

October 12, 2017

Director, Regulations Management (00REG)  
Department of Veterans Affairs  
810 Vermont Ave., NW  
Room 1068  
Washington, DC 20420

Re: VA-2017-19480 - Comments Submitted in Response to Notice of Intent and request for comments for “Employees Whose Association with For-Profit Educational Institutions Poses No Detriment to Veterans”

Dear Director:

We, the undersigned, respectfully submit comments in response to the Notice of Intent and request for comments issued by the Department of Veterans Affairs (“VA”) on September 14, 2017, concerning “Employees Whose Association with For-Profit Educational Institutions Poses No Detriment to Veterans” (“Notice”).<sup>1</sup> We respectfully request that these comments be treated as “significant adverse comments” so that they are fully addressed by the VA before it issues a final decision on the matter.<sup>2</sup>

The notice states that the Secretary intends to waive the statutory bar “for all VA employees who *receive any wages, salary, dividends, profits, gratuities, or services from, or own any interest in,* a for-profit educational institution in which an eligible person or veteran is pursuing a program of education using VA education benefits, as long as employees abide by the conflict of interest laws discussed in the following paragraph.”<sup>3</sup> The decision to issue the waiver is based on the Secretary’s determination that no detriment will result to the United States, veterans, or eligible persons from such activities.<sup>4</sup> At a time when the agency should be

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<sup>1</sup> 82 Fed. Reg. 43288.

<sup>2</sup> *Id.* The waiver becomes applicable on October 16, 2017, without further notice, unless VA receives a “significant adverse comment” by October 16, 2017. If significant adverse comments are received, VA will publish a notice of receipt of significant adverse comments in the Federal Register addressing the comments and announcing VA’s final decision on this action. For purposes of the notice, comments are considered “significant adverse comments” if they explain why the waiver would be inappropriate, including by making challenges to the waiver’s underlying premise or approach and explanations of why it would be ineffective or unacceptable without change.

<sup>3</sup> 82 Fed. Reg. 43288 (emphasis added).

<sup>4</sup> 82 Fed. Reg. 43288-89.

strengthening its oversight of for-profit colleges that collectively receive more than \$1 billion a year in VA educational benefits, it proposes a blanket waiver that will have the opposite effect. By allowing VA employees agency-wide to own interests in and receive compensation from for-profit educational institutions, the proposed waiver will likely strengthen the financial ties between VA employees and for-profit colleges that receive VA educational benefits. In doing so, it enhances the overall influence such entities likely will have on VA's policy making on issues involving these entities, and undermines the Secretary's determination that no detriment will result to the United States, veterans, or eligible persons from such activities. This outcome is clearly not what Congress intended when it enacted 38 U.S.C. § 3683.

We believe that the proposed waiver is inappropriate because it is premised on a determination that lacks a sufficient basis. In addition, we believe the Secretary lacks the legal authority to issue such a waiver without providing reasonable notice and public hearings. We believe that the Secretary should respect Congress's judgment, as reflected in law, to enact special measures to protect the VA from the potential harm of public corruption.

### **38 U.S.C. § 3683(d) Waiver Authority**

38 U.S.C. § 3683(a) prohibits any VA officer or employee from owning an interest in, or receiving "any wages, salary, dividends, profits, gratuities, or services from, any educational institution operated for profit in which an eligible person or veteran was pursuing a [VA] program of education or course." Violation of this provision by a VA officer or employee requires automatic dismissal.<sup>5</sup> However, the Secretary may, "*after reasonable notice and public hearings,*" waive in writing the application of this provision if the Secretary "finds no detriment will result to the United States or to eligible persons or veterans by reasons of such interest or connection of such officer or employee."<sup>6</sup> The statute's implementing regulation states that "the Secretary may, *after reasonable notice and public hearings if requested,* waive in writing the application of the bar in the case of any VA officer or employee, if it is found that no detriment will result to the United States or to veterans or eligible persons by reason of such interest or connection of such officer or employee."<sup>7</sup>

The VA notice is deficient because it does not include a notice for a public hearing, which is statutorily mandated before a determination can be made and a waiver can be issued.

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<sup>5</sup> 38 U.S.C. § 3683(a).

<sup>6</sup> 38 U.S.C. § 3683(d) (emphasis added).

