July 29, 2016

The Honorable John King, Jr.
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Attn: Jean-Didier Gaina Re: Docket ED-2015-OPE-0103

Dear Secretary King:

The United Negro College Fund (UNCF), Thurgood Marshall College Fund (TMCF), and the National Association for Equal Opportunity in Higher Education (NAFEO) appreciate the opportunity to comment on the U.S. Department of Education's proposal to update regulations governing borrower defense to repayment, published on June 16, 2016 in the *Federal Register*.

UNCF, TMCF, and NAFEO represent 101 historically black colleges and universities (HBCUs) and 85 predominantly black institutions (PBIs) that, collectively, enroll more than 700,000 students, who are primarily first-generation, low-income, and/or minority students, at tuitions substantially less than those charged by other four-year public and private, nonprofit institutions. Not only are these institutions affordable, but also the quality of their educational programs and support services is high, their productivity in generating African Americans with college degrees is extraordinary, and student satisfaction is strong. For example, the 2015 *Gallup-USA Funds Minority College Graduates Report* found that black HBCU graduates are significantly more likely than black non-HBCU graduates to strongly agree that their university prepared them well for life outside of college (55 percent vs. 29 percent). In short, HBCUs and PBIs offer great value to their students, communities, and taxpayers, and are producing the college graduates who are most underrepresented in American higher education.

We commend the U.S. Department of Education (ED) for taking proactive steps to eradicate predatory practices in postsecondary education and ensure students have appropriate recourse when warranted. Especially in the wake of the collapse of Corinthian Colleges, ED's professed goal – to "protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department's student aid programs" – is an admirable one.

Students seeking forgiveness of federal student loans based on fraudulent practices, however, are largely not those attending and graduating from HBCUs and PBIs. Thus, given the unique role played

by HBCUs and PBIs, we are concerned that the proposed regulations would have a significant and detrimental impact on some of the institutions we represent and the students that they are serving well. Specifically, we believe that certain elements of the borrower defense provisions and the Financial Responsibility provisions have the potential to be unduly injurious and burdensome to HBCUs and PBIs, potentially causing financial calamity for some schools.

In light of the far-reaching implications of the proposed regulations, we urge ED to take additional time to consider these issues, revise the pending rule to focus only on borrower defense to repayment, and eliminate provisions pertaining to Financial Responsibility. ED should separately conduct a separate, holistic, and inclusive review of the existing Financial Responsibility standards and ED's process for determining Financial Responsibility scores, including evaluating whether the current standards provide an accurate assessment of the financial health of institutions. Accordingly, we request that ED review submitted comments and issue a second notice of proposed rulemaking (NPRM) so that all potentially impacted stakeholders have an opportunity to review ED's regulatory proposals again before they are published in final form.

Borrower Defense

The NPRM raises significant questions about institutional liability for losses incurred by the Secretary related to defense to repayment claims and other actions initiated by borrowers. The proposed regulations would continue the current authority provided by § 685.206 for the Secretary to "initiate an action to recover from a school whose act or omission resulted in an approved borrower defense the amount of loss incurred by the Department for that claim." In addition, the proposed regulations would strip out the provision that limits the Secretary to initiating action within the three-year record retention period, and proposed § 685.308 would further clarify under what circumstances the Secretary incurs a loss for which the institution is accountable.

Relatedly, we are concerned about the standard by which institutions may be judged to have misrepresented the conditions of a borrower's loan or the provision of education services for which the loan was approved. This standard is vitally important, because it is the basis for both potential administrative action by the Secretary – including fines or termination from participation in Title IV programs under the Higher Education Act (HEA) – and for alleged borrower defense claims for loans disbursed after July 1, 2017. In the NPRM, ED proposes amending the definition of "**misrepresentation**," which currently appears in § 668.71, to read as follows:

Any false, erroneous or misleading statement by an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to mislead under the circumstances. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program. ***Misrepresentation includes any statements that omits information in such a way as to make the statement false, erroneous or misleading.***

We believe that the broad nature of this definition, and specifically the repeated use of the word "erroneous," exposes institutions to potentially significant liability as a result of changes to

instructional policies or practices that may be unavoidable. For example, an institution's course catalog may, at the beginning of the academic year, include a course offering that is later discontinued due to lack of student interest or other circumstances. Under the proposed regulations, this could potentially be considered a "misrepresentation" that would expose the institution to either administrative action by the Secretary or claims of defense to repayment from borrowers.

