The U.S. Department of Education's Federal Student Aid Program Integrity Final Regulations

*By Robert S. Eitel and Kent D. Talbert**

Note from the Editor . . .

This paper assesses the Department of Education's new regulations concerning Title IV in the Higher Education Act on several levels. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. The Federalist Society seeks to foster further discussion and debate about the Department's new regulations. To this end, we are in the process of inviting responses to these materials. For alternative views, readers might want to consult resources from the New America Foundation, the Center for American Progress, and the Department of Education. To join the debate, you can e-mail us at info@fed-soc.org.

President Lyndon B. Johnson returned to his *alma mater* in San Marcos, Texas to sign the Higher Education Act (HEA) on November 8, 1965.[1] With that signature in the Strahan Gymnasium of Southwest Texas State Teachers College,[2] the federal government began to play a major, continuing role in financing higher education in the United States, with HEA reauthorizations occurring in 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. [3] The current authorization expires on September 30, 2013. Among other things, the HEA significantly increased federal funding for universities, scholarships, and student loans; Title IV of the HEA covers the administration of student financial aid programs.[4] According to the U.S. Department of Education (the "Department"), federal student aid programs are now the nation's largest source of student aid, providing more than $150 billion annually in new aid to nearly 14 million postsecondary students and their families.[5] To receive funds under Title IV and to ensure that students remain eligible for federal financial assistance, the HEA imposes numerous requirements on institutions of higher education, including public and nonprofit entities, proprietary institutions of higher education, and postsecondary vocational institutions.[6]

The Department is the federal agency with responsibility for promulgating regulations pertaining to Title IV.[7] On May 26, 2009, the Department commenced a negotiated rulemaking process to develop new Title IV regulations pertaining to program integrity that included committee meetings, public hearings, and the acceptance of written comments from the public.[8] After the participants at these sessions failed to achieve consensus on several issues, the Department issued a Notice of Proposed Rulemaking on June 18, 2010.[9] The Department established a deadline of August 2, 2010, for members of the public to submit comments.[10] After receiving comments from approximately 1,180 parties, the Department published final regulations designed to improve the integrity of Title IV programs on October 29, 2010, or eighty-eight days after the close of the comment period.[11] The Department's proposals relating to gainful employment received more than 90,000 comments, and the Department has yet to decide how it will proceed with those.[12] With few exceptions, the final regulations will take effect on July 1, 2011.[13]

The issues that weave through these regulations have generated heated debate and controversy since 2009, resulting in at least nine congressional hearings,[14] at least two Government Accountability Office (GAO) reports,[15] a federal lawsuit against GAO arising from one of those GAO reports (and an official revision by GAO of portions of the report that lead to that litigation),[16] a federal court challenge to the program integrity rules by an association of proprietary institutions,[17] and allegations of short-selling activities and illegal stock manipulations by hedge fund managers.[18] Although the media has focused primarily on the impact of these rules on proprietary institutions of higher education, non-profit institutions of higher education have recently enhanced their criticisms of certain important components of the final rules.[19] There is much debate over whether the rules will achieve the Department's stated intent of guaranteeing the integrity of its Title IV programs, as well as the costs and benefits of compliance.[20] Faced with unabated controversy over the new rules, the Department issued guidance (the "Guidance") to the public on March 17, 2011.[21]

While this policy debate continues, it is important to step back and to ask a fundamental legal question about whether the Department has exceeded its statutory authority under the HEA concerning several of the regulations. If so, this defect serves as a basis for judicial review under the Administrative Procedures Act, and there should be a concerted discussion about whether the Department can, rather than should, do what it is doing.[22] To that end, this paper focuses on three regulations (the "Final Regulations"):

- the "misrepresentation regulations," which seek to prohibit minor, unintentionally misleading statements by eligible institutions to students, prospective students, members of the public, any accrediting agency, a state agency, or to the Secretary;[23]
- the "incentive compensation regulations," which expand the kinds of compensation prohibited by the HEA and the class of compensated persons encompassed within those prohibitions;[24] and

** Robert S. Eitel and Kent D. Talbert are attorneys in Washington, D.C. Mr. Eitel served as Deputy General Counsel of the U.S. Department of Education from 2006-09 and as Senior Counsel from 2005-06. Mr. Talbert served as General Counsel of the Department from 2006-09 and as Deputy General Counsel from 2001-06. They practice law at Talbert & Eitel, PLLC, an education and employment firm.*

