

August 15, 2017

The Honorable Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Secretary DeVos:

I write to obtain information on the ethics rules that apply to Mr. Robert Eitel, a Senior Counselor to the Secretary of Education, and to determine whether he may have violated criminal conflict-of-interest statute 18 U.S.C. § 208 by working on the Department of Education's ("the Department") Borrower Defense to Repayment ("borrower defense") rules while simultaneously employed by the Department and by Bridgepoint Education, Inc. ("Bridgepoint").

### **The Education Department Delayed the Implementation of Rules Designed to Protect Students and Taxpayers from Fraudulent Colleges**

Under your direction, the Department has delayed the implementation of all or key parts of two regulations designed to protect students from fraudulent or poorly-performing colleges.

In March, just a few weeks after you were confirmed by the Senate, you delayed two critical deadlines essential to the implementation of the gainful employment (GE) rule. You delayed the deadline for failing programs to submit final alternative earnings appeals from March 10, 2017 to July 1, 2017. You also delayed the deadline by which GE programs would have to update their disclosure templates and disclose them to students from April 3, 2017 to July 1, 2017. In your announcement of these delays, you said that they were in order to "allow the Department to further review the GE regulations and their implementation."<sup>1</sup> On June 30<sup>th</sup>,

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<sup>1</sup> DeSantis, N. "U.S. Gives Colleges More Time for Appeals Under Gainful-Employment Rule." *The Chronicle of Higher Education* (March 6, 2017). Online at: <http://www.chronicle.com/blogs/ticker/u-s-gives-colleges-more-time-for-appeals-under-gainful-employment-rule/117200>; Mahaffie, L. "Gainful Employment Electronic Announcement

you again delayed the deadline for certain disclosures, this time for a full year, to July 1, 2018.<sup>2</sup> The Department also announced plans to extend the deadline for all GE programs to file alternate earnings appeals.<sup>3</sup>

The delays and regulatory rollbacks were not limited to the GE regulation. In June, you also delayed all parts of the borrower defense regulations “until further notice.”<sup>4</sup> In announcing this delay, the Department of Education also announced that it would begin the process to rewrite both the GE and borrower defense rules through a new round of negotiated rulemaking.<sup>5</sup>

### **Mr. Eitel Was Simultaneously Employed by the Department of Education and Bridgepoint Education, Inc. from February 2017 to April 2017**

From July 2015 until April 2017, Mr. Eitel served as the Vice President of Regulatory Legal Services at Bridgepoint, a company that owns several for-profit colleges. In September 2016, the Consumer Financial Protection Bureau fined Bridgepoint for “deceiving students into taking out private student loans that cost more than advertised.”<sup>6</sup> During Eitel’s tenure, Bridgepoint’s SEC filings highlighted the company’s belief that the GE and borrower defense regulations could adversely impact the company’s operations and financial interests. In November 2016, Bridgepoint noted that the borrower defense rule would “**expand the circumstances in which students may assert a defense to repayment against an institution...that could result in the imposition of significant restrictions on us and our ability to operate.**”<sup>7</sup> As recently as March 2017, Bridgepoint expressed concern that the borrower defense rule “could damage our reputation in the industry and **have a material**

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#105 - Additional Time for Submission of an Alternate Earnings Appeal and to Comply with Gainful Employment (GE) Disclosure Requirements.” Federal Student Aid. *U.S. Department of Education* (March 6, 2017). Online at: <https://ifap.ed.gov/cannouncements/030617GEAnnounce105AddtlSubTimeAEAandGEDisReq.html>

<sup>2</sup> “DeVos Presses Pause on Burdensome Gainful Employment Regulations” [press release]. *U.S. Department of Education* (June 30, 2017). Online at: <https://content.govdelivery.com/accounts/USED/bulletins/1a6a438>

<sup>3</sup> “Program Integrity: Gainful Employment” [rule]. 82 F.R. 30975. *U.S. Department of Education* (July 5, 2017). Online at: <https://www.federalregister.gov/documents/2017/07/05/2017-14186/program-integrity-gainful-employment>

<sup>4</sup> “Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program” [final rule]. 82 F.R. 27621 (June 16, 2017). Online at:

<https://www.federalregister.gov/documents/2017/06/16/2017-12562/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>; “Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions” [press release]. *U.S. Department of Education* (June 14, 2017). Online at: <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>

