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

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To Whom It May Concern:

Thank you for the opportunity to comment in response to the Department's guidance on the requirements and responsibilities for third-party servicers and institutions (ID # ED-2022-OPE-0103, DCL GEN-23-03). Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. For nearly the last seven years, we have invested in research, policy development, litigation, and advocacy to end predatory behavior in higher education and increase the return on investment of higher education for both students — especially students who have been historically marginalized — and taxpayers. Should you have further questions regarding these comments, we welcome the opportunity to discuss them further.

Third-Party Servicer Requirements Are A Critical Oversight Tool

Requirements that institutions report on their third-party servicer (TPS) arrangements, and that third-party servicers undergo an annual audit of their activities, have been in the law since 1992. Originally added to the law at the suggestion of the Inspector General of the Education Department,[1] the regulations were designed to ensure that – where an institution decides to contract with a TPS – that servicer is following the same rules as the institution is required to follow with respect to Title IV. As the House Committee on Education and Labor wrote at the time, "servicers frequently control millions of dollars in Federal cash designated for institutions' Title IV programs. This fact alone justifies the Department of Education implementing monitoring procedures."[2]

The Department promptly moved to implement regulations following the inclusion of a third-party servicer definition in the 1992 Higher Education Act reauthorization, first through an

[1] "Higher Education Amendments of 1992: Report of the Committee on Education and Labor," House Report 102-447, 102nd Congress, 2nd Session, February 27, 1992, document available from authors upon request.
[2] "Legislative Recommendations for Reauthorization of the Higher Education Act and Related Measures," Appendix, H342-20, May 1991, document available from authors upon request.

interim final rule (IFR) and then through revised regulations. The expansion of oversight to third-party servicers was, according to the Department, "an important element in the general effort for better and more accountable schools."[3] The regulations defined a third-party servicer as an individual, state, or private for-profit or nonprofit organization that enters into a contract with an institution to administer "any aspect of the institution's participation in a Title IV, HEA program," and established the requirements that servicers undergo annual audits and accept joint and severable liability for Title IV compliance violations that remain in place today.[4]

The third-party servicer requirements serve important functions for the Department of Education. For starters, institutions and third-party servicers must report their covered arrangements to the Education Department, providing important transparency into the entities providing key Title IV services – such as ensuring institutional eligibility, assessing student financial aid eligibility, or delivering federal funds to students – and ensuring the Department can better monitor their actions. Additionally, annual compliance audits help to streamline oversight, flagging potentially problematic violations of the law via an independent third-party assessment, without requiring the Department to conduct a program review or audit of every one of the hundreds of third-party servicers working with thousands of colleges. By requiring these compliance audits, the Department can more effectively marshal its resources to identify and respond to the most troubling situations. And finally, the shared potential liability of both the institution and its third-party servicers provides an important deterrent to misconduct among third-party servicers who might otherwise cut corners, assuming their partner institutions would be the ones on the hook for potential taxpayer losses or other penalties.

Over the years, institutions have outsourced more and more of these functions core to the administration of Title IV – including in some of the areas that remain the highest risk for compliance problems. This necessitates continuous clarification of how the third-party servicer regulations should be applied, and to which entities. The Department acknowledged from the beginning that the activities of a third-party servicer could not necessarily be neatly defined in the regulations, stating nearly 30 years ago that "the examples that the Secretary proposes to include in the definition of third-party servicer are primarily examples that show an obvious relationship to the administration of the Title IV, HEA programs.... While these examples are not all-inclusive, they do provide a baseline to judge other activities that could be deemed an aspect of the administration of an institution's participation in the Title IV, HEA programs."[5] Today's regulations note the list of regulatory activities that meet the definition are "not restricted to" only those services on that list, and past guidance has confirmed that even added TPS activities are "non-exhaustive."[6]

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[3] 59 Federal Register 33, Proposed Rules, available at: https://archives.federalregister.gov/issue_slice/1994/2/17/8039-8077.pdf#page=6.

[4] 59 Federal Register 61142, Final Regulations, available at: https://archives.federalregister.gov/issue_slice/1994/11/29/61126-61190.pdf.

[5] 59 Federal Register 8044, Proposed Rules, available at: https://archives.federalregister.gov/issue_slice/1994/2/17/8039-8077.pdf#page=6.

