NACUA

November 2015 CLE Workshop

Omni Shoreham Hotel · Washington, DC
November 11 – 13, 2015

8B

Compliance Initiatives Tied to Federal Student Aid Funding: Strategies and Tools for Managing Title IV Risks, Preparing for Program Reviews, and Structuring Off-Campus Programming

COLLEGE & UNIVERSITY COMPLIANCE PROGRAMS:
NOW AND FOR THE FUTURE

COMPLIANCE INITIATIVES TIED TO FEDERAL STUDENT AID FUNDING: Strategies and Tools for Managing Title IV Risks, Preparing for Program Reviews, & Structuring Off-Campus Programming

NACUA November Workshop
Wednesday, November 11 – Friday, November 13, 2015
Omni Shoreham Hotel
Washington, D.C.

Justin Draeger
President of the National Association of Student Financial Aid Administrators

Tom D'Antonio
Partner, Ward Greenberg Heller & Reidy LLP

Julie Miceli
Associate General Counsel, Northwestern University

Introduction[1]

In 2014, the federal government invested $161.3 billion in grants, loans, and work-study assistance to help students pay for postsecondary education. These funds help millions of Americans obtain the benefits of a higher education. Given the size of the federal investment in higher education, Congress has always imposed a number of requirements and controls through the Higher Education Act of 1965, as amended, 20 U.S.C., § 1001 et. seq., ("HEA") to prevent fraud, waste and abuse. But ongoing debate around the affordability of higher education and return on taxpayer investment have resulted in tightened accountability requirements and enhanced compliance enforcement. Efforts are underway to peel back burdensome compliance requirements that are either unrelated to the Title IV financial aid programs or that fail to protect taxpayers and students. At the same time, new compliance requirements seek to ensure that students and families are not taking on more debt than they can afford in order to finance their educations and living expenses.

For these reasons, Title IV compliance is growing in complexity and breadth. While all of these requirements are derived from law, regulation and sub-regulatory guidance, financial aid

[1] With thanks to Abigail Giarrusso, Ward Greenberg Heller & Reidy LLP, and Katie Jo Luningham, Husch Blackwell LLP, for their assistance in preparing these materials.

administrators are the ones on the front line of this battle. The U.S. Department of Education's Office of Federal Student Aid (FSA) keeps financial aid administrators posted on changes and requirements though its "Information for Financial Aid Professionals" web site (IFAP), which includes Dear Colleague Letters, publications, handbooks, electronic announcements, regulations, etc. FSA also offers financial aid administrators a multitude of trainings and web-presentations, and hosts an annual conference where it highlights changes for aid administrators. Organizations like the National Association of Student Financial Aid Administrators (NASFAA), the American Council on Education (ACE), and others help aid administrators digest and interpret these requirements.

At the same time, college and university counsel who are knowledgeable about this area can be valuable partners to financial aid administrators when facing a program review, audit, or investigation. This presentation identifies the Title IV compliance issues that college and university counsel should be aware of and highlights the relevant legal requirements and reasoning for the requirements. This presentation also highlights what compliance issues are on the horizon; provides information on where to get more information; and offers useful tips in supporting financial aid administrators.

I. Overview of Compliance Oversight

Types of Compliance Reviews Involving Federal Financial Aid Programs:

- U.S. Department of Education Office of Federal Student Aid program reviews
- Annual Title IV compliance audits (e.g., A-133, SFA audit)
- U.S. Department of Education Office of Inspector General (OIG) audits
- OIG investigations
- Accrediting agency reviews
- State education authorizing agency reviews
- State Attorney General reviews (consumer protection)

The HEA requires all Title IV institutions to conduct annual compliance audits. 20 U.S.C. § 1094. These audits are generally performed by an outside CPA firm in accordance with the Department's regulations and Audit Guide and are provided to FSA. *See* 34 C.F.R. § 668.23. In addition to reviewing an institution's annual audit, section 498A of the HEA authorizes the Secretary to conduct systemic program reviews for all eligible institutions. 20 U.S.C. § 1099c.

Program reviews are usually handled by one of FSA's regional offices and are increasing in volume. The Department's Office of Inspector General may also conduct audits and investigations. These are not as common.

Some potential triggers for a compliance review or investigation include: repeat findings or a high volume of findings in an institution's annual audit; high cohort default rates or withdrawal rates; irregularities or deficiencies in data reporting; student or employee complaints; negative publicity; and concerns from the institution's accreditor, OIG, state attorney general, or other federal agency (e.g., Veterans Affairs, Consumer Financial Protection Bureau). As compliance with the new "gainful employment" rule commences, we can also expect that low program repayment rates, high program default rates, and institutional borrowing rates may also serve as triggers in the future for program reviews and additional oversight.

II. Common Pitfalls And Navigating The Most Institutionally Painful Title IV Challenges

Findings from recent formal and informal program reviews conducted by FSA and NASFAA provide useful information so colleges and universities can better evaluate their own Title IV compliance protocols and avoid the most institutionally painful compliance issues. This section summarizes the top compliance findings institutions must be diligent to avoid and outlines the related legal requirements.

A. NASFAA Standards of Excellence Review Issues

Through NASFAA's Standards of Excellence (SOE) reviews[2] conducted during the 2013-2014 academic year, peer reviewers revealed six common compliance issues. With proper due diligence, self-evaluation, and peer review, these findings can be avoided. NASFAA's findings through its SOE process, as well as a summary of the relevant legal requirements and guidance, follow:

1. Student Consumer Information

Peer reviewers found that every institution reviewed during the 2013-2014 academic year had potential compliance issues regarding their provision of student consumer information. The

[2] NASFAA's Standards of Excellence peer review program assists member institutions in evaluating their performance in correctly interpreting and implementing new financial aid requirements through the institution's policies and procedures.

HEA and U.S. Department of Education ("Department") regulations impose numerous requirements on colleges and universities to make available certain consumer information items that may help students make decisions around their investment in education. Missing or inadequate consumer information is often a common finding. The following are some of the more prevalent issues: having an outdated net price calculator; failing to provide an annual student consumer information notification; missing a sample loan repayment schedule; and omitting gainful employment information.

