



March 6, 2007

Honorable Susan C. Schwab
United States Trade Representative
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Schwab:

We write on behalf of the undersigned higher education associations representing more than 4,000 public and private two- and four-year colleges and universities in the United States and the seventeen million students they serve. We have met repeatedly with officials in your office over the past six years to express our ongoing concerns with respect to the U.S. offer on higher education services in the General Agreement on Trade in Services (“GATS”) portion of the Doha Round negotiations. We followed up our 2001 and 2003 meetings with letters outlining our concerns.

At this important juncture, as the United States and other WTO members attempt to move the Doha Round forward, we write to reiterate our serious reservations about the possible inclusion of higher education under the higher (tertiary) education services sector of the United States. We do not believe that the current U.S. offer would best serve the interests of American higher education. We continue to hold the view that the U.S. offer fails to provide adequate protections to three unique features of the U.S. higher education sector: (1) the substantial mix of public and private institutions; (2) institutional autonomy; and (3) decentralized governance (i.e., the primary regulation of higher education is at the state, not the federal, level). These features are essential to the strength of the U.S. higher education sector of which this nation is justifiably proud. We are concerned that, in an effort to open certain markets for a handful of institutions or companies, the current U.S. offer will have the unintended consequence of undermining the strengths of U.S. higher education.

On January 23, 2007, we met with USTR officials, including Deputy Assistant USTR Christopher P. Melly, to explain once again our concerns with the current U.S. offer in the Doha Round. At that meeting, we shared with USTR officials a scenario that demonstrated the potential harmful effects of the GATS for an important feature of U.S. higher education: its broad mix of public and private institutions. The GATS rules apply to measures taken by governments and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities (GATS Art. I.3(a)). Article I.3 therefore threatens to impose differential treatment of public and private institutions of higher education pursuant to

the GATS. This is so because some public colleges and universities operate pursuant to certain delegated powers of state governments. On the other hand, private colleges and universities do not operate pursuant to powers delegated by government. We therefore explained to USTR officials that the current U.S. offer would subject certain public college and university decisions, such as whether to accept or deny the transfer of credits from foreign institutions, to a challenge pursuant to GATS Article XVII (National Treatment). Similar decisions by private universities, however, would not be subject to GATS scrutiny.

The USTR officials with whom we met listened carefully to our concerns and offered feedback on, and legal analysis of, the scenario we presented. At the same time, though, they agreed with one of our fundamental concerns: public and private institutions of higher education may be subjected to different treatment under the GATS if the U.S. offer becomes effective. Our constituents would find this type of differential treatment intolerable.

Moreover, the USTR officials' response gave rise to an additional, broader concern: a U.S. commitment in the higher education services sector could ultimately undermine all of our institutions' time-honored autonomy with respect to important prerogatives, including the approval of credit transfers. Our institutions' autonomy would be affected, for example, if the U.S. Department of Education decided to issue new regulations to bring the United States into compliance with an adverse WTO dispute settlement decision that resulted from the failure of several states to meet the U.S. commitment on higher education services pursuant to the GATS. The inability of U.S. institutions of higher education to make qualitative judgments in establishing minimum standards for coursework creditworthiness would compromise the quality and integrity of American higher education.

USTR officials have been unable to provide us with a satisfactory explanation for why USTR insists on maintaining the current U.S. offer. Although officials mentioned that a handful of institutions or companies had previously expressed concerns about market access in foreign countries, none of our four-thousand strong member institutions has made us aware of any market access issues that could not be resolved outside the GATS. Additionally, we understand from our recent meeting that USTR does not want to alter the U.S. offer now for fear of having to accept less generous concessions in other sectors of the GATS talks. This stance understandably causes concern to our members about the potential for U.S. higher education to be used as leverage for extracting concessions elsewhere in the negotiations. Moreover, since we understand that very few negotiating partners have actually made offers in the higher education sector, it would seem that any strategic benefit to maintaining the current U.S. offer in the higher education sector is relatively small.

As we previously have recommended to USTR, the United States should define carefully the part of education services to which its Doha Round commitments will apply. The current U.S. offer on higher education services, which USTR has not made public but which was

attached to a 2006 report released by Public Citizen,¹ contains a footnote that enumerates several features of fundamental importance to the U.S. system of higher education. However, the footnote is simply a statement; it does not specifically exempt these important features from dispute settlement challenges pursuant to the GATS. Moreover, if this language was designed to protect these important features of the U.S. system of higher education from GATS scrutiny, the placement of this language in a footnote undermines this important effort. In fact, the WTO Committee on Specific Commitments for the GATS has stated that there should be “no need for footnotes” in WTO services commitments and that any language “intended to define the scope or extent of a commitment should be inscribed in the body of the schedule. Footnotes should in principle be avoided.”² The footnote to the revised U.S. offer therefore does not safeguard important features of the U.S. system of higher education from potential WTO challenges pursuant to the GATS.

In light of these ongoing concerns, and in the absence of any compelling benefit to U.S. higher education, we continue to believe that any U.S. offer should expressly exclude services offered by accredited, degree-granting, postsecondary institutions and accrediting organizations. We previously have proffered the following language for USTR’s consideration:

“5. EDUCATIONAL SERVICES

- C. Higher Education Services (except flying instructions and services offered by accredited, degree granting postsecondary institutions and accrediting organizations (CPC023))”

This type of exclusion still would enable the United States to make a robust offer that covers educational testing services and services offered by non-degree granting institutions (e.g., certificate programs). In so doing, it would assist the handful of institutions or companies that have expressed an interest in expanding the coverage of the GATS, while at the same time protecting the vital interests of the thousands of accredited, degree-granting public and private institutions of higher education and accrediting organizations in the United States.

¹ See Public Citizen, U.S. Negotiators Posed to Sign Up Higher Education “Service Sector” to World Trade Organization Jurisdiction in 2006, Jeopardizing Public Subsidies, Scholarships and Loans, as well as Other Education Policies (Memorandum from Mary Bottari, Public Citizen’s Global Trade Watch Division to U.S. Higher Education Officials, State Regulators, Educators, Students and Interested Parties) (July 15, 2006), available at <http://www.citizen.org/trade>.

² See World Trade Organization, Revision of Scheduling Guidelines (Note by the Secretariat), MTN.GNS/W/164 and 164/Add.1 (Mar. 5, 1999) (emphasis added), available at <http://docsonline.org/GEN>.

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Thank you for consideration of this request. We have appreciated the opportunity to express our ongoing concerns to USTR and look forward to your response.

Sincerely,



David Ward
President
American Council on Education



Judith Eaton
President
Council for Higher Education Accreditation

Cc: Christine Bliss, Assistant USTR for Services and Investment
Christopher P. Melly, Deputy Assistant USTR for Services

DW/mmm

On Behalf Of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State College and Universities
American Council on Education
American Indian Higher Education Consortium
APPA: Association of Higher Education Facilities Professionals
Association of American Law Schools
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Council for Christian Colleges & Universities
Council for Higher Education Accreditation
Council for Opportunity in Education
Council of Independent Colleges
National Association for College Admission Counseling
National Association of College and University Business Officers
National Association of State Universities and Land-Grant Colleges
National Collegiate Athletic Association
The College Board
University Continuing Education Association
Women's College Coalition