

Memorandum

TO: Ralph Wolff, Barbara Beno
FROM: Laurence W. Kessenick, Daniel I. Zacharia
DATE: June 30, 2010
RE: State by State Analysis (34 C.F.R. § 600.9)

This memorandum is our response to your request that we evaluate the impact on the State licensure schemes of the 50 States of a regulation, proposed by the U.S. Department of Education (“DOE”), identified as 34 C.F.R. §600.9 in the Federal Register, dated June 18, 2010 (the “Proposed Regulation”).

Existing federal law requires that, as a condition for eligibility for Title IV funding, private postsecondary institutions are legally authorized to operate within the States in which they are issuing degrees. Under the Proposed Regulation, an institution will not be considered legally authorized unless all of the following four conditions exist: (1) the State in which the institution operates has a method of formally approving of the institution, whether by charter, license or other document issued by an appropriate State agency or entity;¹ (2) the authorization is specifically for programs beyond secondary education;² (3) the authorization is subject to adverse action by the State;³ and (4) the State reviews and acts on complaints concerning an institution and enforces applicable State laws.⁴ In order to study the potential impact of the Proposed Regulation on the educational statutory schemes of the 50 States, we attempted to measure each state’s licensure scheme against the above four conditions. To that end, we asked four questions:

- (1) Does the State have a system of laws that grant private postsecondary degree granting institutions approval or authority to operate in the State?
- (2) Is the approval or authority to operate granted by the State specifically for programs beyond secondary education?
- (3) Is the approval or authority to operate granted by the State subject to adverse action by the State?

¹ Subsection (a)(1) of the Proposed Regulation.

² Subsection (b)(1) of the Proposed Regulation.

³ Subsection (b)(2) of the Proposed Regulation.

⁴ Subsection (b)(3) of the Proposed Regulation.

(4) Does the State have a process to review and appropriately act on complaints concerning an institution and enforce applicable State laws?

We evaluated each State's laws under the premise that the laws would not comply with the Proposed Regulation if the answer to any of the four above questions is "no" with respect to a particular State's laws. If this is the case, the noncompliant State will either have to amend its existing laws, or adopt new laws, to bring itself into compliance with the Proposed Regulation. Otherwise, private postsecondary schools operating within those States face the prospect of losing their Title IV eligibility. In this regard, there is a large degree of ambiguity in the meaning and application of the terms of the Proposed Regulation. It is uncertain, for example, whether a State can rely on existing federal laws that relate to the accreditation of institutions receiving Title IV funds in fulfilling its "adverse action" responsibilities under condition (3), above. It is also uncertain whether State enforcement of laws unrelated to institutional licensure, such as common law fraud or false advertising laws, for example, could be used to meet condition (4), above. Accordingly, in many instances our evaluation could not determine with any certainty whether the laws will comply with the Proposed Regulation or not. In addition, please keep in mind that memo's conclusions with respect to each State were limited by time constraints, and that it is possible that State statutory or regulatory schemes beyond those identified below may impact the determination of the State's compliance with the Proposed Regulation. We do not practice law in 49 of the 50 states we evaluated. Therefore we cannot presume to be experts with respect to these States. It is quite possible that we missed relevant laws simply because we are not familiar with each States' overall statutory schemes.

The results of the State-by-State analysis are as follows:

- the laws of twelve (12) States will, in our opinion, comply with the Proposed Regulation;
- the laws of six (6) States will, in our opinion, clearly not comply with the Proposed Regulation;
- the laws of thirty two (32) States will probably not comply with the Proposed Regulation (*i.e.*, it is doubtful that the laws of these States will comply with one or more of the four criteria).

Based on these results, it is likely that a total of thirty eight (38) States will have to amend, repeal or otherwise modify their laws to comply with the Proposed Regulation. We provide the complete analysis, in alphabetical order, below:

1. Alabama. It is doubtful that Alabama law will comply with the Proposed Regulation. Although Alabama has a state licensure scheme, Alabama exempts schools from licensure on the basis of age or accreditation. Moreover, the law provides that such exemption "shall not be construed to constitute approval or endorsement by the State of Alabama for any purpose." (See Code of Ala. § 16-46-3. Contrast this with States that have exemptions from licensure schemes, but grant express approval on the grounds of

such exemption, such as California's Education Code § 94890.) Current law probably does not meet criteria 1, 2, and 4.

