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June 6, 2019

Mr. Phil McAllister, Esq.
Regulatory Actions Coordinator
California Department of Veteran Affairs
1227 O Street, Suite 300
Sacramento, CA 95814

Re: Comment of Groups Representing Veterans, Consumers, and Children in Support of Proposed Rulemaking to Title 12 of California Code of Regulations Regarding CSAAVE Title 38 Approval of Postsecondary Institutions

Dear Mr. McAllister:

Pursuant to the notice dated April 26, 2019, the undersigned groups representing veterans, consumers, students, and children offer public comment in support of proposed sections 443, 444, 445, 446, and 447 of Title 12, Division 2, Chapter 3, subchapter 3.6, California Code of Regulations.

As we observed in our comments to the first set of publicly-noticed regulations, these proposed regulations mostly and simply memorialize existing applicable law and, thus, offer consistency and transparency¹ to how CSAAVE implements its already-existing duty of approving Title 38 funding to educational institutions. Regulations such as the ones proposed not only promote government efficiency in decision-making but when, as here, significant discretion is given to approving agency, regulations such as the ones proposed are practically required to avoid underground rulemaking banned by Government Code section 11340.5(a).

I. The Regulations Are Urgently Needed As Numerous and Uncontested Authorities Document That Veterans Are Targets And Victims of Disreputable Postsecondary Education Businesses.

Title 38 funding is intended to provide education opportunity for American veterans who have often suffered unimaginable sacrifices for our common good, as have their families. Veterans and taxpayers have a right to expect and require a minimum level of beneficial results from Title 38 expenditures. This is especially true as there is no Title 38 “do over” — these are one-time benefits for our heroes.

Studies and litigation have now exhaustively documented that a significant number of institutions receiving Title 38 taxpayer funds simply do not provide baseline quality education worthy either of

¹ “A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules.” *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.

taxpayer subsidies or veteran sacrifice. Three flagship examples of such institutional failure are the widespread failures of their students to graduate, pass licensing exams, or obtain employment. Such institutions often entice students to enroll over less expensive community college options, and then leave them jobless, older, in debt where the debts are by law not dischargeable in bankruptcy, and with their credit irrevocably ruined. In particular, government reports examining students at for-profit colleges have found lower success rates than similar students at public and nonprofit colleges, as evidenced by lower graduation rates, lower employment offerings, and higher loan default rates.²

As one news report aptly summarized:

A large number of veterans enrolled in ITT Tech and Corinthian College, which both heavily recruited students from the military. The two colleges shut down dozens of campuses, suddenly closing their doors to thousands of students, amid a crackdown on the industry from the Obama administration.

For-profit colleges in general have been accused of preying on veterans and low-income students, and making false promises about good jobs upon graduation. But many students at for-profit colleges don't ever finish their degree. They make up about 35% of all federal student loan defaults.

After the schools shut down, many students found their credits wouldn't transfer to other colleges. While students who borrowed federal student loans to attend ITT Tech or Corinthian can apply to have their debt erased, veterans were unable to reuse their GI Bill benefits.³

The list of recently shuttered for-profit education businesses (many of which operated in California) is depressingly long, exemplifying the urgency and common sense of efforts such as these regulations to guarantee minimum educational benefits to veterans. Indeed, Brightwood College just closed on December 5, 2018, one day into the semester.⁴

- Allied American University – Laguna Hills, California, closed 2016
- Allied College – Maryland Heights, Missouri and Fenton, Missouri, closed
- Anthem College – multiple locations, closed in 2014
- Anthem Institute – formerly the Chubb Institute; multiple locations, closed 2014
- Ashmead College – multiple locations, closed
- ATI Enterprises – campuses in Arizona, Florida, and Texas, closed
- Banner College – Arlington, Virginia, closed
- Banner Institute – Chicago, closed

² U.S. Senate Committee on Health, Education, Labor & Pensions, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* (July 30, 2012) (executive summary provided in attached exhibits), available online at <https://www.govinfo.gov/content/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf>.

³ Katie Lobosco, *Congress Expands GI Bill, helping veterans burned by for-profit schools*, CNN (Aug. 9, 2017), available online at <https://money.cnn.com/2017/08/03/pf/college/gi-bill-benefits-for-profit/index.html>.

⁴ As one veteran studying to be a patient care technician who was one month away from graduating remarked: "You had a hint something might happen but not a definite answer, and then all of a sudden, BAM, here we are... I don't blame the teachers and staff here. I don't blame them at all because it's not really up to them but the corporation is what we're upset with." Andrew Johnson, *Brightwood College Permanently Closes Three Local Campuses One Day Into Semester*, NBC 7 (December 5, 2018), available online at <https://www.nbcsandiego.com/news/local/brightwood-college-kearny-mesa-chula-vista-closure-education-corporation-of-america-students-502031331.html?akmobile=o>.

