TESTIMONY

OF

BARBARA L. CARROLL

ON BEHALF OF
THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES

JUNE 3, 2015

FOR A HEARING ENTITLED

"EXAMINING THE EMPLOYMENT EFFECTIVENESS OF THE AFFORDABLE CARE ACT"

BEFORE

THE JOINT ECOMOMIC COMMITTEE

Chairman Coats, Ranking Member Maloney and Honorable Members of the committee, thank you for the opportunity to appear before you today to discuss the Affordable Care Act and its impact on colleges and universities.

I am the Associate Vice Chancellor for Human Resources at North Carolina State University. I am speaking on behalf of the College and University Professional Association for Human Resources, known as CUPA-HR. CUPA-HR represents more than 1,900 institutions of higher education and more than 18,000 HR professionals and other campus leaders. I am the Chair-elect of CUPA-HR's national Board of Directors and have chaired the Board's committee on public policy for the last two years.

CUPA-HR appreciates and supports the ACA's overarching goal of ensuring that Americans have access to health care coverage. Higher education for the most part is a sector that has historically has provided healthcare benefits for its fulltime faculty and staff. So for higher ed, implementation of the ACA did not result in new coverage requirements for its primary population of campus employees. Colleges and universities have encountered new challenges, however, with collateral impact of the ACA's employer mandate on a couple of unanticipated populations in higher ed: specifically part-time professionals and students.

As a sector, higher ed tends to employ a fair number of part-time professionals, ranging from adjunct faculty who teach on a per-course basis to part-time coaches in non-revenue sports. We also provide opportunities for our own students to earn financial support by performing compensated activities on campus. Students whose primary purpose for being on campus is to pursue learning and to seek an education, rather than to earn a living, are just that -- students -- and are not "employees" of the institution.

I would like to share some of the difficulties of having to apply the employer mandate to students, which is the current state of things. Colleges and universities understand the important role employer provided health care plays in ensuring the health and wellbeing of our nation. Our members provide robust benefits to their employees. According to CUPA-HR's 2014 survey: 82% of our members offer employees PPO plan coverage; 36% offer HMO plans; two-thirds offer employees dental and vision benefits; 42% offer coverage to at least some part-time staff; and nearly half provide health coverage for retirees.

Students who work on campus, however, generally do not share the same needs or status as employees, and campuses have not historically offered health coverage or other employee benefits such as retirement contributions or paid vacation days to students as part of the employer-sponsored plans we provide to true employees. Students by their nature have a temporary relationship with their institution, and their primary purpose for being at a college or university is to receive an education, rather than to be employed. Colleges and universities generally view the funds that students receive for on-campus

assignments as a form of financial aid to support the continuation of their degree progress rather than as salary or wages for performing services that primarily benefit the employer.

Even though we don't cover students under our employee healthcare plans, the vast majority of students have access to health coverage through their family's plan, or through a government-regulated student health insurance plan, or SHIP plan, provided by the college or university.

Nonetheless, the ACA does not specifically exclude student workers from the employer mandate, and to date, the Department of Treasury has only provided a limited exemption, for students working as part of formal federal or state work-study programs—an exemption we requested and appreciate.

As result, colleges and universities—which, like other employers, must provide coverage to 95% of their full time employees in 2016—are facing the prospect of offering employee healthcare coverage to any students who may exceed the ACA's eligibility threshold. Offering student workers such coverage would substantially increase administrative burdens, costs, and liabilities to higher education institutions, at the same time that higher ed is under ever-increasing pressure to keep the costs of education as low as possible. While a handful of schools have sizeable endowments, the revenue of the vast majority of colleges and universities must come from only one or two essential sources: either tuition or governmental support. With government support increasingly constrained, significant new costs must be borne by an institution in the form of higher tuition to students. To avoid these burdens, costs and liabilities, many colleges and universities are being forced to cut on-campus work opportunities for students and limit the amount of time that students can work.[1] Unfortunately, we expect more schools will do so as 2016 and the ACA's 95% coverage requirement approaches. Such limits will be particularly impactful on students with limited or no family resources, for whom campus financial opportunities are their primary source of support other than incurring student debt.