2. Alaska. Alaska law should comply with the Proposed Regulation. It has a state licensure scheme, which includes adverse actions, review of complaints and enforcement. The exemption for accredited schools is discretionary. (See Alaska Stat. § 14-48-010.) Current law probably meets all four criteria.
3. Arizona. Arizona law should comply with the Proposed Regulation. The current law requires that an institution must be licensed by the State. The State Board for Private Postsecondary Education has adequate review and enforcement capability. (See A.R.S. § 32-3001 *et seq.*) Current law probably meets all four criteria.
4. Arkansas. Arkansas law will comply with the Proposed Regulation. Through the Arkansas Higher Education Coordinating Board, the State has an adequate system for authorization, review and enforcement. (See A.C.A. § 6-61-301 *et seq.*) Current law meets all four criteria.
5. California. It is doubtful that California law will comply with the Proposed Regulation. Although California recently enacted the California Private Postsecondary Education Act of 2009 (Cal. Ed. Code § 94800 *et seq.*), and implementing regulations (5 C.C.R. § 70000 *et seq.*), it is unclear whether California would be deemed to have sufficient authority over WASC accredited institutions, which are exempt. Current probably meets criteria 1, 2, and 3, but probably not criterion 4.
6. Colorado. It is doubtful that Colorado law will comply with the Proposed Regulation. Colorado has a state licensing scheme that requires state authorization and contains review standards that possibly comply with the Proposed Regulation; however, the scheme includes an exemption for accredited institutions. (See C.R.S. § 23-2-103.3.) Current law probably does not meet criteria 1, 2, and 4 with respect to exempt institutions.
7. Connecticut. It is doubtful that Connecticut law will comply with the Proposed Regulation. The State licenses and accredits private postsecondary institutions, and monitors them for compliance with its licensing laws, although there is a State exemption for programs accredited before 1965. (See Conn. Gen. Stat. § 10a-34.) With respect to exempt institutions, current law probably does not meet criteria 1, 2, and 4.
8. Delaware. It is doubtful that Delaware law will comply with the Proposed Regulation. Although there is a state licensure scheme, the State exempts accredited institutions and relies on accrediting agencies to conduct state authorization review. (See C.D.R. § 14-200.) Current law probably does not meet criteria 1, 2, and 4.

9. Florida. Florida law will probably comply with the Proposed Regulation. There is a State licensure scheme, but the State exempts institutions that are granted licenses based on accreditation. However, exempt accredited institutions must still comply with the standards of fair consumer practices established by the State, and the State has the discretion to limit or revoke the exemption (See Fla. Stat. § 1005.32.). Current law probably meets all four criteria.
10. Georgia. It is doubtful that Georgia law will comply with the Proposed Regulation. Although there is a state licensure scheme, and Georgia's State authorization review standards arguably comply with the requirements of the Proposed Regulation, the State law currently exempts institutions on the basis of accreditation, age and non profit status. (See O.C.G.A. § 20-3-250.3.) With respect to exempt institutions, current law will probably not meet criteria 1, 2 and 4.
11. Hawaii. Hawaii law will not comply with the Proposed Regulation. Hawaii does not have a traditional licensure scheme. Institutions accredited by an agency recognized by the U.S. DOE are exempt from regulation by the State (H.R.S. § 446E-1.6); unaccredited institutions must simply comply with a short list of disclosures mandated by the State that fall short of complying with the State authorization review component of the Proposed Regulation (H.R.S. § 446E-2). Current law would not meet any of the four criteria.
12. Idaho. It is doubtful that Idaho law will comply with the Proposed Regulation. The State laws provide for the licensing and review of institutions, and enforcement of State laws, but exempt nonprofit institutions. (See Idaho Code § 33-2402, and implementing regulations, IDAPA 08.01.11.001.) With respect to exempt institutions, current law will probably not meet criteria 1, 2, and 4.
13. Illinois. It is doubtful that Illinois law will comply with the Proposed Regulation. Under the Private College Act (110 ILCS § 1005/0.01) and the Academic Degree Act (110 ILCS § 1010/0.01), Illinois licenses and reviews institutions. However, the Private Business and Vocational Schools Act exempts certain postsecondary vocational schools that would be subject to the Proposed Regulation (See 105 ILCS 425/1.1). With respect to exempt institutions, current law will probably not meet criteria 2, 3, and 4.
14. Indiana. Indiana law will not comply with the Proposed Regulation. Indiana has no state licensure scheme in place for private postsecondary institutions with regional accreditation, nor any laws that address the state's responsibility to conduct state authorization review. Indiana would have to enact comprehensive legislation to comply with the Proposed Regulation. Current law does not comply with any of the four criteria.
15. Iowa. It is doubtful that Iowa law will comply with the Proposed Regulation. Although Iowa has a registration system for private postsecondary institutions, there is an exemption for accredited institutions, and Iowa does not have standards for state

