

**BUREAU FOR PRIVATE POSTSECONDARY EDUCATION
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: April 25, 2018

Subject Matter of Proposed Regulations: Registration and Re-Registration of Out-of-State Institutions

Four (4) Sections Affected: Division 7.5 of Title 5 of the California Code of Regulations: Adopt sections 71396, 71397, 71398, and 71399.

Specific purpose of each adoption, amendment, or repeal:

1. Problem being addressed:

The Bureau for Private Postsecondary Education (Bureau) has statutory authority to approve and regulate “private postsecondary educational institutions” in California. Existing law, California Education Code (CEC) section 94858, defines those institutions as private entities with a physical presence in California. These institutions must collect from its students Student Tuition Recovery Fund (STRF) assessments and otherwise comply with the Bureau’s STRF regulations. California residents of these institutions are eligible for recovery from the STRF.¹ Historically, the Bureau has not regulated institutions that do not have a physical presence in California, even though there are out-of-state institutions that enroll California students through online distance education.

SB 1192 (Hill, Chapter 593, Statutes of 2016), approved by Governor Brown and filed with the Secretary of State on September 24, 2016, made it mandatory for out-of-state private postsecondary institutions enrolling California residents in distance education programs to register with the Bureau effective July 1, 2017. Such institutions that do not register with the Bureau are not allowed to operate in California. These institutions must qualify for registration by providing specific information to the Bureau. Also, they must comply with the STRF requirements, including collection and submission of STRF assessments, STRF student disclosures, and related record-keeping. A registration is valid for two years. The statute authorized the adoption of relevant regulations by the Bureau including the authority to adopt the application form through emergency regulations, and to ensure that they become law through the regular rulemaking process.

The primary purpose of the proposed regulatory action is to implement SB 1192, which requires the Bureau to adopt regulations requiring out-of-state private postsecondary schools to register

¹ STRF is a monetary fund that exists to mitigate economic losses suffered by California students when an institution or program closes prematurely, or when students are otherwise entitled to economic relief. See, California Education Code § 94923.

with the Bureau and participate in the STRF for California students in distance education programs. Existing regulations do not address this new statutory addition. Specific regulatory language is necessary to implement, interpret, and make specific the requirements of SB 1192. Out-of-state private postsecondary education programs need to understand the registration process, have a uniform application to use to apply for registration and re-register when the two-year term is expired, and know exactly what STRF requirements they are obligated to perform if they are to operate in California.

2. Anticipated benefits from this regulatory action:

The proposal would benefit institutions enrolling California students in distance education by providing clarity regarding the timing, processes and procedures associated with the registration process and STRF compliance. It makes permanent the incorporated application form. It provides: an informal appeal for denials of an application to register; the process for re-registration; and clarification of the specific STRF regulations that these institutions must follow. Ultimately, the regulatory action, like the statute itself, will benefit California students who are enrolled in distance education with an out-of-state institution because such students will be eligible for STRF recovery should the need arise. STRF recovery means an eligible student is entitled to economic relief from losses suffered if a school or program closes or for other circumstances provided under the statute. The action also benefits the Bureau by having uniform standards and processes for registration of and STRF compliance by these institutions.

Factual Basis/Rationale:

Section 94801.5 is added to the Education Code, which includes requirements that out-of-state private postsecondary educational institutions must: (1) register with the Bureau; (2) pay a fee pursuant to Section 94930.5; (3) provide the Bureau with evidence of accreditation and evidence the institution is approved to operate in the state where its main administrative location is maintained; (4) provide the Bureau with a California agent for service of process consistent with Section 94943.5; (5) provide a copy of the institution's catalog and enrollment agreement; and (6) comply with the Student Tuition Recovery Fund (STRF) laws and regulation for its California students, including collection and submission of STRF assessments, providing the STRF disclosures to its California students, and related record-keeping. An institution to which Section 94801.5 applies may not operate in California unless it registers. Registration is valid for two years. The Bureau developed a registration form through emergency regulations and the emergency regulations shall be adopted through regular rulemaking by January 1, 2018. Existing regulations do not address these requirements.

Out-of-state private postsecondary institutions that wish to enroll or continue enrolling California residents will have an effective process and application to register with the Bureau and, if approved, be authorized to operate in California.

