

Russ Poulin:

Hello, everyone, and welcome to this webinar about the Department of Education's, third-party servicer guidance, and we'll talk a little bit about the OPM questions that came out around that as well. Very happy to see you all here today and thanks for joining us. Just a few housekeeping things. One is that we do invite you to use chat to talk among yourselves and to ask questions of each other. We won't have the Q&A part open because one of the things we did was that we asked for questions ahead of time and we must have a lot of questions because we have a lot of people signed up for this and we've received a lot of questions. We see well over a hundred questions for this. We won't get through all hundred questions. Some of them we're able to categorize together and we'll get to those at the end and talk about those that were pre-submitted. Very good, very good questions on that.

Some of you sought yes and no answers. We might not always have yes or no, but we'll give you our best interpretations on what's going on. And we do want to remind you that, yes, this is being recorded and yes, we will share the slides. People always ask that, even though I've yet to been on hardly any webinars, whether anyone's ever not shared those things, but we will share all of that for you.

With that, let's go to the next slide and I want to introduce our panel. Again, I'm Russ Poulin, executive director of WCT, the WICHE Cooperative for Educational Technologies. While we're part of WICHE, which is a regional organization, we focus on digital learning issues and especially the policy issues. We have members in all 50 states and DC and a few in Canada and from a few other places. With that, Cheryl, let me turn it to you to introduce yourself.

Cheryl Dowd:

Thank you, Russ. I'm Cheryl Dowd. I'm the senior director for the State Authorization Network, SAN and WCET Policy Innovations. So, my primary focus is on the state authorization network, which is also a membership organization. We're a division of WCET, but our focus is on the regulatory compliance and management for consumer protections for out-of-state activity compliance. And I'll turn it to Phil.

Phil Hill:

Hi, my name's Phil Hill, consultant and market analyst with Phil Hill & Associates. We're actually in the middle of rebranding the company, but any case, most people know me from the blog. So, On EdTech is the blog by Phil Hill & Associates and who the associates are, we'll get to outside of this webinar, but we basically cover all things EdTech and not necessarily the technology itself, but all of the impact. And today, as we're talking about policy is a huge area of impact. So, we do consulting and market analysis in this area and I love working with WCET and SAN, so I'm looking forward to today.

Russ Poulin:

Yes. Yeah, Phil. You're seeing three people here who geek out on such things, so we enjoy talking to each other and we hope that we can bring it up so that you don't have to be a geek to listen to all this, but geeks are welcome. Let's move to the next slide where we have a very fuzzy picture of Peter Bergman, the actor, and they had this caveat where I wondered, I've often said this. "I'm not a doctor, but I play one on TV." That that's a phrase. I thought, "Well, it can't be that old." Well, it goes back to Vicks medicine ads from 1984, and this very fuzzy pictures from an ad from 1986 where Peter Bergman played a doctor on All My Children.

But the point of this is that we really have to be clear that we're not providing legal advice. We're providing our opinions based upon our best reading of what's coming out of the department, and also talking to a lot of people who either have talked to the people in the department or have other legal

advice and are giving us their legal thoughts, if not advice on it. And so, we are not providing official regulatory interpretations, so don't take it that way.

So, with the caveats out of the way, let's go ahead and move on to the next part and some background about where did all this come from. And then on February 15th that you'll see here and that we have some links there to this press release that they came out where there actually was two parts to this press release that came out and one was about online program managers and that they're going to ask questions about them, but also that some new guidance that went into effect immediately that's since been changed about third-party servicers.

Let's move to the next slide on this. And remember that was guidance and we're going to talk about what guidance is and all this, but thought we give you a quick refresher, and this is really condensed down and so doesn't have all the legal language in it here, but just to remind you that a law is something that's passed by Congress. And so, that is a law that is rules on some activity plus any penalties involved regulation. Something else that if it's financial aid related, that Department of Ed has a rulemaking process that includes notifications, getting a rulemaking team and putting it out for public comment. For this and this is guidance, so it's something where the department can just put it out when they wished, don't have to go through the formal process, but it's typically used more for clarifications. And some things people have asked about, "Well, how do we enforce this," or, "How are we to comply?" Or in the case of COVID that there were temporary exceptions that happened over things that couldn't wait for a regulatory process.

Let's move on to the next slide, get at that. And then, we talked about OPMs and third-party services, most of about these things, but the OPMs, they help with all sorts of services in online education, helping to get them go and getting them out there and offering them. And third-party services is one that we probably haven't heard as much. In the past, it was mostly focused on tools that were used around financial aid processing this, but now this part down at the bottom of that to address any aspect of an institution's participation, it's been expanded out a bit.

