

New FSA Guidance on Third-Party Servicers

New York State Financial Aid Administrators Assoc.

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Syllabus

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Defining “Third-Party Servicer”

Statutory Definition of TPS

- For purposes of this subchapter, the term “third party servicer” means any individual, any State, or any private, for-profit or nonprofit organization, which enters into a contract with:
 1. any eligible institution of higher education to administer, through either manual or automated processing, **any aspect** of such institution's student assistance programs under this subchapter; or
 2. any guaranty agency, or any eligible lender, to administer, through either manual or automated processing, any aspect of such guaranty agency's or lender's student loan programs under part B of this subchapter, including originating, guaranteeing, monitoring, processing, servicing, or collecting loans.

Regulatory Definition of TPS

- Any party that “enters into a contract with an eligible institution to administer, through either manual or automated processing, **any aspect** of the institution's participation in any Title IV, HEA program.”
 - ED considers “administration of participation in a Title IV, HEA program” to include “performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA...”
 - An employee of an institution is **not** a third-party servicer.

Regulatory Definition of TPS: Covered Functions

Processing student
aid applications

Performing need
analysis

Determining student
eligibility and related
activities

Originating loans

Processing output
documents for
payment to students

Receiving,
disbursing, or
delivering Title IV,
HEA program funds

Conducting activities
required by the
provisions governing
student consumer
information

Preparing and
certifying requests
for advance or
reimbursement
funding

Loan servicing and
collection

Preparing and
submitting required
notices and
applications

Preparing a FISAP

Regulatory Definition of TPS: Excluded Functions

Publishing ability-to-benefit tests

Performing functions as a Multiple Data Entry Processor (MDE)

Financial and compliance auditing

Mailing of documents prepared by the institution

Warehousing of records

Providing computer services or software



Responsibilities in TPS Relationships

Institutional Responsibilities in TPS Relationships

Ultimate Liability

- Schools are ultimately responsible for the use of Title IV funds and will be held accountable even if TPS mismanagement led to the liability.

Notification of TPS Relationships

- Schools must notify ED within 10 days of new TPS contracts, as well as material changes to and termination of existing TPS contracts.

Include Required Clauses in TPS Contracts

- Institutions must ensure that any contract with a TPS includes specific clauses concerning liability, compliance, reporting, records, and responsibilities.

Institutional Responsibilities in TPS Relationships

TPS Contract Clauses Required in the Law

- TPS will be jointly and severally liable with the institution for any violation of Title IV requirements resulting from TPS performance.
- TPS will comply with all Title IV requirements, including submitting compliance audits.
- TPS will refer suspicion of fraudulent/criminal conduct regarding the Title IV programs to the OIG.
- TPS will confirm student eligibility and return Title IV funds (if required) when a student withdraws from the institution if the servicer disburses Title IV funds.
- TPS will return all records related to its administration of the Title IV programs to the institution, and if the servicer disburses or releases Title IV funds, return all unexpended Title IV funds to the institution, if the contract with the institution is terminated, or the servicer ceases to perform any of its functions for any reason including non-payment of financial obligations by the institution.

Institutional Responsibilities in TPS Relationships

TPS Contract Clauses Required in Guidance

- Must accurately and specifically detail the functions that the TPS and institution will perform.
- Must identify the TPS by its legal name and include any other name under which the TPS does business.
- Must provide the primary physical address and phone number for the TPS, as well as the name, title, phone number, and email address of its president.
- If a TPS subcontracts any of its responsibilities, must identify each subcontractor and describe the functions performed by the subcontractor.
- Must require TPS to comply with FTC information security requirements for financial institutions under GLBA.
- Must require the TPS to agree to comply with all applicable aspects of FERPA.

TPS Responsibilities in TPS Relationships

Agree to Clauses in TPS Contracts

- Each TPS must agree to the specific clauses concerning liability, compliance, reporting, records, and responsibilities.

Audits and Program Reviews

- A TPS must submit an annual Title IV compliance audit within six months of its fiscal year end and may be the subject of a Title IV program review.

TPS Past Performance

- An institution cannot knowingly contract with a TPS that has been terminated or committed fraud with Title IV funds.

