NACAC
National Association for College Admission Counseling

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March 28, 2023

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

Re: Docket ID ED-2022-OPE-0103

Dear Secretary Cardona,

Thank you for the opportunity to submit comments on the Department's proposed Third Party Servicer (TPS) guidance. The National Association for College Admission Counseling (NACAC) is a non-profit association of more than 26,000 school counselors, college advisors, college admission officers, and others associated with the transition from secondary to postsecondary education. NACAC was founded in 1937 and maintains a set of ethical principles for college admission counseling practice, as currently articulated in the Guide to Ethical Practice in College Admission.

In these comments, NACAC wishes to convey several important themes:

1. That the ban incentive compensation is a bedrock principle of best practice in college admission counseling and in federal program integrity measures.
2. That the Departments' 2011 "bundled services" guidance conflicts with the statutory ban on incentive compensation, as well as regulations adopted in 2009-10.
3. Finally, that there are complexities warranting further consideration by the Department, notably (and among others) for non-profit college access and success organizations and for large institutions that use services to help manage workloads that, if not completed on time, could result in significant delays in application and financial aid processing.

Ban on Incentive Compensation as a Bedrock Principle of Best Practice and Program Integrity

The ban on incentive payments was added to the Higher Education Act of 1965 by the Higher Education Amendments of 1992. (See Pub. L. No. 102-325, § 490, 109 Stat. 448, 625-27) The Higher Education Act prohibits colleges that receive federal student aid from providing 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))

The federal restriction against incentive compensation rests on a deep and illustrative history with origins in the original enacted after World War II. At the crux of the matter are the often-conflicting priorities between an institution's bottom line—particularly in instances when profit, beyond simple institutional well-being, is the motive—and students' educational needs and objectives. "The issues that

Congress grappled with in 1952 are, in many respects, the same struggles that today's lawmakers are having: given the financial incentives that for-profit school owners have to enroll as many students as possible and to spend as little as possible on their education."[1]

The challenges presented by the fundamental conflict between profit motives and educational outcomes persist to the present day, ebbing and flowing as successive Congresses and presidential administrations enacted alternately restrictive and permissive regulatory approaches to the for-profit education sector.[2] Based in part on the challenges documented in the Truman and Eisenhower administrations, NACAC implemented restrictions against incentive compensation in 1951. From the outset, NACAC's advocacy on for-profit college recruitment problems has been rooted in two primary ethical practice restrictions:

1. The restriction, first enacted by NACAC in 1951, against providing commissions or bonuses based on the number of students recruited.
2. Multiple ethical practice principles against misrepresentation in student recruitment.

The history of problematic recruitment behavior at unscrupulous institutions is rooted in the deployment of incentivized, high-pressure recruitment tactics that often involve substantial misrepresentations to students. A 1991 Senate reported highlighted recruitment practices a central factor in abuses responsible for defrauding students and taxpayers:

> One of the most widely abused areas of those observed during the Subcommittee's investigation lies in admissions and recruitment practices. Among these practices three stand out in terms of the adverse effects they generate: false and/or misleading advertising; unethical and/or illegal recruitment efforts [incentive compensation]; and, falsification of information used to satisfy [student loan program] ability to benefit requirements.[3]

Accordingly, in 1992 Congress enacted a ban on the use of incentive compensation at institutions eligible to participate in federal student aid programs.

In 2001, the Bush Administration loosened regulations to allow for incentive compensation in student recruitment, in direct contrast to the 1992 law passed by Congress. NACAC's comments to the Department of Education in response to this proposed change warned of impending negative consequences for students and taxpayers:

> *[R]educing the basis for compensation to the number of students enrolled in any circumstance introduces an incentive for recruiters to actively ignore the student interest in the transition to postsecondary education, and invites complications similar to those that preceded the*

[1] "Truman, Eisenhower, and the First GI Bill Scandal," David Whitman, The Century Foundation, January 24, 2017. https://tcf.org/content/report/truman-eisenhower-first-gi-bill-scandal/

[2] See "The Cycle of Scandal at For-Profit Colleges," The Century Foundation, 2017. https://tcf.org/topics/education/the-cycle-of-scandal-at-for-profit-colleges/

[3] "Abuses in Federal Student Aid Programs," Report of the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, May 1991

> *enactment of the ban on incentive compensation under the 1992 Higher Education Act reauthorization.*

NACAC's advice was not heeded by the Department, and the de-regulatory measures were implemented in 2002.

