



October 12, 2017

**Submitted via Regulations.gov**

Director  
Regulations Management (00REG)  
Department of Veteran Affairs  
810 Vermont Avenue NW, Room 1068  
Washington, DC 20420

Re: *Notice of Intent and Request for Comments—Employees Whose Association With For-Profit Educational Institutions Poses No Detriment to Veterans*, 82 Fed. Reg. 43,288 (Sep. 14, 2017)

Dear Director:

The Campaign Legal Center opposes VA’s proposal to gut an important conflict of interest law that has protected the nation’s veterans for 51 years. Though the law permits individual waivers, VA exceeds the bounds of its waiver authority by proposing to waive the entirety of the law for all of its 378,000 employees—the universe of covered federal officials.<sup>1</sup> In proposing this blanket waiver, VA has neither complied with applicable legal requirements nor offered a persuasive justification for ending a half century of vigilance, and waiving the law will allow all VA employees to engage in conduct that Congress prohibited for a reason.

CLC is a nonpartisan, nonprofit organization whose mission includes monitoring compliance by government officials with ethical obligations and defending government ethics laws, regulations, and standards. This letter constitutes CLC’s formal written comment in opposition to VA’s “Notice of Intent and Request for Comments—Employees Whose Association With For-Profit Educational Institutions Poses No Detriment to Veterans.” CLC opposes VA’s proposed waiver because it is both (1) contrary to law and arbitrary and capricious in violation of the Administrative Procedures Act (APA), and (2) unjustified on the merits.

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<sup>1</sup> See U.S. Department 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. 43,288 (Sept. 14, 2017); Dep’t Veterans Affairs, *2016 Agency Ethics Program Questionnaire*, Part 4, Question 2 (Dec. 31, 2016), <https://goo.gl/871uP5>.

## I. Background

In 1966, Congress determined that it was necessary to protect veterans with regard to for-profit educational institutions from the potential conflicts of interest posed by VA employees owning any interest in, or receiving wages, salary, dividends, profits, gratuities, or services from those institutions.<sup>2</sup> To that end, Congress enacted 38 U.S.C. § 3683, which mandates in relevant part that VA employees with such connections be immediately terminated.<sup>3</sup> At the same time, Congress provided that the Secretary, “after reasonable notice and public hearings,” may “waive in writing the application of this section in the case of any officer or employee of the Department . . . or of a State approving agency, if the Secretary finds that no detriment will result to the United States or eligible persons or veterans by reasons of such interest or connection of such officer or employee.”<sup>4</sup> On September 14, 2017, VA issued the above-referenced notice stating the Secretary’s intent to waive the application of 38 U.S.C. § 3683(a) to all VA employees, for all types of covered conflicts of interest, effective October 16, 2017.

## II. The Proposed Blanket Waiver Is Contrary to Law and Arbitrary and Capricious in Violation of the Administrative Procedures Act.

The proposed blanket waiver is contrary to law and arbitrary and capricious in violation of the APA. In exercising this statutory waiver authority, the Secretary may not violate the APA’s prohibition on agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”<sup>5</sup> “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,”<sup>6</sup> or “without observation of procedure that is required by law.”<sup>7</sup> The proposed general waiver violates the APA for a number of reasons. It also violates the unambiguous terms of the provision that confers authority to waive the statute.<sup>8</sup>

### A. The Secretary’s Proposed General Waiver Constitutes *De Facto* Repeal of a Congressionally Enacted Statute.

The proposed waiver is contrary to law and in excess of the Secretary’s statutory authority because it constitutes a *de facto* repeal, through Federal Register notice, of an Act of Congress in violation of the APA. The D.C. Circuit has held that a statutory exception may not be interpreted in such a broad manner that they undermine a general statutory rule. Rejecting an interpretation where the “exception . . . swallows the rule,” the court of appeals explained that it will “refuse to conclude that with the one hand Congress intended to enact a statutory rule . . . but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule.”<sup>9</sup>

The Secretary’s proposed blanket waiver of the conflict of interest prohibition as to *all* VA employees—the entire universe of the provision’s federal government coverage—

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<sup>2</sup> 38 U.S.C. § 3683(a).

<sup>3</sup> 38 U.S.C. § 3683(a), (b).

<sup>4</sup> 38 U.S.C. § 3683(d).

<sup>5</sup> 5 U.S.C. § 706(2)(A).

<sup>6</sup> 5 U.S.C. § 706(2)(C).

<sup>7</sup> 5 U.S.C. § 706(2)(D).

<sup>8</sup> 38 U.S.C. § 3683(d).