Let's move to the next slide, and I'll say a few things about the OPM part and the questions that they asked about that before. Most of the rest of this webcast will be about the third-party services, but thought we would say some since the OPM was in there and it got really confusing about was this about OPMs or third-party services or both of them together and what was guidance and what was not that people got really confused and in fact, it took us a few days to parse that all out in order to actually write a blog post that was coherent about it.

So, just about OPMs that there's a lot of concern about some of the practices and fiscal models used, if you have the revenue share or incentive compensation, that really what they worry about is that there is an amount of money that the OPM gets per enrollment on that. And there's a thought of that. People have called that sort of a bounty per student and maybe bringing in the worst part of for-profit practices into public and nonprofit institutions.

And then the others, the fee for service where the OPMs, they decide that they want instructional design or they want recruiting or whatever, that they pay a flat rate for that. But again, that is often said on how much do you want to recruit or how much instructional design do you want? And then, down at the bottom there that there was some guidance that came out in 2011 that allowed for some incentive compensations as long as if you had a revenue share contract that was part of a bundle that you paid for all at once. And there's been some real fears that that has been a big loophole that has allowed for some unsavory practices to happen.

And let's move to the next slide and wanted to get to some things here where just letting you know about some of the concerns that have been raised just in the last few years officially, that the Senators

Brown and Warren had previously worried about this and then sent a letter last year to the owners of several of these companies asking for data about their practices.

Let's go to the next one, Catherine. And then last year there was a government accounting office report that came out that said education department needs to do better in terms of monitoring these arrangements and perhaps making sure that students are protected.

And then finally the third one here that just this year, just a few weeks ago, Representative Rosa DeLauro of Connecticut. Note that she's the ranking member of the House Appropriations Committee was calling these OPMs predators and some of them were predators in terms of what they're doing. So, lots of pressure on the Department of Education in terms of what they need to do more and need to work on these from these different sources as well as a lot of the consumer protection groups have written to go to our first blog post that we had out there that there is a ... Go to our first blog post that we have several links to those articles as well.

With that, let's move to the next slide. Just very quickly that they had nine questions about OPMs that they wanted the public to comment on, and especially about the revenue sharing or incentive compensation. I'm paraphrase six of them here, but this gives you an idea that they wanted to see what the institution's experiences were and also what are better ways that they could regulate these things on that.

And so, with that, I'm going to move on and go to the next slide. And I believe the next one is going to ... Oh, no. We have [inaudible 00:10:32] ... Just that we did have the commenting WCT and SAN, we canvassed our members who had OPMs, that we got feedback from them and that we submitted a comment based upon their experiences, which was both very positive to very negative, to most of them were in the middle, that they had some things that could be better. And so, we wanted to reflect their experience with that. Okay, now I'll move on to Cheryl and the next slide.

Cheryl Dowd:

Thank you very much, Russ. So, as Russ was saying, we received this press release from the department that had conglomeration of things. We had to piece it apart. It took us a little bit of time. However, we were able to distinguish, as Russ indicated, the first part of the press release, addressed the OPMs and their interest in learning more. So, it was a request for information, but then we got to the point where they were saying, "No, we're also going to provide additional guidance about third-party servicers."

So, we go to the guidance and the guidance address that the third-party servicer is defined, it's defined in statutorily also, but in federal regulation as an entity that enters into a contract with an institution to administer any aspect of the institutions participate in any Title IV HEA program and then list a non-exhaustive list of functions. And so, what I want to point out here before we move forward is that the department was very specific about the use of the term any aspect found in regulation. We go to the next slide, please.

So, keeping in mind the whole idea of any aspect, what we see is the department's view that in its newest revised guidance that we have here, that they maintain that most activities by outside entities are subject to the department's oversight because the activities, and again, use this term intrinsically intertwine with the administration of Title IV. And so, I want to point out again that this is revised guidance. And so, needless to say, since this was first released, we've had our ear to the ground to listen to as many or read as many reviews analysis of the guidance as we can. And I was interested to find that there was particular analysis provided by a law firm that showed a graphic of this nice little circle from the first guidance and then a slightly bigger circle for this second guidance. And then a very large circle for the third guidance showing that it had expanded in terms of what functions might be found to be a

third-party servicer, to the point that there is some confusion about what could be, because we're looking into new areas and I'll talk about surprises there.

But what I want to share first is this email address here because the department in their guidance did indicate that if there are any questions about what is a TPS, what would be subject to TPS requirements and is a new function for your purposes to please contact them for clarification. So, CaseTeams@ed.gov, and we'll talk about that again in a few minutes. But you have this as an opportunity to reach out to the department to determine if your functions are a TPS. Next slide, please.

