**Written Submission To OMB Regarding The Department Of Education's Potential Regulatory Changes Governing Incentive Compensation That Are Currently Under OMB Review**

DeVry and its affiliate institutions ("DeVry") submit the following analysis to help the Office of Management and Budget in its review of the recent submission by the Department of Education ("ED" or "the Department") involving a proposed rulemaking for Title IV financial aid programs. ED held negotiation sessions in conjunction with this rulemaking, but negotiators were unable to reach consensus on several issues. That unsuccessful result permitted the Department to craft its own proposed rules for issues discussed during the negotiations. Department of Education, Team I—Program Integrity Issues, Session Three Meeting Summary (2010), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html.

DeVry has been actively monitoring these regulatory efforts and has had discussions with the Department about the regulatory changes under consideration. Although we are obviously unaware of the contents of the draft rule, DeVry believes that OMB may benefit from our general, preliminary views concerning one topic in particular that may be included in the rulemaking package: proposed changes to the existing regulations governing incentive compensation for employees involved in recruiting, admissions, and financial aid.

## Executive Summary

Since the 1992 Higher Education Amendments, Congress has forbidden all institutions that wish to participate in Title IV funding 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." 20 U.S.C. § 1094(a)(20). In response to compelling evidence that the bare statutory text by itself provided insufficient clarity as to what compensation practices were and were not permissible, the Department since 2002 has

maintained regulations that clearly define the scope of certain permissible forms of compensation through the use of twelve safe harbors. Under this approach, if a compensation system fits within the contours of one of the safe harbors, it is deemed compliant with the statutory ban on incentive compensation. *See* 34 C.F.R. §§ 668.14(b)(ii)(22)(A)-(L).

The incentive compensation issue is one that affects every school, whether private, non-profit, or public, that participates in Title IV funding. Accordingly, how ED modifies the current regulations will determine whether schools of every type will be able effectively to compensate their recruiting, admissions, and financial aid personnel for doing their jobs—locating qualified students who want to further their careers and helping them identify and finance educational opportunities that can improve their quality of life.

These issues are of fundamental importance. The jobs of tomorrow will require continued educational achievement, which underscores the importance of the educational opportunities offered by DeVry and other higher education institutions. A recent report commissioned by the Department acknowledged this very point, stating that "postsecondary education will be ever more important for workers hoping to fill the fastest-growing jobs in our new economy." The Secretary of Education's Commission on the Future of Higher Education, A Test of Leadership: Charting the Future of U.S. Higher Education ix (Sept. 2006) ("Commission Report"). In addition, President Obama has stated "whatever the training may be, every American will need to get more than a high school diploma" to thrive in the new economy, and he recently announced a broad and ambitious goal for the United States to have the highest percentage of college graduates in the world by 2020. President Barrack Obama, Remarks to a Joint Session of Congress (Feb. 24, 2009).

It is with this context in mind that we make this submission. Contemplated changes to incentive compensation regulations could unduly impede the ability of schools, including DeVry, to educate and train future classes of students for advancement within their chosen professions. DeVry strongly believes that whatever regulations the Department adopts to enforce the incentive compensation prohibition must provide clear, workable guidance to the industry.

As explained more fully below, the 2002 regulations provided much needed clarity to schools. This has enabled schools to identify and appropriately compensate good employees for their work, who in turn provide high quality student services. As a result of these efforts, prospective students are better informed of the myriad of educational opportunities that potentially fit their lives and can prepare them for higher-paying careers. Without clear guidance from the Department, all institutions of higher education will face increased risk from costly enforcement actions and profit-driven, private *qui tam* litigation that will compromise their outreach efforts. As a result, prospective students would be less likely to learn about (and pursue) educational opportunities. Therefore, clear rules that preserve effective compensation arrangements will allow higher education institutions to continue to focus their resources and efforts where they should be focused—on the education of their students.

