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# Department's Negotiated Rulemaking Process for Gainful Employment

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## FINAL AUDIT REPORT



**ED-OIG/A19L0002**  
**June 2012**

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Our mission is to promote the efficiency, effectiveness, and integrity of the Department's programs and operations.



U.S. Department of Education  
Office of Inspector General  
Washington, DC

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Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report represent the opinions of the Office of Inspector General. Determinations of corrective action to be taken will be made by the appropriate Department of Education officials.

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**UNITED STATES DEPARTMENT OF EDUCATION**  
**OFFICE OF INSPECTOR GENERAL**

THE INSPECTOR GENERAL

June 21, 2012

**Memorandum**

**TO:** The Honorable Arne Duncan  
Secretary of Education

**FROM:** Kathleen S. Tighe /s/  
Inspector General

**SUBJECT:** Final Audit Report  
Department's Negotiated Rulemaking Process for Gainful Employment  
Control Number ED-OIG/A19L0002

Attached is the **final audit report** that covers the results of our review of the Department's negotiated rulemaking process for gainful employment. We received the Department's comments on the contents of our draft report and the planned corrective actions for each of our recommendations.

Corrective actions proposed (resolution phase) and implemented (closure phase) by your office will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System (AARTS). Department policy requires that you develop a final corrective action plan (CAP) for our review in the automated system within 30 days of the issuance of this report. The CAP should set forth the specific action items and targeted completion dates necessary to implement final corrective actions on the findings and recommendations contained in this final audit report.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on the audits that remain unresolved after 6 months from the date of issuance.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

We appreciate the cooperation given to us during this review. If you have any questions, please call Michele Weaver-Dugan at (202) 245-6941.

Enclosure

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## EXECUTIVE SUMMARY

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The Department of Education (Department) is required to use negotiated rulemaking to develop proposed regulations for programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). Under negotiated rulemaking, the Department works to develop the proposed regulations in collaboration with representatives of the parties who will be significantly affected by the regulations. The proposed regulations are subsequently published in a document referred to as a Notice of Proposed Rulemaking (NPRM).

On May 26, 2009, the Department published a notice in the Federal Register announcing its intention to develop proposed regulations to maintain or improve program integrity in the Title IV HEA programs, including the topic of gainful employment (GE). GE was a requirement for eligibility in the Title IV programs for proprietary schools and certain postsecondary vocational schools, but had never been defined. The Department's goals were to establish measures for determining whether programs lead to GE in recognized occupations and to institute conditions under which these educational programs could remain eligible to participate in student financial assistance programs authorized under the HEA. The proposed rules would seek to protect taxpayers against wasteful spending on educational programs of little or no value that also lead to high indebtedness for students.

On September 9, 2009, the Department published a notice in the Federal Register, which stated that defining GE in a recognized occupation would fall under the scope of the committee established to address program integrity issues ("Program Integrity Committee"). The Program Integrity Committee conducted three public negotiated rulemaking sessions beginning in November 2009, all of which included discussions on the topic of GE. By the final meeting in late January 2010, the negotiating committee had not reached agreement on each of the 14 program integrity issues, including GE. Because consensus was not achieved, the Department was under no obligation to adopt any of the draft language discussed in its development of the proposed regulations.

Over the next few months, Department officials worked on drafting the Program Integrity NPRM. In May 2010, the Department, in agreement with the Office of Management and Budget (OMB), split the Program Integrity NPRM into two separate NPRMs, with one to be devoted only to GE due to the complexity of the issue. On July 14, 2010, the Department sent the proposed GE regulations to OMB for formal review and comment. OMB cleared the proposed regulations the following day. At 8:45 am on July 23, 2010, the GE NPRM was posted for public inspection on the Federal Register website and published on July 26, 2010, in the Federal Register.

The initial objective of our audit was to determine whether the Department had a process for handling embargoed regulations and protocols related to the protection of sensitive information for Department staff involved in the negotiated rulemaking process. A few months into our fieldwork, we determined that in order to adequately address concerns being raised by members of Congress and public interest groups, we needed to significantly expand the scope of our audit work to include communications that took place between Department officials and outside

parties. We subsequently revised our audit objective. The revised objective of our audit was to determine whether the Department appropriately handled sensitive information during the negotiated rulemaking process, specifically between the end of the public negotiated rulemaking sessions in January 2010 and the publication of the NPRM in July 2010.

In performing this audit, we obtained all email communications falling within the time period noted for 11 Department officials who were significantly involved in the development of the proposed GE regulations. We also obtained email communications falling within the same time period related to any Department employee that had either sent emails to or received emails from any of 14 individuals who were known to represent investment companies, student advocacy groups, and research firms. In addition, we obtained all email communications between Department employees and outside parties associated with any of nine email domains registered to investment companies, student advocacy groups, and research firms. A total of 357,095 emails were subsequently made available for review. We searched these emails using terms that were related to GE and the for-profit education industry to identify those for further review. We also reviewed documentation provided by the Department in response to related Freedom of Information Act requests and Congressional requests. In total, we reviewed over 69,602 pages of documentation,<sup>1</sup> consisting primarily of emails,<sup>2</sup> as part of our audit.

In addition to reviewing the emails and related documentation for any inappropriate disclosures of sensitive information, we further sorted and analyzed the emails and documentation to determine the types of entities that were communicating with Department employees, who was initiating the communications, and the purpose of the communications. We also examined hardcopy and electronic calendars maintained by the Department officials, to include related email communications, to identify scheduled meetings between Department officials and outside parties during this time period where the topic of discussion appeared to be related to GE. We further analyzed the identified meetings to determine the types of entities the Department officials were meeting with, who was requesting the meetings, and the number of times each entity type was met with. We also interviewed applicable Department officials to discuss the negotiated rulemaking process, the handling of sensitive information, and to follow-up on related emails and meetings as necessary.

Our audit found no improper disclosure of sensitive information by Department officials in their communications with outside parties, to include representatives from student advocacy groups, investment companies, for-profit colleges, media representatives, Congressional leaders and staff, or other Executive Branch agencies, between the end of the public negotiation rulemaking sessions and the publication of the GE NPRM.<sup>3</sup> We also noted no concerns regarding Department activities, to include its communications strategy, preceding the release of the GE NPRM, and noted that, while the final metrics to be used were still subject to discussion, the

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<sup>1</sup> Documentation included attachments to emails, such as analyses and industry reports on the for-profit education sector, perspectives and suggestions on GE, related audit reports, and copies of related speeches given by Department officials or outside parties at conferences.

<sup>2</sup> Emails reviewed generally consisted of more than one page.

<sup>3</sup> Our conclusion is based upon a review of emails and other documentation as noted, as well as statements made by Department officials interviewed as part of this audit. It was not possible to determine whether any sensitive information may have been improperly disclosed through forms of undocumented communications such as phone conversations or unofficial personal meetings.

Department's position on GE was generally public knowledge via the public negotiated rulemaking sessions and information posted on the Department's public website from the public sessions, to include draft regulatory language discussed during the final rulemaking session. We did note instances where outside parties informed the Department that they had received nonpublic information from individuals outside of the Department that had knowledge of the proposed regulations. In all instances, the source of the nonpublic information was identified as entities outside of the Department.

We noted some areas that the Department could improve upon with regard to the negotiated rulemaking process. Specifically, we determined that the Department lacked written protocols and transparency in the rulemaking process regarding communications with outside parties before the GE NPRM was published. Without protocols, current staff with little rulemaking experience or new staff is less likely to understand what types of communications are prohibited, discouraged, or acceptable. In addition, inconsistent procedures may be employed by staff involved in the rulemaking process. A lack of publicly available information regarding who the Department communicates with while drafting regulations may lead to diminished public trust in the Department's decision-making process.

We also found that the Department did not require all Department employees who worked on the GE regulations to file a financial disclosure report. While we did not become aware of any conflicts of interest among the employees who did not file, failure to require employees who work on rulemakings with the potential to affect publicly traded entities to file the confidential disclosure forms could compromise the integrity of the rulemaking process.

During the course of our audit, we noted that a former high-level Department official that was significantly involved in the GE negotiated rulemaking process engaged in communications with his former employer, potentially in violation of applicable ethics standards. Our investigations office is reviewing this matter further.

