



Veterans Legal Services Clinic

YALE LAW SCHOOL

MEMORANDUM

RE: VA'S FAILURE TO PROTECT VETERANS
FROM DECEPTIVE RECRUITING PRACTICES

FEBRUARY 26, 2016

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The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

MEMORANDUM

To: Interested Parties

From: Erin Baldwin, Corey Meyer, Rachel Tuchman
Law Student Interns, Veterans Legal Services Clinic

Date: February 26, 2016

Re: U.S. Department of Veterans Affairs and State Approving Agencies' authority to deny G.I. Bill funds to schools using deceptive marketing to recruit veterans

QUESTIONS PRESENTED

Does the U.S. Department of Veterans Affairs ("VA") have the authority to protect veterans by denying G.I. Bill funds to educational institutions that use deceptive recruiting practices, including misleading marketing and false advertising, to target veterans? What actions can the VA and State Approving Agencies ("SAAs") take to prevent these institutions from receiving G.I. Bill funds?

SHORT ANSWER

Both the VA and SAAs have the authority to approve, disapprove, and suspend G.I. Bill funds for educational institutions engaged in deceptive recruiting practices.¹ Indeed, the VA has an obligation to act: the VA must not approve veterans' enrollment in courses offered by institutions that use "erroneous, deceptive or misleading" advertising, sales, or enrollment practices.² Additionally, the VA and SAAs may disapprove and suspend the use of G.I. Bill funds at educational institutions that utilize such practices.³

BACKGROUND

Educational institutions have strong incentives to engage in deceptive recruitment tactics to secure veterans' enrollment and collect G.I. Bill funds. For-profit institutions in particular rely on G.I. Bill funds to offset the statutory cap on other federal student aid programs.⁴ As one official explained, this structure

¹ See 38 U.S.C. §§ 3672, 3679, 3690.

² See *id.* § 3696.

³ See *id.* § 3679, 3690; 38 C.F.R. § 21.4259.

⁴ Under the Higher Education Act, for-profit institutions are barred from receiving federal funds if they draw more than 90 percent of their revenue from federal student aid programs. 20 U.S.C. § 1094(a)(24). However, the statute does not list G.I. Bill funds, thereby creating a loophole that allows for-profit institutions to count G.I. Bill funds as non-public dollars that do not count against the 90 percent cap. See Daniel J. Riegel, Note, *Closing the 90/10 Loophole in the Higher Education Act: How to Stop Exploitation of Veterans, Protect American Taxpayers, and Restore Market*; Letter from 22

incentivizes many for-profit educational institutions to view veterans “as nothing more than dollar signs in a uniform.”⁵

Predatory for-profit schools routinely employ deceptive advertising practices to entice veterans to enroll in their programs.⁶ The aggressive recruitment tactics garnered public attention in 2012 when a two-year investigation by the Senate Committee on Health, Education, Labor, and Pensions documented evidence of schools recruiting veterans at hospitals and wounded warrior centers.⁷ The report cited internal corporate documents and training materials depicting a boiler-room sales environment in which for-profit colleges instructed recruiters to “pok[e] the pain”⁸ in prospective students’ psyches and mislead them about tuition, accreditation, transferability of credits, academic quality, graduation rates, job and salary prospects, career assistance, and the inability of G.I. Bill funds to cover the full tuition.⁹ Other tactics included creating fake military websites that purported to offer unbiased advice on G.I. Bill educational opportunities, but in reality sold veterans’ contact information to for-profit schools, which subjected the veterans to a barrage of recruiting calls and emails.¹⁰ Another example involved recruiters attending job fairs under the guise of hiring veterans when they actually sought to enroll students in their programs.¹¹

In addition, many schools accepting G.I. Bill funds lack the accreditation needed to deliver on their

State Attorneys General to the Senate and House Committee on Veterans’ Affairs (May 29, 2012), https://www.iowaattorneygeneral.gov/media/cms/Schools_4_profit_924BF51B5599F.pdf (stating that this accounting gimmick runs contrary to the intent of the Higher Education Act statute, if not its letter).

⁵ Hollister K. Petraeus, Op-Ed, *For Profit Colleges, Vulnerable G.I.’s*, N.Y. TIMES, Sept. 21, 2011, <http://www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html?r=1> [hereinafter Petraeus, *For Profit Colleges*].

