

**EXHIBIT A**

# CREW

citizens for responsibility  
and ethics in washington

February 7, 2011

By Email: [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov) and First-Class Mail

U.S. Department of Education  
Office of Management  
Regulatory Information Management Services  
400 Maryland Avenue, S.W., LBJ 2W220  
Washington, D.C. 20202-4536  
Attn: FOIA Public Liaison

Re: Freedom of Information Act Request

Dear FOIA Public Liaison:

Citizens for Responsibility and Ethics in Washington (CREW) makes this request for records, regardless of format, medium, or physical characteristics, and including electronic records and information, pursuant to the Freedom of Information Act, (FOIA), 5 U.S.C. § 552, and U.S. Department of Education (Education) FOIA Regulations, 34 C.F.R. §§ 5.1, *et seq.*

Specifically, CREW seeks any and all records from June 1, 2010, to the present of any contracts between Education and former Education Deputy Undersecretary Robert Shireman.

Please search for records regardless of format, medium, or physical characteristics. We seek records of any kind, including electronic records, audiotapes, videotapes, photographs, and back-up tapes. Our request includes any telephone messages, voice mail messages, daily agenda and calendars, information about scheduled meetings and/or discussions, whether in-person or over the telephone, agendas for those meetings and/or discussions, participants included in those meetings and/or discussions, minutes of any such meetings and/or discussions, e-mail or facsimiles sent as a result of those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions to the extent they relate to the aforementioned requested information.

If it is your position that any portion of the requested records is exempt from disclosure, CREW requests that you provide an index of those documents as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1972). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). Moreover, the *Vaughn* index must "describe each document or portion thereof withheld, and for *each* withholding it must discuss the consequences of supplying the sought-after information." *King v. U.S. Dep't of*

*Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added). Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’” *Id.* at 224, citing *Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d. 242, 251 (D.C. Cir. 1977).

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions in accordance with 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments that are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed throughout the documents. *Mead Data Central*, 566 F.2d at 261. Claims of non-segregability must be made with the same degree of detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

#### **Public Interest Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.64, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii). *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9<sup>th</sup> Cir. 1987).

Specifically the requested records will inform the public about the extent to which Mr. Shireman continues to be involved with the formulation and implementation of Education policy, including but not limited to regulations governing the for-profit education industry. While at Education, Mr. Shireman led this regulatory effort and questions were raised about whether, given his former involvement with The Institute for College Access and Success, Mr. Shireman had a conflict of interest. In announcing Mr. Shireman’s departure, Education officials reportedly said Mr. Shireman would remain an adviser to Education Secretary Arne Duncan.<sup>1</sup>

CREW is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to transparency in government and protecting the citizen’s right to be aware of the activities of government officials and to ensuring the integrity of those officials. CREW uses a combination of research, litigation, and advocacy to advance its mission.

---

<sup>1</sup> *See* Doug Lederman, [Cut From Similar Cloth](http://www.insidehighered.com/layout/set/print/news/2010/06/03/kvaal), *Inside Higher Ed*, June 3, 2010, available at <http://www.insidehighered.com/layout/set/print/news/2010/06/03/kvaal>.

The release of information garnered through this request is not in CREW's financial interest. CREW will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, [www.citizensforethics.org](http://www.citizensforethics.org), which also includes links to thousands of pages of documents CREW has acquired through its multiple FOIA requests as well as documents related to CREW's litigation and agency complaints, and through [www.scribd.com](http://www.scribd.com).

Moreover, CREW has a demonstrated interest in the subject of this request and a demonstrated history of publicly disseminating information on the for-profit education controversy to the public. For example, on January 19, 2011, CREW sent a letter to Secretary Duncan requesting that he investigate the role hedge fund managers and outside interest groups have played in Education's formulation of the regulations governing the for-profit education industry.<sup>2</sup>

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

#### **News Media Fee Waiver Request**

CREW also asks that it not be charged search or review fees for this request because CREW qualifies as a "representatives of the news media" pursuant to the FOIA, 5 U.S.C. § FOIA 552(a)(4)(A)(ii)(II). In *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), the U.S. Court of Appeals for the D.C. Circuit found the National Security Archive was a representative of the news media under the FOIA. As the court reasoned, the FOIA's legislative history indicates the phrase "representative of the news media" is to be interpreted broadly "if the act is work as expected . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" *Id.*, citing 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original).

CREW routinely and systematically disseminates information to the public in several ways. First, CREW maintains a frequently visited website, [www.citizensforethics.org](http://www.citizensforethics.org), that received 53,145 page views in January 2011. In addition, CREW posts all of the documents it receives under the FOIA on [www.scribd.com](http://www.scribd.com), and that site has received 607,799 visits to CREW's documents since April 14, 2010.

Second, since May 2007, CREW has published an online newsletter, *CREWCuts*, that currently has 16,960 subscribers. *CREWCuts* provides subscribers with regular updates regarding CREW's activities and information the organization has received from government

---

<sup>2</sup> This letter is enclosed as Exhibit 1.

FOIA Public Liaison  
February 7, 2011  
Page Four

entities. A complete archives of past *CREWCuts* is available at <http://www.citizensforethics.org/newsletter>.

Third, CREW publishes a blog, *Citizens blogging for responsibility and ethics in Washington* that reports on and analyzes newsworthy developments regarding government ethics and corruption. The blog, located at <http://www.citizensforethics.org/blog>, also provides links that direct readers to other news articles and commentary on these issues. CREW's blog had 4,045 page views in January.

Finally, CREW has published numerous reports to educate the public about government ethics and corruption. Examples include: *The Revolving Door*, a comprehensive look into the post-government activities of 24 former members of President Bush's cabinet; *2008 Top Ten Ethics Scandals*; *2008 Most Embarrassing Re-Elected Members of Congress*; and *Those Who Dared: 30 Officials Who Stood Up For Our Country*. These and all other CREW reports are available at <http://www.citizensforethics.org/reports>.

Based on these extensive publication activities, CREW qualifies for a fee waiver as a "representative of the news media" under the FOIA.

If you have any questions about this request or foresee any problems in releasing fully the requested records please contact me at (202) 408-5565. Also, if CREW's request for a fee waiver is not granted in full, please contact me immediately upon making such a determination. Please send the requested records to Anne L. Weismann, Citizens for Responsibility and Ethics in Washington, 1400 I Street, N.W., Suite 450, Washington, D.C. 20005.

Sincerely,



Anne L. Weismann  
Chief Counsel

Enclosure

# CREW | citizens for responsibility and ethics in washington

January 19, 2011

**By Fax (202) 401-2854 (without exhibits) and Hand Delivery**

Arne Duncan  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Secretary Duncan:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you examine the role hedge fund managers and outside interest groups have played in the Department of Education’s (Education) formulation of regulations governing the for-profit education industry. Agency records CREW obtained recently from Education in response to a Freedom of Information Act (FOIA) request and records made public as a result of a private Florida lawsuit<sup>1</sup> reveal certain hedge fund managers had direct and sustained input into the regulatory process in furtherance of their own financial interests. More troubling, Education officials knew of this involvement and the financial motivations of the short sellers, yet continued to solicit and receive their input. The FOIA documents also reveal the extraordinary degree to which Education has been captivated by outside groups in the development of its regulations. These groups essentially functioned as agency decision-makers with unprecedented access to high-level Education officials. This backdrop raises a serious question about the propriety of Education’s regulatory process and the regulations that process produced.

### *Role of Steven Eisman and His Hedge Fund at Education*

CREW was first alerted to this problem by the testimony of Steven Eisman before the Senate Committee on Health, Education, Labor and Pensions (HELP Committee). Mr. Eisman is a portfolio manager of a hedge fund, FrontPoint Financial Services Fund, known to short-sell stocks in for-profit education companies. Despite his lack of expertise in education policy, Mr. Eisman, after contacting Chairman Tom Harkin, was invited to testify at a June 24, 2010 hearing on federal spending on for-profit education. Mr. Eisman offered a scathing attack on an industry he described as “fundamentally unsound” and predicted that over the next ten years, defaults of Title IV loans would total \$275 billion.<sup>2</sup> Previously, when Mr. Eisman offered similar

---

<sup>1</sup> Those documents are posted at <http://www.careercollegecentral.com/keiser-university-lawsuit-repository/document-index>.

<sup>2</sup> Testimony of Steven Eisman before the U.S. Senate Committee on Health, Education, Labor and Pensions, June 24, 2010, available at <http://help.senate.gov/hearings>.

Honorable Arne Duncan  
January 19, 2011  
Page Two

characterizations of the for-profit education institutions as resting on shaky financial footing at a May 26, 2010 speech at the Ira Sohn Investor Conference (“Sohn Speech”), share values of the named companies plummeted and Mr. Eisman reaped huge profits from short-sales in those companies.<sup>3</sup> Mr. Eisman’s June 24th congressional testimony had a similar affect on the stocks of for-profit companies.<sup>4</sup>

Documents CREW obtained through a Freedom of Information Act lawsuit filed against Education reveal that beyond his congressional testimony, Mr. Eisman worked actively behind the scenes to affect the outcome of Education’s regulatory process. In early April 2010, Mr. Eisman sought a meeting with then-Education Deputy Undersecretary Robert Shireman, who was leading the regulatory effort at Education, and Policy and Budget Development Staff Director David Bergeron to provide the results of his firm’s research on the for-profit education industry.<sup>5</sup> During the meeting that followed on April 16, at which Mr. Bergeron was present in person and Mr. Shireman participated by telephone, Mr. Eisman provided his “Subprime Goes to College” slide deck and data on the for-profit industry.<sup>6</sup> Of note, at a speech Mr. Shireman gave to state

---

<sup>3</sup> David A. Kaplan, Short-Sellers Get Snagged in Education Litigation, *Fortune.com*, October 16, 2010, available at [http://money.cnn.com/2010/10/15/news/eisman\\_education\\_lawsuit.fortune/index.htm](http://money.cnn.com/2010/10/15/news/eisman_education_lawsuit.fortune/index.htm).

<sup>4</sup> For example, shares of the Apollo Group, the parent company of the University of Phoenix, were trading at \$46.33 per share at the close of June 23, 2010 – the day before Mr. Eisman’s congressional testimony – and had dropped to \$43.75 per share by the close of June 25, a drop in value of over 9.4%. See <http://www.bloomberg.com/apps/quote?ticker=APOL:US>. The overall decline in the stocks of for-profit education companies in the 24 hours following Mr. Eisman’s congressional testimony has been placed at between 6% and 8%. Kaplan, *Fortune.com*, Oct. 16, 2010. The share value of for-profit education stocks experienced a similar decline after Mr. Eisman’s Sohn Speech. *Id.*

<sup>5</sup> See email from David Bergeron to Kathleen Smith and Robert Shireman, April 7, 2010 (suggesting to Mr. Shireman that “we take this meeting”); email from David Bergeron to Diane Schulman, April 7, 2010 (confirming Mr. Bergeron’s ability to attend the meeting) (both attached as Exhibit A).

