submit herewith the Comments of the below listed nationally recognized accrediting agencies on the proposed Final Judgment against the American Bar Association.

Accrediting Bureau of Health Education Schools (ABHES)
Accrediting Council for Continuing Education & Training (ACCET)
Accrediting Council for Independent Colleges and Schools
National Accrediting Commission of Cosmetology Arts & Sciences

You will note that we have asked for a hearing before the Court. We would appreciate a copy of any response to our Comments that you may file with the Court.

Sincerely,

C. William Tayler

CWT:das
Enclosure

cc:
U.S. Department of Education (w/encl.)
Participating Accrediting Agencies (w/encl.)
William C. Clohan, Jr., Esq. (w/encl.)
David T. Pritken, Esq. (w/encl.)

United States District Court for the District of Columbia

United States of America, Plaintiff, v. American Bar Association, Defendant. Civil Action No.: 95–1211(CR), Judge Charles R. Richey, Deck Type: Antitrust.

Comments and Suggested Modification of Proposed Final Judgment and Request for Hearing

The undersigned recognized accrediting agencies (''the agencies''), by counsel, hereby submit the following Comments and Suggested Modification to the proposed final judgment in this manner. The agencies also respectfully request a hearing concerning modification and entry of the proposed final judgment in this matter.

Introduction

The agencies are all formally recognized by the United States Department of Education. They submit that the proposed final judgment is inconsistent with current antitrust law in this circuit with respect to the applicability of the antitrust laws in the field of accreditation and in those areas subject to oversight by Congress and other federal government agencies. In this connection, the proposed final judgment fails to recognize the significant role of the United States Department of Education in accreditation as mandated by the Congress in the Higher Education Act of 1965, as amended. 20 U.S.C. § 1099b. The agencies submit that this Court should ensure that the proposed final judgment not undermine or otherwise limit the important purposes of the Higher Education Act.[1]

Thus, the agencies respectfully submit that the proposed final judgment be modified by adding an additional sentence to Part XI(C) as follows: ''Nothing in this judgment shall be construed to modify any of the provisions of the Higher Education Act of 1965, as amended, or any of the regulations adopted pursuant thereto, or any existing law concerning the recognition of private accrediting agencies, or the activities of such agencies relating thereto.''

The Framework of Recognition of Private Accrediting Agencies

Private accrediting agencies are recognized by the Department of Education under the provisions of the Higher Education Act of 1965 (HEA), Pub. L. 89–329, 20 U.S.C. 1001, et seq. as amended, and are subject to a significant oversight by the Secretary of Education. Recognition is a process by which the Secretary of Education determines that an accrediting agency is a ''reliable authority as to the quality of education or training offered'' at the institutions accredited by the agency. 20 U.S.C. 1099b(a). Accreditation by a recognized accrediting agency is a prerequisite to the ability of students to obtain federal financial assistance. See 20 U.S.C. § 1085(c).

For an accrediting agency to be ''recognized,'' the Secretary must conduct a comprehensive review and evaluation of the accrediting agency to determine whether the agency meets the standards established by the law. 20 U.S.C. 1099b(n). An accrediting agency may be recognized for a period of no more than five years and must apply to be re-recognized by the Secretary. 20 U.S.C. 1099b(d).

An accrediting agency seeking recognition from the Department of Education must have accrediting standards which assess the following areas of activity of educational institutions:

1. Curricula
2. Faculty
3. Facilities, equipment and supplies
4. Fiscal and administrative capability
5. Student support services
6. Recruiting and admissions policies
7. Academic calendars, catalogues, publications, grading and advertising
8. Program length
9. Tuition and fees
10. Measures of program length
11. Course completion, State licensing examination and job placement rates
12. Default rates
13. Student complaints
14. Compliance with program responsibilities

20 U.S.C. 1099b(a). The Secretary of Education is required by the Congress to conduct oversight activities even during periods of recognition. 20 U.S.C. 1099b(n). Thus, it is clear that the oversight role of the Department of Education is, as required by Congress, extensive. In this connection, the Secretary has further authority to promulgate regulations concerning the recognition process. 20 U.S.C. 1099b(o).

Application of the Antitrust Laws to Accrediting Agencies

Since at least 1970, the courts have shown substantial deference to accrediting agencies in recognition of their expertise in the area of educational accreditation.[2] In the case of *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit specifically rejected an antitrust challenge to the actions of private accrediting agencies: ''We do not believe that Congress intended this concept [accreditation] to be molded by the policies underlying the Sherman Act.'' *Id*. at 655. As recently as 1993, federal courts have recognized the continuing viability of *Marjorie Webster*,[3] and it remains the law in this Circuit. The continued applicability of *Marjorie Webster* in the field of accreditation has never been questioned in court decisions.

Five years after *Marjorie Webster* was decided, the Supreme Court was called upon to address the applicability of the antitrust laws in circumstances where there is an inconsistency with federal agency activity. In *U.S.* v. *National Ass'n of Sec. Dealers*, 422, U.S. 694 (1975) and *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), the Supreme Court held that when there is an inconsistency between a federal regulatory scheme and the antitrust laws, there is an implied immunity from the antitrust laws for the conduct subject to the agency's scheme. This rule has been recognized and applied in the context of several federal statutory frameworks, including the Federal Communications Commission,[4] the Securities and Exchange Commission,[5] and the Interstate Commerce Commission.[6]

Ramifications of the Proposed Final Judgment

The Department of Justice is asking this Court to approve a broad, in-depth intrusion of the Sherman Act into the field of educational accreditation that will have a chilling effect on the entire accreditation process and conflict with the Higher Education Act of 1965, as amended. Nowhere in the proposed final judgment does the Department of Justice attempt to reconcile this intrusion in light of the existing precedent in this Circuit and the implied immunity doctrine relating to activities subject to federal agency oversight.

Arguably, many accrediting agency standards adopted in connection with 20 U.S.C. § 1099b(a)(5) could be the basis for claims of anticompetitive activity. Yet the Congress has clearly legislated that these

[1] By submitting these comments, the agencies are not taking a position on the merits of the current litigation.

[2] See *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970); *Wilfred Academy of Hair and Beauty Culture v. Southern Ass'n of Colleges and Schools*, 957 F.2d 210 (5th Cir. 1992); *Medical Inst. of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F.2d 1310 (8th Cir. 1987); *Peoria School of Business, Inc. v. ACCET*, 805 F. Supp. 579 (N.D. Ill. 1992); *Transport Careers, Inc. v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986): *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

[3] See *U.S. v. Brown University, et al.*, 5 F.3d 658 (3rd. Cir. 1993).

[4] See *Phonetelle, Inc.* v. *American Telephone and Telegraph Co.*, 664 F.2d 716 (1981).

[5] See *Finnegan* v. *Campeau Corp.*, 915 F.2d 824 (2nd. Cir 1990); *Shumate & Co., Inc.* v. *NYSE, Inc.*, 486 F. Supp. 1333 (N.D. Tex. 1980).

[6] See *Waldo* v. *North American Van Lines*, 669 F. Supp 722 (W.D.Pa. 1987).