



American Association of Collegiate Registrars and Admissions Officers

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October 7, 2002

Ms. Wendy Macias
U.S. Department of Education
P.O. Box 33076
Washington, D.C. 20033-2076

**Subject: AACRAO Comments Regarding Proposed Rule for Program
Participation Agreement 34 CFR 668.14(b)(22)**

Dear Ms. Macias:

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) and the undersigned associations, I am pleased to submit comments on proposed regulations published on August 8, 2002 in the *Federal Register*. AACRAO is a nonprofit association of more than 2,300 institutions of higher education and more than 9,000 campus enrollment services officials. Some 5,000 of our members are professionals with responsibilities that include recruitment, admissions, or financial aid decisions at their respective institutions.

I write to respectfully express our opposition to certain provisions of the proposed regulations that, if promulgated in final form, would significantly alter the incentive compensation provisions of 34 CFR 668.14(b)(22).

General Background

Congress first enacted the incentive compensation ban in 1992 as a critical component of new program integrity provisions in order to combat waste, fraud and abuse by a minority of Title IV-participating institutions. By the early 1990s, with student loan default costs escalating at an alarming rate and reports of rampant abuse and outright fraud in the trade-school sector emerging in the media, Congress and the Bush administration both agreed that urgent action was needed to restore public confidence in the integrity of federal student financial aid programs. Hearings held throughout 1990 by the Senate

Permanent Subcommittee on Investigations, chaired by Senator Sam Nunn, documented a number of abusive and fraudulent practices and found that instances of waste, fraud, and abuse, while confined to a small minority of schools, had caused significant harm to students and the taxpayers. In 1990, the Department of Education's review of 1988 default data indicated that five colleges and 85 trade schools accounted for more than 30 percent of all defaulted loans in 1998. The Senate Subcommittee's staff, in testimony before the Subcommittee, produced vivid examples of outrageous admissions practices at trade schools that treated admissions as commissioned sales. In the case of one school they cited, the following items were included in the advice dispensed by the supervisor for sales to commissioned "admissions" representatives:

Drive through large housing projects SLOWLY with door sign on. Best times are Friday afternoons and Sunday afternoons.

Meet the managers of low income and government housing apartments. Give group presentations.

Food stamp offices – leave referral cards.

Welfare offices – leave referral cards.

For other examples of questionable recruitment practices, please review the *Admissions Representative's Training Manual* from the institution in question, attached as Appendix A. (Originally included in the Subcommittee's report, Senate Hearing 101-659.)

To better demonstrate the manner in which admissions and sales incentives had overwhelmed the putative mission of the school, the Subcommittee staff concluded:

Finally, our review of A.C.T. financial records revealed that training and education expenses were dwarfed by advertising and sales costs. Our analysis of corporation expenses during the period 1986-1989 revealed that in FY 1986 instructor salaries were \$72,253 or 1.3% of revenues and advertising was \$384,583 or 7.0% of revenues. For 1988, instructors' salaries increased to \$468,079, representing 1.4% of revenues. During the same year, Advertising increased to \$11,004,410 which was a significant 33.8% of revenues. Classroom materials for FY 1986 were 0.4% of revenues and decreased to 0.3% of revenues in 1989. In FY 1986 there was no salary category for Admission Representatives which totaled \$5,935,746 or 17.2% of revenues in 1989. [Senate Hearing 101-659, pp. 190-191].

Subcommittee staff found such egregious recruitment practices as recruitment of individuals unable to ever possibly attend classes because they were serving long prison sentences and admission of individuals to truck-driving programs despite disabilities that made it impossible for them to operate a motor vehicle

The Department's Inspector General (I.G.), testifying before the Subcommittee, also specifically identified the use of commissioned recruiters as a misplaced economic incentive that led to abuse and was harming students. Citing the example of an institution against which a Boston grand jury had returned a 12-count indictment, the I.G. testified that the indictment charged that the school "attempted to recruit young, unlearned, disadvantaged students through a multi-media advertising effort and used commissioned sales agents who were required to meet or exceed certain enrollment quotas."

The Subcommittee concluded that the federal government and state agencies did a poor job of reviewing participating schools, allowing them "to prosper on a steady flow of federal student aid, targeting and manipulating students who are not sophisticated enough to realize that they are signing up for nothing more than a rip-off."

The Nunn Subcommittee and contemporaneous media reports on abusive recruitment and admissions practices, almost exclusively limited to the trade school sector, further documented the consequences of configuring admissions as a sales position. As part of the changes authorized in the 1992 reauthorization of the Higher Education Act, Congress imposed an outright ban on commissioned recruiting by requiring institutions participating in Title IV programs to agree 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. [HEA §487(a)(20), 20 USC 1094]

In 1994, the Department, in regulating the unambiguous legislative language cited above, chose only to add a \$25 exemption for token gifts.

