

insights

TYPES NOT MAPPED YET May 11, 2022 | TTR not mapped yet | Aaron D. Lacey, Scott Z. Goldschmidt, Christopher T. Murray

New GAO report signals increased scrutiny of Higher Ed contracts with online program managers

On May 5, 2022, the U.S. Government Accountability Office (GAO) released a long awaited report scrutinizing the U.S. Department of Education's (ED) oversight of relationships between institutions of higher education and Online Program Managers (OPMs). The Report, titled [Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers](#), does not address all aspects of the relationships between OPMs and institutions, but instead focuses on ED's role in ensuring institutional compliance with the federal ban on incentive compensation. Below, we review the salient points from the GAO report.

We also invite you to join us for webinar on May 17, 2022, during which we will discuss in further detail the state of the incentive compensation ban and its application to OPM arrangements, as well as language introduced by ED during its recent negotiated rulemaking that would impact OPM relationships. Interested institutions can register [here](#).

Report findings and recommendations

As many REGucation readers are aware, the GAO is an independent, nonpartisan agency of the legislative branch that advises Congress. At the request of any member of Congress or Congressional committee, the GAO will prepare reports on topics of public interest. This Report was commissioned years ago by several Democratic members of Congress and is the latest part of an effort by certain members to highlight their concerns with the use of OPMs (for example, see the [January 23, 2020 Letters from Senators Warren and Brown](#) or the [January 14, 2022 Letter from Senators Warren, Smith, and Brown](#) to various OPMs).

The Report explains that arrangements between institutions of higher education and OPMs are dramatically increasing and often include recruiting services that may be subject to the rule on incentive compensation ([20 USC 1094\(a\)\(20\); 34 CFR 668.14\(b\)\(22\)](#)). The incentive compensation rule generally prohibits institutions that participate in federal student aid programs from paying incentive payments, such as commissions or bonuses, to individuals or third parties engaged in student recruiting.

OPM relationships frequently take advantage of the "bundled services" exception to the incentive compensation ban. Under the "bundled services" exception, certain tuition revenue-sharing arrangements are deemed to not violate the incentive compensation ban if the payment is for a bundle of services that includes recruiting, so long as other conditions are met to safeguard against abusive recruiting practices. The bundled services exception is based on sub-regulatory guidance, promulgated in a Dear Colleague Letter issued by the Obama Administration in 2011, [Negotiated Rulemaking for Higher Education 2009-10 - Program Integrity Questions and Answers - Incentive Compensation](#).

For further analysis of the incentive compensation rule, please see Thompson Coburn's webinar, [Examining ED's Incentive Compensation Rule](#), which explores the intricacy and nuance of the rule.

While ED is responsible for enforcing the ban on incentive compensation, the GAO found that ED is not obtaining the information it needs to detect violations during its regular compliance audits and program reviews. With this in mind, it made the following recommendations to ED:

1. The Secretary of Education should provide additional instructions for inclusion in the Compliance Supplement to help auditors better identify and assess potential incentive compensation ban violations when a college contracts with an OPM. Additional instructions should prompt auditors to ask specifically

about OPMs, direct auditors to obtain and assess compensation information for OPM staff who provide recruiting services, and reference relevant guidance including the 2011 Dear Colleague Letter.

2. The Secretary should also provide additional instructions to colleges regarding the information they must provide about their OPM arrangements during compliance audits and program reviews. Additional instructions should explain that colleges are responsible for both identifying all OPM contracts that include recruiting and then providing auditors and ED's program review staff with copies of those contracts and information on how covered OPM staff are compensated.

In a March 15, 2022 letter (attached to the Report), ED concurred with both of the GAO's recommendations. In response to the first recommendation, ED agreed to "propose revisions to the Compliance Supplement" in order to provide relevant guidance with respect to incentive compensation as well as strengthening audit procedures. In response to the second recommendation, ED agreed to reinforce that the "ban on incentive compensation applies to all educational programs that an institution offers and all contracts that an institution enters," along with amending its procedures for program reviews and proposing changes to the Compliance Supplement.

Looking forward

Based on ED's responses to the GAO's recommendations, institutions of higher education should expect at least the following in the near term:

1. Revisions to the Compliance Supplement's treatment of the ban on incentive compensation, specifically addressing the bundled services exception;
2. Stronger audit procedures for auditors reviewing the relationships between institutions and OPMs;
3. Forthcoming guidance to institutions about the scope and breath of the incentive compensation rule; and
4. Amended procedures for program reviews to specifically address any institutional agreements with OPMs.

The Report also confirms that ED is "currently reviewing its guidance on the incentive compensation ban and how it applies to OPM arrangements for possible revisions to address some of these issues." The lessons learned from ED's ongoing program reviews will inform its plans for revising this guidance. While the Report did not say whether ED is considering a revision of the "bundled-services exception," we note that there are commentators advocating for its repeal: [The shaky legal ground for revenue-sharing agreements for student recruitment \(opinion\) \(insidehighered.com\)](https://www.insidehighered.com/article/2022/03/15/the-shaky-legal-ground-for-revenue-sharing-agreements-for-student-recruitment-opinion).

Finally, we note that the recent negotiated rulemaking on Changes of Ownership and Change in Control may have an impact on an institution's agreements with OPMs. In its final [Issue Paper](#) on the topic, ED proposed amending the definition of nonprofit institution. Under the revised definition, a domestic non-profit institution is generally one that would not enter into or maintains:

"a revenue sharing agreement with any party..., unless the institution demonstrates that payments under the revenue-sharing agreement are reasonable based on the market price for such services or materials, including demonstrating a reasonable relationship to the cost of the services or materials provided."

Because negotiators did not reach consensus on this issue, ED is not bound to use the above definition when issuing its proposed rule, but it also has the flexibility to do so. Interested institutions should be on the lookout for this proposed rule and may wish to submit comments during the public comment period.





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