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May 3, 2010

Kevin Neyland
Deputy Administrator
Office of Information and Regulatory Affairs Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: **Proposed Rule Involving Institutional Eligibility Under The Higher Education Act Of 1965; Student Assistance General Provisions**

DeVry Inc. and its subsidiary educational institutions (Apollo College, Chamberlain College of Nursing, DeVry University, Keller Graduate School of Management and Western Career College), which serve more than 100,000 students, submit this letter regarding the proposed rule recently submitted by the Department of Education ("ED") addressing Institutional Eligibility under the Higher Education Act of 1965; Student Assistance General Provisions (RIN 1840-AD02). We appreciate the opportunity to present our views as OMB reviews the rulemaking proposal.

In connection with this rulemaking, ED held three separate negotiation sessions. Our comments below address two issues that failed to reach consensus as a result of that process– "gainful employment" and "incentive compensation." These issues are of fundamental importance to students. We are obviously unaware of the contents of the proposed rule pending at OMB and therefore cannot provide comments on any specific regulatory proposals. Our comments are instead based on ED's proposed regulatory approach that it set forth during the negotiation sessions. It is important that OMB carefully review the regulatory provisions pertaining to gainful employment and incentive compensation and keep in mind the considerations mentioned below.

Gainful Employment

President Obama, in his inaugural state of the union address, laid out a new vision for higher education in the United States – to "once again have the highest proportion of college graduates in the world." He also laid out a goal for the creation of 3.5 million new jobs, many of which will be in emerging industries requiring new skills and new knowledge. These goals cannot be accomplished without adding new programs and new capacity in order to educate the millions of additional students that would be required to meet the President's goals.

Yet, ED is proposing new rules to regulate proprietary institutions and some programs of study in private non-profit and public institutions, whose sole purpose, is to eliminate programs and constrict educational opportunities. These rules, would introduce a definition of "gainful employment" in relationship to Sections 101(b)(1), 102(b)(1)(A)(i) and 102(c)(1)(A) of the Higher Education Act of 1965 that require proprietary and vocational colleges to provide "an eligible program of training to prepare students for *gainful employment* in a recognized occupation."

The phrase "gainful employment" has been in use for more than 300 years. It has been defined by other federal agencies[1] and interpreted by numerous U. S. courts. It has consistently been interpreted to refer to employment for which one receives more than token compensation. ED's attempt to include a measure of a student's debt burden as part of that definition is inconsistent with any other definition and, if successful, would represent a new burden on institutions that, for the last 35 years have used the broader definition in developing and delivering their educational programs.

We understand and share ED's concerns regarding graduates' increasing debt burden. We have proposed a robust disclosure process that would inform every student, prior to enrolling, of the costs and debt burden assumed by the typical graduate. We have also proposed the inclusion of a warning, to be inserted with that disclosure, that would alert students when they are choosing a program that may require a high level of borrowing in relationship to their expected earnings. Enclosed are copies of two letters sent to Deputy Secretary Anthony Miller which include our proposals for a robust disclosure with warnings for high debt programs. We think both of these actions will better inform our students of the dangers of over-borrowing and help to reduce the instances of such.

Using debt burden as a measure of "gainful employment" is an arbitrary standard. It has no relationship with the quality of the program (in fact, there is more likely to be an inverse relationship – longer-term programs like associate and bachelor degree programs have higher costs which leads to greater borrowing) and is subject to external factors on which the institution has no control. Those factors include student socio-economic factors as well as accrediting requirements within each program and the availability of state grant aid. Under the proposed rule, a program in a middle-income metropolitan suburb within a state with a substantial state grant program may pass the test, whereas a program in a low-income urban setting with no state grant program to assist students may fail, regardless of actual employment outcomes.

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[1] See Social Security Administration definition for "gainful activity" at 20 CFR 416.972 and Railroad Retirement Board regulations at 20 CFR 220.29

We would like to continue to work with ED to develop sound strategies to combat unnecessary and over-borrowing. We are willing to test alternative disclosures, monitoring methods and communications to best help graduates minimize their debt.

Incentive Compensation

Although we provide a more detailed overview of the incentive compensation issue in the accompanying attachment, we would like to highlight a few points in this letter.

