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Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue SW
Room 6W232B
Washington, DC, 20202

Dear Mr. Gaina:

On behalf of the higher education associations listed below, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) regarding borrower defenses to repayment that was published in the *Federal Register* on June 16, 2016 (Docket ID ED-2015-OPE-0103).

As we have noted in a companion letter, it is clear that the Department is tackling a difficult problem and is proposing valuable remedies for borrowers who have been misled or defrauded by their institutions. We strongly support the Department's efforts in the NPRM to curb abuses and support harmed students.

We support the overarching goals of the NPRM: to streamline the debt relief process for borrowers who have been defrauded and hold these institutions accountable. However, some provisions could be improved to better meet these goals while minimizing unintended consequences. Our companion letter comments on a limited number of issues related to the borrower defense portion of the NPRM. In this letter, we focus specifically on the NPRM's proposed changes to the financial responsibility standards.

The NPRM represents a significant shift in the Department's approach to determining whether an institution is financially responsible and the consequences for being found "not financially responsible." As proposed, these provisions are likely to result in adverse and unintended consequences for many institutions. The effects of the NPRM may be particularly harsh for smaller, tuition-dependent nonprofit institutions, many with a mission of serving low-income and first-generation students. Such a dramatic re-envisioning of the financial responsibility standards is particularly troubling in light of the widely known problems with the Department's current method for determining an institution's composite score—a process which often is inaccurate and can lead to deeply misleading indicators regarding the financial health of the institution.

When the original elements of the financial responsibility regulations were determined over 20 years ago, they resulted from a deliberative and inclusive process that started from two basic principles. The first principle was that the goal of these regulations was to prevent the sudden or precipitous closure of an institution, leaving students in the lurch. The second was a recognition that the composite score methodology was not perfect and that there was a need for an alternative process to cover institutions that may be financially weak, as indicated by a lower composite score, but nonetheless viable. This evaluation would be done on a case-by-case basis via the "Zone Alternative."

The changes proposed in the NPRM would fundamentally alter these core principles. The inclusion of a number of automatic triggering events that are not related to financial solvency, including actions by accrediting agencies, institutional cohort default rates, and dropout rates, would inappropriately shift the emphasis of these regulations from financial oversight to much broader accountability measures. Such measures may be worthy of discussion and enhancement, but they are not indicative of an institution's financial health and should not be included in this NPRM.

The triggering provision entitled "Other events or conditions" would give exceptionally broad and undefined authority to the Secretary of Education. This provision provides the Secretary with the authority to determine "that an event or condition is reasonably likely to have an adverse impact on the financial condition, business, or results of operations of the institution," and deem that a triggering event. This provision seemingly allows the Secretary to deem something that is irrelevant to an institution's financial health to be a triggering action, with all the attendant consequences of that determination. For example, because of the calculations involved, a small, private nonprofit college might show a significant change in the amount of federal aid it disburses in terms of percentage, when the actual numbers may be relatively low.

These consequences are substantial. The cost to an institution of securing a line of credit can be high, and one may need to be purchased for three consecutive years. This imposes a costly and undue burden on institutions that would otherwise be financially sound. The fact that the amount needed to be secured for meeting one trigger would stack with other triggering events only serves to magnify the impact on institutions, considering the wide scope and large number of triggers. It is not hard to foresee a set of circumstances in which an institution that may not be financially robust but is fully capable of meeting its financial obligations is driven into closing as a result of one or more automatic triggers being enforced. Such a result will not serve students' interests.

Further, the proposed thresholds for whether a trigger is material are set far below accepted materiality standards, due to the "lesser of" construction. This means that for almost all institutions, from small theological seminaries to large research universities, the NPRM sets a materiality threshold of $750,000. The NPRM also relies on a term ("current assets") that is not used by private nonprofit institutions, and would necessarily introduce confusion and result in widely varying interpretations. Accounting standards do not require classified financial statements from nonprofit organizations. Further, the definition of current assets differs between nonprofit and proprietary entities. The inclusion of such a threshold points to a lack of participation in the rulemaking process by individuals with detailed knowledge of institutional finances. While we are opposed to the inclusion of financial responsibility triggers in the NPRM, if this provision were to remain, it should be significantly revised to reflect a meaningful gauge of an institution's exposure.

The concept that the Department should recognize the limitation of the composite score is particularly meaningful to institutions, since the inaccuracy of the composite score calculation by the Department has been repeatedly demonstrated in the last few years. As previously noted, current regulation addresses this problem to some degree by employing the "Zone Alternative." This allows schools scoring slightly under the 1.5 composite score threshold to be considered financially responsible under certain conditions. Under the NPRM, however, the Zone Alternative has been gutted and would no longer be an available option for many financially viable institutions.

Currently, certain events experienced by institutions "in the zone" must be reported to the Secretary. This gives the Department's case management teams some discretion with regard to the stringency of any additional monitoring that might be required. The NPRM would turn these events into mandatory triggers for the Secretary to impose provisional certifications and require letters of credit from institutions that are financially viable, by the Department's own reckoning. Superseding the procedural structure of the Zone Alternative through the use of automatic triggers, as this NPRM proposes to do, would therefore effectively nullify the ability of these institutions to demonstrate their financial health before sanctions are imposed.

Financial responsibility standards are meant to ensure that Title IV funds are protected and that institutions will not close suddenly, leaving student borrowers without any recourse. This is a valuable goal, and while there are significant flaws in how the composite score is currently determined, the overall approach is a sensible one.

However, the new proposals contained in this NPRM would undermine the effectiveness of the Department's financial oversight of institutions. These new provisions would replace a thoughtful process based on each individual institution's unique circumstances with a process based on numerous new and overlapping automatic triggers that are tied to indicators that are vague or unrelated to an institution's financial standing. The proposed rules then inflict further reputational damage to institutions mistakenly caught up in this web by requiring them to publicly disclose on their home page the fact that they have been required to provide these financial assurances to the Department.

The ultimate effect, were this section of the NPRM to be promulgated into final regulations, would be to layer damaging penalties on institutions that are serving students well and that would otherwise meet their obligations under Title IV. We urge you to decouple assessing an institution's financial standing with the worthy goal of trying to establish regulations to protect borrowers who have been defrauded of their education and consider the variety of financial responsibility issues—current, proposed, and upcoming FASB changes—in a separate process.

We believe we have clearly demonstrated the harm that would be caused by the changes to the financial responsibility standards contained in this NPRM and why these proposed provisions should not be included here. But at a minimum, given the complexity of these proposed changes and the concerns they raise, we urge the Department to review the public comments and issue a revised NPRM. This would at least afford better clarity about the Department's intentions regarding various aspects of the proposed rules and provide an opportunity for more specific and targeted comments from the community.

Thank you for the opportunity to comment on this NPRM. We appreciate your attention to our concerns.

Sincerely,

Molly Corbett Broad
President

On behalf of:
American Council on Education
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Council for Christian Colleges and Universities
Council for Higher Education Accreditation
National Association of College and Business Officers
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