



June 20, 2023

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20006

Re: Docket ID ED–2023–OPE–0089

Dear Secretary Cardona:

On behalf of the National Association of College and University Business Officers (NACUBO), I write to submit our comments in response to the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on May 19, 2023, addressing Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, and Ability to Benefit (ATB).

NACUBO represents college and university business officers at more than 1,700 public and private nonprofit colleges and universities across the country. As an organization dedicated to advancing the economic vitality, business practices, and support of higher education institutions in pursuit of their missions, we appreciate the opportunity to provide feedback and contribute to the development of impactful policies that shape our education system.

NACUBO supports the comments provided by the American Council on Education and the American Institute of Certified Public Accountants on the NPRM. As the only national higher education association collaborating with accounting standard-setters on financial accounting and reporting matters, as well as issuing sector practice and implementation guidance, we are writing to provide additional insights on financial responsibility and certification procedures.

### **Financial Responsibility**

Concerning proposed financial responsibility changes, our comments address three areas:

1. Additional disclosures in the notes to the financial statements
2. Time to report certain triggering events
3. Public institution requirements

### **Disclosure Requirements**

*Related entities.* Amendments to § 668.23(d) would require institutions to include detailed information on related entities, including name, location, and a description of

the entity and *any* transactions between the related party and the institution, in the notes to the financial statements. The expectation is that note disclosures would be audited. This amendment is concerning because “any” transactions implies “all” transactions and as such is problematic and unattainable because such a requirement—

- (1) Would not be auditable by independent auditors. A clean audit opinion by an auditor provides reasonable assurance that the auditor has evaluated *enough* information through their adherence to audit standards in order to conclude that financial statements are fairly presented and conform to Generally Accepted Accounting Principles (GAAP). Consequently, auditors cannot provide reasonable assurance when there is a requirement to audit all information and transactions.
- (2) Goes well beyond disclosures of material-related party transactions under GAAP (Financial Accounting Standards Board Accounting Standards Codification 850-10-50-1). Such a disclosure will be burdensome for the institution. Audit opinions and financial statement preparation are fundamentally based on GAAP; only accounting standard-setters can establish such requirements. Additional requirements will lead to unprecedented risk, cost, and burden.
- (3) Appears to violate Office of Management and Budget (OMB) Memorandum M-17-12, which discourages making personally identifiable information publicly available. The single audit financial statements submitted by institutions are available to the public. Institutions cannot disclose personal information in financial statements.

*Recruiting activities, advertising, and other pre-enrollment expenditures.* Amendments to § 668.23(d) that would require institutions to disclose in a footnote to the financial statement the dollar amounts spent in the **preceding** fiscal year on recruiting activities, advertising, and other pre-enrollment expenditures are problematic and unattainable as written because—

- (1) Recruiting activities, advertising, and pre-enrollment expenditures are not defined in the NPRM. Without clear and absolute definitions, operational processes and control procedures cannot be put into place to facilitate identification for accurate posting to the general ledger or tracking outside of this process for disclosure. In addition, lack of precise definitions may raise questions in the following areas:
  - a. The outreach activities associated with the educational missions of nonprofit institutions may be interpreted as recruitment or pre-enrollment activities that need to be quantified. Faculty may speak at community centers, youth conferences or high schools, and it is unclear if faculty time would need to be tracked and reclassified.
  - b. Nonprofit college and university websites provide information that describes the attributes and benefits of the institution. It is unclear if expenditures that support the content and infrastructure of an institution’s website would need to be tracked, evaluated, and allocated as an advertising activity.
- (2) The same audit concerns raised about disclosing all related party transactions in the notes to the financial statements would apply to disclosure requirements for all



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- advertising, recruitment, and pre-enrollment activity expenditures. Audit opinions provide reasonable assurance—not absolute assurance—and therefore requirements to audit all information and transactions are inherently problematic.
- (3) Notes to the financial statements relate to the current reporting period. Requiring a note for expenses that occurred in the preceding fiscal year would be out of step with the current reporting period of the audited financial statements.

