

Once Again, Implementation of the Distance Education Rule Is Delayed – This Time to 2020

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Almost eight years after it first proposed the rule, the Department of Education [announced](#) today that it will delay the effective date of the [state authorization for distance education](#) rule from July 1, 2018, to July 1, 2020. This is the third delay of a major education regulation issued under the Obama administration and is intended to allow time to conduct a negotiated rulemaking and revise the rule.

The delay applies to the entire rule, including the requirement that institutions obtain state authorization for distance education programs in any state that requires it, the requirement to obtain authorization for foreign locations and the lengthy disclosures surrounding professional licensure programs, among others.

The department cites two letters it received in February – one from the American Council on Education and one from the Western Interstate Commission on Higher Education, the National Council for State Authorization Reciprocity Agreements and the Distance Education Accrediting Commission – as the basis for seeking additional time to reconsider the rule. The letters raised concerns about the rule's requirement that states have an adequate complaint process, confusion among institutions over how to determine and track a student's state of residency and a lack of clarity as to the content and format of the required disclosures. In its announcement, the department stated that these issues are too substantive to be handled through nonbinding guidance without the input of negotiators and that there is not enough time for a full negotiated rulemaking before the rule's July 1, 2018, effective date. The department also argued that the delay would benefit students, because schools will be able to offer online programs this summer that they may have otherwise canceled to avoid the penalties of failing to come into compliance with the rule.

The administration's prior two regulatory delays – of the [gainful employment](#) and [borrower defense to repayment](#) regulations – are both the subject of procedural lawsuits from more than a dozen state attorneys general, who argue that the delays were improper and should have been effected through a negotiated rulemaking rather than simply through a Federal Register announcement. Although the distance education rule has not raised the same concerns as the gainful employment and borrower defense rules, a lawsuit objecting to the delay remains a possibility and may impact the department's implementation of the delay.

It is critical to recognize that the delay of the *federal* distance education rule has nothing to do with the legal obligation of every provider to comply with *state* law licensing and disclosure requirements. Institutions that participate in SARA and only offer online courses in other states must still make the disclosures required by SARA, including those that relate to professional licensure. Non-SARA institutions (including those that are not subject to federal law because they do not participate in the Title IV programs) must comply with the requirements of each state in which they enroll students and may face severe state penalties for failing to do so. And, every institution that has an on-the-ground presence in a state must abide by that state's licensure requirements.

Finally, it is important to remember that although the department has delayed its specific disclosure requirements under the proposed rule, failing to accurately disclose consumer-sensitive information can lead to misrepresentation claims and litigation, either by a state AG or privately.

If you have questions about your obligations under existing state licensing laws, please contact us. Please visit our [State Authorization](#) page for more information about our advisory service.

Nancy Anderson focuses on regulatory issues affecting higher education institutions, including compliance with federal, state and accrediting agency requirements.

Paul Thompson counsels schools and technology companies that provide services to schools on regulatory challenges in the education sector.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

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