Written Comments re: Guidance on the Higher Education Act's Incentive Compensation Prohibition
2U and edX

March 16, 2023

Submitted via Regulations.gov - Docket ID ED-2023-OPE-0030

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Re: Comments to Incentive Compensation Rule, Docket ID ED-2023-OPE-0030

Dear Under Secretary Kvaal and Ms. Clark:

Further to the above-identified Request for Comments published in the *Federal Register* on February 15, 2023 (88 Fed. Reg. 10101), we are pleased to submit the following comments and recommendations to improve the existing guidance on the incentive compensation prohibition under the Higher Education Act of 1965, as amended ("***HEA***"), particularly with respect to bundled services.

This letter is divided into four sections. The first section is an overview of 2U's operations and business model, and provides context for a substantive discussion regarding "bundled services" contracts between institutions of higher education[1] and online program managers ("***OPMs***"). As described further below, those bundled services arrangements rely upon revenue share models that the Department has consistently recognized as lawful. The second section provides a procedural and legal history of the HEA's incentive compensation prohibition and the Department's "bundled services" guidance, and analyzes the current legal structure for the implementation of the HEA's incentive compensation prohibition. The third section provides our comments, including our responses to each of the questions posed by the Department, as well as our discussion of available data. The final section provides a brief summary of our conclusions.

We recognize the Department's longstanding interest in reducing student debt and preserving educational quality. It is our strong belief that the current revenue share model has allowed for

[1] Referred to herein as "institution" and "Title IV institution."

and propelled the type of innovation that expands access, equity, and affordability. We make these comments in the spirit of collaboration and with the hope that our transparent and thorough responses will assure the Department of the quality of our programs and the positive impact of OPMs on institutions and, most importantly, the students that we serve.

I. Overview

A. About 2U

2U, Inc. (*"**2U**"*) was founded on the belief that expanding access to the world's great nonprofit institutions through online education can change lives and meet the critical needs of our society. Today, in the face of an acute shortage of skilled labor in America, organizations like 2U play a vital role in helping nonprofit institutions meet the growing need for career-relevant education at scale. For more than 15 years, 2U has partnered with nonprofit institutions to build and support thousands of high-quality online programs giving millions of people access to high-quality higher education without having to quit their jobs or uproot their lives. 2U currently provides over 48 million learners with access to these programs, ranging from free courses to full degrees, in partnership with more than 230 institutions and corporations.

Institutions choose to partner with 2U because of our dedicated focus on quality and student outcomes, as well as the unique bundle of support services, technology, and investment capital we provide. From large public institutions to small private institutions, hundreds of institutions rely on 2U's bundle of technology, data, and people to help them develop and deliver online education that meets the same high standards as their on-campus programs.

More than 50% of the degree programs we support are in licensure-based disciplines. 2U plays a pivotal role in ensuring thousands of students in rural areas who are studying online to become nurses, midwives, social workers, teachers, physician assistants, and speech pathologists find placement sites to complete their schoolwork in their local communities. To date, 2U's clinical placement team has matched students with over 26.5 million hours of virtual and in-person field placements in all 50 states. We have also supported institutions to develop 180 state-of-the-art online degree programs that span 29 career-relevant fields like nursing, education, social work, AI, business, and data science.

Students enrolled in our partners' online programs boast strong retention and graduation rates, and career outcomes.[2] For example, in 2021, 2U-enabled degree programs had a 90% retention rate[3] and a 73% graduation rate.[4] Over 50,000 students have graduated from 2U-supported

[2] *Note:* Outcomes of 2U's partner programs vary by institution and by program.
[3] 2U, Inc., *2021 Transparency Report* (Dec. 20, 2022), https://ddfoqzqsu0zvp.cloudfront.net/media/documents/2021_Transparency_Report.pdf. Defined as the percent of students who enroll in a graduate degree program and remain through the add/drop period in 2021 who also enroll in the second term of the graduate degree program and remain through add/drop period, excluding students on leaves of absence.
[4] *Id*. Defined as the number of students who have graduated from our programs, as a percentage of the total number of students who enrolled in our programs (and remain through the add/drop period), from inception to December 31, 2021. Only students in programs that started at least 3 years ago are taken into account.

degree programs since inception, and today, many of these graduates are teaching in classrooms, providing pivotal healthcare to their communities, bringing tech skills to local employers, and providing leadership and insights to organizations worldwide. According to the 2019 *Gallup–2U Graduate Outcomes Benchmark Report*[5], 92% of alumni from 2U-powered degree programs would still pursue an online graduate degree if they had to do it over again.[6]

2U also publishes a *Transparency Report* with self-reported data on our partnerships and the outcomes being achieved by our partner institutions.[7] The *Transparency Report* is published annually on 2U's website and focuses on six pillars: University Oversight and Accountability, Marketplace Openness, Access, Affordability, Quality, and Outcomes.

B. OPMs and the Revenue Share Model

2U is just one of several major providers of technology and services that support online programming in higher education. As a recent report from the Government Accountability Office ("***GAO***") has noted, delivery of these services has grown markedly in the last decade.[8] As of July 2021, services provided by third parties support at least 2,900 online education programs nationwide.[9] The vast majority of institutions that contract for such support are public or private nonprofit institutions, and the vast majority of those institutions are 4-year degree granting institutions.[10]

2U and other OPMs leverage their experience and proprietary technology to help build, deliver, and support digital education at a scale previously not available to most institutions and learners. For many traditional, nonprofit institutions, working with third parties like OPMs to develop their online programs is less capital-intensive, less risky and more efficient than to develop them in-house. OPM relationships provide institutions access to capital, technology expertise, and other critical services they need to build, deliver, and support high-quality online programs.

Like many of its peers, 2U provides institutions with a bundled package of technology and services that include learning technology, learning design, career support, marketing services, student engagement and support, technology, enrollment application assistance, student recruitment, and other support services necessary for the online delivery of university programs. In exchange, 2U receives a share of the tuition revenue received by those institutions. Institutional independence and university oversight is also at the foundation of our partnerships. Institutions maintain full control over tuition pricing, accreditation, curriculum, admissions standards and acceptance decisions, graduation requirements, faculty hiring decisions, student

[5] 2U, Inc., 2019 Graduate Outcomes Benchmark Report (Mar. 24, 2020), https://ddfoqzqsu0zvp.cloudfront.net/media/documents/Gallup_2U_2019_Graduate_Outcomes_Benchmark_Report.pdf.
[6] *Id.* at 9.
[7] Transparency Report, https://2u.com/approach/transparency/ (last visited Mar. 14, 2023).
[8] U.S. Gov't Accountability Office, GAO-22-104463 *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers* ("***GAO Report***") 11-12 (April 2022), https://www.gao.gov/assets/gao-22-104463.pdf.
[9] *Id.* at 12.
[10] *Id.*

instruction, program size, and financial aid decisions. They also approve all marketing assets and collateral.

