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Macias, Wendy

From: [redacted]
Sent: Tuesday, June 23, 2009 5:07 PM
To: negreg09
Subject: Shared file: Newman_Exhibits.pdf

Comments on negotiated rulemaking regulations to maintain or improve program integrity in the Title IV, HEA programs, relating to the topic of incentive compensation paid by institutions to persons or entities engaged in student recruiting or admission activities.
NEWMAN EXHIBITS submitted by [redacted]

Newman_Exhibits.pdf
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[redacted]

*also admitted in Louisiana

Fax: [redacted]
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June 23, 2009

By e-mail: negreg09@ed.gov; Wendy.Macias@ed.gov

Ms. Wendy Macias
U.S. Department of Education
Office of Post Secondary Education
1990 K Street, NW., Room 8017
Washington, DC 20006

Mr. Daniel T. Madzelan,
Director, Forecasting and Policy Analysis
U.S. Department of Education

Re: Negotiated Rulemaking Committees; Establishment
Office of Postsecondary Education, Department of Education.
ACTION: Establishment of negotiated rulemaking committees; and notice of public hearings.

Dear Ms. Macias and Mr. Madzelan:

Attached are my comments with respect to the proposed regulations to maintain or improve program integrity in the Title IV, HEA programs, relating to the topic of incentive compensation paid by institutions to persons or entities engaged in student recruiting or admission activities.

The comments consist of four (4) parts, each of which is a separate attachment, as follows:

(1) Profiteering & Piracy by the Proprietary Schools (17 pages)
(2) Timeline - Recruiter Compensation (4 pages)
(3) Newman Exhibits (309 pages)
(4) ITT criminal investigation (2 pages)

The Newman Exhibits are too long to be emailed or faxed. Therefore, I have uploaded those documents, and the link to the documents has been forwarded to the email addresses shown above for your immediate viewing and downloading.

I respectfully request an extension to provide supplemental document relating to the ITT criminal investigation, item no. 4, above. My request for extension is also made on behalf of [redacted], Andrews Law Group, Tampa, Florida and [redacted] Attorney at Law, Jackson, Mississippi. Both lawyers represent persons who have information that may be material to the proposed rulemaking.

Respectfully yours,

[redacted]

United States Department of Education
Office of Post Secondary Education

Comments on Negotiated Rulemaking

Profiteering & Piracy by the Proprietary Schools

A. INTRODUCTION

Proprietary schools that compensate their recruiters based *directly or indirectly* on the number of students they enroll are prohibited from receiving any federal student financial aid. 20 U.S.C. § 1094(a)(20).

1. THE U.S. DEPARTMENT OF EDUCATION ADOPTED A REGULATION THAT DIRECTLY CONFLICTS WITH THE HIGHER EDUCATION ACT

In 2001, the U.S. House of Representatives passed the "Internet Equity and Education Act of 2001," a bill amending the recruiter compensation prohibition in the Higher Education Act. The bill inserted a revenue-based "salary" exemption and other exceptions to the prohibition against paying incentive compensation to recruiters at proprietary schools. H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001). The amendment permitted third parties and employees to participate in the revenues from an enrollment, limiting the ban to compensation "based directly on success" in securing enrollments [eliminating the word "indirectly" from the existing law]. The House bill passed on October 10, 2001. The companion Senate bill – S. 1445, 107TH CONG., 1ST SESS. § 484C (2001) – never came up for a vote. The amendment failed when it was discovered that the Career College Association, and ITT Educational Services, Inc., committed in the passage of the H.R. 1992.

The U.S. Department of Education adopted regulations in November 2002 allowing the very exemptions that Congress refused to enact when it considered the Internet Equity and Education Act of 2001. See, 34 C.F.R. § 668.14(B)(22)(ii)(A)(Nov. 1, 2002). The Agency explained in the Federal Register that the reason for the so-called "safe harbors" was because the Department of Education considered the incentive compensation statute to be outmoded.

> incentive payments are now just one of several remedies in place that prevent schools from unscrupulously recruiting unqualified students.[1]

Under the Higher Education Act, proprietary schools are strictly prohibited from paying recruiters "directly or indirectly" based on the number

[1] 67 FEDERAL REGISTER 67054 (NOV. 1, 2002).

of students they enroll. The U.S. Department of Education circumvented Congress on the incentive compensation issue. The U.S. Department of Education has effectively legalized the conduct directly prohibited in the Higher Education Act.

2. THE U.S. DEPARTMENT OF EDUCATION ANNOUNCED A POLICY OF NON-ENFORCEMENT OF THE RECRUITER COMPENSATION STATUTE

In a memorandum dated October 30, 2002, the U.S. Department of Education announced a new policy "to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department." The U.S. Department of Justice has taken the opposite position. The Agency's practice, as reflected in the regulation and policy statement, is that proprietary schools are without liability to repay the defaulted student loans and Pell grants received while their recruiters are being compensated in direct violation of the Higher Education Act.

