



National Association of College and University Attorneys
Presents:

**M&A or Closure? Complex Considerations,
Critical Choices**

Webinar

April 29, 2024

2:00 PM – 4:00 PM Eastern
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12:00 PM – 2:00 PM Mountain
11:00 AM – 1:00 PM Pacific

Presenters:

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Contents

1. Speaker Bios, Pages 1-2
2. Materials, Pages 3- 37
3. PowerPoint Slides, Pages 38-56
4. NACUA Webinar CLE Forms, Pages 57-59

M&A or Closure? Complex Considerations, Critical Choices



Tracey S. Pachman is Vice President and General Counsel of Saint Joseph's University. Pachman has over 20 years of deep and varied higher education and corporate legal experience, specializing in contracts, intellectual property, research, employment and student matters, and other higher education law issues.

Before joining Saint Joseph's in April 2020, Pachman served as the deputy general counsel at Villanova University, assistant general counsel at Aramark and senior counsel at Comcast. She was also previously in private practice at Pepper Hamilton LLP (now Troutman Pepper Hamilton Sanders LLP) in Philadelphia.

Pachman has been a member of NACUA since 2014 and has served as a moderator and panel member for NACUA Annual Meeting sessions. She currently serves on the Board of Directors of a nonprofit arts organization and volunteers with and supports other local non-profit organizations. She is a member of the Bar of the Federal District Court for the Eastern District of Pennsylvania and the Supreme Court of Pennsylvania. Pachman has spoken and moderated panels on topics including in-house legal careers, employment law and other legal issues in higher education.

Pachman earned her bachelor's degree from Bryn Mawr College, magna cum laude, in both psychology and political science. She received her law degree from the University of Pennsylvania Law School, where she was an associate editor of the University of Pennsylvania Journal of Labor and Employment Law.



Mike McGrath is a partner in the Colleges & Universities practice at Ropes & Gray. Mike advises educational institutions, research institutes and nonprofit organizations on a variety of transactional, corporate governance, compliance, and regulatory matters. Mike is also a member of the firm's public finance practice and has served as borrower's counsel, underwriter's counsel, and bond counsel in connection with both public and private tax-exempt and taxable financings.

Mike advises numerous colleges and universities in connection with accreditation, affiliations, and corporate transactions with other educational institutions, including: Berklee College of Music in its merger with The Boston Conservatory; The Museum of Fine Arts, Boston in its transfer of the School of Museum of Fine Arts to Tufts University; Albert Einstein College of Medicine and its spinout from Yeshiva University; Boston University in its merger with Wheelock College; Saint Joseph's University in its mergers with University of the Sciences of Philadelphia and Pennsylvania College of Health Sciences; Antioch University in its first-of-its-kind affiliation with Otterbein University.

Mike advises various health care systems and community hospitals in connection with both affiliations and mergers with other health care and academic organizations. He counseled Tulane University in connection with the reorganization of its clinical and academic enterprises and relocation of its primary teaching hospital.

Mike graduated magna cum laude from Georgetown University with a B.S. in Health Care Management and Policy. He graduated cum laude with a JD from Duke University School of Law, where he also served as research editor for the Duke Law Journal.



Tracey L. Schneider serves as the Senior Vice President for Legal Affairs and General Counsel for the Middle States Commission on Higher Education (MSCHE). She has more than 15 years of legal experience with a primary focus on education law. In her role, Tracey oversees all legal aspects of the complex substantive change process and all strategic transactions proposed by MSCHE's member institutions. In addition, Tracey oversees MSCHE's regulatory work, engaging with state and federal partners in the regulatory triad on all institutional matters. Prior to joining MSCHE, Tracey served as general counsel for an educational institution, represented public and private educational entities in private practice, and held a faculty position teaching in organizational leadership in a doctoral program. Tracey frequently publishes and presents on a wide variety of legal and organizational topics. Her academic credentials include a B.S in Business Administration from the University of Richmond (VA), a J.D. from the University of Richmond School of Law, and a Ph.D. in Educational Policy, Planning & Leadership from the College of William & Mary (VA).

Materials

1. Tracey S. Pachman, Michael R. McGrath, & Tracey L. Schneider, “Frequently Asked Questions,” Webinar Outline/Manuscript (April 29, 2024)
2. Additional Resources: Regulations, Guidance, Accreditation Processes, Coverage of Trends, & Other NACUA Programs
3. Corporate Due Diligence Questions
4. Regulatory Due Diligence Questions

M&A OR CLOSURE? COMPLEX CONSIDERATIONS, CRITICAL CHOICES

April 29, 2024

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FREQUENTLY ASKED QUESTIONS

The following questions and answers are adapted from the agenda for today's webinar. The questions and answers are written to reflect the perspective of an in-house counsel engaged in conversation with outside counsel and counsel for an accrediting agency. For additional resources, please see the other links and document included in the webinar materials.

Pre-planning—Informing and Engaging Stakeholders

- **Question #1:** When should colleges and universities be discussing strategic transactions such as mergers, acquisitions or other partnerships, and which stakeholders should be a part of those discussions?
 - Now/as early as possible; well in advance of a financial or other crisis
 - Engage stakeholders at all levels – governing board, leadership team, faculty and staff
 - Consult with experts as needed – outside counsel for potential deal structures, and legal and regulatory requirements, investment firms, accountants for valuation (e.g., study of costs of building vs. acquiring an academic program) etc.
 - Consider during strategic planning and self-study discussions whether potential partnerships may be appropriate for advancing the goals or mission of the institution

- **Question #2:** What types of topics or information should be covered in those stakeholder conversations?
 - Awareness of current strategic transactions and closures in higher education, understanding of reasons, successes and failures, and challenges
 - What types of strategic transactions will be most beneficial to your institution and aligned with your mission, and why?

- If there is an opportunity for a transaction, who will take the lead and have authority to speak on behalf of the institution?
- If there is an opportunity, who has expertise that will be critical to supporting the institution through the process? E.g., project planners, communications/public relations professionals, government affairs professionals, human resources, alumni relations team
- If there is a transaction or potential closure, what will stakeholders need to know and when?
- Question #3: When should institutions of higher education think about discussing strategic transactions or closure with accrediting agencies?
 - As early as possible – it is critical to the process and accrediting agencies can provide guidance to navigating not only its own approval process but the approval processes of the other members of the regulatory triad
 - MSCHE has an early notification requirement in its substantive change/complex substantive change policies and procedures for this very reason
 - Accreditors recognize concerns about confidentiality and have mechanisms in place to protect confidentiality
 - Commission actions do not note a complex substantive change until the time of approval and MSCHE does not make information public unless and until necessary to correct inaccurate information
 - This includes allowing institutions to choose whether to speak with the Commission individually or in conjunction with another institution involved in the transaction
- Question #4: Why is this so critical?
 - Understanding the process early on only improves the timeline
 - Other members of the regulatory triad prefer or require the accreditors to approve the transaction first.
 - Institutions who work with accreditors early in the process will understand exactly what is needed from their institutional accreditor and will be able to more efficiently and effectively navigate that process. That can be critical because it will have to be navigated **BEFORE** the other processes can even begin.
 - MSCHE says that the process can take up to a year (that does not include the early notification and preliminary review, that *presumes* those steps). Institutions who communicated early and often with the Commission moved through the process much more quickly.
 - Accreditors work with many institutions in these processes. Accreditors can warn of potential pitfalls, areas where you may face challenges, and even put institutions in touch (with proper permissions) with other institutions who have completed a similar transaction.
 - This includes hearing from institutions about hard timelines with other regulators that are non-negotiable and must be met.
 - Learning of a transaction in a press release or on the eve of a public announcement only causes confusion and concern. Accreditors often have to take other monitoring steps to gather information, rather than focusing attention on facilitating the approval process.
- Question #5: What else should college and university leadership be thinking about regarding strategic transactions and potential closures in the pre-planning phase? What is the General Counsel's role in raising these topics and facilitating conversations?