• the "state authorization regulations," which effectively impose upon the states a specific framework for authorizing eligible institutions to provide a postsecondary program of study.[25]

I. DEFERENCE TO ADMINISTRATIVE INTERPRETATION?

In the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[26] the Supreme Court set forth the well-known rule that, when a court reviews an agency's formal interpretation of a statute that the agency administers, it must defer to any reasonable agency interpretation.[27] The threshold question is whether "Congress has directly spoken to the precise question at issue."[28] If the court finds that Congress has done so, the court will not give deference to the agency. But, if the statute does not address the precise issue, as where the statute is silent or the language ambiguous, the court will then determine whether the agency's interpretation is "based on a permissible construction of the statute."[29] The courts have not hesitated to determine that Congress has settled a matter, thus avoiding the deferential second-step of the *Chevron* inquiry.[30]

In the case of the Final Regulations, critics have argued that important portions of the Final Regulations are at odds with the text of the HEA itself and the plain meaning of the words chosen by Congress. They assert that Congress has spoken to the precise issues, which are capable of resolution on the basis of the HEA's "plain language" alone.[31] Indeed, in at least one instance, the Department itself concedes in the Final Regulations that the language of the HEA is "clear." The issues presented by the misrepresentation, incentive compensation, and state authorization regulations arguably involve pure questions of statutory construction for the courts to decide.[32] Moreover, where it exists, the legislative history supports the conclusion that Congress has settled these matters and that certain of the Department's interpretations in the Final Regulations violate the HEA. These regulations are thus vulnerable to attack under the Administrative Procedures Act, which permits a court to set aside an agency's actions or remand to the agency for corrective action if the agency acts outside of its statutory authority.[33]

THE MISREPRESENTATION REGULATIONS

Section 487(c)(3) of the HEA (20 U.S.C. § 1094(c)(3)) requires the Department to suspend or terminate a school's participation in Title IV programs if it determines that an institution eligible for Title IV funds has substantially misrepresented the nature of its program, its financial charges, or the employability of its graduates.[34] If, after "reasonable notice and opportunity for a hearing," the Department determines that an institution "has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates, the Secretary may suspend or terminate" the offending institution's eligibility for Title IV funds.[35] The Department's current regulations reflect this statutory language. Prior to any suspension or termination from the program, the Department must provide reasonable notice and a hearing, with the Department carefully delineating in the current regulations the procedural protections to which an institution is entitled.[36] The current regulations define misrepresentation to mean "any false, erroneous or misleading statement an eligible institution makes to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary."[37] Underscoring that such statements require an element of calculated harm by the institution, the current regulations define the term "misrepresentation" to encompass the "dissemination of endorsements and testimonials that are given under duress."[38] The current rules also require a showing of reasonable reliance: "Any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment."[39] The current regulations mandate not only due process protections for eligible institutions, but also a showing of reasonable detrimental reliance upon their untrue, incorrect, or deceptive statement by an enrolled or prospective student, his family, or the Secretary.

The new misrepresentation regulations change all of this by removing mandatory due process requirements for institutions facing fines or Title IV eligibility termination, limitation, or suspension. Now, these due process protections are expressly optional, with the new rules permitting the Department to fine or terminate, limit, or suspend an institution's participation in Title IV with no notice and hearing.[40] In response to comments raising this issue during the comment period, the Department stated that "[t]o the extent the Department *chooses* to initiate an action based upon a violation of the misrepresentation regulations, nothing in the proposed regulations diminishes the procedural rights that an institution otherwise possesses to respond to that action."[41] But the Department need not ever exercise this option, as the misrepresentation regulations permit the Secretary to revoke, limit, or deny participation in Title IV programs without initiating any action requiring due process.[42] The HEA's notice and hearing requirements exist not to protect the Department but to ensure that participating institutions facing fines or termination, limitation, or suspension of their eligibility to participate in the Title IV program receive due process.[43]

The Department's removal from the Final Regulations of current 34 C.F.R. § 668.75, which governs how the Department reviews allegations of substantial misrepresentation, also supports the view that the Department views the due process procedures as optional. Under that rule, the Department must review a complaint of substantial misrepresentation to judge its seriousness. If minor or unintentional, the Department must work with the institution to obtain an informal, voluntary correction. If, however, the matter rises to a substantial misrepresentation, the Department initiates a fine or limitation, suspension, or termination action in accordance with the notice and hearing procedures required by the HEA. Effective July 1, 2011, this regulation will be replaced by a rule that admonishes institutions never to suggest that the Department approves or endorses the institution because of its participation in Title IV programs.[44]