To correct the weaknesses identified, we recommend that the Secretary ensure that the appropriate Department officials:

- Develop and implement a general written policy on the handling of private communications with outside parties during each phase of rulemaking proceedings and make the policy available to all Department employees.
- Consider publicly disclosing all relevant meetings with outside parties that occur after the public negotiated rulemaking sessions end and prior to the issuance of an NPRM, similar to the process followed for the disclosure of private meetings held following the public comment period, to increase transparency in the process.
- Require employees who work on rulemakings with the potential to affect publicly traded entities to file confidential financial disclosures.

In its response to the draft audit report, the Department concurred with Finding 1, stating that it took a number of steps to ensure that the rulemaking was a lawful, ethical process, and noting that it was gratified its careful handling of sensitive information was validated by OIG. The Department also noted its commitment to ensuring that all aspects of the negotiated rulemaking process are handled appropriately and that the process is as effective as possible. The Department stated that it will closely review the findings and recommendations in the final report and, where appropriate, incorporate them into future negotiated rulemakings under Title IV of the HEA.

Overall, we did not make any changes to our findings or recommendations based on the Department's response to the draft audit report. We did make a minor technical correction in the Objective, Scope, and Methodology section of the report as suggested by the Department. The Department's comments are summarized at the end of each finding. The full text of the response is included as Enclosure 2 to this report.



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## BACKGROUND

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The Department of Education (Department) is required to use negotiated rulemaking to develop proposed regulations for programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), unless the Secretary determines it to be impractical, unnecessary, or contrary to the public interest. Once the Department determines that rulemaking is necessary, it publishes a notice in the Federal Register. Under negotiated rulemaking, the Department works to develop the proposed regulations in collaboration with representatives, referred to as negotiators, of the parties who will be significantly affected by the regulations. The proposed regulations are subsequently published in a document referred to as a Notice of Proposed Rulemaking (NPRM).

On May 26, 2009, the Department published a notice in the Federal Register announcing its intention to establish negotiated rulemaking committees. The purpose of one of these committees would be to develop proposed regulations to maintain or improve program integrity in the Title IV HEA programs. Among the topics to be included for discussion was gainful employment (GE). Because GE was a requirement for eligibility in the Title IV programs for proprietary schools and certain postsecondary vocational schools, but had never been defined, the Department's goals were to establish measures for determining whether programs lead to GE in recognized occupations, and to institute conditions under which these educational programs could remain eligible to participate in student financial assistance programs authorized under the HEA. The proposed rules would seek to protect taxpayers against wasteful spending on educational programs of little or no value that also lead to high indebtedness for students.

On May 29, 2009, after receiving several inquiries about the Federal Register notice, the Department held a conference call with analysts and investors who monitor the career college and education industry to further explain the notice and the rationale behind it. A similar call was held with the career college community. In June 2009, several public meetings and forums were held throughout the country to provide for public input on topics to include in negotiated rulemaking. Subsequent to those meetings, on September 9, 2009, the Department published a notice in the Federal Register announcing its intention to establish two negotiated rulemaking committees. The notice also solicited nominations for individual negotiators. In the notice, the Department stated that defining GE in a recognized occupation was a topic that would be included and that it would fall under the scope of the committee established to address program integrity issues ("Program Integrity Committee").

The Program Integrity Committee conducted three negotiated rulemaking sessions beginning in November 2009. Each session lasted 5 days and included discussions on the topic of GE. Members of the public were permitted to observe the meetings and also provided an opportunity to comment at the end of each day. By the final meeting in late January 2010, the negotiating committee had not reached agreement on all 14 program integrity issues, including GE. Because consensus was not achieved, the Department was under no obligation to adopt any of the draft language discussed in its development of the proposed regulations.

Over the next few months, Department officials worked on drafting the Program Integrity NPRM, and provided a proposed NPRM to the Office of Management and Budget (OMB) for review in April 2010.<sup>4</sup> In the beginning of May 2010, the Department discussed splitting the Program Integrity NPRM into two separate NPRMs, with one to be devoted only to GE due to the complexity of the issue. The Department notified officials in OMB and the White House of its intention to split the Program Integrity NPRM. On May 13, 2010, OMB officials stated that the Department's proposal to split GE from the Program Integrity NPRM was preferable.

On July 14, 2010, the Department sent the proposed GE regulations to OMB for formal review and comment. The following day, OMB cleared the proposed regulations, which allowed the Department to publish the NPRM in the Federal Register. At 8:45 am on July 23, 2010, the GE NPRM was posted for public inspection on the Federal Register website and published on July 26, 2010, in the Federal Register.

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<sup>4</sup> In its email pertaining to the transmission of the NPRM to OMB, the Department noted that the provisions related to GE were still going through the internal Department clearance process and additional changes could result from that review.

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## AUDIT RESULTS

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Our audit found no improper disclosure of sensitive information by Department officials in their communications with outside parties between the end of the public negotiation rulemaking sessions and the publication of the GE NPRM.<sup>5</sup> We also noted no concerns regarding Department activities, to include its communications strategy, preceding the release of the GE NPRM. We did note instances where outside parties informed the Department that they had received nonpublic information from individuals outside of the Department that had knowledge of the proposed regulations. In all instances, the source of the nonpublic information was identified as entities outside of the Department.

While we found that the Department appropriately handled sensitive information pertaining to the scope of our review, we noted some areas that the Department could improve upon with regard to the negotiated rulemaking process. Specifically, we determined that the Department lacked written protocols and transparency in the rulemaking process regarding communications with outside parties before the GE NPRM was published. We also found that the Department did not require all Department employees who worked on the GE regulations to file a financial disclosure report. As a result, staff is less likely to understand what types of communications are prohibited, discouraged, or acceptable; the public's trust in the Department's decision-making process may be diminished due to a lack of publicly available information about its communications with outside parties; and not all Department employees who worked on the GE regulations were reviewed for potential conflicts of interest.

### **FINDING NO. 1 – The Department Appropriately Handled Sensitive Information During the Gainful Employment Negotiated Rulemaking Process**

We found that the Department appropriately handled sensitive information during the GE negotiated rulemaking process. Specifically, between the end of the public negotiated rulemaking sessions and the publication of the GE NPRM, we found no improper disclosure of sensitive information by Department officials in their communications with outside parties, to include representatives from student advocacy groups, investment companies, for-profit colleges, media representatives, Congressional leaders and staff, or other Executive Branch agencies. We also noted no concerns regarding Department activities, to include its communications strategy, preceding the release of the GE NPRM.

We noted that other parties outside of the Department, specifically OMB and other Executive Branch agencies, had access to draft versions of the regulations at certain times during the process. We also noted that, while the final metrics to be used were still subject to discussion, the Department's position on GE was generally public knowledge via the public negotiated rulemaking sessions and information posted on the Department's public website from the public sessions, to include draft regulatory language discussed during the final rulemaking session.

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<sup>5</sup> See footnote 3 on page 2.

### *Communications with Outside Parties*

With respect to communications, we reviewed emails sent to and from 11 Department officials who were significantly involved in the development of the proposed GE regulations between the end of the public negotiated rulemaking sessions in January 2010 through publication of the NPRM in July 2010. Our review noted that communications pertaining to GE were generally initiated by the outside parties, citing their desire to share analyses, opinions, or concerns about GE and the for-profit education industry with the Department. In some communications, the outside parties also requested information about the regulations or comments from the Department. We noted that Department officials typically did not respond to these emails or simply acknowledged receipt of the information. In several instances where Department officials or staff did respond to these communications, we noted that they explicitly stated they could not disclose sensitive information prior to the publication of the GE NPRM, to include specifics related to the content of the draft regulations or timing of submissions to OMB.

We also reviewed hardcopy and electronic calendars and/or related emails for the 11 Department officials to identify any scheduled meetings with outside parties, to include conference calls, where the topic of discussion appeared to be related to negotiated rulemaking for program integrity issues. We identified 150 such meetings, 60 of which appeared to be specifically related to GE.<sup>6</sup>

Entity or Entities	Meetings Related to Program Integrity Issues	Meetings Specific to GE
Investment Companies	4	2
Media	15	4
Student Advocacy Groups	17	5
For-Profit Colleges	26	12
OMB and Other Executive Branch Agencies	27	16
Congressional Members and Staff	35	21
<b>Totals</b>	<b>124*</b>	<b>60</b>
* This total does not include accrediting agencies (6 meetings), non-profit colleges (15 meetings), or tutoring and consulting companies (2 and 3 meetings, respectively) as none of the meetings with these entities appeared to be related to GE.		

