Re: The proposal to adopt and enforce certain accrediting standards on tuition and fees would not violate antitrust laws. [*Accrediting Commission on Career Schools and Colleges of Technology, P944015*]

January 19, 1995

Dear Mr. Pelesh:

This letter responds to your request on behalf of the Accrediting Commission on Career Schools and Colleges of Technology for an advisory opinion on the permissible means, under the antitrust laws, of adopting and enforcing an accrediting standard on tuition and fees, as the Higher Education Amendments of 1992 require. You have proposed three possible standards by which your organization might assess tuition and fees, and asked us to provide guidance on the permissibility of each.

On the basis of information you provided, the Commission has no present objection to an accreditation program along the lines of your third proposal, but believes your first and second proposals raise substantial antitrust concerns.

I. BACKGROUND OF THE REQUEST

According to the request for advisory opinion, the Accrediting Commission on Career Schools and Colleges of Technology ("ACCSCT") is a private, nonprofit organization that adopts and enforces standards for accrediting and evaluating educational institutions with trade and technical objectives. The United States Department of Education ("DOE" or "Department") recognizes ACCSCT under the Higher Education Act of 1965 as a reliable authority on the quality of its accredited institutions, education and training. To participate in federal student financial assistance programs, a post-secondary institution of higher education must maintain accreditation from a recognized organization such as ACCSCT. ACCSCT is a membership organization, composed of the accredited schools. Five of its eleven Commissioners have no affiliation with any of the schools accredited by ACCSCT, while six are owners or executives of accredited schools.

In 1992, Congress re-authorized the student financial assistance programs of the Higher Education Act with the Higher Education Amendments of 1992. Through this re-authorization, Congress specified in great detail the requirements that accrediting agencies like ACCSCT must meet in order to receive DOE recognition. One requirement is that their accrediting standards assess the institutional "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." 20 U.S.C. 1099b(a)(5). ACCSCT will be eligible for re-recognition in Fall of 1995, at which time DOE expects it to have adopted new accreditation standards on tuition and fees.

The Department of Education's Notice of Proposed Rulemaking ("NPRM") included a commentary in which the Department proposed that accrediting organizations use one of three ratios comparing tuition to expected earnings to determine whether tuition and fees are excessive. DOE stated that it could recognize an accrediting agency even if its standards departed from these proposals, but that the agency would bear the burden of justifying different standards. 59 Fed. Reg. at 22,273. The DOE rules implementing the statutory requirements for accrediting standards repeat the statutory provisions, without including the ratios in the NPRM commentary. 34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994).

II. EFFECT OF THE 1992 HIGHER EDUCATION AMENDMENTS

ACCSCT has raised the possibility that Congress impliedly exempted educational accrediting bodies from the antitrust laws when it required them to adopt a standard assessing tuition and fees in order to be recognized by DOE. It is well-established, however, that, where antitrust immunity is not express, it is disfavored and to be implied only where "necessary to make the . . . [a]ct work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see also United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945). Indeed, except for industries in which Congress has committed pricing to agency regulation rather than to normal market forces, *see e.g., Keogh v. Chicago & Northwestern Railroad*, 260 U.S. 156 (1922) (Interstate Commerce Commission rates), the courts have found

implied repeal very rarely and then only under extremely limited circumstances.

The courts have found an implied repeal where Congress has established a substantial regulatory scheme and there is a clear repugnancy between that scheme and the application of the antitrust laws to the conduct in question. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (statute provided for Securities and Exchange Commission review of exchange's self-regulation of commission rates so that application of antitrust laws conflicted with SEC's vigorous supervision of such rates); *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975) (finding price-fixing on inter-dealer sales of mutual fund shares immune because of conflict between antitrust laws and regulatory scheme; Congress had given agency power over such sales and agency had accepted practice over long period); *Behagen v. Amateur Basketball Association of the U.S.*, 884 F.2d 524, 529 (10th Cir. 1989) (court found an implied repeal in rejecting the claim that the antitrust laws prohibited an amateur athlete's exclusion from defendant Association; Amateur Sports Act required the establishment of gatekeeping, governance organizations to determine amateur eligibility); *see also Thill v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970) (remanding for determination whether restriction on sharing commissions was necessary to meet the goals of the Securities Exchange Act).

