

**State Authorization
Background Information and NAICU Concerns
November 2010**

Background: The Higher Education Act has long required every institution of higher education to be authorized by a State as a condition of eligibility for federal student aid. Current law and regulations require institutions to be "legally authorized to provide a program of education beyond secondary education," but do not expand upon the requirement. The Department of Education has now finalized a much more detailed set of regulations. These new regulations will go into effect on July 1, 2011, although there are cases in which implementation may be delayed for up to two years beyond that date.¹

Final Regulations: The final regulations are summarized below:

- **Complaints** – A State must have a process to review and appropriately act on complaints about an institution.
- **Establishment “by name”** – An institution must be “established by name” by a State as a postsecondary educational institution—not as a business or nonprofit charity.
- **Exemptions to State regulation** – The institution is subject to State approval or licensure requirements, unless exempted by the State based on its accreditation or being in operation for at least 20 years.
 - **Exceptions** – An institution that is not established as a postsecondary educational institution must be approved or licensed by name and may not be exempted from this requirement unless it is a religious institution under the State constitution or law.
 - **Religious exemption** – To qualify for an exemption as a religious institution, the institution must be “owned, controlled, operated, and maintained” by a religious corporation and must award only religious degrees or certificates.
- **Distance education** – If offering distance education to students in another state, the institution must meet that State’s requirements for offering postsecondary distance or correspondence education and be able to document that it does so.
- **Disclosures** – An institution must also disclose to students and prospective students information about filing complaints with an accreditor, a State approval or licensing agency, and any other appropriate State agency.

Department’s Views: The Department believes that many States have been too lax in undertaking the consumer protection functions expected of them and indicates these more detailed rules are intended to clarify the role of the States in assuring the integrity of federal student aid programs.

NAICU’s Views: NAICU is concerned that States could use these new requirements as an excuse to set up new oversight functions of private, not-for-profit colleges that go well beyond the grant of authority to operate as postsecondary institutions—which is the sole requirement in the law. We recognize that the Department made a number of changes in the proposed regulations to try to address the many concerns raised about them. However, institutions in many states are still finding it difficult to determine whether or not they meet the criteria expected by the Department. These include hundreds of institutions that have provided quality postsecondary education programs for decades—and, in some cases, for centuries.

¹ As explained in the preamble to the regulations, “A State may request a one-year extension of the effective date to July 1, 2012, and—if necessary—an additional one-year extension to July 1, 2013. To receive an extension of the effective date for institutions in a State, an institution must obtain from the State an explanation of how a one-year extension will permit the State to modify its procedures to comply with amended §600.9.”

State Authorization Excerpt - NAICU Comment Letter – August 2, 2010

State Authorization

We urge that the provisions relating to state authorization proposed in §600.9 be stricken in their entirety.

There is well established law in the states dealing with the authorization of institutions to offer programs of postsecondary education, as such authorization has been required since the inception of the Higher Education Act. NAICU member institutions are operating well and offering a quality higher education to their students. And they have done so for decades. The need for additional regulatory language in this area with respect to our institutions has not been demonstrated, and such language should not be included in the final regulations.

The negotiated rulemaking discussions and the explanation included in the preamble to the proposed regulation cited only the example of the elimination of an agency in California with authority over private proprietary postsecondary institutions as the justification for needing further regulation in this area. Evidence of widespread problems was not presented. Yet, the proposed regulations open the floodgates to a chaotic array of interpretations with respect to how well-established state arrangements should be altered—or whether they even need to be.

Moreover, institutions function under a wide variety of authorizing authority, both within and among the various states. Special provisions were included in the proposed regulation to deal with certain institutions authorized by the Federal government or an Indian tribe and to address certain religious institutions. However, the regulations were developed with virtually no information about the range of methods by which states have exercised their authorizing responsibilities. As a result, special consideration and clarification was provided only with respect to a few arrangements that happened to be known by participants in the rulemaking process.

The inevitable result is either that the Department will need to add an endless parade of further special provisions as other unique arrangements and situations arise or states will find themselves engaged in endless battles over what constitutes sufficient “authorization.”

Longstanding arrangements have worked well in the overwhelming majority of cases. It is inappropriate and unnecessary for the federal government to require states to second guess the explicit decisions they have already made about meeting their authorization responsibilities.

**State Authorization Excerpt – ACE/Higher Education Community Comment Letter –
August 2, 2010**

III. State Authorization

The Department's proposal to alter state authorization requirements is unclear, unnecessary and undesirable. In negotiated rulemaking, the Department only cited the lapse of California's Bureau for Private and Postsecondary and Vocational Education as justification for altering long-standing federal policy in this area. We believe that federal regulation based on anecdote is a very bad practice. Rather than pursuing a targeted response in light of a single incident, the proposed regulations would open a Pandora's box of potential challenges to the well established and carefully considered approaches that various states have chosen to meet their obligation under the Higher Education Act. Given the lack of evidence of a problem, we believe the proposed expansion is completely gratuitous. We urge the Department to reconsider moving forward in this area.

