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By E-mail: Christopher.Britt@VA.Gov

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Dear Ms. Kennedy and Mr. Britt:

We thank you for the briefing Mr. Britt provided last month to veterans service organizations on the revised plan of the U.S. Department of Veterans Affairs (VA) to grant waivers under 38 U.S.C. § 3683. The undersigned federal ethics experts, veterans and military service organizations, employee representatives, and consumer protection and education advocates write to express strong concern regarding that revised plan. We urge you to meet with us to develop an appropriate path forward.

On September 14, 2017, VA initially proposed to issue a blanket waiver to all of its employees regarding the prohibition against receiving wages, salary, dividends, profits, gratuities, or services from, or owning any interest in, a for-profit educational institution that participates in VA education benefits.¹ Public interest groups and concerned citizens submitted 144 comments highlighting the dangers of the proposed blanket waiver.² As a result, VA withdrew its blanket waiver proposal and developed the revised plan that Mr. Britt outlined on May 3, 2018.

Under the revised plan, VA's approach in analyzing requests for waivers would vary depending on whether the requesting employees perform any of six specified duties related to GI Bill oversight.³ Mr. Britt indicated that approval of waiver requests would not be automatic for employees who perform any of these duties, but he did not identify any criteria for evaluating their requests. As to all other employees, Mr. Britt indicated approval would be automatic.⁴

¹ See U.S. Dep't of Veterans Affairs, *Notice of Intent and Request for Comments—Employees Whose Association With For-Profit Educational Institutions Poses No Detriment to Veterans*, 82 Fed. Reg. 43288 (Sept. 14, 2017), <https://bit.ly/2IxjDKU>.

² Docket VA-2017-VACO-0001-0227 (82 Fed. Reg. 43288), <https://bit.ly/2rQJ2bZ>.

³ The six education-related activities are: (1) policy determinations regarding payment of VA education benefits; (2) processing applications for education benefits; (3) decisions re individual education benefit applications; (4) compliance inspections on education institutions or persons; (5) processing claims by, or payments to, schools or students; and (6) inspection, approval, or supervision of education institutions.

⁴ Mr. Britt's PowerPoint presentation states: "Waiver Criteria: If an employee's duties do NOT concern six education related activities, *then the employee satisfies the waiver criteria*," (emphasis added). Mr. Britt explained at

While VA's agreement to require employees to submit requests for waivers improves upon its original plan somewhat, the revised plan falls short of VA's statutory responsibility to protect veterans.⁵ For the review process to fulfill the purpose of the statute – and, therefore, for that process to be “in accordance with law” and not “arbitrary and capricious” under the judicial review provisions of the Administrative Procedure Act⁶ – VA must establish criteria for evaluating and limiting the waiver requests it receives, as to both employees who perform GI Bill duties and those who do not perform such duties. The most stringent criteria should apply to employees who perform GI Bill duties, and waivers issued to them should be limited in scope.

I. Proposed Criteria

To facilitate VA's establishment of appropriate criteria, we provide the following recommendations regarding the evaluation of waiver requests from each group of employees.

1. Employees Who Perform Any of Six GI Bill Duties, Senior Executives, Employees of the Office of the Inspector General, and Employees of the Office of the General Counsel

VA should impose strict limitations on waivers to employees who perform any of the six specified GI Bill duties. These heightened standards should also apply to all Senior Executives and to employees in the Office of the Inspector General and the Office of the General Counsel.

Ownership Interests: VA could reasonably waive the prohibitions against owning any interest in for-profit schools only if the employee has received the interest through inheritance, divests the interest within 90 days of receiving it, and recuses from all duties related to the GI Bill until the divestiture is complete.

Gratuities, Wages, Salary, Dividends, and Profits: These employees should be ineligible for waivers of the prohibitions against receiving any wages, salary, dividends, profits, or gratuities. There is no circumstance in which a waiver request from one of these employees could meet the statutory standard that “no detriment will result” to veterans.⁷ It would be unreasonable for VA to assert that, as to employees who perform duties related to the GI Bill, it could conclude with any degree of confidence that a waiver of these particular prohibitions would not harm veterans, given the well-documented problem of for-profit schools' targeting veterans with deceptive and aggressive recruiting.

the May 3, 2018, briefing that, if an employee does not have one of the six specified duties, VA will make a finding of “no detriment” to veterans and issue a waiver.

⁵ See 38 U.S.C. § 3683(d).