authorization review. (See Iowa Code §§ 261B.3A, 261B.11.) With respect to exempt institutions, current law probably will not meet criteria 1, 2, and 4.

16. Kansas. It is doubtful that Kansas law will comply with the Proposed Regulation. The State requires State approval for all private postsecondary institutions, without exception, and has the ability to suspend that approval. However, regulations for State review do not apply to accredited institutions. (See K.S.A. § 74-32,162, and see K.A.R. § 88-28-4.) Current law probably meets criteria 1, 2, and 3, but, with respect to accredited institutions, may not meet criterion 4.
17. Kentucky. It is doubtful that Kentucky law will comply with the Proposed Regulation. Although Kentucky has a state licensure scheme, and system for State review, the State may exempt of schools from licensure on the basis of accreditation. (13 KAR § 1:020.) Current law may not meet criteria 1, 2 and 4 with respect to exempt institutions.
18. Louisiana. It is doubtful that Louisiana law will comply with the Proposed Regulation. The current law requires that an institution must be licensed by the State; but the State expressly allows accrediting agencies to conduct statute authorization review activities. (See LAC 28:IX.Chapters 1-5, 32 LR 386.) Current law probably meets criteria 1, 2 and 3, but not criteria 4.
19. Maine. Maine law will probably comply with the Proposed Regulation. Maine has a state licensure scheme, and although it exempts certain schools from licensure, the State reserves the right to review institutions for exemption status on a case by case basis. (See 20-A M.R.S. § 10708; and see C.M.R. § 05-071-149.) Current probably meets all four criteria.
20. Maryland. Maryland law will comply with the Proposed Regulation. The State has an approval process for private postsecondary institutions, which is subject to State review and action. (See COMAR 13B.02.03, and 13B.02.02.08.) Current law meets all four criteria.
21. Massachusetts. Massachusetts law will comply with the Proposed Regulation. The State Board of Higher Education fulfills all of the duties required. (See 610 CMR 2.01 *et seq.*) Current law meets all four criteria.
22. Michigan. Michigan law will not comply with the Proposed Regulation. We could not locate a State system of licensing and review for private postsecondary educational institutions. Current law does not appear to meet any of the four criteria.
23. Minnesota. Minnesota law will comply with the Proposed Regulation. (See Minn. Stat. § 136A.61 *et seq.*) Current law meets all four criteria.

