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“The Gainful Employment Regulation: Limiting Job Growth and Student Choice”

Joint Subcommittee Hearing:

**Committee on Oversight and Government Reform’s Subcommittee on Regulatory Affairs,
Stimulus Oversight and Government Spending**

Honorable Jim Jordan – Chair

Education Committee’s Subcommittee on Higher Education and Workforce Training

Honorable Virginia Foxx – Chair

TESTIMONY BY

Harry C. Alford

President/CEO

Testimony

Greetings Mr. Chairman and members of this joint committee. My name is Harry Alford and I am the President of the National Black Chamber of Commerce. The Black Chamber serves 100,000 Black owned businesses. There are 1.9 million Black owned businesses in the United States. Black businesses account for over \$138 billion in annual sales. The National Black Chamber of Commerce is dedicated to economically empowering and sustaining African American communities through entrepreneurship and capitalistic activity within the United States and via interaction with the Black Diaspora.

Mr. Chairman, I am here today because the Black owned businesses that I represent rely on graduates of proprietary colleges targeted by the recent Gainful Employment Rule. These proprietary colleges serve minority, low-income, and high-risk students at much greater numbers than traditional four-year institutions and have more success doing it.

As issued by the Department of Education, the Gainful Employment Rule will limit college access to scores of minority students. The Department, which had no authority to make law in the first place, nevertheless made several significant blunders. Making law is the job of the Congress and so today I am asking you to right this wrong, eliminate the Gainful Employment rule, and initiate the necessary higher education reforms across all sectors, rather than just discrimination against one.

Black businesses, like all businesses, are suffering today from high unemployment. The figures supplied by the Bureau of Labor Statistics covering unemployment through May, 2011 show the disparity in joblessness not just between races, but shows a clear trend line between educational levels attained and the likelihood of being unemployed.

As an example, along the racial axis, a study by Stanford University shows unemployment among all teenagers is 24.2%. Among Black teenagers, regardless of gender, the rate is 41.6% but among Black teenage males the unemployment rate is a very dangerous 45.5% - nearly half of that population is unemployed. The percentage of these young people who will be enrolling at the University of North Carolina or the University of Texas this Fall is very small indeed.

This is made all the more crucial when we look along the educational axis. The BLS data show that Americans with less than a high school diploma have an unemployment rate of 14.7 percent. Those with a high school diploma, 9.5%. For Americans with some college or an Associate Degree or certificate the rate is 8.0%. And for those with at least a bachelor's degree the unemployment rate is 4.5%.

Putting these data together on one graph allows us to come to only one conclusion: It should be a primary goal of the Federal government to provide as many young, minority Americans as broad a range of educational opportunities as possible.

There are those who complain that the Federal government is spending too much on financial assistance to students attending career colleges. Let's take a brief glance at those numbers. A typical unemployment check is about \$330 per week that produces monthly assistance in the range of \$1,420 per month per recipient.

There are about 13.1 million Americans currently unemployed. Multiplying 13.1 million times a monthly check of \$1,420 leads us to an astonishing Federal expenditure of just under a quarter of a TRILLION dollars per year. Think about the difference in the debates you are having in this very building if a significant percentage of those people drawing unemployment –

because of a lack of education – were, instead on a payroll – paying taxes instead of consuming Federal and state dollars.

Mr. Chairman, let me speak candidly: Proprietary colleges are the only broad group of institutions of higher learning which are stepping up to the plate and taking on the daunting task of educating “high risk” students. “High risk” is a classification defined by the Department of Education; it includes a combination of factors such as income and employment status. Incredibly, proprietary schools serve 52 percent of these “high risk” students while non-profit schools serve only 9 percent and public schools serve a paltry 6 percent.

Two more facts further demonstrate this point:

- 49 percent of students enrolled at for-profit institutions are low income, as opposed to just 18 percent at public schools; and
- Over 50 percent of students attending for-profit colleges are minority students, compared to just 34 percent at public schools.

These facts tell us, Mr. Chairman, that the rigorous implementation of the Gainful Employment Rule will not shift students from career colleges to traditional schools. They will simply be frozen out of the educational marketplace with the result impairing their employment prospects – and on society as a whole – as I outlined above.

There are those who point to America’s highly developed network of community colleges and ask why they can’t take up the slack. It is well documented that in almost every locality, community colleges are oversubscribed and current budget crises in every city, county and state make untenable the major capital projects which would be necessary to provide the facilities and faculty for these at-risk students.

So the problem at-hand is that minority students are already at a great disadvantage and now the Department of Education has made it worse by shutting-down a major path to education and jobs. The Department of Education has drifted over into the lane reserved for the Congress of the United States – making laws. *That* the Department created this rule is harmful enough. *How* they went about doing it deserves the closest possible scrutiny from this Committee.

Let me spend just a few minutes, Mr. Chairman, on the deeply flawed process which was employed by the Department of Education in developing the Gainful Employment Rule.

There was never a doubt that certain employees of the Department went into the process with the sole purpose of making it as difficult as possible for these institutions to continue operating on behalf of their student populations. Attached to these written remarks I am providing a legal brief titled, “Review of Gainful Employment Process as a Breach of APA Rights.” However, in the interest of time, I want to draw your attention to six questions that beg your intervention:

1. We know that secret meetings took place between Department officials and Wall Street short-sellers that were placing heavy bets against the share prices of for-profit schools. But the question is: Were those meetings illegal and if they were, what are you going to ensure that short-sellers don’t manipulate the Federal rule-making process for their own personal gain?¹

2. We know that the Department assembled a covert group of allies – including former employers of Department staff, short-sellers, and competitors of the for-profit industry – and that they traded secret information against the code of the rule-

¹Godown email to Bergeron/Manheimer, et al, 8/25/09 11:08 AM (Tab 17); Desai email to Manheimer/Bergeron, et al, 10/28/09 5:03 PM (Tab 19)

making process. The question for this Committee is: What are you going to do to ensure the Department gives a fair shake to those they chose to regulate?²

3. We also know that Department officials elicited negative information about the for-profit colleges from this secret cabal and that information was provided, even when it was deceptively collected. So another question for the Committee is: How can you prevent the Department from fishing for and then promoting intentionally bogus information to support their prejudiced conclusions?³

4. We know the Department relied heavily on a now-discredited GAO report⁴, but never withdrew this report from their process or consideration. What impact did this bogus report have on the Rule and how can its impact be extracted?

5. We know that the Department assembled a biased rulemaking committee composed of a sixteen-to-one ratio – meaning there was no opportunity for the industry, and the minority students they represent, to have a fair voice in the proceedings. The question is that if the deck was stacked from the beginning, how are you going put the genie back in the bottle?⁵

6. The Department acknowledged that it was intent on pursuing proprietary colleges from the very beginning⁶ even while America's higher education challenges confront every type of institution. So what is the joint committee going to do to address

²Ibid

³Manheimer email to Desai, 4/2/10 4:03 PM (Tab 31); Desai email to Manheimer, 4/8/10 4:09 PM (Section 2 Tab 1)

⁴ Secretary Duncan letter to Chairman Harkin and Ranking Member Enzi, 8/13/10;

<http://www2.ed.gov/policy/highered/guid/secletter/100817.html>

⁵ List of Negotiators: Program Integrity Issues, U.S. Department of Education, 1/25/10

<http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/2009-2/team-one-negotiators.pdf>

⁶ Dept of Education press release, 10/28/10; <http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax>

student debt, academic performance, and occupational preparation in every college in the country?