Absent a clear repugnancy between the antitrust laws and the regulatory scheme, however, the courts have rejected the implied repeal claim. *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985) (no implied repeal because no conflict between antitrust laws and Commodities Futures Trading Commission's oversight); *Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 981 (1985) (Robinson-Patman Act not preempted by regulations promulgated under the Emergency Petroleum Allocation Act because no conflict between statutes); *Huron Valley Hospital v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981) (no implied repeal where no direct conflict between antitrust laws and National Health Planning Act); *Essential Communications Systems v. AT&T*, 610 F.2d 1114 (3d Cir. 1979) (no implied repeal because no conflict between antitrust laws and Federal Communication Commission's regulatory activities).

The courts have refused to imply a repeal when the regulatory scheme did not protect consumer interests by supervising the challenged conduct. In rejecting a claim that the securities regulatory scheme conflicted with the antitrust laws and thus implied antitrust immunity, the Supreme Court noted that:

> By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of * * * [improper collective action] over which the Commission has no authority . . . ." . . . . Since the antitrust laws serve, among other things, to protect competitive freedom . . . it follows that the antitrust laws are peculiarly appropriate as a check on the anticompetitive acts of exchanges . . . . Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.

Silver, 373 U.S. at 357 (no implied exemption because exchange's rule that excluded non-members from access to exchange without a hearing not necessary to make securities act work), quoting *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 460.

The Commission believes the 1992 Higher Education Act amendments do not impliedly repeal the antitrust laws as they apply to the technical school industry. Congress has not authorized the Department of Education to supervise or review accrediting agency self-policing of tuition and fees. The most persuasive argument for an implied repeal is that Congress, in requiring that accrediting agencies have a standard for assessing tuition, intended for them to exclude any school with a tuition that is unreasonable in light of expected earnings. Indeed, the tuition assessment standard seems superficially similar to the eligibility standard at issue in the Behagen case. There, the Amateur Sports Act authorized the U.S. Olympic Committee to recognize and monitor a governance organization in each sport to determine amateur eligibility and provide a mechanism to assure compliance with the Act. 884 F.2d at 528. In dismissing a group boycott claim against a governance organization for its refusal to reinstate an athlete's amateur status, the Tenth Circuit held that the defendant Association's "actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics." *Id.* at 527. The court noted that the Association's "monolithic control exerted . . . over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports

Act." *Id.* at 528. The court added that the Association "could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." *Id.* at 529.

Unlike Behagen, the 1992 Higher Education Act Amendments do not require accrediting agencies to fix tuition levels; they merely require that accrediting agencies have a standard for assessing tuition as one of many standards for determining accreditation. (ACCSCT's submission of a less restrictive accreditation standard, requiring only disclosure, indicates that setting tuition levels is not necessary to achieve the statute's mandate to curb school loan abuse. Indeed, as noted above, the Department stated that it would recognize an accrediting agency even if its standards departed from DOE's suggested tuition-to-expected-earnings ratios.) Thus, there is no broad or inherent conflict between the antitrust laws and the regulatory regime. *Cf. Behagen*, 884 F.2d at 529 ("Behagen complains of exactly that action which the Act directs"); *see also Gordon*, 422 U.S. at 692 (Stewart, J., concurring) ("The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants").

III. ANALYSIS OF ACCSCT'S PROPOSED STANDARDS

A. First Proposed Standard

Under ACCSCT's first proposed standard, ACCSCT would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard by withdrawing accreditation. The standard might use one of the following three measures to cap tuition at a certain level: (1) a percentage of annualized minimum wage, (2) a percentage of graduates' earnings for their first year of employment, or (3) a percentage of average annualized wages. ACCSCT believes that adopting this standard would require it to collect tuition data from its members, define acceptable tuition limits, and enforce its standard by potentially withdrawing accreditation. Thus, ACCSCT members would in effect be agreeing to charge no more than the ACCSCT standard would allow.

As ACCSCT recognizes, such a standard, like any system for collective competitor regulation of prices, raises grave antitrust concerns. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum price fixing is *per se* illegal); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (maximum price fixing is *per se* illegal); McLean County Chiropractic Association, 59 Fed. Reg. 22163 (April 29, 1994) (consent order settling FTC charges that chiropractor association members fixed maximum prices); *see also* American Medical Association (FTC Advisory Opinion, February 14, 1994) (adopting fee peer review program with disciplinary sanctions would present serious antitrust concerns, because it would allow competitors to set the maximum fees of their rivals) ("AMA Opinion").