In connection with this review of the incentive compensation regulations, we would support efforts to provide even more clarity to affected stakeholders. We believe it is important, for example, to maintain clear standards with respect to compensation tied to students making significant progress in the academic program; provided as a part of a general profit-sharing plan; paid to supervisory employees not directly involved with recruiting or admissions activities; and paid to third party internet vendors either for distributing information or enabling prospective students to apply on-line. The current safe harbors, codified at 34 C.F.R. §§ 668.14(b)(ii)(22),

address these issues in a clear manner that is consistent with the statute, and provide the necessary regulatory certainty to allow DeVry to compensate its employees effectively and to run its schools in a way that benefits its students. To the extent that the Department proposes regulatory changes that provide even more regulatory certainty surrounding these beneficial practices and more clearly distinguish them from unsavory and fraudulent activities, DeVry would support such efforts.

In considering modifications to the existing regulations governing incentive compensation, the Department's proposal must satisfy certain legal requirements. First, like the current regulations, the new regulations must themselves be consistent with the statutory text. Second, the new rules must be the product of a reasoned decision-making process; the Department must consider all relevant information and articulate its reasons for altering the status quo. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In other words, after considering all the facts, "the agency must show that there are good reasons for the new policy." *FCC v. Fox Televisions Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Third, any rules adopted by the Department must offer sufficient guidance to regulated parties so that they can conform their conduct to the requirements of the prohibition. *See, e.g.*, *R.L. Sanders Roofing Co. v. Occupational Safety & Health Review Comm'n*, 620 F.2d 97, 100-01 (5th Cir. 1980) (noting that an agency must "provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority"). To be a "meaningful exercise" of agency authority, rulemaking activity must provide clarity; it "is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent" interpretations and enforcement. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

As we describe in greater detail below, given the text and history of the incentive compensation statute and the Department's previously expressed rationale for adopting the existing regulations, DeVry believes that any effort to remove the current safe harbors, to limit them significantly, or to create new safe harbors that do not provide adequate guidance, will not satisfy those legal requirements.

## I. Development Of Existing Regulatory Approach Towards Incentive Compensation

To better understand the implications of repealing the governing incentive compensation regulations, we first review the statutory authority and background behind the current regulations as they apply to private sector institutions and the broader higher education community.

These issues have a well-chronicled history. In the late 1980s and early 1990s some less than reputable institutions engaged in the unethical practices of admitting unqualified students simply to obtain federal financial aid funding. At the time, schools were allowed to keep federal financial aid money even if students dropped out or never enrolled. As part of the 1992 Higher Education Amendments, Congress sought to bar these practices by reducing schools' ability to admit unqualified students, requiring schools to return federal aid money allocated to students who dropped out or never attended, and permitting the Department to disallow schools with high cohort dropout rates from participating in the Title IV program.

In addition, Congress restricted the practice of compensating recruiting and financial aid personnel with "commission[s], bonus[es], or other incentive payment[s] based directly or indirectly on success in securing enrollments or financial aid." 20 U.S.C. § 1094(a)(20). As recognized by ED, the purpose of the incentive compensation prohibition is to prevent "an institution from providing incentives to its staff to enroll unqualified students." Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,053 (Nov. 1, 2002).

Even though initial enforcement efforts did not focus on the incentive compensation provision, ED's broader efforts to reduce Title IV abuse proved successful. By 2002, "most of [the] unscrupulous institutions" had been "terminated from participating in the Title IV, HEA programs because of their high cohort default rates," and the type of abuse of Title IV funding that led to the enactment of the 1992 reforms is "no longer possible today." *Id.* at 67,054. In fact, more than 1100 schools lost their ability to participate in Title IV programs during this period of time. Press Release, Dept. of Education, Accountability for Results Works: College Loan Default Rates Continue to Decline (Sept. 19, 2001). As a result of these and other reforms, the average cohort default rate for all schools which was over 22% in 1990 decreased to 6.7% by 2007, the last year with available data for comparison. Dept. of Education, National Student Loan Default Rates, http://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html.

