

Comments of

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Regarding

**The Authorization of New York's Postsecondary Institutions to Participate in the State
Authorization Reciprocity Agreement and the Approval of Out-of-State Postsecondary
Institutions for Distance Learning**

State of New York
Department of Education

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Thank you for the opportunity to comment on NYSED's proposed approach to bringing consumer protections to New York residents enrolling online in out-of-state, degree-granting postsecondary schools.² The proposed regulation consists of two distinct parts: a general rule and an exception. The general rule, proposed as subpart 49-2 is that any out-of-state institution seeking to enroll New York residents must submit to oversight by the State of New York. We commend the Department for taking action to fill that gap.

The exception, created by section subpart 49-1, will allow some institutions to enroll New Yorkers without direct oversight by the Department, based on their approval in other states through the State Authorization Reciprocity Agreement, or SARA. While we believe there are serious problems with SARA, we recognize that many of New York's universities hope that participation in SARA will pave the way for them to enroll more students from other states. Therefore, we are recommending that if the proposed subpart 49-1 is adopted it be amended to ensure that:

- The Department receives the data it needs to monitor New York residents' participation in online postsecondary education;
- The Department does not tie its own hands in terms of how it may handle complaints; and,
- Students receive refunds if their schools are unable to provide the education for which a student paid.

Our specific recommendations, which include additional clarifying amendments are offered beginning on page 6, while an attachment that shows our recommendations as incorporated into the current text of the proposed regulation. Below we offer background on the issue of distance education and more information regarding our concerns with SARA.

Absence of Distance Learning Regulation Leaves Consumers Vulnerable

The advance of technology has given rise to exciting new mediums through which institutions of higher education can supply students a greater variety of educational options, supplement traditional classroom learning with interactive and flexible features, and offer educational opportunities to students who would otherwise be unable to partake in postsecondary programming. Distance learning is an outgrowth of this technology that, up until this point, has not been adequately regulated by either state or federal authorities. This reality is particularly dangerous due to the potential for the rapid expansion of unvetted online programs unbound by the constraints of material resources. NYSED is therefore right to see this as an area in need of attention, to bring much-needed protections to New York consumers, and to contribute to the national discussion about how to facilitate online learning opportunities without harm to students.

² Vol. XXXVIII, *New York Register*, page 12 (May 4, 2016).

Today, growth in the enrollment of postsecondary distance learning outpaces the expansion of higher education as a whole.³ Over a quarter of the almost 21 million Americans enrolled in postsecondary studies take advantage of at least some online education and over 2.6 million of these students enrolled exclusively through online learning.⁴ Institutions of higher education based in New York served 728,736 students exclusively through online education in 2014; of these, 584,256 were located in-state and 114,684 were located in the United States, but not in New York. The State University of New York alone enrolled 190,152 students in exclusively distance education courses and 282,816 students in some, but not all, distance education courses as these students worked towards their postsecondary educational goals.⁵

Despite the tremendous number of postsecondary students taking advantage of online learning, federal regulators have struggled with the question of the appropriate state oversight when federal aid is concerned. After a series of efforts that began in 2009, the U.S. Under Secretary of Education announced in 2014 that the Obama administration was “pausing” on the question of the state role in overseeing distance learning.⁶

Meanwhile, states’ treatment of online higher education varies. While all states mandate that postsecondary schools operating with a physical presence—or similar such standard—in that state abide by specific consumer protection standards and regulatory requirements, regardless of the delivery method of the material, out-of-state schools are not held to similar standards. Rather, three-fifths of states—including, at the present time, New York—provide no standards for out-of-state schools enrolling in-state students online, leaving New Yorkers with minimal protection against fraud or abuse. Among the remaining two-fifths of states, most simply require out-of-state institutions enrolling in-state students to register with the state, rather than mandating these institutions abide by any particular standards or undergo a substantive review process.⁷

In response to an increasing awareness that state and federal officials alike were not developing regulation to keep pace with the rise of postsecondary distance learning, leaving institutions in legal limbo and students vulnerable, third-party organizations—specifically the four pre-existing regional compacts—began formulating alternatives to governmental regulation. To unify these efforts, the National Council for State Authorization Reciprocity Agreements (NC-SARA) was established in 2013 and has since received funding from the Lumina Foundation and the Bill & Melinda Gates Foundation to spur the development of the SARA, the first national, interstate compact focused on the regulation of online education provided by institutions based beyond the

³ Allen, I Elaine et al. “Online Report Card: Tracking Online Education in the United States,” Babson Survey Research Group and Quahog Research Group LLC, February 2016, <http://onlinelearningconsortium.org/read/online-report-card-tracking-online-education-united-states-2015/>.