According to a 2023 HolonIQ report, "digital adoption and transformation remains the greatest challenge across regions and institutions globally. Since last year, we've seen a sharp increase ***in the proportion of higher education leaders citing digital transformation as one of their biggest*** issues (from 50% to 69%)."[11] This statistic punctuates the importance of online delivery and the growing need for institutions to partner with external companies, such as OPMs, to help them deliver their programs online. Many institutions have learned, especially during the pandemic, that building and delivering high-quality digital programs is challenging, risky and expensive. Sustaining and scaling them is even harder; it requires a party that is willing to take significant capital risks upfront and invest for the long term. A majority of institutions of higher education do not have available capital or sufficient resources to invest in building online program management capabilities to keep them competitive with the ever-evolving higher education marketplace and the demands of today's students.

As the pandemic maintained its grip into 2021, a meaningful shift continued to take place in the world's perception of digital education. More people chose high-quality online learning as a viable and valuable way to acquire new skills, ignite their careers, and reach their goals.

The growth of high-quality online course and program offerings has proven to be a valuable development in American higher education because it makes flexible, affordable postsecondary education available to a greater number of students, especially students from traditionally underserved backgrounds. Such growth has rested in part on an unbroken, bipartisan understanding that the HEA permits the kind of bundled services agreements that enable these offerings and reflect the needs of both the service providers and institutions. That understanding—which has prevailed for three decades, across five presidential administrations—is memorialized in the Department of Education's current guidance in this area, issued in 2011, a Dear Colleague Letter*: Implementation of Program Integrity Regulations*, GEN 11-05, Office of Postsecondary Education, U.S. Dep't of Educ. (March 17, 2011) ("***DCL***"),[12] which makes clear that the HEA permits bundled services agreements of the sort entered into by 2U and its partners.

[11] *See 2023 Higher Education Digital Transformation Survey* ("***2023 HolonIQ Report***"), https://www.holoniq.com/notes/2023-higher-education-digital-transformation-survey.

[12] U.S. Dep't of Educ., Dear Colleague Letter: Implementation of Program Integrity Regulations, GEN-11-05 ("Dear Colleague Letter") (Mar. 17, 2011), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2011-03-17/gen-11-05-subject-implementation-program-integrity-regulations.

II. The Department's Consistent Recognition That The HEA Allows Title IV Institutions To Enter Into Bundled Services Agreements Without Violating The Incentive Compensation Prohibition

Under the HEA, institutions of higher education that participate in federal student aid programs may not pay admissions or recruitment employees or contractors on the basis of their success in obtaining new enrollments. But the text, history, and purpose of the HEA all indicate that institutions *are* allowed to engage in revenue-sharing with independent third-party entities, so long as those third parties provide a bundle of services to the partner institution, adhere to the prohibition on incentive compensation for employees engaged in admissions or recruiting, and remain uninvolved in the ultimate decision of whether to admit or enroll particular students. The Department has properly adhered to that view for decades. There is no basis for revising that basic view at this late date.

A. The HEA's Text and Purpose

In 1992, Congress reformed the HEA to safeguard the proper allocation of federal aid to students enrolled in institutions of higher education. In particular, Congress enacted new rules that all Title IV institutions must agree to follow in order to participate in federal student aid programs under Title IV of the HEA ("***Title IV***").[13] As part of this effort, Congress prohibited Title IV institutions from paying commissions to admissions representatives based on the number of students those representatives admitted—a prohibition referred to here as the "incentive compensation prohibition." The legislative history of this prohibition indicates that Congress sought to prevent institutions from awarding incentive payments to salespersons with the power to *make a sale*; that is, to enroll prospective students.[14]

To implement this objective, the HEA provides that Title IV institutions "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."[15] By its terms, the statutory language prohibits the payment of "incentive payments" in exchange for "success" in enrolling individual students. That language does not forbid Title IV institutions from contracting with other entities to provide a bundle of services in exchange of a share of tuition revenue received for the provision of that bundle of services, so long as the service provider and institution are unaffiliated and the institution does not separately make incentive payments for recruitment tied to enrollments. As the subsequent regulatory history set forth below confirms, the provision of such bundled services in exchange for a share of tuition revenue fully aligns with the HEA's text and purpose.

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[13] Higher Education Amendments of 1992 § 490(a), 106 Stat. 625-27, 20 U.S.C. § 1094(a)(13)-(22).

[14] H.R. Rep. No. 102-630, at 499 (1992) (expressing concern about "the use of commissioned sales representatives" and explaining that the amendments "prohibit their use"); *see also Hearings on the Reauthorization of the Higher Education Act of 1965: Program Integrity*, 102d Cong. 59 (1991) (statement of Rep. Waters) ("Commissioned recruiters should be banned or . . . controlled so that they do not have an incentive to *enroll* as many people as they can.") (emphasis added).

[15] 20 U.S.C. § 1094(a)(20) (emphasis added).

B. <u>The Department's Consistent Interpretation and Enforcement of the Incentive Compensation Prohibition</u>

With respect to bundled services, the Department's regulations implementing the incentive compensation prohibition have always tracked the text and purposes of Congress's enactment. In 1994, the Department promulgated a new regulation that implemented the incentive compensation prohibition by not only prohibiting Title IV institutions from paying commissions for success in securing enrollments, but also by prohibiting program participants from "contract[ing] with entities that improperly provide" commissions and "other incentive payment[s]" for enrollments.[16] Notably, the Department's regulations did *not* proscribe revenue-sharing agreements with entities that provided a broad array of bundled services to Title IV institutions. Nor did the Department take any other steps to forbid such arrangements while overseeing and administering the Title IV program.

