Presents:

Required Institutional State Authorizations: Compliance with the U.S. Department of Education Program Integrity Rule

Virtual Seminar

Sponsored by the National Association of College and University Attorneys
In Cooperation with the American Council on Education

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17833
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Stephanie Gold is a partner at Hogan Lovells US LLP in Washington, D.C. Her practice focuses on the representation of colleges, universities, post-secondary institutions, education associations, distance education firms, student loan organizations, and investors in education-related companies. She has represented education clients in matters related to federal financial assistance, student financial aid, privacy, student discipline, campus crime, military recruiting, research activity, state education licensure, foreign students, and accreditation. Stephanie advises clients on legal issues related to distance education, overseas initiatives, and institutional changes in ownership, including state education licensure, accreditation, and federal regulation. Ms. Gold received an A.B. with Honors from Brown University and a J.D. from the University of Michigan Law School where she was editor in chief of the University of Michigan Journal of Law Reform. After law school, Stephanie served as a law clerk to The Honorable Cornelia G. Kennedy of the U.S. Court of Appeals for the Sixth Circuit.

James F. Shekleton is the General Counsel of the South Dakota Board of Regents. The University of Minnesota, Morris, awarded him a baccalaureate in philosophy, the University of Oregon a doctorate in philosophy, and the University of Minnesota Law School a law degree. When last in Paris, he was delighted to get his picture taken standing alongside Hammurabi's Code, but he was shocked to discover that there was no line.
Required Institutional State Authorizations: Compliance with the U.S. Department of Education Program Integrity Rule

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Introduction
Origins and Objectives of the State Authorization Requirement

Michael B. Goldstein
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HEA Sec. 101(a)(2)

(a) Institution of higher education
For purposes of this chapter… the term “institution of higher education” means an educational institution in any State that—

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(2) is legally authorized within such State to provide a program of education beyond secondary education;
The Reserved Powers Clause

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

U.S. Const., Amendment X

Prohibition Against Federal Control of Education

“No provision of any applicable program shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration or personnel of any educational institution.”

Notice of Proposed Rulemaking

• Current regulations do not define or describe the state authorization requirement
• Department has historically viewed the requirement for State Authorization for entities to offer postsecondary education as “minimal”

75 Fed. Reg. 34812, 13 (June 18, 2010)

Notice of Proposed Rulemaking

“Upon further review, we believe the better approach is to view the State approval…as a substantive requirement where the State is expected to take an active role in approving an institution and monitoring complaints from the public about its operations and responding appropriately.”

75 Fed. Reg. 34813
Notice of Proposed Rulemaking

1. Movement of substandard institutions and diploma mills from State to State in search of least oversight
2. Example of lapse in existence of California Bureau for Private Postsecondary and Vocational Education

75 Fed. Reg. 34813

Final Regulations

“We are concerned that States have not consistently provided adequate oversight, and thus we believe Federal funds and students are at risk.”

75 Fed. Reg. 66859 (October 29, 2010)
Final Rule

“We continue to view State Authorization…as a substantive requirement where states take an active role in authorizing an institution to offer postsecondary education.”

“Unless at State provides at least this minimal level of review, we do not believe it should be considered as authorizing an institution of offer [postsecondary education].”

75 Fed. Reg. 66859, 66863

Department Press Release

“Students at for-profit institutions represent 11 percent of all higher education students, 26 percent of all student loans and 43 percent of all loan defaulters. The median federal student loan debt carried by students earning associate degrees at for-profit institutions was $14,000, while the majority of students at community colleges do not borrow. More than a quarter of for-profit institutions receive 80 percent of their revenues from taxpayer financed federal student aid.”

October 28, 2010
Department Press Release

“This rapid growth of enrollment, debt load, and default rates at for-profit institutions in recent years prompted the Obama administration to embark on an 18-month negotiation with the higher education community over new regulations, which was required by Congress. During the negotiation, the Department worked with stakeholders to develop a set of proposals around 14 specific issues (outlined below) that strengthen the integrity of the federal student aid program and ensure that taxpayer funds are used appropriately.”

October 28, 2010

Components of the State Authorization Requirement: State Complaint Procedure

“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.” §600.9(a)(1)

75 Fed. Reg. 66946

Establishment, authorization or licensure “by name” to offer programs beyond secondary education (“Home State” authorization).

§600.9(a)(1)(i)(A), (B); §600.9(a)(1)(ii)(A), (B)

75 Fed. Reg. 66946, 47

Components of the State Authorization Requirement: Distance Education

“If an institution is offering postsecondary education through distance…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 meeting any State requirements for it to be legally offering postsecondary distance…education in that State.” §600.9(c)

75 Fed. Reg. 66947
Components of the State Authorization Rule: Disclosure and Documentation

“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 it’s State….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…” §668.43(b)

Components of the State Authorization Rule: Disclosure and Documentation

Distance Education: “An institution must be able to document to the Secretary the State’s approval [to be legally offering postsecondary distance…education] upon request.” §600.9(c)

75 Fed. Reg. 66947
Failure to Meet State Authorization Requirement

“If a State declines to provide an institution with legal authorization to offer postsecondary education in accordance with these regulations, the institution will not be eligible to participate in Federal [student financial aid] programs.”

75 Fed. Reg. 66859

Required State Actions

“We believe the provisions in amended §600.9 are so basic that state compliance will be easily established for most institutions.”

75 Fed. Reg. 66863
**Required State Actions**

“One commentator cited an analysis that estimated that 13 States would comply with the proposed regulations upon implementation; 6 States would clearly not be in compliance; and 37 states would likely have to amend, repeal or otherwise modify their laws.”

75 Fed. Reg. 66863

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**Compliance Deadline**

July 1, 2011
(with possibility of extension for “home state” authorization)

75 Fed. Reg. 66833
Today’s Program

1. “Home State Authorization

2. Distance Education Authorization

3. Required State Complaint Procedure

4. Questions and Discussion


Stephanie J. Gold
Hogan Lovells US LLP
Category 1 -- Definition

Institution is established as an educational institution by a State through charter, statute, constitutional provision or other action issued by an appropriate State agency or State entity that identifies the institution by name and affirms or conveys to the institution the authority to operate educational programs beyond secondary education, including programs leading to a degree or certificate.

Category 1 -- Rules

• Category 1 institution is State authorized for Title IV purposes, provided the institution complies with any applicable State approval or licensure requirements.
Category 1 -- Rules

• Institution may be exempted from any State approval or licensure requirements based on accreditation (but not pre-accreditation/candidacy) by accreditor recognized by ED or operation for at least 20 years.
  – State action must exempt the institution by name.

Category 2 -- Definition

• Institution is established by State on basis of authorization to conduct business in the State or to operate as a nonprofit charitable organization but is not established by name as an educational institution.
Category 2 -- Rules

- Category 2 institution is State authorized for Title IV purposes if it is approved or licensed by name by State to offer postsecondary education programs leading to degree or certificate.
  - Institution may not be exempt from State approval and licensure requirements based on accreditation, years in operation, or other comparable exemption.

Category 3

Religious Institution -- Definition

- Owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation; and
- Awards only religious degrees or certificates.
Category 3
Religious Institutions -- Rule

• An institution is considered legally authorized to operate education programs beyond secondary education if it is exempt from State authorization requirements as a “religious institution” under State constitution or by State law.

Additional Categories

• Institutions that are authorized by name by the Federal Government.
• Institutions that are authorized by name by Indian tribe, provided institution is located on tribal lands and tribal government has complaint process.
Institutions Considered Legally Authorized

- Community college meets the requirements based on its status as a public institution.
  - “As instrumentalities of a State government, State institutions are by definition compliant with” Category 1 requirements.”
  - Not exempt from state complaint process requirement.

Institutions Considered Legally Authorized

- A nonprofit institution has State constitutional authorization by name as a postsecondary institution; State does not apply a licensure or approval process.
Institutions Considered Legally Authorized

• 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.

Institutions Considered Not Legally Authorized

• 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 certification from an appropriate State official that it is in compliance with requirements for state licensure exemption.
**Possible Error in Examples**

- Legally authorized: 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 regional accreditation.

  - What is missing? State action that exempts the institution by name from approval and licensure requirements.

**Institutions Considered Not Legally Authorized**

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

  - Same analysis for authorization based on accreditation.
Physical Locations in Multiple States

• An institution must demonstrate that it is legally authorized by home State as well as any other State in which it has a physical presence.

Physical Locations in Multiple States - - Reciprocity

• Institution is legally authorized if both States provide authorization that complies with § 600.9, and they have an agreement to recognize each other’s authorizations, provided institution supplies ED with “appropriate documentation.”
Physical Locations in Multiple States -- Category 2

• Legally Authorized: An individual institution is owned by a publicly 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.

Case Study -- California

• California education licensure law exempts, among others, institutions that are accredited by Western Association of Schools and Colleges.
  – Implications for Category 1 v. Category 2 institutions.
Disclosure Requirement

- Institutions 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.

ED Enforcement -- Context

- Initial application
- Recertification application
- Application/notice related to new location
- Annual compliance audit
- ED Program Review
- Office of the Inspector General audit
ED Enforcement -- Penalty

- Loss of institutional eligibility to participate in the federal student financial aid programs.
- Loss of eligibility to participate in the federal student financial aid programs with respect to particular State.