- Briarcliffe College – Long Island, New York; a subsidiary of Career Education Corporation; closed 2016
- Brightwood College – California, closed December 5, 2018
- Brooks College – California, closed in 2008
- Brooks Institute of Photography – multiple locations, closed in 2016
- Brown College – Mendota Heights, Minnesota; not to be confused with Brown University in Providence, Rhode Island
- Brown Mackie College – multiple locations, a subsidiary of Education Management Corporation, closed in 2017
- Bryman College – multiple locations; not to be confused with The Bryman School in Arizona, closed in 2014
- Career Colleges of America – California, closed in 2014
- Collins College – Phoenix, Arizona area
- Charlotte School of Law – subsidiary of InfiLaw System
- Corinthian Colleges
- Court Reporting Institute – St. Louis, MO and Dallas, TX
- Le Cordon Bleu – multiple locations, subsidiary of Career Education Corporation; closed 2017
- Crown College – Tacoma, Washington; lost accreditation in 2007 and closed
- Daniel Webster College – Nashua, New Hampshire, subsidiary of ITT Educational Services, closed 2017
- Decker College - 2002
- Drake College of Business – New Jersey; closed 2015
- Eagle Gate College – Utah; closed 2015
- Everest College – multiple locations, a subsidiary of Corinthian Colleges, closed 2015
- Everest Institute – multiple locations, a subsidiary of Corinthian Colleges, closed 2015
- Erie Business Center – Erie, Pennsylvania, closed 2014
- FastTrain College – Florida, closed in 2014 after FBI raid
- Gibbs College – multiple locations; closed 2009
- Globe University/Minnesota School of Business – multiple locations in Minnesota not to be confused with Carlson School of Management the business school of the University of Minnesota
- Harrington College of Design – a subsidiary of Career Education Corporation; closed 2016
- Heald College – multiple locations, a subsidiary of Corinthian Colleges; closed 2015
- High-Tech Institute – multiple locations, closed
- Illinois School of Health Centers – Chicago, Illinois, closed 2015
- International Academy of Design and Technology – multiple locations - consolidated with Sanford-Brown, then closed
- ITT Technical Institute – all locations (closed September 6, 2016)
- Kee Business College – multiple locations in Virginia, subsidiary of Corinthian Colleges, Inc.
- King's College - Charlotte, North Carolina (closed December 2018)
- Lighthouse College – closed 2015

- Metro Business College – closed 2015
- Miami-Jacobs Career College – closed 2016
- Missouri College – a subsidiary of Career Education Corporation, closed 2016
- Mount Washington College – multiple locations in New Hampshire, closed 2016
- McNally Smith College of Music – Saint Paul, Minnesota
- Oregon Polytechnic Institute - closed 6/28/1996
- Sanford-Brown College – multiple locations; subsidiary of Career Education Corporation; not to be confused with either Stanford University or Samford University; closed 2016
- Southwest Florida College Tampa, Fort Myers, Port Charlotte, Bonita Springs, closed
- Springfield College – Springfield, Missouri (not to be confused with Springfield College in Springfield, Massachusetts, changed name to Everest College) closed in 2015
- Star Career Academy – Berlin, New Jersey, closed in 2016
- TCI College of Technology – New York City; in 2007 TCI also assumed responsibility for the closed Interboro Institute, owned by EVCI Career Colleges Holding Corporation[
- Trump University – New York City, New York; closed 2010
- University of Southernmost Florida – closed 2015
- Victory University – Memphis, Tennessee; closed in 2014
- Video Technical Institute - Bell Gardens, CA
- Westwood College – multiple locations; closed 2016
- Wright Career College – multiple locations; closed 2016⁵

Almost as long (but with some overlap) is the large number of education businesses sanctioned or investigated by regulators.⁶

It is overwhelmingly within the for-profit education business sector where problems afflicting veterans and all students have arisen. There are three reasons for this:

First, markets work best when consumers understand what they are buying, especially when it comes to the quality of the product.⁷ However, without sufficient disclosures and information, prospective students are not able to differentiate between the quality of the product they are pursuing; namely, education.

Second, virtually by definition, education businesses do not depend upon repeat customers. They instead depend upon securing new customers and every year our high schools graduate millions of them.

⁵ See https://en.wikipedia.org/wiki/List_of_for-profit_universities_and_colleges.

⁶ See www.collegeaffordabilityguide.org/online-colleges-sanctioned-by-government-organizations/; www.pbs.org/news/hour/education/dept-ed-names-schools-facing-financial-investigation-severe-audit-findings; <https://www.chronicle.com/article/State-Attorneys-General-Open/144255>; https://www.huffpost.com/entry/state-attorneys-general-_b_4677145?guccounter=1.

⁷ John O. Ledyard, “Market Failure” *The New Palgrave Dictionary of Economics*, 2nd Ed. (2008), available online at https://en.wikipedia.org/wiki/The_New_Palgrave_Dictionary_of_Economics.

