August 1, 2010

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, N.W., Room 8031
Washington, DC 20006-8502

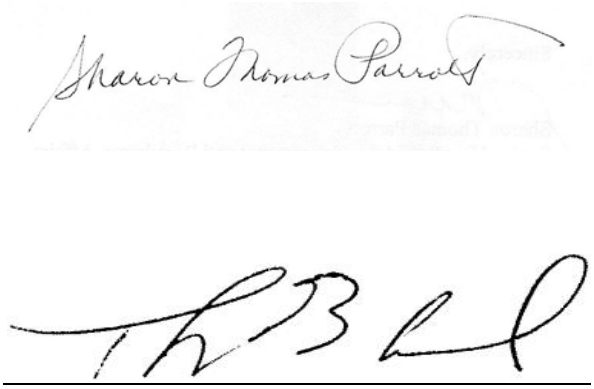
Re: *Program Integrity Issues, 75 Fed. Reg. 34,806 (June 18, 2010) (Notice of Proposed Rulemaking), Department of Education Docket ID ED-2010-OPE-0004.*

DeVry, Inc. ("DeVry") is pleased to respond to the request for comments from the Department of Education (the "Department") on its proposed rules on *Program Integrity Issues*, Department of Education Rulemaking Docket Matter No. ED-2010-OPE-0004 (June 18, 2010). This proposed rule is very important to students, potential students, and to the schools in the regulated community who serve those students. Although DeVry has comments about other aspects of the proposed rule, those comments are addressed in a separate submission.

Our comments here are focused on the proposed changes to the regulations governing the statutory prohibition on bonuses, commissions, and other incentive payments. In addition, we have attached as an appendix to our comments an expert report prepared by Professor Daniel J. Slottje that analyzes the potential adverse consequences from delinking compensation from job performance under the proposed regulatory approach. Throughout our comment letter, we have highlighted alternative methods by which the Department could address its concerns about over-aggressive recruiting and financial aid practices that do not involve restricting schools entirely from compensating their employees based on job performance.

We are eager to continue working with the Department on these important issues. If you have any questions or would like to discuss these issues further, please contact Thomas Babel at 630-515-3133.

Very truly yours,



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cc: Department of Education
Marty Guthrie

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I. Introduction

DeVry appreciates the opportunity to comment on the Department's recently issued Notice of Proposed Rulemaking ("NPRM") on program integrity issues. This letter addresses the proposed changes to the regulations governing the statutory prohibition on bonuses, commissions, and other incentive payments, currently found at 34 C.F.R. § 668.14(b)(22).

There are some overarching considerations that frame our comments below. DeVry fully supports a regulatory regime that encourages students to pursue their educational goals and facilitates their doing so. There are many well-qualified institutions, public, non-profit, and private sector alike, that provide invaluable educational services to students and reply upon their dedicated and highly-skilled admissions and financial aid personnel to provide those services. Consequently, in considering regulatory changes to title IV programs, it is important that the Department not impose any restrictions that would indiscriminately restrict well-intentioned schools—ones that impart invaluable knowledge and training to their students—from fulfilling their educational mission. The Department should facilitate those efforts which best serve students, and should adopt regulations which are appropriately tailored to help ensure that "the many good actors" are "protected from being tainted or being tarnished" by the misdeeds of a small minority of schools. Jennifer Epstein, *Splitting The Difference On Gainful Employment*, INSIDE HIGHER ED, July 23, 2010, http://www.insidehighered.com/news/2010/07/23/gainful.

As the Department is aware, since the 1992 Higher Education Amendments, Congress has forbidden all institutions—private sector, public, and non-profit, alike—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). As

explained more fully below, this prohibition *does not* restrict schools' ability to provide employees with merit-based salaries and salary adjustments. It only prohibits schools from awarding bonuses, commissions, and other like payments to reward employees engaged in recruiting and financial aid activities. Accordingly, throughout this comment we refer to the statutory provision as the "bonus prohibition" or the "compensation restriction."

DeVry supports the purpose of the statutory restriction on bonuses and commissions. Neither the Department nor any school should tolerate overzealous recruiting, admissions, and financial aid practices that guide prospective students into programs from which they are unable to benefit. But the proposed regulatory approach in the NPRM is contrary to the statutory text; inconsistent with the Department's own regulatory experience; unsupported by data or analysis; and entirely antithetical to good government and a sound regulatory regime. The proposed rule will increase uncertainty for both students and every school that participates in title IV funding programs. The result will be less efficient recruiting, fewer students enrolled, and reduced hiring by schools struggling to overcome government-mandated inefficiencies. Increased *qui tam* and pay discrimination lawsuits can also be expected. These lawsuits will force schools to divert resources from programs and activities that beneficially serve their students.

The current regulations provide clarity and help define the meaning of the statutory prohibition. These clarifying regulations were adopted following a long history of uncertainty and ambiguity on behalf of all stakeholders about the meaning of the compensation restriction. For approximately a decade after the enactment of the statutory prohibition in 1992, the Department declined to adopt clear regulations specifying the types of compensation regimes covered by the statutory prohibition. During this period, the Department often gave contradictory regulatory guidance to regulated parties, which left schools to operate in an

environment of uncertainty about the application of the statutory prohibition and subject to potentially catastrophic liability for running afoul of it.

In contrast, the current regulations draw clear lines, in accordance with the statute, between merit-based salaries and other permitted forms of compensation, and impermissible bonuses, commissions, and other incentive payments that are based either directly or indirectly on success in securing enrollments or financial aid. The Department has long recognized that the current regulations were adopted as a direct and specific response to the difficult compensation questions that repeatedly arose during the decade following the statute's enactment. At least three times since the adoption of the current regulations, the Department has publicly stated that they provide increased clarity to the statutory scheme. *See* Federal Student Aid Programs, 67 Fed. Reg. at 67,049 (noting that the regulations "*clarify* the statutory program participation agreement provision concerning incentive payment restrictions" (emphasis added)); Settlement Agreement Between Dep't of Educ. and ITT Educ. Servs., Inc., Mar. 2003 (the current regulations "*clarify* the scope and meaning of the statute" (emphasis added)); Settlement Agreement Between Dep't of Education and Apollo Group, Inc., Sept. 2004 (same).

We agree that the current regulations have provided increased clarity to schools developing compensation packages that reward merit and are within the confines of the statute. However, as discussed in greater detail below, we support Departmental efforts to continue to refine and improve the current regulatory regime to help prevent non-compliant schools from evading punishment for overaggressive recruiting and financial aid practices. We discuss straightforward regulatory changes that could further enhance this goal. We do not, however, support the proposed wholesale repeal of the current regulations, a proposal that delinks compensation from merit and shared institutional and societal goals, and places restrictions on

how schools can compensate senior management. That regulatory regime would be unworkable for both schools and ultimately the students they serve.

Under the current regulatory approach, if a compensation system or a particular payment fits within the contours of one of the so-called "safe harbors," it does not run afoul of the statutory ban on bonuses. *See* 34 C.F.R. § 668.14(b)(ii)(22)(A)-(L); Federal Student Aid Programs, 67 Fed. Reg. 67,0498, 67,049 (Nov. 1, 2002). These regulations have been largely successful. Violations of the compensation restrictions are rare, and schools can now compensate their employees with confidence that they have complied with the law and without the need to try to pre-clear their employee policies with the Department.

The current regulations allow the Department to distinguish between schools improperly using commissioned salespeople to drive up enrollment, and schools that are simply paying their recruiting, admissions, and financial aid staffs salaries that are competitive and appropriately adjusted for providing quality services valued by prospective and admitted students. This is a critical distinction that the proposed regulation would completely eviscerate. This process affords the Department a tremendous opportunity to take a nuanced approach and modify aspects of the current regulations to further clarify matters and, above all, reinforce this critical distinction. Instead, the Department has needlessly chosen a blunt instrument and inexplicably proposed to strike all of the current clarifying regulations. If implemented and interpreted as set forth in the NPRM, the resulting regulatory regime would transform a statutory provision aimed at curbing certain bonus practices into an over-inclusive regulation that imposes harmful constraints on legitimate educational operations. Notably, the Department seems determined to proceed along this path without articulating any sound reasons for its proposal or grounding it in any empirical data.

Repealing the current clarifying regulations will serve only to restore the widespread ambiguity that existed before their adoption in 2002. That ambiguity will have real and significant costs. In 2000, for example, the uncertainty was largely responsible for the bankruptcy of Computer Learning Centers ("CLC"). The CLC incident shocked stakeholders because the $187 million fine imposed by the Department grew out of compensation practices that were widely thought—based on informal Department guidance—to be compliant with the law. With the expansion of liability under the False Claims Act, *qui tam* litigants and lawyers are very likely to use the proposal's uncertainty to try to reap damages that compare with, or even exceed, the size of the CLC fine. In today's legal environment, the Department no longer has exclusive control over whether schools are subject to crippling costs like the fines levied against CLC. In 2005, the Court of Appeals for the Seventh Circuit held that violations of the bonus prohibition could form the basis of a False Claims Act case—a holding subsequently adopted by the Ninth Circuit as well. That means that *qui tam* litigants and opportunistic plaintiffs' lawyers also have the ability to subject schools to monetary penalties that could force them out of business. To date, no court or jury has found any school to have violated the False Claims Act as a result of its compensation practices. Those results are attributable, in part, to the clarity provided by the current regulations, which allow regulated entities to determine easily which types of compensation regimes are permissible, to adopt lawful, permissible practices, and to defend themselves on the basis of having done so.

The uncertainty that would result from repealing the clarifying regulations would impose high costs on potential students. Uncertainty makes it harder for schools to compensate recruiting, admissions, and financial aid personnel in ways that motivate them to identify and enroll quality students who might not otherwise learn about the educational opportunities and

payment options available to them. Uncertainty also means that it will be harder to compensate senior management officials who are responsible for overseeing that recruiting, admissions, and financial aid personnel reach prospective students who can benefit from and contribute to the school's programs. Economically disadvantaged students who may not have exposure to, or awareness of, the educational and financial aid programs available to them will feel these costs most noticeably. The effect of these prospective students remaining outside of the country's postsecondary educational system will also surely result in costs to the nation's economy.

The proposed regulations itself contains four key features. First, the proposal eliminates all of the clarifying regulations promulgated in 2002. Second, it expansively defines statutory terms like "commission, bonus, or other incentive payment" and "securing enrollments or the awards of financial aid" in a manner that severs any tangible link between employee performance and compensation. Third, the Department has opined that the prohibition will reach "all the way to the top of an institution" so as to potentially cover all forms of profit sharing plans and executive compensation. Fourth, the proposal specifically forbids payments based on achieving institutional goals such as program completion or graduation.

The proposed regulatory approach is fundamentally flawed for at least two independent reasons. First, the proposal contravenes the statute. The proposed regulation brings within its ambit compensation practices—most notably, salaries based on job performance—that lie well beyond the scope of the statutory language. The proposal's two-part test, which will allegedly accurately and easily sort permissible merit-based compensation from impermissible compensation practices, is unhelpful. By its terms, it appears to forbid merit-based compensation, and, at best, it only informs schools of impermissible compensation practices, providing no guidance about which forms of compensation would be permissible. Second, the

proposal violates the laws that govern the Department's rulemaking authority. The proposed regulation is arbitrary and capricious; it is not the product of reasoned decision-making as it rests on flawed logical and historical premises. It runs contrary to national educational goals as expressed by President Obama and Secretary Duncan. It fails to identify any real benefits that its adoption would bring about and fails to account for real costs associated with its implementation. Moreover, the claims it makes about the perceived problems of the current regime lack any empirical foundation or other evidentiary support.

As outlined more fully below, DeVry believes that the Department should reconsider its approach to the issues surrounding the compensation restriction and either retain the current regulations, or if necessary, propose a new rule that more closely tracks the statutory language and congressional intent, is consistent with the dictates of reasoned decision-making, and is grounded in policy rationales that comport with the shifting realities of postsecondary education. To this end, we offer a few suggestions at the end of the letter about how the Department might modify the current regulations to strengthen enforcement efforts against non-compliant schools in ways that comply with the text of the statutory prohibition and with the strictures of the Administrative Procedure Act ("APA").[1]

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[1] The Department published this lengthy NPRM in the Federal Register on Friday, June 18, 2010, with a 45-day comment period. A comment period must be "'adequate [under the circumstances] to afford interested parties a reasonable opportunity to participate in the rulemaking process.'" *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1140 (D.C. Cir. 1995) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)). According to Executive Order 12,866, "in most cases," a reasonable comment period is "not less than 60 days." Exec. Order No. 12,866 § 6(a), 58 Fed. Reg. 51,735 (Sept. 4, 1993); *see also* JEFFERY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 278 (4th ed. 1998) ("As a practical matter, most agencies do provide 60 or more days for complex or controversial rules."). Here, the Department has provided 45 days for interested parties to review and comment on a complex NPRM containing fundamental changes to higher education policy; and the comment

[Footnote continued on next page]

II. The Proposed Regulations Conflict With The Higher Education Act.

A. The Proposed Regulations Appear To Prevent Merit-Based Compensation Altogether.

The statutory bonus prohibition states:

> [An] 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.

[Footnote continued from previous page]
period spanned the Fourth of July holiday and the traditional summer vacation season. Under the circumstances, the notice and comment period is inadequate under the APA.

Pursuant to 20 U.S.C. § 1089(c), to have effect in the upcoming award year beginning on July 1, 2011, the Department must publish a final regulation by November 1, 2010. This deadline, however, is no reason to ignore the requirements of the APA, the clear text of the bonus prohibition, or the dictates of reasoned decision-making. The Department, as well as students and schools affected by the proposed regulatory changes, would be better served with more detailed analysis and careful weighing of these considerations, and promulgation of a more effective final rule to go into effect in 2012.

Further, GAO has stated that it intends to issue a report on the Department's enforcement of the compensation restriction in the near future. *See* Government Accountability Office, *Higher Education: Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education*, Feb. 23, 2010 ("GAO Report"). The Chairmen of the House and Senate committees with oversight responsibilities for higher education have also asked GAO to examine "[w]hether existing program integrity safeguards are sufficient to protect against waste, fraud, and abuse in the Federal student aid programs." Letter from Rep. George Miller, House Comm. on Educ. & Labor, and Sen. Tom Harkin, Senate Comm. on Health, Educ., Labor, and Pensions, to Gene L. Dodaro, GAO (Jun. 21, 2010). At a minimum, the Department should delay adopting any significant regulatory changes until these analyses have been made publicly available and additional public comment has been solicited.

Indeed, given the legal challenges the current, flawed proposal is likely to engender, it is not clear the proposed regulations will be able to take effect on July 1, 2011, even if they are published in final form by November 1. Accordingly, the Department's policy goals will be best served by pursuing a more reasoned, deliberate course.

20 U.S.C. § 1094(a)(20). The NPRM is inconsistent with the statutory provision because the statute does not extend to merit-based salaries and salary adjustments.

Analysis of a statute "begins with the language of the statute," and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citations omitted); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there . . . . When the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." (internal citations omitted)).

A "salary" is "fixed compensation paid regularly (as by the year, quarter, month, or week) for services." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2002 (4th ed. 1976). A "bonus" is "money or an equivalent given *in addition* to [an employee's] usual compensation." *Id.* at 252 (emphasis added). A "commission" is "a percentage of the money received in a sale or other transaction paid to the agent responsible for the business." *Id.* at 457. Finally, an "incentive" is "*an additional* payment (or other remuneration) to employees as a means of increasing output." WordNet 3.0 (Princeton University 2010) (emphasis added) (last visited July 23, 2010); *see also* WEBSTER'S, *supra*, at 1141 (defining "incentive" as something "designed to enhance or improve production").[2] These definitions make it clear that salaries are not bonuses, commissions, or other incentive payments. The term "salary" is therefore not encompassed by the statute's plain language.

Indeed, when a word or phrase that is within the contemplation of Congress is omitted, that omission is deemed to be intentional. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTES

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[2] WordNet is a large lexical database of English usage, developed at Princeton University. *See* http://wordnet.princeton.edu.

& STATUTORY CONSTRUCTION § 47.25, at 330-31 (7th ed. 2007) ("There is generally an inference that omissions are intentional."). "When the legislature expresses things through a list, the court assumes that what is not listed is excluded." *Id*. at 316-17; *see also Dart v. United States*, 961 F.2d 284, 286 (D.C. Cir. 1992) (where Congress clearly knew how to bring in another phrase but did not do so, the omission can be presumed to be deliberate). Congress's glaring omission of any mention of the word "salaries" confirms that salaries are not within the statute's reach. Salaries are among the most common methods of employee compensation and are far more prevalent than bonuses, commissions, and incentive payments. Yet the statute is utterly silent with respect to salaries. It would be odd to conclude that Congress meant to regulate a common type of compensation by listing narrower, less common forms of compensation.

Under well-established canons of statutory interpretation, the statutory term "other incentive payment" cannot be read to encompass salaries. According to one cannon: "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated." SINGER, *supra*, at 258-60; *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998); *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Here, a "salary," which is "*fixed* compensation paid *regularly*," is not akin to the statutory terms "bonus" or "commission." The term "salary" therefore cannot be deemed included within "other incentive payment" as this phrase is used in the statute. A related canon provides that "an ambiguous term may be given more precise content by the neighboring words with which it is associated." *Bilski v. Kappos*, No. 08-964, 2010 WL 2555192, at *7 (U.S. June 28, 2010). To the extent "other incentive payment" is ambiguous,

therefore, it must be defined in relation to the terms "bonus" and "commission," neither of which is close in meaning to the word "salary."[3]

In addition, the legislative history is also clear that merit-based salaries are permissible under the statute. First, the legislation was directed at schools' use of "commissioned salespeople." 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); *id*. (noting Congress's intent to curb "program abuse" resulting from "the use of commissioned sales representatives"). Second, the conferees clarified "that use of the term 'indirectly' does not imply that schools cannot base employee salaries on merit." *Id.* Of course, where, as here, a statute is unambiguous, resort to legislative history to determine a statute's meaning is inappropriate. *See Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454 (1987); Singer, *supra*, § 48.01, at 414. But at the very least, the legislative history confirms the plain meaning of the statutory text and establishes that salary-based compensation plans that take into account an employee's success in securing enrollments or financial aid are permissible so long as "such compensation" is not "solely a function" of that success. H.R. Rep. No. 102-630, pt. G, at 499 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 334. The current regulations are consistent with that understanding of congressional intent; the proposal is not.

