September 19, 2017

U.S. Department of Education
ATTN: Ms. Hilary Malawer, Assistant General Counsel
Office of the General Counsel
400 Maryland Avenue SW., Room 6E231
Washington, DC 20202.

RE: Docket ID: ED–2017–OS–0074

Dear Ms. Malawer:

Champion College Services, Inc. has been providing default prevention services to student loan borrowers across the United States since 1989, and we have touched the lives of more than 3 million borrowers during that time. We recently expanded our services to include extensive financial literacy training, life skills courses, job search tools and an expansive database of scholarships and grants under Champion Empowerment Institute. The goals of both companies are to enrich lives through our training, mentoring and life-skills offerings, to build the self-esteem and self-worth of students, and to support long-term success and contentment.

During my career, spanning 30 years of working in education, I helped draft the original cohort default rate (CDR) laws and regulations including drafting Appendix D, the original criteria for default prevention plans, later versions for default prevention as seen in Subpart M and Subpart N, the appeals rights, disclosures, and several versions of the Cohort Default Rate Guide. I have provided valuable information for lawmakers and regulators in all aspects of student loans, and have served as a special witness, alternate negotiator and twice as a lead negotiator for the Department's negotiated rulemaking processes in 1999, 2000, and 2009.

I have also provided data analysis and evidence motived by my goal of ensuring ethical practices and quality servicing for students that support the right of all Americans to choose from a variety of quality educational options. My drive comes from my own journey as an at-risk student, and my passion in business and life continues to be helping others overcome obstacles and attain success.

It is an honor and pleasure to be able to provide suggestions for regulatory changes that will continue to support the quality of education and student loan servicing in our country.

7776 S Pointe Parkway W, Suite 250, Phoenix, AZ 85044
(800) 761-7376 · (480) 947-7375 · Fax (480) 947-7374

I have included suggestions for the following regulatory changes:

- **34 C.F.R §668.209(b)(2)(ii)** Mandates for Student Loan Payment Application *(page 3)*
- **34 C.F.R §668.217** Mandates for Default Prevention Plans *(page 5)*
- **34 C.F.R §668.202(c)(2) and New Regulations to be Developed** Default Statuses Processed in Error *(page 7)*
- **34 C.F.R §668.212(b)** Expansion of Loan Servicing Appeals *(page 9)*
- **34 C.F.R §668.23, §668.2 and §682.200** Mandates for Third-party Servicer Audits *(page 13)*

Please, don't hesitate to contact me if you need any additional clarification or back-up documentation either at ML@ChampionCollegeServices.com or (480) 947-7375.

Your time and consideration is greatly appreciated.

Sincerely,

Mary Lyn Hammer

Mary Lyn Hammer
Education Advocate
President and CEO
Champion College Services
Champion Empowerment Institute
Champion for Success, a nonprofit corporation

Mandates for Student Loan Payment Application

SUGGESTED REGULATORY CHANGE

Remove language that is harmful to federal student loan borrowers who are making payments in excess of their required monthly payment amount (prepayment). Replace with regulatory language that ensures prepayments are applied to reduce costs and financial burdens for students.

The current regulations give lenders and servicers the discretion to apply payments in excess of the required monthly payments toward future payments. Not only is this against the law in some states but it encourages predatory practices that harm students.

Lenders and servicers should be mandated to apply excessive payments to principle reduction unless specifically instructed otherwise by the borrower.

EXISTING REGULATORY LANGUAGE

34 C.F.R. §682.209 Repayment of a loan.

(b) *Payment application and prepayment.* (1) Except in the case of payments made under an income-based repayment plan, the lender may credit the entire payment amount first to any late charges accrued or collection costs and then to any outstanding interest and then to outstanding principal.

(2)(i) The borrower may prepay the whole or any part of a loan at any time without penalty.

