

**LEGISLATING RELIEF FOR THE HIGH COST OF COLLEGE TEXTBOOKS: A  
BRIEF ANALYSIS OF THE CURRENT LAW AND ITS IMPLICATION FOR  
STUDENTS, FACULTY AND THE PUBLISHING INDUSTRY**

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**I. INTRODUCTION**

According to a 2007 report<sup>1</sup> by the Advisory Committee on Student Financial Assistance (ACSFA), an advisory committee to both Congress and the Secretary of Education, textbook expenditures for students “can easily approach \$700 to \$1,000”<sup>2</sup> per year. A U.S. General Accountability Office (GAO) study in 2005 similarly found that “first-time, full-time students attending four-year private, nonprofit colleges were estimated to spend \$850 for books and supplies in their first year, or 8 percent of the cost of tuition and fees during academic year 2003-2004.”<sup>3</sup> The same report found that the cost of textbooks at colleges and universities had risen at twice the rate of inflation in the two decades prior to the writing of the report, with prices in December of 2004 186 percent higher than in December of 1986, compared with a 240 percent increase in the cost of tuition and fees at colleges, universities, and professional schools and an overall inflation rate of 72 percent during the same time period.<sup>4</sup> While the increase is felt by students in all of higher education, the effect can be disproportionately severe for students who can least afford it. As the GAO report shows, for 2003-2004 students at private, not for profit colleges and universities were expected to spend an estimated \$850 in books and supplies during their first year, an amount that is approximately eight percent of their total tuition and fees, while students paying in-state tuition at public four-year colleges and universities would pay on average \$898 during the same period for their textbooks and supplies, an amount representing 26 percent of the cost of their tuition and fees, students at two-year public institutions would pay \$886 in books and supplies, an amount equal to 72 percent of their overall cost of in-state tuition and fees.<sup>5</sup>

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<sup>2</sup> *Id.* at 5.

<sup>3</sup> U.S. Gen. Accounting Office, College Textbooks: Enhanced Offerings appear to Drive Recent Price Increases (2005), at 10, available at <http://www.gao.gov/new.items/d05806.pdf>.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 10.

## II. THE CAUSES OF HIGH TEXTBOOK PRICES

While the publishing industry is often blamed for artificially maintaining the cost of textbooks high, there is little evidence that the industry is greatly profiting from textbook sales. A report by the non-partisan Iowa Public Research Organization (IPRO) in 2008 noted that approximately 80 percent of college textbooks are published by five publishers (Thomson, McGraw-Hill, Houghton- Mifflin, Wiley, and Pearson).<sup>7</sup> Since that report was published, the list has shrunk to four as Cengage Learning, formerly known as Thomson Learning, purchased Houghton Mifflin's College Division in 2008, further lessening an already reduced field of competitors. Given that not every publisher publishes textbooks for every subject, the choices available for faculty members are narrower still. Not surprisingly, the lessening of competition over the years as more than a dozen hearty competitors were whittled down to four, with some lesser known imprints struggling to be noticed, has resulted in less competition for the major publishers, fewer textbook choices for college faculty, and higher prices for students. The inference should not be drawn from the lessening of competition that nefarious forces or antitrust activities are at play by publishers. One reason that there has been such a remarkable shakeup of the industry over the past two decades is quite simply that the publishing business is not as profitable as it might seem given the cost of books. One undeniable reason contributing to the high cost of college textbooks is the used textbook market. Publishers (and authors) make a profit only from the first sale of a book, with profits for subsequent used book sales going exclusively to college bookstores and other online and brick and mortar used book resellers. There is no

<sup>6</sup> See e.g., Merriah Fairchild, Ripoff 101: How the Current Practices of the Textbook Industry Drive Up the Cost of College Textbooks, CALPIRG (2004), available at <http://www.calpirg.org/uploads/Wb/6K/Wb6Kit5YIS-aWOV9HHesyw/textbookripoff.pdf>; SAFFRON ZOMER, EXPOSING THE TEXTBOOK INDUSTRY: HOW PUBLISHERS' PRICING TACTICS DRIVE UP THE COST OF COLLEGE TEXTBOOKS, STUDENT PIRGS (2007), available at [https://www.calpirg.org/uploads/Co/Se/CoSevsEF7JlcxDweAZsNmA/Exposing\\_the\\_Textbook\\_Industry.pdf](https://www.calpirg.org/uploads/Co/Se/CoSevsEF7JlcxDweAZsNmA/Exposing_the_Textbook_Industry.pdf).

<sup>7</sup> IOWA POLICY RESEARCH ORGANIZATION, THE COST OF COLLEGE TEXTBOOKS (2008), available at <http://www.uiowa.edu/~ipro/Papers%202008/Textbook%20Cost.pdf>.

<sup>8</sup> Cengage Learning has incorporated a number of former competitors in the college textbook publishing business. Its college imprints currently include Brooks/Cole, Course Technology, Delmar, Heinle, Schirmer, South Western and Wadsworth. When I was seeking a publisher for my first textbook, BUSINESS LAW: AN INTRODUCTION in the late 1980s, South Western, Houghton Mifflin and Mirror Press all expressed enough of an interest in the project to arrange face to face meetings to discuss publication. Ultimately I decided to sign with Mirror Press, a new imprint of Richard D. Irwin and the Times Mirror Company. Within a few years of the textbook's publication, Irwin and Mirror Press and Richard D. Irwin were sold to McGraw Hill. (Mirror Press ceased to exist and the text was published for a number of years under the Irwin/McGraw Hill imprint.) Houghton Mifflin and South Western are now combined under the Cengage Learning umbrella. Thus Irwin, Mirror Press, Houghton Mifflin and South Western, four competing publishers among many others who long since merged or simply went out of business, have morphed into one, and two of these have vanished altogether, their titles incorporated into those of the new parent company and competing versions of textbooks inherited in such mergers from former competing authors excised or allowed to wither on the vine as the sales force pushed their better established or more profitable offerings.