Cuts to student work hours and reductions in student opportunities will be particularly drastic in jobs where tracking student work hours is difficult. For example, colleges and universities do not track hours for graduate student research assistants or residence life assistants. When is a grad student, who's conducting research in a lab under the supervision of a faculty member, learning for his or her own – and society's – benefit, vs. 'working' for the university's benefit? When is a dormitory resident advisor 'working' vs. 'hanging out' and getting opportunities to have campus housing and demonstrate mentorship skills? Because calculating hours in these situations is impractical, institutions may err on the side of caution and impose dramatic cuts, which could severely and negatively impact opportunities for students. Another group potentially impacted would be students who receive stipends for engaging in various campus activities. Colleges and

[1] See articles highlighting this trend at http://www.thecollegefix.com/post/19847/ and http://news.investors.com/politics-obamacare/090514-669013-obamacare-employer-mandate-a-list-of-cuts-to-work-hours-jobs.htm.

universities often provide stipends to students participating in activities such as student government, student publications, drama clubs, bands, debate teams, radio stations, and intramural and interscholastic athletics. Colleges and universities do not track these students' participation as "work" hours -- and the stipends are not considered compensation for work, but rather a manner by which the institution can help students, who might need to otherwise seek paid employment, to participate in these activities. While the U.S. Department of Labor has recognized that a student may receive payment for participation in such activities without creating an "employment relationship," [2] Treasury has yet to provide such assurances with respect to the ACA. As a result, colleges and universities may conclude they must simply stop providing stipends in these situations.

This is a bad outcome for students; a bad outcome for parents; and a bad outcome for colleges and universities.

Treasury recognized this to some extent, and it exempted work-study students from the ACA employer mandate. But there are many similar students who are subsidized directly by their institutions rather than by a federal or state aid program, although with the same goals in mind: supporting their financial needs and making progress toward degree attainment.

CUPA-HR, the American Council on Education and other higher education associations have approached Treasury with several possible solutions to this problem. We have met with the agency several times since 2013 and sent two letters, one dated March 18, 2013 and the other July 16, 2013 – both of which I have included as part of my written testimony. In the letters, we asked that the agency to issue guidance that excludes from the ACA employer mandate any hours where students are exempt from the requirements of the Fair Labor Standards Act (FLSA) as set forth in DOL's Field Operations Handbook at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. DOL acknowledges in the Handbook the reality that in many cases students worker and the nature of the functions they perform significantly differ from typical employees so much so that they warrant special treatment (e.g., the functions are deemed not to be "work" or the student is deemed not to be an "employee"). By mirroring the DOL Handbook, Treasury would exempt from the employer mandate student employees such as graduate research assistants, resident life assistants and those receiving a stipend for participation in student activities. Treasury itself has recognized the unique nature of such student workers on campus by largely exempting them from employee FICA taxes.

Treasury might also consider another approach: deeming colleges and universities in compliance with ACA if the institution offers those students coverage under an ACA-compliant SHIP plans. According to the federal government, approximately 1.1–1.5 million

[2] U.S. Department of Labor, Field Operations Handbook, Section 10b03(e).

students receive health coverage under student health plans.[3] The Department of Health and Human Services (HHS) issued final regulations on SHIP plans imposing ACA's coverage mandates to them. Significantly, the rule proposed by HHS designates self-funded student health plans as minimum essential coverage, meaning that a student who is covered by such a plan meets his or her individual mandate under the ACA.

We believe these solutions are within Treasury's authority, and by taking action, the agency could prevent unnecessary negative outcomes for students, parents and universities. I would like to note here that Treasury has responsive to our request to meet and has been willing to engage in thoughtful dialogue on these issues. We wish they would act rapidly with respect to the solutions we have offered. Again, as you consider these solutions please keep in mind the unique role student employment plays in helping students progress toward degree attainment and the fact that the vast majority of students have access to ACA compliant health care coverage through family or student plans.

I want to highlight one more issue with the application of the ACA to SHIP plans—particularly with respect to coverage for graduate students. Many schools provide graduate students with SHIP coverage at no or a greatly reduced cost as part of a graduate assistantship package. In a recent webinar, a well-known benefits consulting firm stated that the IRS had provided informal guidance that this practice is not permitted pursuant to IRS Notice 2013-54 and institutions could face fines of $36,500 per impacted individual.

