

June 1, 2022

Secretary Miguel Cardona
United States Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: Online Program Managers and the ban on incentive compensation

Dear Secretary Cardona,

The Higher Education Act's ban on "incentive compensation," which prohibits the use of commission-based pay based on an admissions or financial aid representative's success in recruiting students, is one of the most important consumer protections in higher education law.¹ The ban is intended to protect students from pressurized and misleading sales pitches that are often used when a recruiter is paid based on their success in enrolling students.

Information available to the public indicates numerous colleges are out of compliance with the incentive compensation ban and the Education Department's guidance on program integrity regulations.² OPM-fueled growth of the online graduate degree market is associated with tuition inflation and increasingly outsized student debt balances.

As is made clear by the newly released Government Accountability Office report, "[Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers](#)," the Department of Education must do more to ensure that both the spirit and the letter of the statutory ban on incentive compensation is being followed as it relates to colleges' contracts with companies known as online program managers (OPMs).³

As part of acting on the GAO's recommendations, the Education Department should issue an information request to all institutions for details on their OPM arrangements. Responses to that request will be essential for both adequate enforcement in the short term and for rescinding and revising guidance in the long term.

In addition to this information request, we believe that it is in the interest of students and the public for the Department of Education to align its oversight and enforcement of the incentive compensation ban by:

- 1) enforcing the current guidance, while working toward
- 2) rescinding the 2011 sub-regulatory guidance that created a "bundled services" carve-out to the ban.

As part of the process of rescinding the bundled services guidance, the Department should issue new guidance that updates and clarifies which activities are impermissible under the incentive compensation ban.

¹ 20 USC 1094(a)(20), 487(a)(20) of the HEA

² <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/compensation.html>

³ <https://www.gao.gov/products/gao-22-104463>

Enforcing the Current Guidance

The GAO found that the Department has failed to monitor colleges' compliance with the incentive compensation ban. Initial research based on information acquired from public institutions shows that this lack of monitoring has allowed non-compliance to flourish.⁴

Up to now, the Education Department has not monitored colleges' arrangements with OPMs, even though the arrangements that include recruitment are implicated for oversight. Current guidance provided by the Education Department in 2011 is clear on the importance of colleges and their contractors maintaining an arm's-length relationship. The contractor should be an independent entity, unaffiliated with the institution, and uninvolved in decision making. Despite this, some schools have been or are currently in arrangements with OPMs that cross the line. Such arrangements involve:

- the establishment of steering committees or other governing bodies that give the OPM an official and regular role in decision making;
- higher shares of revenue paid to the OPM as enrollment increases; and
- OPM control over marketing and recruiting, in the name of school.

These examples are derived from the public's limited access to records related to university–OPM arrangements. Those contracts are often kept confidential, and indeed, many colleges' websites do not clearly disclose that core features of their online programs are run by an OPM at all. As such, we believe that these practices may be widespread and that the Department should make an information request of all institutions. The Department should act on the information it receives, in addition to implementing the GAO recommendations for improvements to compliance audit and program review processes, in order to better enforce the current guidance for as long as such guidance is in place.

Rescinding the 2011 Sub-Regulatory Guidance

The Higher Education Act prohibits “any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities[.]”⁵

However, a dangerous loophole to the incentive compensation ban was created with the 2011 sub-regulatory guidance that indicates incentive payments are sometimes permissible if recruiting is part of a “bundle of services” provided by an “unaffiliated third party” contractor. OPMs are examples of such contractors: they provide a suite of services to run colleges' online programs, including marketing to and recruiting online students. This “bundled services” exception in the 2011 guidance has been used to permit colleges and OPMs to enter into agreements that compensate the OPM based on a percentage of the tuition revenue it brings in.

Notably, the Department's OIG formally disagreed with the department's action, stating “we do not believe that the existing statutory ban on incentive compensation allows any incentive payments to entities involved in recruiting based on their success in enrolling students,” indicating that the OIG has

⁴ Stephanie Hall, “Invasion of the College Snatchers,” *The Century Foundation*, September 30, 2021, <https://tcf.org/content/report/invasion-college-snatchers/>.

⁵ 20 USC 1094(a)(20), 487(a)(20) of the HEA

viewed revenue-sharing agreements with OPMs to be a violation of the incentive compensation ban, regardless of whatever bundled services are being provided.⁶

Colleges' arrangements with bundled service providers that involve incentive-based payments introduce an incentive for recruiters to engage in pressurized and misleading sales tactics – exactly what the statutory ban on incentive compensation was intended to avoid.

According to the new GAO report, the Department of Education is reviewing its guidance on the incentive compensation ban and how it applies to OPM arrangements for possible revisions. We urge the Department to use this opportunity to better align the guidance with the underlying law, and to align its practices with the legal opinions of the Inspector General, by repealing the “bundled services” carve-out.

Issuing Revised Guidance

In any revised guidance it issues, the Department should update its interpretations of activities covered under the incentive compensation ban with contemporary student recruitment practices, which rely heavily on targeted, online advertising.

We hope the Department of Education will take the opportunity to respond to the GAO report and strengthen its oversight and enforcement of HEA's incentive compensation ban by enforcing the current guidance while starting a process to rescind it. The Department should also issue updated guidance that clarifies what does and does not constitute compliance with the incentive compensation ban.

Sincerely,

American Federation of Teachers
Americans for Financial Reform Education Fund
Association of Young Americans (AYA)
Center for American Progress
Center for Responsible Lending
Consumer Action
David Halperin, Attorney
Maryland Consumer Rights Coalition
National Consumer Law Center (on behalf of its low-income clients)
New America Education Policy Program
Project on Predatory Student Lending
Stephanie Hall, The Century Foundation
Student Defense
The Institute for College Access & Success
Third Way
Veterans Education Success
Young Invincibles

⁶ US Department of Education Office of Inspector General, *Semiannual Report to Congress, Number 62*, May 2011, <https://www2.ed.gov/about/offices/list/oig/semiann/sar62.pdf>.

cc: Under Secretary James Kvaal
Senator Patty Murray
Senator Elizabeth Warren
Senator Tina Smith
Representative Bobby Scott