Notably, the only appellate court to have interpreted 20 U.S.C. § 1094(a)(20) emphasized that it does not reach 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). Various district courts have construed the HEA in a similar manner. In *United States ex. rel. Lee v. Corinthian*

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[3] These canons are commonly known as *ejusdem generis* and *noscitur a sociis*.

Colleges, Inc., for example, the court rejected the claim that the school had violated the HEA's compensation restriction by "award[ing] *raises* to recruiters if they exceed[ed] their recruiting quotas." No. CV 07-1984, 2009 WL 4730890, at *5 (C.D. Cal. Dec. 4, 2009) (emphasis added); *see also United States ex rel. Pilecki-Simko v. Chubb Inst.*, No. 06-3562, 2010 WL 1076228, at *2, 9, 10 (D.N.J. Mar. 22, 2010).[4]

It is not surprising that Congress would omit merit-based salaries from the statutory prohibition: abusive commissions, not salaries, were the problem Congress addressed. Recruiting, admissions, and financial aid activities are beneficial to students and merit-based salaries are the best way to help ensure that students continue to reap the full benefits of these services. Merit-based salaries at schools serve the same function they serve in other sectors of the economy: they motivate and inspire employees to do their jobs well. And qualified recruiting, admissions, and financial aid personnel improve all students' educational experiences. According to one report, high-quality "policies and practices in the area[] of recruitment . . . are *critical* to supporting student persistence to [a] degree." Watson Scott Swail, *Graduating At-Risk Students: A Cross-Sector Analysis, Imagine America Foundation* (2009) (citation omitted) (emphasis added). Qualified and motivated recruiting, admissions, and financial aid staffs make it possible for prospective students who have not finished high school or who are single working parents, for example, to learn about programs that can improve their quality of life and earning potential. These personnel can help students navigate the complicated world of financial aid,

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[4] *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), and *United States ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), did not reach the question of the statute's possible application to salaries. Those cases addressed the different question, whether an alleged violation of the bonus prohibition could state a claim for relief under the False Claims Act.

directing students to the appropriate forms and advising students about the terms of their loans. In short, these employees help individuals cut through "the complex interplay of inadequate preparation, lack of information about college opportunities, and persistent financial barriers," that prevent people from investing in themselves and their futures. The Secretary of Education's Commission on the Future of Higher Education, *A Test of Leadership: Charting the Future of U.S. Higher Education* 1 (Sept. 2006).[5]

By omitting merit-based salaries from the statutory prohibition on bonuses, Congress appropriately distinguished permissible salaries from impermissible bonuses. The statutory framework allows schools to compensate high-quality employees for their job performance but prohibits them from over-incentivizing enrollment success. The Department previously understood that it was statutorily required to maintain some distinction between these concepts. *See* Letter from Brian Kerrigan, Dep't of Educ., to Redacted (Feb. 5, 1996) (noting that although the statute could be read "to include just about any incentive payments made to an admissions representatives, that were based on his or her job performance," Congress did not intend such an "all encompassing interpretation"); *see also* Letter from Fred J. Marinucci, Dep't of Educ., to Redacted (Apr. 11, 1996) ("Congress did not prohibit all incentive payments, and the statute and regulation must therefore logically be read to permit some kinds of incentives based on job performance"). Accordingly, the Department in 2002 adopted a workable distinction in the Code of Federal Regulations, advising parties that merit-based compensation that was adjusted no

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[5] The Health Care and Education Reconciliation Act, Pub. L. No. 111-152, Title II (2010), amended the HEA to transfer the funding and administration of title IV programs exclusively to the federal government. Notwithstanding this provision, schools' financial aid employees continue to assist students who do not qualify for title IV assistance or whose need for financial aid extends beyond this government assistance.

more than bi-annually and not based solely on recruiting, admissions, or financial aid factors would fall on the permitted side of the bonus/salary divide. 34 C.F.R. § 668.14(b)(ii)(22)(A); 67 Fed. Reg. 51,718, 51,723 (Aug. 8, 2002) (noting that the clarifying regulations "are based on a purposive reading of" the statute).[6]

The Department's current proposal erroneously abandons any effort to maintain the distinction between salaries and bonuses. The NPRM's statement that "eligible institutions and their contractors may make merit-based adjustments to employee compensation" based on a number of unidentified "standard evaluative factors" is belied by the proposal's statement that these "standard evaluative factors" may not be based "directly or indirectly," in whole or in part, "upon success in securing enrollments or the award of financial aid." 75 Fed. Reg. at 34,817, 34,819.

The proposal pays mere lip service to the idea of merit-based salaries. If merit-based compensation systems are permitted as the Department states they are, and if "a recruiter's job description is to recruit," as the Department affirms that it is, 75 Fed. Reg. at 34,818, then the regulatory scheme must allow schools to adjust recruiters' fixed compensation from time to time based on objective, quantitative and qualitative determinations about how well or how poorly its recruiters are recruiting without deeming such payments impermissible bonuses. Unfortunately, the proposed regulations appear to foreclose every means by which schools could adjust recruiters' merit-based salaries without running the risk that the Department or *qui tam* litigants

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[6] *See also* 67 Fed. Reg. at 51,723 (noting that the clarifying regulations "balance . . . the need of an institution to base its employees' salaries or wages on merit, and concern that such adjustments do not make the statutory prohibition against the payment of commissions, bonuses, and other incentive payments meaningless"); 67 Fed. Reg. at 67,053 (noting that the purpose of the regulation is to distinguish between legitimate business practices and impermissible practices).

could try to characterize those adjustments as illegal bonuses. Indeed, even with the clear lines provided by the clarifying regulations between salaries and bonuses, litigants have tried to argue—unsuccessfully—that ordinary compensation practices give rise to False Claims Act liability. *See, e.g.*, *United States ex rel. Hendow*, 461 F.3d at 1175 (noting relators' theory that "higher salaries" and "benefits" violated the incentive compensation prohibition). These efforts would surely increase if the proposed regulations were adopted as a final rule.

The expansive definition the proposal gives to the statutory phrase "commission, bonus, or other incentive payment" apparently renders any true "merit-based" system unavailable. The proposal would define "commission, bonus, or other incentive payment" as "a sum of money or something of value paid to or given to a person or entity for services rendered." *Id.* at 34,874 (proposed 34 C.F.R. § 668.14(b)(iii)(A)). Unlike the current regulation, which clearly protects biannual salary adjustments, *see* 34 C.F.R. § 668.14(b)(22)(ii)(A), the NPRM seems to define a salary as equivalent to a "commission, bonus, or other incentive payment." The current proposal offers no discernible distinction between what is a permissible salary adjustment and what is a potentially unlawful bonus. After all, salary—fixed compensation paid regularly for services—would appear to be a "sum of money given" in exchange "for services rendered." 75 Fed. Reg. at 34,874. A salary increase also would seem to meet that definition. The proposal would therefore impermissibly reach beyond the statutory text to regulate salaries, a form of compensation that Congress clearly left open to schools when it enacted the compensation restriction.

The proposal further excludes any workable notion of "merit-based" pay by expansively defining "securing enrollments." Under the proposed regulations, "securing enrollments or the awards of financial aid" includes any "activities that a person or entity engages in for the purpose

of the admission or matriculation of students for any period of time or the award of financial aid to students," including "preadmission or advising activities, scheduling an appointment to visit the enrollment office, attendance at such appointment, or signing an enrollment agreement or financial aid application." *Id.* at 34,874 (proposed 34 C.F.R. § 668.14(b)(iii)(B)).

The proposal's definition of "securing enrollments or the awards of financial aid" seems to describe every job-related function performed by recruiting, admissions, and financial aid personnel. In fact, the proposal's assertion that "securing enrollments or the awards of financial aid" includes "recruiting contact *in any form* with a prospective student" raises considerable doubt whether there is any aspect of a recruiter's job description that may form the basis of schools' compensation plans. *Id.* (proposed 34 C.F.R. § 668.14(b)(22)(iii)(B)(1)) (emphasis added). Accordingly, every job-related metric that schools could use to calibrate merit-based salary adjustments could be foreclosed by the NPRM's proposed definition of "securing enrollments or the awards of financial aid." For example, the proposal expressly states that schools cannot base adjustments "directly or indirectly on individual student numbers." *See id.* at 34,819. The proposal also prohibits adjustments based on individual contributions to "institutional goals" like "completion" or "graduation." *Id.* at 34,819. Other job-related metrics are also expressly excluded. Merit adjustments that include the number of prospective students who sign up to learn more about a school through interviews or campus visits as a component of an individual's evaluation are prohibited. *Id.* at 34,817. Similarly, merit adjustments based even in part on evaluations that measure how well recruiters convey the benefits of the school's educational programs to prospective students, on how well recruiters address potential students' questions and concerns, or on prospective student reviews of recruiters' performance could be argued to fall within this expansive definition of "securing enrollments." Under this approach,

only remote and indirect performance factors like punctuality, attendance, and collegiality in the workplace could be permissible bases for compensation determinations. If these are the "standard evaluative factors" upon which the Department intends schools to make merit-based pay decisions, then the Department has so skewed the definition of merit-based pay as to render the term meaningless. These are weak factors that will not permit employers to identify and retain efficient, competent employees. *See infra*, at A-17 (noting that in such systems, employers "pay workers not for *output* produced, not even for labor *input* provided, but simply for *time* spent on the job"); *id*. (noting that in such payment structures an "institution may be described as *hoping* for performance, while *rewarding* attendance").

Therefore, notwithstanding the NPRM's assertion that it permits "merit-based" adjustments, the proposal raises significant doubt about whether schools could in fact provide merit-based compensation in any meaningful sense to personnel involved in recruiting, admissions, or financial aid activities, or to senior management responsible for overseeing those employees. The proposal's purported allowance of "merit-based adjustments to employee compensation" is nothing more than an exercise in circular reasoning. The Department acknowledges that a "recruiter's job description is to recruit." 75 Fed. Reg. at 34,818. Recruiting, by definition, is directed at securing enrollments. A recruiter who does not secure enrollments of students who can benefit from a school's program is a bad recruiter; a recruiter who secures such enrollments is a good recruiter. The proposal, therefore, is akin to telling schools that they may adjust recruiters' pay based on how well or how poorly they recruit students as long as they do not adjust recruiters' pay, even in part, based on how well or how poorly they recruit students or perform other functions related to recruiting. The proposal's failure to identify a single "standard evaluative factor[]" which schools could use to make merit-

based compensation decisions under the NPRM underscores the difficulty schools will face in evaluating recruiters if it takes effect. *See id.* at 34,819.

The current regulations specify that salary adjustments are permissible provided they are not *solely* based on the number of students admitted, recruited, enrolled, or awarded financial aid. *See* 34 C.F.R. 668.14(b)(ii)(A). The Department proposes to eliminate this provision because it is allegedly difficult to distinguish between salary adjustments completely determined by recruiting, admissions, and financial aid success from adjustments based only in part on those factors. In so doing, the Department strongly implies that any salary increase "tainted" in even the smallest way by merit-based considerations is impermissible. As explained above, this complete delinking of salaries from employees' job description impermissibly severs the link between merit and compensation that 20 U.S.C. § 1094(a)(2) and its legislative history clearly leave intact.[7]

B. The Proposed Regulations Would Impermissibly Extend Beyond Enrollment And Financial Aid Officials To Senior Management.

The statutory prohibition was not meant to and does not reach senior management officials with little, if any, day-to-day involvement in, and direct responsibility for, student recruitment, admissions, and financial aid activities. Accordingly, the current regulations properly exclude from their scope managerial and supervisory employees who do not directly

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[7] The proposal's supposedly easy-to-apply two-part test does not remedy the proposal's overreaching. *See* 75 Fed. Reg. at 34,818-19. The two-part test provides that a payment is permissible so long as it is not "an award of a sum of money or something of value paid to or given to a person or entity for services rendered" that is "based directly or indirectly upon success in securing enrollments or the award of financial aid." This test does not adequately distinguish between permitted salaries and impermissible bonuses. It adds literally nothing to the analysis. The test therefore will likely yield results that are contrary to the statute and congressional intent, and will disserve students.

manage or supervise employees engaged in recruiting, admissions, or financial aid activities. 34 C.F.R. § 668.14(b)(22)(i)(G).

The proposal runs contrary to the statutory text by impermissibly eliminating this provision and extending the ban on bonuses to include schools' senior management. *See* 75 Fed. Reg. at 34,818. According to the proposal, the extension is justified because the statute is "clear that incentive compensation prohibition applies all the way to the top of an institution or organization. Therefore, individuals who are engaged in any student recruitment or admissions activity or in making decisions about the award of student financial aid are covered by this prohibition." 75 Fed. Reg. at 34,819.

The Department, however, fails to cite any statutory text to support its assertion that the statute clearly applies to senior management. Indeed, the Department's assertion of legislative clarity gets it exactly backwards: it is clear from the statute's text and legislative history that the compensation restriction does not apply as broadly as the Department would have it.

By its plain language, the statute applies only to "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). Although senior management officials are responsible for a school's ultimate success or failure and are therefore invested in the success or failure of their school's recruiting, admissions, and financial aid functions, it does not follow that they are "engaged in" those recruiting activities or "in making decisions regarding the award" of financial aid. A school's faculty likewise has an interest in recruiting and financial aid success because without students, professors will not be paid. But professors are not covered by the prohibition because, like senior management, they are not "engaged in" recruiting and financial aid activities. Congress chose the precise, limiting phrases "engaged in" and "making decisions"

and they must be given meaning. *Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc.*, 522 F.3d 1190, 1195 (11th Cir. 2008) ("To the extent possible, the rules of statutory construction require courts to give meaning to every word and clause in a statute." (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

In addition, the legislative history is clear that the statute was not meant to regulate a school's senior management. The Conference Report details how the "Senate bill eliminates any institution from Title IV eligibility that uses *commissioned salespeople*" and how the "house bill adds a similar prohibition." 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). According to the Conference Report, Congress was concerned about "program abuse" resulting from "the use of *commissioned sales representatives*," and so "prohibit[ed] their use." *Id.* (emphasis added). Nowhere does the legislative history demonstrate that Congress was concerned about the role of senior management with respect to title IV programs.

Restricting how senior management officials are compensated does not further the purposes underlying the statutory compensation restriction. As explained above, the law is aimed at abuses that could result from giving bonuses and commissions to employees responsible for recruiting and admitting students. It is not intended to affect how institutions reward senior management for developing high-performing staff and achieving institutional goals. Indeed, the line Congress drew between "commissioned salespeople" and senior management is quite sensible, given that payments to senior management are more likely to be influenced by a host of considerations, only some of which relate to increased enrollment.

Instead of citing any statutory text for its assertion that senior management are clearly covered by the statute, the Department insists that "senior management may drive the organizational and operational culture at an institution, creating pressures for top, and even middle, management to secure increasing numbers of enrollments for their recruiters." 75 Fed. Reg. at 34,818. Contrary to the Department's claim, however, this statement does not support the conclusion that senior management employees are "engaged in" recruiting, admissions, or financial aid activities as the statute uses that term. To be "engaged in" an activity, a person must "take part" or "participate" in that activity. WEBSTER'S, *supra*, at 751. Mere influence is not equivalent to active participation.

Applying the compensation restriction "all the way to the top" would also bring within the statute's scope a whole host of compensation regimes that Congress never intended to regulate, such as profit-sharing, 401(k), and 403(b) contributions to senior management officials' retirement plans. The NPRM recognizes that the statute does not prohibit profit sharing, but it largely contradicts itself when it clarifies that such plans may not be "based upon success in securing enrollments." 75 Fed. Reg. at 34,817. A school's profits or surplus revenues are linked, in some way, to successful recruiting efforts because tuition is an important source of a school's revenue. Profit-sharing contributions to senior management, therefore, would be based at least in part on "success in securing enrollments" and thus seemingly subject to the proposed regulation's reach "all the way to the top of an organization." On its face, these payments, along with profit-distributions to school executives based on ownership, would seem to be captured by the proposal, notwithstanding the contrary meaning of the statutory text.

Exceeding the statutory language in this manner would prohibit forms of compensation for high-level officials that are becoming increasingly common in the education industry,

including at "traditional" universities. Performance-based compensation is increasingly a part of university presidents' compensation packages. *See* Scott Jaschik, *Paying For Performance*, INSIDE HIGHER ED, Oct. 3, 2006, *available at* http://www.insidehighered.com/layout/set/print/news/2006/10/03/compensation; *see also Compensation of Public-College Presidents*, CHRON. OF HIGHER EDUC. (Nov. 24, 2006), at B14-16 (describing president compensation packages at 183 public universities, including 147 so-called "research universities"); *Compensation of Presidents of Private Institutions*, CHRON. OF HIGHER EDUC. (Nov. 24, 2006), at B17-30 (describing president compensation packages at over 700 private institutions). These compensation packages are often based on a number of factors, including, for example, graduation rates. *Id.* (discussing graduation rates).[8]

As with the extension of the prohibition to cover salaries generally, by extending the prohibition "all the way to the top," the proposal contravenes the statute by severing any linkage between those who are "engaged in" recruiting and those who oversee school operations more generally. Preventing senior management from receiving salaries and salary adjustments made on the basis of the performance of the departments under their supervision—including recruiting and financial aid—is entirely inconsistent with the principle of merit-based compensation. Managers in any field whose employees meet or exceed the goals and objectives of their jobs rightfully have their salaries adjusted based on that excellent performance; managers working at schools should not be, and under the statute are not, treated differently. *See infra*, at A-12

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[8] Notably, many of the common forms of compensation that the proposal appears to prohibit are subject to detailed regulation by other agencies like the IRS and the SEC. It is highly unlikely that Congress intended the Department to employ its regulatory authority as a blunt instrument in such a complex, heavily regulated area.

(describing the importance and effectiveness of pay-for-performance compensation for senior executives).[9]

III. The Stated Reasons For The Proposed Regulatory Changes Are Legally Inadequate.

In addition to promulgating regulations that are consistent with the statutory language, the NPRM must comport with basic standards of administrative law established under the APA. For example, before promulgating a regulation, the Department must consider all relevant information and articulate a reasoned basis 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's decision-making process "must show that there are good reasons for the new policy." *FCC v. Fox Televisions Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). In addition, before an agency may enforce a statutory prohibition, it must adopt rules that offer regulated entities enough guidance to allow them to 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").

The subsections below describe why the reasons offered in support of the proposed changes fail to satisfy these basic APA requirements.

