**EDUCAUSE**

**ASSOCIATION OF RESEARCH LIBRARIES**

March 30, 2023

The Honorable Miguel Cardona
Secretary
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 EDUCAUSE and the Association of Research Libraries (ARL), we would like to thank you for the opportunity to comment on the recent "Dear Colleague Letter" (DCL), titled "Requirements and Responsibilities for Third-Party Servicers and Institutions" (DCL ID: GEN-23-03) (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). In the letter that EDUCAUSE previously submitted to this docket (https://www.regulations.gov/comment/ED-2022-OPE-0103-0024), the association noted that it planned to supplement its initial comments with examples of institutional concerns regarding the current DCL on third-party servicers (TPSs). This document provides examples from both EDUCAUSE and ARL members.

ARL (www.arl.org) is a nonprofit organization whose mission is to empower and advocate for research libraries and archives to shape, influence, and implement institutional, national, and international policy. EDUCAUSE (www.educause.edu) is a nonprofit association with the mission of advancing higher education through information technology (IT). It represents over 2,100 colleges, universities, and related organizations. Thousands of leaders and professionals in the higher education IT space cooperate and collaborate with each other as part of the EDUCAUSE community to help colleges and universities fulfill their teaching and learning, research, and service missions.

The following insights from representatives of our member institutions reinforce the analysis and recommendations that EDUCAUSE provided in its comment letter submitted to the docket on March 7. They illustrate the confusion generated by the TPS DCL and the concerns arising from its negative effects.

**Ban on Foreign Owned and Located Firms**

Institution 1:

*The "Computer Services/Software and Record Maintenance" section of the DCL has created significant uncertainty for higher education CIOs who are modernizing their enterprise systems to next-generation solutions from firms like Workday and Oracle, both of which are global companies with US-based as well as international developers. As written, the language in the DCL raises uncertainty over whether companies with employees, subcontractors, or staff outside the United States may operate these systems, and whether the core systems supporting finance, human resources, and student records fall within or outside the scope [of the DCL].*

*At our institution, we are implementing Oracle Cloud using a leading Oracle partner that is owned by US citizens and based in the United States, but with a team of consultants split between the US and India. The company maintains all data within the US and has strict technical and process controls to ensure that India-based staff can only remotely access data stored in a US data center and cannot download it. We believe many other Workday and Oracle implementations follow a similar approach. And indeed, while our Oracle agreement maintains all our cloud data within the United States, Oracle is a global firm and their platform is supported around the clock by Oracle teams globally, likely in a follow-the-sun approach.*

*Even institutions that continue to run on-premises ERP/HRIS/SIS systems [enterprise resource planning systems/human resources information systems/student information systems] – which carry high costs and leave the institution potentially more vulnerable for cyberattacks including ransomware and data theft – are often turning to third party support firms to assist with management of their systems, including many schools using India-based resources to maintain these legacy systems.*

*A broad interpretation of the DCL's scope to encompass all core enterprise systems used by IHEs [institutions of higher education], coupled with an overly strict restriction on international partners that does not differentiate US data domicile from the location of the employees or contractors working on such systems, would be highly disruptive to IHEs' technology operations with very short notice from the Department.*

Institution 2:

*As a large Research I university with operations overseas, the definition of TPS seems extraordinarily broad. This will cover an enormous, complex vendor supply chain that will be extremely expensive to unravel and ensure continuous compliance. The requirements not only prohibit foreign-based TPS but also foreign-owned TPS. What degree of ownership is the Department referring to—majority ownership, or is a TPS with minority ownership (<49%) by a foreign entity/individual also prohibited? Are TPS entities/individuals from/owned by friendly-foreign countries also prohibited? Initial compliance is complex and expensive to determine, [and] it will even be more difficult to perform continuous compliance monitoring—how many resources will be required to monitor and assess for mergers and acquisitions? How many companies and to what degree of the supply chain must an institution monitor to ensure continued compliance?*

*Instead of this overly broad definition of foreign-based or -owned companies, ED should consider leveraging existing laws to prevent organizations [from] processing, transmitting or storing FSA data within countries prohibited under Section 126.1 or OFAC [Office of Foreign Assets Control] countries. This way institutions can leverage processes already in place for export controls to protect FSA data.*

**Instructional Content**

Institution 3:

*The functions and services listed under "instructional content" in the revised guidance are so broad as to potentially implicate entities that research libraries contract with for materials to support course-assigned reading and research.*

*For instance, LibGuides are content-management and information-sharing systems that are designed by libraries. Through LibGuides, libraries provide curated information on specific topics, courses, and assignments. According to the activities and functions listed in the "instructional content" column of the DCL, any vendor that a library contracts with to host LibGuides may be subject to TPS requirements.*