B. HISTORY

The HEA was passed in 1964. By 1975, Congress launched its first investigation into wide scale fraud in the Title IV, HEA Programs by the proprietary school industry. The Senate conducted a second, two-year investigation of the proprietary school industry beginning in 1990. "The Subcommittee investigation uncovered overwhelming evidence that the GSLP, particularly as it relates to proprietary schools, is riddled with fraud, waste, and abuse, and is plagued by substantial mismanagement and incompetence."

See, 102 S. Rpt. 58 (1991), Abuses In Federal Student Aid Programs ("Senator [redacted] Report").

The Senate Permanent Subcommittee on Investigations held a series of hearings in 1990 in response to widespread fraud, waste and abuse in the student financial aid programs committed by the proprietary school industry. The hearings were conducted pursuant to Senate Resolution 66, which authorized the Subcommittee to examine "the existence of possible fraud, mismanagement, unethical practices, waste, conflicts of interest, and the improper expenditure of Government funds in connection with transactions, contracts, and other Federal activities." Report, *id.* The U.S. General Accounting Office ("GAO") and the Office of Management and Budget "identified

Federal student loan programs as being among those government efforts they believed to be 'high risk' in terms of their vulnerability to waste, fraud, and abuse." *Id.*

Senator [redacted] (D-GA) presented an indictment against the for-profit, so-called "education" companies, for systematically victimizing the intended beneficiaries of the Higher Education Act Title IV financial aid programs in Senate Report 102-58. The students were being saddled with huge student loan liabilities that they could not possibly repay with the substandard - and overpriced -training provided by the for-profit schools.

The Subcommittee found that proprietary schools were victimizing the very students who were supposed to benefit:

"Fraud and abuse in the GSLP have had perhaps the most profound and disastrous effect on the intended beneficiaries of the Federal student aid the students. The Subcommittee heard testimony that unscrupulous and dishonest school operators victimize students, leaving them with huge debts and little or no education.

Senator Roth expressed his concern for the students:

Rather than allowing these young people to improve themselves, these schools actually leave (them) in a worse position than when they started. Because of the deceptive practices of such schools, these students have to pay for an education they never received. Lacking proper training, (they) are not able to get jobs by which guaranteed loans and thus suffer the added humiliation of having their credit ratings destroyed in the process." *Id.*

The incentive compensation prohibition was added to the HEA in 1992 as a result of high default rates on student loans. H.Rep. 447, 102nd Cong., 2d Sess., reprinted in 1992 *U.S.C.C.A.N.* 334, 343. The legislative history plainly explains how the Government is effected:

. . . H.R. 3553 makes major changes to enhance the integrity of the student financial aid programs. The student aid programs have been tarnished by reports detailing the exploitation of students by unscrupulous schools, growing default costs, schools offering overpriced and inferior educational programs and schools and lenders with unacceptable default rates. The easy assumption can no longer be made that everyone who assumes the title of "educator" offers a quality educational program or puts the interests of students uppermost. H.R. 3553 includes nearly 100 provisions to strengthen controls on schools and colleges to end waste and abuse and to minimize loan defaults. <u>These provisions include prohibiting the use of commissioned sales representatives and recruiters. . .</u> (emphasis added).

<u>C. Background of Recruiter Compensation Prohibition in the Higher Education Act</u>

The Subcommittee concluded that "[o]ne of the most widely abused areas of those observed during the Subcommittee's investigation lies in admissions and recruitment practices." See, Abuses In Federal Student Aid Programs, 102 S. Rpt. 58 (1991) (hereafter [redacted] Report).

"The Subcommittee uncovered overwhelming evidence that the GSLP, particularly as it relates to proprietary schools, is riddled with fraud, waste, and abuse, and is plagued by substantial mismanagement and incompetence. Despite the acknowledged contributions of the well-intended, competent, and honest individuals and institutions comprising the large majority of the GSLP participants, unscrupulous, inept, and dishonest elements among them have flourished throughout the 1980s. The latter have done so by exploiting both the ready availability of billions of dollars of guaranteed student loans and the weak and inattentive system responsible for them, leaving hundreds of thousands of students with little or no training, no jobs, and significant debts they cannot possibly repay. While those responsible have reaped huge profits, the American taxpayer has been left to pick up the tab for the billions of dollars in attendant losses."

Congress determined that the intended beneficiaries of the Higher Education Act financial aid programs — the students — were being left with huge debts they could not repay as the result of unscrupulous recruiting practices. Since the defaulted student loans are debts to the Government, the Bankruptcy Code does not permit their discharge. The long term social ills created by the student debt burdens was considered of critical importance to the Senate Subcommittee:

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Fraud and abuse in the GSLP have had perhaps the most profound and disastrous effect on the intended beneficiaries of the Federal student aid the students. The Subcommittee heard testimony that unscrupulous and dishonest school operators victimize students, leaving them with huge debts and little or no education.