Third, for-profit business leaders have a legally-imposed, fiduciary duty to their shareholders to maximize their profits. They thus have a financial incentive to charge as much as they can in tuition without scaring away a potential student, and to spend as little as possible on the education delivered.⁸ This of course does not preclude useful and effective education, but does introduce an element at times in proven conflict with a student’s educational purpose. As our Attorney General explains and cautions:

Be careful and do your homework before enrolling in a “for-profit” college or career training college. The for-profit college and career training industry is not part of the public school system; they operate schools to maximize profits for their investors. For-profit schools have been accused of fraud, abuse, and predatory practices targeting the poor, veterans and minorities by offering expensive degrees that often fail to deliver promised skills and jobs. Students have complained about aggressive recruiting practices, misleading graduation and employment rates, and illegal debt collection practices—their complaints suggest that many graduates can’t get jobs or afford to repay their loans. If you are not careful, enrolling in a for-profit school may leave you under a mountain of debt, but not help you get a job.

The Attorney General’s Office led the charge against California-based Corinthian Colleges for targeting low-income, vulnerable individuals through false advertisements that misrepresented job placement rates and the value of the school’s programs, obtaining a \$1.1 billion judgment against Corinthian.⁹

Further underscoring the need for government oversight, many of the measures intended to ensure institution quality have been compromised and cannot alone be relied upon. For example, when government contracts with private vendors there are commonly two ways it prevents taxpayers from being overcharged: competitive bidding resulting in an agreed-upon price and price setting as in set reimbursements for medical care in Medicaid.

Strangely, and perhaps reflecting the time when education was primarily public or philanthropic, no comparable protection against overcharging exists even though studies such as the one by the Federal Reserve Bank of New York, show that for-profits, consistent with their fiduciary obligations, price their tuition as high as the government will permit; to the amount of government benefit available.¹⁰

The GI Bill has long had a built-in defense related to this problem, requiring that for every 17 veterans who are enrolled using a GI Bill, a business must show that at least three students paid the tuition charged in the free market from sources such as an employer, a private scholarship program, family,

⁸ James Surowiecki, *The Rise and Fall of For-Profit Schools*, The New Yorker (Nov. 2, 2015), available online at <http://www.newyorker.com/magazine/2015/11/02/the-rise-and-fall-of-for-profit-schools>.

⁹ Xavier Beccera, Attorney General, State of California, *For-Profit Colleges*, available online at <https://oag.ca.gov/consumers/general/for-profit-schools>.

¹⁰ David O. Lucca, Taylor Nadauld, and Karen Shen, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs*, Federal Reserve Bank of New York Staff Reports, No. 733 (July 2015; revised February 2017) at 4, available online at https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf: “Our study is one of only a few to look at the impact of loan programs. Cellini and Goldin (2014) study the impact of overall federal aid eligibility by constructing a dataset of comparable eligible and ineligible for-profit institutions and show that eligible institutions charge tuition that is about 75 percent higher than comparable institutions whose students cannot apply for such aid.”

or self-financing (the rule is referred to as “85-15,” because no more than 85% of the students in a program can be funded by the GI Bill). In other words, in lieu of competitive bidding or price-setting, the rule uses paying customers as a check to determine the cost reasonableness of tuition. The U.S. Supreme Court ruled in 1978 that the policy made sense as a “free market mechanism” designed to “minimize the risk that veterans’ benefits would be wasted on educational programs of little value” by “weed[ing] out those institutions [that] could survive only by the heavy influx of Federal payments.”¹¹

Over time, this market test of a program’s cost has been undermined by the fact that many of the non-veteran students that are supposed to be paying with private funds are in fact legally permitted to be supported by federal grants and loans from the U.S. Department of Education. The similar so-called “90-10” rule which does apply to Education Department funds is likewise undermined by the lack of inclusion of GI Bill funds as public funds subject to limitation.¹² As a result, veterans have become the for-profit colleges’ favored method of satisfying the 10 percent requirement for Department of Education funds, contributing to even more aggressive pursuit of veterans than would exist in the absence of the Education Department’s rule.¹³ Those private for-profit schools receiving Title 38 funding charge and receive tuition levels well above public school levels. And, importantly, the Title 38 GI Bill program includes room and board cash while the veteran attends school, giving further incentive for students to attend in order to receive this ancillary funding, and for schools to solicit Title 38 eligible students.

These dynamics have led to widely documented and publicized marketing abuses in the enrollment of veterans,¹⁴ including the expenditure of large sums of Title 38 revenue for CEO salaries, profit, lobbying, and marketing.¹⁵ The last has included incidence of illegal “bounty” payments to those securing additional enrollment.¹⁶ Representations and promises have grown increasingly deceptive and

¹¹ Max Cleland, *Administrator of the Veterans Administration, et al. v. National College of Business* 435 U.S. 213 (1978).