<sup>5</sup> “Negotiated Rulemaking Committee; Public Hearings” [proposed rule]. 82 F.R. 27640 (June 16, 2017). Online at: <https://www.federalregister.gov/documents/2017/06/16/2017-12555/negotiated-rulemaking-committee-public-hearings>

<sup>6</sup> “Consumer Financial Protection Bureau Takes Action Against Bridgepoint Education, Inc. for Illegal Student Lending Practices.” *Consumer Financial Protection Bureau* (Sept. 12, 2016). Online at: <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-takes-action-against-bridgepoint-education-inc-illegal-student-lending-practices/>

<sup>7</sup> “Form 10-Q.” Bridgepoint Education, Inc. *United States Securities and Exchange Commission* (Nov. 8, 2016). Online at: <https://www.sec.gov/Archives/edgar/data/1305323/000130532316000139/bpi093016form10-q.htm>

adverse effect on enrollments and our revenues, financial condition, cash flows and results of operations.”<sup>8</sup>

You appointed Mr. Eitel as Special Assistant to the Secretary on February 13, 2017 under the Temporary Transition Senior Executive Service hiring authority. In early April, you appointed Mr. Eitel as your Senior Counselor.<sup>9</sup> So, from February 13, 2017 to April 5, 2017, Mr. Eitel simultaneously served as an employee of the Department and an employee of Bridgepoint. Mr. Eitel was reportedly “on an unpaid leave of absence” from Bridgepoint during this seven-week period before officially resigning from Bridgepoint.<sup>10</sup>

### **The Department Has Not Required Mr. Eitel to Recuse Himself from Certain Issues Related to Borrower Defense Claims**

I have sent multiple letters to you and the Department’s Designated Agency Ethics Official (DAEO) in the Department following Mr. Eitel’s appointment regarding his compliance with federal conflict-of-interest statutes and regulations.<sup>11</sup> These rules are designed to ensure that public officials act, and appear to act, in the interests of the America public, rather than in the interests of individuals or companies with which officials are currently or formerly affiliated.

In a June 21, 2017 letter, the Department’s DAEO wrote, “In accordance with the Ethics Pledge at paragraph 6 and 18 U.S.C. § 208, Mr. Eitel is disqualified from working on particular matters involving specific parties that are directly and substantially related to his former employers,” and is “thus recused from the borrower defense claims filed by students under the current borrower defense regulation because students of schools at these former employers have claims under the current rules.” The DAEO also stated that Mr. Eitel “has gone above and beyond that to recuse himself from all such claims filed by any students from any school under the 1994 regulation.”<sup>12</sup>

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<sup>8</sup> “Form 10-K.” Bridgepoint Education, Inc. *United States Securities and Exchange Commission* (March 7, 2017). Online at: <https://www.sec.gov/Archives/edgar/data/1305323/000130532317000016/bpi201610k.htm>

<sup>9</sup> “U.S. Secretary of Education Announces Chief of Staff and Additional Staff Hires” [press release]. *U.S. Department of Education* (Apr. 12, 2017). Online at: <https://www.ed.gov/news/press-releases/us-secretary-education-announces-chief-staff-and-additional-staff-hires>

<sup>10</sup> Eitel, R. “Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e).” *U.S. Office of Government Ethics* (June 5, 2017).; Cohen, P. “Betsy DeVos’s Hiring of For-Profit College Official Raises Impartiality Issues.” *The New York Times* (March 17, 2017). Online at: <https://www.nytimes.com/2017/03/17/business/education-for-profit-robert-eitel.html>

<sup>11</sup> Letter from Senator Elizabeth Warren to Secretary of Education Betsy DeVos (March 17, 2017). Online at: [https://www.warren.senate.gov/files/documents/2017-3-17\\_Letter\\_to\\_DeVos\\_re\\_ED\\_official\\_hires.pdf](https://www.warren.senate.gov/files/documents/2017-3-17_Letter_to_DeVos_re_ED_official_hires.pdf); “Murray, Warren Question Department of Education Official’s Ties, Conflicts of Interest with For-Profit College Chain” [press release]. *Office of U.S. Senator Elizabeth Warren* (March 31, 2017). Online at: [https://www.warren.senate.gov/?p=press\\_release&id=1526](https://www.warren.senate.gov/?p=press_release&id=1526); “Warren, Murray Raise Concerns about Potential Ethics Violations by Education Dept. Advisor Eitel” [press release]. *Office of U.S. Senator Elizabeth Warren* (May 23, 2017). Online at: [https://www.warren.senate.gov/?p=press\\_release&id=1640](https://www.warren.senate.gov/?p=press_release&id=1640)

<sup>12</sup> Letter from Marcella Goodridge-Keiller, Assistant General Counsel & Designated Agency Ethics Official, Department of Education, to Senator Elizabeth Warren (June 21, 2017).