<sup>9</sup> *Mitchell v. Fed. Bureau of Prisons*, 587 F.3d 415, 421 (D.C. Cir. 2009).

violates this basic principle. In enacting the prohibition, Congress determined that, as a general matter, connections between VA employees and for-profit education companies that receive VA funds are detrimental. Congress therefore prohibited such connections. The Secretary appears to disagree with Congress, stating that any such conduct by any VA employee would yield “no detriment.”<sup>10</sup> VA’s proposal accordingly seeks to overrule Congress and use its waiver authority to create an exception that swallows the rule prohibiting conflicts of interest. But that was not Congress’s judgment, and the Secretary lacks the authority to decide otherwise.

It is a “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”<sup>11</sup> If the Secretary believes that a “literal reading of the statute” would have “illogical and unintended consequences,” as VA’s notice indicates,<sup>12</sup> his recourse is to raise the issue with Congress, not to effectively repeal and rewrite the statute in his own design.

Because an agency may not repeal an Act of Congress, the proposed blanket waiver is contrary to the text of the statute and thus violates the APA.

## **B. The Proposal is Contrary to Law Because It Converts a Statutorily-Mandated Result into a Discretionary Determination by the Secretary.**

The Secretary contends that other ethics rules suffice to address the problem Congress identified in enacting 38 U.S.C. § 3683(a),<sup>13</sup> but proposes to nonetheless “reserve his authority to remove an employee under section 3683(a) if the employee has committed, in relation to a for-profit educational institution, a violation of” *other* conflict of interest laws.<sup>14</sup> This is contrary to law.<sup>15</sup>

Section 3683(a) is not a grant of discretionary authority to the Secretary. Rather, the statute proscribes certain conflicts of interest among VA employees and provides that any non-complying employee “*shall* be immediately dismissed from such officer’s or employee’s office or employment.”<sup>16</sup> Congress’s use of the word “shall” signals mandatory, not discretionary, action.<sup>17</sup> This is particularly so “when a statutory provision uses both ‘shall’ and ‘may,’” because by doing so, Congress is presumed to have “intended the ordinary distinction.”<sup>18</sup> Such is the case here, where sections (a) through (c) employ the word “shall” in the context of imposing penalties for prohibited conduct, while section (d) employs the word “may” in the context of granting individualized waivers for such conduct.

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<sup>10</sup> See 82 Fed. Reg. 43,288-89.

<sup>11</sup> *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014).

<sup>12</sup> 82 Fed. Reg. at 43,288.

<sup>13</sup> For the reasons discussed below in Part III, below, this contention lacks merit.

<sup>14</sup> 82 Fed. Reg. at 43,289.

<sup>15</sup> With respect to VA employees, it is also contrary to fundamental notions of fair play. Following issuance of the proposed blanket waiver, VA would presumably cease training employees on 38 U.S.C. § 3683 but, despite the lack of notice, would purportedly preserve the “right” to terminate them under this statute for infractions of different rules that might otherwise warrant less severe corrective action. See 82 Fed. Reg. at 43,289; see also Office of the Inspector General, U.S. Dep’t. Veterans Affairs, *Administrative Investigation: Conflicting Interests and Misuse of Government Equipment, Overton Brooks VA Medical Center, Shreveport, Louisiana*, Report No. 14-03508-275, 3-4 (Jul. 18, 2017) (noting that VA has already failed to train employees on the requirements of this statute even absent a waiver), <https://goo.gl/FQDy9g>.

<sup>16</sup> 38 U.S.C. § 3683(a) (emphasis added).

<sup>17</sup> See *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016).

<sup>18</sup> *Id.*

In contravention of this statutory scheme, the Secretary proposes to convert section 3683(a)'s "shall" into a "may"—by "reserv[ing] his *authority* to remove an employee under section 3683(a)."<sup>19</sup> In effect, the Secretary has decided to reverse Congress's chosen structure by making section 3683(d)'s waiver the *rule*, and section 3683(a)'s prohibitions the *exceptions*. Worse yet, the Secretary proposes reserving this non-existent discretionary authority as a tool to respond to violations by employees of *different federal statutes*. The Secretary may not waive the prohibitions of section 3683(a) in their entirety, convert the mandatory termination provision into a discretionary one, and then employ that newfound discretionary authority as a tool to punish violations of *other* statutes.<sup>20</sup>

### **C. The Proposed Blanket Waiver is Contrary to Law Because the Statute Requires a Case-by-Case Assessment of the Detriments Posed by Individual Employees' Conflicts.**

The proposal is also contrary to law in violation of the APA because section 3683(d) requires any waiver to occur on a case-by-case basis, and does not permit the categorical waiver the Secretary seeks.<sup>21</sup>

The Supreme Court has explained that where a statute describes an agency's determination with respect to individuals in the singular tense, the statute requires a case-by-case, rather than a general, agency determination. In *Albertson's, Inc. v. Kirkingburg*, the Court considered whether, under an earlier version of the Americans with Disabilities Act (ADA), a person could be presumed disabled based upon a medical diagnosis.<sup>22</sup> The Court said no, holding that the ADA required determination of disabilities on "a case-by-case basis" because it "defin[ed] 'disability' 'with respect to an individual,' and in terms of the impact of an impairment on 'such individual.'"<sup>23</sup>

The same case-by-case requirement exists here. Section 3683(d)'s waiver provision applies to "*the case of any officer or employee . . . if the Secretary finds that no detriment will result . . . [from the conduct of] such officer or employee.*"<sup>24</sup> Just as the ADA required a determination of "such individual[s]" medical condition, § 3683(d) requires a determination of the detriment posed by "such officer or employee." The plain text of the VA-specific

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<sup>19</sup> 82 Fed. Reg. 43,289 (emphasis added).