So, within this guidance I was sharing before, they talked about the intrinsically intertwined and then provided a table. And this table is not new. It's a charting of the various areas that could be services that are outsourced by the institution. And in that there are this laundry list of services. And within each of those was the table with two different sides. And on one side, they were trying to explain what functions within these categories were considered an aspect of an institution's participation in Title IV programs. And then contrast that with what would not be. And what was interesting is over time being able to look to previous guidance and see that the development of what is considered, what are the descriptions within these categories has grown. And so, we're interested to find out the parameters as we see this growth. Can we go to the next slide, please?

So, there are a few surprises for us as we looked through it. So, first we had received early in 2023 the intention of the notice that there might be ... Wasn't even a notice. It was thought, from the calendar of events, that there could be another rulemaking and we could see an official notice for another rulemaking that is to include third-party servicers. So, we were quite a bit surprised to see this guidance as opposed to what's coming forward for rulemaking. So, this is before what we anticipate to be a notice for further rulemaking that will address third-party services that we will probably see in fall of winter of this coming year. So, we'll look for that to see what the rulemaking will entail. But as far as increased scope of the guidance, we saw some areas, educational content and instruction, provision of software products and services involving Title IV administrative activities and recruiting and retention.

So, something that the department has addressed is that they had previously shared that non-US owned or controlled companies were ineligible to be a TPS. And we found that in the 2016 guidance, which was updated in 2017 as part of a Q&A that was an attachment to the guidance. So, this wasn't, although new, was also found in, like I said, a Word document in 2016, revised 2017. So, it's not new, but it had not been fully discussed to know what those parameters would be.

And then finally, in this last bullet, we were surprised as we were determining that state agencies could be considered a third-party servicer, when we consider that state sometimes act as a consortium to supply different aspects of programs for distance education within the institutions within their state. We go to the next slide, please.

So what? So, what does this mean? So, when this was initially released as guidance in mid-February, it was indicated that the guidance, and we'll talk about it in a second, was to be considered effective as of the date of release. And that institutions, though, would have a period of time to identify all of their third-party servicers. They would have until May 1st. The department revised their guidance about two weeks later after the prompting from several organizations indicating that this would take some time for institutions to review the activities with their servicers. So, they have expanded that date until September 1st so that institutions can identify their third-party servicers.

And the reason this is important is because third-party servicers would be conducting yearly federal audits. They could be liable for misapplication of Title IV aid. And what I understand is a real speed bump for some servicers was that they would be held joint and separately liable with the institution for any violation of Title IV requirements that are resulting from functions performed by the servicer. So, that is

something that is expanded for some servicers, some contracts, some vendors who are working with institutions. Can you go to the next slide, please?

And so, as I was mentioning before, what we see here is the hyperlink to the requirements and responsibilities for third-party servicers and institutions. This is an updated guidance and as I said a minute ago, it was to be effective immediately, but they have extended the effective date to September 1st. So, with the effective date also comes the reporting responsibilities. So, institutions would update their reporting on third-party servicers, contractors, vendors that are now considered a TPS would be required to submit a third-party servicer data form. And the link to that is also provided within the guidance.

And the last but not least, is the opportunity for any interested party to submit written public comments. And the deadline for that is now March 30 of this month. So, you have until March 30th, you see some cross-outs there. The original deadline was 3/17 in the original guidance, then they expanded it to 3/29, then they recounted how many days actually was the 30 days out, which put them to March 30. So, there has been some confusion about that. But we do note for certain now that the deadline is March 30th of 2023 and the hyperlink is available there to reach the place to submit your public comment. Next slide, please.

And so, my last thought here is to share that you have the opportunity to provide public comment, but here is another opportunity to communicate with the department. In the guidance, the department specifically offers the opportunity if the institution is unsure whether the institution or entity is subject to TPS requirements, that you may contact the school participation division at that email address there, CaseTeams@ed.gov. And we are aware that, at this point, the department is collecting these questions and also waiting until the end of the public comment period to review all of this and provide further guidance or FAQs they indicated. We also are aware that they had offered in one situation, maybe others, the ability to review the contract to make a determination of whether it actually falls in that third-party servicer type of contract. So, thank you very much and I'll turn it over to Phil.

Phil Hill:

All right. Thank you, Cheryl. And I'd really like to pick up on one of the points that Cheryl was making. We're talking about the definition of TPS, how it's grown from one area, then it's expanded and then it's expanded. And we're talking about the conflating of two different guidance going together, bundled services exception plus the TPS definition. So, there's a risk of sort of missing the scope of what's happening here. So, for example, in the definition of what is the TPS, there was, it used to be five bullet points that described it, and it all dealt with Title IV programs interpreted as dealing with financial aid and reporting on financial aid, things such as for the institution to remain eligible to participate in Title IV, that's financial aid, et cetera.