NACUBO also supports comments submitted by audit experts at the American Institute of Certified Public Accountants (AICPA), which elaborate on the audit challenges that the proposed disclosures would create.

*Liquidity disclosures required under applicable accounting standards.* Under proposed § 668.175(c), the Department would clarify that a disclosure, **as required under the applicable accounting or auditing standards, about the institution’s liquidity**, ability to continue operations, or ability to continue as a going concern, **places the institution in the status of not being financially responsible. Any one of these disclosures would require an institution to pursue an alternate standard of financial responsibility to comply with the associated regulatory requirements under § 668.175.** (emphasis added)

However, because all nonprofit entities have a GAAP requirement to disclose in the notes to financial statements relevant information about the liquidity or maturity of assets and liabilities, including restrictions and self-imposed limits on the use of particular items, which goes beyond information provided on the face of the statement of financial position, we ask that § 668.175 specifically exclude liquidity disclosure requirements under FASB ASC 958-250-50-1. (For-profit and public institutions do not have such a GAAP requirement.) Without such an exclusion, any nonprofit institution may be seen as having to provide financial surety. The requirements in § 668.175(c) should explain that referenced disclosures would be for institutions under financial stress and are in addition to those required for nonprofit institutions under FASB ASC 958-250-50.

*Single audit concerns.* We are concerned that the expectation of an audit opinion on the proposed new disclosure requirements in the notes to the audited financial statements runs contrary to the intention behind the Single Audit Act. Nonprofit institutions are subject to the Act, and annual federal audits are conducted using a regularly updated OMB Compliance Supplement. There is a process that all federal agencies follow to submit audit requests to OMB for inclusion in the Compliance Supplement. Proposed audit requirements in the NPRM violate the spirit of a law designed to ensure that each federal agency does not impose its unique compliance and audit desires on nonprofit (and governmental) recipients of federal funds.



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## Time to Report Triggering Events

The NPRM gives institutions 10 days to report certain mandatory and discretionary triggering events. This timeframe will not be reasonable, as a short reporting window creates an administrative burden for many types of institutions and may trigger financial protection solely due to time constraints. Small nonprofit institutions have fewer resources and will be burdened with this short reporting window. Large, complex, decentralized institutions will need more time to involve pertinent department experts and coordinate with various administrative and compliance offices. Instead, we suggest a timeline of 21 days, a common benchmark for institutions that go through a monthly cycle for an accounting close and related financial reporting.

## Public Institution Requirements

As indicated in 34 CFR 668.171(g), public institutions are able to prove that they are financially responsible and are not subject to the requirements in 34 CFR 668.171(b),(c), and (d) as long as they notify the Secretary that they are designated as a public institution by either a (1) state government entity, (2) local government entity, (3) municipal government entity, (4) tribal authority, or (5) other government entity that has the legal authority to make that designation. They also must provide a letter from an official of that state or other government entity confirming that the institution is a public institution, and they must not be subject to a condition of past performance under 34 CFR 668.174.

Decades ago, public institutions provided letters from state officials to the Department substantiating financial responsibility for those institutions. The NPRM is asking public institutions to provide a new letter guaranteeing financial responsibility as well as additional letters for recertifications. The proposed requirement for numerous letters would result in more than one governmental attestation and would create administrative burden for the institution, with unnecessary back and forth communications between the Department, public institutions, and their states—costing more time and effort for all parties.

Additionally, the NPRM does not exempt public institutions from needing to provide financial protection when they become subject to a mandatory or discretionary triggering event. Because public institutions are governmental entities, they are not at risk of sudden or unexpected closure. The new regulation should clarify the reasoning for public institution requirements before creating undue administrative burden. At the very least, existing state official documentary letters on file for public institutions should suffice.