incentive for publishers to keep the cost of books low and every incentive to offer new editions of popular textbooks every three years or so, ideally with extensive extra cost ancillaries such as student workbooks and study guides, to prevent the used book market from heavily eroding the value of their intellectual property and the initial development costs for college textbooks. According to a recent independent report, for each dollar of textbook sales, the publisher makes seven cents profit and spends 32.2 cents for printing and editorial costs, 10 cents for administrative costs, and 15.4 cents for marketing costs. The net percentage of profit to the publisher is 10.8 percent on the sale of textbooks.<sup>10</sup> College bookstores make 40 percent of their revenue from new book sales and 17 percent of their revenue from used book sales, with the remainder coming from other sources such as clothing and supplies.<sup>11</sup> The net percentage of profit from the sale of a new textbook by a bookstore is estimated to be 19.8 percent according to the same report.<sup>12</sup>

### III. A DISTINCTIVE U.S. PHENOMENON

International editions of U.S. textbooks are priced differently than editions intended for domestic distribution. The GAO notes in a recent report that “[i]n assigning prices to the different versions of U.S. textbooks sold in the international marketplace, publishers told us that they consider local market conditions and the willingness and ability of students to purchase the textbook.”<sup>13</sup> The report goes on to note:

[Publishers told us that they make country-by-country and book-by-book distribution and pricing decisions. Specifically, publishers told us that factors they consider in making pricing decisions are income levels, the cost of living, the role of the textbook in the classroom, intellectual property protections, the strength of the local currency, and the prices of competing textbooks sold in that marketplace. In some cases, international prices may be substantially lower than prices at which the textbook is sold in the United States, while in other cases, they may be the same as or higher than U.S. prices.<sup>14</sup>

It should come as no surprise that basic economic principles have an impact on the price of textbooks in the U.S. and abroad, and that substantially lower prices or even higher prices can result based on the purchasing power and competition in various international markets. Along similar lines, the GAO report also notes that:

<sup>9</sup> Iowa Policy Research Organization, *supra* note 7 at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> *Supra* note 3, at 22.

<sup>14</sup> *Id.*

[P]ublishers typically incur substantial costs in order to develop textbooks, but once these development costs have been undertaken, the additional cost of producing more copies is quite low. As a result, a publisher may be able to profitably sell textbooks in one country at prices that are closer to actual costs of printing and distributing additional copies while charging higher prices in the United States that reflect the substantial development costs undertaken.<sup>15</sup>

In other words, publishers pass along the substantial development costs for the production of new textbooks exclusively to their primary customers, U.S. students, which then allows publishers to sell the same textbooks internationally at cut-rate prices, subsidized by American consumers.

Another reason for substantially lower college textbook costs outside of the U.S. is that there is less of a demand for “electronic and print supplements to support teaching and learning in non-U.S. markets.”<sup>16</sup> In demanding ever more resources and ancillaries to accompany the textbooks that we adopt for our classes, U.S. faculty are helping to perpetuate the upward spiral in textbook prices that has brought textbooks beyond the reach of too many students.

Finally, the disparity in the cost of textbooks in different countries can also be traced to education funding trends:

Publishers also told us that because higher education funding tends to be highly subsidized in the United Kingdom and European countries, students may not be willing to pay out-of-pocket costs for textbooks at U.S. prices. According to publishers, textbook prices in Canada and Australia tend to be similar to those in the United States because the instructional styles are similar in that instructors select specific textbooks for their classes.<sup>17</sup>

In other words, students in countries that are very generous in subsidizing the cost of higher education are unwilling to pay a high price for their textbooks, so U.S. textbook publishers accommodate them by offering college textbooks at substantially lower cost than they are sold to U.S. college students who are already bearing the burden of tuition and fees that have increased on average of 240 percent from December 1986 to December 2004.<sup>18</sup>

As of this writing, Congress and eight states have passed legislation intended to offer students relief from the high cost of college textbooks. A brief analysis of that legislation will show what Congress and the states believe to be the

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 22-23.

<sup>18</sup> *Id.* at 1.

root causes of high textbook prices and help us predict the potential impact of the new legislation.

#### IV. CURRENT LEGISLATION ENACTED TO REDUCE THE COST OF TEXTBOOKS

##### A. Federal Legislation

Congress passed new legislation that will become effective on July 1, 2010<sup>19</sup> intended to curtail college textbook costs. The purpose of the legislation is to “ensure that students have access to affordable course materials by decreasing costs to students and enhancing transparency and disclosure with respect to the selection,<sup>20</sup> purchase, sale, and use of course materials.” The legislation mandates a number of significant changes in operation for publishers and colleges.

Publishers are required to provide faculty or others who make textbook adoption decisions at institutions that accept federal financial assistance with the following information:

The price at which the textbook or supplemental material available to the bookstore and the price at which it offers the textbook or supplemental material directly to the public, if applicable;<sup>21</sup>

The copyright dates of the three previous editions to the textbook, if any;<sup>22</sup>

A description of the substantial content revisions made between the current and previous edition, if any;"

Whether the textbook or supplement is available in any other format such as paperback or unbound and, if available, the price charged for such alternate formats to the bookstore and directly to the public;<sup>24</sup>

If textbooks and supplemental materials are sold as a single bundle, the text and supplements must also be made available for purchase individually and the individual price disclosed;

<sup>19</sup> 20 U.S.C.S. § 1015b (LexisNexis 2009).

<sup>20</sup> 20 U.S.C.S. § 1015b(a).

<sup>21</sup> 20 U.S.C.S. § 1015b(c)(1)(A).

<sup>22</sup> 20 U.S.C.S. § 1015b(c)(1)(B).