<sup>6</sup> See email from Chris Susanin (of FrontPoint) to Bob Shireman, April 19, 2010 (thanking him for reviewing the slides, financial analysis and data, and describing Steve Eisman as “a character”); email from Andrew Black (of FrontPoint) to Bob Shireman, April 16, 2010 (forwarding FrontPoint’s slide presentation). FrontPoint updated the slides a week later. Email from Matthew Leahy (of FrontPoint) to David Bergeron and Bob Shireman, April 22, 2010 (providing “new analyses” as an update from the prior week). See also David A. Kaplan, Did Steve Eisman Unduly Influence the Education Dept.?, *Fortune*, November 2, 2010 (all attached

Honorable Arne Duncan  
January 19, 2011  
Page Three

regulators several weeks later, he reportedly compared the for-profit education industry to Wall Street firms responsible for the financial meltdown, apparently borrowing a page directly from Mr. Eisman's book and foreshadowing Mr. Eisman's May 26 Sohn Speech.<sup>7</sup> Mr. Eisman's "Subprime Goes to College" theme would be echoed repeatedly during the regulatory process, particularly by non-profit groups seeking the most restrictive gainful employment regulations.

This was the beginning of a months-long correspondence between Mr. Eisman, others at FrontPoint and key Education officials at a critical point in the debate over Education's treatment of gainful employment at for-profit schools. At times, Mr. Eisman merely forwarded articles and news of interest.<sup>8</sup> At other times FrontPoint and Mr. Eisman provided Education officials with substantive analysis of the for-profit industry to justify their views on the percentage Education should adopt for the gainful employment regulations. For example, on May 26, 2010, Mr. Eisman sent an email to numerous Education officials, including you and David Bergeron, advising that his Sohn Speech of that afternoon had been "very negative on the industry." Mr. Eisman included his speech and power point presentation as an attachment.<sup>9</sup>

Two days later, Mr. Eisman sent another email to numerous Education officials, including Dan Madzellan, then-Acting Assistant Secretary for the Office of Postsecondary Education, and David Bergeron, calling attention to his views on the for-profit education industry. He also included an analysis completed by FrontPoint of the gainful employment regulations then under review at Education, focusing on what he termed "key metrics (specifically the debt service percentage and the repayment period)."<sup>10</sup> As you know, the gainful employment regulations have been the most controversial in the regulatory package with the potential to have the greatest economic impact on the for-profit education industry, as the percentage Education chooses could cause for-profit institutions to lose access to the bulk of their revenue, which comes from federal

---

as Exhibit B).

<sup>7</sup> See Comparing Higher Ed to Wall Street, *Inside Higher Ed*, April 29, 2010 (attachment to email from Susan Lehr to Mark Bailey, April 29, 2010 (attached as Exhibit C)).

<sup>8</sup> See, e.g., email from Steven Eisman to David Bergeron, April 20, 2010 (forwarding write-up by Height Analytics of lawsuit involving for-profit education institute) (attached as Exhibit D).

<sup>9</sup> A copy of this email and the attached speech, *Subprime Goes to College*, are attached as Exhibit E.

<sup>10</sup> A copy of this email, which begins "My name is Steven Eisman," and goes on to discuss highlights of his enclosed analysis of the gainful employment proposal, is attached as Exhibit F.



Honorable Arne Duncan  
January 19, 2011  
Page Four

financial aid.<sup>11</sup>

The documents CREW obtained also reveal that Education officials were well aware of the economic interests Mr. Eisman was attempting to further as he contacted Education officials, although he himself never revealed those interests. For example, Mr. Bergeron was sent a copy of a *Bloomberg Businessweek* article entitled “FrontPoint’s Eisman Bets Education Stocks to Fall on Loan Rules” that outlines how Mr. Eisman is pursuing the same investment strategy he did with the housing market – shorting shares of for-profit education companies.<sup>12</sup> Similarly, a June 14, 2010 email from Mark Kantrowitz, the publisher of FinAid.org and FastWeb.com, to Mr. Shireman, among others, states: “I mentioned previously that Steve Eisman, an analyst with some fame for shorting subprime mortgages, is now shorting for-profit higher education . . . Keep in mind that this guy is a short-seller . . .”<sup>13</sup>

*Contacts Between Steven Eisman, His Hedge Fund, and Non-Profit Groups*

Other documents show the role of The Indago Group, a small research company used by FrontPoint that worked behind the scenes to obtain information and entree to Washington lawmakers to help FrontPoint gain a further economic advantage.<sup>14</sup> Beyond contacting Education

---

<sup>11</sup> See, e.g., Goldie Blumenstyk, Education Dept. to Delay Issuing ‘Gainful Employment’ Rules Opposed by For-Profit Colleges, *Chronicle of Higher Education*, September 24, 2010, available at <http://chronicle.com/article/Education-Dept-to-Delay/124617/>.

<sup>12</sup> This document was an attachment to an email from Peter Warren to David Begeron and is attached as Exhibit G.

<sup>13</sup> See email from Mark Kantrowitz to Bob Shireman and James Kvaal (Deputy Undersecretary of Education) entitled “Talk at Ira Sohn Conference,” June 14, 2010 (attached as Exhibit H). Mr. Kantrowitz and Mr. Shireman talked so frequently that Mr. Shireman was on Mr. Kantrowitz’s “speed dial.” See email from Bob Shireman to Mark Kantrowitz entitled “Morgan Stanley on NPRM publication data and contents,” June 14, 2010 (also attached as Exhibit H).

<sup>14</sup> FrontPoint also appears to have used the services of another research firm, Alternative Research Services, headed by Rob MacArthur. In a February 23, 2010 letter to a number of non-profits and Education officials, including Zakiya Smith, Policy Advisory to the Assistant Secretary, Mr. MacArthur commented on a GAO letter issued that day regarding schools participating in federal student aid programs that had violated the ban on making incentive compensation payments. Mr. MacArthur noted distribution of this letter “may affect the stock prices in the industry if the market believes there will be increased scrutiny from various parts of the federal government.” See email from Rob MacArthur to Barmak Nassirian (Associate

Honorable Arne Duncan  
January 19, 2011  
Page Five

officials directly, Diane Schulman of The Indago Group and Mr. Eisman formed alliances with a small group of non-profits and community colleges (collectively “non-profits group”) seeking to ensure that Education adopted the most stringent regulations of the for-profit education industry, particularly the gainful employment rules. As outlined below, this group had an enormous impact on the scope and direction of the regulations and Education officials essentially allowed the group to function as agency officials, completely eviscerating the line between the agency and outside groups pursuing their own agenda.

As part of The Indago Group’s efforts, Ms. Schulman shared with the non-profits group FrontPoint’s analysis of the issue, which was in sync with the view of the non-profits group that the gainful employment level should be eight percent.<sup>15</sup> Ms. Schulman also shared Mr. Eisman’s Sohn Speech with the group, which provoked the following enthusiastic reaction from Susan Lehr, Vice President of Government Relations at Florida State College, as to its likely affect on the market:

This is a speech given to Wall Street today that will rock the market. Eisman was one of the first ones to see the mortgage crisis coming – he is a Wall Street big time guy profiled in the book The Big Short. Thought you would like to see this. It is very WOW! . . .<sup>16</sup>

The group also obtained an advance copy of Mr. Eisman’s June 24, 2010 congressional testimony that Ms. Lehr circulated internally two days ahead of the hearing with the gushing

---

Executive Director, American Association of Collegiate Registrars and Admissions Officers), et al. entitled “GAO report,” February 23, 2010 (attached as Exhibit I). Of course, this is the market effect FrontPoint, as a short seller, was hoping for.

<sup>15</sup> See email from Diane Schulman to Deanne Loonin (staff attorney at the National Consumer Law Center), James Simpson (Vice President of Florida State College), Susan Lehr entitled “Gainful Employment Analysis,” May 21, 2010 (email and attachment attached as Exhibit J). A regulation dictating an eight percent gainful employment level would mean that students at for-profit institutions would be eligible for federal student loans only if Education determined their career programs prepare them for gainful employment in an occupation with expected pay scales that would establish a debt-to-earnings ration of eight percent or less.

<sup>16</sup> See email from Susan Lehr to Joe Jangro of Water Street Capital entitled “Wall Street Speech today on For Profit Education Industry,” May 26, 2010; email from Diane Schulman to Susan Lehr and James Simpson (forwarding Sohn Speech), May 26, 2010 (both attached as Exhibit K).

Honorable Arne Duncan  
January 19, 2011  
Page Six

description of Mr. Eisman as “my hero.”<sup>17</sup> Days before Education released the proposed regulations on gainful employment, Ms. Schulman forwarded to some group members what she described as “some of the speculation” on the effect of the gainful employment regulations on education stocks, laying out the effects of the two proposals Education was considering.<sup>18</sup>

Like the Education officials, the non-profits group was well aware of Mr. Eisman’s underlying financial motives. The group’s head, Pauline Abernathy, Vice President of The Institute for College Access and Success (TICAS), an organization she co-founded with Robert Shireman, sent a cautionary email to Ms. Lehr advising that while Mr. Eisman “and his folks sometimes have useful info . . . I try to be careful what I share since he has a financial interest we do not, and he may make money based on what happens in the market each day while we only care about the final outcome.”<sup>19</sup> Nevertheless, Mr. Eisman remained tuned in to the group’s efforts, giving him an inside track on the progress of the regulations, most particularly the gainful employment regulations of greatest interest to both.

While it is not known whether Mr. Eisman received an advance copy of the gainful employment regulations from Education officials prior to their issuance on July 23, 2010, at least some in the non-profits group received an advance copy and spoke with Mr. Eisman around this time. A July 21, 2010 email from Ms. Lehr to Ms. Abernathy conveys Ms. Lehr’s understanding that the gainful employment regulation was coming out at midnight the following evening with the subsequent request “don’t pass on beyond our group.” A later email that day from Ms. Lehr conveys her expectation she would receive an embargoed copy before its official release and notes “Jim met by phone with Eisman yesterday for a very interesting conversation.” Another email sent the following morning states “We expect lots of market churn” from the issuance of the gainful employment regulations. That same morning, Ms. Lehr told Ms. Abernathy “Eisman had questions for Jim on Wednesday . . . they spoke for about an hour . . .”<sup>20</sup> This email chain

---

<sup>17</sup> See email from Susan Lehr to Doug Cooley and Doug Axtel, June 22, 2010 (attached as Exhibit L).