FLST Proceedings and Emergency Actions

- ED can initiate a fine, limitation, suspension, or termination proceeding or to take emergency action against a TPS.

Submit Third-Party Servicer Data Form

- A TPS is required to submit the Third-Party Servicer Data Form to the Department and to update certain changes within 10 days.



Prior TPS Guidance

Prior DCL Guidance

- On April 26, 2012, ED released DCL [GEN-12-08](#), which focused on clarifying that the definition of TPS includes servicers who deliver Title IV credit balances to students “directly or through a contractor-supplied financial institution such as a bank or credit union.”
- On Jan. 9, 2015, ED released DCL [GEN-15-01](#), which expanded the definition of TPS to include more computer services and software providers, and clarified that TPS must comply with FERPA and information security requirements established by the FTC for financial institutions.

Prior DCL Guidance

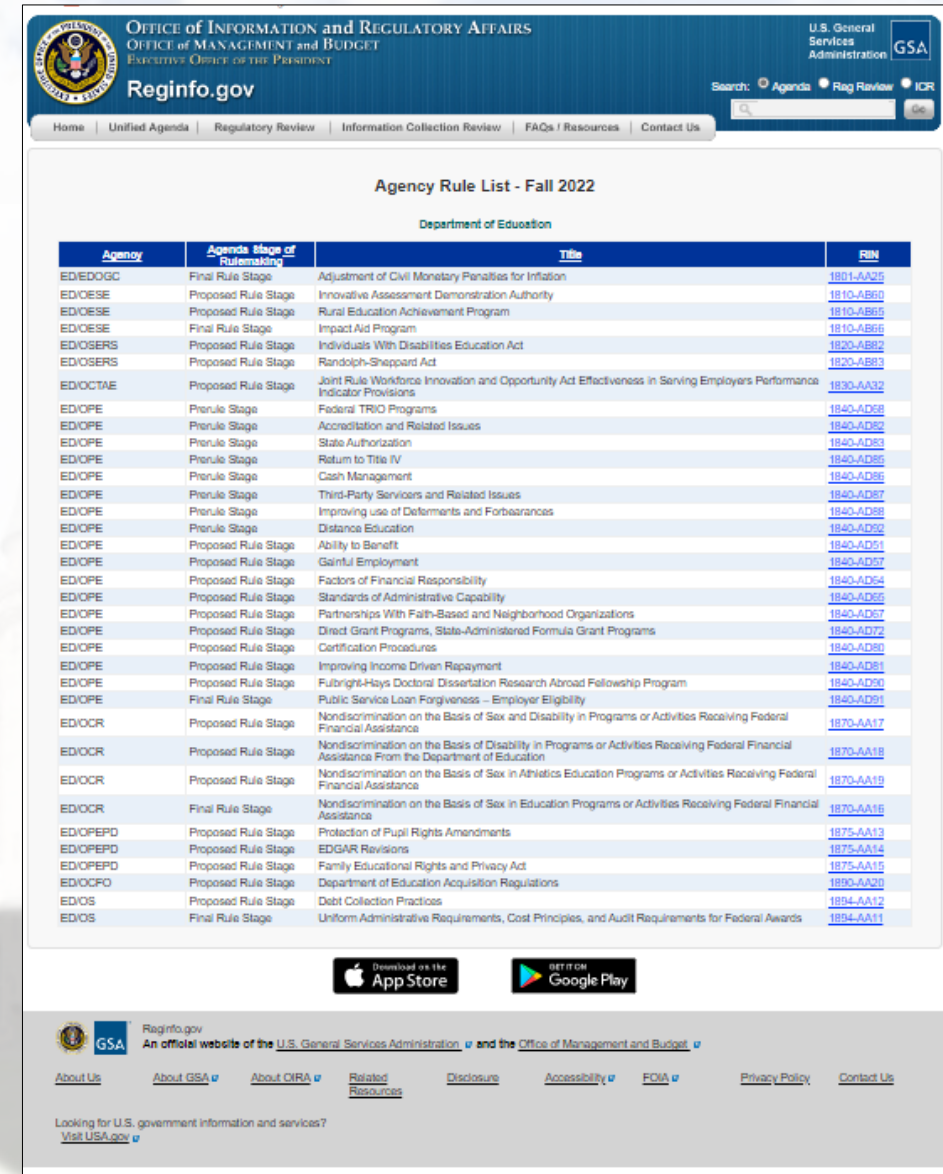
- On Aug. 18, 2016, ED released [GEN-16-15](#), a 22-page Q&A document intended provide further clarification with regards to TPS concerns. An [updated version](#) was released on March 17, 2018.
 - This 2016 Q&A document serves as the foundation for the new TPS guidance.
 - It introduces the chart embedded in the new guidance and includes many of the same categories (though not recruiting, retention, or instructional content).
 - The 2016 Q&A document also introduces the prohibition on contracting with a TPS “located outside of the United States and/or is owned or operated by an individual who is not a U.S. citizen or national, or a lawful U.S. permanent resident.”



