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Update: U.S. Department of Education Third-Party Servicer Guidance

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UPDATE: On April 11, the Department of Education (Department) published a blog post updating the latest Third-Party Services (TPS) Dear Colleague Letter (DCL) which was published on February 15, 2023 (updated February 28, 2023). Our summary of the February 15th DCL is below.

In the blog post, the Department announced it was in the process of developing an updated DCL (after receiving over 1,000 comments on the February version), but it "wanted to highlight several key pieces of information that [it] think[s] the community should be aware of right away." Specifically, the Department (1) identified several activities that do not trigger the TPS rules; (2) noted its intent to remove the provision of the guidance pertaining to foreign ownership of TPS; and (3) noted its intent to provide clarifications based on the public comments submitted last month. Rather than the (now defunct) September 1, 2023, effective date of the February DCL, the blog post noted the effective date of any future guidance will be at least six months after the revised DCL is published.

UPDATE: On February 28, 2023, the Department updated the Dear Colleague Letter issued February 15, 2023 to establish a future effective date for the guidance, extend the public comment period, and extend the reporting deadline for institutions and third-party servicers. The new effective date is September 1, 2023. Institutions will be required to report any arrangements with third-party servicers that have not been reported to the Department, and entities meeting the definition of a third-party servicer will be required to submit the Third-Party Servicer Data Form to the Department by September 1, 2023. Additionally, the comment period was extended and now closes on March 30, 2023.

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Wednesday's U.S. Department of Education Dear Colleague Letter announces an expanded Department interpretation of the definition of Third-Party Servicer to include a new array of vendors providing student recruiting and retention services, certain software products and services linked to Title IV Federal Student Aid administration activities, and educational content and instruction. Specifically, the new interpretation includes a "catch-all" provision that captures all vendors that "perform any other aspect of the administration of the Title IV programs or comply with the statutory and regulatory requirements associated with those programs."

A plain-language reading of this new guidance captures an extremely broad swath of products and services not previously considered to be covered as Third-Party Servicer activity. Where colleges and universities contract with vendors for these products and services, both the schools and vendors must comply with Third-Party Servicer rules. The Department's new guidance was initially effective immediately. However, on February 28, 2023 the Department extended the effective date to September 1, 2023.

Colleges and universities have until September 1, 2023, to report any arrangements with Third-Party Servicers that have not previously been reported to the Department. Institutions must also: (1) ensure their Third-Party Servicer contracts include specified terms; (2) obtain a signed certification form from each Third-Party Servicer; and (3) ensure their E-App is updated to identify each Third-Party Servicer. Notably, the Department's guidance specifies that, upon request, the institution must provide a copy of its contract (and any modifications) to the Department, which could, conceivably, expose such contracts to public release under the federal Freedom of Information Act (FOIA).

Vendors covered by the Department's new interpretation of a Third-Party Servicer: (1) are responsible for compliant contracts; (2) must submit to the Department or update a Third-Party Servicer Data Form; and (3) must meet annual audit requirements. Third-Party Servicers are also subject to obligations such as: incurring joint and several liability with schools related to Title IV activities, heightened data privacy and security responsibilities, and reporting to the Department's Office of Inspector General information related to an institution engaging in criminal misconduct in connection with Title IV programs.

The Department announced that it is accepting public comment on Wednesday's guidance at regulations.gov for 30 days (through Thursday, March 30).

Also this week, the Department announced it will host virtual listening sessions on March 8 and 9, 2023, regarding rules related to the incentive compensation prohibition of the Higher Education Act (HEA), particularly the ambiguous "bundled services" exception allowed by the Department since 2011. Institutions often rely on this exception in structuring compensation for entities involved in recruiting and retention efforts—which the Department has now announced it will oversee as Third-Party Servicer activity.

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The Department's Authority to Oversee Third-Party Servicers

The HEA defines "Third-Party Servicers" as:

> 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 and part C of subchapter I of chapter 34 of Title 42; 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.

See 20 U.S.C. § 1088(c). However, in Wednesday's guidance, the Department concludes that, "most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of Title IV programs." From this reading, the Department reasons that recruiting, retention, providing software for performing Title IV functions, and providing educational content or instruction trigger the Third-Party Servicer requirements. Whether such an expanded description is compatible with the definition in the HEA and the Department's existing regulatory definition in all instances is debatable.

What This Means to You

Most institutions of higher education and many higher education vendors will be impacted by this week's guidance, in that many widely utilized vendors that were not previously treated as Third-Party Servicers will fall within the newly announced description, absent clarification from the Department. In the short term, we recommend that institutions take inventory of their arrangements with all outside vendors providing products or services in the following areas:

Recruitment/retention;

Software products and services linked to Title IV compliance where the provider has access to certain information identified in the guidance and/or performs "Title IV activity" for the institution; and

Education content/instruction (most commonly, Online Program Managers, but, under a plain reading of the new, broad guidance, possibly other entities such as learning management system providers or schools in consortium arrangements).

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Institutions should also consider communicating with potentially covered vendors, citing the guidance and requesting feedback on the vendor's compliance (or plans to come into compliance) with Third-Party Servicer requirements. Finally, institutions and covered vendors should ensure they are in compliance with applicable Third-Party Servicer rules going forward.

Given the expansive and immediate compliance impact of this new guidance, institutions should also consider participating in the Department's upcoming listening sessions and public comment opportunity.

Contact Us

For assistance with Third-Party Servicer compliance or other matters linked to Title IV Federal Student Aid, please contact Annie Cartwright, Abby Felter, Hayley Hanson, Julie Miceli, Lisa Parker, or your Husch Blackwell attorney.

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