Other concerns arise from the way the misrepresentation regulations seek to expand the meaning of "substantial misrepresentation" in a way that some may argue erases the word "substantial" from the statute. The new rules define "misleading

statement" (a type of misrepresentation under the current and new rules) as one "that has the likelihood or tendency to deceive or confuse."[45] Accordingly, in the Department's view, a "substantial misrepresentation" may be a true statement, even if made without the intent to deceive, mislead or confuse; at the outside, the standard is now a mere "tendency to . . . confuse," without regard to the intent of the declarant. The new rules include no limitations and no safe harbor for good faith error. The Department may thus punish an institution for petty declarations, true statements, and incorrect responses to minor questions, as long as the declaration, statement, or response has "a tendency to . . . confuse" a member of the public. Critics assert that the plain meaning of the language employed by Congress requires that an institution's misrepresentations be substantial for the Department to terminate or suspend Title IV eligibility. The Department's new regulation effectively nullifies this determination by Congress.

The misrepresentation regulations also conflict with the HEA in the categories of misrepresentations that the new rules seek to prohibit. Congress explicitly prohibited substantial misrepresentations in three specific areas: "the nature of [an institution's] educational program, its financial charges, or the employability of its graduates."[46] Yet, despite this express determination, the new rules expand this language to prohibit misrepresentations "regarding the eligible institution, *including* about the nature of its educational program, its financial charges, or the employability of its graduates."[47] Congress used clear language in the HEA when it elucidated three specific types of misrepresentations that it sought to prohibit; they are not mere examples of some larger body of potential misrepresentations. Through the new rules, opponents of the Final Regulations say that the Department is appropriating to itself the power to prohibit statements beyond the "substantial" ones addressed by Congress in the HEA.[48]

The new misrepresentation rules become all the more important when one understands that the Department has added to the classes of persons protected by the HEA's substantial misrepresentation provision, as well as those whose conduct the statute governs. (The HEA is silent on these issues, other than proscribing the conduct of "an eligible institution.") Under the current rules, an institution is prohibited from making substantial misrepresentations "to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary."[49] The new regulations expand that list to include "any member of the public," as well as to accrediting agencies and State agencies.[50] The list of persons governed by the new regulation includes not only "an eligible institution," but also "its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to educational programs, or to provide marketing, advertising, recruiting or admissions services."[51] Accordingly, the new rule prohibits substantial misrepresentations made to any member of the public by "ineligible institutions, organizations, or persons" with whom the eligible institution has a service agreement for marketing, advertising, recruiting, or admissions efforts.

In a nutshell, the new misrepresentation regulations authorize the Department to punish an eligible institution for any comment uttered to a member of the public by that institution, its representatives, and certain of its vendors or obligors, as long as the comment is in regard to the eligible institution and has a tendency to confuse a member of the public.[52] And the Department may do so, at its option, without notice and hearing. The HEA does not support this interpretation of the substantial misrepresentation provisions.

THE INCENTIVE COMPENSATION REGULATIONS

To participate in the federal student loan program, an eligible institution must enter into a program participation agreement with the Secretary of Education; those agreements include statutory conditions with which the institution must comply. Specifically, section 487(a)(20) of the HEA declares that, with the exception of certain situations involving foreign students residing in foreign countries, no institution may "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."[53] Accordingly, these "incentive compensation provisions" disallow only three types of compensation—commissions, bonuses, or other incentive payments—to persons or entities engaged in only three kinds of activities—student recruiting, admission activities, or student financial aid awards—but only when an institution directly or indirectly seeks to make payments based on the success of the person or entity in securing student enrollments or financial aid. Critically, the legislative history shows that Congress intended that the number of students recruited or awarded financial aid by schools could not serve as the sole basis for an institution's paying salaries based on merit.[54]

The current rules provide a series of "safe harbor" provisions that clarify what conduct the incentive compensation prohibition proscribes or permits.[55] The new incentive compensation regulations do away with the safe harbor rules and create a regulatory scheme that hinges upon an expansive reading of the text of the HEA's incentive payment provision and that does not follow the plain meaning of its words or the legislative history. The Department does this primarily in two ways. First, the new rules widen the scope of employees covered by the incentive compensation prohibitions through the substitution of a "responsibility for" standard for the text's "engaged in" language. Second, they enlarge the HEA to regulate compensation arguably left untouched by Congress.