The New TPS Guidance

TPS Rulemaking

- Late last year, ED announced as part of the Biden Administration's Unified Agenda of Regulatory and Deregulatory Actions that it intends to initiate a TPS rulemaking in April 2023.
- You can view ED's part of the Unified Agenda [here](#).



Agency	Agenda stage of Rulemaking	Title	RIN
ED/EDGOC	Final Rule Stage	Adjustment of Civil Monetary Penalties for Inflation	1801-AA25
ED/OESE	Proposed Rule Stage	Innovative Assessment Demonstration Authority	1810-AB60
ED/OESE	Proposed Rule Stage	Rural Education Achievement Program	1810-AB65
ED/OESE	Final Rule Stage	Impact Aid Program	1810-AB66
ED/OSERS	Proposed Rule Stage	Individuals With Disabilities Education Act	1820-AB82
ED/OSERS	Proposed Rule Stage	Randolph-Sheppard Act	1820-AB83
ED/OCTAE	Proposed Rule Stage	Joint Rule Workforce Innovation and Opportunity Act Effectiveness in Serving Employers Performance Indicator Provisions	1830-AA32
ED/OPE	Prerule Stage	Federal TRIO Programs	1840-AD68
ED/OPE	Prerule Stage	Accreditation and Related Issues	1840-AD62
ED/OPE	Prerule Stage	State Authorization	1840-AD63
ED/OPE	Prerule Stage	Return to Title IV	1840-AD65
ED/OPE	Prerule Stage	Cash Management	1840-AD66
ED/OPE	Prerule Stage	Third-Party Services and Related Issues	1840-AD67
ED/OPE	Prerule Stage	Improving use of Deferrals and Forbearances	1840-AD68
ED/OPE	Prerule Stage	Distance Education	1840-AD69
ED/OPE	Proposed Rule Stage	Ability to Benefit	1840-AD91
ED/OPE	Proposed Rule Stage	Gainful Employment	1840-AD97
ED/OPE	Proposed Rule Stage	Factors of Financial Responsibility	1840-AD94
ED/OPE	Proposed Rule Stage	Standards of Administrative Capability	1840-AD95
ED/OPE	Proposed Rule Stage	Partnerships With Faith-Based and Neighborhood Organizations	1840-AD97
ED/OPE	Proposed Rule Stage	Direct Grant Programs, State-Administered Formula Grant Programs	1840-AD92
ED/OPE	Proposed Rule Stage	Certification Procedures	1840-AD80
ED/OPE	Proposed Rule Stage	Improving Income Driven Repayment	1840-AD81
ED/OPE	Proposed Rule Stage	Fulbright-Hays Doctoral Dissertation Research Abroad Fellowship Program	1840-AD90
ED/OPE	Final Rule Stage	Public Service Loan Forgiveness – Employer Eligibility	1840-AD91
ED/OCR	Proposed Rule Stage	Nondiscrimination on the Basis of Sex and Disability in Programs or Activities Receiving Federal Financial Assistance	1870-AA17
ED/OCR	Proposed Rule Stage	Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of Education	1870-AA18
ED/OCR	Proposed Rule Stage	Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance	1870-AA19
ED/OCR	Final Rule Stage	Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance	1870-AA16
ED/OEPD	Proposed Rule Stage	Protection of Pupil Rights Amendments	1875-AA13
ED/OEPD	Proposed Rule Stage	EDGAR Revisions	1875-AA14
ED/OEPD	Proposed Rule Stage	Family Educational Rights and Privacy Act	1875-AA15
ED/OCFO	Proposed Rule Stage	Department of Education Acquisition Regulations	1890-AA20
ED/OS	Proposed Rule Stage	Debt Collection Practices	1894-AA12
ED/OS	Final Rule Stage	Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards	1894-AA11

