MEMORANDUM

To: Interested Parties

From: Career College Association

Date: March 29, 2010

Re: The Myth That the Department of Education is Powerless to Stop "Bad Actors" in Postsecondary Education

CCA staff and members have heard during recent visits with Administration officials, especially at the Department of Education ("the Department"), and less frequently during Capitol Hill visits, a narrative that runs as follows: Although the majority of for-profit postsecondary institutions may be high quality institutions serving their students well, there are a few "bad actors" over which the Department lacks sufficient regulatory authority. In fact, one of the justifications for the radical proposal put forth by the Department to change the meaning of "gainful employment" as it has been accepted and understood for forty years is to stop the conduct of "bad actors." Part of this same narrative is that prospective students do not have adequate consumer protections to prevent these bad actors from taking unfair advantage of them.

CCA agrees that any percentage of bad actors in the sector is unacceptable. What we do not agree with, however, is the mythology that the Department lacks what is, in fact, extensive authority under current law to investigate and take action against institutions that are not following the myriad of rules that govern higher education generally, and for-profit higher education, in particular. In addition to a high degree of regulatory oversight at the federal level, each of these schools is also overseen by the other two legs of the regulatory "triad"—state government and accrediting entities that are approved by the Department itself. For example, over the last decade, the sector has seen a vast increase in active oversight by state agencies.

This memorandum provides an overview of the layers of quality control and consumer protection regulation that already exist within the authority of the Department and other federal and state entities that can and do serve as a check on "bad actors." It is important to note that some significant enhancements in the law were enacted as part of the Higher Education Opportunity Act of 2008 ("HEOA"), which amended the Higher

Education Act of 1965 ("HEA"). The final regulations implementing the HEOA are not effective until July 1, 2010 and, therefore, many important enhancements to the law have yet to be fully implemented. In addition, during this year's Title IV Program Integrity Negotiated Rulemaking process, the negotiators reached consensus on changes to strengthen the misrepresentation regulations. The process of reaching consensus on enhanced misrepresentation regulations, of which CCA was a part, demonstrates that higher education and the Department share the goal of weeding out bad actors through common sense enforcement of and enhancements to existing law.

I. Quality Control and "Bad Actors"

As a threshold matter, the Department has never explained clearly how it defines a "bad actor" school or what specific rules such a school is violating. In reality, real laws apply to real schools that violate them. For example, if a bad actor is a school that misrepresents information to a potential student about placement rates or salary prospects, federal and state consumer protection laws apply. If a bad actor is a school that "lures" students to enroll through prohibited payments to admission or financial aid officials, regulations subject that school to penalties and risks to Title IV eligibility. If a bad actor is a school that charges "too high" a tuition relative to earnings, then students will default massively and the cohort default rate thresholds will act as a check on Title IV eligibility. This section describes the quality control regulations in current law put into place over the last decade to improve quality and thereby eliminate so-called "bad actors."

The Higher Education Act of 1972 established Title IV eligibility for proprietary institutions consistent with the Department's goals of expanding postsecondary education access for a growing and financially needy college-aged population. Since that time, Congress has established and built upon the following measures in federal law, some generally applicable to all postsecondary institutions and some specific to proprietary schools, to ensure school and program quality:

- Caps on excessive cohort default rates (Fiscal Year 1989 Appropriations Act);
- Thirty day delay in delivery of loans to new borrowers by schools with cohort default rates of more than 30% (Omnibus Reconciliation Act of 1989);
- Prohibition on certification or recertification of an institution as Title IV eligible if it has lost accreditation during the past 24 months, unless the accreditation has been restored or the institution demonstrates program integrity (Omnibus Reconciliation Act of 1989);
- Addition of new program integrity provisions, including periodic recertification, and other requirements for strengthened national accreditation standards and procedures (Higher Education Amendments of 1992);
- Establishment of early 85/15 (now 90/10) ratio for proprietary schools (Higher Education Amendments of 1992);