And the list goes on and on. It reminds me, Mr. Chairman of that scene from “Guys and Dolls” where someone produces a pair of dice with no dots. The gambler says “That’s not a problem. I know where they are.”

But lest we not forget, the outcome of this biased and corrupt process is not a joke. As I mentioned at the beginning the Gainful Employment Rule is now the law of the land and it will have grave consequences on hundreds of thousands of minority students.

In conclusion, Mr. Chairman, I want to remind everyone that to qualify for public assistance programs, proprietary schools must meet exactly the same academic standards set by the same accreditation agencies as Harvard or Ohio State. The fact is that the opponents of proprietary schools are really trying to mask the same concerns that all colleges share, such as student debt, academic performance, and occupational preparation. The Black employers that I represent hope you will work together to find solutions to these vexing challenges, rather than make a scapegoat out of for-profit schools.

Take a look at this process, Mr. Chairman, and I think you will come to the conclusion that a remedy is necessary. The biased and corrupt process which produced this rule should be reversed through the Congressional Review Act or some other means.

Thank you, Mr. Chairman. I look forward to a lively and important discussion.

Legal Brief:

Review of Gainful Employment Process as a Breach of APA Rights

1. The U.S. Code specifies that affected parties are permitted to play a substantial role in decision-making about forthcoming Federal rules. The APA accomplishes this goal by requiring that agencies go through the time-honored process of notice and comment, telling the American people what they propose to do and why, receiving comments about the proposals, and responding to them in a manner that explains their reasoning and thus allows meaningful review. In some instances, agencies are now also required to convene negotiating committees that are representative of the affected interests to see if they can reach consensus about the best way to regulate in a given area.

2. None of these procedural protections has any meaning, however, if agency officials come into the process with a predetermined set of decisions and are unwilling even to consider the alternative perspectives presented by commenters or members of a negotiating committee. Certainly officials can bring to rulemaking their own experience and ideas. But the process of allowing and considering public input cannot be turned into a complete sham, with agency officials utterly closed-minded and with decisions either already made or being discussed in secret with a hand-picked set of “friendly” parties. Courts are often reluctant to conclude that a rulemaking process was so orchestrated and biased that it failed to serve its statutory purpose, but they have always maintained their power to take action in extreme cases. This is the extreme case, where the evidence of the Department’s unalterably closed mind and bad faith is so overwhelming and extraordinary that the resulting regulations need to be set aside. As set forth more fully herein, the Department’s closed mindedness and bad faith are evidenced by the following eight categories of improper conduct that occurred throughout the rulemaking process:

(1) Secret Cooperation With Short-Sellers

Prominent and well-known short-sellers – who make money by betting that the share price of career college stocks will go down – played a major, secretive role in the regulatory process. At the same time they were “shorting” career college stocks, the short-sellers sought punitive Department regulations that they knew would cause the stock prices of career colleges to plunge. Even though the short-sellers had no expertise or experience in higher education and obviously had a personal interest in causing financial harm to the career colleges, the Department repeatedly looked to short-sellers for research, analysis and information. The Department and short-sellers also helped each other develop and deliver inflammatory public statements about career colleges – the subject of the ongoing rulemaking. The Department’s regulatory proposals that resulted from this secret and symbiotic relationship with short-sellers in fact caused the stock values of the career colleges to plunge, allowing the short-sellers to reap enormous financial gain. The pervasive presence of short sellers in the rulemaking process was unprecedented and shocks the conscience.

(2) Undisclosed Use Of Misleading and Suspect Information Received From Short-Sellers

A high-ranking Department official overseeing the rulemaking took the advice of short-sellers and in a public speech attacked career colleges, comparing them to the subprime mortgage industry, without disclosing the suspect source of this information. Moreover, in at least one case, in response to a Department official’s request for information about career colleges, short-sellers apparently manufactured information, shamelessly alleging that career colleges improperly recruited students at homeless shelters. The Department then provided that falsehood to the media. In another case, short-sellers urged the Department to “strengthen” the

punitive regulations against career colleges because the Department's proposed regulations would not reduce the publicly traded career colleges' revenue to the extent desired by short-sellers. The Department adopted many of the short-sellers' suggestions without disclosing the source and without conducting its own independent analysis.

(3) Reliance On A Grossly Flawed And Biased GAO Report

In justifying its promulgation of rules against career colleges, the Department relied on an investigation conducted by the Government Accountability Office ("GAO") concerning career colleges that claimed there was widespread deceit and fraud among career colleges despite the fact that the GAO's report was biased and error-ridden and now is under investigation by Congress. The Department continued to rely on the GAO report even after it was discredited.

(4) Misleading Statements That Career Colleges Were Not Being Targeted

At the outset of the rulemaking, the Department misleadingly announced that it was not singling out career colleges even though in its announcement of the final regulations it admitted that career colleges were the target of the regulations from the beginning.

(5) A Department Official's Pledge To Help His Anti-Career College Former Employer

The Department's rulemaking was spearheaded by a Department official who had previously founded and headed a lobbying group opposed to career colleges. The Department official pledged to continue to work on behalf of the group's agenda. In fact, during the rulemaking process, he helped to edit anti-career college position pieces drafted by this group. The Department explicitly referred to this group and other anti-career college special interest groups as "friends."

(6) Stacking The Negotiated Rulemaking Committee

As required by statute, the regulatory drafting process began with a negotiated rulemaking, a method designed to ensure that all stakeholders are represented in the decision-making process. Yet in an apparent effort to railroad the Department's predetermined policy through the negotiated rulemaking committee, the Department stacked the committee with members who were known to be hostile to career colleges, allowing career colleges only a single token representative on the committee of sixteen members.

(7) Improper, Secret Coordination With Anti-Career College Special Interest Group "Friends"

When the negotiated rulemaking committee failed to reach consensus, Department officials reconvened its "friends" from the committee and from outside organizations to plot a strategy to press ahead with regulations targeted at career colleges. Over the following months, in the midst of the rulemaking, the Department engaged in repeated undisclosed, *ex parte* communications with advocates opposed to career colleges, in which they shared information and coordinated their public relations strategies. Moreover, on at least one occasion, a Department official attended an offsite meeting sponsored by one of the anti-career college special interest groups.

(8) Seeking Only Negative Information About Career Colleges

The Department sought only negative information about career colleges from short-sellers and the Department's "friends," demonstrating that it was not interested in career college success stories or truly understanding the issues at hand in an objective fashion.

3. The Department's conduct, which is detailed in its own emails obtained through Freedom of Information Act ("FOIA") requests, creates the strong inference that the Department did not engage in a good faith, fair and transparent rulemaking. Instead, the Department entered the informal rulemaking process with predetermined, closed minds, conducting a biased process

designed to achieve the predetermined outcome. In fact, since these internal documents have come to light, the Department has acknowledged that the involvement of short-sellers on the rulemaking was improper, but the rules that resulted from that flawed and predetermined process remain on the books.

4. Moreover, the Department has actively concealed its bad faith in the regulatory process. Only through FOIA requests has evidence of the Department's predetermined mindset been more fully revealed. On information and belief, these documents represent only the tip of the iceberg.