Net Price Calculator. Section 132(h) of the HEA, (20 U.S.C. § 1015a(h)), requires each postsecondary institution that participates in the Title IV federal student aid program to post a "net price" calculator on its website. The calculator allows students to calculate an estimated net price of attendance at the institution, which is defined as cost of attendance minus grant and scholarship aid. The calculator must use institutional data to provide the estimated net price to current and prospective students and their families based on a student's individual circumstances and on what students with similar circumstances paid in the previous year. The net price calculator is required for all Title IV institutions that enroll full-time, first-time degree- or certificate-seeking undergraduate students.

The concept of net price is to ensure that students and their families have a better sense of the cost of college at a particular school, based on *their individual circumstances* such as the size and income of their family. Net price offers students information beyond an institution's "sticker price" so they can better estimate what their actual costs to attend any one institution may be, after student aid such as grants and scholarships are taken into consideration.

Notably, institutions must update their calculators on an annual basis to ensure that their net price calculator is based on current data of what similar students paid in the previous year. Further, while not specified in the HEA, the Department has indicated that it "strongly urges" institutions to make their calculators easy to find by posting them prominently in locations where consumers will likely look for information on cost and financial aid. In 2011, the Department made available a web application to allow schools to build a calculator for their websites; institutions may also design their own. In 2014, this web template was updated and is available, along with additional information at: https://www.ifap.ed.gov/eannouncements/012714UpdatedNetPriceCalculatorTemplate.html. Note it is expected that the Department will release a new template version in January 2016.

Financial assistance information. Section 485 of the HEA (20 U.S.C. § 1092) and Department regulations require institutions to publish and make readily available to prospective and currents student information related to federal, state, local, private and institutional student financial assistance programs available to enrolled students. *See* 34 C.F.R. § 668.42. There are a number of requirements included in this provision, which is why it is common for institutions to discover that an item is missing upon self-evaluation, peer review, or program review. Of note, these requirements mandate that institutions provide all enrolled students with a description of all Federal, State, local, private and institutional student financial assistance programs. The description should include:

- Procedures and forms by which students apply for assistance;
- Criteria for selecting recipients from the group of eligible applicants; and
- Criteria for determining the amount of a student's award.

Additionally, 34 C.F.R. § 668.42(c) requires institutions to describe the rights and responsibilities of students receiving financial assistance by providing specific information about:

- Criteria for continued student eligibility under each program;
- Standards which the student must meet in order to be considered to be making satisfactory progress in his or her course of study for the purpose of receiving financial assistance, as well as the criteria by which the student who has failed to maintain satisfactory progress may re-establish his or her eligibility for financial assistance *(discussed below)*;
- The method by which financial assistance disbursements will be made to students and the frequency of those disbursements;
- The terms of any loan received by a student as part of the student's financial assistance package;
- A sample loan repayment schedule for sample loans and the necessity for repaying loans;
- The general conditions and terms applicable to any employment provided to a student as part of the student's financial assistance package; and

- The exit counseling information the institution provides and collects as required for borrowers under the Federal Perkins Loan Program[3], the William D. Ford Federal Direct Student Loan Program, and borrowers under the Federal Stafford Loan Program.

Gainful employment information. After a successful legal challenge to the Department's first round of gainful employment regulations, new gainful employment regulations were published October 31, 2014, and took effect July 1, 2015. The new regulations apply to programs that receive Title IV funds under the HEA, on the basis that the program is an "eligible program of training to prepare students for gainful employment in a recognized occupation." 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), (c)(1)(A). Gainful employment programs ("GE programs") are, generally, non-degree programs at public or nonprofit institutions, and all degree and non-degree programs at proprietary institutions. These regulations require institutions to report the program and other related information to the Department for each federal borrower in a GE program. The Department then works with the Social Security Administration (SSA) to calculate the mean and median earnings of borrowers, by program, which is reported back to the institution. The Department uses the higher of the SSA-reported mean or median earnings to calculate a program's debt-to-earnings rates.

Beginning January 1, 2017, institutions are required to disclose on their websites data related to each program's previous cohorts. This data includes items such as: cohort's debt to discretionary earnings, debt to annual earnings, program default rate, and repayment rates. *See* 34 C.F.R. § 668.412. Institutions' programs will later be held accountable for meeting minimum debt to earnings thresholds and may face penalties up to and including loss of Title IV eligibility for programs that fail to meet these thresholds. Until January 2017, however, institutions must continue to comply with the current disclosure requirements by updating their disclosures each year in accordance with 34 C.F.R. § 668.6(b), using the Department's GE Disclosure Template, which is available, along with other relevant information, at: https://ifap.ed.gov/eannouncements/091114GE50UpdatedDisclosureTemplate.html. This template includes information related to each program, such as: cost, debt, earnings, competition rates, and job placement rates. In addition to the required disclosure items, the items must be prominently linked from the gainful employment program webpage and any other institution

[3] The Federal Perkins Loan program lapsed on September 30, 2015.

webpage that provides general, academic or admissions information about the program. Last, the disclosure or a clearly identified link must also appear, where feasible, in any printed, email, online media, or other solicitations that mention the program.

Gainful employment program participation agreement certifications. 

Under the regulations at 34 C.F.R. § 668.414, each institution must also certify in its program participation agreement (PPA) that each Title IV-eligible GE program that it offers:

1. Is approved by a recognized accrediting agency or is otherwise included in the institution's accreditation by its recognized accrediting agency or, if the institution is a public postsecondary vocational institution, is approved by a State agency recognized to approve such programs in lieu of accreditation;
2. Is programmatically accredited if such accreditation is required by a Federal governmental entity or by a governmental entity in the State in which the institution is located or in which the institution is otherwise required to obtain State approval under 34 C.F.R. § 600.9 [state authorization]; and
3. In the State in which the institution is located or in which the institution is otherwise required to obtain State approval under 34 CFR 600.9 [state authorization], satisfies the applicable educational prerequisites for professional licensure or certification requirements in that State so that a student who completes the program and seeks employment in that State qualifies to take any licensure or certification examination that is needed for the student to practice or find employment in an occupation that the program prepares students to enter.