<sup>7</sup> 38 C.F.R. § 20.4005(a)(7) (emphasis added). The implementing regulation also provides a mechanism by which the bar can be waived under delegated authority by the Director of VA Education Service based on stated criteria. The Secretary also reserves the authority to waive the requirements in the case of any officer or employee who does not meet the stated criteria.

As a result, any waiver issued by the Secretary without the requisite notice or opportunity for a public hearing would violate the statute and its implementing regulation.

In addition, there is question as to whether this is a legitimate exercise of the Secretary's waiver authority since it would override and make inoperative the statutory bar enacted by Congress for the broader purpose of preventing corruption. Although, as the notice states, 38 U.S.C. § 3683 was initially passed before the executive branch-wide financial conflict of interest statute, the statutory predecessors to that statute, 18 U.S.C. § 208, date back to 1863.<sup>8</sup> It does not follow from this that Congress would not intend for there to be a different, broader anti-corruption provision that applies in a limited set of circumstances where the risk of harm to veterans from corruption is particularly high. Indeed, the recent experience of the VA, as discussed below, would support a conclusion that the significant educational funds Congress has designated for veterans' education are particularly worthy of such protection. Regardless, the Secretary should not substitute his judgment for Congress's on this point, especially considering that the statute itself already includes a waiver provision that addresses concerns about overbreadth.

An additional concern is that the Secretary would make the proposed waiver retroactive as well as prospective.<sup>9</sup> In doing so, it would violate a basic tenant of government ethics against retroactive waivers as set forth in guidance issued by the Office of Government Ethics ("OGE").<sup>10</sup> OGE has stated:

Although different kinds of waivers require different procedures and criteria for the granting officials, all such waivers have one thing in common: the waiver must be granted prior to the employee engaging in otherwise prohibited conduct.

It is axiomatic that any of these waivers is a prospective grant of permission, not a

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<sup>8</sup> Bayless Manning, *Federal Conflict of Interest Law*, Harvard University Press, 1964, at 110.

<sup>9</sup> 82 Fed. Reg. 43289. The notice states that "this waiver will apply to all employees who previously had a connection to a for-profit educational institution, who currently have a connection to a for-profit educational institution, and who in the future will have a connection to a for-profit educational institution. This includes, but is not limited to, employees whose only connection to a for-profit educational institution is that they have taken, are taking, or will take classes, regardless of how the classes were paid for."

<sup>10</sup> Memo from Don W. Fox, General Counsel, U.S. Office of Government Ethics, to Designated Agency Ethics Officials, Guidance of Waivers under 18 U.S.C. § 208(b), Authorizations under 5 C.F.R. § 2635.502(d), and Waivers of Requirements under Agency Supplemental Regulations, DO-10-005 (2010) (guidance clarifying that waivers must be issued prospectively and stating that "OGE does not consider retroactive waivers to be valid"), available at <https://goo.gl/1T4hbo>. See also Letter from David J. Apol, Acting Director and General Counsel, U.S. Office of Government Ethics, to The Honorable Claire McCaskill, Ranking Member, U.S. Senate Committee on Homeland Security and Government Affairs, August 7, 2017, available at [https://oge.gov/web/OGE.nsf/All%20Documents/2AE40BDFA679E513852581760057FF40/\\$FILE/OGE%20Response%20to%20Sen%20McCaskill%20on%2013770%20Waivers%20August%202017%20\(2\).pdf?open](https://oge.gov/web/OGE.nsf/All%20Documents/2AE40BDFA679E513852581760057FF40/$FILE/OGE%20Response%20to%20Sen%20McCaskill%20on%2013770%20Waivers%20August%202017%20(2).pdf?open) ;

retrospective grant of forgiveness. Even apart from the specific legal requirements discussed below, sound ethics policy demands that those who grant waivers should not be in the position of essentially exercising enforcement discretion by deciding which past violations should or should not be condoned. The subtle, or not so subtle, pressures that would be brought to bear on a granting official are all too plain, and it is difficult to imagine that a granting official could act in a dispassionate way to balance all the appropriate waiver criteria, if the waiver decision were made after the fact and that decision would have the practical effect of determining culpability.<sup>11</sup>

Since a retroactive ethics waiver would not be recognized as legitimate by OGE for purposes of the federal conflict-of-interest law, 18 U.S.C. § 208, it should also be considered inappropriate for purposes of addressing conflicts of interest arising under 38 U.S.C. § 3683. A retroactive waiver also raises questions about how many VA employees may have already violated the statute, the basis of those violations, and whether such employees are intended to be retroactively protected from the consequences of engaging in prohibited conduct.