The new incentive compensation rules interpret section 487(a)(20) to govern not only those persons and entities who actually "undertake" student recruiting and admissions or financial aid decisions but also to embrace "*any higher level employee with responsibility* for recruitment or admission of students, or making decisions about awarding title IV, HEA program funds."[56] Despite the statutory language and the legislative history showing otherwise, the Department declared in the June 18, 2010, NPRM that its "position is that section 487(a)(20) of the HEA is clear that the incentive compensation prohibition applies all the way to the top of an institution or organization."[57] The Department concedes a point important

to its critics: In crafting the statute, Congress was not silent on the issue of the class of persons that the statute prohibits, and the language is not ambiguous. It is, in fact, "clear." This aspect of the new rules now presents a pure question of statutory construction for the courts to decide, with no *Chevron* deference due the Department's interpretation.[58] By its plain language, the statute applies to persons "engaged in" recruiting, admitting students or awarding financial aid. Congress spoke explicitly to the "precise question at issue" when it expressly used the word "engaged"—or "to become involved"[59]—and chose not to employ the words like "officers," "senior management," "responsible" or "responsibility for" in the statute. The legislative history supports such a reading. Congress was clear that it wanted to ban commissioned salesmen and the like, not "higher level employees" or "the top of an institution or organization" with "responsibility for" recruiting, admissions, or financial aid awards.[60] Noting that the statute is "clear," the Department admits that it is not entitled to *Chevron* deference on this issue.[61]

The new regulations also seek to regulate forms of compensation that Congress did not prohibit in section 487(a)(20). The Department interprets the phrase "commission, bonus, or other incentive payment" to include merit-based salaries and salary adjustments that institutions directly or indirectly base on success securing student enrollments, admissions, and financial aid awards. But this interpretation ignores that Congress did not include the words "salaries," "salary adjustments," "wages," or "remuneration" in the statute, and it did not mandate fixed salaries. Congress used the words "commission, bonus, or other incentive payment," deliberately and unambiguously choosing particular words that denote a related meaning.[62] If Congress had wished to spread its net wider to keep institutions from using success in recruiting, admissions, and financial aid awards as a component in figuring merit-based "salaries" and "wages," it could have easily done so and specifically referenced them in the text. Congress could have mandated fixed salaries for those undertaking recruiting, admissions, and financial aid award functions. It did not. One can thus presume that Congress meant to exclude this type of compensation when it did not include them in the statute.[63] It has, after all, reauthorized the HEA twice since 1992 and has not revised this language.[64] Indeed, the Department believes that section 487(a)(20)'s prohibitions are "clear."[65]

The legislative history supports the view that Congress directly intended a narrow definition of the kinds of incentive compensation prohibited by the HEA. The House Conference Report states that Congress clearly sought to bar commissioned salesmen and other similarly compensated persons whose compensation was based only on success in recruiting, admitting, and awarding students:

> The conferees note that substantial program abuse has occurred in the student aid programs with respect to the use of commissioned sales representatives. Therefore this legislation will prohibit their use. The conferees wish to clarify, however, that use of the term "indirectly" does not imply that schools cannot base employee salaries on merit. It does imply that such compensation cannot *solely* be a function of the number of students recruited, admitted, enrolled, or awarded financial aid.[66]

Critically, Congress left open the door for merit-based salary payments and adjustments that could take into account, as one of many factors, an employee's success in student recruitment and admissions or financial aid awards. The House Conference Report underscores that this is not an issue that Congress failed to consider. The Department's reading of the HEA appears unsupported by the plain meaning of the words "commission, bonus, or other incentive payment" and the legislative history. The incentive compensation regulations bar payments that the HEA arguably permits.[67]

THE STATE AUTHORIZATION REGULATIONS

Section 101(a)(2) of the HEA defines "institutions of higher education" to mean "an educational institution *in* any State that . . . . is legally authorized *within* such State to provide a program of education beyond secondary education."[68] Hewing closely to this easily understood language, the current regulations neatly define such institutions as those "in a State" with the legal authority to provide a postsecondary educational program "in the State in which the institution is physically located."[69] The present rules underscore the obvious about the meaning of HEA's use of the phrases "in any State" and "within such State"—an "institution is physically located in a State if it has a campus or other instructional site in that State."[70] Under the current regulatory regime, a "legally authorized" institution is one that has the "legal status granted to an institution through a charter, license, or other written document issued by the appropriate agency or official of the State in which the institution is physically located."[71] In this vein, the HEA also imposes certain reporting requirements upon the states that relate to descriptions of licensing requirements and authorizations, revocations of licenses and authority to operate, and fraudulent or illegal activity by a licensed or authorized institution.[72] The current rules require a physical locality requirement and leave to each state to determine how to authorize an institution seeking to provide postsecondary education.