⁶ See, e.g., *PBS News Hour: Are For-Profit Universities Taking Advantage of Veterans?* (PBS July 24, 2015), available at <http://www.pbs.org/newshour/bb/profit-universities-taking-advantage-veterans/>; *PBS News Hour: Is G.I. Bill Benefitting For-Profit Colleges Instead of Helping Veterans?* (PBS July 7, 2014), available at <http://www.pbs.org/newshour/bb/gi-bill-benefitting-profit-colleges-instead-helping-veterans/>; Susannah Snider, *3 Steps to Take Before Using G.I. Bill Benefits at For-Profit Colleges*, U.S. NEWS & WORLD REPORT, Nov. 11, 2015, available at <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2015/11/11/what-veterans-need-to-know-about-gi-bill-benefits-at-for-profit-colleges>.

⁷ S. Health, Educ., Labor & Pensions Comm., 112th Cong., *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* (2012), available at http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.

⁸ *Id.* at 60.

⁹ *Id.* at 4 (citing U.S. GOV. ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010)), available at <http://www.gao.gov/products/GAO-10-948T> (reporting that each one of 15 large for-profit schools made deceptive statements to federal undercover officers in recruiting, and four encouraged fraudulent practices by encouraging students to falsify FAFSA forms).

¹⁰ Larry Abramson, *For-Profit Schools Under Fire for Targeting Veterans*, NATIONAL PUBLIC RADIO, April 9, 2012, <http://www.npr.org/2012/04/09/150148966/for-profit-schools-under-fire-for-targeting-veterans> (reporting that when an employee of Veterans of Foreign Wars tested the aggressiveness of recruiting by entering his information at “gibill.com,” for profit colleges telephoned him more than 70 times and emailed more than 300 times over the course of a few days); see also Petraeus, *For Profit Colleges*, *supra* note 5; Patricia Cohen, *For-Profit Colleges Accused of Fraud Still Receive U.S. Funds*, N.Y. TIMES, Oct. 12, 2015, <http://www.nytimes.com/2015/10/13/business/for-profit-colleges-accused-of-fraud-still-receive-us-funds.html> (noting how Alta Colleges marketed a criminal justice program promising prime careers where only 3.8% of graduates were actually employed as law enforcement or correctional officers).

¹¹ Chris Kirkham & Alan Zarembo, *For-Profit Colleges are Using the G.I. Bill to Make Money Off of Veterans*, L.A. TIMES, Aug. 18, 2015, <http://www.latimes.com/business/la-fi-for-profit-colleges-gi-bill-20150809-story.html>.

educational promises to veterans. A 2015 study found that as much as 20 percent of the current educational programs approved for G.I. Bill funds lacked the accreditation that is needed for students to work in the relevant field (such as medical and law careers).¹² In addition, a 2015 news report found that 2,000 unaccredited schools approved for G.I. Bill funds, including sex schools and bible schools, have taken more than \$260 million in G.I. Bill dollars since 2009.¹³

Veterans seeking higher education can use their G.I. Bill benefits only at educational institutions meeting specific approval criteria.¹⁴ These criteria include a prohibition on using deceptive or misleading recruitment practices.¹⁵ The authority for enforcing the prohibition rests with the VA and SAAs, state agencies created by Congress to ensure that veterans' education and training programs comply with federal standards.

In response to the deceptive tactics of some educational institutions, in 2012, the White House issued Executive Order 13607, to require educational institutions receiving G.I. Bill funding to, *inter alia*, “end fraudulent and unduly aggressive recruiting techniques.”¹⁶ Pursuant to the Executive Order, the VA and other federal agencies, must—among other measures—engage in targeted risk-based program reviews of schools that may be engaged in deceptive recruiting tactics; create a centralized system to receive, respond to, and refer complaints to law enforcement; and ensure websites and programs are not engaged in deceptive marketing, including trademarking military and veterans related terms.¹⁷

Meanwhile, a growing number of federal agencies and state officials have directly investigated, sued, or taken other actions against educational institutions. The Department of Education (DoE) threatened to cut off federal funds to Corinthian Colleges in 2014, resulting in the school's eventual closure, following its failure to correct falsified job placement numbers.¹⁸ Shortly after, California SAA (“CalVet”) withdrew G.I. Bill approval for California veterans from Corinthian Colleges.¹⁹ Also in 2014, the Consumer Financial Protection Bureau sued the ITT chain for predatory, deceptive loan schemes targeting students, while the Securities Exchange Commission sued ITT in 2015 for deceiving shareholders.²⁰ In 2015, the Department

¹² See Walter Ochinko, Veterans Education Success, “The GI Bill Pays for Degrees That Do Not Lead to a Job,” available at

<http://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5619840ae4b0ae8c3b994957/1444512778604/Final+Research+paper+for+Senate+Testimony.pdf>.

