



# MEMORANDUM

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**TO:** Clients of the Firm

**FROM:** Greg Ferenbach  
Matt Johnson

**DATE:** June 27, 2014

**RE:** **"Pause" on Distance Education Proposal and Notice of Delay of Effective Date of "On-Ground" State Authorization Rule**

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This week, U.S. Department of Education ("ED" or "the Department") officials indicated that the Department will not release a proposal for a new "Distance Education Rule" (at § 600.9(c)) in time to meet the deadline for a 2015 effective date.

In addition, ED announced a further delay of the effective date of 34 C.F.R. § 600.9(a) and (b), which sets minimum standards for a state's authorization of an institution's physical locations (the "On-Ground Rule").

## **"Pause" on Distance Education Proposal**

In comments at the Council for Higher Education Accreditation ("CHEA") meeting in Washington this week, Ted Mitchell, the new Undersecretary for Higher Education at ED, indicated that the Department does not intend to release a Notice of Proposed Rulemaking ("NPRM") for a new Distance Education Rule in the immediate future. For the Distance Education Rule to be effective on July 1, 2015, as originally contemplated, the Department would have needed to release a *final* version of that rule before November 1, 2014, a deadline that essentially required ED to release the NPRM next month to provide an adequate opportunity for public comment.

Mitchell's public comments, which are consistent with what we have been hearing privately, are a reflection of the overwhelmingly negative feedback ED has received from institutions concerning the Department's state authorization proposal. Mitchell specifically indicated that ED may be reconsidering its whole approach to the regulation and cited the lack of progress during the negotiated rulemaking (where ED's proposal failed to achieve consensus and did not garner a single institutional-representative vote) as one of the primary reasons for the delay.

The delay is a substantial victory for all our higher education clients and likely indicates that federal regulation of state authorization is "off the table" for the rest of the year. Bear in

mind, however, that the Department's activities have no impact on underlying state law requirements.

### **On-Ground Rule Delay**

ED also announced this week that it would again delay the On-Ground Rule requirement for institutions located in states that have not developed adequate authorization or student complaint processes.

The On-Ground Rule, which ED initially intended to become effective on July 1, 2011, has now been delayed multiple times, with this latest extension until **July 1, 2015**. The delay protects institutions unable to comply with the rule because of a defect in a state law or process in the state where they are located. To be eligible for the extension, an institution must obtain a letter from the applicable state requesting additional time to alter the state process. Many institutions – and states – have expressed confusion regarding what elements are necessary for ED to determine that a state's process is sufficient, and ED has not provided a specific list of which states must alter their processes.

Most recently, there has been significant confusion about the requirement that institutions be covered by a student complaint process in a state. Specifically, ED has not been clear regarding whether a general consumer complaint process satisfies this requirement or whether a student-specific complaint process is necessary. This issue has been especially problematic for institutions in California that are exempt from the Bureau of Private Postsecondary Education's oversight due to their regional accreditation exemption.

The delay will give institutions – and states – at least one additional year to sort out any necessary alterations. The full text of ED's announcement is available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-14721.pdf>.

We will continue to monitor developments on both of these important issues and provide updates as warranted. In the meantime, please do not hesitate to contact us with any questions or concerns.

cc: Michael Goldstein  
Jeannie Yockey-Fine  
Vince Sampson