<sup>20</sup> CLC questions whether the termination of an employee under such circumstances would be upheld. Though an employee's ignorance of the law might not constitute a defense to a removal action, an employee could not reasonably be expected to know the nuanced limits of an obscure Federal Register announcement concerning a waiver whose terms—in addition to being illegal—are ambiguous. See *Ryan v. Dep't of Homeland Sec.*, 123 M.S.P.R. 202 (2016) ("Fundamental fairness precludes disciplining an employee for creating the appearance of an ethical violation unless he should have known it would appear improper to a reasonable observer under the circumstances.").

<sup>21</sup> VA's implementing regulations similarly provide for individual waivers. See 38 C.F.R. § 21.4005.

<sup>22</sup> *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Note that one of *Kirkingburg's* holdings was later superseded by statute, but not the specific statutory requirement discussed here.

<sup>23</sup> *Id.* at 566 (citations omitted).

<sup>24</sup> 38 U.S.C. § 3683(d) (emphasis added).

conflict of interest statute requires an individualized, case-by-case determination, and thus, under the Supreme Court's holding in *Kirkingburg*, section 3683(d) does not permit the blanket waiver the Secretary proposes. The proposal is thus contrary to law in violation of the APA.

#### **D. The Proposal Violates the APA Because It Impermissibly Bypasses the Statutorily Mandated Public Hearings Requirement.**

The statute expressly requires “public hearings” before VA may issue waivers,<sup>25</sup> but VA proposes waiving the conflict of interest prohibition without complying with this requirement.<sup>26</sup> This proposed action would violate the APA's prohibition against agency action that is “without observation of procedure that is required by law,” because it impermissibly bypasses the statutorily mandated public hearings.<sup>27</sup>

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 used. Where a “public hearing” is simply a prerequisite to appellate judicial review, an opportunity for written submissions is sufficient.<sup>28</sup> 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.”<sup>29</sup> The same is not true, however, where a “public hearing” is mandated as a “procedure[] [to] be followed in the process of agency decisionmaking.”<sup>30</sup> In those circumstances, the statute “requires oral public participation.”<sup>31, 32</sup>

Here, Congress authorized the Secretary to issue waivers “after reasonable notice and public hearings.”<sup>33</sup> The public hearing requirement is an integral procedure in the sequence of the Secretary's decisionmaking, and not simply a mechanism to create a record for judicial review or to trigger appellate jurisdiction. As such, the Secretary may not bypass the requirement for public hearings involving oral public participation prior to the issuance of waivers. Yet that is what the Secretary proposes to do, declining in the Federal Register notice to schedule any public hearing, asserting instead that “[t]his notice is applicable on October 16, 2017, without further notice, unless VA receives significant adverse comment by October 16, 2017.”<sup>34</sup> As such, the proposal runs afoul of the APA by failing to observe a statutorily required procedure.

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<sup>25</sup> 38 U.S.C. § 3683(d) (“The Secretary may, after reasonable notice and public hearings, waive in writing the application of this section . . .”).

<sup>26</sup> 82 Fed. Reg. 43,289.

<sup>27</sup> 5 U.S.C. § 706(d)(D).

<sup>28</sup> See *Env'tl Defense Fund, Inc. v. Costle*, 631 F.2d 922, 930 (D.C. Cir. 1980).

<sup>29</sup> *Humane Soc'y of the United States v. EPA*, 790 F.2d 106, 111 (D.C. Cir. 1986).

<sup>30</sup> *Costle*, 631 F.2d at 930.

<sup>31</sup> *Id.*

<sup>32</sup> 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. *Id.* at 928-29 (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240 (1973)). But the court noted that the same is not true for the phrase “public hearing.” *Costle*, 631 F.2d at 929.

<sup>33</sup> 38 U.S.C. § 3683(d).

<sup>34</sup> 82 Fed. Reg. 43,288.