Well, there's a new bullet in here that really changes everything. And that bullet point in the new guidance says to provide Title IV eligible educational programs. And so, really what you have here is you're saying, "Now we're defining program as an academic or educational program at an institution that's eligible for financial aid." And that is a huge difference. That is what has led to this expansion into instructional content into most of EdTech. And, at the same time, we already talked about the fact that buried in a Q&A from 2016 was this provision about non-US owned, non-US located companies being excluded from being a TPS. So, take those two things and combine them together. Now all of a sudden it impacts study abroad. We're going to address some of these questions, but there is a whole host of non-US companies that at least on the surface of the new guidance are ineligible to provide these services to US schools. The point I'm trying to make is the fact that this action is unprecedented in scope and in lack of process.

And we need to take a look back at the big picture about why this is happening, to understand what the implications are going to be and what should we expect to see. It takes a deeper dive. Quick comment that came up during the ASU+GSV conference a year and a half ago, and Paul LeBlanc was giving a session, it was almost an offhand comment but that it's hit right at home. His point was, back during the Obama administration, the Department of Education seemed to have a dual role. You had a lot of the initiatives about innovation, how to enable competency-based education programs, how to enable different types of alternative models, balancing that with a consumer protection mentality. How do we look out for bad companies and protect students? How do we do this? And what's happened is during the Biden administration, even though you have a lot of the same people, all of the effort has moved to the consumer protection.

So, you need to think from a political standpoint and from a consumer protection mindset to understand how this happened and what's likely to happen in the future. And because you are really looking at the intention of saying how do we protect students from predatory companies in particular, particularly OPM? That is really driving the initiatives that the various people are going after.

So, that gets to the question of why are these issues conflated, the bundled services exception in TPS, and why use guidance? Well, part of the issue is I had written a post a year ago talking about that there's increased regulatory activism within the Department of Education with the intent of using regulations or guidance to achieve their goals, consumer protection being the biggest one that we're looking at. And if you follow these things, it led to these two guidance issues being added together.

But they make sense from, if you think in the same terms that we talked about before, consumer protection, we think OPMs, there's a lot of predatory behavior. How do we protect people? And I think that's led to the situation that we have with this dramatic increase in scope. And at the same time a lack of any real process to get input on what the applications are.

There's a survey that WCET put out trying to get feedback on what they're hearing. And I really want to point out these two bullet points because I'm hearing the exact same thing on my side. The people I'm talking to. On one hand, we're getting the entire, well, the majority of the higher ed community in agreement on the big impact of this guidance, even the organizations that tend to be neutral are saying, "Oh, my gosh! This is going to be a massive change and it hasn't been thought through and we don't have input." And so, there's this general agreement, but at the same time, what we keep hearing is there's a lot of surprise at the Department of Education of, "Oh, I didn't know this was going to be such a problem," "I didn't know people would push back," or even, "I didn't know people would interpret rules these ways." And so, we have this dual situation of agreement on one hand of huge changes, but surprised that it's actually happening. Next slide, please.

And so, that's partially leading to the reaction I think that we're seeing. So, for example, and some of these give direct links to the blog posts where they're covered, but if you look at the Department of Education, it appears that they're seeking a way out of the situation. They do recognize the massive feedback that they're getting through comments and in other routes, but we have not yet seen a willingness to confront the fundamental underlying problems beneath it. So, for example, there was an anonymous interview with Times Higher Education where a spokesman or somebody from the Department of Education was saying, "Providing computer services or software where the provider has no access to or control over other systems would not fall into the category of a third-party provider." But then if you look at what was actually written, there was a phrase that's added saying, "This exclusion is limited only to where the computer products or services are essentially self-hosted and a hundred percent under institutional control." While in this day and age of cloud computing, that basically makes that exclusion moot for most cases.

The point I'm trying to make here is the fact that we definitely seem to be in a situation where there's likely to be a change coming out of the comment period, but I'm not at all convinced that we know what those changes are going to be. So, we're in this fluid situation that has enormous scope and impact. Next slide, please.

Okay. So, what should we expect? Again, all indications are that the Department of Education is hearing the feedback and will revise the guidance at a minimum. So, on one hand, you can say, "Oh, this is going to be good. We won't have as big of a problem moving forward." And I'll remind you what Russ said. I'm not a doctor, I'm just playing one on a webinar.

We don't know when the changes will happen, but the best guess is April or May after comments are done. It's possible, if you look at the comments, the Department of Education will only make tiny changes at the margins leaving the fundamental impacts in place. But even so, the market impacts, at least for the next year, will come from how institutions interpret the guidance and the confusion, not necessarily what people intend or hope that it reads because if you're a school, you need to be careful of, "Well, I don't want to get in trouble, so I'm going to be conservative into my interpretations." So, it's a dynamic situation that we're looking at and politics is hugely important in it.