<sup>23</sup> 20 U.S.C.S. § 1015b(c)(1)(C).

<sup>24</sup> 20 U.S.C.S. § 1015b(c)(1)(D)(i)-(ii).

<sup>25</sup> 20 U.S.C.S. § 1015b(c)(2).

Pricing information for custom-published textbooks must be disclosed in the same manner as traditional textbooks “[t]o the maximum extent practicable;”<sup>26</sup>

Colleges are also “encouraged” (but not required) to also disclose, where applicable, any available textbook renting, guaranteed textbook buy-back or alternative book delivery programs it may make available to students.<sup>27</sup>

Institutions of higher education that receive federal financial assistance are required to implement the following changes:<sup>28</sup>

Disclose on the institution’s Internet course schedule the International Standard Book Number (ISBN) of required and recommended college textbooks and supplements or, where the ISBN is not available, the author, title, publisher and copyright date for each textbook or supplement. The notation “[t]o be determined” must be inserted in place of the ISBN or identifying information where it is “not practical for a textbook or supplemental material.”<sup>29</sup><sup>31</sup>

Make available, to a college bookstore operated by or in a contractual relationship with the institution, as soon as practicable upon the bookstore’s request the institution’s course schedule for the subsequent academic period with a list of required and supplemental materials, the number of students enrolled in classes and the maximum student enrollment for classes.<sup>32</sup>

By July 1, 2013, the legislation requires reporting by the Comptroller General of the United States on the implementation of the law by colleges, publishers and college bookstores as to the availability of the required information on course schedules, of textbook pricing information availability to faculty, or institutional alternative content delivery programs, and other available institutional cost-saving strategies.<sup>33</sup>

<sup>26</sup> 20 U.S.C.S. § 1015b(c)(3).

<sup>27</sup> 20 U.S.C.S. § 1015b(f)(1)-(4).

<sup>28</sup> 20 U.S.C.S. § 1015b(d).

<sup>29</sup> 20 U.S.C.S. § 1015b(d)(1).

<sup>30</sup> 20 U.S.C.S. § 1015b(d)(1)(A).

<sup>31</sup> 20 U.S.C.S. § 1015b(d)(1)(B).

<sup>32</sup> 20 U.S.C.S. § 1015b(d)(e)(1)-(2).

<sup>33</sup> 20 U.S.C.S. § 1015b(d)(g)(1)-(4).

### B. State Legislation

As of this writing eight states, California, Florida, New York, Iowa, Oklahoma, Tennessee, Virginia, and West Virginia, have enacted some form of legislation intended to alleviate the high cost of college textbooks. A brief examination of the legislation in these states can be useful not only to better understand the current state efforts at addressing what is largely perceived to be a problem but also in spotting what is fast becoming a clear trend in legislative efforts to lower textbook prices.

#### 1. California

California has the most extensive regulations. The legislative findings and declarations in California's Education Code state that "the production and pricing of college textbooks deserves a high level of attention from educators and lawmakers because they impact the quality and affordability of higher education."<sup>34</sup> This particular code section does not mandate but "urges" textbook publishers to unbundle instructional materials, provide information to faculty and departments and post online information about their different products with pricing information and information about the differences between current and past editions, disclose how long they intend to produce current editions, produce online supplements to existing editions instead of new editions, and provide an extra copy of adopted textbooks for faculty members to place on reserve in the campus library. In addition, the Trustees of the California State University and the Board of Governors of the California Community Colleges are charged with working with academic senates at colleges and universities to encourage faculty to "give consideration to the least costly practices in assigning textbooks . . . such as adopting the least expensive edition when the educational content is equal"<sup>36</sup> and encourage faculty to disclose

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the cost of adopted textbooks and the differences from previous editions. In addition, college and university senates are asked to work with bookstores to review issues of timelines and processes for book orders, work closely with faculty and/or publishers to create economically affordable, sound book packages, and make information about book costs public; campuses are encouraged to "provide as many forums as possible that provide access to students to as many used books as possible, including book rental programs, book swaps, and book buyback programs by college bookstores."<sup>38</sup> Private colleges and universities are likewise encouraged to work with the respective senates to encourage practices in the selection of textbooks that will result in the lowest cost to students.<sup>39</sup>

<sup>34</sup> CAL. EDUC. CODE § 66406 (West 2008).

<sup>35</sup> CAL. EDUC. CODE § 66406(a)(b) (West 2008).

<sup>36</sup> CAL. EDUC. CODE § 66406(c)(1)(A) (West 2008).

<sup>37</sup> CAL. EDUC. CODE § 66406(c)(1)(B)(i)-(ii) (West 2008).

<sup>38</sup> CAL. EDUC. CODE § 66406(c)(4)(A)-(E) (West 2008).

<sup>39</sup> CAL. EDUC. CODE § 66406(d) (West 2008).

Another new section of the Education Code in California creates the  
<sup>40</sup>  
 Textbook Transparency Act. The Act requires publishers to provide information  
<sup>41</sup>  
 on textbook cost and content on a timely manner and requires publishers by January 1, 2010 to  
 print on the outer or inner covers of textbooks the differences  
<sup>42</sup>  
 between a new edition and the old edition and the copyright date of the prior edition  
<sup>42</sup>  
 of the text. Publishers and their agents are also required to separately furnish to  
 prospective post-secondary adopters on request a list of products offered by the  
 publisher that are relevant to the needs and interests of the adopter, the publisher's  
 price for the new book, and the copyright date for any prior editions.<sup>43</sup> Bookstores at  
 all public, post-secondary institutions are required to post in their stores or online  
 their retail pricing policies on new and used textbooks.<sup>44</sup> In addition, public  
 postsecondary institutions are charged with encouraging faculty to place orders with  
 sufficient lead time to allow bookstore managers to confirm the availability of  
 requested material, and adopters are forbidden from accepting any consideration in  
 exchange for adopting textbooks other than complimentary course materials for  
 review or adoption, with adopters forbidden from selling instructor copies.<sup>46</sup> Faculty  
 may, unless forbidden by their institution's policies, be paid royalties for their own  
 published work, including work used in their classes, accept honoraria for peer-  
 reviewing course materials, accept payment for travel, meals and lodging for training  
 related to the use of course materials, and bookstores are forbidden from trading in  
 complimentary or teachers' editions of course materials (other than unsolicited . . . review  
 copies).