(ii) If the prepayment amount equals or exceeds the monthly payment amount under the repayment schedule established for the loan, the lender shall apply the prepayment to future installments by advancing the next payment due date, unless the borrower requests otherwise. The lender must either inform the borrower in advance using a prominent statement in the borrower's coupon book or billing statement that any additional full payment amounts submitted without instructions to the lender as to their handling will be applied to future scheduled payments with the borrower's next scheduled payment due date advanced consistent with the number of additional payments received, or provide a notification to the borrower after the payments are received informing the borrower that the payments have been so applied and the date of the borrower's next scheduled payment due date. Information related to next scheduled payment due date need not be provided to borrowers making such prepayments while in an in-school, grace, deferment, or forbearance period when payments are not due.

SUGGESTED REDLINE AMENDED REGULATORY LANGUAGE

34 C.F.R. §682.209(b)(2)(ii)

If the prepayment amount equals or exceeds the monthly payment amount under the repayment schedule established for the loan, the lender shall apply the prepayment to ~~future installments by advancing the next payment due date, unless the borrower requests otherwise. The lender must either inform the borrower in advance using a prominent statement in the borrower's coupon book or billing statement that any additional full payment amounts submitted without instructions to the lender as to their handling will~~

~~be applied to future scheduled payments with the borrower's next scheduled payment due date advanced consistent with the number of additional payments received, or~~ principle unless expressly instructed otherwise by the borrower through a written, oral or electronic request. The lender or servicer shall provide a notification to the borrower after the payments are received informing the borrower that the payments have been so applied and the date of the borrower's next scheduled payment due date. Information related to next scheduled payment due date need not be provided to borrowers making such prepayments while in an in-school, grace, deferment, or forbearance period when payments are not due.

SUGGESTED AMENDED REGULATORY LANGUAGE

34 C.F.R. §682.209(b)(2)(ii)

If the prepayment amount equals or exceeds the monthly payment amount under the repayment schedule established for the loan, the lender shall apply the prepayment to principle unless expressly instructed otherwise by the borrower through a written, oral or electronic request. The lender or servicer shall provide a notification to the borrower after the payments are received informing the borrower that the payments have been so applied and the date of the borrower's next scheduled payment due date. Information related to next scheduled payment due date need not be provided to borrowers making such prepayments while in an in-school, grace, deferment, or forbearance period when payments are not due.

Mandates for Default Prevention Plans

SUGGESTED REGULATORY CHANGE

The current regulations have no defined end date for institutions that successfully reduce their cohort default rate after being mandated to develop and implement a default prevention plan exists.

Some schools that were mandated to have a default prevention plan in place, not only have their three (3) most recent official cohort default rates under the threshold but they also have several additional years under the threshold. These schools are not receiving notices to release them from mandated obligations.

Default prevention plans have to be malleable in order to adapt to both the programs being taught and changes caused by severe economic conditions. Mandates should be lifted in a specific period of time for when a school has been successful in lowering their default rates under the threshold. This reduces labor and financial burdens for schools, the Department of Education, auditors and taxpayers.

For these reasons, we seek to do the following:

1. Create an option for voluntary revisions to approved default prevention plans when at least one (1) subsequent official cohort default rate falls below the threshold.
2. Define an end date for required default prevention plans when there are three (3) consecutive cohort default rates under the statutory threshold.

EXISTING REGULATORY LANGUAGE

34 C.F.R §668.217 Default prevention plans.

(a) *First year.* (1) If your cohort default rate is equal to or greater than 30 percent you must establish a default prevention task force that prepares a plan to—

(i) Identify the factors causing your cohort default rate to exceed the threshold;

(ii) Establish measurable objectives and the steps you will take to improve your cohort default rate;

(iii) Specify the actions you will take to improve student loan repayment, including counseling students on repayment options; and

(iv) Submit your default prevention plan to us.

(2) We will review your default prevention plan and offer technical assistance intended to improve student loan repayment.

(b) *Second year.* (1) If your cohort default rate is equal to or greater than 30 percent for two consecutive fiscal years, you must revise your default prevention plan and submit it to us for review.