⁴ U.S. Department of Education, National Center for Education Statistics (2016), Digest of Education Statistics, 2014 (NCES 2016-006), Table 311.15, <https://nces.ed.gov/fastfacts/display.asp?id=80>.

⁵ Author’s analysis of National Center for Education Statistics’ Integrated Postsecondary Education Data System (IPEDS).

⁶ “Education Department Will ‘Pause’ on State Authorization Rule,” Inside HigherEd, June 26, 2014, <https://www.insidehighered.com/quicktakes/2014/06/26/education-department-will-%E2%80%98pause%E2%80%99-state-authorization-rule#sthash.L1Jg7iVP.H2FKHjPJ.dpbs>.

⁷ Author’s research based upon communication with state regulators in each of the 50 states.

borders of the student's home state. In 2014, NC-SARA began inviting states to sign onto the agreement; at the time of writing, there are 36 states and approximately 835 institutions participating in SARA.⁸

The lack of regulations regarding the enrollment of New York residents in out-of-state online schools is unsustainable and dangerous. As indicated above, there are, at present, effectively no standards to which an out-of-state school operating online in New York must abide and no governmental office with which students can engage if they believe themselves to be the victim of fraud or abuse. This means that New Yorkers lack basic consumer protection for one of the largest investments they make in their future, and one that both state and federal government officials encourage Americans to undertake: higher education.

We commend the Department for taking action to fill the regulatory gap that technological innovation has expanded. While we recognize that the impetus for the regulation came from institutions based in New York that seek easier entry into other states, the more important aspect of the proposed regulation is its application to out-of-state schools that have not opted into SARA. Our research indicates that most colleges that could opt into SARA are not doing so: of the institutions based in the 36 states that have already joined the pact, fewer than 20 percent of those that offer online programs have opted into SARA.⁹ That means that without the general rule proposed as subpart 49-2, the regulation would accomplish little in terms of protecting New York consumers.

Given the history of predatory practices in higher education, as well as the novel opportunities online education provides for the rapid expansion of programs unbound by the physical resources that constrain brick-and-mortar programming, regulations applied to the online postsecondary marketplace must take care not to create even more hazard to students or taxpayers.¹⁰ We caution that even well-intentioned regulatory processes frequently are captured by the regulated entities, and we are concerned that some aspects of SARA show signs that this has occurred. The recommendations included here are geared toward ensuring the state is not hampered in its effort to protect New York consumers, while encouraging residents to take advantage of new educational opportunities that, if all goes well, will improve their job prospects and enhance their lives.

Flaws of SARA Can Be Lessened, But Not Eliminated

In an open letter addressed to Commissioner MaryEllen Elia on March 16, 2016, more than thirty leading consumer protection and legal services organizations expressed concerns regarding

⁸ "SARA States and Institutions," National Council for State Authorization Reciprocity Agreements, accessed May 23, 2016, <http://nc-sara.org/sara-states-institutions>.

⁹ Calculations based on author's analysis of data available through the Integrated Postsecondary Education Data System (IPEDS), in conjunction with information available from the National Council for State Authorization Reciprocity Agreements (NC-SARA) as of April 28, 2016.

¹⁰ See, for example, the United State Senate's Committee on Health, Education, Labor, and Pensions' 2012 report, "For Profit Higher Education."

the state joining SARA.¹¹ We agree with those concerns. The recommendations below would help to address some of those problems, but there remain fundamental flaws with the SARA agreement that and should not be overlooked. Even if New York ultimately signs onto the compact, it is critical that regulators, students, and advocates alike remain aware of the weaknesses of the agreement and the regulatory areas that must be monitored closely to guard against abuse.

By signing onto SARA, New York is ceding some of its authority to approve institutions to a third-party, private entity that is controlled by institutional representatives. Though the state has been assured that, even under SARA, New York's general consumer protection laws remain applicable, the state would necessarily rely to a large extent on the goodwill of other states, as well as that of NC-SARA, to provide comprehensive oversight. The compact curtails NYSED's regulatory authority, and if New York regulators or students are unsatisfied with the oversight by a college's home state, the only action, other than begging, that NYSED could take would be to abandon SARA entirely, a move that would face fierce opposition from New York-based colleges and universities that would lose the ability to operate in other member states.