The total potential impact of the proposal is difficult to estimate, due to the ambiguities and contradictions in the text and accompanying explanatory statement. We are troubled by the Department's admission that it did not examine the impact of this proposal before it was put forward. In fact, the full effect of the proposed changes is still not known. What is clear is that attempts to implement the proposal would be chaotic as each state brings its own interpretation of the regulation to the table.

Clearly, this is an area where a one-size-fits-all approach simply does not work. States have chosen a variety of ways in which to authorize institutions to provide programs beyond secondary education within their borders. Within any given state, this authority may take different forms for different institutions or groups of institutions. These authorizations are spelled out in state statutes—with careful attention given to the form of this authority. The discussion of the provision in the proposed regulation, however, suggests that such state documents might be inadequate because they do not provide for "oversight." The nature and extent of what such "oversight" might entail is not explained. The preamble discussion of the California example seems to suggest the need for an "oversight agency" in order to comply with the proposed regulations. This reference goes far beyond later descriptions that "oversight" means an authorization is subject to adverse action and that there is an ability to act on complaints.

In addition to the lack of clarity about the proposal and its impact, we believe it represents an inappropriate intrusion by the federal government into state responsibilities and prerogatives. For example, many states have decided that a determination by an accrediting body may serve as the basis for state authorization or for follow-up monitoring after the state has granted authorization. The federal government should not second-guess states' decisions in this regard.

The proposal also fails to address the issue of reciprocity. A state is in the best position to determine for itself whether authorization provided by another state is sufficient for its own purposes. For example, University of Maryland University College's online programs enroll approximately 40,000 students from all 50 states. Discussions during negotiated rulemaking suggested that the Department does not intend to change its current practices on reciprocity. We ask the Department to include a statement to that effect in the preamble of the final rule.

The Department also has failed to fully recognize the issue of tribal sovereignty in the case of tribal colleges and universities in meeting the proposed requirements. While the proposed rule recognizes that an institution would be considered legally authorized in a state if the institution is authorized by an Indian tribe, it does not make it clear that oversight and monitoring are responsibilities of the relevant Indian tribe and not the state. If the Department is intent on moving forward with the state authorization proposal, it is very important that recognition of tribal authority be clarified throughout the rule.

Finally, the Department admits it has no mechanism in place or plan to enforce these new requirements, and moreover, enforcement of the regulation would conflict with principles of sovereign immunity. There would be no way for the Department to force a state into compliance with these requirements, leaving students' ability to qualify for federal financial aid subject to the whims of state legislative action. If the Department has no means of enforcing changes in this area, we fail to see how these changes will improve the integrity of Title IV programs.

This proposal appears to be a solution looking for a problem, and we urge its elimination from the final rule. We firmly believe states should continue to make their own determinations regarding the requirements for state authorization and monitor established institutions within their jurisdiction.

STATE AUTHORIZATION PROVISIONS
Final Regulations: Program Integrity
Federal Register – October 29, 2010

§600.9 State authorization.

(a)(1) An institution described under §§600.4, 600.5, and 600.6 is legally authorized by a State if the State has a process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws, and the institution meets the provisions of paragraphs (a)(1)(i), (a)(1)(ii), or (b) of this section.

(i) (A) The institution is established by name as an educational institution by a State through a charter, statute, constitutional provision, or other action issued by an appropriate State agency or State entity and is authorized to operate educational programs beyond secondary education, including programs leading to a degree or certificate.

(B) The institution complies with any applicable State approval or licensure requirements, except that the State may exempt the institution from any State approval or licensure requirements based on the institution's accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.

(ii) If an institution is established by a State on the basis of an authorization to conduct business in the State or to operate as a nonprofit charitable organization, but not established by name as an educational institution under paragraph (a)(1)(i) of this section, the institution—

(A) By name, must be approved or licensed by the State to offer programs beyond secondary education, including programs leading to a degree or certificate; and

(B) May not be exempt from the State's approval or licensure requirements based on accreditation, years in operation, or other comparable exemption.

(2) The Secretary considers an institution to meet the provisions of paragraph (a)(1) of this section if the institution is authorized by name to offer educational programs beyond secondary education by--

(i) The Federal Government; or

(ii) As defined in 25 U.S.C. 1802(2), an Indian tribe, provided that the institution is located on tribal lands and the tribal government has a process to review and appropriately act on complaints concerning an institution and enforces applicable tribal requirements or laws.