As noted in the table above, we found that 2 meetings (3 percent) were held with investment companies, 5 meetings (8 percent) were held with student advocacy groups, 12 meetings (20 percent) were held with for-profit colleges, 16 meetings (27 percent) were held with OMB and other Executive Branch agencies, specifically the Department of Labor and Social Security Administration, and 21 meetings (35 percent) were held with Congressional members and staff. We found that these meetings were generally scheduled at the request of the outside parties. We also noted that no particular interest appears to have been favored, as meetings occurred with

<sup>6</sup> We identified meetings related to negotiated rulemaking for program integrity issues and GE, specifically, based on information contained in the subject line and/or body of calendar appointments and related emails. In some cases, we could not determine initially whether a meeting pertained to either topic, but were able to do so by reconciling the calendars and emails of key individuals involved in the process and by reviewing other available information.

parties who were both for and against the GE regulations. We found no indication in the related emails and documentation reviewed that the Department shared sensitive information with outside parties during these meetings.

Department officials stated that these meetings served as listening sessions and that at no time were they permitted to share the contents of the draft regulations or specifics with regard to the intentions of the Department. Department officials stated that they were receptive to meeting with any interested parties who had information relevant to GE. Officials added that they were sensitive to the opinions brought forth during these meetings, since the Department's interests and those of the individuals with whom they met were not always aligned, but that they appreciated the concerns that were raised. It was noted that some Department officials expressed concern that investment companies in particular may have had an undisclosed agenda, but it was decided that these companies, similar to other outside parties, had conducted research on the for-profit industry and had perspectives and data that could potentially be valuable in developing the proposed regulations.

We noted that Department officials also attended a number of meetings with the public at OMB between April 23, 2010, and May 21, 2010. These meetings were scheduled to provide the public with an opportunity to present concerns about program integrity issues, including GE, directly to OMB officials. Department officials were invited to these meetings to listen to any such concerns.

#### *Activities Leading Up to Publication of the NPRM*

Final preparations for the release of the GE NPRM began in early July 2010. Paper copies of the proposed regulations were provided to Department officials involved in the rulemaking process between July 6, 2010, and July 7, 2010. These individuals were directed not to make copies or distribute the document and were required to return their copies to the Office of the General Counsel (OGC). On July 12, 2010, OGC staff electronically provided the same individuals with an updated version of the proposed regulations in a password-protected file. Later that day, Department officials held an internal clearance meeting to discuss and approve the proposed GE regulations.

Beginning on July 21, 2010, Department officials made courtesy calls to public interest groups to disclose the publishing schedule for the NPRM. Officials explained that this was done as a professional courtesy to make sure that no one was "sleeping" when the proposed rule was published. On July 22, 2010, the day before the publication of the NPRM, the Department's senior officials conducted briefings to inform selected media outlets and Congressional leaders on the nature of the proposed regulations. We noted that briefing documents were distributed only to those Department officials who were scheduled to give briefings on the proposed regulations. Department officials stated that the Department's planned communications timeline followed the frequently used strategy of releasing complicated stories in advance of publication to allow for the gathering of reactions from others, as well as to provide these individuals with some time to understand the issues before publication. Specifically:

- At 4:00 pm, the Department provided an advance copy of the press release and the NPRM to media representatives. In order to receive this information, the media representatives were required to abide by the following embargo terms:

- Solicitation of reactions to the press release and background call were embargoed until 7:00 pm to allow for the Department's Congressional notification process to be completed, and
  - The press release and information from the background call were embargoed for publication until 11:59 pm that evening.
- From 4:00 pm to 5:00 pm, courtesy calls were made to key Congressional leaders to discuss broad talking points regarding the timing of release and the nature of the NPRM.
- Between 5:00 pm and 6:00 pm, a press call was held with key media representatives to discuss the policy background behind the proposed regulations.
- At 6:00 pm, the Department held a bipartisan briefing with Congressional offices to discuss specifics about the GE NPRM.

We found no evidence that the Department provided the press release or NPRM to anyone other than Congressional or media representatives. A Department official involved with the communications strategy explained that after 7:00 pm on July 22, 2010, media outlets were permitted to share information from the press release and NPRM, albeit with a common understanding among media professionals that such information would be used only to obtain comments for the purpose of writing about the regulations. The official said that media professionals typically contact stakeholders and elected officials for comment and also noted that the Department does not clear individuals with whom the media wishes to speak. The official stated that the Department was very sensitive to the fact that information pertaining to the NPRM could have an impact on the financial markets. The Department official stated that the Department's communications strategy was to release the information after the close of market trading with enough time before the market opened again to allow everyone sufficient time to absorb, with context, the substance of the proposal. The official explained that the timing related to the sharing of the information was the primary way by which the Department managed the impact of the information being shared. Officials noted that the Department had previously used this strategy and, as in this case, did not have information published in the media before the agreed upon release time.

#### *Other Parties with Access to Sensitive Information*

During our review, we noted that other parties outside of the Department had access to the proposed GE regulations at certain times during the process. Among these were officials at OMB who received draft regulations for review in April 2010, while GE was still part of the overall program integrity regulations, and in July 2010, when the proposed GE regulations were sent for formal review and comment. After the latter, a former Deputy Under Secretary stated that OMB staff asked if they could share an informal draft of the proposed regulations with the Small Business Administration, Department of Justice, and Social Security Administration. He said OMB believed the agencies must have an opportunity to comment and that OMB would notify the agencies of the importance of confidentiality and request comments. The Department's senior officials agreed that OMB could share the document informally with these agencies.

While we found no evidence that the Department inappropriately shared sensitive information with outside parties, we did note instances where outside parties informed the Department that they had received nonpublic information from individuals outside of the Department with knowledge of the proposed regulations. In all instances, the source of the nonpublic information was identified as entities outside of the Department. Specifically:

- On April 13, 2010, a media representative forwarded to a Department official an education services industry update prepared by a research analyst from an investment firm. The industry update stated that draft regulations had been submitted to OMB for review and that “a credible source close to OMB” told the firm that the Department’s proposed GE measures presented at the January negotiated rulemaking session had been essentially unchanged, but also noted that a third alternative measure had been added. The analyst included the specific metrics associated with the third measure in the update. The next day, an investment analyst forwarded to Department staff a report from a different investment firm with identical information, again referencing OMB as the source of the information.<sup>7</sup>
- On April 20, 2010, a member of a higher education association forwarded to a Department official a report from an investment analyst that provided potential developments on GE, including metrics contained in the current GE proposal, “according to comments from one Congressional staffer.”<sup>8</sup>
- On July 19, 2010, a research analyst emailed an update regarding the pending GE NPRM to an unknown number of individuals on what appears to have been an automated mailing list. Among the recipients was a former Deputy Under Secretary. In the email, the analyst stated that “our DC [District of Columbia] source” learned that the GE metrics had been “watered down” based on information conveyed during a briefing from a Congressional leader. Three days later, an education policy update from a DC-based investment research group was forwarded to Department officials by a higher education attorney that also referenced information on the GE metrics that allegedly came from “a good Congressional source.”<sup>9</sup>

The Administrative Procedure Act contains no restrictions on private communications between a Federal agency and outside parties at any point during informal, notice-and-comment rulemaking under 5 U.S.C. § 553. The President’s Memorandum on Transparency and Open Government, dated January 21, 2009, states that executive departments and agencies should offer the public increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.

Department officials stated that during the development of the GE NPRM, while there were no formal limitations on communications with outside parties, everyone involved clearly understood that information from internal discussions and the contents of the proposed regulation should not be shared with outside parties. Officials also said they were frequently directed by OGC

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<sup>7</sup> The Department submitted the draft Program Integrity regulations, which at that time included GE, to OMB on April 9, 2010.

<sup>8</sup> We noted that meetings with Congressional representatives pertaining to GE were scheduled on the calendars of Department officials on April 16, 2010, and April 19, 2010.