¹³ See Aaron Glantz, *GI Bill Pays for Unaccredited Sex, Bible and Massage Schools*, REVEAL NEWS, Jul. 15, 2015, <https://www.revealnews.org/article/gi-bill-pays-for-unaccredited-sex-bible-and-massage-schools>.

¹⁴ See 38 U.S.C. § 3672.

¹⁵ See *id.* §§ 3696, 3676(c)(10).

¹⁶ Exec. Order No. 13607, Fed. Reg. 285, 861 (April 17, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-02/pdf/2012-10715.pdf>; see also Tamar Lewin, *Obama Signs Order to Limit Aggressive College Recruiting of Veterans*, N.Y. TIMES, Apr. 27, 2012, <http://www.nytimes.com/2012/04/28/education/obama-signs-order-to-protectveteransfrom-college-recruiters.html>.

¹⁷ *Id.*; see also Pub. L. No. 112-249, 126 Stat. 2398 (Jan. 10, 2013) (codifying certain aspects of the executive order, including improving access to information for veterans choosing a school, requiring the VA to create a system to obtain student veteran's feedback about schools, and banning incentive compensation at schools to limit deceptive recruiting).

¹⁸ Richard Perez-Peña, *College Group Run for Profit Looks to Close or Sell Schools*, N.Y. TIMES, July 14, 2014, http://www.nytimes.com/2014/07/05/education/corinthian-colleges-to-largely-shut-down.html?_r=0.

¹⁹ Press Release, California Department of Veteran Affairs, *CalVet Withdraws Approval for Corinthian Colleges*, Aug. 25, 2014, <https://www.calvet.ca.gov/Pages/CalVet-WithdrawsApproval-for-Corinthian-Colleges.aspx>.

²⁰ Press Release, Consumer Financial Protection Bureau, *CFPB Sues For-Profit College Chain ITT For Predatory Lending*, Feb. 26, 2014, <http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory>

of Defense temporarily banned the University of Phoenix from recruiting on military bases after finding that the institution deceptively and surreptitiously targeted veterans and service members.²¹ The Department of Justice, in 2015, announced a \$95.5 million settlement with another large for-profit college chain, Education Management Corporation, following a multi-year suit for violating federal rules that prevent deceptive recruiting.²² In 2015, the Federal Trade Commission (FTC) settled with Ashworth College for deceiving students about career training and transferability of credits.²³ Most recently, in January 2016, the FTC filed suit against the operators of DeVry University, alleging that its advertisements deceived consumers about the prospect of finding employment after graduation.²⁴ Finally, more than 30 state Attorneys General have investigated and sued dozens of for-profit colleges for deceptive recruiting. These institutions include unaccredited programs deceiving students about their ability to work in licensed fields and schools' unlawfully using military seals and claiming Pentagon approval to lure veterans.²⁵

Although the VA is responsible for overseeing education benefits for veterans, it has been slow to join other agencies in addressing deceptive practices, drawing criticism from Congressional and veterans' leaders.²⁶ Veterans advocates note the VA has not completed its obligations under the 2012 Executive Order and that the VA's own "Choosing a School" guide directs veterans to a profit-making college search website that collects and sells veterans' contact information, rather than directing veterans to the DoE's reputable college search tools.²⁷

According to the VA, it has limited authority to take action against educational institutions that use deceptive marketing practices. In response to a July 2015 letter from eight U.S. Senators concerned about

lending/; Press Release, U.S. Securities and Exchange Commission, *SEC Announces Fraud Charges Against ITT Educational Services*, May 12, 2015, <https://www.sec.gov/news/pressrelease/2015-86.html>.

²¹ Douglas Belkin & Ben Kesling, *Justice, Education Departments Coordinate University of Phoenix Probes*, WALL ST. J., Oct. 9, 2015, [http://www.wsj.com/article_email/university-of-phoenix-barred-from-military-bases-1444369975-lMyQjAxMTI1NDE5MDQxODAxWj](http://www.wsj.com/article_email/university-of-phoenix-barred-from-military-bases-1444369975-lMyQjAxMTI1NDE5MDQxODAxWj; see also Letter from Dawn Bilodeau, Chief Department of Defense Voluntary Education, Military Community and Family Policy, to University of Phoenix (Oct. 7, 2015), available at http://chronicle.com/blogs/ticker/files/2015/10/Suspension-Letter-to-University-of-Phoenix_7Oct20151.pdf); *see also* Letter from Dawn Bilodeau, Chief Department of Defense Voluntary Education, Military Community and Family Policy, to University of Phoenix (Oct. 7, 2015), *available at* http://chronicle.com/blogs/ticker/files/2015/10/Suspension-Letter-to-University-of-Phoenix_7Oct20151.pdf. Department of Defense lifted the ban in January 2016. *See* Associated Press, *Arizona: Sanction Lifted for University of Phoenix*, N.Y. TIMES, Jan. 15, 2016, http://www.nytimes.com/2016/01/16/us/arizona-sanction-lifted-for-university-of-phoenix.html?_r=0.