**E. The Proposal Is Arbitrary and Capricious and Contrary to Law Because It Disregards VA’s Own Regulations Governing the Process for Granting Section 3683(d) Waivers.**

The proposal is arbitrary and capricious and contrary to law in violation of the APA because it disregards VA’s own regulations governing waivers. Under VA regulations, VA may grant section 3683(d) waivers for VA employees under two circumstances: (1) where the employee “[a]cquired his or her interest in the educational institution by operation of law, or before the statute became applicable to the officer or employee, and his or her interest has been disposed of and his or her connection has discontinued,” or (2) where *all* of six conditions are met:

1. The employee’s position “involves no policy determinations, at any administrative level, having to do with matters pertaining to payment of educational assistance allowance, or special training allowance”;
2. The employee’s position “has no relationship with the processing of any veteran’s or eligible person’s application for education or training”;
3. The employee’s position “precludes him or her from taking any adjudicative action on individual applications for education or training”;
4. The employee’s position “does not require him or her to perform duties involved in the investigation of irregular actions on the part of educational institutions or veterans or eligible persons”;
5. The employee’s position “is not connected with the processing of claims by, or payments to, schools, or their students”; and
6. The employee’s position “is not connected in any way with the inspection, approval, or supervision of educational institutions desiring to train veterans or eligible persons or to offer a licensing or certification test; or with the processing of claims by or making payments to veterans and eligible persons for taking an approval licensing or certification test.”<sup>35</sup>

The regulations provide that the Secretary reserves the authority to grant a waiver “in the case of an officer of the Department . . . and in the case of any employee . . . who does not meet the criteria” listed above.<sup>36</sup> Consistent with the statutory requirement to issue waivers individually, the plain language of these regulations provides only for the issuance of each waiver individually. The Secretary’s proposed categorical waiver is, thus, entirely inconsistent with these regulations.

In order to change its position on an issue, an agency “must display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”<sup>37</sup> Rather, the new position

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<sup>35</sup> 38 C.F.R. §§ 21.4005(b)(1)(ii)(A)-(F).

<sup>36</sup> *Id.* § 21.4005(c)(3).

<sup>37</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

must be “permissible under the statute,” must be supported by “good reasons” for the change, and the agency must “believe[] it to be better, which the conscious change of course adequately indicates.”<sup>38</sup> Where “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account,” a “more detailed justification” is required.<sup>39</sup> In such circumstances, “[i]t would be arbitrary and capricious to ignore such matters.”<sup>40</sup>

The proposal fails the requirements set forth by the Supreme Court in *FCC v. Fox Television Stations, Inc.* First, VA’s Federal Register notice does not even mention the existing regulatory framework for granting waivers, let alone acknowledge that the proposal constitutes a stark departure from those requirements.<sup>41</sup> As such, it appears VA intends to “simply disregard rules that are still on the books.”<sup>42</sup> Second, the Federal Register notice does not discuss—or even mention—the facts that underly the prior policy, let alone explain how any new facts justify a departure from the framework established by the regulations.<sup>43</sup> The notice thus falls far short of the “more detailed explanation” necessary to avoid being arbitrary and capricious under the test the Supreme Court established in *Fox*.

The proposal disregards existing regulation and fails to even acknowledge its departure from that regulation, let alone offer any justification for the policy change. As such it is contrary to law and arbitrary and capricious in violation of the APA.

### **III. VA’s Proposed Waiver is Unjustified on the Merits.**

#### **A. Congress Made a Determination as to the Need for a VA-Specific Conflict of Interest Statute.**

The VA-specific conflict of interest statute at issue here, 38 U.S.C. § 3683 represents a congressional determination that an ethics restriction is necessary to guard against a heightened risk of harm to veterans. VA has issued a formal legal opinion acknowledging this congressional determination and noting “Congress’ obvious concern with abuses” by for-profit educational companies.<sup>44</sup> The VA opinion adds that “the variety and pervasiveness of circumstances and conditions enabling such abuse were known” and “fully understood” by Congress.<sup>45</sup> The opinion also describes in vivid terms the specific harm Congress identified:

Documented and anecdotal accounts of these abuses, including blatant bribery resorted to by owners and operators of for-profit schools, such as gifts of furniture, liquor, money, and even

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<sup>38</sup> *Id.* (emphasis in original).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See 82 Fed. Reg. 43,288.

<sup>42</sup> *Fox* at 515.

<sup>43</sup> See 82 Fed. Reg. 43,288

<sup>44</sup> *Conflicting Interests (38 U.S.C. § 3683, 38 C.F.R. § 21.4005)*, Mem. from Mary Lou Keener, General Counsel, Dep’t Veterans Affairs to Under Secretary for Benefits, Dep’t Veterans Affairs, *Conflicting Interests*, O.G.C. Precedent 17-94 (Jul. 18, 1994) (“Keener Op.”), <https://goo.gl/JPPzGK>.