In 2001, however, the Department's Office of the Inspector General ("***OIG***") questioned the Secretary's interpretation of the incentive-compensation ban while auditing several Title IV institutions that had entered into revenue-sharing agreements with contractors that provided bundled services, including recruiting services. The OIG's final reports suggested that such agreements violated the incentive-compensation ban by paying the provider based upon the number of students enrolled.[17]

In 2002, the Department rightly rejected the OIG's interpretation of the HEA and affirmatively recognized the legality of such bundled services arrangements. Consistent with the 1994 rulemaking, the Department reiterated that the prohibition on enrollment incentive payments "applies both to individuals who work for the institution and to entities outside the institution."[18] As the Department explained, however, "Congress did *not* intend to limit an institution's ability to contract with outside entities for recruitment, admissions, enrollment, or financial aid services if the outside entity adheres to the same limitations that apply to institutions."[19]

For this reason, consistent with the HEA's text and purpose, the Department proposed and adopted various regulatory safe harbors, including an express safe harbor to "clarify that the incentive payment restrictions do not extend to revenue-sharing agreements between institutions and third-party service providers as long as the third-party servicers have no decision-making authority for admissions decisions or financial-aid awards."[20] As the Department explained, "[p]ayments made by an institution to a third party would not violate the incentive payment restrictions as long as the individuals performing any activities related to recruitment . . . were

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[16] Student Assistance General Provisions and Federal Pell Grant Program, 59 Fed. Reg. 9,539 (proposed Feb. 28, 1994) (to be codified at 34 C.F.R. pt. 668 and 690); *see also* Student Assistance General Provisions, 59 Fed. Reg. 22,427 (Apr. 29, 1994) (to be codified at 34 C.F.R. pt. 668).
[17] *See* Dep't of Educ. Office of Inspector General, Final Audit Report: Olivet Nazarene Univ., at 2-8 (May 21, 2001), https://bit.ly/2SdIjze; Dep't of Educ. Office of Inspector General, Final Audit Report: William Penn Univ., at 1-9 (May 15, 2001), https://bit.ly/2HdlUvS.
[18] Institutional Eligibility Under the Higher Education Act of 1965, 67 Fed. Reg. 51,725 (proposed Aug. 8, 2002) (to be codified at 34 C.F.R. pt. 600, 668, 673, 675, 682, 685, 690, and 694).
[19] *Id.* (emphasis added).
[20] *Id.* at 51,723.

compensated in a way that would otherwise be permissible . . . for covered employees of the institution."[21]

Under the terms of the safe harbor regulation, Title IV institutions were thus expressly authorized to make "[p]ayments to third parties, including tuition-sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities … provided that the individuals performing the recruitment or admission activities … are not compensated in a manner that would be impermissible under [the incentive compensation prohibition]." [22] The Department's 2002 regulation thus reaffirmed its longstanding view that tuition-sharing arrangements with servicers providing bundled services (including recruiting services) are fully consistent with the HEA.

In 2008, Congress substantially amended the Title IV program participation requirements of the HEA against the backdrop of the 2002 regulations.[23] In doing so, Congress made no change to the statutory provision governing incentive payments and thereby confirmed and acquiesced to the Department's interpretation of that provision to allow revenue sharing in exchange for bundled services including recruiting.[24] As the D.C. Circuit has explained, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[25]

In 2010, the Department comprehensively revised the 2002 regulations. In doing so, it repealed all of the "safe harbors" recognized in the 2002 regulations, including the safe harbor allowing revenue sharing in exchange for bundled services. The Department expressed concern that the safe harbors had broadly created a risk that "non-compliant conduct," including "aggressive sales tactics," could be protected by the safe harbors.[26] Crucially, however, the Department in the 2010 regulations did *not* reverse its longstanding interpretation that the HEA allows revenue-sharing agreements for bundled services in appropriate circumstances. On the contrary, the preamble to the Department's 2010 regulations recognized the need for the Department to

[21] *Id.*at 51.725; *see also* Rules and Regulations: Federal Student Aid Programs, 67 Fed. Reg. 67,073 (Nov. 1, 2012) (to be codified at 34 C.F.R. pt. 600, 668, 673, 675, 682, 685, 690, and 694).
[22] 34 C.F.R. 668.14(b)(22)(ii)(L) (2002).
[23] Higher Education Opportunity Act of 2008, Pub. L. 110-315, § 493, 122 Stat. 3308 (2008) (codified as amended at 20 U.S.C. § 1094(a)).
[24] *Id.* § 1124, 122 Stat. 3507-08.
[25] *See Doris Day Animal League v. Veneman,* 315 F.3d 297, 300 (D.C. Cir. 2003). *See also, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012) ("If a statute uses words or phrases that have already received … uniform construction by … a responsible administrative agency, they are to be understood according to that construction.").
[26] *See* Program Integrity Issues; Proposed Rule, 75 Fed. Reg. 34,806, 34,850 (proposed June 18, 2010) (to be codified at C.F.R. pt. 600, 602, 603, 668, 682, 686, 690, and 691).

provide "examples of arrangements with third parties that would be *permitted* under the [HEA's] regulatory framework."[27]

In 2011, the Department provided such examples in the DCL, giving definitive guidance to Title IV institutions and providers of bundled services.[28] Consistent with the text and history of the HEA, the DCL confirms that the HEA permits "tuition-sharing" if "paid to an unrelated third party for a variety of bundled services," even when they involve "recruiting services."[29] The DCL recognizes that the HEA generally allows Title IV institutions to enter into tuition-sharing arrangements with service providers that provide bundled services—including recruiting services— so long as certain conditions are satisfied. It explains that the HEA's prohibition on incentive payments does not apply "[w]hen the institution determines the number of enrollments and hires an unaffiliated third party to provide bundled services," because such arrangements do not incentivize enrollment as when a recruiter "determin[es] the enrollment numbers and there is essentially no limitation on enrollment."[30] In addition, "[t]he independence of the third party (both as a corporate matter and as a decision maker) from the institution that provides the actual teaching and educational services is a significant safeguard" against the abuses of salespeople paid on the basis of securing enrollments.[31]

The DCL then illustrates its guidance through several examples of permissible business models. Example 2-B states that:

> A third party that is not affiliated with the institution it serves and is not affiliated with any other institution that provides educational services, provides bundled services to the institution including marketing, enrollment application assistance, recruitment services, course support for online delivery of courses, the provision of technology, placement services for internships, and student career counseling. The institution may pay the entity an amount based on tuition generated for the institution by the entity's activities for all bundled services that are offered and provided collectively, as long as the entity does not make prohibited compensation payments to its employees, and the institution does not pay the entity separately for student recruitment services provided by the entity.[32]

[27] Program Integrity Issues, 75 Fed. Reg. 66,832, 66,875 (Oct. 29, 2010) (to be codified at pt. 600, 602, 603, 668, 682, 685, 686, 690, and 691); *see also* 75 Fed. Reg. 34,820 (proposed June 18, 2010) (to be codified at pt. 600, 602, 603, 668, 682, 685, 686, 690, and 691) (reserving the right to respond to ongoing questions by publishing "a Dear Colleague Letter").
[28] DCL at 11-12.
[29] *Id*. at 10.
[30] *Id*. at 11.
[31] *Id*.
[32] *Id*. at 12.