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[9] The Secretary has recognized the benefits of performance-based pay in the education industry by extolling the virtues of compensating teachers on the basis of student outcomes. *See* Dep't. of Educ., *U.S. Department of Education Announces Teacher Incentive Grant (Pay For Performance) Competition* (May 21, 2010). There seems to be little justification for rewarding teachers for successful student outcomes while prohibiting administrators and senior management from being similarly compensated. Although Congress could have drawn such a distinction, as shown above, it did not.

A. Claims That The Proposal Will Bring Increased Clarity To The Compensation Restriction Are Illogical.

According to the Department, a primary reason for repealing existing regulatory clarifications about what types of payments constitute impermissible bonuses is that "the language in section 487(a)(20) of the HEA is clear." 75 Fed Reg. at 34,817. The Department's claims about clarity, however, are difficult to reconcile with reality. The statute is indeed clear, as explained above; but the proposal muddles that statutory text. The current regulations draw clear lines concerning the scope of the bonus prohibition, giving schools detailed guidance about what types of payments are and are not impermissible bonuses, commissions, and other incentive payments; but the proposal removes those clear lines without substituting anything meaningful in their place. Further, the proposal's interpretation of the statute is contrary to the text and thus will deny the regulated community even the certainty that the statute's plain words provide. So the proposal increases confusion and creates ambiguity where none exists now.

None of this is fixed by the two-part test that will purportedly readily "demonstrate whether a compensation plan or payment complies with the statute and its implementing regulations." 75 Fed. Reg. at 34,818-19. The two-part test provides that a payment is permissible so long as it is not "an award of a sum of money or something of value paid to or given to a person or entity for services rendered" that is "based directly or indirectly upon success in securing enrollments or the award of financial aid." This test does not adequately distinguish between permitted salaries and impermissible bonuses. The test therefore will likely yield results that are contrary to the statute and congressional intent and will disserve students.

The NPRM fails to explain how the two-part test does a better job of providing clarification than the current regulations. In fact, it is clear that instead of answering schools' questions, the two-part test raises its own set of interpretive challenges. At best, the test is one of

exclusion, describing how schools should not compensate their recruiting, admissions, and financial aid personnel. The test does not add any clarity about how a school *could* compensate its employees based on quality job performance. More fundamentally, the test fails to address even basic questions that private sector, public, and non-profit schools will face about the legality of certain types of merit-based compensation systems that logically should fall outside the scope of the compensation restriction but that could fail to satisfy the two-part test. Contrary to the Department's claim, these issues are not "belied by the ease of the application" of the tautological two-part test. *Id.* at 34,819. Fundamental questions left open by the test include:

- What constitutes a permissible merit-based salary adjustment?
- Can schools implement profit-sharing plans for their employees?
- Can schools implement profit-sharing plans for senior management? Does it matter that 34 C.F.R. § 668.15 makes having positive net operating income over a certain time period a prerequisite for participating in title IV programs? Can a school reward, for example, its president for achieving these required regulatory thresholds which themselves are tied at least in part to enrollment success?
- Can schools compensate recruiters based on qualitative assessments of their performance? For example, can compensation decisions be based on how well recruiters address student concerns, how well they convey information about the school's programs, or even on a prospective student's assessment of how knowledgeable or informative a recruiter was during an interaction?
- Can a school decrease the salary of an employee engaged in recruiting, admissions, or financial aid activities for failing to meet quantitative or qualitative job-related goals?

- Can a school terminate a poor-performing employee to the extent the employee's role was arguably linked in any way to student enrollment or financial aid activities. What rationales could a school provide for its decision that the disgruntled employee or the Department could not challenge as a subterfuge?
- Can a school increase the compensation of an athletic coach for his or her players graduating at a high rate?
- Can schools compensate professors based on the academic achievement of their students?
- Can schools compensate career services advisors based on successful career outcomes for their students?
- Can schools compensate academic advisors for improving student retention and graduation rates by helping already enrolled students select courses of study they enjoy and helping them progress through their chosen program?
- Can schools increase compensation to personnel involved in diversity outreach programs for successfully assembling a diverse student body? Does the Department intend to foreclose schools' ability to compensate their staffs for successfully managing outreach programs for students from disadvantaged backgrounds like the eight TRIO programs administered by the Department?
- May a school compensate its employees in charge of housing affairs for successfully locating student housing for prospective students? What if the prospective student indicates that assistance with finding housing was a substantial factor in the decision to enroll?

- Can schools compensate recruiting, admissions, and financial aid personnel on measures of student success like grade performance, job placement, or loan default rates?

The Department's blithe assertion that these questions are easily answered by the two-part test simply ignores the lack of any real guidance provided by the test. These are not abstract concerns as even fundamental issues such as the difference between a merit-based salary and a bonus confounded stakeholders and the agency for many years prior to the adoption of the current regulations. *Compare* Letter from Brian Kerrigan, Dep't of Educ., to Blain B. Butner, Dow, Lohnes and Albertson (Sept. 8, 1994) ("a salary level based in whole or in part on the number of students who were enrolled . . . would be a violation of the prohibition") *with* Letter from Jeffrey Baker, Dep't of Educ., to Alice Kurz, Arthur Andersen & Co. (Jan. 23, 1996) (although bi-directional salary adjustments that occur more than once a year look like bonuses, annual salary adjustments based at least in part on enrollment do not violate the prohibition).

In short, unlike the current regulations, the two-part test does not allow schools to answer basic questions about the legality of their compensation regimes. And the test calls into question compensation practices that reward employees for achieving goals like higher graduation rates that are typically thought of as being worthwhile and beneficial to students. Far from providing easy answers to these questions about compensation, the proposed regulation, with or without the vaunted two-part test, leaves stakeholders with a significant degree of increased regulatory uncertainty.

B. Claims That The Proposal Will Bring Increased Clarity To The Compensation Restriction Are Contradicted By History.

The well-documented regulatory experience before adoption of the current regulations also belies the Department's claim that repealing them will increase clarity. As noted above, at

least three times since the adoption of the current regulations, the Department has publicly stated that they provide increased clarity to the statutory scheme. *See* 67 Fed. Reg. at 67,049 (noting that the regulations "*clarify* the statutory program participation agreement provision concerning incentive payment restrictions" (emphasis added)); Settlement Agreement Between Dep't of Educ. and ITT Educ. Servs., Inc., Mar. 2003 (the current regulations "*clarify* the scope and meaning of the statute" (emphasis added)); Settlement Agreement Between Dep't of Education and Apollo Group, Inc., Sept. 2004 (same).

The decade preceding the adoption of the current regulations was a period of great uncertainty about the meaning of the bonus prohibition. The Department's governing regulation left schools with little but the statutory text to guide their compensation decisions. Trying to fill this perceived regulatory gap, the Department often gave contradictory regulatory guidance. For example, in response to certain inquiries, the Department advised schools that adjustments to salaries paid to recruiters and financial aid officials were permissible provided they occurred only once per year; other times the Department held that twice-yearly adjustments were acceptable. *See* Letter from Brian Kerrigan, Dep't of Educ., to Charles Galland, Corporate Counsel, Computer-Ed, Inc (July 8, 1997) (only annual adjustment allowed); Letter from Jeffrey Baker, Dep't of Educ., to Alice Kurz, Arthur Andersen & Company SC (Jan. 23, 1996) (only annual adjustment permitted); Letter from Brian Kerrigan, Dep't of Educ., to Stanley Freeman, Powers, Pyles, Sutter & Verville (Apr. 3, 1996) (biannual adjustment permitted). Similarly, the Department provided guidance that salaries paid to recruiters and financial aid officials were permissible provided they were only adjusted upward—at odds with separate guidance that made no distinction between upward or downward adjustments. *See* Letter from Brian Kerrigan, Dep't of Educ., to Stanley Freeman, Powers, Pyles, Sutter & Verville (Apr. 3, 1996) (upward

adjustment only); Letter from Jeffrey Baker, Dep't of Educ., to Alice Kurz, Arthur Andersen & Company SC (Jan. 23, 1996) (drawing no distinction 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.[10]

The regulatory uncertainty made it hard for higher education institutions to know whether their compensation structures violated the law, which left them vulnerable to regulatory sanctions and potentially catastrophic liability. 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 the Department issued a Final Program Review Determination to CLC that found the institution to have violated the bonus prohibition and ordered it to return 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' debts.

The Department based the CLC enforcement action on the fact that in paying its student recruiters, CLC allegedly did not consider "other substantial performance factors that are not

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[10] In fact, although the statutory provision enacted in 1992 clearly prohibited the payment of most commissions, a Department 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). Indeed, at one point, the Department pointed to Appendix D as an example of a type of bonus that was permissible under the statute only to later retract that explanation a few years later. *Compare* Letter from Fred J. Marinucci, Dep't of Educ., to Redacted (Apr. 11, 1996) *with* Letter from Jeff Baker, Dep't of Educ., to Redacted (Aug. 31, 1998).

related to recruiting, enrolling, or awarding Title IV aid." Final Program Review Determination Letter from Victoria Edwards, Acting Director of Case Management and Oversight, Dep't of Educ., to John L. Corse, CEO, Computer Learning Centers, Inc., at 3 (Dec. 15, 2000). Alarmingly, this "other substantial performance factors" test is nowhere to be found in, and is at odds with, the statute, the legislative history, and the Department's earlier 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 Department might attempt to enforce the bonus prohibition beyond the statutory language to reach fixed salaries and raised a host of additional questions.

By 2002, the substantial confusion and its attendant costs to students, schools, and taxpayers, led the Department to admit that its regulatory approach of relying upon the statutory text coupled with informal guidance had proven "problematic" and had resulted in "unclear guidance." Letter from Jeffrey R. Andrade, Dep't of Educ., to Leigh M. Manasevit and Jonathan D. Tarnow, Brustein and Manasevit (Dec. 4, 2002). Accordingly, the Department sought to establish more uniform standards and increased regulatory certainty so that schools could be left to carry out their educational missions instead of constantly worrying about whether litigants, the Department, and courts would deem their compensation systems to be non-compliant.

Reverting to this failed regulatory regime would have even more drastic consequences in today's legal environment than that regime had when it was previously in place. Before 2005, regulated parties could rely on the Department to exercise its prosecutorial discretion in enforcing the prohibition. The Seventh Circuit's decision in *United States ex rel. Main*, 426 F.3d

at 914, and the Ninth Circuit's decision in *United States ex rel. Hendow*, 461 F.3d at 1166, have significantly altered that dynamic. The courts in those cases held that a violation of the bonus prohibition could give rise to liability for *qui tam* suits brought under the False Claims Act. As a result, schools are now at risk not only of having to pay administrative fines if their compensation regimes are deemed to violate the law, but they also face potentially crippling liability in the form of having to pay treble damages to private litigants under the False Claims Act. Whether another CLC-type debacle occurs—leaving students without a school and taxpayers on the hook for students' loans—is no longer under the federal government's exclusive control. Indeed, the potential for private litigants to seize on the ambiguity that would be created by repealing the current clarifying regulations to put schools out of business is reason enough to reconsider the proposal.[11]

Moreover, each additional legal challenge means that schools will be able to devote fewer resources to their educational missions as their budgets are consumed by litigation costs. And as compensating recruiting, admissions, and financial aid employees in ways that motivate them to excel at their jobs becomes prohibitively risky, students will be increasingly deprived of the legitimate and beneficial services performed by those qualified and motivated recruiters. None of these outcomes is desirable from the point of view of students, schools, the Department, or the United States treasury.

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[11] For example, even with the clarifying regulations in effect, private litigants have tried to distort the statutory text by arguing that the words "indirect . . . incentive payments" prohibit merit-based salaries that reward recruiting, admissions, and financial aid personnel for doing their jobs. *See, e.g.*, *United States ex rel. Hendow*, 461 F.3d at 1175 (noting relators' theory that "higher salaries" and "benefits" violated the incentive compensation prohibition).

The history of bonus regulation from 1992 to 2002 demonstrates that stakeholders can expect *increased* rather than decreased uncertainty as a result of the current proposal. The strong disagreement expressed in this comment letter—and by other stakeholders throughout the negotiated rulemaking process—with the Department's proposed interpretation of the statute is itself evidence that these issues have not been ameliorated with the passage of time. *See* Jennifer Epstein, *It's Up To The Department Now*, INSIDE HIGHER ED, Feb.1, 2010, *available at* http://www.insidehighered.com/news/2010/02/01/rules (noting some negotiators' belief that regulations should specifically protect merit-based payments). Notably lacking from the proposal are any reasons to expect that this time the rampant confusion that characterized the pre-2002 era will not materialize. Even if the Department refuses to provide private guidance—as it has asserted it will, *see* 75 Fed. Reg. at 34,820—the Department's non-textual interpretation of the statute ensures regulatory confusion. The entirely foreseeable result of eliminating the existing clarifying provisions and reverting to the failed status quo of the 1990s, is to force all parties, including students, to relive that unfortunate history. The only difference will be that this time, schools will face potentially crippling liability driven by potentially thousands of private litigants rather than only through the exercise of the Department's prosecutorial discretion. That is irrational and, thus, impermissible under the APA.

C. The Proposal's Prohibition On Compensation Based On Successfully Graduating Students Defies Any Reasonable Explanation.

The NPRM inexplicably prohibits payments based on shared institutional and societal goals like graduation. According to the Department, payments linked to graduation are "'indirectly' based upon securing enrollments" because "unless the student enrolls, the student cannot successfully complete an educational program." 75 Fed. Reg. at 34,818.

By prohibiting graduation-based compensation, the Department flips the statute's goals on their head and affirmatively prevents schools from incentivizing the recruitment of students who are likely to reap the rewards from their educational programs. Recruiting efforts targeted at the prospective students who are most likely to excel in and complete schools' programs are beneficial to all stakeholders. Schools are better educators when they target their admissions efforts on students most likely to benefit from the added schooling. The individual students gain knowledge and qualifications that can help advance their careers. And the Nation's treasury gains because of the lower default rates and the improved productivity that results from an increasingly knowledgeable workforce. From the very inception of the statutory compensation restriction, the Department has recognized the logic and statutory permissibility of graduation-based compensation because, after all, "[g]raduation from, or completion of, eligible programs is what the taxpayer is paying for with the student aid programs." Letter from Brian Kerrigan, Dep't of Educ., to Redacted (Feb. 5, 1996).

The illogic of prohibiting graduation-based compensation becomes all the more clear in light of President Obama's and Secretary Duncan's stated pronouncements to increase graduation rates over the next decade. According to President Obama, it is a national priority for the country to "once again have the highest proportion of college graduates in the world" by 2020. President Barack Obama, Remarks to a Joint Session of Congress (Mar. 24, 2009). Secretary Duncan has likewise called for increased graduation rates. *See* Arne Duncan, Dep't of Educ., HBCU's and Higher Education: Beyond the Iron Triangle (Sept. 2, 2009). Both President Obama and Secretary Duncan have also recognized the need to "help more students succeed" in postsecondary educational programs. *See* Arne Duncan, Dep't of Educ., Education Secretary

Duncan Highlights Budget Proposals To Increase College Access and Affordability (Feb. 26, 2009).

Accomplishing these goals will not occur without quality recruiting, admissions, and financial aid personnel. Increasing college graduation rates will require educating and graduating more non-traditional and "high-risk" students. Lytle, et al., *Parthenon Perspectives on Private Sector Post-Secondary Schools*, Mar. 12, 2010, at 11.[12] Such students are frequently older, are working, single parents, are first-generation college-attendees, or are returning to college to restart their education. Motivated recruiting, admissions, and financial aid staffs make it possible for these types of prospective students to learn about programs that can improve their quality of life and earning potential. These employees are often prospective students' first contacts with a school. Their professionalism as well as their ability and willingness to address students' questions and concerns can mean the difference between an individual enrolling in a beneficial course of study and foregoing a valuable educational opportunity.

By prohibiting schools from providing compensation to recruiting, admissions, and financial aid employees linked to graduation factors—or even considering these factors in annual merit-based salary adjustments—the proposal reduces the incentives of these employees to work hard to locate, educate, and enroll students most likely to succeed and benefit from the educational programs. Disincentivizing the recruitment of such students is not only at cross-purposes with the thrust of the statute, but also conflicts with the urgent call to action from both the President and the Secretary to create a culture of postsecondary education that enrolls more students and graduates more students than it currently does. At a time when postsecondary

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[12] The Parthenon Group is a management consulting company that specializes in providing strategic advice to businesses across numerous industries.

education is more crucial than ever, the Department's efforts should be focused on enhancing, rather than unnecessarily hindering, schools' ability to seek out, locate, and enroll qualified students.

In addition to being illogical, the proposal to prohibit graduation-based payments also muddles the statutory text. The Department's logic for prohibiting graduation-based compensation—that a student cannot graduate unless a student first enrolls—would logically prohibit compensation based on *anything* that becomes possible as a result of students' enrollment. The Department's logic would prohibit compensation based on employees recruiting students who obtain gainful employment or who do not add to the school's cohort default rate. These are the *exact* behaviors and outcomes the prohibition is meant to encourage. The proposal's expansive reasoning is therefore at odds with the very purpose of the statutory provision which is to prevent "an institution from providing incentives to its staff to enroll unqualified students." 67 Fed. Reg. at 67,053. To accomplish that goal, Congress prohibited only bonuses based on factors directly or indirectly related to success in securing enrollments. It did not prohibit all bonuses. Thus, bonuses tied to graduation rates are properly lawful; *a fortiori*, salaries based on graduation rates are also lawful.

The Department has previously asserted that the statute could be construed in an unworkable manner. But, as noted above, instead of interpreting the statute in a way that conflicts with its underlying policy goals, the Department concluded that the statute does not prohibit all incentive payments to recruiting, admissions, and financial aid personnel, and provided guidance to schools about where to draw the appropriate distinctions. *See* Letter from Fred J. Marinucci, Dep't of Educ., to Redacted (Apr. 11, 1996) ("Congress did not prohibit all incentive payments, and the statute and regulation must therefore logically be read to permit

some kinds of incentives based on job performance"). Applying this logic, the Department recognized that graduation demonstrates something more than mere success in securing enrollments: unlike a student who simply stays enrolled for a specified period of time, for example, a "graduate . . . has not merely survived on the rolls of the school . . . but has demonstrated academic achievement in the most formal way that can be conferred by that school." Letter from Fred J. Marinucci, Dep't of Educ., to Redacted (Apr. 11, 1996). Accordingly, the Department determined that graduation-based compensation payments were not direct or indirect measures of success in securing enrollments.