<sup>45</sup> Keener Op. at 3.

donations to one [state] official's church organ fund, were presented in extensive hearings held in connection with the House Select Committee's investigation of the WWII GI Bill. As a result of initial hearings in Harrisburg, Pennsylvania alone, 21 persons were indicted, 133 audits were made by the General Accounting Office and VA, with exception taken to \$2,625,232 in payments to Private trade schools in Pennsylvania, many of which should never have received approval.<sup>46</sup>

To protect veterans, Congress imposed in 1966 a blanket prohibition on VA employees having entanglements with for-profit education companies.<sup>47</sup> In 1962, Congress had previously passed a set of comprehensive ethics reforms applicable across the executive branch.<sup>48</sup> Despite the existence of these executive branch-wide laws, Congress added the VA-specific prohibitions at 38 U.S.C. § 3683 to prevent a recurrence of the documented harm to the nation's veteran population. When Congress later amended the 1962 executive branch-wide ethics laws and instituted various government ethics reforms in 1978,<sup>49</sup> 1989,<sup>50</sup> 2007,<sup>51</sup> and 2012,<sup>52</sup> as well as smaller changes at other times, Congress chose not to change 38 U.S.C. § 3683. As a result, this law has stood the test of time for 51 years.<sup>53</sup>

## **B. VA's Articulated Justification for the Proposed Waiver Is Factually Incorrect.**

After more than a half century of vigilance, VA now proposes to let down its guard and scrap this conflict of interest law.<sup>54</sup> In lieu of an explanation, VA states only that the Secretary has determined that "no detriment will result to the United States, veterans, or eligible person."<sup>55</sup> VA does not indicate how the Secretary arrived at this determination, nor does VA cite any study of the business practices of the education-for-profit industry.<sup>56</sup>

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<sup>46</sup> *Id.* (citing Summary Report of the House Select Committee to Investigate Educational, Training, and Loan Guaranty Programs Under GI Bill, 82d Congress, 1st Sess. (1951)).

<sup>47</sup> See Pub. L. 89-358, § 3(b), 80 Stat. 22, § 1783 (1966) (codified at 38 U.S.C. § 3683, Conflicting interests), as amended.

<sup>48</sup> See Pub. L. 87-849, 76 Stat. 1124 (1962) (codified as 18 U.S.C. ch. 11), as amended.

<sup>49</sup> Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824-1867 (1978), as amended.

<sup>50</sup> Ethics Reform Act of 1989, Pub. L. 101-194, 202, 103 Stat. 1716, at 1724 (1989), as amended.

<sup>51</sup> Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 (2007).

<sup>52</sup> Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. 112-105, 126 Stat. 295 (2012), as amended.

<sup>53</sup> 38 U.S.C. § 3683; 38 C.F.R. § 21.4005.

<sup>54</sup> U.S. Dep't Veterans Affairs, *Employees Whose Association with For-Profit Educational Institutions Poses No Detriment to Veterans*, 82 Fed. Reg. 43288 (Sep. 14, 2017).

<sup>55</sup> *Id.*

<sup>56</sup> Although CLC takes no position with respect to the underlying basis for the congressional determination of heightened risk, VA should take note of the fact that the business practices of for-profit educational companies continue to be a subject of public concern half a century after Congress enacted 38 U.S.C. § 3683. One entity that identifies itself as a nonpartisan charitable organization focused on veterans' issues, Veterans Education Success, contends on its website that "a loophole in federal law" known as the 90/10 rule motivates for-profit education companies "to use GI Bill dollars & Defense Department Tuition Assistance to offset a cap on federal student aid the schools otherwise face." See Veterans Education Success, *What Is The 90/10 Loophole?* (site viewed Oct. 11, 2017), <https://goo.gl/7Kmr9F>. Veterans Education Success quotes Hollister Petraeus, a retired Assistant Director of the Consumer Financial Protection Bureau as asserting, "This gives for-profit colleges an incentive to see service members as nothing more than dollar signs in uniform, and to use aggressive marketing to draw them in and take out private loans, which students often need because the federal grants are insufficient to cover the full cost of tuition and related expenses." *Id.* (emphasis omitted); see also Kate O'Gorman, *The 90-10 Rule: Why Predatory Schools Target Veterans*, IRAQ AND AFGHANISTAN VETERANS OF AMERICA (May 7, 2012), <https://goo.gl/N57F8H>; Alia Wong, *Dollar Signs in Uniform: Why For-Profit Colleges Target Veterans*, THE ATLANTIC (Jun. 24, 2015), <https://goo.gl/4WknnC>; Jacob Davidson, *How For-Profit Colleges Target Military Veterans (and Your Tax Dollars)*, TIME (Nov. 11, 2014), <https://goo.gl/i8ZBnk>; Eric Westervelt, *For-Profit Colleges Seeking Veterans' GI Bill Dollars Aren't Always The Best Fit*, NAT'L PUBLIC RADIO (Jan. 29, 2016), <https://goo.gl/aJrZus>. In addition, advances in technology have reportedly made it possible for "Lead-generators" to



VA appears to be relying solely on the existence of other ethics requirements. VA's Federal Register notice states incorrectly that 38 U.S.C. § 3683 was enacted "before there were conflict-of-interest laws applicable to all Executive Branch employees," adding that employees must continue to adhere to executive branch-wide rules.<sup>57</sup> Consistent with the position implicitly taken in the Federal Register notice, a VA spokesperson reportedly expressed the view that 38 U.S.C. § 3683 has been made superfluous by the subsequent enactment of executive branch-wide conflict of interest statutes.<sup>58</sup> This justification does not, however, hold up to scrutiny.

