NACUBO

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August 1, 2016

Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue, SW
Room 6W232B
Washington, DC 20006

Re: Docket ID ED-2015-OPE-0103

Dear Mr. Gaina:

The National Association of College and University Business Officers (NACUBO) appreciates the opportunity to comment on the Department of Education's (ED) notice of proposed rulemaking (NPRM) published in the *Federal Register* on June 16, 2016, to establish a new federal standard and a process for determining whether a borrower has a defense to repayment on a loan based on an act or omission of a school.

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. The undersigned organizations also support and endorse our comments.

NACUBO firmly believes student borrowers should be protected from misleading, deceitful, and predatory practices of institutions. Students who may have been victims of fraud or were left in the lurch by the sudden closure of an institution should not be left without recourse. NACUBO also recognizes that the existing rules under the Higher Education Act borrower defense to repayment provision were skeletal and seldom used. We support ED's goal 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 announced rulemaking process and has proposed rules that expand the definition of misrepresentation and alter and augment current financial responsibility regulations in ways that have the potential to be both unduly burdensome to colleges and universities and even possibly harmful to current or prospective students.

The proposed regulations go beyond the remedies necessary to establish systems to provide relief to federal student loan borrowers who have been wronged. Abusive practices that prey on students must be curbed. However, the regulatory changes put forth by ED include inappropriate indicators—and generate consequences for institutions and students— that will not reliably address the deceptive, fraudulent practices that motivated this rulemaking effort.

NACUBO is particularly concerned about the consequences for private nonprofit colleges and universities. The proposal is an invitation to failure. Rather than reining in risky behavior, the department could punish those institutions that strive to give students a hand-up and inhibit their ability to meet their institutional missions. In search of financial protection for taxpayers, the department instead has created a regime of penalties that will be costly for both students and institutions.

In summary, we largely support the approach taken by ED to establish new regulations governing borrower defenses. We strongly oppose the additional steps proposed by the department to expand financial responsibility rules in a way that would penalize nonprofit colleges and universities for circumstances that may be completely unrelated to borrower defense claims and are not indicative of potential risk to either students or the federal government.

Our specific comments and concerns follow in greater detail.

## I. Borrower Defense to Repayment (§685.222)

NACUBO largely supports the proposal to establish a new federal standard for a borrower's defense to repayment for loans disbursed on or after July 1, 2017, but we have some concerns. NACUBO also endorses the positions expressed by the American Council on Education (ACE) in its comment letter on borrower defense to repayment and misrepresentation.

### Time Limitations

We agree that borrowers should have sufficient time to assert a defense to repayment for amounts still owed on a loan disbursed on or after July 1, 2017. However, we urge ED to consider a statute of limitations.

For claims to recover amounts previously collected, we also agree with ED that there should be reasonable time limits for claims that are not made on the basis of a favorable contested judgment. ED's proposed six-year time limit for claims based on a breach of contract or a substantial misrepresentation is a sensible threshold.

### Group Process

NACUBO supports the department's plan to allow for claims to be made by individuals or groups of borrowers, and believes it is appropriate to allow the department to include borrowers who have not filled out an application in a group. ED's proposed provision that allows those borrowers to opt out of a group would allow this process to be flexible and accommodating.

### Timeframe for Processing Claims

While borrowers filing claims may welcome the provision allowing for an administrative forbearance (or a suspension of collection activity if the loan is in default) as their application is being processed, with no established timeframe for the department to complete defense claims, borrowers could see interest accrue on their loans for an indeterminate amount of time. Before submitting an application for defense to repayment, a borrower should know how long—at a maximum—it should take ED to reach a decision. We urge the department to establish a timeframe for processing these claims.

## Appeals

NACUBO is concerned with an inconsistency in the proposed regulations between individual and group claims to borrower defense for an open school. While we understand that there might be a need for different procedures for a closed school, NACUBO believes that there should be similar processes for individual and group claims for defense to repayment at institutions that are still operating.

The proposed language for a group process to borrower defense at an open school allows the departmental official representing a group of borrowers *and* the institution in question to appeal a decision to ED (§685.222(h)(2)). Unfortunately, such a provision is not included in the section for individual claims. In §685.222(e)(5), the proposed language reads, "if a borrower defense is denied in full or in part, the borrower may request that the secretary reconsider the borrower defense upon the identification of new evidence in support of the borrower's claim." NACUBO believes that both borrowers and institutions should have the opportunity to properly appeal a decision made by ED, thus creating a fair process for both parties.