During that same time period between 1992 and 2002, significant regulatory uncertainty about the meaning of the incentive compensation prohibition persisted, as ED failed to adopt specific regulations. Without regulatory guidance, it remained unclear whether merit-based salaries paid to recruiters could be based in part upon enrollment success and whether merit-based salaries could be adjusted up or down within a year without contravening the prohibition. Institutions were also confused over other issues such as whether compensation paid to recruiters and financial aid officials as part of a profit-sharing plan was permissible and whether incentive compensation restrictions applied to supervisory employees and to compensation arrangements with third-party vendors.

As a result, higher education institutions frequently sought guidance from ED as to whether their compensation structures were compliant. This "informal guidance" approach led to its own inconsistencies and regulatory uncertainty. For example, in response to certain

inquiries, ED advised schools that mid-year adjustments to salaries paid to recruiters and financial aid officials were permissible provided they occurred only once per year; other times ED held that adjustments twice in a year were acceptable. *See* Letter from Brian Kerrigan, ED, to Charles Galland, Corporate Counsel, Computer-Ed, Inc (July 8, 1997) (only annual adjustment allowed); Letter from Jeffrey Baker, ED, to Alice Kurz, Arthur Andersen & Company SC (Jan. 23, 1996) (only annual adjustment permitted); Letter from Brian Kerrigan, ED, to Stanley Freeman, Powers, Pyles, Sutter & Verville (Apr. 3, 1996) (biannual adjustment permitted). Similarly, ED provided guidance that salaries paid to recruiters and financial aid officials were permissible provided they were only adjusted upward—seemingly at odds with separate guidance that made no distinction between upward or downward adjustments. *See* Letter from Brian Kerrigan, ED, to Stanley Freeman, Powers, Pyles, Sutter & Verville (Apr. 3, 1996) (upward adjustment only); Letter from Jeffrey Baker, ED, to Alice Kurz, Arthur Andersen & Company SC (Jan. 23, 1996) (failing to distinguish between upward and downward adjustments). At times, the guidance seemed to indicate that the Department would consider certain forms of merit-based salaries as non-compliant, notwithstanding the law's utter silence on restricting such forms of compensation. As a result, there was no uniform approach being applied. In fact, although the statutory provision enacted in 1992 clearly prohibited the payment of commissions, a ED regulation that remained in effect until 2000 encouraged schools "with a high default rate" to implement a "compensation structure" under which recruiters could earn "progressively greater *commissions* for students who remain in school for substantial periods." 34 C.F.R. pt. 668, Appendix D (emphasis added).

The regulatory uncertainty made it hard for higher education institutions to know whether their compensation structures violated the law, possibly subjecting them to catastrophic liability

and regulatory sanctions. It also had implications for prospective and current students who were adversely affected by the murky enforcement regime. The consequences of that lack of clarity came to a head in December, 2000, when ED issued a Final Program Review Determination ("FPRD") to Computer Leaning Centers ("CLC") that found the institution to have violated the incentive compensation prohibition and ordered the return of more than $187 million in Title IV funding. The penalty forced CLC into bankruptcy, left its thousands of students and employees in the lurch, and obliged the Government to assume the students' discharged debts.

The Department based its enforcement action on the fact that in paying its student recruiters, CLC did not consider "other substantial performance factors that are not related to recruiting, enrolling, or awarding Title IV aid." Final Program Review Determination Letter from Victoria Edwards, Acting Director of Case Management and Oversight, ED, to John L. Corse, CEO, Computer Learning Centers, Inc., at 3 (Dec. 15, 2000). Alarmingly, this "other substantial performance factors" test had not appeared in any of the Department's previous guidance letters. The CLC enforcement action signaled to schools that their inability to understand and predict the case-by-case enforcement of the statutory prohibition could put them out of business. Before the CLC case, many schools believed that restrictions on fixed salaries were beyond the scope of the statute. The enforcement action, however, suggested that the incentive compensation restrictions could potentially apply to fixed salaries and raised a host of additional questions.