VA's statement that 38 U.S.C. § 3683 predates the executive branch-wide conflict of interest laws is simply untrue. As discussed above, Congress enacted a consolidated and reformed set of executive branch-wide conflict of interest laws four years before it enacted 38 U.S.C. § 3683.<sup>59</sup> Though these laws were subsequently amended around the edges, the basic prohibitions contained in them have remained substantially unchanged in the intervening years. Other laws enacted afterward have added narrow prohibitions, such as the prohibition on earning compensation as a member of a corporate board of directors,<sup>60</sup> but the core of the substantive conflict of interest laws were in place before 1966 when Congress enacted 38 U.S.C. § 3683.<sup>61</sup> In any event, these subsequent changes to the conflict of interest laws serve only to demonstrate the continuing congressional commitment to the VA-specific prohibition within 38 U.S.C. § 3683, which Congress chose not to change when it amended discrete parts of the framework for ethics in the executive branch.

### C. VA's Proposed Waiver Would Create Gaps in Coverage.

VA is also wrong in its assertion that other laws would entirely fill the gaps that implementing VA's proposed waiver would create. The executive branch-wide conflict of interest rules are not coextensive with the VA-specific law, which prohibits the following with respect to for-profit education companies: (1) any ownership interest or any investment income or stake in profits, (2) any salary or wages, (3) any gifts, and (4) the receipt of services.<sup>62</sup> The law also permits a waiver but only after a public notice and a hearing. A comparison of each of these restrictions, as well as the waiver requirements, with the executive branch-wide rules reveals that the executive branch-wide rules would not fill the gaps created by VA's proposed waiver.

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collect and sell Veterans' contact information to what some call predatory recruiters. *See, e.g.*, U.S. PIRG ED. FUND & CENTER FOR DIGITAL DEMOCRACY, "Private for Profit Colleges and Online Lead Generation: Private Universities Use Digital Marketing to Target Prospects, Including Veterans, via the Internet" (2015), <https://goo.gl/57i9sN>; David Halperin, *Military-Branded Websites Push Veterans to For-Profit Colleges*, HUFFINGTON POST (Feb. 1, 2016), <https://goo.gl/X3FGFX>. The potential for conflicts can arise because, among other reasons, VA makes decisions about whether these businesses can recruit on military bases. Aaron Glantz, *University of Phoenix gained special access to military base – for a price*, CENTER FOR INVESTIGATIVE REPORTING (Sept. 8, 2017), <https://goo.gl/tD29Rf>. In this context, therefore, VA's Secretary has a duty to evaluate and form a conclusion regarding the business practices of for-profit education companies before waiving a half-century old prohibition on entanglements between such companies and the VA employees who serve the nation's veteran population.

<sup>57</sup> 82 Fed. Reg. 43,288-89.

<sup>58</sup> Patricia Cohen, *Veterans Agency Seeks to Scrap Ethics Law on For-Profit Colleges*, THE WASHINGTON POST (Sep. 29, 2017), <https://goo.gl/XR4AKm>.

<sup>59</sup> *See* Pub. L. 87-849, 76 Stat. 1124 (1962) (codified as 18 U.S.C. ch. 11), as amended.

<sup>60</sup> *See* Pub. L. 521, 103 Stat. 1761 (1978), as amended (codified at 5 U.S.C. app. § 502(a)(4)).

<sup>61</sup> Compare Pub. L. 87-849, 75 Stat. 1124 (1962) with 18 U.S.C. ch. 11.

<sup>62</sup> 38 U.S.C. § 3683(a).

## 1. *Ownership interest or any investment income or stake in profits*

The ban on VA employees owning interests in for-profit education companies has no corollary in the ethics requirements generally applicable to all executive branch employees, but its nearest counterpart is 18 U.S.C. § 208.<sup>63</sup> Section 208 prohibits an executive branch employee from participating personally and substantially in a particular matter that directly and predictably affects the financial interest of a company in which the employee has a financial interest.<sup>64</sup> Unlike 38 U.S.C. § 3683, section 208 is not a “prohibited holdings” statute; rather section 208 is a “recusal” statute.<sup>65</sup> Waiving 38 U.S.C. § 3683 would permit VA employees to acquire financial interests in for-profit education companies, which they are currently prohibited from holding. Allowing those who administer benefits for, and provide healthcare to, veterans to hold interests in for-profit education companies implicates the heightened risk of influence that Congress sought to address when it enacted 38 U.S.C. § 3683 four years after enacting section 208. At a minimum, it increases the potential incentive to influence veterans to consider for-profit education providers.<sup>66</sup>