Section 71396: This entire new section incorporates the form for institutions to use to register with the Bureau and also addresses the timing of the required STRF compliance, namely that it begins on July 1, 2017, regardless of whether an application for registration is pending with the Bureau at that time.

Section 71396(a): The proposal requires an out-of-state private postsecondary institution seeking registration with the Bureau to submit an application on Form Application 94801.5 (rev. 1/17), which is incorporated by reference and named “Application for Registration or Re-Registration of Out-of-State Institution.” The proposal clarifies that the applicant must submit the completed form, the additional evidence required by statute, and the statutory fee to the Bureau. The Bureau’s creation of an application form is necessary to establish an organized process to obtain information and the registration fee from applicants seeking registration.

The form would be cumbersome and impractical to publish in the California Code of Regulations, so it is incorporated by reference. The Bureau will make the form available on its website and upon request.

The form “Application for Registration or Re-Registration of Out of State Institutions” contains the following:

- **Introduction, List of Items to Include with Application, and Checklist Inquiries:**

The form is named “Application for Registration and Re-Registration of Out-of-State Institutions” in order to identify its purpose. The form references the statutory and regulatory citations under the title to provide applicants with the legal framework and authority for the information, documents, and fee required. The \$1,500.00 non-refundable fee reference is intended to alert the applicant to include the fee with the application.

An introductory paragraph provides a summary of the relevant legal background and legal citations, including (a) the effective date of the law requiring registration, (b) the statutory definition of an “out-of-state private postsecondary educational institution,” (c) the criteria for an exemption to registration, (d) the registration fee, and (e) that registration is valid for two years. This ensures that applicants are on notice of the basic elements of the law to which the form applies.

The second paragraph lists the following items that must be included with the completed form: (1) evidence of accreditation by an accrediting agency recognized by the United States Department of Education; (2) evidence of state approval to operate where the institution maintains its main administrative location; (3) copies of the enrollment agreement and catalog used for California students; and (4) the registration fee. The list of items required to qualify for Bureau registration is included to help prevent incomplete applications from being submitted to the Bureau.

Since a registration is only valid for two years, applicants must apply anew for registration every two years. The applicant must indicate whether the application is an initial application for registration or an application for re-registration, and, if the latter, whether the institution has previously complied with the requirements for STRF disclosures and assessments. Having this information will assist the Bureau in determining whether the applicant is re-registering or

applying for the first time. If the applicant is re-registering, the Bureau will be able to review the applicant's prior compliance with STRF disclosures to students and assessments to the Bureau.

- **Section 1 (“OUT-OF-STATE INSTITUTION”):**

The proposal requires an applicant to provide the institution's legal name, business form (sole proprietorship, partnership, limited liability company, or corporation), dba or trade name (if different), main administrative address, telephone number, fax number, and website address. This information will ensure complete identifying information is available to the Bureau in a consistent format and that the required applicant information is provided to enable identification and accuracy in the processing of the application and issuance of the registration.

- **Section 2 (INSTITUTION'S CONTACT PERSON (for this application)):**

The proposal requires the applicant to identify an individual's name, email address, address, phone and fax number for the contact person for the application. This ensures that the Bureau has a point-of-contact at the institution for questions about the application or correspondence related to the application.

- **Section 3 (INSTITUTION'S CALIFORNIA AGENT FOR SERVICE OF PROCESS):**

The proposal requires the applicant to provide the name, address, and telephone number of a California agent for service of process. This provision assures compliance with Education Code section 94801.5, which states, in part: “The institution shall provide the bureau with...[t]he agent for service of process consistent with Section 94943.5 [“An institution shall designate and maintain an agent for service of process within this state, and provide the name, address, and telephone number of the agent to the bureau.”]).

- **Section 4 (AFFILIATED INSTITUTION(S) IN CALIFORNIA (if any)):**

The proposal requires the applicant to identify any affiliated institutions or institutional locations in California, and provide their legal names, business forms, trade names, and contact information. According to the statutory definition of “out-of-state private postsecondary institution” in Education Code section 94850.5, an out-of-state private postsecondary institution is one that has no physical presence in California itself even if it has “affiliated” institutions or institutional locations in California. An affiliate is clarified in the application as an entity that is related to the out-of-state institution by financial interests or other means of control. This information ensures that the Bureau can properly determine that the applicant meets the statutory definition and will know whether the applicant has any affiliate institutions in California that must be regulated under other provisions of the Bureau's laws related to institutions with a physical presence in the state.

