

2015

## Protecting Students, Protecting Consumers: A New Federal Regulation of the For-Profit Distance Learning Industry

Menesha Mannapperuma

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

---

### Recommended Citation

Menesha Mannapperuma, *Protecting Students, Protecting Consumers: A New Federal Regulation of the For-Profit Distance Learning Industry*, 23 J. L. & Pol'y (2015).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol23/iss2/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**PROTECTING STUDENTS, PROTECTING CONSUMERS:  
A NEW FEDERAL REGULATION OF THE FOR-PROFIT  
DISTANCE LEARNING INDUSTRY**

*Menesha Mannapperuma*<sup>\*</sup>

*The rise of online distance learning portends new promises of a college degree for students who are less likely to attend a traditional two- or four-year college or university. Online for-profit educational institutions have rushed to meet the needs of these students. However, the for-profit distance learning industry, generally lightly regulated from its inception, has been dogged with accusations that it places profits before the interests of its students. While a system of proposed regional interstate compacts promise to standardize oversight of the for-profit distance learning industry, it fails to include states that regulate the industry the least and thus fails to protect students who are most likely to need protection. This Article proposes a modification to the interstate compact system: by tying federal Title IV funds to consumer protection efforts, the regional interstate compacts can standardize regulation of the for-profit distance learning industry while providing students with basic consumer protections that can help rectify the most egregious problems associated with the for-profit distance learning industry.*

---

<sup>\*</sup>Menesha Mannapperuma, J.D. 2013, Berkeley Law School; B.A. 2008, Stanford University. I am grateful to Professor Michelle Anderson for her guidance and support for this project, Alan Contreras for his willingness to answer any and all questions, the staff of the *Journal of Law and Policy* for their diligence and editing expertise, Tony Au for his unvarnished critiques, and Josh Newman for his unwavering support.

## INTRODUCTION

- I. AN OVERVIEW OF THE DISTANCE LEARNING INDUSTRY
  - A. Distance Learning Background
  - B. For-Profit Universities
  - C. The Regulatory Triad and Consumer Protection
    1. Accrediting Agencies
    2. The Federal Government
    3. States
- II. FEDERAL AND STATE OVERSIGHT OF POSTSECONDARY DISTANCE LEARNING: A FRAGMENTED APPROACH TO REGULATION
  - A. Federal Oversight
  - B. State Oversight
    1. The Physical Presence Model
    2. The Online Explicit Model
    3. The Exemption Model
  - C. Problems and Complexities Created by the Federal Online State Authorization Rule
- III. STATE REGULATORY MODELS COMPARED
  - A. California—Lax Oversight
    1. The Bureau for Private Postsecondary Education
    2. Assembly Bill 2296 and Other Improvements
  - B. Ohio—Rigorous Oversight
  - C. A Comparative Analysis of California and Ohio's Regulatory Structures
- IV. RECOMMENDATIONS
  - A. Regional Interstate Compacts
  - B. The Compacts and Consumer Protection
  - C. Using Federal Intervention and National Consumer Protection Standards to Solve the Problem of Fragmentation
    1. Tying Title IV Funding to Consumer Protection
    2. Benefits of Proposed Regulation and Interaction with Interstate Compact

## CONCLUSION

## INTRODUCTION

For thousands of years, most interactive learning has been through face-to-face interactions between students and instructors. With the rise of distance learning during the mid-nineteenth century, this began to change. Students began taking “correspondence courses” through which they used the postal service to receive lessons and submit their work for grading.<sup>1</sup> Now, a new revolution is taking place in the distance learning industry. The ubiquity of Internet technology in recent years has made distance learning easier than ever.<sup>2</sup> The ease with which this technology allows students to access a professor or course has resulted in a proliferation of online courses, often as part of degree-granting programs offered by for-profit universities.<sup>3</sup> Distance

---

<sup>1</sup> *What is Distance Learning?: History of Distance Learning*, CAL. DISTANCE LEARNING PROJECT, <http://www.cdiponline.org/index.cfm?fuseaction=whatis&pg=3> (last visited Feb. 7, 2015) [hereinafter CAL. DISTANCE LEARNING PROJECT, *What is Distance Learning?*].

<sup>2</sup> This Article will focus on for-profit higher education institutions that offer distance learning courses. However, prominent universities such as Stanford offer free online courses to the general public, with Stanford’s five free online courses garnering more than 335,000 participants in the spring of 2012. Jamie Beckett, *Stanford Offers More Free Online Courses for the World*, STANFORD NEWS (Mar. 6, 2012), <http://news.stanford.edu/news/2012/march/online-courses-mitchell-030612.html>. In May 2012, Harvard and Massachusetts Institute of Technology announced the formation of a nonprofit partnership, edX, to offer free online courses from both universities. Tamar Lewin, *Harvard and MIT Team Up to Offer Free Online Courses*, N.Y. TIMES (May 2, 2012), <http://www.nytimes.com/2012/05/03/education/harvard-and-mit-team-up-to-offer-free-online-courses.html>.

<sup>3</sup>

In 2007–08, about 4.3 million undergraduate students, or 20 percent of all undergraduates, took at least one distance education course. About 0.8 million, or 4 percent of all undergraduates, took their entire program through distance education . . . . In addition to these undergraduate students, about 0.8 million, or 22 percent, of all postbaccalaureate students took distance education courses in 2007–08. The percentage of postbaccalaureate students who took their entire program through distance education (9 percent) was higher than the percentage at the undergraduate level.

*Fast Facts: Distance Learning*, NAT’L. CTR. FOR EDUC. & STATS.,

learning increases access to education for individuals who may not otherwise be able to obtain it, such as those with families or disabilities, or who live in remote areas.<sup>4</sup>

Despite its advantages, regulation of distance learning has proven problematic. Degree-granting programs offered by for-profit distance learning institutions are particularly troublesome due to the lack of regulatory experience in dealing with these programs. Furthermore, recent investigations and student complaints have revealed that for-profit universities have at times taken advantage of ill-informed or vulnerable populations.

For-profit institutions account for over nine percent of the national population of students enrolled at higher education institutions.<sup>5</sup> The rapid growth of for-profit universities has been met with numerous reports of improper practices. These reports have resulted in increased scrutiny from the media and both the federal and state governments. A 2010 *PBS Frontline* special shed light on questionable recruitment tactics, high student loan debt burdens, and poor overall educational outcomes associated with these institutions.<sup>6</sup> In 2010, Iowa Senator Tom Harkin led a series of Congressional hearings that focused on for-profit universities' alleged improprieties, which included allegations that they made misleading claims regarding program credentials and used deceptive and fraudulent sales tactics.<sup>7</sup> The Government Accountability Office ("GAO") conducted undercover testing of fifteen for-profit colleges and found that all fifteen made "deceptive or otherwise questionable" statements to undercover

---

<http://nces.ed.gov/fastfacts/display.asp?id=80> (last visited Feb. 7, 2015).

<sup>4</sup> CAL. DISTANCE LEARNING PROJECT, *What is Distance Learning?*, *supra* note 1.

<sup>5</sup> *For-profit Colleges and Universities*, NAT'L CONF. OF STATE LEGS., (July 3, 2013), <http://www.ncsl.org/research/education/for-profit-colleges-and-universities.aspx>.

<sup>6</sup> *PBS Frontline: College, Inc.* (PBS television broadcast May 4, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/collegeinc/view/>.

<sup>7</sup> Thomas L. Harnisch, Am. Ass'n of State Colls. & Univs., *Changing Dynamics in State Oversight of For-Profit Colleges*, POL'Y MATTERS, April 2012, at 1, 3, available at [http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy\\_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf](http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/Policy_Matters/Changing%20Dynamics%20in%20State%20Oversight%20of%20For-Profit%20Colleges.pdf).

applicants, and that four of them engaged in fraudulent practices.<sup>8</sup> Moreover, in August 2011, the U.S. Department of Justice filed a lawsuit against the Education Management Corporation, an operator of private for-profit postsecondary educational institutions. The primary charge against the company was that it paid recruiters based solely on the number of students enrolled—a violation of a federal law that prohibits colleges from providing any commission or incentive based either directly or indirectly on securing enrollment of students.<sup>9</sup>

The Department of Education responded to increasing concern that the industry needed more oversight when it published the 2010 Program Integrity Rules. One of these rules (the “Online State Authorization Rule”) requires higher education institutions offering distance-learning courses to obtain authorization from each state in which it does business if that state requires its own form of authorization.<sup>10</sup> Thus, the Online State Authorization Rule would require programs to obtain approval in each state in which they operate, otherwise the program would risk losing federal funds under Title IV.<sup>11</sup> While the Department of Education does not currently enforce the Online State Authorization Rule, it is widely believed that this rule will be reintroduced in 2015.

However, the debate surrounding the Online State Authorization Rule brought to light the complexity of the state

---

<sup>8</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-984T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010) [hereinafter GAO, UNDERCOVER TESTING], available at <http://www.gao.gov/products/GAO-10-948T>.

<sup>9</sup> Stephen Burd, *A Non-Profit College Recruiting Scandal?*, HIGHER ED WATCH (June 14, 2011), <http://higheredwatch.newamerica.net/node/53064>; Charles Huckabee, *Whistle-Blower Suit Against Education Management Corp. to Proceed*, CHRON. OF HIGHER EDUC. (May 7, 2014), <http://chronicle.com/blogs/ticker/whistle-blower-suit-against-education-management-corp-can-proceed-judge-says/77179>.

<sup>10</sup> State Authorization, 34 C.F.R. § 600.9 (2013); see also State Authorization, 75 Fed. Reg. 66,858–68 (Oct. 29, 2010) (providing legislative history for 34 C.F.R. § 600.9).

<sup>11</sup> Allie Bidwell, *Many Colleges Could Lose Federal Aid Eligibility Under New Interpretation of Rule*, CHRON. OF HIGHER EDUC. (April 3, 2013), <http://chronicle.com/article/Many-Colleges-Could-Lose/138263/>.

authorization regulatory scheme both for institutions seeking state authorization and the students enrolled at these institutions.<sup>12</sup> As a result, the Commission on the Regulation of Postsecondary Distance Education (“Commission”) is working toward creating a set of regional interstate compacts that will remove some of the regulatory hurdles facing higher education institutions that attempt to procure authorization in more than one state.<sup>13</sup> However, the regional interstate compacts focus primarily on easing the burden on higher education institutions that offer distance education, rather than ensuring that student consumers are protected.<sup>14</sup> Moreover, according to Marshal Hill, former Executive Director of the Nebraska Coordinating Committee for Postsecondary Education, states with subpar consumer protection frameworks will be excluded from the compacts entirely.<sup>15</sup> Thus, the interstate compacts do not provide for or improve the consumer protection available to the students located in these excluded states.

This Article proposes a new federal regulation that would tie Title IV federal funding of for-profit distance learning institutions to the consumer protection standards of the state in which the institution is headquartered. The proposed regulation would thus allow federal funds only for distance learning institutions

---

<sup>12</sup> COMM’N ON THE REG. OF POSTSECONDARY DISTANCE EDUC., ADVANCING ACCESS THROUGH REGULATORY REFORM: FINDINGS, PRINCIPLES, AND RECOMMENDATIONS FOR THE STATE AUTHORIZATION RECIPROCITY AGREEMENT (SARA) 7 (2013) [hereinafter ADVANCING ACCESS].

<sup>13</sup> *Id.* at 3. The Commission is composed of former U.S. Secretary of Education Richard Riley and twenty other higher education leaders invited by the Association of Public and Land-Grant Universities and the State Higher Education Executive Officers to “explore the regulation of postsecondary distance education.” The Commission was convened in May 2012 to “develop and provide recommendations that will address the costs and inefficiencies faced by postsecondary institutions that must comply with multiple (often inconsistent) state laws and regulations as they endeavor to provide educational opportunities to students in multiple state jurisdictions.” *Id.*

<sup>14</sup> *Id.* at 6 (“Complexity, confusion, and costs of compliance can be reduced if state laws and regulations embody common principles and/or rules are established that narrow compliance obligations [for institutions] . . .”).