¹² The “90/10 rule” is based on revenue but includes Department of Education funds, while excluding the robust funding from Title 38 for veterans. The latter are subject only to a different restriction called the “85-15 rule” that limits not revenue, but the number of students in any given program to 85% who are veterans receiving GI bill (Title 38) assistance. See *e.g.*, 20 U.S.C. § 1094(a)(24)(2014); 38 U.S.C. § 3680A(d)(1) (2014).

¹³ Daniel J. Reigel, *Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market Incentives to the For-Profit College Industry*, 81 GEO. WASH. L. REV. 259 (2013).

¹⁴ Meagan Day, *For-profit colleges have been ripping off veterans since World War II* Business Insider (Jun. 7, 2016), available online at www.businessinsider.com/for-profit-colleges-have-been-ripping-off-veterans-since-world-war-ii-2016-6; David Olinger, *Veterans feel ripped off by Colorado for-profit college*, The Colorado Independent (Jan. 26, 2017), available online at www.coloradoindependent.com/2017/01/26/veterans-colorado-tech-for-profit-college-debt/; Larry Abramson, *For-Profit Schools Under Fire for Targeting Veterans*, National Public Radio (Apr. 9, 2012), available online at <https://www.npr.org/2012/04/09/150148966/for-profit-schools-under-fire-for-targeting-veterans>; Herb Weisbaum, *Are For-Profit Colleges Unfairly Targeting Vets?* CNBC (Nov. 11, 2013), available online at <https://www.cnn.com/2013/11/11/are-for-profit-colleges-unfairly-targeting-vets.html>; David Halperin, *This Army Veteran Wanted to Become a Video Game Animator. Instead, he got played by two for-profit colleges* SLATE (Jul. 20, 2016), available online at <https://slate.com/human-interest/2016/07/why-are-people-so-easily-exploited-by-for-profit-colleges-stealing-americas-future-explains-a-veterans-story-of-student-loan-debt.html>; Editorial Board, *Exploiting Veterans for Profit* THE NEW YORK TIMES (Nov. 24, 2017), available at www.nytimes.com/2017/11/24/opinion/exploiting-veterans-profit.html; Jillian Berman, *Dan Rather on for-profit colleges: ‘It’s hard to find anything more outrageous than this’* MarketWatch (Dec. 28, 2017), available online at www.marketwatch.com/story/new-film-exposes-how-for-profit-colleges-exploit-veterans-and-single-moms-2017-11-14; CBS News, *For-profit colleges linked to almost all loan fraud claims* (Nov. 9, 2017), available online at www.cbsnews.com/news/study-most-student-loan-fraud-claims-involve-for-profits/; Adam Weinstein, *How Pricey For-Profit Colleges Target Vets’ GI Bill Money*, Mother Jones (Sept./Oct. 2011), available online at www.motherjones.com/politics/2011/09/gi-bill-for-profit-colleges/.

¹⁵ Chris Kirkham and Alan Zarembo, *For-Profit Colleges are Using the GI Bill to Make Money Off Veterans*, LOS ANGELES TIMES (Aug. 18, 2015), available online at <http://www.latimes.com/business/la-fi-for-profit-colleges-gi-bill-20150809-story.html>.

¹⁶ Robert Shireman, *To Get Value from For-Profit Colleges, Create the Right Incentives*, HuffPost (May 31, 2013), available online at http://www.huffingtonpost.com/robert-shireman/forprofit-colleges-gettin_b_3367622.html.

problematic.¹⁷ It is crucial to ensure that veterans receive a high-quality education and that the taxpayer-funded GI Bill education benefits are used effectively.¹⁸

Some of the for-profit colleges with the lowest graduation rates, questionable retention rates, and higher loan default rates are those that cost taxpayers the most money.¹⁹ Veterans are most aggressively recruited by for-profit colleges with lower graduation rates, lower retention rates, and higher cohort default rates, than other institutions (schools) the veterans could attend if they had the information and counseling to do so.²⁰ For example, the Defense Department has alleged that the University of Phoenix has sponsored recruiting events in violation of an executive order preventing for-profit colleges from gaining preferential access to the military,²¹ and California regulators have barred them from enrolling veterans in seven programs.²² Therefore, there is a need to raise the standards for the quality of education that these schools provide and to strengthen protections for veterans so they are not taken advantage of.²³ To help veterans graduate, obtain gainful employment post-graduation, repay their loans, and to ensure that taxpayer dollars are used in a more effective way, it is necessary to hold for-profit colleges to a minimum floor or standard.²⁴

Although the most serious abuses have centered in the for-profit education sector, they are not confined to that sector and, consequently, the proposed regulations appropriately apply identically to all Title 38 possible institutions.

II. Real-world Examples of Why The Proposed Regulations That Seek To Prevent Harm Are Needed: Stories Of Veterans Defrauded With Little Or No Remedies.

