

Foreign location authorization rule appears on schedule for July 1 effective date

March 15, 2018

Although Congress and the U.S. Department of Education (ED) have taken action to [repeal](#), [delay](#), or [amend](#) certain regulations promulgated during the Obama Administration, they have so far left untouched the [final rule](#) on state authorization for distance education and foreign country authorization for certain locations outside the United States. *See* 81 Fed. Reg. 92,232 (Dec. 19, 2016). The regulations, which are scheduled to go into effect on July 1, 2018, include both authorization requirements and disclosure obligations for institutions that participate in federal student financial aid programs under Title IV of the Higher Education Act, as amended (Title IV).

This alert addresses key aspects of the final regulations related to authorization of foreign additional locations and branch campuses. We addressed the distance education portion of the final rule in a previous [education alert](#).

Overview of the final rule

In the preamble to the [proposed rule](#), ED noted that according to data in its Postsecondary Education Participation System (PEPS), 80 U.S. postsecondary education institutions (35 public, 42 nonprofit, and three for-profit) had additional locations in 60 other countries. 81 Fed. Reg. 48,598, 48,612 (July 25, 2016). In light of that growing presence abroad, ED concluded that just as it expects Title IV participants to comply with domestic state authorization requirements as a condition of Title IV eligibility, they should do so with respect to authorization for foreign locations. *Id.* at 92,241, 92,242.

Codified at 34 C.F.R. § 600.9(d), the final rule requires a Title IV-participating institution to have legal authorization from each foreign country for each additional location or branch campus that the institution operates there. Institutions also must disclose information about the home-state complaint process to enrolled and prospective students at those locations. Certain additional requirements may apply depending on the location type or the portion of the program offered abroad.

ED clarified in the preamble to the final rule that the regulations do not apply to: (a) study abroad or other arrangements with foreign institutions whereby a student attends a separate foreign institution for less than half of an educational program; (b) foreign institutions; (c) programs for which the domestic institution does not seek Title IV program eligibility; and (d) distance

education programs offered by the domestic institution to Title IV-eligible students located in foreign countries. 81 Fed. Reg. at 92,240.

Branch campuses, additional locations, and education programs

The final rule and other ED regulations distinguish in some respects between additional locations and branch campuses. Under ED's definitions additional locations are far more common than branch campuses. These phrases are terms of art, as are "educational program" and "foreign". These concepts, as defined by ED, inform the requirements of the final rule. We have included the pertinent definitions at the end of this alert.

Foreign additional locations

For foreign additional locations, the final rule's authorization requirements depend on the percentage of the educational program offered at the foreign location:

- If an institution offers (or will offer) less than 50 percent of an educational program at an additional location in a foreign country, the rule requires the institution to "meet the requirements for legal authorization in that foreign country as the foreign country may establish." 34 C.F.R. § 600.9(d)(2).
- If an institution offers (or will offer) 50 percent or more of an educational program at an additional location in a foreign country, then the rule requires more (*See id.* § 600.9(d)(1)):
 - The foreign additional location must
 1. be "legally authorized by an appropriate government authority to operate in the country where the additional location . . . is physically located," except such requirement does not apply to U.S. military bases, facilities, or otherwise exempt areas; and
 2. meet "any additional requirements for legal authorization in the foreign country."
 - The institution must
 1. provide documentation of such legal authorization, upon ED's request;
 - The final rule's preamble indicated that such documentation must demonstrate "that the government authority for the foreign country is aware that the additional location . . . provides postsecondary education and does not object to those activities." ED declined to require specific formatting or language. 81 Fed. Reg. at 92,241.
 2. obtain approval from its accreditor for the additional location, as applicable; and
 3. make reports concerning its foreign additional locations to its home state at least annually and comply with any limitations that the state places on the location.
 - ED noted in the final rule's preamble that temporary sites or rented spaces at which the institution offers 50 percent or more of an educational program may qualify as an additional location. *See id.* at 92,241.

Foreign branch campuses

Under the final rule, institutions with foreign branch campuses are subject to the same authorization requirements as institutions with foreign additional locations at which 50 percent or more of an educational program is offered.

Requirements applicable to both foreign additional locations and branch campuses

- *Diligence*: In the final rule's preamble, ED emphasized that institutions should do their own diligence to ascertain the authorization requirements of any foreign country in which the institution operates an additional location or branch campus and document all efforts to obtain foreign authorization. *Id.* at 92,241–43.
- *Home-state authorization*: ED confirmed in the final rule's preamble that each state may determine the extent to which it will oversee foreign locations of institutions based in the state. *Id.* at 92,244. However, ED will not consider a foreign additional location or branch campus to be legally authorized by the institution's home state if the state excludes the additional location or branch campus from authorization. *See* 34 C.F.R. § 600.9(d)(4).
- *Disclosures*: An institution with an additional location or branch campus located in a foreign country must disclose its home-state complaint process to the foreign location's enrolled and prospective students. *Id.* § 600.9(d)(3). ED added in the final rule's preamble that the institution is required to make such disclosures only to the Title-IV-eligible students at that foreign location. *See* 81 Fed. Reg. at 92,244.