<sup>15</sup> Interview with Marshall Hill, Executive Director, Neb. Coordinating Comm. for Postsecondary Educ. (Apr. 17, 2012) [hereinafter Hill Interview].

headquartered in states with adequate consumer protection frameworks.

Part I provides an overview of the distance learning industry, with a particular focus on for-profit universities. It explores the risks that accompany for-profit universities, including the risks that these institutions in particular pose to their students and the accompanying financial liabilities that accrue to taxpayers and the federal government. In addition, this Part outlines the history of the regulation of education in the United States, focusing on the regulatory triad: private, nongovernmental accrediting bodies; the federal government; and the states.

Part II introduces the federal government's Online State Authorization Rule, its current status, and the varying state authorization schemes for higher education institutions that offer distance learning courses. It then discusses the problems created by the complexities of the state authorization regulatory structure.

Part III presents a case study of California's regulatory structure and assesses the deficiencies of the structure and how those deficiencies negatively affect student consumer protection in the state. It then describes the regulatory structure in Ohio, a state with a robust authorization process for higher education institutions. Part III then compares the state authorization regulatory frameworks in California and Ohio.

Finally, Part IV introduces a regional interstate compact system and analyzes the deficiencies of this system. It then proposes a solution that involves tying federal funding of for-profit distance education providers to state consumer protection frameworks, a proposal that may help close current gaps in consumer protection.

## I. AN OVERVIEW OF THE DISTANCE LEARNING INDUSTRY

This Part introduces the concept of distance learning, including its benefits and its growth in the United States. Next, it covers for-profit universities, including the problematic practices of these universities and how these practices hurt students. Finally, this Part explores the "regulatory triad": the three regulatory authorities that oversee the education sector: private, nongovernmental accrediting bodies; the federal government; and states.



*A. Distance Learning: Benefits and Statistics*

Distance learning greatly increases the availability and accessibility of education. It allows for both synchronous learning (when students and classroom instructors interact simultaneously) and asynchronous learning (when students choose when to access lessons and course materials, and communicate with their instructors).<sup>16</sup> For students with families, disabilities, or limited transportation options, distance learning can reduce these barriers and make degree attainment possible.<sup>17</sup> For schools, distance learning can lower costs and provide opportunities for collaboration across school systems.<sup>18</sup> For example, while distance learning among the three public higher education segments in California (California Community Colleges, California State Universities, and the University of California) is currently fragmented, analysis suggests that these segments could collaborate to produce significant savings through shared online courses, joint academic collaboration, and public-private partnerships.<sup>19</sup>

Distance education has grown rapidly: “In 2007–08, about 4.3 million undergraduate students, or 20 percent of all undergraduates, took at least one distance education course. About 0.8 million, or 4 percent of all undergraduates, took their entire program through distance education.”<sup>20</sup> In 2012, about 18.2 million, or about 11 percent of all undergraduates, took their entire program through distance education.<sup>21</sup> Distance education has helped fuel the growth of the for-profit industry—“nearly ninety percent of the for-profit industry’s growth from 2000-2009 can be

---

<sup>16</sup> MAC TAYLOR, CAL. LEGIS. ANALYST’S OFFICE, THE MASTER PLAN AT 50: USING DISTANCE EDUCATION TO INCREASE COLLEGE ACCESS AND EFFICIENCY 6 (2010). This report was presented to the 197<sup>th</sup> Session of the California legislature at the California Student Aid Commission Public Hearing on February 23–24, 2012. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> NAT’L. CTR. FOR EDUC. & STATS., *supra* note 3.

<sup>21</sup> *Enrollment in Distance Education Courses, by State: Fall 2012*, NAT’L CTR. FOR EDUC. STATS. (June 2014), <http://nces.ed.gov/pubs2014/2014023.pdf>.

attributed to for-profit chains and primarily online establishments.”<sup>22</sup>

*B. For-Profit Universities: Problematic Practices*

For-profit educational institutions—also referred to as for-profit colleges, proprietary institutions, trade schools, or private career schools—are postsecondary higher education institutions that “provid[e] job-focused education and skills while deriving a profit.”<sup>23</sup> In comparison, nonprofit colleges and universities reinvest tuition money into the university, and thus individual stakeholders in the university do not stand to benefit financially from increased student enrollment.<sup>24</sup> For-profit universities in the United States enroll approximately thirteen percent of the national population of students at higher education institutions.<sup>25</sup> As a result of the for-profit industry’s growth—and the concomitant allegations of improper practices—for-profits have been the focus of increased scrutiny from federal and state governments and the media. Further, “for-profits educate a disproportionate share of minority, disadvantaged, and older students,” which raises

---

<sup>22</sup> Harnisch, *supra* note 7, at 2.

<sup>23</sup> Cheryl Auster, *Promising a Better Future but Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the Effect of the New Program Integrity Rules*, 13 SCHOLAR 631, 637 (2011).

<sup>24</sup>

Notwithstanding the historical or present rationales for nonprofit status, there is the strong tendency to associate nonprofits with a sense of altruism that is absent from for-profit firms. Nonprofit higher educational institutions, unlike FPCUs [for-profit colleges and universities], receive significant donations from third parties. To an extent, nonprofit status may serve as a crude heuristic for quality in the higher education context. One can argue that nonprofit organization limits managerial incentives to exploit students and makes managers less sensitive to profit maximization.

Omar Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 348–49 (2013) (internal citations omitted).

<sup>25</sup> *Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges*, U.S. DEP’T OF EDUC. (Mar. 14, 2014), <http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca>.

concerns about exploitation of society's more vulnerable populations.<sup>26</sup>

These students often lack both information crucial to making informed decisions about college and the "familial and extrafamilial networks, through which they can gather important information concerning higher education."<sup>27</sup> Research indicates that these students approach college decisions in a more ad hoc manner than students from privileged backgrounds, often failing to gather sufficient information about educational quality when making important decisions such as school selection.<sup>28</sup> Moreover, if these students attend public schools, they are also likely to lack access to individualized counseling about their higher education options.<sup>29</sup> Thus, these students are more likely to both misinterpret information about, and be misled by, for-profit higher education institutions.<sup>30</sup>

Moreover, the profit-driven mission of these institutions increases their incentive to enroll more students.<sup>31</sup> This incentive can result in deceptive marketing and recruitment practices that

---

<sup>26</sup> Kelly Field, *Study Finds Mixed Results for Students Attending For-Profit Schools*, CHRON. OF HIGHER EDUC. (Jan. 3, 2012), <http://chronicle.com/blogs/ticker/study-finds-mixed-results-for-students-attending-for-profit-colleges/39474>. "Affluent students cluster at four-year public and private universities, whereas working class, low-income, veterans, and underrepresented minority students cluster at two-year community colleges and FPCUs [for-profit colleges and universities]." Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 359 (2013).

<sup>27</sup> Simmons, *supra* note 26, at 351–52.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 352.

<sup>30</sup> *Id.* This information asymmetry is further enhanced by the easy entry into for-profit higher education institutions. *Id.* at 337 ("But the portable and loan-heavy nature of federal financial aid also has a downside: ill-informed, vulnerable students may be duped into selecting inferior educational options that differentially empower them.").

<sup>31</sup> *Id.* at 352–53 ("At traditional institutions, tuition rarely exceeds total education costs due to institutional subsidies. FPCUs [for-profit colleges and universities], however, do not subsidize a meaningful portion of total educational costs. Instead, FPCUs charge tuition that normally exceeds total education costs. Within this context, hard-selling techniques used by FPCUs are not surprising; they are expected.").

ignore students' best interests.<sup>32</sup> In 2010, undercover testing by the GAO found that for-profit universities engaged in fraudulent practices.<sup>33</sup> GAO agents posed undercover as prospective students and applied for admission to fifteen for-profit colleges located in six states and Washington, D.C.<sup>34</sup> The testing found that some for-profit college representatives exaggerated potential future earnings, failed to provide clear information about program costs and graduation rates, and pressured applicants to sign contracts for enrollment without providing them with a financial advisor to counsel them on program costs and financing options.<sup>35</sup>

Students at for-profit universities also tend to borrow more heavily to finance their education than students enrolled at other types of universities. A recent study indicated "that 94% of students who enroll at for-profit colleges take out federal loans to pay for tuition, compared [to] 33% of students at public nonprofit colleges[,] and 69% of students at private nonprofit universities."<sup>36</sup> In addition, a Department of Education study determined that although for-profit universities enrolled only about thirteen percent of the nation's undergraduates in 2010, their students comprised close to half of all federal student loan defaults in fiscal year 2012 for loans that went into repayment in fiscal year 2010.<sup>37</sup>

Large amounts of student debt affect the student and the public in several ways: "(1) the financial burden on the individual

---

<sup>32</sup> See GAO, UNDERCOVER TESTING, *supra* note 8, at 7–13.

<sup>33</sup> *Id.* Revisions were made to this report in November 2010. For an article critical of this report and its revisions see Nick Anderson, *GAO Revises Its Report Critical of Practices at For-Profit Schools*, WASH. POST (Dec. 7, 2010, 8:44 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/07/AR2010120706803.html>.

<sup>34</sup> GAO, UNDERCOVER TESTING, *supra* note 8, at 2.

<sup>35</sup> *Id.* at 9–11.

<sup>36</sup> Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225, 232 (2011).

<sup>37</sup> Tbl.331.20 Enrollment in degree-granting postsecondary institutions: 2000–2012, NAT'L CTR. FOR EDUC. STAT. (November 2013), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_331.20.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_331.20.asp); Tbl. 332.5: Postsecondary student loan repayment and default statistics, by default period and level and control of institution: 2009–2011, NAT'L CTR. FOR EDUC. STATS. (December 2013), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_332.50.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_332.50.asp).

[student]; (2) the expense of loan subsidies to taxpayers; and (3) the negative effect of defaults on the individual and the taxpayer.”<sup>38</sup> If a student is unable to pay back a loan due to economic hardship, the student may request forbearance of the loan, which “results in the government waiving interest payments.”<sup>39</sup> While forbearance represents a gain for the individual debt-holder, taxpayers ultimately must pay the costs.<sup>40</sup> When students default on loans, the federal government and taxpayers “assume nearly all the risk[s] and are left with the costs.”<sup>41</sup>

However, this is not to understate the impact that defaulting on student loans has on the students themselves. Students who default on loans suffer a variety of negative consequences, including poor credit ratings, possible prohibition from obtaining a professional license,<sup>42</sup> wage garnishment, the inability to qualify for future student loans, and collection harassment.<sup>43</sup> Further, student loan debt is more difficult to discharge than most other types of debt.<sup>44</sup> In a typical Chapter 7 bankruptcy proceeding, “a court sells the debtor’s assets and the creditors receive the proceeds from the sale of the assets.”<sup>45</sup> The court then discharges the remainder of the debtor’s obligations to creditors, including, for example, credit card debt or debt related to medical bills.<sup>46</sup> In contrast, with student loan debt, a student must generally convince a bankruptcy judge

---

<sup>38</sup> Auster, *supra* note 23, at 667–68.

<sup>39</sup> *Id.* at 668.

<sup>40</sup> *Id.*

<sup>41</sup> GAO, UNDERCOVER TESTING, *supra* note 8, at 5.

<sup>42</sup> See, e.g., TENN. CODE ANN. §63-1-141 (West 2010).

<sup>43</sup> *Id.*

<sup>44</sup> Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 611 (2013) (“Whereas the U.S. Bankruptcy Code generally gives individual borrowers an ‘insurance policy’ against failure in the form of a bankruptcy discharge, student loans are somewhat more difficult to discharge than most kinds of debt.”).

<sup>45</sup> Amy E. Sparrow, *Unduly Harsh: The Need to Examine Educational Value in Student Loan Discharge* *Cases Involving For-Profit Schools*, 80 TEMP. L. REV. 329, 342 (2007).