<sup>9</sup> Our review of Department officials’ emails noted that a conference call on GE was scheduled for July 14, 2010, with Congressional members.

attorneys and the Department's senior officials to maintain proper control over the rulemaking process. They added that the negotiated rulemaking process for the GE regulations was handled in the same manner as the Department's previous rulemakings and that they were very familiar with the process. Officials noted that it was the Department's most public rulemaking, citing unprecedented interest and public participation.

### **Department Comments**

The Department concurred with Finding 1 and stated it was gratified that its very careful handling of sensitive information was validated, noting that the gainful employment rulemaking generated a level of public interest unprecedented for the Department. The Department was also pleased that the OIG had no concerns regarding Department activities, to include its communications strategy, preceding the release of the NPRM. It further noted that it went to great effort to ensure that the rulemaking process was handled properly at every stage, and while pleased with these findings, it remains fully committed to continuing to ensure that conduct in connection with all stages of future rulemakings is appropriate.

The Department expressed that one part of the finding appeared to be beyond the scope of the audit and should either be deleted from the final report or, as an alternative, be mentioned in the Other Matters section. Specifically, the Department referred to the section of the finding on page 11 that references an education services industry update in which an investment firm analyst wrote that the Department submitted draft gainful employment regulations to another government entity for review and contends that the other entity provided the analyst who wrote the report with information about the substance of the draft regulations. The Department stated that the scope of the audit is defined as being limited to communications that took place between Department officials and outside parties, and since this reference concerns information about communications between two outside parties, it falls outside of the defined scope. The Department further noted that the OIG did not discuss whether it investigated the source of the alleged disclosure or if the information allegedly disclosed was ever put to use.

### **OIG Response**

We do not agree that the part of the finding mentioned above should be deleted or moved to the Other Matters section. As stated in this section of the finding, we noted instances where outside parties informed the Department that they had received nonpublic information from other individuals with knowledge of the proposed regulations. In some instances, the communications were an attempt by the outside parties to confirm with Department officials that the leaked information included in the reports written by the investment analysts was accurate. In other instances, the communications were sent to inform Department officials of the latest information that people were hearing about the proposed regulations. As such, the communications clearly fit within the scope of the audit; they are not communications between two outside parties, as stated in the Department's comments. We reviewed these emails as part of our effort to determine whether Department officials were inappropriately disclosing information. We noted that sensitive information may have been improperly disclosed, but was not identified as coming from a Department official. As these were not improper disclosures of sensitive information by Department officials or staff, pursuing the source of the alleged disclosures was not part of the scope of this audit.



## **FINDING NO. 2 – The Department Could Further Strengthen its Negotiated Rulemaking Process**

While we found that the Department appropriately handled sensitive information as pertaining to the scope of our review, we did note some areas that the Department could improve upon with regard to the negotiated rulemaking process. Specifically, we noted improvements could be made with regard to written protocols, transparency, and requirements regarding the filing of financial disclosure reports.

### *Written Protocols for Communications with Outside Parties*

We found that the Department lacked written protocols regarding its process for handling communications with outside parties during the development of the GE NPRM, specifically between the time the public rulemaking sessions ended and the publication of the NPRM. Department officials stated that no written guidance or training was developed and disseminated addressing the control of sensitive information, but that staff were routinely reminded by the Department's senior officials that the content of the proposed regulations was on a close hold and should not be discussed with outside parties.

We noted that organizational protocols were developed for the related negotiated rulemaking sessions that occurred between November 2009 and January 2010. Although these protocols applied only to the negotiators, the protocols required them to generally limit contact with the media, investment companies, and other organizations outside the community of interest represented by the negotiators to discussions of the overall objectives and progress of the negotiations. The negotiators were also required to refrain from characterizing the views, motives, and interests of other members during these discussions.

We also noted that prior to the GE rulemaking, the Department developed draft guidance for American Recovery and Reinvestment Act of 2009 rulemakings. The guidance contained communication considerations for rulemaking, describing the types of information Department staff may share with outside parties, how meetings with these parties should be conducted, and outside communications that are acceptable or prohibited. However, Department officials stated that this particular guidance was never finalized and was not used during development of the GE NPRM.

The Government Accountability Office (GAO) "Standards for Internal Control in the Federal Government" states that control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives and help ensure that actions are taken to address risks. It also states that internal control needs to be clearly documented and appear in management directives, administrative policies, or operating manuals.

Department officials stated that a special protocol for GE rulemaking was not created due to the level of professionalism of the staff involved. Officials said it was understood that sensitive information should not be shared or discussed with anyone who was not directly involved in the rulemaking process. Department officials also stated that even though there were no protocols, everyone involved in the process knew the sensitivity of the GE regulations. One Department official further noted that all Department employees are advised of and expected to abide by the principles set forth in the Standards of Ethical Conduct for Employees of the Executive Branch

(5 C.F.R. 2635). Among these principles is a prohibition on the misuse of nonpublic government information for personal financial gain.

A lack of written protocols increases the risk to the Department that sensitive information may be inappropriately shared with parties who are not privileged to such information. This in turn could also lead to inappropriate financial gain when dealing with information that could impact financial markets. In addition, it may lead to inconsistent procedures being employed by staff involved in the rulemaking process. Furthermore, without protocols, current staff with little rulemaking experience or new staff is less likely to understand what types of communications are prohibited, discouraged, or acceptable.

As part of this audit, we reviewed other agencies' policies for communications with outside parties during the development of proposed regulations. We found that these agencies' policies generally did not address the subject of such communications prior to the issuance of an NPRM, with the exception of one agency that required its staff to disclose communications if the substance of the communications formed a basis for issuance of the NPRM. We also noted that each of the policies advocated full public participation in the development of regulations and encouraged agency officials to be receptive to appropriate communications from all affected and/or interested parties. By developing written protocols governing contact with outside parties prior to the issuance of an NPRM, the Department could serve as an example for other applicable agencies to follow.

The Department provided comments on the preliminary findings presented at our exit conference. The Department specifically expressed that it would be difficult, if not impossible, to establish one set of guidelines that would properly guide communications with external parties for all rulemakings. We would note that the Department has already prepared similar guidance for other rulemakings, as noted above, that is general enough to be applied to other rulemakings. When deemed necessary, the Department could supplement the guidance to add details specific to a particular rulemaking.

#### *Transparency Prior to Publication of the NPRM*

The Department lacked transparency in the rulemaking process regarding private meetings it held with outside parties after the public negotiated rulemaking sessions ended and before the GE NPRM was published. As stated in Finding No. 1, we found that the Department participated in meetings with representatives from various organizations while drafting the proposed regulations. However, these meetings were not publicly disclosed.

We reviewed the Department's website and noted that it included information about the public hearings and private meetings conducted with outside parties after publication of the NPRM. According to the website, the hearings and meetings were hosted to allow Department officials to listen to individuals and organizations who submitted written comments on the proposed regulations regarding GE. The Department posted the hearing and meeting dates, transcripts of the public hearings, and the lists of attendees during the private meetings. While this information gave the public a chance to see who the Department was meeting with after the NPRM was published that may have influenced the final regulations, we found no such information for the meetings held prior to publication.

OMB Memorandum M-10-06, "Open Government Directive," dated December 8, 2009, states that transparency promotes accountability by providing the public with information about what the government is doing. It directs executive departments and agencies to expand access to government information by making it available online in order to increase accountability and promote informed participation by the public.

In response to the memorandum, the Department developed an Open Government Plan that includes a set of strategic goals and objectives for openness that will drive its work forward and allow it, and the public, to measure and assess its progress. Two of the goals developed by the Department are to increase its transparency and accountability and to solicit and incorporate more public input into Department operations. The Department plans to accomplish these goals by making more data and information available to the public and by providing more insight into the agency's decision-making process.

Department officials stated that posting meetings with outside parties on the Department's website may cause these parties to feel uncomfortable in being open and honest if they know the meeting will be publicly disclosed. Officials explained that the Department wants candid opinions from the public on regulatory matters, and that posting meetings that occur during the development of an NPRM may hinder the Department's ability to gather such opinions. An official also said that requiring the Department to list every meeting held with outside parties before an NPRM is published would likely interfere with the staff's ability to do the necessary preparatory work in developing the regulations. Officials explained that the Department's focus was on internal discussions of a very contentious issue due to the lack of consensus during the negotiation sessions. Another official added that the Department may encounter issues in protecting its deliberative process while developing proposed regulations if Freedom of Information Act requests are extended to include notes or other documentation from meetings with outside parties.