Thus, the DCL sets out the following criteria for legal revenue-sharing with a third party that provides bundled services:

> *First*, the institution itself—not the service provider—must retain control over the number of enrollments and the admission of students into its program.
>
> *Second*, and distinct from the 2002 safe-harbor provision, the service provider must be independent of all institutions, including the institutions which it serves.
>
> *Third*, the service provider may not make incentive payments to its employees based on the number of students who are successfully enrolled.
>
> *Fourth*, the third party must provide a wide range of services to the institution.
>
> *Finally*, the service provider may not receive separate payment for services relating to recruitment. [33]

To be sure, the Department is responsible for monitoring bundled services revenue-sharing agreements in order to ensure that they comply with the criteria set out in the DCL.[34] The Department carries out this responsibility through annual compliance audits and occasional program reviews of especially "high-risk" programs.[35] As the GAO recently explained, the Department has "faced questions about how to interpret and apply its safeguards, as they are currently described in the Dear Colleague Letter"—particularly as to "how to determine whether a college is sufficiently independent and unaffiliated with the [third-party] provider," and "what constitutes a sufficient bundle of . . . services"—and the Department is "currently reviewing its guidance" as to these issues.[36] That review should focus on refining the current enforcement framework, in ways consistent with the Department's longstanding interpretation of the HEA.

In conclusion, the DCL is far from a "loophole," as certain commenters stated on the public listening sessions. Rather, the DCL—which remains the Department's authoritative guidance in this area— accurately reflects the text and purpose of the HEA, including the HEA's incentive compensation prohibition. The Department's interpretations of the incentive compensation prohibition have uniformly concluded—across five presidential administrations over three decades—that bundled services agreements of the kind discussed here do not violate the HEA's incentive compensation prohibition, and—as discussed below—a blanket rule prohibiting such agreements would be contrary to the long-standing interpretation of this framework.

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[33] *Id*. at 10-12.
[34] U.S. Gov't Accountability Office, GAO-22-104463, *Higher Education: Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers ("**GAO Report**")* 8 (April 2022), https://www.gao.gov/assets/720/719953.pdf.
[35] *Id*. at 9-10.
[36] *Id*. at 18.

III. Response to the Department's Questions

A. Responses to the Department's Specific Questions

As requested in the *Federal Register* notice, we respond below to each question posed by the Department. At the outset, we note that the series of questions themselves point to the need for the Department to further conduct research and compile data prior to making any proposed changes. In issuing the announcement regarding the virtual listening sessions and public comment period, the Department focused on "comments, recommendations, and suggestions to improve *guidance* on the incentive compensation prohibition under title IV of the Higher Education Act of 1965, as amended (HEA), particularly with respect to bundled services."[37] (emphasis added). As discussed below in section III.A.9, we support the recommendations of the GAO to improve instructions for auditors and institutions to help the Department assess compliance with the incentive compensation rules. While the GAO raised concerns about assessing compliance, there was no indication that the current framework should be revised. In fact, any proposals to change the framework are misguided and premature. Our responses to the questions below are offered in the spirit of transparency and collaboration. They should not be construed as comprehensive responses, but instead as examples from the field.

1. What are the benefits and disadvantages of the current incentive compensation exception for bundled services for institutions and students?

Online higher education that meets students' needs is now flourishing across the United States and around the world, reaching new, non-traditional students and creating a more diverse, skilled, and better-educated workforce. Many students taking online degree programs supported by 2U are non-traditional learners. In 2021, 49% of learners were Black, Indigenous, or People of Color, 67% were over the age of 24, and 66% were female.[38] As a result of the capital investments made by OPMs in developing and launching distance learning programs, students today have access to better and more diverse educational opportunities than ever before.

For most nonprofit public and private institutions, it is more efficient, less capital-intensive and less risky to partner with an OPM to develop and deliver certain aspects of their distance learning programs than to develop them in-house. OPM relationships give institutions the access to capital, technology expertise, and other critical services needed to build, deliver, and support high-quality online programs. Revenue sharing is the most common and practical option for most institutions because it provides the university with the most flexibility and conserves its financial resources.

[37] Announcement of Listening Session, 88 Fed. Reg. 10,101 (Feb. 16, 2023).
[38] 2021 Transparency Report at 8.

To reiterate our testimony from the public listening session conducted on March 9, 2023, revenue sharing arrangements under the bundled services framework provide institutions and their students at least five key benefits:

- *Incentive Alignment*: Revenue sharing is the only model that aligns incentives between the OPM, the university and the student. Unlike fee-for-service providers, who get paid upfront regardless of student outcomes, 2U and other OPMs only get paid as students progress through their programs, ultimately earning a degree. Our financial success is directly tied to student success.

- *Student Outcomes*: Revenue sharing arrangements result in tangible benefits to students. The programs 2U has enabled have graduated over 50,000 students with excellent outcomes. Also, as highlighted above, we have included several notable data points regarding student outcomes from our Transparency Report.

- *Risk Allocation*: Developing a high-quality online program is expensive and risky. 2U, not the university, invests $5 million dollars on average into each degree program, while the university has minimal upfront investment. In addition, nearly 25% of all online degrees launched by institutions fail within the first year.[39] Revenue sharing eliminates these risks for the university, while other models burden the university with higher costs and greater execution risk.