<sup>18</sup> See email from Diane Schulman to James Simpson and Susan Lehr entitled “Here’s some of the speculation,” July 20, 2010 (attached as Exhibit M).

<sup>19</sup> Email from Pauline Abernathy, to Susan Lehr, July 22, 2010 (attached as Exhibit N).

<sup>20</sup> Email from Susan Lehr to Pauline Abernathy entitled “GE out Tomorrow,” July 21, 2010; email from Susan Lehr to CEO entitled “Gainful Employment,” July 21, 2010; email from CEO to Gilchrist Berg entitled “Gainful Employment,” July 22, 2010; email from Susan Lehr to Pauline Abernathy entitled “GE-ED briefing hill staff at 6pm tonight!,” July 22, 2010 (all attached as Exhibit O).

Honorable Arne Duncan  
January 19, 2011  
Page Seven

suggests, at a minimum, Mr. Eisman likely knew Education was about to issue the long-awaited regulations.

#### *Role of Other Hedge Funds*

FrontPoint is by no means the only hedge fund to both actively short-sell stock in the for-profit education industry and attempt to influence Education's regulation of that industry. Partners of a Dallas-based hedge fund, CPMG, also met with Education officials and traded information and data extensively with non-profit group members on the negotiated regulations committee ("NegReg Committee") Education established to make recommendations on the regulatory package. A March 31, 2010 email from Pauline Abernathy to NegReg Committee members describes efforts to coordinate with Education to gather gainful employment examples, such as individuals who took on debt to pursue education at a for-profit institution and then could not find jobs in their promised fields. Ann Manheimer, Director of Education's Management Systems Improvement Group, was coordinating the effort and the email noted Education officials already had met with a lobbyist and analysts for short-seller CPMG, including Antal Desai, as part of this effort.<sup>21</sup> Mr. Desai had been working on gathering student testimonials for the past year, as reflected in a July 8, 2009 email from James Simpson to Susan Lehr and Elizabeth Baldwin.<sup>22</sup> That email describes CPMG as "a mid size investment company" with "some investments (stocks) of publically [sic] traded education companies," and explains "they [CPMG] are trying to determine the amount of risk that may be associated with these investments."<sup>23</sup> By actively injecting itself into the regulatory process, it appears CPMG was doing more than assessing the risk of its investments – it apparently was trying to cause a specific regulatory outcome.<sup>24</sup>

Another hedge fund that claimed to have followed the education and student loan companies for over a decade, QuilCap Corp., also voiced its growing concern "over the viability

---

<sup>21</sup> See email from Pauline Abernathy to Susan Lehr, et al. regarding Neg reg follow up info and docs for review by Friday COB, March 31, 2010 (enclosed as Exhibit P).

<sup>22</sup> See email from James Simpson to Susan Lehr and Elizabeth Baldwin entitled "Student Testimonials," July 8, 2009 (attached as Exhibit Q).

<sup>23</sup> *Id.*

<sup>24</sup> Moreover, at least some in the non-profits group were willing to overlook the fact that CPMG was acting in pursuit of its own financial interests. A July 28, 2009 email from Barmak Nassirian to Susan Lehr (attached as Exhibit R) states: "I know Antal [Desai] and have been impressed with him and his firm. I don't care – or fully understand – what their financial interests in these matters might be . . ."

Honorable Arne Duncan  
January 19, 2011  
Page Eight

of certain publicly traded for-profit schools' business models" in a June 9, 2009 letter to Education.<sup>25</sup> QuilCap's annual report outlines its strategy and rationale for pursuing short sales of the for-profit education industry.<sup>26</sup>

*Role of Non-Profits Group at Education*

At the same time, the non-profits group and others in the non-profit education community enjoyed an inordinate amount of influence over Education's internal deliberations and decision-making. Their influence began with Robert Shireman serving as Senior Advisor to the Secretary, starting at the beginning of the Obama administration. While in his capacity as a consultant to Education, Mr. Shireman remained on the board of TICAS, a group leading the charge in advocating for more stringent gainful employment regulations. A few months later in April, 2009, Mr. Shireman was appointed Deputy Undersecretary. A day before his appointment was announced, he sent an email to TICAS officials advising them of his appointment to the position where he would have "responsibility for financial aid policy and operations as well as higher education and related initiatives."<sup>27</sup> While Mr. Shireman noted he would "have no further official connection to TICAS," he also expressed his intent "to make myself available as a volunteer in my personal time. Let me know how I can be helpful."<sup>28</sup>

In fact, however, Mr. Shireman did not limit his assistance to his "personal time." Instead, as reflected in numerous documents Education released to CREW under the FOIA, Mr. Shireman had ongoing contacts with TICAS and others working with TICAS to push a specific regulatory agenda, even during sensitive internal agency deliberations over the regulations. Among the many examples, on November 10, 2009, just after the first negotiating committee meeting, TICAS Vice President Pauline Abernathy sent Mr. Shireman and others an article on for-profits with the notation, "Apollo Group and other for-profit colleges will find it harder to make the grade – especially as they come under scrutiny for aggressive enrollment practices."<sup>29</sup>

---

<sup>25</sup> Letter to Wendy Macias, U.S. Department of Education, from QuilCap (name of signator has been redacted), June 9 2009 (attached as Exhibit S).

<sup>26</sup> QuilCap's annual Report of January 2009 is enclosed as Exhibit T.

<sup>27</sup> Email from Robert Shireman to Roger Nozaki, et al., April 19, 2009 (attached as Exhibit U).

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

<sup>29</sup> Email from Pauline Abernathy to Luke Swarthout (HELP Committee), James Kvaal, Bob Shireman, Dan Madzellan entitled "Baron's cover article on for-profits," November 10, 2009 (attached as Exhibit V).

Honorable Arne Duncan  
January 19, 2011  
Page Nine

In February 2010, once the NegReg Committee completed its work by making recommendations to Education, Ms. Abernathy reconvened many in the group telephonically along with Education officials such as Mr. Shireman – who asked specifically to be included in the call,<sup>30</sup> – then-White House official James Kvaal, and HELP Committee staffer Luke Swarhout, to develop a strategy for dealing with the for-profit industry, which was expected to fight back hard against the rule.<sup>31</sup> The following month, Ms. Abernathy solicited help from Mr. Shireman, Mr. Bergeron, and other Education officials to respond to the “firestorm” she feared would result from a newly released paper by Mr. Kantrowitz critiquing Education proposals on gainful employment as “a little bit too harsh.”<sup>32</sup> Two months later, on April 13, 2010, Ms. Abernathy complained to Education officials Shireman, Madzellan, and Manheimer about Education’s failure to provide “consumer, student and workforce stakeholders” with the same information Education had provided to industry groups.<sup>33</sup> In response, Ms. Manheimer – who serves on Mr. Shireman’s staff – quickly provided Ms. Abernathy with answers to her questions about how the gainful employment regulation would affect bachelor of arts programs at for-profit schools.<sup>34</sup>

Most troubling, in April 2010, Mr. Shireman accepted an invitation from TICAS to travel to California for a two-day small “brainstorming session” to discuss “consumer and taxpayer issues related to distressed borrows and identify our own research and/or policy priorities.”<sup>35</sup>

---

<sup>30</sup> See email from Bob Shireman to Pauline Abernathy, et al. entitled “Height Analytics – For-Profit Ed. Gainful Employment Means,” February 3, 2009 (Mr. Shireman stated “If I’m available when you have your call I’d like to listen in.”) (attached as Exhibit W).

<sup>31</sup> See email from Bob Shireman to David Bergeron entitled “Height Analytics – ForProfit Ed. Gainful Employment Means,” February 5, 2010 (entire email chain together with analysis by Height Analytics attached with Exhibit W).

<sup>32</sup> See email from Pauline Abernathy to Bob Shireman, et al. entitled “What is Gainful Employment? What is Affordable Debt?,” March 2, 2010 (included with Mr. Kantrowitz’s analysis as Exhibit X).

<sup>33</sup> See email from Pauline Abernathy to Dan Madzellan, et al. entitled “Industry take on what was submitted to OMB on Friday on GE,” April 13, 2010 (attached as Exhibit Y).

<sup>34</sup> See email from Ann Manheimer to Pauline Abernathy entitled “Application of GE,” April 14, 2010 (attached as Exhibit Z).

<sup>35</sup> See email from Lauren Asher (TICAS) to Bob Shireman, et al., May 11, 2010 (describing the April 29-30 session) (attached as Exhibit AA).

Honorable Arne Duncan  
January 19, 2011  
Page Ten

Other attendees included Margaret Reiter, a negotiator for the NegReg Committee and former Deputy Attorney General for the California Attorney General's Office; Deanne Loonin, staff attorney at the National Consumer Law Center, alternate negotiator for the NegReg Committee, and frequent email correspondent with Ms. Schulman; Tim Ranzetta, founder and president of Student Lending Analytics; Jamiene Studley, President of Public Advocates, Inc.; and Michelle Rodriguez, a staff attorney at Public Advocates, Inc. No one from the for-profit industry was included. Mr. Shireman's participation in this two-day session belies his claim that he would limit his assistance to TICAS to his "personal time," and demonstrates that by that time, the interests of the outside non-profit groups and Education were so aligned there no longer was any distinction between the two.

The non-profits group had extensive contacts with other Education officials throughout the regulatory process, as documented in the records Education provided in response to CREW's FOIA request.<sup>36</sup> Those contacts paid off handsomely for the non-profits. For example, on the eve of Education's June 16, 2010 publication of its notice of proposed rulemaking Ms. Lehr and others had managed to obtain an embargoed copy of the rulemaking.<sup>37</sup> And when TICAS was preparing its public comments on the gainful employment regulations in September 2010, David Bergeron responded readily to Ms. Abernathy's inquiry about "what share of the more than 26,000 public comments received so far support the reg and/or making it stronger."<sup>38</sup> These are just some of the many examples illustrating the inside track TICAS and other non-profits had with Mr. Shireman and other Education officials in their combined effort to tighten the gainful employment regulations.

### *Conclusion*

In sum, Education employed a deeply flawed process to formulate these regulations, regardless of their underlying merit. Education officials knowingly allowed that process to be tainted by the undisclosed role of short-sellers, seeking to use the regulatory arena to manipulate the financial markets and drive down the share value of for-profit education companies, all for their own personal gain. Further, Education officials at the highest levels of this process put

---

<sup>36</sup> Those documents are posted at [http://www.scribd.com/document\\_collections/2742136](http://www.scribd.com/document_collections/2742136).

