

Third time's the charm? ED delays distance education rule

May 14, 2018

On May 9, 2018, the Office of Management and Budget (OMB) issued the Spring 2018 Agency Rule List, which indicates that the U.S. Department of Education (ED) has proposed a two-year delay of the [distance education rule](#) that was set to take effect on July 1, 2018 (*see OMB posting*). OMB also indicated ED's intention to conduct a further [negotiated rulemaking](#) on state authorization issues, including any subsequent iteration of a distance education rule.

Background

The rule – which we discussed in a [previous client alert](#) – would have required an institution offering distance education programs or correspondence courses to be authorized in all states from which it enrolls students if the institution is not physically located in the state and such authorization is required by the state. An institution could have satisfied the authorization requirement through participation in a state authorization reciprocity agreement. The requirements of the distance education rule would have affected an institution's ability to disburse federal student financial aid (Title IV) funds to students on a state-by-state basis. The rule also would have imposed substantial new disclosure requirements on institutions, particularly as to professional licensure programs. We discussed the [foreign location portion](#) of the authorization rule in a separate client alert.

ED's action represents the latest chapter in the notably long and tortured history of state authorization regulation.

- Distance education rules were first promulgated as part of ED's [program integrity rule package](#) in 2010.
- The original distance education rule was [struck down](#) in 2011 by a federal court on procedural grounds (failure to provide adequate notice), a decision subsequently upheld on appeal.
- ED conducted a negotiated rulemaking in 2014 to consider a replacement rule, but no consensus was reached. Instead, ED's approach was widely criticized, leading then-Undersecretary Ted Mitchell to “pause” the proceedings.
- Ultimately a proposed rule was drafted, but it was not until December 2016 – the very end of the Obama administration – that a final rule was adopted.

Given the distance education rule's controversial history and the year and a half lapse between promulgation of the rule and its effective date, this further delay is not unexpected.

In addition to concerns about the additional, potentially burdensome requirements on both institutions and states, the distance education rule has been criticized for being unclear and overly broad in some respects, and for creating unnecessary inconsistencies with the [National Council for State Authorization Reciprocity Agreement](#) (NC-SARA, commonly known as SARA). While it remains to be seen what the Trump administration will do next, it seems likely that a more streamlined rule will ultimately emerge. However, ED's action may also trigger another lawsuit by state attorneys general and consumer advocates, many of whom participated in the latest rulemaking process.

Looking ahead

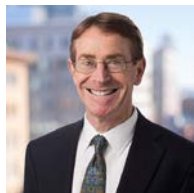
So, what does ED's notice mean as a practical matter? The short answer: not much. Here's why.

- **SARA.** A federal distance education rule, while obviously very important, is no longer the focus of most institutions' compliance efforts. Indeed, in some ways ED's action highlights how much has changed since the 2010 program integrity rule package. Many institutions that offer distance education programs are now members of the SARA compact, which has undercut the need for having a federal rule at all. And since virtually all states are members of the SARA compact, institutions outside of California are not as worried about obtaining the necessary state authorization for online programs. Compliance with SARA requirements – particularly its requirements to disclose any prerequisites for professional licensure programs in the states where such programs are offered – is now a higher priority for most institutions than worrying about the fate of the latest Title IV rules.
- **Active state regulators.** State education agencies and state attorneys general are now more vigilant in enforcing state law. In addition, in many cases states have moved away from using “physical presence” as the trigger for state authorization requirements. In the majority of states, any online program must now be authorized, which is still challenging for California institutions and any other institutions not covered by SARA. The “Wild West” of the mid-2000s is clearly long gone (at least in the United States), and in this respect the Obama administration largely succeeded in its goals. Nowadays, careless marketing strategies, especially an institution's failure to provide adequate disclosures to students about the nature of their educational programs, will likely lead to liability under state law regardless of what federal rule is in place.
- **Other federal rules and accreditation standards.** Remember too that while this particular rule is in abeyance, many other federal rules relevant to distance education – like ED's misrepresentation rules, federally-required consumer complaint disclosures, and the borrower defense to repayment rule – are all still in place. Plus, ED career staff has long taken the position that a state authorization requirement for online programs is implied under the Higher Education Act even without a formal rule. Finally, many accreditors now require institutions to demonstrate they have all necessary state approvals.

Hopefully, the third time will prove to be the charm, and ED will strike the right balance in its state authorization rules. In the meantime, we advise clients to take the long view: maintaining compliance with state law is the cost of doing business in the online education field.

We are available to respond to questions.

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