Even under a rule of reason approach similar to the Third Circuit's approach in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), ACCSCT's first proposal would pose significant antitrust risks. An accrediting criterion based an tuition and fee level would be inherently suspect because it sets prices and impedes the ordinary functioning of the free market. *Brown University*, 5 F.3d at 674; *see generally Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988).

Further, the only efficiency justification that ACCSCT could coffer would be that the standard "protects" consumers, because unfettered competition over tuition levels is unwise or dangerous. The Courts have consistently rejected this argument as "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *see also FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 463 (1986); *Brown University*, 5 F.3d at 676-77. Moreover, even if consumer protection justified regulation of tuition levels, the first proposed standard is not reasonably necessary to achieve this objective. Courts often rule that such overbroad restraints are unreasonable and in violation of the antitrust laws. *See Brown University*, 5 F.3d at 678-79; *Bhan v. NME Hospitals*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 151-52 n.18 (3d Cir. 1981). The fact that ACCSCT has proffered less restrictive alternatives that it believes can achieve the statutory goal of assessing tuition and fees for trade school consumers indicates that the proposed standard is not reasonably necessary.

B. Second Proposed Standard

Under the second proposed standard, ACCSCT would collect and analyze tuition information from accredited schools to compare the tuition charged for a given program at a particular school with that charged for similar programs and schools. Any tuition in the ninetieth percentile or above of similar programs would trigger requirements that the school explain why its tuition was so high and provide this information to students and prospective students.

This approach appears to be less restrictive than the first, primarily because, rather than denying accreditation, it would require that a school disclose and justify its relative tuition. Nonetheless, because it targets for attention institutions charging prices of a certain top percentage or level, the standard may have the same effect as the first proposed standard. Hence there is a substantial danger that implementation of this standard may violate the antitrust laws. *See Maricopa*, 457 U.S. at 332.

In evaluating the reasonableness of the standard, the Commission would find the following factors particularly relevant. First, targeting would identify high tuition schools, opening them up to pressure to conform. Indeed, that appears to be the very purpose of the standard.

Second, the Commission in reviewing association fee peer review programs has emphasized the increased potential for antitrust problems where participation is mandatory. *See AMA Opinion,* at 6*; Iowa Dental Association*, 99 FTC 648 (1982) (advising association not to discipline members who refuse to use peer review process or accept its guidance). Here, the mandatory nature of ACCSCT's proposed standard compounds the antitrust concerns.

Third, the potential for antitrust concern is reduced when peer review programs involve mediation of specific fee disputes. A peer review program based on tuition or fees runs a more serious antitrust risk when it involves review of all schools' tuition levels, particularly in the form of a systematic exchange of data and identification of schools with high tuition. *See Iowa Dental Association*, 99 FTC at 649 ("Competition will be best protected if all concerned parties view fee peer review as a means of mediating specific fee disputes, rather than a process for the collective sanctioning of fee levels or particular practices").

Finally, as discussed above, the antitrust laws do not condone a restraint that is not reasonably necessary to achieve its stated

procompetitive objective. *See Brown University*, 5 F.3d at 678-79; *Fleer Corp.*, 658 F.2d at 151-52 n.18. Thus, the availability of a less restrictive plan (ACCSCT's third proposed standard) suggests that its second proposed standard would fail to meet this test.

C. Third Proposed Standard

As a third alternative for assessing tuition and fees, ACCSCT proposes a standard requiring schools to inform students in the catalog, enrollment agreement, and other publications that they may obtain information about tuition charges for comparable programs from ACCSCT. ACCSCT would collect tuition information from accredited schools and make it available to students who could use the information to compare the cost of similar programs at other institutions.

Based upon the information ACCSCT has provided, there appears to be little cause for concern that the information exchange contemplated by ACCSCT will have any anticompetitive effects. The school tuition information ACCSCT proposes to collect already is widely available and easily accessible to the industry, alleviating the concern that members would use the exchange to set prices. *Cf. United States v. Container Corp of America*, 393 U.S. 333, 335 (1969) (striking down exchange among competitors of information that "was not available from another source"); *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 605 (1925) (when information is publicly available, court will not infer purpose to fix prices).

