September 13, 2018

Submitted via Federal eRulemaking Portal

The Honorable Elisabeth DeVos
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Ashley Higgins
Management and Program Analyst
United States Department of Education
400 Maryland Ave. SW, Mail Stop 294-20
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0042

Dear Secretary DeVos and Ms. Higgins:

We, the undersigned attorneys general of Maryland, Pennsylvania, Illinois, California, Connecticut, Delaware, Hawai‘i, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia write to oppose the U.S. Department of Education's ("Department") August 14, 2018, Notice of Proposed Rulemaking (the "NPRM") seeking to rescind the 2014 Gainful Employment Rule ("the GE Rule"). Rescinding the GE Rule in its entirety ignores the Department's statutory obligations and disregards strong evidence that accountability standards are needed to protect students and taxpayers from low-value educational programs that leave students mired in debt. The proposed rescission of the GE Rule would be disastrous for students and taxpayers and a windfall for low-quality, predatory schools. We urge the Department to abandon its proposal and enforce the GE Rule.

The GE Rule enforces the Higher Education Act's requirement that applicable programs "prepare students for gainful employment in a recognized occupation." It was prompted by concerns that some career-focused programs leave students with unaffordable levels of debt relative to their earnings, leading to widespread default. The Rule was designed to ensure that students attending career-focused programs receive an education that will allow them, at a minimum, to repay their federal student loans. Consistent with the requirements of the Higher Education Act, the Rule applies to career-focused non-degree programs at nonprofit schools and to all programs offered by for-profit colleges. It requires schools to demonstrate that graduates of their programs meet minimum benchmarks for loan repayment capacity, as reflected in graduate debt-to-earnings ratios, and provides that programs that fail to meet the standard for debt-to-earning ratios risk losing eligibility for federal financial aid. The Rule also requires schools to disclose certain student outcome information directly to prospective students, which empowers students to make informed decisions when choosing programs.

The GE Rule was promulgated after a robust and thorough negotiated rulemaking in which the Department received over 95,000 public comments from students, postsecondary institutions, state government officials, consumer advocates, and other concerned individuals and institutions. Various stakeholders, including state attorneys general, student advocates, and for-profit schools, participated in the negotiated rulemaking processes. But although the Rule was finalized years ago, the Department has successfully blocked its implementation through a series of delay notices, all part of an effort to see to it that institutions would never have to comply with the Rule's requirements.[1] Now, as the last step in that effort, the Department has proposed rescinding the Rule in its entirety. It proposes to eliminate the GE Rule's accountability framework without replacing it with any substitute, and it proposes to eliminate the GE Rule's disclosure requirements subject to a vague commitment to impose some other, unspecified disclosure requirements in a future rulemaking.

By rescinding the GE Rule without replacing it with similar protections for students, the Department: (1) harms students and taxpayers; (2) fails to provide an adequate justification for this action; and (3) subverts the Higher Education Act ("HEA") by taking action that was not considered during the corresponding negotiated rulemaking sessions.

[1] *See* 82 Fed. Reg. 30,975 (July 5, 2017); 82 Fed. Reg. 39,362 (August 18, 2017); 83 Fed. Reg. 28,177 (June 18, 2018).

I. Rescission of the GE Rule Will Harm Students and Taxpayers

The GE Rule established an objective measure of program success and imposed concrete consequences on failing programs. The need for such measures persists today. There is evidence that for-profit colleges continue to offer low-value, high-cost programs that leave students with insurmountable debt. And federal student loan default rates remain alarmingly high: According to a recent report by the Brookings Institution, close to 29 percent of federal student loan borrowers default within 12 years.[2]

In the GE Rule, the Department recognized the growing evidence from federal and state investigations of the predatory marketing practices employed by many for-profit schools. We, the entities tasked with enforcing our respective states' consumer protection laws, know firsthand the deceptive conduct of these schools and the need for strong protections for students. In the GE Rule, the Department noted the numerous efforts by state attorneys general to stop such conduct: "Several State Attorneys General have sued for-profit institutions to stop these fraudulent marketing practices, including manipulation of job placement rates." 79 Fed. Reg. at 64,907 (discussing various investigations and enforcement actions by 16 states). As the Department concluded, "[t]his accumulation of evidence of misrepresentations to consumers by for-profit institutions regarding their outcomes provides a sound basis for the Department to conclude that a strong accountability framework for assessing outcomes by objective measures is necessary to protect consumers from enrolling and borrowing more than they can afford to repay." 79 Fed. Reg. at 64,908.