While these new certifications have not yet raised compliance issues, institutions currently offering GE programs must submit a "Transitional Certification" no later than December 31, 2015, unless the institution has executed a new PPA between the effective date of the regulations, July 1, 2015, and December 31, 2015. Thereafter, certifications will be required for each subsequent PPA, and upon adding or modifying a GE program.

See:https://ifap.ed.gov/eannouncements/061115GECertificationsFinalJune9.html.

2. Satisfactory Academic Progress (SAP)

Amongst peer-reviewed institutions for the 2013-2014 academic year, SOE reviewers found that 78% had at least one issue related to Satisfactory Academic Progress (SAP). Common examples of these flags included: (a) missing information about how to reestablish Title IV

eligibility if a student fails to meet the SAP standards and has not appealed, and (b) calculating SAP status only for students who had received financial aid during the term.

Students must be making satisfactory academic progress in order to continue receiving federal student aid. *See* 34 C.F.R. § 668.34, and https://studentaid.ed.gov/sa/eligibility/staying-eligible. Additionally, institutions must check at least annually that a student is annually meeting that requirement for programs longer than a year. As part of the Department's program integrity regulations in 2010, the Department modified its rules related to institutional SAP policies. Some of the goals in this revision were to lower student debt by helping institutions hold students accountable for their academic goals earlier in their academic careers. Additionally, the regulations encourage institutions to evaluate SAP more frequently than annually and to issue financial aid warnings, which could lead to earlier intervention for students who face difficulties. *See* 75 Fed. Reg. 66879-66880 (discussion on SAP).

Specifically, under 34 C.F.R. § 668.34, an institution must establish a policy for determining whether a student eligible for Title IV funding is making satisfactory academic progress in his or her educational program. The regulation generally specifies that the policy must include:

- The grade-point average (or equivalent standard) a student needs to maintain;
- How quickly a student needs to be moving toward graduation (e.g., how many credits a student should have successfully completed by the end of each year);
- How an incomplete class, withdrawal, repeated class, change of major, or transfer of credits from another school affects a student's satisfactory academic progress;
- How often the institution will evaluate the student's progress;
- What happens if a student fails to make satisfactory academic progress;
- Whether a student is allowed to appeal a decision that he/she hasn't made satisfactory academic progress (reasons for appeal usually include the death of a family member, student illness or injury, or other special circumstances); and
- How a student can regain eligibility for federal student aid.

For a detailed list of SAP policy requirements, see: http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/sap.html.

In addition to the availability of a comprehensive policy covering these issues, the Department will consider whether the policy is being properly and regularly administered.

Among common issues related to SAP compliance is a failure to provide information to students on how to regain eligibility after losing it. This information should be available online, and should also be provided to students who fail to make SAP and lose eligibility. Further, institutions must calculate SAP based on all terms of a student's enrollment, not just the payment period term during which the student was receiving financial aid. 34 C.F.R. § 668.34.

3. Verification

The SOE peer reviewers identified that 56% of institutions reviewed during 2013-2014 had policies and procedures for verifying student eligibility that were incomplete. These findings identified that institutions may have omitted procedures for referring suspected fraud to the OIG, or were missing information about waivers and modifications under the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, (Pub. L. 108-76, 20 U.S.C. § 1098bb(b)). The HEROES Act provides for the modification and waiver of some provisions related to students who both receive financial and who are on active duty military. The most recent update of the HEROES Act authorized its provisions through 2017.

In order to comply with these requirements, the Department suggests developing a checklist to ensure that all required data elements are verified. This will also ensure that any conflicting data elements are resolved. This will address the problem of incomplete verification, or situations where applicants provide conflicting information. Institutions should also monitor the verification process to ensure that procedures are followed and work to develop school verification worksheets.

4. Eligibility and Certification Approval Report (ECAR) Information

Fifty-six percent of institutions were missing ECAR information, such as information on third party-servicers or certificate programs. ECAR information shows school specifics that are approved by the Department. An institution's ECAR can be updated via their E-App.

A school's eligibility extends to all eligible programs and locations that were identified on the school's E-App. In general, the school's eligible non-degree programs and locations are specifically named on their ECAR, and additional locations and programs may be added later. Once the Department's School Participation Team (SPT) approves a program or location, the SPT notifies the institution. E-Apps should be updated regularly to change programs and

locations. *See* Volume 2, Chapter 5 of the Federal Student Aid Handbook for requirements on adding locations and programs.

5. Drug-free Workplace

Fifty-six percent of institutions reviewed were missing components necessary for a drug-free workplace, such as an annual drug-free statement or drug-free program for employees.

Department regulations Part 84 extend the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 *et seq.,* as amended), which apply to grants, cooperative agreements and other financial assistance awards. Because an institution applies for and receives its Campus-Based allocation directly from the Department, the institution is considered to be a federal grant recipient and is subject to these requirements. To comply, an institution must make a good faith effort, on a continuing basis, to maintain a drug-free workplace; publish a drug-free workplace statement; establish a drug-free awareness program for employees (*see* 34 C.F.R. §§ 84.205 through 84.220); take actions concerning employees who are convicted of violating drug statutes in the workplace (*see* 34 C.F.R. § 84.225); and identify all known institution workplaces (*see* 34 C.F.R. § 84.230).

Under 34 C.F.R. § 84.210, the drug-free workplace statement must be given to each employee who will be engaged in the performance of any federal award, and, under 34 C.F.R. § 84.205, the statement must:

- Inform employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited at the institution;
- Outline the actions the institution will take against employees for violating that prohibition;
- Inform employees they must abide by the terms of the statement, as a condition of employment under any award, and that they will notify the institution in writing if they are convicted for a violation of a criminal drug statute occurring in the workplace, no more than five calendar days after the conviction.

Institutions must also offer an ongoing drug-free awareness and prevention program for employees that covers the requirements specified in 34 C.F.R. § 84.215, which include:

- The dangers of drug abuse in the workplace;
- Your policy of maintaining a drug-free workplace;

- Any available drug counseling, rehabilitation, and employee assistance programs; and
- The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

6. Consortium Agreements and Written Agreements

Agreements between Title IV institutions are referred to as "consortium agreements;" agreements between Title IV institutions and non-Title IV institutions to provide educational programming are referred to as "written agreements." Fifty-six percent of institutions reviewed had some sort of consortium agreement issues; these issues included determining which institution is responsible for disbursing aid; which institution monitors student eligibility; which institution's procedures apply when calculating awards; and which institution bears the burden of monitoring SAP.