(b)(1) Notwithstanding paragraph (a)(1)(i) and (ii) of this section, an institution is considered to be legally authorized to operate educational programs beyond secondary education if it is exempt from State authorization as a religious institution under the State constitution or by State law.

(2) For purposes of paragraph (b)(1) of this section, a religious institution is an institution that—

(i) Is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation; and

(ii) Awards only religious degrees or certificates including, but not limited to, a certificate of Talmudic studies, an associate of Biblical studies, a bachelor of religious studies, a master of divinity, or a doctor of divinity.

(c) If an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction as determined by the State, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. An institution must be able to document to the Secretary the State's approval upon request.

(Authority: 20 U.S.C. 1001 and 1002)

Section 668.43 is amended by:

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D. Revising paragraph (b)

§668.43 Institutional information.

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(b) The institution must make available for review to any enrolled or prospective student upon request, a copy of the documents describing the institution's accreditation and its State, Federal, or tribal approval or licensing. The institution must also provide its students or prospective students with contact information for filing complaints with its accreditor and with its State approval or licensing entity and any other relevant State official or agency that would appropriately handle a student's complaint.

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**State Authorization Provisions: Department of Education’s Summary
Excerpt from Appendix A – Regulatory Impact Analysis
Federal Register – October 29, 2010
[pages 66970-71]**

The provisions related to State authorization generated comments from those who supported the regulations as an effort to address fraud and abuse in Federal programs through State oversight and from others who believed the regulations infringed on States’ authority and upset the balance of the “Triad” of oversight by States, accrediting agencies, and the Federal Government. We clarified that the final regulations do not mandate that a State create any licensing agency for purposes of Federal program eligibility as an institution may be legally authorized by the State based on methods such as State charters, State laws, State constitutional provisions, or articles of incorporation that authorize an entity to offer educational programs beyond secondary education in the State.

We revised §600.9 to clarify that an institution’s legal authority to offer postsecondary education in a State must be by name and, thus, it must include the name of the institution being authorized. We have removed proposed §600.9(b)(2) regarding adverse actions. In response to concerns about the effect on distance education and reciprocity arrangements, we clarified that an institution must meet any State requirements for it to be legally offering distance or correspondence education in that State and must be able to document to the Secretary the State’s approval upon request. Thus, a public institution is considered to comply with §600.9 to the extent it is operating in its home State, and, if operating in another State, it would be expected to comply with the requirements, if any, the other State considers applicable or with any reciprocal agreement that may be applicable. In making these clarifications, we are not preempting any State laws, regulations, or other requirements regarding reciprocal agreements, distance education, or correspondence study.

We also have revised the State authorization provisions in §600.9 to distinguish between a legal entity that is established as an educational institution and one established as a business or nonprofit entity. An institution authorized as an educational institution may be exempted by name from any State approval or licensure requirements based on the institution’s accreditation by an accrediting agency recognized by the Secretary or based on the institution being in operation for at least 20 years. An institution established as a business or nonprofit charitable organization and not specifically as an educational institution may not be exempted from the State’s approval or licensure requirements based on accreditation, years in operation, or other comparable exemption. Chart A illustrates the basic principles of §600.9 of these final regulations, *with additional examples discussed in the preamble to these regulations.*²

² These examples are attached to this document.

The following chart and examples illustrate the basic principles of amended §600.9:

CHART A – STATE AUTHORIZATION REQUIREMENTS [Meets State Authorization Requirements*]		
Legal entity	Entity description	Approval or licensure process
Educational institution	A public, private nonprofit, or for-profit institution established by name by a State through a charter, statute, or other action issued by an appropriate State agency or State entity as an educational institution authorized to operate educational programs beyond secondary education, including programs leading to a degree or certificate.	The institution must comply with any applicable State approval or licensure process and be approved or licensed by name, and may be exempted from such requirement based on its accreditation, or being in operation at least 20 years, or use both criteria.
Business	A for-profit entity established by the State on the basis of an authorization or license to conduct commerce or provide services.	The State must have a State approval or licensure process, and the institution must comply with the State approval or licensure process and be approved or licensed by name.
Charitable organization	A nonprofit entity established by the State on the basis of an authorization or license for the public interest or common good.	An institution in this category may not be exempted from State approval or licensure based on accreditation, years in operation, or a comparable exemption.
<p>*Notes:</p> <ul style="list-style-type: none"> • Federal, tribal, and religious institutions are exempt from these requirements. • A State must have a process, applicable to all institutions except tribal and Federal institutions, to review and address complaints directly or through referrals. • The chart does not take into requirements related to State reciprocity. 		

To maintain the State’s role in student consumer protection and handling student complaints related to State laws, we have revised §668.43(b) to provide that an institution must make available to students or prospective students contact information for not only the State approval or licensing entities but also any other relevant State official or agency that would appropriately handle a student’s complaint.