The state authorization regulations wholly revise this regulatory scheme to expand the scope of the HEA. The Department apparently bases the state authorization regulations on the language of section 101(a)(2) that an institution "in a State" maintain "legal authorization" from that state to provide a postsecondary program, as well as minimal state reporting requirements in the HEA.[73] Based on these statutory provisions, the new regulations create two main classes of institutions and several exemptions and give the state specific responsibilities.

The first class of institutions involves those expressly identified by the state by name in a charter, statute, or other approval action to operate postsecondary programs; states cannot simply authorize schools as a class to conduct business in a state.[74] These "named" institutions must comply with applicable state approval or licensing procedures, and the state must also approve or license them by name. Exemptions exist for institutions based on accreditation activity or for twenty years of operation.[75] The second class of institutions is composed of those entities that a state does not establish by name as an

educational institution in a State; instead, these institutions are established by the state on the basis of an authorization to conduct business or to operate as a nonprofit charitable organization in the state.[76] Thus, for the great majority of institutions (most of which are not established by name in a charter and the like), a state must have an approval or licensing procedure in place, as the institution must comply with that process and obtain authorization by name. States must possess "a process to review and appropriately act on complaints including enforcing state laws." States may not exempt these institutions from state approval or licensure based on accreditation, years in operation, or similar exemption. States cannot defer to other agencies or entities to ensure compliance with state laws.[77]

The new rules give the states a detailed approval and licensing framework that does not exist in the HEA. Although the Department states that the final rules do not require the creation of an actual licensing entity and that they may rely on existing state agencies, most states will have to revise substantially (or create from whole cloth) their procedures and approval systems to comply with these federal directives.[78] As a consequence, those that do not license institutions by name must now name each school; states that do not maintain procedures for handling complaints must now develop them; those without enforcement mechanisms must now create them; jurisdictions that do not maintain licensing and enforcement bureaucracies must now build and pay for them.[79] This effort to compel a specific authorization and enforcement scheme is without foundation in the HEA's provisions governing state responsibilities, which form little more than reporting requirements and do not reference minimum licensing requirements and procedures, much less state enforcement efforts.[80] If Congress had intended for the Department to commandeer these state functions, it could have expressly chosen so in the HEA.[81]

SUMMARY

Rulemaking is often difficult, requiring close attention to the language of statutes that are sometimes poorly drafted with little or no legislative history; however, this is not the case with the substantial misrepresentation, incentive compensation payment, and state authorization provisions of the HEA. The Final Regulations remain vulnerable due to an expansive reading of the HEA by the Executive Branch. Critics assert that the promising discussion in the spring of 2009 on ways to develop rules to guide institutions through the requirements of the HEA has changed into a debate in which both reluctant foes and erstwhile allies of the Administration have found common cause to oppose many of the more controversial elements of the Final Regulations. The Department's recent attempt to use informal guidance to clarify language that contradicts the HEA only underscores their defective nature. A strong case exists that the Department should rescind the regulations and that it should begin the rulemaking anew.

Endnotes

1 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

2 Southwest Texas State College is now known as Texas State University-San Marcos.

3 Higher Education Amendments of 1968, Pub. L. No. 90-575, 82 Stat. 1014 (1968), Higher Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), Higher Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2018 (1976), Higher Education Amendment of 1980, Pub. L. No. 96-374, 34 Stat. 1367 (1980), Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986), Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992), and the Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998).

4 20 U.S.C. § 1070 *et seq.*

5 *See* http://studentaid.ed.gov/PORTALSWebApp/students/english/aboutus.jsp.

6 See 20 U.S.C. § 1002(a)(1), (b), and (c), defining an "institution of higher education" for purposes of Title IV student financial assistance and referencing the definition of "institution of higher education" in 20 U.S.C. § 1001. "Institutions of higher education" includes public or other nonprofit institutions, proprietary institutions of higher of education, and postsecondary vocational institutions.

7 20 U.S.C. § 1221e-3.

8 74 Fed. Reg. 24,728 (May 26, 2009); *see also* 20 U.S.C. § 1098a for negotiated rulemaking authority.