[redacted] Report.

B. Statutory Language Against Incentive Compensation is part of the Program Participation Agreements

The Higher Education Act requires proprietary schools that receive Title IV funding to execute the Program Participation Agreement. The language required to be included in the Program Participation Agreement is set forth in the statute. The Higher Education Act, 20 U.S.C. 1094(a)(20), requires for-profit schools to comply with the following condition in order to receive Title IV funds:

"1094. Program participation agreements

(a) Required for programs of assistance; contents. In order to be an eligible institution for the purposes of any program authorized under this title, an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall ... enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following:

* * *

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance."

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C. Change in text from the Original Regulation

The original regulation, adopted in 1994, made no elaboration whatsoever from the incentive compensation statute. Section 34 C.F.R. § 668.14 (b)(22) (April 29, 1994) provided in relevant part:

"(b) By entering into a program participation agreement, an institution agrees that —
....
(22) It will not provide, nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly in securing enrollments...."

The modified regulation, adopted eight (8) years later, in 2002 while the schools were under suit, provides thirteen (13) exceptions to the language in the statute. Section 34 C.F.R. § 668.14(b) (22) (ii) (A) (Nov. 1, 2002) provides in relevant part:

"(22)

(i) It will not provide any commission, bonus, or other incentive payment based directly or indirectly upon success in securing enrollments or financial aid to any person or entity engaged in any student recruiting or admission activities or in making decisions regarding the awarding of title IV, HEA program funds, except that this limitation does not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive title IV, HEA program funds.

(ii) Activities and arrangements that an institution may carry out without violating the provisions of paragraph (b)(22)(i) of this section include, but are not limited to:

(A) The payment of fixed compensation, such as a fixed annual salary or a fixed hourly wage, as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. For this purpose, an increase in fixed compensation resulting from a cost of living increase that is paid to all or substantially all full-time employees is not considered an adjustment.

(B) Compensation to recruiters based upon their recruitment of students who enroll only in programs that are not eligible for title IV, HEA program funds.

(C) Compensation to recruiters who arrange contracts between the institution and an employer under which the employer's employees enroll in the institution, and the employer pays, directly or by reimbursement, 50 percent or more of the tuition and fees charged to its employees; provided that the compensation is not based upon the number of employees who enroll in the institution, or the revenue they generate, and the recruiters have no contact with the employees.

(D) Compensation paid as part of a profit-sharing or bonus plan, as long as those payments are substantially the same amount or the same percentage of salary or wages, and made to all or substantially all of the institution's full-time professional and administrative staff. Such payments can be limited to all, or substantially all of the full-time employees at one or more organizational level at the institution, except that an organizational level may not consist predominantly of recruiters, admissions staff, or financial aid staff.

(E) Compensation that is based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter. For this purpose, successful completion of an academic year means that the student has earned at least 24 semester or trimester credit hours or 36 quarter credit hours, or has successfully completed at least 900 clock hours of instruction at the institution.

(F) Compensation paid to employees who perform clerical "pre-enrollment" activities, such as answering telephone calls, referring inquiries, or distributing institutional materials.

(G) Compensation to managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities, or the awarding of title IV, HEA program funds.

(H) The awarding of token gifts to the institution's students or alumni, provided that the gifts are not in the form of money, no more than one gift is provided annually to an individual, and the cost of the gift is not more than $100.

(I) Profit distributions proportionately based upon an individual's ownership interest in the institution.

(J) Compensation paid for Internet-based recruitment and admission activities that provide information about the institution to prospective students, refer prospective students to the institution, or permit prospective students to apply for admission on-line.

(K) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, provided that none of the services involve recruiting or admission activities, or the awarding of title IV, HEA program funds."

D. The Regulation Violates the Appropriations Clause

The incentive compensation restriction is an explicit limitations by Congress on Higher Education Act Title IV program funds. *OPM v. Richmond*, 496 U.S. 414 (1990). It is basic constitution law that the Appropriations Clause gives Congress control over all federal spending. "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." Art. I, Sec. 9, Cl. 7. The constitutional limitation is absolute, and forbids payment of Government funds contrary to the conditions Congress attaches when it appropriates the funds. The Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive Department ... ." *Cincinnati Soap Co. v. United States*, [redacted] Congress has the exclusive power to control all federal spending. No executive department may exercise those functions in the absence of Congressional authorization. *OPM v. Richmond*, [redacted] "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.*, at 424. *Richmond* stands for the proposition Government funds may not be paid "contrary to a statutory appropriation." *Burnside-Ott Aviation Training Center, Inc. v. United States*, 895 F.2d 1574 (Fed. Cir. 1993). *See generally, "GAO Red Book,"* Principles of Federal Appropriations Law, U.S. Government Printing Office (1982), for authoritative guidance on the subject of appropriations. "The oft-quoted observation in *Rock Island, A.& L.R. Co. v. United States*, [redacted] that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the condition defined by Congress for charging the public treasury." *Federal Crop Insurance Corp. v. Merrill*, 332

U.S. 380 (1947). "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Heckler v. Community Health Services of Crawford County, Inc.*, [redacted] "[P]ublic funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond, id.*, at 428.