In August 2010, NACAC testified before a hearing of the Senate Health, Education, Labor and Pensions (HELP) Committee during which the Government Accountability Office (GAO) produced video documentation of recruiters at for-profit institutions providing misleading/false information to prospective students. NACAC's testimony noted:

> In the eight years since the enactment of [the Bush Administration deregulatory measures], there is evidence of widespread disregard for the incentive compensation statute. [Documentation included with testimony] provides what we believe is a critical mass of evidence to suggest that the practice of compensating admission officers via commission has become standard practice at many institutions of higher education, particularly in the publicly traded for-profit sector. Our concern for compliance with this long-held ethical principle and federal law extends to colleges of all types. Indeed, NACAC's Statement of Principles of Good Practice binds our postsecondary members (all of whom are not-for-profit public and private institutions) to this principle in addition to their legal obligation. However, evidence that incentive compensation is more the rule than the exception in the publicly traded for-profit sector is plentiful.

From 2011 to present, recruitment abuses have persisted even in light of new regulations, as evidenced by a 2012 Senate HELP committee report and subsequent investigations by government regulators and media outlets. NACAC continues to be called upon to inform policy discussions, as the scrutiny on unscrupulous institutions has increased considerably. We attribute this scrutiny to the growing awareness of the 'recipe' for fraud and abuse, a key ingredient of which is commissioned, high-pressure, often misleading recruitment tactics.

Indeed, the 2012 Senate HELP Committee report noted once again that highly commissioned sales and fraudulent/misleading recruitment information was at the center of a "boiler-room atmosphere" that fed the seemingly limitless "demand for revenue growth…satisfied by enrolling a steady stream of new student enrollees or 'starts.'"[4]

Statutory Clarity and Program Integrity Rulemaking

In response to the troubling media reports about unscrupulous recruitment practices in many online education programs and the role the incentive compensation safe harbors played in encouraging those practices, the Obama Administration's Department of Education moved forward with eliminating the 12

[4] For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, Committee on Health, Education, Labor and Pensions, United States Senate, July 2012. https://www.help.senate.gov/imo/media/for_profit_report/ExecutiveSummary.pdf

safe harbors created by the Bush Administration and putting in place strong regulatory language that better adhered to the 1992 statute. In its Notice of Proposed Rulemaking, the Department noted:

> The Department previously explained that it was adopting the safe harbors based on a ``purposive reading of section 487(a)(20) of the HEA.'' 67 FR 51723 (August 8, 2002). Since that time, however, the Department's experience demonstrates that unscrupulous actors routinely rely upon these safe harbors to circumvent the intent of section 487(a)(20) of the HEA. As such, rather than serving to effectuate the goals intended by Congress through its adoption of section 487(a)(20) of the HEA, the safe harbors have served to obstruct those objectives.[5]

NACAC participated in the negotiated rulemaking process as a primary representative for college admission officers. While the rulemaking committee did not obtain a consensus on the Department's proposed regulation, the intent of the regulations, as was clear from the negotiation, was to create an ironclad front-end protection against highly incentivized, high-pressure sales tactics loyal to the original intent of the 1992 statute.