[6] 34 CFR 668.2 defines a third-party servicer as an entity that "include[s] performing any function required by any statutory provision of or applicable to Title IV of the HEA... such as, but not restricted to," the list of activities published in the rule. Additionally, DCL GEN-12-08, issued in April 2012, reminds

Indeed, the Department has made repeated clarifications of third-party servicer activities with the continued growth of the industry. For instance, in 2015, the Department issued guidance reminding the field that default prevention/management functions, like cohort default rate analysis, enhanced loan counseling, delinquency assistance, development/implementation of a default management plan, and/or other default prevention activities, qualified as third-party servicer activities.[7] The guidance followed the growth of a default management industry that helped institutions to evade accountability under the cohort default rate measure, a statutory institutional eligibility requirement, including by often pushing borrowers into forbearances that may not have been the best financial option for them.[8] Despite the importance of that industry in ensuring institutions maintained eligibility for Title IV – and in administering a core aspect of the Title IV programs – the Department found that “a significant number of schools had not reported information on the third-party servicers they use as required.” Following the guidance, the Department reported, it had received information on 48 companies providing these services.[9]

The Department has also periodically made changes to the regulations governing third-party servicers. For instance, by 2014, the Department became aware of a growing industry providing debit cards to students onto which institutions could load students’ Title IV credit balances – often with significant fees associated for students who used the cards for PIN debit transactions, overdrafts, insufficient funds, inactivity, ATM access, and more.[10] Given the risk to students, and the integral nature of these activities to the administration and delivery of Title IV funds, the Department issued new regulations in 2015 clarifying the requirements for third-party servicers involved in the disbursement of funds.[11]

More recently, the Government Accountability Office added its voice to the chorus of those concerned about the growing industry of online program management companies (OPMs), which

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institutions that “the listing, which is not-exhaustive, includes” activities like processing student financial aid applications, determining student eligibility and related activities, conducting activities required by title IV, HEA consumer information service regulations, and more. See: “Disbursing or Delivering Title IV Funds Through a Contractor,” DCL GEN-12-08, April 26, 2012, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2012-04-26/disbursing-or-delivering-title-iv-funds-through-contractor. DCL GEN-15-01 confirmed largely the same, saying that “an institution’s Title IV responsibilities include, but are not restricted to, performing one or more of the following,” including default prevention/management functions. See: “Third-Party Servicer Institutional Requirements and Responsibilities,” DCL GEN-15-01, January 9, 2015, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2015-01-09/third-party-servicer-institutional-requirements-and-responsibilities.

[7] “Third-Party Servicer Institutional Requirements and Responsibilities,” DCL GEN-15-01, January 9, 2015, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2015-01-09/third-party-servicer-institutional-requirements-and-responsibilities.

[8] “Actions Needed to Improve Oversight of Schools’ Default Rates,” GAO-18-163, Government Accountability Office, April 2018, https://www.gao.gov/assets/gao-18-163.pdf.

[9] Ibid.

[10] “Third-Party Servicer Use of Debit Cards to Deliver Title IV Funds,” Final Management Information Report, ED-OIG/X09N0003, U.S. Department of Education, Office of Inspector General, March 10, 2014, https://www2.ed.gov/policy/highered/reg/hearulemaking/2014/pii2-lindstrom1-oig.pdf.

[11] Final Regulations, 2015-27145 Federal Register Number, available at: https://www.regulations.gov/document/ED-2015-OPE-0020-0212.

more than 500 institutions – including 165 new agreements in 2020 alone – partner with to establish and grow Title IV-eligible online programs.[12] In that report, the GAO noted that institutions' compliance audits were falling short in examining these companies, particularly to determine whether there were violations of incentive compensation rules, and urged the Education Department to require more information about OPM arrangements, like seeking copies of institutions' contracts with OPMs, and to ask questions more deeply about these arrangements via compliance audits and program reviews.[13]

In response, the Department issued new guidance – rescinding and replacing old guidance to ensure the information about third-party servicers was consolidated in a single location and to make other necessary adjustments to the regulations – governing TPS requirements. The new guidance outlines key areas in which the Department is aware of contracts between institutions and TPS entities where the "activities and functions performed by outside entities… are intrinsically intertwined with the institution's administration of the Title IV programs."[14] This new guidance is a critical step to ensure students are protected and taxpayer dollars are subject to appropriate oversight – removing many of the third-party servicer activities from the shadows and ensuring that those companies working as agents of an institution are complying with federal law as intended.