As a result of these findings, the GE Rule included objective benchmarks for evaluating program success and strong direct-to-consumer and other disclosure requirements that were aimed at increasing the quality and availability of information about student outcomes. If programs caused students to take on more debt than they could pay back, the programs lost eligibility to receive federal student loans and grants. The Department also required various disclosures within the GE Rule to combat misleading statements by predatory institutions and

[2] *See* Judith Scott-Clayton, *The looming student loan default crisis is worse than we thought*, Brooking Inst. (Jan. 11, 2018), https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/ (citing Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, Center for American Progress (Oct. 16, 2017), https://www.americanprogress.org/issues/education-possecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/).

those institutions' efforts to obscure material information that might reflect poorly on their programs.

Unfortunately, the pervasive fraud that served as a basis for the GE Rule in the first place persists today and continues to harm consumers. Attorneys general have repeatedly exposed abusive practices by for-profit and other institutions of higher education through investigations and enforcement actions. Below are just a few examples:

- **American National University of Kentucky, Inc.**
  - Complaint, *Commonwealth of Kentucky ex rel. Conway v. National College of Kentucky, Inc.*, No. 11-CI-4922, (Daviess Cir. Ct. July 27, 2011); Judgment, *Commonwealth of Kentucky ex rel. Conway v. National College of Kentucky, Inc.*, No. 11-CI-4922, (Daviess Cir. Ct. March 20, 2018).

- **The Career Institute, LLC.**
  - Complaint, *Massachusetts v. The Career Institute, LLC. et al.*, No. 13-4128H (Mass. Super. Ct. Sept. 17, 2015) *available at* http://www.mass.gov/ago/docs/consumer/aci-amended-complaint.pdf; Final Judgment by Consent, *Massachusetts v. The Career Institute, LLC. et al*., No. 13-4128H (Mass. Super. Ct. June 1, 2016) *available at* http://www.mass.gov/ago/docs/consumer/aci-consent-judgment.pdf.

- **Corinthian Colleges, Inc.**
  - Illinois investigation initiated on 12/14/2011; Opp. to Debtor's Obj. with findings, Doc. No. 1121, *In re: Corinthian Colleges, Inc. et al*. No. 15-10952 (KJC) (U.S. Bankr. Ct. Dist. of Del., Dec. 9, 2015).
  - Complaint, *Massachusetts v. Corinthian Colleges, Inc. et al.* No. 14-1093 (Mass. Super. Ct. Apr. 3, 2014) *available at* http://www.mass.gov/ago /docs/press /2014/everest-complaint.pdf.
  - $1.1 billion judgment, *People of the State of California v. Corinthian Colleges, Inc., et al.*, No. CGC-13-534793 (Cal. Super. Ct, Mar. 23, 2016) *available at* https://oag.ca.gov/system/files/attachments/press_releases/Corinthian %20Final%20Judgment_1.pdf.
  - California's Objection to Bankruptcy Plan Confirmation, *In re Corinthian Colleges, Inc. et al.*, No. 15-10952, Doc. No. 824 (Bankr. D. Del., Aug. 21, 2015).

- **DeVry Education Group, Inc.**
  - Assurance of Discontinuance, New York Attorney General's Office (January 27, 2017) https://ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-devry-university-providing-225-million-restitution.

- **Daymar Learning, Inc.**
    - Complaint, *Commonwealth of Kentucky ex rel. Conway v. Daymar Learning, Inc. et al.*, No. 11-CI-01016 (Daviess Cir. Ct. July 27, 2011); Consent Decree, *Commonwealth of Kentucky ex rel. Conway v. Daymar Learning, Inc., et al.*, Action 11-CI-01016 (Daviess Cir. Ct. Sept. 11, 2015).