The Ethics of Admissions

Members of AACRAO, consisting of degree-granting collegiate institutions of higher education, have been and continue to be satisfied with current law. Since the enactment of the 1992 law, we have had no complaints from our members about the ban on incentive compensation. Our membership believes that college admissions is primarily a counseling profession concerned with assisting students to attend an institution *that is right for them*, and that any attempt to tie the compensation of admissions officials to the number of students they recruit for their own institution would constitute an inherent conflict of interest. Indeed, we believe that the very possibility that *any* admissions official may have a vested personal interest in securing the enrollment of students would bring disrepute to the profession. The AACRAO Board of Directors has affirmed this view by adopting the *AACRAO Professional Practices and Ethical Standards*, among whose strictures is the requirement that the members of the Association shall "represent

an institution or Association perspective without vested interests or personal bias.” AACRAO also has endorsed the *Statement of Principles of Good Practice (SPGP)* developed by the National Association for College Admission Counseling, a sister organization to which some 1,700 AACRAO member-institutions also belong. Section I(A)(1) of the NACAC *SPGP* states:

College and university members agree that they will ensure that admission counselors are viewed as professional members of their institutions’ staffs. As professionals, their compensation shall take the form of a fixed salary rather than commissions or bonuses based on the number of students recruited.

In addition, Section I(A)(5)(b) of the *SPGP* states:

College and university members agree that they will not use unprofessional promotional tactics by admission counselors and other institutional representatives. They will not offer or pay a per capita premium to any individual or agency for the recruitment or enrollment of students, international as well as domestic.

The Proposed Rule

The proposed regulations, published in the August 8, 2002 *Federal Register*, were part of a package initially submitted to a negotiated rulemaking committee convened by the Department pursuant to HEA Title IV Part G §492. Despite the fact that the Department took extraordinary steps to appoint negotiators of its choosing, the negotiations failed to arrive at a consensus on the proposed regulations on incentive compensation. Nevertheless, the Department is unilaterally proposing to alter—and weaken—the legislative ban on incentive compensation in the following manner:

- 1. Section 668.14(b)(ii)(A) would create a safe harbor exemption for fixed “salary” payments, even if such payments are partially based on the number of students recruited, admitted, enrolled, or awarded financial aid, provided that such “salaries” are not adjusted more than twice a year.** This provision violates the letter of the law and, if adopted, would create a loophole that would be easily susceptible to gaming. Unscrupulous schools could bundle sales commissions earned over six-month cycles, marginally modify them with other performance criteria, and adjust employees’ “salaries” to reflect the changes.
- 2. Section 668.14(b)(ii)(B) would allow commission-based recruiting for non-Title IV programs at institutions participating in Title IV.** This provision violates the letter of the law and, if adopted, would allow unscrupulous schools to engage in predatory recruitment practices against one segment of their “market” while also participating in federal student assistance programs. There is also a high likelihood that students secured through high

pressure sales tactics would, after a brief period of enrollment financed through loss-leader private loans, be transferred to aid-eligible programs.

3. **Section 668.14(b)(22)(ii)(D) would expand the commonly accepted concept of “profit sharing” to allow currently prohibited payments if these are made to all or “substantially all” employees of the school, and it also fails to provide important definitions that would limit abuse.**

Unscrupulous schools could find numerous ways in which to manipulate this provision to generate commission payments to recruiters. The case of the trade school referred to above provides a particularly instructive example. The Nunn Subcommittee found that, upon gaining entry into the federal student loan programs, the school experienced a one-year change of fortune in 1986, which took it from a net loss of \$90,926 the previous year to profits of \$2,449,231. The school’s profit sharing and bonus plan for its two executive officers consumed \$2,242,400 in total compensation for that year. There is nothing in the proposed rule that would prohibit a repeat of such practices.

4. **Section 668.14(b)(ii)(E) would allow commission-based compensation based on program completion.** The preamble to the April 29, 1994 Interim Final Rule on incentive compensation provides a compelling argument against this policy change: “The Secretary believes that even in incentive payment structures based on retention there is room for abuse and, in fact, has seen evidence of such abuse. Since July 1992 when the Amendments of 1992 were enacted, many institutions have opted to change to retention-based pay for admissions personnel. In that time, the Secretary has seen evidence of lowered satisfactory progress standards and in extreme cases, falsified attendance and leave of absence requests, all in an effort to keep students enrolled. In many cases, these practices were designed by admissions personnel who were duly paid after the student passed a retention mark. After that mark, the students were dropped.”

5. **Section 668.14(b)(22)(ii)(F) would allow commission-based compensation to employees who perform “pre-enrollment” activities, provided the compensation is not based on the number of individuals actually enrolled.** This provision violates the letter of the law in failing to include the awarding of financial aid as a prohibited basis for commissions, and would allow admissions and recruiting—by definition, “pre-enrollment” activities—to be compensated on the basis of the amount of federal aid successfully secured per student.