We urge the Department to maintain this guidance going forward, and we make some specific suggestions throughout the remainder of our comments. Should you have any questions regarding these comments, please contact us at kmcmanus@arnoldventures.org and cmccann@arnoldventures.org.

Sincerely,

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[12] "Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers," GAO-22-104463, U.S. Government Accountability Office, April 2022, https://www.gao.gov/assets/gao-22-104463.pdf.
[13] Ibid.
[14] "Requirements and Responsibilities for Third-Party Servicers and Institutions," DCL GEN-23-03, U.S. Department of Education, February 28, 2023, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023.

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Third-Party Servicer Activities Related to Recruitment- and Application-Related Activities and to the Retention of Students

The Department's guidance clarifies a variety of activities that are "intrinsically intertwined"[15] with the institution's administration of Title IV, including both recruitment- and application-related activities (like 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; and establishing or modifying admissions standards) and activities connected with the retention of students (like monitoring academic engagement, conducting outreach to students regarding attendance, and responding to inquiries from students or their families regarding assistance or resources designed to help students maintain enrollment or eligibility for Title IV aid).

Recruitment services are an important area for oversight, particularly with respect to incentive compensation. As we noted in our comments to the Department regarding its current bundled services guidance, recruitment activities fueled by an incentive compensation structure have a long and sordid history of unduly pressuring prospective students, to their detriment, and abusing the taxpayer-financed federal student aid programs.[16] That history is why Congress agreed to ban incentive compensation in the first place; stories about institutions' willingness to put educational quality on the back-burner in the interest of bringing bodies — and their Title IV vouchers — in the door raised hackles on both sides of the aisle.

Today, that threat persists, often powered by a loophole sanctioned in federal guidance known as the bundled services loophole. Again, as we wrote in our comments to the Department,[17]

> As the *Wall Street Journal* reported regarding USC's OPM-run programs:
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> > To attract students, USC employs a style of recruiting once rare at highly regarded universities, according to dozens of interviews with current and former students and employees. Recruiters for 2U Inc., a for-profit company that works with USC and others to develop online degrees, repeatedly call and email prospective applicants. Counselors sometimes recruited people with low grades to meet enrollment targets.
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> > The school formulated marketing campaigns to woo applicants, using demographic profiles of the kinds of students they would recruit, internal documents used by the marketing department and reviewed by the Journal show.

[15] Requirements and Responsibilities for Third-Party Servicers and Institutions," DCL GEN-23-03, U.S. Department of Education, February 28, 2023, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-feb-28-2023.
[16] McManus, Kelly and Clare McCann, Letter to U.S. Department of Education re: Docket ID # ED-2023-OPE-0030, March 16, 2023, https://craftmediabucket.s3.amazonaws.com/uploads/AV-Comment-Letter-on-Bundled-Services-Hearing-FINAL.pdf.
[17] Ibid.

> The profiles include cartoon characters depicting potential recruits; in one depiction, a Black woman dubbed Needy Nelly "needs hand-holding" and "calls and emails everyone" because she has trouble with her application.
>
> 2U is not alone in employing such tactics. About half of Academic Partnerships' employees are telemarketers who do student recruitment.[18] The Learning House requires its 'contact agents' to attempt to contact each prospective recruit for University of West Florida at least 13 times for 10 days in a row.[19] USC and 2U are facing litigation over a systematic, years-long misrepresentations to students for the school's online education graduate programs, after confessing to misrepresenting data about the programs for U.S. News and World Report rankings and then using the school's inflated spot in the rankings to recruit students.[20]

Incentive compensation regulations are not being complied with, albeit often because federal guidance in DCL GEN-11-05 runs counter to those rules. But it is clear that the Department must keep a close eye on the entities that are providing recruitment services to institutions, and – especially when the Department has also rescinded the bundled services loophole – ensure those entities are not engaged in illegal incentive compensation schemes.