- **Short Answer** (from the accreditor’s perspective): It is never too early to think about what might happen if a transaction fails. The best thing a general counsel can do is to plan for potential failure. Accreditors will ask; they have to.
 - Do not see this as a purely legal transaction. Keep students and the protection of students at the forefront of your considerations. Accreditors will not see your transaction as a legal transaction; that is just one part of this process. Counsel who utilize the approach that it is sufficient if “state law allows it” usually have a harder time successfully navigating the process.
 - The regulatory triad includes the United States Department of Education, state licensing authorities, and accreditors. However, there are other approvals to be considered, which if not part of the early planning, will often lead to the failure of a transaction. For example, the state attorney general.
 - There may be special considerations for the location of a potential partner or type of potential partner.
 - States vary drastically in what they allow for certain transactions.
 - International entities are often interested partners.
 - Extensive rules if the transaction involves a for-profit becoming a non-profit and may be deemed a conversion.
 - There are some trends in strategic transactions that accreditors are seeing that would help to inform the process early on
- **Short Answer** (from outside counsel’s perspective)
 - To reiterate, it is very important for institutions to avoid putting “all of its eggs” in one basket with respect to a possible transaction. Transactions fail for a variety of reasons and if a school does not have a “Plan B” and is out of financial runway, this can spur disastrous results for all stakeholders and potential legal liability for management and trustees for breach of fiduciary obligations.
 - When an institution is evaluating a potential transaction partner, don’t underestimate how key the right communication and messaging to key stakeholders is – particularly students and faculty. It can be a difficult balance. Transactions fall apart on both ends of the spectrum:
 - On one hand, because a transaction was announced so early in the process it gave opponents the opportunity and time to build a strong campaign against the potential transaction. It also meant that leadership wasn’t able to share many concrete details about the planned transaction yet with the constituencies, which in turn resulted in more questions and allowed for fear and bad narratives to take root.
 - On the other hand, a transaction that is developed in secrecy by just a select group of leaders can face fierce opposition when it is made public and, in particular, may be open to criticisms around process and exclusion of key decision makers.

Due Diligence and the Anatomy of a Deal

- Question #1: What are the typical stages of an M&A transaction in higher education?
 - **Short answer**: An M&A transaction in any space, particularly in a highly-regulated industry involving non-profit institutions, isn’t usually a quick process.

- Transaction can take between 2.5 and 3 years, start to finish with the “core” stages typically taking about 1 to 1.5 years. Usually includes the following stages:
 - Stage #1: Exploration to confirm the parties to the agreement (1-2 months)
 - Often includes an NDA if multiple institutions are contemplating the transaction or are being considered.
 - Stage #2: Due diligence (3-4 months)
 - Parties usually sign a non-binding letter of intent to provide a period of exclusive negotiating rights.
 - Parties may also engage respective communities (students, donors, etc.) to solicit feedback on the potential deal.
 - Stage #3: Negotiation of the deal terms (3-4 months)
 - Includes seeking the required pre-closing approvals from the Department of Education, state regulators, and accrediting bodies.
 - Stage #4: Officially execute the merger and the corresponding change of control (~2 months after closing)

- Question #2: What kind of due diligence is involved in a higher ed transaction?
 - Typical M&A deal diligence
 - Corporate records
 - Financial information
 - Tax matters
 - Intellectual and real property
 - Employment matters
 - Litigation history
 - Material contracts
 - Higher education-specific diligence
 - General information
 - Student body and faculty composition
 - Campus policies
 - Course catalogs
 - Federal law compliance
 - Title IV (federal financial aid)
 - Title IX and other civil rights laws
 - Clery Act (campus crime statistics) and other consumer protection laws
 - State and accreditation authorization(s)

- Question #3: Beyond the terms of the agreement, what else should the institutions be considering when approaching a deal?
 - **Short answer**: These transactions are more than business deals; there are education-specific factors at play.
 - Impact on stakeholders
 - Enrollment numbers
 - Risk of attrition at target institution
 - Campus culture and community buy-in
 - Academic offerings and strength of programs

- Question #4: Who are the stakeholders in transactions between institutions?
 - **Short answer**: There are many...
 - Board of Directors
 - Donors
 - Administration, faculty and staff
 - Alumni and professional associations
 - Current and prospective students
 - Federal and state agencies
 - Accrediting organizations
 - Lenders
 - Local Community
 - **The point**: The success of the deal depends, in part, on both institutions considering these stakeholders and engaging them as appropriate. Especially at early stages, will need to balance confidentiality considerations with the need to communicate with these stakeholders.

- Question #5: How should NDAs align with early notification requirements or recommendations for accreditors?
 - Make sure your NDAs do not prevent you from providing early notification to, getting guidance from, or discussing your potential transaction with regulatory bodies (accreditors, in particular).
 - Accreditors are not subject to Freedom of Information Act (FOIA) requests.

The New Two-Step Change in Ownership Process

- Question #1, Part 1: First, can you walk through for us what was the old process?
 - **Short answer**: it was a one-step Transaction; in other words, there wasn't a change of control (i.e., a change in ownership)
 - The Department of Education used to allow mergers of institutions to occur without classifying them as changes of ownership subject to the regulations governing institutional eligibility.
 - The Department was effectively turning a blind eye because these mergers have historically met the Department's own definition of change of ownership.
 - The result was a single transaction: the institution simultaneously changed ownership and became an additional location of another institution.

- Question #1, Part 2: Why did it change?
 - **Short answer**: The Department wanted to provide some safeguards to the transaction.
 - The Department wanted to ensure that, following the transaction, the institutions maintained both sufficient financial health and administrative capabilities to provide students with a complete educational experience.

- Question #2: What is the new process?
 - **Short answer**: To remain compliant with federal regulations and eligible for federal funding, the institutions must now take a two-step approach. The target institution is responsible for step one and the acquiring institution is responsible for step two.

- Program consortiums (share costs and infrastructure to strengthen programs and reduce expenditures)
- Closure of acquired institution
 - Downsides include teach-out requirements and potential liabilities for borrower defense claims and student loan discharges

The Closure and Teach-Out Option

- Question #1: What are the circumstances under which institutions should be encouraged to think about closures as part of a strategic transaction or as an alternative to a strategic transaction?
 - Closure as part of a transaction – anytime an institution will cease to exist as a legal entity or cease all academic operations
 - Certain transactions, by definition, including multiple substantive changes, one of which may be a closure
 - If the institution is considering entering into the transaction for financial reasons
- Question #2: When are teach-outs required and what options might an institution have for teach-outs that are part of a strategic transaction?
 - Federal regulatory requirements - 34 C.F.R. §602.3 (referencing 34 C.F.R. §600.2 - Definitions)
 - **Teach-out**: A process during which a program, institution, or institutional location that provides 100 percent of at least one program engages in an orderly closure or when, following the closure of an institution or campus, another institution provides an opportunity for the students of the closed school to complete their program, regardless of their academic progress at the time of closure.
 - **Teach-out agreement**: A written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides 100 percent of at least one program offered, ceases to operate or plans to cease operations before all enrolled students have completed their program of study.
 - **Teach-out plan**: A written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides 100 percent of at least one program, ceases to operate or plans to cease operations before all enrolled students have completed their program of study.
 - When is a teach-out required?
 - 34 C.F.R. §602.24(c)
 - Accreditors have additional requirements and discretion within certain transactions
 - Teach-out options (from the accreditor’s perspective)
 - Acquiring institution or surviving institution following a transaction can teach-out another institution’s students
 - To be acquired institution or non-surviving institution can enter into agreements with other qualified institutions
 - An institution can teach-out its own students
 - Duration of a teach-out

- Until all students have been accounted for and are able to complete their programs
- Cannot extend beyond the period of accreditation and degree-granting authority
- Accreditors can grant an extension for the grant of accreditation while the teach-out is being implemented
- However, this has caused questions about navigating the implementation of a teach-out and the Department of Education’s two-step process

Accreditation Substantive Change Review

- Question #1: Substantive changes are governed by federal regulation (34 C.F.R. §602.22). Should we take that to mean that definitions and processes for change in ownership are the same as those of the Department of Education?
 - **Short Answer**: No, each accreditor has a different process for managing substantive changes.
 - MSCHE does not speak for the other accreditors, but can share a sampling of policies, procedures, and other resources, all of which are publicly available.
 - MSCHE’s process
 - We certainly maintain the same federal regulatory definition of “change in ownership” as the Department of Education
 - Anything that the Department of Education considers a change in ownership, we also consider a change in ownership
 - However, MSCHE and other accreditors also maintain a broader definition of Change in Legal Status, Form of Control, or Ownership 34 CFR § 602.22(a)(1)(ii)(B) and (G) and 34 CFR § 600.31. For MSCHE, all changes in legal status, form of control, or ownership are considered Complex Substantive Changes and are guided by MSCHE’s Complex Substantive Change Procedures.
 - The Commission recognizes the definitions used by the other members of the regulatory triad. MSCHE requires institutions to comply with all state laws and certainly all of the requirements of the Department of Education. The Commission does, however, have to define the transaction in accordance with its own definitions.
 - MSCHE’s definitions are set forth in our Substantive Change Guidelines. We help institutions to define the transaction early on in the preliminary review process.
 - MSCHE also honors and recognizes when an institution has to use a particular definition to meet a state requirement, federal requirement, or just for political reasons.
 - Tip: Consider these definitions early on. There is a tendency, as attorneys, to simply look at the transaction from the state law perspective. That is where the first definition usually forms. However, it is important to align definitions early in the process across all regulatory bodies from whom you need approval.
- Question #2: Why can’t accreditors all have the same process?
 - **Short Answer**: Because accrediting agencies all have different standards.