- *Cost Reduction*: There is no evidence whatsoever that revenue sharing increases tuition or student debt. In fact, we believe the exact opposite is true. OPMs operate at a scale that most institutions do not. And by burdening the OPM instead of the university with significant costs, the revenue-share model drives greater efficiency, which in turn can lower prices for students at the institution's discretion.

  Moreover, revenue sharing arrangements incentivize OPMs to lower the cost of higher education. In our experience, higher education programs are inelastic goods—as price increases, demand decreases. And as demand decreases, finding students becomes more expensive, a cost borne entirely by the OPM in a revenue sharing arrangement. While institutions are solely responsible for setting tuition prices, lower tuition prices tend to be better for our financial performance.

- *Institution Success*: Institutions' budgets are increasingly under strain and they are looking for ways to generate revenue and reduce costs. Revenue share arrangements do not take funds away from institutions. To the contrary, the revenue simply would not exist without these arrangements. OPMs are the reason these online programs get off the ground, and OPMs are often the reason that they successfully operate in a complicated digital marketplace.

[39] Scott Bittle, Nyerere Hodge, Layla O'Kane, Matthew Sigelman, & Bledi Taska, "Bad Bets: The High Cost of Failing Programs in Higher Education," Burning Glass Technologies at 9 (November 2020).

- Without revenue sharing, institutions would also be responsible for the significant upfront and ongoing costs required to launch and scale online programs and would not benefit from the expertise and efficiencies that OPMs deliver, ultimately resulting in increased cost and risk to the university. Revenue sharing arrangements can enable institutions to build sustainable programs and focus on delivering their core academic competencies.

Testimony offered during the public listening sessions underscored these benefits, the overall value of OPM relationships and the importance of the Department's existing bundled services guidance.[40] It cannot be understated that the value an OPM brings to an institution is significant, including upfront capital expenditures and resources that most institutions would otherwise be unable to secure or sustain on their own or through a model other than revenue sharing.

2. How can the Department better identify, define, and address the activities that may raise concerns under the current incentive compensation guidance?

Fundamentally, we continue to support the DCL, which reaffirmed that revenue-share arrangements are appropriate and permissible under the HEA and its implementing regulations so long as certain safeguards are present. The DCL was carefully crafted with these important, built-in safeguards to address concerns about bad incentives, and, in fact, incidents of abuse of the Department's policy through violations of the incentive compensation prohibitions are exceedingly rare, as recently confirmed by the findings in the April 2022 GAO report on OPMs.[41] Significantly, the GAO did not recommend additional rulemaking or wholesale changes on the topics investigated. Although some commenters recommended eliminating the DCL entirely, it would be a mistake. We also agree with the recommendations outlined in the April GAO Report that included recommendations directed at strengthening audit guidance.

Accordingly, we believe any new guidance from the Department should focus on providing further detail and clarity around areas of potential misinterpretation or misunderstanding, particularly with respect to the following important issues:

- <u>Affiliation and decision-making authority</u>: the Department should clarify the types of affiliations between an institution and service provider that enhance the risks of a violation of the incentive compensation prohibition and provide clearer guidance about what decisions a service provider should not be involved with when working with institutions. *See* Section II.A.8. below for further discussion and recommendations;

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[40] *See e.g.,* Testimony from Helen Drinan, Anne Skleder, and Brooke Elliott.

[41] GAO Report. *Note:* The GAO concluded that the Department should: 1) Provide additional instructions to auditors to better identify and assess OPMs and potential incentive compensation ban violations; and 2) Provide additional instructions to schools regarding the information they must provide about their OPM arrangements during compliance audits and program reviews.

- The nature of a bundle of services: the Department should clarify how many services, and types of services, can or should be in the service "bundle" so as not to fall within the Department's ban on incentive compensation; and

- Student recruitment: The Department should retain its guidance on the distinction between student recruitment activities, on the one hand, and marketing and advertising on the other. The 2011 DCL distinguished "recruitment activities," such as "[t]argeted information dissemination to individuals" and "[s]olicitations to individuals," from "marketing activities," such as "[b]road information dissemination," and correctly recognized—consistent with the purposes of the HEA—that only individualized recruitment activities come within the scope of the incentive compensation prohibition. [42] This language provides helpful clarity on how the Department views the distinction between these concepts. The Department should also consider requiring any employee involved in student recruitment activities to disclose their employer, if other than the institution.

- Disclosure: The Department should consider requiring institutions to disclose their service providers (regardless of revenue model) and provide the Department with copies of their contracts with such partners.

> 3. *How much of an institution's spending on a bundle of services provided by a third-party entity is typically allocated to recruitment and related expenses? This will help the Department understand the proportion of the spending in the bundle that goes to recruitment versus a range of services.*

We do not have sufficient data to opine on how institutions allocate expenses with respect to the services they purchase from OPMs. However, for 2U, in 2022, our recruitment and related expense was approximately 9% of revenue.

It is also fair to underscore that a significant proportion of bundled service spending supports the development and delivery of digital programs. As noted above, OPMs take significant capital risks upfront and invest for the long term. These upfront capital expenditures allow OPMs like 2U to assist institutions in creating sustainable and scalable programs.

In addition to upfront capital expenditures, 2U continues to invest in programs through the lifetime of our agreements with our partners. For example, in late 2020 we leveraged a "blended" approach when moving boot camps online in response to the pandemic—trading synchronous instruction for more asynchronous learning. When the aggregate graduation rate for all boot camp disciplines decreased by 1% in 2021, the data showed how critical live instruction is to learner success. In response, we worked with our partners to shift all boot camps to a "live online" model with 180 to 250 hours of live instruction. 2U, not the university, made the investment necessary to effect these changes. This example illustrates the ongoing investment 2U makes to continue to evaluate efficacy, in terms of preferred student outcomes, working with

[42] DCL at 8.

our partners. The programmatic realignment and pivot further illustrate the continued investment in course and program design.

> 4. *How has contracting with a third-party providing services under the bundled services exception impacted enrollment, tuition and fees, the types of programs offered, the modality through which programs are provided, student outcomes, revenues, and expenditures at institutions? How do these results compare to programs not supported by an OPM or students attending in-person at a program that is also supported by an OPM?*

As we highlight in our 2021 *Transparency Report*, the impact of 2U and similar service providers relying on bundled services agreements has been transformational in American higher education. Millions of students at hundreds of institutions around the country have relied on distance-learning offerings that are possible only because of the existence of bundled services agreements of the kind offered by 2U and its peers. Any adjustments to the guidance set forth in the 2011 DCL should account for those important reliance interests.