In light of all of this confusion, the substantial disruption to students and taxpayer cost associated with the CLC bankruptcy, the Department decided to address the issue through a negotiated rulemaking. The rulemaking process itself was extensive and originated with the Department compiling "a list of proposed regulatory changes from advice and recommendations

submitted by individuals and organizations" regarding ways to improve the Title IV programs. Postsecondary Education; Federal Perkins Loan Program, et al., 67 Fed. Reg. 51,718, 51,718 (Aug. 8, 2002). Negotiation sessions followed and included representatives from stakeholders that would be potentially affected by changes to the incentive compensation rules—including students, independent public and private sector schools, lenders, accrediting agencies, and Department officials. Following the completion of the negotiation sessions, the Department issued a proposed rule in the Federal Register for public comment before subsequently adopting its final rule. Notably, that rulemaking and the reasoning supporting it were of course subject to OMB review.

ED adopted these regulatory changes, in part, because it concluded that its informal approach had provided "problematic" and "unclear guidance" to schools and recognized that more uniform standards were necessary to allow educational institutions to effectively carry-out their missions. Letter from Jeffrey R. Andrade, ED, to Leigh M. Manasevit and Jonathan D. Tarnow, Brustein and Manasevit (Dec. 4, 2002). Responding to these concerns, the final regulations adopted by ED fully interpreted the incentive compensation prohibition, identifying what conduct was not (and never had been) covered by the provision. *See* 34 C.F.R. § 668.14(b)(22)(ii); Federal Student Aid Programs, 67 Fed. Reg. at 67,049 (purpose of rulemaking was to "clarify the statutory program participation agreement provision concerning incentive payment restrictions").

In the final regulations, ED adopted twelve safe harbor provisions expressly permitting various forms of compensation. The safe harbors, among other things, allow educational institutions to pay their recruiting and financial aid employees a fixed salary or hourly wage that may be adjusted (upward or downward) at most twice per any twelve month period, as long as

the adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid. 34 C.F.R. § 668.14(b)(22)(ii)(A). The safe harbors also permit compensation based on recruited students successfully completing the education program or one academic year, whichever is shorter. *Id.* § 668.14(b)(22)(ii)(E). Compensation paid as a part of a profit-sharing plan that is available to other employees at the same organization level is also expressly permitted. *Id.* § 668.14(b)(22)(ii)(D). In addition, payments made to management officials not directly involved with recruiting or financial aid activities and compensation for internet-based activities that provide information to prospective students or allow such students to apply for admission on-line do not run afoul of the incentive compensation ban. *Id.* §§ 668.14(b)(22)(ii)(G), (J).

Since their adoption, the various safe harbor provisions have reduced the uncertainty surrounding regulatory compliance and have allowed educational institutions to reward high-caliber enrollment officials through permissible compensation plans. These safe harbors expressly limit the incentive compensation prohibition from extending beyond what Congress intended and allow schools to manage their operations effectively to the benefit of their students.

## II. Considerations In Modifying The Existing Regulations

With that background in mind, we now turn to ED's reexamination of the safe harbor provisions as part of this rulemaking proceeding. We are unaware what, if any changes, were ultimately proposed by ED to incentive compensation provisions in the draft rule submitted to OMB. However, in conjunction with the third negotiation session, ED released an issue paper stating its belief "that the specific language of the statute is clear, and that the elimination of *all* of the regulatory 'safe harbors' would best serve to effectuate congressional intent." Department of Education, Team I—Program Integrity Issues, Issue Paper #4 (2010), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html (emphasis added).

That proposal, if maintained in the draft rule under consideration, is mistaken and unsupportable.[1]

The Department's suggestion that the language of the statute is clear without any need for regulatory guidance is contradicted by the ten-year history of confusion that prevailed before the Department adopted the current safe harbors. This experience demonstrates that the statutory language alone fails to give regulators or the regulated community enough guidance to discern which compensation practices are permissible and which violate the law. The entirely foreseeable result of eliminating the safe harbor provisions—in effect, reverting to the status quo of the 1990s—is to force all parties, including the students who would be harmed as a result, to relive that unfortunate history. Second, the Department's apparent belief that repealing the safe harbors will better serve congressional purposes is also mistaken. The current regulatory approach is—as the Department recognized in 2002—entirely consistent with the statutory language and the underlying legislative intent.