- **Education Management Company** (including The Art Institutes and Brown Mackie College)
    - *District of Columbia v. Education Management Corporation, et al.* Case No. 2015 CA 8875 B (D.C. Sup. Ct.) (Consent Order entered on January 20, 2016).
    - Complaint, *State of Connecticut v. Education Management Corp., et al.*, HHD-cv-15-6063687-S (CT Super. Ct. Nov. 16, 2015); Stipulated Judgment, *State of Connecticut v. Education Management Corp., et al.*, HHD-cv-15-6063687-S (CT Super. Ct. Jan. 11, 2016).
    - Complaint, *Commonwealth of Pennsylvania v. Education Management Corporation, et al.*, 545 M.D. 2015 (Pa. Commw. Ct., Nov. 16, 2015); Stipulated Consent Order, *Commonwealth of Pennsylvania v. Education Management Corporation, et al.*, 545 M.D. 2015 (Pa. Commw. Ct., Nov. 20, 2015).
    - *Consumer Protection Division, Office of the Attorney General of Maryland v. Education Management Corporation, et al*. Case No. 24-C-15-005705 (Md. Cir. Ct. Nov. 16, 2015).
    - Complaint, *People of the State of Illinois v. Education Management Corporation et al*., No. 2015 CH 16728 (Cir. Ct. Cook County Nov. 16, 2015); Consent Judgment, *People of the State of Illinois v. Education Management Corporation et al*., No. 2015 CH 16728 (Cir. Ct. Cook County Nov. 16, 2015).
    - Complaint, *State of New York v. Education Management Corp., et al*., No. 453046/15 (N.Y. Sup. Ct. Nov. 16, 2015); Consent Order and Judgment (N.Y. Sup. Ct. Jan. 14, 2016).
    - Petition, *State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa v. Education Management Corporation, et al.*, EQ CE079220 (Iowa District Court for Polk County, Nov. 16, 2015); Consent Judgment, *State of Iowa ex rel. Thomas J. Miller, Attorney General of Iowa v. Education Management Corporation, et al.*, EQ CE079220 (Iowa District Court for Polk County, Nov. 16, 2015).
    - Complaint, *State of North Carolina v. Education Management Corporation, et al*, No. 15-CV-015426 (N.C. Sup. Ct. Wake County Nov. 16, 2015); Consent Judgment, *State of North Carolina v. Education Management Corporation, et al*, No. 15-CV-015426 (Sup. Ct. Wake County Nov. 16, 2015).
    - Complaint, *State of Oregon v. Education Management Corp., et al.*, No. 15CV30936 (Or. Cir. Ct. Nov. 16, 2015); Stipulated General Judgment (Or. Cir. Ct. Nov. 17, 2015).
    - Complaint, *State of Washington v. Education Management Corp.*, *et al*., Case No. 15-2-27623-9 SEA (King County Sup. Ct. Nov. 16, 2015); Consent Decree (King County Sup. Ct. Nov. 16, 2015).

- $95.5 million global settlement, intervention by States of California, Illinois, Minnesota, and others, *United States ex rel. Washington v. Education Management Corp., et al.*, No. 07-00461 (W.D. Pa., Nov. 13, 2015).

- **Hosanna College of Health**
  - Complaint, *Massachusetts v. Hosanna College of Health, Inc. et al.* No. 16-0608B (Mass. Super. Ct. Feb. 24, 2016).

- **ITT Educational Services, Inc.**
  - Complaint, *Massachusetts v. ITT Educ. Servs. Inc.*, No. 16-0411 (Mass. Super. Ct. Mar. 31, 2016).

- **Kaplan**
  - Assurance of Discontinuance, *In the Matter of Kaplan, Inc., Kaplan Higher Education*, LLC, No. 15-2218B (Mass. Super. Ct. July 23, 2015) *available at* http://www.mass.gov/ago/docs/press/2015/kaplan-settlement.pdf.

- **Lincoln Technical Institute, Inc.**
  - Complaint, *Massachusetts v. Lincoln Tech. Inst.*, No. 15-2044C (Mass. Super. Ct. July 8, 2015); Consent Judgment, *Massachusetts v. Lincoln Tech. Inst.*, No. 15-2044C (Mass. Super. Ct. July 13, 2015) *available at* http://www.mass.gov/ago/docs/press/2015/lincoln-tech-settlement.pdf.