By not publicly disclosing meetings held with outside parties that may have formed a basis for issuance of the GE NPRM, the Department lacked transparency during the negotiated rulemaking process, specifically from the time the public negotiated rulemaking sessions ended to the issuance of the NPRM. As a result, the public may be less likely to view the rulemaking process as legitimate due to a lack of confidence that the Department incorporated a diversity of interests and perspectives throughout the entirety of the negotiated rulemaking process. A lack of publicly available information regarding who the Department communicates with while drafting regulations may lead to diminished public trust in the Department's decision-making process.

The Department provided comments on the preliminary findings presented at our exit conference. The Department reiterated the concerns noted above and also noted that interested parties interact with the Department in a number of different ways, to include phone calls, emails, and private meetings, and pointed out the difficulties associated with determining what type of interactions would need to be disclosed. The Department felt that a better way to increase transparency would be to identify in the preamble the information relied upon in developing the proposed regulations. We agree that including the noted information in the preamble of the NPRM would increase transparency to a certain extent. We do not agree that it would be difficult to disclose meetings with outside parties during the specific time frame noted

and point to the fact that the Department already followed a similar process for disclosing private meetings held with outside parties following the public comment period.

### *Filing of Financial Disclosure Reports*

We determined that the Department did not require all Department employees who worked on the GE regulations to file a financial disclosure report. Although senior officials working on the GE regulations filed annual public disclosures (Office of Government Ethics (OGE) Form 278) as required, the Department did not require all other employees working on the GE regulations to file annual confidential disclosures (OGE Form 450); only those employees who were also supervisors or managers would have filed a confidential disclosure. While the Department is not specifically required to include all of these employees as required filers, we believe it is a better practice for the Department to follow as these employees may have access to information that could be used for personal financial gain in violation of ethics requirements.

The Department did perform a special review for potential conflicts after the GE rulemaking was underway. In late 2010, OGC conducted a review of relevant stocks and interests held by senior officials involved in formulating GE policy. The purpose of OGC's screening was to determine whether senior officials working on the GE regulations had financial interests or other connections that would cast doubt on their impartiality in that area. This included financial holdings in, or professional or personal ties to, for-profit educational companies or financial firms with any significant interest in such companies. To perform the review, OGC developed a search protocol for 14 senior officials that included: (1) reviewing the officials' public financial disclosure forms; (2) searching for stocks held by the officials by searching for their names in the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval database; and (3) searching the officials' names along with specified keywords in a web search engine. In a draft memorandum dated December 10, 2010, OGC noted that none of the officials included in its review maintained financial interests in for-profit educational institutions or financial institutions with an interest in the success or failure of for-profit companies.

However, we noted that this screening process was not performed until after the NPRM was published for public comment and allegations of improper activity began being asserted by Congressional leaders. In addition, the screening process was not performed for staff who filed a confidential disclosure or for other staff working on the regulations who were not required to file a confidential disclosure.

A Federal criminal conflict of interest statute, 18 U.S.C. § 208, and the Federal standards of ethical conduct, 5 C.F.R. § 2635.502, provide that Federal employees may not work on matters that could affect their own financial interests, such as personal investments and investments of their family members, or the interests of a family member's employer. To identify potential conflicts of interests, the Ethics in Government Act requires senior officials to file an annual public financial disclosure (OGE Form 278) and requires other employees working in sensitive areas designated by their agencies to file an annual confidential disclosure (OGE Form 450).

While the Ethics in Government Act requires all senior officials in the executive, legislative and judicial branches to file public reports of their finances as well as other interests outside the Government, agency ethics officials have discretion in determining who is required to file confidential disclosure forms based on criteria provided by OGE. The Department's Designated

Agency Ethics Official (DAEO) noted that in determining required filers, she considers the nature of the employee's position and the employee's authority to exercise supervisory discretion. She noted that she includes any employees in supervisory and managerial positions as employees who must file disclosures, as well as contracting personnel. There was no additional consideration outside the process noted for employees involved in rulemaking. As a result, not all Department employees who worked on the GE regulations were subject to review for potential conflicts of interest. While we did not become aware of any actual conflicts of interest among the employees who did not file, the Department missed the opportunity to review for potential conflicts of interest. Failure to require employees who work on rulemakings to file the confidential financial disclosure forms could compromise the integrity of the rulemaking process.

In its comments provided in response to the preliminary findings presented at our exit conference, the Department stated its disagreement with the need to have all employees involved in rulemaking file disclosure forms beyond those already required to file. The Department noted that this would be inconsistent with the law and runs counter to the discretion provided to OGE and the agency head in determining which employees in the agency should be required to file confidential financial disclosure reports. The Department further stated that employees that are not currently required to file disclosures act in the context of a collaborative process that involves many Department employees across offices and at various levels of the organization and they are not in a position to exercise significant independent judgment or to make final decisions. The Department believes the danger that a non-senior employee may individually violate the conflict of interest rules does not generally endanger the integrity of the overall process. The Department added that it was proactive in conducting a conflict of interest review with response to the Department's senior officials involved in the GE rulemaking process, that the measures taken by the Department with regard to this rulemaking were the appropriate ones in this matter, and the use of appropriate discretion is warranted.

As noted previously, we recognize that the Department is not specifically required to include all employees involved in rulemaking as required filers; however, we believe it is a better practice for the Department to follow with regard to rulemakings with the potential to affect publicly traded entities and note that ethics rules permit the designation of additional filers. While employees that are not currently required to file a disclosure may not be in a position to determine the outcome of a rulemaking, these employees can nevertheless influence the outcome and would have access to information that could be used for personal financial gain in violation of ethics requirements, which can affect public confidence in the overall process. We would point out that without the requirement for employees to file disclosure forms, the Department has no ability to determine whether actual or potential conflicts of interest even exist. Further, we disagree that the additional measures taken by the Department to screen senior officials for conflicts of interest was proactive for this rulemaking, as the screening did not occur until after the NPRM had been issued and allegations of improper activity began being asserted by Congressional leaders.

## Recommendations

We recommend that the Secretary of Education ensure that the appropriate Department officials:

- 2.1 Develop and implement a general written policy on the handling of private communications with outside parties during each phase of rulemaking proceedings and make the policy available to all Department employees. It could include communication considerations for rulemaking, the types of information Department staff may share with outside parties, how meetings with these parties should be conducted, and general legal and ethical principles for consideration, similar to what the Department previously prepared for other rulemakings referenced in this report.
- 2.2 Consider publicly disclosing all relevant meetings with outside parties that occur after the public negotiated rulemaking sessions end and prior to the issuance of an NPRM, similar to the process followed for the disclosure of private meetings held following the public comment period, to increase transparency in the process.
- 2.3 Require employees who work on rulemakings with the potential to affect publicly traded entities to file confidential financial disclosures.

## Department Comments

In response to recommendation 2.1, the Department noted that while it believes that its negotiated rulemaking process is already strongly supported by appropriate controls, it is committed to continuous improvement and will continue to look for ways to strengthen its process where appropriate. The Department stated that guidance given to employees during the gainful employment rulemaking was designed specifically for the events that occurred during this rulemaking and that it would not necessarily be applicable to other negotiated rulemakings. The Department added that the unique and tailored guidance offered during this rulemaking contributed significantly to the fact that there were no improper communications. While the uniqueness inherent in each negotiated rulemaking makes it difficult to design a single set of guidelines and warrants flexibility to better ensure that the Department is able to accommodate a varied and wide range of interests, the Department recognizes the importance of developing guidance that informs employees how to handle communications with outside parties at various phases of the rulemaking process and will consider developing further general written policy guidelines in this area. The Department requested that OIG provide specific information it reviewed concerning other agencies' policies in this area to assist in the Department's consideration of this issue.

With regard to recommendation 2.2, the Department stated it will evaluate the potential of additional ways to share information about meetings held with outside parties after public negotiated rulemaking sessions end and before an NPRM is issued. It stated it will continue to consult with other agencies that engage in negotiated rulemakings to further identify best practices and consider incorporating additional best practices used by other agencies, if it is determined that those practices would improve meeting disclosure practices. The Department stated that it was committed to having an open and fair rulemaking process in which all interested parties have access to participate and also to ensuring that the rulemaking process is transparent.