The GAO agrees with this determination. In a recent report on the online program management industry, GAO wrote that "a significant share of OPMs provide student recruiting services – a service subject to [the Department of] Education's oversight of the ban on incentive compensation. According to information we collected from seven of the largest OPMs, five of them offered colleges a set of services that almost always included student recruiting."[21] Yet, the GAO found, "colleges may not always report OPM arrangements."[22] Two audit organizations reported to GAO that none of their colleges had informed them of any OPM arrangements – even though publicly available information indicated that both had audited institutions that do have recruiting-based contracts with OPMs. The GAO recommended that the Department ensure auditors could "better identify and assess potential incentive compensation ban violations when a college contracts with an OPM." The Department concurred with the recommendations from GAO, and the updated third-party servicer guidance, especially in concert with changes to restore the integrity of the incentive compensation rules by rescinding the bundled services loophole, \follows through on the Department of Education's promise.

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[18] Howard, Caroline, "No College Left Behind: Randy Best's Money-Making Mission to Save Higher Education," Forbes, February 12, 2014, https://www.forbes.com/sites/carolinehoward/2014/02/12/no-college-left-behind-randy-bests-money-making-mission-to-save-higher-education/?sh=5e3382a014a2.

[19] Hall, Stephanie and Taela Dudley, "Dear Colleges: Take Control of Your Online Courses," The Century Foundation, September 12, 2019, https://tcf.org/content/report/dear-colleges-take-control-online-courses/.

[20] "Students File Lawsuit Against USC and 2U for Deceptive Enrollment Scheme," Press Release, Student Defense, December 20, 2022, https://defendstudents.org/news/students-file-lawsuit-against-usc-and-2u-for-deceptive-enrollment-scheme.

[21] "Education Needs to Strengthen Its Approach to Monitoring Colleges' Arrangements with Online Program Managers," GAO-22-104463, U.S. Government Accountability Office, April 2022, https://www.gao.gov/assets/gao-22-104463.pdf.

[22] Ibid.

But it is not only pre-enrollment recruitment activities that are subject to the incentive compensation ban. Federal regulations prohibit incentive compensation based not only on the number of students who enroll or receive federal aid, but also "the number of students (calculated at any point in time of an educational program) who… are enrolled for any period of time, including through completion of an educational program."[23] That means post-enrollment activities designed to continue enrollment — strategies designed to ensure retention of students, like financial aid counseling of already-enrolled students to ensure they can continue enrollment, student reengagement, or answering questions from students to ensure they can maintain enrollment — are covered by the incentive compensation ban. Institutions are required to comply with that prohibition, as are any third-party servicers working on behalf of the institution. Furthermore, while past litigation means that graduation- or completion-based compensation structures are not prohibited, the Department has been clear that it does "[reserve] the right to take enforcement action against institutions if compensation labeled by an institution as graduation-based or completion-based compensation is merely a guise for enrollment-based compensation, which is prohibited."[24] Thus, to enforce these activities, the Department must ensure compliance auditing of institutions' compensation structures, as well as those of any entity that may be working on behalf of the school to promote either enrollment or continued enrollment.

Without question, the risk of incentive compensation violations is concentrated in certain types of servicers. For-profit OPMs, for instance, have already been identified by GAO as high-risk; they may title their employees "admissions counselors," "enrollment advisers," and "student success coaches," then position them in a call center to bring students in the door and keep them enrolled.[25] This language effectively coopts the titles – without providing the deeper, genuine investments – of the staff who work for nonprofit organizations that provide critical academic, financial, and personal support for students from underserved communities. Such nonprofit organizations are far less likely to engage in this risky behavior – and, we believe, far more likely to receive a clean bill of health on the compliance audits that are required of third-party servicers. We anticipate, and expect, that the Department's enforcement work will focus more heavily on for-profit entities that are truly seeking to turn a profit off of the Title IV programs.

