

Cooley

December 18, 2014

The Department of Education ("ED") announced on December 8, 2014 that it is seeking comments on new data collection and validation procedures for reporting the use of "third-party servicers."¹

Whether an entity providing services to an institution is deemed a "third-party servicer" for purposes of the Federal Student Aid ("FSA") programs has been a source of confusion in recent years. That confusion has been heightened by the increased use of online "enablers" providing "bundled services" to institutions, which generally do not include financial aid services. The consequences of being designated a third-party servicer are significant: an entity that is a third-party servicer as defined by ED is required to comply with all applicable FSA regulatory provisions (even if the regulation appears to only apply to schools) and submit annual reports. In addition, the third-party servicer can be held jointly and severally liable with the institution for any FSA-related violations alleged to be related to services provided by the third-party servicer.²

For both of these reasons, an entity providing services to Title IV-eligible institutions needs to ensure that it either (1) does not administer any aspect of an institution's Title IV participation *or* (2) has systems in place to ensure compliance with all relevant Title IV requirements.

Determining whether an entity is a third-party servicer

An entity is considered a third-party servicer by ED if it has been contracted by an institution to "administer ... any aspect of the institution's participation in any Title IV, HEA program."³

The regulation elaborates that such activities include, *but are not limited to*, processing student aid applications; performing need analysis; determining student eligibility; certifying, servicing, or collecting loans; processing output documents for payment to students and receiving, disbursing, or delivering financial aid funds; conducting required student consumer information services; preparing and certifying requests for cash monitoring or reimbursement funding; preparing notices, applications, and FISAPs for participating schools; and processing enrollment verification for deferment forms or NSLDS enrollment reporting.⁴

The regulation also provides examples of functions that are not considered the administration of FSA participation. These include performing lockbox processing of loan payments; performing normal electronic fund transfers after being initiated by the school; acting as a Multiple Data Entry Processor; financial and compliance auditing; mailing documents prepared by the school or warehousing school records; participating in a written agreement with other eligible schools to make eligibility determinations and awards for certain students; and providing computer services or software.⁵

Whether an entity is intended to be a third-party servicer should be clearly specified in the written contract that exists between the school and the entity. If the entity is a third-party servicer, the regulations specify that certain provisions need to be added to the agreement, including an acknowledgment of potential joint and several liability. If an entity is not acting as a third-party servicer, the third party should specifically disclaim that role in the contract and the parties should include language to prevent the institution from erroneously reporting the entity to ED as a third-party servicer. Failure to clarify the third-party entity's role may expose that entity to unnecessary liability or administrative burden, as further discussed below.

The Federal Register notice appears to be aimed at helping institutions and entities (and ED) make this distinction and helping ED

correct prior errors related to the identification and reporting of third-party servicers. In addition, ED appears to be concerned that some third-party servicers are not being reported at all.

Further guidance on this issue in the form of a *Dear Colleague* letter may be forthcoming.

Consequences of misreporting of third-party servicers

Under the current system, if an entity is misreported to ED as a third-party servicer there is no easy way for ED to correct that error. Worse, the entity is not notified by ED that it has been reported as a third-party servicer unless the issue arises. The institution can provide an "end date" for the entity's status as a third-party servicer; however, this does not directly address the issue that the entity is still listed as a third-party servicer in the institution's records. This can result in exposure to potential liability for which the entity should not be responsible.

Through its brief announcement, ED is soliciting comments on how such errors can be prevented and corrected more efficiently. ED seems intent on providing a process by which a third-party entity must validate an institution reporting it as a third-party servicer. ED is interested in any comments related to how this validation process could work most effectively.

The Department's notice provides a critical opportunity to recommend changes to the way errors (past, present and future) can be corrected. We suggest interested entities and institutions consider submitting recommendations and concerns to ED to (1) clarify what services make an entity a third-party servicer; (2) develop a validation system to avoid reporting errors; and (3) develop a better system to correct errors (including errors made prior to the implementation of the new system).

Comments are due by January 7, 2015. Comments may either be submitted electronically through the federal rulemaking portal at www.regulations.gov, under Docket Number ED–2014–ICCD–0130, or via postal or hand delivery to the following address:

Director of the Information Collection Clearance Division
U.S. Department of Education
400 Maryland Avenue SW
LBJ, Mailstop L–OM–2–2E319, Room 2E103
Washington, DC 20202

If you have any questions about this notice or other questions related to third-party servicers, please do not hesitate to contact [Greg Ferencbach](#) or [Matt Johnson](#) in Cooley's [Higher Education](#) practice.

Notes

1. 79 Fed. Reg. 72,661. [The Federal Register announcement](#).
2. 34 C.F.R. § 668.25.
3. 34 C.F.R. § 668.2.
4. 34 C.F.R. § 668.2
5. *Id.*

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It

is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.