

# Cooley

July 9, 2015

Governor Jerry Brown has now signed into law Senate Bill 81, which included language amending the California Private Postsecondary Education Act of 2009 (the "Act") to permit "independent institutions of higher education" (that is, non-profit, degree granting, accredited institutions formed in California) to meet federal requirements including access to the complaint resolution process managed by the California Bureau for Private Postsecondary Education (BPPE). This action was taken in response to the US Department of Education's ("ED") state authorization rule (or "On-Ground Rule") which requires all institutions participating in the Title IV financial aid programs to have approval to operate from any state in which the institution has a physical location. The rule requires institutions to have both state authorization and a state-provided student complaint process. [See our Alert of June 9, 2015.](#)

Prior to passage of this bill, the Act did not authorize the BPPE to apply its student complaint process to exempt institutions, nor were exempt institutions obligated to comply with the Act. This new pathway provides a hybrid process that is a very positive solution for independent institutions: such institutions get the advantages of authorization and a complaint process, without having to comply with the Act's provisions. The Act only requires that these institutions post BPPE contact information as part of their complaint process, and comply with "applicable state and federal laws, including laws relating to fraud, abuse and false advertising," which they were already bound to comply with anyway.

Prior to this new pathway for independent institutions, the California legislature previously amended the Act to allow exempt institutions to waive their exempt status and instead obtain approval from BPPE by means of accreditation (ABMA). Institutions that did so became fully subject to BPPE's jurisdiction, but without the option to become exempt again.

The new pathway is not available to for-profit institutions and apparently does not apply to non-California non-profit institutions (public or private) that have a physical location in California. In addition, BPPE has advised us that independent institutions that had been exempt from oversight based on regional accreditation, but that have waived that exemption and received an approval to operate from BPPE prior to the passage of the bill, will not be eligible to use this approach.

One open question is whether the new pathway is constitutional as it appears to violate the Commerce Clause by discriminating against out-of-state institutions. Courts have previously held that the Commerce Clause forbids states from requiring out-of-state entities to become resident in order to compete on equal terms, most notably in a high profile case involving California's WASC exemption.<sup>1</sup> We would also note that the BPPE referral process could be problematic under the federal state authorization rule because one of ED's primary goals in developing that rule was to require states to develop their own viable complaint processes rather than simply relying on referral to an accreditor. California may need to make further changes to address these defects.

BPPE is contacting institutions potentially eligible for this pathway, attaching a standard agreement and instructions on how to complete and file the document. The agreement provides for the statutorily defined annual fee of \$1,076, and requires that the institution publish the BPPE contact information with their published complaint process in the Academic Catalog and Student Handbook and on the institution's website. The contract also states that the BPPE can refer a complaint for external review, including to the institution's accrediting agency.

If your institution had been contacted by the BPPE about this pathway, or you believe your institution meets the definition of an independent institution and might be eligible for this approach, we recommend that you take advantage of the new law to demonstrate compliance with federal requirements and avoid potential Title IV liabilities in the future. [See our Alert of June 22,](#)

[2015.](#)

If you have additional questions, please contact us.

#### Notes

1. *Daghlian v. DeVry Univ., Inc.*, 582 F. Supp. 2d 1231, 1248–49 (C.D. Cal. 2008).

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## Key Contacts

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