## II. Misrepresentation (§668 Subpart F)

The department's proposed expansion of the definition of misrepresentation is unnecessary and has the potential to be unduly burdensome to college and university academic advisors, career counselors, and faculty members. The existing framework in Subpart F regarding accusations of misrepresentation or substantial misrepresentation on the part of colleges and universities in borrower defense claims is expansive, reasonable, and as ED notes in the NPRM "a clear framework regarding the acts or omissions that would constitute misrepresentations as they relate to the nature of educational programs, the nature of financial charges, and the employability of graduates" (p. 39342).

However, in the proposal the department recommends adding to the definition of misrepresentation in §668.71(c) a sentence addressing omissions that would read, "Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading." This would permit claims of misrepresentation even when it occurred unintentionally or inadvertently. Such an expansive definition of misrepresentation would place individuals that offer career, financial aid, or program guidance to current or prospective students in the position of constantly guarding their words for fear of unintentionally creating a misrepresentation. This will result in less guidance and advisement in general being offered—certainly not a beneficial outcome to either current or prospective students.

From a resource management perspective, the proposed regulations would also require colleges and universities to expend a great deal of time and money having any areas where institutions come into contact with current or prospective students, including but not limited to marketing materials, advising policies, institutional websites, and program descriptions, reviewed to ensure that there is no instance of misrepresentation.

NACUBO understands ED's desire to regulate false and misleading marketing, but this proposal takes a sledgehammer to the problem. The vastly broadened view of misrepresentation will result in a booming business for lawyers and will tie-up institutions in governmental red tape.

## III. Institutional Accountability and Financial Responsibility (§668, Subpart L and §668.41)

Under the auspices of the borrower defense rulemaking, ED has introduced onerous new accountability and financial responsibility requirements. 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 is not the appropriate venue to address and improve upon the current rules as they pertain to financial responsibility. NACUBO also endorses the positions expressed by ACE in its comment letter on financial responsibility.

The department did not adequately disclose its intention to make significant changes to the financial responsibility regulations. On October 20, 2015, when ED published its intention to establish a negotiated rulemaking committee, there was no indication that it would raise financial responsibility regulations as an issue open for rulemaking, nor were any stakeholders with financial expertise invited to participate.

After the official selection process, no financial experts were at the negotiated rulemaking table; there were no representatives of college or university business officers, independent auditors, stakeholders that regularly use or analyze higher education's financial information, or others with knowledge of institutional finances. It did not become clear that this was an agenda item until the first meeting of the panel January 12-14, 2016, when ED provided negotiators with "Issue Paper #5—Financial Responsibility."

This broken process has resulted in a regime of "triggers" that do not reliably address the deceptive and fraudulent practices that motivated this rulemaking effort. Additionally, terminology presented in the NPRM reflects an inadequate familiarity with nonprofit accounting—which we believe to be a reflection of the faulty rulemaking process. The materiality threshold for some proposed triggers are unreasonably low; such events might not even merit mention in the footnotes of an institution's annual financial statements because they fall beneath an independent auditor's materiality threshold. Further, the proposed triggers would lead to required actions that could expose institutions to financial burdens and needlessly damage their reputations even when there is little risk the institution would be implicated in any borrower defense claims or is in any danger of imminent closure.

ED's current financial responsibility practices are broken. The standards should not be expanded until they are fixed. NACUBO and others have found that the department is not calculating financial responsibility ratios for nonprofit institutions correctly—and has been doing it wrong for years. Before ED imposes a new financial responsibility structure, it should take steps to resolve the problems inherent in its current practice 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 computed composite scores that neither NACUBO nor independent financial auditors can replicate using current law and generally accepted accounting principles. For example, time and again, ED analysts interpret an institution's endowment as an albatross rather than a valuable resource. The table in the attachment summarizes the most common accounting mistreatments that disregard current accounting standards and definitions in the current financial responsibility regulation.

NACUBO continues to support the recommendations in the 2012 Report of the NAICU Financial Responsibility Task Force that calls 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.