<sup>46</sup> *Id.*

that he or she suffered an “undue hardship,” a standard which is difficult to meet.<sup>47</sup>

### C. *The Regulatory Triad and Consumer Protection*

The regulatory bodies of the higher education sector are often referred to as the “regulatory triad”—private, nongovernmental accrediting bodies, the federal government, and states.<sup>48</sup> While regulation of the higher education sector is considered a shared responsibility of the regulatory triad, the limited regulatory power of the federal government and accrediting agencies over higher education institutions means that states are in the best oversight position.<sup>49</sup> However, states vary considerably in their consumer protection activities and enforcement.<sup>50</sup> Typically, state consumer protection in the realm of higher education includes regulations on advertising, educational outcomes, personnel credentials, and consumer complaints.<sup>51</sup> Generally, either the state’s higher education commission or consumer protection agency oversees this regulatory activity.<sup>52</sup>

---

<sup>47</sup> See *id.* at 331–32. To determine what constitutes an “undue hardship,” a majority of circuits have adopted the three part test articulated in *Brunner v. N.Y. State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The three part *Brunner* test requires a debtor to show:

- (1) that the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor had made good faith efforts to repay the loans.

*Brunner*, 831 F.2d at 396; see also, Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 373–81 (2013) (providing an in depth analysis of each of the three prongs of the *Brunner* test and what a debtor needs to prove to satisfy them).

<sup>48</sup> Harnisch, *supra* note 7, at 1.

<sup>49</sup> See *id.* at 8.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.*

<sup>52</sup> See *id.*

## 1. Accrediting Agencies

Accrediting agencies are private, nongovernmental entities designed to ensure that higher education institutions meet a certain level of quality. These private educational associations, either regional or national in scope, “develop criteria and conduct peer evaluations to assess whether or not those criteria are met.”<sup>53</sup> National agencies focus on accrediting for-profit schools, whereas regional agencies focus on accrediting public and nonprofit universities.<sup>54</sup> If an institution or program meets an accrediting agency’s criteria, it becomes “accredited.”

The Department of Education requires that institutions be accredited in order to receive Title IV funds.<sup>55</sup> Accrediting agencies thus have the power to provide or deny access to billions of dollars of federal education benefits each year.<sup>56</sup> Critics of accreditation assert that the process is not sufficiently rigorous to safeguard this substantial amount of money.<sup>57</sup> Further, institutions often use their accreditation status as a means of promoting legitimacy, which can be problematic because approval by an accrediting agency does not necessarily ensure the quality of a school.<sup>58</sup>

---

<sup>53</sup> *Accrediting Agencies*, CAL. POSTSECONDARY EDUC. COMM’N (March 28, 2012, 6:05 PM), [http://www.cpec.ca.gov/x\\_collegeguide\\_old/accreditingagencies.asp](http://www.cpec.ca.gov/x_collegeguide_old/accreditingagencies.asp).

<sup>54</sup> See STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 112TH CONG., S. PRT. NO. 112–37: FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 141 (Comm. Print 2012), available at <http://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf>. [hereinafter FOR PROFIT HIGHER EDUCATION].

<sup>55</sup> See 20 U.S.C. §§ 1099b, 1099c-1 (2014).

<sup>56</sup> FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 145–46.

<sup>57</sup> Eric Kelderman, *In Accreditation Proposals, Panel Pleases Neither Reformers nor Status Quo Advocates*, CHRON. HIGHER EDUC. (April 13, 2012), <http://chronicle.com/article/In-Accreditation-Proposals/131561/>. These criticisms came from panelists on the National Advisory Committee on Institutional Quality and Integrity, “an 18-member panel that advises the education secretary on whether to approve accrediting agencies as gatekeepers of federal financial aid.” *Id.*

<sup>58</sup> See *id.* (“Accreditation currently gives students and parents a false sense

Accrediting agencies are under increasing scrutiny, in part because of the view that they have not adequately dealt with recruiting and enrollment fraud.<sup>59</sup> This may be the result of the fast growth of the for-profit education sector, which has “outpaced accrediting agencies’ efforts to measure and enforce basic standards of quality in higher education.”<sup>60</sup> In the past, accrediting agencies oversaw institutions whose primary focus was academic improvement.<sup>61</sup> Now, the education sector, and specifically the for-profit education sector, is also driven by profit maximization and growth.<sup>62</sup> As a result, accreditors are “behind the curve” and do not have in place the policy framework and procedures necessary to adequately deal with the changing landscape of the higher education sector.<sup>63</sup>

Moreover, policy makers and the public have high expectations for accreditation. Accreditation is expected to serve as a barrier against abuse and fraud, a means of measuring academic performance, a tool for parents and students to compare the value

---

that accredited schools have passed a meaningful test of quality when they have not.”). *See also* FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 142 (“The self-reporting and peer-review nature of the accreditation process exposes it to manipulation . . .”); Judith S. Eaton, *U.S. Accreditation: Meeting the Challenges of Accountability and Student Achievement*, 5 EVALUATION IN HIGHER ED. 1, 12 (June 2011) (noting that accreditors “view accountability as primarily a ‘formative’ process,” which means that “when accreditors review institutions and programs and find flaws in [their] operations, [the accreditors] call for remediation of deficiencies even as they . . . continue accreditation.”).

<sup>59</sup> *See* FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 145–46 (noting that ACICS, one of two major national accrediting agencies, “recently announced that it had revised its placement data for each of its 49 campuses under scrutiny by the New York State attorney general . . . [with the revisions showing] that only 13 of the 49 campuses met the accreditor’s placement-rate standards.”). *See generally* Sam Dillon, *Troubles Grow for a University Built on Profits*, N.Y. TIMES (Feb. 11, 2007), *available at* [http://www.nytimes.com/2007/02/11/education/11phoenix.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/02/11/education/11phoenix.html?pagewanted=all&_r=0) (discussing University of Phoenix’s legal troubles resulting from inadequate enrollment and credit hour standards, fraudulent graduation rate reporting and other substantial improprieties related to student recruitment and enrollment).

<sup>60</sup> FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 144.

<sup>61</sup> *Id.* at 144–45.

<sup>62</sup> *Id.* at 144.

<sup>63</sup> *Id.* at 144–46.



of different colleges, and “as a stamp of financial stability.”<sup>64</sup> However, accrediting agencies often do not have the staff or legal authority to conduct investigations into consumer complaints.<sup>65</sup> Accrediting agencies typically have only one powerful tool against noncompliant higher education institutions—disaccreditation.<sup>66</sup> The lack of graduated disciplinary methods thus inhibits the effectiveness of accrediting agencies.<sup>67</sup>

## 2. The Federal Government

Within the regulatory triad, the federal government oversees the administration of federal student aid funds and evaluates institutional eligibility to participate in federal student aid programs.<sup>68</sup> Before 1972, only nonprofit and public institutions were eligible for Title IV funding.<sup>69</sup> Beginning in 1972, Congress authorized for-profit institutions to receive federal student loans and grants through the Department of Education.<sup>70</sup> In making this change, Congress recognized that for-profit institutions had “done

---

<sup>64</sup> Eric Kelderman, *Accreditors Examine Their Flaws as Calls for Change Intensify*, CHRON. HIGHER EDUC. (Nov. 3, 2011), <http://chronicle.com/article/Accreditors-Examine-Their/129765/>.

<sup>65</sup> *Id.*

<sup>66</sup> Harnisch, *supra* note 7, at 8.

<sup>67</sup> Kevin Carey, *A Tale of ‘Too Big to Fail’ in Higher Education*, N.Y. TIMES, July 15, 2014, [http://www.nytimes.com/2014/07/15/upshot/city-college-of-san-francisco-survives.html?\\_r=0](http://www.nytimes.com/2014/07/15/upshot/city-college-of-san-francisco-survives.html?_r=0). “The accreditor, an independent, nonprofit body that determines whether colleges can receive federal financial aid, is the only outside organization with substantial regulatory authority over schools like City College. But like an army with no weapons other than thermonuclear bombs, its power is too potent and blunt to use.” *Id.* Carey also explains why accreditation agencies are often unwilling to take the final step of disaccreditation. *Id.* The reasons he provides range from political pressure to the unwillingness of college administrators to “condemn peers at other institutions publicly, particularly since their turn for review will eventually come.” *Id.*

<sup>68</sup> *Accreditation in the United States*, U.S. DEP’T OF EDUC., [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg3.html#Recognition](http://www2.ed.gov/admins/finaid/accred/accreditation_pg3.html#Recognition) (last visited Feb. 7, 2015).

<sup>69</sup> Simmons, *supra* note 24, at 339.

<sup>70</sup> FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 153.

well the socially valuable job of training people for technical and semi-professional careers.”<sup>71</sup>

As a result, for-profit universities’ existence is premised on the availability of these substantial federal funds. However, in the Higher Education Amendments of 1992, Congress limited the proportion of Department of Education funds available to for-profit colleges to a percentage of their total revenue.<sup>72</sup> After these amendments, for-profit colleges were limited to receiving federal student aid funds equal to 85 percent of their revenue.<sup>73</sup> The proportion has now increased to 90 percent, commonly referred to as the “90/10 rule.”<sup>74</sup> These rules were designed to ensure that students, employers, and state agencies contribute to a student’s education, and thus have a stake in the success of a student’s educational outcome.<sup>75</sup> Failure to abide by the 90/10 rule results in penalties for the school, including federal financial aid ineligibility.<sup>76</sup>

Despite these measures that were designed to safeguard students and prevent abuse of the federal financial aid system, the federal government does not have a comprehensive consumer protection scheme for students. Similar to the limited consumer protection role of accreditation agencies, the federal government has only a limited ability to help aggrieved students. Students with complaints specifically related to student loans can file a complaint with the Federal Student Aid Ombudsman Office, which will work with students, officers of the U.S. Department of Education, private lenders, loan guaranty agencies and servicing agencies in order to resolve disputes related only to student loans.<sup>77</sup> However,

---

<sup>71</sup> Johnson, *supra* note 36, at 240 (quoting H.R. REP. NO. 92-554, pt. 1 at 2484 (1972)).

<sup>72</sup> FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 154.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 156.

<sup>75</sup> *Id.* at 154–55.

<sup>76</sup> *Id.* at 156. “Colleges that fail to comply with the rule for two consecutive years lose their eligibility to participate in the student-aid programs for at least two years.” Alina Mogilyanskaya, *3 For-Profits Lose Student-Aid Eligibility After Failing 90/10 Test Twice*, CHRON. HIGHER EDUC. A22 (Oct. 5, 2012), available at <http://chronicle.com/article/3-Institutions-Lose/134696/>.

<sup>77</sup> *Getting Prepared Before Seeking Help*, FED. STUDENT AID,

the Federal Student Aid Ombudsman Office does not handle complaints about such issues as the quality of educational programming, recruiting practices, or issues with credits received for courses, among other things.

### 3. States

States typically provide higher education institutions with the legal authority to operate, and students with consumer protections. They may also regulate standards for participation in state student financial aid programs.<sup>78</sup> States approach education oversight differently. The result is that some states have robust regulatory schemes, while others have far laxer systems. These varying state regulatory schemes lead to complexities for higher education institutions and students, as discussed in Part II.

## II. FEDERAL AND STATE OVERSIGHT OF POSTSECONDARY DISTANCE LEARNING: A FRAGMENTED APPROACH TO REGULATION

Typically, the regulation of education is the province of state governments.<sup>79</sup> However, a 2010 federal regulation introduced federal oversight into the distance learning industry.<sup>80</sup> This Part introduces the 2010 federal regulation, which required that distance learning providers be authorized in each state in which they offer courses.<sup>81</sup> Next, this Part outlines state authorization requirements for distance learning providers and provides an

---

<https://studentaid.ed.gov/repay-loans/disputes/prepare> (last visited Feb. 7, 2015). *See also About the FSA Ombudsman*, FED. STUDENT AID (Mar. 28, 2012, 7:35 PM), <https://ombudsman.ed.gov/about/about.html#whereelsetogo> (providing the complaint form for students with grievances).

<sup>78</sup> Harnisch, *supra* note 7, at 8.

<sup>79</sup> *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”).

<sup>80</sup> 34 C.F.R. § 600.9 (2010). The D.C. Circuit overruled portions of the Program Integrity Rules in *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 461–463 (D.C. Cir. 2012).

