

EDUCATION INVESTORS UPDATE

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U.S. Department of Education Issues Final Rules on Accreditation

On October 27 the U.S. Department of Education (ED) issued final regulations relating to accreditation, covering key topics such as distance education, transfer of credit, accreditor disclosures to ED, substantive change, accreditors' monitoring of institutions and programs, and due process. 74 Fed. Reg. 55,414. The final regulations implement Higher Education Opportunity Act (HEOA) provisions pertinent to accreditation and clarify, update, or otherwise modify existing accreditation-related regulations. The final regulations, which are effective July 1, 2010, are the product of negotiated rulemaking. Although the final regulations generally apply to accreditors in the first instance, they nevertheless affect institutions because they create standards and processes that accreditors must impose on, or follow with respect to, institutions or programs that they accredit. This memorandum summarizes selected final accreditation regulations.

1. Distance education

HEOA requires accreditors that evaluate institutions offering distance education to require such institutions to have processes through which the institution establishes that the student who registers for a distance education program is the same student who participates in and receives credit for the program. During the negotiated rulemaking, much of the discussion regarding distance education focused on whether accreditors would require institutions to use particular technologies to verify student identity. ED sought to require the adoption of new technologies as they become "widely accepted," but non-federal negotiators opposed such language because it did not address their concern that required technologies be affordable. The final rule resolves the matter by giving discretion to institutions. Specifically, accreditors must require institutions to verify identity "by using, at the option of the institution, methods such as (i) A secure login and pass code; (ii) Proctored examinations; and (iii) New or other technologies and practices that are effective in verifying student identity." 74 Fed. Reg. at 55,427. Under the final rule, accreditors also must require institutions (1) to use processes that protect student privacy and (2) to notify students at the time of registration or enrollment of additional student charges associated with identity verification.

2. Transfer of credit

The final rules implement without elaboration HEOA provisions that require an accreditor to confirm that the institutions that it accredits have transfer of credit policies that (1) are publicly disclosed and (2) include a statement of the institution's criteria regarding the transfer of credit earned at



another institution. HEOA separately imposes requirements on institutions with respect to public disclosure of transfer of credit policies.

3. Accreditor disclosures to ED

The final regulations contain two new provisions that address communications between accreditors and ED regarding institutions.

- If an accreditor has a policy on notification to an institution or program of contact with ED regarding federal student financial aid matters related to the institution or program, including with respect to compliance, fraud or abuse, and eligibility, the policy must provide for case-by-case review by the accreditor to assess whether a communication should remain confidential. If ED requests that the accreditor keep a contact confidential, the accreditor must do so. ED believes that the regulation “strike[s] the appropriate balance” between the gatekeeping role of accreditors and ED’s fiduciary responsibilities to ensure that government programs are run effectively and are protected against fraud and abuse. 74 Fed. Reg. 39,498, 39,504 (Aug. 6, 2009) (notice of proposed rulemaking).
- HEA requires ED to make certain information available to the public and, in so doing, to comply with the Freedom of Information Act (FOIA) and other applicable laws. Negotiators discussed extensively what material is considered confidential. Non-federal negotiators expressed particular concern that the relationship between accreditors and institutions would be undermined if the accreditor were unable to provide confidentiality guarantees to institutions. ED acknowledged the importance of confidentiality, but stressed that it must comply with FOIA and other applicable laws. The final rules allow accreditors to redact or otherwise designate information that they believe is entitled to protection under FOIA or other applicable law when submitting documents to ED as part of an application to be recognized or re-recognized by ED as a reliable quality-assurance authority.

4. Substantive change

Current regulations require accreditors to maintain adequate policies that ensure that any substantive change to an accredited institution’s program does not adversely affect the institution’s ability to continue to meet the accreditor’s standards. The final regulations expand the matters that must fall under an accreditor’s substantive change policy, while also streamlining in certain circumstances the accreditor-approval process for new locations.

Although HEOA did not require changes to ED’s substantive change regulations, ED included the issue in negotiated rulemaking in part to address an increase in institutions that operate as “distributed enterprises.” ED described a “distributed enterprise” as a business model “that encompasses the establishment of multiple locations operated within the context of a single administrative system.” *Id.* at 39,510. The final regulations provide that an accreditor may pre-approve additional locations if the accreditor determines that the institution has:

- Successfully completed at least one accreditation cycle and one renewal, or been accredited for at least ten years;
- At least three additional locations approved by the accreditor; and
- Met criteria established by the accreditor indicating that the institution has sufficient capacity to add additional locations without accreditor approval of each individual location.

An accreditor's determination that an institution satisfies the above criteria is limited to five years, and the accreditor must conduct visits to a representative sample of additional locations at reasonable intervals.

Other types of substantive change addressed in the proposed regulations include:

- Addition of courses or programs that represent a significant departure from existing offerings;
- Addition of programs at degree levels different from that which is included in the institution's current accreditation;
- Contracts under which an entity that is not certified to participate in federal student financial aid programs offers more than 25 percent of one or more of the accredited institution's programs;
- Acquisition of any other institution or any program or location of another institution; and
- Addition of a permanent location at a site at which the institution is conducting a teach-out for students of another institution that has ceased operating.

5. Monitoring

The final regulations contain a number of provisions that pertain to accreditors monitoring institutions and programs.

- HEOA requires accreditors to monitor growth of programs at institutions that are experiencing "significant enrollment growth." The final regulations do not define "significant enrollment growth," but rather permit each accreditor to "reasonably define" what constitutes significant growth. *Id.* at 39,526. The final rules also specify that accreditors must monitor the overall growth of institutions and programs that they accredit, and they must collect, at least annually, headcount enrollment data.
- The final rules amend existing regulations related to monitoring to require an accreditor to have, and to apply effectively, a set of monitoring and evaluation approaches that enables the accreditor to identify problems with an institution's or program's compliance with accreditor standards and that takes into account institution or program strengths and stability. These approaches must include periodic reports and collection and analysis of key accreditor-identified indicators, including fiscal information and student achievement data.

6. Due process

HEOA expands due process protections that apply when an accreditor pursues adverse action against an institution or program. The negotiators discussed extensively the appeals process. ED emphasized that an appeals panel must be a decision-making body, not a body that makes recommendations to a decision-making body. The final regulations specify that an appeals panel must not serve only an advisory role and must have authority to affirm, amend, reverse, or remand an adverse action. In a remand decision, the appeals panel must identify specific issues that the original decision-making body must address.

The final rules also address an HEOA provision that requires an accreditor to have a process by which an institution under certain circumstances may present new financial information before the accreditor reaches a final adverse action decision. The final rule clarifies that the provision applies not only where the only concern that the accreditor has had about the institution relates to financial matters, but also where the accreditor has had other concerns as well but the only remaining concern in the appealable decision relates to financial matters.

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