The federal government should not be building additional layers of complexity on top of a faulty foundation.

A new accounting standard will be released later this month that will upend the current formulas, making further changes to financial responsibility regulations imprudent at this point in time. All affected entities subject to the financial reporting changes, including colleges and universities, will be required to comply with the standards in their 2018-19 fiscal year audited financial statements, although the Financial Accounting Standards Board (FASB) will encourage early adoption. 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. In addition, lease accounting standards are also scheduled to change soon and will impact all stakeholders—both nonprofit and for-profit. ED officials should be prepared for the imminent accounting standards update when current regulatory definitions will need to be revisited.

**General Standards** (§668.171)

ED proposes to add 10 new "automatic triggers" in 668.171(c) that might apply to any institution. (Several others only apply to for-profit institutions and are not addressed here.) If an institution is subject to one or more of these triggers, ED will consider it unable "to meet its financial or administrative obligations" without regard to the institution's actual financial condition. The institution would face multiple sanctions, including participating in the Title IV programs only under provisional certification, providing a letter of credit or other surety to ED, telling all of its students and prospective students that it failed, and providing a warning on the home page of its website. These are fairly drastic consequences for institutions and NACUBO is deeply concerned about ED's proposal to tie them to newly developed, untried standards that are often unrelated to financial solvency.

***Lawsuits and Other Actions (§668.171(c)(1))***
Many of the proposed triggers focus on liabilities arising from various legal actions including those not related to the making of a federal loan or the provision of educational services brought by federal, state, or other oversight entities, in some cases looking back three years, and

including currently pending actions that have not yet been resolved. We have a number of concerns.

**Materiality thresholds**. First and foremost, we need to address an overarching problem: The proposed materiality threshold of “ten percent of current assets” incorporates reasoning from a 1973 ruling in which the Security and Exchange Commission (SEC) determined that a materiality threshold of 10 percent of current assets was more reasonable than a 15 percent threshold. SEC requirements apply to publicly traded companies (issuers of equity securities). Although there are some proprietary institutions that are publicly traded, the vast majority of institutions—including all nonprofit institutions—are not regulated by the SEC.

The term “current assets” is problematic for nonprofit institutions because, as a rule, nonprofit institutions do not classify their balance sheets (i.e., segregate assets and liabilities between current and noncurrent); generally accepted accounting principles do not require classification of assets and liabilities for nonprofit entities. Further, if a nonprofit entity was to report current assets, the definition of current assets is different for nonprofit entities and business (proprietary) entities. The genesis of the difference relates to donor and governing board restrictions and designations that can only occur in the nonprofit sector.

Nonprofit institutions follow guidance in FASB’s Accounting Standards Codification. FASB ASC 958-205-55-7 explains that when a nonprofit presents a statement of financial position that sequences assets and liabilities based on their relative liquidity, cash and cash equivalents that are held temporarily in permanent endowment funds until suitable long-term investment opportunities are identified and included in the classification long-term investments. Similarly, cash and contributions receivable restricted by donors to investment in land, buildings, and equipment are not included with the line items cash and cash equivalents or contributions receivable. Rather, those items are reported as assets restricted to investment in land, buildings, and equipment and are sequenced closer to land, buildings, and equipment. Likewise, FASB ASC 210-10-45-4 states that the concept of the nature of current assets contemplates the exclusion from that classification such resources as cash that is designated for expenditure in the acquisition or construction of noncurrent assets or is segregated for the liquidation of long-term debts.

As a practical matter, for reasons explained above and in FASB’s authoritative literature, nonprofit institutions would have relatively insignificant amounts of current assets. Ten percent of a relatively insignificant amount could lead to a materiality threshold that would not even comport to various materiality levels used by independent auditors to form an opinion on the fairness of information reported in the audited financial statements.