There are certain long-standing principles that are essential to understanding the issue of incentive compensation. First, school employees play a critical role in helping students to identify beneficial educational opportunities and navigate the admissions and financial aid processes. Accordingly, Congress through its legislative actions in this area has sought to preserve the ability of schools to compensate their employees for effectively providing these services to students. Second, in the late 1980s and early 1990s, some less than reputable institutions engaged in unethical practices of admitting unqualified students simply to obtain federal financial aid funding. This led to increased legislative scrutiny on issues such as eligibility requirements for schools to participate in Title IV financial aid programs and the ability of schools to admit unqualified students. Included within this legislative review was the use of improper financial incentives by schools with their employees to enroll unqualified students.

In order to further the interests noted above, Congress in 1992 enacted a prohibition against institutions participating in Title IV funding programs from "provid[ing] 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."[2] This was part of a broader legislative and regulatory effort to reduce Title IV abuse and protect students from unsavory recruiting practices. Although enforcement efforts did not focus on the incentive compensation provision, this crackdown proved immensely successful. The average cohort default rate for all schools has declined to less than 1/3rd of what it was in 1990, numerous schools have been excluded from participating in Title IV due to their lack of compliance with the more stringent requirements, and the type of abuse that prevailed earlier is, according to ED, "no longer possible today."[3] Significantly, a

[2] 20 U.S.C. § 1094(a)(20)
[3] Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,054 (Nov. 1, 2002)

comprehensive review of enforcement of the incentive compensation provision during this same period of time indicated that substantiated violations were infrequent and were relatively minor in scope.[4]

With that backdrop in mind, ED in 2002 adopted clarifying regulations that better defined the scope of certain permissible forms of compensation through the use of twelve safe harbor provisions. In effect, Congress in 1992 legislated what institutions could not do in terms of their compensation practices; in 2002 ED took the added step of providing further regulatory guidance and clarifying what institutions could do under this statutory scheme. In fact, the safe harbors were developed in order to address well-recognized deficiencies with the incentive compensation regime. Relying solely on the statutory language had provided insufficient clarity to interested parties. Accordingly, confusion abounded on the part of higher education institutions and on the part of ED itself. The regulatory experience with the safe harbors since their adoption reveals that they have been successful in alleviating this confusion and have facilitated the implementation of compensation practices that comport with Congress's statutory directive.

During the recent negotiation sessions, though, ED proposed to eliminate all existing safe harbors that provide guidance as to permissible and impermissible forms of compensation. ED instead proposed reverting to the bare statutory language to provide meaning to the incentive compensation ban. But that approach would simply bring back the same regulatory confusion that prevailed before adoption of the current regulations. It would amount to going backward and that would not be good for students or the institutions that serve them. Reinstating the murky status quo from 2002 would impose significant burdens and risks on institutions for encouraging their employees to help students identify and pursue beneficial educational opportunities. That stands at odds with President Obama's goal for the United States to have the highest percentage of college graduates in the world by 2020.

DeVry supports the legitimate purpose of the compensation ban enacted by Congress. But we want to move forward. We would like to continue working with ED and other interested parties in identifying ways in which the existing regulations and safe harbors can be improved to provide even more effective guidance and better serve students and schools. When ED publishes the proposed rule for public comment, we look forward to reviewing it carefully and, as appropriate, presenting additional feedback and potential

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[4] Government Accountability Office, *Higher Education: Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education*, Feb. 23, 2010

alternative regulatory approaches that would further the interests of students and provide greater regulatory certainty in this area.

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We believe that maintaining an open dialogue between ED, OMB, and interested stakeholders will facilitate a more complete understanding of the issues under review. Therefore, to the extent that OMB has additional questions or needs further information to aid its review, we would welcome the opportunity to discuss these matters further and provide any such additional requested information.

Sincerely,

Sharon Thomas Parrott
Senior Vice President,
Government & Regulatory Affairs and Chief Compliance Officer

Cc: Arne Duncan, Secretary, U. S. Department of Education
Anthony G. Miller, Deputy Secretary, U. S. Department of Education
Charles P. Rose, General Counsel, U. S. Department of Education

Enclosures:

i. April 12, 2010 Letter to Anthony G. Miller
ii. April 19, 2010 Letter to Anthony G. Miller
iii. Written Submission to OMB Regarding The Department of Education's Potential Regulatory Changes Governing Incentive Compensation That Are Currently Under OMB Review