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To Whom It May Concern:

Thank you for the opportunity to comment in response to the virtual listening sessions and comment period related to guidance on the incentive compensation prohibition in the Higher Education Act, particularly with respect to bundled services (ID # ED-2023-OPE-0030). Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. For nearly the past seven years, we have invested in research, policy development, litigation, and advocacy to end predatory behavior in higher education and increase the return on investment of higher education for both students — especially students who have been historically marginalized — and taxpayers.

The Statutory Incentive Compensation Ban

The incentive compensation prohibition is a legislative requirement rooted in a long history of abuses of students via the taxpayer-financed federal aid programs. More than three decades ago, the Senate Committee on Governmental Affairs held a series of hearings and published a striking report on a variety of ways in which the higher education industry — particularly for-profit colleges — were committing waste, fraud, and abuse of the federal programs.[1] Those stories included upsetting details of aggressive, deceptive, and outright fraudulent recruiting practices, fueled by recruiter compensation structures that encouraged enrollment at all costs. Such stories included:

- A school in Georgia that paid little attention to its medical office training and offered few materials for students, but had 75 phone lines in a telemarketing room to ensure continuous recruitment work.[2]

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[1] "Abuses in Federal Student Aid Programs: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs," Senate Committee on Governmental Affairs, Senate-Hrg-101-659, February 1990, https://files.eric.ed.gov/fulltext/ED334955.pdf.
[2] Ibid, page 10.

- A Houston, Texas-based school that sent buses to homeless shelters, where recruiters signed residents up for loans and promised free housing – only to leave those students without options when their loan money ran out.[3]
- An institution in Boston indicted on fraud charges for aggressive recruitment of "young, …disadvantaged students" by "commissioned sales agents who were required to meet or exceed certain enrollment quotas" and who "are alleged to have used high pressure and deceptive sales practices."[4]
- An institution that reportedly had just 23 instructors to the school's 109 recruiters and more than 70 financial aid representatives processing paperwork.[5]

Appalled by these stories, Republican and Democratic lawmakers agreed that a priority for the 1992 reauthorization of the Higher Education Act should be to address these aggressive and deceptive recruiting practices. In fact, the Education Department itself — then under President George H.W. Bush — had considered that institutions should be prohibited from commission-based recruitment of students.[6] The 1992 reauthorization of the HEA did just that.

That didn't stop all incentive compensation activity, unfortunately. For example, throughout the late 1990s, Computer Learning Centers, headquartered in Virginia, faced allegations, investigations, and lawsuits from state regulators related to its educational quality, misrepresentations to students about job placement rates, admission of unqualified students, and other compliance issues.[7] But it was the results of a two-year Department of Education investigation that spelled the end for CLC. In 2000, the Department ordered the institution to repay the agency $187 million for its incentive compensation violations – far more cash than the school had on hand. The incentive compensation scheme had been in place since 1994, and assigned salary ranges for recruiters based on the number of new students recruited to start each month, with more points awarded to recruiters who enrolled students in higher-cost programs; recruiters who fell short of their quotas were placed on probation.[8] When the institution summarily filed for bankruptcy and shuttered its campuses, a consumer lawyer pointed out that the action "illustrates that the [Education] Department isn't doing what it needs to do to police these schools," including enforcing the incentive compensation ban.[9]

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[3] Ibid, page 10.
[4] Ibid, page 157.
[5] Ibid, page 71.
[6] Ibid, page 21.
[7] Borrego, Anne Marie, "How a Computer-Training Chain Crashed in Plain Sight," The Chronicle of Higher Education, February 16, 2001, https://www.chronicle.com/article/how-a-computer-training-chain-crashed-in-plain-sight/.
[8] Borrego, Anne Marie, "U.S. Orders Computer Learning Centers to Return $187-Million in Federal Funds," The Chronicle of Higher Education, December 18, 2000, https://www.chronicle.com/article/u-s-orders-computer-learning-centers-to-return-187-million-in-federal-funds/.
[9] Borrego, Anne Marie, "How a Computer-Training Chain Crashed in Plain Sight," The Chronicle of Higher Education, February 16, 2001, https://www.chronicle.com/article/how-a-computer-training-chain-crashed-in-plain-sight/.