- Requirements for pro rata refund policy for first-time students who withdraw (Higher Education Amendments of 1992) and return to Title IV policy as a successor to that;
- Enhancements to federal financial responsibility standards and requirement for letters of credit for institutions with impaired financial responsibility;
- Requirement for annual submission of audited financial statements and financial aid compliance audits (Higher Education Amendments of 1992);
- Establishment of incentive compensation prohibitions on student recruitment and processing of financial aid;
- Strengthened federal requirements for ability-to-benefit tests and limit on percentage of ability to benefit students;
- Student satisfactory academic progress requirements (Omnibus Budget Reconciliation Act of 1989, Omnibus Reconciliation Act of 1990; Higher Education Technical Amendments of 1991);
- Required disclosure of completion and placement rate requirements for short-term programs;
- Establishment of the clock to credit hour conversion rules and minimum academic year requirements as part of Pell grant eligibility;
- Required disclosure of graduation rates (1990 Student Right to Know and Campus Security Act);
- Limitations on branch campuses;
- Increased disclosures to borrowers of student loans; and
- Disclosure of schools with the greatest tuition increases.

In addition to these measures, institutions must also ensure that the information disclosed about programs is accurate. The Department may initiate a fine, or a limitation, suspension, or termination of Title IV eligibility for any substantial misrepresentation made by an institution regarding the nature of its educational program, its financial charges, or the employability of its graduates.[1] At the recently concluded negotiated rulemaking, the Department proposed improvements to the misrepresentation regulation that were agreed upon by consensus by stakeholders, including CCA, that will increase the oversight of the information provided by institutions. Specifically, the proposed regulatory language on which the negotiators reached consensus strengthens the current misrepresentation regulation in several ways, including:

- Expanding the class of persons to whom a substantial misrepresentation can be made to include accrediting agencies and state agencies, as well as prospective students and the general public;

[1] See 34 CFR 668.74(c).

- Holding institutions responsible for any misrepresentation made by companies with which they contract their services; and
- Broadening the definition of what constitutes "substantial misrepresentation."

During negotiated rulemaking, the Department also proposed language that would support robust state regulation of postsecondary institutions. In addition, it is important to remember that under current state laws and state attorneys general have broad grounds to pursue schools in violation of state licensing or consumer protection requirements. State authorizing agencies and state attorneys general are additional tools against bad actors in the sector.

There are also other oversight agencies in addition to the Department that sanction institutions for misrepresentations or inaccuracies in the information they provide. Institutions are subject to oversight by the Federal Trade Commission (proprietary institutions only), the accrediting agencies, the Federal Reserve Board (for institutional and private educational loans), the Securities and Exchange Commission (for publicly traded schools), and the Department's Federal Student Aid Office and Office of Inspector General.

II. Consumer Protections

As stated above, the provision of postsecondary educational services is a highly regulated activity with numerous controls and enforcement mechanisms currently available to the Department of Education in statute and regulation that permit it to identify, investigate, and end Title IV eligibility to institutions of higher education that violate federal and state law. Consumer protection enhancements applicable to the sector at the federal and state level have also grown consistently over the last decade, were further enhanced in the HEOA, and can be strengthened even more, without relying on a "gainful employment" hook that would damage quality educational service providers.

A variety of consumer protections exist to inform the educational choices of prospective and current students. Institutions are required to disclose detailed information about college cost, student success metrics, and loan repayment. Under the Higher Education Act and recent amendments to that Act, schools are required to provide a vast array of consumer information,[2] including the following:

- The price of attendance, including tuition and fees, estimated cost of books and supplies, room and board, and transportation costs, and any additional costs for a program in which the student is enrolled or expresses an interest (HEA, 20 U.S.C. §§ 1092(a)(1)-(2), unchanged by HEOA);
- Institutions must make available on their websites by October 29, 2011 a net price calculator (HEOA Section 111 amended HEA Title I, Part C; added HEA, 20 U.S.C. §§ 1015a(a),(h));

[2] See HEA Section 485(a)(1) (20 U.S.C. 1092(a)(1)); see also, Report of the National Postsecondary Education Cooperative, *Information Required to be Disclosed Under the Higher Education Act of 1965: Suggestions for Dissemination*, Nov. 2009 (including HEOA amendments).