- Question #3: Is it possible to have two institutions, with two different institutional accreditors, engaged in the same transaction? If so, how is that navigated, and can they just submit the same materials to both accreditors?
 - **Short Answer**: Yes, that is absolutely possible. In fact, it is becoming more common.
 - Accreditors cannot simply rely on the submissions to another accreditor for several reasons
 - First, different standards noted above
 - Second, antitrust prohibitions on accreditors
 - Third, accreditors may have institutions on two different sides of the transaction requiring different processes and different procedures

Additional State Authorization and Accreditation Requirements and Post-Transaction Considerations

- Question #1: What should college and university leaders expect or plan for to obtain state authorization or approval of a strategic transaction or closure?
 - Each state’s requirements are different, if the institutions involved have campuses in more than one state, may need to follow different processes in each state to obtain approval
 - Public institutions and private institutions may encounter different state-level requirements for approval
 - Some states may not begin the review or approval process until they receive confirmation of accreditor action
 - Some states may public notice requirements and the opportunity for a public hearing; need to build in time for these requirements into the timeline of completion of the transaction

- Question #2: What should institutions expect working with the U.S. Department of Education after the effective date of a strategic transaction or closure?
 - US DOE will not begin review of change in ownership until they receive notice the transaction has closed
 - US DOE will not begin the first step of the two-step change in ownership process until the accreditor has approved the “entire” transaction
 - Transaction closing will trigger certain reporting obligations (e.g., Same-day balance sheet and audited financials) discussed earlier as part of the two-step process
 - US DOE issuance of temporary Program Participation Agreement, which will include increased financial and legal reporting obligations while that temporary agreement is in place
 - If change in ownership is approved, and will transition to a single identifying number (OPEID) in US DOE systems, can transition to OPEID after CIO approved, but should consider timing based on impact on student financial aid applications and financial aid awards
 - Timing is critical
 - US DOE has taken longer to process the change in ownership applications. The first step in the two-step process (change in ownership application) is taking 12-18 months. The second step (merger application) is moving quicker.
 - US DOE will approve certain integration steps in the process

- Accreditor perspective, this is a very interesting part of the process because we have typically only allowed the implementation of a teach-out post transaction
 - MSCHE and other accreditors have had to adjust policies, procedures, and requirements to allow for a longer time to receive approvals (previously, one year). Accreditors will adjust processes and each has a different process but information and communication is critical.
 - Communication is critical
 - Keep accreditors informed. Our process does not end after approval, it is just beginning.
- Question #3: What should institutions expect working with accrediting agencies after the effective date of a strategic transaction?
 - Different processes for different accreditors
 - For MSCHE, there is an entire post-transaction process
 - Approvals of state and federal partners
 - Visit required by 34 CFR § 602.24(b) following a change in ownership (6 months following transaction closure)
 - Financial/Dues considerations
 - Monitoring requirements
 - Tracking the integration
 - Tracking changes in the accreditation cease date and date for degree granting authority to terminate
- Question #4: Are there some other potential regulatory or accreditation processes that institutions should consider?
 - Qualification for Veterans Administration funding for institutions participating in veteran education programs
 - Approval for transfer of prisoner education programs for accreditation and state regulatory purposes
 - Approval of boards of licensing for licensed professional programs, such as medical, nursing, other allied health programs, or law
 - Potentially others depending on the types of programs and sources of student funding for those programs
- Question #5: Can you talk about what to expect for institutions working with program-specific accreditations and state boards of licensure and what stakeholders should be involved?
 - Typically, notice that transaction is effective, may also require additional information
 - Boards having authority over licensed professional programs such as medical schools, nursing schools, etc. - have different requirements for different states and different professions
 - Assigning primary responsibility for working with each accreditor and board (e.g., Dean or program director), tracking progress and seeking resources to help, such as General Counsel's office, outside counsel, subject matter experts
- Question #6: Any additional advice or recommendations for attendees about the complex considerations and critical choices around strategic transactions and closures?

- Early discussion, planning and action can make a significant difference in success
- Work is not over when the transaction closes – in addition to the continuing work with accreditors, US DOE and state agencies, expect continued work on institutional alignment, including cultural and mission alignment
- Continue to work closely with partners such as communications/public relations, human resources, for productive engagement with stakeholders
- Do not view the transaction as a purely legal transaction – keep students in the forefront
- TIMING AND TIMELINES are critical

ADDITIONAL RESOURCES

Department of Education: Regulation and Guidance

34 C.F.R. §300.31 [Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions](#)

- 87 Fed. Reg. 65,426 (Oct. 28, 2022) [Change in Ownership and Change in Control](#)
Effective July 1, 2023

Guidance from the Office of Federal Student Aid

- Electronic Announcement GENERAL-22-70
[Updated Guidance and Procedures for Changes in Ownership](#)
September 15, 2022

Guidance from the Office of Postsecondary Education, Accreditation Group

- [Memorandum re: Changes of Ownership](#)
from Herman Bounds, Jr., Director to Executive Directors and Presidents
February 2, 2023

Accrediting Agency Policies and Guidance

Higher Learning Commission

- Evaluating Institutions on Accredited Change of Control Status
<https://www.hlcommission.org/Policies/accredited-change-of-control-status.html>

Middle States Commission on Higher Education

- Substantive Change Webpage and Resources
<https://www.msche.org/substantive-change/>
- Substantive Change and Complex Substantive Change Policies and Procedures
<https://www.msche.org/policies-guidelines/?title-search=substantive+change&type=>

New England Commission on Higher Education

- Policy on Substantive Change
<https://www.neche.org/wp-content/uploads/2021/07/Pp72-Policy-on-Substantive-Change-REVISED.pdf>

Northwest Commission on Colleges and Universities

- <https://nwccu.org/substantive-change/>

SACSCOC:

- Substantive Change Webpage and Resources
<https://sacscoc.org/accrediting-standards/substantive-changes/>

WASC Senior College and University Commission

- <https://www.wscuc.org/resources/substantive-change/>

Coverage of Trends

From Higher Ed Dive

- [A look at trends in college consolidation since 2016](#)
(updated on a rolling basis)

From Inside Higher Ed

- [A Look Back at College Closures and Mergers](#)
Josh Moody (December 21, 2023)

From the Association of Governing Boards of Colleges and Universities (AGB)

- [College at a Crossroads: Closures and Mergers](#)
David Tobenkin, Trusteeship Article (Volume 28, Number 3; May/June 2020)

Other NACUA Programs

[Tango or Two-Step? Mergers and Acquisitions Could Happen to You: Are You Ready to Dance?](#)

Mary Phelps Dugan, J. Christopher Jennings, Lisa S. Loo

2024 General Counsel Institute

[Strategic and Other Innovative Partnerships Among Institutions: A Guide for General Counsel](#)

Carolina Avellaneda, Deborah Solmor, Tony Guida, John Przypyszny

2023 Annual Conference

[The Great Contraction: Managing Financial Distress with Strategic Partnerships, Mergers, and Institutional and Program Closures](#)

Kristen Bowes, Stephen Donato, Miyoko Sato, Bert Weil

2021 Virtual Conference

CORPORATE DUE DILIGENCE QUESTIONS
(issued by acquiring entity to target entity)

[DATE]

VIA E-MAIL ONLY

_____ University

Re: Preliminary Information Request for Proposed Transaction

Dear _____:

In connection with our representation of a California nonprofit public benefit corporation (code named “_____”), with respect to _____’s proposed acquisition of a California nonprofit public benefit corporation (code named “_____” and referred to herein under that code name or “You” or “Your”), we will be performing diligence with respect to You and analyzing potential transaction structures that may be utilized.

Please advise us if any requests set forth below are overly burdensome or inapplicable. We will be happy to work with You to make this process as efficient as possible.

We recognize that some of the material requested already has been provided in the data room set up to facilitate the exchange of information. This request, while endeavoring to be comprehensive, is not meant to ask You duplicate what already has been provided.

To the extent a folder or responsive document is in the data room we have noted the folder or document number in parenthesis. Even if documents have already been provided, please confirm (in tracked changes or otherwise) that the information provided in response to our requests is complete. If the response to our request is “none” or “not applicable,” please include a response to that effect.

Our information and document requests are below. Given the various subheadings, please note that education regulatory due diligence questions are separated out into an attached appendix.