- **Section 5 (ACCREDITATION):**

The proposal requires the applicant to provide the required verification of accreditation so that the Bureau can evaluate the applicant's compliance with Education Code section 94801.5, which

states, in part: “The institution shall provide the bureau with...evidence of accreditation.” The Education Code defines “accredited” to mean that an institution is accredited by an accrediting agency recognized by the United States Department of Education. (Ed. Code §94813.)

Accordingly, this section ensures that the applicant is aware of the requirement that it produce evidence of accreditation from an accreditation agency that is recognized by the United States Department of Education in order to become registered with the Bureau.

- **Section 6 (STATE AUTHORIZATION):**

The proposal requires the applicant to provide the required verification of state authorization so that the Bureau can evaluate compliance with Education Code section 94801.5, which states, in part: “The institution shall provide the bureau with...evidence that the institution is approved to operate in the state where the institution maintains its main administrative location.”

- **Section 7 (CATALOG AND ENROLLMENT AGREEMENT):**

The proposal requires the applicant to provide the Bureau with copies of the institution’s catalog and enrollment agreement for its California students so that the Bureau can evaluate compliance with Education Code section 94801.5, which states, in part: “The institution shall provide the bureau with...[a] copy of the institution’s catalog and sample enrollment agreement.” The Bureau will review the sample enrollment agreement and catalog to ensure that the applicant has included the required STRF disclosures in order to become registered with the Bureau.

- **Section 8 (CERTIFICATION UNDER PENALTY OF PERJURY AND LEGAL NOTICE):**

The proposal includes a certification *under penalty of perjury* that would help ensure that the application contains truthful, factual representations and is made in good faith by the applicant (see, e.g., judicial explanation of the use of certifications in *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223). The Bureau will be better able to meet its obligation to protect the consumers of California since only an applicant who meets the statutory requirements as demonstrated by their application for registration will be authorized to provide distance education to California students. Creating the application with a certification helps protect the public by helping ensure that only qualified applicants are authorized to operate in California. The proposal also includes a privacy notice that the Bureau is required to provide with any form that collects personal information. This notice ensures that the applicant is aware of the Bureau’s practices with respect to collecting personal information pursuant to the Information Practices Act.

Section 71396(b): The proposal explains that an application which does not contain all the information required by the section will render the application “incomplete” and the institution will be ineligible for registration or re-registration. This is necessary so that applicants are clearly aware that an application must have all required components to be considered complete and thereby eligible for a substantive review by Bureau staff. It is also necessary to ensure that applicants are aware of the consequences for failing to provide a complete application.

Section 71396(c): The proposal provides that even if an application for registration is pending with the Bureau, an applicant must still comply with the part of Education Code section 94801.5, which states: “Effective July 1, 2017, an out-of-state private postsecondary institution shall...comply with...the requirements of the Student Recovery Fund...and regulations adopted by the bureau related to the fund...” This is required because institutions may mistakenly believe that if they have a registration pending with the Bureau, they do not have to comply with the STRF requirements until that application is approved by the Bureau.

Section 71397: This new section addresses the processing of completed applications and the process for appealing a denied application.

Section 71397(a): This new section makes clear what the conditions are for the Bureau to either grant or deny an application for registration, as set forth in section 94801.5 of the Code. This section states that the Bureau is limited to one of two options when acting on the completed application, either a grant or denial of registration. If an institution is required to register with the Bureau under section 94801.5 of the Code, then the requirements set forth in that section must also be satisfied, or the application will be denied.

Section 71397(b): This new section describes options available to an institution upon application denial by the Bureau. One option is simply to reapply for registration. This option allows the institution to start from the beginning and provide a new and different application that presumably corrects any deficiencies with the prior application. However, since a new application would require a new application fee, and since an applicant may believe that the Bureau incorrectly denied the application, a second option is for the applicant to appeal the denial by submitting a written request for an informal conference to the Bureau Chief or his or her designee.

An informal conference before the Bureau Chief or his or her designee ensures that the Bureau is complying with section 94801.5 by registering all institutions that meet the criteria set forth in statute. Moreover, an informal conference appeal creates a mechanism that ensures uniform review and processing of applications by the Bureau.

