

ED's Proposed Rules for Online Learning Present New Compliance Challenges

July 25, 2016

On Monday, July 25, the US Department of Education (ED or the Department) formally released a [Notice of Proposed Rulemaking \(NPRM\)](#) to amend its current state authorization regulations, particularly with respect to distance education programs. The proposed rules would make proof of state authorization for online programs a condition of institutional eligibility to participate in the Title IV federal loan and grant programs, to the extent such authorization is required by state law, and impose a number of new and potentially burdensome requirements with respect to consumer disclosures, particularly for programs that lead to professional licensure.

While intended as part of the Administration's wide-ranging crack down on for-profit colleges, the proposed rules would impact virtually all sectors of higher education, including public and private universities as well as some ed-tech providers, such as online program management companies. Indeed, we expect that the initial regulatory burden may fall more heavily on traditional institutions of higher education, which have expanded into online learning in recent years.

Although the proposed rules have been on "pause" for over two years, the Department is only permitting 30 days for public comment. The deadline to file comments on the NPRM is August 24. We anticipate the Department will issue final rules by the end of the year and likely by the end of October. If the final rules are issued prior to November 1, they may take effect as early as July 1, 2017. If the final rules are issued after November 1, they will likely take effect July 1, 2018.

State authorization for distance education programs – SARA preserved as best alternative

The proposed rule requires institutions participating in the Title IV federal student aid programs to meet all state requirements for legally offering distance education in any state in which they are offering distance education courses. As proposed, this would only require institutions to meet state requirements if there are any; it does not necessarily require authorization in every state. If an institution does not hold authorization in a state that requires it to do so, students in that state would not be eligible to receive Title IV funding to enroll in distance education programs offered by the institution in the state. This proposal thus closely resembles the Department's original distance education rule from 2010, which was vacated by a federal court on procedural grounds in 2011, and is much narrower than the Department's final proposal made during the 2014 negotiated rulemaking.

The current proposal also explicitly considers participation in a state reciprocity agreement – including [NC-SARA](#) – as sufficient to satisfy this requirement, as long as both the state where the program is being offered and the institution participate in the agreement.

While good news for institutions in SARA states, the new requirements would mean that institutions in non-SARA states, such as California, Florida, Massachusetts and New York, will need to act promptly to secure all necessary approvals or else risk losing eligibility to offer Title IV funds to students in online programs in those states. While it remains possible that ED will delay implementation of the new rule, we believe that is less likely now because ED has been considering this issue for nearly six years.

Burdensome new consumer disclosure requirements for all distance education offerings

The proposal requires that institutions make a significant number of consumer disclosures regarding their distance education programs, some of which must be made publicly (such as on the institution's website) and some of which must be made directly to individual students or prospective students. Participation in SARA would not limit the applicability of these new requirements. The proposed disclosures – though not a condition of Title IV eligibility – will significantly heighten institutions' exposure to potential liabilities and misrepresentation claims, particularly as the Department is seeking to expand the reach of the borrower defense regulations in a separate rulemaking. (See our [analysis of the borrower defense regulations](#).)

The proposed public disclosures are the following:

1. **Licensure and certification requirements:** The disclosure requirements are particularly burdensome for distance education programs that lead to professional licensure, which must disclose all the "prerequisites" for professional licensure for the relevant occupation(s) in *any* state in which they enroll students or any other states for which the institution has made such a determination. The institution must also state whether its program(s) meet those requirements. If an institution has not made a determination as to whether its program satisfies the prerequisites in any given state, it must also disclose a statement to that effect.

If the institution concludes the program does not meet a given state's professional licensure or certification prerequisites, it also must disclose that fact directly and individually to each prospective student located in that state prior to enrollment. The institution must obtain an acknowledgment from any student who subsequently enrolls in the program after receiving that disclosure.

Determining the nature and applicability of such requirements for any such professional licensure programs on a national basis would be a significant new burden for many institutions.

2. **State authorization:** Institutions must disclose whether the institution is authorized to provide the program in each state in which enrolled students reside, or whether the institution is authorized through a reciprocity agreement. SARA-participating institutions must still make this disclosure.
3. **Student complaints:** Institutions must include a description of the process for (1) submitting complaints to the appropriate agency in the state of the institution's main campus; (2) if the institution participates in a reciprocity agreement, submitting complaints under the agreement at the appropriate state authorities (such as the institution's home state under SARA; and (3) submitting complaints to the appropriate agency in each state in which the program's enrolled students reside.
4. **Adverse actions:** Any "adverse action" an accrediting agency or state entity has initiated in the prior five calendar years related to distance education programs must be disclosed; and
5. **Refund policies:** Institutions must disclose refund policies for any state in which enrolled students reside. Refund policies vary significantly by state.

In addition to the so-called "public disclosures" (expected to be posted on each institution's website), institutions offering distance education programs must disclose certain information directly and individually to students, including:

1. As noted above, any determination that a program does not meet licensure or certification prerequisites in the student's state. Such a determination must be disclosed within 7 days of the determination. Students that subsequently enroll in the program after receiving the disclosure must acknowledge they received the disclosure; and
2. To each enrolled and prospective student, any adverse action initiated by a state or accrediting agency related to distance education programs, within 30 days of the institution become aware of the action.

State complaint process requirement: still muddled

The proposed rule would require all states to have a process for reviewing complaints from any student located in that state enrolled in a distance education program at an out-of-state institution even if state law doesn't require the institution to be authorized in that state. This requirement may prove challenging in practice, including for some SARA-participating institutions – especially those that have students enrolled in California. While an institution's "home state" can generally satisfy this requirement for institutions participating in a reciprocity agreement, SARA participation would not protect those institutions when operating in non-participating states. Notably, this requirement would raise serious concerns in California, which does not currently participate in SARA. The California Bureau of Private Postsecondary Education ("CA-BPPE") does not currently require purely online institutions to be authorized, and CA-BPPE does not accept complaints against non-authorized institutions. Additionally, the California Attorney General previously issued a formal determination that its "broad" power to act on consumer complaints is not "the kind of 'complaint process'" that section 600.9 of the Federal Regulations requires. If ED subsequently determines that an out-of-state institution is not covered by an adequate complaint process in California, students in California would not be eligible for Title IV to attend the institution's distance education programs. The California legislature would potentially need to cure this defect.

New requirements for foreign locations

The proposed rule provides yet another administrative impediment for schools offering programs at a foreign location, either independently or in partnership with a foreign institution. By our estimates, the rule would currently impact over 300 Title IV-eligible US institutions with foreign locations. (At this point, the proposed rule would not cover distance education in foreign countries.)

The proposed rule would require institutions to obtain authorization for every foreign location that is a branch campus or where a school offers more than 50% of an educational program in order to offer Title IV student aid to students at the location. Such locations must be legally authorized by "an appropriate government authority to operate in the country," ostensibly regardless of whether the country has any formal authorization process. The institution must be able to provide evidence to ED on request demonstrating that the foreign government authority is aware that the location provides postsecondary education and that the government does not object to those activities. Similarly, foreign locations at which less than 50% of a program is offered must satisfy the legal requirements for authorization to operate in that country.

And finally, in an odd wrinkle, the rule would make a location ineligible for Title IV purposes if the state where the main campus of the institution is located considers the foreign location to be outside the scope of its authorization.

Comment period

As noted, the deadline to file comments on the proposed rules is August 24, 2016. Given their potential impact on all online offerings, we urge you to read the proposed rule carefully and ensure your voice is heard in the comment period. If you would like assistance preparing comments or more information on the impact of the proposed rule, please contact us.

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