Effective Date -- Extension

- Effective July 1, 2011
- Institutions unable to meet the “legally authorized” standard by July 1, 2011 may request a one-year extension (and, if necessary, a second one-year extension).
Effective Date -- Extension

- Institutions that seek an extension must submit an explanation from the State regarding how extension will permit the state to modify its procedures to comply with ED requirements.
  - Who should institution approach?
  - What should the explanation address?
  - Will ED defer to state explanation?

"We believe that in any circumstance in which an institution is unable to qualify as legally authorized …, the institution and State will take the necessary actions to meet the requirements . . . .”
Practical Points

• Review formation documents.
• Review any approval or licensure documentation, which may require consideration of law at time approval or licensure was issued.
• Review current law regarding approval or licensure.
• Based on such review, determine whether institution’s authorization if sufficient for Title IV purposes.

• If not, determine what action is required to cause institution to be in compliance with § 600.9.
• Communicate with State to clarify status and develop plan to effectuate any required action.
• Obtain appropriate statement from State if extension required.
• Prepare required disclosures.
Questions and Answers

Distance Education Programs: Meeting “Any State Requirements” to be “Legally Offering” Distance Education

Michael B. Goldstein
Practice Leader-Postsecondary Education
DowLohnes, PLLC
The confluence of telecommunications and adult learning will result in a new set of policies that are increasingly based on an evolving marketplace approach, punctuated by interstate agreements for the approval of delivery systems that operate on regional, national and international bases.

Report of the Project on Adult Lifelong Learning via Telecommunications
(Project ALLTEL)
The outlines of such agreements are already becoming apparent, as institutional, state and accrediting agency leaders seek to develop a framework for these programs while they are still in their infancy.

Sir John Daniel
Vice-Chancellor, British Open University
Speaking at the 2003 Annual Meeting of the National Governors Association

When I came to America to establish the U.S. version of the Open University I thought I was dealing with one country.
Statutory Authority

* * * the term “institution of higher education” means an educational institution in any State that –
* * *

(2) is legally authorized within such State to provide a program of education...

Higher Education Act of 1965, as amended, Sec. 101(a)
New Regulatory Provision

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.

34 CFR §668.

Commentary

We agree with the commenters that further clarification is needed regarding legal authorization across State lines in relation to … distance education and correspondence study. … we are in no way preempting any State laws, regulations or other requirements…

75 FR 66867 (Oct. 29, 2011)
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.

“If an institution is offering postsecondary education through distance education or correspondence education….”

- The definition of “offering” is left to state discretion.
  - what constitutes “presence” sufficient to trigger state interest?
- Does the rule apply to the offering of courses or programs leading to a credential?
- Does the rule apply to non-Title IV eligible programs?
“…to students in a State in which it is not physically located or in which it is otherwise subject to State jurisdiction”

- Does the rule apply to non-Title IV eligible students?
- What does “students in a state” mean?
  - Residents?
  - Physically present?
  - Permanent or transient?

“as determined by the State . . .”

- What is the significance of State enforcement practices?
  - What if a state has a written requirement which it chooses not to enforce?
- Will ED have a list of States that require authorization?
  - Will it differentiate among levels of presence?
  - Will it be shared?
“the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State.”

- Facially not limited to laws and regulations pertaining to education.
  - e.g. Business registration
- There does not appear to be a requirement that the State rules are in compliance with the new “state authorization” standards.
  - Institution must meet state requirements regardless of compliance with complaint procedures, etc.

“An institution must be able to document to the Secretary the State’s approval upon request.”

- Will demonstrating compliance be a requirement for the annual Independent Audit?
  - Will this be a test item included in the Audit Guide issues by ED Inspector General?
- What constitutes documenting compliance?
  - What if a state does not require authorization?
    • Must a school have affirmative documentation from the state to that effect?
Case Study - Tennessee

• “Pure” online program.
  – No contact with state other than electronic interaction with students.
  – Unknown to institution, Internet marketing provider purchased “pop-up” advertisements on the homepage of a Memphis newspaper.
  – State ruled the pop-up ads triggered presence sufficient for requiring authorization pursuant to the “local advertising” provision of state regulations.

Arkansas

<table>
<thead>
<tr>
<th>Authorizing State Agency</th>
<th>State Board of Private Career Education</th>
<th>Department of Higher Education</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction</td>
<td>Private postsecondary career schools</td>
<td>Nonpublic or out of state postsecondary institutions</td>
</tr>
<tr>
<td>Average Approval Period</td>
<td>Less than 6 months</td>
<td>Less than 6 months</td>
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<tr>
<td>Licensure for an Exclusively Online Program Required?</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Physical Presence/Operating Defined?</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Summary of Formal Requirements

No persons shall operate, conduct, maintain, or offer to operate in Arkansas a school, or solicit the enrollment of students residing in the state, unless a license is first secured from the Board.

Staff Guidance and Comments

While there is no Board guidance, written confirmation of a strictly online program is strongly recommended. Agency guidance confirms that any online program must get approval from the Department.
Is it Right, and is it Legal?

- Are presence and authorization standards reasonable?
  - Equal protection
    - Student access to competing sources of postsecondary education
  - Competition under the state action doctrine
    - Anticompetitive activity pursuant to “clearly articulated” state policy that is “actively supervised” by a state

How Does an Institution Know it is in Compliance?

- What are the requirements for any given state at any given point in time for any given instructional program?
  - What information will be available and what will ED rely upon?
  - Note that there is no requirement that it be an education agency.
    - Arguably, a business registration law would stand in the same place as an institutional licensure law.
- How closely does an institution need to monitor enrollment?
  - Will there be a de minimus test?
Questions and Answers

Meeting State Complaint Procedure Requirements

James F. Shekleton, Ph.D., J.D.
South Dakota Board of Regents
State Complaint Review: The Core Element in § 600.9

An institution … 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 …. 34 C.F.R. § 600.9(a)(1).

Institutions Cannot be Deemed “legally authorized” in States that Lack Complaint Procedures

The regulations do not “make allowance for an institution in a State without a process for complaints[; if] no complaint process existed, the institution would not be considered to be legally authorized.”

Final Rule, 75 Fed. Reg. 66866
The ED Requires Active State Oversight of Institutions In Order:

(1) to minimize risks to students and to federal financial aid funds; and
(2) to reduce the need for federal intervention or funding to police degree mills.

75 Fed. Reg. 66835 and 66859

State Oversight Effectively Discourages Shoddy Institutions

“The movement of substandard institutions and diploma mills from State to State in response to changing requirements demonstrates the effectiveness of state regulation.”

NPRM, 75 Fed. Reg. 34813
What is the Required Scope of State Complaint Procedures?

- Section 600.9(a)(1) assumes that states will “review and appropriately act on complaints concerning the institution including enforcing applicable State laws.”
- The phrase “including enforcing applicable State laws” implies that states cannot limit their review to enforcement of state laws.

State Procedures Must Address Three Ranges of Complaints

- Violations of state consumer protection laws, e.g., laws related to false advertising;
- Violations of state laws or rules related to licensure of postsecondary institutions; and,
- Complaints relating to quality of education or other state or accreditation requirements.

75 Fed. Reg. 66865 - 66866
Complaints, Accreditation Standards and Program Quality

The ED originally proposed requiring states to monitor the quality of educational programs and financial responsibility, but removed the requirement to avoid duplication of accreditation agency obligations under § 602.23.

NPRM, 75 Fed. Reg. 34813

Complaints, Accreditation Standards and Program Quality

The final rule takes a different course to the original end. It assumes that states will entertain complaints that fall within the purview of accreditation agency complaint procedures: “[T]o the extent that a complaint relates to an institution’s quality of education” or accreditation matters, states may refer such complaints “to the institution’s accrediting agency for resolution.”

75 Fed. Reg. 66866
Accreditation Complaints Include Complaints About Program Quality

- Section 602.16 requires accreditation agencies to establish standards that assure program quality.
- Section 602.23 requires accreditation agencies to accept all complaints arising under their standards.

Q.E.D.

States Must Control Final Complaint Review and Adjustment

- States may defer to accreditation agencies only an initial review of complaints.
- States “retain the primary role and responsibility for student consumer protection against fraudulent or abusive practices by some postsecondary institution”

75 Fed. Reg. 66866
**States May Not Delegate Ultimate Authority to Adjust Complaints**

- States that rely upon accreditation agency reviews remain responsible for the appropriate resolution of a complaint.
- States may not permitted rely on institutional complaint processes but must provide for independent review and adjustment.

*75 Fed. Reg. 66866*

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**States May Divide Authority to Review and to Adjust Complaints**

- The regulations assume that states will assign responsibility for handling each range of complaints.
- Institutions must inform all students how to initiate complaints in the state where the students receive instruction.

*75 Fed. Reg. 66865 - 66866*
What Happens When States Have No Complaint Procedure?

- Institutions operating within a state that has no procedure by July 1, 2011, may request a waiver from ED for 2011-2012.
- The request must be accompanied by an explanation from the State of how a one-year extension will permit the State to comply with amended § 600.9.

75 Fed. Reg. 66833 and 66863

Distance Education in States with No Complaint Procedure

- Distance education programs must comply with any pertinent state requirements, but can only obtain waivers in states where they are located.
- Initially, it appeared that, absent presence in a noncompliant state, online programs could not be legally authorized to operate there.

75 Fed. Reg. 66866 – 66867
Distance Education in States With No Complaint Procedure

In January, ED indicated unofficially that a distance education program could operate legally in a noncompliant state, if
– it applied for approval, and
– if the state did not regulate distance education activities by out-of-state institutions.
http://wcetblog.wordpress.com/2011/01/12/state-approval-no-extensions/
No official statement has yet issued.