²² Press Release, Department of Justice, *For-Profit College Company to pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations*, Nov. 16, 2015, *available at* <http://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>.

²³ Press Release, Federal Trade Commission, *Ashworth College Settles FTC Charges it Misled Students About Career Training, Credit Transfers*, May 26, 2015, <https://www.ftc.gov/news-events/press-releases/2015/05/ashworth-college-settles-ftc-charges-it-misled-students-about> [hereinafter FTC Press Release].

²⁴ Press Release, Federal Trade Commission, *FTC Brings Enforcement Action Against DeVry University*, Jan. 27, 2016, <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-brings-enforcement-action-against-devry-university>.

²⁵ David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REPORT, Oct. 9, 2015, <http://www.republicreport.org/2014/law-enforcement-for-profit-colleges> [hereinafter Halperin, *Actions Regarding For-Profit Colleges*].

²⁶ Telephone Interview with Rick Weidman, Executive Director of Veterans Affairs, Vietnam Veterans of America (Feb. 10, 2016); *see also* Bobby Caina Calvan, *University of Phoenix Probation Brings Calls for VA to Pull the Plug*, REVEAL NEWS, Oct. 9, 2015, <https://www.revealnews.org/article/university-of-phoenix-probation-brings-calls-for-va-to-pull-the-plug/>.

²⁷ Telephone Interview with Carrie Wofford, Director, Veterans Education Success (Feb. 9, 2016) [hereinafter Wofford Interview].

unaccredited schools receiving G.I. Bill funds,²⁸ then VA Under Secretary of Benefits, Allison Hickey, stated that SAAs, not the VA, are responsible for disapproving funds to the schools in question and that the VA has limited authority over the process. The letter noted:

The authority for the approval of educational programs is specifically granted to the State Approving Agencies (SAAs) under Title 38 of the United States Code (38 U.S.C.) . . . Any course approved for benefits that fails to meet any of the approval requirements should be immediately disapproved by the appropriate SAA. VA is prohibited, by law, from exercising any supervision or control over the activities of the SAAs, except during the annual SAA performance evaluations.²⁹

Moreover, veterans groups report that VA officials suggest they cannot take intermediate steps, such as a suspension of funds.³⁰ Both the VA and SAAs, however, have explicit authority to suspend courses, in addition to their authority to approve and disapprove courses.³¹

When SAAs have taken action, the VA has declined to support—or has even undercut—SAAs' efforts to prevent non-compliant institutions from enrolling veterans. In one instance, although not related to deceptive recruitment practices, the California SAA (CalVet) blocked the enrollment of additional veterans at the University of Phoenix's San Diego campus after an audit revealed the university exceeded an enrollment cap on veterans,³² but the VA reversed the enrollment ban within days.³³ When CalVet suspended G.I. Bill funds to IIT and withdrew approval from Corinthian Colleges, the VA declined to assist CalVet.³⁴ Most recently, in late 2015, after Virginia's SAA withdrew approval from ECPI's Medical

²⁸ See Letter from Richard Durbin, Senator from Illinois, to Under Secretary of Benefits Allison Hickey (July 17, 2015), *available at* <http://www.durbin.senate.gov/newsroom/press-releases/senators-terrible-failure-of-our-veterans-senators-terrible-failure-of-our-promise-to-veterans-and-taxpayers-when-gi-bill-benefits-wasted-on-questionable-institutions-> [hereinafter Durbin Letter].

²⁹ Letter from Allison A. Hickey, Former Under Secretary of Benefits in the Department of Veteran Affairs, to Senator Richard J. Durbin (Sept. 4, 2015), *available at* <https://assets.documentcloud.org/documents/2428666/va-educational-benefit-program-letter-to-sen.txt>.

³⁰ Wofford Interview, *supra* note 27.

