum, the Department's proposed delay will have significant, negative implications for students, who will lack effective consumer protections and information. The proposed delay will also have significant, negative implications for state actors, who would again be limited in their ability to enforce their own laws that oversee distance education programs operating within their borders. And, it will have significant, negative implications for taxpayers, who will have less transparency and less rigorous oversight of potentially predatory colleges and universities seeking to evade states' consumer protections.

Contrary to the Department's claims, maintaining the effective date of the rule is practicable, necessary, and in the public interest. We therefore reiterate our position that the Department should allow the rule to take effect and work with institutions and states to resolve any lingering administrative concerns that may exist.

Sincerely,

PATTY MURRAY
Ranking Member
U.S. Senate
Committee on Health, Education, Labor, and Pensions

ROBERT C. "BOBBY" SCOTT
Ranking Member
U.S. House of Representatives
Committee on Education and the Workforce

[9] American Council on Education. Letter to Secretary DeVos, dated February 6, 2018. http://www.acenet.edu/news-room/Documents/ACE-Letter-on-State-Authorization-Concern.pdf
Western Interstate Commission for Higher Education (WICHE) Cooperate for Educational Technologies, the National Council for State Authorization Reciprocity, and the Distance Education Accrediting Commission, Letter to Acting Asst. Secretary Frank Brogan, dated February 7, 2018. https://wcet.wiche.edu/sites/default/files/WCET-SARA-DEAC-Letter-2-7-18_0.pdf