Efforts to Undermine the Incentive Compensation Ban

In the years that followed, attempts have been made by colleges to weaken the incentive compensation ban, most notably by persuading the Education Department to establish "safe harbors" in regulation that would allow commission-based payments in some cases.[10] On the eve of those new regulations, issued under President George W. Bush in 2003, higher ed lobbying associations reported that the changes were needed to resolve uncertainty about how incentive compensation rules could be applied in practice because "competition for students is fiercer" than it was when the law was passed eleven years prior.[11] Comments from the field noted that the changes would "allow unscrupulous institutions to engage in the kinds of improper recruiting activities that gave rise to" the incentive compensation ban in the first place, but the Bush Administration moved forward anyway.[12]

Worse, the Bush Administration took steps to undermine the Department's enforcement authority, issuing a memo from Deputy Secretary Bill Hansen that stated it would treat incentive compensation violations as a simple compliance matter subject to a fine, rather than risking the school's overall status in Title IV with a limitation, suspension, or termination action, as permitted by law. The impact was significant. The so-called Hansen Memo "discouraged [Department] employees from using all allowable enforcement actions" and left employees "hesitant to take enforcement actions against schools that might have violated the incentive compensation ban," according to the Department's Inspector General (IG), which operates independently from the Department in overseeing both agency work and institutional practices.[13] The use of fines rather than more serious actions, as sanctioned by the Hansen Memo, also "would not be an appropriate deterrent to future violations" where the incentive compensation violation were "particularly egregious," the IG wrote, and "significantly [restricted] the ability of the Department to protect students from unscrupulous actors…"[14]

One of the Bush Administration's twelve safe harbors — the last one on the list — allowed institutions to enter into tuition-sharing agreements in exchange for multiple third-party services, including recruiting, admissions, and Title IV awarding work, provided that the individuals at the

[10] Borrego, Anne Marie, "For-Profit and Nonprofit Colleges Alike Criticize U.S. Rules on Compensating Recruiters," The Chronicle of Higher Education, February 2, 2001, https://www.chronicle.com/article/for-profit-and-nonprofit-colleges-alike-criticize-u-s-rules-on-compensating-recruiters/; and 67 Federal Register 67047, published at November 1, 2002, https://www.federalregister.gov/documents/2002/11/01/02-27627/federal-student-aid-programs.
[11] Borrego, Anne Marie, "For-Profit and Nonprofit Colleges Alike Criticize U.S. Rules on Compensating Recruiters," The Chronicle of Higher Education, February 2, 2001, https://www.chronicle.com/article/for-profit-and-nonprofit-colleges-alike-criticize-u-s-rules-on-compensating-recruiters/.
[12] 67 Federal Register 67047, published at November 1, 2002, https://www.federalregister.gov/documents/2002/11/01/02-27627/federal-student-aid-programs.
[13] "Federal Student Aid's Oversight of Schools' Compliance with the Incentive Compensation Ban," Final Audit Report, ED-OIG-A05N0012, United States Department of Education, Office of Inspector General, March 24, 2015, https://www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05n0012.pdf.
[14] Ibid.

third-party servicer weren't themselves directly compensated through incentive payments.[15] The Inspector General for the Education Department noted at the time that it "nonconcurred" with the provision, saying that to include the safe harbor "would allow institutions to pay third parties based on success in securing enrollment, without limitation on the incentive nature of those payments. 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."[16]

That interpretation of the law was nothing new; the IG had already confirmed its view on this matter through on-the-ground audits in the years immediately prior. In May 2001, the OIG issued a final audit report finding that William Penn University had violated incentive compensation rules by paying a share of tuition for all students enrolled since 1996 in its College for Working Adults program to the Institute for Professional Development (IPD), an entity owned by Apollo Group (which also owns University of Phoenix).[17] In the audit report, the IG confirmed that "once recruiting was added to the services to be provided under the contract, compensation based on enrollment was no longer permitted.... The HEA does not excuse or permit incentive payments depending on the type of contractual arrangement that creates them."[18] The president of William Penn noted at the time that "the growth of our program has been phenomenal" due to the IPD revenue-sharing contract, with student enrollment in the program increasing from 17 to nearly 700 in just five years.[19]

At the same time, IG issued final audit reports for Olivet Nazarene University and Indiana Wesleyan University, which had engaged in the same kind of tuition-sharing arrangement with IPD.[20] All told, the OIG recommended the three schools repay a combined $8.1 million in federal financial aid due to the incentive compensation violation created by their revenue-sharing

[15] Former 34 CFR 668.14(b)(22)(ii)(L), available at 67 Federal Register 67047, published at November 1, 2002, https://www.federalregister.gov/documents/2002/11/01/02-27627/federal-student-aid-programs.
[16] "Semiannual Report to Congress, No. 45," U.S. Department of Education, Office of Inspector General, November 2022, https://www2.ed.gov/about/offices/list/oig/semiann/sar45.pdf.
[17] The University of Phoenix was also found to have engaged in incentive compensation practices in violation of the law during this time, ultimately resulting in two settlements with the Education Department: one for $9.8 million to resolve program review findings at the school, and another for $48.5 million to resolve a whistleblower lawsuit. "Stronger Federal Oversight Needed to Enforce Ban on Incentive Payments to School Recruiters," Government Accountability Office, October 2010, https://www.gao.gov/assets/gao-11-10.pdf.
[18] "Audit of Commissioned Sales at William Penn University," U.S. Department of Education, Office of Inspector General, May 15, 2001, https://www2.ed.gov/about/offices/list/oig/auditreports/a0790035.pdf.
[19] Borrego, Anne Marie, "Government May Fine 2 Universities for Payments to Recruiters," The Chronicle of Higher Education, June 8, 2001, https://www.chronicle.com/article/government-may-fine-2-universities-for-payments-to-recruiters/.
[20] Lewis, Lorraine, "Olivet Nazarene University, School of Graduate and Adult Studies Administration of Title IV Programs, Bourbonnais, Illinois," Final Audit Report, U.S. Department of Education, Office of Inspector General, May 21, 2001, https://www2.ed.gov/about/offices/list/oig/auditreports/a05a0030.pdf.

