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Final Regulation Agency Background Document

Agency name	State Council of Higher Education for Virginia
Virginia Administrative Code (VAC) Chapter citation(s)	40 VAC 31-125
VAC Chapter title(s)	Certification Required for Out-of-State Postsecondary Schools Offering Distance Learning in Virginia
Action title	Distance Education
Date this document prepared	May 23, 2022

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This regulatory action comes as a result of a 2020 legislative mandate to create regulatory language to amend 8VAC 40-31. Legislation that will become effective July 1, 2022 requires out-of-state postsecondary schools offering distance education to Virginia citizens to be certified by the State Council of Higher Education for Virginia or be participants in a reciprocity agreement to which the Commonwealth belongs. This action creates the language for the regulation and describes certification requirements for schools that do not participate in a reciprocity agreement.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

“SCHEV” and “Council” are used for the State Council of Higher Education for Virginia.

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On May 17, 2022, Council approved the following resolution:

BE IT RESOLVED that the State Council of Higher Education for Virginia approves the Distance Learning Regulation (8VAC40-31-125). Council further authorizes staff to make any necessary technical or formatting changes that may be necessary to put the regulations into final form.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

Pursuant to § 23.1-215, Council may adopt such regulations as may be necessary to regulate certain private and out-of-state institutions operating in the Commonwealth. Under current law, out-of-state postsecondary schools that provide distance learning to Virginia residents are not required to be certified by Council unless they have physical presence in the state. However, the Code was amended in 2020 to require certification, effective July 1, 2022.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Article 3 of Chapter 2 of Title 23.1 of the *Code of Virginia* grants the State Council of Higher Education for Virginia the authority to regulate Certain Private and Out-of-State Institutions of Higher Education.

§ 23.1-215 of the *Code of Virginia* authorizes the State Council of Higher Education for Virginia to adopt, pursuant to the Administrative Process Act, such regulations as may be necessary to implement the provisions of this chapter.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

This regulation is essential to protect the welfare of citizens who are enrolled in programs by out-of-state distance education providers. The national education landscape has changed such that online education programs have proliferated. While it may once have been a common operational model to offer distance learning through “telecommunications equipment” which was located at a site within the state, technological advancements have rendered that model obsolete. Out-of-state postsecondary schools can and do conduct business with Virginia citizens from locations entirely outside of Virginia. Those citizens are entitled to the same protections afforded to Virginia students enrolled in Virginia schools through SCHEV certification processes.

The regulation will not have any effect on institutions that are members in good standing of the National State Authorization Reciprocity Agreement (NC-SARA)—it imposes no certification requirements on SARA members from other states. The NC-SARA framework ensures adequate consumer protections for students of SARA schools nationwide. Certification for schools that are not members of NC-SARA is more complex and will require a separate process that has been outlined in the proposed language. The agency does not expect objections or comments from NC-SARA members. Any issues that arise will be due to comments and requests by schools that do not participate in the NC-SARA reciprocity agreement.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

The regulation will provide that “any degree-granting postsecondary school providing distance learning to residents of the Commonwealth from a location outside of the Commonwealth shall be certified to operate in the Commonwealth or shall be a participant in a reciprocity agreement to which the Commonwealth belongs”. Schools that are members of the NC-SARA reciprocity agreement are not subject to the regulation as—according to NC-SARA, Virginia reciprocally honors their home states’ authorization.

The substantive sections of the regulation (parts A through E) will provide criteria that must be fulfilled by schools that are not members of NC-SARA in order to be certified to operate. Part A addresses aspects of the school’s current status, such as accreditation, being in good standing in its home state, and providing certain disclosures to the public. Parts B through E address the school’s obligations to the Commonwealth regarding maintenance of student records, payment of fees, etc.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantage to the public is that SCHEV will be able to protect Virginia citizens who are enrolled in out-of-state postsecondary schools in distance education programs. There are no disadvantages to the public or the Commonwealth from this regulation.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no applicable federal requirements to the process of certifying out-of-state postsecondary institutions.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

Other State Agencies Particularly Affected

No other state agencies are affected by this regulation.