(2) We may require you to revise your default prevention plan or specify actions you need to take to improve student loan repayment.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

SUGGESTED REDLINE AMENDED REGULATORY LANGUAGE

34 C.F.R §668.217 Default prevention plans.

(a) *First year.* (1) If your cohort default rate is equal to or greater than 30 percent you must establish a default prevention task force that prepares a plan to—

(i) Identify the factors causing your cohort default rate to exceed the threshold;

(ii) Establish measurable objectives and the steps you will take to improve your cohort default rate;

(iii) Specify the actions you will take to improve student loan repayment, including counseling students on repayment options; and

(iv) Submit your default prevention plan to us.

(2) We will review your default prevention plan and offer technical assistance intended to improve student loan repayment.

(b) *Second year.* (1) If your cohort default rate is equal to or greater than 30 percent for two consecutive fiscal years, you must revise your default prevention plan and submit it to us for review.

(2) We may require you to revise your default prevention plan or specify actions you need to take to improve student loan repayment.

(c) *Revised default prevention plan.* If your cohort default rate subsequently falls below the threshold for at least one (1) out of three (3) years following implementation of a required approved default prevention plan, you may revise your default prevention plan and submit it to us for review.

(d) *Duration of default prevention plan mandate for successfully lowered cohort default rates.* If your cohort default rate subsequently is below the threshold for three (3) consecutive years, you will no longer be required to follow your approved default prevention plan.

SUGGESTED AMENDED REGULATORY LANGUAGE

34 C.F.R §668.217 Default prevention plans.

(a) *First year.* (1) If your cohort default rate is equal to or greater than 30 percent you must establish a default prevention task force that prepares a plan to—

(i) Identify the factors causing your cohort default rate to exceed the threshold;

(ii) Establish measurable objectives and the steps you will take to improve your cohort default rate;

(iii) Specify the actions you will take to improve student loan repayment, including counseling students on repayment options; and

(iv) Submit your default prevention plan to us.

(2) We will review your default prevention plan and offer technical assistance intended to improve student loan repayment.

(b) *Second year.* (1) If your cohort default rate is equal to or greater than 30 percent for two consecutive fiscal years, you must revise your default prevention plan and submit it to us for review.

(2) We may require you to revise your default prevention plan or specify actions you need to take to improve student loan repayment.

(c) *Revised default prevention plan.* If your cohort default rate subsequently falls below the threshold for at least one (1) out of three (3) years following implementation of a required approved default prevention plan, you may revise your default prevention plan and submit it to us for review.

(d) *Duration of default prevention plan mandate for successfully lowered cohort default rates.* If your cohort default rate subsequently is below the threshold for three (3) consecutive years, you will no longer be required to follow your approved default prevention plan.

Corrections for Default Status Processed in Error

SUGGESTED REGULATORY CHANGE

Beginning in 2014, the U.S. Department of Education (ED) "adjusted" cohort default rates (CDRs) for those schools in jeopardy of losing Title IV funding by excluding from the calculation those defaulted loans where one or more of a borrower's loans were in default status while at least one of the borrower's loans remained in current status for a period of at least 60 consecutive days. ED's reasoning for the adjustments was that these defaults were a result of poor servicing that led to inappropriate default claims.

Several loan portfolios have had excessive CDRs reaching as high as 60%, a threshold that is unacceptable by all standards for schools. Yet, a vast majority of students and schools have continued to suffer the consequences of the circumstances that led to high default rates that were calculated due to servicing errors and not due to borrower and school misconduct or errors.

The primary concern is that corrections have never been made for those student and parent student loan borrowers even though they have suffered severe consequences from these defaults.

The secondary concern is that all institutions, not just those in jeopardy of losing funding, were affected by these defaults that should not have been in default status.

In the FFEL Program, when a default claim is paid in error, the lender can repurchase the loans and place them back in good standing. For FDSLP or Direct Loans, there is no process for reversing default status errors and the students should not have to go through the required rehabilitation process if this happens.

The request for regulatory changes is two-fold;

1. A process for reversing default statuses needs to be defined.
2. A CDR correction process for all affected institutions.

EXISTING REGULATORY LANGUAGE

34 C.F.R. §668.202 Calculating and applying cohort default rates.

*****

(c)

*****

(2) A borrower is not considered to be in default based on a loan that is, before the end of the second fiscal year following the fiscal year in which it entered repayment—

(i) Rehabilitated under 34 CFR 682.405 or 34 CFR 685.211(e); or

(ii) Repurchased by a lender because the claim for insurance was submitted or paid in error.