In a letter accompanying these comments, Robert F. Muth, Managing Attorney of the Veterans Legal Clinic, describes examples of just some of the veterans harmed by for-profit education companies that the Clinic has represented.²⁵ The Clinic has assisted hundreds of individual veterans who have lost

¹⁷ David Zucchino and Carla Rivera, *Anger Grows Over GI Bill Profiteers*, LOS ANGELES TIMES (Jul. 16, 2012), available online at <http://articles.latimes.com/2012/jul/16/nation/la-na-vets-colleges-20120716>; U.S. Senate Committee on Health, Education, Labor & Pensions, *Is the New GI Bill Working?: For-Profit Colleges Increasing Veteran Enrollment and Federal Funds*, Majority Committee Staff Report (July 30, 2014) at 3, available online at <https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/56100b87e4b0147725a71e86/1443892103628/GI-Bill-data-July-2014-HELP-report.pdf>.

¹⁸ Tim Hsia and Anna Ivey, Op-Ed., *Fix the New G.I. Bill*, NEW YORK TIMES (Nov. 10, 2014), available online at http://www.nytimes.com/2014/11/11/opinion/fix-the-new-gi-bill.html?_r=0 (asserting that veterans and taxpayers are harmed by predatory for-profit schools because these schools exploit veterans' "G.I. Bill funding and offer them – and taxpayers – very little in return").

¹⁹ *Is the New GI Bill Working?: For-Profit Colleges Increasing Veteran Enrollment and Federal Funds*, *supra* note 17, at 7.

²⁰ *Id.* According to the U.S. Department of Education, an institution's cohort default rate is the percentage of a school's borrowers who enter repayment on certain loans during a particular federal fiscal year, October 1 to September 30, and default or meet other specified conditions prior to the end of the second following fiscal year. U.S. Department of Education, *Three-year Official Cohort Default Rates for Schools*, Federal Student Aid, <https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> (last updated Oct. 17, 2018).

²¹ Danielle Douglas-Gabriel, *Why the Defense Department is Kicking the University of Phoenix Off Military Bases* (October 9, 2015), available online at <https://www.washingtonpost.com/news/grade-point/wp/2015/10/09/why-the-defense-department-is-kicking-the-university-of-phoenix-off-military-bases/>.

²² Aaron Glantz, *University of Phoenix barred from enrolling Veterans in 7 Programs* (July 30, 2014), available online at <https://www.revealnews.org/article-legacy/university-of-phoenix-barred-from-enrolling-veterans-in-7-programs/>.

²³ See Senator Tom Harkin, The Senate Health, Educ., Labor & Pensions Comm., *Department of Defense Data Reveals For-Profit Colleges are Taking in the Bulk of Military Education Benefits* (July 30, 2012) available online at <http://www.help.senate.gov/ranking/newsroom/press/harkin-report-reveals-troubling-realities-of-for-profit-schools>.

²⁴ *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, *supra* note 2; see also Legislative Analyst's Office, *Oversight of Private Colleges in California* (Dec. 17, 2013), available online at <https://lao.ca.gov/reports/2013/edu/oversight/oversight-121713.aspx>.

²⁵ See Correspondence from Robert F. Muth, Managing Attorney of the Veterans Legal Clinic of the University of San

their precious Title 38 benefits to predatory for-profit education businesses. Here, briefly summarized, are two of their stories:

T.O. is a veteran who was medically retired from the United States Marine Corps after suffering catastrophic injuries incurred in a rocket attack while serving in Iraq. This Marine veteran was subsequently rated 100% disabled by the Department of Veterans Affairs (“VA”) due to the extent of his injuries which include a serious Traumatic Brain Injury (“TBI”). Despite his injuries, T.O. was intent on pursuing higher education and sought a meaningful career notwithstanding his combat related disabilities. The veteran was recruited to enroll in a for-profit school with a wide range of false promises. He was given false job placement rates, inaccurate data of starting salaries for graduates, falsely told that the school was accredited when it was not and misled as to the teaching qualifications and quality of instruction provided by the school. When the veteran left the school midway through the course of study, unbeknownst to him, the school continued to debit the VA for his Post 9/11 GI Bill benefits despite the fact he was no longer enrolled. Adding insult to injury, the veteran was later informed that the school was not providing an educational program that met the minimum standards required to be eligible to receive GI Bill funds. The VA then decided to retroactively disapprove the school’s program and told the veteran that, despite the fact that the school was approved at the time he attended, he would now have to pay the VA back for all of the GI Bill funds that had been expended on his behalf at the school. Since the veteran did not have the funds to pay back the VA, the VA began garnishing his disability compensation benefits that he uses to provide for his basic needs and living expenses.