CORPORATE RECORDS

1. Any amendments to the Articles of Incorporation that were filed with the California Secretary of State.
2. Any amendments to the Amended and Restated Bylaws.
3. List of the Your trustees and officers, and the business and/or familial relationships between them.

4. Minutes of Your board of trustees and its committees, if any (e.g., executive committee, governance committee, academic committee, advancement committee, budget and investment committee, finance committee, and audit committee) since January 1, 2020.

5. Current governance policies, including any conflicts, whistleblower, document retention, joint venture, investment, and compensation policies. Describe how each policy is monitored and enforced. Please provide the most recent acknowledgement and financial interest disclosure statements, if any, with respect to the conflicts policy.

6. Any correspondence with the California Attorney General relating to any filing made by You with the Registry of Charitable Trusts (e.g., registration, professional fundraising arrangements, etc.).

7. List of all locations where You offer educational programs, own or lease property or have employees, agents or independent contractors.

a. Real Properties & Leases

b. Personal Property & Leases

8. Summary of Your corporate history and any predecessors, including any mergers and acquisitions.

9. List of all for-profit or nonprofit corporations, partnerships, joint ventures, limited liability companies or other entities in which You own an interest or which can exercise control over You (i.e., parent/subsidiary/sibling entities, affiliates, and related parties).

10. Any contracts, loans, grants or other agreements between You and any of Your trustees or officers.

11. Any contracts, loans, grants or other agreements between You, on the one hand, and on the other hand, any employee of You or any company (i) in which any trustee, officer or other employee of You holds any interest, including a board membership, or (ii) by which he or she is compensated.

TAX MATTERS

12. If submitted and available, Your Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, including all schedules, exhibits, correspondence and all follow-up information provided to or received from the IRS in connection with such application.

13. The IRS determination letter confirming Your tax-exempt status under section 501(c)(3) of the Internal Revenue Code and public charity status under section 509(a) of the Internal Revenue Code.

14. The California Franchise Tax Board (“FTB”) determination letter confirming Your tax-exempt status under section 23701d of the California Revenue and Taxation Code.

15. Any correspondence with the IRS or the FTB relating to Your federal or state determination letters or tax status.

16. Information regarding any significant changes to Your operations since it last received a written IRS acknowledgment of Your tax-exempt status (normally, the date of the most recent IRS determination letter), or confirmation that there have been no such significant changes. Assuming that Your original determination letter was the last received written acknowledgement, please indicate whether Your sources of support, purposes, character or method of operations have substantially changed since those presented or proposed in Your Form 1023 (including the initial application and all follow-up information provided to the IRS in connection therewith).

17. Documentation with respect to any audits, deficiencies or other outstanding disputes with respect to Your (or, if applicable, any tax-exempt related party's) tax-exempt status or any unrelated business taxable income ("UBTI") of You or any related party.

18. Any tax opinions, letters or memoranda relating to the tax-exempt status or any UBTI of You or any related party, including determinations of whether any activities were unrelated or exempt.

19. Copies of any rulings obtained from or ruling requests prepared for or submitted to, and any other correspondence with, the IRS by or on behalf of You or any related entity.

20. A summary of any UBTI received by You or by any related entity.

EDUCATIONAL MATTERS (TAX/HOUSING/PARTNERSHIPS)

21. Any written documentation that demonstrates Your compliance with racial nondiscrimination requirements, including a copy of board minutes approving the adoption of a racial nondiscrimination policy, copies of certifications filed with governmental agencies (e.g., Form 5578), and copies of brochures, catalogs or other written communications distributed to the public dealing with student admissions, programs and scholarships that reference the racial nondiscrimination policy. Please also describe how this policy is monitored and enforced.

22. Copies of records indicating the racial composition of the student body, faculty and administrative staff, if available.

23. Copies of any documentation that shows that scholarships and other financial assistance are awarded on a racially nondiscriminatory bases.

24. Explanation of how any admissions, scholarships, or other programs were impacted by the *Students for Fair Admissions, Inc.* cases against Harvard and UNC.

25. Any housing contracts/agreements/policies that Your students sign or agree to that enables the student to reside on Your property.

26. List and copies of any internship agreements, partnerships, or other similar arrangements that You or any of Your schools or programs has with any third party (businesses employers, governmental authorities, etc.).

EDUCATIONAL REGULATORY

Please see the attached Appendix A, Education Regulatory Due Diligence.

FINANCIAL INFORMATION

27. All financial statements (together with exhibits and schedules thereto) and independent auditor's reports, if any, prepared for the past four taxable years and the current taxable year.

28. Most recent projected financial statements including supporting assumptions.

29. List of Your principal assets and the approximate tax basis for each. If possible, include current asset and depreciation schedule, including a list of all personal property. Also, please let us know if You incurred debt in acquiring (or, if applicable, improving) any of the principal assets.

30. List of Your outstanding debts and liabilities, including accounts payable. Include schedule of total debt amounts (currently outstanding) and conditions, including change of control provisions.

31. All documents purporting to create liens, mortgages, security agreements, pledges, charges or other encumbrances on any real or personal property of You or in favor of You. Copies of all Uniform Commercial Code financing statements filed with respect to the foregoing.

32. Agreements evidencing borrowings by You, whether secured or unsecured, documented or undocumented, including loan and credit agreements, mortgages, deeds of trust, letters of credit, indentures, promissory notes and other evidences of indebtedness, and any amendments, renewals, notices or waivers.

33. Documents and agreements relating to any guarantees by You or releases of guarantees.

34. Bank letters or agreements confirming lines of credit, including any amendments, renewal letters, notices, waivers, etc.

35. Copies of any applications, agreements, loan forgiveness, and any other documentation related to funds received pursuant to the CARES Act, if any, including, but not limited to, Paycheck Protection Program loans, Small Business Administration loans, and the Employee Retention Credit. Please also provide evidence that such funds were spent in accordance with applicable restrictions.

36. List and description of any significant grants that You have received and not yet fully expended, and the related grant agreements. We'll want to understand whether there are any restrictions on the use of such grant proceeds, or any other funds or property held by You.

37. Copies of all grant/donor agreements and any amendments thereto for all restricted funds in excess of \$100,000.

38. List of wills, trusts, and pledges where You are a named beneficiary and the expected amount. Please include a copy of the relevant document, if available.

39. A description of Your fundraising efforts, including copies of the materials used by You or on Your behalf to solicit contributions.

40. List of any agreements with professional fundraisers, solicitors, or other individuals or entities that conduct fundraising programs on Your behalf, including copies of such agreements.

41. List of all governmental agencies from which You receive any grants, student aid or other financial assistance including any correspondence with such governmental agencies relating to such assistance.

42. A copy of any enrollment management plans and/or any other documentation and/or studies prepared with respect to student enrollment and student tuition, fees, and discount rates.

43. Description of how international students are vetted and how visas for international students are handled.

LICENSING AND INTELLECTUAL PROPERTY

44. List of all licenses, permits or other credentials held by You to operate Your programs.

45. A copy of all such licenses, permits or other credentials.

46. List of all U.S. and foreign patents and patent applications owned or held for use by You, indicating in each case, as applicable, the record owner, the dates of invention, application, issue, reexamination and reissue, the patent number or application serial number, and copies of all related prosecution files.

47. List of all U.S. and foreign copyright registrations and applications owned or held for use by You and material unregistered copyrights, indicating in each case, as applicable, the record owner, the dates of authorship, publication, application, registration and renewal, registration number, and copies of all related documents and files.

48. List of all U.S. and foreign trademark, service mark and trade name registrations and applications and unregistered trademarks, service marks and tradenames owned or held for use by You, indicating in each case, as applicable, the record owner, the date of first use, application, registration and renewal, registration number or application serial number, and copies of all related prosecution files.

49. List of all domain names owned or held for use by You, indicating in each case, the record owner, the registrar, registration and renewal date.

50. List describing all proprietary technology and computer software owned, held for use by or being developed by or for You, including as may have been developed in the course of

Your animation, VFX, computer science, or other STEM programs (collectively, “STEM programs”).

51. List describing all material trade secrets and other proprietary know-how or processes owned or held for use by You for Your STEM programs or otherwise.

52. Copies of all material agreements, proposed agreements or arrangements pursuant to which any third-party intellectual property is assigned to or licensed by You for Your STEM programs or otherwise.

53. Copies of all material agreements and proposed agreements pursuant to which any intellectual property is assigned, sold or otherwise transferred to, or licensed by You to any party, in connection with Your STEM programs or otherwise.

54. Copies of all research and development, joint venture or other agreements relating to product, process or technical research, development and testing to which You are a party.