Ensuring retention activities, particularly with respect to distance education programs, qualify an entity as a third-party servicer may help the Department to conduct oversight of other activities, as well. For instance, the Department noted that monitoring of academic engagement and outreach to students on the basis of that engagement are considered covered third-party servicer activities. Both are also key elements of ensuring institutions provide regular and substantive interaction between students and the instructor in their online programs. In recent years, the

[23] 34 CFR 668.14(b)(22)(iii)*(2)(ii)*.
[24] 80 Federal Register 73991, Final Regulations; Clarification and Additional Information, available at: https://www.govinfo.gov/content/pkg/FR-2015-11-27/pdf/2015-30158.pdf.
[25] Manoff, Katerina, "How They (Online Graduate Programs) Get You," The Atlantic, August 14, 2019, https://www.theatlantic.com/education/archive/2019/08/online-graduate-programs-recruitment/596077/; and "A Brief Guide to Guild's Coaches," Open Book, Guild Education, May 12, 2022, https://openbook.guildeducation.com/a-brief-guide-to-guilds-coaches/.

Department has struggled to enforce those requirements, including via a protracted battle between the OIG and an institution and through a rulemaking process that more specifically defined regular and substantive interaction to include certain activities.[26] To the extent institutions are relying on third-party servicers to provide that necessary interaction, the Department should be cautious to ensure the servicers are supplementing, and not replacing, instructor activities. That could be an important element of TPS oversight, if included in future iterations of the OIG audit guide.

Both retention and recruitment activities are also often heavily data-driven, necessitating the use of students' personally identifiable information. Compliance audits required of institutions and of third-party servicers will help to ensure the federal government's rigorous standards for data privacy and security protocols are upheld.[27]

We do, however, recommend several modifications to these sections.

Under the activities related to retention of students, we believe the Department could provide certain exceptions to the rule. For instance, while basic needs supports are critical to ensuring low-income students are able to remain in school and progress toward graduation, we do not believe those activities alone—such as providing an on-campus food pantry, or offering students connections to SNAP and other social services—should constitute third-party servicer activities. Those activities, while supportive of retention, should be considered primarily not on behalf of the institution and added to the list of activities that do *not* constitute third-party servicer activities.

We are also aware of concerns that "non-profit organization[s] providing student engagement and retention services or tools to improve student outcomes" are covered by the TPS regulations.[28] Such retention services are critical to improving the success of students in higher education – which is why we believe it is also critical that those entities be vetted to ensure they are complying with federal requirements, and that the Department be aware of such arrangements. However, we believe the risk is substantially greater when the company is being paid for its services than when the entity providing retention services is charitably funded, for instance by government, philanthropic, or community resources. To that end, we urge the Department to revise GEN-Q1 of its recent guidance, to provide that a nonprofit entity that is not compensated or reimbursed for its services (except via grants from these sources), nor compensates or reimburses the institution (e.g., the third-party entity does not the pay the institution for access to its student

[26] 85 Federal Register 54742, Final Regulations, available at: https://www.federalregister.gov/documents/2020/09/02/2020-18636/distance-education-and-innovation; and "Western Governors University Was Not Eligible to Participate in the Title IV Programs," Final Audit Report, ED-OIG/A05M0009, U.S. Department of Education, Office of Inspector General, September 2017, https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a05m0009.pdf.

[27] See Chapter 4, C.8, of "Guide for Financial Statement Audits of Proprietary Schools and for Compliance Attestation Examination Engagements of Proprietary Schools and Third-Party Servicers Administering Title IV Programs," U.S. Department of Education, Office of Inspector General, https://www2.ed.gov/about/offices/list/oig/nonfed/2023auditguide.pdf.

[28] Letter from Ted Mitchell, President, American Council on Education, to Secretary of Education, February 23, 2023, https://www.acenet.edu/Documents/Letter-ED-TPS-Comments-Extension.pdf.

body, such as for marketing or other purposes), is not considered a TPS. To ensure this change does not become a loophole, the Department should clarify that there must be no compensation, reimbursement, or other remuneration *on either side* or *among any owner or affiliate of either the institution or the servicer*. This exception should also be provided only for nonprofit organizations, which are more soundly vetted in their mission and work than are for-profit entities. However, we do believe that for certain cases in which a nonprofit entity not receiving compensation is permitted to co-locate at the institution, albeit without providing contracted services on behalf of the institution, an exception may still be warranted. While this would constitute a shift from past guidance, we believe it is a reasonable and carefully crafted change that would support the field's efforts to grow evidence-based student success initiatives.