In response to recommendation 2.3, the Department stated that it is satisfied that its current financial conflicts review practices fully meet the need to ensure the fairness and ethical nature of the rulemaking process and is gratified that in its audit, the OIG did not find any conflicts of interest among employees who worked on the gainful employment rulemaking. It acknowledges the concern surrounding conflicts of interest among employees working on future rulemakings that affect publicly traded companies. To address this concern, the Department stated it will consult with other agencies that engage in rulemakings that affect publicly traded entities to learn about any additional policies and possible best practices regarding implementation of the confidential financial disclosure system, particularly as they relate to employees working on rulemakings. It will incorporate further practices into its own process if appropriate. The Department added that it would further consult with OGE about appropriate steps that could be taken to address the interests reflected in the recommendation.

### **OIG Response**

We acknowledge the Department's commitment to continuous improvement and the actions it is planning to take in response to the recommendations. We will separately provide information specific to other agency policies regarding communications with outside parties that was reviewed as part of this audit.

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## OTHER MATTER

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On January 21, 2009, President Obama signed Executive Order 13490, “Ethics Commitments by Executive Branch Personnel.” The order requires every political appointee to sign an Ethics Pledge (Pledge) that includes several commitments. Paragraph 2 of the Pledge prohibits appointees from participating in any particular matter involving specific parties that is directly and substantially related to their former employer or former clients for a period of 2 years from the date of their appointment. This includes any meetings or communications with their former employer that are related to the appointee’s official duties, unless the communication is in reference to a general policy matter and participation in the meeting is open to all interested parties.<sup>10</sup> The Pledge also does not prohibit employees from maintaining personal friendships with colleagues who continue to work for a former employer.

During the course of our audit, we noted that a former high-level Department official engaged in communications with his former employer during the period in which he was subject to the Pledge, which he signed in April 2009. Specifically, we identified six instances in which this official corresponded directly, via email, with his former employer. We also identified one instance in which another Department official stated that the former official had provided informal feedback on two draft documents that were prepared by his former employer; however, the former official was not included on this email exchange. We consulted with the Department’s DAEO and concluded that there may have been a violation of the commitment that he agreed to upon entering the Federal Government.

As a means of mitigating the risk of future lapses in this area, we suggest that the Secretary remind all political appointees of their ethical obligations at least annually, to include a discussion of the ban on participating in any particular matters involving specific parties that are directly and substantially related to former employers or former clients.

Our investigations office is reviewing this matter further.

### Department Comments

The Department stated that the basis for including this matter in the draft report is unclear, noting that it appears to be beyond the scope of the audit. The Department further stated that suggesting the Secretary take action based on an ongoing review, which has not yielded any findings other than that a provision of the Ethics Pledge may have been violated, may be premature. The Department added that including the matter in the draft report seemed inappropriate and requested that the item be deleted from the final report.

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<sup>10</sup> Because opening a meeting to “all interested parties” would be impractical, OGE has opined that “meetings do not have to be open to all comers, but should include a multiplicity of parties” (i.e., five or more stakeholders, to include a former employer or former client). (OGE DO-09-011)



## **OIG Response**

The purpose of the Other Matters section of a report is to communicate information that may not fit in other sections of the report, to include issues needing further study, or issues identified during the audit that are outside of the audit objective or scope. In this case, the communications cited fell within the audit timeframe noted, were between a Department official and outside party, and several were identified as relating to gainful employment.<sup>11</sup> While we did not find any improper disclosure of sensitive information in the noted emails, the communications themselves were identified as potentially problematic from an ethical standpoint and are appropriately included in the Other Matters section of this report as an issue falling outside of the audit objective and in need of further review. We do not believe it to be premature to suggest actions that would help to mitigate the risk of future incidents in this area.

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<sup>11</sup> Due to concerns about potential ethics violations, we subsequently expanded our review to include all communications with the former employer falling within our audit timeframe.

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## OBJECTIVE, SCOPE, AND METHODOLOGY

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The initial objective of our audit was to determine whether the Department had a process for handling embargoed regulations and protocols related to the protection of sensitive information for Department staff involved in the negotiated rulemaking process. A few months into our fieldwork, we determined that in order to adequately address concerns being raised by members of Congress and public interest groups, we needed to significantly expand the scope of our audit work to include communications that took place between Department officials and outside parties. We subsequently revised our audit objective. The revised objective of our audit was to determine whether the Department appropriately handled sensitive information during the negotiated rulemaking process, specifically between the end of the public negotiated rulemaking sessions in January 2010 and the publication of the NPRM in July 2010.

To accomplish our objective, we gained an understanding of internal control applicable to the Department's processes for safeguarding sensitive information and communicating with outside parties during the development of the proposed GE regulations. We reviewed applicable laws and regulations, executive orders, OMB memoranda, Federal Register notices, Department policies and procedures, and GAO's "Standards for Internal Control in the Federal Government." We reviewed the Department's public website for information concerning the GE negotiated rulemaking sessions, the Department's position on GE, and public hearings and private meetings that were held with outside parties during the negotiated rulemaking process. We conducted discussions with Department officials to obtain an understanding of controls in place over the negotiated rulemaking process, including any policies or guidance regarding communications with outside parties during the development of proposed regulations and the handling of sensitive information, as well as processes for identifying potential conflicts of interest of involved staff and officials. We also searched for related policies and guidance prepared by other federal agencies. We subsequently identified four agencies that had related policies, to include the Department of Transportation, Department of Energy, Department of the Interior, and the Consumer Financial Protection Bureau, and reviewed them to identify potential best practices.

We reviewed email communications between Department officials and outside parties, to include documentation attached to the emails, dated between January 1, 2010, and July 30, 2010. We analyzed the email communications and documentation to determine whether Department officials inappropriately disclosed sensitive information after the negotiated rulemaking sessions ended on January 29, 2010, and before the GE NPRM was published on July 26, 2010. We also examined hardcopy and electronic calendars maintained by Department officials, to include related email communications, to identify scheduled meetings between Department officials and outside parties during this time period where the topic of discussion appeared to be related to GE. We interviewed applicable Department officials to follow-up on related emails and meetings as necessary. Additional information on the scope and methodology applicable to each of these areas is presented below.

### Email Communications and Related Documentation

To determine whether the Department appropriately handled sensitive information, we obtained all email communications for the period January 1, 2010, through July 30, 2010, for 11 Department officials who were significantly involved in the development of the proposed GE regulations. We also obtained email communications falling within the same time period related to any Department employee that had either sent emails to or received emails from any of 14 individuals who were known to represent investment companies, student advocacy groups, and research firms. In addition, we obtained all email communications between Department employees and outside parties associated with any of nine email domains registered to investment companies, student advocacy groups, and research firms. A total of 357,095 items were subsequently made available for review. We searched these items using terms that were related to GE and the for-profit education industry. This search resulted in the identification and subsequent review of 57,840 items.

We reviewed unredacted versions of documents that were released by the Department to the Citizens for Responsibility and Ethics in Washington (CREW) under its Freedom of Information Act (FOIA) request related to development of the GE regulations. We also reviewed documents that the Department determined were not releasable under FOIA and were, therefore, withheld from CREW. We were provided with and reviewed a total of 11,105 pages of documentation.

We also reviewed 83 emails that were released by the Department to the Coalition for Educational Success under its FOIA request. This request sought documents related to communications between any Department officials and investors who may have had a financial interest in the for-profit education industry.

We reviewed 574 pages of email correspondence that were included in the Department's response to a request from the chairman of the House Committee on Oversight and Government Reform. The chairman requested all documents related to contacts or communications between and among specifically identified Department officials and outside parties involved in the GE rulemaking process.

In total, we reviewed over 69,602 pages of documentation,<sup>12</sup> consisting primarily of emails,<sup>13</sup> as part of our audit. In addition to reviewing the emails and related documentation for any inappropriate disclosures of sensitive information, we further sorted and analyzed each item where applicable to determine the types of entities that were communicating with Department employees, who was initiating the communications, and the purpose of the communications.

### Hardcopy and Electronic Calendars

We obtained the electronic calendars associated with the 11 Department officials for the period January 1, 2010, through July 31, 2010, who were significantly involved in the negotiated rulemaking process for GE. We obtained additional hardcopy calendars maintained by 5 of those 11 officials and reviewed the calendars to identify meetings, including conference calls, scheduled with outside parties where the topic of discussion appeared to be related to negotiated

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<sup>12</sup> See footnote 1 on page 2.

