



# ENROLLMENT MANAGEMENT NOW LIABLE FOR THIRD PARTY VENDORS

By **Ron Holt** and **David LeFevre**

**O** utsourcing is a fact of life for higher education, particularly when it comes to recruitment. Colleges use third-party marketing companies, ad agencies, social media contractors, enrollment management software solutions and a host of third parties to identify, communicate with and enroll prospective students. These vendors are by their very nature third parties—"independent contractors" in the law business. It is far too easy for schools to overlook how vendors go about doing what it is they are supposed to do and, as has been the subject of debate recently, how they get paid for doing it.



## ENTER THE FEDERAL PROGRAM INTEGRITY REGULATIONS

The incentive compensation rules that became effective July 1 changed the decade-old regulatory landscape for how admissions and recruitment personnel were compensated. The underlying principle did not change: The Higher Education Act prohibits schools from giving commissions, bonuses or other incentive payments based directly or indirectly on success in securing enrollments to anyone engaged in student recruiting or admission activities. Among the changes to this relatively straightforward principle, the Department of Education redefined who someone "engaged in student recruiting or admission activities" is to include entities performing services on behalf of institutions—i.e., vendors—and it reinterpreted what kinds of payments are prohibited.

TC

## THE RULES DON'T APPLY TO MY VENDORS... OR DO THEY?

There is little argument that the intended target of the rule changes was the proprietary sector, but the new rules apply to all segments of higher education. Practices at all schools must be reevaluated. Under the Department's new incentive compensation regulations, there is no difference between purchasing lists of prospective students—"leads," if you will—and participating in college matching or college social networking sites. They are all evaluated the same way by asking the same two questions: what is the vendor doing, and how is it getting paid?

## STEP 1: WHAT DOES THE VENDOR DO, EXACTLY?

Not every recruitment-related vendor is subject to the incentive compensation ban. An advertising agency creating and placing ads (if that is all it is doing) does not fall within the activities the ED considers "recruitment" or "admissions." An Internet media company that hosts a leader board site, collects contact information from students who click on a particular school or program and sends that information to the school is also not covered by the rule. Taking it a step further, consider a vendor that hosts a landing page for a specialized program, provides enrollment applications for interested folks, reviews those applications for completeness and forwards them to the school. As involved as that vendor appears to be in the recruitment process, it is not subject to the incentive compensation rules.

The reason the vendors in these examples are not subject to the Department's incentive compensation ban is that none of them engaged in what the Department calls "covered activity." To reduce a rather complex analysis down to a few words, the primary characteristic that distinguishes between covered activities and activities that are not addressed by the rule is solicitation of individual students. Before wiping your brow, uttering "whew," and moving on, consider this: Vendors are evolving past the Stone Age of collecting directories and selling them. It is a very low value-added proposition to simply resell lists of contact information, so more and more marketing and media companies

are becoming quite sophisticated in how they collect information by using emails, text messages, chat windows, Facebook, Twitter, message boards and their own proprietary social networking sites. Even if the mode of communication is computer-generated messages, all of these methods involve individualized contact with students, and it is student contact that turns what otherwise might be considered a marketing activity into recruitment activity—that is, a covered activity—in the Department’s view.

It is not just the high-pressure sales lead generation company whose contracts need to be evaluated. College matching and college social networking sites like Zinch and Collegeboard.com, which more and more nonprofit and public schools are using, are designed to facilitate interaction with individual students, so payments to such companies are very likely subject to the incentive compensation ban. The proprietary sector in recent years has seen an increasing number of lead generation firms that claim to be (and that may very well be) more professional and ethical than their competition. Ironically, because these firms tend to use various means of contacting prospective students to qualify them, payments to these companies are also subject to the incentive compensation ban. Oversimplifying a little bit (and only a little bit), the only recruitment-related vendors whose contracts are not impacted by the incentive compensation ban are those like the classic ad agency that does not interact with students.

## STEP 2: HOW DOES THE VENDOR GET PAID?

The nature of the vendor’s services is only a gateway issue. The difficulty comes with examining the vendor’s compensation arrangement. It is an incentive compensation ban, so as a general rule, a fixed monthly or quarterly or one-time flat fee is perfectly acceptable. Just about any other structure, though, will require a fair degree of analysis and careful thought. Here are some guidelines to assist in that analysis:

Cost-per-action (CPA) and cost-per-lead (CPL) campaigns are probably not allowed. We say, “probably,” and hedge just a bit because the Department’s guidance is less than crystal clear. So-called “click-through payments” are permissible as long as they are “not based directly or indirectly on success in securing enrollments,” says the Department. However, if the student is merely clicking through a web form, there is no interaction with the student. So this kind of conduct is not subject to the incentive compensation rules in the first place because it is not a recruitment activity. In the same vein, not every CPA or CPL arrangement violates the incentive compensation ban. Recall the first step. CPA and CPL are perfectly legitimate if there is no contact with students.

There is a limited exception for bundled service providers. If a school’s social media contractor is also providing online classrooms for enrolled students, then the

school may be able to pay the vendor a percentage of tuition. Make sure it is a bona fide bundling of non-recruitment services. In our experience, the Department has not hesitated to argue that something is an alleged sham transaction. Also, if an institution wants to avail itself of this exception, it must pay particular attention to the compensation of the vendor’s employees, discussed below.

The employees of the vendor cannot be given incentive compensation. In other words, if a school is prohibited from compensating its recruitment personnel in a particular way (e.g., commissions or volume-based bonuses), then the vendor cannot compensate its personnel that way. Schools cannot pay a third party to do what the school is not permitted to do itself. This means the incentive compensation rules apply to a vendor’s employees, though it remains to be seen how the Department will enforce this extension of the rule.

## DO NOT IGNORE SUBCONTRACTORS

Schools are held accountable for any third party that performs recruiting services; it is not necessary that the school have authorized that third party. This means that if a vendor has purchased names and contact information from another company that engaged in individual student contact, the school will be responsible for the conduct of the vendor’s supplier, for lack of a better term. So if a vendor’s job is to drive traffic, match prospective students or qualify leads, inquire with that vendor how it is driving traffic and from where it gets its prospective student information. If there is a second-tier vendor, that firm is a subcontractor to the institution, hence the college must examine how the vendor pays its sub.

## USE PROTECTION

Inquiry and analysis are exciting, but good risk management requires both prevention and protection. Get contract representations and warranties about subcontractor and employee compensation, or at the very least a covenant, to comply with all laws applicable to the institution. Back up those contractual promises with indemnification provisions. Finally, schools should routinely monitor what its vendors are doing and how they are doing it. The Department has a lot of enforcement leeway, so evidence that a school monitored its vendor and acted quickly to correct an incentive compensation issue will go a long way. **TC**



Holt



LeFevre

**RON HOLT** is co-leader of of Dunn & Davison law firm's higher education practice. He can be reached at [rholt@dunndavison.com](mailto:rholt@dunndavison.com) or 816-292-7604. **DAVID LEFEVRE** is Of Counsel in the Dunn & Davison, LLC Houston Office. David can be reached at [dlefevre@dunndavison.com](mailto:dlefevre@dunndavison.com) or 713-581-1987.