By enacting the incentive compensation prohibition, Congress did not intend to forbid educational institutions from providing merit-based salaries and other similar forms of permitted compensation to their enrollment and financial aid personnel. The statute does not prohibit schools from compensating admissions advisors and financial aid officers for doing their jobs, which include recruiting and helping students pursue their educational goals. Nor does the legislative history support a contrary reading of the text. Both the language of the statute and its legislative history are clear that compensation should not be "de-linked" from enrollment and

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[1] Similarly, to the extent that any regulatory changes proposed by the Department would be equivalent to outright repeal of the safe harbors in terms of their adverse effects on schools and students alike and the regulatory uncertainty that would ensue, the same analysis and concerns set forth below would apply.

other recruiting factors altogether; and forms of compensation that bear little, if any, relationship to recruiting or financial aid activities are entirely beyond the scope of the statutory prohibition. The current regulations specify that schools will not be subjected to liability for engaging in these statutorily permissible activities.

The text of 20 U.S.C. § 1094(a)(20) bans only "commission[s], bonus[es], or other incentive payment[s] based directly or indirectly on success in securing enrollments or financial aid." According to sound principles of statutory construction, "other incentive payment[s]," in this context, should be understood to mean payments in the nature of a commission or bonus based on success in securing enrollments or financial aid. *See Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (noting that under the "old rule of *ejusdem generis*" a general term following a series of specific terms "is confined to covering subjects comparable to the specifics it follows").

The legislative history confirms that the exclusion of merit-based salaries from this provision was intentional. In the Conference Report, Congress clarified that the statute should not be understood to "imply that schools cannot base employee salaries on merit," but rather that "such compensation cannot *solely* be a function of the number of students recruited, admitted, enrolled, or awarded financial aid." H.R. Rep. No. 102-630, pt. G, at 499 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 334 (emphasis added). The use of the word "solely" in this context strongly suggests that Congress never intended to prohibit schools from basing salary and wage rate determinations, at least in part, on job performance—i.e., success or failure in identifying qualified students and helping them pursue their educational goals. Similarly, this language suggests that supervisors, recruiters and financial aid officials could receive forms of

compensation otherwise normally provided in the workplace setting, if not directly linked to, or primarily based upon, recruiting or financial aid metrics—including through profit-sharing plans.

The judicial branch has also confirmed that the law does not prohibit merit-based salaries and these other forms of permitted compensation. The only appellate court to have interpreted 20 U.S.C. § 1094(a)(20) held that it does not prohibit merit-based salaries or "salary reviews generally." *United States ex rel. Bott v. Silicon Valley Colleges*, 262 F. App'x. 810, 811 (9th Cir. 2008) (mem.). The court stated that the statutory provision only prohibits the payment of a "'commission, bonus or other incentive payment' *solely* on the basis of recruitment success." *Id.* (emphasis added).

In adopting the current regulations, the Department shared that view as well. ED acknowledged that the statute does not prohibit merit-based salaries and other similar permitted forms of compensation. Yet, in light of the CLC-enforcement action, which appeared to place those forms of compensation at risk, it was clear that some regulatory guidance was necessary to help ensure that schools would not be deterred from statutorily permissible compensation systems. As a result, ED developed the safe harbors using "a purposive reading" of the law with the express purpose of "*clarifying*" what the incentive compensation provision did not prohibit, and had never prohibited. Institutional Eligibility Under the Higher Education Act of 1965, 67 Fed. Reg. 51,718, 51,723 (Aug. 8, 2002); Federal Student Aid Programs, 67 Fed. Reg. at 67,049 (emphasis added); *see also id.* at 67,053 ("[T]he conference report resolving the different House and Senate versions of the Higher Education Amendments of 1992 indicated that the statutory words "directly" and "indirectly" in section 487(a)(20) of the HEA did not imply that institutions could not base salaries or salary increases on merit."). At the time, the Department understood that giving effect to the language and intent of the statute requires drawing a bright line between

permitted compensation regimes, including merit-based salaries, and impermissible incentive compensation. The safe harbors draw that line consistent with the text and purpose of 20 U.S.C. § 1094(a)(20).