³¹ 38 U.S.C. §§ 3675, 3679 (granting both “[t]he Secretary or a State approving agency” authority to approve and disapprove educational institutions); *see also* 38 U.S.C. § 3690(b)(3)(A) (granting suspension authority to the VA); 38 C.F.R. § 21.4210 (detailing the process that must accompany a mass suspension of funds, and of enrollments or reenrollments at educational institutions); 38 C.F.R. § 21.4259 (granting suspension authority to the SAA); S. REP. NO. 111-346, at 21 (2010) (noting that the 2010 amendments to the G.I. Bill were intended “to *expand* VA’s authority regarding approval of courses for the enrollment of veterans (and other eligible persons) who are in receipt of VA-administered educational assistance programs”) (emphasis added).

³² Adithya Sambamurthy, *VA Overturns Veteran Enrollment Ban on University of Phoenix Programs*, REVEAL NEWS, Aug. 5, 2014, <https://www.revealnews.org/article-legacy/va-overturns-veteran-enrollment-ban-on-university-of-phoenix-programs>.

³³ *Id.* (“VA spokeswoman Victoria Dillon said the agency reversed the state’s enrollment ban without returning to the campus to conduct its own audit. Instead, she said the decision was made after the for-profit school sent new figures by email.”).

³⁴ For information about CalVet’s suspension of G.I. Bill funds for IIT, *see, for example*, Press release, California Department of Veterans Affairs, *CalVet Suspends GI Bill Approval for IIT Technical Institute*, May 15, 2015, <https://www.calvet.ca.gov/Pages/CalVet-Suspends-GI-Bill-Approval-for-IIT-Technical-Institute.aspx>; Letter from Congresswoman Speier to Secretary Robert McDonald, Congresswoman Speier Urges the Department of Veteran Affairs to Suspend GI Bill Benefits for IIT Educational Services (May 21, 2015), *available at* http://speier.house.gov/index.php?option=com_content&view=article&id=1686:congresswoman-speier-urges-the-

Career Institute based on findings of deceptive recruiting, the VA failed to release the corresponding compliance review that would support the SAA's decision, despite requests from veterans' organizations.³⁵

ANALYSIS

This analysis proceeds in two parts. First, it explains the VA's statutory obligation to deny G.I. Bill funds for schools engaging in deceptive recruitment practices. Second, it discusses SAAs' authority to approve, disapprove, or suspend funding for educational institutions that engage in such practices.

I. The VA must deny G.I. Bill funds to educational institutions engaging in deceptive recruitment practices

The VA's statutory authority is clear: the VA is responsible for approving, disapproving, and suspending G.I. Bill funds for educational institutions according to various criteria.³⁶ Although SAAs also have authority to act, the VA retains authority to disapprove schools or courses and approve schools "notwithstanding lack of State approval."³⁷

More specifically, federal statutes and regulations explicitly prohibit the VA from approving veterans' enrollment in courses offered by institutions that utilize deceptive practices.³⁸ Under 38 U.S.C. § 3696(a), "[t]he Secretary shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation." In addition to its approval authority, the VA can disapprove or suspend G.I. Bill funds based on a finding of deceptive practices, as 38 U.S.C. § 3696 is incorporated into the grounds for disapproval and suspension.³⁹

The legislative history of 38 U.S.C. § 3696 underscores Congress' intent that the VA take action against educational institutions that use deceptive recruitment practices. Congress added § 3696 in 1974 as part of the Vietnam Era Veterans' Readjustment Assistance Act to require the VA to prevent colleges with predatory advertising practices from receiving G.I. Bill funds. The Senate Committee on Veterans' Affairs Report concerning the legislation states that the language of the bill includes "safeguards to prevent abuses of the veterans' educational assistance program" in response to the "deep concern . . . about abuses of the

department-of-veterans-affairs-to-suspend-gi-bill-benefits-for-itt-educational-services&catid=20:press-releases&Itemid=14.

For information about CalVet's withdrawal of approval for Corinthian Colleges, see, for example, Press Release, California Department of Veteran Affairs, *CalVet Withdraws Approval for Corinthian Colleges*, Aug. 25, 2014, <https://www.calvet.ca.gov/Pages/CalVet-WithdrawsApproval-for-Corinthian-Colleges.aspx>.

³⁵ Wofford Interview, *supra* note 27; see also *Virginia Department of Veterans Services, Medical Careers Institute- School of Health and Science of ECPI University, Virginia Beach Campus Withdrawn from Offering Education and Training to Veterans and their Dependents*, VIRGINIA DEPT. OF VET. SERV., Dec. 7, 2015, <http://www.dvs.virginia.gov/news-room/education-employment-news/medical-careers-institute-va-beach-approval-withdrawn>.

³⁶ See 38 U.S.C. § 3672(a) (stating that educational courses are approved "by the State approving agency for the State, . . . or by the Secretary"); *id.* § 3675(a)(1) (stating that "the Secretary or a State approving agency may approve accredited programs").

