

NATIONAL COUNSEL OF HIGHER EDUCATION LOAN PROGRAMS

ALEXANDRIA, VIRGINIA

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**Prohibited Inducements Update: Making
Sense of the HEOA; Department of Education
Regulations and State Codes of Conduct**

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PROHIBITED INDUCEMENTS

- New Definitions and Requirements in HEOA Conflict with Existing Regulations
 - HEOA says eligible lender may not offer [prohibited inducements] directly or indirectly “to any institution of higher education or any employee of an institution of higher education in order to secure applicants for loans” (emphasis added).
 - ED Regulations, effective July 2008 bar lenders, directly or through an agent or contractor, from offering [prohibited inducements] to any school or other party to secure applications for FFEL loans or to secure FFEL loan volume (emphasis added).
 - Regulations prohibit payment of marketing or referral fees to other lenders or persons.
 - Regulations prohibit borrower benefits other than repayment incentive that requires one or more scheduled payments.

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- Regulations prohibit payments to sales representatives who visit schools to solicit borrowers.
 - These prohibitions arguably lack statutory authority as statute only prohibits payments to schools or employees of schools.
 - Regulations effectively prohibit lenders from asking school officials to serve on advisory board and prohibit reimbursement of expenses for service on advisory boards; HEOA allows for reimbursement of reasonable expenses to school employees who serve on an advisory board if disclosed on annual basis to the Secretary.
 - Regulations prohibit lenders from providing staffing services to schools except certain services provided to foreign schools; HEOA allows staffing services on short-term basis during emergencies.
 - Regulations prohibit lenders from providing in-person entrance or exit counseling; HEOA allows lenders to provide such services, if school stays in control of counseling.

STATE CODES OF CONDUCT

- Numerous states have attempted to impose Codes of Conduct on schools and lenders post Cuomo investigation.
- States adopting Code of Conduct, many of which are limited to public schools, or specific in-state schools, include:
 - Arizona
 - Connecticut
 - District of Columbia
 - Florida
 - Iowa
 - Kansas
 - Maryland
 - Massachusetts
 - Nevada
 - New Jersey
 - New York
 - Texas

STATE CODES OF CONDUCT

- Potential conflicts between state codes and HEOA
 - Definition of opportunity loans
 - Training requirements
 - Definition of prohibited gifts
 - Broad definition of lender to include services and guarantors
 - Ban on reimbursement of expenses for advisory council service

SCHOOL CODES OF CONDUCT

HIGHER EDUCATION OPPORTUNITY ACT

- Code of Conduct Requirements in Multiple Places-Effective when Act is signed.
- Title I, Part E
 - Applies to all educational institutions that receive federal funds and have preferred lender arrangements (but see Section 493(a)(25)).
 - Applies to Institution-affiliated organizations that have preferred lender arrangements.

Authority: H.R. 4137, Section 153(c)(3)

SCHOOL CODES OF CONDUCT

- Title IV, Program Participation Agreement
 - Requires institutions that participate in a loan program under Title IV (FFEL or Direct Loan Program) to develop Code of Conduct with respect to loans with which its officers, employees and agents shall comply.
 - Code of Conduct must prohibit conflicts of interest and contain the following minimum requirements:
 - Ban solicitation of or acceptance of “gifts.”
 - Gifts broadly defined as gratuity, favor, discount, entertainment, hospitality, loan or other item worth more than *de minimus* amount
 - Exclusions from definition of “gift”
 - Prohibit certain contracting arrangements.
 - Prohibit “revenue sharing arrangements” (Title IV only).
 - Preclude covered employees from requesting or accepting call center or financial aid office services.
 - Ban acceptance of funds for private loans in exchange for concessions on Title IV loans.
 - May not assign lender to a first time borrower or delay certification of a loan.

Authority: H.R. 4137, Sections 493(a)(25) and 493(e)

SCHOOL CODES OF CONDUCT

- Schools must publish Code of Conduct on website.
- Schools must inform covered employees annually on Code of Conduct requirements.
- Title X: Private Student Loan Transparency and Improvement Act
 - Prohibitions on private educational lenders mirror Code of Conduct provisions that apply to schools.
 - Prohibits private education lenders from giving gifts to schools and school employees.
 - Prohibits revenue sharing with respect to private loans.
 - Requires schools to report reimbursement of expenses for service on lender advisory board.
 - Prohibits co-branding on private loans.

Authority: H.R. 4137, Section 1011

SCHOOL CODES OF CONDUCT

ISSUES UNDER HIGHER EDUCATION OPPORTUNITY ACT

- Gift ban applicability to family members.
- “School Affiliated Organizations” broadly defined.
- Applicability of code to “Agents” of schools.
- Lenders serving as trustees of a school.
- Recourse loans and Opportunity loans.
- Lenders who make FFEL and private loans to borrowers at your school.
 - Broad definition of “other benefits” in regulations.
 - “Rebuttable presumption” in regulations.

SCHOOL CODES OF CONDUCT

Conflicts with Department of Education Regulations

- Advisory boards.
- Entrance and exit counseling.
- Staffing assistance.

Conflicts with State Codes of Conduct

- Advisory Boards.
- Opportunity Loans.
- Staffing Assistance.
- Training Requirements.
- Preemption issues.

SCHOOL CODES OF CONDUCT

- HEOA requires lenders to disclose to ED via an annual report any reasonable expenses paid or given to an FA employee including
 - Amount of each instance in which lender provided reimbursement
 - Name of FA official or other employee to whom reimbursement was made
 - Dates of activity for which reimbursement was made
 - Brief description of the activity for which reimbursement was made

Authority: H.R. 4137, Section 152(b)(1)(B)

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Rob Lavet joined PPSV's Education Practice Group in 2008 as a Principal. Mr. Lavet counsels the firm's higher education clients on student loan matters and on transactional, corporate, securities, and litigation concerns, as well as the resolution of audits and government investigations. Prior to joining the firm, he was General Counsel to SLM Corporation (Sallie Mae). At Sallie Mae, Mr. Lavet managed legal affairs, corporate compliance and student loan servicing policy functions. He regularly advised board members and senior management on securities disclosures and corporate debt offerings, oversaw significant litigation and regulatory matters, led due diligence on numerous acquisitions and transactions, and integrated legal teams of acquired businesses in multiple locations. He and his team of attorneys took on leadership roles in postsecondary education as they developed strategies to address the emerging array of regulatory, legislative, corporate, and transactional challenges facing the nation's student loan programs. He successfully litigated the only federal court case involving the Department of Education's attempted application of the prohibited inducement section of the Higher Education Act to a lender.

Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney at the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn where he specialized in commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia and served as a past president of the Washington Metropolitan Area Corporate Counsel Association.

Mr. Lavet graduated with honors from the University of Pennsylvania in 1976 and received his law degree with honors, from Georgetown University Law Center in 1979.