Assuming that ED persists in seeking to repeal all the safe harbors, DeVry does not believe that drastic policy shift would satisfy applicable legal requirements. Basic principles of administrative law dictate that ED must provide a reasoned explanation for its decision to rescind the safe harbors. *Nat'l Cable & Telecoms. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) ("[I]t is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent." (internal quotation marks omitted)). The Supreme Court has recently emphasized that the requirement of reasoned decision-making is particularly acute where, as here, the "new policy rests upon factual findings that contradict those which underlay its prior policy." *Fox Television Stations, Inc.*, 129 S. Ct. at 1811.

The Department cannot satisfy those demands because, as noted above, the safe harbors themselves were a response to plain regulatory failure and serve to effectuate congressional intent. To satisfy the requirements of reasoned decision-making, the Department will have to explain for each safe harbor why it was wrong in 2002 when it concluded that the provision helped give the law a permissible "purposive reading." Institutional Eligibility Under the Higher Education Act of 1965, 67 Fed. Reg. 51,718, 51,723 (Aug. 8, 2002). In addition, the Department's actions will have to square with the well-documented history of confusion that existed before the safe harbors and the Department's own explicit recognition of the need for those regulatory provisions to mitigate the uncertainty that prevailed. To satisfy *Fox Television Stations*, the Department will have to elucidate why it now thinks in the face of that

overwhelming evidence to the contrary that the bare statutory language does in fact provide sufficient clarity to regulators, regulated parties, and courts.

It should be clear from the history of the incentive compensation prohibition that stripping the law of the clarifying safe harbor regulations will only create more confusion among all interested parties. Eliminating the safe harbors will simply force higher education institutions, the Department, and courts to evaluate each compensation scheme on a fact-intensive basis, leading once again to significant regulatory uncertainty and high compliance costs. This will likely lead to a reduction in enrollment services for prospective students, including non-traditional and low-income students who may benefit from the flexible educational opportunities available at a private sector school like DeVry. *See* Lytle, et al., Parthenon Perspectives on Private Sector Post-Secondary Schools, Mar. 12, 2010, at 8 ("Parthenon Study") (showing that private sector schools serve a greater proportion of non-traditional students than comparable two-year non-profit and public institutions).

Private sector schools help large numbers of individuals each year advance in their careers and improve the quality of life for themselves and their families. And because private sector schools are less reliant on government subsidies than public sector schools, they can help achieve broader educational goals and minimize the financial burden to taxpayers. The importance of private sector schools to serving the needs of students, including non-traditional and low income students, is likely only to increase given the significant budgetary pressures confronting many state-operated colleges and universities.

In addition, the concerns raised by repeal of the safe harbors may affect other educational institutions that receive Title IV funding. Indeed, according to a recent GAO report, substantiated violations of the incentive compensation prohibition, as infrequent as they are, have

involved private, non-profit, and public schools alike. Government Accountability Office, *Higher Education: Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education*, Feb. 23, 2010, at 6 nn.14-15 ("GAO Report"); s*ee also* Jodi S. Cohen, *Bonuses at U. of I. Questioned; President Defends Payments to Global Campus Employees*, Chi. Trib., May 22, 2009, at C6 (describing controversy over bonus payments paid by the University of Illinois to employees based on various factors including "their success in enrolling students"). Therefore, schools in all segments throughout the country—and their students—will suffer the consequences of any misguided changes to the regulations.

Indeed, even with the safe harbors, the prohibition on incentive compensation still engenders harmful confusion that subjects schools to significant enforcement and litigation risks, which jeopardize the ability of schools to provide beneficial enrollment services. It is therefore not difficult to predict how those risks will increase if the Department eliminates the safe harbors. For example, schools have no assurance that the Department will continue to "treat a violation of the [incentive compensation] law as a compliance matter"—thereby ruling out potentially ruinous CLC-type penalties—rather than as "resulting in monetary loss to the Department." *See* Memorandum from William D. Hansen, Deputy Secretary of Education, ED, to Terri Shaw, COO for Federal Student Aid, ED (Oct. 30, 2002) ("Hansen Memo"). The safe harbors give schools some measure of protection from the very real possibility that the Department will attempt to revisit that policy through sub-regulatory means and once again impose severe and punitive sanctions for purported non-compliance.

