

A Briefing on Third Party Servicers Guidance and Education Abroad

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Presenter Profile

- Practice and Experience

- Provides legal services and advice to the Board of Trustees, President, cabinet and divisions, and all other duly authorized representatives of the Colleges acting in their capacity for the Colleges.
- Has taught and guest lectured on business and higher education law topics at Hobart and William Smith and Boston College Law School, respectively, and is an Adjunct Professor of Law at Cornell Law School.

- Contact Information

- GUARD@hws.edu
- (315) 781-3000



Lou Guard

VP & General Counsel
Hobart and William Smith Colleges



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Presenter Profile

- Practice and Experience
 - Chair of Thompson Coburn's Higher Education law practice.
 - Assists institutions of higher education to navigate a wide range of complex legal and regulatory matters.
 - Frequently writes and speaks on topics relating to federal higher education policy and regulation.
- Contact Information
 - alacey@thompsoncoburn.com
 - 314-552-6405



Aaron Lacey

Partner

Thompson Coburn LLP



Presentation Outline

The New TPS Guidance

Defining “Third-Party Servicer”

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Considering Comments

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The New TPS Guidance

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 a slightly updated version of the letter.

(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...



New TPS Guidance: Opportunity to Comment

- Institutions may submit comments through March 30, 2023, via the Federal eRulemaking Portal at Regulations.gov, under Docket ID ED-2022-OPE-0103.
- The effective date of the guidance to September 1, 2023.
- 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.”



TPS Rulemaking

- ED also 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](#).

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Agency Rule List - Fall 2022

Department of Education

Agency	Agenda Stage of Rulemaking	Title	RIN
ED/EOGC	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/OESRS	Proposed Rule Stage	Individuals With Disabilities Education Act	1820-AB92
ED/OESRS	Proposed Rule Stage	Randolph-Sheppard Act	1820-AB93
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-AD69
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 Deferments and Forbearances	1840-AD68
ED/OPE	Prerule Stage	Distance Education	1840-AD62
ED/OPE	Proposed Rule Stage	Ability to Benefit	1840-AD61
ED/OPE	Proposed Rule Stage	Gainful Employment	1840-AD67
ED/OPE	Proposed Rule Stage	Factors of Financial Responsibility	1840-AD64
ED/OPE	Proposed Rule Stage	Standards of Administrative Capability	1840-AD65
ED/OPE	Proposed Rule Stage	Partnerships With Faith-Based and Neighborhood Organizations	1840-AD67
ED/OPE	Proposed Rule Stage	Direct Grant Programs, State-Administered Formula Grant Programs	1840-AD72
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/OPEPD	Proposed Rule Stage	Protection of Pupil Rights Amendments	1875-AA13
ED/OPEPD	Proposed Rule Stage	EDGAR Revisions	1875-AA14
ED/OPEPD	Proposed Rule Stage	Family Educational Rights and Privacy Act	1875-AA15
ED/OFCFO	Proposed Rule Stage	Department of Education Acquisition Regulations	1890-AA20
ED/O'S	Proposed Rule Stage	Debt Collection Practices	1894-AA12
ED/O'S	Final Rule Stage	Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards	1894-AA11

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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:
 - 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
 - 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, servicing, or collecting 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

Preparing a FISAP

Preparing and submitting required notices and applications



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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 8, 2017.
 - 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.”



Considering Comments

Considering Comments

- Institutions may submit comments through March 30, 2023, via the Federal eRulemaking Portal at [Regulations.gov](https://www.regulations.gov), under Docket ID [ED-2022-OPE-0103](https://www.regulations.gov/docket/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

- The Forum also is encouraging institutions to submit comments to ED by the March 30 deadline, highlighting the impact on students and institutions' ability to offer study abroad programs
 - The Forum is providing bullet points but encourages individualized comments an examples.
- Schools also may wish to initiate campus conversations with legal counsel, foreign relations, and campus leadership, can consider providing your comments to your 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... it is not binding on third parties, and where departmental policies conflict with the language of a regulation, the policies may be disregarded.”



Critical Concepts Absent from the Law

- Significantly, 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.
- Also note that 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.



Points of Concern

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.

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>



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
Conducting activities designed to keep an individual enrolled at an institution eligible for Title IV aid. These activities include, but are not limited to:	
<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.	

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.

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>

Examples of Problem Areas for Education Abroad

- Should ED continue to take the position that a TPS cannot be under foreign ownership or control, it could effectively prevent institutions from:
 - Contracting with a foreign institution or training provider to provide a part of a Title IV program, which could impact many study abroad relationships
 - Contracting with foreign recruiters to recruit for Title IV programs
 - Contracting with other foreign-owned service providers



Examples of Problem Areas Highlighted by ACE*

- An institution that provides courses and instruction to another institution as part of an inter-college consortia.
- An online extension campus providing services to another campus of the same university.
- A hospital providing clinical experiences and the related educational programming for nurses and other medical professionals.
- A local police department helping to compile and analyze campus crime statistics.
- A non-profit organization providing student engagement and retention services or tools to improve student outcomes for at-risk students.
- Publishers providing online materials and study guides, or technology providers developing adaptive courseware solutions.

*[Letter from the American Council on Education to the Honorable Miguel Cardona](#) (February 23, 2023).



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