The procompetitive effects of increasing consumers' access to information about relative trade school tuition levels could outweigh any potential anticompetitive concerns raised by the collection of tuition data. *See Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925) (association survey of members' prices held not unlawful under rule of reason). To the extent ACCSCT's proposal will provide information useful to trade school consumers, it is likely to promote competition. *See AMA Opinion,* at 3. Indeed, ACCSCT could require other disclosures, *e.g.*, how the tuition level compares to graduates' earnings for their first year of employment, as a condition of accreditation without injuring consumers or violating the antitrust laws.

Thus, insofar as ACCSCT merely collects tuition information and disseminates that information to students, it would not be likely to run into any antitrust risks. ACCSCT, however, could violate the antitrust laws if it combined its data collection activities with any sort of coercion or admonishment of its members to adhere to certain tuition levels. *See Maple Flooring Manufacturers Association*, 268 U.S. at 563; cf. *American Column & Lumber Co. v. United States,* 257 U.S. 377 (1921).

IV. CONCLUSION

Accordingly, the Commission does not presently object to ACCSCT's third proposed standard to assess tuition, insofar as it calls for ACCSCT merely to collect and disseminate tuition information. The Commission believes that the first and second proposals, because they involve ACCSCT acting against members due to their tuition levels, may involve a significant risk of violating the antitrust laws.

This advisory opinion, like all those that the Commission issues, is limited to the proposed conduct that your request describes. It does not constitute approval for specific aspects of the proposal that may become the subject of litigation before the Commission or any court, since application of the proposal in particular situations may injure competition and consumers and violate the Federal Trade Commission Act. The Commission reserves the right to reconsider the questions involved, and with notice to the requesting parties in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion in the event that implementation of the third proposal results in significant anticompetitive effects, should the purposes of the proposal be found not to be legitimate, or should the public interest so require.

Letter of Request

August 4, 1994

Dear Mr. Clark:

On behalf of the Accrediting Commission of Career Schools and Colleges of Technology ("ACCSCT" or the "Commission"), I hereby request an advisory opinion on the permissibility under the antitrust laws of ACCSCT's adoption and enforcement of an accrediting standard on tuition and fees. In order to ensure that this request is considered by the Department or agency with appropriate jurisdiction, we have also filed a request for a business review letter on the same subject with the Antitrust Division of the Department of Justice. We respectfully ask that the FTC and Antitrust Division coordinate a response to these requests.

Description of ACCSCT. The Commission is a private nonprofit organization with exclusively educational purposes. It adopts and applies standards for the accreditation and evaluation of educational institutions with trade and technical objectives. The Commission is recognized by the U.S. Department of Education under the Higher Education Act of 1965 an a reliable authority as to the quality of education and training offered by its accredited institutions. (Pub. L. No. 89-329, 79 Stat. 1219, codified as amended in scattered sections of 20 U.S.C.). As a result of this recognition, accreditation by the Commission, together with licensure by a state and certification by the Department, make a post-secondary institution of higher education eligible to participate in the student financial assistance programs authorized by the Act. (20 U.S.C. 1088). The Commission currently accredits approximately 950 schools located in all 50 states, the District of Columbia and Puerto Rico. These schools educate and train 450,000 students and employ 16,000 instructors.

The Commission is a membership corporation. The Commissioners serve as the board of directors; five of the Commissioners are public members (*i.e.*, they have no affiliation with any of the schools accredited by the Commission), and six of the Commissioners are school members (*i.e.*, they are owners or executives of accredited schools). The members of the corporation are the accredited schools; membership status is coterminous with accreditation. Further, the rights of the members are restricted: They

elect the school-affiliated Commissioners and two of five members of a nominating committee, receive various informational reports, and approve (but may not initiate) amendments to the articles of incorporation and bylaws, mergers and other fundamental transactions, and dues and assessments. The Commission is unaffiliated with any trade association. It has applied for tax-exempt status under Section 501(c) (3) of the Internal Revenue Code.

Higher Education Amendments of 1992. In 1992, Congress reauthorized the student financial assistance programs of the Higher Education Act by enacting the Higher Education Amendments of 1992. (Pub. L. No. 102-325, 106 Stat. 448, codified in scattered Sections of 20 U.S.C.). This reauthorization formally provided for a "Program Integrity Triad" of accrediting agencies, the states and the Department of Education to control access to the student financial assistance programs. Although such a Triad effectively had existed prior to the 1992 reauthorization, abusive practices of some institutions of higher education impelled Congress to specify in greater detail the gatekeeping responsibilities of each leg of this Triad.