5. In proceeding with bad faith and an unalterably closed mind in promulgating the regulations available at 75 Fed. Reg. 66,665 and 75 Fed. Reg. 66,832, the Department acted in a manner that was arbitrary and capricious, an abuse of discretion, and without observance of procedure required by law or otherwise not in accordance with law, all in violation of the APA, 5 U.S.C. § 702.

FACTUAL BACKGROUND

I. THE DEPARTMENT WAS OBLIGATED TO CONDUCT THE RULEMAKING FAIRLY AND WITH AN OPEN MIND.

6. Under the HEA, Congress authorized the Department to promulgate regulations regarding the administration of federal funds for education. In order for the Department to promulgate these regulations, Section 492 of the HEA requires the Secretary to undertake a "negotiated rulemaking process." *See* 20 U.S.C. § 1098a.

7. The purpose of a negotiated rulemaking process is to ensure that all significantly affected parties are heard from and that the ultimate regulations reflect the diversity of viewpoints and interests in an industry. As part of that process, the Secretary must form a

negotiated rulemaking committee by “select[ing] individuals reflecting the diversity in the industry, representing both large and small participants, as well as individuals serving local areas and national markets.” *Id.* § 1098a(b)(1).

8. If the committee is unable to reach consensus, the Department can promulgate the regulations on its own through ordinary notice-and-comment rulemaking. However, the APA requires that the Department proceed with an open mind so that it fairly and conscientiously considers the evidence before it. By contrast, when the Department proceeds with an unalterably closed mind to issue regulations reflecting a predetermined judgment of the facts, the resulting regulations are arbitrary and capricious in violation of the APA and should be set aside.

9. Here, the committee was unable to reach a consensus. Accordingly, in June and July 2010, the Secretary released two Notices of Proposed Rulemaking (“NPRMs”). (*See* 75 Fed. Reg. 34,806 and 75 Fed. Reg. 43,616.) After an abbreviated 45 day notice-and-comment period, rather than the standard 60-day period – and despite having received 90,000 comments during that period, the most ever received on an education issue – the Department issued the final regulations at issue here on October 29, 2010. (*See* 75 Fed. Reg. 66,665 and 66,832, hereinafter “Program Integrity” rules.)

10. The Department’s regulations were clearly targeted at career colleges and will cause them significant harm. Indeed, the Department’s own press release announcing the final regulations stated: “The rapid growth of enrollment, debt load, and default rates at *for-profit institutions* in recent years *prompted the Obama administration to embark on an 18-month negotiation* [of regulations].” (Tab 120 (emphasis added).)⁷

II. IN VIOLATION OF THE APA, THE DEPARTMENT CONDUCTED THE RULEMAKING IN BAD FAITH AND WITH AN UNALTERABLY CLOSED MIND AS TO ITS OUTCOME.

11. As detailed below, senior officials at the Department led the predetermined rulemaking against career colleges. The unalterably closed, anti-career college mindset of these senior officials infected the Department's rulemaking process and, unsurprisingly, led to a foreordained outcome, in violation of the APA.

12. The senior Department officials most involved in the rulemaking were the following: (1) Deputy Undersecretary Robert Shireman who, prior to joining the administration, was founder and President of The Institute for College Access and Success ("TICAS"), which has long been a vocal and adamant opponent of career colleges; (2) Ann Manheimer, Director, Workforce Development; (3) James Kvaal, current Deputy Undersecretary, having replaced Shireman in summer 2010, who also worked for TICAS previously; and (4) David Bergeron, Director of Policy and Budget Development.

A. The Department Engaged In Highly Improper, Clandestine Communications With Short-Sellers.

13. Throughout the rulemaking process, senior Department officials cultivated an unseemly and improper symbiotic relationship with short-sellers, who stood to reap substantial financial rewards from regulations targeting career colleges. These secret communications are demonstrative of the Department's bad faith and the predetermined outcome of the rulemaking.

14. "Short-sellers" are investors who bet against the performance of a company's stock; that is, they stand to make money if the price of the company's stock declines. To make such a bet, short-sellers borrow stocks and sell them at a high price, and then, following a decline

in stock value, repurchase the stocks at a lower price. The short-sellers retain the profit differential derived from the re-purchase of the stocks at the lower price.

15. Short-selling is subject to special regulation by the Securities and Exchange Commission because of the potential for “manipulat[ion] or abus[e].” Amendments to Regulation SHO, 75 Fed. Reg. 11,232, 11,234 (Mar. 10, 2010).

16. In announcing the further investigation into short-sellers for potential market manipulation, the SEC explained: “Abusive short selling market manipulation and false rumor mongering for profit by any entity cuts to the heart of investor confidence in our markets.” *See* Press Release, SEC Expands Sweeping Investigation of Market Manipulation, Sept. 19, 2008, available at <http://www.sec.gov/news/press/2008/2008-214.htm>.

17. Similarly, in explaining the need for stronger regulation of short-sellers, Congressman William Lacy Clay stated: “Practices of some of the short sellers are tactics one would expect to find in some lawless, unregulated place far removed from the United States of America. Some short sellers use practices of false accusations of crime associations, questionable accounting practices, threats of bankruptcies, all for the purpose of depressing prices. We have to have better control of the situation than this. This is allowing market manipulation.” *Hearing before the House Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, 108th Cong. May 22, 2003 (statement of Rep. Wm. Lacy Clay).

18. Throughout the rulemaking process, short-sellers held substantial short positions in career colleges.

19. Despite short-sellers’ vested financial interest in harming career colleges, Department officials provided them with privileged access to the agency’s decision-making. The

Department sought to use short-sellers to develop information that would support the predetermined outcome of the rulemaking. Accordingly, it solicited from short-sellers information and analysis concerning career colleges that it knew would advance the short-sellers' own financial agendas – despite the risk that such information was slanted or fabricated. The short-sellers, meanwhile, used their privileged access to advocate for punitive regulations that would damage the stock values of career colleges and thereby provide the short-sellers with substantial returns. Meetings between Department officials and short-sellers took place surreptitiously and were only uncovered through FOIA requests.

20. On information and belief, in other instances certain members of the negotiated rulemaking committee served as conduits between the Department and short-sellers, providing short-sellers with sensitive confidential information concerning the timing and content of the Department's rulemaking. This information was of considerable value to short-sellers.

21. Short-sellers with whom the Department worked closely include:

- **Steve Eisman** – Eisman is a portfolio manager of a hedge fund, FrontPoint Financial Services Fund, which is known to short sell stocks in for-profit education companies. He has acknowledged in testimony to Congress that he has taken short positions on the stocks of various for-profit colleges. (*See* David A. Kaplan, “Short-sellers get snagged in education litigation,” *Fortune* (Oct. 16, 2010), *available at* http://money.cnn.com/2010/10/15/news/eisman_education_lawsuit.fortune/index.htm.)
- **CPMG, Inc./Antal Desai** - A Dallas-based hedge fund, CPMG, Inc., including short-sellers Antal Desai and Kent McGaughy, Jr., met and corresponded with Department officials on numerous occasions to propose harsher regulations and to provide the Department with highly biased information to use against career colleges.