The Department has expressed interest in these issues over the past several years, including on the arrangements between the institutions to recruit students. Any such arrangement must include clearly delineated provisions specifying which institution is responsible for the administration of financial aid throughout the lifecycle of the financial aid process, as well as which party is responsible for meeting the compliance requirements related to the student borrowers (e.g., monitoring eligibility and SAP, entrance and exit counseling, etc.).

As more institutions are entering into these arrangements, it is also important to keep in mind that such arrangements must also comply with a number of Department regulations in order for programs to be Title IV eligible. For instance, the Program Integrity rulemaking in 2010 expanded the Department's requirements related to consortium agreements between Title IV institutions in providing Title IV eligible educational programs. Notably, the Department added a limitation on when Title IV institutions that are owned or controlled by the same person or entity may arrange to offer a Title IV eligible program. In such case, under 34 C.F.R. § 668.5(a)(2), the institution that grants the degree or certificate must provide more than 50% of the educational program. In the preamble to the final rule, the Department explained that this 50% rule does not apply to public or private nonprofit institutions because such institutions generally are not owned or controlled by other entities and typically act independently. *See* 75 Fed. Reg. at 66870.

In an effort to provide more transparency, a Title IV institution that enters into a consortium agreement with another Title IV institution, (or a written agreement with a non-Title IV institution) must give current and prospective students information about the arrangement between the institutions, including:

- The portion of the program that the institution that grants the degree or certificate is not providing;
- The name and location of the other institutions or organizations that are providing the portion of the educational program that the institution that grants the degree or certificate is not providing;
- The method of delivery of the portion of the educational program that the institution that grants the degree or certificate is not providing; and
- Estimated additional costs students may incur as the result of enrolling in an educational program that is provided, in part, under the written arrangement.

See 34 C.F.R. § 668.5(e) (incorporating, 668.43(a)(1)). Further, the regulations restrict written agreements between Title IV institutions ─ including public and private non-profit institutions ─ with a non-Title IV institution that has:

- Previously had its Title IV eligibility terminated,
- Withdrawn voluntarily from Title IV participation under a termination, show-cause, suspension or similar type of proceeding by the institution's state licensing agency, accreditor, guarantor, or U.S. Secretary of Education, or
- Had its application for certification or recertification to participate in Title IV programs denied.

See 34 C.F.R. § 668.5(c)(1)(i)-(v). Current rules also require that the school disbursing an FSA award is responsible for maintaining information on the student's eligibility, how the award was calculated, what money has been disbursed, and any other documentation associated with the award, even if some of that documentation comes from other schools.

B. Other Top 10 Program Review Findings

In addition to NASFAA's SOE findings, in 2015 at its annual conference, NASFAA released a top-ten list of the most common U.S. Department of Education Title IV program

review findings. The list is reproduced here, along with the relevant legal requirements associated with items that were not covered in section (I)(A).

1. *Verification Violations* *(covered above)*

2. *Return of Title IV (R2T4) (calculation errors/ returns made late)*

Department regulations require that Title IV aid allocated for a student who later withdraws should be returned. Specifically, 34 C.F.R. § 668.22 governs the circumstances when Title IV aid should be returned, and the calculation and process for determining how much aid should be returned. Aid must be returned within 45-days of the date of withdrawal. 34 C.F.R. § 668.173(b)(4).

Common findings include inadequately tracking students who withdraw; failure to repay funds within the 45-day time period; not following the institution's policies and procedures for withdrawals; and errors in calculating the return amount. Common calculation errors include: incorrect number of days used in term/payment period; actual clock-hours used instead of scheduled hours; incorrect aid used as "could have been disbursed;" incorrect withdrawal date; and mathematical and/or rounding errors.

3. *Student Credit Balance Deficiencies*

Issues arise when institutions do not have an adequate process in place to determine when an aid credit balance has been created. Under 34 C.F.R. § 668.164 (e), an institution must pay a credit balance directly to the student as soon as possible and credit balances must be released to students within the required 14 day timeframe. Moreover, credit balances cannot be held without student authorizations. In order to ensure these requirements are met, institutions should develop and implement procedures and internal controls to identify and release credit balances within the required timeframe. Such procedures should include a process to determine when a credit balance is created and a system to track the number of days remaining to release funds.

4. *Entrance/Exit Counseling Deficiencies*

In effort to provide borrowers with a better sense of the importance of their repayment obligations, consequences of default, and total loan cost, Department regulations require institutions to conduct and document loan counseling for first-time Direct Loan borrowers (including PLUS Loans). Counseling must comply with a number of requirements for both

entrance and exit counseling. 34 C.F.R. § 685.304. Common counseling compliance errors including: exit counseling not conducted/documented for withdrawn students or graduates; exit counseling materials not mailed to students who failed to complete counseling; and exit counseling completed late.

5. *Crime Awareness Requirements Not Met*

Institutions are required, as a condition of participating in the federal student aid program, to satisfy a number of requirements related to campus safety. These include complying with the Clery Act and related regulations regarding the publication of campus crime statistics and campus safety policies and procedures (*see* 34 C.F.R. §§ 668.41(e) and 668.46), and an annual Fire safety report (*see* 34 C.F.R. §§ 668.41(e)(6) and 668.49). Common crime awareness compliance findings include: campus security policies and procedures not adequately developed; annual report not published and/or distributed; annual report missing required components; and failure to develop a system to track and/or log all required categories of crimes for all campus locations.

6. *SAP Policy Not Adequately Developed/Monitored (covered above)*

7. *National Student Loan Data System (NSLDS) Roster Reporting Inaccurate/Untimely Reporting*

Under 34 C.F.R. § 682.610(c), institutions must maintain accurate enrollment records and accurately report enrollment in NSLDS. Common issues include failing to return the Submittal File within 30 days; incorrectly recording enrollment status codes; incorrectly reporting graduation effective dates; and inaccurately reporting students as withdrawn for summer break even though they are expected to return in the fall.