Issues to Consider as States Seek to Implement § 600.9

• Ironically, the ED rules elide the application of basic administrative law principles that govern State regulations.
• State legislatures must decide whether to regulate postsecondary institutions and whether to provide remedies to complainants.
Issues to Consider as States Seek to Implement § 600.9

Due process considerations require an adequate basis for assertion of jurisdiction, comprehensible rules to inform institutions which actions may be subject to complaint review, guidance concerning the range of permissible responsive actions, and opportunities to be heard before findings and directions issue.

Institutional Counsel Should Consider Whether:

- amendment of constitutional governance provisions would be required to permit legislative or executive oversight of program quality;
- reliance on accreditation standards as State program quality standards is a permissible delegation under state law;
Institutional Counsel Should Consider Whether:

- proposed State procedures accommodate general institutional accreditation requirements and additional requirements for specific discipline accreditation;
- cognizable complaints may be limited to complaints involving compliance with specific State approval requirements;

Institutional Counsel Should Consider Whether:

- State procedures avoid delegating quasi-judicial authority to resolve complaints to accreditation bodies;
- State procedures afford the institution sufficient opportunity to dispute an accreditation agency proposed adjustment of the grievance;
Institutional Counsel Should Consider Whether:

- State agency will be obligated to follow contested case procedures in order to take appropriate action;
- State APA procedures permit joinder of accreditation agencies to minimize exposure to disputes between state regulators and accreditation agencies; and

Institutional Counsel Should Consider Whether:

- State procedures can be crafted to accommodate some degree of institutional autonomy, such considerations may be most acute for institutions separated constitutionally from political control, for tribal institutions and for certain religious institutions.
Potential Governance Approaches

• Adopt legislation to assign responsibility for complaint review to an entity to be created under a joint powers agreement.
  • Provide for participation in governance by State regulatory agencies and by public and private institutions located in the State.
  • Institutional participation in complaint review entity governance accommodates limitations on State police powers arising from constitutional governance provisions, tribal sovereignty or free exercise clauses.
  • Section 600.9 should be satisfied if authority to operate in the State is limited to institutions that cooperate with the complaint review process.

Potential Standards Approaches

• Propose consultative approaches to development of legislation to define State standards for reviewable complaints about institutional quality and to determine the range of appropriate State actions.
  – Establish a process that operates outside of the legislative session, and
  – invite participation by in-State public, tribal and private institutions.
Potential Procedural Approaches

• Consider the use of collegial and arbitral approaches to provide for independent complaint review and adjustment.
  – Review by academics protects institutional autonomy in academic matters.
  – Allowing an institution to nominate a portion of the review panel borrows a common arbitration practice to hedge against biased review.

Questions and Answers
Conclusion

Thank You!

Find additional resources on the Program Integrity Rules on the NACUA web page at:

§ 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 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

§ 668.43 Institutional information.

(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.
State Authorization Rule: Excerpts from Department of Education Analysis of Comments and Changes

October 29, 2010

State Licensing Agency Not Required

These final regulations do not mandate that a State create any licensing agency for purposes of Federal program eligibility. p. 66858

In the case of an entity established as a business or nonprofit charitable organization, i.e., not as an educational institution, the entity would be required to have authorization from the State to offer educational programs beyond secondary education. p. 66858

Implementation Date

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. p. 66833

Authority for Requirement

Under the provisions of the HEA and the institutional eligibility regulations, the Department is required to determine whether an institution is legally authorized by a State to offer postsecondary education if the institution is to meet the definition of an institution of higher education, proprietary institution of higher education, or postsecondary vocational institution (20 U.S.C. 1001 and 1002) as those terms are defined in §§ 600.4, 600.5, and 600.6 of the institutional eligibility regulations. In accordance with the provisions of the HEA, the Department is establishing minimum standards to determine whether an institution is legally authorized to offer postsecondary education by a State for purposes of Federal programs. The proposed regulations do not seek to regulate what a State must do, but instead considers whether a State authorization is sufficient for an institution that participates, or seeks to participate, in Federal programs. p. 66858

Rationale for Requirement

We are concerned that States have not consistently provided adequate oversight, and thus we believe Federal funds and students are at risk… p. 66859

This requirement will also bring greater clarity to State authorization processes…p. 66859

We continue to view State authorization to offer postsecondary educational programs as a substantive requirement where the State takes an active role in authorizing an institution to offer postsecondary education. p. 66861

Unless a State provides at least this minimal level of review, we do not believe it should be considered as authorizing an institution to offer an education program beyond secondary education. p. 66863

Enforcement

The determination of whether an institution has acceptable State authorization for Federal program purposes will be made by the Department. p. 66863

Any institution applying to participate in a Federal program under the HEA must demonstrate that it has the legal authority to offer postsecondary education in accordance with § 600.9 of these final regulations. If a State declines to provide an institution with legal authorization to offer postsecondary education in accordance with these regulations, the institution will not be eligible to participate in Federal programs.

As to an institution’s inability to control the actions of a State, we do not believe such a circumstance is any different than an institution failing to comply with an accreditation requirement that results in the institution’s loss of accredited status. We believe that in any circumstance in which an institution is unable to qualify as legally authorized under § 600.9 of these final regulations, the institution and State will take the necessary actions to meet the requirements of § 600.9 of these final regulations. p. 66859

If an institution ceased to qualify as an eligible institution because its State legal authorization was no longer compliant with amended § 600.9, the institution and its students would be subject to the requirements for loss of eligibility in subpart D of part 600 and an institution would also be subject to § 668.26 regarding the end of its participation in those programs. If an institution’s State legal authorization subsequently became compliant with amended § 600.9, the institution could then apply to the Department to resume participation in the title IV, HEA program. p. 66863

Authorization by Name to Offer Postsecondary Education

We believe the distinction for purposes of Federal programs is whether the legal entities are specifically established under State requirements as educational institutions or instead are established as business or nonprofit charitable organizations that may operate without being specifically established as educational institutions. p. 66861

We agree with the commenter that a State’s authorization should name the institution being authorized. We believe that by naming the institution in its authorization for the institution to offer postsecondary education in the State, the State is providing the necessary positive authorization expected under § 600.9. p. 66858
An institution is legally authorized by the State if the State establishes the institution by name as an educational institution through a charter, statute, constitutional provision, or other action to operate educational programs beyond secondary education, including programs leading to a degree or certificate. If, in addition, the State has an applicable State approval or licensure process, the institution must also comply with that process to be considered legally authorized. However, an institution created by the State 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 upon the institution being in operation for at least 20 years. If the legal entity is established by a State as a business or a nonprofit charitable organization and not specifically as an educational institution, the State must have a separate procedure to approve or license the entity by name to operate programs beyond secondary education, including programs leading to a degree or certificate. For an institution authorized under these circumstances, the State may not exempt the entity from the State’s approval or licensure requirements based on accreditation, years in operation, or other comparable exemption. p. 66861

**Scope of Changes Required of States**

Further, these regulations only require changes where a State does not have any authorizing mechanisms for institutions other than an approval to operate as a business entity, or does not have a mechanism to review complaints against institutions. We anticipate that many States already meet these requirements, and will have time to make any necessary adjustments to meet the needs of the institutions. p. 66861

We believe that the provisions in amended § 600.9 are so basic that State compliance will be easily established for most institutions. p. 66863

One commenter cited an analysis that estimated that 13 States would comply with the proposed regulations upon implementation; 6 States would clearly not be in compliance; and 37 States would likely have to amend, repeal, or otherwise modify their laws. p. 66863

We do not believe that it would impose an undue financial burden on States to comply with the provisions in § 600.9. In most instances we believe that a State will already be compliant for most institutions in the State or will need to make minimal changes to come into compliance. p. 66864

**Compliance Date Extensions**

Discussion: We recognize that a State may not already provide appropriate authorizations as required by § 600.9 for every type of institution within the State. p. 66863

If a State is not compliant with § 600.9 for a type or sector of institutions in a State, we believe the State and affected institutions will create the necessary means of establishing legal authorization to offer postsecondary education in the State in accordance with amended § 600.9. However, in the event the State is unable to provide appropriate State authorizations to its institutions by the July 1, 2011 effective date of amended § 600.9(a) and (b), 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-extension of the effective date to July 1, 2013. As described in the section of the preamble entitled “Implementation Date of These Regulations,” 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. p. 66863

**State Complaint Procedure**

While a State must have a process to handle student complaints under amended § 600.9(a) for all institutions in the State except Federal and tribal institutions, the regulations do not require, nor do they prohibit, any process that would lead to continual oversight by a State. pp. 66863-4

For an institution to be considered to be legally authorized to offer postsecondary programs, a State would be expected to handle complaints regarding not only laws related to licensure and approval to operate but also any other State laws including, for example, laws related to fraud or false advertising. We agree that a State may fulfill this role through a State agency or the State Attorney General as well as other appropriate State officials. pp. 66865-66

A State may choose to have a single agency or official handle complaints regarding institutions or may use a combination of agencies and State officials. All relevant officials or agencies must be included in an institution’s institutional information under § 668.43(b). p. 66866

Directly relying on an institution’s accrediting agency would not comply with § 600.9(a)(1) of these final regulations; however, to the extent a complaint relates to an institution’s quality of education or other issue appropriate to consideration by an institution’s accrediting agency, a State may refer a complaint to the institution’s accrediting agency for resolution. We do not believe it is necessary to prescribe memoranda of understanding or similar mechanisms if a State chooses to rely on an institution’s accrediting agency as the State remains responsible for the appropriate resolution of a complaint. p. 66866