³⁷ 38 C.F.R. § 21.4152(b)(5).

³⁸ 38 U.S.C. § 3696(a); 38 C.F.R. § 21.4252(h)(1).

³⁹ 38 U.S.C. § 3679 ("Any course approved for the purposes of this chapter which fails to meet any of the requirements of this chapter shall be immediately disapproved by the Secretary or the appropriate State approving agency."); *id.* § 3690(b).

G.I. Bill program in general.”⁴⁰ According to the Report, the bill “clarifies and strengthens the law with respect to the [Secretary’s] authority to disapprove enrollment of veterans in institutions which utilize advertising, sales, or enrollment practices which are erroneous, deceptive, or misleading.”⁴¹

Congress created two mechanisms to ensure that educational institutions using deceptive recruitment practices do not receive G.I. Bill funds. First, educational institutions are subject to mandatory recordkeeping and disclosure obligations.⁴² Specifically, schools must maintain a record of all advertising, sales, and enrollment materials used during the preceding 12 months.⁴³ This record must be made available for inspection by the VA or SAAs.⁴⁴ Second, the VA is required to enter into an agreement with the FTC to utilize FTC resources to investigate and make determinations as to “enrollment of an eligible veteran or eligible person in any course offered by an institution which utilizes advertising, sales, or enrollment practices of any type which are erroneous, deceptive, or misleading either by actual statement, omission, or intimation.”⁴⁵ Although the mandate to cooperate with the FTC was passed by Congress in 1974,⁴⁶ it appears that only in early November 2015, after pressure from veterans groups and the White House,⁴⁷ did the VA and the FTC enter into a Memorandum of Agreement to “provide mutual assistance in the oversight and enforcement of laws pertaining to the advertising, sales, and enrollment practices” of educational institutions that receive G.I. Bill benefits.⁴⁸

Once the VA determines that an educational institution has used deceptive practices, the VA may take three actions affecting different groupings of G.I. Bill beneficiaries: suspend payments for veterans already enrolled in a course,⁴⁹ disapprove new enrollments in a course,⁵⁰ or disapprove new enrollments for the institution as a whole.⁵¹ The VA must follow certain procedures regardless of which action it decides to take.⁵² First, the Secretary must provide both the SAA and the educational institution with written notice of

⁴⁰ S. REP. NO. 93-907, at 36 (1974). The Report cited numerous findings including Federal Trade Commission investigations of the Vocational and Home Study School Industry; a series of news articles on the practices of the private profit-making vocational education industry; and a Brookings Institution report prepared for the Office of Education entitled “Private Accreditation and Public Eligibility.” *See id.* at 22-23.

⁴¹ *Id.* at 38.

⁴² *See* 38 U.S.C. § 3696(b); 38 C.F.R. § 21.4252(h)(3) (“The materials in this record shall include but are not limited to: (i) Any direct mail pieces, (ii) Brochures, (iii) Printed literature used by sales people, (iv) Films, video cassettes and audio tapes disseminated through broadcast media, (v) Material disseminated through print media, (vi) Tear sheets, (vii) Leaflets, (viii) Handbills, (ix) Fliers, and (x) Any sales or recruitment manuals used to instruct sales personnel, agents or representatives of the educational institution.”).

⁴³ 38 U.S.C. § 3696(b) (“Such materials shall include but are not limited to any direct mail pieces, brochures, printed literature used by sales persons, films, video tapes, and audio tapes disseminated through broadcast media, material disseminated through print media, tear sheets, leaflets, handbills, fliers, and any sales or recruitment manuals used to instruct sales personnel, agents, or representatives of such institution.”).

⁴⁴ *Id.* (“Such record shall be available for inspection by the State approving agency or the Secretary.”).

⁴⁵ 38 U.S.C. § 3696(c); 38 C.F.R. § 21.4001(f).

⁴⁶ Pub. L. No. 93-508, 88 Stat. 1578 (Dec. 3, 1974).

⁴⁷ Telephone Interview with Walter Ochinko, Policy Director, Veterans Education Success (Feb. 9, 2016).

⁴⁸ DEPARTMENT OF VETERANS AFFAIRS and FEDERAL TRADE COMMISSION, MEMORANDUM OF AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF VETERANS AFFAIRS (2015), *available at* https://www.ftc.gov/system/files/documents/cooperation_agreements/151110ftc_va_mou.pdf.

⁴⁹ 38 C.F.R. § 21.4210(d)(1)(i).