In order to avoid inaccurate reporting, institutions should create a schedule for processing and submitting their Submittal Reports and include that process in staff Policy and Procedures Manuals. More specifically, institutions should designate a person to monitor reporting deadlines. Additionally, institutions should provide comprehensive and thorough training to personnel about the definitions of different status codes and enrollment statuses so that personnel are using the correct status codes when documenting enrollment.

8. *Inaccurate Record Keeping*

Institutions have a legal duty to maintain documentation in support of awards, as well as to maintain student eligibility information. When institutions have inadequate accounting and recordkeeping systems, they fail to meet their duty under 34 C.F.R. §§ 668.16 (standards of administrative capability) and 668.24 (record retention and examinations). Institutions should develop or purchase an accounting system that clearly shows when Title IV disbursements are made. The system should indicate when credit balances are created and released, in order to deter student credit balance deficiencies (see above). Institutions should be able to provide a clear audit trail that allows auditors to trace all federal cash from beginning to end. In addition to accounting systems, institutions should develop policies and procedures for complying with handling credit balances, processing drawdowns, and making disbursements.

*9. Drug Abuse Prevention Program Requirements Not Met (**NEW)*

In addition to the Drug-Free Workplace Act of 1988 requirements discussed above, Section 485(k) of the Higher Education Opportunity Act of 2008 requires each institution to provide every student, upon enrollment, a separate, clear, and conspicuous written notice with information on the penalties associated with drug-related offenses. The Department's regulations on Drug and Alcohol Abuse Prevention also require institutions annually to provide drug-prevention materials to students and employees. The Department has specified that making these materials available to those who wish to take them is not sufficient to satisfy this requirement. Instead, institutions may include these materials in publications that are distributed to students and employees such as handbooks, onboarding materials, grades, paychecks, or enrollment and advising materials, at the institution's discretion. However, the institution must employ a method that reaches every student and employee, including students and employees who join the institution after materials have been distributed. The Drug and Alcohol Prevention materials must include:

- Information on preventing drug and alcohol abuse;
- Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of drugs and alcohol by students and employees on the school's property or as part of the school's activities;
- A description of the sanctions under local, state, and federal law for unlawful possession, use, or distribution of illicit drugs and alcohol;

- A description of any drug and alcohol counseling, treatment, or rehabilitation programs available to students and employees;
- A description of the health risks associated with the use of illicit drugs and alcohol; and
- A clear statement that the school will impose sanctions on students and employees for violations of the standards of conduct (consistent with local, state, and federal law) and a description of these sanctions, up to and including expulsion, termination of employment, and referral for prosecution.

Further, as a condition of participating in Title IV, an institution must certify through its Program Participation Agreement that it offers a drug and alcohol abuse prevention program to all students and employees. 34 C.F.R. § 86.301. Schools must perform "biennial reviews," reviewing their programs every two years (usually, by the end of each even-numbered year) to determine the programs' effectiveness and to ensure that sanctions are being enforced. As part of the review, institutions should evaluate: (1) the number of drug and alcohol-related violations and fatalities that occur on campus or as part of any of the institution's activities and that are reported; and (2) the number and type of sanctions that are imposed as a result of drug and alcohol-related violations and fatalities on campus or as part of any of the institution's activities. In its *Complying with the Drug-Free Schools and Campuses Regulations*, the Department provides useful guidance on compliance in this area, including a checklist for meeting biennial review requirements. *See* http://www.higheredcompliance.org/resources/resources/dfscr-hec-2006-manual.pdf.

*10. Consumer Information Requirements Not Met and R2T4 Made Late (*Tied) (covered above)*

III. Off-campus programs: Improving Title IV compliance in distance education, study abroad, and new location programming

A. Title IV and Distance Education—Some Key Considerations

1. Distance Education vs. Correspondence Study

Distance education is defined as "education that uses certain technologies to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor. The interaction may be

synchronous (student and instructor are in communication at the same time) or asynchronous."[4] Technologies used for distance education may include: "the Internet; audio-conferencing; or one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite or wireless communication devices." It may also include use of video cassettes and discs so long as the program also incorporates technology that supports interaction between the student and instructor.[5] Distance education programs are not subject to the additional rules that apply to correspondence study, discussed below, and are FSA eligible so long as they are accredited by an accrediting agency.

Correspondence study is defined as a "home-study course for which the school provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the school. Interaction between the instructor and student is limited, not regular and substantive, and primarily initiated by the student"[6] Even if the correspondence study includes an element of distance education technology (e.g., use of an internet discussion board), it will *not* be considered distance education *unless* (1) there is regular and substantive contact between the student and professor and (2) distance education is the "predominant" method of instruction, as defined by the relevant rules.[7] A key difference between correspondence study and distance education is that correspondence study is primarily self-paced by a student, whereas distance education is driven by the institution and instructor.

Why is this relevant? **Because an institution will lose its FSA eligibility if: (a) it offers over 50% of its courses by correspondence study; *or* (b) if 50% or more of its students are enrolled in its correspondence courses**. Additionally, **students enrolled in a certificate program using correspondence study are not eligible for FSA funds**.[8]

2. Regulations Governing State Authorization of Distance Education

The federal "Distance Education Rule" (34 C.F.R. § 600.9(c)) will not currently be enforced by the Department of Education as the result of the District Court for the District of Columbia's decision in *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427 (D.D.C. 2012). The rule had required that an institution offering distance education "in a state in

[4] 2014-2015 FSA Handbook ["FSA Handbook"], p. 2-26 (Vol. 2), *available at* https://ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2014-2015.
[5] *Id.*
[6] *Id.*; *see also* 34 CFR 600.2, 600.7(a)(1), 602.3.
[7] *Id.* at 2-27.
[8] *Id.*

which it is not physically located . . . meet any State requirements for it to be legally offering distance or correspondence education in that State."[9] The Court of Appeals vacated the rule because the Department did not provide sufficient notice of the proposed rule change.[10] In July 2015, Undersecretary for Postsecondary Education Ted Mitchell stated there is no current timeline for a new distance education regulation.[11] Thus, there currently is no federal regulation of state authorization of distance education at this time. That likely will change at some point in the future, but we have no prediction as to when.