<sup>37</sup> See email from Susan Lehr to Michele Bowles and Mary Cauley entitled "Here are the regs!," June 15, 2010 (attached as Exhibit BB).

<sup>38</sup> See email from Pauline Abernathy to David Bergeron entitled "Today's NYT article," September 4, 2010, and email from David Bergeron to Pauline Abernathy entitled "Today's NYT article," September 7, 2010 (attached as Exhibit CC).

Honorable Arne Duncan  
January 19, 2011  
Page Eleven

aside their responsibilities to the agency to examine these issues impartially, and instead formed a collaboration with and ceded authority to outside groups advancing their own specific agenda. Americans' confidence in the regulatory system is severely undermined when Wall Street investors with no policy expertise are allowed to insinuate themselves into the regulatory process. We therefore ask that you immediately launch an investigation not only into this matter, but also into whether other Education regulations similarly are being manipulated by outsiders. It is imperative that you act quickly to restore integrity to Education's rulemaking process.

Thank you for your attention to this very important matter.

Very truly yours,



Anne L. Weismann  
Chief Counsel

cc: Chairman Tom Harkin  
Ranking Member Michael B. Enzi  
Senate Committee on Health, Education, Labor, and Pensions  
Chairman John Kline  
Ranking Member George Miller  
House Committee on Education and the Workforce

Enclosures



**EXHIBIT B**



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

April 14, 2011

Ms. Anne L. Weismann  
Citizens for Responsibility and Ethics  
In Washington  
1400 Eye St. NW, Ste. 450  
Washington, DC 20005

RE: FOIA Request No. 11-00794-F

Dear Ms. Weismann:

This letter is in response to your letter dated February 7, 2011, requesting information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on February 14, 2011. You requested any and all records from June 1, 2010 to the present of any contracts between Education and former Education Deputy Undersecretary Robert Shireman.

Enclosed are 4 pages of documents responsive to your request. The documents provided are:

- Deputy Undersecretary Robert Shireman records

However, certain information has been withheld according to the FOIA exemption specified below:

1. Personal Information is withheld under (b)(6) of the FOIA, 5 U.S.C. § 552(b)(6) and Departmental Regulation 34 CFR § 5.71(a). Disclosure of this information would constitute a clearly unwarranted invasion of personal privacy.

You have the right to appeal this decision by writing to the address below, 35 days from the date of this letter. Your appeal should be accompanied by a copy of your initial letter of request and this denial letter, and should contain any evidence or argument you wish the Department to consider in making an administrative determination on your appeal.

**Appeal Address:**

U.S. Department of Education  
Office of Management  
400 Maryland Avenue, SW, LBJ-2W311  
ATTN: FOIA Appeals Office  
Washington, DC 20202-4500

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-4500  
[www.ed.gov](http://www.ed.gov)

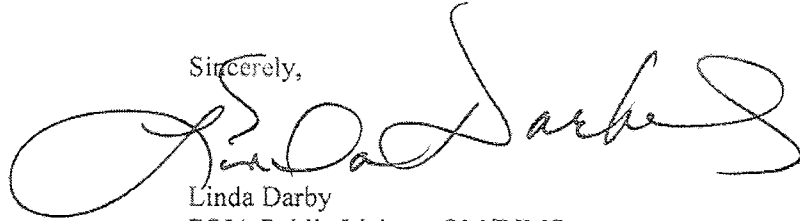
Our mission is to ensure equal access to education and to promote educational excellence throughout the nation.

Page 2 – Ms. Anne L. Weismann  
FOIA Request No. 11-00794-F

Or, you may complete the online FOIA appeal form, located at:  
[http://www.ed.gov/policy/gen/leg/foia/foia\\_appeal\\_form\\_1.html](http://www.ed.gov/policy/gen/leg/foia/foia_appeal_form_1.html)

If you have any questions, please contact the FOIA Service Center (FSC) at (202) 401.8365 or  
EDFOIAManager@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Darby". The signature is fluid and cursive, with a large initial "L" and "D".

Linda Darby  
FOIA Public Liaison, OM/RIMS

Enclosure

**EXHIBIT C**

**CORRESPONDENCE SUMMARY**

**DATE:** June 15, 2010

**TO:** William Taggart, Chief Operating Officer, FSA

**FROM:** Irma Blanchett, Chief Administration Officer

**SUBJECT:** Request for Approval to Hire Bob Shireman as an Intermittent Consultant to Federal Student Aid

**CONTACT PERSON AND PHONE NUMBER:** Irma Blanchett - 202.377.3145

**RATIONALE/JUSTIFICATION:**

The purpose of this memorandum is to request approval of the appointment of Robert Shireman as a consultant in FSA. He would provide advice and counsel to the Chief Operating Officer and other key FSA staff on customer experience matters as well as consumer protection. We would effect the consultant appointment immediately following his departure from his current position as Deputy Undersecretary in the Office of the Under Secretary, so he could retain his federal benefits. He would serve on an intermittent basis - not to exceed 130 days in a calendar year. As you know, Bob is a recognized expert on student loan matters and would be an excellent source of advice.

We are attaching the consultant documents and his resume. His pay will be at the GS 15 step 10 equivalent level of \$74.51 per hour.

Name	Function	Signature/Date
Irma Blanchett	Chief Administration Officer	(b)(6) <i>6/16/10</i>
Mathew Boggs	Executive Secretariat	
William Taggart	Chief Operating Officer: (b)(6)	<i>6/21/10</i>
Martha Kantor	Undersecretary	

**EXHIBIT D**

**SUPPLEMENTAL INFORMATION - EXPERT OR CONSULTANT**

*(Submit with request for Personnel Action, SF-52)*

NOTE: Complete required certification on reverse.

<p>1. NAME OF PERSON <i>(Last, first, middle initial)</i> Shireman, Robert</p>	<p>2. TOTAL PERIOD FOR WHICH APPOINTMENT IS REQUESTED [entire year (365 days) or a shorter period] One year</p>
<p>3. MAILING ADDRESS</p>	<p>4. APPROXIMATE NUMBER OF DAYS PERSON IS EXPECTED TO PERFORM SERVICES DURING THIS PERIOD 90</p>
<p>5. SERVICES TO BE PERFORMED          A. EXPLAIN IN FULL THE SERVICES TO BE PERFORMED          B. Conducts studies and provides expert advice to the Chief Operating Officer on strategies to improve customer experience and consumer protection in the student aid programs. Advises on how to obtain and use data from customers on expectations and satisfaction with federal student financial aid services. Identifies ways to monitor customer experiences and perceptions. Customers include, and are not limited to: students, former students with loans, borrowers, and associations, along with public, private, and proprietary schools. Provides advice on consumer protection strategies to ensure that students and other interested parties have accurate information on interest rates, loan repayment, employment prospects after completing studies for which aid is obtained, graduation rates, and other information which must be considered by consumers.</p>	
<p>B. SPECIFY WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE TRANSACTION OF BUSINESS ON BEHALF OF THE GOVERNMENT WITH ANY PROFIT OR NON-PROFIT ORGANIZATION  None</p>	
<p>C. SPECIFY WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE RENDERING OF ADVICE TO THE GOVERNMENT WHICH WILL HAVE DIRECT AND PREDICTABLE EFFECT ON THE INTERESTS OF ANY PROFIT OR NON-PROFIT ORGANIZATION  None</p>	
<p>D. SPECIAL QUALIFICATIONS OF THE PERSON RECOMMENDED FOR APPOINTMENT <i>(List those which relate specifically to the services to be performed)</i>  See attached</p>	

**EXHIBIT E**



### CERTIFICATION

In approving the appointment of this consultant/expert, I have considered the requirements of law, relevant decisions of the Comptroller General, and Office of Personnel Management and Department policies and instructions. More specifically, I have satisfied myself that:

1. the services of the individual are essential for effective program management
2. the duties to be performed are those of (check one)  
 a consultant (that is, they are purely advisory in nature and will not include the performance or supervision of operating functions)  
 an expert (that is, they require a high level of expertise not available in the regular work force)
3. the proposed appointee is qualified to (check one)  
 provide advisory services as a consultant  
 serve as an expert as that term is used in FPM Chapter 304-1
4. the appointment is appropriately designated as (check one)  
 full-time (the individual will work on a regularly scheduled full-time tour of duty)  
 part-time (the individual will work on a regularly scheduled part-time tour of duty)  
 intermittent (the individual will work without a regularly scheduled tour of duty)
5. the appropriate appointment authority is being used
6. the pay level is appropriate for the duties to be performed and the qualifications of the appointee
7. the record of appointment has been clearly documented to show the services to be performed and the special qualifications of the appointee which relate specifically to those services
8. a statement of employment and financial interests has been obtained and it has been determined that no conflict of interest exists.

6/21/10  
Date  
6/21/10  
Date

(b)(6)

<input checked="" type="checkbox"/>	SI	_____ Consultant's Services
<input checked="" type="checkbox"/>	SI	_____ Expert's Services