## 2. Florida

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Florida's textbook affordability statute forbids community college and state university  
 employees from receiving any consideration for requiring students to purchase a specific textbook  
 for coursework or instruction,<sup>49</sup> with the exception of sample or instructor copies of educational  
 materials (with such copies prohibited from being resold if marked as free samples not for resale),  
 royalties for the sale of the instructor's own work product, honoraria for academic peer review of  
 course materials, or fees for reviewing, critiquing or preparing support materials for

<sup>40</sup> CAL. Educ. Code § 66406.7 (West 2008).

<sup>41</sup> CAL. Educ. Code § 66406.7(c)(2) (West 2008).

<sup>42</sup> CAL. Educ. Code § 66406.7(d)(1)(A)-(B) (West 2008).

<sup>43</sup> CAL. EDUC. CODE § 66406.7(e)(1)(A)-(D) (West 2008).

<sup>44</sup> CAL. EDUC. CODE § 66406.7(f) (West 2008).

<sup>45</sup> Cal. educ. Code § 66406.7(g) (West 2008).

<sup>46</sup> Cal. Educ. Code § 66406.7(i) (West 2008).

<sup>47</sup> CAL. EDUC. CODE § 66406.7(i)-(l) (West 2008).

<sup>48</sup> FLA. STAT. § 1004.085 (2008).

<sup>49</sup> FLA. STAT. § 1004.085(1) (2008).

textbooks, or training in the use of course materials.<sup>50</sup> Public universities and community colleges are required to post on their websites not less than thirty days prior to the first day of class each term a list of all required textbooks with the ISBN or other identifying information that must include the title, the names of all authors, the publisher, the copyright date, the published date and any other relevant information for each required textbook (limited exceptions are made for classes added after the notification date).<sup>51</sup> By March 1, 2009 the State Board of Education and the Board of Governors must each adopt policies and guidelines for implementation by community colleges and state universities “that further efforts to minimize the cost of textbooks for students . . . while maintaining the quality of

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education and academic freedom.” These guidelines and procedures must provide for adoption decisions being made with sufficient lead time to confirm the availability of the requested items and ensure the maximum availability of used books, ensure that each item ordered (especially bundled products) is confirmed by the instructor or department prior to ordering, allow instructors and departments to decide prior to adopting a textbook that it is significantly and substantively better than a prior edition before making a new adoption, and establish policies to address the availability of required textbooks for students who cannot afford them.

### 3. New York

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New York’s Textbook Access Act effective on July 1, 2009 requires publishers to provide on demand to prospective adopters of their products who are faculty members or purchasing entities of institutions of higher education the price at which they would make a product available to college bookstores for purchase by students.<sup>55</sup> The Act covers textbooks and supplemental materials but excludes custom textbooks or special editions.<sup>56</sup> Institutions of higher education are charged with implementing policies that encourage the placing of book orders with sufficient lead time to allow college bookstores to confirm the availability of the requested material and of used and alternate digital versions of adopted texts.<sup>57</sup> Employees at institutions of higher education are precluded from receiving any consideration in exchange for the adoption decision with the exception of sample or instructor’s copies of textbooks and other instructional materials that are not to be resold, royalties or other compensation to instructors for their writing or work, and honoraria

<sup>50</sup> FLA. STAT. § 1004.085(2)(a)-(e) (2008).

<sup>51</sup> FLA. STAT. § 1004.085(3) (2008).

<sup>52</sup> FLA. STAT. § 1004.085(4) (2008).

<sup>53</sup> FLA. STAT. § 1004.085(4)(a)-(d) (2008).

<sup>54</sup> N.Y. Educ. Law Art. 15-C (Consol. 2008).

<sup>55</sup> N.Y. Educ. Law Art.15-C §721(1) (Consol. 2008).

<sup>56</sup> N.Y. EDUC. Law Art. 15-C §721 (2) (Consol. 2008).

<sup>57</sup> N.Y. Educ. LAW AH.15-C §723 (Consol. 2008).

for peer review of course materials and training in the use of course materials and

learning technologies.

#### 4. Iowa

Iowa's version of a textbook act is brief and focuses on requiring that textbook information be available to students in higher education "with adequate time to pursue alternative purchase venues."<sup>58</sup> The new law recommends but does not mandate that every institution of higher learning in the state post the list of required and suggested textbooks for all courses with the ISBN information at least fourteen days prior to the start of each semester or term in campus bookstores and ..<sup>59</sup> online.<sup>60</sup>

#### 5. Oklahoma

Oklahoma takes a different approach in an attempt to address the high cost of textbooks and authorizes the State Regents for Higher Education to establish and implement a textbook rental system.<sup>61</sup> The stated purpose of the legislation is to make books available to students who may not be able to afford them on a rental basis, encourage faculty in the state system of higher education to use books longer, encourage department heads to review textbooks to determine whether they are dated or can be used for a longer period of time, and encourage students to use all required textbooks and not limit their education due to lack of funds to purchase new or used ..<sup>62</sup> texts.