55. Copies of all nondisclosure agreements, settlement agreements, administrative or judicial decisions or orders, consent orders, releases, covenants not to sue, security agreements and other agreements or decisions restricting or encumbering Your intellectual property.

56. Copies of all correspondence from third parties regarding alleged or potential infringement or other violation by You of intellectual property rights of others.

57. Copies of all agreements relating to the provision of information technology, data or internet-related products or services to You.

58. Copies of all of Your current and historical privacy and data security policies and practice manuals, including, without limitation, all privacy policies and procedures for Your use and disclosure of donor, student or other personal information.

59. Copies of any documentation and information regarding Your collection, use, storage or disposal of donor, student or other personal information (whether Yours or a third party’s).

60. Details of any actual or potential data and information security breaches, unauthorized use or access of Your computer systems or data, or data and information security issues impacting You that have been identified in the past three years.

REAL PROPERTY

61. List of real property owned by You, including size, location and use of each parcel. Provide documents of title, title insurance, mortgages, deeds of trust, leases and security agreements for these properties.

62. Description and documentation of any donor-imposed or other restrictions on the use or transfer of real property owned or leased by You.

63. For any owned or leased real property, property tax documentation for the last year or two, including any “welfare exemption” or “college exemption” property tax exemption qualification documentation.
64. Any option agreements involving real property to which You are a party.
65. Copies of any outstanding leases for real property to which You are either a lessor or lessee.
66. Certificates of occupancy relating to any real property owned or leased by You.
67. Description of any Environmental Protection Act, Toxic Substances Control Act or other investigation or claim concerning any real property currently or formerly owned or leased by You.
68. Environmental surveys, site assessments or reports (including copies of any Phase I and Phase II reports) concerning any real property currently or formerly owned or leased by You.
69. Any Master Plan and Master Plan Amendment(s) that include/address property owned by You.
70. Any historical or other special designations given to Your property.

EMPLOYMENT MATTERS

71. All corporate policy and employee manuals covering hiring, employee benefits, regulatory compliance and internal controls.
72. Organizational charts of functions relating to academic and non-academic administrative operations.
73. List of all employees, including location and department assignment, job classifications and function description, and compensation (include names, titles, salary, hours worked per week), accrued vacation and sick leave for each for the most recent taxable year and year to date and benefits.
74. Any “intermediate sanctions” compensation studies and other documentation relating to the setting of executive compensation, including trustee and compensation committee minutes, independent compensation consultants reports and compensation surveys.
75. List of any involuntarily terminated employees and other staff members over the last four years.
76. List of all pending or threatened workers’ compensation claims, unemployment insurance claims and liabilities and other employee-related complaints and actions.
77. Copies of offer letters, employment contracts (including individual faculty contracts), bonus guarantees, severance agreements, independent contractor agreements,

nondisclosure and confidentiality agreements, non-competition agreements, management and consulting contracts.

78. Union and guild contracts, collective bargaining agreements and a summary of any ongoing negotiations with unions and/or guilds.

79. Description of any threatened or pending labor disputes, work stoppages, work slowdowns, walkouts, or lockouts.

80. Documents relating to all retirement plans, deferred compensation plans, severance, medical, flexible spending, dental or other health and welfare plans and any bonus, incentive, performance or other employee compensation/benefit plans or arrangements and related agreements (that provide benefits to current or former trustees, officers or employees and their respective beneficiaries); materials describing any of the foregoing or contemplated amendments; and the applicable trust accounting, IRS determination letters, Form 5500 filing, plan audit reports, actuarial reports and other applicable financial statements for the three most recent years. Summary plan descriptions for each of the foregoing, to the extent available.

81. Copies of complaints and other material pleadings and court filings in connection with any pending lawsuit involving any employee benefit plan or benefits thereunder, or any such lawsuit filed within the past three years.

82. Any notices or other communications issued within the past three years relating to blackout periods under any defined contribution plan or regarding any future reductions in medical, pension or other employee benefit or regarding the termination of any employee benefit arrangements.

83. Any indemnification agreements with any trustees, officers, employees or agents.

84. Copies of any special compensation/retention arrangements in connection with the proposed transaction.

85. Analysis of how employees are classified, including, but not limited to, the classification of adjunct professors.

- a. If adjunct professors are paid as exempt employees, please identify the rate of pay and unit of measurement for the rate of pay, and all work that adjuncts are expected to perform.

86. Describe how employees are reimbursed for business related expenses, including during COVID-related closures or other work from home situations. Please provide a copy of Your employee reimbursement policy.

LITIGATION AND INSURANCE

87. List of current, pending or threatened civil liability claims, including, but not limited to any brought or threatened under the Private Attorneys General Act (“PAGA”). Include

name of court or agency in which the litigation proceeding is pending, date instituted, docket number and principal parties to the action.

88. Notices from the U.S. Department of Education or any other governmental agencies alleging non-compliance with any statute, ordinance, regulation or published standards. If known, include actual and/or pending accusations, investigations and/or records of disciplinary action/actions.

89. Any currently effective consent decrees, judgments, other decrees or orders, settlement agreements and other similar agreements to which You are a party or by which You or any of Your assets are bound.

90. List of types of insurance policies (general, professional, trustee, D&O, workers' comp., cyber security, etc.) held by You, with deductibles, coverage limits, and other significant terms. Please indicate the name and address of all insurance agents, brokers and companies.

91. Summary of self-insurance programs or other risk retention.

92. A schedule of threatened or potential insurance or other claims, judicial or administrative proceedings or litigation of any nature brought by or against You (currently or at any point in the last five years), including, but not limited to any PAGA suits.

OTHER MATERIAL CONTRACTS

93. Any partnership, joint venture, distributorship, franchise, licensing, management, research and development, or similar agreements or contracts to which You are a party.

94. List of Your suppliers (other than suppliers of goods and services generally required by all businesses, e.g., office supplies, utilities, etc.) including for each supplier a description of the amount and nature of products supplied.

95. Any other material agreements or drafts of proposed material agreements.

OTHER

96. Any other documents or information which, in Your reasonable judgment, are or are potentially significant with respect to the proposed transaction.

Please bear in mind that this is a preliminary request and that we may require additional documents as our diligence progresses. Please note that this list is comprehensive and is intended to be over-inclusive rather than under-inclusive in order to most efficiently determine those documents that may be of particular importance. Our goal is to quickly determine the key issues that will need to be considered in connection with the proposed transaction.

If any of the requested documents or items do not exist or are not applicable to You or Your business, please let me know. In addition, if documents and other information which are responsive to this request are prepared, entered into or become available after the date of this letter, please promptly provide such documents and other information to us.

Thank you very much for your assistance in this matter.

[signature block]

Cc:

Attachment: Appendix A – Education Regulatory Information Request

REGULATORY DUE DILIGENCE QUESTIONS

(issued by acquiring entity to target entity)

A. GENERAL INFORMATION

1. **Locations:** Please provide a listing of each location at which the institution offers, or offered at any time since January 1, 2019, all or any portion of an educational program. (The term “location” is intended to subsume any physical place, regardless of how it may be defined for regulatory purposes.) Please include for each location the following information:
 - a. Address
 - b. date each accreditor approved the location
 - c. date the institution began offering instruction at the location
 - d. date the institution stopped offering instruction at the location, if applicable

2. **Existing and Historical Educational Programs:** For each location listed in response to item A.2, please provide a listing of each educational program offered in whole or in part at that location or site since January 1, 2019. Include for each location the following information:
 - a. date the institution began offering the program (unless the program has been offered for more than 4 years)
 - b. percentage of the program offered at that location
 - c. credential offered students who successfully complete the program
 - d. whether and to what extent the program is accepted for credit toward any of the institution’s other degree programs
 - e. date the institution ceased offering the program (if applicable)

3. **Proposed Educational Programs:** Please provide a listing of each educational program proposed by the institution to be offered in whole or in part at each location or site listed in response to item 2. Please include for each location the following information:
 - a. date the institution proposes to begin offering the program
 - b. percentage of the program proposed to be offered at the location
 - c. credential offered students who successfully complete the program
 - d. whether and to what extent the program will be accepted for credit toward any of the institution’s other degree programs

4. **Students:** Please provide a listing of the following student information:
 - a. current students by program
 - b. students currently on leave, together with supporting documentation
 - c. student starts for the last 12 months, by program
 - d. student withdrawals for the last 12 months, by program