Thus, the statute specifies numerous requirements that accrediting agencies like the Commission must meet in order to be recognized by the Department of Education. One of these requirements is that an agency's accrediting standards must assess 12 areas, including "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." (20 U.S.C. 1099b(a)(5)).

The Department of Education has now completed the rulemaking to implement the statutory requirements for the recognition of accrediting agencies. In regard to accrediting standards, the regulations simply repeat the statutory provisions. (34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994)). In the commentary accompanying the regulations, the Department noted that its original proposals, which elaborated on the statute, had prompted substantial adverse comment. Nonetheless, the Department's commentary stated that those proposals provided a "sound framework" for an assessment of the 12 areas, and summarized them. The summary for program length and tuition and fees was as follows:

An accrediting agency's standard for assessing this area should generally address the appropriateness of an institution's program length and tuition and fees, taking into account such factors as program objectives and content, the types and locations of instructional delivery, the knowledge and skills necessary for students to reach competence in the field being taught, and generally accepted practices in higher education.

(*Id.* at 22,273).

The Notice of Proposed Rulemaking ("NPRM") more extensively addressed how to judge the "appropriateness" of tuition and fees. It specified that, in developing a standard for tuition and fees, an accrediting agency should take into account the factors quoted above and "[f]or any pre-baccalaureate vocational education program, consideration of the remuneration that can reasonably be expected by students who complete the program." (59 Fed. Reg. 3,578, 3,597 (January 24, 1994)). In the commentary accompanying the proposed regulations, the Department explained that the basis for this proposal was its concern that tuition and fees for pre-baccalaureate vocational education programs may be "excessive." (*Id.* at 3,586). The commentary also suggested three possible approaches under which annualized tuition and fees for a program could not exceed: (1) a percentage of the annualized minimum wage; (2) a percentage of graduates' earnings for their first year of employment; and (3) a percentage of average annualized wages. (*Id.* at 3,587). The NPRM provided no specifics on these various maximum percentage levels. Although the Department stated that an agency could still be recognized even if its standards departed from the original proposals, it also stated that the agency would bear a burden of justifying the appropriateness of different standards. (59 Fed. Reg. at 22,273).

Development of ACCSCT Standard. In order to comply with the statutory and regulatory requirements described above, ACCSCT will have to adopt and apply an accrediting standard that assesses tuition and fees. It has created a committee of Commissioners to study the issue and develop a proposal. In addition to the inherent difficulty of the task, the Commission is concerned that any standard it adopts not be violative of the antitrust laws.

As explained above, the Commission is a private body consisting in substantial part of school-affiliated Commissioners who could be viewed as competitors. Further, the Commission is legally classifiable as a form of association, although it is not a trade association in the conventional sense that seeks to advocate and

advance the interests of its members. (*See Parsons College v. North Central Ass'n. of Colleges and Sch.*, 271 F. Supp. 65, 70 (N.D. Ill. 1967); *Transport Careers v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986)). Thus, the Commission would appear to be a combination subject to Section 1 of the Sherman Act. (15 U.S.C. 1).

Association activities which limit or set maximum prices are vulnerable to attack as price-fixing. (*Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982); *McLean County Chiropractic Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶23, 524 (FTC Consent Order to Cease and Desist Complaint, Dkt-3491, April 7, 1994)). The nonprofit and educational nature of the Commission does not necessarily exempt it from such antitrust liability. (*See United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) (colleges and universities not immune from antitrust laws for price-fixing); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (no "learned professions" exemption); *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (nonprofit nature of organization does not shield it from antitrust liability)). Moreover, paternalistic aims, such as protection of students, which unduly restrict competition are not a defense to such liability. (*See National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)).

Of particular importance to this request, the FTC recently issued an advisory opinion which found violative of the antitrust laws a physician fee review program proposed by the American Medical Association and state and local medical societies which provided for the imposition of disciplinary sanctions for "fee gouging" or fees that were deemed by peer review panels to be "excessive." (*American Medical Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶ 23,602 at 23,284-87, (FTC Advisory Opinion, Feb. 14, 1994). In contrast, the FTC found permissible sanctions for abusive conduct in connection with fees, such as misrepresentation, deception, or the exertion of undue influence. (*Id.* at 23,284). Private, non-binding advice on fee levels, not based upon benchmarking of fees, and requirements, for disclosure of fee-related information were also found to be permissible. (*Id.* at 23,283; *accord, Iowa Dental Ass'n.*, 99 FTC 648 (FTC Advisory Opinion, April 3, 1982)).