In reviewing the Notice, we think that this informal guidance is based on a misperception of the law. Without clarification, however, the informal guidance is causing great concern on campuses because it interferes with longstanding practice intended to enhance access to higher education and lower the cost of graduate education. We reached out just last week to the IRS to seek clarification and hope to hear from them soon.

As mentioned earlier, campuses were also struggling to apply the employer mandate to adjunct faculty, who are typically paid for a specific academic deliverable (preparing and teaching a specific course) rather than by the hour. Colleges and universities do not track work "hours" for any faculty, and doing so is impractical if not impossible.

Along with the American Council on Education and several other higher education associations, in 2013, we approached Treasury about the application of the ACA to adjunct faculty. In the absence of any method for calculating adjunct hours, several institutions had announced they would need to aggressively limit course loads for those adjunct faculty for whom they could not afford to provide coverage.

After several meetings with higher education associations and groups representing adjunct faculty, Treasury created a "safe harbor," which institutions may rely upon to count adjunct 'hours' for ACA purposes. This safe harbor, which allows institutions to calculate

[3] See 77 Fed. Reg. 16,453 (issued Mar. 21, 2012).

2¼ hours of total work effort for every 1 credit hour taught, is being used by close to 70% of our member institutions, according to a recent survey. Treasury also allowed for other 'reasonable' calculation methods. While many colleges and universities continue to limit adjunct course loads to avoid ACA coverage requirements in the face of economic constraints, the limitations they are imposing on course loads are less severe than were being contemplated prior to the creation of the safe harbor.

Higher ed also has significant concerns about the impact on campuses of the ACA's 40% excise tax on so called "high cost" health plans.

Starting January 1, 2018, the federal government will begin imposing the 40% tax on employer plans that cost more than government-set thresholds—currently $10,200 for individual coverage, and $27,500 for family coverage. The tax will apply to every dollar spent above the threshold and will not be tax deductible by the employer.

According to our most recent benefits survey, 10% of our member institutions *already* have plan costs that exceed the 2018 threshold. Given that our survey did not factor in flexible spending account reimbursements, contributions to health saving accounts and similar costs beyond premiums,10% is an underestimate of the number of immediately-impacted institutions.

Unfortunately in coming years, even more plans and the employees they cover will be impacted by the excise tax. Annual increases to threshold levels are tied to the consumer price index (CPI), even though medical inflation has historically grown much faster than CPI. As a result, the cost of these plans will almost certainly increase much faster than the threshold, and the excise tax will apply to increasing numbers of plans every year. As explained in a report by American Health Policy Institute (AHPI), a nonpartisan think tank, "the inexorable increase in health care costs will eventually cause Chevrolet benefit plans to be taxed as Cadillacs."

The excise tax is currently scheduled to go into effect in 2018, but many colleges and universities are already having to contemplate the extensive impact it will have on their costs as they negotiate multi-year collective bargaining agreements with unions, for example, and other contracts that reach through 2018.

In the face of this tax, many will be forced to bear additional significant costs imposed by the tax, or significantly reduce health benefits they provide for their employees, or both. This cannot be what Congress intended, so we encourage a reconsideration of the excise tax's impact.

In closing, I would like to express my gratitude to the members of the committee for your time and attention today, and I hope that bringing some of our most pressing concerns regarding the ACA will help result in workable solutions. I personally thank you for this opportunity to testify. I would be happy to answer any questions you may have.

Office of Government & Public Affairs

Submitted via http://www.regulations.gov

March 18, 2013

Internal Revenue Service
CC:PA:LPD:PR (REG-138006-12)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12)

Dear Sir or Madam:

On behalf of the American Council on Education ("ACE") and the undersigned higher education associations, I am writing to comment on the Notice of Proposed Rulemaking issued by the Department of the Treasury and the Internal Revenue Service (collectively, the "Department") regarding section 4980H of the Internal Revenue Code ("Code"), which addresses the shared responsibility for employers regarding employee health coverage, 78 Fed. Reg. 218 (Jan. 2, 2013) ("NPRM 4980H").