Without the safe harbors, private *qui tam* litigants will, with increased frequency, advance arguments that lead to absurd results under the statute. For example, even with the safe harbors in effect, such litigants have tried to seize on the words "indirect . . . incentive payments"

contained within the statute and distort its meaning to prohibit any compensation that rewards enrollment professionals for doing their jobs—regardless of type, amount, or method of adjustment. *See, e.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1175 (9th Cir. 2006) (noting relators' theory that "higher salaries" and "benefits" violated the incentive compensation prohibition). Because almost every form of compensation is meant to incentivize performance, such a reading would make just about any conceivable method of compensating enrollment personnel fall within the prohibition. The safe harbors rightly rule such arguments out of bounds.

Without the benefit of robust regulatory guidance, the added compliance costs, increased confusion, and amplified litigation risks identified above could lead educational institutions to reconsider payment of merit-based salaries and other similar forms of permitted compensation altogether. This would frustrate congressional intent and harm prospective students who may not be informed or otherwise able to take full advantage of the available educational opportunities, if they are denied the services of qualified, professional admissions advisors and financial aid officers.

Indeed, according to one report, quality "policies and practices in the area[] of recruitment . . . are critical to supporting student persistence" in pursuit of a degree. Watson Scott Swail, Graduating At-Risk Students: A Cross-Sector Analysis, Imagine America Foundation (2009) (citation omitted). And recruiting and financial aid personnel can help prospective students cut through "the complex interplay of inadequate preparation, lack of information about college opportunities, and persistent financial barriers," that often prevent people from seeking out beneficial educational experiences. Commission Report at 1. Limiting these beneficial enrollment and financial aid services therefore would have significant adverse

consequences, particularly for economically disadvantaged students who may not have the same exposure to, or awareness of, the educational opportunities available and would most benefit from the assistance of school officials.

Educational institutions would also be harmed because they, like any employer, use merit-based pay to run their operations and manage their workforce efficiently. Recruiters' primary job is to recruit qualified students; financial aid officers are responsible for helping qualified students identify financing opportunities that may extend beyond the financial assistance available under Title IV. Separating salary determinations entirely from these performance factors would adversely affect the ability of schools to retain their best employees. In addition, it would be entirely inconsistent with the principle of rewarding merit that is at the core of any profession or job performance. Employees in any field that meet or exceed the goals and objectives of their jobs are rightfully compensated based on that excellent performance, and employees working at schools are no different. Eliminating these financial rewards for job performance for school employees could affect employee morale and yield an unsatisfied and unmotivated workforce, thereby putting schools at risk.

By all indications, the safe harbors are working as intended and have benefited schools and students alike. But if what the Department is attempting to accomplish is to put in place stronger safeguards against admitting unqualified students, the more sensible approach would be to target admissions standards and retention statistics directly rather than legitimate and worthwhile compensation structures. Indeed, ED exercises regulatory supervision over eligibility standards and could take steps to strengthen these requirements to prevent unqualified students from enrolling at schools. It should be noted that the current standards reflect a policy

determination that barriers to higher education should be kept to a minimum to facilitate greater access, and that any readjustment of admission standards may run counter to that policy goal.

The Department may try to claim that concerns about consumer protection warrant limiting school outreach and enrollment efforts in order to prevent students from incurring "unnecessary" debt. We support well-grounded efforts to root out fraud and abuse in higher education. But the Department has not shown that its proposed regulatory shift is based on any meaningful correlation between existing compensation practices allowed under the safe harbors and Title IV abuse or harm to students. *See generally* GAO Report (indicating infractions are mostly minor and have not increased in scope under the current regulations); Hansen Memo (stating that incentive compensation violations do not financially harm the Department). Indeed, even when there was a greater prevalence of Title IV funding abuse by rogue institutions in the early 1990s, the incentive compensation prohibition was never the focus of Department enforcement efforts and played only a minor role, if at all, in addressing the problem.