E.S. is a U.S. Navy veteran who has significant service-connected disabilities. She attended a for-profit school after being fraudulently induced to enroll with false promises as to, *inter alia*, the quality of instruction, time needed to complete the program and guarantees that the school could effectively accommodate her military related disabilities. The for-profit school consistently failed to provide any reasonable accommodations for her disabilities and, further, refused to accommodate necessary VA required medical appointments. Additionally, the school significantly changed the length of time needed to complete its program after the veteran had already enrolled which would have required her to not only expend all of her GI Bill benefits but also incur significant student loans to complete the program. The veteran was then faced with choosing whether to switch to a new school that would not accept the credits she had earned at the for-profit school, or stick with the for-profit program so that her hard earned education benefits already spent would not go completely to waste.

III. Institutions Should Welcome The Certainty Of Knowing What Is Required For Title 38 CSAAVE Approval.

Currently, institutions are not comprehensively apprised before applying to CSAAVE for Title 38 eligibility of the criteria by which their applications will be judged. The proposed regulations admirably forecast for applicants how their applications will be considered and thus allow them the maximum opportunity to shape their applications to obtain certain approval.

Diego School of Law to Phil McAllister, Esq., Regulatory Actions Coordinator, California Department of Veterans Affairs (June 6, 2019), available online at http://www.caichildlaw.org/Misc/CSAAVE_Comments/CSAAVE_Letter_Muth.pdf.

More broadly, neither the public, the federal government, the California Legislature, sister agencies within California government, nor veterans are currently made aware of the criteria by which CSAAVE will approve or disapprove institutions for Title 38 participation. These stakeholders, too, should be aware of the benchmarks used by CSAAVE in approving the Title 38 eligibility of institutions.

IV. The Regulations' Requirement Of An Employment Assessment Is Particularly Warranted.

The proposed regulations (sections 443(g) and 445(c)) put in place a very wise, common sense requirement that each institution desiring to enroll veterans in a new, non-standard college degree program involving a substantially different syllabus or class agenda, or involving a new or different occupation, object, or purpose than was previously approved, provide, in addition to an application, an employment market assessment. Under proposed section 443(g), an employment market assessment is simply an analysis of the labor market and needs assessment to demonstrate the employment demand for the program in the geographic area in which the program is advertised and is offered to students. Simply put, the labor market assessment shows that there is actually a need for the program and students have a reasonable likelihood of finding sufficient employment upon completing the program.

This approach is reasonable, fair, and wise because it will help to ensure students are spending their time and resources on a program that will improve their employment prospects in the area in which they live. It is also an approach that is precedented. Several states as well as the federal government conduct similar assessments as a condition of approval for new programs. For example:

- Oregon requires the initial application for a private career school license to include labor market information showing current employment, replacement, and expansion data for regional, state, and national labor markets for the occupational area being served.²⁶
- Wisconsin's criteria for schools and programs of instruction includes a requirement programs, which are innovative and not comparable to currently approved private or public programs, are based on demonstrable quality and documented labor market needs.²⁷ Wisconsin's School and Approval Guide (the Guide) reinforces this requirement, noting that schools "must be able to clearly state its mission. The education and training provided should be consistent with the school's mission and are documented by either a needs assessment or market experience."²⁸ The Guide further states schools will be asked what market research is available that shows there is a need for the type of programs that will be offered and shows graduates will have labor market success and/or career advancement.²⁹ Finally, the Guide requires a market assessment; it states

²⁶ Or. Admin. R. 715-045-0006(11)(l).

²⁷ Wis. Adm. Code SPS 404.04(1)(d).

²⁸ Wisconsin Educational Approval Program, *School & Program Approval Guide: Understanding EAP Oversight, Protecting Wisconsin Consumers and Promoting Institutional Effectiveness* (Jan. 2018) at 4, available online at <https://dsps.wi.gov/Documents/EASchoolAndProgramApprovalGuide.pdf>.

²⁹ *Id.*

that a school must be able to demonstrate that there is a need for the program(s) that it will offer. The Wisconsin Educational Approval Program will want to know that students in the target market will enroll in the program(s) to be offered and that employers have a need for the school's graduates.³⁰

- Federally, the Workforce Innovation and Opportunity Act of 2014 requires, as a condition to receiving funding for programs, states must submit a unified State plan which meets specified requirements. The state plan must include strategic planning elements, the first of which is an analysis including in-demand industry sectors and occupations, and employment needs of employers including a description of the knowledge, skills, and abilities needed in those industries and occupations.³¹ The determination as to whether an occupation is in-demand is made by the State or local board and is based State and local business and labor market projections, including the use of labor market information.³² This parallels the requirements articulated in the proposed regulations.

V. Proposed §447(a)'s Timeframes Related to the Requirement that Institutions Notify CSAAVE of Changes Were Modified from Earlier Versions of this Proposal and Should Be Changed to Reflect the Earlier, More Reasonable Timeframes.