agreements.[21] Instead, in total, the Education Department reached settlement agreements with 22 institutions related to incentive compensation issues – 16 of them with the Institute for Professional Development's revenue-sharing agreements.[22] With the Hansen Memo in place and policies on enforcement weakened, the Education Department agreed to 16 IPD-connected settlements that required schools to pay just $5,000 to $115,000 – far short of the millions recommended by its own OIG.[23]

The Obama Administration quickly took action to unwind the damage, putting in place new regulations that eliminated the safe harbors established by the Bush Administration and restoring the incentive compensation ban. The Department said that, since it had issued the 2003 regulations, "the Department's experience demonstrates that unscrupulous actors routinely rely upon these safe harbors to circumvent the intent of" the statutory incentive compensation prohibition.[24]

The Return of Incentive Compensation

Yet, another quietly issued loophole quickly emerged. Outside companies that helped colleges to offer online programs lobbied the Department, arguing that they could provide public and nonprofit colleges the competitive advantage they needed to level the playing field with for-profit colleges that already dominated the online higher education marketplace.[25] With just a few companies offering those services at the time, the Department was persuaded. (The CEO of 2U claims he "personally had a lot to do with" the Department's decision to create the loophole.[26]) Less than six months after issuing the regulations that rescinded the Bush Administration's safe harbors, the Education Department issued guidance that recreated one of them outside of the formal regulatory process: the bundled services loophole.[27]

Under the bundled services loophole, the Department stated that it would allow institutions to pay a recruiter based on a percentage of the tuition generated by an institution in certain

[21] Borrego, Anne Marie, "Education Dept. Officials Promise to Clarify Rules on Student-Recruitment Incentives," The Chronicle of Higher Education, July 2, 2001, https://www.chronicle.com/article/education-dept-officials-promise-to-clarify-rules-on-student-recruitment-incentives/.
[22] "Stronger Federal Oversight Needed to Enforce Ban on Incentive Payments to School Recruiters," Government Accountability Office, October 2010, https://www.gao.gov/assets/gao-11-10.pdf.
[23] Ibid.
[24] 75 Federal Register 117, Proposed Rule, June 18, 2010, https://www.gpo.gov/fdsys/pkg/FR-2010-06-18/html/2010-14107.htm.
[25] Shireman, Robert, "The Sketchy Legal Ground for Online Revenue Sharing," Inside Higher Ed, October 30, 2019, https://www.insidehighered.com/digital-learning/views/2019/10/30/shaky-legal-ground-revenue-sharing-agreements-student-recruitment.
[26] Carey, Kevin, "The Creeping Capitalist Takeover of Higher Education," Highline, April 1, 2019, https://www.huffpost.com/highline/article/capitalist-takeover-college/.
[27] Cheslock, John J., Kevin Kinser, Sarah T. Zipf, Eunjong Ra, "Examining the OPM: Form, Function, and Policy Implications," Penn State College of Education, EdArXiv, December 2021, https://edarxiv.org/py3sz/.

circumstances – clearly in contradiction to both the regulations and the statute.[28] Under that provision, an incentive payment would be permitted only if the third-party recruiter were unaffiliated with the institution (both legally and functionally) and providing the institution a set, or "bundle," of services that may include recruitment but also included other activities such as support for the delivery of courses, the provision of technology, internship placement services, and career counseling.

Rightly, the Department's Inspector General again objected to this change as impermissible under the law, saying, "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."[29] Neither do the regulations, which state that the institution may not provide any "incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid" — including "with respect to any entity engaged in any student recruitment or admission activity" and for "activities [that] include contact in any form with a prospective student."[30] The rules are unambiguous; but the Department's bundled services guidance is inconsistent.

Unfortunately, the guidance has had real consequences in practice.

The Department has struggled to enforce even the few protections it put around the bundled services loophole. For instance, the guidance requires that a bundled services vendor be "unaffiliated," and "independent" from the institution "both as a corporate matter and as a decision maker." Yet some of the most notorious revenue-sharing arrangements have come from public or nonprofit schools' acquisitions of for-profit institutions in which an affiliation with the large for-profit institution is maintained. Purdue University purchased Kaplan University and formed Purdue University Global, to be run by Kaplan over a decades-long agreement for a percentage of the revenue. The University of Arizona's new Global Campus, created through an acquisition of Ashford University, operated via a revenue-sharing agreement with Ashford's spun-off educational services company, Zovio, Inc., until a lawsuit over deceptive recruitment practices functionally bankrupted the company.[31] Grand Canyon University, seeking to convert to nonprofit status, spun off into a nonprofit institution to be run by a revenue-sharing agreement with a for-profit academic services company – with both entities run by the same individual, Brian Mueller, former CEO of University of Phoenix Online.[32]

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[28] "Implementation of Program Integrity Regulations," DCL GEN-11-05, U.S. Department of Education, Office of Postsecondary Education, March 17, 2011, https://fsapartners.ed.gov/sites/default/files/attachments/dpcletters/GEN1105.pdf.