New TPS Guidance

- On Feb. 15, 2023, ED published [***Dear Colleague Letter \(GEN-23-03\)***](#) detailing new requirements and responsibilities for third-party servicers and institutions.
- On Feb. 28, 2023, following significant feedback from the regulated community, ED published an updated version of the letter.
- The effective date of the guidance is **September 1, 2023**.

(GEN-23-03) Requirements and Responsibilities for Third-Party Servicers and Institutions (Updated Feb. 28, 2023)

Print

PUBLICATION DATE: February 15, 2023

DCL ID: GEN-23-03

SUBJECT: Requirements and Responsibilities for Third-Party Servicers and Institutions (Updated Feb. 28, 2023)

SUMMARY: This letter updates guidance to institutions that contract with a third-party servicer (TPS) to administer any aspect of the institution's participation in the student assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

Note

On Feb. 28, 2023, we updated this letter to extend the public comment period, establish a future effective date for the guidance, and extend the reporting deadline for institutions and third-party servicers.

On Feb. 16, 2023, we corrected the content of the table titled "Recruitment and Application-Related Activities" to add information that was inadvertently omitted during the publication process.

Dear Colleague:

Since we issued our most recent Dear Colleague Letters regarding third-party servicers, the U.S. Department of Education (Department) has reviewed numerous contractual arrangements between institutions and outside entities. These reviews have confirmed that most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements. The HEA makes clear that agreements to administer "any aspect" of an institution's participation in the Title IV programs fall within the scope of the Department's TPS oversight authority, 20 U.S.C. § 1088(c). The information gathered in the Department's review highlighted the need for an updated list of functions and activities that fall within the scope of the TPS requirements.

In particular, the Department is revising its guidance concerning the functions of student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction. The Department is aware that a large and growing industry has developed to provide one or more of these services as a means of

New TPS Guidance: An Expanded Definition

- In the letter, ED proposes that a “third-party servicer” would now include any vendor that contracts with a Title IV institution to assist with recruiting, retention, or the delivery of Title IV-eligible education programs.
- ED also would include a wider range of vendors providing consulting, auditing, and software solutions.
- This represents an extraordinary expansion of the “third-party servicer” concept.

New TPS Guidance: Foreign TPS Prohibition

- Despite the significantly expanded definition of TPS, ED **maintains** its position that institutions may not contract with a TPS if the TPS (or its subcontractors) is located outside of the US or owned or operated by an individual who is not a U.S. citizen or national or a lawful U.S. permanent resident.

New TPS Guidance: Authorization

- In the opening paragraphs of the DCL, ED establishes its statutory authority to expand the definition of third-party servicer:
 - Its review of contractual relationships between schools and servicers reveals that “most activities and functions performed by outside entities on behalf of an institution are **intrinsically intertwined** with the institution’s administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements.”
 - This is critical, as the HEA defines a TPS as a servicer that under contract administers “any aspect of such institution's student assistance programs...”

New TPS Guidance: Motivation

- ED also is clear regarding its motivation.
 - [T]he Department is revising its guidance concerning the functions of student recruiting and retention, the provision of software products and services involving Title IV administration activities, and the provision of educational content and instruction.
 - Companies providing such services are sometimes referred to as “online program managers,” or OPMs.
 - The Department’s recent review of these functions, and the 2022 GAO report cited above, have made clear that the Department must conduct oversight of the entities performing these functions...



Considering Comments

Considering Comments

- Institutions may submit comments through **March 30, 2023**, via the Federal eRulemaking Portal at Regulations.gov, under Docket ID [ED-2022-OPE-0103](#).
- During a recent conversation with a trade association, Deputy Under Secretary Ben Miller emphasized that ED wants meaningful comments and acknowledged that there may be unforeseen consequences of the proposals.
 - ED is particularly interested in comments “on the impact of continuing the existing limitation on institutions contracting with third-party servicers operating outside the United States or owned or operated by individuals who are not U.S. citizens, nationals, or permanent residents, including how to address the Department’s concerns about the ability to hold such servicers liable if necessary.”