In the modified version of the previously-proposed set of regulatory sections, released on March 1, 2019, proposed §447(a) stated “An institution seeking approval shall immediately notify CSAAVE of any change in institutional or programmatic accreditation, licensing, or approval status and provide all documentation associated with the change to CSAAVE within 30 days of its receipt, if the change is implemented by an accreditor or government agency, and within 30 days of the institution's application for the change, if initiated by the institution.” According to CSAAVE, these timelines were so modified in the March 1, 2019 version “to increase clarity in the expectations of institutions working with the CSAAVE program.”³³

In the version on which we are now commenting, released on April 26, 2019, §447(a) was modified to read as follows: “An institution seeking approval shall immediately notify CSAAVE of any change in institutional or programmatic accreditation, licensing, or approval status and provide all documentation associated with the change to CSAAVE within 30 days of the effective date of the change.”

There is a significant difference between these two versions. The current (April 26, 2019) version allows for far too much time to pass between (a) the time the institution is made aware of a change or initiates a change and (b) the time by which the institution must notify the oversight agency of the change and provides it with all documentation associated with the change. There is a potentially large gap in time between an institution's application for a change, for example, and the effective date of that change.

³⁰ *Id.* at 6.

³¹ 29 U.S.C.S. § 3112(b)(1).

³² 29 U.S.C.S. § 3102(23).

³³ California Department of Veterans Affairs, *Rational for Changes Following 45-Day Review Period* (March 1, 2019) at p. 3.

The previous language, as set forth in the March 1, 2019 version of §447(a), was far more reasonable. As the agency charged with the ongoing task of overseeing the quality of institutions, changes in an institution's approvals, especially during the time an application is pending, CSAAVE must be informed of such indisputably relevant events in a timely manner. In fact, as noted in CSAAVE's Initial Statement of Reasons: "Changes to the educational institution's accreditation and approval of courses are material to their being offered in California, and expeditious notification to CSAAVE is imperative in protecting veterans' educational benefits."³⁴

It is entirely reasonable to require institutions to provide such notice and documentation to CSAAVE within thirty days of the institution's receipt of the change or application for the change. The currently proposed version of §447(a), allowing institutions to provide notification within 30 days of the effective date of a change, increases the likelihood that CSAAVE may approve an institution based on obsolete information provided by the approval-seeking institution.

VI. Additional Comments

A. Proposed §443(k)

The three references to "school" in proposed §443(k) should be replaced with "institution."

B. Proposed §§443(k) and 445(a)(3)(C)

Section 443(k) defines placement rates as those placement rates required by licensing agencies or accreditors. Because the phrase "placement rate" is a defined term, there is no ambiguity about what must be disclosed pursuant to §445(a)(3)(C). However, if an institution does not have placement rates that meet the definition of §443(k) (if there are no placement rates required by either licensing agencies or accreditors), it is unclear what such an institution must disclose pursuant to §445(a)(3)(C).

We propose editing §443(k) to read as follows:

(k) "Placement rate" means (1) for a school required to be approved by a state licensing agency which has defined placement rate, the rate that complies with that agency's law and regulations; (2) for any school that is not approved by a state licensing agency which has a defined placement rate, the rate that complies with the school's accrediting agency placement standards or requirements; or (3) if (1) or (2) are inapplicable, a rate otherwise required to be calculated or disclosed by law, or a rate that is known to or in the possession of the institution.

These changes capture all possible contingencies while clarifying that the institution is not being required to do anything it does not already do.

C. Cross reference to B&P Code §§17500 et seq.

We note there can be no problem with cross-referencing to existing statutes, including the one embraced by §443(s). Every institution must already not violate the longstanding truth-in-advertising

³⁴ California Department of Veterans Affairs, *Initial Statement of Reasons re the Adoption of Sections 443, 44, 445, 446, and 447 of Title 12* (April 26, 2019) at p. 4, available at <https://www.calvet.ca.gov/Regulations/CSAAVE%20ISOR%20Final.pdf>.

statutes cross-referenced §443(s). Thus, they must already and must have for decades worked to comply with them. This regulation is in line with the aim to gather governing law in one place, no more and no less, and the citation needs no further elaboration beyond the decades of case law that has already sufficiently refined it.

D. Proposed §445(a)(8)'s link to CSAAVE

We note there is nothing burdensome about requiring programs of education to include a link to CSAAVE, the overseeing agency to protect veterans—except for those institutions that, in 2019, do not maintain internet websites for their programs of education. Such a claim of burden, if made by those with such sites, is frivolous. But, to the extent there may be an institution without an internet website for a program of education, we propose adding to the outset of section §445(a)(8) “If an institution maintains an Internet website for the program of education,…” to resolve any possible burden.

E. Proposed § 447(b)

The March 1, 2019 modified version of the originally proposed §447(b) read as follows: “If an institution or program fails to fully satisfy any of the requirements of sections 444, 445, and 446 of this subchapter, CSAAVE may suspend the approval of a course for new enrollments, or approval of a licensing or certification test of the Title 38 eligible institution for a period not to exceed 60 days, if evidence of record establishes that the course of licensing or certification test fails to meet any of the requirements for approval. The institution shall have up to 60 days to correct any deficiencies.”