Private Sector Colleges did not vacate all federal oversight in this area, however, and there are still certain federal regulations in effect that may impact institutions that provide distance education. These include:

- The "Where to Complain Rule" (34 C.F.R. § 668.43(b)): Institutions must disclose to students the agency that handles complaints in the state where the student resides and, upon request, must produce copies of documents describing the institution's accreditation and state authorizations.
- The "Misrepresentation Rule" (34 C.F.R. § 668.72(n)): This regulation is violated, in part, by any "false, erroneous or misleading statements concerning . . . whether [the program or institution] has been authorized by the appropriate State educational agency," including in any promotional or advertising materials. One possible penalty for the violation of this rule is the loss of Title IV eligibility.
- The "On-Ground Rule" (34 C.F.R. § 600.9 (a) and (b)): This rule remains in place after the *Private Sector Colleges* ruling from the DC Court of Appeals. Pursuant to this rule, an institution must be "sufficiently authorized by a state" (generally its "home state") and must be subject to a process in the state for addressing student complaints. If an institution is found in violation of this rule, it also could lose Title IV eligibility for students in the state.[12]

An institution of higher education must as well seek authorization in any state in which it offers distance education, if that state requires such approval. Every state has different laws

[9] 34 C.F.R. § 600.9(c).
[10] *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427 (D. D.C. 2012).
[11] WICHE Cooperative for Educational Technologies, *State and Federal Regulations on "State Authorization" of Distance Education* (July 2015), *available at* http://wcet.wiche.edu/wcet/docs/state-approval/State-Authorization-WCETTwo-pager-07-27-15.pdf.
[12] NACUANotes, *Status of Federal Regulation of State Authorization* (Vol. 11, March 29, 2013), *available at* http://www.nacua.org/nacualert/notes/StateAuthorization.pdf.

regarding whether an institution is required to seek authorization. The need to seek authorization will depend on whether the institution engages in a "trigger" activity that requires authorization to conduct under the state's law. Examples of "trigger" activities include, but are not necessarily limited to: advertising locally, employing faculty in the state, conducting internships in the state and/or maintaining a local address.

Since 2010, many states have amended their laws, regulations and/or guidance to expand their jurisdiction over distance education. For example, in Maryland an institution of higher education is now required to register with the Maryland Higher Education Commission, even if it administers a "purely distance education degree program" without any "on the ground" activities.[13] We believe this will be an approach adopted in several other jurisdictions as more attention is focused on distance education issues.

3. The State Authorization Reciprocity Agreement ("SARA")

SARA centralizes the authorization process for institutions of higher education that provide distance education. Institutions in a SARA state only need their "home state" authorization to offer distance education in any other SARA member state. The "home state," for SARA purposes, is the state where the college has its main campus that is its principal location for granting degrees.

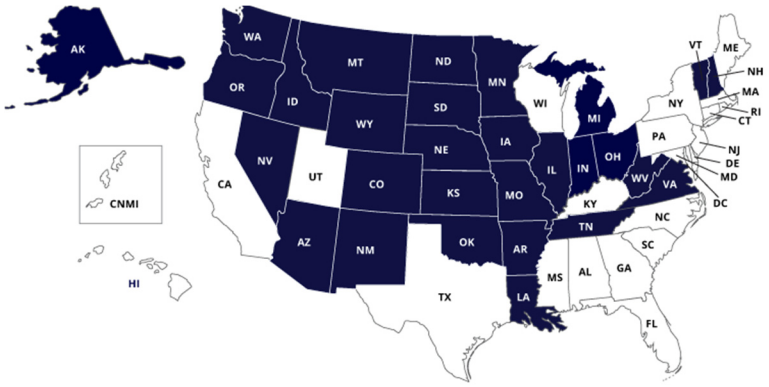
The SARA process is overseen by the National Council for SARA, and is administered by four different boards that are defined by geographic region: the Midwestern Higher Education Compact, the New England Board of Higher Education, the Southern Regional Education Board and the Western Interstate Commission for Higher Education.

States are the member institutions for SARA purposes, and they voluntarily join through their appropriate regional compact. The state must assign an agency or a combination of agencies to investigate and resolve any complaints against an institution within its borders. If the state has a large number of institutions that provide multi-state distance education, its case load will likely increase after it joins SARA.

An institution within a SARA state can decide whether it wishes to operate under SARA. Any independently accredited institution must apply separately to operate under SARA,

[13] *Id.*

including those within the same state system, and those with common ownership.[14] The blue states on the following map—29 in total—are the states participating in SARA as of October 2, 2015:[15]



Note that several states with particularly large college and university contingents, including California, Massachusetts, New York, Pennsylvania and Texas, have not yet opted to participate. These states may not have joined yet because they are concerned that they will lose their ability to protect students who live in their state but take distance education courses through an institution with a different "home state" and/or they do not want to lose the revenue created by applications for state authorization.[16]

Institutions that do participate may derive benefit from operating under SARA, in part because it will reduce the fees and administrative costs required to operate distance education programs in multiple states, and facilitate compliance with multi-jurisdictional requirements in the area. However, the fees incurred by participants are not insignificant, and institutions thus may elect to continue to work directly with the states that require authorization, particularly if the institution only operates in one or two states.[17]

Importantly, SARA does *not* impact state professional licensing requirements. Each state has different standards for licensure, and often has multiple licensing boards that handle licensing for different professions. Any institution that offers distance education for programs

[14] National Council for State Authorization Reciprocity Agreements, *Frequently Asked Questions about SARA* (May 13, 2015), *available at* http://nc-sara.org/files/docs/SARA-FAQs.pdf.
[15] SARA States & Institutions (updated: October 2, 2015), *available at* http://nc-sara.org/sara-states-institutions.
[16] Carl Straumsheim, *Sustaining SARA* (December 18, 2014), *available at* https://www.insidehighered.com/news/2014/12/18/state-authorization-reciprocity-effort-passes-tipping-point-supporters-say.
[17] National Council for State Authorization Reciprocity Agreements, *Frequently Asked Questions about SARA* (May 13, 2015), *available at* http://nc-sara.org/files/docs/SARA-FAQs.pdf.

leading to professional licensure must ensure that it has obtained the necessary approval for all licensure track programs, and must communicate to its students the eligibility requirements to receive a professional license in their home state.[18] The failure to do so may expose the institution to both regulatory sanctions and damage suits if students cannot meet applicable licensure requirements.

