



November 19, 2024

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Ave. SW  
Washington, DC 20202

Dear Secretary Cardona,

On behalf of the undersigned higher education associations, I write to express our serious concerns with reports that the Department of Education (Department) intends to rescind the 2011 bundled services guidance. In the thirteen years since the guidance was issued, it has provided institutions with a clear framework for partnering with outside entities to provide critical services and supports to students and institutional staff. An abrupt rescission of this guidance would result in an untold number of existing contracts becoming suddenly impermissible. Such a disruption would be harmful under any circumstances, but with a new administration set to take office in January that appears likely to reverse this decision, it would subject institutions and the students they serve to an unnecessary interim period of disruption and uncertainty.

To the extent that there are concerns with the guidance, we believe that the Department should work with Congress to clarify the law and congressional intent, as Members of Congress have already requested.<sup>1</sup> This is both the appropriate process, as well as one that recognizes a transition in power is underway. Such discussions must identify the harms that have been caused under the current guidance and should be narrowly tailored to eliminate those specific harmful practices without a general and, we believe, dangerous sweeping away of guidance that has helped countless students and institutions achieve quality educational outcomes. Industry leaders have already developed a code of practice that we believe would be instructive to this more nuanced conversation.

If, contrary to the best interest of students and institutions, the Department intends to move forward with rescinding this guidance, it is critical that certain steps are taken to minimize the harm and disruption that would result. We reiterate: the wisest course of action is to avoid any immediate action and work with stakeholders and Congress to effectively address concerns. But at a minimum, if the Department proceeds, it should take the following into consideration.

### **Preserve Clarification of Incentive Compensation**

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<sup>1</sup> Committee on Education and the Workforce. (2024, November 8). *Foxx pushes back on "unacceptable" last-ditch efforts by Biden-Harris Dept. of ED to regulate provider activities*. <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=412033>

Section 487(a)(20) of the Higher Education Act of 1965 addresses incentive compensation by stating that:

The institution will not provide 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 or in making decisions regarding the award of student financial assistance, except that this paragraph shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.<sup>2</sup>

In an effort to better align the regulatory text with statute, the Department issued final regulations that went into effect on July 1, 2011, removing 12 safe harbors around incentive compensation and replacing them with the existing regulations.<sup>3</sup> To further streamline and provide clarity, the Department released additional guidance around bundled services.<sup>4</sup>

The current 2011 bundled services guidance clearly articulates what activities are subject to the ban on incentive compensation. For instance, the guidance distinguishes between covered activities and exempt activities. Covered activities subject to the ban include recruitment activities, such as information dissemination targeted toward individuals, and services related to securing financial aid, such as completing financial aid applications on behalf of applicants. In addition, the guidance provides necessary clarity around what activities are considered to be exempt from the incentive compensation ban. The Department identifies marketing activities, certain student support services, and certain policy decisions by senior executives and managers as not subject to the ban on incentive compensation.

We believe it is vital that the Department preserves the existing language in the guidance that delineates covered and exempt activities, especially as it relates to marketing. Because the Department gives itself authority in the regulations to require institutions that are provisionally certified and that have been considered to be in violation of incentive compensation to “hire a monitor and to submit marketing and other recruiting materials (e.g., call scripts) for the review and approval of the Secretary,”<sup>5</sup> a lack of clarity around the exclusion of marketing from the ban on incentive compensation will create meaningful uncertainty for institutions. There is no other place in current regulations or the law that clearly articulates what is considered incentive compensation and what is not.

### **A Grace Period Should Be Given to Institutions with Current Contractual Agreements**

If the guidance were rescinded, it is essential that a grace period be applied that covers existing contractual relationships until their terms have expired. Because the guidance covers all third-party servicer agreements, these agreements can consist of a wide range of services, including the delivery of federal student aid to students, the determination of a student’s

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<sup>2</sup> Higher Education Act of 1965. 20 U.S.C. §1094(a)(20)

<sup>3</sup> Section 668.14(b)(22) and Section 668.14(e)(9) both address incentive compensation to include criteria and punitive measures.

<sup>4</sup> Office of Federal Student Aid. (2011, March 17). *Implementation of program integrity regulations*. <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2011-03-17/gen-11-05-subject-implementation-program-integrity-regulations>.

<sup>5</sup> Program Integrity Issues, 34 C.F.R. pt 668.14(e)(9) (2010). <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-VI/part-668>

eligibility for federal student aid, services necessary for institutional eligibility to participate in the student aid programs, as well as online program manager agreements. According to a 2022 Government Accountability Office report, there were at least 550 institutions that worked with an online program manager to support at least 2,900 programs.<sup>6</sup> Given that contractual agreements can be complex and challenging to end once a commitment has already been made, we believe that were the guidance to be rescinded, institutions must be provided sufficient flexibility to untangle the many elements of their existing relationships in order to minimize harm to the thousands of students currently enrolled in programs governed by these arrangements.

## Conclusion

We recognize that existing reports of the Department's intention to rescind guidance may not be accurate but believe it is important to make clear that any hasty decision to withdraw longstanding guidance would have a massive negative impact on students and institutions. Now is not the time to rescind the 2011 bundled services guidance without an actual understanding of the advantages and disadvantages of the existing policy and without considering the impact that this decision may have on higher education institutions and their students.

Thank you for your attention to this letter.

Sincerely,



Ted Mitchell  
President

On behalf of:

American Association of Community Colleges  
American Association of State Colleges and Universities  
American Council on Education  
Association of American Universities  
Association of Public and Land-grant Universities  
National Association of Independent Colleges and Universities

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<sup>6</sup> U.S. Government Accountability Office. (2022, May 5). *Higher education: Education needs to strengthen its approach to monitoring colleges' arrangements with online program managers.* <https://www.gao.gov/products/gao-22-104463>