The Bureau specifically selected an informal conference because it is consistent with other appeal processes used by the Bureau, such as the informal appeal process set forth in Title 5, California Code of Regulations (5 CCR), section 75040, for appeals of citations issued pursuant to violations of the Bureau’s laws. The Bureau has used the informal appeal conference successfully in the context of citation appeals to allow the respondent an opportunity to be heard and the Bureau to reverse an initial decision if warranted under the Bureau’s laws and regulations. Indeed, holding an informal conference could correct any initial denials based on administrative or technical errors in processing. As a hypothetical, a denial could be based on the Bureau’s belief that the institution’s catalog does not comply with Bureau requirements, but during the informal appeal, the institution could show that it is in compliance. Perhaps the Bureau staff member that initially denied application was not aware of another section of the school catalog that demonstrates compliance.

Finally, holding a more formal appeal proceeding under the Administrative Procedure Act (Government Code 11340 et. seq.) (“APA”) is not required by the underlying statute for these types of applications, and such a formal process would be inefficient for an application with such clear and basic requirements as this application. Unlike the Bureau’s licensing process which incorporates the APA, this application is merely for a “registration,” not a Bureau “approval to operate” license. Such a license is preceded by the evaluation of the substantive adequacy of an institution’s operating standards, including curriculum, financial stability, facilities, etc. Rather, these regulations only administer a registration process, and only require the submission of certain documents which is more of a “black and white” standard for approval.

Additionally, this section sets a limit of 30 days for the request for an informal conference to be submitted by the applicant. The deadline for submitting an appeal provides finality to the appeal option if an institution is silent about an appeal. Also, 30 days is a time period that is reasonable and has been used by the Bureau in other regulations for informal appeals [see, for example, 5 CCR section 75040 (informal appeal of citations).] In sum, 30 days allows adequate time for the institution to decide to submit an appeal without extending the process out further than necessary for both parties.

Section 71397(c): This new section states when an informal conference must be scheduled and how it may be conducted. This sets forth that an informal conference must be scheduled within 30 days of the receipt of the written request for the informal conference. It also allows the informal conference to be scheduled beyond the 30 days if good cause exists, such as scheduling issues or medical emergencies. Again, the 30 days for scheduling of the conference is a time frame that is consistent with other Bureau regulations for the scheduling of informal appeals (see, 5 CCR 75040(b).). It keeps the process moving and protects institutions from undue or unreasonable delays. However, allowing an extension beyond the 30 days for good cause also provides necessary flexibility for tight schedules or in cases of an emergency. Additionally, this section allows the option for the informal conference to be conducted by telephone. This allows the conference to be held quickly and also reduces the burden on those requesting a conference by allowing it to take place by telephone rather than a representative having to travel to Sacramento.

Section 71397(d): This new section provides that the applicant may submit declarations and documentation before or at the informal conference, and the Bureau must consider such evidence along with any other relevant documentation. This allows the applicant to submit supplemental materials beyond what was provided with the application to further demonstrate the institution’s qualifications for registration, rather than simply limiting the institution to what it originally submitted. Disallowing the submission of additional materials would decrease the likelihood that the informal conference will result in a final resolution of the application appeal, as only originally submitted materials which have already been reviewed and considered insufficient would be allowed. Furthermore, such declarations and documentation may provide greater context to originally submitted materials that adequately convinces the Bureau that a particular requirement has been satisfied.

Section 71397(e): This new section specifies the post informal conference procedures. Specifically, it provides that the original denial can only be affirmed or reversed and that the

decision must be served on the applicant within 30 days of the conference, unless it is extended for good cause, including to allow the applicant to submit and the Bureau to consider, additional documentation. For the same reasons noted above, the 30-day time frame and acceptance of additional materials is necessary for a fair, efficient, and effective informal appeal process. The process allows an applicant with good cause to submit additional documentation after the conference, while otherwise limiting the time period for a decision to just 30 days so that an applicant obtains a decision relatively quickly. In some cases, a material document may be discussed at the informal conference that would resolve the appeal (for example, new evidence that the institution is accredited may have just come into existence). In such a case, the Bureau could provide the institution an opportunity to supplement the application record in order to fairly and efficiently resolve the appeal.

Section 71398: This entire section addresses re-registering with the Bureau as registration is only valid for two years.