The U.S. Department of Education overstepped its constitutional authority with this regulation. Executive agencies, functioning as the "fourth branch of the Government," may not subvert the statutes under which they operate. The Department of Education acted legislatively, and thus unconstitutionally, by exceeding the parameters of the Higher Education Act, 20 U.S.C. § 1094(a)(20). *See, INS v. Chadha*, [redacted]1983).

A regulation that is in conflict with a statute "is a mere nullity." *Manhattan Gen. Equip. Co. v. Commissioner*, [redacted] "A regulation may not amend a statute." *Cal. Cosmetology Coalition v. Riley*, 110 [redacted]

Congress very directly addressed the precise changes contained in the 2002 regulation, when it considered amending 20 U.S.C. § 1094(a)(20) only one year earlier, in 2001. Congress previously rejected the language adopted into the regulation. *Chevron U.S.A. Inv. v. Natural Resources Defense Council, Inc.*, [redacted]. The U.S. Department of Education adopted the very exceptions that Congress refused to add to the statute prohibiting the payment of incentives compensation to recruiters at proprietary schools.

Ernst & Ernst v. Hochfelder, [redacted] explains the limitations on agency rulemaking authority:

The rulemaking authority granted to an administrative agency charged with administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Dixon v. United States*, [redacted], *quoting Manhattan General Equipment Co. v. Commissioner*, [redacted]

The rulemaking authority of federal agencies is confined to the parameters of federal statutes.

Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

Id., at 213-214

E. Regulation is Time Barred under the General Education Provisions Act

The regulation is void under the General Education Provisions Act. Under the General Education Provisions Act ("GEPA"), 20 U.S.C. § 1232(a), the Department of Education must submit a schedule for promulgating regulations "[n]ot later than 60 days after the date of enactment of any Act, or any portion of any Act, affecting the administration of any applicable program.... Such schedule shall provide that all such final regulations shall be promulgated within 360 days after the date of enactment of such Act or portion of such Act." The 2002 regulation was adopted long after the statutory time bar that the U.S. Department of Education is allowed to promulgate regulations following passage a statute under the HEA. The U.S. Department of Education was time barred by more than eight years under the timetable for adopting regulations set forth in § 1232, which allows a maximum of 360 days after Congress enacts a statute under the HEA to adopt new regulations.

F. Department of Education Has Historically Been Unable - And Unwilling - to Regulate For-Profit schools

The Senator [redacted] Report concluded that the Department of Education was simply incapable of overseeing the vast for-profit education industry that was systematically bilking the Title IV, HEA the student financial aid programs.[2] "[T]he system is so fundamentally rotten that it simply does not and perhaps cannot keep up with uncovering all the bad actors." Senator [redacted] Report at 12. "[A] virtually complete breakdown in effective regulation and oversight had opened the door for fraud, abuse, and other serious problems at every level." Senator Nunn Report.

G. THE U.S. DEPARTMENT OF EDUCATION INTERFERED IN MAJOR LAWSUITS WHEN IT CHANGED REGULATION TO PROTECT PROPRIETARY SCHOOLS

Federal agencies, other than the Department of Justice, are statutorily prohibited from compromising civil fraud claims. As a matter of law, government contracting officials do not have the authority to release or compromise claims under the False Claims Act. Federal agencies are

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[2] Senator [redacted] remarked that the U.S. Department of Education was incapable of policing the schools. As a result, most of the Government funds were being used to pay off defaulted loans.

"In short, we have now reached the sad point where program funds are primarily being used not to subsidize education and training and skills for today's students, but rather to pay off bad loans from the past....
With the above in mind, let me comment on the one factor that has surfaced at every level of these programs and, as such, throughout our entire investigation, and that is the role of the Department of Education itself. In brief, it is not an exaggeration to say that we have heard no testimony or seen any documents that suggest the Department has done even an adequate job in managing and overseeing its student loan program responsibilities. Moreover, criticism of the Department's efforts in this area is not unique to this investigation. Way back in 1975, this same Subcommittee heard testimony on student loan programs that was disturbingly similar, although in much smaller volumes back then, to that which we have heard in these hearings. The General Accounting Office over a period of many years has also repeatedly brought many of these problems to the Department's attention. Despite all of that, the programs failures seem only to have gotten worse, as default volume and cost to taxpayers have skyrocketed."