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## Certification Procedures

NACUBO has concerns with a proposed change to Program Participation agreements included in 668.14(b)(33) regarding institutions' policies regarding transcript holds. While we appreciate ED's desire to highlight bad actors, the proposed approach may be detrimental to students and institutions.

Much like how the Department awards Title IV aid based on the assumption that a student will complete the term for which they were awarded funds, institutions also expect students to remain enrolled for the term and pay for the associated charges—by utilizing FSA funds, aid from other agencies, or external scholarships, or by paying out of pocket. Schools build their budgets and class schedules on this assumption. It is extremely difficult to get another student to enroll in a course when one student withdraws mid-semester. This is true independent of a student's Title IV eligibility.

NACUBO also is concerned with the practicality of this proposal. Financial holds are often initiated via the bursar's office or office of student accounts. Leaders representing these offices have indicated that it would be challenging to pinpoint a debt—and its resulting hold—to a Return to Title IV (R2T4) calculation. A student's ledger account is a snapshot in time. Charges are continually added and removed from the account, while payments are processed and refunds are distributed.

Additionally, many student account systems may not be able to automatically identify these holds/debts as R2T4-related. Staff would have to manually analyze the accounts of students with holds to determine if they were caused by return, and then release the hold. It is unclear how staff would be required to handle a balance on a student's account that came from *both* an R2T4 calculation and some other source and may result in the elimination of a non-R2T4 hold.

This provision also would be in conflict with state law for public institutions in states including Texas. There are cases where state entities are prohibited from forgiving any portion of a debt owed to the state. If a hold was the result of a debt, eliminating the hold would be viewed as forgiving the debt.

We appreciate ED looking at transcript holds; however, in the final rule we strongly recommend adopting language without the R2T4 provision.

We agree that institutions should not withhold transcripts when the related balance was created from an error in the institution's administration of the Title IV HEA programs or due to fraud or misconduct by the institution or its personnel. If ED would like to consider limiting transcript holds resulting from R2T4, NACUBO recommends waiting to consider such a proposal until ED examines its R2T4 rules in the upcoming negotiated rulemaking sessions scheduled for later in 2023. This will allow for the Department to examine the underlying rules and explore any unintended consequences, with stakeholders with expertise in policies on holds included in the negotiations. Transcript



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holds were not intended to be part of the negotiations that led to this rulemaking and this attempt to address them does not belong in this proposal.

NACUBO, in a joint [statement](#) with the Association of Collegiate Registrars and Admissions Officers (AACRAO) released in April 2022, called on college and university leaders to examine their institutions policies regarding transcript and registration holds<sup>1</sup>. The statement includes a number of recommendations that would importantly allow the use administrative-process holds and student-success holds while eliminating holds tied to trivial or minor debts.

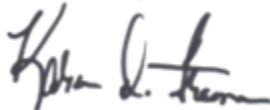
In conclusion, NACUBO is grateful for the opportunity to contribute to the ongoing dialogue surrounding the NPRM and its potential impact on the higher education community. Your consideration of our comments, as well as the collective input of other stakeholders, is critical in ensuring that the final regulations reflect the best interests of students and institutions.

We appreciate the Department of Education's commitment to fostering transparency and inclusivity throughout the rulemaking process, and we applaud your efforts to solicit feedback from diverse perspectives. By actively engaging stakeholders, you create a climate conducive to meaningful cooperation, which leads to well-informed decisions that improve the quality and accessibility of education.

We look forward to the rest of the rulemaking process and remain dedicated to supporting policies that promote the continued advancement of higher education.

Please don't hesitate to contact Ashley Jackson, director of government affairs at NACUBO, at [ajackson@nacubo.org](mailto:ajackson@nacubo.org) for any additional information that may be helpful.

Sincerely,



Kara D. Freeman  
President and Chief Executive Officer  
National Association of College and University Business Officers

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<sup>1</sup> <https://www.nacubo.org/Press-Releases/2022/2022-Joint-Statement-from-AACRAO-and-NACUBO-on-the-Use-of-Holds>



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