Considering Comments

- Individualized comments with examples of how the policies may impact campuses, programs, and students are best.
- Schools also may wish to initiate campus conversations with legal counsel, foreign relations, and campus leadership, any might consider providing a copy of their comments to their members of Congress.

Considering Comments

- As you examine the new DCL, and consider opportunities for comment, it also will be helpful to recall which policies and proposals are supported by statutory or regulatory language, and which are not.
- As recently as 2021, ED acknowledged that “[a] DCL is, at most, an interpretive rule, not a regulation subject to the notice-and-comment rulemaking process under the Administrative Procedure Act...”
- ED is more likely to revise and reconsider positions that are new and unsupported by law.

Critical Concepts Absent from the Law

- Nowhere in statute or regulation is there a prohibition on contracting with a TPS (or its subcontractors) located outside of the US or owned or operated by an individual who is not a U.S. citizen or national or a lawful U.S. permanent resident.
- Nowhere in statute or regulation (or prior guidance) is there any suggestion that TPS would include servicers assisting with recruiting, retention, or the delivery of academic programs.



Points for Consideration

Foreign Ownership

- The new guidance repeats the prior prohibition on institutions contracting “with a TPS to perform any aspect of the institution’s participation in a Title IV program if the servicer (or its subcontractors) is located outside of the United States or is owned or operated by an individual who is not a U.S. citizen or national or a lawful U.S. permanent resident.”

Third-Party Servicer Definition and Activities

A TPS is any entity or individual that administers, any aspect of an institution’s participation in the Title IV programs. [34 C.F.R. § 668.2](#) (definition of a third-party servicer). In general, a TPS performs functions or services necessary —

- For the institution to remain eligible to participate in the Title IV programs;
- To determine a student’s eligibility for Title IV funds;
- To provide Title IV-eligible educational programs;
- To account for Title IV funds;
- To deliver Title IV funds to students; or
- To perform any other aspect of the administration of the Title IV programs or comply with the statutory and regulatory requirements associated with those programs.

To protect the interests of institutions, taxpayers, and students, an institution may not contract with a TPS to perform any aspect of the institution’s participation in a Title IV program if the servicer (or its subcontractors) is located outside of the United States or is owned or operated by an individual who is not a U.S. citizen or national or a lawful U.S. permanent resident. This prohibition applies to both foreign and domestic institutions.

Additionally, under the regulations at [34 C.F.R. 668.25\(d\)](#), a TPS may not have —

- Been limited, suspended, or terminated by the Secretary within the preceding five years;
- Had, during the servicer’s two most recent audits, an audit finding that resulted in the servicer being required to repay an amount greater than five percent of the funds that the servicer administered under the Title IV programs for any award year; or
- Been cited during the preceding five years for failure to submit audit reports required under Title IV of the HEA in a timely fashion.

If the Secretary determines that a TPS has not met the required standards of conduct or has violated its fiduciary duty, the Secretary may fine the servicer or limit, suspend, or terminate the servicer’s participation in the Title IV programs under 34 C.F.R. part 668, subpart G. A former TPS, once subjected to a termination action by the Secretary, may not enter into a written contract to administer any aspect of an institution’s participation in the Title IV programs unless financial guarantees and acknowledgements of joint and several liability under [34 C.F.R. 668.25\(d\)\(2\)](#) are provided.

Foreign Ownership: Impact

- The proposed guidance would prohibit contracts with covered foreign organizations and recruiters who recruit for Title IV programs.
- The guidance would prohibit contracts with covered foreign institutions or training providers that provide a part of a Title IV program could eliminate certain kinds of study abroad relationships.
- The guidance would prohibit contracting with other covered foreign service providers.
- In these cases, covered foreign parties would not simply be required to be a TPS, they would be unable to contract with Title IV institutions.