9 75 Fed. Reg. 34,806 (June 18, 2010).

10 The timing of this deadline deviated from the sixty-day period established by President Clinton in Exec. Order No. 12,866. *See* 58 Fed. Reg. 51,735 (Sept. 30, 1993).

11 75 Fed. Reg. 66,832, 66,833 (Oct. 29, 2010). Facing heated criticism during the comment period, the Department withdrew key portions of its proposed "gainful employment" regulations. Those rules remain pending for final publication.

12 Press Release, Department of Education, Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers (Oct. 28, 2010), *available at* http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax.

13 *Id.* at 66,832.

14 *See, e.g.*, U.S. House, Committee on Education and Workforce, *Education Regulations: Weighing the Burden on Schools and Students,* Hearing, March 1, 2011.

15 U.S. Gov't Accountability Office, GAO-10-948T, For Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices (2010) issued August 4, 2010 and subsequently reissued on November 30, 2010; U.S. Gov't Accountability Office; GAO-11-184R, Program Integrity Issues (November 15, 2010), a report consisting of a letter (B-321105) to Sen. Tom Harkin, Chairman of the U.S. Senate Committee on Health, Education, Labor and Pensions; Sen. Michael Enzi, Ranking Member of the U.S. Senate Committee on Health, Education, Labor and Pensions; Rep. George Miller, Chairman of the U.S. House Committee on Education and Labor; and Rep. John Kline, Ranking Member of the U.S. House Committee on Education and Labor.

16 Coal. for Educ. Success v. United States, Civil Action No. 1:11-cv-00287 (D.D.C. filed Feb. 2, 2011).

17 Career College Ass'n *d/b/a* Ass'n of Private Sector Colleges and Univs. v. Arne Duncan, Civil Action No. 1:11-cv-00138 (D.D.C. filed Jan. 21, 2011).

18 Letter dated February 9, 2011, from Anne L. Weismann, Chief Counsel, Citizens for Responsibility and Ethics in Washington, to Robert Khuzami, Enforcement Division Director, and Securities and Exchange Commission, *available at* http://www.scribd.com/doc/49542789/Letter-to-Robert-Khuzami-SEC-2-9-11.

19 Letter dated February 16, 2011, from Molly Corbett Broad, President, American Council on Education, and on behalf of 70 higher education associations and accrediting organizations to Secretary Arne Duncan (terming

the credit hour regulations as "flawed"), *available at* http://www.acenet.edu/AM/Template.cfm?Section=LettersGovt&CONTENTID=39894&TEMPLATE=/CM/ContentDisplay.cfm; Letter dated March 2, 2011, from Ms. Broad and on behalf of 60 higher education associations and accrediting organizations to Secretary Duncan (asking the Department to rescind its new state authorization regulations in their entirety), *available at* http://www.acenet.edu/AM/Template.cfm?Section=LettersGovt&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=40256.

20 The Department concedes that it did not rigorously examine the economic benefits supporting the NPRM. "It is difficult to quantify benefits related to the new institutional and other third-party requirements, as there is little specific data available on the effect of the provisions on borrowers, institutions, or the Federal taxpayer." 75 Fed. Reg. at 34,855.

21 Dear Colleague Letter dated March 17, 2011, from Eduardo M. Ochoa, Assistant Secretary, Office of Postsecondary Education, U.S. Department of Education.

22 5 U.S.C. §§ 701-706.

23 75 Fed. Reg. at 66,958-59 (to be codified at 34 C.F.R. §§ 668.71-668.75).

24 75 Fed. Reg. at 66,950-51 (to be codified at 34 C.F.R. § 668.14).

25 75 Fed. Reg. at 66,946-47 (to codified at 34 C.F.R. § 600.9).

26 467 U.S. 837, 844-45 (1984).

27 The Court clarified *Chevron's* application in subsequent years. In *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court narrowed Chevron deference to interpretations that are the product of a formal rulemaking process, such as notice-and-comment rulemaking.

28 *Chevron,* 467 U.S. at 842.

29 *Id.* at 843.

30 *See* Sullivan v. Zebley*,* 493 U.S. 521 (1990) (regulations held inconsistent with the statutory standard); Dole v. United Steelworkers of Am.*,* 494 U.S. 26 (1990) (finding no deference given to the Office of Management and Budget's interpretation of the Paperwork Reduction Act where the Act clearly expressed Congress' intention).