**EXHIBIT F**

**NOTIFICATION OF PERSONNEL ACTION**

1. Name (Last, First, Middle) <b>SHIREMAN, ROBERT M.</b>		2. Social Security Number <b>(b)(6)</b>	3. Date of Birth	4. Effective Date <b>07/04/10</b>
<b>FIRST ACTION</b>		<b>SECOND ACTION</b>		
5-A. Code <b>571</b>	5-B. Nature of Action <b>CONV TO EXC APPT NTE 07-03-11</b>		6-A. Code	6-B. Nature of Action
7-C. Code <b>H2L</b>	7-D. Legal Authority <b>REG 304.103</b>		6-C. Code	6-D. Legal Authority
8-E. Code	8-F. Legal Authority		6-E. Code	6-F. Legal Authority
7. FROM: Position Title and Number <b>DEPUTY UNDER SECRETARY</b>		15. TO: Position Title and Number <b>CONSULTANT</b>		
<b>EE ES-0278</b>		<b>EN1 ONT0447</b>		
9. Organization <b>ES</b>	10. Org. Code <b>0301</b>	11. Grade Level <b>00</b>	12. Step/Rate <b>00</b>	13. Total Salary <b>\$177000</b>
16. Pay Plan <b>PA</b>	17. Org. Code <b>EF</b>	18. Grade Level <b>0301</b>	19. Step/Rate <b>00</b>	20. Total Salary/Award <b>\$ 74.51</b>
21. Pay Basis <b>PH</b>	22A. Basic Pay <b>\$177000</b>	22B. Locality Adj. <b>\$ 0</b>	22C. Adj. Basic Pay <b>\$177000</b>	22D. Other Pay <b>\$ 0</b>
23A. Basic Pay <b>\$ 74.51</b>	23B. Locality Adj. <b>\$ 0.00</b>	23C. Adj. Basic Pay <b>\$ 74.51</b>	23D. Other Pay <b>\$ 0.00</b>	
14. Name and Location of Position's Organization <b>OFC OF THE UNDER SECRETARY</b>		21. Name and Location of Position's Organization <b>FEDERAL STUDENT AID IMMEDIATE OFFICE OF THE COO</b>		
<b>WASHINGTON, DC</b>		<b>WASHINGTON, DC</b>		
23. Veterans Preference <b>1</b> (None)		24. Tenure <b>0</b> (None)	25. Agency Use	26. Veterans Preference for RIF <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
27. Plan <b>BASIC ONLY</b>		28. Applicant Indicator <b>9 NOT APPLICABLE</b>	29. Pay Rate Determinant <b>0</b>	
30. Retirement Plan <b>K FERS &amp; FICA</b>		31. Service Comp. Date (Leave) <b>04/13/04</b>	32. Work Schedule <b>I INTERMITTENT</b>	
33. Position Occupied <b>Z</b> (Competitive Service)		34. FLSA Category <b>E</b> (Exempt)	35. Appropriation Code <b>7777</b>	
36. Duty Station Code <b>11-0010-001</b>		37. Duty Station (City - County - State or Overseas Location) <b>WASHINGTON, DISTRICT OF COLUMBIA</b>		
40. Agency Data <b>CLS 00</b>	41. VET-STAT <b>X</b>	42. EDUC LVL <b>21</b>	43. SUPV STAT <b>8</b>	44. POSITION SENSITIVITY <b>HIGH RISK</b>

45. Remarks  
 APPOINTMENT AFFIDAVIT EXECUTED 07-06-10.  
 CREDITABLE MILITARY SERVICE: NONE  
 PREVIOUS RETIREMENT COVERAGE: NEVER COVERED  
 EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS.  
 REASON FOR TEMPORARY APPOINTMENT PROVIDE ADVICE AND COUNSEL TO THE COO AND OTHER KEY FSA STAFF ON CUSTOMER EXPERIENCE MATTERS AS WELL AS CONSUMER PROTECTION.  
 FROZEN SERVICE NONE  
 ELIGIBLE FOR HEALTH BENEFITS AND ANNUAL AND SICK LEAVE.  
 FORWARDING ADDRESS: **(b)(6)**

16. Primary Department or Agency <b>ED - STUDENT FINANCIAL AID</b>		17. Signature/Authentication and Title of Approving Official <b>PAULA GARNER PG LEAD HR SPECIALIST 101327389</b>	
47. Agency Code <b>SDEN</b>	48. Personnel Officer ID <b>1307</b>	49. Approval Date <b>07/02/10</b>	

## **EXHIBIT G**

**U. S. DEPARTMENT OF EDUCATION**  
**PERSONNEL MANUAL INSTRUCTION**

PMI 304-1

DATE December 1, 2000

APPROVED:

*Veronica D. Trietsch*  
Director, Human Resources Group

**SUBJECT: EMPLOYMENT OF EXPERTS AND CONSULTANTS**

I. AUTHORITY

The Department of Education Organization Act, Public Law 96-88, Section 402, stipulates that the Secretary may, as provided in appropriation Acts, obtain the services of experts and consultants. Upon such authorization, appointments are made in accordance with the provisions of Section 3109 of Title 5, United States Code (U.S.C.), and the governing regulations of Title 5 Code of Federal Regulations (C.F.R.) Section 304. Expert and consultant appointments are not subject to the provisions of law and regulation governing:

- (a) appointments in the competitive service
- (b) position classification; and
- (c) General Schedule pay rates.

II. POLICY

It is the policy of the Department of Education (ED) to use experts and consultants when there is a legitimate need for temporary services not available from ED employees.

Neither experts nor consultants may be assigned to full-time, continuing work that regular employees otherwise would perform. The purpose of the expert and consultant authority is to allow agencies to bring in special types of employees to address special situations requiring short-term or occasional attention.

III. APPLICABILITY

This Instruction applies to all ED Principal Offices (POs) that are authorized by an appropriation Act or other statute, to appoint experts and consultants under 5 U.S.C. 3109.

IV. DEFINITIONS

- Expert - A person who is specifically qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in this field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity.
-

- Expert position – A position that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary and/or intermittent basis assigned by a federal official.
- Consultant – A person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. When an agency requires public advisory participation, a consultant also may be a person who is affected by a particular program and can provide useful views from personal experience.
- Consultant position - A position that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a federal official.

V. GENERAL GUIDELINES

Experts and consultants will not be used in positions which should be filled under regular competitive appointment procedures. The position must warrant the services of an expert or consultant and the appointee must be qualified as an expert or consultant to have an appropriate appointment under 5 U.S.C. 3109.

All experts and consultants in ED must receive temporary appointments (i.e. not to exceed one year) and may be reappointed only as provided in section VIII of this PMI.

An agency must not use 5 U.S.C. 3109 to appoint an expert or consultant:

- (1) To a position requiring Presidential appointment. However, subject to the conditions of this PMI, an individual may be appointed to an expert or consultant position while awaiting final action on a Presidential appointment.
- (2) To a Senior Executive Service (SES) position.
- (3) To perform managerial or supervisory work (although an expert may act as team leader or director of the specific project for which he/she is hired), to make final decisions on substantive policies, or to otherwise function in the agency chain of command (e.g. to approve financial transactions or personnel actions).
- (4) To do work performed by the agency's regular employees.
- (5) To fill in during staff shortages.
- (6) Solely in anticipation of giving that individual a career appointment. However, subject to the conditions of this PMI, an individual may be appointed to an expert or consultant position pending Schedule C appointment or noncareer appointment in the SES.

VI. PROCEDURES FOR REQUESTING AND APPROVING APPOINTMENTS

The following procedures apply to all appointments, extensions, and reappointments.

A. Appointment Papers

1. To hire an expert or consultant, the requesting PO must submit all of the following forms:

- Standard Form SF-52, Request for Personnel Action (through the ADP system)
- ED Form EP-1, Supplemental Information – Expert or Consultant (Attachment I)

Note: Explain in full the services to be performed by the expert or consultant. A vague or general statement will not be accepted. The unique qualifications of the expert or consultant must also be described in detail.

- A resume, Optional Application for Federal Employment (OF-612), Standard Form SF-171, or other application format. The qualifications and experience of the proposed expert or consultant must be fully described.
- Financial Disclosure acknowledgement form signed by the proposed expert or consultant. (Attachment II)

2. For extensions or reappointments, the requesting PO must submit all of the following forms:

- SF-52
- ED Form EP-1 (if new services are to be performed, the new assignment must be fully described).
- A resume, Optional Application for Federal Employment (OF-612), Standard Form SF-171, or other application format (for reappointments only).
- Financial Disclosure acknowledgment form (for reappointments only).

Note: For intermittent appointees, the number of hours worked on the previous appointment must be entered on the SF-52 requesting the reappointment or extension (and must be on the final separation SF-52).

B. Certification and Approval

Each proposed appointment (and extension of appointment or reappointment) must be reviewed and certified by the Senior Officer of the requesting PO. The certification is to be documented on the reverse side of ED Form EP-1. The purpose of the certification is to ensure that the Senior Officer has carefully considered the requirements of law, Office of Personnel Management (OPM) regulations, and Departmental policies with respect to the appointment of experts and consultants. The Director, Human Resources Group, will review all expert and consultant requests, and will give final approval upon determination that all applicable requirements have been met.

VII. DURATION AND TYPE OF APPOINTMENT

The requesting official estimates the duration of the appointment which may be any period of time not to exceed one year. Appointments for periods shorter than one year may be extended up to one year, as needed (See VI.A.2.). The requesting official also identifies the type of work schedule for the temporary appointment:

Full Time Employment (regularly scheduled full-time tour of duty)

Part Time Employment (regularly scheduled part-time tour of duty)

Intermittent Employment (no regularly scheduled tour of duty).

VIII. CRITERIA FOR REAPPOINTMENTS

A. Reappointments to SAME POSITION

1. ED may employ an expert or consultant who works on a FULL TIME basis for a maximum of two years – on an initial appointment not to exceed one year and a reappointment not to exceed one additional year.
2. ED may reappoint an expert or consultant who works on PART TIME or INTERMITTENT schedule in accordance with one of the following two options. ED must determine which option it will use in advance of any reappointment and must base its determination on objective criteria (e.g. nature of duties, pay level, whether or not work is regularly scheduled).

(a) Option 1 – Annual service

Intermittent appointments can be renewed from year to year with no limit on the number of reappointments as long as the individual is paid for no more than 130 days or 1040 hours of work, or works for no more than that amount of time without compensation in a service year. (A service year is



the calendar year that begins on the date of the individual's initial appointment with the agency). An expert or consultant who exceeds this limit in his/her first service year may be reappointed for one additional year. Any expert or consultant who exceeds this limit during any subsequent service year may not be reappointed thereafter.

Any part time employee (i.e. one who works more than 130 days or 1040 hours in their first service year but less than on a full time basis) may be reappointed for one additional year.

Option 1 must be used when experts and consultants are appointed without compensation.

(b) Option 2 – Cumulative earnings

ED may reappoint an expert or consultant until his/her total earnings from expert or consultant employment with the agency reaches his/her lifetime limit which is twice the maximum annual rate payable under the annualized pay limitations of 5 CFR 304.105. ED may adjust this limit to reflect statutory increases in basic pay rates. Once an expert or consultant reaches his/her lifetime limit, ED must terminate the employment.

OPM may authorize reappointment of an expert or consultant as an exception to these limitations when necessitated by unforeseen and unusual circumstances.

B. Reappointment to a DIFFERENT POSITION

ED may reemploy an expert or consultant to perform demonstrably different duties without regard to the length of that individual's previous expert or consultant service with the agency.

IX. PAYMENT FOR SERVICES

A. Pay Basis

The pay basis may be daily, hourly, or without compensation as follows:

1. Daily – The daily basis is used for intermittent appointments for each day of employment which interrupts the individual's ordinary pursuits substantially the entire day.
2. Hourly – The hourly basis is used for intermittent service if the individual is not kept from his or her regular work or pursuits for the entire day.

The hourly basis is used for all full-time and part-time appointments.

3. Without Compensation – The without compensation basis is permitted when the employee agrees in advance in writing to waive any claim for compensation for his/her services. A letter of agreement must be obtained and placed on file (Attachment III gives a sample letter).

B. Setting Pay

The rate of pay is based on the work to be performed and the qualifications of the proposed expert or consultant. The requesting office recommends a pay rate, but must not make a commitment to a proposed appointee without receiving approval from the Human Resources Group.