The Department now in a complete reversal of its position makes a considerable logical leap by asserting that the "proliferation of short-time, accelerated programs" and "grading policies that all but ensure that students who enroll will graduate" have turned graduation-based bonuses into enrollment-based bonuses that are easily manipulated to correspond to success in securing enrollments. *See* 75 Fed. Reg. at 34,818. The proposal offers no evidence whatsoever to support these claims, only mere rhetoric and conjecture. And even if the Department's concerns about short-term programs and grading policies were legitimate, the Department could deploy other regulatory tools at its disposal to combat those problems. For example, instead of prohibiting graduation-based compensation plans altogether, the Department could simply prohibit such payments for short-term programs that are a mere sham. Failing to consider this reasonable regulatory alternative, which would preserve the beneficial aspects of graduation-based compensation, constitutes a violation of the APA. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (citing *Motor Vehicle Mfrs. Ass'n v.*, 463 U.S. at 51 (1983)).

IV. Assertions About The Supposed Harms Related To The Existing Regulations Are Unsupported By Any Evidence Or Data.

A. Available Evidence Does Not Support Claims That The Current Regulations Have Enabled Widespread Evasion Of Congressional Intent And Have Caused The Department To Waste Vast Departmental Resources.

To bolster its claims about the need for regulatory action, the Department asserts that the current regulations have enabled rampant circumvention that obstructs the statute's goals. *See* 75 Fed. Reg. at 34,817 ("rather than serving to effectuate the goals intended by Congress . . . the [regulations] have served to obstruct those objectives"). According to the Department, its experience "demonstrates that unscrupulous actors routinely rely upon [the] safe harbors to circumvent the intent of section 487(a)(20) of the HEA." *Id.* at 34,817. Such circumvention allegedly occurs because, relying on the regulations for protection, schools give scant consideration, if any, to factors other than enrollment numbers in making compensation determinations. *Id.* Accordingly, the Department has had "to expend vast resources evaluating the legitimacy of institutional plans, and considerable time and effort has been lost by both the Department and institutions engaged in litigation." *Id.* The Department believes that its proposal to eliminate all of the current clarifying regulations will better "serve to effectuate congressional intent," by eliminating regulations that "do substantially more harm than good." *Id.* 34,817-18.

There are several problems with these claims.

The drastic proposal limiting payments that are based in any way on recruiting, admissions, or financial aid success is itself inconsistent with congressional intent. As explained above, the statutory text and the legislative history demonstrate that the statute does not and was not meant to foreclose merit-based compensation or reach beyond commissioned sales representatives all the way to the top of a school's organizational structure. 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). In 2002, the Department recognized both of these clear statutory limitations, protecting such compensation regimes through a "a purposive reading" of the statute. 67 Fed. Reg. at 51,723 (Aug. 8, 2002); 34 C.F.R. § 668.14(b)(ii)(22)(A); *id* § 668.14(b)(ii)(22)(G). Because the underlying statute and legislative history have not changed in the intervening timeframe, it is wholly arbitrary and irrational for the Department to claim now that these regulations are somehow inconsistent with congressional intent.

Next, the Department's claims about "unscrupulous actors" circumventing the statutory provision and increased enforcement costs are unsupported by any evidence. Basic principles of administrative law dictate that the Department must provide a reasoned explanation for its decision to rescind the existing regulatory clarifications. *Nat'l Cable & Telecoms. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) ("[I]t is axiomatic that agency action" including rulemakings "must either be consistent with prior action or offer a reasoned basis for its departure from precedent." (internal quotation marks omitted)). The need for a reasoned basis for departing from prior regulatory policy is all the more important 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. In other words, if the Department is going to jettison the current regulations, which were premised upon an undeniable public record of uncertainty and confusion among regulators and regulated parties, it must demonstrate a factual basis for its new policy.[13] The Department, however, fails to lay any factual foundation for its proposal.

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[13] We know of approximately 50 requests for guidance received and responded to by the Department during the decade from 1992 to 2002.

Indeed, the Department's claims about rampant evasion and wasted departmental time and resources lack any discernible empirical basis in the NPRM. The Department's rationale presumes a link between the current regulations and the admission of students unable to benefit from schools' academic programs. *See* 75 Fed. Reg. at 34,817 ("the Department believes that the existence of the safe harbors is a major impediment to ensuring that students are enrolled in educational programs that are meaningful to them"). The hope is that repealing the current regulations will disincentivize aggressive recruiting, causing fewer unqualified students to amass debt burdens they are later unable to pay off. Accordingly, it would stand to reason that abuses supposedly allowed under the current regulations would show up in measurable statistics like graduation rates and cohort default rates. The Department, however, has made no showing to that effect. In fact, given available evidence, it is not clear that the Department could make such a showing. Since 1990, the average cohort default rate has dropped from pre-regulation levels as high as 22% down to 6.7% in 2007, the last year with available data. *See* Dept. of Education, National Student Loan Default Rates, http://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html.

Other available indicators also undermine the Department's assertion of increased circumvention under the current regulatory regime. Just this year, the GAO issued a report that illustrates that substantiated violations of the bonus prohibition are infrequent and have not significantly increased in their frequency or severity since adoption of the current regulations. *See* Government Accountability Office, *Higher Education: Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education*, Feb. 23, 2010

("GAO Report"). Remarkably, the notice of proposed rulemaking completely fails to address the significance of this recent government report.[14]

The proposal's claims also are contradicted by the agency's own analysis. According to the proposal, the current regulations have caused it to waste "vast" amounts of time and money investigating and litigating alleged violations. The proposed regulatory changes should therefore presumably reduce the demands on the Department's resources and result in some net savings to the government. And if the proposal is in fact going to reduce regulatory circumvention by "unscrupulous actors," savings should also show up in decreased defaults, as fewer unqualified students unable to repay their loans would be the targets of overly aggressive recruiting. Yet the Department does not identify any such savings and claims the entire proposal (including other proposed regulatory changes) will have a net budget impact of $0.0 million. The Department's own economic "analysis"—slight and lacking in substance as it is—therefore demonstrates that the claims of lost regulatory time and resources and of circumvention and abuse under the current regulations are overstated.

Indeed, the history of the bonus prohibition outlined above belies the Department's claim that the current regulations are the cause of increased investigation and enforcement costs. It is clear from this history that stripping the law of the clarifying regulations will only *increase* litigation and compliance costs—not decrease them. Under the current system, a school's compensation plan can be quickly compared against the current regulations to determine compliance. Under the proposal, however, the Department and courts will have to examine every "sum of money . . . paid for services rendered" to recruiting, admissions, and financial aid

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[14] Notably, the Department of Justice has *never* intervened in a *qui tam* False Claims Act action against a school based on alleged violations of the compensation restriction.

personnel to determine if any portion of that compensation is related to "activities" engaged in "for the purpose of the admission or matriculation of students . . . or the award of financial aid." 75 Fed. Reg. at 34,817. Performing those tasks will, in all likelihood, prove to be enormously resource-intensive and expensive. This is in addition to the increased uncertainty that will result from the proposal and the associated costs for which the proposal has not accounted.

B. Claims About Pervasive Abusive Recruiting Practices Are Unsubstantiated.

The NPRM asserts that "[w]hen admissions personnel are compensated substantially, if not entirely, upon the numbers of students enrolled, the incentive to deceive or misrepresent the manner in which a particular educational program meets a student's need increases substantially." 75 Fed. Reg. at 34,817. The NPRM makes a similar assertion that the Department "oft-times receives complaints from students who allege that they were the victims of false promises and other forms of deception when they are considering their postsecondary educational opportunities." *Id.* at 34,834. However, the proposed rule does not discuss the frequency of these complaints or how often they are substantiated—or even investigated. Without any discussion of these factors, it is impossible to know whether Department personnel have simply seized upon a few isolated and possibly unsubstantiated anecdotes to justify a proposed regulation that lacks any reasoned or empirical foundation. Indeed, the GAO's recent report on substantiated compensation restriction violations indicates that the Department does not maintain data on the overall prevalence of such violations. *See* GAO Report at 3 n.6 (noting that its tally of substantiated bonus prohibition violations does not include data on how many alleged bonus prohibition violations have not been substantiated). In discussing another recently proposed regulation, Secretary Duncan has indicated that as few as "5 percent" of private sector schools, "frankly, the bottom of the barrel" are the source of many of the title IV abuses. de Vise, *supra*, at p.1. According to the Secretary, "[t]he industry as a whole . . . has been given a

black eye by a few bad actors." *Id.* The proposed regulation, however, would extend beyond "a few bad actors," and threaten the educational missions of the other ninety-five percent of higher education institutions. The limited evidence provided by the Department in support of the proposal is entirely anecdotal, appears to be contradicted by other publicly available evidence, and does not substantiate the need for such a drastic change in regulatory approach.

In the face of this sparse evidentiary record, the proper and reasonable response is not to adopt an over-inclusive regulation but to deploy other regulatory tools at the Department's disposal to combat any issues of regulatory circumvention. For example, the Department could provide further guidance about what it means for salaries to not be based "solely" on recruiting and financial aid considerations. There are many areas of the law where liability hinges on difficult questions that turn on whether the existence of certain facts or the performance of certain actions are material or substantially related to the underlying harm. It is no answer, therefore, for the Department to abandon any effort to distinguish between proper merit-based compensation and sham merit-based compensation because such distinctions may be hard to make. *See* 75 Fed. Reg. at 34,817. Or if it is the case that overaggressive recruiting, admissions, and financial aid practices have caused schools to admit unqualified students who are unable to benefit from the school's programs, targeting admissions and retention standards would be more sensible than attempting to outlaw legitimate and worthwhile compensation structures. Indeed, the Department could easily take steps to strengthen these standards to prevent unqualified students from enrolling at schools and to force schools to expel underperforming students from their programs. The Department's failure to consider other commonly available administrative tools at its disposal constitutes a violation of the APA. *Chamber of Commerce*, 412 F.3d at 144 (citing *State Farm Mutual Auto. Ins. Co.*, 463 U.S. at 51).

C. The NPRM's Purported Economic Analysis Does Not Support The Proposed Regulatory Changes.

The NPRM acknowledges that the proposed rulemaking constitutes a "significant regulatory action" under Executive Order 12,866 that will have an annual effect on the economy in excess of $100 million. *See* 75 Fed. Reg. at 34,848. Pursuant to § 6(a)(3)(C) of Executive Order 12,866, in conjunction with proposing a significant regulatory action that imposes costs of this magnitude, the Department must prepare a detailed regulatory impact analysis assessing the costs and benefits of its proposal, as well as identifying feasible alternatives to the planned regulation. The NPRM's analysis falls well short of this requirement.[15]

In terms of benefits from the proposed rule, the NPRM claims that it will provide "increased clarity about incentive compensation for employees at institutions of higher education." *Id.* at 34,855. Aside from the logical and historical implausibility of this statement as outlined above, the NPRM later acknowledges that "[i]t is difficult to quantify benefits related to the new institutional and other third-party requirements, as there is little specific data available on the effect of the provisions on borrowers, institutions, or the Federal taxpayer." *Id.* at 34,855. This is a startling admission that undermines the basis for adopting such significant changes to the Department's regulations. Reasoned decision-making surely requires that an agency be able

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[15] Executive Order 12,866 further establishes that "the private sector and private markets are the best engine for economic growth." Executive Order 12,866, 58 Fed. Reg. at 51735 (1993). Accordingly, it requires federal agencies to "promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material market failures of private markets." *Id.* The order also requires that "[e]ach agency . . . identify . . . the problem that it intends to address (including, where applicable, the failures of private markets)." *Id.* Contrary to these requirements, the proposal fails to explain (among other things) why private standard setters such as accrediting agencies, or more stringent accreditation requirements, would not be more effective at addressing the concerns motivating this regulatory action in a less burdensome manner.

to provide a credible estimate of the expected benefits before it engages in such a drastic regulatory change—particularly in light of the regulatory history.

Additionally, as discussed above, the proposed rule estimates the net costs to the government as $0.0 million because "there is no data indicating that the provisions will have any impact on the volume or composition of Federal student aid programs." 75 Fed. Reg. at 34,857. That contradicts the proposal's assertions that the current clarifying regulations are "a major impediment to ensuring that students are enrolled in educational programs that are meaningful to them," that they "do substantially more harm than good," and that enforcement and litigation over them has led to expenditure of "vast resources" by the federal government. *Id.* at 34,818. As explained above, if these statements were true, the proposal should be expected to create savings to the government—savings which are wholly non-existent under the Department's own economic analysis. In addition, the actual quantitative analysis performed in the proposal suggests that there is *no* adverse effect to students as a result of the existing regulatory clarifications. The Department projects that the *volume and composition* of the title IV programs will remain the same under the proposed regulations as under the current regulations. *Id.* at 34,857. In other words, the Department anticipates that the same number and *type* of students—including the supposedly unqualified students who are allegedly encouraged to enroll in schools by over-incentivized recruiters—will be recruited, admitted, and awarded financial aid under the proposed regime as under the current regime. If it is true that the proposal does not create any savings and will not alter either the *volume or composition* of title IV participants, the Department has not provided any justification for its proposal.

Indeed, if such changes will not induce savings or have any effect on either the volume or composition of title IV loans, it is simply illogical to destroy a regulatory regime that is

consistent with the statute and congressional intent in favor of a regulatory approach that will create greater uncertainty.

The proposal also fails to account for any costs associated with modifying the bonus prohibition regulation. The Department does attempt to calculate the burdens of increased institutional workload associated with certain portions of the proposed rule, but it fails to separately identify any costs resulting from its proposed modification of the compensation restriction regulations. Therefore, the overall cost assessment for the NPRM does not appear to account for the specific costs associated with the proposed bonus prohibition regulation. But such costs are sure to exist. *See generally* Appendix. For example, the Department has advised schools that "going forward" they would need to "re-examine their practices to ensure that they comply" with the proposal. 75 Fed. Reg. at 34,819. Undoubtedly such re-examination can be expected to entail costs for all schools, and in some cases, significant costs. In general, the proposal simply fails to account for the costs schools will incur from having to alter their fundamental operating policies and procedures. Additionally, the ambiguity that the proposal will create about what types of merit-based payments are and are not prohibited will lead to costs from schools having to defend increased *qui tam* False Claims Act accusations. Common sense tells us that regulatory ambiguity and litigation are directly correlated. More of the former means more of the latter. These costs—essentially a tax on compliant schools assessed by private individuals across the country rather than by the Government—will show up either in decreased services or in students' tuition bills. Wherever they show up, the proposal does not account for them.

More fundamentally, the Department has ignored the cost to schools that will result from their inability to "bas[e] any portion of an [income] adjustment on success in securing student

enrollments or financial aid awards." 75 Fed Reg. at 34,854. The inability to differentiate between recruiters on the basis of their primary job description—their ability to recruit—will make it extraordinarily difficult for schools properly and effectively to evaluate the performance of their employees. Without standardized metrics on which to base compensation decisions, the proposal is likely to increase schools litigation risks in pay discrimination lawsuits.

Additionally, costs are sure to accumulate in a system where high-caliber employees are not rewarded based on their job performance. Where the link between quality work and compensation is severed, employees will be less motivated to put in the extra effort needed to locate qualified students who can benefit from a school's educational programs. *See infra*, at A-13 to A-14 (noting worker incentives to shirk job responsibilities when compensation is de-linked from merit-based considerations). Forbidding performance-based compensation will also impede schools' ability to hire and retain quality personnel who will come to find that other industries provide compensation that more accurately values their skills, leaving the higher education field with a lesser quality talent pool. *See infra*, at A-16 to A-18 (describing how delinking compensation from performance makes it more difficult to hire and retain a high-quality workforce).

These costs will be observable in a variety of places. For example, without motivated recruiting, admissions and financial aid officers, and senior management supervising such employees, quality students will not learn about the educational opportunities and payment options available to them. This impact will be felt most notably by economically disadvantaged students who may not have the same exposure to, or awareness of, educational and financial aid programs as other prospective students. The effect of these prospective students remaining outside of the country's postsecondary educational system will also surely result in costs to the

nation's economy. Another possible manifestation of these costs is that schools will have to hire additional employees to do the work that one quality employee would do if properly compensated. The NPRM's failure to even acknowledge these potential costs further supports the notion that the Department has not engaged in a reasoned decision-making process.[16]

V. Conclusion

We appreciate the opportunity to comment on this proposed rulemaking that has enormous significance to the higher education community. We wish to reiterate that we support the legitimate purpose of the statute as enacted by Congress. In that vein, we would like to continue working with the Department and other interested parties in identifying ways in which the existing regulations can be improved to provide even more effective regulation.

As described above, however, the proposed repeal of the existing regulatory clarifications, combined with the proposal's misconstruction of the statute, is unsound as a legal matter and unsupported by logic, experience, empirical analysis, or other evidence. Adoption of this proposed regulatory regime will have unfortunate consequences for both schools and students.

As we have suggested throughout, there are a number of tools at the Department's disposal to address its apparent concerns with schools' compensation practices. For example, the

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[16] The proposal is self-admittedly lacking in detailed economic analysis of its costs and benefits. 75 Fed. Reg. at 34,855 (noting that the benefits of the proposal "are difficult to quantify" and seeking "comments or data that would support a more rigorous analysis of these provisions"); *id.* at 34,856 (noting similar issues with calculating costs associated with the proposal). If the Department had been serious about seeking data, it would have provided for a lengthier comment period. Nonetheless, DeVry solicited and received an economic analysis of the proposal from Professor Daniel Slottje that addresses gaps in the proposal's own economic analysis. Even on the Department's rushed timetable, Professor Slottje is able to demonstrate through expert analysis that the proposal would have significant adverse consequences on employee performance affecting both schools and students—effects which are left unaddressed in the NPRM.

Department could propose regulations that clearly define how often salary adjustments can be made and how much weight schools can give to factors directly and indirectly related to enrollment. Additionally, the Department could clarify that retention and graduation-based compensation is permissible, but that offering of sham programs in an effort to evade the statutory prohibition is prohibited. Whatever tools the Department chooses to employ, however, the Department must take care to provide that the regulations do not reach beyond the statute's scope.

