AUTHORIZATION, INCENTIVE COMPENSATION

March 24, 2011

The Department of Education issued a Dear Colleague letter (GEN-11-05) on March 17 responding to questions about three topics addressed in its recent program integrity regulations: state authorization, incentive compensation, and misrepresentation. NACUBO and others are concerned about the ability of colleges and universities to comply with the state authorization requirements, particularly for distance education programs, by July 1. Institutions with multiple distance education programs that serve students from many states may find compliance quite costly as well.

On March 1, NACUBO joined more than 60 other higher education associations and accrediting organizations in a letter requesting assistance from Congresswoman Virginia Foxx (R-NC), chair of the Subcommittee on Higher Education and Workforce Training, a standing subcommittee of the House Education and the Workforce Committee, in obtaining a one-year delay in implementation of the state authorization provision. While the Department of Education is committed to moving ahead with the planned July 1 implementation date, efforts continue to delay the effective date for several provisions.

STATE AUTHORIZATION

In its October 29 regulations, ED added muscle to the long-standing requirement that in order to be eligible to participate in the Title IV financial aid programs, institutions must be authorized by their state. Under the regulatory scheme laid out by the Higher Education Act, states are part of the “triad” that oversees institutional eligibility, along with accrediting agencies and ED. In the past, the regulations did not specify what it meant for an institution to be “authorized” by a state. The new regulations, which take effect on July 1, are more prescriptive.  

Home State. Here is an outline of the regulatory requirements related to the state where the institution is physically located:

An institution must be identified by name as an educational institution in a state charter, statute, constitutional provision, or other action AND
- comply with any applicable state approval or licensing requirements, OR
- exempt from approval or licensing requirements by state by virtue of accreditation or in operation for at least 20 years.

If an institution is authorized by the state to conduct business or operate as a nonprofit organization, but not by name as an educational institution, it must be approved or licensed by name to offer programs of postsecondary education, including those leading to a degree or certificate. A state may not exempt such institutions from approval or licensure, regardless of accreditation or longevity.

Religious institutions which award only religious degrees or certificates may be exempted by states from the authorization requirement.

Federally-authorized institutions such as the military academies and tribal colleges operating on tribal lands are exempt.

The Dear Colleague letter expands on these requirements, responding to questions such as what types of documents qualify, overlapping state requirements, and clarification on exemptions. The letter notes that public institutions, if they are state institutions, are an instrumentality of state government and by definition compliant with this portion of the regulation.

**Distance Education.** State authorization for institutions with no physical presence in a state was not mentioned in ED’s proposed rules, but a provision was added when the rules were finalized. Institutions that provide distance education to students in a state or are otherwise “subject to State jurisdiction as determined by the State” must comply with any applicable laws of that state. While the regulations do not impose new requirements on institutions—the state laws already exist—they do for the first time tie eligibility for federal student aid to compliance with these state laws. According to the regulatory language, an institution must be able to document the states’ approval, or that such approval is not needed, upon request. Presumably auditors and program reviewers will want to confirm that an institution with distance education programs is in compliance. Seeking authorization in multiple states will present a time-consuming and costly administrative challenge for institutions that offer distance education programs.
institution will first need to determine the state of residence for each of their distance education students (or decide to proceed as if they had students in all states) and what each state’s requirements are for authorizing distance education providers, then commence the application processes, and ultimately figure out how to budget for the cost. Some institutions with extensive distance offerings have estimated their costs at several hundred thousand dollars.

Application and licensing fees vary widely among states. Some charge no fees, while others impose sizeable ones. One of the most expensive is Massachusetts, which has broad requirements for licensing of out-of-state education providers and charges a $10,000 application fee plus an additional $2,000 for each degree or certificate program offered, on top of a $4,000 annual fee. The WICHE Cooperative for Educational Technology (WCET) has developed some of the most useful resources for institutions on state authorization, including a preliminary compilation of the requirements in each state. According to their analysis, nearly every institution that provides distance education will need to apply for authorization in three states (Massachusetts, Minnesota, and Rhode Island); a few institutions will need authorization in seven other states; and some will need authorization in the remaining states depending on a variety of factors.

The Dear Colleague letter addresses some of the questions that have been raised about the distance education requirement, but offers little relief to institutions. The responses confirm that institutions are responsible for obtaining any and all necessary state authorizations in order for students in those states to be eligible for federal student aid. The letter provides some relief in relation to timing, laying out criteria that allow an institution to show, for the 2011-12 award year only, that it has made a good-faith effort to comply. The stated criteria include notifying ED when each state issues its decision on pending applications for approval. NACUBO has asked ED for clarification on this point as the regulations themselves do not require notification to ED, but just require institutions to maintain appropriate documentation.