So, with that in mind, we got some excellent questions, over a hundred questions submitted as part of the registration for this webinar. So, we'd like to address as many of them as we can. So, turn it back over so we can do different Q&A, if you will, from the registered questions.

Russ Poulin:

Yes. Yeah, and we thank everyone for sending in those questions. We are looking a bit at the chat as well, but we'll try to get through quite a few of these. And one of the questions that was assigned to me was about, well, who is affected by the guidance? What departments, academics, technology, service admissions will be affected by this? And pretty much it could be everyone. And then one of our friends I see, hello, shout-out to Erica who came up with the, if it breathes on Title IV, it is included or it could be included in all of this.

And so, and just for an organization that is pretty moderate on most issues is the NASFAA, the financial aid folks that one of the things they said is that, "Well, what happens? You could have a nonprofit behavioral mental health organization helping out and if they're helping out with students, is that then helping with retention and therefore affecting financial aid and then being in this?" And there's a lot of these things where we're trying to figure it out. And that will be, and as Phil was saying, we're looking for more guidance on this.

But another question had to do, there's several questions around why are they doing this and why now? So, what is behind this? And don't they have a negotiated rulemaking coming up on this?

So, this is a good question. We do think it's related to the OPM thing because those were bundled together in this. And so, we think that that thinking that affected what came out of this, we're a little unsure about why, as Phil was saying, said that, and we put in our blog posts, we don't think they were thinking that this was as an expansive a move as possible.

And I want to turn to Phil and get some more thoughts on that in a second. But I do want to say that, yeah, somebody said, "Isn't there a negotiated rulemaking coming later this year?" Yes, third-party servicers was one of the things that was supposed to be in negotiated rulemaking later this year. Phil, what would you like to say more about why they're doing this?

Phil Hill:

Well, and again, I think the OPM angle is the key here. And if you look at what OPMs provide, it can be all the way from marketing and recruiting, defining the programs that you're under, technology provision, LMS provision, instructional content development, retention and data, basing those. If you look at a lot of the TPS additions that have been added, they fit within those categories. And I believe that was the driver of why this came in there. It wasn't separate from the OPMs. It was almost like deconstructing what an OPM is. And I think that's part of the reason we ended up this way.

Russ Poulin:

Okay. And then who decides and what is it? TPS? It's another question. And finally, it's the department. And then I'm seeing coming up in the chat, the same questions that we've been getting all along is that does this fill in the blank service fit into this? And it's really hard to go down through one after another because there's so many dependencies upon does it ... At one place, you could do it one way, and at another institution you could do it another way and it's the impact on financial aid. And so, I also saw that its place said that he enjoyed that, it said, "If the institution is unsure," he says, "Well, this guidance is custom made to generate uncertainty." So, you're going to have to do some interpretation and move and keep watching this and do as best you can as you move you forward.

Other comments on that? If not, I'll move forward then on enforcement and consequences. What happens with all this? Can they really enforce it? And that just a reminder that institutions will be asked by September 1st to report all TPS vendors, TPS, rather third-party service vendors, must also fill out a form. Unclear what happens if they decide, because some of them have decided that they're not one. And so, what happens if you decide they are and they decide they're not or vice versa sorts of things, but you need to work on that. And then, those who are third-party service must conduct a federal audit annually. And the institution could be checked on this during a financial aid audit to see, "Oh, you have this service. Are you overseeing it as a third-party service and do you have the proper paperwork in?" And that's something that could happen and that the consequences could be either a fine or, if you have something where through that service that something is happening to students, that you could be liable for federal financial aid penalties on that as well.

If nothing else, I'll move on to the next one. I'll have Cheryl talk a little bit about this one is that what should institutions be doing? What are the next steps that should be taken with all of this? And our advice, too, is don't wait. Get started doing your best analysis on this and reviewing contracts and see if you think that they fit. And in involving leadership, I'll share, I'll say a little bit more about that. And then, what you'll have to do is develop your best interpretation and would suggest that you apply that interpretation as universally as possible and be watching for updates on this. And remember that the September 1st to put those contracts in. Cheryl, what other advice do you have for next steps?

Cheryl Dowd:

Yes, I appreciate that, Russ. And that goes hand in hand with what Phil was saying about how we may see some tweaks to this guidance, but we don't know when and we don't know what. So, getting started in the review of your interactions with what you are outsourcing for your institution is important. So, in my opinion, I believe you need to start with your general counsel. That's your first line of communication is with your general counsel. I will tell you that just last week, NACUA, the National Association College and University Attorneys held a pop-up policy review and in that they had more than 900 on the call. So, I know that it's on their radar. So, my suggestion would be to first communicate with your general counsel because with your general counsel, you could determine what institution staff should be brought into this discussion and then prepare this related institution staff with the elements



of the guidance as you best see it along with your general counsel, your best interpretation as Russ has been sharing.