<sup>81</sup> 34 C.F.R. § 600.9(c) (2010).

overview of the three main criteria states use to determine whether a distance learning provider must become authorized in that state. Finally, this Part introduces the complexities created by the 2010 federal regulations and the varying requirements for state authorization.

*A. Federal Oversight*

In October 2010, the U.S. Department of Education released an amendment explaining the Online State Authorization Rule of the Program Integrity Rules, a component of the Higher Education Act.<sup>82</sup> The Online State Authorization Rule requires institutions offering online programs to obtain approval in each state in which they operate, or else risk losing Title IV federal funding.<sup>83</sup> Whether an institution may offer distance or correspondence education in a particular state is a matter of widely varying state laws. In essence, for those institutions dependent on Title IV funding, this new rule results in federal oversight of state higher education licensing for institutions.<sup>84</sup> Due to a procedural violation, the Department of Education does not currently enforce the Online State

---

<sup>82</sup> *Id.* § 600.9.

<sup>83</sup> *Id.* § 600.9. Title IV funding is the federal financial aid programs authorized under Title IV of the Higher Education Act, and is regulated and administered by the U.S. Department of Education. REBECCA R. SKINNER, CONG. RESEARCH SERV., INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT AID PROGRAMS UNDER THE HIGHER EDUCATION ACT: BACKGROUND AND REAUTHORIZATION ISSUES, RL33909 (2007), available at [http://assets.opencrs.com/rpts/RL33909\\_20070309.pdf](http://assets.opencrs.com/rpts/RL33909_20070309.pdf).

<sup>84</sup>

To give states and distance-education programs “some breathing room,” the Department will give colleges until July 1, 2014, to obtain all necessary state approvals, so long as they are making a “good faith effort” to do so before then, an administration official told reporters on Wednesday. Evidence of such an effort could include an application to a state or documentation from a state that an application is pending, among other actions.

Kelly Field, *Colleges Get More Time to Comply with New Rule on State Authorization*, CHRON. HIGHER EDUC. (Apr. 20, 2011), <http://chronicle.com/article/Colleges-Get-More-Time-to/127216/>.

Authorization Rule, but it has indicated that it will reintroduce the rule in 2015.<sup>85</sup>

### B. State Oversight

State regulations are generally place-based; thus, distance learning by its very nature presents challenges for state governance because it crosses state lines. States may be reluctant to regulate universities based in other states, or may not have data regarding the enrollment of their residents in out-of-state distance learning programs.

State authorization requirements for higher education institutions also vary greatly. The Online State Authorization Rule has brought into sharp focus this wide variation in state authorization requirements.<sup>86</sup> For example, states vary as to whether a higher education institution is required to be authorized in a state in order to offer distance learning courses to that state's residents, and the process through which higher education institutions become authorized varies by state.

There are, however, several trends in how states determine whether an institution requires authorization in order to operate within the state. States tend to use one of three common models to

---

<sup>85</sup> In 2012, the District of Columbia Circuit held that the Online State Authorization Rule violated the Administrative Procedure Act because it failed to provide adequate notice of the rule to regulated parties. *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d at 461–63. However, the Department of Education has indicated that it will reintroduce the Online State Authorization Rule, as evidenced by the Online State Authorization Rule's inclusion in the Department of Education's Program Integrity and Improvement Negotiated Rulemaking. *Negotiated Rulemaking 2013-2014: Program Integrity and Improvement*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html> (last visited Feb. 16, 2015). It is widely believed by those involved in the higher education industry and in the Negotiated Rulemaking that the reintroduction of this legislation will occur sometime in 2015. Email interview with Alan Contreras, State Authorization Reciprocity Agreement Coordinator, National Council/WICHE (Oct. 27, 2014) (on file with author).

<sup>86</sup> *See generally* EDUVENTURES, ONLINE LEARNING ACROSS STATE BORDERS: ASSESSING STATE REGULATION OF OUT-OF-STATE SCHOOLS 11 (2011) (providing an overview of the state regulation of out-of-state schools with regard to online learning, recruitment, and institution licensing volume).

regulate distance learning: (1) the physical presence model; (2) the online explicit model; and (3) the exemption model.<sup>87</sup> Each of these models is discussed in turn below. The wide variation among models provides a window into the complex regulatory regime and the need for standardization.

### 1. The Physical Presence Model

A majority of states will look to “physical presence” within the state, or whether a state is “operating” within the state, in order to determine whether to regulate a private postsecondary distance learning institution.<sup>88</sup> The terms used to describe physical presence vary considerably among states. Some states, such as Kansas<sup>89</sup> and Missouri, explicitly define the term. Missouri defines “operate” as “to establish, keep, or maintain any facility at a location or locations in this state where, from, or through which education is offered or given and shall include contracting with any person, group, or entity to perform any such act.”<sup>90</sup> In contrast, South Dakota does not define physical presence; it merely notes that “no postsecondary institution may provide educational programs at

<sup>87</sup> See *id.* at 11–14 (categorizing states into these three models, along with a fourth, “online ambiguous”).

<sup>88</sup> See *id.* at 10 (depicting a chart which indicates that in 2011, fifty-five percent of states utilize a physical presence model).

<sup>89</sup> For example, the Kansas Board of Regents requires a Certificate of Approval that must be renewed annually for “all schools operating with a physical presence in Kansas or that are actively soliciting enrollment of prospective students to receive instruction in the state of Kansas.” *Private/Out-of-State*, KAN. BD. OF REGENTS, [http://www.kansasregents.org/academic\\_affairs/private\\_out\\_of\\_state](http://www.kansasregents.org/academic_affairs/private_out_of_state) (last visited Feb. 16, 2015). The Kansas Board of Regents further defines active solicitation as

trying to attract students to enroll in a course (who will remain in Kansas while taking the course) by doing things like placing ads in Kansas papers or running ads on Kansas based TV or Radio stations, student recruitment, or engaging in other means of solicitation that specifically contacts or targets Kansas residents in order to encourage them to enroll in a out-of-state postsecondary school that is offering a certificate, diploma or degree.

*Id.*

<sup>90</sup> MO. REV. STAT. § 173.600 (2013).

physical locations in South Dakota unless” the institution receives authorization.<sup>91</sup>

Moreover, states differ in how they define the physical presence requirement. For example, the Kansas Board of Regents interprets statutorily-defined physical presence to include both a physical building and solicitation that contacts or targets Kansas residents.<sup>92</sup> In contrast, the Nebraska physical presence requirement is defined as establishing an administrative office or mailing address in Nebraska, or offering within the state a course for college credit or a degree program.<sup>93</sup> Institutions that market to Nebraska students, but do not meet the aforementioned criteria, do not require authorization to operate in Nebraska. Marshall Hill advocates Nebraska’s physical presence model and finds the more expansive physical presence model to be impractical and overly burdensome on states.<sup>94</sup>

## 2. The Online Explicit Model

Some states have explicit regulatory language that suggests jurisdiction, rather than online instruction, as the basis for regulation. For example, Arkansas’s application for postsecondary degree programs to offer courses in Arkansas notes that “any non-public or out-of-state postsecondary education institution offering course/degree programs customarily offered at colleges and universities must obtain certification from the Arkansas Higher Education Coordinating Board before offering distance delivery college-level course/degree programs to Arkansas students.”<sup>95</sup>

---

<sup>91</sup> *State Authorization Regulations for Postsecondary Education*, S.D. BD. OF REGENTS, <http://www.sdbor.edu/mediapubs/StateApproval.htm> (last visited Feb. 16, 2015).

<sup>92</sup> KAN. BD. OF REGENTS, *supra* note 89.

<sup>93</sup> This includes establishing a location for “synchronous or asynchronous instruction” or requiring students to “physically meet in one location for instructional purposes more than once during the course term.” 281 NEB. ADMIN. CODE, ch.7 § 003.05, *available at* <http://www.ccpe.state.ne.us/PublicDoc/Ccpe/Rules/pdf/chapter7.pdf>. *See also generally* *Legal and Regulatory*, NEB. COORDINATING COMM’N FOR POSTSECONDARY EDUC. (Apr. 17, 2012), <http://www.ccpe.state.ne.us/PublicDoc/Ccpe/LegalRegs/default.asp>.

<sup>94</sup> Hill Interview, *supra* note 15.

<sup>95</sup> ARK. DEP’T OF HIGHER EDUC., APPLICATION FOR THE CERTIFICATION OF

Similarly, under Alabama state law, the Alabama Commission on Higher Education has jurisdiction over “non-resident institutions defined as postsecondary institutions or corporations offering educational programs in Alabama with main campuses or headquarters located outside the state.”<sup>96</sup>

### 3. The Exemption Model

A minority of states, including California,<sup>97</sup> use an exemption model that allows out-of-state institutions to rely on regional and sometimes national accreditation rather than the independent licensure of the state.<sup>98</sup> Utah, for example, does not require out-of-state schools “accredited by a regional or national accrediting agency recognized by the Department of Education” to seek registration in the state.<sup>99</sup> Other states that follow a similar model include Alaska, Colorado, Delaware and Hawaii.<sup>100</sup>

#### *C. Problems and Complexities Created by the Federal Online State Authorization Rule*

The federal Online State Authorization Rule is problematic for both institutions and students. Procuring authorization to operate in multiple states can be prohibitively expensive and time-consuming for institutions enrolling distance learning students. Very few institutions other than large for-profits “ever considered that they might need each state’s approval in advance should someone from that state happen to join their online program,” and as a result, most were unprepared for the complex state authorization

---

COLLEGE-LEVEL COURSE/DEGREE PROGRAMS AT ESTABLISHED INSTITUTIONS (DISTANCE DELIVERY) 2 (2005), available at [http://www.adhe.edu/SiteCollectionDocuments/AcademicAffairsDivision/ICAC%20Rules%20and%20Regulations/rules\\_part1sec2\\_011609.pdf](http://www.adhe.edu/SiteCollectionDocuments/AcademicAffairsDivision/ICAC%20Rules%20and%20Regulations/rules_part1sec2_011609.pdf).

<sup>96</sup> *Non-Resident Institutions*, ALA. COMM’N ON HIGHER EDUC., <http://www.ache.alabama.gov/Content/Departments/NRI/NRI.aspx> (last visited Feb. 16, 2015). The Alabama code that the Commission on Higher Education bases its regulations on is ALA. CODE §16-5-10(14) (1975).

<sup>97</sup> See *infra* Part III.A.

<sup>98</sup> EDUVENTURES, *supra* note 86, at 11.

<sup>99</sup> Utah Postsecondary Proprietary School Act §13-34-105(1)(e) (2014).

<sup>100</sup> EDUVENTURES, *supra* note 86, at 11.



process.<sup>101</sup> Institutions may need to deal with more than one authorizing body within a state to procure authorization to operate in that state.<sup>102</sup> As a result, a joint survey by two education associations indicated that, in July 2011, “sixty-nine percent of institutions [had] yet to apply for approval in any state.”<sup>103</sup> Some institutions indicated that they lacked the funds necessary to address state compliance.<sup>104</sup>

Moreover, large for-profit institutions are more likely than other types of universities to have the staffing and financial resources necessary to navigate the complex state authorization web, while smaller or nonprofit institutions may not.<sup>105</sup> In addition, many states had not considered out-of-state distance learning programs, and as result had neither the regulations in place nor the resources to accept and process an influx of applications.<sup>106</sup>

Lastly, the requirement for state authorization can also harm students. A survey of institutions in early 2011 indicated that fifty-nine percent of institutions anticipated not accepting students from certain states.<sup>107</sup> If institutions decide not to seek state approval in certain states, students in those states will be unable to enroll in these institutions. This is especially problematic for those students who hope to enroll in distance education programs that serve niche markets, such as Bismarck North Dakota State College’s program for the energy industry or American Academy McCallister

---

<sup>101</sup> Jay Halfond, *Unintended Consequences: An Uncertain Future for Distance Learning*, NEW ENG. J. HIGHER EDUC., June 9, 2011, <http://www.nebhe.org/thejournal/unintended-consequences-an-uncertain-future-for-distance-learning/>.