In the preamble to the current financial responsibility standard, ED explained that current assets are not used in the regulation because the notion of financial responsibility evolved into a construct of expendable reserves. ED notes on page 39364 in the NPRM that expendable assets reflected in the primary reserve ratio are the first line of defense in dealing with an adverse situation, such as a lawsuit, and an institution would first seek to pay damages resulting from the suit out of expendable assets. ED is conflating the terms and concepts in the current financial responsibility regulation and jumping to an unfounded conclusion for nonprofit colleges and universities. First, expendable assets are not a focus of the current financial responsibility rules. Second, under uniform laws, if need be, nonprofit colleges and universities can rely on expendable *net* assets (which are analogous to expendable reserves). Considering that nonprofit institutions can rely on expendable reserves or expendable net assets in urgent circumstances and because current assets is problematic by definition for nonprofits, NACUBO recommends that ED use expendable net assets as a materiality threshold for proposed financial triggers, if it persists in introducing such triggers.

In addition to issues with current assets, the alternate $750,000 threshold for claims and actions related to a federal loan or educational service is also concerning. The amount is derived from 2 CFR Part 200 of the Uniform Administrative Requirements and relates to a federal funding threshold for which an audit could be required. There is really no relationship between the reasoning for the $750,000 threshold in the Uniform Administrative Requirements and an unrelated event concerning an educational or federal loan program—as such, it is arbitrary. For many nonprofit colleges and universities, the $750,000 trigger is exceedingly low. When a materiality threshold is too low, insignificant events are pulled into scope and will force a remedy (letter of credit or disclosure) on an institution that was not injurious; the reputation of healthy and compliant institutions will be needlessly tarnished, or worse.

FASB Concept Statement 2 addresses materiality and offers considerations that must be influenced by judgment when considering materiality. FASB explains that the relative rather than the absolute size of a judgment item determines whether it should be considered material in a given situation. Decisions about materiality are optimally made by those who have all the facts. This is why independent auditors employ varying levels of materiality based upon the circumstances and significance of financial and mission-related elements and events when evaluating the colleges and universities that they audit.

NACUBO recommends that ED allow auditors to evaluate and assess the significance of events related to federal loans for education against materiality levels that are tailored to the unique circumstances of individual nonprofit institutions.

**Look-back period**. If an institution incurred a liability due to an action by a federal or state entity related to making a federal loan or provision of educational services, it would be penalized and labeled “not financially responsible” for three years—even after paying the penalty. But once the school has paid the amount due, its subsequent financial statements, already subject to review as part of the existing financial responsibility standards, would show the impact that judgment had on the institution’s financial statements. There is no need to guess or assume that the payment has weakened the institution’s financial situation. It would be clear if the payment unduly strained the school’s finances. Conversely, if the institution has a passing composite score, then it shouldn’t continue to be penalized.

**Pending actions**. Lawsuits and legal actions may take years to proceed through the court system. Penalizing colleges and universities—for an indeterminate length of time—for lawsuits alleging wrongdoing that have not yet been adjudicated mocks the core American principle of innocent until proven guilty. This is inappropriate given the very real harm that will accrue to institutions under these triggers.

Further, the expansion of the definition of misrepresentation broadens considerably the likelihood of lawsuits and other actions.

***Accrediting Agency Actions*** (§668.171(c)(3))
NACUBO believes that the provision regarding accrediting agency actions is too broad as written. There are many reasons for accrediting agencies to take action or put schools on notice that have no relationship to their treatment of students, financial condition, or to federal loans. We are particularly concerned about the teach out provision in paragraph (3)(i). As ED notes in the preamble (p. 39364), one of the reasons an institution may be required to prepare a teach out plan is when it decides to close a location that provides 100 percent of at least one program. There is nothing wrong with a school deciding to close a site that, for whatever reason, is no longer meeting its or its students' needs. Indeed, periodic reevaluation of programs and a willingness to sometimes close them should be taken as a sign of a well-managed operation. As written, this action would trigger a finding that the institution was not financially responsible, with accompanying sanctions, for three years, providing incentive for schools to avoid making the hard decision to make necessary changes.

***Loan Agreements and Obligations*** (§668.171(c)(4))
ED proposes to take the existing financial responsibility provision about loan agreements and transform it into one of the automatic triggers. The current provision (§668.171(b)(3)) requires an institution to be current in its debt payments. It is not current if, as reported at year end in its audited financial statements, the institution:

- Is in violation of any existing loan agreement (as disclosed in a note to its audited financial statements).
- Fails to make payments on a debt for 120 days and a creditor has filed suit to recover funds.