SUGGESTED REDLINE AMENDED REGULATORY LANGUAGE

34 C.F.R. §668.202(c)(2)(iii)

(2) A borrower is not considered to be in default based on a loan that is, before the end of the second fiscal year following the fiscal year in which it entered repayment—

(i) Rehabilitated under 34 CFR 682.405 or 34 CFR 685.211(e); or

(ii) Repurchased by a lender because the claim for insurance was submitted or paid in error.

(iii) Reinstated to current repayment status when a default status has been processed in error or due to improper servicing under 32 CFR (*insert reference when written*).

(iv) When one or more of a borrower's loans is in default status while one or more of the borrower's loans remained in current status for a period of 60 days or longer.

SUGGESTED AMENDED REGULATORY LANGUAGE

34 C.F.R. §668.202(c)(2)(iii)

(2) A borrower is not considered to be in default based on a loan that is, before the end of the second fiscal year following the fiscal year in which it entered repayment—

(i) Rehabilitated under 34 CFR 682.405 or 34 CFR 685.211(e); or

(ii) Repurchased by a lender because the claim for insurance was submitted or paid in error.

(iii) Reinstated to current repayment status when a default status has been processed in error or due to improper servicing under 32 CFR (*insert reference when written*).

(iv) When one or more of a borrower's loans is in default status while one or more of the borrower's loans remained in current status for a period of 60 days or longer.

ADDITIONAL REGULATORY LANGUAGE NEEDED

Regulations need to be written to define the process to put a loan back into current repayment status when a default claim should not have occurred. Language should include how a student is treated, especially if there have been adverse consequences including, but not limited to, credit reporting, additional fees, and costs of any legal action.

Expansion of Loan Servicing Appeals

SUGGESTED REGULATORY CHANGE

Expand the criteria of loan servicing appeals to identify issues in loan servicing. Since the beginning of the student loan program, harmful situations have occurred to student and parent loan borrowers with significant consequences to the institutions serving students and taxpayers. In most cases, these situations are discovered after a significant amount of damage has occurred to students, schools and taxpayers.

By expanding the criteria of loan servicing appeals to identify issues in loan servicing, the Department of Education (ED) will have pertinent knowledge of issues earlier in the process and will be able to take corrective actions to limit the damage and costs involved. This will help ensure higher quality servicing for students and reduce administrative costs that supports fiscal responsibility.

Schools have also suffered from the consequences of inadequate servicing in their cohort default rates. We have documented cases during the transition to 100% direct lending where loan portfolio cohort default rates were well above the threshold allowable for institutions with some as high as 60%. If the loan servicing issues involved with these high default rates had been well documented through loan servicing appeals, ED would have been able to take action for the subsequent excessive cohort default rates that continued for several years.

Early intervention to ensure proper quality loan servicing would have the following benefits:

1. Prevent student loan borrowers from the severe consequences of default.
2. Allow schools to properly respond to cohort default rates based on their performance and not inflated default rates caused by servicing errors.
3. Eliminate ED's need to "adjust" cohort default rates on a continuing basis.
4. Save taxpayers money. Servicing current loans is less expensive than servicing defaulted loans. It would also eliminate payment for servicing with numerous loan servicers (i.e. one servicing fee paid to collect a current loan and another fee paid to collect a defaulted loan).

The goal of expanding loan servicing appeal is to ensure proper quality loan servicing that protects the fiscal interest and the borrower's right to a full due diligence servicing period.

EXISTING REGULATORY LANGUAGE

34 C.F.R §668.212 Loan servicing appeals.

(a) *Eligibility.* Except as provided in §668.208(b), you may appeal, on the basis of improper loan servicing or collection, the calculation of—

(1) Your most recent cohort default rate; or

(2) Any cohort default rate upon which a loss of eligibility under §668.206 is based.