Accordingly, we encourage the Department to review the comments it receives and then engage in further dialogue with interested stakeholders to craft new proposed regulations that adhere to the statutory framework and better serve schools and their students.[17] To the extent the Department is motivated by the approaching November 1 deadline for issuing a final rule that could go into effect for the next award year, that deadline should not outweigh the compelling need for more detailed analysis and further consideration of the important issues at stake here. *See also supra* note 1. Accordingly, at a minimum, the Department should defer making any changes to the current clarifying regulations until the GAO issues its report, the effects of the proposed regulations are better understood from an empirical basis, and the public is allowed the opportunity to comment upon these developments.

In considering regulatory changes as part of that process, DeVry, as discussed above,

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[17] To the extent the Department decides to adopt an alternative regulatory regime rather than its proposed outright repeal of all the existing regulatory clarifications, the Department should provide the public with a supplemental comment period. The NPRM does not discuss any regulatory alternatives at any length and therefore adopting a different regulatory approach in the final rule would not be a logical outgrowth of the current proposal. *See Sprint Corp. v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003). Such an approach would also deprive the Department of the benefit of public comment.

would support compensation restriction regulations that (i) permit merit-based adjustments linked, at least in some part, to quantitative measurements of enrollment performance based upon annual performance evaluations (consistent with merit adjustments made for other institutional employees); (ii) explicitly restrict compensation practices only for employees directly engaged in enrollment and awarding financial aid; (iii) expressly permit compensation that is linked to shared societal and institutional goals like graduation; and (iv) provide the clarity to discourage private litigants from challenging compensation practices that are clearly permissible under the law. We believe these elements are necessary to allow schools to attract a high-caliber workforce and best serve their students' educational needs and could be implemented effectively to achieve the Department's other stated goals for increased regulatory clarity and targeting of any unsavory recruiting tactics.

Appendix

REPORT OF DANIEL J. SLOTTJE: IN RESPONSE TO DOE PROPOSED REGULATORY CHANGES, FILED AUGUST 1, 2010.

EXPERT CREDENTIALS

I am a Senior Managing Director at FTI Consulting and a Professor of Economics at Southern Methodist University in Dallas, Texas. I have published over 135 articles, the vast majority of which have been peer reviewed. In addition, I have written or edited more than 15 books. I have published many articles on wage and income determination. I teach courses on econometrics, labor economics, human resources and law and economics, among others. I have lectured at universities in North America, Europe, Australia, and the Middle East. I am a consultant to the United Nations Development Programme and a reviewer for the National Science Foundation and the Social Science Research Council of Canada. I have had significant experience in evaluating employment and statistical issues in the context of litigation matters. My academic C.V. and professional resume are attached as Exhibit 1 and Exhibit 2, respectively, to this report. My academic C.V. includes a list of all publications I have authored within the preceding ten years. My professional resume contains a list of all cases in which I have testified as an expert at trial or by deposition within the last 4 years.

EXECUTIVE SUMMARY

The Department of Education proposes to eliminate the clarifying regulations related to the statutory ban on incentive compensation of admissions advisors and financial aid counselors by institutions of higher education, whether private sector, public, or non-profit. The clarifying regulations (34 C.F.R. §§ 668.14(b)(22)(i)(A)-(L)) permit performance-based pay in the form of merit adjustments that may, in part, reflect productivity in securing student enrollments and/or financial aid awards. Thus, elimination of these provisions will restrict compensation schemes to only those that include fixed annual salaries or fixed wage rates. Compensation adjustments will only be permissible if such actions are entirely unrelated to securing student enrollments or financial aid awards.

The proposed elimination of performance-related pay stems from a policy concern that such pay schemes provide incentives for unscrupulous behavior at institutions. While poorly framed incentives can have unintended, negative consequences, the solution is ***not*** to eliminate all performance-related pay; the solution is to ensure that the ***desired behaviors*** are properly tied to performance-related pay. In this case, the desired behaviors include quality educational offerings in the U.S. attended by all students who would benefit from attending such programs.

As detailed in this comment, the proposed elimination of the clarifying regulations provisions does not achieve these desired behaviors. By decoupling pay from a worker's performance, this regulatory change will, among others things, reduce surplus revenues at institutions resulting in diminished quality and quantity of educational programs, lowered efficacy in the recruiting and retention of qualified students, difficulties in hiring and retaining qualified admissions advisors and financial aid counselors, increases in the number of supervisory personnel needed to oversee these employees, and increases in the time and resources devoted to litigation. Moreover, the proposed change will reduce the number and diversity of students enrolled in post-secondary education as non-traditional, harder to reach students slip through the cracks.

Instead, to ensure the continued investment in high quality post-secondary education programs, as well as protect against consumer fraud and fraudulent use of Title IV funds, attention should be focused on the monitoring of quality of programs receiving Title IV funds. A

proper set of incentives provides a powerful tool to achieve the objectives of the Department of Education and should be embraced, not eliminated.

INTRODUCTION

The Department of Education ("ED") proposes to eliminate the clarifying regulations on the permissible compensation of admissions advisors at institutions of higher education (IHEs). The statute (34 C.F.R. §§ 668.14(b)(22)(i)) "prohibits an institution from making any commission, bonus, or other incentive payments based directly or indirectly on success in securing enrollments or financial aid to any persons or entities involved in student recruiting or admissions activities, or in making decisions about the award of student financial assistance."[1]

Due to the ambiguity that arose from the ED's enforcement efforts based on the bare statutory text, twelve clarifying regulations were adopted to provide clarity to IHEs. Most relevant for the analysis herein, 34 C.F.R. §§ 668.14(b)(22)(i)(A) provides that "an institution may make two adjustments (upward or downward) to a covered employee's annual salary or fixed hourly wage rate within any 12-month period without the adjustment being considered an incentive payment, provided that no adjustment is based solely on the number of students recruited, admitted, enrolled, or awarded financial aid."[2] Additionally, 34 C.F.R. §§ 668.14(b)(22)(i)(D) provides that "profit-sharing and bonus payments to all or substantially all of an institution's full-time employees are not considered incentive payments based on success in securing enrollments or awarding financial aid in violation of the prohibition in Section 487(a)(20) of the HEA and current §§ 668.14(b)(22)(i)."[3]

If ED eliminates these provisions, IHEs will only be permitted to offer fixed annual salaries or fixed wage rates to persons employed to recruit students. ED states that merit-based

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[1] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34816.

[2] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34816.

[3] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34816.

adjustments, as well as bonuses or success-sharing payments made to all or substantially all of an institution's full-time employees, will continue to be permissible, but only if such adjustments are not "based directly or indirectly upon success in securing enrollments or the award of financial aid."[4] The implication of this regulatory change is transparent: compensation paid to admissions advisors and financial aid counselors will need to be completely de-linked from their performance on the tasks for which they were specifically hired.

A vast and well-developed theoretical and empirical literature in labor and personnel economics provides much guidance pertaining to the effects of such a policy reversal. We begin by discussing the neo-classical marginal productivity theory of labor demand in order to understand why IHEs would desire to offer compensation packages that, in part, link earnings to the performance of admissions advisors. Then, we turn our attention to the costs of de-linking earnings and performance in this situation. Finally, we discuss ED's rationales for considering the elimination of the "clarifying regulations" provisions along with the shortcomings of this rationale.

THEORETICAL ANALYSIS OF LABOR DEMAND

In the neo-classical model of labor demand, institutions must decide on the number of workers to employ to maximize surplus revenues. Institutions hire individuals in a competitive labor market. As a result, the wage is determined by market-clearing forces and taken as given by institutions. Institutions attempting to pay below-market wages will be unsuccessful in their recruiting efforts and job vacancies will remain unfilled; institutions paying above-market wages will be driven out of business. Finally, it is assumed that each employee contributes less and less to production (so-called diminishing marginal product of labor). According to Kaufman and Hotchkiss (2006, pg. 175), this framework comprises "the standard model of labor demand in economics" and is referred to as the "neoclassical *marginal productivity theory of demand*."[5]

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[4] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34817.

[5] Bruce E. Kaufman and Julie L. Hotchkiss (2006), The Economics of Labor Markets, 7th Edition, Thomson South-Western (italics in original).

The primary implication of this simple, yet extraordinarily powerful, framework is that institutions will hire workers until the marginal productivity of the last worker hired is equal to the market wage. All workers are then paid the market-clearing wage. Thus, institution survival requires institutions to establish a clear link between wages paid to employees and their productivity. Institutions failing to appropriately link wages to worker productivity will not survive. Borjas (2010, p. 98) states: "[I]f some employers did not behave the way the marginal productivity theory says they should have, those employers would not last long in the marketplace. Only the fittest survive in a competitive market."[6]

The market in which not only private-sector IHEs, such as DeVry, but all IHEs, operate falls within the scope of the neo-classical model. First, regardless of whether an IHE is private-sector, public, or non-profit, all IHEs must act as if they are maximizing surplus revenues to remain competitive.[7] Failure to act as if one is maximizing surplus revenues will put an IHE at a competitive disadvantage since surplus revenues available for re-investment in the institution will be reduced. As a result, students will be offered a worse educational product and employees will be offered a less pleasant work environment relative to competing IHEs; students and employees will turn elsewhere and the IHE will ultimately fail. Such logic is now so engrained in the literature on the economics of education that it is now commonplace to model even public elementary and secondary school districts as surplus revenue-maximizers for the purpose of analyzing their behavior. Hoxby (2002, pg. 12-13) states:

> "The for-profit case is a nice place to begin because the institution's incentives to maximize productivity are obvious. The vast majority of school producers … are, however, not-for-profits. At first glance, it might seem difficult to say what not- for-profits maximize, but – in fact – relatively simple modifications of the for-profit case capture not-for-profit behavior. . . . If a not-for-profit school has surplus (a difference between

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[6] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin.

[7] "Maximizing profits" in this context does not mean a institution will do anything to make money, it means the institution is behaving in a way to allocate and use scare resources in as economically efficiently as possible.

> revenues and costs), . . . [the] [s]urplus can be used to make working conditions pleasant for the school's staff (staff lunches, smaller classes, more classroom supplies, and so on) even if these conditions do not contribute to productivity. Surplus also allows a school to pursue social goals that its staff value: experiments with teaching methods, development of new curricula, a diverse student body, exposing students to nature."[8]

Second, all IHEs hire recruiting counselors in a competitive labor market. The sheer number of IHEs, combined with the fact that each employs workers designed to recruit and retain qualified students, ensures that the market for such workers is highly competitive. Moreover, the skills required to be a successful recruiter are useful in other occupations. Thus, IHEs compete against institutions in other industries for workers possessing the requisite skills.

Third, the nature of student recruitment is such that the productivity of each additional recruiter is diminishing. This "diminishing productivity" follows from the fact that the pool of potential qualified students is finite. As such, the "inquiries" that admissions advisors may have to follow become successively worse at a particular point in time; each additional recruiter hired lowers the average productivity of the entire recruiting division of an IHE.

In sum, it is clear that the standard, neo-classical marginal productivity theory of labor demand provides an appropriate framework to begin thinking about employment and compensation decisions pertaining to admissions advisors at all IHEs, be they private-sector, public or non-profit. The model reveals that IHEs must maintain a direct connection between worker compensation and worker productivity in order to remain viable in a competitive market.

That said, the standard marginal productivity theory of labor demand, as discussed to this point, is overly simplistic in some respects, particularly as it relates to the employment of admissions advisors at IHEs. First, the model presumes that workers are identical: each worker is equally productive once hired. Second, the model presumes that an individual worker's productivity is measurable by the institution, in this case the IHE.

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[8] Caroline Hoxby (2002), "School Choice and School Productivity (or Could School Choice be a Tide that Lifts All Boats?)," NBER Working Paper No. 8873, April 2002.

With respect to the first issue, obviously different individuals are not equally adept at helping students learn about programs that can improve their quality of life and earning potential, or help them navigate the complicated world of financial aid. Aside from work ethic, personality traits such as social skills, life experiences, communication skills, etc. may lead some admissions advisors to be more productive than others. The education and work history of admissions advisors may also influence their productivity. Borjas (2010, pg. 89) states: "In fact, workers are very heterogeneous. Some workers are college graduates, while others are high school dropouts; some have a lot of labor market experience, whereas others are new entrants. In short, some workers probably make a much larger contribution to the institution's output than other workers."[9]

With respect to the second issue, certain aspects of a recruiter's job performance are for managers or supervisors to measure. For example, worker effort in terms of pursuing inquiries for highly qualified students or developing contacts with third-party or internet vendors is difficult to quantify. Borjas (2010, pg. 464) states: "Workers differ in their productivity, either because there are ability differentials across workers or because some workers put in a lot of effort on the job and other workers do not…. However, although the worker may know precisely how much she has produced, the institution may be much less certain about the worker's productivity. In other words, the institution may not be able to measure the worker's productivity *and* cannot expect the worker to report her productivity truthfully."[10]

Allowing for the possibility of heterogeneous workers is not complicated in the model; the theory is well developed in the labor economics literature.[11] Incorporating such heterogeneity implies that institutions seeking to survive and thrive by maximizing revenues over costs should pay each worker a wage equal to his or her productivity. Assuming that each individual recruiter's productivity is observable to IHEs, merit rewards based on the criteria

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[9] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin.

[10] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin (italics in original).

[11] See, e.g., George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin, pp. 116-118.

related to the job for which the worker is hired – either up or down – are needed to maintain equality between a worker's compensation and his or her productivity. As stated in the simpler version of the standard, neo-classical model, if compensation deviates from productivity, surplus revenues will fall and the institution will be at a disadvantage relative to its peers and will eventually be driven from the market. Thus, merit awards that reflect individual productivity in the tasks they are hired to perform (i.e., securing enrollments or awards of financial aid) are vital to the successful operation of IHEs. To the extent that removal of the clarifying regulations invalidate such compensation practices (as evidenced by the prior enforcement action against Computer Learning Centers), the proposed changes by ED are problematic.[12]

Extending the marginal productivity theory of labor demand to allow for the fact that worker productivity may be difficult for institutions to measure is also well developed in the literatures on labor and personnel economics. In such a case, the productivity of a worker is assumed to depend on the effort he or she expends (or other worker attributes), and this effort (or other attributes) is assumed to be unquantifiable by the institution. In addition, it is assumed that – all else equal – workers are worse off expending more effort on the job. To maximize surplus revenues, and survive and thrive by providing a program for which students are willing to pay, the institution must design an appropriate compensation package to induce sufficient effort at work by its employees. In industries where the output produced by individual workers is easily measured at low cost, the efficient compensation package for workers depends, in part, on observable measures of output. In other words, workers are compensated based, in part, on their output (e.g., number of enrollments) as opposed to purely based on their input (e.g., the number of hours spent at work). Economists refer to the former type of compensation package as a "piece-rate" or "variable pay" or "performance-related pay" compensation package; the latter is referred to as a "time-rate" package.

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[12] See "Written Submission To OMB Regarding The Department Of Education's Potential Regulatory Changes Governing Incentive Compensation That Are Currently Under OMB Review" by DeVry and its affiliate institutions, at http://www.whitehouse.gov/omb/assets/oira_1840/1840_05032010-2.pdf.

Importantly, while performance-related pay is optimal from the institution's perspective, in practice workers may have different preferences.[13] As will be discussed further below, workers who are very effective at their job will prefer a performance-related compensation package to ensure they are compensated fully for their high productivity. On the other hand, unproductive workers will prefer a time-rate compensation package to avoid being penalized for their low productivity. Other workers may prefer a compensation package that includes both a time- and performance-related component so that earnings are related to a worker's true productivity, but the worker is also (partially) insured against adverse shocks to output (e.g., if the economy is strong, enrollments may dip due to low unemployment). Borjas (2010, pg. 469) states: "Many workers also dislike piece-rate systems because their salaries might fluctuate a lot over time."[14]

The salient point here is that the market for admissions advisors and financial aid counselors at IHEs clearly fit this description of the labor market: effort is difficult to quantify, but the relevant outputs – student enrollments and financial aid awarded – are measurable at low cost, and assignable to specific individuals. Thus, the efficient compensation package from the perspective of IHEs must link compensation to individual worker output through merit-based adjustments to fixed salaries or wage rates that are tied to successful completion of the job for which the individual is hired.[15] Success-sharing may also play a role in this type of compensation, but it is less efficient since it links an individual's compensation to the productivity of an entire team of workers.

From the employees' perspective, however, a pure piece-rate compensation package is not likely to be ideal since the worker assumes all the risk if outputs (i.e., enrollments or financial aid awards) fall. As such, the market equilibrium will entail compensation packages that are based in part on output (through merit awards that depend ***in part***, but not solely, on

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[13] See, e.g., D. Kate Rubin and Jeffrey M. Perloff (1993), "Who Works for Piece Rates and Why," *American Journal of Agricultural Economics*, Vol. 75, No. 4, pp. 1036-1043.

[14] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin.

[15] See, e.g., Charles Brown (1990), "Firms' Choice of Method of Pay," *Industrial and Labor Relations* Review, Vol. 43, pp. 165S-182S.

securing enrollment and financial aid awards) and ***in part*** on inputs or other non-output based criteria. Fortunately, this is the *precise* compensation package that is allowed for under the current clarifying regulations; thus, the market can operate efficiently and workers can be appropriately compensated for performing their duties.

ADVERSE IMPACTS FROM REMOVAL OF THE CLARIFYING REGULATIONS PROVISIONS

According to the marginal productivity theory of labor demand, the nature of the occupations of recruiter and financial aid counselor is such that the efficient compensation package to be offered by IHEs is one that contains both a time- and piece-rate component. Under the current clarifying regulations provisions, the performance-related component is permissible through bi-annual merit-based adjustments as long as merit does not depend solely on securing enrollments and financial aid awards. Thus, removal of the clarifying regulations would bar IHEs from adjusting compensation in any direction on the basis of the job duties for which admissions advisors or financial aid counselors are employed even if such adjustments represent only a small fraction of the total merit-based adjustment. In sum, the proposed removal of the "clarifying regulations" provisions completely de-links compensation from individual worker productivity.

What are the costs of such a policy change? Numerous empirical studies have been performed over the past three decades within the field of labor and personnel economics provide a clear answer to this question.

The first impact follows directly from the preceding theoretical analysis: a loss in surplus revenues. When wages deviate from worker productivity, IHEs end up employing some workers whose productivity is below their cost and surplus revenues are lost. Note two salient points. First, this loss in surplus revenues occurs even if worker productivity is unaffected by the de-linking of compensation from performance. Second, recall from above that surplus revenues are

not simply returns to shareholders of private-sector IHEs (in case one decides to discount such concerns). Rather, all IHEs, whether private-sector, public or non-profit are dependent upon surplus revenues to survive and thrive. A loss in surplus revenues from a repeal of the "clarifying regulations" provisions erases funds that would have been available to improve educational programs and help attain the current administration's goals of improving access to post-secondary education in the United States.