### **The Secretary's Determination Lacks a Sufficient Basis**

The proposed waiver is inconsistent with the statute's purpose to prevent corruption in the administration of VA educational benefit programs.<sup>12</sup> Although the VA states that it is committed to ensuring that veterans are protected from the predatory behavior of for-profit educational institutions,<sup>13</sup> the proposed waiver will enhance VA employees' ties to such entities, many of which target veterans for their VA benefits and have been the subject of federal and state investigations into deceptive recruiting and other illicit practices. According to a 2014 Senate Report, for-profit colleges received \$1.7 billion in GI Bill benefits during the 2012-2013 academic year.<sup>14</sup> The average cost to send a veteran to a for-profit college is twice the amount it would cost to send the veteran to a public college.<sup>15</sup> At the same time, some of the most costly

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<sup>11</sup> *Id.*

<sup>12</sup> *See* 82 Fed. Reg. 43288.

<sup>13</sup> *Id.*

<sup>14</sup> U.S. Senate Health, Education, Labor, and Pensions Committee, Majority Committee Staff Report, Is the New G.I. Bill Working?: For-Profit Colleges Increasing Veteran Enrollment and Federal Funds, July 30, 2014, *available at* <http://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/56100b87e4b0147725a71e86/1443892103628/GI-Bill-data-July-2014-HELP-report.pdf?version=meter+at+0&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=&priority=true&action=click&contentCollection=meter-links-click>.

<sup>15</sup> *Id.* at 7.

for-profit colleges have the most “questionable” overall retention rates for students.<sup>16</sup> Several for-profit colleges have been the subject of investigations by state and federal agencies for deceptive and misleading recruiting or other possible violations.<sup>17</sup> Because of these concerns, several veterans groups have reportedly called on the VA to improve its oversight of for-profit colleges engaged in deceptive recruiting and other illicit practices, and to take steps against the colleges facing federal and state action for deceiving students.<sup>18</sup> A group of eight state attorneys general and the VA’s own education advisory committee have also called on the VA for better oversight of the GI Bill.<sup>19</sup>

The VA’s proposed reliance on 18 U.S.C. § 208(a) and 5 C.F.R. § 2635.502 to prevent conflicts of interest is not sufficient to prevent the corruption that Congress intended section 3683 to address. The statutory restrictions required by section 208 and section 2635.502 have a much narrower application than section 3683. Section 208 and section 2635.502 generally do not require divestiture. Enforcement is administered primarily on a case-by-case basis through recusal. Even then, section 208 only requires recusal if it involves a particular matter that would have a direct and predictable effect on the employee’s financial interest or those imputed to him, such as an outside employer, spouse, or minor child.<sup>20</sup> In circumstances where an employee’s participation in a particular matter would not violate section 208, section 2645.502 may require recusal to address situations in which the employee’s impartiality may be called into question. However, section 2635.502 requires recusal only if it involves a particular matter involving specific parties in which a person with whom the employee has a “covered relationship” is, or represents, a specific party in that matter.<sup>21</sup> An employee is deemed to have a “covered

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<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> Gardiner Harris, [Veterans Groups Seek a Crackdown on Deceptive Colleges](https://www.nytimes.com/2016/05/22/us/politics/veterans-groups-seek-a-crackdown-on-deceptive-colleges.html?_r=0), *New York Times*, May 21, 2016, available at [https://www.nytimes.com/2016/05/22/us/politics/veterans-groups-seek-a-crackdown-on-deceptive-colleges.html?\\_r=0](https://www.nytimes.com/2016/05/22/us/politics/veterans-groups-seek-a-crackdown-on-deceptive-colleges.html?_r=0).

<sup>19</sup> Letter to The Honorable Robert McDonald, Secretary of Veteran Affairs, from Kathy McMurtry Snead, Chair of the VA Veterans’ Advisory Committee on Education, March 6, 2016, available at <http://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5732288427d4bdb264061796/1462904964881/VACOE+recommendations.pdf>; Letter to The Honorable Robert A. McDonald, United States Department of Veteran Affairs, from Kamala D. Harris, California Attorney General, et al, Feb. 29, 2016, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/va-multi-state-letter.pdf>.

<sup>20</sup> A “particular matter” encompasses only matters that involve deliberation, decision or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Examples of specific party matters include contracts, litigation, licenses, grants. 5 C.F.R. § 2635.402(a)(3).