Foreign Ownership: Points to Consider

- For centuries, academic partnerships with foreign institutions have provide extraordinary opportunities for domestic and foreign students. They also generate a wide range of benefits for the US (goodwill, academic, scientific and cultural exchange, recruitment of foreign talent).
- Native recruiters are easily in the best position to recruit students from their country.
- ED suggests a concern regarding its ability to recover against foreign third-party servicers, but most foreign academic and recruiting partners have no role in administering Title IV aid, and as such, would not be responsible for Title IV liabilities.
- Even if a foreign TPS was responsible for Title IV liabilities, ED still can recover directly from the institution.

Foreign Ownership: Points to Consider

- Congress permits domestic institutions of higher education to participate in the Title IV programs even if they have foreign ownership. And Congress permits certain foreign institutions to participate directly in the Title IV programs, despite being outside of the country and under foreign ownership. Any total exclusion of foreign parties would thus seem inconsistent with Congressional intent. In the least, ED should await Congressional action on this point.
- Should ED move forward with this guidance, it should clarify:
 - how ED would determine whether a provider is located outside the US (headquarters, most locations, the location performing the service, etc);
 - whether the ownership/operation provision only applies to individuals, or also impacts corporate entities with foreign ownership, or foreign entities with no ownership (i.e., a foreign non-profit); and
 - whether an entity is impacted if the majority of its ownership remains domestic.

Recruitment

- A TPS would now include entities:
 - interacting with prospective students for the purposes of recruiting or securing enrollment
 - assisting students with the completion of application and enrollment processes
 - processing admissions applications, including the collection of documents, screening, and/or determining initial or final qualification of applicants
 - establishing or modifying admissions standards

Recruitment- and Application-Related Activities

Third-Party Servicer	Not a Third-Party Servicer
<p>Interacting with prospective students for the purposes of recruiting or securing enrollment. This includes, but is not limited to, providing prospective students with information on educational programs, application and document requirements, deadlines, and the enrollment process.</p> <p>Assisting students with the completion of application and enrollment processes. This includes offering admission and enrollment counseling.</p> <p>Processing admissions applications, including the collection of documents, screening, and/or determining initial or final qualification of applicants.</p> <p>Establishing or modifying admissions standards for acceptance into the institution or any educational programs offered by the institution.</p> <p>Processing Title IV student financial aid applications, including FAFSA or pre-FAFSA completion services.</p> <p>Performing individualized and interactive financial aid counseling in person, over the telephone, and/or by electronic means, including operating call centers and online support/engagement tools to answer general questions and/or assist students through the financial aid processes necessary to award</p>	<p>Conducting, hosting, or assisting with community awareness/public service Free Application for Federal Student Aid (FAFSA®) completion events and/or general financial aid/college presentations open to the public and not limited or restricted to students attending, applying to, or considering applying to a specific institution or institutions (e.g., College Goal Sunday).</p> <p>Publishing and/or mailing general student financial aid information, policies, procedures, or handbooks prepared by the institution or other entities via print format, audio format, video format, and/or online, as long as such publication does not involve individualized and interactive financial aid counseling.</p>

Recruitment: Impact

- Institutions have a wide range of relationships with parties that ostensibly involve some form of recruiting.
- The nature of the activities undertaken by these entities varies, from in person recruiting to broad based marketing.
- The parties also vary, from lead providers, to classic recruiters, to employee benefits providers, to other institutions and training providers who assist with recruiting, enrollment, or marketing functions.
- All of these partners could be deemed a TPS based on the new guidance.

Recruitment: Points to Consider

- Many partners that provide recruiting or marketing services do not assist institutions to administer any aspect of the Title IV programs. They have no direct contact with prospective students, they do not assist with providing any required pre-enrollment disclosures or consumer information, and they do not interact with students during the enrollment or financial aid processes.
- Should ED move forward with this guidance, it should clarify whether the rule would apply to:
 - lead generators;
 - partners who have no direct contact with prospective students;
 - partners who only engage in marketing and promotional efforts;
 - partners who do not assist with providing any required pre-enrollment disclosures or consumer information;
 - employee benefit providers; or
 - partners who are institutions of higher education.

Retention

- Under “retention of students” the guidance now includes entities conducting “activities designed to keep an individual enrolled at an institution eligible for Title IV aid,” and gives specific examples of covered retention activities.
- No exceptions are discussed.