The reduction in surplus revenues will be magnified given ED's extension of the restrictions on compensation practices at IHEs from admissions advisors and financial aid counselors all the way to higher level managers, supervisors, and top executives at IHEs. Not surprisingly, studies of the beneficial impacts of performance-based pay to top-level executives date back several decades. Leonard (1990, pg. 27S) states: "The impact of incentive mechanisms on executives' performance is likely to be important, particularly at the highest executive levels, where individual output is crucial to the success of the institution but nonstandard."[16] In fact, performance-related pay is likely to play a larger role influencing worker productivity at the executive-level, relative to lower rungs on the corporate hierarchy, because the incentives provided by the prospect of promotion dwindle as one moves up the corporate ladder. Leonard (1990, pg. 28S) continues: "Higher-level executives are more likely to be motivated by contingent pay than by promotion. Because higher-level executives are also more directly responsible for corporate success and less affected by free-rider problems, their pay is more heavily contingent upon institution performance."[17]

Knowledge of the efficiency gains from utilizing performance-based pay for executives dates back to the seminal studies of Mirrlees (1976) and Holmström (1979). These studies document that the performance-related pay of managers and executives can be aligned with the

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[16] Jonathan S. Leonard (1990), "Executive Pay and Institution Performance," *Industrial and Labor Relations Review*, Vol. 43, No. 3, pp. 13S-29S.

[17] Jonathan S. Leonard (1990), "Executive Pay and Institution Performance," *Industrial and Labor Relations Review*, Vol. 43, No. 3, pp. 13S-29S.

stakeholders of a institution or institution at the least cost through the use of performance-based compensation.[18]

The second impact of de-linking compensation from individual worker productivity compounds the loss in surplus revenues just discussed: a reduction in worker productivity. Such a reduction occurs for two reasons. First, de-linking worker compensation from productivity removes the incentive for workers to put forth more than the "minimal" level of effort to avoid being terminated. Since putting forth effort is "costly" to workers and this cost is not covered by the workers' compensation agreements, it is naïve to believe that workers will put forth the same effort under time-rate compensation packages (or adjustments based on criteria *other* than performance in the tasks required by the job) as with packages that contain at least some element of a performance-related component. Kaufman and Hotchkiss (2006, pg. 533) state:

> "The virtue of an input-based reward system, such as a wage per hour or salary per year, is that it is easy to measure and administer. But a major drawback is it encourages workers to shirk. Shirking means holding back on work effort, such as working at only half-speed or taking extra-long breaks when the boss is not looking. Not only does shirking lead to a productivity loss, it also gives rise to another form of cost – the cost of hiring additional people to act as monitors and contract enforcers."[19]

As just indicated, when positive reinforcement cannot be used to properly incentivize workers, productivity is further inhibited by the need to rely on negative reinforcement to disincentivize workers who are found to be shirking. This entails wasted resources expended on supervisors whose sole function is to "try" and monitor workers; "try" because of the inherent difficulty in measuring worker effort, as well as the fact that the imposition of "negative reinforcement" may be viewed as prohibited after the removal of the "clarifying regulations"

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[18]James A. Mirrlees (1976), "The Optimal Structure of Incentives and Authority within an Organization," *The Bell Journal of Economics*, Vol. 7, No. 1, pp. 105-131; Bengt Holmström (1979), "Moral Hazard and Observability," *The Bell Journal of Economics*, Vol. 10, No. 1, pp. 74-91.

[19] Bruce E. Kaufman and Julie L. Hotchkiss (2006), The Economics of Labor Markets, 7th Edition, Thomson South-Western.

provisions. Kaufman and Hotchkiss (2006, pg. 533) continue: "With a well-designed output-based reward system, this lower-level of the management hierarchy can be substantially reduced because the 'pay for performance' nature of the reward system inquiries workers to self-monitor and self-police their level of work effort."[20]

Empirical evidence supporting the loss in productivity under time-rate payment schemes abounds. Lazear (2000) analyzes data on 3,000 employees over a 19-month period from a large auto glass company after the company switched from time-rate to piece-rate pay.[21] The author finds that average levels of output per worker increased by roughly 44 percent after the switch to piece-rate pay. Paarsch and Shearer (2000) examine the daily payroll records at a tree-planting institution in British Columbia during a five-month window in 1991.[22] The authors find that piece-rate pay increased worker output by 22 percent.

Asch (1990) analyzes the effort of Navy recruiters under different compensation schemes during a five-month period in 1986, concluding that performance-related pay is crucial to inducing appropriate effort.[23] Analyzing data on 50 jockeys over an eight year period, Fernie and Metcalf (1999) document that performance-based compensation schemes induce improved performances relative to fixed pay schemes.[24] Booth and Frank (1999) investigate the impact of performance-related pay schemes on worker productivity using data on over 4,000 British

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[20] Bruce E. Kaufman and Julie L. Hotchkiss (2006), The Economics of Labor Markets, 7th Edition, Thomson South-Western.

[21] Edward P. Lazear (2000), "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5, pp. 1346-1361.

[22] Harry J. Paarsch and Bruce Shearer (2000), "Piece Rates, Fixed Wages, and Incentive Effects: Statistical Evidence from Payroll Records," *International Economic Review*, Vol. 41, No. 1, pp. 59-92.

[23] Beth J. Asch (1990), "Do Incentives Matter? The Case of Navy Recruiters," *Industrial and Labor Relations Review*, Vol. 43, pp. 89S-106S.

[24] Sue Fernie and David Metcalf (1999), "It's Not What You Pay It's the Way That You Pay It and That's What Gets Results: Jockeys' Pay and Performance," *Labour: Review of Labour Economics and Industrial Relations*, Vol. 13, No. 2, pp. 385-411.

workers during the period 1991-1994.[25] The authors find that workers receiving such pay earned 6-9% more than workers on a fixed pay scale; 8-12% in non-unionized jobs. Moreover, this higher compensation is found to be directly attributable to the improved productivity of workers receiving performance-related pay. Copeland and Monnet (2002) analyze production and payroll records from the check processing department of the Federal Reserve Bank of Minneapolis over a 15-month period during 1999-2000.[26] The authors conclude that the bank's performance-related pay scheme raised productivity by more than 12 percent.

Freeman and Kleiner (2005) analyze data from a shoe manufacturer in the United States during the 1990s that switched from piece-rate to time-rate compensation.[27] The authors find that worker productivity declined by six percent after the switch to time-rate pay. Gielen, Kerkhofs, and van Ours (2010) analyze data on roughly 1,200 Dutch institutions over the period 1995-2001.[28] The authors document a 9% productivity gain in institutions utilizing some type of performance-related pay scheme for workers; employment also grew by 5% in institutions offering performance-related pay. Parent (1999) and Piekkola (2005) document similar productivity effects from performance-related pay packages.[29]

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[25] Alison L. Booth and Jeff Frank (1999), "Earnings, Productivity, and Performance-Related Pay," *Journal of Labor Economics*, Vol. 17, No. 3, pp. 447-463.

[26] Adam Copeland and Cyril Monnet (2002), "The Welfare Effects of Incentive Schemes," FEDS Working Paper No. 2003-08.

[27] Richard Freeman and Morris Kleiner (2005), "The Last American Shoe Manufacturer: Decreasing Productivity and Increasing Profits in the Shift from Piece Rates to Continuous Flow Production." *Industrial Relations*, Vol. 44, No. 2, pp. 307-330.

[28] Anne C. Gielen, Marcel J.M. Kerkhofs, and Jan C. van Ours (2010), "Ho Performance Related Pay Affects Productivity and Employment," *Journal of Population Economics*, Vol. 23, pp. 291-301.

[29] Daniel Parent (1999), "Methods of Pay and Earnings: A Longitudinal Analysis," *Industrial and Labor Relations Review*, Vol. 53, No. 1, pp. 71-86; Hannu Piekkola (2005), "Performance-Related Pay and Firm Performance in Finland," *International Journal of Manpower*, Vol. 26, No. 7/8, pp. 619-635.

Several additional studies focus exclusively on the productivity-enhancing effects of success-sharing, another component of performance-based pay that would be effectively eliminated by removal of the clarifying regulations provisions. Kruse (1992) analyzes data on nearly 3,000 publicly-traded companies in the United States over the period 1971-1985.[30] The author finds the institutions with success-sharing experience 2.8-3.5% greater productivity in the manufacturing sector, and 2.5-4.2% greater productivity in the non-manufacturing sector. Cable and Wilson (1989) analyze data on 52 UK engineering institutions over the period 1978-1982, documenting a 3-8% increase in output in institutions offering success-sharing plans to workers.[31] In a follow-up study using data on 61 metalworking institutions in West Germany, Cable and Wilson (1990) find even larger effects; success-sharing induces an increase in productivity between 20 and 30 percent.[32] In a similar study of roughly 2,000 French manufacturing institutions over the period 1986-1989, Cahuc and Dormont (1997) find a 2-2.2% increase in productivity in institutions offering success-sharing.[33] Similar findings are also documented in Fitzroy and Kraft (1997) and Wadhwani and Wall (1990).[34]

In sum, Prendergast (1999, pg. 8) provides an excellent summary of the literature, concluding: "Recent evidence suggests that there are strong responses of output to the use of

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[30] Douglas L. Kruse (1992), "Profit Sharing and Productivity: Microeconomic Evidence from the United States," *The Economic Journal*, Vol. 102, pp. 24-36.

[31] John Cable and Nicholas Wilson (1989), "Profit-Sharing and Productivity: An Analysis of UK Engineering Firms," *The Economic Journal*, Vol. 99, No. 396, pp. 366-375.

[32] John Cable and Nicholas Wilson (1990), "Profit-Sharing and Productivity: Some Further Evidence," *The Economic Journal*, Vol. 100, No. 401, pp. 550-555.

[33] Pierre Cahuc and Brigitte Dormont (1997), "Profit-Sharing: Does it Increase Productivity and Employment? A Theoretical Model and Empirical Evidence on French Micro Data," *Labour Economics*, Vol. 4, pp. 293-319.

[34] Felix Fitzroy and Korenelius Kraft (1997), "Cooperation, Productivity, and Profit-Sharing," *Quarterly Journal of Economics*, Vol. 102, pp. 23-35; Sushil Wadhwani and Martin Wall (1990), "The Effects of Profit-Sharing on Employment, Wages, Stock Returns and Productivity: Evidence from UK Micro-Data," *The Economic Journal*, Vol. 100, pp. 1-17.

pay-for-performance contracts."[35] Thus, removal of the clarifying regulations provisions represents a significant step backwards, harming students, IHEs and workers alike, and gives even more credence to the complaint in Blinder (1990, pg. 2): "We now pay workers not for *output* produced, not even for labour *input* provided, but simply for *time* spent on the job."[36]

One might argue that repeal of the clarifying regulations provisions still permits pay adjustments as long as these are not "based directly or indirectly upon success in securing enrollments or the award of financial aid, " and thus still affords IHEs a lever by which to induce worker effort.[37] For example, adjustments may be designed on the basis of attendance at work. However, Kerr (1975, pg. 779) notes the inadequacy of this approach: "In this sense the institution may be described as *hoping* for performance, while *rewarding* attendance."[38] Lazear (2000, pg. 1346) concludes: "A cornerstone of the theory in personnel economics is that workers respond to incentives. Specifically, it is a given that paying on the basis of output will induce workers to supply more output."[39]

The second mechanism by which de-linking worker compensation from productivity lowers worker productivity is through the hiring and retention of capable employees, which is referred to in the labor and personnel economics literatures as the worker selection effect. In terms of hiring, when vacant positions call for workers to be paid at least in part on the basis of output, only highly productive workers will find it optimal to self-select into such employment. On the one hand, a person unskilled at the tasks required for a particular position that is paid at least in part based on performance will know they will receive low earnings. On the other hand,

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[35] Canice Prendergast (1999), "The Provision of Incentives in Firms," *Journal of Economic Literature*, Vol. 37, No. 1, pp. 7-63.

[36] Alan S. Blinder, ed., (1990), Paying for Productivity, The Brookings Institution, Washington, D.C. (italics in original).

[37] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34817.

[38] Steven Kerr (1975), "On the Folly of Rewarding A, While Hoping for B," *Academy of Management Journal*, Vol. 18, No. 4, 1975, pp. 769-783 (italics in original).

[39] Edward P. Lazear (2000), "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5, pp. 1346-1361.

a person possessing the requisite skills for the position will seek out the position knowing they will be fully compensated for his or her skills. This logic holds not only at the level of admissions advisors and financial aid counselors, but also at the executive level as well. Borjas (2010, pg. 492) states: "Piece-rate compensation systems attract the most able workers and elicit high levels of effort from these workers."[40] Concurring, Booth and Frank (1999, pg. 447) state: "Jobs with performance-related pay (PRP) attract workers of higher ability and induce workers to provide greater effort."[41] Shearer (1996, pg. 277) notes: "In general, firms can use piece-rate compensation schemes to attain goals other than that of motivating workers. In particular, such schemes can be used to sort workers, both across and within firms."[42]

The importance of the worker selection effect is difficult to overstate. IHEs, as with most employers, have a difficult time screening prospective student advisors; forecasting the future productivity of prospective hires is not an easy task. Kaufman and Hotchkiss (2006, pg. 520) state:

> "Employee selection would be trivial if the firm could determine with zero cost and complete accuracy the future job productivity of each candidate in the applicant pool. But the future productivity of each worker is in fact highly uncertain. One reason is lack of information – the firm lacks knowledge about all the KSA [knowledge, skills, and abilities] of each applicant. Another problem is asymmetric information – the applicants know more about their own skills, abilities, and knowledge than the firm

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[40] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin.

[41] Alison L. Booth and Jeff Frank (1999), "Earnings, Productivity, and Performance-Related Pay," *Journal of Labor Economics*, Vol. 17, No. 3, pp. 447-463.

[42] Bruce Shearer (1996), "Piece-Rates, Principal-Agent Models, and Productivity Profiles: Parametric and Semi-Parametric Evidence from Payroll Records," *Journal of Human Resources*, Vol. 31, No. 2, pp. 275-303.

> does and, in a number of situations, will deliberately hide or selectively reveal information to maximize the probability of being selected."[43]

The nature of the compensation package overcomes these difficulties and contributes to the efficient matching of workers to positions.

Aside from hiring, de-linking worker compensation from productivity impedes an institution's ability to retain highly qualified employees. Because the regulation governing performance-related compensation to student advisors applies equally to all IHEs, student advisors who become disenchanted because their earnings do not accord with their value to students or their IHE cannot simply move to a different IHE as that institution will also be precluded from compensating individuals based on their productivity. However, the disenchanted student advisors may take their counseling skills to another industry that also values customer service and other skills required to be a good student advisor and is not barred from using merit-based payments. Thus, IHEs will be unable to retain their most capable employees due to low job satisfaction. Lazear and Shaw (2007, pg. 98) state: "[F]irms will pay for performance when it is cheaper to measure performance. When measurement costs are low, good workers will demand that their output be measured."[44] As discussed above, this is the situation encountered by IHEs employing admissions advisors.

Again, there exists abundant empirical evidence to support these claims. In Lazear (2000), discussed previously, the author finds that roughly half of the 44% increase in average output per worker is attributable to the institution's ability to hire and retain the most productive workers.[45] Azfar and Danninger (2001) analyze roughly 3,500 men in the United States over the period 1988-1994, finding that success-sharing significantly reduces employee quits and layoffs

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[43] Bruce E. Kaufman and Julie L. Hotchkiss (2006), The Economics of Labor Markets, 7th Edition, Thomson South-Western.

[44] Edward P. Lazear and Kathryn L. Shaw (2007), "Personnel Economics: The Economist's View of Human Resources," *Journal of Economic Perspectives*, Vol. 21, No. 4, pp. 91-114.

[45] Edward P. Lazear (2000), "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5, pp. 1346-1361.

and increases the likelihood that workers receive on-the-job training and experience high wage growth over time.[46]

In a similar vein, Green and Heywood (2008) analyze the relationship between performance-related pay and job satisfaction using data on over 11,000 British workers from 1998-2004.[47] The authors conclude that such pay increase workers' overall job satisfaction, as well as satisfaction with pay, hours, and job security. Analogous results are obtained in Petrescu and Simmons (2008) who analyze job satisfaction among over 20,000 British workers.[48]

In Prendergast's (1999, pg. 17) extensive review of the literature, she concludes: "In summary, this new literature points to considerable effects of compensation on performance. Studies that allowed the effects of incentives to be separated from worker selection issues suggest that perhaps one-third of the increase in performance arises from attracting better workers."[49]

The final impact of de-linking worker compensation from productivity follows directly from the preceding two consequences: reduced access to quality higher education. The loss in surplus revenues, the inability to recruit and retain capable admissions advisors, and inability to properly incentivize admissions advisors to be productive will inhibit the Nation's ability to meet President Obama's broad and ambitious goal for the United States to have the highest percentage of college graduates in the world by 2020. The empirical evidence discussed heretofore related to the lower productivity and output in institutions failing to properly incentivize workers supports this claim.

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[46] Omar Azfar and Stephan Danninger (2001), "Profit-Sharing, Employment Stability, and Wage Growth," *Industrial and Labor Relations Review*, Vol. 54, No. 3, pp. 619-630.

[47] Colin Green and John S. Heywood (2008), "Does Performance Pay Increase Job Satisfaction" *Economica*, Vol. 75, pp. 710-728.

[48] Alina Ileana Petrescu and Rob Simmons (2008), "Human Resource Management Practices and Workers' Job Satisfaction," *International Journal of Manpower*, Vol. 29, No. 7, pp. 651-667.

[49] Canice Prendergast (1999), "The Provision of Incentives in Firms," *Journal of Economic Literature*, Vol. 37, No. 1, pp. 7-63.