- e. graduates for the last 12 months, by program
 - f. students placed on probation for the last 12 months, together with documentation of notification and removal, as appropriate
 - g. to the extent applicable, students currently on internship/externship/practicum with the identity of the internship site and the name and telephone number of the contact person at the site
 - h. aggregate withdrawal rate for each of the past 4 academic years
 - i. aggregate graduation rate for each of the past 4 academic years
 - j. aggregate placement rate for each of the past 4 academic years
 - k. daily class and break schedule
 - l. to the extent applicable, all companies, agencies or organizations that routinely send or refer students to the institution, and any written agreements with such companies, agencies or organizations.
5. **Catalogs and Student Handbooks:** Please provide copies of all catalogs and student handbooks in effect at any time since January 1, 2019 (including updates, supplements and addenda, whether in hard copy or virtual form). Please identify the periods during which each catalog, handbook update, supplement or addendum is or was in effect.
6. **Faculty Handbook:** Please provide a copy of the current faculty handbook.
7. **Policies, Procedures, Practices and Forms:** Please provide copies of the following policies and related information, or reference the pages in the most recent catalog where this information has been published.
- a. return of funds and refund policies
 - b. the requirements and procedures for officially withdrawing from the institution
 - c. satisfactory academic progress policy
 - d. drug and alcohol prevention program and drug-free workplace policy
 - e. description of how the institution determines the last date of attendance
 - f. the “Student Consumer Information” provided to each student on an annual award basis regarding required disclosures of information and reports
 - g. forms of consents and other documents used to collect the information of, and communications to, prospective students
 - h. all enrollment agreements and enrollment forms, in use since January 1, 2019. Please indicate on each form the dates in which it has been utilized
 - i. sample of each form of transcript and diploma
 - j. all program and course outlines currently in effect
 - k. description of entrance requirements for each program
 - l. all externship agreements and plans
 - m. Faculty meeting agendas and minutes
8. **Admissions:** Please describe the institution’s policies and practices for admission and award of financial aid to prospective undergraduate and graduate students, including use of assessments and consideration of race, ethnicity, gender, legacy and relationship to donors.

B. FEDERAL FINANCIAL AID (TITLE IV)

1. **Program Participation Agreement (PPA):** Please provide a copy of the current PPA and copies of any and all PPAs in effect at any time since January 1, 2019.
2. **Eligibility and Certification Approval Report (ECAR):** Please provide a copy of the current ECAR and copies of any and all other ECARs and ECAR addenda (such as supplementary approval notices or acknowledgements) in effect at any time January 1, 2019.
3. **Substantive Changes:** Please provide copies of all correspondence notifying USED of a change in any of the following since January 1, 2019 and copies of all approval letters and updated ECARs issued by USED (please duplicate appropriate ECARs and electronic applications, and include them here as well):
 - a. Name of the institution or one of its additional locations
 - b. Address of the institution or one of its additional locations
 - c. Number of additional locations (e.g., establishment of a new additional location or closure of an additional location)
 - d. Change in ownership
 - e. A person's ability to affect substantially the actions of the institution or its ownership (e.g., shareholder, executive officer, director)
 - f. New educational program
 - g. Addition or deletion of a third-party servicer
 - h. Level of program offering
4. **E-App:** Please provide a copy of the institution's most recently filed complete electronic application (e.g., recertification, change in ownership).
5. **Financial Statements:** Please provide copies of (a) annual audited financial statements of the institution for each of the last 4 fiscal years and (b) the transmittal letter to USED that accompanied each submission referenced in item (a).
6. **Financial Statement Actions:** Please provide copies of all correspondence since January 1, 2019 between USED and the institution concerning the sufficiency of financial statements and any actions taken by USED as a result of statements, e.g., letter of credit requirements, escrow requirements, modifications to or restructuring of statements to satisfy USED, etc., including copies of any letters of credit submitted to USED.
7. **Compliance Audits:** Please provide copies of (a) the institution's compliance audit reports for the last 4 fiscal years, and (b) the transmittal letter to USED that accompanied each submission.
8. **Compliance Audit Actions:** Please provide copies of all correspondence since January 1, 2019 between USED and the institution concerning the sufficiency of compliance audit reports and any actions taken by USED as a result of any of the

reports (*e.g.*, confirmation of receipt, interim or final audit determinations, requests for additional information).

9. **Quality Control Reviews:** Please provide all relevant documentation and correspondence relating to any quality control reviews or other audits or proceedings initiated against the auditor or auditing firm that conducts the institution's compliance audits or audits the institution's financial statements.
10. **Open Matters:** If the institution is presently the subject of an open USED program review, USED final audit determination, or an Office of Inspector General (“**OIG**”) or U.S. Department of Justice (“**DOJ**”) audit, investigation, subpoena, or request for information or documentation, please provide the following:
 - a. copies of the request for documents, subpoena, program review report and final program review determination (and/or initial and final audit determination letters, and/or draft and final audit reports);
 - b. any and all correspondence to and from USED, OIG and DOJ related to the program review, audit, investigation, subpoena, or request for information or documentation;
 - c. any appeal documentation (*e.g.*, request for review, motions, briefs, orders governing proceedings, and decisions of the Secretary or an administrative judge).
11. **Closed Matters:** If the institution was the subject of any closed USED program review, USED final audit determination, or OIG or DOJ audit, investigation, subpoena, or request for documentation or information that was closed since January 1, 2019, please provide the following:
 - a. a copy of USED's final program review determination or final audit determination (or, if appealed, any decisions issued by the Secretary or the administrative judge);
 - b. documentation confirming that each finding has been closed, resolved without liability, resolved by payment in full of any liabilities asserted in the finding, or resolved by agreement as to future payment.
12. **Other Outside Audits:** If any audits have been performed by a consultant or outside auditor (other than USED, OIG, or the annual FSA compliance audit) since January 1, 2019, please provide copies of the results of each such review and all related correspondence.
13. **Internal Audits:** If any internal compliance audits or reviews have been performed internally since January 1, 2019, please provide copies of the results of each such audit or review.
14. **LST/Fines:** If the institution has been the subject of any action by USED since January 1, 2019 to limit, suspend, or terminate its participation in the Title IV programs or to impose a fine, please provide all documentation pertaining to each such action and its resolution.

15. **Cash Monitoring or Reimbursement:** If the institution has been placed on reimbursement, cash monitoring, heightened cash monitoring, or any other method of Title IV funding other than the advance payment method since January 1, 2019, please provide all documentation pertaining to the placement on reimbursement, the continuation on reimbursement, or audits of compliance with the requirements of the reimbursement method.
16. **Cohort Default Rates:** With respect to the institution's Cohort Default Rate ("CDR") determinations, please provide:
 - a. USED notification to the institution of its CDR for each of the 3 most recently available fiscal years and, if available, its notification to the institution of its draft CDR for a subsequent year;
 - b. for any rate that is presently under appeal, please provide copies of each appeal and all correspondence to and from USED and any other party in connection with each appeal;
 - c. the student loan default management plan
17. **Loan Discharges:** Please provide the following:
 - a. a summary of claims for borrower defense to repayment asserted by or on behalf of present or former students against the institution since January 1, 2019;
 - b. a summary of other requests for student loan discharges made by or on behalf of present or former students since January 1, 2019.
18. **Incentive Compensation:** Please provide the following:
 - a. list of each individual or entity engaged at any time since January 1, 2019 in any student recruiting activities or in making decisions regarding the awarding of student financial assistance;
 - b. list of each individual or entity with direct supervisory authority over an individual listed in item (a) at any time since January 1, 2019;
 - c. for each individual or entity listed in items (a) and (b), please provide:
 - i. current salary;
 - ii. amount and date of each salary adjustment since January 1, 2019;
 - iii. amount and date of any other payment made since January 1, 2019;
 - iv. documentation of the basis for each salary adjustment listed in item (c)(2) above and for each other payment listed in response to item (c)(3) above (*e.g.*, performance evaluations, etc.).
 - d. copies of any and all written compensation plans, and descriptions of all unwritten compensation plans, covering any of the individuals or entities listed in items (a) and (b) above, including, without limitation, performance evaluation plans or profit-sharing plans;
 - e. if any of the plans described in item (d) require the completion of periodic performance evaluations of admissions staff, provide a representative sample of those completed evaluations; and

- f. copies of any contracts or arrangements with a third-party for lead generation or recruitment or in which payments are made based on institutional revenue or profits, the number of students admitted to or retained by the institution, or the number of students that receive federal student financial assistance.
19. **Third-Party Servicers and Financial Aid Consultants:**
- a. Please provide a list of any third-party servicers or financial aid consultants with whom the institution has done business since January 1, 2019, and copies of any contracts with those servicers or consultants.
 - b. If the institution is aware of any regulatory problems of the servicers or consultants, please provide a written description of those problems and copies of all relevant documentation.
20. **Distance Education:** For each of the last 4 award years, please provide the following:
- a. the percentage of the institution’s courses that were offered using the internet or other technologies that facilitate communication at a distance (collectively, the “**Distance Education Technologies**”) and the percentage that were correspondence courses (as defined by USED regulations);
 - b. a list of each course and program that was offered by the institution during the award year, indicating for each course whether it was offered by correspondence, Distance Education Technologies or on campus, or any combination; and
 - c. the percentage of the institution’s regular enrolled students enrolled in Distance Education Technologies courses and the percentage enrolled in correspondence courses.
21. **Schedule of Repayment Liabilities:** Please provide a schedule including the total amount of Title IV funds that the institution has been required to pay due to findings resulting from an:
- a. audit
 - b. program review
 - c. state agency review
 - d. guarantee agency review
 - e. other (describe)
22. Please provide a **YES/NO** answer to the following questions. **If the answer is “yes” to any of the questions below, please provide the pertinent facts and all relevant documentation:**
- a. Has the institution enrolled any student who does not have a high school degree since January 1, 2019?
 - b. Has the institution or an affiliate of the institution ever filed for relief in bankruptcy or had entered against it an order for relief in bankruptcy?

