



March 30, 2023

The Honorable Miguel Cardona
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2022-OPE-0103

Dear Secretary Cardona,

On behalf of the Software & Information Industry Association (SIIA), I write to comment on the Department of Education's Dear Colleague Letter (DCL) on the Requirements and Responsibilities for Third-Party Servicers and Institutions, written on February 16, 2023, and updated on February 28, 2023.

SIIA is the principal trade association for the software and digital content industry. Our members include the nation's leading publishers and innovative developers of digital products and services for K-20 education, including digital instructional materials, education software and applications, online educational programs, professional development and related technologies and services for use in education. In addition, all of our 500+ members depend on the nation's schools to provide a skilled workforce with both academic proficiency in core subject areas and 21st century skills.

SIIA understands the importance of ED's Title IV oversight role and appreciates the opportunity to respond to the DCL. On behalf of the members of our association, we submit to the Department of Education (ED) to withdraw the current DCL guidance in GEN-23-03 for the following reasons:

- 1) The definition of Third-Party Servicers (TPS) is overbroad;
- 2) The limitation on institutions of higher education (IHEs) contracting with a foreign entity will hurt students and the education technology industry; and
- 3) The guidance will unduly burden institutions of higher education and ed tech providers.

Ed Tech in Higher Education

Educational technology (ed tech) has been utilized by universities for decades. Ed tech software, services and tools are used to supplement the educational experience at the institution. We acknowledge that there are some tools, for example, that deal directly with the administration and disbursement of Title IV dollars. There are others, however, that facilitate classroom collaboration, or provide avenues to tools that

allow a student to move through a course at their own pace, or provide access to high quality learning materials. Most of the services provided through ed tech tools do not directly deal with Title IV dollars and simply act at the direction of the IHEs to enhance the educational experience.

The Definition of Third Party Servicer (TPS) is Overbroad

ED's definition of TPS goes far beyond the commonly understood scope of the term. As mentioned in a recently published article in the Chronicle of Higher Education, "an [ED] spokesperson did not discuss individual vendor categories, but noted in an email that 'broadly used software solutions' are not a key focus."¹

The DCL would expand the TPS requirements to more entities used by IHEs that do not specifically work with Title IV funding. As the DCL states, a software company is a TPS if it "performs any activity on behalf of the institution within a system through remote or automated processing." In ED's previous August 18, 2016 (GEN-16-15) Third-Party Servicer Questions and Answers² guidance, many ed tech companies were considered "computer services or software," thus excluded from the TPS definition. We believe the 2016 guidance got it right - most computer services and software should not be included in this definition.

Many of SIIA's member companies provide services that are non-Title IV functions, such as providing software, digital services, processing systems, and computer software equipment. Things like an email platform to communicate with students and professors, or a digital textbook to access class materials, or a video conferencing platform to connect with a study group outside of class may all be impacted by the new DCL despite not having impact on Title IV funding. SIIA recommends ED revert back to the definition in the original regulations.³

The Foreign Entity Ban Will Hurt Students

The new, expansive definition of TPS extends the foreign entity ban to a new realm of organizations. We are pleased that ED is especially interested in comments related to this limitation and urge it to abandon this unnecessary and unwise restriction.

¹ Taylor Swaak. (2023, February 22). The Chronicle of Higher Education. Retrieved from https://www.chronicle.com/article/education-dept-shocks-ed-tech-experts-and-colleges-with-expansion-of-oversight?cid2=gen_login_refresh&cid=gen_sign_in.

² Attachment to Dear Colleague Letter GEN-16-15: D&E-A3

³ Dear Colleague Letter GEN-16-15



The United States recently entered into a new and updated trade agreement with Canada and Mexico – the United States-Mexico-Canada Agreement (USMCA). USMCA contains, among other things, a robust digital trade chapter, which in Article 19.4 provides, in pertinent part, that:

“1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.”

The provision means that, for example, the United States may not discriminate against a Canadian company or frustrate, or attempt to frustrate, the ability of a Canadian company to provide cross-border digital services.

The proposed guidance appears to clearly violate this obligation. It would effectively ban foreign companies from providing services to United States customers, including educational institutions. If allowed to stand, the rule, in practice, would greatly impair the capacity of institutions of higher learning to properly function and operate: at a minimum undermining the ability of universities to select the curriculum that aligns best with their needs, or the software tools that best help them communicate with their students.

Education, like many industries, is dependent on technologies built, owned, and operated by individuals with diverse backgrounds and different nationalities. If the guidance, in its current form, were to take effect, the restrictions it would impose would limit the availability of diverse learning opportunities for universities and their students, without improving the quality of the underlying issues that ED is trying to address. For all of these reasons, we urge ED to withdraw the DCL.

The Guidance’s Reporting Requirements Create an Undue and Unnecessary Burden on IHEs and Ed Tech Providers

As written, reporting all TPS arrangements will be unduly burdensome for universities and service providers. Given the breadth of software products used on campuses, there could be hundreds of reports that must be filed, which will defer resources away from activities that better serve students.

If this guidance remains in effect, the requirements invoked in the DCL are inherently onerous and taxing on all ed tech companies, universities and ED as a



whole. The filing of forms, independent audits, and the renegotiating of contracts should not be ED's key focus.⁴

We also believe that ED will not have the capacity to ensure this guidance is implemented, as the encumbrance of processing over thousands and thousands of contracts, paperwork, and audits would be extremely burdensome. As a key example, ED did not update the 8-page "Third-Party Servicer Data Form" linked in the DCL. Again, the numerous types of reporting requirements, as listed, should be re-evaluated, so that ED can truly accomplish their goal in protecting and monitoring Title IV funding.

Conclusion

The US is a leader in technology innovation across the globe. With this guidance, ED had the opportunity to create an innovative process that truly protects the rights, privacy, and safety of learners while also embracing the diversity of the ed tech field, and creating a competitive advantage with responsible compliance with the requirements of Title IV. However, we believe this guidance not only failed to accomplish ED's objectives, it will very likely undermine them.

In summary, we recommend ED to do the following:

- 1) Withdraw the DCL and revert the definition of TPS to previous guidance;
- 2) Eliminate the ban and limitations on IHEs contracting with foreign entities.

SIIA would like to thank ED for the opportunity to share our views on this guidance.

Respectfully submitted,



Chris Mohr
President
Software & Information Industry Association

⁴ Kim, J., Maloney, E. J., & DeVAney, J. (2023, March 12). Thoughts on ED's New Guidance on Revenue-Share Arrangements and Third-Party Servicers. Inside Higher Ed. <https://www.insidehighered.com/blogs/learning-innovation/thoughts-ed%E2%80%99s-new-guidance-revenue-share-arrangements-and-third-party>