Together, we represent approximately 4,300 two- and four-year non-profit public and private colleges and universities. We work to address the toughest higher education challenges, with a focus on improving access and preparing every student to succeed. We strive for implementation of the Affordable Care Act ("ACA") in a manner that works best for students, institutions, and employees in higher education. The goal of these comments is to ensure that federal regulations provide appropriate coverage for students who work on campus and adjunct faculty members who are truly full-time employees. Specifically, we write in support of safe harbors for students who work on campus and adjunct faculty in order to more accurately account for their employment status.

Higher education plays a unique role in American society and fulfills many needs, including undergraduate education, graduate and professional training, basic research, and public service. Colleges and universities also foster unique opportunities for temporary and variable-hour staff positions, such as those held by students working on campus and adjunct faculty members. These institutions face extraordinary challenges in providing students with access to affordable higher education. Higher education officials are particularly concerned about potential increased costs for health coverage. Students face many unintended consequences from these increased costs, such as the likelihood of increased tuition and reduced educational services.

We urge the Department to carefully consider the consequences of NPRM 4980H as applied to certain college and university temporary and variable-hour workers. As described below, NPRM 4980H as applied to these workers is incompatible with the goals of ACA's shared responsibility provisions, which are designed to cover full-time employees. The Department must strive to adopt policies that accurately reflect higher education's unique employment arrangements, as in the following safe harbor proposals for determining the hours of students who work on campus and adjunct faculty.

Safe Harbor Proposal for Students Who Work on Campus. The core of the employer responsibility provisions under ACA is an obligation for an employer to either (1) offer its full-time employees the ability to access minimum essential coverage under an eligible employer-sponsored plan or (2) make so-called shared responsibility payments to the federal government to the extent the employer elects (a) not to offer coverage at all or (b) to provide coverage deemed inadequate under the Act. ACA § 1513. For this purpose, "minimum essential coverage" is insurance coverage offered through a group health plan, a governmental plan, Medicaid, Medicare, any other plan or coverage offered in the small or large group market within a state, or any coverage deemed as such by the Department of Health and Human Services ("HHS"). ACA § 1501(b). It should be noted that it is ultimately the employees' responsibility to obtain minimum essential coverage. *Id*. In that respect, the employer responsibility provisions of ACA are meant to support individual employees in their quest to fulfill their individual mandate under ACA.

Students who work on campus do not share the same status as typical employees. There is little risk such students will lack meaningful health coverage. Indeed, many students will be covered by the employer-provided group health plans of their parents inasmuch as 4980H NPRM requires an employer to offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage. For this purpose, a "dependent" is defined as the employee's child who is under age 26. Additionally, according to the federal government, approximately 1.1–1.5 million students receive health coverage under student health plans. See 77 Fed. Reg. 16,453 (issued Mar. 21, 2012). Moreover, HHS issued final regulations bolstering the coverage offered through these plans by applying many of ACA's coverage mandates to them. *Id.* Significantly, a rule proposed by HHS designates self-funded student health plans as minimum essential coverage, meaning that a student who is covered by such a plan meets his or her individual mandate under ACA. 78 Fed. Reg. 7348 (Feb. 1, 2013).

Setting aside the fact that the federal statutory and regulatory schemes favor coverage for adult children up to age 26, student employment in most cases complements the students' overall educational program. For this reason, students who work on campus retain a special status under applicable labor law. The type and amount of work students perform can affect whether they are considered "employees" for purposes of the Fair Labor Standards Act, the National Labor Relations Act, or other employment-related laws. Generally, under the Fair Labor Standards Act, students who are employed as part of their overall educational programs are not considered to be "employees," regardless of effort expended. For example, for purposes of the Fair Labor Standards Act, the U.S. Department of Labor ("DOL") notes that graduate research assistantships are a form of subsidy that both allows the graduate research assistants to continue their studies and prepares them directly for their future careers. *See* DOL *Field Operations Handbook* at section 10b18. It should be noted that the standard for determining the employer-employee relationship is generally broader under the Fair Labor Standards Act than the common law, meaning it is more likely under a given set of facts that the employer-employee relationship will be found for purposes of the Fair Labor Standards Act than under the common law. *Id.* at section 10b01. Yet, in exempting certain employed students from the definition of employee under the

