

AMERICAN COUNCIL ON EDUCATION



DIVISION OF GOVERNMENT & PUBLIC AFFAIRS

December 22, 2010

Secretary Arne Duncan
U.S. Department of Education
LBJ Education Building, Room 7W311
400 Maryland Avenue, SW
Washington, DC 20202

Subject: Incentive Compensation Regulation

Dear Secretary Duncan:

In reviewing the provisions of the Department of Education's final regulation banning incentive compensation (34 CFR 668.14(b)(22)), many questions have arisen regarding its application. In an attempt to assist higher education institutions in understanding and applying the regulation, the American Council on Education has scheduled a webinar for January 11, 2011. It would be most helpful to institutions to have the department's responses to the following questions as soon as possible. As we understand that the Department is already preparing guidance or a "Dear Colleague" letter on this regulation, it may be useful to have these questions addressed in that communication.

1. Under what circumstances is a university president's compensation subject to the incentive pay prohibition? For instance, is a university president's compensation subject to the incentive pay prohibition merely because any one of these circumstances pertain: (a) The head of admissions reports to a subordinate of the president; (b) the president reviews enrollment projections annually with the institution's board; (c) the president is involved in consideration of the aggregate amount of student financial aid from institutional resources; (d) the president approves annually proposed salaries of institutional personnel who recommended the number of students who will be offered admission?
2. In addition to the president, please clarify which "higher level employees" would be covered by the incentive payment ban in light of the repeal of the safe harbor for managerial and supervisory personnel. What facts should an institution consider to determine whether an employee has "responsibility for" recruitment or admission of students or decisions about awarding title IV, HEA program funds?

3. Does the phrase “person engaged...in making decisions about the award of financial aid” cover all employees who are involved in the financial aid process or only those who have decision-making authority regarding aid awards?
4. May an institution make "profit-sharing payments" to a vendor engaged in student recruitment, admissions activities or the awarding of financial aid?
5. If so, what is the difference between “tuition-sharing arrangements,” which are permitted under the safe harbors but will be repealed as of July 1, 2011, and “profit-sharing payments,” which will be permitted under the new rule?
6. Is Earnings Before Interest, Taxes, Depreciation, and Amortization a measure that is based directly or indirectly on success in securing enrollments?
7. Does the new rule regulate how vendors engaged in student recruitment or admissions activities or the awarding of financial aid compensate their employees?
8. What “standard evaluative factors” other than seniority may an institution take into account in determining compensation of employees covered by the new rule?
9. The phrase “person engaged in any student recruitment or admission activity or in making decisions about the award of financial aid” is defined as “any employee who undertakes recruiting or admitting of students or who makes decisions about and awards title IV, HEA program funds, and any higher level employee with responsibility for recruitment or admission of students, or making decisions about awarding title IV, HEA program funds.” Does the phrase cover any of the following non-employees if they engage in recruitment activities or refer prospective students to the institution: (1) independent contractors, (2) alumni or (3) current or prospective students?
10. In the preamble, the department states that it does not consider “bonus” payments made to coaching staff or other athletic department personnel to be prohibited if they are rewarding performance other than securing enrollment or awarding financial aid, such as a successful athletic season, team academic performance or other measures of a successful team. Does this mean institutions may make payments to any person or entity who is engaged in any student recruitment or admission activity or in making decisions regarding the award of financial aid based on student academic performance while enrolled? Does it make a difference whether the payment is based on overall academic performance of the student body or the academic performance of individual students whom a person or entity recruited?

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We hope you will respond by January 7, 2011, so that the webinar may be informed by your guidance.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is written in a cursive style with a large, stylized initial "T".

Terry W. Hartle
Senior Vice President
Government and Public Affairs

TWH/dw