(b) *Improper loan servicing.* For the purposes of this section, a default is considered to have been due to improper loan servicing or collection only if the borrower did not make a payment on the loan and you

prove that the FFEL Program lender or the Direct Loan Servicer, as defined in 34 CFR 685.102, failed to perform one or more of the following activities, if that activity applies to the loan:

(1) Send at least one letter (other than the final demand letter) urging the borrower to make payments on the loan.

(2) Attempt at least one phone call to the borrower.

(3) Send a final demand letter to the borrower.

(4) For a Direct Loan Program loan only, document that skip tracing was performed if the Direct Loan Servicer determined that it did not have the borrower's current address.

(5) For an FFELP loan only—

(i) Submit a request for preclaims or default aversion assistance to the guaranty agency; and

(ii) Submit a certification or other documentation that skip tracing was performed to the guaranty agency.

(c) *Deadlines for submitting an appeal.* (1) If the loan record detail report was not included with your official cohort default rate notice, you must request it within 15 days after you receive the notice of your official cohort default rate.

(2) You must send a request for loan servicing records to the relevant data manager, or data managers, and to us within 15 days after you receive your loan record detail report from us. If the data manager is a guaranty agency, your request must include a copy of the loan record detail report.

(3) Within 20 days after receiving your request for loan servicing records, the data manager must—

(i) Send you and us a list of the borrowers in your representative sample, as described in paragraph (d) of this section (the list must be in social security number order, and it must include the number of defaulted loans included in the cohort for each listed borrower);

(ii) Send you and us a description of how your representative sample was chosen; and

(iii) Either send you copies of the loan servicing records for the borrowers in your representative sample and send us a copy of its cover letter indicating that the records were sent, or send you and us a notice of the amount of its fee for providing copies of the loan servicing records.

(4) The data manager may charge you a reasonable fee for providing copies of loan servicing records, but it may not charge more than $10 per borrower file. If a data manager charges a fee, it is not required to send the documents to you until it receives your payment of the fee.

(5) If the data manager charges a fee for providing copies of loan servicing records, you must send payment in full to the data manager within 15 days after you receive the notice of the fee.

(6) If the data manager charges a fee for providing copies of loan servicing records, and—

(i) You pay the fee in full and on time, the data manager must send you, within 20 days after it receives your payment, a copy of all loan servicing records for each loan in your representative sample (the copies are provided to you in hard copy format unless the data manager and you agree that another format may be used), and it must send us a copy of its cover letter indicating that the records were sent; or

(ii) You do not pay the fee in full and on time, the data manager must notify you and us of your failure to pay the fee and that you have waived your right to challenge the calculation of your cohort default rate based on the data manager's records. We accept that determination unless you prove that it is incorrect.

(7) Within 15 days after receiving a guaranty agency's notice that we hold an FFELP loan about which you are inquiring, you must send us your request for the loan servicing records for that loan. We respond to your request under paragraph (c)(3) of this section.

(8) Within 15 days after receiving incomplete or illegible records, you must send a request for replacement records to the data manager and us.

(9) Within 20 days after receiving your request for replacement records, the data manager must either—

(i) Replace the missing or illegible records; or

(ii) Notify you and us that no additional or improved copies are available.

(10) You must send your appeal to us, including all supporting documentation—

(i) Within 30 days after you receive the final data manager's response to your request for loan servicing records; or

(ii) If you are also requesting a new data adjustment or filing an erroneous data appeal, by the latest of the filing dates required in paragraph (c)(10)(i) of this section or in §668.210(b)(6)(i) or §668.211(b)(6)(i).

(d) *Representative sample of records.* (1) To select a representative sample of records, the data manager first identifies all of the borrowers for whom it is responsible and who had loans that were considered to be in default in the calculation of the cohort default rate you are appealing.

(2) From the group of borrowers identified under paragraph (d)(1) of this section, the data manager identifies a sample that is large enough to derive an estimate, acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval, for use in determining the number of borrowers who should be excluded from the calculation of the cohort default rate due to improper loan servicing or collection.

(e) *Loan servicing records.* Loan servicing records are the collection and payment history records—

(1) Provided to the guaranty agency by the lender and used by the guaranty agency in determining whether to pay a claim on a defaulted loan; or

(2) Maintained by our Direct Loan Servicer that are used in determining your cohort default rate.

