

## STATE AUTHORIZATION OF DISTANCE EDUCATION – PROPOSED REGULATIONS<sup>1</sup> - KEY POINTS JULY 29, 2016

### # 1 – The good news is that the proposed regulations are far less complicated and prescriptive than the last proposal on the table during the 2014 negotiated rulemaking session on this topic.

- They do not include provisions that would have required a state to have an “active process” for reviewing each institution offering distance education programs in the state.
- In fact, they do not require a state to authorize distance education providers at all if the state does not choose to do so. By the same token, states may continue to establish their own requirements for distance education providers if they wish to do so.

### # 2 – There are a couple of SARA-related items to keep in mind.

- Even if you participate in SARA, you will need to know the locations of your distance education students in order to determine if there are authorization requirements in their states of residence.
- The proposal specifies that any agreement between or among states cannot prohibit a state from enforcing its own consumer protection laws. *(This is new language, and it is not clear how it will work with respect to SARA. The WCET blog<sup>2</sup> about the proposal suggests that a clearer definition of “consumer protection laws” is needed to keep states from adding unnecessary restrictions. Given that much of the push-back about SARA was due to concerns it would not adequately protect students, substantial comment on this point can be expected.)*

### # 3 – The proposed regulations continue to focus on State processes “for review and appropriate action on [student] complaints” by requiring institutions to document that there is such a State process in the states where their students reside.

- Again, institutions will need to know the state of residence of their students (though a state authorization reciprocity agreement may designate either the State in which the students reside or the State in which the institution’s main campus is located).
- Identifying and “documenting” the various state complaint processes may be an issue—particularly in any state dealing with issues related to the general complaint provisions of the state authorization regulation. In the preamble [p. 48602], the Department once again emphasizes that “the final authority to ensure that complaints are resolved timely is with the State.”

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<sup>1</sup> <https://www.federalregister.gov/articles/2016/07/25/2016-17068/program-integrity-and-improvement>

<sup>2</sup> <https://wcetfrontiers.org/2016/07/22/department-of-education-state-authorization-for-distance-ed-regulations-a-first-look/>

**#4 - The proposed regulations include a number of institutional disclosure requirements related to distance education programs in a new §668.50.**

- There are 7 disclosures that institutions must make publicly available and 3 individual disclosures requiring direct communication with enrolled and prospective students under specified circumstances.
- The 7 general disclosures address: (1) how the distance program is authorized; (2) how to submit complaints to the appropriate State agency or reciprocity authority; (3) how to submit complaints to a State agency in the student's state of residence; (4) any "adverse actions" taken by a State against a distance education program in the previous 5 calendar years; (5) any "adverse actions" taken by an accreditor against a distance education program in the previous 5 calendar years; (6) any required refund policies; (7) applicable licensure or certification requirements for a career for which the student is preparing in each state where enrolled students reside and any other state where the institution has made a determination, and whether the program meets those requirements. *[Note: The term "adverse actions" is not defined—which could be a problem. In the past, for example, accreditors have had heated battles over whether particular actions should be deemed "adverse" (i.e. probation.)]*
- The 3 individualized disclosures must be provided **only by programs that are offered solely through distance education**. These disclosures include: (1) to each prospective student, any determination that the program does not meet licensure or certification prerequisites in the state of the student's residence (with the institution being able to demonstrate it received the student's acknowledgement); (2) to each enrolled and prospective student, any adverse action by a State or accreditor related to programs offered solely through distance education (within 30 days of becoming aware of such action); and (3) to each enrolled and prospective student, any determination that the program ceases to meet licensure or certification prerequisites of a State (within 7 days of that determination).

**#5 -- The provisions of the regulations dealing with authorization of foreign locations of U.S. institutions remain largely unchanged from those discussed during the 2014 negotiated rulemaking proceeding.**

- The NPRM notes that 80 institutions will be affected by this portion of the regulation. Of those, 42 are private non-profit institutions. However, the institutions affected are not listed by name.

**#6 -- The section of the regulatory package dealing with cost of the regulations for small entities estimates annual costs of \$7 million for those institutions. Most of those costs (just under \$5.5 million) will be borne by private, non-profit institutions.**

- This information may be found on page 48611 of the July 25, 2016, Federal Register. In the discussion, the Department notes that most proprietary institutions that are heavily involved in distance education should not be considered small entities, but that ". . . the private non-profit sector's involvement in the field many mean that a significant number of small entities could be affected."