Enrollment

Enrollment in OPM-supported distance learning programs has increased significantly over time. This increase in enrollment is a result of the increased program offerings and added flexibility that institutions can provide through delivery of online education. Since inception, 2U-powered degree and non-degree offerings by our institutional partners have served students from all 50 states in the U.S. and the District of Columbia, as well as 196 countries. The portfolio of degree and non-degree offerings provided by institutions with our assistance meet the needs of a diverse cross-section of learners, regardless of gender, race, age, or geography.[43]

Tuition and Fees

Of the degree programs offered by our partner institutions with the assistance of 2U, in 2021, over 87% of the degrees were priced at or below their on-campus counterpart.[44] Importantly, our partners are solely responsible for setting tuition prices for their programs.

Types of Programs Offered and Modality

The types of programs offered by institutions through 2U partnerships include degree programs at the doctoral, masters, and bachelors level. This includes clinical degree programs that include both field work and clinical hours. Our partners also offer professional certificate programs, executive education programs, coding boot camps and free courses. The scope and breadth of programs offered in partnership with 2U and similar service providers touches on all facets of the higher education landscape.

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[43] 2021 Transparency Report at 7.
[44] *Id.* at 11.

Student Outcomes

Of the statistics included in the 2021 Transparency Report, we are particularly proud of the statistics regarding student outcomes. In 2019 and 2020, 2U partnered with Gallup to survey the experiences of students enrolled in the online graduate degree programs offered by 2U partners. The results found that 2U powered degree programs have a 90% retention rate[45] and a 73% graduation rate.[46]

5. *How would changing third-party servicer contracts from a revenue-sharing model to a fee-for-service model impact the services, such as recruitment, currently provided to an institution under the bundled services exception?*

As discussed above, public commenters described their experiences with a fee-for-service model as compared to a revenue share model. The fee-for-service model places significant capital costs and risk on institutions by requiring them to bear the upfront costs, whereas the revenue share model requires OPMs, not institutions, to bear both the upfront capital costs and risk. This is why the revenue share model is the most popular among institutions. Prohibiting institutions from using the revenue share model (or forcing them to use the fee-for-service model) would simply dissuade institutions from providing online education.

Also, as discussed above, the revenue share approach creates mutually beneficial incentives because a university only pays the OPM as a student progresses through the program and ultimately graduates. OPMs are not paid upfront and only recoup their investment over time. As a result, OPMs have every incentive to find the right "fit" for their university partners, and to help their students succeed in their chosen program. Under a flat fee or fee-for-service arrangement, however, the third party is paid up front—thereby making the third party completely agnostic with respect to student outcomes. With models other than revenue sharing, the vendor is paid the same amount regardless of whether students succeed. In addition, a fee-for-service model on a fixed fee basis could enable a provider to only perform pre-enrollment activities, such as marketing and recruiting, without any ongoing or continued support of those same students post-enrollment—further misaligning incentives between the fee-for-service provider and the institution.

Forcibly requiring OPMs and their university partners to change their contracts from a revenue-sharing model to a fee-for-service model would be extremely disruptive, and would impair the operation of OPM-assisted programming at institutions around the country. Countless students would be caught in the lurch as the contractual terms between OPMs and their university partners were revised: the renegotiation of such contracts will likely have effects far beyond the narrow realm of student recruitment. Indeed, to the extent the parties were unable to reach new

[45] *See id* at 13. Defined as the percent of students who enroll in a graduate degree program and remain through the add/drop period in 2021 who also enroll in the second term of the graduate degree program and remain through add/drop period, excluding students on leaves of absence.
[46] *Id*. Defined as the number of students who have graduated from our programs, as a percentage of the total number of students who enrolled in our programs (and remain through the add/drop period), from inception to December 31, 2021. Only students in programs that started at least 3 years ago are taken into account.

terms under their existing agreements, programs might need to be closed and students taught out. In addition, mandating that institutions use fee-for-service (or any model for that matter) presumes that institutions are unsophisticated and incapable of determining what is best for them and their students. In our experience, that is simply not the case. For these reasons, wholesale revision of the Department's existing enforcement framework would be a serious mistake of law and policy. While the Department's 2011 DCL may be helpfully updated and refined, it should continue to serve as the anchor of the Department's guidance in this area going forward.

> 6. *How do tuition and fees of programs supported by third-party services differ when provided under a revenue-sharing model as compared to a fee-for-service model?*

As described above, of the degree programs offered in partnership with 2U, in 2021, over 87% of the degrees were offered at or below the cost of their on-campus counterpart.[47] We have not seen similar transparency from fee-for-service providers unfortunately. 2U continues to work with its partner institutions to drive down tuition costs. For example, in January 2023, 2U launched a new online Master of Science degree in Artificial Intelligence with the University of Texas at Austin. The degree is one of the first fully online AI master's programs offered by a top-tier university. The tuition is disruptively priced at $10,000 and will drive price competition at the University of Texas's institutional peers.

Under a fee-for-service model, institutions would need to build the initial capital costs into their tuition pricing and provide the necessary funding up front. Even assuming that funding for the initial capital costs could be obtained, institutions operating under such a model would feel compelled to charge higher tuition and fees in order to recoup their initial outlays. OPMs like 2U are able to leverage their existing expertise and proprietary technology to deliver the same services at lower cost.

> 7. *To what extent does the bundled services exception impact institutions' ability to create or expand online education offerings? To what extent would fee-for-service models impact institutions' ability to create or expand online education offerings?*

The growth of online course and program offerings has proven to be a valuable development for institutions. A recent GAO report found that at least 550 institutions worked with an OPM to support at least 2,900 education programs (e.g., certificate and degree programs). According to the report, almost three-quarters of the nation's students were enrolled in an education program offered at least partially online in 2020.[48]

As noted throughout our discussion and responses, services offered under the "bundled services" framework include a host of technology and services that have transformed online education. Development and delivery of this technology and services bundle requires a significant capital investment, one which may be beyond the reach of many institutions. In addition to the cost

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[47] *Id*. at 11.
[48] GAO Report at 1.

variable, many institutions do not have the background, institutional expertise or risk tolerance to fully develop and support these programs. As we previously highlighted, "digital adoption and transformation remains the greatest challenge across regions and institutions globally."[49]

For these reasons, imposition of a mandatory fee-for-service model would disrupt many institutions' ability to offer or maintain online programs. In fact, one commenter provided a stark contrast between the benefits of the revenue share model and the risks associated with a fee-for-service model. As one commenter described, the fee-for-service arrangement the institution had with an OPM nearly bankrupted their institution and caused the closure of the program.[50] Also, as noted above, requiring institutions to use a fee-for-service model prohibits an institution from determining what is best for itself and its students.

