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You Can't Bundle That

The U.S. Department of Education's "bundled services" loophole is illegal under the Higher Education Act

Under the Higher Education Act, institutions participating in the federal financial aid programs are prohibited from providing "any commission, bonus, or other incentive payment" that is "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."[1] This express prohibition, designed to curb predatory recruiting practices, is referred to as the "Incentive Compensation Ban." Unfortunately, many institutions skirt this requirement by relying on subregulatory guidance issued by the U.S. Department of Education, known as the "Bundled Services Guidance."

The guidance—issued in 2011—interpreted the Incentive Compensation Ban to exclude payments made by institutions to third-parties "for a variety of bundled services."[2] Put otherwise, when an institution makes a payment to a third-party in a manner that would otherwise violate the Incentive Compensation Ban, that payment is considered lawful as long as the third party rendered a "bundle" of services (*i.e.*, not just recruiting) and "does not pay the entity separately for student recruitment services provided by the entity." The guidance suggests the exception is limited insofar that it only applies when the institution, not the third-party, "determines the number of enrollments." Since the guidance was issued, an industry of third-party vendors has developed to recruit students, purporting to operate under the guidance. Many of these vendors also operate as Online Program Management companies, and therefore play a role in both recruitment and educational delivery.

On February 16, 2023, the Department announced that it was soliciting comments regarding the Bundled Services Guidance, including how the Department can "better ensure compliance with the prohibition on incentive compensation."[3] As detailed herein, because the guidance is contrary to the plain text of the HEA, the Department must repeal the guidance. The HEA expressly prohibits payments based "directly or indirectly" on success in securing enrollments or financial aid, or to "any persons or entities engaged in any student recruiting or admission activities." This language—read alongside the Department's prior interpretive pronouncements during rulemaking in 2010—makes clear that there is no exception for individuals or entities that bundle these services with other activities.

1 HEA § 487(a)(2), 20 U.S.C. § 1094(a)(20).

2 Eduardo M. Ochoa, U.S. Dep't of Educ., Dear Colleague Letter: Implementation of Program Integrity Regulations, GEN-11-05, at 8-10 (Mar. 17, 2011), https://fsapartners.ed.gov/sites/default/files/attachments/dpcletters/GEN1105.pdf.

3 88 Fed. Reg. at 10,102 (Feb. 16, 2023).

Congress intended the incentive compensation ban to practice the integrity of Title IV, without exception for "bundled services.

Congress adopted the Incentive Compensation Ban in 1992 to curb the "risk that recruiters will sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans."[4] Congress premised the ban on its findings of "substantial program abuse . . . with respect to the use of commissioned sales representatives," and therefore believed that a strong ban was necessary to curb payments that were designed to "directly" or "indirectly" incentivize abusive recruitment tactics.[5] The ban applies to both individual recruiters employed by the institution and to "entities engaged in any student recruiting or admission activities or in making decisions."

In crafting the statute, Congress made clear that there were only two "limited" exceptions to the ban.[6] First, the statute expressly carves out–and therefore does not prohibit—the use of commissioned sales representatives to recruit foreign students to U.S. institutions. Second, although not mentioned in the statute, Congress made clear in the Conference Report accompanying the 1992 law that "schools can[] base employees salaries on merit."[7] In contrast, Congress never suggested that individuals or entities could dodge the prohibition by providing a "bundle" of services to the institution. And of course, "[w]hen Congress provides exceptions in a statute, it does not follow that courts [or agencies] have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000). In this case, "Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Id*; *see also, Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying the statutory construction "*expressio unius est exclusio alterius"* to limit statutory exceptions to those explicitly stated).

The "bundled services" loophole is illegal.

Given the express language of the statute—and corresponding language in the Conference Report referring to two "limited" exceptions—the 2011 Bundled Services Guidance is contrary to law and should be immediately repealed. Repealing the Bundled Services Guidance is also consistent with prior Department statements and interpretations, specifically the Department's most reasoned interpretation of the Incentive Compensation Ban—issued only months before the Guidance was published.

In 2002, the Department adopted a series of controversial "safe harbors" to the incentive compensation ban, *i.e.*, delineating certain types of conduct that an institution could "carry out without violating" the ban. 34 C.F.R. 668.14(b)(22)(ii) (adopted 2002). Among the safe harbors, the Department determined that the following behavior was not a violation of the ban:

> (L) Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities, or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.