Retention of Students	
Third-Party Servicer	Not a Third-Party Servicer
<p>Conducting activities designed to keep an individual enrolled at an institution eligible for Title IV aid. These activities include, but are not limited to:</p> <ul style="list-style-type: none">• Monitoring academic engagement and/or daily attendance.• Conducting outreach to students regarding attendance or academic engagement.• Responding to inquiries from students and/or their families regarding assistance or resources designed to help students maintain enrollment in the institution/program or maintain eligibility for Title IV aid.	

Retention: Impact

- In addition to OPMs, the proposed guidance would likely cover the many non-profit and service organizations providing student engagement and retention services or tools to improve student outcomes for at-risk students.

Retention: Points to Consider

- Retention services are critical to ensuring student success and, in doing so, significantly improve the return on investment for taxpayers.
- Many of the nonprofit and service organizations that assist with retention efforts may be dissuaded from continuing these efforts, unwilling to take accept the liability, reporting, and other obligations required of a TPS.
- Nowhere in statute or regulation (or prior guidance) is there any suggestion that TPS would include servicers assisting with retention. Moreover, ED offers no explanation for including retention services other than its statement that “most activities and functions performed by outside entities on behalf of an institution are **intrinsically intertwined** with the institution’s administration of the Title IV programs and thus the entities performing such activities are appropriately subject to TPS requirements.”

Instructional Content

- The new “instructional content” section of the guidance indicates that entities providing “any percentage of a Title IV-eligible program at an institution” would now be deemed a TPS.
- The guidance also includes certain exceptions.

Instructional Content	
Third-Party Servicer	Not a Third-Party Servicer
<p>Providing any percentage of a Title IV-eligible program at an institution, including:</p> <ul style="list-style-type: none">• Establishing requirements for the completion of a course and/or evaluating whether a student has met those requirements;• Delivering instruction or mandatory tutoring;• Assessing student learning, including through electronic means; or• Developing curricula or course materials, unless the institution maintains full control of the curriculum/materials and delivers the instruction itself. See previous Dear Colleague Letter.	<p>Providing optional supplementary academic support to students, such as tutoring or other forms of optional academic assistance. This exclusion does not apply if the academic assistance is mandatory or a required part of the academic program.</p> <p>Selling or providing course materials, if the institution maintains full control of the curriculum and delivers the instruction itself. This exclusion does not apply if the vendor maintains control of the program or materials after selling the materials to the institution or is in any way involved with instruction.</p>

Instructional Content: Impact

- The inclusion of academic partnerships under the TPS umbrella is incredibly impactful. Relationships that could be covered include:
- An institution that provides courses and instruction to another institution as part of an academic partnership between the schools.
- A hospital providing clinical experiences and related educational programming for nurses and other medical professionals.
- A local police department providing part of a criminal justice program.

Instructional Content: Points to Consider

- Academic and clinical partnerships are foundational to US higher education.
- As with recruiting and retention, there is no statutory or regulatory basis for including academic partners that do not otherwise assist with the administration of Title IV.
- Including academic and clinical partners would create tens of thousands of TPS, which would be unmanageable for ED.
- Other academic and clinical partners may terminate relationships, unwilling to be designated a TPS.
-

Instructional Content: Points to Consider

- There is regulatory precedent for excluding academic partners from the definition of a TPS. 34 CFR 668.5(d)(2) provides:
 - In the case of a written arrangement between eligible institutions, the institutions may agree in writing to have any eligible institution in the written arrangement make those calculations and disbursements, and the Secretary does not consider that institution to be a third-party servicer for that arrangement.
- Thus, in existing regulation written arrangements between eligible institutions are exempted even where the contracted activities specifically include financial aid administration.

Instructional Content: Points to Consider

- Also in 34 CFR 668.5(h) is evidence that in the past ED appreciated the issue created if clinical agreement were regulated like a standard written arrangement between schools. The regulation specifically exempts internships and externships if:
 - The internship or externship portion of a program if the internship or externship is governed by accrediting agency standards, or, in the case of an eligible foreign institution, the standards of an outside oversight entity, such as an accrediting agency or government entity, that require the oversight and supervision of the institution, where the institution is responsible for the internship or externship and students are monitored by qualified institutional personnel.