<sup>102</sup> Hill Interview, *supra* note 15.

<sup>103</sup> *What Are Institutions Doing (or NOT Doing) About State Authorization?*, WCET ADVANCE (Aug. 18, 2011), <http://wcet.wiche.edu/advance/upcea-wcet-sa-survey>. The survey was conducted by University Professional & Continuing Education Association (UPCEA) and WICHE Cooperative for Educational Technologies. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> In fact, many institutions not in compliance with the State Authorization Rule are established, not-for-profit institutions. See Harnisch *supra* note 7, at 9.

<sup>106</sup> Halfond, *supra* note 101.

<sup>107</sup> WCET ADVANCE, *supra* note 103.

Institute's program for funeral study, since it may be difficult to find a comparable program elsewhere in the United States.<sup>108</sup>

Perhaps even more problematically, the wide range of state regulatory models along with the complexity of state requirements create barriers for distance learning students who seek recourse for issues they encounter with higher education institutions. Students may have difficulty determining which state has authority over their complaint, or which state laws are applicable. Students may get "passed back and forth" between higher education regulatory agencies of different states.<sup>109</sup> Furthermore, students with a complaint who are located in a state that exempts accredited higher education institutions from state education laws may have little or no recourse for any difficulties they encounter with a higher education institution which is also based in an exempt state.

### III. STATE REGULATORY MODELS COMPARED

The wide variation in state regulatory models results in different regulatory schemes with which educational institutions must comply in order to become authorized to offer distance education in that state. Part III provides a comparison between two states with widely divergent processes for state authorization. This Part first outlines California's notoriously lax oversight of higher education institutions. It next details Ohio's authorization process. It concludes by comparing the two models.

#### *A. California—Lax Oversight*

The difficulties that higher education students face, as outlined in Part II.C, are especially pronounced in California. California's exemption model results in lax oversight of higher education institutions in the state, creating a problematic regulatory structure that adversely affects both traditional classroom and distance learning students.

---

<sup>108</sup> Russel Poulin & Jim Fong, *Putting a Student Face on the State Authorization Regulation*, CAMPUS TECHNOLOGY (Aug. 24, 2011), <http://campustechnology.com/Articles/2011/08/24/Putting-a-Student-Face-on-the-State-Authorization-Regulation.aspx?Page=1>.

<sup>109</sup> Hill Interview, *supra* note 15.

Furthermore, the for-profit industry in California is particularly active, prompting even greater concern regarding the regulatory structure in the state. For-profit universities enroll more than a quarter of California's undergraduate students.<sup>110</sup> Students at California's for-profit universities experience many of the same issues facing students enrolled at for-profit universities across the country, but often to a greater degree. For example, sixty-seven percent of the state's student loan defaulters attended a for-profit university even though for-profit universities awarded only twenty percent of all degrees and certificates.<sup>111</sup> In comparison, the national rate of student loan defaulters who attended for-profit universities is forty-seven percent.<sup>112</sup>

### 1. The Bureau for Private Postsecondary Education

Postsecondary education in California is governed by the California Private Postsecondary Education Act of 2009 ("the Act"), which established a Bureau for Private Postsecondary Education within the Department of Consumer Affairs ("the Bureau").<sup>113</sup> Currently, the Bureau oversees higher education

---

<sup>110</sup> *California Oversight of Private Postsecondary Education: Joint Oversight Hearing Before Assembly Higher Educ. Comm. and Senate Bus., Professions and Econ. Dev. Comm.*, 2012 Leg., 197th Sess. (Cal. 2012) [hereinafter *Joint Hearing*], available at [http://www.ticas.org/files/pub/Debbie\\_Cochrane\\_testimony\\_2-14-12.pdf](http://www.ticas.org/files/pub/Debbie_Cochrane_testimony_2-14-12.pdf).

<sup>111</sup> Liz Guillen, *Fact Sheet: California's Oversight of Private Postsecondary Schools*, PUBLIC ADVOCATES (Feb. 14, 2012), <http://www.publicadvocates.org/document/fact-sheet-californias-oversight-of-private-postsecondary-schools>.

<sup>112</sup> *Joint Hearing*, *supra* note 110 (Testimony of Debbie Cochrane, Program Director, The Institute for College Access & Success). Additionally, California's for-profit universities also disproportionately enroll students of color. Guillen, *supra* note 111. African-American and Latino students comprise thirty-seven percent of California undergraduates but represent fifty-seven percent of those attending for-profit universities. *Id.* In comparison, African-American and Latino students comprise twenty-eight percent of U.S. undergraduate students, but represent approximately half of all students in the for-profit sector. *Id.*

<sup>113</sup> CAL. EDUC. CODE §§ 94800–94950 (West 2013).

institutions in the state. The Bureau oversees three categories of higher education institutions: (1) unaccredited institutions; (2) nationally accredited institutions; and (3) regionally accredited institutions.<sup>114</sup>

The Bureau has full authority only over unaccredited institutions.<sup>115</sup> Unaccredited institutions must meet standards that the Bureau sets forth, including meeting minimum standards to obtain approval to operate, complying with fair business practices, and submitting enrollment agreement and disclosure requirements.<sup>116</sup> Unaccredited institutions are also subject to the Bureau's investigation, complaint and enforcement procedures.<sup>117</sup>

Nationally accredited schools are automatically approved to operate in the state, but must still comply with some requirements outlined in the Act, including the Bureau's fair business practice, enrollment agreement, and disclosure requirements.<sup>118</sup> These

---

<sup>114</sup> *Id.*

<sup>115</sup> *Joint Hearing, supra* note 110 (testimony of Jamiene S. Studley, President & CEO, Public Advocates Inc.), available at <http://www.publicadvocates.org/sites/default/files/library/jsshearingtestimony02-14-12.pdf> [hereinafter *Studley Testimony*].

<sup>116</sup> *Id.* at 6. The “minimum operating standards for an institution” include that “(a) the content of each educational program can achieve its stated objective; (b) the institution maintains specific written standards for student admissions . . . ; (c) the facilities . . . are sufficient to enable students to achieve the educational program’s goals.” CAL. EDUC. CODE § 94885 (West 2014). Disclosure requirements might include disclosures of known limitations of a degree program, for example, whether “a graduate of the program will be eligible to sit for the applicable licensure exam in California and other states.” 2011 Legis. Bill Hist. CA A.B. 2296 (2012) (Lexis).

<sup>117</sup> *Studley Testimony, supra* note 115. The Bureau has a spotty track record of actually overseeing postsecondary institutions in California. An investigation by the Bay Citizen (a nonprofit news organization committed to investigative reporting) revealed that the Bureau “had a backlog of some two hundred investigations of “schools accused of hiring unqualified faculty members, providing degrees of dubious value and other violations of state education code.” Jennifer Gollan, *At Vocational Schools, Complaints Mount as Oversight Lags*, THE BAY CITIZEN (Dec. 8, 2011), <https://www.baycitizen.org/news/education/vocational-schools-complaints-mount-lags/>.

<sup>118</sup> *Studley Testimony, supra* note 115, at 6 (citing EDUC. § 94890).

institutions are also subject to the Bureau's investigation, complaint, and enforcement procedures.<sup>119</sup>

In contrast, regionally accredited institutions are exempt from the majority of the Bureau's provisions and are not required to comply with the state's statutory and regulatory requirements.<sup>120</sup> Private postsecondary institutions with regional accreditation must still apply to the Bureau for Private Postsecondary Education.<sup>121</sup> However, the application is only two pages and requests only basic information about the institution.<sup>122</sup>

California's exemption of regionally accredited higher education institutions is particularly problematic. Notably, regionally accredited schools are not required to establish that they meet the Bureau's minimum operating standards or follow the consumer protection standards outlined in the Act.<sup>123</sup> Further, for higher education institutions that do require authorization in California, the Bureau has historically been lax about ensuring that these schools have approval to operate in the state.<sup>124</sup>

---

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Regionally accredited schools must comply with the Bureau's provisions that require an institution to provide records to the Bureau before closing and with provisions governing payments and procedures related to the Student Tuition Recovery Fund. *Id.* n.18 (citing EDUC. §§ 94927.5, 94874.1, 94923–94925).

<sup>121</sup> CAL. CODE REGS. TIT. 5, §71390 (2010).

<sup>122</sup> The application consists of two pages that primarily require basic information about the institution, contact person, and owners of the school, a copy of current verification of accreditation, and a \$750 nonrefundable fee. *Application for Approval to Operate an Accredited Institution*, BUREAU FOR PRIVATE POST-SECONDARY EDUC., [http://www.bppe.ca.gov/forms\\_pubs/approval\\_accredited.pdf](http://www.bppe.ca.gov/forms_pubs/approval_accredited.pdf) (providing the application form).

<sup>123</sup> As a result of this gap in oversight, 266,538 undergraduate students at 154 schools in California attend institutions not approved or overseen by the Bureau. See *Studley Testimony*, *supra* note 115, at 7.

<sup>124</sup> Jennifer Golan, *More Than 130 Vocational Schools Are Operating Without State Approval*, N.Y. TIMES, Apr. 5, 2012, <http://www.nytimes.com/2012/04/06/us/california-vocational-schools-operating-without-approval.html?pagewanted=all>. In April 2012, up to 10 percent of California's approved private postsecondary institutions were permitted to operate with expired approvals. *Id.* Despite their expired approvals, the schools were nonetheless listed on the Bureau's website as approved schools. *Id.*

Thus, California in essence relies on regional accreditation agencies to ensure the quality of a majority of its higher education institutions. This heavy reliance on just one branch of the regulatory triad leads to poor oversight of institutions in the state. Moreover, as discussed above, accrediting agencies are not designed to handle student complaints.<sup>125</sup> Thus, students attending a regionally accredited institution in California have little recourse within the state's consumer protection framework for complaints of fraud, misrepresentation, or other actions.<sup>126</sup>

## 2. Assembly Bill 2296 and Other Improvements

California has recently worked toward improving its oversight of for-profit college and vocational school performance. Chapter 585 of California's Education Code, in effect since January 2013, requires institutions regulated by California's Bureau for Private Postsecondary Education to report certain performance measures.<sup>127</sup> These measures include salaries of recent graduates and the percentages of student borrowers who have defaulted on their loans and percentage of students receiving federal student loans.<sup>128</sup> The statute also requires unaccredited institutions to disclose to students their accreditation status and the accreditation status of specific programs.<sup>129</sup> While these improvements are a step

---

<sup>125</sup> Interview with Betsy Imholz, Director of Special Projects, Consumers Union (Apr. 18, 2012) (notes on file with author). "Many people in the field think accreditation agencies are being burdened with issues beyond their reach. Accreditors have neither the staff nor the legal authority to conduct actual investigations. And accreditation reviewers are volunteers, usually from peer institutions, who are experts in higher education but not corporate malfeasance." Eric Kelderman, *Online Programs Face New Demands from Accreditors*, CHRON. HIGHER EDUC. (Nov. 6, 2011), <http://chronicle.com/article/Online-Programs-Face-New/129608/>.

<sup>126</sup> *Studley Testimony*, *supra* note 115, at 16.

<sup>127</sup> 2013 Cal. Legis. Serv. Ch. 585 (A.B. 2296) (West).

<sup>128</sup> *New California Law Requires Greater Disclosure of For-Profit College and Vocational School Performance*, PUB. ADVOCATES (Sept. 27, 2012), <http://www.publicadvocates.org/press-releases/new-california-law-requires-greater-disclosure-of-for-profit-college-and-vocational-s>.

<sup>129</sup> CAL. EDUC. CODE § 94897(p)(1)-(3), *amended by* 2013 Cal. Legis. Serv. Ch. 585 (A.B. 2296) (West).

in the right direction, the Bureau does not pursue violators who operate without state approval, and the new legislation does not provide a mechanism for increased enforcement. Consequently, if a higher education institution in California does not comply with Chapter 585, the Bureau does not have the authority to compel it to do so.<sup>130</sup>

Despite the recent improvements to California's oversight of higher education institutions, the state's flawed regulatory structure poses many challenges in the distance learning context. For example, a California student taking courses from a regionally accredited out-of-state higher education institution will have little recourse within the consumer protection framework of the state. Likewise, an out-of-state student enrolled in a distance learning course or program based in California will encounter similar difficulties finding recourse.