24. Mississippi. It is doubtful that Mississippi law will comply with the Proposed Regulation. Although there is a state licensure scheme, the State exempts institutions that are accredited by S.A.C.S. from its licensing process and standards. (See Miss. Code Ann. § 37-101-241.) With respect to exempt institutions, current law probably will not meet criteria 1, 2, and 4.
25. Missouri. Missouri law will not comply with the Proposed Regulation. We could not locate a State system of licensing and review for private postsecondary educational institutions. Current law does not appear to meet any of the four criteria.
26. Montana. Montana law will not comply with the Proposed Regulation. The State's private postsecondary licensure scheme was repealed and Montana does not regulate private postsecondary degree granting institutions. (See former Mont. Code Anno., § 20-30-101.) Current law does not meet any of the four criteria.
27. Nebraska. Nebraska law will not comply with the Proposed Regulation. The State only requires approval for private postsecondary institutions created after September 1, 1999. (See R.R.S. Neb. § 85-1105.) Current law does not meet any of the four criteria.
28. Nevada. It is doubtful that Nevada law will comply with the Proposed Regulation. The State requires licensure for all private postsecondary degree granting institutions operating in Nevada; however, the State accepts accreditation in lieu of compliance with its minimum standards, including those pertaining to consumer protection. (See Nev. Rev. Stat. Ann. § 394.415, and § 394.447.) Current law meets criteria 1, 2, and 3, but will probably not meet criterion 4 with respect to accredited institutions.
29. New Hampshire. It is doubtful that New Hampshire law will comply with the Proposed Regulation. The State has a system of approving institutions, but may accept accreditation by a U.S. DOE recognized institutional accrediting agency in lieu of State review. (See N.H. Admin. Rules, Pos 1001.05) With respect to accredited institutions, current law probably meets criteria 1, 2 and 3, but may not meet criterion 4.
30. New Jersey. New Jersey law will comply with the Proposed Regulation. The State has a comprehensive system of licensure, review and enforcement. (See N.J. Stat. § 18A:3B-1.) Current law meets all four criteria.
31. New Mexico. It is doubtful that New Mexico law will comply with the Proposed Regulation. New Mexico exempts from state licensure and state authorization review all private postsecondary institutions accredited by a regional accrediting agency recognized by the U.S. DOE. (N.M. Stat. Ann. § 21-23-4.) With respect to exempt institutions, current probably does not meet criteria 1, 2, and 4.
32. New York. New York law should comply with the Proposed Regulation. (See N.Y. C.L.S. Educ. § 224.) Current law meets all four criteria.

33. North Carolina. It is doubtful that North Carolina law will comply with the Proposed Regulation. Although North Carolina licenses and reviews private postsecondary institutions, it exempts from licensure and state authorization review all institutions that have continuously conducted post-secondary degree activity in the State since July 1, 1972. (See N.C. Gen. Stat. § 116-15.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
34. North Dakota. It is doubtful that North Dakota law will comply with the Proposed Regulation. Although North Dakota licenses and reviews private postsecondary institutions for compliance with its consumer protection laws, it exempts all private four-year institutions chartered or incorporated and operating in the state prior to July 1, 1977, so long as the institutions retain accreditation by national or regional accrediting agencies recognized by the U. S. DOE. (See N.D. Cent. Code, § 15-20.4-02.) With respect to exempt institutions, current law will probably not meet criteria 1, 2 and 4.
35. Ohio. Ohio law will probably comply with the Proposed Regulation. Private postsecondary institutions are subject to a comprehensive State licensure, review and enforcement scheme. (See ORC Ann. 1713.01 *et seq.*) Current law probably meets all four criteria.
36. Oklahoma. It is doubtful that Oklahoma law will comply with the Proposed Regulation. Oklahoma exempts from state authorization all degrees offered by a private postsecondary institution accredited by an accrediting agency recognized by the U.S. DOE. (70 Okl. St. § 4104.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
37. Oregon. It is doubtful that Oregon law will comply with the Proposed Regulation. Oregon exempts from state authorization degrees offered by nonprofit postsecondary institutions. (ORS § 348.604.) With respect to exempt nonprofit institutions, current law probably will not meet criteria 1, 2 and 4.
38. Pennsylvania. It is doubtful that Pennsylvania law will comply with the Proposed Regulation. The State certifies and reviews private postsecondary institutions, but exempts institutions incorporated on or before September 1, 1937. (24 Pa.C.S. § 6503.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
39. Rhode Island. It is doubtful that Rhode Island law will comply with the Proposed Regulation. Rhode Island requires State approval and review, but exempts certain institutions. (See R.I. Gen. Laws § 16-40-1§ *et seq.*, and 16-59-1 *et seq.*) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
40. South Carolina. It is doubtful that South Carolina law will comply with the Proposed Regulation. South Carolina licenses private postsecondary institutions, but exempts those

domiciled within the State and accredited by S.A.C.S. (See S.C. Code Ann. § 59-58-30.)
With respect to exempt institutions, current probably will not meet criteria 1, 2 and 4.