Finally, we have clarified the meaning of a religious institution for the applicability of the religious exemption. We also have expanded §600.9(b) to provide that an institution is considered to be legally authorized by the State if it is exempt from State authorization as a religious institution by State law, in addition to the provision of the proposed regulations that an institution be exempt from State authorization as a religious institution under the State's constitution. We also have included a definition of a religious institution providing that an institution is considered a religious institution if it is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation and awards only religious degrees or religious certificates including, but not limited to, a certificate of Talmudic studies, an associate of biblical studies, a bachelor of religious studies, a master of divinity, or a doctor of divinity.

In response to comments, we confirmed that tribal institutions are not subject to State oversight or subject to the State process for handling complaints and revised §600.9 to clarify the status of tribal institutions. As noted in the preamble discussion of State Authorization, we have removed proposed §600.9(b)(2) regarding adverse actions. Further, we are providing that, in §600.9(a)(2)(ii) of the final regulations, the tribal government must have a process to review and appropriately act on complaints concerning a tribal institution and enforce applicable tribal requirements or laws.

Finally, while the Secretary has designated amended §600.9(a) and (b) as being effective July 1, 2011, we recognize that a State may be unable to provide appropriate State authorizations to its institutions by that date. We are providing that the institutions unable to obtain State authorization in that State may request a one-year extension of the effective date of these final regulations to July 1, 2012, and if necessary, an additional one-year extension of the effective date to July 1, 2013. To receive an extension of the effective date of amended §600.9(a) and (b) for institutions in a State, an institution must obtain from the State an explanation of how a one-year extension will permit the State to modify its procedures to comply with amended §600.9.

Examples attached.

Examples (Federal Register, October 29, 2010, page 66862)

Institutions considered legally authorized under amended §600.9:

- A college has a royal charter from the colonial period recognized by the State as authorizing the institution by name to offer postsecondary programs. The State has no licensure or approval process.
- A community college meets the requirements based upon its status as a public institution.
- A nonprofit institution has State constitutional authorization by name as a postsecondary institution; State does not apply a licensure or approval process.
- A nonprofit institution has a State charter as a postsecondary institution. State law, without naming the institution, considers the institution to be authorized to operate in lieu of State licensure based on accreditation by a regional accrediting agency.
- An individual institution is owned by a publically traded corporation that is incorporated in a different State from where the institution is located. The institution is licensed to provide educational programs beyond the secondary level in the State where it is located.
- An institution is owned by a publicly traded corporation established as a business without the articles of incorporation specifying that the institution is authorized to offer postsecondary education, but the institution is licensed by the State to operate postsecondary education programs.
- An individual institution is owned by a publically traded corporation that is incorporated in a different State from where the institution is located. The State licenses the institution by name as a postsecondary institution.
- Rabbinical school awarding only a certificate of Talmudic studies has exemption as a religious institution offering only religious programs.
- Tribal institution is chartered by the tribal government.

Institutions not considered legally authorized under amended §600.9:

- An institution is a publicly traded corporation established as a business without the articles of incorporation specifying that it is authorized to offer postsecondary education, and the State has no process to license or approve the institution to offer postsecondary education.

- A nonprofit institution is chartered as a postsecondary institution. A State law considers the institution to be authorized based on accreditation in lieu of State licensure but the institution is not named in the State law and does not have a certification by an appropriate State official, e.g., State Secretary of Education or State Attorney General, that it is in compliance with the exemption for State licensure requirements.

- An institution is established as a nonprofit entity without specific authorization to offer postsecondary education, but State law considers the institution to be authorized based on it being in operation for over 30 years. The State Secretary of Education issues a certificate of good standing to the institution naming it as authorized to offer postsecondary education based on its years in operation.

- A Bible college is chartered as a religious institution and offers liberal arts and business programs as well as Bible studies. It is exempted by State law from State licensure requirements but does not meet the definition of a religious institution exempt from State licensure for Federal purposes because it offers other programs in addition to religious programs.

- An institution is authorized based solely on a business license, and the State considers the institution to be authorized to offer postsecondary programs based on regional accreditation.

Comment: One commenter provided proposed wording to amend proposed §600.9(a)(1) to clarify that the State entity would include a State's legal predecessor. The commenter believed that the change was necessary to ensure that colonial charters would satisfy the State authorization requirement.

Discussion: If a State considers an institution authorized to offer postsecondary education programs in the State based on a colonial charter that established the entity as an educational institution offering programs beyond the secondary level, the institution would be considered to meet the provisions of §600.09(a)(1)(i) of these final regulations so long as the institution also meets any additional licensure requirements or approvals required by the State.