[29] "Semiannual Report to Congress, No. 62," U.S. Department of Education, Office of Inspector General, May 2011, https://www2.ed.gov/about/offices/list/oig/semiann/sar62.pdf.

[30] 34 CFR 668.14(b)(22)

[31] Steinbach, Alison, "Online School Bought by University of Arizona Fined $22 Million for Misleading Students," Arizona Republic, March 8, 2022, https://www.azcentral.com/story/news/local/arizona-education/2022/03/08/ashford-university-zovio-fined-university-arizona-acquisition-unaffected/9425487002/.

[32] Carey, Kevin, "The Creeping Capitalist Takeover of Higher Education," Highline, April 1, 2019, https://www.huffpost.com/highline/article/capitalist-takeover-college/.

Even in more standard OPM arrangements, the independence of a vendor in university decision-making has been called into question. For instance, a study of OPM contracts obtained via public records requests identified cases where the OPM is formally represented in university decision-making. A steering committee between Kent State University and Everspring, including representatives of both entities, granted “decision-making authority to jointly administer the programs” – a clear overstep of the requirement that the institution itself maintain decision-making authority.[33] Other contracts between OPMs and universities gave the OPM an equal vote, again in contradiction of the requirements of the guidance, like the Lamar University steering committee, a group that apparently discusses issues related to admissions policies, tuition and fees, enrollment growth, recruitment activities, and lead generation, that included four representatives from the college as well as four from its OPM, Academic Partnerships.[34] As one prominent leader of a nonprofit, online college wrote just a few short years after the guidance was issued, “There is little tradition of outsourcing core academic functions and the key engagement with students that begins with recruitment/admissions and extends through the learning experience and advising. Yet nonprofits are increasingly doing just that in their partnerships with [bundled services providers.]”[35]

Worse, though, are the impacts of this guidance on prospective and actual students – particularly via the aggressive and deceptive recruiting practices that the incentive compensation ban was intended to avoid. As the president of University of Arizona Global Campus said, “the pressures faced by publicly traded companies… — or even private businesses — create financial incentives for OPMs that are rarely in the best interests of students and educators. Too often, OPMs have helped institutions’ online learning programs to scale at the cost of student outcomes.”[36]

For instance, it seems clear that students are bearing the price of these OPM arrangements in the form of debt. While it is difficult to identify in federal data which programs are run by OPMs, the share of undergraduates enrolled fully online grew between 2012 and 2019, from 11.3 to nearly 15 percent, and the share of graduate students — where many OPMs are concentrated — from 22 percent to nearly one in three.[37] New graduate student loan volume has reached more than $40 billion a year – nearly half (47 percent) of annual loan volume.[38] The founder of 2U, who has since

[33] Hall, Stephanie and Taela Dudley, “Dear Colleges: Take Control of Your Online Courses,” The Century Foundation, September 12, 2019, https://tcf.org/content/report/dear-colleges-take-control-online-courses/.
[34] Ibid; and Hall, Stephanie, “Invasion of the College Snatchers,” The Century Foundation, September 30, 2021, https://tcf.org/content/report/invasion-college-snatchers/.
[35] LeBlanc, Paul J., The New For-Profits, Inside Higher Ed, May 31, 2013, https://www.insidehighered.com/views/2013/05/31/nonprofit-colleges-should-be-wary-new-breed-profit-players-essay.
[36] Pastorek, Paul, “President Speaks: To Put Students First, Colleges Need to Rethink the OPM Model,” Higher Ed Dive, December 12, 2022, https://www.highereddive.com/news/president-speaks-university-arizona-global-campus-uagc-cut-ties-opm/638420/.
[37] Kelchen, Robert, “The Need for Better Data on Online Program Outcomes,” March 2022, https://kelchenoneducation.files.wordpress.com/2022/03/kelchen_opm_paper.pdf.
[38] “Student Loans Overview,” Fiscal Year 2023 Budget, Congressional Justifications, March 2022, https://www2.ed.gov/about/overview/budget/budget23/justifications/q-sloverview.pdf.

left to start a "new approach" to OPMs,[39] acknowledged that "there are CEOs [of OPMs] who believe they have a fiduciary duty to their stockholders to just market the most expensive programs and encourage schools to jack up tuition."[40] The executive vice president of another OPM, speaking at an investor meeting in 2015, noted that OPMs accounted for less than 1 percent of graduate tuition revenue – and called the sector "a huge opportunity for Wiley."[41] By 2021, three out of four students in Wiley OPM-supported programs were graduate students.[42]