Fair Labor Standards Act, the DOL acknowledges the reality that such students and the nature of the functions they perform significantly differ from typical employees so that they warrant special treatment (e.g., the functions are deemed not to be "work" or the student is deemed not to be an "employee"). *Id.* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. Similarly, other authorities, such as federal courts and the National Labor Relations Board ("NLRB"), issue determinations from time to time on whether a particular set of students working on campus are considered "employees" for purposes of employment-related laws using facts and circumstances tests that are substantially similar to those set forth in the cited DOL *Field Operations Handbook.*

- ***Nature of Work Safe Harbor***

Accordingly, an appropriate safe harbor would track the existing rules and guidance on employed students for purposes of the Fair Labor Standards Act as reflected in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24, considering whether the student works as part of his or her overall educational program, and would also consider any other rulings on the status of particular groups of students from a federal court, the DOL, or the NLRB. We request that the Department issue guidance clarifying that, for purposes of calculating a student's hours under ACA Section 4980H, institutions of higher education may apply the standards set forth in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. To the extent a student works more than one job (either for the college or university or as part of a work-study program), each job should be evaluated independently to determine whether it meets the DOL standards. We also request that the Department issue guidance clarifying that an individual college or university that receives a ruling or determination specific to that institution with respect to the status of a particular group of students may rely on that specific ruling.

- ***Work-Study Safe Harbor***

Other students whose work is separate from their educational programs typically take on such campus roles as a form of financial aid under work-study programs in order to remain enrolled and make progress toward their degree. Such campus roles are not typically considered to be job paths for students as much as a way to support their continued educational progress. As such, these campus roles do not necessarily fit within the "nature of work" safe harbor set forth above. Nevertheless, these positions are a key component of the strategic arsenal of federal student aid programs created to expand opportunities for students who would not otherwise have the financial resources to attend college. Students who participate in work-study programs are afforded access to student health insurance programs by the institutions they attend. Treating students who hold these work-study positions as "employees" for purposes of ACA Section 4980H places an economic burden on a program that is meant to provide individuals with financial need meaningful access to higher education. It would be an odd result, indeed, to apply 4980H in a manner that would strain institutions' ability to provide access to higher education to such students, which would include access to student health plan coverage in many instances. We therefore recommend that the Department issue guidance clarifying that, for purposes of calculating the hours worked by a student for purposes of ACA Section 4980H, an institution of higher education may exclude the hours worked by a student who is enrolled in classes at least half-time at the institution and who receives a wage as part of a job under a work-study program.

Safe Harbor Proposals for Adjunct Faculty. In the 4980H NPRM, the Department acknowledges that adjunct faculty present difficulties in terms of categorization s as full-time versus part-time employees for purposes of ACA Section 4980H. As the Department points out, the adjunct faculty members' compensation is usually based on the number and type of courses they teach.

Compensation may vary not only by course credit but also by whether the course is entry-level or advanced in content, or the number of students enrolled in the course, or by whether the course content is inherently stable or rapidly-changing from year to year. For this reason, institutions of higher education typically do not track the hours worked by adjunct faculty; rather, they pay the instructor based on the instructional deliverables required by the specific course, including course preparation time, in-class instruction, and student feedback and grading. This reality complicates the requirement under the 4980H NPRM that employers must calculate the hours of adjunct faculty members pursuant to a "reasonable method for crediting hours of service that is consistent with the purposes of section 4980H." Accordingly, we support the safe harbor provisions outlined below.