In the proposed rule, however, the potential triggering events are much broader, encompassing any violation of a provision or requirement in a loan agreement, failure to make payments for 120 days regardless of whether a creditor has filed suit, and any monetary or nonmonetary default or delinquency event or *any other event* that occurs that enables the creditor to make certain changes to the institution's obligations.

This language is too broad and will needlessly ensnare institutions that pose no risk. Loan agreements may include a number of events unrelated to failure of the institution to make payments that trigger changes to their terms, which the language of the provision would seem to include as a reportable event. Nonprofit institutions have access to and use variable rate loans. Some nonprofit institutions have synthetically converted their variable rate interest borrowings into fixed rate debt by entering into an interest rate swap agreement. Under these circumstances it would be incorrect to assume that changes to the interest rates negatively impact the institution.

Further, while the loan provision in the NPRM is narrower than the current one since it only applies to an institution's largest secured creditor, rather than all creditors, there is no materiality threshold and no determination that changes to the interest rate or other terms would have a material impact on the institution.

The exception provided under paragraph (d)(3) that allows the institution to show that newly imposed penalties or constraints will not impact its ability to meet its financial obligations only applies if the creditor waives a violation. Isn't the end result the same if the creditor does not waive the violation, but the penalties or changes to the loan nevertheless will not have an adverse impact?

***Withdrawal of Owner's Equity*** (§668.171(c)(8))
NACUBO assumes that this provision is meant to apply only to for-profit institutions, as nonprofits do not have owners. However, because in financial reporting, the term "equity" is often used conceptually to refer both to owner's equity for businesses or net assets for nonprofits, we recommend that "proprietary" be added before the word "institution" in the first sentence of the paragraph. This would parallel the wording in paragraph (c)(5).

***Cohort Default Rates*** (§668.171(c)(9))
Cohort default rates are unrelated to an institution's financial responsibility. There are already statutory sanctions in place for schools whose CDRs exceed certain limits. NACUBO does not believe it is appropriate to impose additional sanctions in this manner.

***Discretionary Triggers*** (§668.171(c)(10))
In addition to the automatic triggers, ED proposes additional, vaguely described discretionary triggers that ED might use. NACUBO believes that ED already has ample authority over schools in either the zone alternative or provisional certification to require additional surety or impose other safeguards if necessary, and questions the usefulness of the potential triggers listed in (c)(10). For instance, as analyzed by Robert Kelchen for the Brookings Institution recently, small institutions tend to experience larger fluctuations in aid volumes year-to-year than those with more students.

**Stress test.** While NACUBO understands ED's interest in identifying early warning signs of institutional failure, the department's poor record of calculating the relatively straightforward (and widely used in the higher education community) ratios that make up the financial responsibility composite scores for nonprofit institutions provides little comfort that it is capable of developing and using a financial stress test appropriately. For-profit and nonprofit entities regularly apply tests of financial health. However, ED should not undertake an endeavor to develop a financial stress test without a rulemaking process and certainly not without input from accounting experts.

**Bond rating.** The assumption that schools with noninvestment grade bond ratings are somehow deficient is unwarranted. For a nonprofit institution, having a noninvestment grade bond rating is not indicative of inability to repay debt or poor financial standing. The majority of nonprofit colleges and universities do not have a bond rating at all, since they have not issued public debt. The data ED cited on page 39393 bear this out: Only 275 private institutions have been rated by Moody's. (Some others likely have used Fitch Ratings or S&P.)

Those that have a rating are arguably in better financial condition than those that do not. Rather than being a trigger for additional scrutiny, the existence of a credit rating and outstanding public debt would, in and of itself, be an indication of financial responsibility. Further, a bond rating seeks to assess the creditworthiness and risk of nonpayment over an extended time period—typically 20 to 30 years. This represents a much longer view than the financial responsibility regulations contemplate.

***Reporting Requirements*** (§668.171(d))
Requiring colleges and universities to report widely disparate events, across large decentralized organizations, within 10 days is unreasonable and sets institutions up to fail. It is one thing to demand that type of prompt reporting on a limited number of items from institutions that already have been placed in a special status with heightened monitoring but quite different to require hypervigilance from all colleges and universities. Various offices across the administration might be involved and have contemporaneous knowledge of these events, but the individuals dealing with an unrelated agency action, a lawsuit, or a renegotiation of debt are unlikely to have an ED reporting deadline top of minds. Those who are charged with maintaining compliance with ED regulations are unlikely to learn about some of these events within such a short period of time.