- Each institution must make available to prospective and enrolled students information about the institution's refund policy, requirements and procedures for withdrawal; and requirements for the return of Title IV, HEA grant or loan aid (HEA, 20 U.S.C. §§ 1092(a)(1)-(2), unchanged by HEAO);
- Academic program and facility information to prospective and enrolled students (HEOA added 20 U.S.C. § 1092(a)(1)(G)(iv));
- Each institution must make available to prospective and enrolled students: names of accreditors applicable to the institution and programs, and procedures for obtaining and reviewing documents describing such accreditation (HEA, 20 U.S.C. §§ 1092(a)(1)-(2), unchanged by HEAO);
- An institution that advertises job placement rates as a means of recruiting students to enroll must make available to prospective students, at or before the time the prospective student applies for enrollment: (1) the most recent available data concerning employment statistics and graduation and (2) any other information necessary to substantiate the truthfulness of the advertisements; and (3) relevant state licensing requirements of the state in which the institution is located for any job for which the course of instruction is designed to prepare students (HEA, 20 U.S.C. § 1094(a)(8), unchanged by HEOA);
- Institutions must make available to current and prospective students information regarding the types of graduate and professional education in which graduates of the institutions' 4-year degree programs enroll (HEOA, 20 U.S.C. § 1092(a)(1)(S));
- Detailed financial aid information, including information about all of the need-based and non-need based federal, state, local, private and institutional aid programs available to students at the institution (HEAO added HEA § 485(a)(1)(M));
- The retention rate of certificate and degree seeking, first-time, full-time undergraduate students as reported to IPEDS (HEOA added HEA § 485(a)(1)(U));
- The completion or graduation rate of certificate or degree seeking, first-time, full-time, undergraduate students, including data disaggregated by gender, major racial and ethnic subgroups, recipients of a Federal Pell Grant, recipients of a subsidized Stafford Loan who did not receive a Pell Grant, and students who did not receive either a Pell Grant or a subsidized Stafford Loan (HEOA added HEA § 485(a)(4) and HEA § 485(a)(7));
- Each institution must publicly disclose and make available to prospective and enrolled students a statement of the institution's transfer of credit policies and articulation agreements (HEOA added 20 U.S.C. § 1092(h));
- Institutions must make available to current and prospective students information regarding the placement in employment of, and types of employment obtained by, graduates of the institutions' degree or certificate programs (HEOA added 20 U.S.C. § 1092(a)(1)(R));
- Textbook cost disclosure on internet course schedule used for preregistration and registration purposes (HEOA added 20 U.S.C. § 1015b);

- Detailed entrance and exit counseling for student borrowers, including average anticipated monthly repayment amount, repayment plan options, and debt management strategies (HEOA added new HEA § 485(I) and § 485(b)(1)(A)); and
- Detailed private education loan disclosures, including a student self-certification form. In addition, under the amendments to the Truth in Lending Act, private lenders must provide three detailed disclosures to borrowers before making private student loans (HEOA added HEA § 487(a)(28) and HEA §§ 151-155 (20 U.S.C. § 1019, §§ 1019a-1019d)).

The Department makes consumer information easily available to students, parents, and the public. The Department posts many consumer information items on the College Navigator website for each institution, including:

- Tuition, fees and other estimated student expenses for the last several years, with the percentage increase from the most recent year to the current one and a multi-year tuition calendar;
- The percentages of students who receive various types of aid and the average amounts of such aid;
- Graduation rates, disaggregated by major racial subgroups;
- Retention rates for full-time and part-time students;
- Average amount of subsidized and unsubsidized Stafford loans; and
- Cohort default rates for the most recent three years.

In addition, the Department provides some of this consumer information direct to individual students by institution - when the student inputs the school's code on the FAFSA. It is also relevant that from the standpoint of providing tools to students to manage student loan debt, Congress first authorized the Income Based Repayment program in 2007 as part of the College Cost Reduction and Access Act of 2007, and that program is just now being actively promoted by the Department as a tool to assist graduates with loan debt management.

In sum, despite the perception created by the Department's "bad actor" narrative on gainful employment, proprietary postsecondary education is highly regulated at the federal and state levels and through its accrediting bodies. The gainful employment proposal is vastly overbroad and misguided in light of the diverse array of tools that exist under current law to identify and target bad actors and to protect and assist student consumers with loan debt issues.