But the same letter indicated that the Department “informed Mr. Eitel that he is not subject to disqualification under...the conflict of interest statute in regard to review of and any possible changes to the borrower defense regulations that were to be effective July 1, 2017, and now delayed.”<sup>13</sup> In other words, based on the information provided to my office, Mr. Eitel was never required by the Department to recuse himself from the borrower defense rules that the Department is now re-writing.

And, according to public reports, Mr. Eitel appears to have aided your effort to delay the borrower defense rule. Mr. Eitel is a “key figure in the Education Department’s regulatory rollback” efforts and serves as a Co-Chair of the Department’s Regulatory Reform Task Force.<sup>14</sup> In May 2017, for example, Mr. Eitel co-authored a “Progress Report” on regulatory reform, which cites the borrower defense rule as among regulations that the Task Force may recommend “for repeal, replacement, or modification.”<sup>15</sup> Given this information and the Department’s failure to require his recusal, it appears highly likely that Mr. Eitel was involved in the implementation and delay of the borrower defense rule before April 5, when he was still employed at Bridgepoint.

**Applicable Ethics Rules Required Mr. Eitel to Be Recused from Participation in Matters Involving the Borrower Defense Regulation During the Seven-Week Period When He Was Employed by both the Department and by Bridgepoint**

While I appreciate the Department DAEO’s explanation of the ethics laws that apply to Mr. Eitel as a sole employee of the Department of Education, I am concerned that you and your staff have not adequately explained the additional rules Mr. Eitel was subject to during the seven-week period he was employed at both Bridgepoint and the Education Department. This set of rules applied to the Mr. Eitel from the day of his appointment at the Department until April 5<sup>th</sup>, when he formally resigned from Bridgepoint, because they concerned his then-current outside employer.

18 U.S.C. § 208, the federal financial conflict-of-interest law, prohibits Mr. Eitel’s involvement in any “particular matter” in which a current employer had a financial interest. While Mr. Eitel was still employed at Bridgepoint, whether or not he was paid and on leave,

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<sup>13</sup> *Id.* Prior to April 5, 2017, Mr. Eitel's primary ethics recusal obligations with respect to Bridgepoint would be governed by 18 U.S.C. 208. Once Mr. Eitel resigned from Bridgepoint, his financial interest in that entity appeared to be severed for purposes of 18 U.S.C. 208. After April 5, 2017, Mr. Eitel's ethics recusal obligations with respect to his former employer are governed by 5 C.F.R. 2635.502 and Section 6 of the Ethics Pledge (Executive Order 13770, January 28, 2017).

<sup>14</sup> Cowley, S. & Cohen, P. “U.S. Halts New Rules Aimed at Abuses by For-Profit Colleges.” *The New York Times* (June 14, 2017). Online at: <https://www.nytimes.com/2017/06/14/business/student-loans-for-profit-schools-colleges.html>; Venable, J. “Appointment of the Department of Education (ED) Regulatory Reform Officer and Establishment of the Regulatory Reform Task Force in accordance with the Presidential Executive Order Enforcing the Regulatory Reform Agenda dated February 24, 2017” [memorandum]. *U.S. Department of Education* (Apr. 25, 2017). Online at: <https://www2.ed.gov/policy/gen/leg/foia/reg-reform-task-force.html>

<sup>15</sup> Eitel, R. S. “Regulatory Reform Task Force Progress Report” [Memorandum for the Secretary]. *U.S. Department of Education* (May 25, 2017). Online at: <https://www2.ed.gov/documents/press-releases/regulatory-reform-task-force-progress-report.pdf>

these regulations consider any and all financial interests of Bridgepoint as financial interests of Mr. Eitel himself.

The prohibition on involvement in any “particular matter” related to current employees requires broader recusals than those outlined in Mr. Eitel’s Ethics Pledge. According to 5 C.F.R. § 2640.103, “**The term [particular matter] may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons.**”<sup>16</sup> Examples of particular matters identified in the regulation include “a regulation...applicable only to companies that operate meat packing plants” and the “implementation” of legislation that “is sufficiently focused on the interests of pharmaceutical companies.”<sup>17</sup>

Clearly, the term “particular matter” is sufficiently broad to include any “review of and any possible changes to the borrower defense regulations” with regard to Bridgepoint’s financial interests—particularly since the borrower defense regulations contain certain provisions that only apply to for-profit colleges, an “identifiable class of persons” that included Mr. Eitel’s then-current employer.