(f) *Determination.* (1) We determine the number of loans, included in your representative sample of loan servicing records, that defaulted due to improper loan servicing or collection, as described in paragraph (b) of this section.

(2) Based on our determination, we use a statistically valid methodology to exclude the corresponding percentage of borrowers from both the numerator and denominator of the calculation of your cohort default rate, and electronically correct the rate that is publicly released.

(Approved by the Office of Management and Budget under control number 1845-0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

SUGGESTED REDLINE AMENDED REGULATORY LANGUAGE

34 C.F.R. §668.212(b)

(b) *Improper loan servicing.* For the purposes of this section, a default is considered to have been due to improper loan servicing or collection only if the borrower did not make a payment on the loan and you prove that the FFEL Program lender or the Direct Loan Servicer, as defined in 34 CFR 685.102, failed to perform one or more of the following activities, if that activity applies to the loan:

(1) Send at least one letter (other than the final demand letter) urging the borrower to make payments on the loan each time a new address is obtained.

(2) Attempt at least one phone call to the borrower each time a new phone number is obtained.

(3) Attempt at least one email to the borrower each time a new email address is obtained.

(4) Attempt at least one text message to the borrower each time a new mobile phone number is obtained.

(~~3~~5) Send a final demand letter to the borrower as required and each time a new address is obtained thereafter.

(~~4~~6) For a Direct Loan Program loan only, document that skip tracing was performed each time the Direct Loan Servicer determined that it did not have the borrower's current address, email or phone number.

(~~5~~7) For an FFELP loan only and in addition to §668.212(b)(1), (2), (3), & (4) above—

(i) Submit a request for preclaims or default aversion assistance to the guaranty agency; and

(ii) Submit a certification or other documentation that skip tracing was performed to the guaranty agency each time the FFELP Loan Servicer determined that it did not have the borrower's current address, email or phone number.

(8) If no good contact information for the borrower is available, perform skip tracing a minimum of every 3 months.

(9) If there is a gap of more than 30 days in collections efforts due to loan transfers or a lack of servicing when good contact information exists, the collections efforts will begin over as if the delinquent status is 30 days past due.

(i) For FFELP Loans, there will be a minimum of 270 consecutive days of collection efforts.

(ii) For Direct Loans, there will be a minimum of 360 consecutive days of collection efforts.

(iii) Accrued interest during the period where there were no collection efforts will be waived.

(iv) An administrative forbearance without accrued interest will be applied to bring the borrower's account to 30 days past due.

SUGGESTED AMENDED REGULATORY LANGUAGE

34 C.F.R. §668.212(b)

(b) *Improper loan servicing.* For the purposes of this section, a default is considered to have been due to improper loan servicing or collection only if the borrower did not make a payment on the loan and you prove that the FFEL Program lender or the Direct Loan Servicer, as defined in 34 CFR 685.102, failed to perform one or more of the following activities, if that activity applies to the loan:

(1) Send at least one letter (other than the final demand letter) urging the borrower to make payments on the loan each time a new address is obtained.

(2) Attempt at least one phone call to the borrower each time a new phone number is obtained.

(3) Attempt at least one email to the borrower each time a new email address is obtained.

(4) Attempt at least one text message to the borrower each time a new mobile phone number is obtained.

(5) Send a final demand letter to the borrower as required and each time a new address is obtained thereafter.

(6) For a Direct Loan Program loan only, document that skip tracing was performed each time the Direct Loan Servicer determined that it did not have the borrower's current address, email or phone number.

(7) For an FFELP loan only and in addition to §668.212(b)(1), (2), (3), & (4) above—

(i) Submit a request for preclaims or default aversion assistance to the guaranty agency; and

(ii) Submit a certification or other documentation that skip tracing was performed to the guaranty agency each time the FFELP Loan Servicer determined that it did not have the borrower's current address, email or phone number.

(8) If no good contact information for the borrower is available, perform skip tracing a minimum of every 3 months.

(9) If there is a gap of more than 30 days in collections efforts due to loan transfers or a lack of servicing when good contact information exists, the collections efforts will begin over as if the delinquent status is 30 days past due.