A separate statute<sup>63</sup> limits Oklahoma State System of Higher Education employees from receiving any consideration for the adoption of textbooks or instructional materials for classroom use.<sup>64</sup> The receipt of sample and instructor copies of textbooks and instructional materials not to be resold by faculty, staff or bookstores is permissible, as are royalties, honoraria for review of instructional materials and training in the use of instructional materials and technologies.<sup>65</sup> Campus bookstores and other instructional materials vendors are prohibited from soliciting higher education faculty and staff members for the sale of instructional materials provided by publishers without cost, and materials identified as free review instructional materials may not be bought or sold in any bookstore.<sup>66</sup>

<sup>58</sup> N.Y. EDUC. LAW Art. 15-C §724(1)-(4) (Consol. 2008).

<sup>59</sup> IOWA CODE § 261.7(1) (2008).

<sup>60</sup> IOWA CODE 1146 § 261.7(2) (2008).

<sup>61</sup> Okla. Stat. tit. 70, § 3240(A) (2008).

<sup>62</sup> OKLA. STAT. § 3240(A)(1)-(4) (2008).

<sup>63</sup> OKLA. STAT. § 3241.2 (2008).

<sup>64</sup> OKLA. STAT. § 3241.2(A) (2008).

<sup>65</sup> OKLA. STAT. § 3241.2(A)(1)-(4)(2008).

<sup>66</sup> OKLA. STAT. § 3241.2(B) (2008).

#### 6. Tennessee

Tennessee's legislation for dealing with the high cost of college textbooks charges the Tennessee Board of Regents to "develop policies for minimizing the cost of textbooks and course materials used at public institutions of higher education while maintaining quality of education and academic freedom."<sup>67</sup> Specific requirements for these policies include all of the following: 1. Faculty members must submit book orders in a timely manner and the ISBN and other identifying information about required textbooks and related materials must be posted on the institution's web site; 2. Campus bookstores must disclose the cost to students of instructional materials and the instructor must affirmatively acknowledge the price of such materials before orders are placed for every course; 3. Faculty are required to consider the least costly practices in assigning textbooks and course materials, including considering adoption of less costly comparable editions of textbooks and creating bundles of instructional materials only if they deliver cost savings to students; 4. Bookstores are asked to provide students the option of purchasing bundled instructional materials separately, if possible, and to actively promote buyback programs; and 5. Copies of books are to be made available for student use free of charge at the department or college library if publishers provide books free of charge for this purpose.<sup>68</sup>

#### 7. Virginia

Virginia's legislation on the sale of textbooks precludes employees at public colleges and universities from demanding or receiving any consideration for book adoption decisions with the usual exceptions for sample and instructor copies and royalties for their own writings.<sup>69</sup> The law also charges governing boards with implementing policies for institutions to post on their websites and in campus

bookstores a list of required books for all courses that include the ISBN and other

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relevant information for assigned textbooks. The governing boards of public institutions of higher education are charged with instituting policies, procedures and guidelines that encourage efforts to minimize the cost of textbooks for students at public institutions while maintaining the quality of education and academic freedom.<sup>71</sup> The guidelines shall ensure: 1. That textbook adoptions are made with sufficient lead time to confirm the availability of the requested materials and the maximum availability of used books; 2. That items ordered, especially bundled packages, are confirmed by the instructor with the bookstore prior to ordering; 3. That faculty members acknowledge the bookstore's quoted retail price for assigned textbooks;

<sup>67</sup> TENN. CODE ANN. §49-7-141(a)(2008).

<sup>68</sup> Tenn. Code Ann. § 49-7-141 (a)(1)-(7) (2008).

<sup>69</sup> VA. CODE ANN. § 23-4.3:1(A) (2008).

<sup>70</sup> VA. CODE ANN. § 23-4.3:1(B) (2008).

<sup>71</sup> VA. CODE ANN. § 23-4.3:1(C) (2008).

4. That faculty are encouraged to limit the use of new editions when previous editions are not substantively different from a new edition; and 5. that policies be established for making available required textbooks to students otherwise unable to afford their<sup>72</sup> cost. The statute also precludes funds provided for financial aid from university bookstore revenue from being counted in the calculation for state student financial aid appropriations.<sup>73</sup>

#### 8. West Virginia

West Virginia's relevant statute charges governing boards with ensuring that bookstores within their jurisdiction (e.g., public institutions of higher education) minimize the cost to students of purchasing textbooks through measures that can include requiring the purchase and resale of textbooks on an institutional or statewide basis, and providing for the use of certain textbooks for a reasonable number of

<sup>74</sup> years. In addition, the legislation prohibits employees of governing boards from accepting any consideration for textbook adoption decisions and precludes faculty from adopting textbooks that they have written if they contain pull-out workbook-style pages. The usual exceptions are made for sample and instructor copies that are not to be resold and royalties.<sup>76</sup> Governing boards are also charged with providing students with lists of textbooks assigned for all classes to be posted online, in a central location in the institution and in the college bookstore that must contain the ISBN, edition number and other relevant information for each book with books<sup>77</sup> added to the lists when the adoption process is complete.

### V. PROSPECTIVE IMPACT OF THE NEW REGULATIONS

#### A. Impact on textbook prices

Only time will tell whether the new federal and state regulations will actually significantly lower the cost of college textbooks for students. If nothing else, the common thread in these regulations of requiring the cost of textbooks to be disclosed to faculty and students should ensure that textbook adopters have comparative information readily available when evaluating textbooks for possible adoption. And the student-consumer will finally have the information required to find the lowest price option for purchasing required textbooks in a timely basis to facilitate price comparisons. This should put greater pressure on campus bookstores to compete on price with online book retailers and off-campus bookstores for new

<sup>72</sup> Va. Code Ann. § 23-4.3:(C) (1)-(5) (2008).

<sup>73</sup> Va. Code Ann. § 23-4.3:1(D) (2008).

<sup>74</sup> W. VA. CODE § 18B-10-14(c)(1)-(2) (2008).

<sup>75</sup> W. VA. CODE § 18B-10-14(e)(IXA)-(B) (2008).

<sup>76</sup> W. VA. CODE § 18B-10-14(e)(2)(A)-(B) (2008).