1. Department officials cultivated an inappropriate relationship with Eisman.

22. In April 2010, in the midst of the rulemaking process and prior to the Department's release of its NPRMs, Eisman sought a meeting with Department officials

Shireman and Bergeron with the expressed purpose of exchanging information. (Tab 42.) The officials were told that Eisman wished to “share some of [his] exhaustive research on the for-profit education industry and *get your input.*” (Tab 42 (emphasis added).) Upon receiving the request, Bergeron emailed Shireman, “I suggest we take this meeting. *I have some background to share.*” (Tab 42 (emphasis added).) During the resultant meeting, Eisman presented a slide deck entitled “Subprime Goes to College,” which compared career colleges to the subprime mortgage industry. The Department officials – Shireman and Bergeron – then corrected errors in that presentation.

23. Within days of meeting with Eisman, Shireman delivered a speech to state regulators in St. Paul in which he made the same comparison between career colleges and Wall Street firms responsible for the financial subprime mortgage meltdown. (See “Comparing Higher Ed to Wall Street,” *Inside Higher Ed*, April 29, 2010.). On information and belief, Shireman borrowed this comparison directly from Eisman’s presentation to him. Shireman’s public disparagement of career colleges in the midst of the rulemaking is by itself strong evidence of the Department’s unalterably closed mind and bad faith.

24. Shireman’s use of Eisman’s materials exhibits the unseemly symbiotic relationship between the Department and short-sellers. In the midst of the rulemaking process which Shireman himself was overseeing, Shireman used the information given to him by Eisman to attempt to rally public support for new regulations he had already determined to promulgate. Eisman, meanwhile, reaped the financial rewards: immediately following Shireman’s remarks, the share price of career colleges fell by significant amounts – for some companies, as much as 7 to 10%.

25. The content of this meeting between Eisman and the Department does not appear to have been recorded and has not been made available by the Department. Given the secrecy surrounding the meeting, it is a reasonable inference that Department officials provided Eisman with information about the pending rulemaking.

26. The participants have publicly denied impropriety, but their explanations raise significant questions. While Eisman claims that the Department's proposed regulations had not come up at his meeting with the Department in "any way, shape, or form" (*see* David Kaplan, "Did Steve Eisman unduly influence the Education Dept.?" *CNN – Fortune*, November 2, 2010), his slide deck from the meeting mentions the regulations then under consideration by the Department. Moreover, a Department spokesman is on record as saying that Shireman and Bergeron corrected factual errors in Mr. Eisman's presentation. (*Id.*) Further, a month after the meeting, Eisman emailed Bergeron and another official to discuss the various metrics involved in the proposed gainful employment regulations. (Tab 76.)

27. Shortly after the meeting, Eisman's office sent Shireman and Bergeron updated pages from the presentation "with new analyses" that Shireman and Bergeron "may find interesting." (Tab 56.)

28. It also appears that Eisman used his April 2010 meeting with Department officials to collect information and as a dry-run for his future attacks on the career college industry. A few days after Eisman's meeting with Department officials, Eisman's representative emailed Shireman and thanked him for "taking the time to review our slide deck on the for-profit space." (April 19, 2010 email.) Then, just weeks later, Eisman presented a speech, again entitled "Subprime Goes To College," at the Ira Sohn Conference, which contained even more anti-career college rhetoric than the first version he had reviewed with Department officials ("Sohn

Speech”). In that speech, Eisman discussed the Department’s upcoming rules, predicting that the Department would “probably eliminate 12 safe harbor rules,” which it ultimately did. He also attacked career colleges as “socially destructive and morally bankrupt.”

29. Eisman sent his Sohn Speech and revised slide deck back to Department officials telling them that his presentation was “very negative on the industry.” (May 26, 2010.) Again, share values of the named companies plummeted in the wake of the Sohn Speech, and on information and belief, Eisman reaped more profits from short sales in those companies. (*See* David A. Kaplan, “Short-Sellers Get Snagged in Education Litigation,” *Fortune.com*, October 16, 2010.)

30. Department officials appear to have subsequently relied on the Sohn Speech information provided by Eisman. Upon receipt of these materials, Kvall forwarded them to several other government officials. In June 2010, Kvall wanted to review the materials again but no longer had them, so he asked one of those same officials to give him a copy. (*See* Doc 8-1 pg. 5; 8-2 pg. 1.)

31. Not only did Department officials discuss the subject of the rulemaking with Eisman behind closed doors, publicly embrace his inflammatory comparison of career colleges to subprime mortgage lenders, and provide him feedback on his scathing presentations, the Department also adopted in its NPRMs specific policies advocated by Eisman without disclosing its reliance on information he supplied.

32. In particular, the Department appears to have adopted Eisman’s suggestions on particular metrics for “gainful employment.” *See* 75 Fed. Reg. 43,616. Prior to the Department’s issuance of its NPRMs, Eisman sent an e-mail to Bergeron and another Department official expressing his opinion that “if the Department were to move substantially

away from the initial combination (8% and 10-yr. repayment), [then] it would be better off to have no gainful employment rule at all, since it will result in no changes at the schools and no reduction in student's debt loads." (Tab 76.) As part of this email, Eisman forwarded "a new piece of analysis I thought you might find helpful" containing a spreadsheet evaluating various gainful employment metrics. (Tab 76.) The Department's NPRM ultimately proposed the formula that Eisman had advocated, but the communications with Eisman were not disclosed in the administrative record.

33. Throughout the time that they schemed with Eisman, Department officials knew of his short-selling and specifically were warned about his motives and bias. Indeed, on May 27, 2010 – months before the final rules were promulgated – Bergeron received an article with the headline, "Frontpoint's Eisman Bets Education Stocks to Fall on Loan Rules." (May 27, 2010 email.) The article discussed Eisman's profit driven motives for seeking stricter regulation of career colleges.

34. Similarly, Mark Kantrowitz, the publisher of FinAid.org and FastWeb.com and a Department "friend," warned Shireman that: "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 and as such has a tendency to exaggerate. You'll notice that some of the assumptions [in his presentation] misconstrue some of the aspects of the gainful employment proposals." (Tab 86.)

35. Kantrowitz also emailed Kvaal and told him that it was "obvious" that certain information in Eisman's presentation was "bogus." (July 12, 2010 Doc. 8-4 pg. 17.)

36. Despite these warnings, the Department relied on Eisman for information and advice throughout the rulemaking and provided him with information to use against career colleges.

37. During the rulemaking, Eisman and the Department communicated about the day-to-day effects of the rulemaking on stocks of career colleges. For example, on July 19, 2010, Eisman sent an email to Bergeron with a subject line of “i know you cannot respond” in which Eisman wrote, “Education stocks are running because people are hearing DOE is backing down on gainful employment.” Bergeron forward the email with “high” importance to Department official Kvaal, who in turn forwarded it to another Department official, writing, “Let’s discuss.” (July 19, 2010 email.)

2. The Department also secretly exchanged information with short-seller Antal Desai, who attempted to manufacture information detrimental to career colleges.

38. From August 2009 to December 2010, Department officials also met and traded information with a Dallas-based hedge fund called CPMG, Inc., including short-seller Antal Desai.

39. In the summer of 2009, a consultant on behalf of Desai emailed Shireman at the Department and told him that CPMG Investments wanted to meet with Shireman to discuss CPMG’s research into career colleges, including their “database of individuals (students, recruiters, etc.) who have been taken advantage of.” Ann Manheimer, a Department official on Shireman’s staff, wrote back: “I would be happy to speak with you on [Shireman’s] behalf and I can arrange a meeting with our senior policy officials.” (Aug 4, 2009 email)

40. During the resulting meeting in August 2009, Desai shared a presentation with the Department that smeared career colleges as damaging to students and taxpayers, included

misleading information, and called for tough regulations, including elimination of incentive compensation. (Aug. 25, 2009 email.)