- **Minnesota School of Business, Inc. and Globe University, Inc.**
  - Complaint, *Minnesota v. Minnesota School of Business, Inc. et al.*, No. 27-CV-14-12558 (Minn. Dist. Ct. July 22, 2014); Findings of Fact, Conclusions of Law and Order, *Minnesota v. Minnesota School of Business et al.*, No. 27-CV-14-12558 (Minn. Dist. Ct. Sep. 8, 2016); Supreme Court Opinion, 885 N.W.2d 467 (Minn. 2017).

- **The Salter School**
  - Complaint, *Massachusetts v. Premier Educ. Grp.*, No. 14-3854 (Mass. Super. Ct. Dec. 9, 2014) *available at* http://www.mass.gov/ago/docs/press/2014/salter-complaint.pdf; Final Judgment by Consent, *Massachusetts v. Premier Educ. Grp.*, No. 14-3854 (Mass. Super. Ct. Dec. 11, 2014) *available at* http://www.mass.gov/ago/docs/press/2014/salter-judgment-by-consent.pdf.

- **Westwood College, Inc.**
  - Complaint, *People of the State of Illinois v. Westwood College, Inc. et al.*, No. 12 CH 01587 (Cir. Ct. Cook County Jan. 18, 2012); Second Amended Complaint, Doc. No. 57, No. 14-cv-03786 (U.S. Dist. Ct., N. Dist. Ill. Sept. 30, 2014); Settlement entered on October 9, 2015.

Despite this overwhelming evidence of ongoing predatory conduct by for-profit schools, the Department now seeks to revoke the very regulation put into place to protect students from such abuses. This decision flies in the face of common sense and the Department's own statutory

obligations. Under the HEA, a covered program must prepare "students for gainful employment in a recognized occupation" to be eligible for Title IV funding. *See* 20 U.S.C. § 1001(b)(1). Through the GE Rule, the Department carried out its responsibility to ensure that only eligible programs receive federal funds. By rescinding the GE Rule, the Department has now abandoned its obligation and placed additional burdens on the States to police programs which should not be receiving Title IV funding.

The Department's rescission of the Rule will further harm current and prospective students by depriving them of adequate information to make informed choices about enrolling in educational programs. Were students given full and complete information about costs and outcomes, many would choose not to enroll in programs that saddle them with massive debt burdens and provide limited employment prospects. In fact, more than 350,000 students attended some of the worst GE programs, accumulating nearly $7.5 billion in debt.[3] Instead of cutting off federal aid and ensuring that future students do not attend failing programs, the Department now turns its back on the very people it is obligated to protect.

Finally, rescinding the GE Rule harms taxpayers, as these same students will be unable to repay their taxpayer-funded federal loans. Ultimately, the rescission of the GE Rule benefits only one party: predatory for-profit schools. The Department should enforce the GE Rule, not rescind it.

II. The Department Has Failed to Offer an Adequate Basis for Rescinding the Rule

The Department has failed to provide an adequate justification for rescinding the GE Rule, which was issued following an extensive rulemaking process and which survived multiple court challenges. For instance, the Department now asserts that it should not subject for-profit or career-focused schools to heightened disclosure requirements, stating "it is not appropriate to require these types of disclosures for only one type of program when such information would be valuable for all programs and institutions that receive title IV, HEA funds." 83 Fed. Reg. at 40,173.

[3] *How Much Did Students Borrow to Attend the Worst-Performing Career Education Programs*, The Institute for College Access & Success (Aug. 2018), available at https://ticas.org/sites/default/files/pub_files/ge_total_debt_fact_sheet.pdf (the debt amount reflects the amount borrowed to attend failing and zone programs).

As an initial matter, eliminating disclosure requirements precisely because they are "valuable" makes no sense whatsoever. And the Department's own findings in the Rule establish that strong disclosure requirements are particularly important for for-profit and career-focused programs, given the history of abusive and predatory behavior associated with such programs. And the Department fails to acknowledge that the HEA itself recognizes that these programs do require additional oversight. *See* 20 U.S.C. § 1001(b)(1); *id*. § 1002(a)(1), (b)(1)(A)(i). The Department's decision to eliminate the distinction between types of programs that Congress has chosen to treat differently is arbitrary and capricious and fails to give effect to the language and structure of the HEA.[4]

The GE Rule was written with the understanding, reflected in the HEA, that economic factors and incentives at for-profit schools are inherently different from those at public or non-profit institutions. At the time of the GE Rule's adoption, tuition and fees at for-profit colleges were double those of equivalent programs at less-than-two-year public colleges, and four times those of equivalent programs at two-year public schools. *See* Education Trust Comments to GE Rule, ED-2014-OPE-0039-1729. As the Department noted, such for-profit programs, rather than preparing students for gainful employment, were "leaving students with unaffordable levels of debt in relation to their earnings." 79 Fed. Reg. at 64,890.