- ***Safe Harbor Based on Percentage of Full-Time Course Load***

Adjunct faculty should be classified as full-time employees if the course load they teach meets or exceeds three-quarters of the course load for a full-time, non-tenure-track (NTT) teaching faculty member in that academic department. Since most full-time tenured and tenure-track faculty engage in duties beyond instruction as part of their work commitments (including student advising, departmental administration, and institutional service), full-time faculty may teach less than what would be considered a full-time course load for an NTT teaching faculty member (although some adjunct faculty also have these additional responsibilities). This approach is predictable and a fairly accurate reflection of the circumstances of a particular campus. We urge the Department to adopt rules clarifying that institutions of higher education may classify adjunct faculty as full-time employees if the course load they teach meets or exceeds three-quarters of the course load for a full-time NTT teaching faculty member in a particular department. We also request that the Department issue guidance clarifying that, in order to avail itself of this safe harbor, an institution of higher education must adopt in writing a uniform definition of "full-time NTT teaching faculty member" tailored specifically to each academic department prior to the beginning of an academic year. In the alternative, this definition could be made for the institution as a whole rather than specifically for each academic department. This approach comports with the section 4980H NPRM, which permits colleges and universities to adopt a "reasonable method for crediting hours of service that is consistent with the purposes of section 4980H." 78 Fed. Reg. 218, 225 (Jan. 2, 2013). We believe that such an approach, particularly if implemented at the institution level, would provide the requisite transparency and predictability necessary to ensure compliance with the ACA.

- ***Safe Harbor Based on One-to-One Ratio of Hours Teaching to Non-Classroom Work.***

A second method of calculating the total hours worked by adjunct faculty would be to credit adjunct faculty members with one hour of work outside the classroom for each hour teaching in the classroom. Although this approach could in some cases misrepresent actual hours worked, depending on the specifics of the given course, it provides a reasonable approximation as well as predictability and ease of administration, and is supported by at least one self-reporting study.[1] A one-to-one ratio of outside classroom work to teaching hours is the most accurate estimate, because it reflects assumptions, practices, and data found at many institutions of higher education.[2]

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1 *Digest of Education Statistics*, "Percentage distribution of part-time faculty and instructional staff in degree-granting institutions, by level and control of institution, selected instruction activities, and number of classes taught for credit: Fall 2003," http://nces.ed.gov/programs/digest/d11/tables/dt11_266.asp.

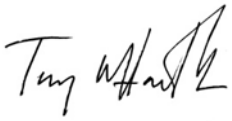
2 A typical example at a community college is Brookdale College in New Jersey. Full-time teaching faculty are exempt employees who are considered to have a workweek obligation of thirty-five hours: five three-hour courses for a total of

Community colleges employ most of the adjunct faculty in higher education institutions, and where their employment contracts account for out-of-classroom efforts, a 1:1 ratio is often assumed. Although some organizations propose assuming two hours of out-of-class work for each contact or teaching hour, this approach is inconsistent with institutional practice and the principles under which faculty generally are categorized and compensated. For example, under such a formula, a community college adjunct faculty member who taught two three-credit courses and one four-credit course (many regular courses are four credits; some lab courses are six credits), would qualify as a full-time employee. With full-time faculty generally teaching five courses at community colleges, and having related administrative, academic counseling, and other campus responsibilities as described above, it is not reasonable to treat as full-time an adjunct faculty member who carries fewer than four courses per semester.

As such, we request that the Department issue guidance clarifying that, for purposes of determining whether an adjunct faculty member is a part-time or full-time employee under ACA Section 4980H, institutions of higher education may credit adjunct faculty members with one hour of non-classroom work for every hour in class teaching.

Thank you for considering our comments to the Section 4980H NPRM. If you have any questions or would like to discuss these comments further, please do not hesitate to contact me.

Sincerely,



Terry W. Hartle
Senior Vice President

On behalf of:
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NASPA: Student Affairs Administrators in Higher Education

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fifteen contact hours; fifteen hours of college obligations including but not limited to participation in governance, department meetings, curriculum development, and prep time; and, in addition, five office hours per week, one for each course taught.

American Council on Education™
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July 16, 2013

Mr. J. Mark Iwry
Senior Advisor to the Assistant Secretary and Deputy
Assistant Secretary for Retirement and Health Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, N.W., Room 3064
Washington, DC 20220

Re: Shared Responsibility for Employers Regarding Health Insurance Coverage (REG-138006-12) and Student Employment in Higher Education

Dear Mr. Iwry:

On behalf of the American Council on Education and the undersigned higher education associations, I am writing to follow up our recent meeting concerning the treatment of student employment in higher education under the proposed regulations concerning employer shared responsibility for employee health insurance coverage. (See 78 Fed. Reg. 218 (Jan. 2, 2013)("NPRM 4980H")).