But too often, students are taking on this debt for low-value credentials. The Wall Street Journal reported on a master's in social work program at the University of Southern California (operated with 2U) that left students with typical debt loads of $112,000 – for a credential where most didn't earn more than $52,000 even several years later.[43] OPMs and institutions haven't always expanded these programs responsibly; the USC MSW program, for instance, which charges far more than comparable programs at other California-based institutions, "quickly became the largest at USC and one of the largest programs overall at any elite private college."[44] In fact, data from the College Scorecard show that about 13 percent of all debt for MSW programs came from USC, despite USC awarding just 5 percent of MSW credentials.[45]

Other 2U-run programs also topped the list. Schools like Northwestern University and New York University are charging six-figure tuition for 2U-run programs in counseling and mental health, respectively – fields that don't typically pay much.[46] Even where those students will ultimately go on to qualify for Public Service Loan Forgiveness, taxpayers will shoulder significant costs in forgiven debt.

The tactics used to recruit students and bring them in the door are often highly problematic. As the *Wall Street Journal* reported regarding USC's OPM-run programs:

> To attract students, USC employs a style of recruiting once rare at highly regarded universities, according to dozens of interviews with current and former students and employees. Recruiters for 2U Inc., a for-profit company that works with USC and others

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[39] "Reinventing Online Program Support," Noodle, available at: https://highered.noodle.com/why/better-than-opms.
[40] Carey, Kevin, "The Creeping Capitalist Takeover of Higher Education," Highline, April 1, 2019, https://www.huffpost.com/highline/article/capitalist-takeover-college/.
[41] Strahler, Steven R., "The Cluster of Chicago Companies Behind All These New Online Courses," Crain's Chicago Business, September 26, 2015, https://www.chicagobusiness.com/article/20150926/ISSUE01/309269992/higher-education-signs-online-program-management-firms-for-digital-instruction.
[42] "Powering Higher Education: Partnership Transparency and Outcomes Report 2021," Wiley University Services, 2021, https://universityservices.wiley.com/wp-content/uploads/2022/01/PoweringHigherEducation-WES.1.21.2021.pdf.
[43] Bannon, Lisa and Andrea Fuller, "USC Pushed a $115,000 Online Degree. Graduates Got Low Salaries, Huge Debts," The Wall Street Journal, November 9, 2021, https://www.wsj.com/articles/usc-online-social-work-masters-11636435900.
[44] Ibid.
[45] Herda, Brett, Tweet, April 5, 2022, available at: https://twitter.com/HerdaBrett/status/1511394515361349638.
[46] Ibid.

> to develop online degrees, repeatedly call and email prospective applicants. Counselors sometimes recruited people with low grades to meet enrollment targets.
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> The school formulated marketing campaigns to woo applicants, using demographic profiles of the kinds of students they would recruit, internal documents used by the marketing department and reviewed by the Journal show. The profiles include cartoon characters depicting potential recruits; in one depiction, a Black woman dubbed Needy Nelly "needs hand-holding" and "calls and emails everyone" because she has trouble with her application.

2U is not alone in employing such tactics. About half of Academic Partnerships' employees are telemarketers who do student recruitment.[47] The Learning House requires its 'contact agents' to attempt to contact each prospective recruit for University of West Florida at least 13 times for 10 days in a row.[48] USC and 2U are facing litigation over a systematic, years-long misrepresentations to students for the school's online education graduate programs, after confessing to misrepresenting data about the programs for U.S. News and World Report rankings and then using the school's inflated spot in the rankings to recruit students.[49]

Another is Concordia University, a small college in Portland, Oregon that contracted with HotChalk to grow its enrollment from about 1,900 in 2009 — including 800 graduate students — to 7,500 students, including 6,200 graduate students, just five years later.[50] By that time, three out of four students were attending entirely online courses. According to reporting by *OregonLive*, Concordia got more graduate student loan funding than any Ivy League institution but Columbia.[51] A whistleblower lawsuit revealed the source of the growth; according to the lawsuit, recruiters were instructed not to tell students they worked for the contractor HotChalk; a boiler-room environment pushed recruiters to aggressively recruit students, ignoring admissions standards and creating false urgency by promising "limited-time-only" scholarships; and incentive compensation rules were ignored, with successful recruiters promised "perks" like