41. After that meeting, Manheimer invited Desai back to “brief a larger group,” which he did in October 2009. (*See* Sept. 9, 2009 email.) In a follow-up email, Desai wrote Manheimer and Bergeron, thanked them for their “commitment to reform,” and railed against the career college industry again. (Oct. 28, 2009 email.)

42. Desai also encouraged the Department to have the GAO investigate career colleges’ “marketing practices” among other things. (August 19, 2009 email chain.) In 2010, the GAO did conduct an investigation of career colleges which focused on “marketing practices.” Like the Department’s regulations against career colleges, the GAO’s investigation had a predetermined outcome, which led to an erroneous and completely biased GAO Report in August 2010. In fact, that report was so inaccurate that in November 2010, the GAO took the rare and extraordinary measure of issuing an amended report revealing numerous errors in the original report all of which were to the detriment of career colleges. The GAO’s actions, including reports of possible destruction of evidence concerning its investigation, are now the subject of a Congressional inquiry.

43. On information and belief, despite the fact that Department officials knew the GAO investigation was tainted, the Department continued to cite the GAO report as support for its attack on career colleges.

44. Desai also repeatedly pressed the Department to adopt even more draconian regulations than it was considering and presented to Department officials his projections of the drop in share prices that would result from different regulatory approaches.

45. On September 14, 2010, Desai pressed the Department to adopt even harsher regulations than it was considering, on the ground that the metrics proposed in the Department's NPRMs would not cause a large enough drop in career colleges' predicted revenue (and thereby hurt their stock price to the benefit of short-sellers, such as Desai). Quoting a Deutsche Bank report that "quantifie[d] the financial impact" of the Department's regulations on "publicly traded For-Profit Education companies," Desai predicted that "schools will be able to comply" with the Department's metrics "by slightly scaling back new enrollments." Referencing a chart listing the predicted decrease in revenue for fifteen career colleges, Desai complained that "this small New Enrollment reduction will result in only a 3% reduction in revenue across the sector." He concluded: "[W]e urge the Department to strengthen" its regulations. (Sept. 14, 2010 email.)

46. The Department knew, or should have known, that CPMG was shorting career colleges and should have questioned the information CPMG provided them. Indeed, when CPMG was first introduced to Department officials in the summer of 2009, the Department received R. Kent McGaughy, Jr. and Desai's biographies. (Aug. 17, 2009 email.) A simple internet search of "Kent McGaughy" leads directly to articles detailing his sharp short-selling practices. (*See, e.g.*, Reynolds Holding, "Double whammy in stock fraud case – Short sellers trash, then sue, Santa Clara tech firm," *San Francisco Chronicle*, Nov. 9, 2003.)

47. Moreover, on information and belief, Desai filed his comments during the public comment period through an attorney. The attorney identified his unnamed client as "maintaining short positions" for career colleges. Desai, however, then forwarded these comments to Department officials, so that they would be sure to know that they were his. (Sept. 13, 2010 email.)

48. Despite Desai’s obvious bias, Department officials and Desai exchanged dozens of emails in which they shared information to attack career colleges. Among other things:

- Desai sent Department officials “specific suggestions [for the negotiated rulemaking session] that address Title IV loopholes currently being exploited by these Title IV recruiting machines.” (Jan. 6, 2010 email.)
- Desai sent Department officials an email in which he stated that he heard the negotiated rulemaking “was progressing well,” and asking how he could assist. (Jan. 27, 2010 email.)
- After one of the negotiated rulemaking rounds, Desai sent Department officials an outline of his “perspectives regarding the Department’s gainful employment and incentive compensation proposals and the dishonest, vacuous counter-arguments brought forth by illegitimate marketing machines opposing these important proposals.” (Feb. 23, 2010 email.)
- The Department also met with Robert MacArthur, the president of Alternative Research Services, Inc., a Connecticut-based investment research firm hired by Desai. MacArthur confirms his client’s short-selling on his LinkedIn page: “I provide research to long/short equity funds primarily in the for-profit, soon to be for-loss, education sector amongst other spaces in decline.” In February 2010, MacArthur sent an email to Department officials, attaching a then recent GAO report critical of incentive-based compensation at some career colleges. MacArthur stated in the email, “[t]he letter came out on the 23rd. I am not sure how widely distributed it is though. *It may affect the stock prices in the industry* if the market believes there will be increased scrutiny from various parts of the federal government.” (Tab 33) (emphasis added).
- At an undisclosed meeting in winter 2010, Department official Manheimer met with Desai and MacArthur. (See March 31, 2010 email.)
- Desai sent Manheimer research reports from Morgan Stanley regarding the rulemaking’s effects on education stocks. In one case, Desai asked Manheimer to confirm that a report was correct in terms of the leaked specifics of a particular regulation. (April 13, 2010.) His request to confirm non-public, leaked information demonstrates his unfettered access to Department officials and his belief that they would share such information with him.

49. In the midst of the rulemaking process, Department officials also affirmatively sought help from Desai in smearing career colleges. In an April 2010 email, official Manheimer wrote Desai: “This request may seem a little odd but by any chance have you collected

anecdotes or data on examples of students taking on debt with nothing to show for it? I am looking esp for particular examples of students enrolling with promises of high earnings only to find out their training did not qualify them for the job they expected to get.” (Apr. 2, 2010 email.)

50. A few days later, Desai provided Manheimer with quotes purporting to show that career colleges were recruiting students at homeless shelters. Manheimer asked if she could provide the individuals’ contact information to the Department Office of the Inspector General. Desai replied, “Absolutely.” (Apr. 8, 2010 email.) Also, per Manheimer’s request, Desai later sent additional contact information. (*see* April 30, 2010 email).

51. Soon thereafter, several prominent publications ran articles with stories concerning allegedly improper recruiting practices by career colleges at homeless shelters. In many of these cases, individuals cited in the articles are the same individuals Desai provided to Manheimer. On information and belief, Manheimer provided the press with this information after she received it from Desai.

52. The Department then used this very same press coverage, as if it were independent and objective, to build public support for its attack on career colleges: For example, *Bloomberg* ran a negative article about career colleges, quoting Shireman: “‘Targeting vulnerable populations who are not likely to benefit is one example of overzealous recruiting that can be driven by paying based on enrollment numbers,’ says Robert Shireman, Deputy Secretary of the [Department], which is pushing to tighten the rules.” (Daniel Golden, “Homeless High School Dropouts Lured by For-Profit Colleges,” *Bloomberg*, April 29, 2010.)

53. Moreover, in June 2010, the National Coalition for the Homeless and 19 administrators of homeless shelters sent Secretary Duncan a letter urging him to tighten

regulation of for-profit schools based on assertions that recruiting at homeless shelters “is a growing problem.” (Tab 89 – June 17, 2010.)

54. According to a ProPublica investigation, however, several signers of that letter felt misled by the person who coordinated the signing of the letter, who, it emerged, had been paid by Desai. (Tab 95A-C.) ProPublica reported that the coordinator had failed to disclose for whom she worked and that many signers did not have actual knowledge of recruiting allegedly occurring at homeless shelters. (Tab 95A-C.) The Executive Director of the National Coalition for the Homeless said he was angered by the tactic and wanted an investigation into Desai’s manufactured letter campaign.