And then after identifying and preparing the staff, consider what are the related contracts and determine the affected servicers because you're going to need to be making communication with those servicers. So, you're going to want to prepare servicers with what could be additional responsibilities if they're now considered a third-party servicer. You recall that they have additional responsibilities, joint and several liability reporting audits, et cetera. And then you'll want to work with your GC and your procurement staff if you have it at your institution to review, perhaps revise contracts and/or make determinations about the future relationships because you may be needing to address some sort of statement of work, including coordination of procedures between the institutions and the servicers in order to limit liability for actions such as misrepresentation, et cetera. So, that would be my simple next steps.

Russ Poulin:

Okay. Yeah, and just say it's a question for Rob, but what if the vendors say it doesn't affect us and one of our blog posts, I noted that we have people who are in the different stages of grief and some are firmly planted in denial. I think you need to do what you need to do. You have paperwork that, if you decide that a vendor fits the category, you submit yours, you tell the vendor that you've done that, but you cannot force the vendor to do anything. So, you need to do what you can.

I've got just a couple others here that I'll go through quickly and that about could the regulation change? I think Phil's already said that it's likely that we think that there will be some changes and I see Giselle's asking about, we think that there's some of those things are happening already where changes will come out, but they usually aren't talking about that so openly. Do you want to say more about that, Phil, on changes?

Phil Hill:

Well, there's a lot of speculation about what the nature of the changes would be. And actually I wouldn't mind, Russ, if you don't mind going back to the previous comment, part of the issue why we're in this place is guidance is supposed to be clarifying and this guidance was the opposite of that.

And so, when I'm seeing questions such as, "Hey, our vendor is saying we're not TPS. Well what do you do?" Well, part of the issue is that if you look at the language and the guidance, it's pretty clear that learning management systems are included in this. It's hard to get around that. But if you go and you look at the statute and the original definition of TPS, from a legally defensible standpoint, they have a pretty strong argument that's at least taking somewhere. So, that puts schools in this position of, well, do I listen to this or do I go with guidance, or do I interpret my own thing? So, I just want to point out, part of the reason some of these questions are so confusing is because this process issued guidance that was the opposite of clarifying.

Russ Poulin:

Got it. And Ricky makes a good point in here, too, that when people want, and then we've seen this in other regulatory things, they want a spreadsheet where they go down and say, "Oh, here's this service and is it or not?" But it depends how you do it, what the contract is in your place. So, you have to do some analysis as well. Yeah. Thanks, Phil.

And my last thing here is about, we had some questions, I'll do this quickly. About OPMs and should they be changing your contracts now? Remember that the things about OPMs were they have not changed

any regulations right now. We're expecting that to come. So, third-party services, you just need to identify that you have those vendors, but nothing has changed about the revenue share or those rules that we talked about at the very start. You're just asking about that. So, don't go changing your contracts quite yet. With that, Phil, I'm going to turn it to you I think next. Your question.

Phil Hill:

Okay. Well, let me capture where we've aggregated some of the questions. And Rob, what Rob asked is very common with what we got going in. How does our contract with our LMS get affected? And besides LMS, do contracts with respondents, turn it in, get audited others, SIS courseware. The reason this comes up so specifically besides this thing is if you look at part of this table that was provided by the Department of Education, they added a clause about providing computers, services, or software, any aspect of the programs including but not limited to systems related to financial aid management, recruiting and enrollment, admissions, registration -- hello, SIS -- billing and learning management.

So, on the surface they specifically called out learning management, but they also essentially called out student information systems and they called out, later on, student retention and tutoring and support systems. So, if you want to look to see if it's possible, are we included, there most of the EdTech world has been listed in one way or the other.

However, some of these interpretations contradict each other with what's excluded, what's included. And this gets to where I was saying it didn't really clarify, but there's definitely elements in there. What this leads to is, on the surface, these LMS contracts look like they're within the new expanded guidance, but who's going to adjudicate did we really mean that? It's set up to just be the Department of Education? And so, there is some fuzziness, but it's there.

Another question that's related is are publisher materials and sites included if the instructor is making the decision about what is done and what the value of it? Basically, what about instructional content, courseware providers, publishers. And if you look at some of the table that was in the guidance, they talked about assessing student learning, including through electronic means, determining requirements of a course, developing curricula or course materials unless the institution maintains full control of the curriculum materials and delivers the instruction itself.

While one of the questions is, with today's courseware that's designed around learning outcomes, has built informative and summative assessments, you could see an argument saying this captures instructional content or certainly courseware within the expansion of TPS. So, this one is trickier. It's not as explicitly called out as learning management. And it depends on the definition of requirements. Is that learning objectives or is it the department coming up with what the definition of a course in a program is? So, it is trickier, but long and short, it's up to the department because the written descriptions are sort of vague. And so, now schools are going to need to figure out how to interpret this, but it does have elements that pull in instructional content. And I'll add one more then I'll open it back up to Russ and Cheryl, but there was the question about state agencies that's already been mentioned.