The rate of pay will be set according to consideration of:

- The level and difficulty of the work to be performed.
- The qualifications of the expert or consultant.
- The pay rates of comparable individuals performing similar work in federal or non-federal sectors.
- The availability of qualified candidates.

C. Range of Rates of Pay

1. Maximum Daily Pay Rate – As provided in appropriation Acts, the Department's maximum daily rate for experts/consultants will not exceed Executive Schedule Level IV.

As a matter of policy, the daily rate should not exceed the grade 15, step 10 rate of the General Schedule except in very unusual circumstances which must be documented.

The rate of pay will be commensurate with the level and difficulty of work to be done, the qualifications of the appointees, and the availability of such services in the labor market.

2. Minimum Daily Pay Rate – Generally, experts or consultants will have knowledge and skills commanding rates at a level equivalent to at least the minimum rate of GS-13.
3. Exceptions – The rates of pay below the minimum rate of GS-13 or above the maximum rate of GS-15 require a written statement to be submitted with the request for appointment, giving reasons for the recommend rate. There can be no exceptions to the statutory maximum rate of pay of Executive Schedule Level IV as authorized by the Department's appropriations Acts.

4. Overtime Pay – Except for experts and consultants paid on a daily rate basis, experts and consultants qualify for premium pay, subject to any applicable eligibility requirements and pay caps. All overtime hours must be officially ordered and approved.
5. Holiday Pay – Experts and consultants with regularly scheduled tours of duty are entitled both to holiday premium pay and holiday paid time off, subject to all requirements for premium pay as well as applicable pay caps, provided those holidays fall on a work day within their regular tour of duty. Intermittent appointees are not paid for any holidays on which they do not work and are not entitled to premium pay for those holidays on which they do work.

D. Pay Plan

The pay plan is ED for expert; and EF for consultant.

E. Pay Adjustments

Pay adjustments for experts and consultants after initial appointment are not automatic. Pay of experts and consultants is fixed by administrative action. The Principal Office will request pay increases in writing and forward it to the Human Resources Group.

X. LEAVE

- A. Full-time and part-time appointees with a regular tour of duty are entitled to earn and use annual and sick leave. The rates of leave accrual, the conditions under which leave may be used, and the provisions for lump-sum payment for unused annual leave are the same for temporary experts and consultants as for regular full-time and part-time employees.
- B. Intermittent appointees are not entitled to annual and/or sick leave.

XI. BENEFITS

Normally, new appointments of experts and consultants are excluded from coverage under the Federal Employees Retirement System Act, the Health Benefits Act, and the Federal Employee Government Life Insurance Act.

XII. FINANCIAL DISCLOSURE

Experts and consultants are required to file either a Public Financial Disclosure Report (SF-278) or a Confidential Financial Disclosure Report (SF-450) based on the number of days he or she is expected to work during the year and the amount of compensation. The Human Resources Group will give the individuals the reports upon their entrance on duty. The reports must be completed and returned to the Office of the General Counsel within 30 days after the effective date of the appointment.

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE GENERAL COUNSEL

**FINANCIAL DISCLOSURE FOR EXPERTS AND CONSULTANTS**

The Federal conflict of interest statute, 18 U.S.C. § 208, prohibits Federal employees, including intermittent and part-time employees, from participating personally and substantially in an official capacity in any particular matter in which, to his or her knowledge, he or she, or any person whose interests are imputed to him or her under the statute, has a financial interest. In addition, Standards of Conduct for the Executive Branch prohibit all employees from having a financial interest that raises the appearance of a conflict of interest with the employee's official duties and responsibilities.

As an expert or consultant at the Department of Education, you will be required to complete and file a financial disclosure report. The purpose of the financial disclosure report is to obtain information on the employment and financial interests of an employee, his or her spouse, and dependent children in order to permit the Department to determine if the employee has a conflict of interest or other problem under the Federal ethics laws. If a potential problem is identified, action can be taken to ensure compliance with all applicable laws and regulations. In this way, the system plays an important role in enabling the Department's ethics program to achieve its purpose; namely, to ensure the integrity of the Department's functions and public confidence in that integrity.

Depending on the number of days you will be expected to work during the year and the amount of compensation you will receive, you will be required to file either a Public Financial Disclosure Report (SF-278) or a Confidential Financial Disclosure Report (SF-450). The Executive Resources Staff of the Human Resources Group will forward a package of information to you, including the appropriate Report form and instructions, after you have been appointed.

If you have any questions about financial reporting in the Executive Branch, please feel free to call the Department's Ethics Counsel Staff at 202/401-1730.

**ACKNOWLEDGEMENT:** I have read the above and understand that, as an expert or consultant at the Department of Education, I will be required to complete and file a financial disclosure report.

\_\_\_\_\_  
Acknowledged

\_\_\_\_\_  
Date

## SUPPLEMENTAL INFORMATION – EXPERT OR CONSULTANT

*(Submit with request for Personnel Action, SF-52)*

NOTE: Complete required certification on reverse.

1. NAME OF PERSON <i>(Last, first, middle initial)</i>	2. TOTAL PERIOD FOR WHICH APPOINTMENT IS REQUESTED [entire year (365 days) or a shorter period]
3. MAILING ADDRESS	4. APPROXIMATE NUMBER OF DAYS PERSON IS EXPECTED TO PERFORM SERVICES DURING THIS PERIOD
5. SERVICES TO BE PERFORMED A. EXPLAIN IN FULL THE SERVICES TO BE PERFORMED	
B. SPECIFY WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE TRANSACTION OF BUSINESS ON BEHALF OF THE GOVERNMENT WITH ANY PROFIT OR NON-PROFIT ORGANIZATION	
C. SPECIFY WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE RENDERING OF ADVICE TO THE GOVERNMENT WHICH WILL HAVE DIRECT AND PREDICTABLE EFFECT ON THE INTERESTS OF ANY PROFIT OR NON-PROFIT ORGANIZATION	
D. SPECIAL QUALIFICATIONS OF THE PERSON RECOMMENDED FOR APPOINTMENT (List those which relate specifically to the services to be performed)	

## CERTIFICATION

In approving the appointment of this consultant/expert, I have considered the requirements of law, relevant decisions of the Comptroller General, and Office of Personnel Management and Department policies and instructions. More specifically, I have satisfied myself that:

1. the services of the individual are essential for effective program management
2. the duties to be performed are those of (check one)  
  
\_\_\_\_ a consultant (that is, they are purely advisory in nature and will not include the performance or supervision of operating functions)  
  
\_\_\_\_ an expert (that is, they require a high level of expertise not available in the regular work force)
3. the proposed appointee is qualified to (check one)  
  
\_\_\_\_ provide advisory services as a consultant  
  
\_\_\_\_ serve as an expert as that term is used in FPM Chapter 304-1
4. the appointment is appropriately designated as (check one)  
  
\_\_\_\_ full-time (the individual will work on a regularly scheduled full-time tour of duty)  
  
\_\_\_\_ part-time (the individual will work on a regularly scheduled part-time tour of duty)  
  
\_\_\_\_ intermittent (the individual will work without a regularly scheduled tour of duty)
5. the appropriate appointment authority is being used
6. the pay level is appropriate for the duties to be performed and the qualifications of the appointee
7. the record of appointment has been clearly documented to show the services to be performed and the special qualifications of the appointee which relate specifically to those services
8. a statement of employment and financial interests has been obtained and it has been determined that no conflict of interest exists.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Program Manager Authorized to Obtain the Consultant's/Expert's Services

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Appointing Official

**MEMORANDUM FOR THE RECORD:**

This confirms that I have agreed to serve the Department of Education as an unpaid Consultant/Expert for the period \_\_\_\_\_ to \_\_\_\_\_. During this period I expect to actually perform work approximately \_\_\_\_\_ days.

I understand that I will \_\_\_\_\_ or will not \_\_\_\_\_ be reimbursed for travel and expenses, subject to the Federal Travel regulations.

I also understand that I am covered by applicable Federal statutes and regulations concerning Conflict of Interest and Political Activity.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date



## **EXHIBIT H**

# CREW | citizens for responsibility and ethics in washington

March 1, 2011

**By Facsimile (202) 401-2854 and First-Class Mail**

Arne Duncan  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Secretary Duncan:

Citizens for Responsibility and Ethics in Washington (“CREW”) writes to follow-up to our letter to you of January 19, 2011, requesting that you examine the role hedge fund managers and outside interest groups have played in the Department of Education’s (Education) formulation of regulations governing the for-profit education industry. Additional agency records CREW obtained recently in response to our Freedom of Information Act (FOIA) request provide further evidence that high-level Education officials involved in the agency rulemaking process not only knew of the efforts of certain hedge fund managers to influence the regulatory outcome, but may themselves have colluded with those individuals to protect the short-sellers’ financial interests. They also document a plan by high-level Education officials to leak the contents of the gainful employment regulations in advance of their public issuance.

The newly discovered documents show, among other things, that both Deputy Undersecretary James Kvaal and Budget Development Staff Director David Bergeron carried out a planned leak of the proposed gainful employment regulations to a number of outside individuals and groups in advance of the regulations’ public release. This effort started with an email from hedge fund short-seller Steven Eisman to Mr. Bergeron on July 19, 2010, just days before Education released the regulations. The subject line of Mr. Eisman’s email reads “I know you cannot respond” with the following text:

But just fyi. Education stocks are running because people are hearing DOE is backing down on gainful employment.<sup>1</sup>

The email thread of which this is a part shows this email was forwarded to a number of Education officials, landing eventually in the email box of your confidential assistant, Phil Martin, with the statement “Let’s discuss.”<sup>2</sup>

---

<sup>1</sup> A copy of this email is attached as Exhibit A.

<sup>2</sup> *See id.*

Secretary Arne Duncan  
March 1, 2011  
Page Two

The following day Mr. Kvaal initiated a plan to call various outside groups and individuals with the apparent purpose of giving them a heads up on the upcoming regulations. The email thread shows that Mr. Kvaal and Mr. Bergeron divided the calls between them, with some key individuals and groups scheduled for contact as early as July 21, two days in advance of when Education issued the proposed gainful employment regulations.<sup>3</sup> None of the listed groups and individuals included anyone representing or acting on behalf of the for-profit education industry.