The legality of the Department's safe harbors was never challenged in court. In June 2010, the Department issued a Notice of Proposed Rulemaking proposing to *eliminate* the safe harbors in their entirety. In doing so, the Department—first and foremost—determined that eliminating the safe harbors would "align [the regulations] more closely with the statutory language"

4 *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 989 (9th Cir. 2011) (citations omitted) (internal quotation marks omitted)). See also, *See Ass'n. of Priv. Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 434 (D.C. Cir. 2012).

5 138 Cong. Rec. H5380-04, 1992 WL 146313 (1992).

6 *Id.*

7 *Id.*

regarding the incentive compensation ban.[8] The NPRM further stated that the statutory language was "clear, and that the elimination of all of the regulatory safe harbors . . . would best serve to effectuate congressional intent."[9]

The Department also noted that removing the safe harbors would eliminate what it had previously described as a "purposive reading of section 487(a)(20) of the HEA."[10] Finally, the Department stated that its "experience demonstrates that unscrupulous actors routinely rely upon these safe harbors to circumvent the intent of section 487(a)(20) of the HEA."[11] Accordingly, the Department believed that the safe harbors "obstructed" Congressional intent.[12] In October 2010, the Department finalized the elimination of the safe harbors, to take effect in July 2011.[13]

Despite Congress's clear intent, and the Department's June 2010 and October 2010 statements stating that removing the safe harbors would effectuate Congressional intent, the Department issued the Bundled Services Guidance in March 2011, which effectively reinstated safe harbor L.[14] But the Department included no explanation or evidence of how the Bundled Services Guidance was consistent with either the language or intent of the statute. Nor did the Department explain how the Bundled Services Guidance was anything other than a complete reversal from the Final Rule that was issued five months earlier, after negotiated rulemaking and a robust notice and comment period.[15] Indeed, the *only* difference between the Bundled Services Guidance and the repealed safe harbor is the apparent requirement that the former only applies if the third-party does not determine enrollment numbers, a factor that is completely unmentioned in the statute itself.[16]

Conclusion

Because the Bundled Services Guidance is contrary to the plain text of the HEA, the Department must repeal it. The HEA expressly prohibits payments based "directly or indirectly" on success in securing enrollments or financial aid, or to "any persons or entities engaged in any student recruiting or admission activities." This language—read alongside the Department's prior interpretive pronouncements—makes clear that there is no exception for individuals or entities that bundle these services with other activities.

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8 75 Fed. Reg. at 34,817 (June 18, 2010).

9 *Id.*

10 *Id.* (citing 67 Fed. Reg. at 51,723 (Aug. 8, 2002)).

11 *Id.*; 75 Fed. Reg. at 66,872 (Oct. 29, 2010).

12 *Id.*; 75 Fed. Reg. at 34,817*;* 75 Fed. Reg. at 66,872 (Oct. 29, 2010).

13 See 75 Fed. Reg. 66,832 (Oct. 29, 2010). In response to commenters asking for clarification whether tuition-sharing arrangements with third parties to secure services that include recruitment would be permitted, the Department simply responded that such arrangements must comply with the final regulatory language. The Department did not mention third parties providing bundled services, let alone assign significance to such an arrangement. *See id* at 66,875.

14 34 C.F.R. 668.14(b)(22)(ii)(L) (adopted 2002).

15 If a court was ever presented with the 2011 Bundled Services Guidance, it is highly likely that it would receive no judicial deference. *First*, if anything, the Guidance would not be afforded deference under *Chevron* because the Guidance was not the product of relatively formal procedures such as notice-and- comment rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001). Under *Skidmore*, agencies are entitled only to a "sliding-scale" of deference, under which the weight given to the agency's view "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Because the Guidance conflicts with the Department's pronouncement—less than six months after Notice & Comment Rulemaking—that safe harbor L was inconsistent with the language and intent of the HEA, the Guidance is entitled to even less deference. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).
In contrast, the Department's decision to remove safe harbor L is wholly consistent with the plain text of the statute. In such circumstances, a reviewing court would give effect to the unambiguously expressed Congressional intent. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

16 "The Department generally views the payment based on the amount of tuition generated as an indirect payment of compensation based on success in recruitment and therefore a prohibited basis upon which to measure the value of the services provided." Eduardo M. Ochoa, U.S. Dep't of Educ., Dear Colleague Letter, GEN-11-05, *supra* note 2, at 11.