

August 25, 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:

On July 28th, the Department of Education [issued](#) a Notice of Proposed Rulemaking (NPRM) on a second set of issues stemming from its recent sessions.^a We are pleased that the Department has put forward proposed regulations regarding 90/10 for proprietary institutions, prison education programs, and the amended changes regarding what happens when an institution undergoes a change in ownership and change in control.

These regulations are of great importance to the National Association of Independent Colleges and Universities (NAICU) as they impact our nation's private, nonprofit sector of higher education and the students who attend these institutions.

NAICU serves as the unified voice for the more than 1,700 private, nonprofit colleges and universities in our nation. Founded in 1976, NAICU is the only national membership organization solely focused on representing private, nonprofit higher education on public policy issues in Washington, DC. NAICU's membership reflects the diversity of private, nonprofit higher education in the country and includes major research universities; faith-based colleges; Historically Black Colleges and Universities; Minority-Serving Institutions; art and design colleges; traditional liberal arts institutions, science institutions, women's colleges, work colleges, two-year colleges and schools of law, medicine, engineering, business and other professions. Each year, private, nonprofit colleges and universities graduate more than 1.1 million students.

While NAICU supports the Department moving forward on the aforementioned issues, I am writing to offer comments on behalf of the undersigned associations and organizations concerning the modifications in the regulations regarding when institutions undergo a change in ownership and change in control.

To start, we thank the Department for making the necessary changes to narrow the focus on institutions that convert from for-profit to nonprofit status. We were extremely concerned when the Department offered language in the third negotiated rulemaking session proposing that private, nonprofit institutions with revenue-sharing agreements with any party (related or unrelated) would not be considered a nonprofit institution unless those agreements were reasonable based on the market price for such services or materials. We strongly advocated

^a Prison education programs were from the affordability and student loan negotiated rulemaking session in the fall of 2021. Change in ownership/change in control and 90/10 were from the institutional and programmatic eligibility negotiated rulemaking committee in the winter/spring of 2022.



against this provision as we believed the language would have a significant impact on a number of contractual agreements that institutions enter into, including those with Online Program Managers, bookstores, and food servicing and housing companies. Now that the Department has amended the language to only focus on revenue-sharing agreements with an institution's former owner, current or former employee, member of its board, or a person that is related to either of the aforementioned persons, we believe this keeps to the true intent of applying these regulations to institutions that convert from for-profit to nonprofit status.

However, we remain concerned about the proposed language that says, "A nonprofit institution is a domestic public or private institution or foreign institution as to which the Secretary determines that no part of the net earnings of the institution benefits any private entity (*emphasis added*) or natural person...." The Higher Education Act (HEA) defines a nonprofit institution as an institution that has no part of the net earnings benefiting any private shareholder or individual.^b

The new language proposed by the Department is an expansion beyond what is currently in statute and in current regulations. We have expressed to the Department, on several occasions, that we are concerned with what it means to restrict net earnings from benefiting a "private entity" when every institution, private or public, has relationships with private businesses. It is unclear how the Department and future administrations will implement this broadened language.

While private, nonprofit institutions do not really have "net earnings," there is no definition of "entity" in the regulations. We appreciate the Department's rationale in the preamble of the NPRM articulating that it simply wants to have the ability to conduct a comprehensive review to ensure that converted institutions are complying with the definition of a nonprofit institution in the HEA; however, the broadened language gives us pause.

We want the Department to have the ability to conduct the necessary reviews and, to our knowledge, this has been happening with no need to revise the regulatory language. The broadening of the language opens the door for future administrations to do even more, which we fear could leave nonprofit institutions defending their tax status with the Department.

We look forward to our continued work to further improve the regulations and are always grateful to have the opportunity to comment. We thank you for your consideration of NAICU's views and would be pleased to provide any additional information that might be helpful to you.

Sincerely,

A handwritten signature in cursive script that reads "Barbara K. Mistick".

Barbara Mistick, D.M
President

^b Section 103(13) of the Higher Education Act.



Submitted on behalf of the undersigned associations and organizations:

Alabama Association of Independent Colleges and Universities
American Association of Presidents of Independent Colleges and Universities (AAPICU)
Asociación de Colegios y Universidades Privadas de Puerto Rico (ACUP) [Association of Private Colleges and Universities of Puerto Rico]
Association for Biblical Higher Education
Association of Advanced Rabbinical and Talmudic Schools
Association of Catholic Colleges and Universities
Association of Chiropractic Colleges
Association of Colleges and Universities of The Church of Jesus Christ of Latter-day Saints
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities of Ohio
Association of Independent Colleges and Universities of Rhode Island
Association of Independent Colleges of Art & Design
Association of Jesuit Colleges and Universities
Association of Presbyterian Colleges and Universities
CCCU - Council for Christian Colleges & Universities
Commission on Independent Colleges and Universities in New York
Conference for Mercy Higher Education
Connecticut Conference of Independent Colleges
Council of Independent Colleges
Council of Independent Colleges in Virginia
Council of Independent Nebraska Colleges
Federation of Independent Illinois Colleges and Universities
Great Lakes Colleges Association
Independent Colleges and Universities of Florida (ICUF)
Independent Colleges and Universities of Missouri
Independent Colleges of Indiana
Independent Colleges of Washington
Iowa Association of Independent Colleges and Universities
Kansas Independent College Association
Louisiana Association of Independent Colleges and Universities
Maryland Independent College and University Association (MICUA)
Michigan Independent Colleges & Universities
Minnesota Private College Council
New American Colleges and Universities
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges and Universities
South Carolina Independent Colleges and Universities
Tennessee Independent Colleges and Universities
Wisconsin Association of Independent Colleges and Universities
Work Colleges Consortium