This approach to regulating incentive compensation was reinforced by the aforementioned hearings conducted by the Senate Health, Education, Labor and Pensions committee in 2010, as well as GAO reports that illustrated clearly that unscrupulous institutions were in violation of a range of program integrity regulations, including incentive compensation. NACAC's testimony to the Senate HELP committee noted:

> Association members stress that NACAC‟s core principles are intended to serve the student interest in the transition from secondary to postsecondary education. Members will readily acknowledge that the number of students enrolled in a given academic year is a matter of great importance to all institutions of higher education. However, reducing the basis for compensation to the number of students enrolled in any circumstance introduces an incentive for recruiters to ignore the student interest in the transition to postsecondary education, and invites complications similar to those that preceded the enactment of the ban on incentive compensation in the 1992 Higher Education Act reauthorization.
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> Our historic concern with the treatment of admission officers as professionals, rather than salespersons, is rooted in the interest of students in transition to postsecondary education. Because the transition to higher education is an unsystematic, often opaque process that individuals possessing varying levels of "college knowledge" must navigate, the information asymmetry between the employees in charge of recruiting and prospective students is immense. In an unregulated environment, the potential for misrepresentation and outright fraud is a clear and present threat, which can result in harm to students and, in the case of federal aid and loans, to the taxpayer. Indeed, the recognition of this asymmetrical environment and its potentially detrimental effects on students was the founding purpose for NACAC in 1937.

[5] U.S. Department of Education Program Integrity Issues, Proposed Rule, June 18, 2010. https://www.gpo.gov/fdsys/pkg/FR-2010-06-18/html/2010-14107.htm

The HELP Committee hearings were bookended by two separate GAO reports, one of which utilized 'secret shoppers' who revealed significant misrepresentations—fueled by commissioned sales—across a wide range of institutions[6] and the other of which highlighted constraints in the effective enforcement of the incentive compensation statute by the Department.[7] Both reports urged strengthening enforcement of the ban.

2011 Guidance

New regulations implemented by the Department after the 2009-10 rulemaking process conformed tightly to statute and provided little room for exceptions. However, in the months after the regulation became final, the Department issued guidance in 2011 that significantly weakened the newly revised regulation regarding third-party servicers and mirrored some of the Bush administration's safe harbors.

In April 2022, the GAO noted[8] that

> In 2011, Education published a Dear Colleague Letter that provided additional guidance related to the ban on incentive compensation. Among other things, Education clarified its view that payment to a third party for student recruiting based on the amount of tuition generated, often referred to as tuition revenue sharing, is considered incentive compensation and is therefore generally prohibited.[9] However, the Dear Colleague Letter explained that Education does not consider some tuition revenue-sharing arrangements to violate the incentive compensation ban if the payment is for a bundle of services that includes recruiting, and if other conditions are met to safeguard against abusive recruiting practices.[10] This letter also states that OPM staff involved in student recruiting cannot receive prohibited incentive payments, even when the college pays the OPM with a share of tuition revenue for a bundle of services and these safeguards are in place.

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[6] Government Accountability Office, "Higher Education: Stronger Federal Oversight Needed to Enforce Ban on Incentive Payments to School Recruiters, GAO-11-10, October 2020, https://www.gao.gov/products/gao-11-10

[7] Government Accountability Office, "Higher Education: Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education," GAO-10-370R, February 2010, https://www.gao.gov/products/gao-10-370r

[8] Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers, Government Accountability Office, April 2022. https://www.gao.gov/assets/gao-22-104463.pdf

[9] From the GAO report cited above: Specifically, in the 2011 Dear Colleague Letter, Education clarified its view that tuition revenue sharing is generally considered indirect incentive compensation based on success in enrolling students, which is prohibited. The statutory ban on incentive compensation prohibits both direct and indirect incentive payments.

[10] From the GAO report cited above: According to the Department of Education's 2011 Dear Colleague Letter, such safeguards were designed to help ensure that the contracted entity is independent from the college and provides services in addition to recruiting, making it less likely for the contracted entity to financially benefit from increasing enrollment through abusive recruiting. Department of Education, Implementation of Program Integrity Regulations, GEN-11-05 (Washington, D.C.: March 17, 2011).

