

# The U.S. Department of Education's Dear Colleague Letter on Third-Party Servicers

National Council of Higher Education Resources

March 27, 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.



# Presenter Profile

- Practice and Experience
  - Assists institutions of higher education to navigate challenging legal and regulatory matters.
  - Advises regarding strategic planning, governance, and complex substantive changes.
  - Represents institutions in proceedings before the U.S. Department of Education and other postsecondary regulators.
- Contact Information
  - [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com)
  - 314-552-6405



Aaron Lacey

Partner & Chair  
Higher Education Practice

# Presenter Profile

- Practice and Experience
  - Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
  - Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.
- Contact Information
  - [sgoldschmidt@thompsoncoburn.com](mailto:sgoldschmidt@thompsoncoburn.com)
  - 202-585-6963



Scott Goldschmidt

Partner

Higher Education Practice

# Presentation Outline

Defining “Third-Party Servicer”

Responsibilities in TPS Relationships

Prior TPS Guidance

The New TPS Guidance

Submitting 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.”
  - 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

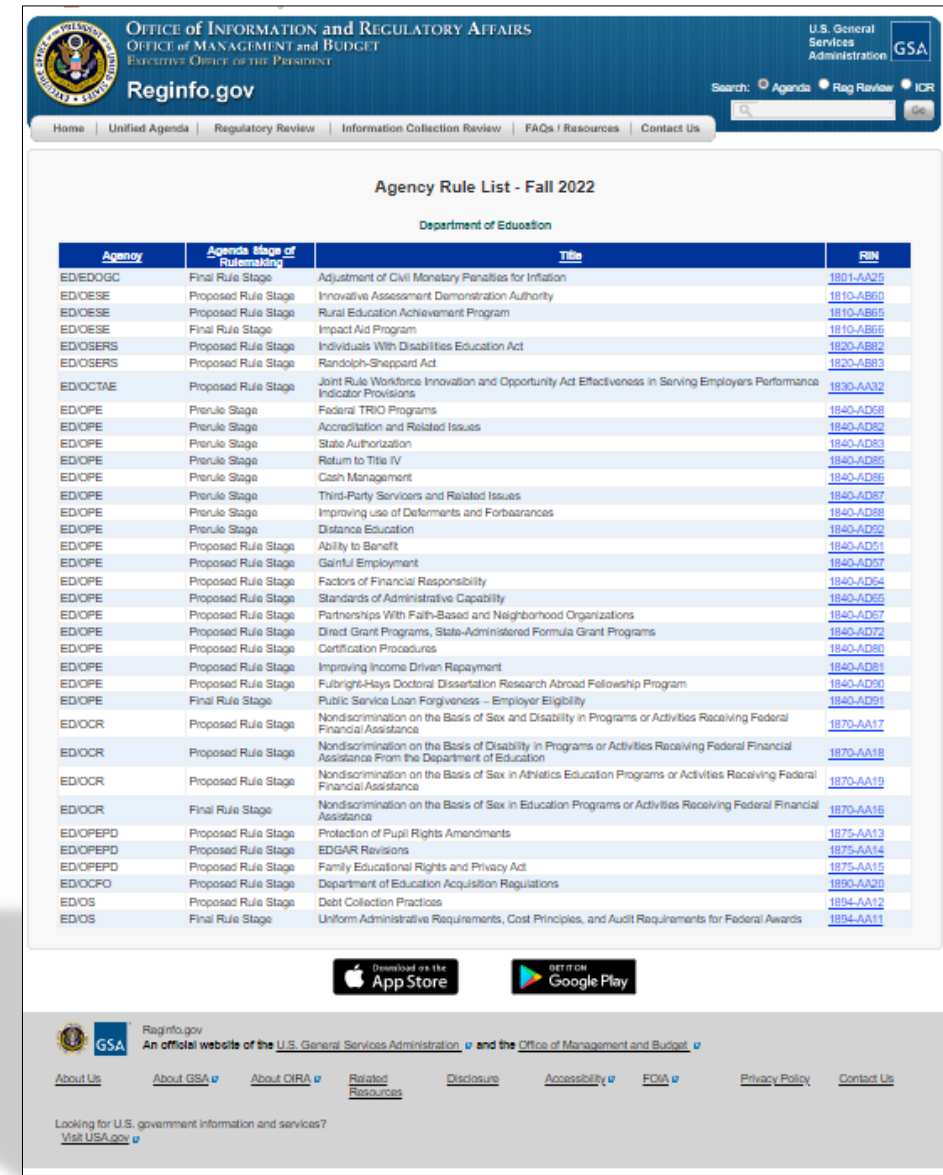
- On Aug. 18, 2016, ED released [GEN-16-15](#), a 22-page Q&A document intended provide further clarification with regards to TPS concerns. An [updated version](#) was released on March 8, 2017.
  - This 2016 Q&A document serves as the foundation for the new TPS guidance.
  - It introduces the chart 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.”