Compliance steps

The Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (the PROSPER Act), the Higher Education Act reauthorization bill reported from the House Committee on Education and the Workforce in December 2017, would repeal the Obama Administration's state authorization rules as to both distance education and foreign location authorization. In the absence of legislative action to alter the rule or ED action to delay the effective date, however, institutions should take steps to comply with the final rule by the July 1 effective date.

With respect to foreign locations, such steps may include:

- identifying the institution's existing and planned foreign additional locations and branch campuses, if any;
- determining whether the institution offers or intends to offer Title IV aid to otherwise eligible students at such locations and branch campuses;
- if so:
 - with respect to additional locations, determining at which locations the institution offers less than 50 percent of a program and at which locations the institution offers 50 percent or more of a program;

- determining whether the institution has given or needs to give notice to or obtain approval from ED with respect to the foreign additional location or branch campus, consistent with ED requirements under 34 C.F.R. § 600.10(b)(3);
- in consultation with in-country counsel as needed, determining whether the institution requires authorization from its home state, its accreditor, or foreign agencies for such locations and, if so, whether the institution has such authorization(s);
- if the institution needs, but does not have such authorization(s), taking steps to obtain them and keeping records of such efforts;
- confirming that the institution’s home state has not or would not exclude the foreign additional location or branch campus from the institution’s authorization; and
- disclosing the institution’s home-state complaint process to enrolled and prospective students at the foreign location or branch campus.

Institutions may want to take some of these steps as a matter of compliance with foreign law even if the institution does not offer or intend to offer Title IV aid to otherwise eligible students at foreign locations.

In the preamble to the final rule, ED indicated that an institution must obtain required foreign authorization before enrolling Title IV-eligible students at the foreign location. If such students are already enrolled at the location, the institution must explain to them the potential loss of Title IV aid if the institution does not timely receive any required foreign authorization:

- “The Department believes that locations should meet the legal requirements where they are located in order to provide educational programs to students receiving Title IV funds. . . . An institution that would be unable to meet the requirements of a foreign country or that cannot show that it has received authorization to operate in that country would not have the ability to offer Title IV financial aid programs to students enrolled at those additional locations.”
- “An institution must receive authorization from a foreign government prior to enrolling title IV-eligible students who would take more than 50 percent of a program at an additional location or branch campus. An institution should plan ahead for a country’s authorization process before enrolling title IV-eligible students so that it is compliant with the authorization requirements. For institutions that have enrolled students prior to these regulations’ effective date, we encourage the institution to provide information to students about the potential loss of title IV aid for programs that do not receive foreign authorization when these regulations go into effect. If an institution is advertising a program and recruiting students for a program that meets this 50 percent threshold, the Department believes that the institution must have obtained authorization from a foreign government for that additional location before enrolling any title IV-eligible students in that program.”

81 Fed. Reg. at 92,241–42.

Terms of art

ED defines “branch campus”, “additional location”, “educational program”, and “foreign” as follows:

- a branch campus, as defined in 34 C.F.R. § 600.2, is “a location of an institution that is geographically apart and independent of the main campus of the institution.” ED considers a location to be “independent” if the location:
 - is permanent in nature;
 - offers courses in educational programs leading to a degree, certificate, or other recognized educational credential;
 - has its own faculty and administrative or supervisory organization; and
 - has its own budgetary and hiring authority.
- an additional location, on the other hand, is “any location of an institution that is geographically apart from the main campus and does not meet the definition of a branch campus.” 81 Fed. Reg. at 92,241.
- an educational program, as defined in 34. C.F.R. § 600.2, is “a legally authorized postsecondary program of organized instruction or study” that:
 - leads to an academic, professional, or vocational degree, or certificate, or other recognized educational credential, or is a comprehensive transition and postsecondary program, as described in 34 CFR part 668, subpart O; and
 - may, in lieu of credit hours or clock hours as a measure of student learning, utilize direct assessment of student learning, or recognize the direct assessment of student learning by others, if such assessment is consistent with the accreditation of the institution or program utilizing the results of the assessment and with the provisions of 34 C.F.R. § 668.10.

The definition goes on to say that the Secretary “does not consider that an institution provides an educational program if the institution does not provide instruction itself (including a course of independent study) but merely gives credit for one or more of the following: instruction provided by other institutions or schools; examinations or direct assessments provided by agencies or organizations; or other accomplishments such as ‘life experience.’”

- Under ED regulations a “foreign institution” is an institution that is not located in a State. *Id.* § 600.52. A “State” includes a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. *Id.* § 600.2.

We are available to respond to questions.

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