Localities Particularly Affected

No localities are affected by this regulation.

Other Entities Particularly Affected

No other entities are particularly affected by this regulation.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
Joshua LaRosa	Thank you very much for the opportunity to provide feedback on the State Council of Higher Education for Virginia (SCHEV)'s proposed regulation regarding governing the certification of certain institutions to confer	Email to the commenter on May 4, 2022: Dear Josh, We noted your official comment on these regulations in the Virginia Regulatory Town Hall and have decided to amend our proposed

<p>degrees, diplomas, and certificates. My name is Joshua LaRosa, MPP, and I am a resident of Virginia. I am very concerned with the direction these policies are headed for the many Virginia residents seeking innovative and high-quality education available via distance learning modalities in California.</p> <p>As a consumer, I appreciate and recognize SCHEV's intentions to provide consumer protections to Virginia residents by ensuring residents only attend institutions of higher education over which SCHEV maintains oversight. However, the proposed regulation to prevent students from attending higher education programs via distance learning modalities is far too restrictive and crosses the threshold from protection to paternalism. Adult students should be afforded the right and the opportunity to make decisions for themselves to attend college at a distance learning program based in California if, by their own estimation, the program meets their needs and aligns with their interests and values. It is not within any State's own capacities to make such decisions for adult residents of right mind.</p> <p>The most preferred course of action would be to rescind these regulations and continue permitting Virginia residents to attend institutions of higher education located in California via distance learning modalities. However, I understand these regulations are being advanced pursuant to a 2020 statute that requires promulgation of such flawed policies.</p> <p>As a consolation, therefore, I recommend SCHEV permit students who were either already enrolled or admitted to an institution of higher</p>	<p>regulation. The final version of the regulation will include the following clause (pending approval by Council on May 17th):</p> <p><u>G. In the case of an institution that has enrolled students who are residents of the Commonwealth prior to July 1, 2022, the institution may instruct only such students through completion of their program without being certified to operate in the Commonwealth or being a participant in a reciprocity agreement to which the Commonwealth belongs.</u></p> <p>Please let me know if you have any questions.</p> <p>Thanks, Beverly</p>
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<p>education based on California via distance learning prior to the effective date of this regulation. In other words: If a student can demonstrate they were either attending or admitted to such an institution prior to July 1, 2022, then the student should be permitted to either continue or begin their studies. This would be more than fair considering these changes were not highly publicized or promoted by SCHEV, which stands to seriously derail the academic plans of Virginia residents.</p> <p>Thank you very much for your consideration of my comments. It is my hope these are instructive to SCHEV and that the agency recognizes the need for flexibility and enforcement discretion for students already enrolled prior to the effective date of the regulation. Please feel free to contact me via email with any further questions.</p>	
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Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
40 VAC 31-125		<p><u>*G. In the case of an institution that has enrolled students who are residents of the Commonwealth prior to July 1, 2022, the institution may instruct only such students through completion of their program without being</u></p>		<p>This additional provision provides delayed applicability of the new regulation for institutions that currently enroll Virginia residents.</p>

		certified to operate in the Commonwealth or being a participant in a reciprocity agreement to which the Commonwealth belongs.		
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Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of updated requirements
40 VAC 31-125		N/A	Under current law, out-of-state postsecondary schools that provide distance learning to Virginia residents are not required to be certified by Council unless they have physical presence in the state. However, the Code was amended in 2020 to require certification, effective July 1, 2022. The new law will require that out-of-state postsecondary schools offering distance education to Virginia citizens to be certified by the State Council of Higher Education for Virginia or be participants in a reciprocity agreement to which the Commonwealth belongs. This action creates a new section in the VAC that describes the new certification requirements.