One of the questions is, are state level consortia funded by the legislature considered TPS? Will public higher ed online consortiums be considered a TPS if they're managed by an agency and not an accredited institution? This one is actually interesting because they addressed in a Q&A beneath the table this question and the Department of Education answer was yes. If a state agency performs Title IV functions or services on behalf an eligible institution, the state agency is considered a TPS and subject to the applicable regulations. And this was in the context of providing instruction and stuff like that. So, certainly state agencies appear to be within the scope and they even addressed it in the Q&A. Now, if I were going to take this to court and I could say, well, in your Q&A, you specifically went back to Title IV

functions, and I do not agree with your interpretation that providing an educational program that is eligible for Title IV is the same thing as a Title IV function.

So, this gets to the whole area of, on the surface there's a lot that's included here and it's called out. But if you really wanted to fight it, there are arguments to be made saying their interpretation was just wrong and there's going to be pushback, but what's going to be the problems in between? This is part of the reason that Russ and Cheryl talking about needing to have legal counsel involved in advising you which way to take this.

But Russ and Cheryl, I know you guys do a lot of work with consortia and state agencies. Anything you'd like to add or clarify on the state agency question?

Russ Poulin:

Yeah, I don't know that I can clarify anything other than that we talked to our members who are systems and consortia and we presented to a SHEEO meeting last week, I guess it was. And so, that they have some real concerns about some of the different things that they do because they can see where a lot of services could fit under that.

And trying to figure out, when I first read it, I was wondering about I'm having a hard time remembering where students were harmed by these sorts of relationships that are put together to try to do more for students in all this and do more across institutions. And so, I'll be interested to see how they follow through on that.

Phil Hill:

Yep. I know that we're mostly addressing the questions from registration, but there is a discussion I would like to call out. I was talking about how things seem to be written. I think the interpretation is very correct, Clay and Karen talking about the way this was written was very much on the consumer mindset think tank advocacy organization being the driver or inspiration or even the writing of this and not from people who are actively involved and here's how we have to administer a school and what we need to be. That's part of the reason I'm saying you've got to think politically here, not just ... So, I went outside of my own scope here, but I thought I wanted to address that conversation.

Russ Poulin:

And let's hope we give the department grace that if we decide, "Oh, okay, this is more than we meant," and that they bring it back, that-

Phil Hill:

Yes.

Russ Poulin:

... we honor that they do that.

Phil Hill:

Yes.

Russ Poulin:

Cheryl, do you want to go to your questions?

Cheryl Dowd:

Sure, sure. So, we have several people that have been asking you about the international circumstances. And so, we had several questions boiling down to kind of specifically about what the guidance was that was provided. And what we were hearing is that there was some surprise that it is now being addressed because it was initially released in guidance in the Q&A section in 2016, but it was not elevated to the discussions until currently. And specifically the institutions may not contract with a third-party servicer to perform any aspect of the institution's participation in Title IV program. If the servicer is located outside of the United States or owned or operated by an individual who's not a citizen or national or lawful permanent resident. That's what we have to work with. And so, we do not have any clearer understanding of any other parameters.

In my mind, I'm looking at it rather conservatively to determine who should be considered a foreign entity at this point to determine if they're people, if these are organizations that there is a concern about whether they can be a TPS. So, we wonder then, so how do we address vendors because we know of vendors who are located in other countries. And actually one I really appreciated the other day came in asking, "Well does this apply to Canadian groups, organizations?"

And there are our northern border friend. And unfortunately, if you're working with a Canadian group, I would say at this point it is unclear based on this language about whether they can be a third-party servicer. We'll have to learn more. So, as far as what we know, institutions should review the entities and the functions of those entities through the lens of this new guidance.

So, who are the entities and for whom are you contracting so that you can determine if they are a foreign entity because they are not to perform any aspect. And I would communicate with that servicer or subcontractor as listed in the guidance as well. So, communicate with this servicer or subcontractor if you believe they're located outside of the US or they're owned or operated by an individual who's not a citizen. So, it's very unclear. We're waiting to learn. And I have to add that the public comment opportunity specifically when they updated the guidance suggested that they wanted to hear from folks about how to address the limitation, they used the word limitation, on foreign owned or controlled organizations as a TPS. And they are specifically interested because they're concerned about the ability to hold these servicers liable if necessary because they're outside the country.