The loss of surplus revenues will increase the prevalence of underfunded programs, impede development of new and innovative programs, and lower diversity in existing programs. The diminished quality of the programs being offered will negatively impact the demand for access by qualified potential students. In addition, the diminished quality of the recruiting workforce, combined with their being not properly incentivized to help students – particularly non-traditional students from atypical backgrounds – achieve a post-secondary degree, will restrict access to those students who remain hopeful of attaining such a degree. Kerr (1975, pg. 769) summarizes this final point: "Whether dealing with monkeys, rats, or human beings, it is hardly controversial to state that most organisms seek information concerning what activities are rewarded, and then seek to do (or at least pretend to do) those things, often to the virtual exclusion of activities not rewarded. The extent to which this occurs of course will depend on the perceived attractiveness of the rewards offered, but neither operant nor expectancy theorists would quarrel with the essence of this notion."[50] Thus, one cannot expect admissions advisors to recruit effectively when recruiting is explicitly decoupled from the compensation paid to employees.

In conclusion, Borjas (2010, pg. 469) summarizes the value of the current "clarifying regulations" provisions, whereby at least a portion of a recruiter's compensation may depend on his or her productivity: "A piece-rate system attracts the most-able workers, elicits high levels of effort from the workforce, ties pay directly to performance, minimizes the role of discrimination and nepotism, and increases the institution's productivity."[51] As 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 future economy.[52] The consequences of repealing the "clarifying regulations" provisions on achieving that goal cannot be dismissed.

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[50] Steven Kerr (1975), "On the Folly of Rewarding A, While Hoping for B," *Academy of Management Journal*, Vol. 18, No. 4, 1975, pp. 769-783.

[51] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin.

[52] President Barrack Obama, Remarks to a Joint Session of Congress (Feb. 24, 2009). See "Written Submission To OMB Regarding The Department Of Education's Potential Regulatory Changes Governing Incentive Compensation That Are Currently Under OMB Review" by

[Footnote continued on next page]

FALLACIES OF POSSIBLE JUSTIFICATIONS FOR REMOVAL OF THE "CLARIFYING REGULATIONS" PROVISIONS

Despite the enormous costs of removing the current clarifying regulations provisions, it is possible – conceptually – that there are benefits from their repeal that more than offset such costs. ED has discussed three such possible benefits: (i) protection against consumer fraud, (ii) protection against "sham" programs, and (iii) avoidance of litigation. However, these rationales are faulty on three fronts. First, as discussed heretofore, the costs of de-linking worker compensation from productivity are quite sizeable and robust across numerous studies. Second, the problems suggested by ED are overstated and not supported by data. Finally, barring performance-related pay for admissions advisors is not the most efficient method to ameliorate the problems suggested by ED. We now briefly discuss the final two points.

To begin, ED claims that "the Department's experience demonstrates that unscrupulous actors routinely rely upon these [clarifying regulations] to circumvent the intent of Section 487(a)(20) of the HEA."[53] Moreover, it is argued that the clarifying regulations provisions provide an "incentive to deceive or misrepresent the manner in which a particular educational program meets a student's need… and may lead to lowered or misrepresented admission standards and program offerings, lowered academic progress standards, altered attendance records, and a lack of meaningful emphasis on retention."[54]

Even if consumer fraud due to low quality or fraudulent programs or poor matching between students and education programs is a severe problem, prohibiting merit-based payments to admissions advisors is not an efficient or even an effective solution. In the prior discussion of the literature assessing the empirical effects of performance-based pay on worker productivity, it is well known that compensating workers purely for quantity, to the exclusion of quality, can

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[Footnote continued from previous page]
DeVry and its affiliate institutions. http://www.whitehouse.gov/omb/assets/oira_1840/1840_05032010-2.pdf.

[53] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34817.

[54] Federal Register, Vol. 75, No. 117, June 18, 2010, pp. 34817-34818.

induce workers to ignore quality. However, the solution is not to de-link pay from performance, but rather to appropriately incentivize quality at the same time. Lazear (1986, pg. 420) states: "It is sometimes alleged that piece rates induce the worker to produce too many low-quality goods and that salaries avoid the problem…. The piece rate can be made contingent on the output quality characteristics as well as on the quantity characteristics."[55] For instance, in Lazear (2000), the study of the large auto glass company discussed above, the issue of quality was addressed by forcing the installer of the defective windshield to reinstall the windshield on his or her own time.[56] In Copeland and Monnet (2002), the study of performance-related pay to check processors at the Federal Reserve Bank of Minneapolis, the authors find that such pay did not adversely affect quality due to other checks in the system.[57] Specifically, another department was responsible for checking for errors and, if found, the errors were traceable to the worker responsible.

In terms of the admissions advisors at IHEs, performance-related pay schemes can be designed that are, at least in part, conditional on the student enrolling and meeting some measure of success, such as program completion. Moreover, any instances of consumer fraud can easily be traced to the offending recruiter and appropriate actions can be taken. Such a compensation system maintains the benefits of performance-based pay, but also ensures against consumer fraud. In fact, this is precisely what is currently allowed in the clarifying regulations provisions.[58] Similarly, "clawback" provisions (whereby executives are contractually obligated to repay performance-related pay to the institution if the measures of performance are later determined to be lower than originally believed) in executive performance-related pay schemes

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[55] Edward P. Lazear (1986), "Salaries and Piece Rates," *The Journal of Business*, Vol. 59, No. 3, pp. 405-431.

[56] Edward P. Lazear (2000), "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5, pp. 1346-1361.

[57] Adam Copeland and Cyril Monnet (2002), "The Welfare Effects of Incentive Schemes," FEDS Working Paper No. 2003-08.

[58] See 34 C.F.R. §§ 668.14(b)(22)(i)(E).

have become increasingly popular and ensure that performance-related compensations contains the "right" incentives.

It may be ED's contention that IHEs themselves are not incentivized to incorporate quality into the incentive schemes offered to admissions advisors. As a result, one must still be concerned over the potential for consumer fraud. However, the solution is not to eliminate performance-related pay for admissions advisors; the solution is to properly incentivize IHEs. For example, if ED is concerned about the "potential" for programs with increasingly lower standards or students essentially "buying" a degree, then it should improve its oversight of the quality of institutions receiving Title IV funds; compensation schemes for admissions advisors and financial aid counselors are too disconnected from this "potential" problem.

In fact, ED already uses one such mechanism by maintaining a list of recognized accrediting agencies and IHEs that have been accredited by at least one such agency. According to ED's website:

> "The accreditation database is brought to you by the U.S. Department of Education's Office of Postsecondary Education. Each of the postsecondary educational institutions and programs contained within the database is, or was, accredited by an accrediting agency or state approval agency recognized by the U.S. Secretary of Education as a 'reliable authority as to the quality of postsecondary education' within the meaning of the Higher Education Act of 1965, as amended (HEA).... The goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality. Accrediting agencies, which are private educational associations of regional or national scope, develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met. Institutions and/or programs that request an agency's evaluation and that meet an agency's criteria are then 'accredited' by that agency."[59]

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[59] See http://www.ope.ed.gov/accreditation/. Accessed 21 July 2010.

In addition to issues of consumer fraud, ED believes that removal of the "clarifying regulations" provisions will eliminate unnecessary litigation due to the "considerable time and effort [that] has been lost by both the Department and institutions engaged in litigation."[60] This claim is faulty for two reasons. First, it ignores the Computer Learning Centers case that arose due to confusion over permissible payment schemes prior to the "clarifying regulations" provisions, as well as the numerous concerns over the lack of clarity in the regulations that originally prompted the adoption of the "clarifying regulations" provisions.

Second, the return to this lack of clarity that will occur if the current "clarifying regulations" regulations are removed ensures continued, if not increased, litigation in the future. This confusion stems from the fact that ED claims that the proposed regulatory changes "continue to authorize merit-based compensation for financial aid or admissions staff" using a "variety of standard evaluative factors" as long as IHEs do not "consider the employee's success in securing student enrollments or the award of financial aid or institutional goals based on that success among those factors."[61] This ensures one of two outcomes. The first possibility is that salary and wage adjustments will be made on the basis of factors that are entirely uncorrelated with performance on the job for which individuals are hired. This will surely lead to resentment among employees and future lawsuits claiming discrimination due to arbitrary merit awards. Re-quoting Borjas (2010, pg. 469): "A piece-rate system attracts the most able workers, elicits high levels of effort from the workforce, ties pay directly to performance, *minimizes the role of discrimination and nepotism*, and increases the firm's productivity."[62] The second possibility is that merit awards will be given on the basis of "standard evaluative criteria" that happen to be correlated with a worker's success in securing enrollments or financial aid awards (e.g., being friendly during recruiting calls). In this case, IHEs will have to defend themselves against litigation claiming the payments were intentionally designed to reward workers for securing

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[60] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34817.

[61] Federal Register, Vol. 75, No. 117, June 18, 2010, pg. 34819.

[62] George Borjas (2010), Labor Economics, 5th Edition, McGraw-Hill Irwin (emphasis added).

enrollments or financial aid. In fact, IHEs will be forced to design merit criteria that are uncorrelated with productivity simply to avoid the appearance of impropriety.

The absurdity of this situation arises from the fact that ED wishes workers to be compensated on the basis of criteria that are completely independent of the job for which admissions advisors are hired. This ensures that someone – either IHE workers or ED – will always be dissatisfied with any compensation package offered by IHEs.

CONCLUDING REMARKS

ED's efforts to increase the quality of post-secondary programs, improve access to such programs, and protect consumers of these programs from fraudulent behavior are laudable. However, removing the "clarifying regulations" provisions and returning to the regulatory environment of the 1990s is not only not the solution, it will exacerbate many problems. By de-linking pay from performance for admissions advisors and financial aid counselors, (i) surplus revenues available to IHEs to expand and innovate will fall markedly, (ii) the most able employees will leave the industry for positions that appropriately reward their productivity, further diminishing surplus revenues and access to post-secondary education, and (iii) litigation will almost surely rise due to discrimination lawsuits concerning ad hoc pay policies or lawsuits brought by private litigants or ED when merit is suspected to be correlated with performance.

To ensure the continued quality of post-secondary education programs, as well as protect against consumer fraud and fraudulent use of Title IV funds, ED should focus its attention on the monitoring of quality of programs receiving Title IV funds.

Exhibit 1

June 2010

CURRICULUM VITAE

Daniel J. Slottje

Academic Experience:

Assistant Professor (1983)
Department of Economics
University of North Texas
Denton, TX 75206

Assistant Professor (1984 - 1988)
Department of Economics
Southern Methodist University
Dallas, TX 75275

Faculty Member (July 1988)
Luxembourg Income Study Summer Workshop Series
Walferdange, Luxembourg

Associate Professor (1989-1995)
Department of Economics
Southern Methodist University
Dallas, TX 75275

Visiting Professor (Fall 1991)
Department of Economics
S.U.N.Y.-Binghamton
Binghamton, NY 13901

Research Fellow (August 1994)
UpJohn Institute for Employment Research

Visiting Professor (October 1995)
Department of Economics
University of Melbourne
Melbourne, Australia

Professor (1996-present)
Department of Economics
Southern Methodist University
Dallas, TX 75275

Education: Ph.D., Economics, Texas A&M University, August 1983
B.A., Clemson University, May 1979

Teaching Experience: Law and Economics. Econometric Theory and Applications. Labor Economics. Human Resource Economics. Intermediate Microeconomic Theory. Applied Demand Analysis. Mathematical Economics. Industrial Organization. Regulation and Antitrust. History of Thought. Microeconomic and Macroeconomic Principles.

Professional Memberships:

American Economic Association
Southern Economic Association
American Statistical Association
Econometric Society

Other Professional Activities:

Consultant to:
United Nations Development Programme (2007)

Reviewer for:
The National Science Foundation
Social Science Research Council of Canada
Cambridge University Press
Oxford University Press

Member of:
Scientific Committee for International Conference on Gini and Lorenz, May 2005, Siena, Italy

International Program Committee for International Conference on Time Series Econometrics, Finance and Risk, July 2006, Perth, Australia

Fellow:
Journal of Econometrics, 2008

Referee for:
American Economic Review
Communications in Statistics
Econometric Theory
Economica
Economic Journal
Empirical Economics
European Economic Review
Industrial Relations
Industrial Relations and Labor Review
Journal of American Statistical Association
Journal of Applied Econometrics
Journal of Business and Economic Statistics
Journal of Econometrics
Journal of Economic Surveys
Journal of Human Resources
Journal of Public Economics
Review of Economics and Statistics
Review of Economic Studies
And many others.

Founding Editor of:
Research on Economic Inequality (1989-1998)

Founding Co-editor of:
Journal of Economic Inequality (2003)

Associate Editor of:
NAFTA: The Business and Law Review of the Americas
Journal of Economic Surveys
Journal of Income Distribution (1998-2003)
Empirical Economics (1998-2003)

Editorial Board (1993-1996):
Review of Income and Wealth

Research Interests: Statistics and Applied Economics.

Publications:

"Measuring the Volatility in U.S. Treasury Benchmarks and Debt Instruments," Econometric Reviews, (forthcoming) with S. Hoti, E. Maasoumi and M. McAleer.

Measuring Human Capital: Theory and Practice," Journal of Economic Surveys, Vol. 24 (2010), pp. 210 - 205.

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"Labor Supply Decisions, Human Capital Attributes and Inequality in the Size Distribution of Earnings in the U.S.: 1952-81," Journal of Human Resources, Vol. 22 (1987), 82-100, with Joyce R. Shackett.

"Relative Price Changes and Inequality in the Size Distribution of Various Components of Income: A Multidimensional Approach," Journal of Business and Economic Statistics, Vol. 5 (1987), 19-26.

"Industrial Policy and the Nature of the Firm," Journal of Institutional and Theoretical Economics, Vol. 142 (1986), 79-100, with P. K. Porter and G. W. Scully.

"Variable Preferences, Demand Elasticities and the True Cost-of-Living Index: The Case of Mexico," Advances in Econometrics, Vol. 5 (1986), 327-341, with K. Hayes, D. J. Molina, and M. Nieswiadomy.

"A Sensitivity Analysis of the Effect of Fiscal and Monetary Policy on the Size Distribution of Income in the U.S.," Advances in Econometrics, Vol. 5 (1986), 97-122, with W.R. Russell and Joe Haslag.

"A Comprehensive Analysis of Economic Inequality in the U.S. for the years 1952-1981," Southern Economic Journal, Vol. 52 (1985), 412-422, with P. K. Porter.

"A New Measure of Income Inequality Based Upon the Beta Distribution of the Second Kind," Economics Letters, Vol. 15 (1984) 369-375.

"A Note on Aggregation of Fechner-Thurstone Direct Utility Functions," Economics Letters, Vol. 14 (1984) 117-122, with R. L. Basmann and D. J. Molina.

"Variable Consumer Preferences, Economic Inequality and the Cost of Living Index," Advances in Econometrics, Vol. 3 (1984), 1-69, with R. L. Basmann and D. J. Molina.

"Some New Methods of Predicting Changes in Economic Inequality Associated with Trends in Growth and Development," in Issues in 3rd World Development, Westview Publishing Company: Boulder, (1984), with R. L. Basmann, D. J. Molina, and M. Rodarte.

"Budget-Constraint Prices as Preference Changing Parameters of the Generalized Fechner-Thurstone Direct Utility Function," American Economic Review, Vol. 73 (1983) 411-413, with R. L. Basmann and D. J. Molina.

"The Importance of Relative Prices in Analyzing Veblen Effects," Journal of Economic Issues, Vol. 13 (1983) 197-207, with R. Phillips.

Books:

The Generalized Fechner-Thurstone Direct Utility Function and Some Applications, (1988), with R. L. Basmann, K. J. Hayes and D. J. Molina, Springer-Verlag Publishing Co.

The Structure of Earnings and the Measurement of Income Inequality, (1989), North-Holland.

Macroeconomic Activity and Income Inequality in the U.S., (1989), with J. Haslag and W. Russell, JAI Press.

Case Studies in Finance Using Microsoft Excel, (1989), with J. D. Johnson, McGraw-Hill.

Case Studies in Finance Using Lotus 123, (1990), with J. D. Johnson, McGraw-Hill.

Measuring the Quality of Life Across Countries, (1991), with G. Scully, J. Hirschberg, and K. Hayes, Westview Press.

Some New Methods for Measuring and Describing Economic Inequality, (1994), with R. L. Basmann and K. J. Hayes, JAI Press.

Crisis on the Rio Grande: Economic Development on the Mexico-Texas Border, (1994), with D. Betts, Westview Press.

Pay and Performance in the NBA, (1997), with M. Buchanan, JAI Press.

Measuring Trends in U.S. Income Inequality, (1998), with H. Ryu, Springer-Verlag.

Income Inequality, Poverty and Economic Welfare, (eds.), (1998) with B. Raj, Springer-Verlag.

The Role of the Academic Economist in Litigation Support , (ed.), (1999), North-Holland.

Measuring Market Power, (ed.), (2002), North-Holland.

Patent Activity and Technical Change in U.S. Industries, (2005), with Mike McAleer, North-Holland.

Economic Damages in IP Matters (editor), (2006), John Wiley & Son Publishing.

The Impact of Antitrust Enforcement on US Industries. (Under review)

Quantifying Consumer Preferences (editor) in preparation.

Measuring Human Capital (editor) in preparation.

Book Reviews: Dynamics of Income Distribution, by John Creedy for Journal of the American Statistical Association (1987).

The Standard of Living by A. Sen for Economic Development and Cultural Change (1990).

Lifetime Income Distributions and Redistribution, by Ann Harding for Journal of Economic Literature (1995).

A Theory of Earnings Distributions, by R. Von Weizacker for Journal of Income Distribution (1995).

Top Heavy, by Ed Wolff for Journal of Comparative Economics (1996).

Papers:

1. "Impact of Marriage and Children on Worklife Expectancy," under revision, with D. Millimet and M. Nieswiadomy.

Papers Given:

1. Latin American Econometric Society Meetings, Mexico City, Mexico, July 1982, with R. L. Basmann and D. J. Molina.

2. Joint Session of American Economic Association and Econometric Society Meetings, San Francisco, CA, December 1983, with R. L. Basmann and D. J. Molina.

3. Association for Evolutionary Economics Meetings, San Francisco, CA, December 1983.

4. Mid-South Economics Association Meetings, Little Rock, AR, February 1984, with Don MacDonald.

5. Southwest Economics Association Meetings, Fort Worth, TX, March 1984, with M. Nieswiadomy.

6. Southern Economic Association Meetings, Atlanta, GA, November 1984, with Joyce Shackett.
7. World Congress of the Econometric Society, Boston, MA, August 1985, with Ravi Batra.

8. Southern Economic Association Meetings, Dallas, TX, November 1985, with Ravi Batra
9. Southwest Economics Association Meetings, San Antonio, TX, March 1986, with B. B. Reagan.