In essence, the Department reinstated one of the just-overturned safe harbors with a caveat that the third-party servicer could not be affiliated with another institution. This caveat originated with the University of Phoenix's affiliation with the Institute of Professional Development, which had systemically violated the incentive compensation ban ten years prior.[11] Just as it had in 2002, the Department of Education's Inspector General did not concur with this aspect of the guidance and reiterated its position that the third-party servicer provision violated the statutory ban on incentive compensation.[12]

Given the regulatory imperative established by the Department's 2009-10 negotiated rulemaking procedure, abuses uncovered by the Harkin/HELP Committee hearings, and the recommendations from two GAO reports, the Department's move to create new safe harbors in their 2011 guidance seemed fundamentally out of step with statute and regulation. Predictably, evidence of predatory recruitment resurfaced at some, though not all, OPMs.[13] [14] [15] [16]

The April 2022 GAO report found that OPMs commonly recruit students for colleges, making these arrangements subject to the Department of Education's oversight and the Higher Education Act's ban on incentive compensation—which was designed to prevent abusive recruiting practices. In its review, the GAO found that

> Education's monitoring instructions for annual audits and agency reviews do not ensure it obtains information about colleges' OPM arrangements to fully assess compliance with the ban on incentive compensation.

Further, the GAO noted

- Education relies on independent auditors to collect information on OPM arrangements to identify potential violations of the incentive compensation ban; however, auditor instructions lack some key details. For example, the instructions do not specifically reference OPMs or a key piece of guidance that Education released in 2011. As a result, compliance audits may not assess relevant OPM arrangements.

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[11] "Government May Fine 2 Universities for Payments to Recruiters," Chronicle of Higher Education, June 8, 2001, https://www.chronicle.com/article/government-may-fine-2-universities-for-payments-to-recruiters/

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

[13] "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/

[14] "OPMs: The Next Frontier of Predatory Practices in Higher Education," Project on Predatory Student Lending, https://www.ppsl.org/news/opms-the-next-frontier-of-predatory-practices-in-higher-educationnbsp

[15] "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

[16] "Senators Warren and Brown Examine Questionable Business Practices of Largest Managers of Online Degree Programs," Office of Senator Elizabeth Warren, January 24, 2020 https://www.warren.senate.gov/oversight/letters/senators-warren-and-brown-examine-questionable-business-practices-of-largest-managers-of-online-degree-programs

- Education depends on colleges to provide information about their OPM arrangements during audits and agency reviews. However, Education's instructions to colleges also lack key details about identifying OPM arrangements subject to agency oversight and consequently colleges do not always report such arrangements, according to agency officials. Without clearer instructions to auditors and colleges about the information on OPM arrangements that must be assessed during compliance audits and agency reviews, *there is a risk that Education will not have the information it needs to detect incentive compensation violations*. (emphasis added)

In sum, the Department's 2011 guidance appears to be inconsistent with statutory and regulatory intent, including regulations that were promulgated just months prior to its issuance. NACAC believes that the Department is well within its authority to correct this inconsistency, though we do encourage a close examination of additional considerations.

Complexity of Environment

NACAC acknowledges the increasingly complex environment in which the Department must implement statutory requirements, including:

- **Programs for cohorts of under-represented students**: As noted by the GAO in April 2022, the increasingly complex partnerships colleges and universities enter to deliver their services. Of particular attention are partnerships to encourage and assist low-income, first-generation, under-represented students to apply, enroll, and succeed in postsecondary education. We believe that in qualified cases, such as those that are not serving as recruiters for the colleges themselves but who maintain agreements to assist small cohorts of students to and through colleges, the Department should ensure that these programs are not inadvertently swept up in program integrity measures.

- **Student recruitment by international institutions**: Many institutions located outside of the United States but eligible for Title IV funding utilize commissioned agents or agencies for student recruitment, including recruitment of students residing in the US as international secondary students but not eligible for Title IV assistance when they reach postsecondary education. NACAC has been asked on many occasions for an interpretation of the statutory exception that states, "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." The process involved in the Department's current guidance presents an opportunity to provide additional clarity to international Title IV-eligible institutions about the use of commissioned agents to recruit students in the US, provided such students are not eligible for Title IV funding.