(i) For FFELP Loans, there will be a minimum of 270 consecutive days of collection efforts.

(ii) For Direct Loans, there will be a minimum of 360 consecutive days of collection efforts.

(iii) Accrued interest during the period where there were no collection efforts will be waived.

(iv) An administrative forbearance without accrued interest will be applied to bring the borrower's account to 30 days past due.

Mandates for Third-party Servicer Compliance Audits

BACKGROUND

Third-party servicers (TPS) and the criteria for their compliance audits have been defined in law and regulations since 1994. Interpretations of these definitions were applied consistently in statute, regulation, and many versions of the Student Aid Handbook until January 9, 2015 when the U.S. Department of Education (ED) unilaterally and substantively changed their compliance audit interpretation through a Dear Colleague Letter (ED-GEN-15-01). These changes from ED expanded historic definitions and applications of very specific TPS functions directly related to student aid funding, required additional functions, and included many non-required functions and companies that had never been subject to TPS compliance audits. ED's new interpretations also changed specific exclusions into auditable functions. For example, data warehousing and computer services or software were clearly defined in statute and regulation as excluded, but ED's Dear Colleague Letter included those as auditable functions.

ED does not have authority to substantively change laws and regulations without a statutory change or a negotiated rulemaking process.

ED's dissemination of training materials about the TPS changes were put forth in an informal manner at conferences and through workshops with limited attendance. The thousands of companies affected by these changes did not have an opportunity to negotiate or give public comments. Furthermore, the OIG Audit Guide lacked criteria and guidance for these newly defined audits to be completed. To date, many functions that are defined as regulatory requirements have been included in ED's training materials and,, yet, in the most recent version of the OIG Audit Guide published in September 2016, there is still no clearly defined criteria for performing an audit.

Additionally, the retroactive nature of the language in the Dear Colleague Letter left affected companies with the inaccurate impression of having liabilities for missing compliance audits that had never been required prior to the publication date of the letter.

EXISTING COMPLIANCE AUDIT REGULATIONS AND THIRD-PARTY SERVICER DEFINITIONS

§668.23 Compliance audits and audited financial statements.

*****

(a)(3) *Third-party servicers.* Except as provided under this part or 34 CFR part 682, with regard to complying with the provisions under this section a third-party servicer must follow the procedures contained in the audit guides developed by and available from the Department of Education's Office of Inspector General. A third-party servicer is defined under §668.2 and 34 CFR 682.200.

§ 668.2 General definitions.

*****

(b)

*****

Third-party servicer: (1) An individual or a State, or a private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. The Secretary considers administration of participation in a Title IV, HEA program to -

(i) Include performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA, such as, but not restricted to -

(A) Processing student financial aid applications;

(B) Performing need analysis;

(C) Determining student eligibility and related activities;

(D) Certifying loan applications;

(E) Processing output documents for payment to students;

(F) Receiving, disbursing, or delivering Title IV, HEA program funds, excluding lock-box processing of loan payments and normal bank electronic fund transfers;

(G) Conducting activities required by the provisions governing student consumer information services in subpart D of this part;

(H) Preparing and certifying requests for advance or reimbursement funding;

(I) Loan servicing and collection;

(J) Preparing and submitting notices and applications required under 34 CFR part 600 and subpart B of this part; and

(K) Preparing a Fiscal Operations Report and Application to Participate (FISAP);

(ii) Exclude the following functions -

(A) Publishing ability-to-benefit tests;

(B) Performing functions as a Multiple Data Entry Processor (MDE);

(C) Financial and compliance auditing;

(D) Mailing of documents prepared by the institution;

(E) Warehousing of records; and

(F) Providing computer services or software; and

(iii) Notwithstanding the exclusions referred to in paragraph (1)(ii) of this definition, include any activity comprised of any function described in paragraph (1)(i) of this definition.