As we indicated in our meeting, we are deeply worried about the effect of the implementation of the Affordable Care Act ("ACA") on student employment at higher education institutions. In particular, we are concerned that the final regulations will inadvertently impose a terrible choice on colleges and universities: ensuring that needy students have sufficient work necessary to pay for school, or limiting student work hours to avoid additional health insurance costs in already tight budgets. Accordingly, we ask that in crafting the final regulations on this issue, the Department carefully balance the competing concerns of student access to higher education, the central goal of federal higher education policy, and the goal of the ACA to ensure broad access to sufficient, affordable health insurance coverage.

As we discussed in our meeting, there are two broad types of student employment in higher education: 1) students working primarily to earn funds necessary to pay for the cost of college. Often this work is performed <u>on</u> campus; and 2) students working, often though not exclusively, <u>off</u> campus for an employer in an internship or cooperative education program that provides an experiential learning component of the academic program in which the students are enrolled.

Student Employment by the Institution

Institutions work very hard to ensure that students can find sufficient employment to meet their financial needs. Federal higher education policy regards student employment as a form of "self-help" financial aid and promotes it through the Federal Work-Study Program (FWS). This important program provides funds to participating colleges and universities to help pay for part-time employment of undergraduate and graduate students with financial need, allowing them to earn money to help cover educational expenses. Regardless of the funding source, students are employed in virtually all areas on campus, with some jobs directly connected to their educational programs and others less so. In addition, schools sometimes place students in off-campus FWS positions. In some circumstances, the institution remains the student's employer through written agreements with the off-campus entity. Even at mid-sized institutions, student employees can number in the thousands.

In general, students are compensated for these part-time jobs either by the hour or through a salary. Examples of jobs paid on an hourly basis include tutoring, food service, residence hall housekeeping, clerical positions, and security desks. Many institutions limit the number of hours student employees can work so as not to interfere with their academic programs. Often, students with federally-defined financial need who receive an hourly wage are supported by FWS. It is quite common for schools to impose a cap of 20 hours per week under FWS. Examples of students receiving compensation with a salary include resident assistants, graduate assistants, undergraduate student government officers, and students on internships. Payment may be in the form of a single lump sum or payments at regular intervals. The hours of student employees receiving this form of compensation, such as resident assistants, generally are not tracked.

Student employees are not typically covered under an institution's employee health insurance plan. Instead, they receive health insurance coverage in a variety ways, including through their families' health insurance coverage up to age 26 and under ACA-regulated student health insurance coverage, which schools may subsidize through their financial aid program or provide at no cost as part of a graduate school award package. In addition, as of 2014, students will be able to purchase coverage through individual market exchanges, possibly with premium tax subsidies, or in many states through Medicaid, if income eligible.

Student employees rarely hold a single job on campus where the hours exceed the 30-hour threshold. However, there are instances where students combine one or more jobs that together may exceed the 30-hour threshold. For example, a student may combine a 15-20 hour a week part-time FWS job paid hourly with a job in the residential life system like resident assistant. These student employees are working this number of hours primarily for financial reasons. This presents a significant challenge for institutions because, as noted above, many campus jobs hours are not tracked and schools have little capacity to know whether a student will clear the 30-hour threshold.

In some cases, students earn their FWS awards during the summer, when they may work 30 hours or more per week. Federal regulations allow students to "pre-earn" FWS, but the net wages must be applied to the student's next period of attendance. For example, a school

might award a student $3,000 in FWS for the 2013-14 academic year, which he would normally earn over roughly 30 weeks (13 hours per week at minimum wage). That student could be permitted to earn some or all of the award during summer 2013 by working more than 30 hours per week.

