

Practice Update

Senators Question OPMs and Higher Education Institutions on Revenue Sharing

February 10, 2020

On January 23, 2020, Sen. Elizabeth Warren (D-Mass.) and Senator Sherrod Brown (D-Oh.) issued letters to five of the nation’s largest online program management companies (OPMs), alleging, amongst other things, that revenue sharing agreements between OPMs and the higher education institutions they partner with, which often delegate recruitment responsibilities to the OPMs, may violate the so-called “Incentive Compensation Rule” (34 CFR §668.14(b)(22)(i)). The Incentive Compensation Rule is a federal regulation which prohibits higher education institutions from compensating those responsible for their admissions for their successful recruitment and enrollment of students. OPMs, on the other hand, argue that guidance from the Department of Education issued in 2011 (the 2011 Guidance) permits such agreements as a part of a bundled service contract. Despite the 2011 Guidance, Sen. Warren and Sen. Brown rebut in their letters that it is still unclear: (a) whether higher education institutions and OPMs are actually following the stipulations in the 2011 Guidance, and (b) whether the “non-regulatory guidance is consistent with the text of the Higher Education Act.”

In closing, the letters requested information and records from the OPMs, including, but not limited to contracts the OPMs have with higher education institutions that receive Title IV funding, as well as

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presentation materials the OPMs used in meeting with potential higher education partners. The letters request the aforementioned be delivered no later than February 21, 2020.

In the interim, higher education institutions should review any contracts with OPMs to ensure they do not violate the Income Compensation Rule, and if such contracts do have any revenue sharing provisions, ensuring they comport with the 2011 Guidance with regard to its “bundled services” exception. Do not hesitate to reach out to the Akerman Higher Education & Collegiate Athletics Practice Team if you have questions with regard to your existing OPM service contracts, the Incentive Compensation Rule, or any governmental inquiries or requests for information.

The Akerman Higher Education & Collegiate Athletics Practice Team will stay abreast of the correspondence between the OPMs and the Senate, as well as any action the Senate takes with regard to OPMs or the Incentive Compensation Rule.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.