### *B. Ohio—Rigorous Oversight*

In contrast to California's lax approach, some states impose much stricter requirements on educational institutions. Ohio is one such state. In particular, the Chancellor and the Ohio Board of Regents ("the Board") have the authority to approve and review all institutions that operate in Ohio, and Ohio's approval process involves a thorough review of the educational programs that higher education institutions propose.<sup>131</sup>

The primary trigger that causes an institution to require authorization to operate in Ohio is when the institution offers instruction within the state. If the institution has a physical presence in Ohio, then it must also apply for state authorization. Accordingly, the most likely candidates for state authorization include in-state institutions, for-profit out-of-state schools, and

---

<sup>130</sup> Michael Coleman, *Chapter 585: A Renewed Effort to Restore Integrity to California's Vocational and Postsecondary Educational Institutions*, 44 MCGEORGE L. REV. 608, 618–19 (2013) (providing an in-depth analysis of Chapter 585's changes to the California Education Code and their likely impact).

<sup>131</sup> Interview with Shane DeGarmo, Program Approval/Institutional Authorization, Ohio Bd. of Regents (Oct. 18, 2012) [hereinafter DeGarmo Interview] (notes on file with author).

established off-site schools that offer education in Ohio. As a result, the Board has authority over the approval of institutions that award diplomas, offer instruction in certain enumerated fields, or simply offer courses.<sup>132</sup> Institutions that provide distance education to Ohio residents must also apply for state authorization if their online program contains a component such as an internship, student teaching opportunity, or clinical experience that a student completes in Ohio.<sup>133</sup> Further, solicitation or direct recruitment of Ohio residents through mail or agents triggers the authorization process.<sup>134</sup>

---

<sup>132</sup> This requirement is pursuant to Ohio Revised Code Title XVII, Chapter 1713.01 and 1713.02:

As used in sections 1713.01 to 1713.06 of the Revised Code, ‘institution’ includes:

(A) Any nonprofit university, college, academy, school, or other institution, incorporated or unincorporated, that does any of the following:

- (1) Awards or intends to award diplomas for the completion of a course designed to prepare students to be eligible for certification as registered nurses;
- (2) Offers or intends to offer instruction in the arts and sciences, teacher education, business administration, engineering, philosophy, literature, fine arts, law, medicine, nursing, social work, theology and other recognized academic and professional fields of study, and awards or intends to award degrees for fulfilling requirements of academic work beyond high school;
- (3) Offers or intends to offer a course or courses in any of the areas described by division (A)(1) or (2) of this section that are applicable to requirements for a diploma or degree named in either such division.

OHIO REV. CODE ANN. § 1713.01(A) (West 2013). The Ohio Revised Code (which governs program approval) also applies to “any college, university, or school that offers or intends to offer one or more courses . . . that is operated by another state or a subdivision or other governmental entity of another state.” *Id.* § 1713.01(B).

<sup>133</sup> DeGarmo Interview, *supra* note 131.

<sup>134</sup> For out-of-state institutions offering distance education programs, state authorization is required if “the institution maintains a brick and mortar presence in Ohio; the online program contains a component (e.g. student teaching, clinical placement, practicum) that will be completed in Ohio; or the institution solicits Ohio residents for its programs (for-profit institutions only).” *Academic*



Ohio's current model for state authorization consists of an involved review process. Schools seeking authorization in Ohio must complete template forms and submit a first-time application fee and a fee to cover the cost of review.<sup>135</sup> Schools must then begin developing program proposals, which are subject to approval by the Board.<sup>136</sup> The Board only begins the review process once the institution has submitted its program proposals.<sup>137</sup>

In reviewing a proposal, the Board assembles a team with the appropriate expertise needed to review the proposed program. For example, teams may have experts to assess library resources, and may also have experts geared towards certain subject matter, or with a more general expertise in the case of undergraduate programs.<sup>138</sup> The review generally takes place over a three-week period and includes a site visit and meetings with the institution's president, chief academic and financial officers, faculty, librarians, and student support personnel.<sup>139</sup>

The review team also creates a report, which it shares with the institution on the final morning of the site visit.<sup>140</sup> The institution drafts a response to the team's report, which it sends back to the Board.<sup>141</sup> If the school is approved, the Board will write a summary of the request, provide a ten-day public comment period,<sup>142</sup> and then pass the request to the Chancellor for review and approval.<sup>143</sup>

As a result of the 2010 Online State Authorization Rule, Ohio is now in the process of creating a new process to deal with the

---

*Program Approval*, OHIO HIGHER ED, <https://www.ohiohighered.org/academic-program-approval> (last visited Feb. 17, 2015).

<sup>135</sup> DeGarmo Interview, *supra* note 131.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> For a list of current proposals posted awaiting public comments, see *Proposals Posted for Public Comment or Awaiting the Chancellor's Signature*, OHIO HIGHER ED, <https://www.ohiohighered.org/academic-program-approval/programs-pending> (last visited Feb. 16, 2015).

<sup>143</sup> DeGarmo Interview, *supra* note 131.

influx of requests resulting from the state authorization requirements.<sup>144</sup> The Board recognized that the academic program approval process is time-consuming and complex for both the institutions and the Board.<sup>145</sup> The Board is thus introducing a new, streamlined approval process. This process will involve verifying that an institution has appropriate approval from its home state and will ask institutions to verify their accreditation status, among other steps. The new process will reduce the approval time from twelve to twenty months down to nine.<sup>146</sup>

Ohio's approach also affords consumer protection to students. For the consumer protection of students who are Ohio residents, the Board's approach depends on the type of institution involved in the consumer's complaint. For example, if the complaint stems from a student's relationship with a nonprofit institution, the Board records basic information about the complaint if it is also an issue that is normally handled through the institution's grievance procedures.<sup>147</sup> In these cases, if the Board believes that the issue is one that can be addressed through the institution's grievance procedures, then the Board will encourage the student to work through those avenues.<sup>148</sup> On the other hand, if the complaint relates to an issue directly relating to Ohio's program approval process, (for example, an alleged violation of an actual

---

<sup>144</sup> Ohio received approximately 900 applications following the passage of the 2010 State Authorization Rule. *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Regents Team Overhauls Key Review Process to Quicken Turnaround and Ensure Quality*, LEAN OHIO (Mar. 16, 2012), <http://lean.ohio.gov/Results/BoardofRegentsProgramApprovalMarch2012.aspx>. The new process also reduces the number of steps required to gain state authorization in Ohio by 65 percent (from 175 steps to 62 steps). *Id.* Institutions will have a single point of entry to apply for state authorization, will be able to compare Ohio's standards with those of their home state, and will have a mentor at the state agency who will serve as a single contact point throughout the program approval process. *Id.* For the Board, this streamlined process is projected to save the state \$2500 per institution reviewed. *Id.* Further, the new system will have a centralized information management system that will allow staff the ability to quickly and easily retrieve information on past interactions with an institution. *Id.*

<sup>147</sup> DeGarmo Interview, *supra* note 131.

<sup>148</sup> *Id.*

requirement of the approval process) then the Board will likely take a more corrective stance and communicate directly with the institution.<sup>149</sup>

For student complaints related to for-profit institutions, the Board advises students to take complaints to the State Board of Career Colleges and Schools (the “State Board”).<sup>150</sup> The State Board “monitors and regulates Ohio’s private post-secondary career colleges and schools to ensure compliance with minimum standards” established by Ohio Revised Code Chapter 3332, which covers careers colleges and schools.<sup>151</sup> It allows students to file complaints against registered schools.<sup>152</sup> In response to a complaint, the State Board conducts an initial investigation of the complaint to determine if a violation occurred.<sup>153</sup> Upon such a finding, the State Board “may issue a formal complaint or it may endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion.”<sup>154</sup>

If a student complaint results from a distance education program that has an experiential component (for example, student teaching, clinical placement, or practicum) that will be completed in Ohio, the Board has different approaches depending on the student complaint.<sup>155</sup> For example, if the student has an issue with the degree program offered by the out-of-state institution, but not with the experiential component, the student will be directed to the appropriate higher education authority in that institution’s home state.<sup>156</sup> However, if the complaint arises from the experiential

---

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> OHIO REV. CODE ANN. § 3332.01 (West 2014); *About Us – General Information*, OHIO STATE BD. OF CAREER COLLS. & SCHS., <http://scr.ohio.gov/> (last visited Feb. 16, 2015).

<sup>152</sup> *Filing a Complaint*, OHIO STATE BD. OF CAREER COLLS. & SCHS., <http://scr.ohio.gov/ConsumerInformation/FilingaComplaint.aspx> (last visited Feb. 16, 2015).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> DeGarmo Interview, *supra* note 131.

<sup>156</sup> *Id.*

component, the Board will investigate and attempt to resolve the complaint.<sup>157</sup>

*C. Comparative Analysis of California's and Ohio's Regulatory Structures*

California's exemption model results in a lax oversight structure that relies solely on the accrediting agency prong of the regulatory triad as a means of state authorization. In contrast, Ohio's authorization process, in both its current and proposed form, is significantly more robust.

A comparison between the two systems highlights the huge variance in regulatory standards. Ohio's more stringent authorization process renders it more likely that in-state institutions will offer a higher quality education. In contrast, California's system does not ensure a high quality education for its students. California's exemption model means that most higher education institutions in the state are not subject to the entirety of California's regulatory authority, but can achieve state authorization through only regional accreditation. The widely variant state authorization processes and consumer protection standards in each state highlight the need for a comprehensive regulatory scheme that simplifies the state authorization process while adequately protecting the interests of student consumers.

IV. RECOMMENDATIONS

This Part first outlines the genesis of regional interstate compacts and current efforts to recruit states into these compacts in order to deal with the regulatory problems discussed in Part II. This Part next explores flaws with the regional interstate compacts. Finally, it proposes an improved regulatory scheme that ties Title IV federal funding to adequate consumer protection mechanisms in states, thereby providing student consumers with sufficient recourse against their higher education institutions.

---

<sup>157</sup> *Id.*

*A. Regional Interstate Compacts*

A promising avenue for change in the industry is the creation of interstate compacts, which are agreements among two or more states, enacted into law in each state, and designed to address a common problem. The Presidents' Forum, a collaboration of accredited national institutions engaged in distance learning, began the process of creating an interstate compact in 2010.<sup>158</sup> The Forum's objectives mainly focus on reducing impediments to the spread of online education.<sup>159</sup> The Forum identified the structural impediments in state regulatory processes as a main roadblock to online education.<sup>160</sup> The Forum critiqued state approval processes as inhibiting institutions from offering regional or national distance learning.<sup>161</sup> Specifically, the Forum cited the inability of distance learning institutions to afford the "considerable staff and resources necessary to respond individually to each of the fifty states' requirements."<sup>162</sup> Given the differing approaches to state regulations, the Forum proposed a cooperative national effort to effect change in this area.<sup>163</sup>

In September 2010, the Forum convened state authorization officials and representatives from the Council on State Governments ("CSG")<sup>164</sup> to create a Multi-State Reciprocity Task Team ("Task Team").<sup>165</sup> The Task Team reviewed the current state

---

<sup>158</sup> PAUL H. SHIFFMAN, JAMES W. HALL, & ALAN L. CONTRERAS, TOWARD A MODEL TEMPLATE UPON WHICH AN INTERSTATE RECIPROCITY COMPACT OF COLLEGE AND UNIVERSITY PROGRAM AUTHORIZATION COULD BE BASED: A WHITE PAPER OF THE PRESIDENTS' FORUM 1 (2011), *available at* [https://confluence.umassonline.net/download/attachments/62523168/SARA\\_Toward\\_A\\_Model\\_Template.pdf](https://confluence.umassonline.net/download/attachments/62523168/SARA_Toward_A_Model_Template.pdf).