The penalties for a violation of 18 U.S.C. § 208, which are detailed in 18 U.S.C. § 216, are imprisonment for no more than a year or a fine, or both, for a violation that is not willful, and imprisonment for no more than five years, or a fine, or both, if the violation is willful. The statute also allows the Department of Justice to bring a civil suit against the violator in the appropriate United States district court.<sup>18</sup>

### **Questions about Mr. Eitel's Involvement with Borrower Defense Rules and Ethics Compliance**

I have repeatedly sought information from the Department on the nature of Mr. Eitel’s involvement with the borrower defense regulation and the timeline of his involvement, but you have so far failed to provide me with this information.

If Mr. Eitel provided any written or verbal advice to the Secretary of Education and Department or Administration Staff on any aspect of the borrower defense rule—a “particular matter” that affects the financial interest of Bridgepoint—between February 13, 2017, and April 5, 2017, including on implementation, delay, or rulemaking while employed both at the Department and at Bridgepoint, and did so without receiving any relevant waiver, then it appears that Mr. Eitel may have violated the criminal conflict-of-interest statute 18 U.S.C. § 208.

Given this concern, I request that you answer the following questions no later than September 1, 2017:

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<sup>16</sup> 5 CFR § 2640.103. <https://www.gpo.gov/fdsys/pkg/CFR-2017-title5-vol3/pdf/CFR-2017-title5-vol3-sec2640-103.pdf>

<sup>17</sup> *Id.*

<sup>18</sup> 18 U.S.C. § 216. [http://uscode.house.gov/view.xhtml?req=\(title:18%20section:216%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:18%20section:216%20edition:prelim))

1. Did Mr. Eitel have *any* involvement in discussion or decision making regarding the borrower defense rule during the period from February 13, 2017 to April 5, 2017? If so, what was the timeframe and nature of his involvement?
2. The Department's June 21, 2017 letter appears to address Mr. Eitel's potential conflicts of interest under the Ethics Pledge and 18 U.S.C. § 208 with regard to Bridgepoint's status as Mr. Eitel's *former* employer, but it does not address how 18 U.S.C. § 208 applied to Bridgepoint's status as Mr. Eitel's *current* employer when Mr. Eitel was employed by that entity between February 13 and April 5.

Please describe the Department's determination as to whether Mr. Eitel's involvement with borrower defense rulemaking while still employed at Bridgepoint before April 5 violated 18 U.S.C. § 208, as well as the justification for that conclusion.

3. Since Mr. Eitel began working at the Department, have Department ethics officials made a determination as to whether or not borrower defense implementation, delay, or other rulemaking qualified as a "particular matter" with regard to the financial interests of Bridgepoint, as it is defined in 5 C.F.R. § 2640.103?
  - a. If so, please describe your conclusion and justification for that determination.
  - b. If not, why not?
4. Did any Department ethics official issue any waiver to Mr. Eitel that might exempt him from the aforementioned prohibitions in 18 U.S.C. § 208? If not, did any ethics official determine that an exemption outlined in 5 C.F.R. §§ 2640.201–205 or 18 U.S.C. § 208 applied to Mr. Eitel?
5. What actions will you take if Mr. Eitel is found to have violated 18 U.S.C. § 208 between February and April of this year?
6. When and how did Mr. Eitel recuse himself from matters involving the GE regulations?
  - a. Please provide a copy of Mr. Eitel's ethics agreement or ethics counseling memorandum.
  - b. Please provide any other documentation addressing his ethics obligations or commitments involving the GE regulations or any other matters. If no such documents exist, please provide a detailed explanation from the DAEO as to how and when his recusal from the GE regulations was implemented and made effective.
  - c. Please confirm that Mr. Eitel did not participate in the GE regulation at any time prior to April 5, 2017.

I appreciate your attention to this important matter and look forward to your prompt response.

Sincerely,



Elizabeth Warren  
United States Senator

CC: The Honorable Kathleen Tighe, Inspector General, U.S. Department of Education  
Mr. David J. Apol, Acting Director, U.S. Office of Government Ethics