- c. Has the institution, or its chief executive officer pled guilty or *nolo contendere* to, or been found guilty of, a crime involving the acquisition, use, or expenditure of Title IV funds or been judicially determined to have committed fraud involving Title IV funds?
- d. Has any person who exercises substantial control over the institution, or any member of that person's family exercised substantial control over another higher education institution or third-party servicer that owes a liability for a violation of Title IV requirements?
- e. Has the institution:
 - i. employed in a capacity that involves the administration of Title IV programs or the receipt of Title IV funds an individual who has been convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving federal, state, or local government funds;
 - ii. contracted with a higher education institution or third-party servicer that has been terminated from any Title IV program for a reason involving the acquisition, use, or expenditure of federal, state, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving federal, state, or local government funds; or
 - iii. contracted with or employed any individual, agency, or organization that has been, or whose officers or employees have been convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of federal, state, or local government funds or administratively or judicially determined to have committed fraud or any other material violation of law involving federal, state, or local government funds?
- f. Has the institution been debarred or suspended or does cause exist for debarring or suspending the institution or any of its principals, affiliates, or its third-party servicers?
- g. Since January 1, 2019, has the institution offer any remedial academic programs that are not eligible for Title IV?

C. ACCREDITATION

- 1. **Accrediting Agencies:** List each accrediting agency that accredits the institution or any of its locations or educational programs.
- 2. **For each accrediting agency listed in response to item 1, please provide the following:**
 - a. **Location and Site Approvals:** Letters of accreditation since January 1, 2019 for each of the institution's locations and any and all other sites at which it offers all or a portion of an educational program.

- b. **Educational Program Approvals:** Letters of approval since January 1, 2019 for each educational program offered by the institution.
 - c. **Applications for Educational Program Approvals:** List of educational program that the institution has filed an application for accreditation agency approval but the educational program has not yet been approved.
 - d. **Annual Reports:** Copies of the 4 most recent annual reports to the accrediting agency, with transmittal letters.
 - e. **Self-Evaluation Report:** A copy of the most recent self-evaluation report.
 - f. **Site Visit Reports:** Copies of all accreditation body site visit reports since January 1, 2019, and the follow-up correspondence resolving any findings raised in the reports.
 - g. **Substantive Changes:** Copies of any submissions or notifications to the accrediting body since January 1, 2019 concerning any substantive changes in the institution or any of its locations or educational programs.
 - h. **Adverse Actions or Conditions:** If the institution at any time since January 1, 2019 has been the subject of a show cause proceeding or other adverse action, been placed on special status (*e.g.*, probation, warning, special monitoring, reporting), or had conditions placed upon its accreditation, please provide all relevant documentation for each such instance.
 - i. **Student Complaints:** If the institution is aware of any student complaints reported to accrediting agencies at any time since January 1, 2019 please provide copies of all relevant documentation including the original complaint and accrediting agency notification, the institution's response, and copies of any close-out documentation from the accrediting agency.
3. **Current Accreditation Applications:** A copy of each accreditation application currently in process, including items listed in response to item D.2(c).

D. CLEARY ACT

- 1. A copy of each annual security report the institution has provided to students, employees and USED in the last four fiscal years.
- 2. Please describe the preparation and awareness programs in respect of any of the items required to be disclosed in annual security reports the institution has provided to its students since January 1, 2019.
- 3. A copy of each Campus Safety and Security Survey completion certificate submitted to USED since January 1, 2021.

E. TITLE IX

- 1. Since January 1, 2015, have any claims been asserted that the institution, its administration or faculty have taken any action, or failed to take any action, that is in violation of Title IX (including the regulations promulgated thereunder)?

If so, please describe the claim, its present status and any resolution.

2. Has there been any governmental inquiry or investigation in respect of any item described in item E.2.? If so, please provide a copy of all applicable documents, including copy of action taken or proposed to be taken by any governmental authority.
3. A copy of the institution's Title IV policies in effect since January 1, 2019.

F. STATE AUTHORIZATION

1. **Exemptions and Agreements with the state agency where you have brick and mortar operations:**
 - a. a copy of each agreement between the institution and the state agency since January 1, 2019;
 - b. a copy of each exemption issued by the state agency to the institution since January 1, 2019.
2. **State educational agencies:** List each state educational agency that licenses, authorizes, or requires registration of the institution as a consequence of the institution offering any of its programs by Distance Education Technologies to residents of such state.
3. **For each state educational agency listed in response to Section F.1, please provide:**
 - a. **Approvals:** Copies of licensure, authorization, or registration since January 1, 2019 for the institution.
 - b. **Educational Program Approvals:** If not already evident on the state license, please provide copies of the state approval of each program offered by the institution by Distance Education Technologies since January 1, 2019.
 - c. **Applications for Educational Program Approvals:** List of educational programs that the institution has filed an application for state approval but the education programs has not yet been approved.
 - d. **Adverse actions:** Copies of all relevant documentation and correspondence if, since January 1, 2019, the institution has been subject to any adverse action, regulatory enforcement action, or other action or proceeding seeking to impose any financial liability or to in any way limit, suspend, or terminate the licensure of the institution or its ability in any way to conduct business.
4. **Subpoenas/Investigations:** Copies of all relevant documentation and correspondence if, since January 1, 2019, the institution has been the subject of any subpoena, request for information or documentation, or other investigation of any kind by a state or local department, agency, or official.
5. **Admissions Representative Approvals:** Copies of all admissions representative approvals since January 1, 2019.

6. **State Licensing Examinations:** Please provide a correct and complete list of all state agencies that have administered examinations or otherwise evaluated the qualifications of graduates of the institution to work in the fields for which they have received training.
7. **Student Complaints:** If the institution is aware of any student complaints reported to state agencies at any time since January 1, 2019 please provide copies of all relevant documentation including the original complaint and state agency notification, the institution's response, and copies of any close-out documentation from the state agency.
8. **State Financial Aid:** Please provide a copy of approvals for any state financial aid or grant program.
9. **Veterans Education:** Please provide a copy of approvals by designated state approving agency for veterans education and training programs.

G. MISCELLANEOUS REGULATORY AGENCIES AND REQUIREMENTS

1. **Lenders:**
 - a. Please provide a list of financial institutions with which the institution regularly does student financial aid business.
 - b. Please provide copies of all relevant documentation and correspondence if the institution has experienced any lender access problems since January 1, 2019.
 - c. Provide copies of all agreements with student loan lenders in effect at any time since January 1, 2019 (providing the time period for each contract or agreement). If the institution in the past had arrangements with any of those lenders, or any others lenders, that involve revenue-sharing or income-based repayment arrangements, provide copies and an explanation of these arrangements.
2. **Articulation, Consortia and Educational Service Agreements:** If the institution is or has been a party to consortia or articulation agreements or agreements respecting the performance of educational services for or by other institutions or entities, please provide copies of the agreements and a description of activities conducted under such agreements since January 1, 2019.

If the institution is aware of any regulatory problems with any institution that is a counterparty to a consortia or articulation agreement, please identify the identity, the problem, and copies of relevant documentation and correspondence in the institution's possession.
3. **Civil Rights:** If the institution has been a party to or the subject of any administrative proceeding, investigation, or judicial proceeding arising under or related to any federal civil rights since January 1, 2019, please identify each such instance and provide copies of relevant documentation and correspondence.

