

# The Federal Update for February 17, 2023

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Re: Federal Update

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## Legislation and Guidance

### ED to Update Acquisition Regulations

The U.S. Department of Education (ED) issued a proposed regulation this week to update the agency’s acquisition regulations. The proposed regulation aligns the current Department of Education Acquisition Regulation (EDAR) with the Federal Acquisition Regulations (FAR), which are general rules regarding procurement.

The changes include updating section numbers in EDAR to align with FAR sections, removing sections that are unnecessary and redundant with the FAR, updating definitions, as well as other changes that align the outdated EDAR with current federal acquisition requirements.

The last time ED updated the EDAR was in 2011. A proposed rule for updates was issued in 2014 as well, but ED never finalized those proposed regulations. ED is seeking stakeholder feedback on the proposed rule issued this week. Stakeholders can submit comments through the *Federal Register* portal on or before April 3, 2023.

[The proposed rule to update the EDAR is available here](https://www.federalregister.gov/documents/2023/02/16/2023-00832/education-acquisition-regulation).

Author: KSC

### House Republicans to Impose More Restrictions on Earmarks

Two years after House Democrats opted to bring back congressionally directed spending items, or “earmarks,” to the annual appropriations process, the new Republican majority in the House is seeking to tighten the rules surrounding the earmark process.

Earmarks were eliminated in 2011 by the incoming House Republican majority. While Democrats held the House majority the last two years, the party decided to allow earmarks once again, but with some restrictions and efforts for transparency that had not previously been imposed before the ban. Earmarks have been controversial over the years, with some lawmakers, including many Republicans, opposed to the practice, but others acknowledging that they help smooth the process to get appropriations bills passed. With the current divided Congress and tight majority in the House, some Republicans recognize that earmarks may be useful in the appropriations process for the 118th Congress, while others have remained vocally opposed.

As part of the deal Speaker of the House Kevin McCarthy (R-CA) struck with the conservative Freedom Caucus in order to gain their support for his Speaker election, McCarthy agreed to impose more restrictions on the earmark process in the House. While the final guidelines have not yet been determined, House Republicans are considering new caps on the number of earmarks per member; prohibiting earmarks that involve commemoration of a House member, such as parks in a member’s Congressional district; expanding the application process to ensure necessity of the project; and requiring projects to have a “federal nexus.”

The guidelines are expected to be finalized in the coming weeks.

Resources:

Sarah Ferris and Jennifer Scholtes, “GOP to ‘tighten’ rules for earmarks while embracing their revival,” *Politico*, February 12, 2023.

Author: KSC

### New Guidance Expands Definition of Third-Party Servicers

In a “Dear Colleague” letter issued Wednesday, the U.S. Department of Education (ED) offered guidance that expanded the definition of entities that are considered “third-party servicers” and thus subject to restrictions under the Higher Education Act (HEA).

Under the HEA, entities that administer “any aspect” of an institution are subject to oversight by ED. Based on a recent review conducted by ED, the agency concluded that it needed to update its list of functions and activities that fall within that scope of oversight, particularly as it relates to recruitment and retention, software products and services, and educational content and instruction. Because ED is now considering entities that perform these functions to be third-party servicers, institutions that contract with these entities are subject to reporting requirements with respect to the third-party servicers, and the third-party servicers themselves are subject to annual non-federal audits of the Title IV-relevant functions they perform. Institutions will be required to report details of their agreements with third-party servicers by May 1.

The new definition of third-party servicers may capture a broader sample of organizations that contract with institutions to provide online services, known as online program managers or OPMs. Often these companies receive compensation from institutions based in part on the number of students they enroll under an exception to the band on incentive compensation known as the “bundled services” exception.

According to ED, “[t]he Department is aware that a large and growing industry has developed to provide one or more of these services as a means of transitioning academic programs into a distance education format and expanding enrollment” and “has separately become aware of non-compliance with limitations on the portion of an eligible academic program that can be provided by a third party.” ED is expected to crack down on OPMs in forthcoming rulemaking, but critics say that this expansion of who is considered a third-party servicer is overbroad and involves subjecting private businesses to federal oversight without clear cause to do so.

The [new third-party servicer guidance is available here](https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions).

Author: JCM

## News

### ED Considers Changing Rules for OPMs

The U.S. Department of Education (ED) is considering a policy change for the use of online program management companies (OPMs), which contract with colleges and universities to manage, and often recruit for, online programs. On Wednesday, ED announced that it would seek public comment on its current guidance.

The 2011 guidance letter has come under scrutiny by Democrats and consumer advocacy groups in recent years. The 2011 guidance carves out a “bundled services” exception to the incentive compensation ban, which prevents colleges and universities from providing incentive compensation to recruiters for securing student enrollment unless that recruitment is among a group of services provided under a contract. The exception allows colleges and universities to engage in tuition-sharing agreements with OPMs as long as recruitment is bundled with other services. Many have raised concerns over ED’s limited oversight of OPMs and stressed the need to protect students from harmful recruiting practices. A General Accountability Office (GAO) report called for increased monitoring, noting that at least 550 colleges and universities have hired OPMs. Representative Rosa DeLauro (D-CT), who serves as Ranking Member on the House Appropriations Committee, released an op-ed last month, in which she strongly encouraged ED to rescind the guidance.

A recent lawsuit by graduates against the University of Southern California (USC) and 2U, an OPM, has also increased attention on the guidance. Graduates allege that 2U and USC misled prospective students by using in-person program rankings to encourage students to apply to online graduate programs. The claim states that the tuition-sharing agreement incentivized 2U to use false claims to recruit students.

ED previously indicated that it would review the guidance, but Democrats and other interested parties have increased pressure on the administration to immediately review the guidance. Along with considering changes to the guidance, ED is considering new regulations that address outside contractors hired by colleges and universities. New regulations will take years to implement, as they must go through the rulemaking process.

ED will accept public comments until March 16th and will hold virtual listening sessions on March 8th and 9th. [The Federal Register notice can be found here.](https://www.federalregister.gov/documents/2023/02/16/2023-03261/announcement-of-listening-sessions)

Resources:

Michael Stratford, “Education Department Seeks Feedback on Colleges’ Outsourcing of Online Programs,” *Politico*, February 15, 2023.

Author: BNT

*To stay up-to-date on new regulations and guidance from the U.S. Department of Education, register for one of Brustein & Manasevit’s upcoming virtual trainings. Topics cover a range of issues, including COVID-19 related issues, grants management, the Every Student Succeeds Act, special education, and more. To view all upcoming virtual training topics and to register, visit* [*www.bruman.com/virtualtrainings/*](http://www.bruman.com/virtualtrainings/)*.*

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