31 *Id.*

32 Immigration and Naturalization Serv. v. Cardoza-Fonseca*,* 480 U.S. 421, 446 (1987).

33 5 U.S.C. § 706(2)(C). Although this provision states that a reviewing court must set aside an unlawful agency action, the courts of appeals will remand the rule to the agency so that the agency may take further action that complies with the legal standard. South Prairie Construction Co. v. Local No. 627, 425 U.S. 800, 806 (1976) (*per curiam*).

34 20 U.S.C. § 1094(c)(3)(A).

35 *Id.*

36 34 C.F.R. §§ 668.75(c)(1), 668.81-668.98.

37 *Id.*

38 *Id.*

39 34 C.F.R. § 668.71(b).

40 75 Fed. Reg. at 66,958 (to be codified at 34 C.F.R. § 668.71(a)(1)-(4)). To the extent schools possess liberty and property interests in their eligibility to participate in Title IV programs, this provision could also be said to contravene the Due Process Clause of the Fifth Amendment to the Constitution.

41 75 Fed. Reg. at 66,915 (emphasis added).

42 75 Fed. Reg. at 66,958 (to be codified at 34 C.F.R. § 668.71(a)(1)-(4)).

43 In the Guidance, the Department attempts to allay this criticism, stating that "there is nothing" in the misrepresentation regulations "that reduces the procedural protection given by the HEA and applicable regulations" to contest an action by the Department to address an allegation of substantial misrepresentation. *Guidance* at 14. With this statement, the Department offers a novel view of its own regulation, which states with great clarity that if "the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary" has four choices—revocation of the program participation agreement, limitation on the Title IV participation, denial of participation applications, *"or"* initiation of a proceeding under the due process provisions of the regulations. Whatever the Guidance says, by making due process procedures optional under new § 688.71, the misrepresentation regulations alter the statutory framework established for due process under the HEA.

44 75 Fed. Reg. at 66,960 (to be codified at 34 C.F.R. § 668.75).

45 75 Fed. Reg. at 66,959 (to be codified at 34 C.F.R. § 668.71(c)).

46 20 U.S.C. § 1094(c)(3)(A).

47 75 Fed. Reg. at 66,958 (to be codified at 34 C.F.R. § 668.71(b))(emphasis added).

48 The Guidance claims that the misrepresentation regulations do not extend beyond these three areas, but the language of the new regulation contradicts this interpretation. *Guidance* at 15. "An eligible institution is deemed to have engaged in substantial misrepresentation when the institution . . . makes a substantial misrepresentation regarding the eligible institution, *including* about the nature of its educational program, its financial charges, or the employability of its graduates." 75 Fed. Reg. at 66,958 (to be codified at 34 C.F.R. § 668.71(b)) (emphasis added).

49 34 C.F.R. § 668.71(b).

50 75 Fed. Reg. at 66,959 (to be codified at 34 C.F.R. § 668.71(c)).

51 *Id.*

52 These rules may also raise First Amendment questions, to the extent the Misrepresentation Regulations seek to regulate noncommercial speech, or to restrict commercial speech unduly.

53 20 U.S.C. § 1094(a)(20) (emphasis added).

54 H.R. Rep. No. 102-630, pt. G, at 499 (1992) (Conf. Rep.), *reprinted in* 1992 U.S.C.C.A.N. 334, 335; *see also* United States *ex rel.* Bott v. Silicon Valley Colleges*,* 262 Fed. Appx. 810 (9th Cir. 1998).

55 34 C.F.R. § 668.14(b)(22)(ii)(A)-(L). The first safe harbor describes how an entity might adjust compensation without running afoul of the incentive compensation prohibition. The remaining eleven safe harbors cover other areas, including adjustments to employee compensation, enrollment in non-Title IV programs, contracts with training providers, profit-sharing bonus plans, program completion, pre-enrollment activities, managerial and supervisory employees, gifts of $100 or less, profit distributions, internet-based efforts, and payments to third parties.

56 75 Fed. Reg. at 66,951(to be codified at 34 C.F.R. § 668.14(b)(iii)(C)(2)(emphasis added).

57 75 Fed. Reg. at 34,819.

58 Immigration and Naturalization Serv. v. Cardoza-Fonseca*,* 480 U.S. 421, 446 (1987).

59 http:// www.dictionary.reference.com/browse/engage.