# 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](#).



Office of Information and Regulatory Affairs  
Office of Management and Budget  
Executive Office of the President

Reginfo.gov

U.S. General Services Administration GSA

Search: Agenda Reg Review ICR

Home Unified Agenda Regulatory Review Information Collection Review FAQs / Resources Contact Us

### Agency Rule List - Fall 2022

Department of Education

Agency	Agenda stage of Rulemaking	Title	RIN
ED/DOGC	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-AB92
ED/OSERS	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-AD93
ED/OPE	Prerule Stage	Return to Title IV	1840-AD85
ED/OPE	Prerule Stage	Cash Management	1840-AD86
ED/OPE	Prerule Stage	Third-Party Services and Related Issues	1840-AD87
ED/OPE	Prerule Stage	Improving use of Deferments and Forbearances	1840-AD88
ED/OPE	Prerule Stage	Distance Education	1840-AD92
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-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/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

Download on the App Store GET IT ON Google Play

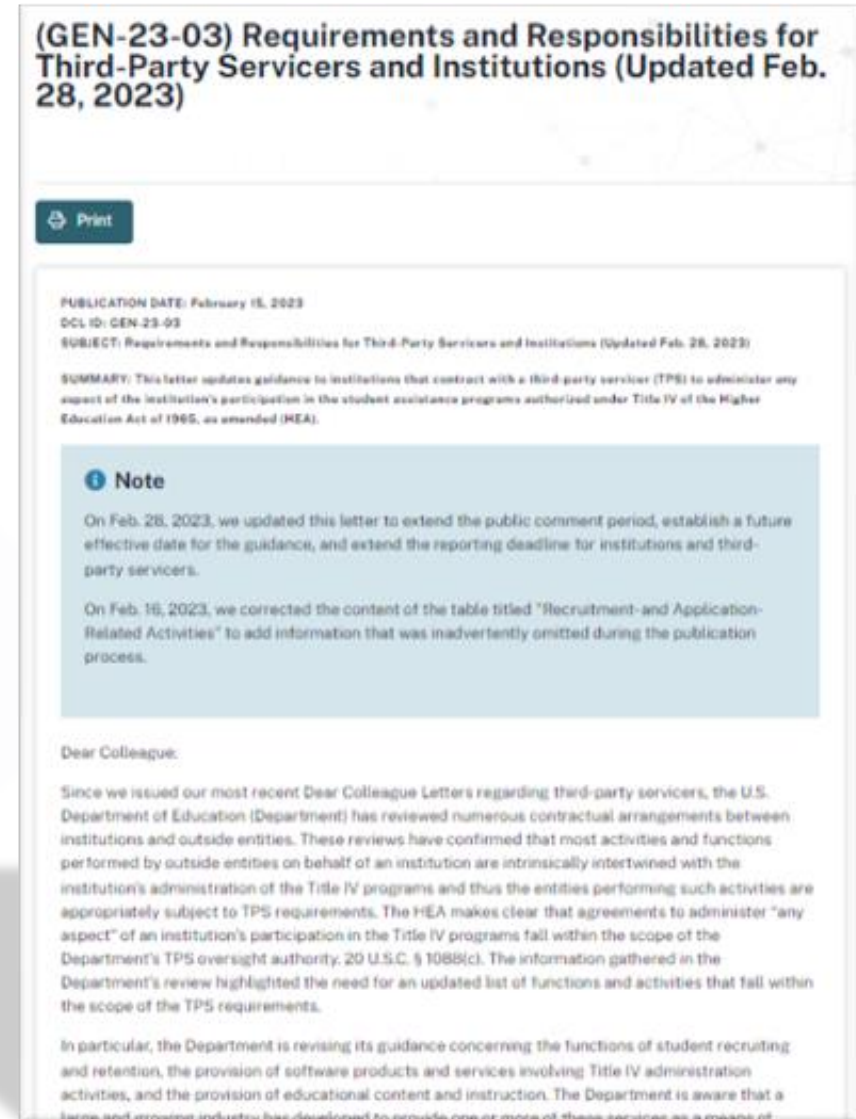
Reginfo.gov  
An official website of the U.S. General Services Administration and the Office of Management and Budget

About Us About GSA About OIRA Related Resources Disclosure Accessibility FOIA Privacy Policy Contact Us

Looking for U.S. government information and services?  
Visit USA.gov

# 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 also **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...

# Submitting Comments



# Submitting Comments

- The public 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.”