<sup>77</sup> W. VA. CODE § 18B-10-14(f)(1)-(3) (2008).

and used textbooks and should result in overall lower prices to students. Moreover, the price transparency required by the new regulations will force textbook publishers to reconsider the clear trend over the past several decades towards ever- larger textbooks bloated with ancillary materials that are often at best of marginal use to students and instructors and at worst distracting and confusing to students. Authors and publishers alike will need to reexamine the need for glossy full color pages and heavily illustrated hard-cover editions that can cost twice as much to produce as black and white softbound editions. And publishers will also be forced to provide more custom-published editions of their textbooks that contain only the chapters and ancillary appendix materials that instructors actually use in their courses as well as electronic versions of books. These factors will exert downward pressure on textbook prices for the foreseeable future, though to what extent and at what secondary cost are matters yet to be determined.

*B. Impact on the publishing industry*

The fault for the sharp increases in textbook prices that we have seen over the past several decades is often laid at the feet of textbook publishers by campus bookstore representatives and others in academia. Publishers make a handy target for a number of reasons that include the instinctive distrust of many academics for large corporations, and a misapprehension of the profitability of the print publishing industry in the United States, which for the most part has been struggling and contracting for many years. This is not to say publishers do not share some of the blame for the high price of college textbooks. In a competitive frenzy to outdo one another, and to stake out a competitive advantage for their titles, publishers have tended to sell the sizzle rather than the steak in a marketing driven process where a publisher's sales force pushes titles based on their profitability and on the number of pedagogical devices and "free resources" available to adopters with each text. And too many textbooks are revised for the sole purpose of undermining used book sales in existing editions.

It is clear, even upon the most cursory analysis of the regulatory efforts by the states to reign-in the high cost of college textbooks, that some of these efforts evidence at best naivete and at worst a complete lack of understanding of the textbook industry. For example, California charges the State University and the Board of Governors of the California Community Colleges to encourage faculty to "give consideration to the least costly practices in assigning textbooks . . . such as adopting the least expensive edition when the educational content is equal" and Virginia requires that faculty be encouraged to "limit the use of new editions when previous editions are not substantively different from a new edition." While on their face these regulations may seem eminently reasonable, they ignore the reality

<sup>78</sup> CAL. EDUC. CODE § 66406(c)(1)(A) (2008).

<sup>79</sup> VA. CODE ANN. § 23-4.3:l(C)(l)-(5) (2008).

that once a new edition is published the older edition it replaces goes out of print and is not generally available for adoption because publishers will no longer sell it. Indeed, the primary motivation for publishing a new edition of a popular textbook is to ensure that sale of the older edition (especially used textbook sales) is no longer possible. Thus, counseling faculty to carefully consider the cost of adopting a new textbook over an existing one, or, whenever practical, to delay adoption decisions until the current textbook goes out of print makes sense, but requiring faculty to make a cost-benefit analysis of keeping an existing edition of a text over a new edition released by a publisher is silly; faculty do not generally have that option in the real world unless there are sufficient used copies of the textbook available to guarantee that every student who needs the book will be able to find it in the used market. In a similar vein, Tennessee's requirement that "[c]opies of books are to be

made available for student use free of charge at the department or college library if

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publishers provide books free of charge for this purpose" also seems unrealistic ; publishers who are now reticent to give away textbooks to be placed in libraries or to be given away to students will be even less likely to do so when the new legislative measures further erode their profit margins. And if they do provide such free textbooks, it would only expedite the publication of a new edition because giving away textbooks further erodes the profitability and sales of an existing edition by requiring fewer students to purchase it.

Overall, these regulations will force publishers to be more competitive on price and that will very likely, over the short term at least, help to reduce the average cost of college textbooks. At the same time, the regulations have the potential to mortally wound an industry that is already arguably moribund and facing

competition from new imprints like Freeload Press/Textbook Media and Flat

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World Knowledge " that offer free, advertising-supported textbooks to students online as well as advertising-free electronic and traditionally bound copies of

<sup>80</sup> TENN. CODE ANN. § 49-7-141 (a)(1)-(7) (2008).

<sup>81</sup> Freeload Press is a textbook publisher in business for more than five years whose textbooks are distributed by Textbook Media As of this writing, they have thirty-one books available online that are accessible to students free of charge in an advertising supported format, with ads imbedded in the textbook at approximately seven page intervals). The textbooks are also available as advertisement-free e-books at a cost of \$5 to \$20, as printable PDF files for \$5 to \$20 and in soft-bound traditional printed formats at a cost to students of \$10 to \$40 per book. Individual chapters may also be downloaded without advertisements for a modest cost Both the free and premium online versions of textbooks have useful enhanced search and annotation capabilities that can make it easy to find information and personalize a textbook to suit the student's needs. The company's web page can be found at <http://www.freeloadpress.com/index.html>. Textbook Media's web page can be found at <http://www.textbookmedia.com/Default.aspx>.

<sup>82</sup> Flat World Knowledge has ten college textbooks available as of this writing with a total of twenty-five titles planned to be released by May 2010. It offers textbooks online to students in a free, advertising-supported format as well as advertisement-free low cost versions of the textbooks in soft-bound and various electronic formats generally for under \$30. (According to its web site, a black and white softbound textbook would cost about \$29 and a student could opt for a \$59 color version of the text, or buy chapters individually for \$1.99.) Mp3 audio versions of textbooks are also reportedly available. It also offers adopting faculty the opportunity to customize textbooks with their own content for its electronic and print textbook versions that they refer to as an "open textbook" format. The company's web page can be found at: <http://www.flatworldknowledge.com/>.

textbooks at a small fraction of the cost of competing titles from the remaining traditional publishing houses. And placing too heavy an emphasis on price can have a devastating effect on quality. At present, the non-traditional publishers employ a peer review process not unlike that of the traditional publishers prior to accepting a new textbook for publication. But anyone with access to a computer and word processing software can produce and post online their “new textbook” for sale or free adoption. When technology allows anyone to be an author, faculty will need to be ever more vigilant in reviewing the content of textbooks they assign their students, as free and low-cost textbooks that are inaccurate or inappropriate for the intended audience are not a bargain.