The April 26, 2019 version on which we are commenting reads as follows: “If an institution or program fails to fully satisfy any of the requirements of sections 444, (a)(2-8)and 446 of this subchapter, CSAAVE may suspend the approval of a course for new enrollments, or approval of a licensing or certification test of the Title 38 eligible institution for a period not to exceed 60 days, if evidence of record establishes that the course of licensing or certification test fails to meet any of the requirements for approval. The institution shall have up to 60 days to correct any deficiencies.”

We believe that the reference to §445 was inadvertently omitted in the April 26, 2019 version, as the reference to “(a)(2-8)” can only refer to §445. This should be corrected in the final rule. Further, we question whether it is CSAAVE’s intent to *only* reference §445(a)(2-8) in proposed §447(b), instead of the entire §445. Referencing §445 in its entirety is necessary in order to ensure that CSAAVE has authority to suspend an institution’s or program’s approval for failure to fully satisfy all of the requirements of §445.

Further, we believe there is a typographical error where §447(b) states “...if evidence of record establishes that the course of licensing or certification test fails....” We believe that this was intended to read “if evidence of record establishes that the course or licensing or certification test fails....”

F. CSAAVE has a good-government obligation to set forth any criteria it might use to approve institutions in regulation.

As a general matter, one of the valuable aspects of these proposed regulations is they safeguard against so-called “underground rulemaking.” “If a state agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to, the rule is called an “underground

regulation.” State agencies are prohibited from enforcing underground regulations.”³⁵ Thus, CSAAVE has an obligation to promulgate regulations setting forth the criteria by which applications will be evaluated and institutions should welcome being apprised before-hand of such criteria.

More broadly, as correctly stated in the Notice, Education Code §§67100–67102 provide state authority for such approvals and, in the absence of any final court order enjoining or invalidating those statutes, CSAAVE may properly rely on that authority. In this regard, §67101 is particularly relevant as it reads, with emphasis added:

The Title 38 Funding Program is hereby established, under the administration of the California State Approving Agency for Veterans Education. The California State Approving Agency for Veterans Education shall approve qualifying institutions desiring to enroll veterans or persons eligible for Title 38 awards in accordance with federal law, this chapter, **and other reasonable criteria established by the California State Approving Agency for Veterans Education.**

See also Education Code §67102(c)(3)(i)’s reference to CSAAVE “regulations”. To the extent that the regulations seek to elicit information for CSAAVE in light of California’s sorry record as the “diploma mill capital of the nation,”³⁶ they are consistent with the reason why federal law permits states approval authority: states know best what is happening within their borders.

And, on that score, it is important to observe that the information required by §445 is solely information to be reviewed by CSAAVE in weighing whether to approve an application. The proposed regulation does not establish unwavering minimum requirements. Whether it is default rates or placement rates, no hard-and-fast requirements are imposed. This is CSAAVE simply gathering information indisputably relevant to its approving role. For the same reason, and because CSAAVE’s role is different than that of the BPPE, and its charge of protecting veterans unique and uniquely weighty, there is no reason to conform definitions to those relevant to BPPE enforcement. Here, CSAAVE is simply gathering information.

VII. Conclusion

The proposed regulations modestly gather in one place and clarify the application of existing federal and state requirements. With the suggestions made above, they will provide predictability for institutions and students alike and will constitute an enduring veteran-protecting legacy for CSAAVE.

Sincerely,



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on behalf of

³⁵ See https://oal.ca.gov/underground_regulations/.

³⁶ Chris Reed, *CA Continues to Lead Nation in ‘Diploma Mill’ Colleges*, CalWatchdog.com (Nov. 2015), available online at <https://calwatchdog.com/2015/11/25/ca-continues-lead-nation-diploma-mill-colleges/>.

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List of Enclosures to Attached Comment on CSAAVE Rulemaking Proposal

[please note that these documents are also available electronically at

www.caichildlaw.org/CSAAVE_Comments.html]

Document	Citation / Web Address
Case: <i>Armistead v. Personnel Board</i>	<i>Armistead v. State Personnel Board</i> (1978) 22 Cal.3d 198, 204.
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Case: <i>Max Cleland, Administrator of the Veterans Administration, et al. v. National College of Business</i>	<i>Max Cleland, Administrator of the Veterans Administration, et al. v. National College of Business</i> 435 U.S. 213 (1978).
20 U.S.C. § 1094(a)(24)	20 U.S.C. § 1094(a)(24)(2014)
38 U.S.C. § 3680A(d)(1)	38 U.S.C. § 3680A(d)(1) (2014)

Law Review Article: <i>Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market Incentives to the For-Profit College Industry</i> (Excerpt: Abstract)	Daniel J. Reigel, <i>Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market Incentives to the For-Profit College Industry</i> , 81 GEO. WASH. L. REV. 259 (2013).
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