Another difference between the two statutes is that, while 38 U.S.C. § 3683 establishes an absolute prohibition, section 208 is subject to exemptions.<sup>67</sup> For example, an employee making a decision affecting the for-profit education industry could, under section 208, own as much as \$25,000 in the publicly traded stock of any company in that industry.<sup>68</sup> An employee making a decision involving one specific for-profit education company could own as much as \$15,000 in the publicly traded stock of that company.<sup>69</sup>

In addition, the requirements for waivers under the two statutes differ in a meaningful way.<sup>70</sup> As discussed above, 38 U.S.C. § 3683 requires VA to give public notice and hold a hearing before issuing a waiver to an individual employee. VA’s proposed blanket waiver to all employees deprives the public of the ability to evaluate the appropriateness of the waiver as to any individual employee. Although VA employees would still be covered by 18 U.S.C. § 208, they would be eligible for waivers under 18 U.S.C. § 208(b)(1). Such waivers are available to the public upon request, but there is no requirement to give public notice before issuing one. As a result, the public would not know to request a copy of a section 208 waiver and, in any event, could encounter difficulty requesting one without knowing the name of the employee who received it. Thus, the proposed waiver of 38 U.S.C. § 3683 would significantly reduce transparency if issued as a blanket waiver, rather than as an individual waiver.

## 2. *Salary or wages*

The VA-specific conflict of interest law, 38 U.S.C. § 3683, also establishes a blanket prohibition on earning “salary” or “wages” from a for-profit education company, and there is

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<sup>63</sup> While other agency-specific conflict of interest statutes exist, they do not apply globally to all executive branch employees. *See, e.g.*, 12 U.S.C. § 244 (barring members of the Federal Reserve Board from holding bank stock).

<sup>64</sup> 18 U.S.C. § 208(a).

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.*, Heather Vogell, *The Failure Track: For-Profit Schools Reward Students for Referrals and Facebook Endorsements*, PRO PUBLICA (Oct. 6, 2017), <https://goo.gl/GEGFdU>.

<sup>67</sup> *See* 38 U.S.C. § 3683; 18 U.S.C. § 208(b)(2).

<sup>68</sup> 5 C.F.R. § 2640.202(c).

<sup>69</sup> 5 C.F.R. § 2640.202(a).

<sup>70</sup> *See* 38 U.S.C. § 3683(d); 18 U.S.C. § 208(b)(2).

no corresponding executive branch-wide prohibition. The nearest comparable ethics restrictions applicable executive branch-wide are an earned income ban applicable to certain Presidential appointees<sup>71</sup> and a 15% cap on outside earned income applicable only to senior political appointees.<sup>72</sup> These rules do not, however, apply to career employees, nor is the 15% cap an absolute prohibition.

Other executive branch-wide rules apply to employees who take outside jobs with for-profit education companies, but they're narrower than the VA-specific prohibition. A conflict of interest prohibition, pursuant to 18 U.S.C. § 208, applies only so long as the employee holds the job, is subject to individual waiver without public notice, and does not apply if a VA employee is an independent contractor<sup>73</sup> of a for-profit education company, as could be the case with adjunct professor positions or other positions. Moreover, a separate impartiality regulation applies only if the employee, himself or herself, concludes that a reasonable person would be concerned about the employee's impartiality.<sup>74</sup>

### 3. Gifts

Waiving the absolute prohibition on gifts under 38 U.S.C. § 3683 would open the door to VA employees accepting various types of gifts from for-profit education companies, due to regulatory exceptions to the executive branch-wide gift rules.<sup>75</sup> Although the gift rule exceptions are based on the executive branch's experience in other contexts, VA must analyze the appropriateness of a blanket waiver in the context of the congressional determination that a heightened level of risk flows from dealings between VA employees and for-profit education companies.<sup>76</sup> With the proposed waiver, VA employees responsible for administering veterans' benefits would be able to accept gifts of free attendance for themselves and their spouses at lavish events, as there is no cap on the cost of the event when the event's sponsor offers the gift.<sup>77</sup> VA employees would also be able to accept up to an aggregate total of \$50 per year in small gifts from each individual for-profit education company.<sup>78</sup> They would similarly be able to accept awards, and gifts of travel to award ceremonies, in certain circumstances from for-profit education companies. For-profit education companies would also be able to give VA employees informational materials, such as expensive professional reference books.<sup>79</sup>

If VA issues its proposed waiver, for-profit education companies would also be able to entice VA employees by offering discounts on training. An exception to the gift rules allows employees to accept discounts, provided the discounts are available to all government employees in a region.<sup>80</sup> For-profit education companies could target VA employees by offering such discounts in regions where VA is the major governmental

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<sup>71</sup> Exec. Order 12674 (1989), as modified by Exec. Order 12731 (1990); 5 C.F.R. § 2635.804(a).

<sup>72</sup> 5 C.F.R. §§ 2635.804(b), 2636.304.