B. Title IV and Study Abroad

An institution must have a written agreement with the institution offering a study abroad program, or an entity representing that institution, for the participating student to be eligible for Title IV funds. This arrangement may be a consortium or a contractual agreement, and is subject to certain requirements depending on this categorization.

A consortium agreement is an agreement between two or more *Title IV eligible* institutions. Any of the participating eligible schools may make FSA calculations and disbursements. The institution that disburses the award must maintain information regarding the student's eligibility, the calculation of the award, the disbursements and other documentation concerning the award.[19]

A contractual agreement is an agreement between an *eligible institution and an ineligible institution*. Any agreement between an eligible U.S. institution and a foreign institution will be a contractual agreement. Contractual agreements are subject to more requirements than consortium agreements. These requirements include:

- The eligible institution is the "home" institution, which means the student must be continuously enrolled in that institution as a regular student, and it must determine the student's Title IV eligibility, make the necessary calculations and disbursements, and maintain all required records.
- If both institutions are owned or controlled by the same person, partnership, or corporation, the ineligible institution "may provide no more than 25 percent of the program." If the institutions are not owned or controlled by a common entity, the ineligible institution must provide "less than 50 percent of the program," subject to

[18] WICHE Cooperative for Educational Technologies, *State Authorization and Professional Licensure: The Intersection of State Authorization Agencies and Professional Licensing Boards* (February 2015), *available at:* http://wcet.wiche.edu/wcet/docs/state-approval/State-Authorization-Professional-Licensure.pdf.
[19] FSA Handbook at 2-22 – 2-24.

the accrediting or state agency's standards.

- An institution is prohibited from entering into a contractual agreement with an institution that "(1) has had its eligibility to participate in the Title IV, HEA program terminated by the Department; or (2) has voluntarily withdrawn from participation in the Title IV, HEA programs under a termination, show-cause, suspension or similar proceeding initiated by the institution's State licensing agency, accrediting agency, guarantor, or by the Department."[20]

An institution must deliver certain information regarding the written arrangements to enrolled and prospective students, including: (1) the name and location of the other schools that are providing the program, (2) the portion of the program that the school granting the degree or certificate does *not* provide, (3) how the program is delivered, and (4) potential additional costs the students may experience by enrolling in this program.[21]

A student may be eligible for additional FSA funds if the study abroad program is more expensive than the home school. This information should be reflected in the student's cost of attendance.[22]

C. Title IV and New Locations

1. Eligibility of New Locations

An additional location is generally not obligated to satisfy the "two-year requirement," which otherwise mandates that a school must be legally authorized to provide and have continuously been providing higher education programs for two successive years before its eligibility application. There is an exception if (1) "the [new] location was a facility of another school that has closed . . . for a reason other than a normal vacation period or a natural disaster" (2) "the applicant school acquired . . . the assets at the location" and (3) the former institution is not making payments required to repay a liability for violating a FSA program requirement. This type of new location can avoid the "two-year requirement" by entering into an agreement regarding the improperly used FSA funds.[23]

2. Reporting of the New Location

[20] United States Department of Education: Office of Postsecondary Education, *Dear Colleague Letter: Written Arrangements between U.S. and Foreign Institutions* (October 25, 2011), *available at:* http://www.ifap.ed.gov/dpcletters/attachments/GEN1118FS.pdf.
[21] FSA Handbook at 2-23.
[22] *Id.* at 2-25.
[23] *Id.* at 2-91.

An institution must "report (using the E-App) to the Department when adding an additional accredited and licensed location where they will be offering 50% or more of an eligible program if the school wants to disburse FSA program funds to students enrolled in that location."[24]

If the institution is provisionally certified, is on "a cash monitoring or reimbursement system of payment," attained the assets of an institution that provided FSA eligible programs at the same location the year before, would lose eligibility "under the cohort default rate regulations" by adding the location, and/or is required by the Department to apply, it must apply and wait for approval before disbursing FSA funds to students at the additional location. In all other circumstances, an institution may disburse FSA funds to students enrolled in a new *accredited and licensed* location after it reports the new location to the Department.

If an institution does not follow the above requirements and disburses funds early, it will be liable for all of the funds it disburses to students enrolled at the new location.[25]

IV. Tools for implementing successful strategies to improve campus-wide Title IV compliance

The Department's Office of Federal Student Aid has stated that, for many of the Department's new requirements such as gainful employment and state authorization, it will work to ensure compliance "in the ordinary course." We interpret this to mean during the institutional recertification process, through applications to add new programs or locations, in response to complaints from students or other agencies, and through the resolution of audits and program reviews.

This presentation may create an opportunity for you to reach out to your institution's financial aid team to discuss what you have learned and start gauging their readiness and confidence about a program review. Since financial aid administrators may not be able to anticipate a program review, it can be helpful for counsel to work together with them to determine how likely it is that the institution will soon face a program review or other oversight and whether the institution is prepared. Keep in mind that they are the experts on these issues and have likely been doing this work for a long time. It is not the role of college and university

[24] *Id.* at 2-92.
[25] *Id.*

counsel to audit your institution's financial aid operations. But given the regulatory nature of Title IV compliance, there are numerous ways legal counsel can be of significant help, both in the preparation for, and during, a program review. Some tips for college and university attorneys:

- Familiarize yourself with your annual audit
- Read your institution's Program Participation Agreement
- Familiarize yourself with the Department's Program Review Guide for Institutions, Federal Student Aid Programs
- Reinforce or build that relationship with your financial aid administrators now
- Emphasize your role as a partner
- Ask your financial aid team:
    1. What compliance concerns do they have? Are any of those resource-related (for example, budget, staffing, or training concerns)?
    2. If they knew a program review was ahead in 6 months, what would they change or look at now?
    3. Is the institution facing any circumstances that warrant a deeper self-evaluation, now?
    4. What institutional offices' involvement would be a crucial to ensuring a good result? Would those offices know to make this a priority?
    5. How can the Office of General Counsel help? Get their perspective on how an attorney could help factor into responding to a program review?
- Use "buckets" (metaphorically) to sort and address compliance issues as a team. For instance:
    1. Items that can be "checked-off" a list, (e.g., you have it or you don't; you did it or you didn't do it).
    2. Qualitative items that need evaluation, (e.g., you need a policy, but it needs to have a number of components to it; you need a policy, but you also need to make sure you are complying with it).
    3. Calculations and data files. It's important to recognize that there are a lot of complex calculations and data exchange processes between your financial aid

administrators and the Department that you may not fully understand. But it may be helpful to identify what these are and who is in charge of these.

