

August 26, 2021

Dr. Michelle Asha Cooper
Acting Assistant Secretary for Postsecondary Education
and Deputy Assistant Secretary for Higher Education Programs
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Negotiated Rulemaking Protocols [Docket ID ED-2021-OPE-0077]

Dear Dr. Cooper,

We write in response to the August 10, 2021 Federal Register notice regarding nominations and the schedule of committee meetings for negotiated rulemaking [Docket ID ED–2021–OPE–0077] to provide recommendations for protocols guiding these important upcoming negotiation sessions. Although some protocols from previous negotiated rulemaking processes remain useful, we see unique needs in an all-virtual environment that demand attention to ensure equitable opportunity for input among negotiators, guided by the ultimate goal of attaining consensus on essential regulations to protect the interests of students, their families, and taxpayers who invest in financial aid and other programs. We outline a set of recommended protocols below.

Addition of Committee Members and Topics. When negotiations begin, any seated committee member should have the opportunity to propose the addition of a committee member, subject to consensus agreement among all other seated negotiators. In any case that a negotiator is added, the nominating committee member should immediately provide contact information to the facilitator to enable the newly appointed negotiator to join the virtual session.

Similarly, at the outset of negotiations, any negotiator should have the opportunity to propose additional topics for consideration during the three work periods, subject to consensus agreement among all other seated negotiators (including, if applicable, any newly appointed committee members).

Advance Materials to Prepare Committee Members. After selection, negotiators should receive advance materials from the Department *at least 7 business days* before the beginning of each negotiation week. These materials should include relevant data, Department and independent research and policy reports, and prospective regulatory language to serve as starting points for negotiations. We stand ready to assist in providing advance materials on topics on the agenda for this table of negotiations.

Participation of Alternates. The Department has indicated alternate negotiators may participate “for the purpose of determining consensus in the absence of the primary negotiator.” We urge the Department to provide guidance to alternate negotiators that they may fully participate in all

negotiation discussions. Their only restriction should be on votes to determine consensus, when alternates would vote only in the absence of primary negotiators.

Public Commentary. Previous protocols have restricted public comment by negotiators: “Members will refrain from characterizing the views, motives, and interests of other members during contact with the media, the investment community, other organizations outside the community of interest represented by the member, and to the general public through social media.” This requirement should remain in place.

However, organizations represented by individuals should be given as much leeway to offer public comments as possible. In the case that consensus is reached on a given topic, previous protocols have articulated a restriction: “If the committee reaches consensus on regulations that have been grouped together by the Department, the Department will use this consensus-based language in its proposed regulations, and committee members *and the organizations whom they represent* will refrain from commenting negatively on the consensus-based regulatory language” (emphasis added). In the past, this language has disadvantaged student and consumer advocacy organizations with participating negotiators. Unlike institutions, which are numerous and not constrained by the participation of one person from their membership organization, student and consumer groups are much less numerous and thus effectively silenced by this protocol. To maintain the proper balance of public comments on the final regulation, if consensus is achieved, we ask that you clarify as narrow a restriction on public comment as possible. This will ensure a diversity of perspectives weigh in on the agreed-upon proposal.

In addition, we request clarification on whether this restriction would apply to members of the Prison Education Program Subcommittee. Mindful that they will not be authorized to make decisions for the full committee, may members of the subcommittee, and organizations they represent, comment on other topics and proposals outside of the subcommittee’s scope?

Scheduling. As our nation continues to confront the Covid-19 pandemic, we respect the need to conduct negotiated rulemaking via video conference. We also note, however, the physical and mental taxation of extended periods conducting meetings and work in a virtual environment. Therefore, we request the Department set aside regular break times, in addition to a meal break and with at least one extended break per day of negotiations. These breaks will give time for negotiators to attend to personal needs—which may include caretaking for children or other family members—and to refresh from extended periods logged into negotiation meetings.

We also note that negotiators should be drawn from across the country, meaning they will be spread across at least three time zones. Accordingly, we ask that negotiation periods each day be mindful of working hours for committee members outside the Eastern Time Zone.

Finally, the Department should not schedule subcommittee meetings at the same time as other subcommittee, working group, or committee meetings.

Data Requests. In the event a negotiator submits a data request to the Department to clarify implications of potential actions or deepen understanding of a topic, the Department should share that data request with the entire committee. In addition, the Department should respond by the next committee work period by either providing the requested data, stating if more time is needed and a target date to provide the data, or if it cannot or will not provide all or a portion of the data. Should the Department be unable to provide requested data, it should inform the committee and explain the reasons it cannot or will not do so.

Transcript Availability. The Department has indicated its intention to post video recordings and transcripts of committee discussions via a website established for sharing 2021 rulemaking materials. We request the Department post recordings and transcripts from all public sessions within two weeks after their respective dates.

Thank you for your consideration of these recommendations for protocols and negotiator accommodations. We believe attending to these recommendations and reflecting them in the Department's approach to facilitating negotiated rulemaking will help ensure the best outcomes for students, borrowers, and the general public. Please let us know how to be of any further support in this critical process for the future of higher education.

Sincerely,

Americans for Financial Reform Education Fund
Center for American Progress
National Association for College Admission Counseling
National Consumer Law Center (on behalf of its low-income clients)
New America Higher Education Program
The Education Trust
The Institute for College Access & Success
Veterans Education Success
Young Invincibles
Stephanie Hall, The Century Foundation
David Halperin, Attorney