> *8. How might the Department more clearly define what it means to be an unaffiliated third-party for purposes of the incentive compensation guidance to ensure there is no affiliation between the institution and the entity providing services?*

This question pertains to the Department's statement in the 2011 DCL that "the Department does not consider payment based on the amount of tuition generated by an institution to violate the incentive compensation ban *if that payment compensates an unaffiliated third party: providing a set of services that may include recruitment services*."[51] As a critical safeguard, the DCL then speaks to "[t]he independence of the third party (both as a corporate matter and as a decision maker) from the institution that provides the actual teaching and educational services."[52]

We support the Department's policy position regarding affiliation and recommend the Department strengthen it by clarifying its understanding of the term "unaffiliated third party." The term "unaffiliated" should be defined to more clearly indicate that an institution that contracts with a third party for recruitment and/or financial aid services, as part of a broader set of services, must have an arms-length relationship with the third party.[53] This means that:

- The entities are not affiliates, as defined in 2 CFR §180.905;

- The service provider has no current or former ownership relationship with the institution – either as a corporate entity or with respect to the individuals who currently control or otherwise have decision-making authority (the service provider could hire employees working previously at an affiliated institution so long as they have with no control or decision-making authority);

[49] 2023 HolonIQ Report.
[50] Public comments from Helen Drinan, interim president of Cabrini University, in Pennsylvania.
[51] DCL at 11 (emphasis added).
[52] *Id.*
[53] *Note:* We understand that the Department may regulate any ongoing relationship between converted institutions and their prior owners through its upcoming Notice of Proposed Rulemaking. We believe further guidance to the incentive compensation rules relating to affiliation will provide additional safeguards.

- The service provider has no decision-making authority or ability under the agreement to determine:
    - which students are admitted to and enrolled at the institution;
    - which students are eligible for and receive Title IV or other federal student aid funds;
    - what the tuition for a program will be;
    - which academic programs will be offered by an institution; and
    - what faculty members to hire, retain, or tenure.

- In other words, whenever an institution contracts with a service provider to provide student recruitment or financial services on the institution's behalf, the institution must retain complete and sole decision-making authority over these "core academic functions," which is consistent with accreditation requirements and critical to the success of or partnership.

In addition, the service provider should have no governance role in the institution it serves (e.g., it should have no representation on the institution's board of trustees/directors, in senior leadership, nor any controlling representation or decision-making authority on any admissions committees, financial aid committees, tuition-planning committees, or faculty-academic planning committees).[54]

9. What steps can the Department take to better ensure compliance with the prohibition on incentive compensation?

On April 5, 2022, the GAO released a report, GAO-22-104463, regarding Colleges' use of OPMs, in response to a Congressional request. The report examined (1) institutions' of higher education (IHEs') use of OPMs and (2) the extent to which the Department's monitoring efforts ensure that it obtains the information needed to assess whether OPM arrangements comply with the incentive compensation ban. Notably, the GAO report *does not* recommend the rescission or revision of the "bundled services" exception. Rather, the GAO focused on recommendations to increase oversight and compliance with the existing framework.

Specifically, the GAO made two recommendations to ensure greater compliance and oversight:

1. The Department should provide additional instructions for inclusion in the Compliance Supplement to help auditors better identify and assess potential incentive compensation ban violations when an institution contracts with an OPM; and

2. The Department should provide additional instructions to institutions regarding the information they must provide about their OPM arrangements during compliance audits and program reviews.

[54] *Note:* We note that advisory boards established by either institutions or OPMs unrelated to specific contracts or decision-making should continue to be permitted.

We agree with these recommendations. We also refer to our discussion in section II.A.2.

B. Department's Lack of Data

Department regulatory action—even sub-regulatory guidance, like DCLs—requires evidence-based information that is accurate and reliable and satisfies the Department's "Information Quality Guidelines" ("***Guidelines***").[55] The Guidelines were created to ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies to the public. Here, reasoned decision-making should be founded on evidence-based conclusions.

We are concerned about the absence of any data supporting the Department's stated concerns regarding the growth of OPMs and their impact on the higher education sector, in general, and tuition and student debt, in particular. According to a study conducted by Robert Kelchen, IPEDS data provides no way to determine the number of graduates coming from online programs versus in-person or hybrid programs.[56] This makes it difficult to determine the prevalence of online delivery models and makes it impossible to tell how either delivery model performs.[57]

The Department has posited that bundled services contracts have been a driver of higher tuition and student debt and caused a proliferation of low-quality programs. This statement, however, is wholly unsupported. The Department has not pointed to any data or analysis supporting the accuracy of that statement. In fact, the cost of higher education and student loan debt are rising for numerous reasons that pre-date the rise of online education: inflation, reduced State funding, more access to federal government-backed loans, increased financial aid, unchecked investment in campus facilities and amenities.[58] Further, the Department has stated that it wants "to ensure students get value for their money,"[59] but does not indicate how bundled services arrangements limit student value. When viewed properly, "OPMs can be understood as symptomatic of the higher education market and the structural challenges facing traditional colleges and universities. The use of OPMs is an attempt to fix a problem, not create one."[60] This reality is exemplified in the public comments provided by small nonprofit institutions. For example, one university President articulated how smaller institutions that use tuition-sharing arrangements with OPMs

