



August 26, 2022

Mr. Brian Schelling
U.S. Department of Education
400 Maryland Avenue SW
Second Floor
Washington, DC 20202

Re: Docket ID ED-2022-OPE-0062

Dear Mr. Schelling:

The National Association of College and University Business Officers (NACUBO) respectfully submits comments to the Department of Education on the Notice of Proposed Rulemaking (NPRM) posted in the Federal Register on July 28. We would like to thank the Department for addressing proposed 90/10 regulations for proprietary institutions, prison education programs, and the amended changes concerning institutions that undergo a change in ownership and a change in control.

NACUBO is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 nonprofit and public colleges and universities across the country. NACUBO works to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions. We are dedicated to sound fiscal and administrative practices at institutions of higher education.

NACUBO fully endorses feedback provided by both the American Council on Education and the National Association of Independent Colleges and Universities on changes in ownership and control. However, because NACUBO is the only national higher education association that works with accounting standard setters on financial accounting and reporting matters and promulgates related sector practice and implementation guidance, our comments discuss the need for clarity around ownership changes with financial reporting standards in mind.

Proposed changes to the definition of a nonprofit institution

Per the NPRM preamble, the genesis of the proposed nonprofit definitional change that no part of an institution's net earnings can benefit any **private entity or person**, (emphasis added), is the Department's concern that when an institution converts from proprietary status to nonprofit status it may not be complying with expectations in the Higher Education Act. However, if the Department is apprehensive about nonprofit institutions that convert from proprietary status, then we ask that the regulatory language specifically address conversions from proprietary status. We suggest adding a sentence to the current nonprofit definition: "Nonprofits formerly structured as proprietary institutions cannot have net earnings that

benefit a private entity or person,” or something similar. Although regulatory preambles explain intent, without specificity in the regulatory text, there is a risk of misinterpretation and overreach in the future.

For nonprofit institutions with 501(c)(3) status, it is the mission-related purpose for which excess revenue is used that determines tax-exempt status. Stakeholders associated with a nonprofit institution can have a beneficial stake in its revenue: students, parents, faculty, staff, board directors, board members, for-profit and nonprofit community organizations, governmental entities, grantors, donors, and businesses that institutions depend upon – whether for services, collaborative activities, fundraising pursuits, grants, or contributions.

Revenue sharing agreements

Concerning proposed changes for revenue sharing arrangements, although we understand that the Department intends to focus on institutions that have converted to nonprofit from for-profit status, we once again suggest that the regulatory definition specifically address institutions that previously held for-profit status to avoid possible future misapplication of intent. We are concerned that certain types of conditional contributions and promises to give, for example matching contributions and grants requiring that recipients fundraise or contribute their own resources, may be construed to have a revenue sharing component.

An important part of a nonprofit board’s role is revenue generation. In fact, fundraising can extend to personal financial contributions. Moreover, in addition to board members, current and former employees can gift conditional contributions – such as matching gifts, donor-advised funds, and split-interest agreements (a type of planned giving contribution) to nonprofit institutions. To avoid possible misapplication of regulatory intent that could lead to current nonprofit institutions’ defending their tax status, or disallowance of revenue needed to fulfill educational mission related activities, we suggest that ED exclude charitable grants and contributions from the definition of revenue sharing agreements. Excluded contributions should be those with or without donor / grantor restrictions that result in revenue allowable under the Internal Revenue Code rules and by the Financial Accounting Standards Board and Governmental Accounting Standards Board.

NACUBO greatly appreciates the Department’s efforts to improve regulations. We thank you for considering our feedback. Please do not hesitate to contact me for any additional information that might be helpful.

Sincerely,



Elizabeth L. Clark
Vice President, Policy and Research