The Department further recognized that students at for-profit programs were more likely than those at other institutions to rely on loans, including federal student aid, to finance their education; on average, students at for-profit schools had larger amounts of debt than those who attended public or non-profit institutions. 79 Fed. Reg. at 65,033. Students of color, low-income students, veterans, and women were particularly affected by for-profit colleges' high costs and the commensurate high debt load students incurred to attend. *See* Education Trust Comments to GE Rule at 4, ED-2014- OPE-0039-1729; *see also* American Ass'n of University Women Comments to GE Rule at 1, ED-2014-OPE0039-2072. Also, as discussed above, the GE Rule acknowledged that the vast majority of the unfair and deceptive recruitment practices were

[4] Even when it does cite apparent support for its position, the Department misrepresents the research it relies on. One professor whose research was relied upon by the Department in the NPRM wrote: "[T]he Department of Education has misrepresented my research, creating a misleading impression of evidence-based policymaking. The Department cites my work as evidence that the GE standard is based on an inappropriate metric, but the paper cited in fact presents evidence that would support making the GE rules stronger." Baum, Sandy, *DeVos misrepresents the evidence in seeking gainful employment deregulation*, Urban Institute (Aug. 22, 2018), *available at* https://www.urban.org/urban-wire/devos-misrepresents-evidence-seeking-gainful-employment-deregulation.

occurring at for-profit schools. 79 Fed. Reg. at 64,907-08. Finally, perhaps the strongest support for the application of the GE Rule to for-profit schools was the Department's January 6, 2017, release of debt-to-earnings rates for career training programs indicating that 98% of failing gainful employment programs were offered by for-profit institutions.[5]

The Department justifies eliminating these important disclosure requirements by noting its intention to include similar information on the College Scorecard in the future: "The Department plans to update the College Scorecard, or a similar web-based tool, to provide program-level outcomes for all higher education programs" so that "students and parents can compare the institutions and programs available to them and make informed enrollment and borrowing choices." 83 Fed. Reg. at 40,168. This assurance rings hollow, given that, by the Department's own admission, the College Scorecard "is not the subject of this regulation." *Id*. In fact, the Department asserts it would not even consider publishing such information "until such time that a reliable data source is identified to validate such data." *Id*. at 40,176. The Department cannot rely on an *intention* to provide some of the disclosure information required under the GE Rule on the College Scorecard at some unspecified date in the future as a basis for the removal such disclosures now.

The Department similarly fails to provide an adequate justification for eliminating the GE Rule's accountability framework. Although it identifies a number of supposed concerns with the Rule's accountability provisions, it fails to consider any alternatives other than wholesale rescission to address those concerns. For example, why did the Department rule out tweaking the debt-to-earnings ratios, revisiting the number of years of non-compliance that will result in ineligibility, or amending the appeals process? Why can the Department not address purported inconsistencies among schools' disclosures through guidance? If the Department is truly concerned that a lengthy economic recession would cause too many programs to fail, why did it not consider modifying the GE Rule to account for extended economic downturns?

Finally, the Department has failed to explain how it interprets the provisions of the HEA that condition certain schools' eligibility for federal funding on their ability to "prepare students for gainful employment in a recognized occupation," 20 U.S.C. § 1002(b)(1)(A)(i), (c)(1)(A); *see also id.* § 1088(b)(1)(A)(i), or how it will enforce this condition going forward. The Department "*must* establish some kind of test" for compliance with this provision. *Ass'n of*

[5] *Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs*, Department of Education (Jan. 9, 2017), *available at* https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs.

Private Sector Colleges & Univs. v. Duncan, 110 F. Supp. 3d 176, 186 (D.D.C. 2015) (emphasis added). In fact, none of the concerns identified by the Department call into question the central premise of the GE Rule: that a program that requires its students to assume debt loads that are unmanageable given their likely income fails to "prepare students for gainful employment in a recognized occupation." As a result, the Department's proposal to rescind the Rule is nothing short of an abdication of its statutory responsibilities.