***Public Institutions*** (§668.171(e))
NACUBO believes that ED intends to maintain the current exemption for public institutions from the financial responsibility standards, including the new triggers, but we found it difficult to be certain from the NPRM. ED should make this clear in the final rules.

**Alternative Standards and Requirements** (§668.175)

***Letter of Credit Alternative*** (§668.175(b) and (c))
Under current rules, an institution that is not financially responsible because its composite score is less than 1.5 may qualify as financially responsible by providing a letter of credit to ED for 50 percent or more of its anticipated or past Title IV funds. When the current financial responsibility regulations were drafted, this provision was intended to provide a way for institutions that were in good financial shape despite failure to receive a passing composite score to offer surety to ED and avoid the collateral consequences of the zone alternative or provisional certification, including the reputational risk of being labeled as "not financially responsible." In recent years, the option has proven valuable to financially healthy institutions that have failed the composite score test due to the vagaries of ED's calculations of ratios at nonprofit institutions. Since ED has not proposed any changes to these subsections, and they are not listed in proposed §668.41(i), we assume that no disclosures are required for these institutions.

If the financial triggers are included in the final regulation, NACUBO recommends that ED expand §668.175(c) to also allow institutions that are otherwise financially responsible but experience a triggering event to post a letter of credit for 50 percent or more of their prior year's Title IV funding and avoid the stigma and operational hurdles presented by participating under provisional certification. This would allow ED to focus its administrative resources where they are needed while protecting federal resources and mitigating harm to colleges and universities.

***Alternative Financial Protection*** §668.175(f)(2) and (h)
In the NPRM, the department has given institutions the option of providing, as an alternative to an irrevocable letter of credit, cash or an agreement to set aside Title IV funds owed to the institution by ED in order to qualify for provisional certification. While we appreciate ED's effort to provide more flexibility to institutions, NACUBO doubts that these will be attractive choices for many institutions, as there may be a significant negative impact on operations and cash flows. This will certainly be the case at small institutions that often operate "at the margin."

Note that paragraph (h) also refers to letters of credit required under paragraphs (d) or (f) although, as we mentioned above, there are no letter of credit requirements in (d).

**Reporting and Disclosure of Information** (§668.41)

In new paragraph (i), ED proposes to require any school that is required to provide financial protection to the secretary under §668.175(d) or (f) to disclose that fact to current and prospective students and on the home page of its website. NACUBO objects strenuously to this provision and believes that, given the tenuous relationship between some of the triggering factors listed in §668.171(c) and either the institution's value to students or its financial standing, it represents an unwarranted branding of an unknown number of institutions as untrustworthy.

Such a warning will drive away students and alarm potential donors. Small schools, particularly those serving disadvantaged populations, in both urban and rural areas, tend to be heavily tuition dependent—and the difference of 25, 50, or 100 students can lead to real difficulty. A damaged reputation would also discourage donors and undercut any efforts to support students with charitable revenue. Declines in enrollment and alumni and donor support will force tuition to rise—and could force some colleges to close. Additionally, the disclosures (resulting from the poorly designed triggers) will likely diminish access to capital, which is critical to improving—or even stabilizing—the infrastructure of college campuses.

Just as consumer protections try to avoid pushing economically troubled individuals into further debt, ED's proposal must take every precaution to prevent thrusting colleges into a cycle of failure. For some nonprofit institutions, operating close to the margin is part of their charitable commitment; they have formulas that have supported students for decades. Just as it is costly to be poor, the department is making it difficult to be a small, enrollment-dependent private nonprofit college.

As noted in ACE's comment letter on the financial responsibility provisions, ED has a system in place to recognize that although institutions may be financially weak, they nonetheless can be viable. The changes proposed in the NPRM would weaken the zone alternative, creating a new system that goes beyond notice directly to punitive measures. This gives institutions no opportunity to seek resolution to problems before damage has been done.

Note that the zone alternative under §668.175(d) does not include any requirement to provide financial protection to ED and therefore should not be referenced in the disclosure requirement.