[47] Howard, Caroline, "No College Left Behind: Randy Best's Money-Making Mission to Save Higher Education," Forbes, February 12, 2014, https://www.forbes.com/sites/carolinehoward/2014/02/12/no-college-left-behind-randy-bests-money-making-mission-to-save-higher-education/?sh=5e3382a014a2.
[48] Hall, Stephanie and Taela Dudley, "Dear Colleges: Take Control of Your Online Courses," The Century Foundation, September 12, 2019, https://tcf.org/content/report/dear-colleges-take-control-online-courses/.
[49] "Students File Lawsuit Against USC and 2U for Deceptive Enrollment Scheme," Press Release, Student Defense, December 20, 2022, https://defendstudents.org/news/students-file-lawsuit-against-usc-and-2u-for-deceptive-enrollment-scheme.
[50] Young, Molly, "Concordia Gained Thousands of New Students – And A Federal Inquiry," Oregon Live, October 21, 2016, https://www.oregonlive.com/portland/2016/10/concordia_gained_thousands_of_new_students_--_and_a_federal_inquiry.html.
[51] Ibid.

vacations and baseball tickets.[52] Ultimately, the entire university closed down, and was later sued by HotChalk for payment.[53]

Students rarely know the difference between OPM and non-OPM programs – at least, not until it's too late. Recruiters working for OPMs often use email addresses from the school for which they're recruiting and mask area codes on their phone numbers to match the area codes of the school.[54] Disclosures about the nature of the OPM arrangement are often in the fine print at the bottom of a school's website.[55] One student reported learning the truth when the recruiter he was speaking with slipped up and used the name of another institution, and then confessed she worked for 2U's Trilogy across multiple institutions.[56] Another noted that even if he had seen the website's disclosure before enrolling, he wouldn't have understood the depth of the relationship, saying, "This is a Trilogy program with a pretty university façade."[57] As one institutional official said, it's "the first rule of OPM Club: Never acknowledge that you use an OPM."[58]

These aggressive and misleading tactics prevalent among OPM-run programs at public and nonprofit colleges, unfortunately, are not far from those used in other incentive compensation-fueled for-profit institutions. The Senate HELP Committee, investigating for-profit institutions in a 2012 report, reported that ITT Technical Institute required recruiters to make 140 calls a day if they had no appointments, or 100 if they had one appointment; and instructed recruiting staff to "poke the pain a bit" for students who signed an enrollment agreement but said they didn't want to start the program.[59] The institution EDMC circulated internal emails pressuring recruiters to close the deal with prospective students, saying things like "The goal is 100 March starts and we only have 47 on the books. So we must take no less [sic] than 15 March apps each week for the next 6 weeks."[60] Bridgepoint required recruiters to call prospective students eight times in the first seven days after acquiring the lead.[61] National American University required recruiters to

[52] Ibid.
[53] Hill, Phil, "HotChalk Responds to Concordia University Closure with $302m Lawsuit," Phil on Ed Tech, April 20, 2020, https://philonedtech.com/hotchalk-responds-to-concordia-university-closure-with-302m-lawsuit/.
[54] Bannon, Lisa and Rebecca Smith, "That Fancy University Course? It Might Actually Come From an Education Company," The Wall Street Journal, July 6, 2022, https://www.wsj.com/articles/that-fancy-university-course-it-might-actually-come-from-an-education-company-11657126489.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Gilbert, Erik, "College Finances Are Being Eaten From the Inside," The Chronicle of Higher Education, November 4, 2021, https://www.chronicle.com/article/college-finances-are-being-eaten-from-the-inside.
[59] "ITT Educational Services," Senate Health, Education, Labor and Pensions Committee Report, "For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success," July 30, 2012, https://www.help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf.
[60] "Education Management Corporation," Senate Health, Education, Labor and Pensions Committee Report, "For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success," July 30, 2012, https://www.help.senate.gov/imo/media/for_profit_report/PartII/EDMC.pdf.
[61] "Bridgepoint Education, Inc.," Senate Health, Education, Labor and Pensions Committee Report, "For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success," July 30, 2012, https://www.help.senate.gov/imo/media/for_profit_report/PartII/Bridgepoint.pdf.

check for new student leads at least every 15 minutes, to call the prospective student at least three times that day and several more times that week until the lead answered or called back.[62]

In some cases, institutions with OPM-run programs have also lowered their admissions standards to recruit more students – often leaving academically underprepared students struggling to succeed, yet still bearing the debt for their programs. For instance, the University of Southern California began making exceptions to its policy requiring a 3.0 GPA of students, with 40 percent of entering students in recent years considered "conditional admits."[63] According to reporting by the *Los Angeles Times*, "faculty noticed many new students had difficulty doing graduate-level work," even after additional tutoring and counseling.[64] According to an internal review of financial records, USC "had become financially dependent on the admission of students who fell below the normal academic criteria."[65] At Morthland College, employees of the school's OPM partnership with KEEN alleged that they faced significant pressure to let in students who attended sports academies and who the employees felt weren't academically qualified for the program.[66] The college spiraled even deeper into financial trouble, and ultimately shuttered after being placed on Heightened Cash Monitoring 2 by the Education Department and fined millions.[67] These financial constraints even in light of a new source of enrollment can often be explained that on-campus students bring more money to campus; one school official said that "the rule of thumb is that it takes three students in an OPM-run program to create the same revenue as one on-campus student…. As a result, despite a nominally stable enrollment, we have been lurching from one budget crisis to another."[68]