6. **Section 668.14(b)(22)(ii)(G) would allow commission-based compensation to managerial or supervisory employees who are not directly involved, and do not supervise others who are directly involved, in recruiting, admissions, or awarding of financial aid.** This provision violates the letter of the law, which bans the payment of commission, bonus, or other incentive payments to any person “engaged” in *any* recruitment or admission activity, regardless of whether the nature of such activity is direct or mediated. The assumption that supervisors, because they are not directly involved, are

therefore not engaged in recruitment, admission, or awarding aid is questionable.

7. **Section 688.14(b)(22)(ii)(J) would allow commission payments for Internet-based recruitment and admission activities.** This provision violates the letter of the law and would, if adopted, create a regulatory exception to the blanket legislative ban on such arrangements. The Department cites the Report of the Web-based Education Commission, as if this citation provides it with both a rationale for the change and the authority to act. We note that the Commission conducted its work without the requisite familiarity with the workings of Title IV or the history of past abuses that Congress had sought to curb in drafting its specific provisions. Furthermore, its 168-page report devotes merely three paragraphs to a discussion of the incentive compensation ban, and moves quickly through a series of non-sequiturs to note that the provision bans web recruiting contracts based on the number of referrals who actually apply or enroll. We believe that a radical change in national policy should be based on a meaningful fact-finding effort by the congressional committees with knowledge of, and jurisdiction over, the Higher Education Act. We also note that the Report's brief discussion of the ban ends with the assertion that "the Department has concluded that this provision could only be changed through new legislation."
8. **Section 688.14(b)(22)(ii)(L) would allow schools to enter into revenue-sharing (i.e., commission-based) contracts "with outside entities for recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing recruiting or admission activities or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible" for institutions to compensate their employees.** This provision turns the unequivocal language of the law, which specifically bans commission payments to any persons or *entities*, on its head. Congress did not, and the Department therefore cannot, make a distinction between external entities based on their compensation policies. The law simply bans all commission-based contracts, largely to address documented cases of abuse arising out of such arrangements. The proposed language would effectively allow outside companies to be retained as commissioned sales agents, so long as other "services" are bundled with recruitment to mask the essential nature and purpose of the arrangement.

We believe the proposed changes listed above are ill-advised at this time for the following reasons:

1. **No Evidence of a Problem**

First, it is noteworthy that the two organizations representing the admissions profession support the current ban, while the Department of Education, one of whose responsibilities

is to ensure the integrity of Title IV programs, is contemplating the creation of loopholes in a law that has proven effective in combating waste, fraud, and abuse. As already mentioned above, we are unaware of any difficulties the current ban has posed for our members. We would ask the Department to more precisely identify the “problem” it is seeking to address, and urge it to review recent history before legalizing practices whose consequences are sadly predictable.

2. No Authority

Second, the proposed regulations violate the clear language of the law. Regardless of whether or not the severity of the current ban is appropriate, the Department has no authority to promulgate regulations that fundamentally rewrite the statute. The strained interpretive effort to conjure up exception after exception, while appropriate as an expression of the administration’s policy goals for the upcoming reauthorization, can hardly be viewed as an attempt by the Department to fulfill its obligation to implement what the legislative language plainly states.

3. Questionable Timing and Procedures

Third, the proposed regulations have been published and could be finalized on the eve of a reauthorization. Congress has already embarked on a comprehensive review of the Higher Education Act, and any changes to this or other provisions can be lawfully adopted through the reauthorization process in short order. As there is no evidence of a crisis requiring immediate action, we urge the Department to make its case before the Congress on this important policy issue. Unilateral action by the Department is all the less appropriate because it was, as noted above, unable to obtain consensus for the proposed regulations from the negotiating committee it handpicked.

4. Complexity of Compliance and Enforcement

Finally, the proposed regulations—precisely because the Department is straining to interpret the law to mean other than what it says—constitute a textbook example of unnecessary complexity. The new exemptions are so numerous that they expand the regulatory language by more than six-fold. What is and what is not allowable will be more difficult for institutions, for the Department, and for the courts to understand and correctly interpret. Secretary Paige himself acknowledged the importance of providing clear and workable rules on this issue when he assured the late Representative Patsy Mink in writing on July 24, 2001 that “any new guidance on this topic [will] be clear and not overly prescriptive for institutions of higher education” [Congressional Record, October 10, 2001, page H-6468]. Yet, the proposed rule would expand the one clear exemption in current law to twelve highly nuanced categories. We believe that this complex proposal does not conform to the spirit of the overall requirement of Executive Order 12866 to reduce regulatory burdens. Indeed, the proposed rules are so broad and so vague that we believe the Department will some day find itself unable to pursue even the most obvious and egregious violations of this provision.

Summary

We believe that these proposed changes represent a giant step backward for the integrity of federal student financial assistance programs. Recent corporate scandals have reminded the nation of the importance of the federal role in ensuring that ethical norms govern the marketplace. In proposing a de facto administrative repeal of an existing law, the Department would not only be acting without authority, it would be establishing a policy that will undoubtedly result in future scandals.

Sincerely,

Jerome H. Sullivan
Executive Director

On behalf of:

American Association of State Colleges and Universities
State PIRG's Higher Education Project
United States Student Association