55. The problems with Desai’s manufactured “evidence” of improper recruitment at homeless shelters were known by Department “friends” even before the ProPublica investigation. In an email about the *Bloomberg* article, Deanne Loonin, one of the Department’s “friends” and a member of the negotiated rulemaking committee, remarked that it was “[i]nteresting about the homeless recruitment too b/c I called a lot of people [] quoted [in the *Bloomberg* articles] and they all told me that there wasn’t recruitment going on at the shelters.” (May 10, 2010 email.) Yet, on information and belief, the Department and its “friends” did not to seek to correct or mitigate the clearly unreliable information which they had help spread.

56. In addition to Eisman and Desai, the Department also exchanged information with several other investors and short-sellers, including Manuel Asensio, a notorious short-seller who founded a non-profit organization, the Alliance for Economic Stability, to advocate for his short positions. Asensio used this organization to send numerous emails and letters to Secretary Duncan and other Department officials demanding that the Department investigate a particular career college. (*See e.g.*, tab 61.) Notably, when Asensio began sending letters to the

Department disparaging a career college and insisting on investigations, the stock related to that college was at a 52-week high. Asensio slowed his correspondence to the Department around the time that the stock price sank to a 52-week low because, on information and belief, he had achieved his goal of injuring the college's stock price and enriching himself.

57. Only recently did the Department acknowledge that “at least one short-seller probably should have been banned from the meetings because of his ties to Wall Street and community college officials who were involved in the rulemaking.” (*See, e.g.*, Julia Edwards and Fawn Johnson, “Short-Selling Questions Raised on For-Profit College Rules,” *National Journal*, Feb. 9, 2011.) Yet the rules which were produced from this predetermined process remain on the books.

58. Recently, an independent watchdog group, Citizens for Responsibility and Ethics in Washington (“CREW”), asked the Securities and Exchange Commission to investigate whether short-sellers became involved in the rulemaking precisely in order to drive down career-college companies' stock prices and whether they profited from the collapse in share values. (*See* CREW letter of Feb. 9, 2011 *available at* [tp://www.citizensforethics.org](http://www.citizensforethics.org).)

3. Members of the negotiated rulemaking committee served as a conduit between the Department and short-sellers.

59. Certain members of the negotiated rulemaking committee, who were closely linked to Department officials, also cultivated relationships and swapped information with short-sellers – including confidential information concerning the timing and content of Department rulemaking. For example:

- On July 21, 2010, Susan Lehr of Florida State College, who had served as an alternate negotiator on the negotiated rulemaking committee, sent an email to Paula Abernathy of TICAS, an advocacy group opposed to career colleges, expressing her understanding that the second NPRM would be released at midnight the following evening. (*cite.*) Lehr was

well aware that she was providing confidential information, adding “forgot to say don’t pass on beyond our group.” (July 21, 2010 email.)

- Yet later that evening, Lehr sent an e-mail to her boss, the CEO of Florida State College, stating, “[the NPRM] will come out tomorrow after the markets close and I think it will be good. . . Jim [Simpson – also of Florida State College and a primary negotiator on the negotiated rulemaking committee] met by phone with Eisman yesterday for a very interesting conversation. Fill you in tomorrow.” (Tab 97/100.) It is a reasonable inference from this email that Simpson shared the contents of the NPRM, which he must have obtained from the Department in advance of its release, with Eisman.
- The next day, Lehr wrote Abernathy concerning Simpson’s phone meeting with Eisman, informing her: “Eisman had questions for Jim on Wednesday . . . they spoke for about an hour. . . I was so happy for him to have such a cool conversation. I love having found such friends as all of you to help wage this battle.” (Tab 99.)
- The CEO of Florida State College passed on the sensitive and valuable information obtained from Lehr to short-seller Gilchrist Berg, the founder of Water Street Capital: “Breaking news, Gilchrist. Reporters will be briefed by USDOE on the proposed gainful employment regs at 6pm tonight with a public release at midnight. We expect lots of market churn.” (Tab 100.)

60. Short-sellers and members of the negotiated rulemaking committee also routinely shared information and coordinated their attacks on career colleges. For example:

- On one occasion, Lehr sent an email to Desai: “Antal, can you give me the proper footnote to reference this figure [for profit education profit margins]? I think I too will use this info in fighting a for-profit funding (state money) that is before the legislature in committee this week. Again, thank you for your help. I am also attaching a document that I did that may be of use to you on a FL study.” (Tab 46). Desai provided Lehr with requested information the next day.
- Lehr sent an e-mail to an analyst at Water Street Capital, requesting the average profit margin for the for-profit industry. (Tab 40.) Lehr wanted this information to provide it to a reporter doing a “big story on FP’s,” that is, for-profit schools. (Tab 40.) The analyst provided the requested profit margin information the next day. (Tab 40.)
- After Eisman gave the Sohn Speech, Lehr sent him an email gushing over the speech, stating, “I cannot thank you enough for speaking out on the for-profit higher ed industry. I read your speech and could just leap with joy!” (Tab 72.) Eisman responded, “You are welcome. Pls stay in touch.” (Tab 72.)
- Lehr worked to capitalize on Eisman’s speech in her effort to harm career colleges. (Tab 74.) She forwarded Eisman’s speech to others including an analyst at Water Street

Capital and wrote, “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! I bet some reporters will have a field day with this.” (Tab 74.)

- Lehr also received from TICAS an advance copy of congressional testimony Eisman was to give, in which Eisman called the career college sector “fundamentally unsound” and predicted that defaults of Title VI loans would total \$275 billion over the next ten years. Lehr shared the testimony with colleagues, noting that it was “Confidential.” (Tab 90.)
- Simpson sent Lehr an e-mail entitled, “I Love My Job,” in which he stated that he had a discussion with “one of my ‘favorite’ Financial Analysts” and was able to obtain a Credit Suisse analysis of the proposed regulations on the condition that the source of the report be left anonymous. (Tab 31B.) Lehr responded, “Oh MY! *OH MY, I knew we did good but this is too good, do you think it will stick? Will the big boys start divesting before the axe falls?*” (Tab 31B (emphasis added).)
- Simpson sent an e-mail to an investor with Water Street Capital stating, “It was a pleasure to meet you in DC during the US DOE Negotiated Rule Making. A friend provided me with this Credit Suisse analysis of the impact of USDOE’s proposed gainful employment regulations. Thought you might be interested.” (Tab 31A.) Department “friends” later sent this report to Shireman, who noted that it had “rich data.” (Feb. 5, 2010.)

61. On information and belief, Department officials knew of, and approved, these improper communications with short-sellers.

B. The Rulemaking Process Was Rigged To Yield A Predetermined Outcome, As Evidenced By The Biased Composition Of The Negotiated Rulemaking Committee And The Department’s Repeated *Ex Parte* Communications With Anti-Career College Special Interest Groups.

62. At the same time as Department officials and anti-career college special interest groups were meeting and sharing information with short-sellers, they were also working behind the scenes with one another to promulgate regulations targeting career colleges. These *ex parte*, undisclosed communications between the Department and its allies constitute further evidence of the Department’s unalterably closed mind and bad faith.