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 6.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 7 ("The Council on State Governments . . . is a non-partisan, nonprofit organization that represents every elected and appointed official in the three branches of state government in the fifty states and U.S. territories[, which] offers guidance and technical assistance in dealing with interstate compacts and other interstate agreements.").

<sup>165</sup> *Id.*

regulatory approval procedures and the “processes and institutional data that states indicate are necessary in order to validate the credibility of an institution for the purpose of granting authority to operate in a state.”<sup>166</sup> The CSG concluded that in order to promote reciprocal strategies among states, its regulatory authorization officials needed to create and define a common template, policy, and enforcement strategy that was closely aligned with the need for review and revision of state regulations.<sup>167</sup> The CSG then drafted a model interstate compact.<sup>168</sup>

The proposed model interstate compact depends on regional interstate compacts that the four regional higher education organizations have already created: the Western Interstate Commission for Higher Education (“WICHE”), the New England Board of Higher Education, the Midwestern Higher Education Compact, and the Southern Regional Education Board. These higher education organizations encourage resource sharing and facilitate action among higher education systems.<sup>169</sup> Currently, the four regional higher education organizations are creating distinct interstate compacts and enlisting the states within their jurisdiction to join.<sup>170</sup> Authorization by one of the four regional interstate compacts would provide a higher education institution with the ability to operate in all states in that compact.<sup>171</sup>

The Commission on the Regulation of Postsecondary Distance Education (“the Commission”) builds upon the work of the Forum and the CSG.<sup>172</sup> The Commission was established to “develop and

---

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Interview with Alan Contreras, Member, Presidents’ Forum (Apr. 18, 2012).

<sup>169</sup> ADVANCING ACCESS, *supra* note 12, at 17.

<sup>170</sup> *See id.* These four regional organizations are typically referred to as compacts, but for the sake of clarity will be referred to as organizations throughout this Article.

<sup>171</sup> ADVANCING ACCESS, *supra* note 12, at 17.

<sup>172</sup> The Commission is composed of former U.S. Secretary of Education Richard Riley and twenty other higher education leaders invited by the Association of Public and Land-Grant Universities and the State Higher Education Executive Officers to “explore the regulation of postsecondary distance education.” *Id.* at 3. The Commission was convened in May 2012 to “develop and provide recommendations that will address the costs and

provide recommendations that will address the costs and inefficiencies faced by postsecondary institutions that must comply with multiple (often inconsistent) state laws and regulations.”<sup>173</sup> The four regional higher education organizations will use the Commission’s policy paper as a guide for creating four distinct regional interstate compacts.<sup>174</sup>

The Commission expanded upon the work of the CSG and the Forum in its 2013 policy paper, *Advancing Access Through Regulatory Reform*.<sup>175</sup> The paper focused on using the four regional higher education organizations to create distinct regional interstate compacts, overseen by a national coordinating board.<sup>176</sup> The paper emphasized the importance of accreditation and institutional quality, consumer protection, and institutional financial responsibility.<sup>177</sup>

The regional interstate compacts create a comprehensive set of standards for higher education institutions; the goal of the creators of the compacts is to implement standards that will appeal to a broad spectrum of states, including those with the most rigorous standards for higher education institutions.<sup>178</sup> In order to join the

---

inefficiencies faced by postsecondary institutions that must comply with multiple (often inconsistent) state laws and regulations as they endeavor to provide educational opportunities to students in multiple state jurisdictions.” *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Interview with Alan Contreras, State Authorization Reciprocity Agreement Coordinator, National Council/WICHE (Oct. 8, 2013). I spoke with Alan Contreras several times in the course of my research. His job title has changed since my first conversation with him—the citations reflect his job title at the time of the interview.

<sup>175</sup> ADVANCING ACCESS, *supra* note 12, at 1.

<sup>176</sup> *Id.* at 4. The paper discusses that the regional higher education compacts are “well-positioned to manage state participation in the agreement since they have strong, existing relationships with states and institutions and [have] demonstrated experience in managing interstate activities.” *Id.*

<sup>177</sup> *Id.* at 4–5. The Commission’s decision to use the four existing regional higher education organizations rather than create a single national structure was based in part on the belief that creating an entirely new national structure would be “too time- and resource-intensive and potentially too bureaucratic to be viable.” *Id.*

<sup>178</sup> Interview with Alan Contreras, Member, Presidents’ Forum (Apr. 18, 2012). A template of a model interstate compact provides an overview of categories and areas that the interstate compact will address. These include (1)

regional interstate compacts, a state must take on the obligation of overseeing institutions located within its boundaries and will have the authority to oversee the “in-state activities of institutions that have physical presence in its borders.”<sup>179</sup> Physical presence is defined as the “ongoing occupation of an actual physical location for instructional purposes or the maintenance of an administrative office to facilitate instruction in the state.”<sup>180</sup> As of August 2014, nine states have joined regional interstate compacts: three states in the Midwest region and six states in the Western region. Joining one of the regional interstate compacts indicates that the state has adopted the appropriate legislation to facilitate compliance with the requirements of the interstate compact.<sup>181</sup>

Successful regional interstate compacts will provide higher education institutions with solutions to many of the problems that were outlined in Part II.C. If enough states join regional interstate compacts, this will reduce the need for higher education institutions to acquire authorization in each state in which they

---

Institutional Status: Charter, Regional Accreditation, State Approvals; (2) Leadership, Governance and Management; (3) Faculty Qualifications; (4) Curricula; (5) Credit Award; (6) Admissions; (7) Student Services; (8) Institutional Information, Marketing, Recruitment; (9) Registrar services and Student records; (10) Institutional Operational and Student Outcome Data; (11) Finances, Tuition and Fees; and (12) Institutional Infrastructure in Support of Student Study. *Id.*

<sup>179</sup> ADVANCING ACCESS, *supra* note 12, at 17–18. One of the most tangible benefits to states that will result from joining the compacts will be a reduced number of applications from higher education institutions. However, this decrease in time and resources spent processing applications will be accompanied by a reduction in fees generated from these applications. Interview with Alan Contreras (Oct. 8, 2013), *supra* note 174.

<sup>180</sup> ADVANCING ACCESS, *supra* note 12, at 15. Further, “[f]or purposes of the interstate reciprocity agreement, institutions delivering pure distance education courses and conducting no other activities in a state should not be deemed to be physically present.” *Id.*

<sup>181</sup> ADVANCING ACCESS, *supra* note 12, at 18. The National Council for State Reciprocity Agreements provides an updated list on the state-level process for introducing and passing cogent legislation. Alan Contreras Interview with Alan Contreras (Oct. 8, 2013), *supra* note 174. The states in the Western region that have joined are Alaska, Colorado, Idaho, Montana, Nevada, and Washington. *Id.* The states in the Midwestern region are Indiana, Nebraska, and North Dakota. *Id.*



offer distance learning courses, thereby lessening their regulatory burden.<sup>182</sup>

*B. The Compacts and Consumer Protection*

A key issue facing the interstate compact model is whether states with widely differing regulatory standards can belong to the same compact, especially given their potentially differing standards for consumer protection. Under the current proposal, a higher education institution will be subject to the state regulatory authority of one state—the state in which it is based. Thus, the state in which the institution is based will deal with any consumer protection issues. In order to join a regional interstate compact, a state will be required to have a mechanism in place to receive, respond to, and resolve student complaints.<sup>183</sup> For example, if both Nebraska and Oregon are members of an interstate compact and an Oregon higher education institution provides a distance learning course to a Nebraska resident, then the Nebraska student's complaint would be directed to Oregon's state consumer protection agency.<sup>184</sup> This mechanism is necessary in order to ensure that students have a clear avenue for the resolution of any complaints and that states are adequately prepared to deal with any issues that might arise at an institution located within its boundaries.

The regional interstate compact model thus raises a number of issues relating to states' consumer protection frameworks. One issue is whether states with subpar consumer protection laws will be permitted to enter the regional interstate compacts.

---

<sup>182</sup> Hill Interview, *supra* note 15; *see also* Press Release, WCET, Colleges Comply with and Avoid State Authorization Regulations (May 2014), <http://wcet.wiche.edu/wcet/docs/state-approval/StateAuthorizationWhatAreInstitutionsDoingPRMay2014.pdf> (explaining that reasons higher education institutions choose not to apply for authorization in a state include that “costs are too high, they are waiting on the emerging State Authorization Reciprocity Agreement, the institution is collecting information, and the college is waiting for more clarification on regulations”).

<sup>183</sup> Hill Interview, *supra* note 15.

<sup>184</sup> *Id.*

Conversations with members of the Forum and WICHE indicate that these states will not be able to join the regional interstate compacts.<sup>185</sup> The Commission's paper states that "a prerequisite for state participation [in the interstate compact] . . . will be a clear process for receiving and resolving consumer complaints."<sup>186</sup> California was cited as a state with insufficient consumer protection laws such that it would not be invited to join a regional interstate compact.<sup>187</sup>

The juxtaposition of California's and Ohio's processes for authorizing higher education institutions exemplifies one of the main problems facing the interstate compacts: whether two states with widely differing standards for authorization can participate in the same compact. In all likelihood, states with stringent state authorization processes (such as Ohio) would not agree to enter an interstate compact with states that have less regulation (such as California). States with laws like California's would therefore not be allowed into the compact.<sup>188</sup> Furthermore, Ohio's trifurcated system for dealing with consumer complaints is far more complex than California's current consumer protection scheme. Accordingly, it seems unlikely that the interstate compacts would include states with such differing standards.

The regional interstate compacts, though a step in the right direction for streamlining a fragmented regulatory system, contain several flaws. While an interstate compact system will be beneficial for states that are eligible to join and will streamline the state authorization process for higher education institutions, the compact system will not include states with insufficient regulatory structures. Perhaps more problematically, the interstate compacts leaves students who reside in under-regulated states with little or no recourse in the face of violations by higher education institutions.

---

<sup>185</sup> *Id.*

<sup>186</sup> ADVANCING ACCESS, *supra* note 12, at 5.

<sup>187</sup> Hill Interview, *supra* note 15.

<sup>188</sup> *Id.*

*C. Solving the Problem of Fragmentation with Federal Intervention and National Consumer Protection Standards*

A more inclusive and effective solution would involve the federal government playing a greater role in the regulatory framework by establishing a national standard of consumer protection for higher education institutions. As demonstrated by the adoption of the 2010 Online State Authorization Rule, the federal government has previously shown a willingness to intercede in the field of education by attaching strings to Title IV federal funding. The federal government can and should do more to protect the rights of students as consumers and a system that ties federal funding to adequate consumer protections would establish a framework for protecting student consumers.

1. Tying Title IV Funding to Consumer Protection

The federal government should set a new requirement for for-profit distance learning institutions that seek Title IV funds: the institutions may only operate in states that meet a federal standard of consumer protection. If states are encouraged to adhere to a heightened, federally-imposed standard, then students will have a better chance of being protected regardless of where their higher education institution is based.

The system would create a national standard for consumer protection regulations and encourage states to create or designate a bureau to implement that standard. The individual state bureaus could be modeled on the Consumer Financial Protection Bureau (“CFPB”), an independent federal agency charged with regulating consumer protection in the realm of financial services.<sup>189</sup> Like the

---

<sup>189</sup> The CFPB was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and President Barack Obama appointed the first director in January 2012. *About Us*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Feb. 16, 2015). According to section 1021 of the new legislation, the CFPB is to “implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” Theresa A. Gabaldon, *Half-*

CFPB, the state bureaus could write rules, enforce consumer financial protection laws, and educate consumers about abusive financial practices.<sup>190</sup> The CFPB also gathers and analyzes information to better understand consumers, financial service providers, and consumer financial markets, a role that state bureaus could take on as well.<sup>191</sup>

The proposed system would depend on the consumer protection laws of individual states rather than federal consumer protection laws, but would strive to provide a similar level of protection to student consumers as the CFPB provides to consumers of financial services. As such, states would be encouraged to have a bureau of consumer protection that would (1) receive and follow up on student complaints; (2) provide students with comprehensive information about higher education institutions and educate students about loan agreements; and (3) expose and investigate deceptive practices by higher education institutions located within the state.