TC Extra Credit

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Title IX update: Important new ED guidance concerning pregnancy

[Aaron Lacey](#) [Stephanie Cohan](#) [Scott Goldschmidt](#)  October 25, 2022



On October 4, 2022, the U.S. Department of Education (the "Department") released new guidance for students and schools on Title IX's prohibition of discrimination based on pregnancy and pregnancy related conditions (the "Guidance"). As outlined in a memorandum from the White House's Gender Policy Council Director, this Guidance was released in response to the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* and the effect the *Dobbs* decision may have on students and college campuses. [READ MORE](#)

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Financial Responsibility Reporting Under the Borrower Defense to Repayment Rule

Last Updated: August 1, 2021

On September 23, 2019, the U.S. Department of Education published the final version of its 2019 "borrower defense to repayment" rule (the "2019 Rule"). The 2019 Rule, which took effect on July 1, 2020, revised the financial responsibility regulations that require institutions of higher education to report certain "triggering events" to the Department (located at [34 CFR 668.171](#)). If an institution fails to make a required notification under the 2019 Rule, the Department may take administrative action against the institution, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs.

On the following pages, we provide a chart that details the reporting obligations under the 2019 Rule. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to FSAPR@ed.gov. The Department has not specified any required form or content for notices made under the 2019 Rule. However, in a Q&A document issued on June 3, 2019, the agency offered recommendations.¹ Institutions should continue to watch for updated guidance from the Department concerning the reporting of triggering events. The Department also has announced its intent to revisit the financial responsibility regulations in a forthcoming negotiated rulemaking.²

1. The Department established this email address for reporting purposes in guidance issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the borrower defense rule (the "2016 Rule"). As of August 1, 2021, the Department has not issued any further guidance concerning how to report triggering events.
2. As of August 1, 2021, the Department has not issued any further guidance concerning the form or content of notices of triggering events.
3. Additional information regarding the Department's negotiated rulemaking agenda for 2021-2022 is located [here](#). It is unlikely that any new regulations concerning financial responsibility reporting would become effective prior to July 1, 2023.



Institutional Loans: Compliance Considerations

Last Updated: July 2021

For a wide range of reasons, institutions of higher education frequently determine to offer students the opportunity to finance all or part of their education using some form of institutional credit. These arrangements can vary greatly, from a simple, short-term, no interest payment plan to a fully-formed, traditional, interest-bearing loan. Schools should be aware, however, that in many cases, such arrangements will qualify as a "private education loan" under federal law, subjecting the institution to a multitude of federal regulations that must be followed. These arrangements also will frequently be subject to state consumer finance laws, and in some instances, to state laws governing the authorization of postsecondary institutions.

Staying apprised of these federal and state laws, and administering an institutional student loan program in accordance with their complex requirements, is a significant challenge. This is particularly true where institutions operate campuses in multiple jurisdictions, have students who reside in multiple jurisdictions, or offer a variety of student financing options (e.g., loans, payment plans, retail installment contracts). Compliance is critical, however, as the ramifications for noncompliance can be severe. Furthermore, federal and state regulators have made clear that they intend to aggressively enforce the regulatory framework that applies to student financing opportunities offered by schools.¹ Indeed, institutions of higher education that offer private education loans should expect meaningful and coordinated scrutiny from the U.S. Department of Education (the "Department"), the Consumer Financial Protection Bureau (the "CFPB"), state attorneys general, and other regulators.

The purpose of this memorandum is to provide an overview of certain significant federal requirements that institutions of higher education should consider when contemplating an institutional loan program, or any other student financing opportunity. **We strongly emphasize that this document does not provide an exhaustive list of all legal requirements related to the offering of such loans, and in particular, does not address applicable state laws and regulations, which vary based on the jurisdiction(s) in which an institution is operating.** We encourage institutions contemplating any form of student financing opportunity (even simple payment plans), to confer with counsel and other qualified advisors to determine whether the opportunity is subject to federal or state laws governing private education loans or other extensions of credit, and to develop a plan for compliance.

1. By way of example, in May 2021, the Biden Administration selected Richard Cordray, the former director of the CFPB to serve as the senior official overseeing the federal student aid programs.



Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#) (the "Act"), a \$1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."¹ Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

1. 34 C.F.R. §668.14(a)(10); see also 20 U.S.C. §1094(a)(24).



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