<sup>21</sup> A “particular matter involving specific parties” includes “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving specific parties. The term typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.” 5 C.F.R. § 2640.102(l).

relationship” in very limited defined situations, including when an employee has or seeks a business, contractual or other financial relationship with a person (other than a routine consumer relationship).<sup>22</sup>

Because the conflicts of interest covered by section 208 and section 2635.502 are much narrower than those covered by section 3683, the proposed waiver would in some instances create a potential gap between what Congress intended and what would legally be permitted under the proposed waiver. For example, under the proposed waiver, a VA employee could enter into an outside consulting arrangement with a for-profit college to receive compensation for services rendered (e.g., for teaching, accounting, landscaping, etc.). Under these circumstances, the VA employee would not be prohibited by section 208 and section 2635.502 from working on a VA policy matter even if it would have a direct and predictable effect on the financial interests of that for-profit college. In most cases, the employee would only be required to recuse from participating in a specific party matter in which the for-profit college is (or represents) a party.<sup>23</sup>

Furthermore, it is not at all certain that the VA would be able to effectively monitor potential conflicts of interest involving its employees who have ownership interests in or outside financial arrangements with for-profit colleges by relying solely on section 208 and section 2635.502. The effectiveness of these provisions is particularly questionable when an agency does not require employees to obtain prior approval requirements for outside employment or compensation and a significant number of covered employees are not required to file a public or confidential financial disclosure report.

By issuing a blanket waiver to allow VA employees agency-wide to own interests in and receive compensation from for-profit educational institutions, the Secretary will enhance the overall influence such entities likely will have on VA’s policy making on issues involving these entities. Doing so, undermines the basis for the Secretary’s determination that no detriment will result to the United States, veterans, or eligible persons from such activities.

### **“Illogical and Unintended Consequences”**

The VA argues that the proposed waiver is necessary because the “statute has illogical and unintended consequences.”<sup>24</sup> The VA submits that:

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<sup>22</sup> 5 C.F.R. § 2635.502(b)(1).

<sup>23</sup> The employee’s recusal would only be required by section 208 under this scenario if the VA employee had an outside employment relationship with the for-profit college (rather than a consulting relationship) or if the particular matter would affect the ability or willingness of the for-profit college to make its payment to the VA employee under the consulting arrangement.

<sup>24</sup> 82 Fed. Reg. 43288.

A literal reading of the statute would require the removal of a VA lab technician who takes a class, on her own time and using her own money, at a for-profit educational institution that is also attended by students using VA education benefits. It would also require the removal of a VA physician who teaches an introductory biology class at such a school. The statute applies retroactively, in that it requires VA to remove employees who have no current connection to a for-profit institution but took or taught a class at one at any time during their VA employment. Applying this statute to VA employees who have not engaged in any real conflict of interest would be unjust and detrimental to VA's ability to serve veterans.<sup>25</sup>

The notice also states that a VA Office of Inspector General (OIG) report contained recommendations for the VA to issue waivers for employees whose connection with for-profit institutions creates no actual conflict of interest and poses no harm to veterans.<sup>26</sup> In fact, the OIG recommended in that report, which contained a finding of section 3683 violations by two VA employees, that the VA Office of General Counsel (“OGC”) “either enforce the law as written, or initiate the waiver provision found in subsection (d) of the statute.”<sup>27</sup> In response to the OIG’s recommendation, the VA OGC stated:

We will advise employees that they must seek a waiver, in accordance with 38 C.F.R. 21.4005, if they own any interest in, or receive or seek to receive compensation from, a for-profit educational institution, but not for those who merely receive services at a for-profit educational institution as we would not seek enforcement of the law against them. This is in accordance with the latest legislative proposal submitted to Congress seeking to amend section 3863.<sup>28</sup>

Rather than simply advising employees to seek individual waivers as the OGC represented the agency would do, the VA goes beyond that to now propose a broad blanket waiver. Furthermore, the OIG report makes clear that the employees who were found to have violated this provision did not receive ethics training on this issue, which the OIG recommended be addressed through

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<sup>25</sup> *Id.*

<sup>26</sup> 82 Fed. Reg. 43288.

<sup>27</sup> See Department of Veterans Affairs, Office of Inspector General Report, Administrative Investigation on Conflicting Interests and Misuse of Government Equipment, Overton Brooks VA Medical Center (VAMC), Shreveport, Louisiana (LA) (2014-03508-IQ-0126), July 18, 2017, available at <https://www.va.gov/oig/pubs/VAOIG-14-03508-275.pdf>.