**IV. Additional Comments**

Section 668.171(b) cites "paragraphs (c) and (d) of this section" but the cross reference seems to be taken from the current version of the regulations. Since several paragraphs have been added, this exception should now point to paragraphs (e) and (f).

ED continues to refer to §668.15 in several places in the proposed regulations. The regulations at §668.15 should have been removed years ago. These are the old financial responsibility standards that were replaced by Subpart L in 1997. (They were not deleted at the time due to a phase-in period for the new rules.) The existence of the obsolete rules is confusing to say the least. NACUBO recommends that ED take this opportunity to delete them and update the cross references in §668.90 and elsewhere in the regulations covered in this rulemaking.

In conclusion, NACUBO fully supports the undertaking by ED to go after institutions that are deceitful and have lied 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, this proposal has many unfortunate consequences, including a threat to the stability of nonprofit institutions dedicated to their students and their educational missions. The triggers and corresponding requirements—from reporting to securing lines of credit and subsequent disclosures—have the potential to upend a college's ability to carry out its educational mission. These are not institutions we want to needlessly jeopardize.

We urge you to consider our comments and revise the rules before final publication and to adhere to your laudable goal of protecting students from truly fraudulent schools. If you need more information or have questions about NACUBO's concerns, please feel free to contact Liz Clark (202.861.2553, lclark@nacubo.org) or Anne Gross (202.861.2544, agross@nacubo.org).

Sincerely,

John D. Walda
President and CEO

Attachment

On behalf of:

Association of Jesuit Colleges and Universities (AJCU)
Coalition of Higher Education Assistance Organizations (COHEAO)
Council of Independent Colleges (CIC)
National Association of Independent Colleges and Universities (NAICU)
National Association of Student Financial Aid Administrators (NASFAA)
UNCF

## Misused Ratio Components that Negatively Impact Nonprofit Institutions
## (Source—2012 Report of the NAICU Financial Responsibility Task Force)

*Except where noted, each of the items below is:*

- ✓ Highly significant to the overall score
- ✓ Not compliant with current regulations
- ✓ Not compliant with GAAP
- ✓ Not applied consistently

| Ratio Component | Location in the Audited Financial Statements | Department of Education Interpretation | Result |
|---|---|---|---|
| **1. Total expenses** | For nonprofit institutions, defined as "total unrestricted expenses" taken directly from the statement of activities. | Uses the definition for proprietary institutions (which includes expenses and losses). | Decreases the primary reserve ratio |
| **2. Long term debt** | From the statement of financial position (balance sheet) or found in the notes to the financial statements. | Excludes long term lines of credit, working capital loans or certain other debt (which mature in more than one year), and other facilities related liabilities identified by FASB since 1997. | Decreases the primary reserve ratio |
| **3. Total unrestricted revenue** | Taken directly from the statement of activities, and includes net assets released from restrictions during the fiscal year. | Includes gains with revenue. Also occasionally nets losses (investments, swaps, actuarial losses) against revenue. | Increases or decreases the primary reserve ratio |
| **4. Post-employment and retirement benefits** | From the statement of financial position (balance sheet) or found in the notes to the financial statements. In some cases, it may need to be obtained from the institution. | Excludes the liability for pension benefits. | Decreases the primary reserve ratio |
| **5. Unsecured related party receivables (pledges receivable for nonprofit entities)** | In the notes to the financial statements. In some cases, it may need to be obtained from the institution. | Does not allow the pledge receivable exclusion granted to not-for-profits in the preamble to the 11/25/97 rule. Thus, considers pledges from board members to be unsecured related party receivables. | Decreases the equity ratio and the primary reserve ratio<br><br>*Note: This is not a GAAP issue.* |
| **6. Annuities, term endowments, and life income funds included in temporarily restricted net assets** | In the notes to the financial statements. In some cases, it may need to be obtained from the institution. | Assumes all endowment net assets included in temporarily restricted net assets are term endowments (including accumulated gains on endowments). | Decreases the primary reserve ratio |
| **7. Net property, plant and equipment (PPE)** | From the statement of financial position (balance sheet). Construction in progress (CIP) is found on the statement of position or in the notes to the financial statements or obtained from the institution. | Subtracts CIP from total net PPE. Does not consider CIP to be part of PPE until the asset is placed in service. | Increases the primary reserve ratio |