



July 12, 2017

Docket ID ED-2017-OPE-0076

Response to Intent to Re-Negotiate Borrower Defenses to Repayment and Gainful Employment

Thank you for the opportunity to comment on the Department's proposal to reopen negotiations on two significant topics: borrower defenses to repayment (BDR) and gainful employment (GE).

NASFAA supports the intent to hold schools engaging in fraudulent activities accountable. We also believe there is merit in examining the fiscal strength of institutions to ensure that some provisions are in place to not leave taxpayers fully on the hook in case of school closure, but a finer balance must be struck between holding institutions financially accountable without the federal government pushing them into closure.

Rules Related to Borrower Defenses

Recommendation #1: Establish a separate negotiating committee for financial standards

Our first and strongest recommendation is that ED establish at least **three** negotiating committees:

- Borrower defenses to repayment
- Financial responsibility
- Gainful employment

The 2016 borrower defense negotiations were notable for their lack of expertise in the area of financial standards; it is entirely appropriate that those rules be re-negotiated. However, we believe they must be negotiated independent of other issues that do not directly relate to financial standards.

Potential negotiators with expertise in financial responsibility will not likely have expertise in borrower defenses, and vice versa. Each group may well view the other's topics from a narrow frame of reference that constricts the broader purpose. Further, negotiated rulemaking in the past has suffered repeatedly from an over-ambitious schedule of diverse issues that cannot be adequately explored due to time pressures. The likelihood of obtaining consensus over a set of rules that establishes workable norms in a difficult area would be far greater in separate negotiating committees.

A further consideration is that the most basic differences between nonprofit institutions and for-profit institutions lie in financial and accounting standards and practices. ED should not only structure the financial responsibility regulations accordingly, but organize negotiating committees to reflect that fact.

The financial health and stability of institutions is a major factor of institutional eligibility across the spectrum of institutional type and control, with far-reaching implications. Negotiation of financial standards should be isolated from other regulatory initiatives that have much narrower purpose and applicability, such as borrower defenses to repayment. Borrower defense to repayment may have an impact on an institution's financial health, but only in cases of institutions who will be held accountable for substantial numbers of discharges-- the exception rather than the rule. The formulation of financial standards should be based upon the broader concerns affected by normal operations and not the unusual actions of a small subset of bad actors.

Recommendation #2: Negotiate improvements to current financial standards to resolve issues raised by NACUBO and NAICU

We are troubled by the many long-standing criticisms of current financial standard rules and the calculation of the ratios. NACUBO and NAICU are experts in this area insofar as nonprofit institutions are concerned; we urge the Department to consider carefully the points they have made about the formulation and application of financial standards, and to undertake a reasoned study of the effect of those rules on schools that are not viewed as financially unstable by any other valuations. Negotiated rulemaking in this regard should seek to fix the current standards and anticipate pending changes to industry standards, and should establish a reproducible methodology for calculations associated with the standards, that comports with accepted accounting practices.

We also believe that steps to protect the federal interest should be taken only when a clear and imminent threat is detected by thresholds to which expert parties agree. Most importantly, the punitive measures and purported safeguards that ED takes when it believes a school may be headed for financial difficulty should not further propel that school towards a financial crisis that could otherwise be avoided, unless the school has intentionally engaged in substantial misrepresentation. Experts either at the table or invited to inform negotiators at the table should address these concerns.

Recommendation #3: Expedite processing of borrower defense claims under rules equally applicable to both parties

There was general community support for ED's desire to standardize treatment and processing of borrower applications for discharge. We continue to support ED's goal of expediting discharges for borrowers harmed by school closure, substantial misrepresentation, or other clear cases of authorized discharge. Delays in making those former students whole only exacerbates the harm done to them.

The process itself should apply the same rules, to the extent possible and reasonable, to both parties in any dispute over fault or liability.

ED announced its intent to re-negotiate the regulations published Nov. 1, 2016, but did not include the procedural rules published subsequently on January 19, 2017. In its press release,

ED noted that applications will continue to be processed under current rules. The procedural rules were not negotiated; ED should take this opportunity to review those rules with the negotiating committee as well.

Recommendation #4: Current misrepresentation rules are sufficiently strong, but their use should be monitored for transparency, fairness, and consistency

Regulation against misrepresentation is a key element in student protection and in ensuring proper stewardship of public funds. NASFAA has long supported strong rules regarding misrepresentation, so long as they focus on intentionally deceitful or misleading practices as distinguished from inadvertent errors or ethical interpretations that cause no harm. Identifying substantial misrepresentation—which incorporates an element of detriment—is an important feature of the current regulations. Borrower defenses to repayment and subsequent recovery of discharged federal loans from schools that have engaged in substantial misrepresentation rely upon balanced but enforceable misrepresentation rules that can be clearly understood and reasonably applied.