4. **Foreign Students:** Please provide the United States Citizenship and Immigration Services (USCIS) authorization to enroll international students, including copies of any I-17A or I-17B attachments and any supporting documentation submitted to USCIS (or a site visit contractor) and any subsequent updates to the petition, if any. In addition, please provide:
 - a. correspondence (including emails) from USCIS or United States Immigration and Customs Enforcement (ICE) concerning the school's status and participation in the Student Exchange and Visitor Information System (SEVIS), as well as the school's approval code;
 - b. identity of the Principal Designated School Official authorized to utilize SEVIS;
 - c. the number of international students currently enrolled in SEVIS;
 - d. recruiting agreements with agents or organizations of any kind for the recruitment of foreign students; and
 - e. agreements with other SEVIS approved schools pertaining to conditional enrollment or concurrent enrollment.
5. **Veterans Administration:** If applicable, please provide copies of approvals to participate in the Veterans Administration programs since January 1, 2019, including forms that list the VA-approved programs.
6. **Other Non-Title IV Programs:** Please provide a list and description of all non-Title IV governmental programs of student assistance (such as those administered by the U.S. Department of Defense, the U.S. Department of Labor or state employment services agencies) in which the institution or its students participate and, for each such program, provide (a) copies of approvals since January 1, 2019, (b) any program participation agreement and (c) a list of the amount of funds received through the program since January 1, 2019.
7. **Faculty Agreements:** Please provide copies of standard form agreements with faculty (including adjunct faculty), such as confidentiality agreements and employment agreements or offer letters.
8. **Form Documents:** Please provide copies of all documents, forms, applications and other informational or promotional materials provided to students or prospective students during the admissions and financial aid counseling processes (including a form of consent required by the TCPA).
9. **State Attorney General Inquiries:** All written inquiries, document requests, subpoenas or other correspondence from any state Attorney General, or other governmental agency or official, regarding the institution's policies and practices with respect to student loan program (whether Title IV or private) or disclosures to consumers, and the institution's responses thereto.

M&A or Closure?

Complex Considerations, Critical Choices

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Saint Joseph's University

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Counsel, Middle States Commission on Higher Education

Agenda

- Introduction
- Pre-Planning – Informing & Engaging Stakeholders
- Due Diligence & the Anatomy of a Deal
- The New Two-Step Change in Ownership Process
- The Closure & Teach-Out Option
- Accreditation Substantive Change Review
- Additional State Authorization & Accreditation Requirements & Post Transaction Considerations
- Audience Q&A and Closing Remarks

Trends

- Small, private colleges have experienced the most change
- Institutions with specialized focus have also experienced significant change
 - E.g., religious, healthcare, graduate-only
- Notable increase in strategic transactions since 2023
- Enrollment and financial issues were present for many years preceding the transaction/closure
- Few transactions are truly strategic - most have been out of necessity
- Closure is the typical result when transactions fail
- Clear patterns in certain states (e.g., NY, CA)
- State regulatory requirements can have a significant impact on the trajectory of a transaction and the options available to institutions

Pre-Planning & Stakeholder Engagement

- Timing: strategic vs. of necessity
- Stakeholders for conversations
- When to engage accrediting agencies
- The role of the GC

The Anatomy of a Deal

- Stages of an M&A Transaction
- Corporate & Regulatory Due Diligence
- Stakeholders
- Nondisclosure Considerations

The New Two-Step Process

- What changed and why?
- What is the new process?
- What are the challenges and alternatives?

Dept. of Education: Regs and Guidance

- Final Regulations, Change in Ownership and Change in Control
87 Fed. Reg. 65487 (Oct. 28, 2022), Effective July 1, 2023
- Updated Guidance and Procedures for Changes in Ownership
FSA General-22-70 (Sept. 15, 2022)
- Accreditation Group, Office of Post-Secondary Education,
Memorandum to Executive Directors and Presidents
(Feb. 2, 2023)

What has changed?

- Previously, the Department had allowed mergers of two institutions to occur without first treating them as a change of ownership ("CIO"), resulting in a one-step process where an institution simultaneously changed ownership and became an additional location of the surviving institution.
- The Department has revised its approach and determined that these transactions are CIOs requiring (1) a review of the CIO and (2) only after such review and approval, a consolidation of the two OPEIDs.

Change of Ownership - § 600.31

- "A change of ownership that results in a change of control includes any change by which a person who has or thereby acquires an ownership interest in the entity that owns the institution or the parent of that entity, **acquires or loses the ability to control the institution.**"
- 34 CFR § 600.31(c) contains examples of transactions representing CIOs
- Institutions may seek an **Abbreviated Pre-Acquisition Review**
 - The Department will determine if the new owner of the institution will be required to provide financial protection in the form of an irrevocable letter of credit or cash escrow equal to 10-25% of the acquired institution's Title IV distribution.

The New Reality: Step #1

Step #1: The target institution must first receive approval under the Department's change of ownership procedures.

- To maintain program eligibility during the transaction process, provide 90-day notice to the Department of the intended CIO (notice also must be provided to enrolled and prospective students).
- Within 10 business days of the CIO, submit a materially complete application to the Department for approval of the CIO.
 - Audited financial statements of both acquirer and institution for past 2 years
 - State authorizing agency approval of CIO
 - Institutional accrediting body approval of CIO
 - Audited Same day balance (due end of the month after the month in which transaction closes)
- Target institution's Title IV participation terminates, and Department issues TPPPA, which, subject to providing certain information to Department, is extended until Department approves the CIO.
- Department approves the CIO and issues a PPPA to the target institution.
 - **Acquiring institution must guarantee the Title IV obligations** of the target (or put up a letter of credit)

The New Reality: Step #2

Step #2: If approved, the acquiring institution must then apply to add the targeting institution as an additional location or merge if co-located.

- Submit an application to the Department for approval of the acquisition.
- Once approved, the acquiring institution will continue as an approved institution and the target institution will cease to exist in the eyes of the Department.

The New Reality: A Two-Step Process

“Until both steps are complete, Title IV funds continue to be processed separately for each institution. Separate state and accrediting agency approvals must be maintained during this period, and additional state and accrediting agency approvals are required for the second step.”

- The Department has also suggested that a closure is an option, but requires teach-outs and risks borrower defense claims and paying loan defaults from non-continuing students.

Transaction Timeline

Exploration to Deal Closing	(continue contingency planning)	
<ul style="list-style-type: none"> • Exploration (1-2 months) • Negotiation & Due Diligence (3-4 months) • Sign Definitive Agreement • Consultation with Accreditor & State Licensing Agency (Review may take 6-12 months) 	Step #1 (Target Institution)	(if approved...)
	<ul style="list-style-type: none"> • Notice of CIO to ED (90 days) • “Materially Complete Application” to ED (10 days!) • ED issues TPPPA; Acquiring Institution guarantees Title IV obligations • Accreditor must approve “entire” transaction • ED begins review (Sometimes takes 12-18 months) • ED issues PPPA 	Step #2 (Acquiring Institution)
(10-18 months)	(12-18 months)	(6-12 months)
		<ul style="list-style-type: none"> • May now apply for Target to become an additional location • Once approved: Acquiring Institution continues, Target ceases to exist

The Closure & Teach-Out Option

- When does a transaction involve a closure?
- When are teach-outs encouraged or required?
- How do teach-outs work?

Teach-Outs

- **Definitions - 34 C.F.R. § 602.3 (referencing 34 C.F.R. § 600.2 - Definitions)**
 - *Teach-out*. A process during which a program, institution, or institutional location that provides 100 percent of at least one program engages in an orderly closure or when, following the closure of an institution or campus, another institution provides an opportunity for the students of the closed school to complete their program, regardless of their academic progress at the time of closure.
 - *Teach-out agreement*. A written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study.
 - *Teach-out plan*. A written plan developed by an institution that provides for the equitable treatment of students.
- **When is a teach-out required? 34 C.F.R. § 602.24(c)**
 - Heightened Cash Monitoring
 - Withdrawal of accreditation
 - Closure
 - Revocation of state licensure
 - Other discretionary reasons

Accreditation Substantive Change Review

- Governed by Federal Regulations
- Each accreditor has its own process
- Might involve multiple accrediting agencies

Additional Requirements

- State Authorization
- Timing of Accreditation & Department of Education Review
- Post-transaction Accreditation Review?
- Other Regulatory or Accreditation Processes?
- Final Recommendations?



Questions?

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M&A or Closure? Complex Considerations, Critical Choices

April 29, 2024

If you are an attorney applying for Continuing Legal Education credits (CLEs), you must sign this attendance record to verify your attendance. Please complete and return this form no later than Friday, May 3 to the CLE Credit Submission Portal (www.nacua.org/submitCLE).

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M&A or Closure? Complex Considerations, Critical Choices

April 29, 2024

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Amanda McLean

Amanda McLean
Meetings and Events Coordinator

M&A or Closure? Complex Considerations, Critical Choices

April 29, 2024

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