Again, the primary purpose of campus work is to make higher education affordable to students with need, and to provide work experience related to the academic program. It is with these considerations in mind that we proposed two safe harbors in our regulatory comment letter dated March 18, 2013 in response to the NPRM 4980H: one based on the Department of Labor's approach toward students under the Fair Labor Standards Act and one focused on student employment under a work-study program. As we discussed in our meeting, we continue to believe that those proposed safe harbors, set out again below, provide a reasonable and fair approach to addressing the issue of student employment under the employer shared responsibility requirement:

- ***Nature of Work Safe Harbor***

  [A]n appropriate safe harbor would track the existing rules and guidance on employed students for purposes of the Fair Labor Standards Act as reflected in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24, considering whether the student works as part of his or her overall educational program, and would also consider any other rulings on the status of particular groups of students from a federal court, the DOL, or the NLRB. We request that the Department issue guidance clarifying that, for purposes of calculating a student's hours under ACA Section 4980H, institutions of higher education may apply the standards set forth in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. To the extent a student works more than one job (either for the college or university or as part of a work-study program), each job should be evaluated independently to determine whether it meets the DOL standards. We also request that the Department issue guidance clarifying that an individual college or university that receives a ruling or determination specific to that institution with respect to the status of a particular group of students may rely on that specific ruling.

- ***Work-Study Safe Harbor***

  Other students whose work is separate from their educational programs typically take on such campus roles as a form of financial aid under work-study programs in order to remain enrolled and make progress toward their degree. Such campus roles are not typically considered to be job paths for students as much as a way to support their continued educational progress. As such, these campus roles do not necessarily fit within the "nature of work" safe harbor set forth above. Nevertheless, these positions are a key component of the strategic arsenal of federal student aid programs created to expand opportunities for students who would not otherwise have the financial resources to attend college. Students who participate in work-study programs are afforded access to student health insurance programs by the

institutions they attend. Treating students who hold these work-study positions as "employees" for purposes of ACA Section 4980H places an economic burden on a program that is meant to provide individuals with financial need meaningful access to higher education. It would be an odd result, indeed, to apply 4980H in a manner that would strain institutions' ability to provide access to higher education to such students, which would include access to student health plan coverage in many instances. We therefore recommend that the Department issue guidance clarifying that, for purposes of calculating the hours worked by a student for purposes of ACA Section 4980H, an institution of higher education may exclude the hours worked by a student who is enrolled in classes at least half-time at the institution and who receives a wage as part of a job under a work-study program.

Students Working as Part of Internship or Cooperative Educational Programs

Since filing our letter on March 18, we have become aware of another area of concern regarding the potential adverse effect of the employer shared responsibility requirement on students engaged in work as part of an internship or cooperative educational program sponsored by a college or university.

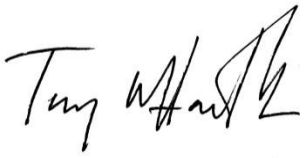
Increasingly, colleges and universities are incorporating internships or cooperative educational programs into their undergraduate and graduate academic programs because they aid students in their future careers and enable them to support themselves financially while in school. In these experiential educational programs, students alternate semesters of academic study with semesters as an intern or on "co-op" in full-time employment with a private employer, often off campus, in positions related to their academic or career interests. Students usually work for a semester (3 months) or longer, sometimes "doubling up" co-ops to work for 6-9 months. Some students may even continue working part time for the same employer after returning to classes. Frequently, these internships or co-op placements lead to full-time employment for students post-graduation.

Based on feedback from employers participating in such programs, we are concerned that the ACA's employer shared responsibility requirements could undermine these experiential education programs. Specifically, if employers believe they are obligated to offer interns or co-op students employee health insurance coverage, they may either limit the length of the internship or co-op placement or, worse, choose not to participate in the program at all because of the additional cost.

As we discussed in our meeting, we propose that the final regulations permit employers to deem students working as part of a college- or university-sponsored internship or cooperative educational program as *per se* seasonal employees exempt from the employer's obligation to offer health insurance coverage under the employer shared responsibility requirement. We believe such students would not be deprived of health insurance coverage as they are likely to be insured in the manner described above. Further, we recommend that the Department define such internship or cooperative educational programs in a manner similar to the approach codified in Title 20 of the U.S. Code (see 20 USC §1161n or 20 USC §2302).

Thank you for considering our views. If you have any questions or need additional information, please do not hesitate to contact Steven Bloom at 202-939-9461 or sbloom@acenet.edu.

Sincerely,



Terry W. Hartle
Senior Vice President

TWH/ldw

On behalf of:
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
National Association of Independent Colleges and Universities
National Association of College and University Business Officers
National Association of Student Financial Aid Administrators