⁵⁰ *Id.* § 21.4210(d)(1)(ii).

⁵¹ *Id.* § 21.4210(d)(4).

⁵² 38 U.S.C. § 3690(b)(3)(B); *see also* 38 C.F.R. § 21.4210 (detailing the process that must accompany a mass suspension of funds, and of enrollments or reenrollments at educational institutions).

any failure to meet the approval requirements.⁵³ Second, the VA must provide the institution 60 days to take corrective action.⁵⁴ Finally, within 30 days of notice to the institution, the Secretary must provide each eligible veteran and person already enrolled written notice of the VA's intent to take action against the educational institution.⁵⁵ For any actions affecting groups of veterans, including suspensions and disapprovals, the VA Director of the Regional Processing Office must refer the matter to that regional office's Committee on Educational Allowances.⁵⁶ The Committee then makes findings of fact and recommendations on the matter to the Director of the Regional Processing Office.⁵⁷ The Director of Regional Processing then considers the recommendation of the Committee and makes a decision, though it does not have to be the same decision as the Committee.⁵⁸ The educational institution affected by a decision can request review by the VA Director of Education Services.⁵⁹

The statutes and regulations establishing the VA's authority over the administration of the G.I. Bill program enable the VA to actively participate in the disapproval or suspension of educational institutions that engage in deceptive marketing or recruitment practices, contrary to the VA's claims. Yet the VA has been slow to take action against educational institutions that engage in such practices.⁶⁰

II. SAAs must deny G.I. Bill funds to educational institutions engaging in deceptive recruitment practices

SAAs, like the VA, are responsible for approving educational institutions and courses that receive G.I. Bill funding.⁶¹ Accordingly, Congress characterized cooperation between the VA and SAAs as "essential," particularly with respect to the "enforcement of approval standards."⁶²

SAAs have authority to approve accredited courses⁶³ and non-accredited courses offered by public or private, for-profit or non-profit schools.⁶⁴ In regards to advertising practices, SAAs may only approve a non-accredited institution after confirming that "the institution does not utilize advertising of any type which is erroneous or misleading, either by actual statement, omission, or intimation."⁶⁵ To evaluate an institution under this requirement, SAAs must determine whether the FTC has issued an order instructing the institution to discontinue "erroneous or misleading" advertising acts or practices and must take any

⁵³ 38 U.S.C. § 3690(b)(3)(B)(i).

⁵⁴ *Id.* § 3690(b)(3)(B)(ii).

⁵⁵ *Id.* § 3690(b)(3)(B)(iii).

⁵⁶ 38 C.F.R. § 21.4210(g); *see also id.* § 21.4212 (explaining the referral process to the Committee on Educational Allowances); *id.* § 21.4211 (discussing the composition of the Committee on Educational Allowances); *id.* § 21.4213 (providing details on notice of hearings by the Committee on Educational Allowances); *id.* § 21.4214 (describing the rules and procedures for the Committee on Educational Allowances); *id.* § 21.4215 (discussing decision guidelines for the Committee on Educational Allowances).

⁵⁷ 38 C.F.R. § 21.4211(a)(ii)(5).

⁵⁸ *Id.* § 21.4215.

⁵⁹ *Id.* § 21.4216.

⁶⁰ Aaron Glantz, *VA Lags in Addressing Complaints Against Colleges Using GI Bill Funds*, REVEAL NEWS, Nov. 19, 2014, <https://www.revealnews.org/article-legacy/va-lags-in-addressing-complaints-against-colleges-using-gi-bill-funds>.

⁶¹ 38 U.S.C. § 3672(a)(1).

⁶² *Id.* § 3673(a); *see also* 38 C.F.R. § 21.4151(a) (stating that "the cooperation of the Department of Veterans Affairs and the State approving agencies is essential").

⁶³ 38 U.S.C. § 3675.

⁶⁴ *Id.* § 3676.

⁶⁵ *Id.* § 3676(c)(10); *see also* 38 C.F.R. § 21.4254(c)(10).

order into consideration.⁶⁶ In addition, SAAs and the VA may inspect the advertising materials used by schools, a record of which must be kept by educational institutions for the preceding 12-month period.⁶⁷

SAAs also share authority with the VA to disapprove educational institutions found to be out of compliance with the approval requirements, including those related to deceptive recruitment practices.⁶⁸ Like the VA, SAAs must “immediately disapprove” noncompliant courses.⁶⁹ The SAAs’ responsibilities also include evaluating compliance of schools and “inspecting and supervising schools within the borders of their respective states.”⁷⁰ To ensure ongoing compliance, SAAs conduct compliance surveys (routine and regulated compliance checks) at educational institutions.⁷¹