We do not agree that public institutions should be exempt from this requirement as a complainant must have a process, independent of any institution—public or private, to have his or her complaint considered by the State. The State is not permitted to rely on institutional complaint and sanctioning processes in resolving complaints it receives as these do not provide the necessary independent process for reviewing a complaint. A State may, however, monitor an institution’s complaint resolution process to determine whether it is addressing the concerns that are raised within it. p. 66866

Changes: We have amended proposed § 668.43(b) to provide that an institution must make available to a student or prospective student 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. p. 66866

We do not agree that proposed § 668.43(b) needs to make allowance for an institution in a State without a process for complaints, since every State is charged with enforcing its own laws and no institution is exempt from complying with State laws. If no complaint process existed, the institution would not be considered to be legally authorized. With respect to an institution offering distance education programs, the institution must provide, under § 668.43(b), not only the contact information for the State or States in which it is physically located, but also the contact information for States in which it provides distance education to the extent that the State has any licensure or approval processes for an institution outside the State providing distance education in the State. p.66866

**Role of Accrediting Agencies**

We believe that accreditation may be used to exempt an institution from other State approval or licensing requirements if the entity has been established by name as an educational institution through a charter, statute, constitutional provision, or other action issued by an appropriate State entity to operate educational programs beyond secondary education, including programs leading to a degree or certificate. For such an educational institution, a State could rely on accreditation to exempt the institution from further approval or licensing requirements, but could not do so based upon a preaccredited or candidacy status. p. 66864

We have amended proposed § 600.9 to provide that, if an institution is an entity that is established by name as an educational institution by the State and the State further requires compliance with applicable State approval or licensure requirements for the institution to qualify as legally authorized by the State for Federal program purposes, the State may exempt the institution by name from the 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. If an institution is established by a State as a business or a nonprofit charitable organization, for the institution to qualify as legally authorized by the State for Federal program purposes, the State may not exempt the institution from the State’s approval or licensure requirements based on accreditation, years in operation, or other comparable exemption. p. 66865

**Distance Education**

To demonstrate that an institution is legally authorized to operate in another State in which it has a physical presence or is otherwise subject to State approval or licensure, the institution must demonstrate that it is legally authorized by the other State in accordance with § 600.9. p. 66867

If an institution is offering postsecondary education through distance or correspondence education in a State in which it is not physically located, the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document upon request from the Department that it has such State approval. p. 66867

**Changes:** We have revised § 600.9 to clarify in paragraph (c) that, if an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located, the institution must meet any State requirements for it to be legally offering postsecondary education in that State. We are further providing that an institution must be able to document upon request by the Department that it has the applicable State approval. p. 66867

**Public Institutions**

As instrumentalities of a State government, State institutions are by definition compliant with § 600.9(a)(1)(i), and no exemption from the provisions of § 600.9 of these final regulations is necessary. We do not agree that State institutions should be exempt from the requirement that a State have a process to review and appropriately act on complaints concerning an institution. We believe that students, their families, and the public should have a process to lodge complaints that is independent of an institution. p. 66867

**Religious Institutions**

**Discussion:** We agree with the commenters that a definition of a religious institution is needed to clarify the applicability of a religious exemption. We also agree that a modification to the proposed regulations is needed to allow a State to provide an exemption to religious institutions without requiring the State to change its constitution.

**Changes:** We 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 the exemption by law, or exempt under the State’s constitution. We have also included a definition of a religious institution, which provides 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. We note, however, that a religious institution is still subject to the requirement in § 600.9(a)(1) of these final regulations that, for the institution to be considered to be legally authorized in the State, the State must have a process to review and appropriately act on complaints concerning the institution.

**Tribal Institutions**

We agree that tribal institutions are not subject to State oversight for institutions operating within tribal lands. Proposed § 600.9(a)(2) provided that a tribal college would be considered to meet the basic provisions of proposed § 600.9(a)(1) if it was authorized to offer educational programs beyond secondary education by an Indian tribe as defined in 25 U.S.C. 1802(2).
We did not intend to make a tribal institution subject to any State process for handling complaints and have clarified the language in § 600.9. If a tribal college is located outside tribal lands within a State, or has a physical presence or offers programs to students that are located outside tribal lands in a State, the tribal college must demonstrate that it has the applicable State approvals needed in those circumstances.

Note: Captions supplied separately; not included in text of Department’s Final Rule Comments and Analysis.
State Authorization (§§ 600.4(a)(3), 600.5(a)(4), 600.6(a)(3), 600.9, and 668.43(b))

General—No Mandate for a State Licensing Agency

Comment: Several commenters believed the proposed regulations would create mandates for States to create new State oversight bodies or licensing agencies, or compel States to create bureaucratic structures that would further strain higher education resources. Some commenters believed that a majority of the States would have to modify licensing requirements or adopt new legislation and that the regulations would cause a major shift in State responsibilities.

Discussion: These final regulations do not mandate that a State create any licensing agency for purposes of Federal program eligibility. Under the final regulations, 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. If the State had an additional approval or licensure requirement, the institution must comply with those requirements. In the case of an entity established as a business or nonprofit charitable organization, i.e., not as an educational institution, the entity would be required to have authorization from the State to offer educational programs beyond secondary education. While these final regulations require the creation of a State licensing agency, a State may choose to rely on such an agency to legally authorize institutions to offer postsecondary education in the State for purposes of Federal program eligibility.

Changes: None.

Comment: Several commenters supported the proposed regulations as an effort to address fraud and abuse in Federal programs throughout the States oversight. An association representing State higher education officials noted that despite differences in State practice, all the States, within our Federal system, have responsibilities to protect the interests of students and the public in postsecondary education and supported the basic elements of proposed § 600.9. A State agency official praised the Department’s proposed regulations but suggested that the Department insert “by name” in the proposed § 600.9(a)(1) to provide some protection against recurrence of situations such as the one in California when the State licensing agency lapsed prior to the State renewing the agency or a successor to the agency and no State approval was in place that named an institution as licensed or authorized to operate in the State.

Discussion: We appreciate the support of the commenters. We agree with the commenter that a State’s authorization should name the institution being authorized. We believe that by naming the institution in its authorization for the institution to offer postsecondary education in the State, the State is providing the necessary positive authorization expected under § 600.9. Changes: We are amending proposed § 600.9, where appropriate, to recognize that an institution authorized by name in a State will meet the State authorization requirements as discussed further in response to other comments.

Comment: Some commenters believed that the proposed regulations exceeded the Department’s authority and infringed on the States’ authority. One commenter requested that the proposed regulations be eliminated because private institutions are authorized through various unique authorizations. Another commenter believed that the proposed regulations upset the balance of the “Triad” of oversight by States, accrediting agencies, and the Federal Government. One commenter questioned whether the Department could impose conditions restricting a State’s freedom of action in determining which institutions are authorized by the State by requiring that a State’s authorization must be subject to, for example, adverse actions and provision for reviewing complaints. The commenter believed that there was no intent to have the Department impose such conditions. Another commenter believed that proposed § 600.9 unnecessarily intruded on each State’s prerogative to determine its own laws and regulations relative to the authorization of higher education institutions and to define the conditions for its own regulations. One commenter suggested that the Department only apply proposed § 600.9 to the problem areas that the commenter identified as substandard schools, diploma mills, and private proprietary institutions.

One commenter believed that the proposed regulations would infringe upon the States’ sovereignty by commanding state governments to implement legislation enacted by Congress. Specifically, the commenter noted that under the proposed regulations the States must adopt legislation or rules that expressly authorize institutions to offer postsecondary education and further make such an authorization subject to adverse action by the State and that the proposed regulations would require that States establish a process to act on complaints about the institution and enforce State laws against the institution. The commenter believed that the Department would improperly direct State officials to participate in the administration of a federally enacted regulatory scheme in violation of State Sovereignty. By doing so, the commenter believed that the Federal Government would be forcing State governments to absorb the financial burden of implementing a Federal regulatory program, while allowing the Federal government to take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher Federal taxes. The commenter believed that the Department cannot construe the HEA to require a State to regulate according to the Department’s wishes. The commenter believed that such a construction would exceed the Department’s authority under the HEA and violate the States’ rights under the Tenth Amendment.

Discussion: We disagree with the commenters that the proposed regulations exceed the Department’s authority and infringe on States’ authority. Under the provisions of the HEA and the institutional eligibility regulations, the Department is required to determine whether an institution is legally authorized by a State to offer postsecondary education if the institution is to meet the definition of an institution of higher education, proprietary institution of higher education, or postsecondary vocational institution (20 U.S.C. 1001 and 1002), as those terms are defined in §§ 600.4, 600.5, and 600.6 of the institutional eligibility regulations. In accordance with the provisions of the HEA, the Department is establishing minimum standards to determine whether an institution is legally authorized to offer postsecondary education by a State for purposes of Federal programs. The proposed regulations do not seek to regulate what a State must do, but instead considers whether a State authorization is sufficient for an institution that participates, or seeks to participate, in Federal programs.

Contrary to the commenter’s suggestion that the Department is upsetting the Triad, we believe these regulations clarify the role of the States, a key participant in the Triad, in establishing an institution’s eligibility for Federal programs. Further, the Department believes that clarifying the State role in the Triad will address some of the oversight concerns raised by
another commenter regarding problem areas with certain types of institutions.