# Submitting Comments

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

# Submitting 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 decades, 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"><li>• Monitoring academic engagement and/or daily attendance.</li><li>• Conducting outreach to students regarding attendance or academic engagement.</li><li>• 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.</li></ul>	

# 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"><li>• Establishing requirements for the completion of a course and/or evaluating whether a student has met those requirements;</li><li>• Delivering instruction or mandatory tutoring;</li><li>• Assessing student learning, including through electronic means; or</li><li>• Developing curricula or course materials, unless the institution maintains full control of the curriculum/materials and delivers the instruction itself. See <a href="#">previous Dear Colleague Letter</a>.</li></ul>	<p>Providing optional supplementary academic support to students, such as tutoring or other forms of optional academic assistance. This exclusion <b>does not</b> 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 <b>does not</b> 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 agreements 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.

# Software Providers

- The new guidance emphasizes that “computer services or software in which the provider has access to, or maintains control over, the systems needed to administer any aspect of the Title IV programs” would be covered, including “systems related to financial aid management, recruitment and enrollment, admissions, registration, billing, and learning management.”

Third-Party Servicer	Not a Third-Party Servicer
Collecting, reviewing, and/or maintaining the information and/or documentation necessary to make or support student eligibility determinations and/or to disburse Title IV funds to a student or borrower. This includes, but is not limited to, information necessary to validate information reported on a student's FAFSA and/or to resolve conflicting information, as well as information regarding student disbursement preferences for the delivery of Title IV credit balances.	<p>Warehousing of records, if such activity involves only storage of records and the entity has no access to or control over the data.</p> <p>The exclusion for the “warehousing of records” is restricted to the storage of Title IV-related records and <b>does not</b> apply if the entity performs any Title IV activity on behalf of the institution within the data storage or hosted environment. For these purposes Title IV activity includes, but is not limited to, remote or automated processing.</p> <p>The exclusion <b>does not</b> apply if the entity has view or update access to any student-level information within the hosted environment and/or exercises control over the data.</p>
Providing computer services or software in which the provider has access to, or maintains control over, the systems needed to administer any aspect of the Title IV programs, whether through manual or automated processing, including, but not limited to, systems related to financial aid management, recruitment and enrollment, admissions, registration, billing, and learning management.	<p>Providing computer services or software where the provider has no access to and maintains no control over the systems needed to administer any aspect of the Title IV programs.</p> <p>This exclusion is limited to computer products and/or services that reside at and are under the control of the institution and <b>does not</b> apply if the provider performs any activity on behalf of the institution within a system through remote or automated processing, or if the provider uses or has view or update access to any student-level information in any system used for the administration of any aspect of the Title IV programs.</p>

# Software Providers: Impact

- ED still contemplates that some computer services or software providers could be excluded, but only if:
  - the provider has **no access** to and maintains no control over the systems needed to administer any aspect of the Title IV program, including no ability to use or have view or update access to any student-level information in any system used for the administration of any aspect of the Title IV programs;
  - the products and/or services reside at and are **under the control** of the institution; **and**
  - the provider **does not** perform any activity on behalf of the institution within a system through remote or automated processing.

# Software Providers: Impact

- This revised construction of the “access” standard would potentially cover:
  - cloud-based software and service solutions; and
  - providers that retain access to systems in order to provide technical support.
- Indeed, this construction is so broad, it would seem to even capture ISP providers, insofar as their infrastructures are needed to administer many aspects of the Title IV programs, are not under the control of institutions, and still within their control.

# Software Providers: Points to Consider

- Should ED move forward with some version of this guidance, which seems likely, it should clarify:
  - that the rule would not apply to ISP providers and similar “utilities;”
  - that application of the rule would not turn on where products and services “reside,” which is an outdated concept, particularly as applied to computer and software services;
  - that access limited to what is required to provide updates and technical support should not be covered.

Q&A

# Disclaimer





# Conditions of Use and Disclaimer

- Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.
- The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.
- If you desire legal advice for a particular situation, you should consult an attorney.