#### a. Complaint Process

A state bureau of consumer protection complaint process would function analogously to the CFPB's complaint process. The CFPB allows consumers to submit complaints about any of eleven financial products and loans, ranging from bank accounts to vehicle loans.<sup>192</sup> Consumers may submit a complaint in which they describe the issue they are experiencing and provide information about the company.<sup>193</sup> The CFPB reviews the complaint and works with the company to provide a response to the consumer.<sup>194</sup> The

---

*A-Cup Better Than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers*, 81 GEO. WASH. L. REV. 929, 936 (2013) (quoting Dodd-Frank Act § 1021(a), 124 Stat. at 1979–80).

<sup>190</sup> See CONSUMER FIN. PROT. BUREAU, *About Us*, *supra* note 189.

<sup>191</sup> *Id.*

<sup>192</sup> *Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/complaint/> (last visited Feb. 16, 2015).

<sup>193</sup> *Id.*

<sup>194</sup> *The Complaint Process*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/complaint/process/> (last visited Feb. 16, 2015).

company must review the consumer's complaint and inform the CFPB and the consumer as to what steps it will take to resolve the consumer's complaint.<sup>195</sup> The consumer then reviews the company's response, and provides feedback to the CFPB.<sup>196</sup> Using the aggregated data compiled by consumer complaints, the CFPB is able to analyze which business practices pose risks to consumers and share the data it compiles with law enforcement and federal agencies.<sup>197</sup>

A mechanism for handling student complaints about higher education institutions would function analogously. A state consumer protection bureau should provide students with a forum for filing a complaint and should work with the higher education institution to resolve the complaints. By receiving student complaints from across the state, a state consumer protection bureau would be able to understand which higher education institutions are particularly problematic and would be able to focus its regulatory efforts on those institutions. Aggregated data from student complaints would guide future rulemaking and help states understand how to better enforce consumer protection laws. Currently, in some states, student complaints are directed toward accrediting agencies, which, as detailed in Part I.C, are ill-equipped to handle them.<sup>198</sup> A state consumer protection bureau that handles all student complaints about higher education institutions in the state would streamline consumer complaints and allow for easy aggregation of data.

#### b. Consumer Education

The CFPB also provides education for consumers. It provides information targeted to students, the elderly, service members, and veterans.<sup>199</sup> A state consumer protection bureau should, like the

---

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> FOR PROFIT HIGHER EDUCATION, *supra* note 54, at 144–46.

<sup>199</sup> *Financial Protection for Older Americans*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/older-americans/> (last visited Feb. 16, 2015); *Information for Servicemembers*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/servicemembers/> (last visited Feb. 16, 2015);

CFPB, provide general information about for-profit distance learning institutions, but should also go further and provide students with the specific performance metrics of higher education institutions within the state.<sup>200</sup> California Education Code § 94929.5, detailed in Part III.A, provides a model for states. It requires higher education institutions to report accurate information about their performance.<sup>201</sup> Students must be able to see the salaries of a school's graduates, the percentage of a school's borrowers who default on their loans, and the accreditation status of the school and its programs.<sup>202</sup> Additional measures that might be useful to students include cost of attendance and related expenses, policies related to refunds, student withdrawal rates, and requirements for the "return of Title IV grants or loan assistance."<sup>203</sup> State consumer protection bureaus could compile this information about for-profit distance learning institutions within their boundaries and ensure that this information is available and easily accessible to students and parents. As in California, this may require the passage of state laws that require higher education institutions to report such performance measures to the state consumer protection bureaus.

---

*Students and Young Americans*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/students/> (last visited Feb. 16, 2015).

<sup>200</sup> This would help students interested in for-profit universities gather information about them, because "[u]nlike selective higher education institutions, where third party rankings (e.g., U.S. News & World Report and college guidebooks) serve as a proxy for quality, the information available concerning FPCUs [for-profit colleges and universities] and other nonselective higher education institutions is sparse and often unreliable." Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 352 (2013) (quoting Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, CHRON. HIGHER EDUC. (July 30, 2012), <http://chronicle.com/article/A-Damning-Portrait-of/133253/>).

<sup>201</sup> CAL. EDUC. CODE § 94929.5 (West 2013); see also Press Release, Public Advocates, New California Law Requires Greater Disclosure of For-Profit College and Vocational School Performance (Sept. 27, 2012), [http://www.publicadvocates.org/sites/default/files/press\\_releases/ab\\_2296\\_press\\_release\\_9-27-12.pdf](http://www.publicadvocates.org/sites/default/files/press_releases/ab_2296_press_release_9-27-12.pdf) ("Effective January 1, 2013, those higher education institutions regulated by California's Bureau for Private Postsecondary Education (BPPE) must report accurate information about their performance.").

<sup>202</sup> EDUC. § 94929.5.

<sup>203</sup> ADVANCING ACCESS, *supra* note 12, at 25.

### c. Institution Supervision

The CFPB also focuses on supervising institutions to ensure their compliance with financial laws and to prevent deceptive practices.<sup>204</sup> In order to accomplish these goals, the CFPB focuses on sharing information about deceptive practices with partners in local, state, and federal law enforcement.<sup>205</sup> Further, the CFPB strives to file or settle enforcement actions within two years of opening an investigation in order to increase deterrence and “provide[] consumers with greater protections of law.”<sup>206</sup>

State consumer protection bureaus should work with state law enforcement bodies to monitor higher education institutions with a history of deceptive practices. As outlined in Part II, even states with regulations regarding reporting or complaints related to deceptive practices sometimes lack the resources to enforce compliance. A key provision of the proposed federal regulation would be adequate measures to ensure compliance with state laws.

## 2. Benefits of Proposed Regulation and Interaction with Interstate Compact

An advantage of the proposed regulation is that state consumer protection laws would work together with the regional interstate compacts. For example, if California improved its consumer protection framework such that it met nationally mandated standards, it could join a regional interstate compact provided that it adopted legislation such that it was in compliance with the requirements of the interstate compact.<sup>207</sup> The minimum standards

---

<sup>204</sup> CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU STRATEGIC PLAN 12–14 (2013), *available at* <http://files.consumerfinance.gov/f/strategic-plan.pdf>.

<sup>205</sup> *Id.* at 15.

<sup>206</sup> *Id.*

<sup>207</sup> Interview with Alan Contreras, State Authorization Reciprocity Agreement Coordinator, National Council/WICHE (Oct. 8, 2013). The states in the western region that are expected to have sufficient regulations in place and are prepared to join the WICHE regional compact are Alaska, Washington, Idaho, Colorado, and Hawaii. *Id.* Other states across the United States that are expected to join other regional compacts include Nebraska, Iowa, Indiana, Vermont, Michigan, and Kansas. *Id.* Thus far, the states that are prepared to join

of consumer protection for states will work in conjunction with the regional interstate compacts, since the regional interstate compacts provide a service to higher education institutions as they reduce the transaction costs of becoming authorized in more than one state. These reduced transaction costs mean that interstate compacts allow a variety of institutions, both large and small, to procure authorization to operate in multiple states. Typically, the institutions most able to operate in more than one state are large institutions with the ability to dedicate resources specifically to procuring authorization to operate in different states.

The proposed system has several advantages over a regulatory framework that consists merely of the regional interstate compacts. First, tying Title IV federal funding to consumer protection will encourage states to increase their consumer protections frameworks in an effort to encourage for-profit distance learning institutions to locate within their boundaries. This will create an incentive for states to ensure they are in compliance with national consumer protection standards, and perhaps create competition among states to quickly improve consumer protection.

Second, tying Title IV federal funding to consumer protection will incentivize for-profit distance learning institutions to locate in states that provide an adequate safety net for student consumers. For-profit universities typically have a strong lobbying presence both at the federal and state levels.<sup>208</sup> For-profit universities that wish to remain in certain states would likely utilize their strong lobbying power to demand higher consumer protection within the states in which they are located.<sup>209</sup>

---

are typically low-population states that do not have a large number of higher education institutions located within them. *Id.*

<sup>208</sup> See generally David Halperin, *The Perfect Lobby: How One Industry Captured Washington, DC*, THE NATION (Apr. 3, 2014), <http://www.thenation.com/article/179161/perfect-lobby-how-one-industry-captured-washington-dc> (exploring the extensive lobbying efforts of for-profit colleges).

<sup>209</sup> For-profit universities have previously demonstrated their lobbying clout. In 2011, proposed stricter regulations on federal funding to for-profit universities provoked a “ferocious response” and resulted in weaker final regulations than those the Obama administration had previously sought. Eric Lichtblau, *With Lobbying Blitz, For-Profit Colleges Diluted New Rules*, N.Y. TIMES, Dec. 29, 2011, <http://www.nytimes.com/2011/12/10/us/politics/for->



### 3. Potential Drawbacks of the Proposed Rule

One of the problems posed by this type of federal regulation is that higher education institutions based in states without adequate consumer protection frameworks may be forced to relocate in order to receive Title IV federal funds, which could result in huge costs to the higher education institution. However, much like the federal Online State Authorization Rule of 2010, the introduction and enforcement of the rule could be staggered.<sup>210</sup> A provision of the federal Program Integrity Rules—while introduced in 2010—was not enforced until July 2014.<sup>211</sup> The four-year grace period provided higher education institutions with sufficient time to comply with the new regulations. Similarly, the proposed federal regulation could have a grace period that would provide states with sufficient time to pass legislation to create consumer protection frameworks that meet national standards. Moreover, a grace period would allow higher education institutions to either pressure states to change consumer protection standards, or provide institutions with sufficient time to relocate to a state that meets the federal standards.

Another potential issue that may arise is that states may not be incentivized to increase consumer protection beyond the federally mandated standards. In this scenario, by setting a minimum consumer protection standard, states will, at best, only comply with the minimum standards. As a result, states will not be motivated to strive for excellence with regard to consumer protection for students and motivation to innovate or provide robust protection beyond minimum standards will be lacking. However, this could be remedied by providing additional funds for states whose consumer protection standards surpass national standards.

Much like the Online State Authorization Rule, the proposed regulation will allow states to retain autonomy and simultaneously

---

profit-college-rules-scaled-back-after-lobbying.html. The regulation proposed by this Article will ideally utilize the for-profit's strong lobbying presence for good—to increase the consumer protection safeguards for consumers in states.

<sup>210</sup> Kelly Field, *Colleges Get More Time to Comply with New Rule on State Authorization*, CHRON. HIGHER EDUC. (Apr. 20, 2011), <http://chronicle.com/article/Colleges-Get-More-Time-to/127216/>.

<sup>211</sup> *Id.*

improve outcomes for students. States that do not prioritize or are not currently home to for-profit distance learning institutions will not be compelled to improve their consumer protection frameworks for student consumers. Conversely, states with a large presence of for-profit distance learning institutions will prioritize meeting the nationally mandated consumer protection standards to encourage these institutions to locate to or remain within their borders.

#### CONCLUSION

The federal government's Online State Authorization Rule brings into sharp focus the snarled nature of state authorization of higher education institutions offering distance learning courses. The complications associated with state authorization additionally affect the recourse available to students wronged by higher education institutions. The regional interstate compacts, if successful, will streamline the state authorization process for higher education institutions. However, the compacts largely focus on aiding education institutions and do little to ensure a consumer protection framework that adequately protects students. As the case studies of California and Ohio exemplify, states have widely differing standards and processes for authorization and levels of consumer protection. Because the regional interstate compacts will leave out states where regulation is most lax, they may not help the students who most need protection.

To remedy this, this Article proposes increased federal regulation in the form of a federal rule that ties Title IV federal funding for for-profit higher education institutions offering distance education to states' consumer protection frameworks. This proposed regulation would encourage states to increase consumer protection for students and simultaneously encourage for-profit higher education institutions offering distance education to locate in states with consumer protection schemes that meet a national standard. These requirements will ensure both a higher quality education for students and appropriate protections for students in the case of improprieties by higher education institutions. Moreover, the proposed regulations would function in concert with the regional interstate compacts, leading to a regulatory framework

that, in addition to aiding higher education institutions, protects student consumers.