The email chain references both Mr. Eisman and Diane Schulman of The Indago Group as individuals who should receive advance notice.<sup>4</sup> The Indago Group is a small research company used by Mr. Eisman and his hedge fund, FrontPoint Services Fund to obtain information and entree to Washington lawmakers for Mr. Eisman.<sup>5</sup> Notice to either Mr. Eisman or Ms. Schulman, either directly from Education officials or indirectly from others in contact with Education officials, would have provided Mr. Eisman with reassurance about the likely market impact of the upcoming regulations. While neither is listed on the final call list for Mr. Kvaal or Mr. Bergeron, other documents reveal that Mr. Eisman likely received that notice from at least one non-profit group in receipt of an advance copy of the regulations.<sup>6</sup>

The newly acquired documents also show that on the same day Mr. Eisman initially contacted Mr. Bergeron with an update on how education stocks were faring, Mr. Kvaal quickly located the analysis prepared by the investment banking firm Signal Hill that apparently was fueling market speculation that Education had made the proposed gainful employment regulations “more accommodating” to the for-profit education industry.<sup>7</sup> Signal Hill questioned Mr. Eisman’s analysis, suggesting a need to “discredit the widely-circulated Eisman negative-earnings scenario,” and disputing “the assumption used by most shorts, including apparently Mr.

---

<sup>3</sup> This email chain is attached as Exhibit B.

<sup>4</sup> Specifically, a follow-up email from Mr. Bergeron on July 21 (enclosed with Exhibit B) discussing who both he and Mr. Kvaal would call states: “Also, there’s the Eisman/Schluman/etal [sic] but Eisman is a short seller anyway you cut it and anything you tell Schulman gets to Eisman.”

<sup>5</sup> Their professional relationship is spelled out in our January 19, 2011 letter to you.

<sup>6</sup> See Letter to Arne Duncan from Anne L. Weismann, January 19, 2011, at pp. 6-7.

<sup>7</sup> See Email from Barmak Nassirian to James Kvaal, Re Write-up, July 19, 2010 and enclosed Regulatory Update from Signal Hill, attached as Exhibit C.

Secretary Arne Duncan  
March 1, 2011  
Page Three

Eisman, that 'active repayment' means current within 30 days."<sup>8</sup> Mr. Kvall, with no explanation, promptly characterized this assessment as "not all accurate information."<sup>9</sup>

These documents also bear directly on issues that have been referred to Education Inspector General Kathleen Tighe. Last November Senators Richard Burr (R-NC) and Tom A. Coburn (R-OK), who at that time were both on the Senate Committee on Health, Education, Labor and Pensions, requested that Ms. Tighe investigate the failure of key Education negotiators for the gainful employment regulations to comply with the organizational protocols governing Education's rulemaking process. Among their concerns was evidence that "the Department may have leaked the proposed regulations to parties supporting the Administration's position and investors who stand to benefit from the failure of the proprietary school sector."<sup>10</sup> As this latest batch of documents reveals, Education officials at least had a coordinated plan to leak information about the gainful employment regulations to outside organizations in advance of the regulations' issuance.<sup>11</sup>

Together with the previously released documents discussed in our letter of January 19, 2011, this new batch of documents raises extremely troubling questions about the actions of Education officials at the highest levels of this regulatory process. Those officials knowingly allowed short-sellers to manipulate agency processes for personal gain and ignored their own

---

<sup>8</sup> See Signal Hill Regulatory Update at p. 1.

<sup>9</sup> See Email from James Kvaal to Gomez Gabriella (Education's Assistant Secretary for Legislative and Congressional Affairs), Re Write-up, July 19, 2010 (attached as Exhibit D).

<sup>10</sup> See letter from Senators Burr and Coburn to Kathleen Tighe, November 17, 2010 (attached as Exhibit E).

<sup>11</sup> One of the newly released documents shows that at least some in the non-profit community understood the restrictions imposed on Education officials. In a June 17, 2010 email to Education Press Secretary Justin Hamilton, Edie Irons, Communications Director for TICAS, notes: "I know that you all haven't been allowed to talk publicly about these rules yet." This email is enclosed as Exhibit F.

Secretary Arne Duncan  
March 1, 2011  
Page Four

responsibilities to the agency they serve. Unless these questions are answered, the public can have no faith in any aspect of Education's rulemaking process.

Very truly yours,



Anne L. Weismann  
Chief Counsel

cc: Chairman Tom Harkin  
Ranking Member Michael B. Enzi  
Senator Richard Burr  
Senate Committee on Health, Education, Labor, and Pensions  
Chairman John Kline  
Ranking Member George Miller  
House Committee on Education and the Workforce  
Inspector General Kathleen Tighe

Enclosures

## **EXHIBIT A**

**Kvaal, James**

---

**From:** Kvaal, James  
**Sent:** Monday, July 19, 2010 10:09 AM  
**To:** Martin, Phil  
**Subject:** FW: i know you cannot respond  
**Importance:** High

Let's discuss

**From:** Bergeron, David  
**Sent:** Monday, July 19, 2010 10:06 AM  
**To:** Kvaal, James; Yuan, Georgia  
**Subject:** FW: i know you cannot respond  
**Importance:** High

fyi

**From:** Eisman, Steven [<mailto:seisman@fppartners.com>]  
**Sent:** Monday, July 19, 2010 9:45 AM  
**To:** Bergeron, David  
**Subject:** i know you cannot respond

But just fyi. Education stocks are running because people are hearing DOE is backing down on gainful employment.

Steven Eisman  
FrontPoint Financial Services Fund  
[seisman@fppartners.com](mailto:seisman@fppartners.com)  
917-934-1770

## **EXHIBIT B**



**Kvaal, James**

---

**From:** Bergeron, David  
**Sent:** Wednesday, July 21, 2010 2:47 PM  
**To:** Kvaal, James  
**Subject:** RE: group calls

Looks good. Hartle called me today from the road and asked what was going on. I said to expect a call from one of us tomorrow or Friday. He said he'll be in the office and that we should ask to have him interrupted to take the call.

**From:** Kvaal, James  
**Sent:** Wednesday, July 21, 2010 2:45 PM  
**To:** Bergeron, David  
**Subject:** RE: group calls

How's this for a division of labor?

**Today/Tomorrow morning:**

David:  
Baime  
AASCU

James:  
TICAS  
Barmak  
Terry  
Kantrowitz

**Friday:**

David:  
Angela Peoples, USSA  
Jason DeLisle and Steve Burd, New America  
Deanne Loonin, NCLC

James:  
Chris Lindstrom, PIRG  
David Halperin, Campus Progress  
Jamie Studley, Public Allies

**From:** Bergeron, David  
**Sent:** Wednesday, July 21, 2010 8:02 AM  
**To:** Kvaal, James  
**Subject:** RE: group calls

I'd suggest we add David Baime, ACCU & Pat Smith or Robert Moran at AASCU. Also, should probably call NASFAA on Day 2 or 3. I can make any calls you'd like. I'd prefer not to call Mark but Danny could do that one. He gets the guy. When I talk Mark, the conversation goes more like Bob & Tony.

Also, there's the Eisman/Schluman/et al but Eisman is a short seller anyway you cut it and anything you tell Schulman gets to Eisman.

**From:** Kvaal, James  
**Sent:** Tuesday, July 20, 2010 11:13 PM  
**To:** Bergeron, David  
**Subject:** group calls

While I'm on a roll ... here is my list of people who need calls. What am I missing? Do you want to sign up for a few or how should we split up?

Day 1 (most likely to be called by reporters)

- Pauline Abernathy and Lauren Asher, TICAS
- Barmak Nassarian, AACRAO
- Terry Hartle, ACE
- Mark Kantowitz, Finaid

Day 2:

- Deanne Loonin, NCLC
- Jason DeLisle and Steve Burd, New America
- Chris Lindstrom, PIRG
- Angela Peoples, USSA
- Jamie Studley, Public Allies
- David Halperin, Campus Progress

## **EXHIBIT C**

**Kvaal, James**

---

**From:** Kvaal, James  
**Sent:** Monday, July 19, 2010 10:52 AM  
**To:** Martin, Phil  
**Subject:** FW: Write-up  
**Attachments:** Download.aspx.pdf

---

**From:** Nassirian, Barmak [<mailto:barmak@aacrao.org>]  
**Sent:** Monday, July 19, 2010 10:47 AM  
**To:** Kvaal, James  
**Subject:** Write-up



Signal Hill

## Business Services - Education Services Industry Update

July 16, 2010

### Regulatory Update -- What's Next

Trace Urdan

turdan@signalhill.com  
415.364.0365

#### **Our Call: On Gainful Employment:**

Multiple reliable sources say that the Department of Education (ED) sent a revised, metric-based Gainful Employment draft to the OMB for review around July 4, suggesting that next week could see the proposal released for public comment. We believe this new draft could include terms more accommodating than the infamous 8% language first floated by ED in January's neg-reg sessions.

We further expect, based on reports of conversations between industry and ED officials over the last few months, that the revised proposal will effectively relieve most of the BA and MA programs from the debt/income measure through an alternative measure of graduate loan repayments. We believe the intent of the rules is to target AA and non-degree programs, where students are seen as less sophisticated and less able to make informed decisions about borrowing for their education. We also think there could be a completion/placement standard as part of the final proposal.

Near-term, we see the publication of the Gainful Employment draft rule as most likely to relieve pressure on BA and MA programs and to better clarify the exposure for non-degree and AA degree providers. (We note that COCO management has publicly stated that it will offer an indication of the the likely impact of the rule on its future earnings, even before a final rule is published.) Because we believe that clarity in both cases will begin to discredit the widely-circulated Eisman negative-earnings scenario, we see the GE rule as a potentially positive catalyst.

Specifically, we believe the terms of an alternative default measure will be such that company's with two-year graduate default rates of <3.5% should meet the 90% "active repayment" criterion. We do not believe the assumption used by most shorts, including apparently Mr. Eisman, that "active repayment" means current within 30 days.

- Near-term beneficiaries: APOL, BPI, DV, EDMC, LOPE, STRA.

But near-term evidence that negative earnings are unlikely will not by itself relieve the short pressure on the sector or persuade disenchanted longs to reinvest. The more meaningful catalyst for the sector will not come, in our opinion, until we see a) an LBO; b) a balanced assessment of the industry's contribution to higher education by the GAO; or c) some positive commentary/testimony from USDOE following the rules being finalized.

We believe that private equity remains highly engaged in the sector, and possible Senate bills notwithstanding, inclined to act as soon as rules become clearer. Though some may be cowed by Harkin's rhetoric, we think others will be able to read the political environment as one in which a liberal Democrat will be hard-pressed to pass heavy new regulations that will discourage college access, industry jobs and tax receipts.

- Most likely LBO candidates: ESI, COCO, CECO, and (if John Sperling is prepared to cede control,) APOL.

---

Please see important disclosure information on pages 2 - 3 of this report.