So, they are very interested in this. And so, we would strongly urge you if you have interactions with a foreign vendor that you would want to communicate with the department and learn more. So, let's see. So, there was that and then, oh, how does this apply to study abroad groups? Well, okay, so naturally we just talked about if it's a foreign entity, but we should also consider that if they're also a coordination with foreign institutions or there's some co-teaching with faculty from outside the US or the foreign education study abroad organizations. So, we look at that and so you're going to have to review that and relate it to any aspect reviewed to see that they are falling into that category.

And then second, even if this study abroad organization is all US-based, you would need to consider if they're, dare I say, a traditional third-party servicer in that they are providing certain functions, you're outsourcing certain functions for the student to participate in Title IV within that program. So, is there anything in regard to an international fill-in, Russ, that you want to add to that?

Phil Hill:

No. I would add a comment that somebody shared with me privately that if you think through the foreign implications and study abroad is that, and I agree with you, it's probably the most likely area to change in this guidance, but if it doesn't change, one of the impacts will be only students who don't

require financial aid will have these opportunities with study abroad. So, no. I agree with your analysis, but that was an interesting point that somebody made to me privately.

Cheryl Dowd:

So, this is quite expansive. Yes, Russ. Sorry.

Russ Poulin:

Oh, sorry. No, were you going to say more, Cheryl? Let's see.

Cheryl Dowd:

Go ahead.

Russ Poulin:

No, I guess one of the things I'm seeing in the chat is that they may be expanding it out more than was intended because a lot of the international is based upon if you're contracting with companies that are owned or controlled financially. So, that was a very clear thing about owner controlled because there may be some where the ownership or control is in the US, is that correct? But they do things internationally. That's a different thing, right?

Cheryl Dowd:

So, my suggestion then again is you do take at this point until we learn more is a conservative approach and work with your general counsel to determine next steps at this point until we get more guidance on that matter. But which leads me, as I look at the time, to questions about communication. And so, one of our big points about having this webinar today was to encourage you to prepare a public comment. And so, we had several people ask us, "Well what do we do to prepare?" And so, as we look at this, I have several steps that I can encourage you to walk through. First is the review of the contracts to determine if the entities provide functions of the contracts that may be a third-party servicer based on this expanded guidance, evaluate and determine the consequences if the entity would be considered a third-party servicer.

So, questions that you would ask at your institution is should the institution revise the contract with the third-party servicers or in some cases may take steps to end the relationship with the entity. Are there illogical consequences affecting these contracts and how does it affect students? So, when you're writing the comment, obviously you're going to want to be respectful and thoughtful in your comments, but you're going to want to ask clarifying questions about the language of the guidance. You're going to want to ask questions about implementation of the guidance, perhaps use examples of functions at your own institution and provide stories of concern leading to illogical consequences, provide examples that will affect students, share concerns to the institution in regard to liability execution of the expanded guidance elements that you're finding.

And then I do want to point out, I'm talking about all these that's appearing negative, but you may also include in guidance, providing comments that are supportive of language if that's where you are at your institution and what might be particularly helpful or important that is part of the current guidance.

And remember that the department indicated that they are particularly interested in comments on this limitation for foreign owned or controlled organizations as a TPS. And so, I'm going to put one in the chat. We have some representatives from some folks with us today from Educause who purposely put out their comment early to be able to share with folks. You can review comments that have already

been posted, but you may want to review one that I have the link for right here. And so, I will put that in and add and then just turn it back to Russ and Phil to add any other comments about commenting.

Phil Hill:

No, I think you covered it very well as far as what people need to be active in providing comments. I'm actually writing a blog post now looking at the publicly available comments on TPS. There's a lot more in bundled services exception than there are for TPS when I think that the Department of Education needs to hear real world examples. So, I fully endorse what Cheryl was saying about what school should do, give realistic answers and information to help them understand what's happening, positive or negative.

Russ Poulin:

Yeah. And if you uncomfortable with commenting, you know that you can comment, just make sure that you're only commenting officially if somebody said you could do that. But if not, just CaseTeams@ed.gov. Bring that up again. You can ask questions. Everybody can ask questions about this. We've had some questions about including the chat. We'll see what we can do about doing. I think we should be able to do that to include the chat because we had lots of great information in this, but we'll get the chat, the recording, and the slides out to everyone and up very, very soon. Come join us here. We'd love to have you. Phil's new service is really great. It's premium coverage, so I'll promo that for you, Phil. It's done well.

So, this is a lot of stuff. There's no sure answers and the answers are going to change. You've already seen the guidance. The dates changed twice since February 15th on things. And so, this is a moving target. We'll do our best to continue to keep you up to date and so we'll do that.

With that, Phil, thank you so much for always being a good partner with us. Cheryl, your analysis is aces, as always. And so, with that, we want to thank Kathryn and the team for their help behind the scenes and I'm sure we'll be talking about this again in the future. Take care.

Phil Hill:

Thank you.