*C. Impact on faculty*

As previously noted, the states of Florida, Tennessee and Virginia use identical language to state that the regulations will maintain the quality of education and academic freedom; nevertheless, serious issues of academic freedom and quality of education exist in any regulation that affects how textbooks are selected and urges or requires that the least costly textbook alternative be chosen. There is also a workload issue involved in states that require faculty to justify textbook or edition changes when less expensive alternatives are available, and many faculty members will take umbrage at the legislative language in most of the regulations that seek to prevent faculty members from receiving consideration in exchange for textbook adoptions, leaving one to draw the unsavory inference that perhaps faculty members are somehow partially responsible for the high cost of textbooks by accepting payoffs for their textbook adoption decisions.

*D. Impact on campus bookstores*

Campus bookstores have profited nicely over the years both through the sale of new and used textbooks ; though they cost of textbooks can more directly be attributable to the profits of bookstores than of publishers as discussed in Section II *supra*, bookstores have generally managed to escape the brunt of the criticism that has been directed (and sometimes redirected by the bookstores) at book publishers. Both campus bookstores and the institutions they serve have become accustomed to and, in lean times, perhaps dependent on the profits that these businesses make and which are then often used to fund necessary and discretionary spending. It is not unusual, for example, for part of bookstore profits to help fund faculty travel to conferences and other professional development activities. Thus the new requirements that students be given all necessary information to find the lowest cost alternative for their new and used textbooks will directly and immediately impact the profitability of college bookstores and reduce an important source of funding for many underfunded institutions as students will readily find lower-cost alternatives to purchasing both new and used textbooks outside of the campus bookstore once they are provided with the necessary information about required textbooks on a timely

basis. If students are able to buy their new and used books through retailers that are willing to make less than the traditional 20 to 25 percent markup that campus bookstores impose on the sale of new and used textbooks, directly from publishers at a discounted price or through the emerging modality of free, advertising-supported textbooks from some publishers, college bookstores will lose a very significant source of revenue. Do not expect them to do so without a fight.

## VI. SOME ALTERNATIVE SOLUTIONS

Despite its shortcomings, the federal and state legislation to date represents an honest effort at containing the cost of college textbooks. If nothing else, the legislation will ensure that information about textbook cost is made available to faculty and to students on a more timely basis; such transparency cannot help but have a positive impact as faculty are made more aware of the cost of the textbooks and supplements adopted for class use, and students will have the information they need to purchase used or new textbooks at the lowest available price from a wide range of sellers, including their campus bookstores. The increased competition that will inevitably result should exert downward pressure on textbook prices and force retailers to reduce their profit margins, lower textbook production costs, or find alternative creative means of delivering their product to the consumer in a more cost effective manner.

But competition alone may not bring about a substantial enough reduction to the cost of textbooks and could have the undesirable effort of lessening competition by putting some of the remaining publishers out of business or forcing even greater consolidation. For this reason, colleges, universities and legislative bodies would do well to at least study the feasibility of more radical solutions in case the new legislation falls short of reaching its desired effect. Normally any proposal that calls for additional government funding for academia is a non-starter, but with the recent \$787 billion economic stimulus package signed into law and an additional stimulus package being considered by some in Washington, perhaps it is not completely out of the question under the current economic and political climate. If a tiny fraction of existing unallocated or any new stimulus funding were dedicated to reducing the cost of college textbooks, drastic results could be achieved within a relatively short period of time. Specifically, Congress (or state legislatures in receipt of stimulus funding) could pilot any or all of the following programs, some of which would have an immediate impact on textbook prices.

<sup>83</sup> See e.g., Anthony Hall, *Economic Outlook: Stimulus Revisited*, UP1, July 8, 2009; *Article of Interest: Democrats Split on Stimulus as Job Losses Mount, Deficit Soars*, STATES NEWS SERVICE, July 8, 2009; Michael Goodwin, *Obama's Stimulating Do-Over*, DAILY NEWS, July 12, 2009, at 27.

A. *Provide funding for public universities to implement a textbook lending or rental program to students*

The state could reimburse colleges and universities who purchase textbooks to be used by their students. Publishers would have to agree to keep a book in print for a reasonable period of time (e.g., three to five years) in exchange for a guaranteed purchase of thousands of textbooks. If an outright federal or state grant is not economically feasible, states could subsidize a textbook rental program under similar terms in which money would be advanced by the state to facilitate the textbook purchase and the university would repay the grant in whole or in part out of the rental fees it received from students. (Even states with serious economic difficulties could explore such a funding scheme by floating bonds to be repaid out of the textbook rental fees.) A \$150 textbook used for three years in courses offered in the fall and spring semesters could be rented to students for \$30 and return \$ 180 in rental fees—more if it is used in summer or winter courses or for a longer period of time. At the end of the three years, the publisher could take back (and presumably destroy) the used copies while giving a pre-arranged credit to the university to be used towards purchasing the new edition of the text. The entire transaction could be handled directly by college bookstores for a fair and reasonable (if smaller) fee than they would have received from selling a new or used book. Although this alternative would be less attractive to campus bookstores than the traditional sale of new and used textbooks, it would represent a predictable, steady stream of revenue for campus bookstores that may otherwise very well cease to exist in the not too distant future when the measures required by the new legislation are fully in place.