The reality is that this federal guidance, and its creation of the bundled services loophole, has served to prop up a multi-billion dollar industry[69] of companies that are primarily marketers and recruiters – in direct opposition to what Congress intended and the regulations allow. That's clear in the extent to which institutions rely on OPMs *almost entirely as marketers*.[70] For instance, in response to a request for information from Senators Brown, Smith, and Warren, 2U wrote that it

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62 "National American University," Senate Health, Education, Labor and Pensions Committee Report, "For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success," July 30, 2012, https://www.help.senate.gov/imo/media/for_profit_report/PartII/NAU.pdf.
63 Ryan, Harriet and Matt Hamilton, "Must Reads: Online Degrees Made USC the World's Biggest Social Work School. Then Things Went Terribly Wrong," Los Angeles Times, June 6, 2019, https://www.latimes.com/local/lanow/la-me-usc-social-work-20190606-story.html.
64 Ibid.
65 Ibid.
66 Smith, Isaac, "Morthland College Investigated By State, Federal Agencies; Fined Millions Over Alleged Mishandling of Federal Funds," The Southern Illinoisan, September 25, 2017, https://thesouthern.com/news/local/communities/westfrankfort/morthland-college-investigated-by-state-federal-agencies-fined-millions-over/article_0bd62e4f-af67-559c-b277-f863255d4f52.html.
67 Ibid.
68 Gilbert, Erik, "College Finances Are Being Eaten From the Inside," The Chronicle of Higher Education, November 4, 2021, https://www.chronicle.com/article/college-finances-are-being-eaten-from-the-inside.
69 "The $7B Global OPM and Academic PPP Market," HolonIQ Education Intelligence Unit, April 24, 2020, https://www.holoniq.com/notes/the-7b-global-opm-and-academic-ppp-market.
70 Hall, Stephanie, "Your OPM Isn't a Tech Platform. It's a Marketing Firm.," The Century Foundation, January 20, 2023, https://tcf.org/content/commentary/your-opm-isnt-a-tech-platform-its-a-predatory-marketing-firm/.

spends nearly one in three dollars of its expenditures on marketing and recruitment activities.[71] Others spend even more. One OPM leader wrote that "some online program manager contracts do nothing more than recruiting; we've seen several large contracts in which an otherwise prudent school is paying an online program manager 35 percent of tuition to market their programs. A current [2016] RFP from LSU seeks just such a contract, flouting Title IV prohibitions against incentive compensation."[72]

These programs have had significant, and often negative, effects. Institutions offering OPM-run programs, seizing the incentive to super-size their programs, have handed over the student recruitment keys in many cases. OPM recruiters hound prospective students to enroll, seeing a Title IV bounty on their heads. Recruiters say whatever it takes to bring the student in the door – that the student will run out of time or lose out on scholarship money; that the outsourced, online program carries the same prestige of the selective institution that lends its name to the program; that the enrollment counselor on the phone is more than simply an uninvested telemarketer. Once enrolled, even when the quality of the program seems questionable, students may not be entirely clear that they are enrolled in a program effectively run by the contractor. Once out of school, it is students — not institutions, and not OPMs — who carry tens of thousands, or even more, in loan debt that must be repaid. And the process begins anew with the next set of unsuspecting students.

What's Next?

Moving forward, it is clear that — both to preserve the integrity of the student aid programs and to ensure compliance and consistency with the law — the Department of Education must rescind the bundled services loophole from DCL GEN-11-05. In doing so, the Department will make clear that *no* form of incentive compensation for recruiting students or securing financial aid is permissible – as Congress intended to be the case many years ago.

To ensure compliance with this guidance, institutions will have several options available to them. For instance, some institutions may wish to move to a fee-for-service model for their OPM contracts; as opposed to using revenue-sharing agreements, these contracts don't have an incentive compensation component and thus are consistent with the prohibition in the HEA. Researchers have suggested fee-for-service models are well-suited to "institutions that are confident about the success of their online programs, and which can access funds or loans to cover the upfront costs of establishing such programs.[73] Other institutions may wish to maintain tuition- or revenue-sharing agreements, but to move marketing and recruitment activities into a separate,

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[71] 23% of tuition generated from degree programs is spent on marketing, and 8% on recruitment. Letter from 2U Co-Founder & CEO Chip Paucek to Senators Brown, Smith, and Warren, January 28, 2022, available at: https://ddfoqzqsu0zvp.cloudfront.net/media/documents/FINAL_2U_Reponse_to_Senators_Brown_Smith_Warren_2022_luDAKtT.pdf.