<sup>28</sup> *Id.*

annual ethics training for all VA employees.<sup>29</sup> Had the employees received mandatory ethics training or the VA required prior approval for outside employment and activities, any potential violation of section 3683 would likely have been identified in advance and a waiver could have been obtained prophylactically on an individual basis without any “illogical or unintended consequences” resulting.<sup>30</sup>

The VA also has failed to consider reasonable alternatives to the proposed blanket waiver. To the extent that the VA views the statute as unfairly barring its employees from paying fair market value to enroll and takes courses from for-profit colleges, a limited waiver for these purposes may be appropriate and would be viewed as consistent with its enforcement practice. However, a blanket waiver to permit its employees to own interests in, and accept compensation from, for-profit educational institutions is not consistent with OGC’s representation to the OIG or with the purpose of the statute.

### **Future Revisions**

In making any future changes to the current legal requirements, the VA should consult ethics and consumer protection experts to ensure that veterans’ interests are adequately protected. In general, the VA should carefully consider how a predatory college might try to manipulate VA employees, and ensure that appropriate safeguards are in place so that VA employees are not unwittingly used as “lead generators.” “Lead generation” is a business model some for-profit colleges employ to pay for “leads” on potential students, including veterans, through surreptitious means.<sup>31</sup> For example, one “lead generation” company operated “GIBill.Com,” which purported to be a portal for veterans to access information about GI Bill benefits, but was actually designed to capture veterans’ contact information and sell it as leads to for-profit colleges.<sup>32</sup> Legal action resulted in shutting down this website and transferring the domain to the VA, which was hailed as a victory for veterans.<sup>33</sup> In addition, a major for-profit college was suspended for improper recruiting and marketing practices after the school paid the military for exclusive access to military bases.<sup>34</sup> The VA should bear this business model in

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<sup>29</sup> *Id.*

<sup>30</sup> Unlike many other agencies, VA has no apparent requirement for its employees to obtain prior approval for outside employment or compensated activities.

<sup>31</sup> 2014 Senate Report.

<sup>32</sup> *Id.*

<sup>33</sup> U.S. Department of Veterans Affairs Vantage Point, [After Court Settlement, VA Takes Over GIBill.com and Other Sites](https://www.blogs.va.gov/VAntage/7356/after-court-settlement-va-takes-over-gibill-com-and-other-sites/), June 27, 2017, available at <https://www.blogs.va.gov/VAntage/7356/after-court-settlement-va-takes-over-gibill-com-and-other-sites/>.

<sup>34</sup> Aaron Glantz, [University of Phoenix gained special access to military base - for a price](https://www.revealnews.org/blog/university-of-phoenix-gained-special-access-to-military-base-for-a-price/), *Reveal*, Sept. 8, 2017, available at <https://www.revealnews.org/blog/university-of-phoenix-gained-special-access-to-military-base-for-a-price/>.



mind in crafting any revised proposal to ensure for-profit colleges are not able to manipulate unwitting VA employees in the surreptitious business of “lead generation.”

Specifically, for VA employees who wish to take classes at a for-profit college, the VA should require that they pay fair market value for the classes personally and not receive any special discount or other benefit. Otherwise, these types of entities could exploit a VA employee’s sense of indebtedness to help the school identify veterans for purposes of obtaining their GI Bill benefits.

Moreover, there should be no blanket exemption for VA employees to teach at for-profit colleges. For example, in no circumstances should employees who work on GI Bill issues be allowed to receive payments from for-profit colleges, and, to avoid real or perceived bias or endorsement, in no circumstances should any high-level VA employees be allowed to own interests in or receive payments from such entities.

### **Conclusion**

Based on the foregoing reasons, the blanket waiver proposed for all VA employees under the authority of 38 U.S.C. §3683(d) is inappropriate and is inconsistent with the waiver’s underlying premise or approach and would be ineffective and unacceptable without change.

Sincerely,

Noah Bookbinder,  
Citizens for Responsibility and Ethics in Washington

Ambassador (ret.) Norm Eisen,  
chief White House ethics lawyer, 2009-2011

Richard Painter,  
chief White House ethics lawyer, 2005-2007

Norman J. Ornstein

Project on Government Oversight (POGO)