



March 30, 2023

U.S. Department of Education
400 Maryland Ave.
Washington, DC 20202

Docket ID ED-2022-OPE-0103-009

To whom it may concern:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA), we respectfully submit to the U.S. Department of Education (ED) our comments on ED's updated guidance on Requirements and Responsibilities for Third-Party Servicers and Institutions (Docket ID ED-2022-OPE-0103-009).

NASFAA's membership consists of more than 29,000 financial aid professionals at nearly 3,000 colleges, universities, and career schools across the country. NASFAA member institutions serve nine out of every 10 undergraduates in the United States.

NASFAA appreciates and supports the Department's desire to act on the Government Accountability Office's (GAO) recommendation for ED to make clear that online program managers (OPMs) are subject to third-party servicer rules so ED can properly enforce prohibitions on incentive compensation. We also understand that ED is attempting to capture in its classification of third-party servicers not just entities that identify as OPMs, but the individual activities typically conducted by OPMs in order to ensure organizations aren't able to circumvent the rules simply by choosing a different name.

However, we believe ED's attempt to use broad enough language to capture all of these OPM-type activities has inadvertently swept up a slew of activities that institutions of higher education commonly contract out to third parties that have nothing to do with the administration of Title IV student aid or the incentive compensation ban.

The changes go far beyond GAO's recommendations and effectively change the regulatory definition of third-party servicers, and are mischaracterized as simply clarifying guidance. Using guidance, without first seeking stakeholder feedback, to expand the scope of who is considered a third-party servicer will likely lead to unintended consequences. Those include confusion, unnecessary burden, high rates of noncompliance, possible litigation, and a mass exodus of

valuable service providers from the higher education market. This could be identified and resolved preemptively with a more thoughtful and deliberate approach.

Lastly, this expanded scope of third-party servicer activities necessitates reconciliation of Questions & Answers section item CNT-Q1 with the statutory and regulatory definition of a third-party servicer. Those definitions stipulate that whether an entity is considered a third-party servicer is contingent upon the presence of a contract between the entity and the institution. CNT-Q1, however, states an institution that receives a product or service from a third-party servicer must enter a contract with that entity. This language is circular and makes it unclear if institutions must now enter into contracts with currently uncontracted entities if those entities provide any of the expanded services in the updated guidance. While the language in CNT-Q1 is not new, the expanded scope of third-party servicers requires re-examination.

New Activities Categorized as Third-Party Servicing Overly Expands Scope of Regulations

In the updated guidance, ED adds the provision of Title IV-eligible education programs and recruitment and retention activities to its previous list of third-party servicer functions. These additions significantly expand the definition of a third-party servicer and stray from the original statutory and regulatory intent of the definition that limits third-party servicers to those entities providing Title IV-related functions.

The existing statutory and regulatory language, as well as the examples of third-party servicer functions provided in previous guidance, reflect that limited scope of what is considered a third-party servicer. Those include performing need analysis; processing student aid applications; and originating, servicing, and collecting loans, among other things. The updated guidance adds a wide swath of activities to this previously limited set of functions, but ED fails to consider what activities could be inappropriately captured under such broad language.

We disagree with ED's assertion 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 share several examples below of services provided by outside entities that have no connection to Title IV student aid administration and should not be captured in a net designed to catch OPMs and OPM-like providers.

Recruitment and Application-Related Activities

ED characterizes "Assisting students with the completion of application and enrollment processes ... including offering admission and enrollment counseling" in its list of recruitment activities that require classification as a third-party servicer. This stipulation would require nonprofit college access organizations that help recruit underrepresented students to college —

and whose work helps forward the Department's goals of increased access to and completion of higher education — to comply with third-party servicer requirements. Organizations like these were not the target of the GAO's investigation and yet would have to divert resources from mission-driven activities instead toward compliance with rules never intended to apply to them. They should not be swept up in ED's updated third-party servicer guidance.

Another common practice that appears to fall under ED's new third-party servicer definition is hiring temporary admissions staff during peak application season, under the "processing admissions applications, including the collection of documents, screening, and/or determining initial or final qualification of applicants" activity. Seasonal admissions staff are unlikely to be willing to be subjected to the many requirements imposed upon third-party servicers, and admissions offices could find themselves overworked and understaffed.

ED also includes "interacting with prospective students for the purposes of recruiting or securing enrollment" as a third-party servicer activity. This appears to encompass even activities like alumni volunteer interviews, which many admissions offices use to keep alumni engaged, to lighten admissions staff workload during peak season, and to accommodate applicants who reside far from campus.

The implications of categorizing an alumni interviewer as a third-party servicer are far-ranging. Institutions would have to create or modify contracts and report each volunteer to ED and the volunteer would be subject to an annual compliance audit and information security requirements. While it seems unlikely ED intends to put an end to such arrangements, the new guidance would almost certainly lead institutions to abandon these efforts due to complexity and burden, at a loss to all parties involved.

At minimum, this section of the guidance requires revision, with an eye toward adding more examples of recruitment-related activities to ED's list of activities not considered third-party servicer arrangements to avoid confusion and unintended consequences.

Computer Services/Software and Record Maintenance

Several additions to previous language about the nature of computer services classifying those providers as third-party servicers are confusing.