41. South Dakota. It is doubtful that South Dakota law will comply with the Proposed Regulation. South Dakota has a State approval and accreditation process for most nonpublic postsecondary institutions; however, South Dakota allows accreditation by an “external third-party accreditation agency” as an alternative means of approval for nonpublic schools. (See ARSD 24:43:04:01; and ARSD 24:43:04:03.) Current law probably will not meet criteria 1, 2, and 4.
42. Tennessee. It is doubtful that Tennessee law will comply with the Proposed Regulation. Tennessee licenses and reviews institutions, but exempts institutions that are located and domiciled in Tennessee for at least ten (10) consecutive years and accredited by S.A.C.S. (See Tenn. Code Ann. § 49-7-2001, and § 49-7-2004.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
43. Texas. It is doubtful that Texas law will comply with the Proposed Regulation. Texas requires State licensure or certification, and compliance with comprehensive consumer protection laws; however, these laws do not apply to institutions accredited by a regional accrediting agency recognized by the U.S. DOE. (See Tex. Educ. Code § 61.303; and 19 TAC § 7.4.) With respect to exempt institutions, current law probably will not meet criteria 1, 2 and 4.
44. Utah. It is doubtful that Utah law will comply with the Proposed Regulation. Utah has a registration system for private postsecondary institutions, and requires compliance with comprehensive consumer protection laws; however, these laws do not apply to institutions accredited by a regional accrediting agency recognized by the U.S. DOE. (See Utah Code Ann. § 13-34-105.) With respect to exempt institutions, current law probably will not meet criteria 1, 2 and 4.
45. Vermont. It is doubtful that Vermont law will comply with the Proposed Regulation. Although the State requires state board approval, and reviews institutions in accordance with federal standards established in 20 U.S.C. § 1099a-3. (16 V.S.A. § 2882.), it exempts religious institutions, and institutions accredited by an accrediting agency recognized by the State Board. (See 16 V.S.A. § 176.) With respect to exempt institutions, current law will probably not meet criteria 1, 2 and 4.
46. Virginia. It is doubtful that Virginia law will comply with the Proposed Regulation. Virginia requires State licensure or certification, and compliance with comprehensive consumer protection laws; however, these laws do not apply to religious institutions, or nonprofit institutions accredited by an agency recognized by the U.S. DOE, or accredited institutions in operation for at least 10 years at the time the state legislation was passed. (See Va. Code Ann. § 23-276.2; and § 23-276.4.) With respect to exempt institutions, current law will probably not meet criteria 1, 2 and 4.

47. Washington. It is doubtful that Washington law will comply with the Proposed Regulation. Washington requires State licensure or certification, and compliance with comprehensive consumer protection laws; however, Washington's regulatory scheme does not apply to private postsecondary institutions that are religious oriented, or accredited by an agency recognized by the state board and have been operating within the state for 15 years or more. (See Rev. Code Wash. (ARCW) § 28B.85.010 et seq.; and WAC § 250-61-060.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
48. West Virginia. It is doubtful that West Virginia law will comply with the Proposed Regulation. The State requires licensure and compliance with comprehensive consumer protection laws (See W. Va. Code § 18B-4-7); however, it exempts institutions approved to operate in West Virginia prior to July 1, 2006, and waives significant levels of state authorization review for institutions accredited by regional accrediting associations. (See W. Va. CSR § 133-20-9; and W. Va. CSR § 133-20-4.) With respect to exempt institutions, current law may not meet criteria 1, 2 and 4.
49. Wisconsin. It is doubtful that Wisconsin law will comply with the Proposed Regulation. The State approves and reviews private postsecondary institutions, but exempts institutions accredited by accrediting agencies recognized by the State board. (See Wis. Stat. § 38.50.) With respect to exempt institutions, current law will probably not meet criteria 1, 2 and 4.
50. Wyoming. Wyoming law will probably comply with the Proposed Regulation. Wyoming requires State licensure for all private postsecondary degree-granting institutions (See Wyo. Stat. § 21-2-401 et seq.; and W.C.W.R. § 005-000-030). Current law probably meets all four criteria.