<sup>13</sup> See footnote 2 on page 2.

rulemaking for program integrity issues. We identified 150 such meetings, 60 of which appeared to be specifically related to GE. We further analyzed the 60 identified meetings to determine the types of entities Department officials were meeting with, who was requesting the meetings, and the number of times each entity type was met with.

#### Other

As a result of information reviewed during our audit, we subsequently reviewed the official ethics file for a former Department official that was significantly involved in the GE negotiated rulemaking process to determine whether he was prohibited from communicating with his former employer during the process and, if so, what exactly was prohibited. We also held discussions with the DAEO and other Department officials to obtain additional information on rules governing conflicts of interest and the ethics obligations that appointees must commit to upon entering the Federal Government.

We conducted fieldwork at Department offices in Washington, D.C. from January 2011 through April 2012. We provided our preliminary audit results to Department officials during an exit conference conducted on May 1, 2012.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives.

**Acronyms/Abbreviations/Short Forms Used in this Report**

CAP	Corrective Action Plan
C.F.R.	Code of Federal Regulations
CREW	Citizens for Responsibility and Ethics in Washington
DAEO	Designated Agency Ethics Official
DC	District of Columbia
Department	U.S. Department of Education
FOIA	Freedom of Information Act
GAO	Government Accountability Office
GE	Gainful Employment
HEA	Higher Education Act of 1965, as amended
NPRM	Notice of Proposed Rulemaking
OGC	Office of the General Counsel
OGE	Office of Government Ethics
OIG	Office of Inspector General
OMB	Office of Management Budget
Pledge	Ethics Pledge
U.S.C.	United States Code



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202

**TO:** Michele Weaver-Dugan, Director  
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Office of Inspector General

**FROM:** Georgia Yuan *Georgia Yuan*  
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David Bergeron *David Bergeron*  
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Phil Rosenfelt *Phil Rosenfelt*  
Deputy General Counsel, Delegated the Authority to Perform the  
Functions and Duties of the General Counsel; Office of the General Counsel

**DATE:** June 8, 2012

**SUBJECT:** Response to Draft Audit Report, Department's Negotiated Rulemaking Process  
for Gainful Employment Activities, Control Number ED-OIG/A19L0002

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The purpose of this memorandum is to respond to your Draft Audit Report, Control Number ED-OIG/A19L0002, titled Department's Negotiated Rulemaking Process for Gainful Employment Activities (the draft Report). Thank you for the opportunity to review and comment on your draft audit findings. On behalf of the U.S. Department of Education (Department), we appreciate your thorough review of the communications made during the gainful employment rulemaking process. The Department took a number of steps to ensure that the gainful employment negotiated rulemaking was a lawful, ethical process, and we are pleased that you concluded that the Department appropriately handled sensitive information during the rulemaking.

The Department remains committed to ensuring that all aspects of the negotiated rulemaking process are handled appropriately, and the process is as effective as possible. As explained in more detail below, while we have comments on certain parts of the draft Report, we will closely review the findings and recommendations in the final Report and, where appropriate, incorporate them into future negotiated rulemakings under Title IV of the Higher Education Act of 1965, as amended (HEA).

## **FINDING NO. 1 – The Department Appropriately Handled Sensitive Information During the Gainful Employment Negotiated Rulemaking Process**

### Department's response

We concur with Finding No. 1 in the draft Report and are gratified that the Department's very careful handling of sensitive information was validated. Starting with the public meetings the Department held in November 2009 until the final rule's release in June 2011, the gainful employment rulemaking generated a level of public interest unprecedented for the Department. The Notice of Proposed Rulemaking (NPRM) alone elicited approximately 90,000 public comments. In the planning stages, and as it became apparent that gainful employment was a unique rulemaking in terms of the amount of public interest as well as the diversity of interested parties, the Department took a number of steps to ensure that it was prepared for the high level of interest. For example, attorneys in the Office of the General Counsel (OGC) provided guidance to employees working on the rulemaking about how to handle communications with outside parties. After receiving this guidance, when outside parties asked Department employees for specifics about the proposed rule, the employees responded that they could not disclose sensitive information. (p. 7). The Department also put controls on sensitive information leading up to the release of the final rule. Specifically, OGC provided draft language to Department employees working on the rulemaking in paper copy or in a password-protected file and employees were directed not to make copies or distribute documents and were required to return copies to OGC after review. (p. 8). These are only a few examples of the measures the Department put in place to maximize and help ensure the integrity of the negotiated rulemaking process.

As noted in the draft Report, the U.S. Department of Education Office of Inspector General (OIG) was asked to audit the Department's communications with outside parties between the end of the public negotiated rulemaking sessions and the publication of the NPRM. To investigate the propriety of the thousands of communications that occurred during the relevant time period, the OIG interviewed a number of Department officials involved in the gainful employment rulemaking process. The Department also provided the OIG with copies of communications between Department employees working on the rulemaking and outside parties. Ultimately, the Department made available hundreds of thousands of pages of communications for review. We are confident that the access granted to the OIG during this undertaking, which allowed for review of all relevant documents and interviews with officials involved in the rulemaking, provided sufficient information for a valid and reliable Report.

Having actively worked throughout the negotiated rulemaking process to ensure integrity and fairness at all stages, the Department is gratified that the OIG found that there was "no improper disclosure of sensitive information by Department officials in their communications with outside parties between the end of the public negotiation rulemaking sessions and the publication of the [gainful employment] NPRM." (p. 6). The Department is also pleased that the OIG reviewed the events leading up to the publication of the NPRM and had "no concerns regarding Department activities, to include its communications strategy, preceding the release of the [gainful employment] NPRM." (p. 6). The Department went to great effort to ensure that the rulemaking process was handled properly at every stage, and while pleased with these findings, the

Department remains fully committed to continuing to ensure that conduct in connection with all stages of future rulemakings is appropriate.

There is one part of Finding No. 1 that appears to be beyond the scope of the audit. The OIG discussed an education services industry research report, in which an investment firm analyst wrote that the Department submitted draft gainful employment regulations to another government entity for review and contends that the other entity provided the analyst who wrote the report with information about the substance of the draft regulations. (p. 10). In the draft Report the scope of the audit is defined as being limited to “communications that took place between Department officials and outside parties.” (pp. 1-2). The matter discussed in Finding No. 1 concerns information about communications between two outside parties and therefore falls outside the defined scope. As part of the audit process, the Department, as auditee, has been granted an opportunity to review the draft Report before its release. However, consistent with established OIG practice, the other entity has not been given an opportunity to address this matter, further supporting the fact that this matter can be viewed as outside of the scope of this audit.

Moreover, in the draft Report the OIG did not discuss whether it investigated the source of the alleged disclosure or if the information allegedly disclosed was ever put to use. The draft Report provided only a very limited context surrounding the statement about the research analyst’s report. The only information related to the alleged disclosure is that there exists a research report from an investment analyst in which the analyst makes an assertion apparently without identifying a source. The paucity of factual information provided surrounding the alleged disclosure, weighed against the potential seriousness of the allegation, calls into question its inclusion in the draft Report. We respectfully request that the OIG provide appropriate context and clarification on this part of the discussion under Finding No. 1 or delete it from the final Report. As an alternative, based on the factors mentioned above, this matter could be mentioned in the “Other Matters” section, and the OIG could indicate that it has not collected information about this matter because it is outside of the scope of the audit.

## **FINDING NO. 2 – The Department Could Further Strengthen its Negotiated Rulemaking Process**

### **OIG Recommendation 2.1**

Develop and implement a general written policy on the handling of private communications with outside parties during each phase of rulemaking proceedings and make the policy available to all Department employees. It could include communication considerations for rulemaking, the types of information Department staff may share with outside parties, how meetings with these parties should be conducted, and general legal and ethical principles for consideration, similar to what the Department previously prepared for other rulemakings referenced in this Report.