⁶ See 5 U.S.C. § 706.

⁷ See 38 U.S.C. § 3683(d).

Services: In contrast, VA could reasonably grant one of these employees a waiver of the prohibition on receiving services from a for-profit school if the employee's request is limited to taking a class at a for-profit school. The following criteria should apply in such cases:

- The employee is paying market value for the class;
- The employee is not seeking a degree from the school;
- The employee is receiving no other benefits from the school;
- Upon consideration of quality, cost, and location, VA has determined that there is no readily available alternative for the employee to take the class from a provider that is not a for-profit school; and
- The employee has committed in writing that the employee will not grant the school permission to reference the employee's affiliation with VA in any promotional materials.

2. Employees Who Do Not Perform Any of the Six GI Bill Duties, and are not Senior Executives, Employees of the Office of the Inspector General, or Employees of the Office of the General Counsel

With regard to other employees, VA should not grant waivers automatically. Instead, VA should grant waivers, if at all, only under certain conditions.

Ownership Interest, Dividends, and Profits: VA could reasonably waive the prohibition against any of these employees' owning any interest in for-profit schools when an employee has received the interest through inheritance and divests the interest within 180 days of receiving it. Except for dividends and profits received in connection with an inherited interest that is divested within 180 days, these employees should be ineligible for any waiver of the prohibitions against receiving dividends or profits from for-profit schools.

Gratuities: These employees should also be ineligible for any waiver of the prohibitions against gratuities. No good can come of gifts to VA employees by a company with a predatory interest in the GI Bill. An exception to this ineligibility could reasonably allow a gift of free attendance at an event offered solely in the ordinary course of a spouse's employment with a for-profit school (e.g., a holiday party for all staff members and their spouses).

Services: It would be reasonable for VA to grant these employees waivers of the prohibition against receiving services from a for-profit school, but only if their requests are limited to taking classes and only if they are paying market value for the classes.

Wages and Salary: These employees should be ineligible for waivers of the prohibitions against receiving any wages or salary, except when they satisfy all of the following criteria:

- The wages or salary are not for any services related to management, recruitment, writing, editing, promotion, or non-clerical administrative support for the for-profit school;
- The school is not the subject of any ongoing federal or state law enforcement investigation or action;

- Within the past 5 years, VA has not received any significant, non-frivolous student veterans' complaints or whistleblower allegations;
- The employee has obtained a written commitment from the school not to mention the employee's VA affiliation in any promotional materials;
- The employee has agreed to certify in writing to agency ethics officials each year that the employee recently checked the school's website and any other readily accessible promotional materials and confirmed that they do not mention the employee's VA affiliation;
- The employee has completed a supplemental one-hour training module on ethics regulations regarding "misuse of position," "teaching, speaking and writing for compensation," and "gifts," separate from any required annual ethics training;
- The employee's total income from the for-profit school and any related entity in a calendar year will not exceed 15% of the employee's annual VA salary;
- In the past 3 years, the employee has not received any disciplinary action and has not received any rating on a critical element of the employee's performance standards that is at or below the "minimally satisfactory" level; and
- The employee has signed a statement acknowledging that it would be a misuse of position to encourage a veteran to attend the for-profit school and that doing so will lead to disciplinary action.

II. Hearing Requirement

VA must comply with the statutory requirement to hold public hearings on employee requests for waivers.⁸ Its plan to post a notice on its website and accept public comments fails to satisfy this requirement. Accordingly, we restate below an explanation of the hearing requirement.

The U.S. Court of Appeals for the D.C. Circuit has explained that the phrase "public hearing" in a statute requires different levels of formality depending upon the context in which it is used. Where a "public hearing" is simply a prerequisite to appellate judicial review, an opportunity for written submissions is sufficient.⁹ In such cases, the purpose of the public hearing is to provide "an adequate record for review in a court of appeals" and thus "the crucial inquiry is whether such a record is available."¹⁰ The same is not true, however, where a "public hearing" is mandated as a "procedure[] [to] be followed in the process of agency decisionmaking."¹¹ In those circumstances, the statute "requires oral public participation."¹²

⁸ 38 U.S.C. § 3683(d): "The Secretary may, after reasonable notice and *public hearings*, waive in writing the application of this section *in the case of any officer or employee* of the Department of Veterans Affairs or of a State approving agency, if the Secretary finds that 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.*" (emphasis added).