[72] Katzman, John, "Why Are Colleges and Universities Handing Over More Than Half of Their Tuition to Online Program Managers?," The Hechinger Report, December 26, 2016, https://hechingerreport.org/colleges-universities-handing-half-tuition-online-program-managers/

[73] Cheslock, John J., Kevin Kinser, Sarah T. Zipf, Eunjong Ra, "Examining the OPM: Form, Function, and Policy Implications," Penn State College of Education, EdArXiv, December 2021, https://edarxiv.org/py3sz/.

differently structured contract that complies with the incentive compensation prohibition. This may be preferable for institutions ramping up new programs that wish to have more of the initial upstart costs covered by an outside entity.[74] Still other institutions may prefer to offer their online programming via in-house investment. For instance, UNC launched "Project Kitty Hawk" to help the system "avoid of the expense of the profit-driven OPM model for building online education programs."[75]

OPMs are already well aware of this likely outcome. For instance, Coursera expounded on the matter in a March 2021 SEC filing, saying that the "validation" of its business model via a Dear Colleague Letter (DCL GEN-11-05) "is not codified by statute or regulation and may be subject to change." Coursera noted at the time that it couldn't assure the guidance wouldn't be reviewed, altered, or vacated, or that it would be upheld by a court if subject to litigation. In any case, though, Coursera noted that doing so would "require us to… renegotiate the terms of our college and university partner agreements."[76] 2U reported fundamentally the same thing in its own SEC filings as long ago as 2014.[77]

Institutions will also be prepared to make necessary changes. Institutions' contracts with OPMs are frequently amended already, including to respond to regulatory issues.[78] In many cases, institutions may welcome the opportunity to be able to reassess and revise their contracts with OPMs. For instance, a survey of chief online learning officers found many of them considering OPMs a short-term solution to launching online programs (although the contracts are often very long[79]); about half felt that OPM partners had overestimated enrollment numbers, including by counting unqualified or underqualified student leads and/or combining leads across multiple institutional clients to pad their numbers; and many felt contracts were too narrowly written to allow "accountability metrics with regular review periods" or otherwise constricted the

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74 Ibid.
75 Smalley, Suzanne, "UNC's $97 Million Plan to Reach Adult Online Learners," Inside Higher Ed, December 9, 2021, https://www.insidehighered.com/news/2021/12/09/unc-system-launch-ambitious-97-million-ed-tech-start.
76 Coursera, Inc., SEC Filing, Form S-1, March 5, 2021, https://www.sec.gov/Archives/edgar/data/1651562/000119312521071525/d65490ds1.htm.
77 2U, Inc., SEC Filing, Form S-1, February 21, 2014, https://www.sec.gov/Archives/edgar/data/1459417/000104746914001172/a2218267zs-1.htm.
78 For instance, this Louisiana State University contract with Academic Partnerships was amended five times between May 2015 and September 2017, including to insert an assertion that Academic Partnerships is not a third-party servicer. Contract Approval, State of Louisiana, October 12, 2012, available at: https://s3-us-west-2.amazonaws.com/production.tcf.org/assets/OPM_contracts2/Louisiana+State+University+%26+Academic+Partnerships.pdf.
79 56 percent of contracts obtained through public records requests and examined were five years or more; six were seven to 10 years. Twenty-seven percent "lock in schools with strict exiting terms" that make it difficult for the institution to get out of the contract. Hall, Stephanie and Taela Dudley, "Dear Colleges: Take Control of Your Online Courses," The Century Foundation, September 12, 2019, https://tcf.org/content/report/dear-colleges-take-control-online-courses/.

institution's own rights.[80] Giving institutions the ability to renegotiate aspects of their contracts may allow them to revisit other unfavorable terms, as well.

In the meantime, as the Department considers these comments and prepares to rescind the bundled services guidance, it must also invest in enforcement with respect to institutions engaged in revenue-sharing agreements. As noted elsewhere in these comments, even within the loophole that was created through the guidance, the Department sought to include some guardrails – most notably, the requirement that the entity providing bundled services be independent from the institution, *both as a corporate matter and as a decision maker*. But it is clear from reviewing OPM contracts with institutions — and especially in reviewing the changes in ownership that have resulted in an ongoing servicing agreement with a former owner/affiliate of the institution based on revenue-sharing — that not enough has been done to enforce those rules.

Once the guidance is rescinded, further enforcement work will be needed to ensure institutions have adapted their contracts appropriately, avoided the use of indirect incentive compensation structures, and fully come into compliance with the new rules within the allotted timeframe. By preparing to issue clear guidance to the field, providing FAQs as appropriate, and ensuring strong and consistent oversight of institutions and their OPM partners, the Department of Education can work to right this past wrong.

Should you have any questions regarding these comments, we welcome the opportunity to discuss them further. Please contact us at kmcmanus@arnoldventures.org and cmccann@arnoldventures.org.

Sincerely,

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[80] Sun, Jeffrey C. and Heather A. Turner, "In-House or Outsource?," University of Louisville Skills Collaborative and University Professional and Continuing Education Association (UPCEA), October 2022, https://upcea.edu/wp-content/uploads/2022/10/In-House-or-Outsource_UPCEA-and-University-of-Louisville-SKILLS-Collaborative_October-2022-1.pdf.