## Department's response

While the Department believes that its negotiated rulemaking process under Title IV of the HEA is already strongly supported by appropriate controls, the Department is committed to continuous improvement and will continue to look for ways to strengthen its process where appropriate. The Department is generally required to use negotiated rulemaking to develop proposed regulations under Title IV of the HEA. While the statute imposes several principles with which the Department must comply when conducting a rulemaking under Title IV of the HEA (i.e., to obtain public involvement in the development of proposed regulations, submit the regulations to a negotiated rulemaking process, and take into account certain considerations when choosing negotiators), the principles can be adapted to the circumstances presented by each rulemaking.<sup>1</sup> 20 U.S.C. § 1098a. For example, the number of public hearings held to elicit input in a rulemaking, and whether to supplement public hearings with additional communications to inform stakeholders, are pieces of the rulemaking process that can be tailored to fit the complexity of issues involved in the rulemaking and the level of interest from stakeholders.

The Department also works with OMB on negotiated rulemakings conducted under Title IV of the HEA, and OMB must comply with its own requirements that control rulemaking proceedings, including negotiated rulemaking. The implementation of these requirements presents additional opportunity for rulemakings to unfold in different ways. For example, the gainful employment rulemaking included a series of meetings convened by OMB under Executive Order 12866 that allowed interested parties to provide feedback on the proposed rule. This was the first time that regulated parties and others interested in a Department rulemaking sought meetings under Executive Order 12866, although this process has been in place since 1993.

Guidance given to employees during the gainful employment rulemaking was designed specifically for the events that occurred during this rulemaking. Among other topics, OGC provided guidance on how Department employees should communicate with outside parties at various stages of the rulemaking process to ensure the integrity of the rulemaking. The guidance for the gainful employment rulemaking, and the period of time during which meetings were held under Executive Order 12866 in particular, would not necessarily be applicable to other negotiated rulemakings. We think that the unique and tailored guidance offered during the gainful employment rulemaking contributed significantly to the fact that there were no improper communications.

While the uniqueness inherent in each negotiated rulemaking makes it difficult to design a single set of guidelines and warrants flexibility to better ensure that the Department is able to accommodate a varied and wide range of interests, the Department recognizes the importance of developing guidance that informs employees how to handle communications with outside parties at various phases of the rulemaking process. Accordingly, building on the success and the

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<sup>1</sup> The Secretary must submit regulations developed under Title IV of the HEA to negotiated rulemaking unless he “determines that applying such a requirement to given regulations is impracticable, unnecessary, or contrary to the public interest[.]” 20 U.S.C. § 1098a.

lessons learned in this negotiated rulemaking, the Department will consider developing further general written policy guidelines to advise employees how to handle communications with outside parties during rulemakings conducted under Title IV of the HEA. The Department will closely review and consider the sample provisions listed in OIG Recommendation 2.1 for inclusion in any guidelines it develops.

The Department continually considers best practices among other agencies, and to assist in the Department's consideration of this issue, it would be helpful if the OIG would provide additional information related to your audit findings in the final Report or in a supplementary document. In the draft Report, you explain that you reviewed other agencies' policies for communications with outside parties during the development of proposed regulations and found only one agency that requires its staff to disclose these communications. (p. 12). It would be helpful if you could identify the agency that requires its employees to disclose certain communications, whether that requirement is a written rule or policy, the agency's reasons for the policy or rule, and the substance of the requirement.

#### OIG Recommendation 2.2

Consider publicly disclosing all relevant meetings with outside parties that occur after the public negotiated rulemaking sessions end and prior to the issuance of an NPRM, similar to the process followed for the disclosure of private meetings held following the public comment period, to increase transparency in the process.

#### Department's Response

The Department shares your commitment to having an open and fair rulemaking process in which all interested parties have access to participate and also to ensuring that the rulemaking process is transparent. Indeed, early in the rulemaking the Department held conference calls with institutions and analysts to further explain the planned rulemaking and conducted public meetings around the country to solicit public input on the topics to be negotiated. Later, the Department held three public rulemaking sessions (each five days), published the approximately 90,000 public comments it received in response to the NPRM, and published information about all public and private meetings held after it published the NPRM.

In response to Recommendation 2.2, the Department will evaluate the potential of additional ways to share information about meetings held with outside parties after public negotiated rulemaking sessions end and before an NPRM is issued. The Department will further continue to consult with other agencies that engage in negotiated rulemakings to further identify best practices and consider incorporating additional best practices used by other agencies, if it is determined that those practices would improve our meeting disclosure practices.

#### OIG Recommendation 2.3

Require employees who work on rulemakings with the potential to affect publicly traded entities to file confidential financial disclosures.

### Department's Response

The Department is satisfied that its current financial conflicts review practices fully meet the need to ensure the fairness and ethical nature of the rulemaking process and is gratified that in its audit, the OIG did not find any conflicts of interest among employees who worked on the gainful employment rulemaking. We believe this finding comes as a result of the conflicts review the Ethics Division in OGC initiated when it became aware that the gainful employment rulemaking was highly sensitive and involved the interests of publicly traded companies. The Ethics Division tailored its review to the specific nature and facts of this rulemaking process and reviewed the financial disclosure reports filed by the senior officials involved in the rulemaking.

The Department stands by the results of the conflicts review performed by the Ethics Division, but it acknowledges the concern surrounding conflicts of interest among employees working on future rulemakings that affect publicly traded companies. To address this concern, the Department will consult with other agencies that engage in rulemakings that affect publicly traded entities to learn about any additional policies and possible best practices regarding implementation of the confidential financial disclosure system, particularly as they relate to employees working on rulemakings. If appropriate, the Department will incorporate further ideas and practices used by other agencies in our own process. Additionally, the Ethics Division will further consult with the U.S. Office of Government Ethics (OGE) specifically about the recommendation that employees who work on rulemakings with the potential to affect publicly traded entities file confidential disclosure forms. OGE is the "supervising ethics office" for the Executive Branch under the Ethics in Government Act and, as such, establishes the criteria for when an employee is required to file a confidential financial disclosure form. We are hopeful that OGE can provide useful guidance on appropriate steps to address the interests reflected in Recommendation 2.3. We remain committed to ensuring that our rulemakings continue to comply with the highest ethical standards.

To clarify one issue related to Recommendation 2.3, the Department encourages the OIG to include in the final Report the fact that all regulations affecting Title IV programs potentially affect publicly traded companies. Publicly traded companies are within the definition of institutions that may be eligible to participate in the Title IV programs, and therefore regulations promulgated under this title will potentially affect them. Including this point in the final Report will clarify the scope of impact of the OIG's recommendation.

### Other Matter

The OIG indicated that it continues to review a former Department official who was involved in the gainful employment rulemaking and allegedly engaged in communications with a former employer, potentially in violation of applicable ethics standards. The OIG also suggested, based on the ongoing review, that the Secretary remind all political appointees of their ethical obligations.

### Department's Response

The basis for including this matter in the draft Report is unclear. The OIG found that the Department appropriately handled sensitive information, and this finding addressed the scope of the audit. The matter concerning the former Department official appears to be beyond the scope of the audit, as it does not appear to concern communications about the gainful employment rulemaking during the applicable period of time. Further, publicly disclosing the ongoing review in the draft Report conflates an ethics issue about contacts with past employers with the substance of this audit. Also, the employee we believe is identified as the subject of the review has left the Department. There is no risk of future ethical violations and the need to disclose this matter while the review is ongoing is significantly mitigated. Finally, suggesting that the Secretary take action based on the ongoing review, which has not yielded any findings other than that a provision of the Ethics Pledge "may" have been violated, may be premature. We can assure you, however, that Department officials, including officials in the Ethics Division of the Office of the General Counsel, frequently remind all political appointees and career staff of their ethical obligations. We will participate appropriately and cooperate fully in the OIG's audit or other review of this matter if called upon to do so, but including the matter in the draft Report seems inappropriate, and we respectfully request that the item be deleted from the final Report.

### Technical Correction

Discussing the methodology used in the audit, the OIG mentioned the fact that it reviewed documents produced to the Chairman of the House Committee on Oversight and Government Reform in response to a request he made. The draft Report describes the Chairman's request as seeking "all documents related to contacts or communications between and among Department officials and outside parties involved in the rulemaking process." (p. 19). The Department's review of the request indicates it was more specific. The Chairman requested that the Department produce documents related to communications between certain Department officials and certain outside parties, and included an attachment that identified both groups of parties at issue. (Oct. 20, 2011, correspondence). We request that the final Report be corrected to accurately reflect this fact.

We appreciate the opportunity to comment, and please let us know if you have any questions about our comments or need further information.