⁹ *Env't Defense Fund, Inc. v. Costle*, 631 F.2d 922, 930 (D.C. Cir. 1980).

¹⁰ *Humane Soc'y of the United States v. EPA*, 790 F.2d 106, 111 (D.C. Cir. 1986).

¹¹ *Costle*, 631 F.2d at 930.

¹² *Id.*

Congress authorized VA's Secretary to issue waivers "after reasonable notice and public hearings."¹³ The public hearing requirement is an integral procedure in the sequence of the Secretary's decision-making, and not simply a mechanism to create a record for judicial review or to trigger appellate jurisdiction.¹⁴ As such, the Secretary may not bypass the requirement for public hearings involving oral public participation prior to the issuance of waivers.

III. IG Recommendation

VA's Inspector General recommended in July 2017 that VA train its workforce on the requirements of 38 U.S.C. § 3683.¹⁵ In the recent meeting with veterans and military service organizations, Mr. Britt indicated that VA plans to comply with this recommendation at some point "in the future," but that he did not know when that would occur. Eleven months have passed since the Inspector General made this recommendation without VA's having undertaken any corrective action. It is time for VA to prioritize its compliance with this recommendation. We urge you to quickly notify VA employees of their obligations under this statute, even while you spend time revising your proposal. VA employees should not be left in the dark about their statutory obligations.

IV. Conclusion

As you know, there is a documented history of for-profit schools' targeting veterans with deceptive and surreptitious recruiting for substandard educational services. A loophole in the federal Higher Education Act (the so-called "90/10 loophole") creates the incentive for such conduct by allowing these schools to use GI Bill funds to offset an otherwise applicable cap they face on federal funding.

Public comments VA received in October emphasized that waiving the statutory conflict of interest prohibition could leave VA employees, who interact with veterans in VA medical centers and other settings, at risk of being manipulated or pressured into steering veterans toward for-profit schools. Just last month, the U.S. Department of Justice publicized a guilty plea by the owner of a for-profit school in connection with a \$2 million bribery scheme for paying a VA Vocational Rehabilitation (VR&E) counselor a seven percent cash kickback of all payments made by VA to the school.¹⁶ As the Justice Department's press release explains, "In exchange, the counselor steered VR&E program veterans to" the school.

¹³ 38 U.S.C. § 3683(d).

¹⁴ The *Costle* court noted that in some contexts the Supreme Court has instructed that the word "hearing" appearing alone in a statute should be construed by reference to the APA's definition, which does not require formal proceedings. *Costle*, 631 F.2d at 928-29 (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240 (1973)). However, the court noted that the same is not true for the phrase "public hearing." *Costle*, 631 F.2d at 929.

¹⁵ *Administrative Investigation Conflicting Interests and Misuse of Government Equipment Overton Brooks VA Medical Center Shreveport, Louisiana*, Dep't of Veterans Affairs, Office of Inspector General (July 18, 2017), <https://www.va.gov/oig/pubs/VAOIG-14-03508-275.pdf>.

¹⁶ See U.S. Dep't of Justice, "School Owner Pleads Guilty to \$2 Million Bribery Scheme Involving VA Program for Disabled Military Veterans" (Apr. 16, 2018), <https://www.justice.gov/opa/pr/school-owner-pleads-guilty-2-million-bribery-scheme-involving-va-program-disabled-military>.

These concerns are precisely the reason why Congress enacted 38 U.S.C. § 3683(a). Congress reiterated these concerns as recently as July 2017 in the U.S. Senate Appropriations Committee report when it directed VA to study ways to strengthen 38 U.S.C. 3683, stating: “The Committee is concerned current laws and regulations related to conflicting interests may be *inadequate* to identify conflicts of interest that can develop through the provision of meals or de minimis gifts to [employees].”¹⁷ The documented history of for-profit schools’ deceiving and defrauding veterans necessitates cautious consideration of waiver requests. Automatic approval of waivers runs counter to VA’s mission to serve veterans, as does individualized consideration of waivers without any established criteria.

There is no doubt Congress was right: Financial entanglements between VA employees and for-profit schools that seek GI Bill payments put veterans at risk.

Consistent with the comments VA received last fall, the undersigned strongly urge you to adopt our recommendations in this letter. We request that you meet with us after you have had an opportunity to review this letter, and we thank you in advance for your consideration of this request.

Sincerely,

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¹⁷ 115 S. Rep. 130 (July 13, 2017) (emphasis added).

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