B. *Provide incentives for faculty members to author new textbooks*

Faculty members who have authored college textbooks will readily attest to the meager economic and professional rewards for this type of scholarly activity. Scholarly books and textbooks usually are rated the same as a single publication in a refereed first-tier journal by accrediting bodies, though the former usually take several years to research and write and the latter can more often than not be researched and written in a fraction of that time. If lowering the cost of college textbooks and enhancing their quality are truly goals that are deemed to be in the national interest, it seems reasonable that the federal and/or state governments could allocate resources to provide an economic incentive for faculty to pursue this type of scholarship. Reasonable grants for the outright sale of a new textbook (e.g., \$5,000 per 100 printed pages of a published textbook up to a maximum of \$25,000 per textbook), or a smaller grant with a nominal reduced royalty to the author (e.g., \$5,000 and five percent of the selling price of the book) would provide at least some tangible benefit for new textbook development.

Providing a process for competitive, peer reviewed, grant-supported textbook development would also likely encourage faculty collaboration as faculty members who are unwilling to devote the time and resources necessary to writing an

entire textbook would have increased opportunities to collaborate by chapter or unit in a textbook in their field with colleagues from institutions around the world. Grant funded research of this type would produce high quality textbooks, provide meaningful publication opportunities to new and established faculty, increase the prestige of the authors' home institutions, and provide a low-cost, high quality product for students.

*C. Implement a federally funded open textbook project*

California is currently experimenting with the concept of an open source textbook project in an effort to reduce the \$400 million per year cost to the state of

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providing textbooks for use in the state's public schools. Congress should fund a similar project aimed at reducing the cost of textbooks at both public and private colleges and universities at the national level. Such a project could provide at least a partial long-term solution to the high cost of college textbooks at a minimal cost. To increase the potential pool of participants, some type of incentive program would need to be developed that could include federal tax credits for authors who release existing or new textbooks into the public domain. Individual faculty members could then expand, edit, and customize the textbooks as they saw fit for use in their classrooms and post such collaborative revised versions for use by others in much the same way that open source systems and applications software is created and improved for the benefit of all users.

*D. Encourage universities and colleges to publish textbooks written by their faculties*

Even without external funding, colleges and universities should encourage and support peer-reviewed textbook writing efforts by their faculty not only because it can lead to less expensive, better quality textbooks, but simply because it is the right thing to do. If grant funding cannot be secured, many faculty members would take advantage of the opportunity to create high quality textbooks alone or in collaboration with their peers that could be printed by university presses, where available, or college print shops at smaller institutions, at low cost. Institutions could market these textbooks directly through their web pages or through outside firms and faculty members could be provided a smaller royalty than the industry standard for sale of their textbooks outside of their home institutions. Collaborations beyond coauthorship opportunities would be possible and should be encouraged on such projects (e.g., the vital work of copy editing, artwork creation, production and other related activities) could be performed by colleagues with the appropriate expertise who would share in royalties, grant or release time available to work on such projects.

<sup>84</sup> See e.g., *New Chapter in Textbooks*, L. A. TIMES, May 23, 2009, Home Ed., at 42.

*E. Make available e-book readers to students*

Depending on the availability of grant funding or other local resources, colleges and universities could make available to students e-book readers funded through the ubiquitous student activity or technology fees, or through a lending, discounted sale, or rental arrangement. At present there are no fewer than seven different such devices at retail prices starting at under \$300, including the Amazon

Kindle, Sony Reader, Fujitsu FLEPiA, Hanlin eReader, Foxit eSlick Reader,

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Samsung Papyrus and the yet-to-be-released Plastic Logic reader. Quantity purchases would make these devices more affordable and students would then be able to download and carry to class e-book versions of their textbooks at a significantly reduced price over traditional textbooks in a single portable device smaller and much lighter than a single textbook.

*F. Support student-to-student used book sales*

A low-cost/no-cost solution to reduce the cost of used textbooks for their students is to provide a centralized location for students to buy and sell textbooks on campus and virtually through the institution's server. There are some commercial services that currently do this, matching up buyers and sellers for a fee, but universities could provide this service for free. At small or underfunded institutions, clubs and/or fraternities can be encouraged to organize and oversee book swaps/sales with minimal support institutional support (e.g., web development support to help create a working online book swap system and making facilities available for students to host book swap meets).

## VII. CONCLUSION

Whatever the cause, it is clear that college textbooks have become too expensive and, for some students, simply unaffordable. The federal and state regulatory efforts briefly reviewed here are certain to have an impact on the cost of textbooks by at the very least ensuring that students will have the information they need to buy their college textbooks on a timely basis that will facilitate comparison shopping and allow them to purchase their textbooks at a lower cost. Textbook publishers will need to operate in a more competitive environment and adapt to the emerging paradigm of providing more choices such as making available less profitable custom published or online versions of their leading titles. They will also have to rethink the traditional model of selling books wholesale to campus bookstores for them to package and retail to students at a significant markup. Bookstores, too, will need to adapt by very significantly reducing the markup they charge for textbooks or they will risk becoming obsolete in the not too distant future. And faculty will need to face head on the vital issues of academic freedom and

<sup>85</sup> <http://www.wired.com/gadgetlab/2009/03/samsungs-new-e/>.

academic quality that inevitably emerge when adoption decisions are mandated to be filtered through the criterion of cost. But the new and existing legislation is of itself unlikely to solve the problem. More will need to be done by those who are in the best position to find and implement viable solutions. I mean, of course, not our legislative leaders with an imperfect understanding of the causes of the problem, as some of the legislative efforts discussed here illustrate, but those who write, review, evaluate, and ultimately adopt college textbooks: the faculty.

As is often the case with government regulation, unintended consequences will likely ensue from the current legislation. And while there is room for cautious optimism that the new regulations will remove an unnecessary barrier to learning for the students we serve, it would be wise to temper such optimism with a diligent effort to find other effective solutions while remaining vigilant to ensure that the mandated remedy is not worse than the economic illness it is intended to cure.