- Develop a "soft" plan for a program review:
    1. Identify who would serve as the point of contact with the Department.
    2. Identify who would manage the process and track issues as they arise.
    3. Consider how other institutional offices would be involved, and whether they understand their role.
    4. Identify peers in the financial aid and OGC worlds who can be contacted with questions.
    5. Identify who should be on-site and on-call to support the review.
    6. Brainstorm about how staff would be prepared for interviews with the program review team.

V. Key Resources

- Title IV of the Higher Education Act of 1965, as amended (HEA) http://www2.ed.gov/policy/highered/leg/hea08/index.html
- 34 C.F.R. § 668 http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title34/34cfr668_main_02.tpl
- Office of Federal Student Aid, U.S. Department of Education http://www2.ed.gov/about/offices/list/fsa/index.html?exp=1
- IFAP: Information for Financial Aid Professionals website (includes Dear Colleague Letters, publications, electronic announcements, regulations, etc.) http://www.ifap.ed.gov/ifap/
- Federal Student Aid Handbook http://www.ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook
- Program Review Guide for Institutions, Federal Student Aid Programs http://www.ifap.ed.gov/programrevguide/attachments/2009ProgramReviewGuide.pdf
- ED Presentation at 2015 NASFAA Conference: Program Review Essentials and Top 10 Compliance Findings http://fsaconferences.ed.gov/conferences/library/2015/nasfaa/2015NASFAAProgramReviewTop10ComplianceFindings.pdf

Compliance Initiatives Tied to Federal Student Aid Funding:

Strategies & Tools for Managing Title IV Risks, Preparing for Program Reviews, & Structuring Off-Campus Programming

Justin Draeger, President & CEO, National Association of Student Financial Aid Administrators
Tom D'Antonio, Partner, Ward Greenberg Heller & Reidy LLP
Julie Miceli, Associate General Counsel, Northwestern University

Regulatory Developments, Common Pitfalls, & Navigating the Most Institutionally Painful Title IV Challenges

Justin Draeger
President & CEO
National Association of Student Financial Aid Administrators

Preparing for Title IV Oversight

Julie Miceli
Associate General Counsel
Northwestern University

ED's Compliance Toolbox

- Annual Audits
- Program Reviews
- Investigations

Compliance Review Goals

- Evaluate institution for administrative capability
- Identify areas of non-compliance
- Identify areas for improvement
- Quantify loss to students and/or taxpayers for noncompliance
- Raise awareness within the institution for this important function
- Identify best practices

Potential Results

- Positive
  - Validate good practices
  - Identify areas for improvement
  - Raise the profile of your aid office within the institution
- Negative
  - Impose required corrective actions
  - Administrative action against the institution to protect students and taxpayers

University Counsel… Get Prepared

- Don’t wait for a program review letter!
  - Read your institution's annual audit
  - Familiarize yourself with the Program Review Guide and FSA resources
  - Get up to speed on the top compliance triggers

Supporting Financial Aid Administrators

- Meet with your Financial Aid Administrators to discuss risks, recent compliance activity and related issues
- Identify offices and officials with responsibility for compliance components
- Identify relationships with “buddy” institutions

Supporting Financial Aid Administrators (2)

- Review prior audits and make sure deficiencies are addressed
- Review consumer information requirements/check-lists
- Self-evaluate top trigger issues for potential risk
- Discuss whether additional resources or support is needed to improve compliance

Supporting Financial Aid Administrators (3)

- Check-in on comfort-level with new compliance requirements
- Identify any need for training on new regulatory changes
- Develop a strategy so a compliance review is not a surprise and so all interested offices and leaders are aware of potential and consequences
- Discuss how University Counsel can assist in preparation and review process (entrance through exit and any corrective action)

Resources

- FSA Handbook -- https://ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2015-2016
- Institutional Student Information Record Guide (ISIR) -- https://www.ifap.ed.gov/isirguide/attachments/1516ISIRGuide.pdf
- FSA Dear Colleague Letters -- https://www.ifap.ed.gov/ifap/byYear.jsp?type=dpcletters
- FSA Assessment Chart and Tools -- https://ifap.ed.gov/qahome/fsaassessment.html
- NASFAA Standards of Excellence Review Program -- http://www.nasfaa.org/Standards_of_Excellence_Review_Program
- NASFAA Self-Evaluation Guide -- http://www.nasfaa.org/news-item/1014/NASFAA_Self_Evaluation_Guide_for_2014_15_Phase_One_Now_Available

Compliance Initiatives Tied to Federal Student Aid Funding: Structuring Off-Campus Programming

Thomas S. D'Antonio
Ward Greenberg Heller & Reidy LLP
Rochester, NY and Philadelphia, PA

OVERVIEW

- Key Considerations concerning Title IV and Distance Education
- Title IV and Study Abroad Programs
- Title IV Eligibility and the Reporting of New Locations

KEY CONSIDERATIONS CONCERNING TITLE IV AND DISTANCE EDUCATION

- Distance Education vs. Correspondence Study—what is the difference and why do we care?
- The Impact of the *Private Sector Colleges* Holding
- State Authorizations and SARA

TITLE IV AND STUDY ABROAD PROGRAMS

- Necessary Written Agreements—the Options
- Additional Considerations

TITLE IV ELIGIBILITY AND THE REPORTING OF NEW LOCATIONS

- Eligibility
- The Manner of Reporting
- Potential Consequences for Failing to Properly Report

QUESTIONS