

**Memorandum**

**To:** U.S. Department of Education  
**From:** Carolyn Fast, Jaylon Herbin, Adam Welle, and Yael Shavit  
**Date:** February 4, 2022  
**Re:** Issue Paper 5: Changes of Ownership and Changes of Control - Proposed Language

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The above-listed negotiators submit this proposed language for your review:

Change of Ownership and Change in Control

600.2 Definitions

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Nonprofit institution: An institution that -

(1)

(i) Is owned and operated by one or more nonprofit corporations or associations and the Secretary has determined that, no part of the net earnings of which benefits any private shareholder or individual;

(ii) Is legally authorized to operate as a nonprofit organization by each State in which it is physically located;

(iii) Complies with all state and federal transparency and accountability requirements applicable to nonprofit institutions; and

~~(iv)~~ Is determined by the U.S. Internal Revenue Service to be an organization to which contributions are tax-deductible in accordance with section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)); except that

~~(v)~~ For purposes of participating in the federal student aid programs, a nonprofit institution is generally not an institution that has entered into an arrangement to benefit the institution's former owner, a natural person or entity related to or affiliated with the former owner, or another entity or natural person where such arrangement is inconsistent with nonprofit status, including but not limited to an institution that:

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**Commented [1]:** The Department's comments in the Issue Paper indicate that the list of arrangements in this section is a "non-exhaustive" list. However, the Department's proposed language does not make it clear that the list is non-exhaustive. This change is proposed to make it explicit that the list is non-exhaustive.

**Commented [2]:** Added this in an attempt to broaden the provision to address not only improper arrangements with former owners, but improper arrangements with any for-profit entity/person.

(A) Is an obligor (either directly or through any entity in its ownership chain) on a debt owed to a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution; or

(B) Either directly or through any entity in its ownership chain, enters into, or maintains, an ~~revenue-based servicing~~ agreement with a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution in which payments are based on the gross or net revenues of the institution or otherwise comprise a substantial portion of the net revenues of the institution;

(C) Either directly or indirectly enters into, or maintains, agreements with for-profit entities in which payments to the for-profit are based on the gross or net revenues of the institution or programs of that institution, where such revenues comprise more than 50% of the tuition revenues of the institution;

(D) Either directly or indirectly, enters into, or maintains, an agreement with a for-profit entity in which the institution outsources a substantial number of core services to a for-profit entity;

(D) Enters into a contract, lease, or other agreement that provides that the institution must, under conditions specified in the agreement, make payments to a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution where the obligation extends beyond 12 months after transfer of control;

(D) Is a membership corporation in which one or more of the members does not meet the Department's definition of a nonprofit institution;

(E) Has a former owner of the institution or a natural person or entity related to or affiliated with the former owner of the institution as a member of the board of trustees or in a similar position of authority, or in a position to directly or indirectly name, remove, or replace members of the board of trustees of the institution; or

**Commented [3]:** Alternatively, this could read "a substantial portion" of the tuition revenues of the institution.

**Commented [4]:** This language is intended to address situations where long-term contracts with former owners are part of the transaction in which the for-profit entity transfers ownership to a non-profit entity. These may include leases of real estate from the former owners, for example.

**Commented [5]:** This language is proposed to address the inappropriate use of "membership" nonprofit corporations. Most nonprofit colleges have boards of trustees (or boards of directors) who have full control. Some for-profit owners have established nonprofit corporations with members (generally a sole member) who can overrule and/or replace board members. This type of arrangement is problematic, unless the sole member is a valid nonprofit.