In view of the regulations promulgated by the Department of Education, the Commission appears to be obliged to consider adoption of an accrediting standard under which it would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard potentially by withdrawing accreditation. Such a standard might use one or more of the three approaches suggested in the NPRM with tuition capped at a percentage of expected earnings. Yet, such action by the Commission could be viewed as price fixing under the antitrust laws since the Commission is arguably a combination which would be limiting the pricing discretion of competitors.

It might be argued that Congress impliedly exempted accrediting bodies like the Commission from the antitrust laws when it conditioned recognition of accrediting agencies upon the adoption of a standard for the assessment of tuition and fees. (*See Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989) (private governing board for amateur basketball exempt when it set and enforced player qualifications pursuant to Amateur Sports Act)). However, this is an uncertain basis for actions which could have extremely severe consequences. Congress did not speak directly to the issue, and such exemptions are disfavored. (*Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

The Third Circuit's holding in Brown University indicates that the rule of reason would be applied to evaluate a tuition and fees standard. Under the rule of reason, it might be argued that the standard is designed not to inhibit competition but to protect students who lack the knowledge and sophistication to make informed choices. However, such a paternalistic justification was rejected by the Supreme Court in National Society of Professional Engineers and Indiana Federation of Dentists. Further, less restrictive means may be available to achieve the pro-competitive aims of correcting information deficiencies in the market. (*See* Brown University, *supra*).

Alternatively, the Commission might collect tuition information from its accredited schools and analyze this information to determine how the tuition charged for a given program at a particular school compares to similar programs and schools. If the tuition were in the top tenth percentile of all similar programs, for example, the Commission might then require the school to explain why its tuition was so high and to provide this information to students and

prospective students. Under this approach, the school would retain its pricing discretion and remain free to charge the tuition that it wished. A standard establishing this procedure would provide students with useful information on which to base a decision to attend an institution and improve the functioning of the market.

Even this approach may present difficulties under the antitrust laws. In its advisory opinions on the fee review proposals in American Medical Ass'n. and Iowa Dental Ass'n., the FTC cautioned that the associations should not systematically collect fee data, develop any explicit or implicit "benchmarking" scheme, or publicly disclose their review of particular fees. The alternative approach described above could be viewed as inconsistent with these conditions. The heart of the accrediting standard would be the systematic collection of tuition data and the disclosure to students of information comparing and explaining the school's tuition in relation to other schools. Since schools may wish to avoid this disclosure because it could inhibit students' decisions to attend, the standard could be regarded as an implicit form of benchmarking, with the benchmark as the range of tuition levels where disclosure would not be mandated by the Commission.

A final possibility would be an accrediting standard which required schools to inform students in the catalog, enrollment agreement and other publications that they may obtain information about tuition charges for comparable programs from the Commission. The Commission would again collect tuition information from accredited schools about their programs, and assemble this information in a data base. Students could access this information to determine the cost of similar programs at other institutions. The data base might also contain other information useful to consumer choice, such as geographic location, size of the institution, and other programs and services offered at the school.

This approach would avoid any benchmarking of acceptable tuition levels. Schools would retain full discretion to price their services. The accrediting standard would be formulated to address directly the underlying problem of lack of consumer information by providing students with the data necessary to make informed choices. By assembling, categorizing and providing context to the data, the commission would still meet the requirements of the Higher Education Amendments of 1992 since it would be "assessing" the tuition and fees of schools. The Antitrust Division recently released

a business review letter stating that a similar type of fee survey should not be subject to challenge under the antitrust laws. (Trade Regulation Reports (CCH), No. 322 at 3 (July 6, 1994)).

Request for Guidance. The Commission respectfully requests guidance on the permissibility under the antitrust laws of the approaches to an accrediting standard on tuition and fees outlined above. The Commission will in the near future begin the process to renew its recognition by the Department of Education. As part of that process, the Commission will have to demonstrate its compliance with the statutory and regulatory recognition criteria, including the requirement for a standard to assess tuition and fees. Your review of the approaches under consideration by the Commission will be of substantial assistance as it seeks to continue to demonstrate that it is a reliable authority as to the quality of the education and training offered by its accredited institutions. Accordingly, we respectfully urge expedited consideration of this request.

Sincerely,

Mark L. Pelesh
Counsel to ACCSCT