[55] U.S. Dep't of Education Interim Information Quality Guidelines (2019), https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf.
[56] Robert Kelchen, *Improving Outcomes Data for Online Programs*, Inside Higher Ed, Mar. 29, 2022, *https://www.insidehighered.com/views/2022/03/29/how-improve-outcomes-data-online-programs-opinion.*
[57] *Id.*
[58] *See* Cong. Budget Off. Report, "The Volume and Repayment of Federal Student Loans: 1995 to 2017" at 1 and Box 1 (Nov. 2020), https://www.cbo.gov/publication/56754.
[59] *See* "U.S. Department of Education Launches Review of Prohibition on Incentive Compensation for College Recruiters," February 15, 2023, https://www.ed.gov/news/press-releases/us-department-education-launches-review-prohibition-incentive-compensation-college-recruiters?utm_name=&utm_term=&utm_medium=email&utm_content=&utm_source=govdelivery.
[60] *See* John J. Donohue, "Understanding OPMs: A Reality-Based Analysis" at 5 (Aug. 22, 2017), https://www.synergiseducation.com/wp-content/uploads/2018/05/Understanding-OPMs.pdf.

would otherwise be limited if the required capital investments to build and develop online programs were otherwise borne by the university.[61]

Further, the types of degree programs that 2U typically enables feature high market demand, partnership with an institution, and linkage to a specific career. A pillar of success for any such program is that the degree appeals to qualified students, is conferred upon competent graduates, and provides students with their desired outcome. If an OPM provides subpar learning technology or mediocre student support services, or otherwise does not enable students to achieve their desired outcome, the program will fail. OPMs are engaged in long-term partnerships with institutions; a precipitous decline in quality would not be in the best interest of either the institution or the OPM.[62]

Any shift by the Department in its longstanding regulatory posture toward bundled services arrangements should be evidence-based and consistent with the Guidelines and the Department's longstanding interpretation of the HEA.

C. <u>Negotiated Rulemaking Required for Substantial Changes</u>

The recent suggestions from certain participants in the public listening sessions that tuition revenue-sharing arrangements in the context of bundled services are prohibited by the HEA is entirely misplaced: As explained above, it is well established that such agreements *are lawful* under the HEA and existing regulations so long as they do not run afoul of the HEA's specific prohibition on incentive compensation for employees engaged in admissions or recruiting activities. If Congress wishes to address tuition revenue-sharing arrangements in the context of bundled services for online education—a significant area of innovation in higher education that did not even exist when Congress enacted the HEA's incentive-compensation ban in 1992—then Congress should enact new legislation addressing such arrangements.

To the extent the Department is considering substantial changes to the long-settled interpretation of the incentive compensation prohibition, it should make any such recommendations to Congress instead of proceeding through administrative action or sub-regulatory guidance. That is especially true given the sheer scale and reach of such revenue-sharing agreements in American higher education today,[63] the long-extant nature of the statutory incentive-compensation ban and its lack of "focus . . . in relation to the problem" at hand,[64] and the Department's "past interpretations" of the HEA,[65] which have uniformly concluded—across five presidential administrations over three decades—that bundled services agreements of the kind

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[61] Public comments from Anne Skleder, president of Brenau University, in Georgia.
[62] *Id.*
[63] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (noting that agencies cannot exercise regulatory power over "a significant portion of the American economy" without clear congressional authorization to do so) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *id.* at 2621 (Gorsuch, J., concurring) (same); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (noting that questions of "vast" economic and political significance should be resolved by Congress, not courts or agencies) (quoting *Util. Air Regulatory Grp.*, 573 U.S. at 324).
[64] *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).
[65] *Id.*

discussed here do not violate the HEA's incentive-compensation prohibition. The Department should not attempt to unilaterally rewrite settled law.

Even assuming that the Department has the authority to assess as a broad policy matter whether revenue-sharing agreements should be permissible in the context of bundled services, it may not do so in the absence of formal, negotiated rulemaking. The HEA expressly requires the Department to "obtain public involvement in the development of proposed regulations" through negotiated rulemaking when considering changes to the operation of student assistance programs, including as to the prohibition on incentive compensation.[66] The HEA's express negotiated-rulemaking requirement is designed to "diminish[ ] the likelihood of adversarial conduct and later legal challenges" to regulatory action, as well as to "build[ ] legitimacy for the results" of agency rulemaking.[67] To that end, the HEA directs the Department to "obtain the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs," including "students" and "institutions of higher education."[68] It also prescribes that "[p]articipants in the negotiations process" should include "individuals with demonstrated expertise or experience in the relevant subjects under negotiation, reflecting the diversity in the industry, [and] representing both large and small participants."[69]

To date, the Department's negotiated rulemaking and guidance with respect to the prohibition on incentive compensation has been consistent. Any change in that policy would "create[ ] 'unfair surprise' to regulated parties" or "substitute[ ] one view of a rule for another"[70] and would trample the extensive reliance interests created by the Department's current regulations. This would be contrary to Supreme Court decisions that have repeatedly emphasized that "serious reliance interests . . . must be taken into account" in undertaking new agency action that might disrupt those reliance interests.[71]

Given those reliance interests, there is every reason *not* to unilaterally determine that tuition revenue sharing arrangements are no longer permissible under the bundled services framework. Rather, the Department should continue to focus on further clarifying the existing regulatory framework—which recognizes that such arrangements are permissible—while redoubling its commitment to ensuring that institutions' revenue-sharing agreements are compliant with the Department's guidance in this area, consistent with the GAO's specific recommendations.

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[66] 20 U.S.C. § 1098a(a)(1) (requiring public involvement in the development of any "proposed regulations for this subchapter"); *cf. id.* § 1094(a)(20) (prohibiting student-assistance recipients from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments").

[67] Mark L. Pelish, *Regulations Under the Higher Education Amendments of 1992: A Case Study in Negotiated Rulemaking*, 57 L. & Contemporary Probs. 151, 156 (1994).

[68] 20 U.S.C. § 1098a(a)(1).

[69] *Id.* § 1098a(b)(1).

[70] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019); *see also Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency.").

[71] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

IV. Conclusion

2U supports the Department's longstanding 2011 DCL. As noted above, revenue-sharing agreements in exchange for bundled services are lawful, and are utilized across the higher education sector as a necessary aspect of developing high-quality online educational programming. To the extent the Department considers refining the DCL, it should do so in a way that preserves its core while providing additional clarity on the specific items noted above.

We appreciate the Department's consideration of our public comment submission. We request a thorough review of the suggestions included here, and we appreciate the Department's attention to our concerns. We also would appreciate an opportunity to meet with the Department to discuss our recommendations in greater detail.

Thank you for your consideration of these comments.

Sincerely,

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Co-Founder and Chief Executive Officer

Matthew J. Norden
Chief Legal Officer