Just as schools must be scrupulous in the integrity and reliability of the information they provide that informs a prospective student's decision to enroll, so must ED be vigilant in a fair and reasoned approach to applying the rules. Formulation of the letter of the rule can only provide the foundation for that application; the practice of its application must be monitored to ensure both its adequacy and fairness. NASFAA believes the current regulations do not need further strengthening at this point, but believes that ED should be completely transparent in how and when the rules are applied, and should thoroughly monitor their use for consistency and propriety as a matter of priority.

Rules Related to Gainful Employment

Measures of gainful employment are certainly difficult; current metrics are subject to underlying assumptions and proxies, and indirect data that cannot be verified by the school. We support a thorough review of these regulations.

Broadly speaking, we support defining gainful employment, but wish to point out that given the widespread ramification on program and institutional eligibility, it is our strong preference that Congress weigh in on what it deems appropriate to measure whether a program leads to students being “gainfully employed.”

Whatever new gainful employment regulations we come up with, we believe they should be grounded in the recognition that:

- Proxies will always be imperfect and leeway should be built-in that recognizes that fact.
- Any accountability metric must be completely transparent and challengeable by an institution.

Recommendation #5: Design metrics that are appropriate to the academic level and purpose of the program

Gainful employment as a qualifier of Title IV eligibility for certain programs of study has been in the law since its inception, but has never been defined by Congress. Programs subject to the gainful employment requirement have changed dramatically over the ensuing decades, and no effort at any distinctions among them has been made. For example, using the same measure of effectiveness for a program that seeks to instill basic trade skills in students who never completed high school and programs that seek to refine a graduate student's field of expertise is absurd, regardless of whether the law anticipates such differences. ED should seek measures that are appropriate to the academic level and purpose of the program.

Recommendation #6: Reconsider automatic waivers and exemptions

ED should consider automatic waivers of reporting requirements and calculations of metrics for programs that show exceptional performance, for a defined period: how likely is it that a program that rises above a certain threshold and has thereby proven it provides gainful employment will fail to do so in a year or two or even longer? In the preamble to the final rule, ED stated: "We will continue to consider ways to recognize exceptional programs." What progress has ED made in that endeavor?

ED responded to suggestions of exemptions based on low borrowing as follows: "if a GE program is indeed 'low cost' or does not have a significant percentage of borrowers, which commenters claimed is the case with many community college programs, it is very likely that the program will pass the D/E rates measure because most students will not have any debt." If it is "very likely" that the program will pass, what is the point of creating administrative and financial burden to a school—quite possibly raising costs to students—to prove a logical assumption? If ED persists in using metrics that presume debt to earnings ratios can be a proxy for gainful employment, or considers other measures that directly or indirectly use program cost or indebtedness, exemptions based on low cost or low indebtedness should be reconsidered.

Recommendation #7: Reconsider alternate definitions and metrics

ED rejected suggestions to consider certain approval or developmental standards for new programs as evidence of gainful employment. Re-negotiation should consider whether programs that are developed in response to specific local business or industry needs, that are certified by employers to meet those needs or that can show acceptable placement rates, satisfy presumptions of gainful employment so long as demand by employers continues as reflected in placement rates. For example, for many years the shortest eligible programs have been required to satisfy completion and placement rates, identified as qualitative factors in 668.8(e), of at least 70% each to retain eligibility. Is there not a logical way to consider satisfaction of those qualitative factors indicative of gainful employment, both for those short programs and other programs that the school elects to demonstrate meet the same factors?

In the preamble to the final rule, ED stated: "Given the wealth of feedback we received on this issue through the comments, we believe further study is necessary before we adopt pCDR or another accountability metric that would take into account the outcomes of students who do not

complete a program. We also believe further study is necessary before adopting other metrics based on CDR ...” Has ED undertaken such studies? What are the conclusions?

Recommendation #8: Avoid previous implementation problems

Unlike the BDR and financial standards regulations, the GE regulations are already in effect. Initial implementation of those rules, including the data collection supporting them, was beset with problems. Lessons gained from that experience can serve to improve any revised regulations, both during the re-negotiation and in any future implementation. Effective dates must be realistic, and must afford sufficient time for thorough testing with schools. We urge ED to share with negotiators any issues encountered during implementation, and to invite comments from schools specifically on implementation problems that should be avoided. Even though implementation itself is not normally imbedded in regulation, regulations can perhaps be framed in a way that avoids these problems.

We look forward to working with the Department and our association colleagues to negotiate rules that treat borrowers fairly and efficiently, hold actual bad players accountable, and ensure the integrity of the Title IV programs without undue and unnecessary burden.

Regards,

A handwritten signature in black ink, appearing to read "Justin Draeger". The signature is fluid and cursive, with a long horizontal stroke at the end.

Justin Draeger, President & CEO