(2) For purposes of this definition, an employee of an institution is not a third-party servicer. The Secretary considers an individual to be an employee if the individual -

(i) Works on a full-time, part-time, or temporary basis;

(ii) Performs all duties on site at the institution under the supervision of the institution;

(iii) Is paid directly by the institution;

(iv) Is not employed by or associated with a third-party servicer; and

(v) Is not a third-party servicer for any other institution.

(Authority: 20 U.S.C. 1088)

§ 682.200 Definitions.

*****

(b)

*****

Third-party servicer. Any State or private, profit or nonprofit organization or any individual that enters into a contract with a lender or guaranty agency to administer, through either manual or automated processing, any aspect of the lender's or guaranty agency's FFEL programs required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA that governs the FFEL programs, including, any applicable function described in the definition of third-party servicer in 34 CFR part 668; originating, guaranteeing, monitoring, processing, servicing, or collecting loans; claims submission; or billing for interest benefits and special allowance.

HISTORY: AMBIGUITY IN TPS DEFINITIONS AND AUDIT REQUIREMENTS

Reviewing the history is helpful, and we are providing two examples of compliance ambiguity arising after the changes in ED's Dear Colleague Letter. Please note that many others examples exist.

EXAMPLE 1: Prior to 1996 under then-existing Appendix D to 34 CFR Part 668, default management plans were required for institutions with high default rates. As such, default management providers, like Champion College Services, were third-party servicers, and we complied in all respects with those requirements (our audit that year had with no findings). However, after 1996, default management plans for schools with high default rates became optional (when Appendix D was removed and incorporated into Subpart M). As such, since 1997, unless specifically performing the mandated entrance and exit counseling to borrowers, default management providers have operated *without* the designation as a third-party servicers because they provide optional functions not required by the regulations. This was confirmed in oral guidance to Champion College Services by numerous industry expert auditors and ED personnel over the last 18 years contemporaneous with the change in the law. Except for default management services that are a part of mandated default management plans, we sincerely hope the ED will clarify that companies like Champion College Services, which provide *optional* default management services, are not designated as third-party servicers.

EXAMPLE 2: The Dear Colleague Letter also considered companies providing software (SaaS) and data storage services to be third-party service providers. We believe that runs contrary to long-standing exceptions to the third-party servicer regulation. For both the SaaS product and data warehousing, we and industry expert auditors have always relied upon the original language in the NPRM explanations and Preamble for the Third-party Servicer definition as follows:

> **February 17, 1004 Federal Register, Volume 59 Issue 33**
> **NPRM: Third Party Servicers**
>
> *"Other proposed examples classified as being outside the scope of these regulatory requirements simply reinforce the Secretary's belief that certain activities performed by a third-party servicer that do not substantially affect the delivery of Title IV, HEA program aid do not constitute the administration of an institution's participation in the Title IV, HEA programs, (for example, contracting to warehouse records).*

"As a result of deliberations during the negotiated rulemaking sessions, Federal and non-Federal negotiators concluded that it was not necessary to include or exclude computer services or software providers from the proposed definition of third-party servicer or the examples provided. The negotiators concluded that computer software and computer services are simply technological means to assist in carrying out specific administrative functions. Accordingly, the Secretary invites public comment on whether an individual, State, or organization providing computer software and services represented to satisfy Title IV, HEA program requirements should specifically be included in what the Secretary considers to constitute a third-party servicer's administration of an eligible institution's participation in a Title IV, HEA program."

April 29, 1994 Federal Register, Volume 59, Number 82
Interim Final Regulation: Third Party Servicers

"Discussion: The Secretary agrees with those commenters who either objected to the inclusion of computer services or software providers in the examples of Title IV-related activities, or who saw no need to separately include such providers. In adopting the definition of third party servicer, the Secretary is not including providers of those services or software because the Secretary believes that this type of service is simply a technological means to assist in carrying out certain administrative functions that are already included in the proposed definition of a third-party servicer."

SUGGESTED AMENDED REGULATORY LANGUAGE

Substantive changes in interpretation and definitions require either a statutory change or a negotiated rulemaking process where parties affected by these changes are given an opportunity to negotiate and comment on those proposed changes. Furthermore, these proposed changes should not be retroactive and should not be in effect until sufficient written guidance has been published for each function that is considered auditable.