63. The rulemaking was spearheaded by Deputy Undersecretary Robert Shireman who, prior to joining the administration, was founder and President of TICAS, which is a

“registered lobbying client.” TICAS has long been a vocal and adamant opponent of career colleges. For example, in testimony before the Department in October 2008, TICAS proposed a change to regulations to “reduce the potential for gaming by proprietary schools.” (*See* http://ticas.org/files/pub/HEOA_negreg_testimony.pdf)

64. Upon taking office, Shireman continued to pursue TICAS’s goals – but this time through the rulemaking process in addition to public advocacy. On April 19, 2009, the night before Secretary Duncan announced Shireman’s appointment, Shireman informed the TICAS leadership that “[w]hile I have no further official connection to TICAS, *I intend to make myself available as a volunteer in my personal time. Let me know how I can be helpful.*” (Tab 4 (emphasis added).)

65. Soon after Shireman’s appointment, Barmak Nassirian of the American Association of Collegiate Registrars and Admissions Officers, an organization opposed to career colleges, emailed Shireman, criticizing the former Education Secretary Richard Riley’s “mindset” and warning that the new Secretary, Arne Duncan, should distinguish his “*friends*” from “*enemies*” in Washington. (Tab 7B (emphasis added).) Nassirian cautioned Shireman that “*helping your enemies is not a good strategy for success.*” (Tab 7B, emphasis added).)

66. Soon thereafter, Shireman’s office published a notice of intent to establish a negotiated rulemaking committee, with the purpose of “develop[ing] proposed regulations to maintain program integrity in the Title IV, HEA programs.” (*See* 74 Fed. Reg. 43,24,748 (May 26, 2009).)

67. As demonstrated below, the friends/enemies mentality recommended by Nassirian became a hallmark of the rulemaking process.

- 1. From the start of the rulemaking process, the Department concealed *ex parte* communications with its “friends.”**

68. In the days following the Department's notice of its intent to establish a negotiated rulemaking committee, Shireman's staff organized several conference calls between Shireman and various stakeholder groups concerning the Department's regulatory objectives. One such meeting was held with members of the career college community. (See Tab 13.) A transcript of that conference call is available on the Department's website relating to the negotiated rulemaking. (See <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/negreg-summerfall.html>.)

69. During that call, Shireman was asked specifically about reports that the Department rulemaking was "targeting" the career college sector. Even though the Department clearly already had decided that the regulations would target career colleges, Shireman denied that career colleges were the focus of the regulations, claiming instead that, "our interest is making sure that students and taxpayers are well served regardless of sector, whether it's public, private, for profit, nonprofit, 2-year, 4-year, that that's really our focus." (Tab 12B) It was not until it issued the final regulations in October 2010 that the Department finally admitted that: "The rapid growth of enrollment, debt load, and default rates at *for-profit institutions* in recent years *prompted the Obama administration to embark on an 18-month negotiation* [of regulations]." (Tab 120 (emphasis added).)

70. Moreover, while the Department provided a transcript of the May 2009 conference call with members of the career college sector, it did not disclose another conference call with "nonprofits and higher ed advocates and think tanks" that had taken place the day before. (Tab 14). Internal Department communications obtained through a Freedom of Information Act request refer to that call as the "*friends/non profits*" call. (Tabs 10, 12A (emphasis added).) According to some reports, during that call with Department "friends,"

Shireman discussed the Department's desire to locate "victims" of career colleges. (*See* "Ferment over For-Profit Colleges," Inside HigherEd, June 16, 2009.) As discussed in paragraphs ____, the Department did seek one-sided anecdotes. The Department's failure to disclose the call with its "friends," let alone make the transcript available, gives rise to a strong inference of bad faith on the part of the Department.

2. The Department stacked the negotiated rulemaking committee against career colleges.

71. The Higher Education Act requires that a negotiated rulemaking committee "reflect[] the diversity in the industry, representing both large and small participants, as well as individuals serving local areas and national markets," 20 U.S.C. § 1098a(b)(1), and the Department accordingly stated its intent to create a committee that would "include representatives of organizations or groups with interests that are significantly affected by the subject matter of the proposed regulations" and "reflect the diversity among program participants." (Tab 9.)

72. However, the Department violated that statutory requirement and instead stacked the negotiated rulemaking committee with its "friends," in an apparent effort to ram through regulations that it knew would be harmful to career colleges and would be rejected by that sector.

73. Career colleges had only two representatives among the 33 non-federal negotiators on the negotiated rulemaking panel, and only one representative among the sixteen primary negotiators, despite the fact that the regulations, by the Department's own admission, targeted the career college sector. By contrast, interest groups opposed to career colleges had numerous representatives on the negotiated rulemaking panel. They included US PIRG, the

National Consumer Law Center, United States Student Association, National Association for College Admission Counseling, and Florida State College.

74. Several of these groups had received contributions from TICAS, the group founded by Shireman. Between 2006 and 2008, TICAS provided US PIRG, the National Consumer Law Center, and the United States Student Association Foundation with approximately \$1.3 million in grants. (Tabs 1D, 1F, 1G.)

75. In all, at least four primary non-federal negotiators represented public/non-profit institutions or regional accreditors known to be hostile to career colleges. They included: (1) Jim Simpson, of Florida State College, whose anti-career colleges emails are detailed above; (2) David Hawkins of the National Association for College Admission Counseling (NACAC), a group which does not allow career colleges into its membership; (3) Margaret Reiter, a former state Attorney General who had prosecuted career colleges; and (4) Rich Williams, a student representing US PIRG, an organization that between 2005 and 2008 had received over \$1.25M in grants from TICAS. (Tab 24A/24B).

76. Additionally, at least four alternate non-federal negotiators represented public/non-profit institutions or regional accreditors known to be hostile to career colleges. They included: (1) Susan Lehr of Florida State College, who was described in 2009 by her boss as “the best higher ed lobbyist in Florida and is the *designated antagonist of the privates*” (tab 7); (2) Deanne Loonin of the National Consumer Law Center, who in 2005 published a paper titled, “Making Numbers Count: Why Proprietary School Performance Data Doesn’t Add up and What Can Be Done About It.” In that paper, Loonin wrote that career colleges “prey[] on vulnerable students’ dreams of betterment through education.” (Tab 24b); (3) Angela Peoples, a student

representing USSA, which consistently advocates against career colleges; and (4) Amanda Modar of NACAC.

77. Moreover, included among the primary and alternate negotiators were an additional eight negotiators who represented non-profit and public institutions, which are in direct competition with career colleges.

3. The Department continued to coordinate with its “friends” to bring about a predetermined rule targeting career colleges.

78. When the negotiated rulemaking committee failed to reach consensus despite its biased and skewed membership, the Department reconvened in secret meetings with “friendly” members of committee to develop a strategy for dealing with the for-profit industry. (Tab 30.) The Department officials on the call included Shireman (who specifically requested that he be included in the call), Michael Dannenberg (from the Office of the Under Secretary), and Leigh Arsenault (the Confidential Assistant Office of the Under Secretary). Deanne Loonin, a member of the committee, explained that a “strategy meeting session” was required because “[t]he response so far I have seen from the [career college] industry, while not surprising, show[s] how hard they will be fighting this.” (Tab 30 (emphasis added).)

79. The purpose of that call is strong evidence of the Department’s bad faith and unalterably closed mind in conducting the rulemaking.

80. Throughout the rulemaking process that followed, the Department engaged in continuous *ex parte*, undisclosed communications with its “friends” to bring about the rulemaking’s predetermined outcome. TICAS, Shireman and Kvaal’s former employer, was a key player in carrying out that strategy.