Finally, we recommend that the Department clarify that training and technical assistance from outside entities advising institutions on their retention services — provided those services are not directly provided by the outside entities, and consistent with the Department's guidance on consulting services in the same Dear Colleague letter — are exempt from the third-party servicer definition and not subject to these requirements. We believe this is already clear, given that the regulations require a servicer to "administer" any aspect of an institution's Title IV participation, rather than to advise on the administration of that participation. But we also believe that further clarifying this in the guidance will ensure the Department maintains the appropriate and intended scope of third-party servicer activities.

Third-Party Servicer Activities Related to Instructional Content

The Department's guidance also, importantly, clarifies that the provision of instructional content is a covered third-party servicer activity, including establishing course requirements, evaluating whether a student has met course requirements, delivering instruction or required tutoring, assessing student learning, or developing curricula or course materials where the institution does not maintain full control of those materials and does not deliver the instruction itself. Without question, this activity should be considered "intrinsically intertwined" with the Title IV activities of the institution and critical for ensuring "the institution [can] remain eligible to participate in the Title IV programs," as the guidance requires – after all, without instruction, the institution would not be eligible to receive Title IV at all.

The provision of instructional content is also a critical component of ensuring an institution's compliance with regulations governing written arrangements, particularly between the institution and an ineligible entity, in 34 CFR 668.5. Those regulations require, for instance, that written arrangements with other eligible institutions continue to meet the definition of an eligible program in 34 CFR 668.5; that arrangements with ineligible entities not exceed the outsourcing of 50 percent or more of the program; and that such arrangements be subject to approval by the accrediting agency of the institution if it exceeds 25 percent of a program.

The Department was concerned enough about compliance in this space to issue guidance last year through DCL GEN-22-07.[29] In the guidance, the Department specifically noted that it has observed noncompliance with the regulations in two places, including one in which the percentage of the academic program outsourced exceeds the regulatory (50 percent) limit, but the institution "incorrectly characterizes the portion of the program offered by the ineligible entity as being offered by the eligible institution."[30] This guidance also features in the OIG's audit guide as an area for needed school compliance.[31] Third-party servicers providing that instructional content should be subject to transparency in their arrangements to ensure consistency with the guidance and fulsome oversight and accountability where the institution and/or the entity is noncompliant.

Third-Party Servicer Activities Related to Consumer Information

Under the Department's guidance, a variety of consumer information-associated activities are considered covered third-party servicer activities. For instance, the responsibility of preparing required consumer information disclosures has previously been covered by the guidance. DCL GEN-23-03 adds to that the preparation or dissemination of promotional materials to market educational programs if the outside entity either provides a key element of the program (technology, curriculum, or faculty) or if the servicer is engaged in the "design or delivery" of educational programs.[32] This addition would help to shore up the Department's oversight of third-party servicer activities.

That's especially important given how costly consumer information disclosures have been to the Department when handled irresponsibly by institutions. For instance, the Biden-Harris Administration alone has discharged nearly $6 billion in federal student loans for 560,000 borrowers who attended Corinthian Colleges, Inc. – largely on the basis of "widespread and pervasive misrepresentations related to a borrower's employment prospects."[33] Another nearly $6 billion in discharges were approved to borrowers from ITT Technical Institutes, including due

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[29] "Written Arrangements Between Title IV-Eligible Institutions and Ineligible Third-Party Entities Providing a Portion of an Academic Program," DCL GEN-22-07, U.S. Department of Education, June 16, 2022, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-06-16/written-arrangements-between-title-iv-eligible-institutions-and-ineligible-third-party-entities-providing-portion-academic-program.

[30] Ibid.

[31] See Chapter 3, C.1.5, of "Guide for Financial Statement Audits of Proprietary Schools and for Compliance Attestation Examination Engagements of Proprietary Schools and Third-Party Servicers Administering Title IV Programs," U.S. Department of Education, Office of Inspector General, https://www2.ed.gov/about/offices/list/oig/nonfed/2023auditguide.pdf.

[32] The Department has long required that such activities be considered third-party servicer activities unless the individual or entity involved in publishing or distributing consumer information disclosures "does not provide any technology, curriculum, or faculty, and is not involved in the design or delivery of educational programs." But adding a new element to the third-party servicer activities column, which is functionally the inverse of that exception, will help to clarify the Department's expectations to the field.