Comment: Several commenters questioned the need for proposed § 600.9. For example, several commenters questioned whether the Department’s concern that the failure of California to reinstate a State regulatory agency was justified. Commenters believed that the regulations would not have prevented the concerns the Department identified in the case of the lapping of the California State agency. One commenter believed the California issue was resolved and that accreditation and student financial aid processes worked. Some commenters believed that the current State regulatory bodies or other authorization methods were sufficient. One commenter stated that authorizations are spelled out in State statutes, and there is no need for the regulations. Some commenters believed that additional information is needed, such as a State-by-State review of the impact of proposed § 600.9, or the States with adequate or inadequate oversight. Several commenters were concerned that proposed § 600.9 would unnecessarily impact small States without discernable problems. Some commenters believed there is no evidence of marginal institutions moving to States with lower standards and that there is no danger to title IV, HEA program funds. One commenter believed that proposed § 600.9 should be eliminated because the commenter believed the full effect is not known and that it will be chaotic if implemented. Another commenter believed that proposed § 600.9 would be burdensome, is not economically feasible, and would leave an institution at the mercy of the State. One commenter believed that proposed § 600.9 would encourage for-profit institutions to undermine State agencies such as through lobbying to underfund an agency and would stall reconsideration of legislation. Some commenters believed that the Department’s concerns were valid. One of these commenters believed that, in the absence of regulations, many States have forfeited their public responsibilities to accrediting agencies. In the case of the interim lapse of the State regulatory agency in California, the commenter believed that we do not know yet the extent of the mischief that may have occurred or may still occur, but the commenter has reported that schools began operating in the gap period and were allowed to continue to operate without State approval until the new agency is operational. The commenter understood that at least one of those schools closed abruptly, leaving many students with debts owed and no credential to show for their efforts.

Some commenters believed that the proposed regulations would not address issues with degree mills as they are not accredited. Some commenters urged the Department to offer leadership and funding to combat diploma mills. One commenter recommended that the Department use Federal funds for oversight. Another commenter suggested that the Department encourage the Federal Government to provide incentives to the States.

Discussion: We do not agree with the commenters who believe that proposed § 600.9 should be eliminated. For example, we believe these regulations may have prevented the situation in California from occurring or would have greatly reduced the period of time during which the State failed to provide adequate oversight. While it may appear that the California situation was satisfactorily resolved as some commenters suggested, the absence of a regulation created uncertainty. As one commenter noted, during the period when the State failed to act, it appears that problems did occur, and that no process existed for new institutions to obtain State authorization after the dissolution of the State agency. We are concerned that States have not consistently provided adequate oversight, and thus we believe Federal funds and students are at risk as we have anecdotal evidence of institutions shopping for States with little or no oversight. As a corollary effect of establishing some minimal requirements for State authorization for purposes of Federal programs, we believe the public will benefit by reducing the possibilities for degree mills to operate, without the need for additional Federal intervention or funding. We do not believe that additional information is needed to support § 600.9 in these final regulations as § 600.9 only requires an institution demonstrate that it meets a minimal level of authorization by the State to offer postsecondary education. Because the provisions of § 600.9 are minimal, we believe that many States will already satisfy these requirements, and we anticipate institutions in all States will be able to meet the requirements under the regulations over time. This requirement will also bring greater clarity to State authorization processes as part of the Triad. Since the final regulations establish minimal standards for institutions to qualify as legally authorized by a State, we believe that, in most instances they do not impose significant burden or costs. States are also given numerous options to meet these minimum requirements if they do not already do so, and this flexibility may lead to some States using different authorizations for different types of institutions in order to minimize burden and provide better oversight. The question of whether these regulations will impact the ability of any group to seek changes to a State’s requirements is beyond the purview of these final regulations. As one commenter requested, we will continue to support oversight functions as provided under Federal law, and we believe that these final regulations will provide the necessary incentives to the States to assure a minimal level of State oversight.

Changes: None.

Comment: Some commenters questioned how the Department would enforce the proposed regulations. One commenter stated that the Department has no mechanism to enforce the proposed regulations and asks how they will improve program integrity. One commenter questioned why an institution may be held accountable for the actions of the State over which it has no direct control.

Discussion: Any institution applying to participate in a Federal program under the HEA must demonstrate that it has the legal authority to offer postsecondary education in accordance with § 600.9 of these final regulations. If a State declines to provide an institution with legal authorization to offer postsecondary education in accordance with these regulations, the institution will not be eligible to participate in Federal programs.

As to an institution’s inability to control the actions of a State, we do not believe such a circumstance is any different than an institution failing to comply with an accreditation requirement that results in the institution’s loss of accredited status. We believe that in any circumstance in which an institution is unable to qualify as legally authorized under § 600.9 of these final regulations, the institution and State will take the necessary actions to meet the requirements of § 600.9 of these final regulations.

Changes: None.

Comment: One commenter believed that proposed § 600.9 would result in an unfunded mandate by the Federal Government. Another commenter stated that many States may see proposed § 600.9 as a revenue-generating opportunity and pass the costs of this requirement on to institutions, which...
would have no choice but to pass that cost on to students.

Discussion: We do not agree that §600.9 of these final regulations will result in an unfunded mandate by the Federal Government, since many States will already be compliant and options are available that should permit other States to come into compliance with only minimal changes in procedures or requirements if they want to provide acceptable State authorizations for institutions. The regulations also include a process for an institution to request additional time to become compliant. Furthermore, if a State is unwilling to become compliant with §600.9, there is no requirement that it do so. We also do not agree that States will see coming into compliance with §600.9 as a revenue-generating opportunity, since any required changes are likely to be minimal.

Changes: None.

Implementation

Comment: Some commenters believed that the proposed regulations are ambiguous in meaning and application or are vague in identifying which State policies are sufficient. For example, one State higher education official suggested that proposed §600.9 should be amended to differentiate among authorities to operate arising from administrative authorization of private institutions from legislation and from constitutional provisions assigning responsibility to operate public institutions. The commenter believed that proposed §600.9 obfuscated the various means of establishing State authorization and the fundamental roles of State legislatures and State constitutions and recommended that these means of authorization and roles of State entities should be clarified.

Several commenters questioned what authorizing an institution to offer postsecondary programs entails. A few commenters pointed out that there is a wide array of State approval methods and many institutions were founded before the creation of State licensing agencies. An association representing State higher education officials urged that ample discretionary authority explicitly be left to the States. One commenter indicated that proposed §600.9 failed to address when more than one State entity is responsible for a portion of the oversight in States where dual or multiple certifications are required. Another commenter believed that proposed §600.9 did not adequately address the affect an institution’s compliance with proposed §600.9 would have if one of two different State approvals lapsed and both were necessary to be authorized to operate in the State or if the State ceased to have a process for handling complaints but the institutions continued to be licensed to offer postsecondary education. Some commenters asked whether specific State regulatory frameworks would meet the provisions of the proposed regulations. For example, one commenter believed that, under State law and practice in the commenter’s State, the private institutions in the State already met the requirements in proposed §600.9 that the commenter believed included: (1) The institution being authorized by a State through a charter, license, approval, or other document issued by an appropriate State government agency or State entity; (2) the institution being authorized specifically as an educational institution, not merely as a business or an educational institution; (3) the institution’s authorization being subject to adverse action by the State; and (4) the State having a process to review and appropriately act on complaints concerning an institution. The commenter noted that all postsecondary institutions in the State must either have a “universal charter” awarded by the legislature or be approved to offer postsecondary programs. The commenter noted that these institutions are authorized as educational institutions, not as businesses. In another example, a commenter from another State believed that current law in the commenter’s State addresses and covers many of the requirements outlined in proposed §600.9. The commenter noted that many of the State laws are enforced by the State’s Attorney General and attempt to protect individuals from fraud and abuse in the State’s system of higher education. However, the commenter believed that it remained unclear whether the State would be required to create an oversight board for independent institutions like the commenter’s institution or would be subject to State licensure requirements via the State licensure agency. The commenter believed that either option would erode the autonomy of the commenter’s institution and add layers of bureaucracy to address issues currently covered by State and Federal laws.

One commenter suggested that proposed §600.9(a)(1) be amended to provide that authorization may be based on other documents issued by an appropriate State government agency and delete the reference to “state entity.” The commenter believed that the documents would affirm or convey the authority to the institution to operate educational programs beyond secondary education by duly enacted State legislation establishing an institution and defining its mission to provide such educational programs or by duly adopted State constitutional provisions assigning authority to operate institutions offering such educational programs.

Some commenters questioned whether there were any factors that a State may not consider when granting legal authorization. One commenter requested confirmation that under the proposed regulations authorization does not typically include State regulation of an institution’s operations nor does it include continual oversight. A few commenters expressed concern regarding the involvement of the States in authorization and that a State’s role may extend into defining, for example, curriculum, teaching methods, subject matter content, faculty qualifications, and learning outcomes. One commenter was concerned that proposed §600.9 would create fiscal constraints on an institution due to, for example, additional reporting requirements or would impose homogeneity upon institutions that would compromise their unique missions. One commenter stated that the Department does not have the authority to review issues of academic freedom or curriculum content.

One commenter wanted assurances that the Department does not intend to use the proposed regulations to strengthen State oversight of colleges beyond current practices. One commenter was concerned that States could exercise greater and more intrusive oversight of private colleges.

One commenter suggested that the Department grandfather all institutions currently operating under a State’s regulatory authority without a determination of its adequacy. Another indicated that private colleges and universities operating under a State-approved charter issued prior to 1972 are already subject to State regulation, even as they are exempt from State licensing. One commenter believed that the Department should accept State laws and regulations that can be reasonably interpreted as meeting the regulatory requirements.