81. Among other things, Department officials went as far as to actually *edit* draft documents TICAS prepared to support the anti-career college regulations. On March 31, 2010,

TICAS' Abernathy sent Department official Manheimer an email stating "Per our conversation, attached are two short draft neg reg documents that we'd appreciate ED's informal feedback on before we starting sharing with them with Hill staff and reporters." The very next day, Manheimer responded, "I shared your drafts with [Shireman] – here are a couple of minor changes from us."

82. Then, in April 2010, TICAS sent two versions of a draft comments on the Career College Association's assessment of the Department's proposed regulations and requested "quick feedback [] before we circulate it more widely." (April 14, 2010.)

83. These were not isolated instances. There are many additional examples of the Department's secret coordination with TICAS against career colleges:

- Abernathy of TICAS solicited help from Shireman and other Department officials to combat the "firestorm" she feared would result from a newly released paper by researcher Mark Kantrowitz (a Department "friend") critiquing Department proposals targeting career colleges as "a little bit too harsh." (Tab 35A.)
- At the invitation of TICAS, Shireman attended an off-site two-day "brainstorming session" with Department friends. (Tab 60A.)
- TICAS sought to coordinate with high-ranking Department officials, including Shireman, the Department's response and TICAS' and the other anti-career college special interest groups' response to a letter which petitioned Secretary Duncan "not to move forward on gainful employment until a 'comprehensive data-based review' is conducted and asks for a briefing and some specific information." (Tab 37.) Specifically, TICAS requested information regarding "what if anything the Dept. is doing in response to inform what TICAS and other organizations that support changes in gainful employment regulations do." (Tab 37.)
- Abernathy exchanged a series of emails with Department official Manheimer about "gainful employment," in which Manheimer asked if the information she sent was helpful to Abernathy. (See Tab 50.) Manheimer then forwarded the exchange to John Kolotos, another Department official, who was responsible for drafting portions of the new rules, but that message and Kolotos's response are redacted. (Tab 50.)
- Fred Sellers, a Department employee and a federal negotiator in the negotiated rulemaking, notified Abernathy of TICAS that a career college trade association had

urged its members to ask their students to sign a petition to “reject the Department of Education’s definition of Gainful Employment.” (Tab 63.) Abernathy forwarded the e-mail to several Department officials with the subject line, “CCA astroturfing opposition to defining gainful employment.” (Tab 63.)

- Separately, Abernathy thanked Sellers for sharing the information, stating, “I assumed you didn’t want it attributed but pls let me know if I assumed incorrectly.” (Tab 63.) Sellers responded, “*Yep, would not want my name attached to it* but knew some folks would care very much about these activities.” (*Id.*) (emphasis added).
- Abernathy sent an e-mail to several “friends” of the Department, entitled, “Bad News on GE [gainful employment]?” in which she forwarded an article regarding recent Wall Street analysis of the proposed regulations which predicted damage to career colleges’ share values. Department officials appear to have informed her that the analyst’s report was premised on incorrect assumptions about the content of the proposed rule. Abernathy’s email continued, “*I have been assured that the Credit Suisse description of the regulation is not accurate, but I don’t know that it is in our interest to share that.*” (Tab 47/48) (emphasis added). Deanne Loonin, a member of the negotiated rulemaking committee, wrote in response, “wow, how interesting. It set off quite a frenzy. We should keep; that info. confidential? (i.e. that the Credit Suisse is wrong??).” (*Id.*)
- Abernathy sent an email to Shireman and other Department officials entitled, “CCA outreach to Mayors against gainful employment.” (Tab 53.) In the email, Abernathy mentioned efforts by career colleges to persuade certain senators to oppose the Department’s planned regulations. (Tab 53.) She further stated, “*it would be worth the administration reaching out to the conference of mayors and other state and local elected associations on the issue*” to write to these same senators in support of the regulations. (Tab 53) (emphasis added). Shireman forwarded this note to another Department employee asking, “*If we wanted to send something to Mayors, how would we do that?*” (Tab 53 (emphasis added).)

84. Shireman’s continued and substantial involvement with his former employer, TICAS, during the rulemaking is particularly troubling in light of the Obama’s administration’s “Revolving Door Ban [for] All Appointees Entering Government,” which requires a pledge by appointees as follows: “I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.” *See* Exec. Order No. 13490 (Jan. 21, 2009).

85. Additionally, Department officials forwarded some of TICAS' internal analyses to the private email account of Secretary Duncan, who in turn requested that the information be printed out, presumably so he could review them. And when TICAS told the Department that its members would be generating emails to Secretary Duncan about the gainful employment regulation, Department official Kvaal (who formerly worked with TICAS) had a "unique" email address created at the Department for these emails, and informed TICAS of the email address. (June 23, 2010 email Doc. 8-4, pg. 47.)

86. The Department also solicited from its "friends" anecdotal examples of students who obtained loans to pursue an education at a career college but could not find jobs upon graduation in an effort to strengthen "gainful employment" regulations. (Tab 38 – March 31, 2010.) Notably, official Manheimer only counted as suitable "examples" those stories that demonstrated students' failure to repay loans. (*See, e.g.*, April 1, 2010 Lehr, April 1, Abernathy). The Department was not interested in any of the numerous career college success stories.

87. Indeed, any apprehension about the singling-out of career colleges was apparently brushed aside. In one email among Department "friends," Mark Kantrowitz wrote that the affordable debt provision of the gainful employment rule "should be applied to **all** colleges, not just for profit colleges. The lack of a profit motive at non-profit and public colleges is no excuse for graduating students with excessive debt. *I actually hear from more borrowers with debt problems who attended a certain non-profit New York university than from borrowers who attended non-profit colleges.*" (Tab 35A, emphasis added.) Yet, the Department and its "friends" charged forward in their attempts to promulgate rules aimed overwhelmingly at career colleges.

88. The Department also actively used the press to promote its attack on career colleges. In addition to the Department's apparent promotion of stories concerning Desai's "research" into recruiting at homeless shelters (*see infra* ___), the Department also coordinated with the press on negative stories to push their agenda on the gainful employment regulation against career colleges. For example, in August 2010, a Department official wrote in an email to friendly staffers from the Senate Committee on Health, Education, Labor, and Pensions committee that "we are doing a big press blitz next week on [gainful employment] ... Also learned that we are working with the New York Times on a piece that will not portray Kaplan [a career college owned by the Washington Post] in a positive light." (Aug 13, 2010 email).

89. Department officials also appear to have leaked time-sensitive and confidential papers concerning the rulemaking to its "friends." For example:

- Employees of the Student Lending Analytics received an early draft copy of a negotiated rulemaking issue paper, which, according to BMO Capital Markets, had not yet been posted to the Department's website. (Tab 28.)
- TICAS forwarded the advanced copy of the first NPRM to other anti-career college special interest groups, stating "THESE ARE EMBARGOED AND SHOULD NOT BE SHARED WITH ANYONE UNTIL AFTER MIDNIGHT." (Tab 87.) These groups also received an advance copy of the second NPRM.
- Just days before release of its second NPRM, Department officials Bergeron and Kvaal created a list of groups to call (including TICAS and several of the "friends" who were on the negotiated regulation committee), apparently to give them a heads up about the upcoming NPRM. In discussing who to include in the list, Bergeron also suggested Eisman. (Doc. 8-4 pg. 29-30 of 53.)