10. Southwest Economics Association Meetings, San Antonio, TX, March 1986, with J. Haslag and T. Fomby.

11. Southwest Economics Association Meetings, San Antonio, TX, March 1986, with K. Hayes.

12. Southwest Economics Association Meetings, San Antonio, TX, March 1986, with R. L. Basmann.

13. Summer North American Econometric Society Meetings, Durham, NC, June 1986, with D. J. Molina.

14. Summer North American Econometric Society Meetings, Durham, NC, June 1986, with R. L. Basmann.

15. Southern Economics Association Meetings, New Orleans, LA, November 1986 with R. Batra.

16. Southern Economics Association Meetings, New Orleans, LA, November 1986 with K. Hayes.

17. American Statistical Association Meetings, San Francisco, CA, August 1987, with K. J. Hayes and J. G. Hirschberg.

18. Econometric Society Meetings, Chicago, IL, December 1987, with D. Black and K. Hayes.

19. Southern Economics Association Meetings, San Antonio, TX, November 1988, with K. Hayes and J. Hirschberg.

20. Southern Economics Association Meetings, San Antonio, TX, November 1988, with M. Nieswiadomy.

21. American Statistical Association Meetings, San Diego, CA, January 1989, with K. Hayes and J. Hirschberg.

22. Southwest Finance and Amalgamated Disciplines, Dallas, TX, March 1990, with J. Haslag and M. Nieswiadomy.

23. World Congress of the Econometric Society, Barcelona, Spain, August 1990, with R. Basmann and K. Hayes

24. World Congress of the Econometric Society, Barcelona, Spain, August 1990, with R. Basmann and K. Hayes

25. American Public Policy Association Meetings, San Francisco, CA, October 1990, with K. Hayes and P. Byrnes.

26. Southern Economics Association Meetings, New Orleans, LA, November 1990, with K. Hayes, M. Nieswiadomy and E. Wolff.

27. Southern Economics Association Meetings, New Orleans, LA, November 1990, with Charlie Diamond, E. Maasoumi and M. Nieswiadomy.

28. International Workshop on Discrimination and Segregation, Ramat Gan, Israel, June 1991, with K. Hayes and J. G. Hirschberg.

29. International Workshop on Discrimination and Segregation, Ramat Gan, Israel, June 1991, with K. Hayes and J. G. Hirschberg.

30. Western Economics Association, Seattle, WA, July 1991, with K. Hayes and Peter Lambert.

31. International Meeting on Income Inequality and Poverty, Siena, Italy, October 1991, with K. Hayes, M. Nieswiadomy and E. Wolff.

32. Sesquicentennial Conference on Inequality, University of Notre Dame, September 1992, with N. Balke.

33. Sesquicentennial Conference on Inequality, University of Notre Dame, September 1992, with K. Hayes, M. Nieswiadomy and E. Wolff.

34. Southern Economics Association Meetings, Washington, D.C., November 1992, with H. Ryu.

35. Southern Economics Association Meetings, Washington, D.C., November 1992, with J. Hirschberg.

36. Southern Economics Association Meetings, New Orleans, LA, November 1993, with J. Hirschberg.

37. ASSA Meetings, Boston, MA, January 1994, with R. L. Basmann.

38. NSF Conference on Equity, Distribution and Growth, Honolulu, Hawaii, August 1994, with H. Ryu.

39. Biannual Conference of International Association of Income and Wealth, New Brunswick, Canada, August 1994, with B. Raj.

40. UpJohn Institute/Donner Foundation Conference on Fringe Benefits and Labor Costs, Kalamazoo, Michigan, November 1994, with Steve Woodbury.

41. Southern Economics Association Meetings, Orlando, Florida, November 1994, with S. Woodbury.

42. Southern Economics Association Meetings, Orlando, Florida, November 1994, with J. Hirschberg, J. Lye and V. Martin.

43. World Congress of the Econometric Society, Tokyo, Japan, August 1995, with H. Ryu.

44. Southern Economics Association Meetings, New Orleans, Louisiana, November 1995, with Shlomo Yitzhaki and S. Zandvakili.

45. Texas Econometrics Camp, San Antonio, Texas, February 1996, with H. Ryu.

46. Asian Meetings of Econometric Society, Perth, Australia, July 1996, with E. Maasoumi and J. Hirschberg.

47. Asian Meetings of Econometric Society, Perth, Australia, July 1996, with B. Raj.

48. Biannual Conference of International Association of Income and Wealth, Lillihammer, Norway, August 1996, with S. Yitzhaki and S. Zandvakili.

49. American Economic Association Meetings, New Orleans, January 1997, with S. Yitzhaki.

50. Texas Econometrics Camp, Corpus Christi, Texas, February 1997, with B. Raj.

51. American Statistical Association, Dallas, August 1998, with E. Castillo and J. Sarabia.

52. Southern Economic Association, Baltimore, Nov. 1998, with J. Hirschberg.

53. American Statistical Association, Baltimore, August 1999, with C. Dagum.

54. World Congress of the Econometric Society, Seattle, August 2000, with H. Ryu.

55. Swiss Competition Commission, Geneva, Switzerland, January 2001.

56. State Bar of Texas Asian Pacific Interest Section, Austin, April 2001.

57. American Law Firm Association, Labor and Employment Section, Dallas, October 2001.

58. Econometric Society Australasian Meeting, July 2002.

59. State Bar of Texas Intellectual Property Section, Austin, February 2003.

60. General Electric Co., Litigation Counsel Meeting, Southburg, Ct., October 2004, with C. Gerardi, and B. Imburgia.

61. Southern Economic Association, New Orleans, LA, November 2004, with T. Fomby.

62. Law Seminars International, Philadelphia, PA., October 2006.

Exhibit 2

Daniel J. Slottje, Ph.D.

Telephone: 214-397-1703

Professional Experience

Dr. Slottje is a Senior Managing Director with FTI Consulting, Inc. He resides in the firm's Dallas office. Dr. Slottje has provided consulting services to clients in various industries. He has significant experience in litigation consulting in labor/employment matters. In addition to advising counsel, he has provided testimony in these matters as well as in others. Dr. Slottje is a Professor of Economics at Southern Methodist University in Dallas, Texas and is a former partner in an international consulting firm.

Education and Certification

Dr. Slottje received his Bachelor of Arts from Clemson University in 1979 and his Ph.D. in Economics from Texas A&M University in 1983. He has published more than 135 articles and written or edited 15 books on many economic issues**.** His papers have appeared in the American Economic Review, Econometric Reviews, the Journal of Econometrics, the Review of Economics and Statistics, the Journal of Human Resources, the Journal of Labor Research, Research in Labor Economics, the Journal of Applied Econometrics and the Journal of Business and Economics Statistics, among others.

Professional Activities

Dr. Slottje is a member of the American Economic Association, the American Statistical Association, and the Econometric Society. He has advised the United Nations Development Programme. He has served as a consultant to many firms on labor and employment issues including the U.S. Postal Service. He is a reviewer for the National Science Foundation, the Social Science Research Council of Canada, Oxford and Cambridge University Presses, as well as serving as a referee for many journals including the American Economic Review, the Review of Economics and Statistics, the Journal of Applied Econometrics, the Journal of Econometrics, and the Journal of Business and Economic Statistics. Dr. Slottje was named to the "applied econometrician hall of fame" in 1999 and ranked in the top three in the world (out of over 5000 people) in applied econometrics, based on number of published articles in top econometrics journals. He was named Fellow, Journal of Econometrics, in 2008.

Selected Labor/Employment Engagement Experience

- Analysis of Class Certification Issues in Labor/ Employment matters.

- Analysis of Hour/Wage claims.
- Discrimination Analysis.
- Analysis of FLSA claims.
- Quantification of damages in wrongful termination claims.
- Performed wage studies in collective bargaining negotiations.
- Productivity/Wage Studies.
- Analyzed Appropriateness of Job Search.
- Lost Earnings Analysis.
- Analyzed compensation/benefit packages for employees.
- Valued Stock Option Plans for employees.
- Seniority System and Compensation Structure Analysis

Selected Publications

Below are select publications. A complete list is available in Dr. Slottje's curriculum vitae.

1. "Measuring Human Capital: Theory and Practice," Journal of Economic Surveys, Vol. 24 (2010), pp. 210 - 205.

2. "The Impact of Worklife Expectancy on Measuring Human Capital," Journal of Economic Surveys, Vol. 24 (2010), pp. 339 - 361 with D. Millimet and M. Nieswiadomy.

3. "Bounding Estimates of Wage Discrimination," Research in Labor Economics, Vol. 23 (2004), 215-233, with J. Hirschberg.

4. "Estimating Worklife Expectancies: An Econometric Approach," Journal of Econometrics, Vol. 113 (2003) 83-114, with M. Nieswiadomy, H. Ryu and D. Millimet.

5. "Measuring Human Capital and Its Distribution", Journal of Structural Change and Economic Dynamics, Vol. 11 (2000), 67-94, with C. Dagum.

6. "Estimating the Density of Unemployment Duration Based on Contaminated Samples or Small Samples", Journal of Econometrics, Vol. 95 (2000), 131-156, with H. Ryu.

7. "Productivity Slowdown in the United States: Some New Evidence from the Level Shift Hypothesis," Economic Inquiry, Vol. 37 (1999), 226-241, with B. Raj and J. Dolmas.

8. "A New Method for Detecting Discrimination in Labor Markets," Journal of Econometrics, Vol. 61 (1994), 23-42, with K. Hayes and G. Scully.

Testimony History

Professor Slottje has appeared live at **trial** over **80** times and given over **170** depositions from 1987 to the present. Herein is his testimony history since 2006.

Case Style	***Cause No.***	***Court***	***Testimony Type***
Melissa Fukuchi, individually and on behalf of all other similarly situated v. **Pizza Hut, Inc.,** a California Corporation, And Does 1 through 50, Inclusive	NO. BC302589	Superior Court of California, County of Los Angeles Central	Deposition 01/19/2006
David Jurado and Penny Schultz v. **Hewlett-Packard Company**	CV 025620	Superior Court of California, County of San Joaquin	Deposition 04/10/2006
Xenium S.A. de C.V. v. Regent Hotels Worldwide, Inc.	12 296/JNK	International Court of Arbitration, Dallas	Arbitration 04/20/2006
Avid Identification Systems, Inc. v. **Philips Semiconductors, Inc., Philips Semiconductor Manufacturing, Inc., The Crystal Import Corporation, and Datamars, SA**	2:04-CV-183	U.S. District Eastern District of Texas, Marshall Division	Trial 05/24/2006
Nutrition 21, LLC v. **General Nutrition Corporation**	6:05-CV-228(LED)	U.S. District Court, Eastern District of Texas Tyler Division	Deposition 10/27/2006
Ellen Schaaf, v. **SmithKline Beecham Corporation d/b/a/ GlaxoSmithKline; SmithKline Beecham Corporation; and GlaxoSmithKline**	1:04-CV-2346-GET	U.S. District Court, Northern District of Georgia Atlanta Division	Deposition 01/17/2007
In re: Apollo Group, Inc. Securities Litigation	CV 04-2147-PHX-JAT	U.S. District Court, District of Arizona	Deposition 02/02/2007

Case Style	***Cause No.***	***Court***	***Testimony Type***
Orion IP, LLC v. **Hyundai Motor America**	6:05-CV322-LED	U.S. District Court, Eastern District of Texas, Tyler Division	Deposition 02/15/2007
Network-1 Security Solutions, Inc. v. **D-Link Corporation and D-Link Systems, Incorporated**	6:05-cv-00291	U.S. District Court Eastern District of Texas, Tyler Division	Deposition 03/28/2007
Orion IP, LLC v. **Mercedes-Benz USA LLC, et al.**	6:05-CV-322	U.S. District Court Eastern District of Texas, Tyler Division	Trial 05/25/2007
Miguel Garcia v. **Lowe's Company, Inc.; Lowe's Home Centers, Inc.; Lowes' HIW, Inc.; Dedicated Delivery & Install Services, Inc.; Victor Manuel Montes, doing business as Cash Cow; and DOES 1-100 inclusive.**	GIC 841120	Superior Court of the State of California for the County of San Diego	Deposition 05/30/2007
Trading Technologies International, Inc. v. **eSpeed, Inc., et al.**	C.A. No. 03-612 (KAJ)	U.S. District Court for the Northern District of Illinois, Eastern Division	Deposition 09/07/2007
Greg Randall, Cynthia Peterson, and Terry Head, on behalf of themselves and all others similarly situated and on behalf of the general public v. **Costco Wholesale Corporation, a Washington corporation doing business as Costco, and DOES 1 through 100, inclusive.**	BC 296369	Superior Court of the State of California for the County of Los Angeles	Deposition 09/13/2007
Trading Technologies International, Inc. V, **eSpeed, Inc., et al.**	C.A. No. 03-612 (KAJ)	U.S. District Court for the Northern District of Illinois, Eastern Division	Trial 09/28/2007

Case Style	***Cause No.***	***Court***	***Testimony Type***
MS Perry Company, Inc. and ANISA International, Inc. **v.** **Mary Kay Inc.**	05-00857	US District Court of Dallas County, 68th Judicial District	Deposition 12/05/2007
Dennis Johnson and Arnold Rosenfeld, individually and on behalf of others similarly situated v. **GRUMA CORPORATION, a Nevada corporation, dba MISSION FOODS CORPORATION**; and DOES 1 through 100, inclusive.	1220026252	JAMS Arbitration Los Angeles, CA	Deposition 03/28/2008
In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding **(Representing the Recording Industry of America)**	2006-3 CRB DPRA	Copyright Royalty Judges Library of Congress Washington, D.C.	Adjustment Proceeding 05/07/2008
Dennis Johnson and Arnold Rosenfeld, individually and on behalf of others similarly situated v. **GRUMA CORPORATION, a Nevada corporation, dba MISSION FOODS CORPORATION**; and DOES 1 through 100, inclusive.	1220026252	JAMS Arbitration Los Angeles, CA	Arbitration 05/15/2008
Nelson Gonzalez, Marco Garcia, Reymundo Garcia, Aymer Avila, Julian Nunez, Luis A. Arteaga, Juan Carlos Torres, Roberto Lopez, and Nestor Alvarez, et al. v. **Freedom Communications, Inc., d/b/a/ The Orange County Register**	03CCO8756	Superior Court of California County of Orange, Central Justice Center	Deposition 09/17/2008

Case Style	***Cause No.***	***Court***	***Testimony Type***
Trish Wren and Cynthia Piper et. al., individually and on behalf of others similarly situated, Plaintiffs, vs. **RGIS Inventory Specialists, LLC, RGIS, LLC**, and Does 1-25 Inclusive, Defendants.	3:06-cv-05778 JCS	United States District Court Northern District of California	Deposition 10/30/2008
Raytheon Company, Plaintiff, v. Indigo Systems Corporation and **FLIR Systems, Inc.**, Defendants.	Case No. 4:07 cv 109	United States District Court for the Eastern District of Texas, Sherman Division	Deposition 12/19/2008
The American Medical Association, et al., Plaintiffs, v. **United Healthcare Corporation**, et al., Defendants.	Master File No. 00 Civ. 2800 (LMM) (GWG)	United States District Court Southern District of New York	Hearing 03/31/2009 04/01/2009
Franchez Isaguirre, et al., Plaintiffs, v. **Guess ?, Inc.**; and Does 1 to 50, Inclusive, Defendants.	Case No.: BC357631	Superior Court of the State of California for the County of Los Angeles	Deposition 04/13/2009
Centocor, Inc., and New York University, Plaintiffs, v. **Abbott Laboratories, Abbott Bioresearch Center, Inc., and Abbott Biotechnology LTD.**, Defendants.	Civil Action No. 2-07-cv-139 (TJW)	United States District Court for the Eastern District of Texas, Marshall Division	Deposition 04/17/2009
Eduardo Rios, et al., Plaintiffs, v. **Jennie-O Turkey Store, Inc. A Minnesota corporation**, West Central Turkeys, Inc. a/k/a Pelican Turkeys, Inc.), and Heartland Foods Co., Defendants.	Court File No. EM 03-020489	State of Minnesota Fourth Judicial District, Hennepin County District Court	Deposition 06/09/2009

Case Style	***Cause No.***	***Court***	***Testimony Type***
Centocor Ortho Biotech, Inc., and New York University, Plaintiffs, v. **Abbott Laboratories, Abbott Bioresearch Center, Inc., and Abbott Biotechnology Ltd.**, Defendants.	Civil Action No. 2-07-cv-139 (TJW)	United States District Court for the Eastern District of Texas, Marshall Division	Trial 06/22/09
Becton Dickinson and Company, and MDC Investment Holdings, Inc., Plaintiffs, v. Retractable Technologies, Inc., Defendant.	Civil Action No. 5:07-cv-137	United States District Court for the Eastern District of Texas, Texarkana Division	Deposition 07/14/2009
Autodesk, Inc. v. Dassault Systèmes SolidWorks Corporation.	Civil Action No. 3:08-cv-4397 WHA	United States District Court Northern District of California, San Francisco Division	Deposition 11/17/2009
Marvell Semiconductor, Inc., Marvell Asia Pte., Ltd., and Marvell Intl., Ltd., Plaintiffs, v. Commonwealth Scientific and Industrial Research Organization, Defendants.	Civil Action No. 6:07-CV-204	United States District Court for the Eastern District of Texas, Tyler Division	Deposition 01/25/2010
TRISHA WREN and CYNTHIA PIPER et. al., individually and on behalf of others similarly situated, Plaintiffs, vs. **RGIS Inventory Specialists, LLC, RGIS, LLC**, and Does 1-25 Inclusive, Defendants.	Civil Action No. 3:06-cv-05778 JCS	United States District Court Northern District of California	Deposition 04/15/2010
IN RE: **AETNA** UCR LITIGATION	Civil Action No. 2:07-CV-3541	United States District Court District of New Jersey	Deposition 05/05/2010

Case Style	***Cause No.***	***Court***	***Testimony Type***
Christopher Williams, on behalf of himself and all others similarly situated, Plaintiffs, v. **Allstate Insurance Company, an Illinois Corporation**; and DOES 1 to 100, Inclusive, Defendants.	Case No. BC 382577	Superior Court of the State of California for the County of Los Angeles – Central District	Deposition 06/24/2010

Highlighted text denotes party(ies) Dr. Slottje assisted.