Abuses In Federal Student Aid Programs: Hearing Before the Permanent Committee On Investigations of the Senate Committee On Governmental Affairs, S. Hrg. 101-659, Pt. 4 at 4.

prohibited from compromising civil fraud lawsuits. Title 31 U.S.C. § 3711(b)(1) provides in relevant part:

"The head of an executive, judicial, or legislative agency may not act . . . on a claim that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim...."

There were lawsuits alleging major violations of the recruiter compensation restrictions in several different circuits at the time the U.S. Department of Education adopted the safe harbor provisions into the regulation. The U.S. Department of Justice was spent major resources to prevent the decision in the ITT Educational Services, Inc. case from being applied in other circuits, while the actions of the Department of Education was compromising those very lawsuits. The Solicitor General filed an amicus brief in the U.S. Court of Appeals for the Ninth Circuit on January 10, 2005 in a case involving the identical issue of whether violation of the recruiter compensation ban by a proprietary school is actionable under the False Claims Act in No. 04-16247, entitled *United States of America ex rel. Julie Albertson and Mary Hendow v. University of Phoenix.* The Government argued that the Fifth Circuit decision is incorrect. In addition, the U.S. Department of Justice appeared for oral argument on January 14, 2005 in <u>*United States of America ex rel. Jeffrey E. Main v. Oakland City University,*</u> [redacted] in the U.S. District Court for the Southern District of Indiana, and again argued that Fifth Circuit decision in ITT is incorrect in response to defendant's motion to dismiss the False Claims Act suit brought against another proprietary school on the basis of its violations of the recruiter compensation provision in the Higher Education.

The University of Phoenix case involved a *qui tam* suit against a company that was receiving over one-half billion dollars annually in Title IV funds. *See* Second Amended Compl, ¶ 1. The relators, [redacted] and [redacted] (enrollment counselors at UOP), alleged that UOP intentionally and knowingly violated the incentive compensation ban while falsely certifying each year that it is in compliance with the requirement.

The Education America case involved a *qui tam* suit against a company that made its recruiters sign employment contracts that required them to meet minimum enrollment quotas in consideration of their so-called "salary." [redacted] was employed as a recruiter at the Houston, Texas campus of Education America, Inc. [redacted] entered into Education America, Inc.'s employment contract on the company's standard which required him to enroll a minimum number of students. [redacted] was eventually terminated, as were many other former recruiters of Education America, based on his failure to enroll the minimum number of students dictated by the company. ¶¶ 15; 35-36; 49 Amended Complaint.

The U.S. Department of Justice filed a statement of interest in the district court in support of relators' FCA causes of action against ITT Educational Services, Inc., on December 13, 2002, where the government asserted that the United States had lost *at least $400 million* in defaulted student loans, without taking into account the Pell grant losses!

H. Official Policy Not to Enforce Statute

On October 30, 2002, Deputy Secretary of Education William D. Hansen issued a memorandum stating that it was the policy of the U.S. Department of Education to view violations of the incentive compensation prohibition as causing no financial loss to the United States.

"FROM: William D. Hansen
Deputy Secretary

SUBJECT: Enforcement policy for violations of incentive compensation prohibition by institutions participating in student aid programs

* * *

The statutory prohibition was designed to reduce the financial incentive for an institution to enroll students by misrepresenting the quality of the institution, or the ability of the student to benefit from its educational programs. The Department has in the past measured the damages resulting from a violation as the total amount of student aid provided to each improperly recruited student. After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department. Improper recruiting does not render a student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department

should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.
* * *
cc: * * *

Sally L. Stroup
Assistant Secretary, Office of Postsecondary Education"

The Department of Education acknowledged in a civil settlement with ITT Educational Services that it had not authority with respect to the False Claims Act lawsuit. The U.S. Department of Education entered into a settlement agreement with ITT, and fined the company $230,000 relating to the recruiter compensation violations. The agreement expressly states, however, that the settlement has no effect on the False Claims Act lawsuit.

"G. The Department does not have authority to, and this Agreement does not, waive, compromise, restrict or settle any past, present or future violations by ITT, its trustees, officers or employees of the criminal laws of the United States or any action initiated against ITT, its trustees, officers or employees for civil fraud against the United States under 31 U.S.C. §§ 3729-33."

When the Senate Subcommittee's investigated the role of the U.S. Department of Education, and its administration and oversight of the Title IV, HEA Programs, it concluded that the Agency had become a partner with the industry it was supposed to regulate, abandoning its responsibility to protect the students and the government. The Subcommittee determined that the Department was incapable of carrying out its GSLP responsibilities. The Subcommittee concluded there was "mismanagement and ineptitude at every level in the Department's execution of it GSLP responsibilities." "[T]he Subcommittee found that through gross mismanagement, ineptitude, and neglect in carrying out its regulatory and oversight functions, the Department of Education had all but abdicated its responsibility to the students it was supposed to service and the taxpayers whose interest it is charged with protecting." Moreover, a similar investigation conducted in 1975 revealed that the Department of Education had allowed known problems to proliferate.