July 16, 2010



## **Investment Analysis:**

### **Senate HELP Hearings**

We're told that the next Senate HELP committee hearing on for-profit education will be devoted to the issue of "misrepresentation" and will take place during the first week of August.

We believe the politics of rule-making, which encourages USDOE to generate support for the rules during this public comment period, as well as the politics of the mid-term elections, in which the Democrats appear to be appealing to the left in order to rally their political base, has caused the current firestorm of populist outrage in Congress as expressed by Senators Harkin, Franken, Sanders, and Durbin.

Our read is that having been placed on the defensive early with respect to the need and appropriateness of new Gainful Employment rules that effectively cap student debt levels by program, USDOE has coordinated an impressive and highly successful public relations and lobbying effort to shift the terms of the debate such that these rules now appear to the public to be a badly-needed and even moderate response to a crisis.

We read the Senate HELP hearings, as well as Senator Durbin's speech to the National Press Club, in this context as well. There is a strong professional association between Senator Harkin's top education staffer Luke Swarthout and Bob Shireman's advocacy organization, the Institute for College Access & Success. And Senator Durbin's speech likewise seems to have benefited from a host of talking points supplied directly by USDOE.

In our analysis, the mid-term elections, the publication of a GAO report and most importantly, the finalization of new rules on Nov. 1, 2010 governing the sector should result in a much more moderate tone among lawmakers. While we cannot dismiss the possibility of new legislation being introduced in the Senate to alter rules governing for-profit schools, we rate the likelihood of *passage* of any such law as very low given the source of the agitation and the tough line being taken by Republicans on new regulatory initiatives.

## **Important Disclosures**

### **Analyst Certification**

I, Trace Urdan, hereby certify that all of the views expressed in this research report accurately reflect my personal views about the subject securities or issuers. I also certify that no part of my compensation was, is or will be directly or indirectly related to the specific recommendations or views expressed in this research report. Signal Hill does not compensate its equity research analysts based on specific investment banking transactions. Signal Hill Equity research analysts receive compensation based on several factors, including overall profitability and revenues of the firm, which include investment banking revenues.

Applicable current disclosures for all companies covered in this report are available in written or electronic format upon request. To request copies of applicable current disclosures please write to the Signal Hill Capital Group Research Department at the following address: Signal Hill Capital Group Research Department, 300 East Lombard Street, Suite 1700, Baltimore MD 21202.

### **Meaning of Ratings**

Signal Hill uses a three-tiered rating system defined as follows:

BUY: We expect this stock to outperform its peers over the next 12 months:

HOLD: We expect this stock to perform in line with its peers over the next 12 months:

SELL: We expect this stock to underperform its peers over the next 12 months:

July 16, 2010



Distribution of Ratings/IB Services  
Signal Hill

Rating	Count	Percent	IB Serv./Past 12 Mos.	
			Count	Percent
BUY	79	61.7	74	93.7
HOLD	48	37.5	39	81.2
SELL	1	0.8	1	100.0

**Disclaimer**

This report has been prepared using sources we deem to be reliable but we do not guarantee its accuracy and it does not purport to be complete. This report is published solely for information purposes and is not intended to be used as the primary basis for making investment decisions, which should reflect the investment objectives and financial situation of the investor. The opinions expressed herein are subject to change without notice. This report is not an offer or the solicitation of an offer to buy or sell securities. Additional information is available upon request.

## **EXHIBIT D**



**Kvaal, James**

---

**From:** Kvaal, James  
**Sent:** Monday, July 19, 2010 11:12 AM  
**To:** Gomez, Gabriella  
**Subject:** Fw: Write-up  
**Attachments:** Download.aspx.pdf

This is not all accurate information

-----  
Sent using BlackBerry

---

**From:** Nassirian, Barmak <[barmak@aacrao.org](mailto:barmak@aacrao.org)>  
**To:** Kvaal, James  
**Sent:** Mon Jul 19 09:47:29 2010  
**Subject:** Write-up

**EXHIBIT E**

# United States Senate

WASHINGTON, DC 20510

November 17, 2010

Ms. Kathleen Tighe  
Inspector General  
U.S. Department of Education  
Office of Inspector General  
400 Maryland Avenue, SW  
Washington, DC 20202-1500

Dear Ms. Tighe:

The work of your office is essential to protecting the efficiency and effectiveness of programs administered by the U.S. Department of Education. Independent analysis helps ensure the integrity of the Department's mission and operations. To that end, we request an investigation by your office of the events leading up to the issuance of the Department's proposed regulations regarding "gainful employment."

As you know, Section 492 of the Higher Education Act requires the Department to convene negotiated rulemaking any time it promulgates regulations affecting the federal student aid programs. Negotiated rulemaking ensures the Department works with individuals who are experienced in implementing the federal student aid programs and who understand the consequences of the proposed regulations.

Information has become available that raises serious concerns about whether some negotiators failed to comply with the organizational protocols governing the rulemaking process and other laws governing these proceedings. In addition, publicly available documents indicate the Department may have leaked the proposed regulations to parties supporting the Administration's position and investors who stand to benefit from the failure of the proprietary school sector. We believe an independent investigation will provide additional transparency surrounding the actions taken by Department officials and those who stand to benefit financially from the regulations.

Since November 2009, the Department of Education has been engaged in negotiations to promulgate regulations designed to improve the integrity of the federal student aid programs. At the beginning of the rulemaking sessions, the negotiators adopted "Organizational Protocols" that governed the proceedings. One of the agreed upon principles states: "All members and the organizations they represent shall act in good faith in all aspects of these negotiations" ("Organizational Protocols," U.S. Department of Education. Section VI.B). Another states: "Contact with the media, the investment community, and other organizations outside the community of interest represented by the member will generally be limited to discussion of the overall objectives and progress of the negotiations" ("Organizational Protocols," U.S. Department of Education. Section VI.C.).

The panel met three times between November 2009 and January 2010 and did not reach consensus on the regulations package. On June 16, 2010, the Department released the first package of proposed regulations on "program integrity." A month later, on July 23, 2010, the Department released the second package of proposed regulations on "gainful employment."

In a July 23 Freedom of Information Act (FOIA) request, Citizens for Responsibility and Ethics in Washington (CREW) sought information pertaining to the communications occurring between Department officials and several individuals and organizations outside of the Department. In its request, CREW stated:

Specifically the requested records will inform the public about the role of Education in the controversy over the for-profit education industry and the extent to which Education has knowingly relied on, or has been manipulated by, the views of individuals who seek to advance their financial interests in the for-profit industry by publicly criticizing certain for-profit education entities and companies.

It is our understanding that as of today, the Department has not responded to this FOIA request.

Based on information that has come to light from records released under a Florida public records request, it appears Department officials may have leaked information to outside organizations, some of whom may stand to financially benefit from the failure of the proprietary school sector. For example, an email attached to this letter demonstrates that Edie Irons, Communications Director for TICAS, emailed an embargoed copy of the program integrity regulations to the "GainfulEmploymentGroup" on June 15 at 5:38 p.m. As previously noted, the regulations were not made public until June 16. If one group received an embargoed copy of these proposed regulations, other groups, including those who stand to benefit financially from the failure of the proprietary sector, may have as well.

To resolve these questions, we request an investigation by your office into the events leading up to and surrounding the issuance of the Department's proposed program integrity regulations for the period of April 2009 to the present. In this investigation we respectfully request your review of whether the organizational protocols adopted for negotiated rulemaking were followed by both non-federal negotiators and Department staff. In addition, we ask that you review the propriety of all communications between Department employees and outside individuals and organizations to determine if the proposed regulations packages were inappropriately provided to any individuals or organizations prior to their public release.

Members of the public, including students and the institutions they attend, have a right to expect the Department of Education to promulgate regulations through a negotiated rulemaking process that is undertaken in good faith and without bias.

Thank you for your attention to this request. If you have any questions, please do not hesitate to contact our offices.

Sincerely,



Richard Burr  
United States Senator



Tom A. Coburn, M.D.  
United States Senator

Enclosures

**EXHIBIT F**

**Kvaal, James**

---

**From:** Pauline Abernathy [pabernathy@ticas.org]  
**Sent:** Thursday, June 17, 2010 6:53 PM  
**To:** Kvaal, James  
**Subject:** FW: Error in your NPRM release

---

**From:** Hamilton, Justin [mailto:Justin.Hamilton@ed.gov]  
**Sent:** Thursday, June 17, 2010 3:45 PM  
**To:** Edie Irons  
**Cc:** Lauren Asher; Pauline Abernathy  
**Subject:** Re: Error in your NPRM release

Thanks. We'll take a look.

---

Justin Hamilton  
Press Secretary  
U.S. Department of Education  
c: 202-591-6734

---

**From:** Edie Irons <EIron@ticas.org>  
**To:** Hamilton, Justin  
**Cc:** Lauren Asher <LAsher@ticas.org>; Pauline Abernathy <pabernathy@ticas.org>  
**Sent:** Thu Jun 17 17:43:13 2010  
**Subject:** Error in your NPRM release

Hi Justin,

I left you a voicemail yesterday. Your press release on the proposed rules says, "Though current laws prohibit schools from compensating admissions recruiters based solely on success in securing student enrollment," however, the current law actually says "directly or indirectly." "Solely" is the language that was in the safe harbors, and what the for-profits want to keep! This definitely needs to be fixed online ASAP, not sure it is worth issuing a correction.

I wanted to flag another issue – not one that needs immediate correction, but something to be aware of. None of the stories from yesterday characterize the likely GE rule correctly. They say the metric will be based on an average of the student's debt-to-income ratio, or they make it sound like any student with a high debt-to-income ratio could cause a school to lose federal aid eligibility. Here are the three points we have found it is very important to make super clear (and sometimes reporters still get it wrong!):

1. More than half of a program's students would need to be beyond 8% (or whatever the metric will be).
2. 8% is just a "red flag," and there are other metrics that the school could then use to prove gainful employment. In other words, it's not the be-all-end-all, but the first of a series of tests, so schools are getting ample and flexible opportunities to show they lead to gainful employment.
3. That the rules apply to *programs*, not schools. So even if a program is negatively affected, it wouldn't necessarily put an entire school out of business.

I know that you all haven't been allowed to talk publicly about these rules yet, so I just thought it might be helpful to share what we've learned since we've been talking about this for a while!

Edie

Edie Irons  
Communications Director

The Institute for College Access & Success  
405 14th St. 11th floor  
Oakland, CA 94612  
(510) 318-7902  
[eirons@ticas.org](mailto:eirons@ticas.org)

*Please note the new address and phone number, we moved in April.*

[www.ticas.org](http://www.ticas.org)

<http://projectonstudentdebt.org>