<sup>73</sup> In the absence of an extensive body of precedential opinions interpreting 38 U.S.C. § 3683, it is not known whether the term "wages" would be read broadly to include payments for contractual services.

<sup>74</sup> 5 C.F.R. § 2635.502.

<sup>75</sup> 38 U.S.C. § 3683(a); 5 U.S.C. § 7353, 5 C.F.R. part 2635, subpart B.

<sup>76</sup> See Keener Op. at 3.

<sup>77</sup> See 5 C.F.R. § 2635.204(g).

<sup>78</sup> 5 C.F.R. § 2635.204(a).

<sup>79</sup> 5 C.F.R. § 2635.204(m) (setting an annual cap of \$100 per donor without agency approval, but setting no cap on such gifts with agency approval).

<sup>80</sup> See 5 C.F.R. § 2635.203(b)(4) (exclusion from definition of "gift"); see also 5 C.F.R. § 2635.204(c) (exception to gift prohibition).

employer or by offering discounts on courses that are more likely to interest VA employees than others in a region. There is no limit on the value of such discount under the gift rule exception.<sup>81</sup>

#### 4. *Receipt of services*

Waiving the VA-specific law would also open the door to the receipt of services from for-profit education companies. Unlike the VA-specific law, the executive branch-wide rules do not prohibit the receipt of services if an employee has paid market value<sup>82</sup> for the services.<sup>83</sup> VA's proposed waiver expresses concern about prohibiting employees from taking classes at for-profit institutions, but this expressed concern is at odds with VA's longstanding position that Congress intentionally barred such activity based on the documented history of abuses.<sup>84</sup> VA's proposal does not indicate if the Secretary has considered whether veterans might be influenced to take courses from for-profit education companies if they observe an increased number of certificates of completion, certifications, or degrees issued by for-profit companies hanging on the walls of VA employees or if VA employees talk about attending classes. Notably, VA's notice of proposed waiver includes no discussion whatsoever of any circumstances that may have changed sufficiently to warrant the relaxation of a prohibition Congress imposed to protect veterans.

#### **D. VA's Proposed Waiver is Overbroad and Would Produce an Indefensible Inconsistency.**

VA's stated concern about "unintended consequences" focuses on the issue of VA employees wanting to take classes presented by for-profit companies.<sup>85</sup> However, VA is incongruously proposing not to waive only the prohibition on taking classes but to waive the entire statute for the entire population of covered federal employees. This incongruity belies VA's articulated basis for issuing the waiver to some extent.

Along the same lines, this proposed waiver would create an indefensible anomaly. VA is proposing to waive the statutory prohibition for all of the hundreds of thousands of VA employees, but is not proposing to waive the prohibition for the smaller number of state government employees who are also covered by the statute.<sup>86</sup> VA's Federal Register notice offers no rational justification for holding VA employees to a lower conflict of interest standard than their state government counterparts who participate in VA programs. Even if VA's rationale is that the existing executive branch-wide conflict of interest laws are inapplicable to state government employees, the fact remains that the VA-specific statute sets a higher bar than the executive branch-wide conflict of interest laws and, as a consequence, implementation of this waiver would result in VA holding itself to a lower standard than its partner state agencies.

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<sup>81</sup> *Id.*

<sup>82</sup> Because the statute separately refers to "gratuities," this particular aspect of the prohibition presumably addresses services purchased at fair market value.

<sup>83</sup> 5 C.F.R. § 2635.203(b)(10).

<sup>84</sup> *Id.*

<sup>85</sup> 82 Fed. Reg. 43,288.

<sup>86</sup> 38 U.S.C. § 3683(c).

#### IV. Conclusion

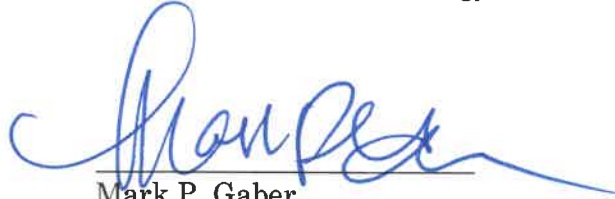
VA's proposed waiver is illegal in form and wrong in substance. Standing alone, the failure to satisfy applicable legal requirements is reason enough not to go forward. This proposed waiver represents an exception swallowing a rule and would amount to an executive branch agency repealing an Act of Congress. As a blanket waiver, this proposed action would exceed the bounds of VA's statutory authorization to issue only individual waivers. Moreover, VA has made no real effort to justify its proposed course of action on the merits or even to tailor the waiver to address only its articulated concern. To the extent that VA offers any explanation at all, VA misstates the history of the conflict of interest laws, is incorrect in describing the effect of the waiver, and omits any discussion of changed circumstances that could warrant reversal of VA's longstanding position. For all of these reasons and the other reasons discussed in this letter, VA should not gut the half-century old law that Congress enacted to protect our nation's veterans.

Respectfully submitted,



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