Discussion: We agree with the commenters who were concerned that proposed §600.9 may be viewed as ambiguous in describing a minimal standard for establishing State legal authorization. We agree, in principle, with the State higher education official who suggested that proposed §600.9 should be amended to differentiate the
types of State authorizations for institutions to operate, but not based upon whether the source of the authorization is administrative or legislative. We believe the distinction for purposes of Federal programs is whether the legal entities are specifically established under State requirements as educational institutions or instead are established as business or nonprofit charitable organizations that may operate without being specifically established as educational institutions. We believe this clarification addresses the concerns of whether specific States’ requirements were compliant with § 600.9 as provided in these final regulations.

We continue to view State authorization to offer postsecondary educational programs as a substantive requirement where the State takes an active role in authorizing an institution to offer postsecondary education. This view means that a State may choose a number of ways to authorize an institution either as an educational institution or as a business or nonprofit charitable organization without specific authorization by the State to offer postsecondary educational programs. These legal means include provisions of a State’s constitution or law, State charter, or articles of incorporation that name the institution as established to offer postsecondary education. In addition, such an institution also may be subject to approval or licensure by State boards or State agencies that license or approve the institution to offer postsecondary education. If a legal entity is established by a State as a business or a nonprofit charitable organization and not specifically as an educational institution, it may be subject to approval or licensure by State boards or State agencies that license or approve the institution to offer postsecondary education. The key issue is whether the legal authorization the institution receives through these means is for the purpose of offering postsecondary education in the State.

In some instances, as one commenter noted, a State may have multiple State entities that must authorize an institution to offer postsecondary programs. In this circumstance, to comply with § 600.9, we would expect that the institution would demonstrate that it was authorized to offer postsecondary programs by all of the relevant State entities that conferred such authorizations to that type of institution.

We do not believe it is relevant that an institution may have been established prior to any State oversight. We are concerned that institutions currently be authorized by a State to offer postsecondary education, although we recognize that a State’s current approval for an institution may be based on historical facts. We therefore do not believe it is necessary to grandfather institutions currently operating under a State’s regulations or statutes nor are we making any determination of the adequacy of a State’s methods of authorizing postsecondary education apart from meeting the basic provisions of § 600.9 in these final regulations. If a private college or university is operating under a State-approved charter specifically authorizing the institution by name to offer postsecondary education in the State, a State may exempt an institution from any further State licensure process. The requirement to be named specifically in a State action also applies if the institution is exempt from State licensure based upon another condition, such as its accreditation by a nationally recognized accrediting agency or years in operation.

Further, these regulations only require changes where a State does not have any authorizing mechanisms for institutions other than an approval to operate as a business entity, or does not have a mechanism to review complaints against institutions. We anticipate that many States already meet these requirements, and will have time to make any necessary adjustments to meet the needs of the institutions.

With regard to the commenters who were concerned with the potential scope of a State’s authority, we note that the Department does not limit a State’s oversight of institutions, and only sets minimum requirements for institutions to show they are legally authorized by a State to provide educational programs above the secondary level. These regulations neither increase nor limit a State’s authority to authorize, approve, or license institutions operating in the State to offer postsecondary education. Further, nothing in these final regulations limits a State’s authority to revoke the authorization, approval, or license of such institutions. Section 600.9 ensures that an institution qualifies for Federal programs based on its authorization by the State to offer postsecondary education.

Changes: We are amending proposed § 600.9 to distinguish the type of State approvals that are acceptable for an institution to demonstrate that it is authorized by the State to offer educational programs beyond the secondary level.

An institution is legally authorized by the State if the State establishes the institution by name as an educational institution through a charter, statute, constitutional provision, or other action to operate educational programs beyond secondary education, including programs leading to a degree or certificate. If, in addition, the State has an applicable State approval or licensure process, the institution must also comply with that process to be considered legally authorized. However, an institution created by the State 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 upon the institution being in operation for at least 20 years.

If the legal entity is established by a State as a business or a nonprofit charitable organization and not specifically as an educational institution, the State must have a separate procedure to approve or license the entity by name to operate programs beyond secondary education, including programs leading to a degree or certificate. For an institution authorized under these circumstances, the State may not exempt the entity from the State’s approval or licensure requirements based on accreditation, years in operation, or other comparable exemption.

The following chart and examples illustrate the basic principles of amended § 600.9:
### MEETS STATE AUTHORIZATION REQUIREMENTS*

<table>
<thead>
<tr>
<th>Legal entity</th>
<th>Entity description</th>
<th>Approval or licensure process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational institution</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>Business</td>
<td>A for-profit entity established by the State on the basis of an authorization or license to conduct commerce or provide services.</td>
<td>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. An institution in this category may not be exempted from State approval or licensure based on accreditation, years in operation, or a comparable exemption.</td>
</tr>
<tr>
<td>Charitable organization</td>
<td>A nonprofit entity established by the State on the basis of an authorization or license for the public interest or common good.</td>
<td></td>
</tr>
</tbody>
</table>

*Notes:*
- 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.

**Examples**

**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 publicly 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 publicly 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 § 600.9(a)(1)(i) of these final regulations so long as the institution also meets any additional licensure requirements or approvals required by the State.

**Changes:** None.

**Comment:** Several commenters expressed concern that all institutions within a State could lose title IV, HEA program eligibility at once and that the regulations put students at risk of harm through something neither they nor the institution can control.

One commenter was concerned with how the Department would specifically assess State compliance with proposed § 600.9. Another commenter believed...
that the Department should accept State laws and regulations that can be reasonably interpreted as meeting the requirements of § 600.9 especially if State officials interpret their laws and regulations in such a manner.

One commenter requested that the Department explain how it would address currently enrolled students if a State is deemed not to provide sufficient oversight in accordance with Federal regulatory requirements. Another commenter asked how the Department will avoid such negative consequences as granting closed school loan discharges for large numbers of enrolled students. One commenter requested that the Department provide for seamless reinstatement of full institutional eligibility when a State meets all eligibility requirements after losing eligibility.

Discussion: We do not anticipate that all institutions in a State will lose title IV, HEA program assistance due to any State failing to provide authorization to its institutions under the regulations, because States may meet this requirement in a number of ways, and also with different ways for different types of institutions. If a State were to undergo a change that limited or removed a type of State approval that had previously been in place, it would generally relate to a particular set of institutions within a State. For example, a licensing agency for truck driving schools could lapse or be closed at a State Department of Transportation without providing another means of authorizing postsecondary vocational training, and the State could continue to be compliant for all other institutions in the State. It also seems likely that the State would consider alternate ways to provide State authorization for any institutions affected by such a change.

We believe that the provisions in amended § 600.9 are so basic that State compliance will be easily established for most institutions. The determination of whether an institution has acceptable State authorization for Federal program purposes will be made by the Department. We also note that the regulations permit a delayed effective date for this requirement under certain circumstances discussed below, and this delay will also limit the disruption to some institutions within a State.

If an institution ceased to qualify as an eligible institution because its State legal authorization was no longer compliant with § 600.9, the institution and its students would be subject to the requirements for loss of eligibility in subpart D of part 600 and an institution would also be subject to § 668.26 regarding the end of its participation in those programs. If an institution’s State legal authorization subsequently became compliant with amended § 600.9, the institution could then apply to the Department to resume participation in the title IV, HEA program.

Changes: None.

Comment: Several commenters were concerned that students may lose eligibility for title IV, HEA program funds if a State is not compliant with proposed § 600.9. Some commenters noted that States may have to take steps to comply, which may include making significant statutory changes, and the regulations therefore need to allow adequate time for such changes, reflecting the various State legislative calendars. In some cases, the commenters believed a State’s noncompliance would be because the State could no longer afford to meet the provisions of § 600.9. One commenter believed that alternative pathways should be allowed for meeting State authorization and that States that exempt or grant waivers from licensing should be considered to fulfill requirements of proposed § 600.9 and another questioned whether a State that is not in compliance would have an opportunity to cure perceived problems before all institutions operating in the State lost institutional eligibility.

Discussion: We recognize that a State may not already provide appropriate authorizations as required by § 600.9 for every type of institution within the State. However, we believe the framework in § 600.9 is sound and provides a State with different ways to meet these requirements. Unless a State provides at least this minimal level of review, we do not believe it should be considered as authorizing an institution to offer an education program beyond secondary education.

If a State is not compliant with § 600.9 for a type or sector of institutions in a State, we believe the State and affected institutions will create the necessary means of establishing legal authorization to offer postsecondary education in the State in accordance with amended § 600.9. However, in the event a State is unable to provide appropriate State authorizations to its institutions by the July 1, 2011 effective date of amended § 600.9(a) and (b), 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-extension of the effective date to July 1, 2013. As described in the section of the preamble entitled “Implementation Date of These Regulations,” 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.

Changes: None.

Comment: A few commenters requested that the Department identify, publish, and maintain a list of States that meet or do not meet the requirements. One commenter cited an analysis that estimated that 13 States would comply with the proposed regulations upon implementation; 6 States would clearly not be in compliance; and 37 States would likely have to amend, repeal, or otherwise modify their laws. One commenter requested data to be provided by the Department for each sector of postsecondary education, including how many States are out of compliance, how many institutions are within those States, and how many students are enrolled at those institutions.