Section 71398(a): For clarity, this new section provides the exact date and time that a registration expires if an institution does not re-register beforehand. This avoids any confusion as to when the registration expires. Midnight is chosen because it separates calendar days.

Section 71398(b): This new section provides the steps needed to re-register with the Bureau. The proposal specifies that a new application must be completed and submitted along with the registration fee and required documentation. As registration is valid for two years, institutions need a method to re-register. Otherwise, they would no longer be able to operate in California after the two-year period expires. The steps are identical to the original application as set forth in section 71396(a).

Section 71398(c): This new section provides that so long as a completed re-registration application is received prior to the expiration of the current registration, an institution can continue to operate in California while the Bureau processes the application. This allows institutions to operate and provide uninterrupted distance education to California residents while their re-registration is being processed if they submit the application and fees before their current registration expires. In case of a backlog in processing these registrations and re-registrations, it will be clear that the institutions are authorized to operate in this state while the application is pending.

Section 71398(d): This new section provides that an institution which has not submitted the required Student Tuition Recovery assessments to the Bureau is not eligible to re-register. The primary purpose of the statute at issue is to make California residents of these distance education programs eligible for the Student Tuition Recovery Fund. Institutions not submitting the assessments as required by statute directly contradicts this purpose. Additionally, institutions with physical presences in California also are unable to renew their approval if they have not remitted the necessary assessments to the Bureau. Accordingly, this provision brings parity between in-state and out-of-state institutions.

Section 71399: This section specifies the STRF requirements that these institutions are to follow.

Section 71399(a): This new section specifies that the STRF regulations related to the collection and submission of STRF assessments and the related record keeping requirements apply to these institutions as well. This section is necessary to clarify that these institutions will be following the same process and schedule set forth in the current regulations for schools with physical presences in California as required by section 94801.5(a)(2) of the Code.

Section 71399(b): This new section specifies that an institution must provide a prospective student with both a catalog and an enrollment agreement containing the required Student Tuition Recovery Fund disclosures prior to enrollment. This section is necessary to clarify that these institutions will be required to provide the same disclosures set forth in the current law for schools with physical presences in California as required by section 94801.5(a)(3) of the Code.

Section 71399(c): This new section requires that the enrollment agreement contain a statement that the Student Tuition Recovery Fund fee is non-refundable. This section is necessary to clarify that these out-of-state institutions will be required to provide the same disclosure in the enrollment agreement as is set forth in the current law for schools with physical presences in California as required by section 94801.5(a)(3) of the Code.

Section 71399(d): This new section requires that at least 30 days prior to closing, an out-of-state institution shall notify its California students about the Student Tuition Recovery Fund and the Bureau's contact information. This section is necessary to clarify that these out-of-state institutions will be required to provide the same disclosures prior to closing as is set forth in the current law for schools with physical presences in California as required by section 94801.5(a)(2) of the Code.

Underlying Data

None

Business Impact

This regulation will not have a significant adverse economic impact on businesses. This proposal does not affect institutions in California. California institutions will be regulated the same. The proposal requires out-of-state private postsecondary institutions that enroll California residents in distance learning programs to register with the Bureau and participate in the Student Tuition Relief Fund as required by the statute.

Economic Impact Assessment

The regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the state of California because the requirement to register with the Bureau is limited to out-of-state institutions. Institutions in the state of California will not be effected by the proposal.

- It will not create new business or eliminate existing businesses in the State of California because the regulations only address out-of-state institutions. Institutions in the state of California will not be effected by the proposal.
- It will not affect the expansion of businesses currently doing business within the state of California because the regulations only effect out-of-state institutions. Institutions in the state of California will not be effected by the proposal.
- The regulatory proposal benefits the health and welfare of California residents by making those who participate in distance education with out-of-state private postsecondary institutions eligible for the Student Tuition Recovery Fund, which mitigates the economic loss under specified circumstances. Currently, California residents enrolled in these out-of-state private postsecondary distance programs are not eligible for assistance from the Fund.
- The regulatory proposal does not affect the state’s environment because these are regulations to provide a registration form and its processing by the Bureau.
- The regulatory proposal would not enhance worker safety because the regulations are to create and process an application form to register with the Bureau.

Specific Technologies or Equipment

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. The alternative was rejected because this conflicts with the requirements of SB 1192.