60 H.R. Rep. No. 102-630, pt. G, at 499.

61 In the Guidance, the Department attempts to clarify the incentive compensation rules. *Guidance* at 8-15. Explaining which employees are covered by the new regulation, the Guidance confirms that the new rule applies to all employees of the institution and tries to make "a distinction between recruitment activities that involve working with individual students and policy-level determinations that affect recruitment, admission, or awarding Title IV funds." *Id.* at 12-13. The Guidance claims that the regulations do not cover "senior managers and executive level employees who are only involved in the development of policy and do not engage in individual student contact" and certain other activities. *Id.* at 13. As with the misrepresentation regulations, the Guidance conflicts with the wording of the incentive compensation regulation. The new rule specifically defines "persons engaged in any student recruitment or admission activity or in making decisions about the award of financial aid" to include any "higher level employee with responsibility for recruitment or admission, or making decisions about awarding" financial aid. 75 Fed. Reg. at 66,951 (to be codified at 34 C.F.R. § 668.14(b)(22)(iii)(C)(2)).

62 This is the principle of *noscitur a sociis:* Words grouped in a list should be

given their related meaning.

63 Nor can it be assumed that Congress was simply silent issue on the issue, given the legislative history. "Not every silence is pregnant." Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983).

64 The few courts that have reviewed this issue agree that the Act bars only incentive payments that use success in recruiting, admissions, or financial aid awards as the sole basis of the payment. *E.g.,* United States ex rel. Bott v. Silicon Valley Colleges, 262 Fed. Appx. 810, 812 (9th Cir.), *cert. denied*, 129 S. Ct. 573 (2008) ("The Act does not prohibit salary reviews generally, but rather bars the payment of a 'commission, bonus, or other incentive payment' solely on the basis of recruitment success.").

65 75 Fed. Reg. at 66,876.

66 H.R. Rep. No. 102-630, pt. G, at 499.

67 The Guidance ignores this legislative history when confirming that the incentive compensation regulations permit an institution to use a host of "qualitative factors" "so long as they are not related to the employee's success in securing student enrollments or the award of financial aid." *Guidance* at 13.

68 20 U.S.C. § 1001(a)(2) (emphasis added).

69 34 C.F.R. §§ 600.4(a) (1) and (3), 600.5(a)(2) and (4), and 600.6(a)(1) and (3).

70 34 C.F.R. §§ 600.4(b), 600.5(c), and 600.6(c).

71 34 C.F.R. § 600.2.

72 20 U.S.C. § 1099a.

73 *Id.*

74 Exceptions for certain kinds of institutions exist, such as entities already authorized by the federal government, certain tribal schools, and religious institutions. 75 Fed. Reg. at 66,947 (to be codified at 34 C.F.R. §§ 600.9(a)(2) and 600.9(b)).

75 75 Fed. Reg. at 66,861 (to be codified at 34 C.F.R. § 600.9(a)(1)(i)).

76 75 Fed. Reg. at 66,861 (to be codified at 34 C.F.R. § 600.0(a)(1)(ii)).

77 75 Fed. Reg. at 66,946 (to be codified at 34 C.F.R. § 600.9(a)(1)).

78 The President of the Accrediting Commission for Senior Colleges and Universities of the Western Association of Schools and Colleges (WASC) recently offered evidence to a House panel that the state authorization regulations will require at least thirty-seven states to amend, repeal, or otherwise modify their laws to comply with the new rule. *Education Regulations: Federal Overreach into Academic Affairs: Hearing Before the Subcomm. on Higher Education and Workforce Training of the H. Comm. on Education and the Workforce*, 112th Cong. (2011) (testimony by Ralph Wolff), *available at* http://edworkforce.house.gov/UploadedFiles/03.11.11_wolff.pdf.

79 These concerns are not theoretical. By way of illustration, the Alabama Private School License act allows for limited exemptions for schools with certain characteristics that indicate educational quality, such as schools with a religious mission and institutions principally supported by the state. Ala. Code § 16-46-3. California similarly exempts institutions accredited by the Western Association of Schools and Colleges, among others. Cal. Educ. Code § 94874.

80 20 U.S.C. § 1099a(a)(1)-(3).

81 To the extent the state authorization regulations can be considered to displace the traditional role of the states in education and to instruct states how to authorize postsecondary education programs, the new rules may give rise to constitutional concerns based in federalism, particularly given the absence here of a clear and manifest directive from Congress. *See* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government may not command the States "to administer or enforce a federal regulatory program"). Indeed, the Department of Education Organizational Act expressly recognizes that our federal system reserves the education power to the states. 20 U.S.C. § 3403(a) ("It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.").