Given the administrative complexity and rapidly changing conditions of postsecondary institutions, the enormous scope of this definition creates the very real possibility that institutions will be subject to significant financial and administrative burden as a result of unavoidable changes that do not materially affect the conditions of a borrower's loan or the institution's educational service offerings. **We urge the Department to specifically state that any statement or other action that might fall under the scope of the definition of misrepresentation be a *willful* act, which would exclude inadvertent mistakes that were without intent to mislead.** Without this protection, we fear that all institutions, including HBCUs and PBIs, could be subject to inaccurate and frivolous claims of misrepresentation, resulting in significant costs that would severely undermine our institutions and divert precious resources that should be spent on serving students.

Another problematic aspect of these proposed regulations is that they fail to recognize the limited role institutions play in determining the level or purpose of student borrowing. Under the proposed regulations, institutions could be found liable for all costs incurred by the Secretary, despite the fact that the institution has very little control over how much a student borrows and the fact that students may expend loan dollars on expenses beyond tuition and fees. The proposed regulations fail to take these realities into account when establishing a framework for determining institutional liability. **We urge the Department to consider whether an institution should be liable for all amounts borrowed under a successful claim, or instead be liable only for costs related to tuition and fees.** There is precedent for such a structure, as evidence by the loan debt calculations under the gainful employment regulation (34 CFR Part 668, Subpart Q) being based on tuition and fees, and not total borrowing.

Regarding an additional issue, the NPRM states that a Department official's determination of a borrower defense claim is final unless the Secretary chooses to reopen a borrower defense application to consider evidence that was not considered in the original decision. This structure raises a question of what appeal rights an institution may have regarding a determination by a Departmental official on a borrower defense claim. If a Departmental official's determination is final under the proposed rule, then this would eliminate due process protections for the institution against which the claim has been determined. **We urge the Department to clearly articulate an appeals process for institutions in the case of successful borrower defense claims to remedy the apparent lack of due process protections.**

Financial Responsibility

The NPRM also includes new proposals that would deem private institutions of higher education of to be in violation of Financial Responsibility standards unless certain conditions are met, many of which would automatically require institutions to secure a costly letter(s) of credit that totals at least 10 percent of Title IV funds received by the institution in the prior year**.** Under proposed § 668.171(c), "an institution is not able to meet financial or administrative obligations … If it is subject to one of more of the following actions or triggering events." These new triggering conditions would apply to

all private institutions, not only to those with a demonstrable history of predatory practices or abuse of student borrowers.

While we consider ED's overall goal to be positive, these triggers, and the accompanying requirement to secure one or more letters of credit, could cause a cascading financial impact that thrusts some HBCUs into financially precarious situations. Secured letters of credit, which require institutions to put up collateral, may not be easily obtained and may have conditions that lead to other financial constraints on an institution. Put more bluntly, ED's requirements could actually lead to the closure of institutions that may not be financially robust but are providing quality educational opportunities to students, in the event that an institution is unable to obtain a mandated letter(s) of credit. We believe that ED would not intentionally undermine the financial and academic stability that many small private institutions are working so hard to achieve for their schools and students, but that could be the effect of the draft proposals.

Specifically, the draft regulations would establish 12 new conditions that would require an institution to provide financial protection, such as a letter(s) of credit to ED, of which nine conditions would impact private, nonprofit institutions. Several these triggering conditions are overly broad, vague, and undefined, potentially subjecting institutions to unwarranted liabilities and obligations. The two triggering conditions that most concern us in this context are:

- Lawsuits from state, federal, or other oversight entities arising from claims related to the making of a federal loan, provision of education services, or claims of any kind where the potential monetary sanctions or damages from the suit exceed 10 percent of the institution's current assets; and

- Other events or conditions determined by the Secretary to be "reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution," which may include having high annual dropout rates or failing a financial stress test developed by the Secretary.

The NPRM's reference to "claims of any kind" with "potential" monetary damages exceeding 10 percent of an institutions assets is exceedingly broad. Institutions would have to secure financial protection in the event of any pending claim against the institution meeting this standard, irrespective of its merit or its focus. To require that HBCUs, PBIs, and other institutions obtain a letter of credit for *any* claim that *might* lead to material damages, without its merits and eventual dispensation being determined, is simply unreasonable.