Nor are these consumer protection concerns valid with respect to private sector schools as a whole. Not only do private sector colleges attract more non-traditional students, but they also help them graduate and achieve meaningful professional advancement at higher rates. The Parthenon study shows that students at private sector colleges graduate at rates roughly 50 percent higher than comparable public schools and realize higher percentage wage increases (54% vs. 36%) after completing their education. Students themselves care "little about the distinctions" between a school's "private sector or non-profit status" or "whether its classes are offered online or in brick-and-mortar buildings. Instead, they care . . . about results." Commission Report at xi. Instead of deterring these beneficial educational practices by repealing the safe harbors, ED should maintain clear incentive compensation standards that facilitate

regulatory compliance by legitimate schools and make it easier to identify the bad actors unable or unwilling to comply with the governing standards.

At a minimum, the facts recounted above caution restraint on behalf of the Administration if it does move forward with significant changes to the safe harbors. To the extent the Department does conclude that additional protections are necessary to safeguard Title IV funds from fraud and abuse, the Department should adopt clear, bright line rules expressly allowing for merit-based salaries and other forms of permissible compensation to all employees, including recruiting and financial aid officials. Murky rules will make enforcement and compliance more difficult and costly and will come at the expense of legitimate forms of merit-based compensation—policies which improve the ability of bona fide schools to identify qualified prospective students and help them achieve their educational and career goals.

## III. Regulatory Impact Analysis Should Be Carefully Weighed Regarding Any Significant Change In Regulatory Approach

In addition to determining whether ED's proffered explanation for any change in its regulatory approach is adequate, OMB must also carefully examine the regulatory burdens that would be imposed on higher education institutions and the students they serve. As stated above, we are not currently aware of the precise contents of the Department's proposed rule, but we would expect that the rulemaking package constitutes a "significant regulatory action" under Executive Order 12,866. *See* Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (defining a "significant regulatory action," in relevant part, as having "an annual effect on the economy of $100 million or more, . . . materially alter[ing] the budgetary impact of . . . loan programs or the rights and obligations of recipients thereof . . . or rais[ing] novel legal or policy issues."). Pursuant to section 6(a)(3)(C) of Executive Order 12,866, in conjunction with proposing a significant regulatory action that imposes costs of this magnitude, ED would have to

prepare a detailed regulatory impact analysis assessing the costs and benefits of its proposal, as well as identifying feasible alternatives to the planned regulation.

DeVry believes that the required regulatory impact analysis is particularly important here because deviating from the existing safe harbor regime may impose significant costs (as described above)—including costs on state governments and educational systems—with few, if any, countervailing benefits. For example, under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, ED would have to assess the impact of its regulatory proposal on "small entities." The regulatory burdens described above may be particularly acute for smaller educational institutions. Although some schools have thousands of employees, others potentially affected by the regulation are much smaller. Smaller schools may not be able to benefit from advertising, referrals, or brand recognition to the same degree as larger schools, and therefore may rely even more heavily on highly qualified recruiting personnel to inform prospective students of the benefits of their programs. In addition, smaller schools may be less able to absorb the increased compliance costs described above. These effects should be properly accounted for and examined as part of the required Regulatory Flexibility Act analysis.

Finally, it is worth noting that because many higher education institutions are operated by state governments, proposed changes to the safe harbor regulations may implicate federalism concerns, as defined in Executive Order No. 13,132, 64 Fed. Reg. 43,225 (Aug. 4, 1999). Under that order, the Department must ensure that state officials are given a meaningful and timely opportunity to comment on the proposed rule changes, and must also provide OMB with a federalism impact statement describing state concerns about the regulation and any efforts the Department has made to mitigate those concerns. *Id.* §§ 6(a), (c). Failure to comply with these

requirements could force the federal government to incur the burden of states' direct compliance costs. *Id.* § 6(b).

Given these factors, OMB should closely examine ED's explanation for any suggested changes to the safe harbors and carefully review the supporting economic analysis.

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We appreciate the opportunity to present our views as OMB reviews the rulemaking proposal. 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.