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Abuses In Federal Student Aid Programs: Hearing Before the Permanent Committee On Investigations of the Senate Comm"Hearings") S. Hrg. 101-659, Pt. 4 at 4.

I. Triad System of Regulation is unsuited to For-Profit Schools

Proprietary schools are governed by a "triad" system of regulation. Under this system, schools are licensed by the states. The states, however, lack incentive to police the schools because "there is no State money involved at all." Report, 102 S. Rpt. 58. Second, private accrediting agencies, who charge fees to member schools, provide accreditation to proprietary schools — "accreditation can be bought.... accreditors clearly view themselves as the schools advocates and not as protectors of the students or the federal government's interests." *Id.* Finally, the U.S. Department of Education pays the full cost of education, yet has no authority whatsoever on the quality of education. The Subcommittee referred to this system as a "mismatched self-regulatory concept," designed for two- and four-year non-profit colleges and universities, which is completely incapable of governing the profit driven schemes practiced by proprietary schools.

"Witnesses testified that the accreditation system is simply not suited to the structure and operations of proprietary schools. The accreditation approach is based almost entirely on principles and assumptions developed over the course of many years of traditional two- and four-year colleges and universities. For-profit, business considerations in proprietary school operations were neither part of this traditional approach, nor was it contemplated that they would be included.

The traditional approach assumes that those involved are educators, whose basic concern is not profit, but the welfare of their students, and who can be counted upon to be honest and truthful in all facets of accreditation. In does not recognize certain significant differences between colleges and universities, and proprietary trade schools. **For example, colleges and universities do not employ commissioned sales representatives, while proprietary schools commonly use such personnel in their marketing efforts... ."**

J. Obstruction of Justice by the Career College Association

The Career College Association, the trade association representing the for-profit education industry, presented false testimony to the U.S. House of Representatives in order to obtain passage 107 H.R. 1992 in 2001. H.R. 1992 sought to amend 20 U.S.C. 1094(a)(22). Passage of said bill would have served to exonerate ITT Educational Services, Inc. - and other members companies- from massive liability in lawsuits then pending seeking the recovery of $500 million in federal student financial aid paid by the U.S. Government. The November 26, 2001 letter from U.S. Congresswoman [redacted] to Senator Edward Kennedy pointed out the misconduct that had occurred by concealment of the existence of these lawsuits in the testimony given before Congress. Congresswoman Mink wrote: "HR 1992 passed the House on October 10, 2001. I was the principal opponent for all the reasons stated in the debate. [redacted] letter to me reveals certain very disturbing matters that compromise the enactment of HR 1992 at this time." There should be no reward for lying to Congress.

There is absolutely no mention in the Career College Association's testimony of these massive lawsuits against its membership. "I am appearing today on behalf of the Career College Association (CCA) and their 963 members."

"The 963 members of the Career College Association enthusiastically support the concepts in HR 1992. We have included with this testimony suggested report language that <u>we believe will help to further clarify the intent of the incentive compensation provision</u>."

Testimony of Omer Waddles, "H.R. 1992, the Internet Equity and Education Act of 2001" Committee on Education and the Workforce Subcommittee on 21st Century Competitiveness June 20, 2001.

K. CONCLUSION

There should be a thorough, probing, in depth review of the events surrounding the passage of HR 1992. The misconduct that occurred in the passage of 107 H.R. 1992 clearly spelled out in Congresswoman [redacted] letter. Moreover, the 2002 regulation must be viewed in light of the prior fraudulent attempt to amend the statute. "[T]he Secretary's decision is entitled to a presumption of regularity. [internal cites omitted]. But that presumption is not to shield this action for a thorough, probing, in-depth review." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). In conducting this review, the court "shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. 706.

Dated: June 23, 2009
Houston, Texas

Respectfully submitted:

[redacted]

By: ______________________________

[redacted]