ED adds that the exclusion for computer service providers from being considered third-party servicers is limited to products and services that "reside at ... the institution." We ask for clarification of the term "reside" and how this would apply to cloud-based computer products and services.

In previous guidance, ED generally considered the provision of computer services and records warehousing as exempt from treatment as a third-party servicer unless the provider had view or update access to student-level data needed for determination of Title IV eligibility or performed Title IV activity on the institution's behalf.

The new language states that computer services providers are third-party servicers if they have access to or maintain control over the systems needed to administer any aspect of the Title IV programs. There is a marked distinction between control over the data held in a system and control over the system itself. Presumably, a computer services provider would always have access to and maintain control over its own systems; it would be unable to provide updates and improvements without such control. We request clarification as to whether ED's intent behind this revision is for virtually all providers of computer services to institutions of higher education to be classified as third-party servicers.

For instance, is it ED's intent to include NASFAA's Policies and Procedures (P&P) Builder, which NASFAA maintains by regularly updating new regulatory citations, to be a third-party servicer, as subject to annual compliance audits with the Department of Education? If so, it is likely that NASFAA, along with hundreds if not thousands of other cloud-based providers, will simply stop providing these services.

Retention of Students

ED's updated guidance about student retention-related activities pertaining to designation as third-party servicers is of special concern because of the sheer scope of retention activities institutions engage in, often by contracting with third parties. Especially concerning is that ED provides no examples of types of retention activities that would not be considered third-party servicer functions, implying there are no exceptions.

For instance, many institutions offer financial literacy or mental health counseling services with an explicit goal of student retention. If they enter into contracts with outside entities to perform those functions, would they be required to meet all of the third-party servicer requirements, despite no discernable link to Title IV student aid administration?

Nonprofit organizations like One Million Degrees also contract with institutions of higher education to help guide their students toward completion. As with nonprofits engaged in recruitment activities, the third-party servicer statute and regulations were not written with these types of organizations in mind and, yet, ED's updated guidance captures them in its widely-cast net.

Instructional Content

As the updated guidance is written, it appears study abroad programs would now be considered third-party servicers by nature of delivering instruction. Since many study abroad programs are based outside of the U.S. because of the very nature of the services they provide, and because schools are prohibited from contracting with third-party servicers located outside the U.S., the new guidance would significantly limit study abroad opportunities by removing a large number of providers of study abroad opportunities from the market.

In fact, all host institutions — whether domestic or abroad — appear to now be considered third-party servicers by nature of the fact that the host institution establishes the requirements for the completion of a course.

We wish to also point out in light of the above that ED's exception in 34 CFR 668.5(d)(2) to treatment of host schools as third-party servicers in cases where a written agreement specifies that the host institution will perform Title IV-related calculations and disbursements would now be irrelevant since all host institutions would be considered third-party servicers by nature of their provision of instructional content.

Consulting and Auditing

Finally, ED also adds a new qualification to previous guidance exempting entities providing financial and compliance auditing from being considered third-party servicers, stipulating now that entities providing audit activities would be considered third-party servicers if they perform any other activities related to the institution's administration of the Title IV programs. There are instances where, as a result of a financial or compliance audit, an institution hires the entity that completed the audit to help them address issues identified in the audit by providing activities related to the institution's administration of Title IV programs. In many cases, the activities related to administration of Title IV programs may occur months or even years after the audit activities ended.

We ask ED to clarify whether the audit activity and the administration of Title IV programs would have to be concurrent for the audit activity to be considered third-party servicing or, if not, how long of a time frame between the two activities would determine whether the audit activities be considered third-party servicing, as well as to consider the potential implications of requiring schools to retroactively classify a contractor as a third-party servicer.

This distinction is critical because classification as a third-party servicer determines whether liability for Title IV violations falls solely on the institution or on both the institution and the

outside entity as jointly and severally liable parties. If audit activities became retroactively considered third-party servicers because the auditor eventually provided Title IV administration-related services to the institution, it must be clear which parties are liable for Title IV violations and at what point.

Furthermore, the DCL states, “The institution will be held responsible for any liability incurred as a result of ... incorrect consulting advice,” which appears to conflict with prior definitions of jointly and severally liable applying to *any* third-party servicer functions. Without clarification on whether consulting advice is actually a third-party servicer function, and who is liable for the advice provided, schools may be reluctant to use outside consultants to help them evaluate and improve their operations, a potential detriment to program integrity, institutions, and students.

In conclusion, the updated guidance is contradictory in places, confusing in others, and generally overly broad in scope. ED has failed to adequately consider the implications of the updated guidance on contracts with entities that aren’t OPMs or don’t provide bundled services similar to those OPMs provide. As written, compliance will be nearly impossible considering institutions will need to examine every third-party contract it has entered, which could number in the hundreds at large schools. Schools will inevitably miss reporting one or more third-party servicer arrangements under this expanded definition, and ED will waste time penalizing them for paperwork errors instead of identifying truly problematic areas of noncompliance. ED must revisit this guidance to narrow its scope to avoid these unintended consequences.

We appreciate the opportunity to comment on this guidance. If you have any questions regarding these comments, please contact me or NASFAA Senior Policy Analyst Jill Desjean at desjeanj@nasfaa.org.

Regards,



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