- **Oversight and accountability**: During the 2009-10 negotiated rulemaking process, there was some discussion, although no specific action, of how third parties, such as lead generators and other marketing services not exclusive to an institution, are held accountable for incentive compensation violations.

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Comments on ED Guidance

GEN-Q4: Is a TPS subject to the ban on incentive compensation?

Yes. A TPS is subject to the same incentive compensation prohibitions as an institution. Neither persons nor entities may receive direct or indirect incentive compensation for recruiting or securing the enrollment of students, or for securing financial aid for students. See 34 C.F.R. § 668.14(b)(22).

NACAC agrees with the Department's assessment that a TPS working on behalf of an institution to recruit students is subject to the same incentive compensation as the institution. Statute and regulation on this point are clear.

Interacting with prospective students for the purposes of recruiting or securing enrollment. This includes, but is not limited to, providing prospective students with information on educational programs, application and document requirements, deadlines, and the enrollment process.

NACAC agrees with the Department's assessment that a TPS working on behalf of an institution to recruit students is subject to the same incentive compensation as the institution. Statute and regulation on this point are clear.

Assisting students with the completion of application and enrollment processes. This includes offering admission and enrollment counseling.

This is an area that has been the subject of a previous 'safe harbor' which was closed during the 2009-10 negotiated rulemaking process. Given the substantial abuse that resulted from this and other safe harbors, NACAC concurs that entities that are paid to provide these services by colleges and universities should be subject to the incentive compensation ban. The only exception, in this case, could well be entities that work with small cohorts of under-represented students on college access and success measures and which may receive some compensation from institutions to help cover their costs. We encourage the Department to work with the network of community based organizations, such as NACAC and the National College Attainment Network, to ensure a thorough understanding of the potential unintended consequences of this guidance.

Processing admissions applications, including the collection of documents, screening, and/or determining initial or final qualification of applicants.

This is an area where we encourage the Department to communicate with large, public institutions of higher education. Large institutions with state-mandated admission criteria are known to employ pre-screening contractors to filter out applications that do not meet state requirements for admission. Such screening services are often paid based on the volume of applications received by the institution. However, the screening contractor is not involved in recruitment or in making admission decisions beyond the minimal criteria required by the state. In this way, such services appear not to contradict

the spirit or letter of the law, as they are similar to FAFSA processing services that function in much the same way.

We recognize that unscrupulous institutions have taken advantage of a similar loophole in the past to utilizing incentive compensation structures. As a result, we understand the Department's need to maintain the integrity of the incentive compensation statute and regulations.

Processing Title IV student financial aid applications, including FAFSA or pre-FAFSA completion services.

As with the previous comment on application screening, student financial aid form pre-processing is a common occurrence at larger institutions. We encourage the Department to collaborate with public university systems/universities to determine whether the guidance will have an adverse effect on their ability to process financial aid applications in a timely fashion.

Performing individualized and interactive financial aid counseling in person, over the telephone, and/or by electronic means, including operating call centers and online support/engagement tools to answer general questions and/or assist students through the financial aid processes necessary to award and disburse Title IV funds. Such processes include, but are not limited to, completing the FAFSA, conducting verification, identifying and resolving student eligibility issues, and providing general Title IV counseling.

This is an area that has been the subject of a previous 'safe harbor' which was closed during the 2009-10 negotiated rulemaking process. Given the substantial abuse that resulted from this and other safe harbors, NACAC concurs that entities that are paid to provide these services by colleges and universities should be subject to the incentive compensation ban. The only exception, in this case, could well be entities that work with small cohorts of under-represented students on college access and success measures and which may receive some compensation from institutions to help cover their costs. We encourage the Department to work with the network of community based organizations, such as NACAC and the National College Attainment Network, to ensure a thorough understanding of the potential unintended consequences of this guidance.