TIMELINE - RECRUITER COMPENSATION

April 15, 1999	[redacted] *et al.*, file False Claims Act lawsuit against **Computer Learning Centers** (ticker: CLC) for violations of recruiter compensation law in the U.S. District Court, Southern District of Texas, Houston Division, [redacted] **[FIRST LAWSUIT]**
November 5, 1999	[redacted] *et al.*, file False Claims Act lawsuit against **ITT Educational Services, Inc.** (ticker: ESI) for violations of the recruiter compensation law in the U.S. District Court, Southern District of Texas, Houston Division, [redacted] **[SECOND LAWSUIT]**
August 29, 2000	[redacted] files False Claims act lawsuit against **Education America** for violations of recruiter compensation law in the U.S. District Court, Southern District of Texas, Houston Division, [redacted] **[THIRD LAWSUIT]**
December 8, 2000	U.S. Department of Education demands **$187 million** from Computer Learning Centers for violations of recruiter compensation law as asserted in [redacted] lawsuit.
March 14, 2001	[redacted] *et al.*, file False Claims act lawsuit against **Lincoln Technical Institute** for violations of recruiter compensation law in the U.S. District Court, Southern District of Texas, Houston Division, (transferred to Northern District of Texas, Dallas Division), [redacted] **[FOURTH LAWSUIT]**
May 24, 2001	**Bill introduced in U.S. House of Representatives**: "The Internet Equity and Education Act of 2001," H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001), to amend the incentive compensation provisions in the Higher Education Act.
May 25, 2001	Notice in **ITT Educational Services, Inc.** that United States declines to intervene in case.

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June 20, 2001	**Career College Association** presents testimony in support of H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001) to amend the incentive compensation provisions in the Higher Education Act, before U.S. House of Representatives, Committee on Education and the Workforce, defrauding Congress.
September 21, 2001	**Career College Association** press release urging membership to take advantage of crisis of September 11, 2001 to obtain passage of H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001).
September 21, 2001	**Bill introduced in U.S. Senate**: "The Internet Equity and Education Act of 2001," S. 1445, 107TH CONG., 1ST SESS. § 484C (2001) to amend the incentive compensation provisions in the Higher Education Act.
October 10, 2001	**Vote by U.S. House of Representatives** in favor of passage of H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001).
November 20, 2001	Notice in **Education America** that United States declines to intervene in case.
November 26, 2001	**Congresswoman** [redacted] (D-HI) sends letter to **Senator** [redacted] (D-MA) advising that enactment of H.R. 1992, 107TH CONG., 1ST SESS. § 484C (2001) was compromised due to concealment of $500 million lawsuit against ITT Educational Services, Inc.
February 26, 2002	Notice in **Lincoln Technical Institute** that United States declines to intervene in case.
October 30, 2002	Deputy Secretary of Education **William D. Hansen** issued a memorandum stating that it was the policy of the U.S. Department of Education to view violations of the incentive compensation prohibition as causing no financial loss to the United States.
November 1, 2002	34 C.F.R. 668.14(b) (22) (ii) (A) adopted by U.S. Secretary of Education, providing thirteen (13) "**safe harbors**" against incentive compensation prohibition.

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November 1, 2002	67 FEDERAL REGISTER 67054 Statement by U.S. Department of Education regarding adoption of 34 C.F.R. 668.14(b) (22) (ii) (A) (2002) that incentive compensation statute was unnecessary, to disregard the statutory prohibition: "incentive payments are now just one of several remedies in place that prevent schools from unscrupulously recruiting unqualified students."
December 3, 2002	[redacted] files False Claims act lawsuit against **Whitman Education Corporation** for violations of recruiter compensation law in the U.S. District Court, Southern District of Texas, Galveston Division (transferred to Houston Division), [redacted] **[FIFTH LAWSUIT]**
December 13, 2002	The U.S. Department of Justice filed a statement of interest in the district court in support of relators' FCA causes of action against ITT Educational Services, Inc., U.S. ex rel. Graves v. **ITT Educational Services, Inc.**, Southern District of Texas, asserting **$400 million** in damages to United States from defaulted student loans.
March 31, 2003	Memorandum and Order, and Final Judgment, dismissing case against **ITT Educational Services, Inc.** Single most costly decision ever in American jurisprudence to Title IV student financial aid programs, and most injurious to students at for-profit schools.
April 18, 2003	Notice in **Whitman Education Corporation** that United States declines to intervene in case.
April 23, 2003	Suit filed U.S. ex rel. Jeffrey E. Main v. **Oakland City University**, [redacted], S.D. Indiana for violations of the recruiter compensation law.
October 27, 2003	Motion by United States as [redacted] for extension to file brief in U.S. ex rel. Graves v. ITT Educational Services, Inc.
December 19, 2003	Notice by United States that government will not be filing brief as [redacted], **blocked** by office of

