New FSA Guidance on Third-Party Servicers
New York State Financial Aid Administrators Assoc.
March 17, 2023
Thompson Coburn LLP

• Full-service law firm with over 400 attorneys.
• Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, and Washington, D.C.
• Higher education practice provides legal counsel, compliance, and training services to colleges and universities.
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Syllabus

- Defining “Third-Party Servicer”
- Responsibilities in TPS Relationships
- Prior TPS Guidance
- The New TPS Guidance
- Considering Comments
- Points for Consideration
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.”
  o 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...”
  o An employee of an institution is not a third-party servicer.

34 C.F.R. § 668.2.
### Regulatory Definition of TPS: Covered Functions

<table>
<thead>
<tr>
<th>Function</th>
<th>Details</th>
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<tbody>
<tr>
<td>Processing student aid applications</td>
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<td>Performing need analysis</td>
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<td>Determining student eligibility and related activities</td>
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<td>Originating loans</td>
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<td>Processing output documents for payment to students</td>
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<td>Receiving, disbursing, or delivering Title IV, HEA program funds</td>
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<td>Conducting activities required by the provisions governing student consumer information</td>
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<tr>
<td>Loan servicing and collection</td>
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<td>Preparing and submitting required notices and applications</td>
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<td>Preparing a FISAP</td>
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34 C.F.R. § 668.2.
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

<table>
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<th><strong>Ultimate Liability</strong></th>
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<td>• School are ultimately responsible for the use of Title IV funds and will be held accountable even if TPS mismanagement led to the liability.</td>
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<th><strong>Notification of TPS Relationships</strong></th>
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<td>• Schools must notify ED within 10 days of new TPS contracts, as well as material changes to and termination of existing TPS contracts.</td>
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<th><strong>Include Required Clauses in TPS Contracts</strong></th>
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<tr>
<td>• Institutions must ensure that any contract with a TPS includes specific clauses concerning liability, compliance, reporting, records, and responsibilities.</td>
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34 C.F.R. §§ 668.23 and 668.25.
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

34 C.F.R. § 668.25(c).
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.

34 C.F.R. §§ 668.23 and 668.25.
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.
  o This 2016 Q&A document serves as the foundation for the new TPS guidance.
  o It introduces the chart embedded in the new guidance and includes many of the same categories (though not recruiting, retention, or instructional content).
  o 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.
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.
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:
  o 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.”
  o 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.
  o [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.
  o Companies providing such services are sometimes referred to as “online program managers,” or OPMs.
  o 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

- 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(e)(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

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<th>Third-Party Servicer</th>
<th>Not a Third-Party Servicer</th>
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<td>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.</td>
<td>Conducting, hosting, or assisting with community awareness/public service Free Application for Federal Student Aid (FAFSA®) completion events and/or general financial aid/counseling 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).</td>
<td>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.</td>
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<tr>
<td>Assisting students with the completion of application and enrollment processes. This includes offering admission and enrollment counseling.</td>
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<td>Processing admissions applications, including the collection of documents, screening, and/or determining initial or final qualification of applicants.</td>
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<td>Establishing or modifying admissions standards for acceptance into the institution or any educational programs offered by the institution.</td>
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<tr>
<td>Processing Title IV student financial aid applications, including FAFSA or pre-FAFSA completion services.</td>
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<td>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 process.</td>
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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:
  o lead generators;
  o partners who have no direct contact with prospective students;
  o partners who only engage in marketing and promotional efforts;
  o partners who do not assist with providing any required pre-enrollment disclosures or consumer information;
  o employee benefit providers; or
  o 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: 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.”
• 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.
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:
  o 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.
• 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:
  o 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
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.

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Financial Responsibility Reporting

Under the Borrower Defense to Repayment Rule

Last Updated: August 9, 2023

On September 20, 2020, the U.S. Department of Education published the final version of the 2018 “Borrower Defense to Repayment” rule (the “Rule”). The Rule, which took effect July 1, 2020, imposed the financial responsibility regulations that require institutions of higher education to report certain “triggers” to the Department of Education. The Rule is scheduled to take effect under the July 2020 timeframe and requires institutions to report certain financial triggers in order to maintain their eligibility to participate in federal student aid programs. The Department has issued final regulations to implement the new reporting requirements for institutions of higher education. The new regulations require institutions to report certain financial triggers in order to maintain their eligibility to participate in federal student aid programs.

On the following pages, you will find a chart that details the reporting obligations under the Rule. Pending further guidance from the Department, we suggest that you consult with your compliance and financial reporting contacts to ensure that your institutions are prepared for the Rule to take effect.

Institutional Loans: Compliance Considerations

Last Updated: July 4, 2023

For a wide range of reasons, institutions of higher education frequently determine that students have the opportunity to finance a part of their education through some form of institutional credit. These arrangements can range from a simple promissory note to more complex financial arrangements, such as loans, lines of credit, and credit cards. The Department of Education’s rules governing institutional credit are intended to ensure that institutions do not impose unreasonable or excessively burdensome terms and conditions on credit arrangements.

Staying aligned with federal and state laws and regulations, an institutional student loan program is an accreditable activity. This capability to issue student credit requires institutions to implement a program that complies with applicable laws and regulations. Therefore, in order to maintain eligibility to participate in federal student aid programs, institutions must ensure that their institutional student loan programs are in compliance with the applicable law and regulations.

The purpose of this memorandum is to provide an overview of the key financial regulations that institutions are required to comply with in order to maintain eligibility to participate in federal student aid programs. We strongly encourage institutions to consult with their legal or financial advisors to ensure compliance with all applicable laws and regulations.

1. The Department has established the email address for reporting purposes in accordance with the 2018 version of the Borrower Defense to Repayment Rule (the “Rule”). On August 2, 2019, the Department also issued an institutional notice concerning the borrower defense to repayment requirements.

2. As of August 2, 2019, the Department has issued an institutional notice concerning the borrower defense to repayment requirements.

3. Additional information regarding the Department’s regulatory compliance and reporting practices for 2018–2019 is included. It is unlikely that any regulations concerning reporting for financial responsibility reporting are still in effect at the time of this publication.

Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 12, 2013, President Obama signed into law the American Recovery and Reinvestment Act of 2013 (the “ARRA”) as a bipartisan solution to an economic crisis. Among other things, the ARRA established a new 90/10 rule that governed how an institution could be affiliated with an identifiable entity. The 90/10 rule is a series of requirements that are designed to ensure that the government’s investment in education assistance benefits is not used to invest in entities that are not substantially engaged in education.

In order to comply with the 90/10 rule, institutions that are affiliated with an identifiable entity must ensure that they are not engaging in activities that are not substantially engaged in education. The 90/10 rule requires that an institution’s earnings from educational programs that are not substantially engaged in education do not exceed 90% of the institution’s total operating expenses. The 90/10 rule is intended to ensure that the government’s investment in education assistance benefits is not used to invest in entities that are not substantially engaged in education.

The Department of Education is continuing to develop a system to better identify institutional entities and their operations. The system will be designed to ensure that institutions are able to maintain compliance with the 90/10 rule and that the government’s investment in education assistance benefits is not used to invest in entities that are not substantially engaged in education.

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