SAAs must follow certain procedures to take action against educational institutions that engage in deceptive recruiting practices. The SAAs have authority to suspend enrollment in a new course for a period of up to 60 days.⁷² If the educational institution does not meet requirements for approval or correct deficiencies within the 60 day period, the SAA has the authority to disapprove the course.⁷³ In the event the course is in a state without an SAA, the VA has authority to handle the suspension and disapproval function of the SAA.⁷⁴

Despite this authority, few SAAs are thoroughly reviewing programs as part of the approval and disapproval process.⁷⁵ A former SAA official has suggested that the Post-9/11 G.I. Bill amendments to the approval and disapproval process effectively stopped SAAs from conducting thorough approval reviews.⁷⁶ The official observed that the VA and SAAs have begun to summarily approve accredited institutions, thus limiting SAAs to auditing already approved institutions through compliance surveys.⁷⁷ Although SAAs have the authority to review institutions and suspend or disapprove funding for those found out of compliance with statutory requirements, resource constraints undermine SAAs’ capacity to disapprove G.I. Bill

⁶⁶ 38 U.S.C. § 3676(c)(10).

⁶⁷ *Id.* § 3696(b); 38 C.F.R. § 21.4252(h)(3).

⁶⁸ *See* 38 U.S.C. § 3670 *et seq.*

⁶⁹ *Id.* § 3679.

⁷⁰ 38 C.F.R. § 21.4151(b); *see also id.* § 21.4253(b) (recognizing the SAAs’ authority to approve accredited courses); *id.* § 21.4253(d) (recognizing the SAAs’ authority to approve school applications).

⁷¹ *See* 38 U.S.C. § 3673(d) (noting the Secretary’s authority to utilize services of SAAs for compliance and oversight); *see also* U.S. Department of Veterans Affairs, *Compliance Survey Report* (March 2014), *available at* <https://assets.documentcloud.org/documents/1236731/university-of-phoenix-audit-report.pdf> (showing that VA form includes two requirements SAAs must check related to deceptive recruiting).

⁷² 38 C.F.R. § 21.4259(a)(1).

⁷³ *Id.* § 21.4259(a)(2).

⁷⁴ *Id.* § 21.4259(c).

⁷⁵ *But see Virginia Department of Veterans Services, Medical Careers Institute- School of Health and Science of ECPI University, Virginia Beach Campus Withdrawn from Offering Education and Training to Veterans and their Dependents*, VIRGINIA DEPT. OF VET. SERV., Dec. 7, 2015, <http://www.dvs.virginia.gov/news-room/education-employment-news/medical-careers-institute-va-beach-approval-withdrawn> (documenting Virginia SAA’s recent suspension action against Medical Careers Institute for 60 days followed by a disapproval action for the Virginia Beach Campus of the University under 38 C.F.R. § 21.4252(h)(1)(i) for findings of misleading materials).

⁷⁶ Interview with Jim Bombard, National Association of State Approving Agencies, Retired Legislative Director and Retired Chief, New York Bureau of Veterans Education (Nov. 11, 2015) (on file with author) [hereinafter “Bombard Interview”].

⁷⁷ *Id.*

funding.⁷⁸ In addition, veterans advocates note that SAAs report feeling relegated by the VA to simple financial audits of schools.⁷⁹ Whatever the cause, a former SAA director has suggested that SAAs rarely, if ever, review advertising materials during compliance reviews.⁸⁰

CONCLUSION

Both the VA and SAAs have the authority and an obligation to protect veterans from deceptive recruiting by denying G.I. Bill funds to educational institutions that deceive and defraud veterans. Both the VA and SAAs are mandated by law to approve funding only for courses that comply with statutory requirements and to suspend or disapprove funds for educational programs that utilize deceptive advertising to entice veterans to enroll in their programs. Thus far, both the VA and SAAs have failed to fulfill their duty to prevent schools from recruiting veterans through misleading recruitment tactics. The VA and SAAs must take action against institutions that are using deceptive practices to recruit veterans.

⁷⁸ Statements of Dr. Joseph W. Wescott, President, National Association of State Approving Agencies before the Subcommittee on Economic Opportunity Committee on Veteran's Affairs, United States House of Representatives, Nov. 19, 2014.

⁷⁹ Telephone Interview with Col. Robert F. Norton (Ret.), Deputy Director of Government Relations, Military Officers Association of America (Feb. 10, 2016).

⁸⁰ Bombard Interview, *supra* note 76.