*To take another example, libraries license electronic scholarly resources to support curriculum and research within the academy. Libraries may also use Learning Management Systems (LMS) to monitor usage of scholarly resources and evaluate whether these resources are meeting student needs. These core functions of research libraries could be interpreted as falling under "instructional content" if the library outsources these functions to a third-party. In this example, the LMS, as well as the vendor from which the library licenses instructional and research content, could be subject to TPS requirements.*

*In addition, the prohibition on contracting with third party servicers that are located outside of the US raises questions about the ability of research libraries to license electronic scholarly materials, as described above. The major providers of research and course materials are multinational corporations with corporate headquarters located outside of the United States.*

**Retention of Students**

Institution 4:

*Under the "retention of students" table, there are no examples of functions that would be exempt from third-party servicer requirements. This raises concerns that any vendor that a library contracts with to assess student learning and student success might be subject to TPS requirements. [According to the Association of College and Research Libraries (ACRL),](link) learning analytics systems that libraries use may be as varied as centralized or decentralized learner record stores, Integrated Planning and Advising for Student Success (iPASS) systems, early alert systems, and engagement tracking systems. This section may also implicate email services or learning management systems that libraries use to respond to student inquiries regarding resources that students may use to pass courses.*

**General Compliance Burden**

Institution 5:

*As a small, private institution that is tuition dependent, our IT department's ability to provide the services and functions required to support the needs and expectations of our students, faculty, and staff requires the ability to use external software solutions that are hosted in the cloud.*

*We currently use over 100 cloud-hosted software solutions that would fall under the definition of a third-party servicer (TPS) and be subject to the requirements placed upon those agreements. Having to meet these requirements for each of these solutions would place a tremendous compliance burden on an already resource-constrained institution and result in disruptions in learning for our students.*

*One of the issues I have is identifying what is actually foreign-owned. Understanding that aspect will take even more research from our legal team who are already challenged to keep up with the day-to-day administrative tasks. When you add in the complexities of what company owns what other companies, it makes my head spin.*

Institution 6:

*If our institution was to complete and submit the required forms today, based on early interpretation, we would have to include third party vendors responsible for the tools we use to calculate and distribute financial aid. These would be vendors providing cloud-based and on-prem[ise] student and financial aid software/systems, banking institutions for ACH transactions, learning management software providers, and potentially other software tools required for aid management. Requiring these third party vendors to meet the new compliance requirements is not a short term endeavor if achievable at all, especially if it*

*involves relocating physical hardware. Plus, renegotiating contracts is very time consuming for our respective institutions and may cause a complete rethink on the tools we would use, if that's even possible. Assuming the seemingly broadened scope of the new ruling is not the intent, we would appreciate the Department of Education reworking the scope and compliance criteria to one that is more reasonable.*

Institution 7:

*The potential scope of services included in this new ruling could require not only that the University renegotiate contracts with an unknown (currently undeterminable) number of vendors in a short period of time, but it is not clear that it is even possible to simply renegotiate all contracts. Not all vendors will have the capability of coming into compliance or fully understand the scope of the ruling, and many of them may be unwilling to agree to having their existing contracts amended in a way that would require them to be held jointly and severally liable with the institution for any violation of Title IV requirements.*

*Additionally, most large universities have overseas operations with vendors which must be sourced locally. This decision could potentially impact the viability of those operations.*

**Conclusion**

These examples represent only a small fraction of the questions and concerns under active discussion by our member institutions. They highlight, however, the extent to which the DCL as currently written fosters a degree of confusion across the higher education landscape that is certain to create significant, widespread compliance problems. EDUCAUSE and ARL urge the U.S. Department of Education (the Department) to avoid these unnecessary, excessively burdensome outcomes by withdrawing the DCL, engaging our members and their content, software, systems, and services providers in a full, transparent consultation on the issues that the DCL seeks to address, and revising the Department's guidance to provide a clear scope that reasonably reflects its oversight needs and authority. In the absence of these steps, a large number of colleges and universities will likely be unable to meet the September 1 effective date of the guidance, despite their best efforts to do so. As a result, institutions will not only face compliance concerns, but also the depletion of already limited institutional resources and the subsequent negative effects of that depletion on teaching and learning, research, and service.

EDUCAUSE and ARL are ready to work with the Department and other stakeholders on the development of TPS guidance that advances, rather than detracts from, the ability of colleges and universities to effectively serve students and communities. Please contact us at any time if we and our member institutions may be helpful in achieving that end.

Sincerely,

Jarret S. Cummings
Senior Advisor, Policy and
Government Relations
EDUCAUSE
jcummings@educause.edu

Katherine Klosek
Director, Information Policy
Association of Research Libraries
kklosek@arl.org