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*Advancing equity, integrity, and learning*

 March 29, 2023

**UNITED STATES DEPARTMENT OF EDUCATION**

**Docket ID ED-2022-OPE-0103.**

**Identity of the ATP**

The ATP is a not-for-profit international trade association for the global testing and lifelong learning industry, which includes regional organizations individually representing Europe, Asia (including China, Japan, South Korea, and Australia), India, and the Middle East/Africa. The ATP is comprised of hundreds of publishers, test sponsors (i.e., owners of test content, such as professional certification bodies), delivery vendors of tests used in various settings, including healthcare, employment (e.g., employee selection and other HR decisions), education (e.g., academic admissions, K-12, and higher education), clinical diagnostic assessment, certification, licensure, and credentialing, as well as businesses that provide testing services (e.g., test development, proctoring, scoring) or who own and administer test programs (collectively, the “Members”). Additionally, many Members are global vendors and service providers of technology in assessment and learning.

Since its inception in 1987, the Association has advocated for the use of fair, reliable, and valid assessments, which includes ensuring the fairness of test content and test results. Our activities include providing resources and expertise to the U.S. Congress and state legislatures in the United States on legislative proposals affecting the use of testing in education and employment, as well as representing the industry in federal and state regulatory matters and litigation surrounding the use of testing. With the growth of its global representation, the ATP has been active in providing educational guidance materials to its Members on many international regulatory issues.

**Background**

Originally, the Department announced that it intended to start a Negotiated Rulemaking in April 2023 to amend regulations on third-party servicers under the Higher Education Act of 1965, as amended (HEA), related to existing guidance on third-party servicers; reporting requirements; financial or other compliance requirements; and past performance requirements, RIN 1840-AD87, Fall 2022). Contrary to that indication, on February 15, 2023, the Department issued a 60+ page Dear Colleague Letter (“DCL”) addressing its guidance on regulation of Third-Party Servicers (“TPS). In a major departure from the 2016 DCL, the current Letter adds “educational programs” to previously covered financial aid programs. Comments are due to be submitted to the Department by March 29, 2023.

**ATP Comments**

1. **Inclusion of “educational programs” within the TPS guidance represents an entirely new regulatory position and is likely to cause significant confusion.**

 Numerous ATP Members seem likely to fall under the description of providing educational program services, most of which have nothing to do with institutional recruitment or administration of Title IV funds. In many instances, these testing organizations produce educational/curriculum content and assessments for those courses, whether they are online or in-person classes (which could be identical materials). Thus, it is doubtful that many of these organizations are Online Program Managers, even if they are providing online course materials. In addition to the confusion over exactly what services are being provided, and whether they constitute “learning management” or the instruction is being provided by the institution’s employees, these organizations often do not know if they are being paid by the institution with Title IV monies.

In a host of other situations, ATP Members would likely be engaged by institutions to provide computer services, which could range from delivery of courses, to providing remote proctoring of assessments, to storage of data. Here, too, the DCL seems to prompt more questions than it resolves. A major question involves the use of cloud-based services, which the DSL seems to exempt except that the exclusion only applies if the computer products/services reside at the institution and are under the “control” of the institution. The ATP is concerned about this approach inasmuch as, for example, in privacy regulation, the use of cloud services does NOT remove control and access responsibility from the institution engaging the cloud-service provider. As long as the institution is setting the parameters around the use of the cloud services, it seems more logical that the institution should be deemed to have control over the data and access to it, not merely if the servers are physically located on the campus. This issue will arise in many edtech situations, including for the vast Leaning Management Systems (LMS) used in higher ed institutions.

 The ATP has carefully reviewed the DCL and unfortunately, we contend it lacks clarity and is internally inconsistent. **While these issues may be inadvertent and unintended, we urge the Department to resolve them and provide for clarity and consistent understandings through a Negotiated Rulemaking to rewrite the guidance**. Otherwise, the vague definitions that are currently written in the DCL will prevent smooth implementation and create serious confusion, chaos, and burdens on ATP Members.

1. **Prohibition of all Foreign TPSs**

Applying the ban on foreign businesses to this expanded definition of educational program providers is anticompetitive and will not only create a disruption in the provision of existing educational services required by institutions, but it is likely to cause a retaliation by foreign regulators. As described above, many of the “educational program” services that the Department now seeks to include within the scope of the DCL/TPS regulations are being provided today to institution by ed tech companies, including educational product developers and service providers without negative effects on Title IV funding issues, so this approach is unnecessary – not to mention that the ed tech marketplace has been among the most innovative over the past decade.

The ATP further submits that the marketplace for educational program services/technology providers is global in nature; the proposed ban will have the effect of stifling innovation in the availability of products and services needed by institutions. The Department needs to find a way to ensure protection of student data (if that is the concern) without imposing an artificial market barrier. As noted, provision of academic content and assessments does NOT give those organizations access to Title IV student financial data.

1. **Implementation of the Proposed Guidance is likely to result in significant confusion and likley chaotic applications.**

Despite statements by the Department disputing the interpretation of the DCL language, If the DCL is implemented as written, the ATP is very concerned about the confusion and chaos that will result – from institutions who over-react and report every testing organizations as TPSs, to testing organizations that fear being incorrectly subjected to regulation and stop contracting their services, to the legal mess resulting from new contracts being written and negotiated between testing organizations and institutions over a variety of legal issues, including the contractual handling a “joint and several liability.” The ATP also believes that the reporting of a business by one institution will place that entity in jeopardy of having the Department deem it to be a TPS for ALL institutions regardless of what other institutions conclude about the status of that same entity for the same services. Finally, the cost of regulation (e.g., audit, liability and other significant resources) is likely to increase the cost of products/services borne by institutions.

**CONCLUSION**

**For all the reasons discussed in these comments, the ATP urges the Department to withdraw the DCL and return to the previously expected Negotiated Rulemaking**. That process should enable the establishment of a limited, yet balanced approach, for protecting Title IV while building a strong foundation for innovative technologies to flourish in the provision of necessary and appropriate products/services for higher education institutions.

 The ATP is pleased to provide these comments and would welcome the opportunity to share further information with the Department. The ATP would also be able to identify potential participants in the Negotiated Rulemaking.

Sincerely,



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