Further, the ability of the Secretary to add "other events or conditions" including undefined indicators such as a financial stress test, high dropout rates, or other indicators that are not presently envisioned is equally problematic. The provision would grant excessive discretion to the Secretary by allowing ED to introduce virtually any condition – including nonfinancial indicators – for meeting Financial Responsibility; thus, subjecting institutions to conditions that could vary over time and with different Administrations, with attendant consequences.

Other triggering conditions for letters of credit in the NPRM are simply inappropriate – they include measures not directly correlated to the financial health of an institution and not necessarily indicative

of whether an institution is at risk of sudden and precipitous closure as was the case with Corinthian Colleges. Two triggering conditions that especially concern us in this regard are:

- Recent actions by accrediting agencies including required submission of a teach-out plan or issuance of a show-cause or probation order; and

- Cohort default rates above 30 percent for two consecutive years.

Of particular concern to HBCUs is the condition that institutions with severe accreditation actions (e.g., probation or show cause orders) in the prior three years be automatically required to obtain letters of credit. Accreditation actions may relate to a variety of issues and standards (e.g. academic, physical plant, governance) that may or may not relate to financial health. Had the proposed triggering condition related to accreditation actions been in place this year, several HBCUs – some with acceptable Financial Responsibility scores – would have been required to secure letters of credit or other financial protection, imposing a significant financial burden.

Similarly, we know that cohort default rates are correlated with the socioeconomic status of an institution's student population and are impacted by external factors, such as economic and labor market conditions, that are not under the control of an institution. We believe that the use of cohort default rates as an automatic trigger is not an appropriate financial indicator and has the potential to disproportionately harm HBCUs simply because their enrollment is comprised primarily of students who face financial and academic challenges to college completion.

An overarching concern with the Financial Responsibility provisions in the NPRM is the lack of harmonization with the current rules. Under ED's proposal, it is possible that an institution with a 3.0 Financial Responsibility score – the top score – would be mandated to secure one or more letters of credit under the triggering conditions. This begs the question of why it is necessary to have numerous and overlapping requirements, if the current Financial Responsibility scores are a valid indicator of an institution's financial health.

In addition to the proposed Financial Responsibility conditions in the NPRM, we are extremely troubled by related disclosure provisions. Under the proposed requirement in § 668.41(i) an institution is required to disclose information to both enrolled and prospective students if it is obligated to provide financial protection to the Secretary. We are concerned that ED's proposal could prejudice students against enrolling (or continuing enrollment) in any HBCUs that are required to obtain a letter(s) of credit, thereby weakening the financial strength of the institution.

In summary, the wide scope of the proposed regulations is cause for immense concern. They would unfairly put some HBCUs and PBIs at risk of unfounded litigation and injurious penalties based on indicators that are vague, overly broad, and inappropriate. Moreover, the NPRM would put a "scarlet letter" on any HBCU impacted by its disclosure requirements. The collective impact of the proposed requirements would result in questions raised anew about the financial health and fiscal management of these institutions – by not only students, but also by alumni, donors, philanthropic and community partners, financial institutions, and Wall Street – not to mention the public and the press. The resulting damage could do irreparable harm with devastating ramifications for the very survival of any HBCU or PBI that might be subject to these requirements.

HBCUs and PBIs are not the cause of the problem ED seeks to solve. **Given the potential consequential impact of the NPRM on these institutions, we again urge that the borrower defense to repayment provisions be revised to address the concerns raised and that the Financial Responsibility provisions be eliminated altogether. We therefore request that ED revise the NPRM and provide another opportunity for a 30-day public comment period based on the revised NPRM before a final regulation is promulgated.** Immediately issuing a final rule after receiving such foundational concerns seems a disservice to institutions and the students they serve.

Thank you again for the opportunity to comment on these proposed regulations. We would be pleased to provide any additional resources or guidance that would be helpful during this process. Please do not hesitate to reach out to us.

Sincerely,

Michael L. Lomax, Ph.D.
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NAFEO

cc:
The Honorable John Kline, Chairman, House Committee on Education and the Workforce
The Honorable Robert C. "Bobby" Scott, Ranking Member, House Committee on Education and the Workforce
The Honorable Lamar Alexander, Chairman, Senate Committee on Health, Education, Labor, and Pensions
The Honorable Patty Murray, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions
Dr. William Harvey, Chairman, President's Board of Advisors on HBCUs