Discussion: We do not believe that there is a need to publish a list of States that meet, or fail to meet the requirements. States generally employ more than one method of authorizing postsecondary education. For example, a State may authorize a private nonprofit university through issuing a charter to establish the university, another private nonprofit college through an act of the State legislature, a for-profit business school through a State postsecondary education licensing agency, a cosmetology school through a State cosmetology board, and a truck-driving school through the State’s Department of Transportation. We believe that an institution of whatever sector and type already is aware of the appropriate State authorizing method or methods that would establish the institution’s legal authorization to offer postsecondary education and publication of any list is unnecessary.

Changes: None.

Comment: One commenter expressed concern with whether a State must regulate the activities of institutions and exercise continual oversight over institutions.

Discussion: While a State must have a process to handle student complaints under amended § 600.9(a) for all students, institutions except Federal and tribal institutions, the regulations do not require, nor do they prohibit, any
process that would lead to continual oversight by a State.

Comment: Several commenters expressed concern regarding the financial burden on the States to make changes in State laws and the amount of time that would be needed to make the necessary changes. Commenters feared that the States would most likely have to reduce further State tax subsidies provided to public institutions. As a result, costs will be increased for students at public institutions to cover lost revenues and increase costs for the title IV, HEA programs. One commenter stated that schools could delay progress of degree completion at State funded universities because they will be forced to reduce offerings.

Discussion: We do not believe that it would impose an undue financial burden on States to comply with the provisions in § 600.9. In most instances we believe that a State will already be compliant for most institutions in the State or will need to make minimal changes to come into compliance. Thus, we do not agree with commenters who believed that the regulations would generally impact the funding of public institutions in a State or would necessitate a reduction in the offerings at public institutions.

Changes: None.

Exemptions: Accreditation and Years of Operation

Comment: Several commenters supported the existing practice by which a State bases an institution’s legal authorization to offer postsecondary education upon its accreditation by a nationally recognized accrediting agency, i.e., an accrediting agency recognized by the Secretary. The commenters believed that proposed § 600.9 should be revised or clarified to permit existing practices allowing exemption by accreditation. Another commenter indicated that several States have exempted accredited institutions from State oversight unless those institutions run afoul of their accreditors’ requirements. One commenter believed that proposed § 600.9 would require the creation of unnecessary, duplicative, and unaffordable new bureaucracies, and recommended that its State should continue its partial reliance on nationally recognized accrediting agencies. Another commenter believed it appropriate that a State delegate some or all of its licensure function to a nationally recognized accrediting agency provided that the State enters into a written agreement with the accrediting agency.

One commenter stated that the Department should eliminate the ambiguity about how much a State may rely on accrediting agencies. Several commenters stated that the regulations are confusing as to which exemptions are permissible and which are not. One commenter believed that the Department should make it clear that although a State is not prohibited from relying on accrediting agencies for quality assessments, the essential duties of State authorization cannot be collapsed into the separate requirement for accreditation.

Some commenters noted that an institution’s legal authorization may be based on a minimum number of years that an institution has been operating. One of the commenters cited a minimum number of years used by States that ranged as low as 10 years of operation while two other commenters noted that institutions had been exempted in their State because they had been in operation over 100 years and were accredited. The commenters believed that the Department should consider it acceptable for a State to rely on the number of years an institution has been operating.

Some commenters did not think that States should be allowed to defer authorization to accrediting agencies. One of these commenters believed that basing State authorization on accreditation was contrary to law. One commenter believed that existing law makes clear that institutional eligibility for title IV, HEA programs is based on the Triad of accreditation, State authorization, and the Federal requirements for administrative capability and financial responsibility. As a result the commenter believed that the extent to which States may rely on accrediting agencies should be clear and limited. Along the same lines, another commenter believed strongly that accrediting agencies should never be allowed to grant authorization to operate in a State, and that further clarifications about the ways in which accrediting agencies may substitute for State agencies is necessary. One commenter encouraged the Department to study more carefully the role of State entities and accreditation agencies. Another commenter believed that relying on accrediting agencies to be surrogates for State authorization is inappropriate and should not be the sole determinant for authorization. One commenter stated that accreditation may not be accepted as a sufficient basis for granting or continuing authorization to operate and that authorization process must be independent of any accreditation process or decision.

We also agree with the commenters that States should be allowed to defer authorization to accrediting agencies, we believe that such a practice would be permissible so long as it does not eliminate State oversight and clearly distinguishes the responsibilities of the State and accreditor under such an arrangement. We also do not agree that additional study is needed of the roles of State entities and accrediting agencies as we believe these relationships are well understood.

We believe that accreditation may be used to exempt an institution from other State approval or licensing requirements if the entity has been established by name as an educational institution through a charter, statute, constitutional provision, or other action issued by an appropriate State entity to operate educational programs beyond secondary education, including programs leading to a degree or certificate. For such an educational institution, a State could rely on accreditation to exempt the institution from further approval or licensing requirements, but could not do so based upon a preaccredited or candidacy status.

We also agree with the commenters that States may utilize an institution’s years in operation to exempt it from State licensure requirements, but only, as with accreditation, for a legal entity that the State establishes as an educational institution authorized to offer postsecondary education.

However, we believe that there should be a minimum standard for allowing years of operation to exempt an institution to ensure that this exemption is not set to a short period of time that would not provide a historical basis to
evaluate the institution. Based on our consideration of the public comment, we believe that standard should be at least 20 years of operation. As in the case of accreditation, such an exemption could only be used if the State has established the entity as an educational institution. As noted above, a State may use a separate process to recognize by name the entity as an educational institution that offers programs beyond the secondary level if an institution was not authorized by name to offer educational programs in its approval as a legal entity to operate by name. We note that a State may also base a licensing exemption on a combination of accreditation and the number of years an institution has been in operation, as long as the State requirements meet or exceed at least one of the two minimum requirements, that is, an institution must be fully accredited or must have been operating for at least 20 years.

If an institution is established as a legal entity to operate as a business or charitable organization but lacks authorization to operate by name as an educational institution that offers postsecondary education, the institution may not be exempted from State licensing or approval based on accreditation, years in operation, or comparable exemption from State licensure or approval.

We do not believe that permitting such exemptions from State licensing requirements will distort the oversight roles of the State and an accrediting agency. We believe these comments are based on a misunderstanding of the role of a State agency recognized by the Secretary under 34 CFR part 603 as a reliable authority regarding the quality of public postsecondary vocational education in its State. Public postsecondary vocational institutions are approved by these agencies in lieu of accreditation by a nationally recognized accrediting agency. As noted in the comments, there are overlapping interests among all members of the Triad in ensuring that an educational institution is operating soundly and serving its students, and a State may establish licensing requirements that rely upon accreditation in some circumstances.

If an institution’s State and accrediting agency have different standards, there is no conflict for purposes of the institution’s legal authorization by the State, as the institution must establish its legal authorization in accordance with the State’s requirements.

Changes: We have amended proposed §600.9 to provide that, if an institution is an entity that is established by name as an educational institution by the State and the State further requires compliance with applicable State approval or licensure requirements for the institution to qualify as legally authorized by the State for Federal program purposes, the State may exempt the institution by name from the 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. If an institution is established by a State as a business or a nonprofit charitable organization, for the institution to qualify as legally authorized by the State for Federal program purposes, the State may not exempt the institution from the State’s approval or licensure requirements based on accreditation, years in operation, or other comparable exemption.

Complaints

Comment: An association of State higher education officials recommended that the States, through their respective agencies or attorneys general, should retain the primary role and responsibility for student consumer protection against fraudulent or abusive practices by postsecondary institutions. The commenter stated that handling complaints is not a role that can or should be delegated to nongovernmental agencies such as accrediting agencies, nor should it be centralized in the Federal Government. Another commenter asked about the role of State enforcement of laws unrelated to postsecondary institutions licensure such as a law related to fraud or false advertising. A few commenters asked for clarification as to whether State consumer protection agencies or State Attorneys General could retain the primary role for student consumer protection and handling student complaints. One commenter believed that the proposed regulations failed to address circumstances where the State licensure or approval agency and the agency handling complaints are different agencies.

Several commenters recommended that the Department allow States to rely on accrediting agencies but require a memorandum of understanding with the accrediting association that would include, at a minimum, procedures for periodic reports on actions taken by the association and procedures for handling student complaints. One commenter strongly believed that accrediting agencies should never be allowed to handle complaints in lieu of the State.

One commenter expressed concern that the Department is requiring States to serve as an additional check on institutional integrity, but believed that there would be no check on the State.

One commenter from an accrediting agency believed that proposed §600.9(b)(3) is an unnecessary use of limited public resources, is impractical, and would be impractical and chaotic to administer. Several other commenters expressed concern that requiring States to act on complaints would be duplicative because 34 CFR 602.23 already requires accrediting agencies to have a process to respond to complaints regarding their accredited institutions. One commenter requested that the Department exempt public postsecondary institutions from the complaint processes. Otherwise, the commenter asked that the Department clarify that a State is permitted to determine whether an institution within its borders is sufficiently accountable through institutional complaint and sanctioning processes. One commenter requested that the Department clarify that student complaints unrelated to violations of State or Federal law are not subject to State process or reviewing and acting on State laws, instead the commenter believed that student complaints are appropriately addressed at the institutional level. A commenter questioned how the requirements for State review of complaints relate to student complaints about day-to-day instruction or operations and whether the potential review process represents an expansion of State authority. The commenter believes that student complaints that are unrelated to violations of State or Federal law are appropriately addressed at the institutional level and thus not subject to the process for review of complaints included as part of proposed §600.9.

