

Third-Party Servicer Guidance: Update, What Do We Know, and Why You Should Comment



March 20, 2023
Webinar

Presenters



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Caveat:

*"I'm not a doctor,
but I play one on TV."*

We provide opinions.
We do not provide
legal advice or
official regulatory
interpretations.



New Dept. of Education Press Release

On February 15, request for comments on Online Program Managers (OPM) and revised guidance on “Third-Party Servicers” released.

U.S. Department of Education



U.S. Department of Education Launches Review of Prohibition on Incentive Compensation for College Recruiters

The Department is also issuing guidance to increase transparency over college and university contractors

FEBRUARY 15, 2023



<http://bit.ly/3FpWLMW>

Types of Education Department Rules

Action	How Is It Done?	What Is it?
Law	Passed by Congress; Signed by President	Rules on an activity, plus penalties
Regulation	If Title IV related, formal “negotiated rulemaking” process	Interprets the laws for purposes of compliance and enforcement
Guidance	Issued by the Department	Clarification or temporary exception

What Are These Things??

Online Program Managers (OPM) -- Companies contracted to help institutions develop, market, & offer online education.

Third-Party Servicers (TPS) -- (by federal regulation) is an entity that contracts with an institution to perform administrative functions on behalf of the institution to address any aspect of the institution's participation in any Title IV HEA program.

Our WCET *Frontiers* blog post has been popular:

<http://bit.ly/3Yi7yz7>



OPM Fiscal Models

- **Revenue-Share** (incentive compensation) – OPM paid part or a percentage of the tuition or receives extra income for increasing enrollment.
- **Fee-for-Service** – OPM paid a set flat-rate for the service.

Typically, incentive compensation is not allowed by law, but **2011 ED guidance** created a “bundled compensation” exception.
ED fears exception has been misused.

Concerns about OPM Revenue-Share

United States Senate
WASHINGTON, DC 20510

GAO

U.S. Government Accountability Office

Jan Home > Reports & Testimonies > Higher Education



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Online Learning Policy & Legal Leadership Student Success

Christopher "Chip" Paucek
Chief Executive Officer
2U, Inc

Higher Education Education Needs to Shift to Monitoring Colleges Online Program Man

GAO-22-104463

Published: Apr 05, 2022. Publicly Released: May 05, 2022

OPINION

DeLauro: For-profit online program management companies are the new predators in higher education

The ranking member of the House Appropriations Committee calls for an end to OPM tuition sharing based on enrollment.

Published Jan. 31, 2023



ED's Questions about OPMs

ED asks nine questions seeking public comments, such as:

- Benefits and disadvantages.
- How much of a bundled service is spent on recruiting?
- Impact on enrollment, tuition and fees, the types of programs offered, the modality used, outcomes, revenues and expenditures.
- Impact on tuition & fees in the two fiscal models.
- Impact on creating or expanding online offerings.
- What steps can the Department take to better ensure compliance with the prohibition on incentive compensation?

OPM Public Commenting

Listening Sessions 3/8 & 3/9

Written Public Comments Deadline 3/16/23



Third-Party Servicers

Third-Party Servicer (TPS) is defined by Federal regulation as an entity that enters into a contract with an institution to administer “any aspect of the institution’s participation in any Title IV HEA program....”

Guidance about Third-Party Servicers

The Department, in its newest revised guidance, maintains that **most activities** by outside entities are subject to Department oversight because the activities are “intrinsically intertwined” with the administration of Title IV.

Ask your questions about determination of a TPS to:

CaseTeams@ed.gov

Guidance about Third-Party Servicers

A table is provided for the following services:

- Recruitment- and Application-Related Activities
- Student and Institutional Eligibility
- Consumer Information
- Delivery of Title IV Funds
- Computer Services/Software and Record Maintenance
- Retention of Students
- Instructional Content
- Consulting and Auditing
- Federal Perkins Loan Program

Guidance about Third-Party Servicers

Surprises:

- That this was done through guidance as opposed to rulemaking.
- The increased scope of the guidance
 - Educational content and instruction
 - Provision of software products and services involving Title IV administrative activities
 - Recruiting and retention
- Non-U.S. owned or controlled companies are ineligible.
- “State agencies” can be considered a Third-Party Servicer.

Guidance about Third-Party Servicers

So what?:

- Institutions must identify all Third-Party Servicers by ~~May 1~~ September 1.
- Third-Party Servicers must conduct yearly federal audits.
- Third-Party Servicers could be liable for misapplication of Title IV aid.
- Third-Party Servicers will be held joint and severally liable with the institution for any violation of Title IV requirements resulting from the functions performed by the servicer.

Guidance about Third-Party Servicers

Guidance: Requirements and Responsibilities for Third-Party Servicers and Institutions

- Effective ~~immediately~~ September 1, 2023.
- Institution reporting due ~~May 1~~ September 1, 2023.
- Contactors now considered TPS must submit a Third-Party Servicer Data Form by ~~May 1~~ September 1, 2023.
- Written Public Comments Deadline ~~3/17/23~~ ~~3/29/23~~ 3/30/23.
 - (Docket ID ED-2022-OPE-0103).

ED Urges You to Contact Them

The Department offers if the institution is unsure whether the institution or entity is subject to TPS requirements that the institution should contact the School Participation Division.

CaseTeams@ed.gov

Context Matters

- Why conflate these issues (bundled services & TPS) and why use guidance?
 - [Recent Clarity into Regulatory Activism in Education](https://bit.ly/ed_reg_activism) https://bit.ly/ed_reg_activism
 - [The Long Runway to the Unexpected Takeoff](https://bit.ly/longrunway) <https://bit.ly/longrunway> (premium)
 - [The Great Conflation](https://bit.ly/greatconflation) <https://bit.ly/greatconflation>
- Assume good intentions (and there are issues to address), but I am hearing the same as WCET:
 - Agreement On the ‘Big Impact’ of this Guidance.” Even organizations that tend to be more neutral on federal issues, such as the [National Association of State Financial Aid Administrators](#), cite the guidance as having been an massive expansion of previous rules and resulting in a big impact on institutions and students.
 - Surprise by the Department of Education on the ‘Big Impact’. While we have not talked to Department personnel, we have talked to several others who told us that those who created the guidance are greatly surprised at the higher education reaction that this is a big change. There have been rumors that the Department may need to issues clarifications and/or change the guidance.

Reaction

- ED is likely seeking a way out of situation, but (so far) doesn't seem willing to confront the fundamental problems.
 - ED Staff Should Read Their Own Guidance
<https://bit.ly/ownguidance>

Along with de-emphasising that language, the Education Department told THE that institutions should pay greater attention to the part of its announcement where it excluded companies that sell a product but then leave the college or university to operate it. "Providing computer services or software where the provider has no access to or control over systems needed to administer any part of Title IV would not fall in the category of a third-party servicer," it said.

Really? Let's look at the actual Dear Colleague Letter language.

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.

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.

This exclusion is limited to computer products and/or services that reside at and are under the control of the institution and **does not** 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

What to Expect

All indications are that ED is hearing the feedback and will revise the guidance (at a minimum), however:

- We don't know when (best guess April – May) after comments
- It's possible ED will only make improvements at the margin
- Market impacts in the next year (at least) will come from institutional interpretation more than what is legally defensible
- It's a dynamic situation

Questions Collected with Webcast Registration



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- Includes international coverage



Thank you!



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