III. The proposed rule is a complete departure from the Department's proposals at the negotiated rulemaking sessions

The HEA requires the Department to obtain "public involvement in the development of proposed regulations" as well as "the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs…." 20 U.S.C. § 1098a. The Department received public input through the negotiated rulemaking related to this NPRM. As noted in the NPRM, state attorneys general and other appropriate State officials were represented by Christopher J. Madaio of the Office of the Attorney General of Maryland and Ryan Fisher of the Office of the Attorney General of Texas. However, during the negotiated rulemaking process, the Department failed to seek input on the possibility of rescinding the entirety of the GE Rule. Instead, the Department submitted various issue papers and other proposals for discussion by the negotiators, including papers suggesting alterations to the disclosure requirements of the GE Rule and potential sanctions.[6] Those proposals were discussed at length by the negotiators. By presenting certain proposals to the negotiators but now putting forward an NPRM that bears no similarity to those proposals, the Department has circumvented the purpose of the negotiated rulemaking process, failed to undertake the process in good faith, and failed to comply with the HEA's requirement that it engage in negotiated rulemaking before promulgating a new rule.

[6] *Gainful Employment*, Department of Education (Aug. 10, 2018), *available at* https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gainfulemployment.html.

* * *

The Department has improperly delayed and discarded the carefully considered and duly promulgated GE Rule. The Department's current proposal to rescind that rule would do nothing but harm students and taxpayers and allow predatory schools to thrive. We urge the Department to instead rescind its NPRM and enforce and implement the existing GE Rule.

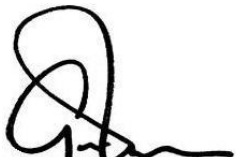
Respectfully submitted,

BRIAN E. FROSH
Maryland Attorney General

JOSH SHAPIRO
Pennsylvania Attorney General

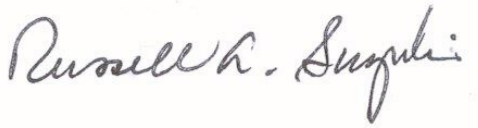
LISA MADIGAN
Illinois Attorney General

XAVIER BECERRA
California Attorney General



GEORGE JEPSEN
Connecticut Attorney General

MATTHEW P. DENN
Delaware Attorney General

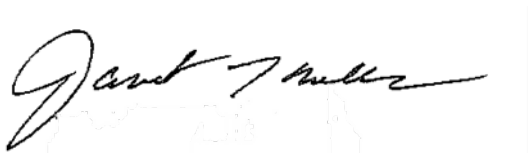


KARL A. RACINE
District of Columbia Attorney General

RUSSELL A. SUZUKI
Hawai'i Attorney General

TOM MILLER
Iowa Attorney General

ANDY BESHEAR
Kentucky Attorney General



JANET T. MILLS
Maine Attorney General

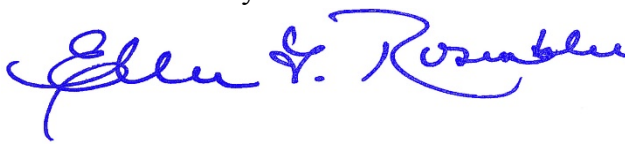
MAURA HEALEY
Massachusetts Attorney General

LORI SWANSON
Minnesota Attorney General

GURBIR S. GREWAL
New Jersey Attorney General

BARBARA D. UNDERWOOD
New York Attorney General

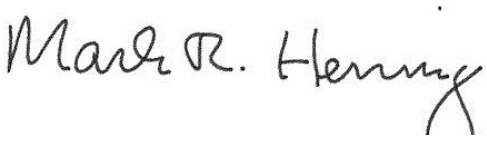
JOSH STEIN
North Carolina Attorney General



ELLEN F. ROSENBLUM
Oregon Attorney General

PETER F. KILMARTIN
Rhode Island Attorney General

THOMAS J. DONOVAN, JR.
Vermont Attorney General



MARK R. HERRING
Virginia Attorney General

BOB FERGUSON
Washington Attorney General