



July 12, 2017

Wendy Macias  
U.S. Department of Education  
400 Maryland Avenue, SW  
Room 6C111  
Washington, DC 20202

Re: Docket ID ED-2017-OPE-0076

Dear Ms. Macias:

The National Association of College and University Business Officers appreciates the opportunity to comment on the Department of Education's June 16<sup>th</sup> notice of intent to establish new negotiated rulemaking committees to consider revisions to the gainful employment and borrower defense to repayment regulations. NACUBO represents college and university business officers at more than 2,100 public and nonprofit colleges and universities. We are dedicated to sound fiscal and administrative practices at institutions of higher education.

NACUBO is particularly concerned with revisions to the financial responsibility standards as part of the borrower defense rulemaking and urges ED to convene a separate negotiated rulemaking committee to address needed changes to the financial responsibility standards for nonprofit institutions. This smaller, more focused committee could do its work concurrently with the borrower defense committee to ensure coordination of effort.

NACUBO stands by comments we expressed during the initial rulemaking. We firmly believe student borrowers should be protected from misleading, deceitful, and predatory practices by institutions. Students who may have been victims of fraud or were hurt by the sudden closure of an institution should not be without recourse. The previous rules addressing borrower defense to repayment provisions in the Higher Education Act were skeletal and seldom used. We support efforts to establish borrower defense standards and to define the evidence former and current students must provide to show that a college's misconduct warrants debt relief.

However, we believe the department exceeded the original intent of the 2016 rulemaking process and the final rules altered and augmented current financial responsibility regulations in ways that have the potential to be both unduly burdensome to colleges and universities and possibly harmful to current and prospective students.

Under the auspices of the borrower defense rulemaking, ED introduced onerous new accountability and financial responsibility requirements. In last year's negotiations, ED did

not disclose its intention to make changes to the financial responsibility standards in advance and failed to include any stakeholders with financial or accounting expertise on the committee.

Colleges and universities are already held to the current standard to ensure they are not at risk of precipitous closure. The borrower defense to repayment rulemaking process was not, and is not, the appropriate venue to address and improve upon the current rules on financial responsibility. Even before the new rules were issued last year, ED's current financial responsibility practices needed to be addressed; NACUBO has long documented ED's misapplication of its financial responsibility definitions when analyzing nonprofit institutions' financial statements. The standards should not have been expanded until existing flaws were fixed.

We ask for a separate negotiation focused on nonprofit institutions because the pressures for updates relate primarily to nonprofit entities. This will enable ED to ensure that committee members include appropriate financial experts such as college or university business officers, independent auditors, stakeholders who regularly use higher education's financial information, and others with knowledge of institutional finances. Financial reporting standards are different for nonprofit and for-profit entities. It has been our experience that many of the issues that schools have encountered over the years with ED's administration of the standards relate to the items that are unique to nonprofits such as endowments, pledges, restricted funds, investments in the physical plant, and pension plans. Further, recent changes in accounting standards for nonprofit entities will render current formulas for calculating institutions' composite scores obsolete.

A dedicated negotiated rulemaking committee to address necessary and timely updates to the current financial responsibility rules will allow ED to ensure that the remedies required under the regulations address the problems they are intended to resolve, update the standards to reflect new accounting standards, and correct widespread confusion around ED's enforcement practices.

### **Triggering Events**

The borrower defense rules promulgated in 2016 introduced a list of triggers that would either cause a recalculation of an institution's composite score in the middle of its fiscal year or an immediate decision that the institution was no longer considered financially responsible. Some of the triggers have little relation to student financial aid or the provision of education and were selected without benefit of empirical data. Colleges and universities are faced with reporting these events—regardless of their materiality—to ED within 10 days and could also be required to provide disclosures to prospective and current students.

### **New Accounting Standards**

Current rules under 34 CFR 668.172 need to be updated to address a not-for-profit accounting standard released by the Financial Accounting Standards Board (FASB) in 2016 that upends the current formulas used in calculating composite scores for nonprofit institutions. The new Accounting Standards Update (ASU) 2016-14, "Not-for-Profit Entities: Presentation of

Financial Statements of Not-for-Profit Entities,” made significant changes to the reporting model used by nonprofit colleges and universities. All affected entities, including colleges and universities, are required to comply with the standards in their FY2018-19 audited financial statements, although FASB encourages early adoption and we expect some institutions of higher education to do so.

Significant changes to the net asset classes will impact the definition of expendable net assets and alter the substance of the net income ratio—making it impossible for ED analysts to calculate ratios using terminology and formulas under the current regulations.

### Longstanding Inaccuracies

NACUBO and others have found that the department is not calculating financial responsibility ratios for nonprofit institutions correctly—and has been doing so for years. Before ED imposes a new financial responsibility structure, it should take steps to resolve the problems inherent in its current practices and ensure its ratio calculations adequately and appropriately measure whether an institution has the financial resources to support its mission.

The department regularly applies adjustments to ratio calculations that are not supported by the regulations and have resulted in failing scores, necessitated expensive letters of credit, and tarnished the reputations of financially viable institutions. ED analysts have repeatedly ignored both regulatory definitions and audited financial statements and have computed composite scores that neither NACUBO nor independent financial auditors can replicate following the definitions in the current regulations and generally accepted accounting principles. For example, time and again, ED analysts treat endowments as a burden rather than a valuable resource, distorting the ratios by excluding expendable portions of the endowment and insisting that investment losses be included in expenses. More details of these concerns are provided in the *Report of the NAICU Financial Responsibility Task Force*.<sup>1</sup>

NACUBO continues to support the recommendations made by the National Association of Independent Colleges and Universities in 2012, calling for:

- Ensuring that the department conforms to the Higher Education Act, follows the current financial responsibility regulations, and applies standard accounting definitions when determining nonprofit colleges' financial responsibility.
- Establishing a uniform appeals process as part of the financial responsibility procedures. This would assure institutions of the opportunity to correct or update financial information before their composite financial responsibility scores are made final and released to the public.
- Establishing an advisory panel of objective nonprofit accounting experts to provide technical guidance to the department.

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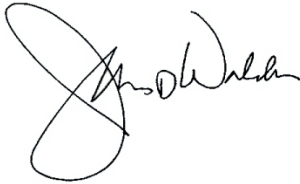
<sup>1</sup> [http://www.naicu.edu/docLib/20121119\\_NAICUFinan.Resp.FinalReport.pdf](http://www.naicu.edu/docLib/20121119_NAICUFinan.Resp.FinalReport.pdf)

In conclusion, NACUBO fully supports the undertaking by ED to go after institutions that are deceitful and have lied to or misled students, leaving them without a degree but with the burden of debt. Further, we recognize the responsibility the federal government has to protect taxpayers from the real costs of discharge relief.

However, we urge you to establish a separate, but concurrent, negotiated rulemaking committee to address the specific nonprofit accounting issues we have outlined.

If you need more information or have questions about NACUBO's concerns, please feel free to contact Anne Gross (202.861.2544, [agross@nacubo.org](mailto:agross@nacubo.org)) or Sue Menditto (202.861.2542, [smenditto@nacubo.org](mailto:smenditto@nacubo.org)).

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Walda". The signature is stylized with a large, looping initial "J" and "W".

John D. Walda  
President and CEO