[33] "Education Department Approves $5.8 Billion Group Discharge to Cancel All Remaining Loans for 560,000 Borrowers Who Attended Corinthian," Press Release, U.S. Department of Education, June 1, 2022, https://www.ed.gov/news/press-releases/education-department-approves-58-billion-group-discharge-cancel-all-remaining-loans-560000-borrowers-who-attended-corinthian-colleges.

to misrepresentations about employment outcomes, students' ability to transfer their credits to other institutions, and the programmatic accreditation held by the institution.[34]

Given the impact that such discharges have had on the Department of Education — and especially on the students who have enrolled in institutions that used misleading or misrepresented statistics to recruit students through their doors — it is clear that more oversight is warranted. Similarly, where a third-party servicer is responsible for preparing or disseminating those provisions, the servicer should be responsible for ensuring compliance with Title IV requirements. Students and taxpayers will continue to pay the price if not.

Third-Party Servicer Activities Related to Computer Services/Software and Record Maintenance

The Education Department's guidance clarifies the types of computer services/software that are covered as third-party servicer activities. For instance, the Department's guidance has required as far back as 2015 that activities to provide computer services or software be considered third-party servicer activities unless the "computer products and/or services… reside at and are under the control of the institution."[35] That exclusion was precluded if the third-party servicer "performs any Title IV activity and/or maintains any student level information."[36]

The Department further clarified this with more detail in its 2016 guidance letter.[37] That guidance clarified that covered activities included "collecting, reviewing, and/or maintaining supporting documentation… to determine or support student eligibility determinations and/or to disburse or deliver Title IV funds." The guidance also clarified that it excluded computer services and software where "the provider [i.e., third-party servicer] was not responsible for using the software for student aid purposes" – unless the provider performed any Title IV activity on behalf of the institution within the system, or had view or update access to any student-level information. Also excluded was the "warehousing of records," unless the provider [i.e., third-party servicer] performed any Title IV activity on behalf of the institution within the data storage or hosted environment, or had view or update access to any student-level information.[38]

Building on that past guidance, the Department's new guidance includes the inverse of the exclusion of certain computer services and software from third-party servicer activities as a covered activity. It specifies that third-party servicer activities include "providing computer

[34] "Education Department Approves $3.9 Billion Group Discharge for 208,000 Borrowers Who Attended ITT Technical Institute," Press Release, U.S. Department of Education, August 16, 2022, https://www.ed.gov/news/press-releases/education-department-approves-39-billion-group-discharge-208000-borrowers-who-attended-itt-technical-institute.
[35] "Third-Party Servicer Institutional Requirements and Responsibilities," DCL GEN-15-01, U.S. Department of Education, January 9, 2015, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2015-01-09/third-party-servicer-institutional-requirements-and-responsibilities.
[36] Ibid.
[37] "Third-Party Servicer Questions and Answers," DCL GEN-16-15, U.S. Department of Education, August 18, 2016, https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2016-08-18/third-party-servicer-questions-and-answers.
[38] Ibid. See D&E Q2.

services or software in which the provider" *does* have access to, or maintains control over, the systems needed to administer any aspect of the Title IV programs (emphasis added).

These clarifications are reasonable and appropriate. Computer software providers often have automated systems that drive institutions' compliance with Title IV rules and regulations – often to the tune of tens or hundreds of million dollars at each institution. Ensuring that software providers, like other third-party servicers, are on the hook for compliance with federal requirements is a critical component of ensuring program integrity. Where computer software providers do have access to Title IV data, a host of data security and records retention requirements apply, so the third-party servicer guidance will help to ensure the providers are in compliance with those rules. Moreover, it is clear that additional guidance is needed and warranted, given significant confusion and surprise from the field over the clarified guidance.[39]

[39] Swaak, Taylor, "Education Dept. Shocks Ed-Tech Experts and Colleges With Expansion of Oversight," The Chronicle of Higher Education, February 22, 2023, https://www.chronicle.com/article/education-dept-shocks-ed-tech-experts-and-colleges-with-expansion-of-oversight.