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	Solicitor General [redacted] contrary to highest recommendation by U.S. Department of Justice, Civil Fraud Division, in U.S. ex rel. Graves v. ITT Educational Services, Inc.
April 14, 2004	Notice by U.S. Department of Justice of intention to file Statement of Interest in U.S. ex rel. [redacted] v. Oakland City University, [redacted], S.D. Indiana
May 24, 2004	Statement of Interest filed by United States in U.S. ex. rel. Main vs. Oakland City University.
October 20, 2004	Fifth Circuit affirmed the district court dismissal in an unpublished *per curiam* decision in **ITT Educational Services, Inc.**
January 10, 2005	Amicus brief filed by the United States in No. 04-16247, entitled United States of America ex rel. [redacted] and [redacted] v. **University of Phoenix**. The United States argued that the decision in ITT Educational Services, Inc. was wrong.
June 3, 2005	Amicus brief filed by the United States in [redacted] entitled U.S. ex. rel. Main v. **Oakland City University** filed in U.S. Court of Appeals, Seventh Circuit. The United States argued that the decision in ITT Educational Services, Inc. was wrong.
October 5, 2005	Dismissal of [redacted] *et al.*, False Claims Act lawsuit against **Silicon Valley Colleges** for violations of recruiter compensation law in the U.S. District Court, Northern District of California, San Francisco Division (transferred to Oakland Division), [redacted] Decision held that **mandatory minimum enrollment** quotas for recruiters at proprietary schools was protected activity under safe harbor provisions in 34 CFR 668.14(b)(22)(ii)(A) (Nov. 1, 2002).
January 4, 2008	Ninth Circuit affirmed the district court dismissal in an unpublished *per curiam* decision in **Silicon Valley Colleges** on interpretation of safe harbor provisions in 34 CFR 668.14(b)(22)(ii)(A) (Nov. 1, 2002) protecting **mandatory minimum enrollment** quotas for recruiters at proprietary schools, [redacted].

Criminal Investigation of ITT Educational Services, Inc.

On February 25, 2004, federal agents served ITT Educational Services, Inc.'s corporate headquarters and ten (10) of its institutes in Indiana, Texas, Louisiana, Virginia, Florida, Nevada, California and Oregon with search warrants seeking documents related to placement figures and rates, retention figures and rates, graduation figures and rates, attendance figures and rates, recruitment and admissions materials, student grades, graduate salaries and transferability of credits to other institutions.

The "Application And Affidavit For Search Warrant," filed in the U.S. District Court for the Eastern District of Virginia on February 19, 2004, Case [redacted] the investigation of ITT Educational Services, Inc. was commenced in February 2004. The ITT investigation was conducted by the United States Department of Education, Office of Inspector General; Postal Inspectors, Special Agents, Auditors, and Analysts for the United States Postal Inspection Services; the United States Department of Veterans Affairs Office of Inspector General; the United States Department of Defense Defense Criminal Investigative Services; the United States Department of Labor Office of Inspector General; and the Federal Bureau of Investigation. More than four-hundred (400) federal agents took part in the investigation into ITT's conduct.

According to paragraph 3 of the "Search Warrant" in the ITT criminal investigation, communications by ITT's management and board of directors were part of the material targeted in the investigation, including but not limited to [redacted]

In addition, on March 9, 2004, ITT Educational Services, Inc. disclosed in its 2004 Proxy that two additional investigations aimed at ITT's business practices were ongoing by the SEC and the California Attorney General. In fact, for the very first time, ITT disclosed that the California Attorney General had been investigating the Company *since October 2002* and that its investigation was focusing on whether ITT falsified student grades and attendance records used for financial aid qualification.

Defendants

ITT Educational Services, Inc. is a Delaware corporation with its principle executive offices located at 13000 North Meridian Street, Carmel, Indiana 46032-1404. From 1966 until its initial public offering on December 27, 1994, the ITT Educational Services, Inc. was wholly owned by ITT Industries, Inc., an Indiana corporation ("Old ITT"), the tenth largest defense contractor in the United States.

On September 29, 1995, ITT Corporation, a Nevada corporation ("ITT Corp."), succeeded to the interests of ITT Industries, Inc. in the beneficial ownership of 83.3% of ITT Educational Services, Inc.'s common stock.

On February 23, 1998, Starwood Hotels & Resorts Worldwide, Inc., a Maryland corporation, acquired ITT Corp.

Public offerings of ITT common stock by ITT Corp. in June 1998 and February 1999, and the repurchase of 1.5 million shares by ITT from ITT Corp. in February 1999 completely eliminated ITT Corp.'s beneficial ownership of any ITT common stock.

Defendant [redacted] served as Chairman of ITT's Board of Directors since October 1994 and Chief Executive Officer of ITT since September 1985. He served as President of ITT from September 1985 through December 2001, and has been a Director of ITT since October 1985.

During the Class Period, Champagne sold 135,000 shares of ITT common stock for proceeds of $5,394,538.

Defendant [redacted] served as Executive Vice President of ITT from April 1999 through December 2001. Waddles served as President and Chief Operating Officer of ITT from January 2002 until July 12, 2004. Waddles resigned from his executive and directorial positions at ITT on July12, 2004, and resigned from his employment with ITT on July 30, 2004.

During the Class Period, Waddles sold 100,000 shares of ITT common stock for proceeds of [redacted]