One commenter suggested that the Department’s Office of Ombudsman respond to student complaints as an alternative if a State does not have a process for complaints.

Discussion: We agree with the commenters who believed that the States should retain the primary role and responsibility for student consumer protection against fraudulent or abusive practices by some postsecondary institutions. For an institution to be considered to be legally authorized to offer postsecondary programs, a State would be expected to handle complaints regarding not only laws related to licensure and approval to operate but also any other State laws including, for example, laws related to fraud or false advertising. We agree that a State may fulfill this role through a State agency or
Changes: We have amended proposed § 668.43(b) to provide that an institution must make available to a student or prospective student 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.

Comment: One commenter believed that proposed § 668.43(b) under which an institution must provide to students and prospective students the contact information for filing complaints with the institution’s State approval or licensing entity should make allowance for situations in which a State has no process for complaints, or defers to the accrediting agency to receive and resolve complaints. Another commenter believed that, in the case of distance education, the institution should be responsible for responding to complaints. Instead of providing students and prospective students, under proposed § 668.43(b), the contact information for filing complaints with the institution’s accrediting agency and State approval or licensing entity, the commenter recommended that the institution provide students with the institution’s name, location, and Web site to file complaints.

Discussion: We do not agree that proposed § 668.43(b) needs to make allowance for an institution in a State without a process for complaints, since every State is charged with enforcing its own laws and no institution is exempt from complying with State laws. If no complaint process existed, the institution would not be considered to be legally authorized. With respect to an institution offering distance education programs, the institution must provide, under § 668.43(b), not only the contact information for the State or States in which it is physically located, but also the contact information for States in which it provides distance education to the extent that the State has any licensure or approval processes for an institution outside the State providing distance education in the State.

Changes: None.

Reciprocity and Distance Education

Comment: In general, commenters expressed concerns regarding legal authorization by a State in circumstances where an institution is physically located across State lines as well as when an institution is operating in another State from its physical location through distance education or online delivery. One commenter urged the Department to include clarifying language regarding a State’s ability to rely on other States’ authorization in the final regulation rather than in the preamble. Several commenters requested that the Department limit the State authorization requirement in § 600.9 to the State in which the institution is physically located. One commenter believed that a State should only be allowed to rely on another State’s determination if the school has no physical presence in the State and the other State’s laws, authority, and oversight are at least as protective of students and taxpayers. One commenter asked whether the phrase “the State in which the institution operates” is the same as “where the institution is domiciled”. The commenter asked for clarification of the meaning of “operate” including whether it means where online students are located, where student recruiting occurs, where an instructor is located, or where fundraising activity is undertaken. One commenter requested that the Department clarify and affirm that reciprocity agreements that exist between States with respect to public institutions operating campuses or programs in multiple States are not impacted by these regulations. Another commenter believed that the Department should issue regulations rather than merely provide in the preamble of the NPRM that a State is allowed to enter into an agreement with another State. One commenter asked whether an institution that operates in more than one State can rely on an authorization from a State that does not meet the authorization requirements. One commenter urged the Department to clarify that States may rely on the authorization by other States, particularly as it relates to distance education. One commenter stated that the proposed regulations would be highly problematic for students who transfer between different States. Another commenter feared that large proprietary schools that are regional or national in scope would likely lobby States to turn over their oversight to another State where laws, regulations, and oversight are more lax. Another commenter was concerned that for-profit institutions may lobby a State to relinquish its responsibilities to a State of those institutions’ choosing. This situation could result in a State with little regulation that is home to a large for-profit institution actually controlling policies in many States where the corporation does business. One commenter suggested that if an institution is not physically located in a State, the State could enter into an agreement with other States where the
institution does have physical locations to rely on the information the other States relied on in granting authority. In this case, the commenter recommended that the oversight be at least as protective of students and the public as those of the State, and the State should consider any relevant information it receives from other sources. However, the commenter thought the State should retain authority to take independent adverse action including revoking the authority to offer postsecondary programs in the State. Another commenter expressed concern that the proposed regulations would confuse and burden the States and institutions because they are not clear regarding whether a State can continue to rely on the authorization of another State. The commenter believed that without clarification, an institution that offers education to students located in other States might be needlessly burdened with seeking authorization from each of those States. Another commenter expressed concern that the proposed regulations could potentially require an institution offering distance education courses in 50 different States to obtain authorization in each State, which would be an administrative burden that could result in increased tuition fees for students. Another commenter stated that during the negotiations, the Department indicated it was not its intent to require authorization in every State. Therefore, the commenter urged the Department to include this policy expressly in the final regulations.

Discussion: We agree with the commenters that further clarification is needed regarding legal authorization across State lines in relation to reciprocity between States and to distance education and correspondence study. In making these clarifications, we are in no way preempting any State laws, regulations, or other requirements established by any State regarding reciprocal agreements, distance education, or correspondence study. To demonstrate that an institution is legally authorized to operate in another State in which it has a physical presence or is otherwise subject to State approval or licensure, the institution must demonstrate that it is legally authorized by the other State in accordance with § 600.9. We continue to believe that we do not need to regulate or specifically authorize reciprocal agreements. If both States provide authorizations for institutions that comply with § 600.9 and they have an agreement to recognize each other’s authorization, we would consider the institution legally authorized in both States as long as the institution provided appropriate documentation of authorization from the home State and of the reciprocal agreement. In addition, the institution must provide the complaint contact information under 34 CFR 668.43(b) for both States.

If an institution is offering postsecondary education through distance or correspondence education in a State in which it is not physically located, the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document upon request from the Department that it has such State approval. A public institution is considered to comply with § 600.9 to the extent it is operating in its home State. If it is operating in another State, we would expect it to comply with the requirements, if any, the other State considers applicable with any reciprocal agreement between the States that may be applicable.

Changes: We have revised § 600.9 to clarify in paragraph (c) that, if an institution is offering postsecondary education through distance or correspondence education to students in a State in which it is not physically located, the institution must meet any State requirements for it to be legally offering postsecondary distance or correspondence education in that State. We are further providing that an institution must be able to document upon request by the Department that it has the applicable State approval.

State Institutions

Comment: Many commenters requested that public institutions be exempted from the proposed regulations. They were concerned that requiring States to reexamine their State authorization for public colleges would not be a good use of resources. One commenter requested that the Department explicitly state that public institutions are by definition authorized to operate under § 600.9 to the extent that they are by definition compliant with § 600.9(a)(1)(i), and no exemption from the provisions of § 600.9 of these final regulations is necessary. We do not agree that State institutions should be exempt from the requirement that a State have a process to receive and appropriately act on complaints concerning an institution. We believe that students, their families, and the public should have a process to lodge complaints that is independent of an institution.

Changes: None.

Religious Institutions

Comment: Two commenters requested a definition of the term religious institution. One of these commenters felt strongly that a religious exemption must be tailored to prevent loopholes for abuse but needed to offer an alternative for religious institutions so that changes to a State’s constitution would not be necessary. The commenter suggested that a religious institution should be exempted if the institution is owned, controlled, operated, and maintained by a religious organization lawfully operating as a nonprofit religious corporation pursuant to the Internal Revenue Code and meets the following requirements:

- Instruction is limited to the principles of that religious organization.
- A diploma or degree awarded by the institution is limited to evidence of completion of that education.
- The institution offers degrees and diplomas only in the beliefs and practices of the church, religious denomination, or religious organization.
- The institution does not award degrees in any area of physical science.
- Any degree or diploma granted by the institution contains on its face, in the written description of the title of the degree being conferred, a reference to the theological or religious aspect of the degree’s subject area.
- A degree awarded by the institution reflects the nature of the degree title, such as “associate of religious studies,” “master of divinity,” or “doctor of divinity.”

Discussion: We agree with the commenters that a definition of a religious institution is needed to clarify the applicability of a religious exemption. We also agree that a modification to the proposed regulations is needed to allow a State to provide an exemption to religious institutions without requiring the State to change its constitution.

Changes: We 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 the exemption by law, or exempt under the State’s constitution. We have also included a definition of a religious institution, which provides 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. We note, however, that a religious institution is still subject to the requirement in §600.9(a)(1) of these final regulations that, for the institution to be considered to be legally authorized in the State, the State must have a process to review and appropriately act on complaints concerning the institution.

**Tribal Institutions**

*Comment:* One commenter suggested the Department should exempt from State authorization any institution established and operated by tribal governments. Three commenters stated that the Department should recognize that tribal institutions would not be subject to State oversight but instead the tribe would exercise oversight. One of those commenters suggested amending the regulations to add “tribal authority” wherever State authority is mentioned in the proposed regulations.

*Discussion:* We agree that tribal institutions are not subject to State oversight for institutions operating within tribal lands. Proposed §600.9(a)(2) provided that a tribal college would be considered to meet the basic provisions of proposed §600.9(a)(1) if it was authorized to offer educational programs beyond secondary education by an Indian tribe as defined in 25 U.S.C. 1802(2). However, proposed §600.9(b), could be read as inappropriately making a tribal institution subject to adverse actions by the State and a State process for handling student complaints. We did not intend to make a tribal institution subject to any State process for handling complaints and have clarified the language in §600.9. If a tribal college is located outside tribal lands within a State, or has a physical presence or offers programs to students that are located outside tribal lands in a State, the tribal college must demonstrate that it has the applicable State approvals needed in those circumstances.

**Changes:** Section 600.9 has been revised to clarify the status of tribal institutions. As noted elsewhere in this preamble, 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.