The SARA pact also enshrines a two-tiered system in which New Yorkers attending in-state online schools are subject to one set of marketing and operating standards, while students attending out-of-state online schools are subject to another, likely lower set of standards. The ability of schools to earn regulatory approval in one state, but enroll students across the country—without even the possibility that New York will regulate them—will likely inspire schools to set up shop in the states with the lowest regulatory standards while broadcasting nationwide. Further, New York-based schools will likely use the competition from less-regulated out-of-state competitors as a reason that New York should weaken its own oversight, to the further detriment of consumers.

The agreement additionally requires New York and every other state to ignore the financial incentives that have caused so much predatory behavior at for-profit schools, by requiring that for-profit, nonprofit and public institutions be assessed as if they are the same. As numerous investigations have shown, deceptive practices are widespread in the for-profit education sector, while they are relatively rare among public and other nonprofit schools.¹² The SARA agreement would prevent states from addressing the root causes of the problems, mandating them to treat fundamentally different actors in the same way.

¹¹ The Century Foundation, "Open Letter to New York State Education Commissioner MaryEllen Elia," March 16 2016, <https://tcf.org/content/commentary/open-letter-to-new-york-state-education-commissioner-maryellen-elia/>

¹² See, for example, the United States Government Accountability Office's 2010 report, "For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices."

Recommendations

Recognizing that NYSED is strongly inclined to adopt subpart 49-1 and to join SARA, we recommend the following changes in the proposed regulations to clarify their intent and scope, to ensure that the Department receives the data it needs to monitor New York residents' participation in online postsecondary education; to ensure that the Department does not tie its own hands in terms of how it may handle complaints; and, to ensure that students receive refunds if their schools are unable to provide the education for which a student paid, as required by SARA.

1. Clarify application of New York law to SARA institutions

Recommendations 1.a - 1.e in the attached document further this goal.

1.a - d. Institutions based in New York that participate in SARA must be held accountable to both the standards outlined in the national compact sponsored by NC-SARA, as well to New York's regulations. As such, our recommendations add language explicitly stating that participating schools must abide by New York regulations and SARA.

1.e. The SARA agreement itself states that "general-purpose laws enforced by state, tribal or federal law enforcement agencies shall not be affected or superseded by any provisions of SARA." However, the parallel provision in the proposed regulations is in subpart 49-1, which applies only to institutions based in New York. It is critical to ensure that New York's general-purpose laws apply to institutions participating in SARA whether they are based in-state and out-of-state. Our recommendation would state clearly that the state's protections against fraud and abuse apply regardless of the home state of the offending institution.

2. Ensure that colleges provide data necessary for the integrity of SARA: Recommendations 2.a - 2.d in the attached document further this goal.

2.a. By joining SARA, NYSED will be taking responsibility for nation-wide oversight of online programs offered by New York-based institutions participating in SARA. It will be the Department's stamp of approval that other states will rely on to allow the institutions to operate in their states without licensure or registration. Therefore, it is incumbent on the Department to be able to verify the information that New York institutions are submitting in their applications for SARA membership, and to monitor the institutions on an ongoing basis. Though we believe this right logically follows from the home state's responsibilities under SARA, Iowa regulators were denied the ability to review the SARA qualifications of the very institutions for which they have responsibility under SARA.¹³ With this experience in mind, New York must actively protect its ability to verify information provided by institutions in order to confirm that the data provided is a fair and accurate representation of the institution.

¹³ According to information provided to the authors by the Iowa Student Aid Commission, the agency was informed by NC-SARA that state officials cannot require institutions participating in SARA to provide any additional documentation beyond that which is required of all in-state institutions once they self-certify that they meet the SARA requirements outlined in the original agreement. Iowa regulators were thereby unable to confirm the eligibility of institutions.

2.b. While New York would not have a general right to seek data from out-of-state SARA institutions, we recommend a provision that ensures that, at a minimum, information is made available regarding the number of New York residents enrolled by the out-of-state institutions. Our expectation is that these data would be submitted to NC-SARA and made available to participating states.

2.c-d. These provisions would require non-SARA institutions enrolling New York students from out of state to provide data requested the department, including New York enrollment figures.

3. Retain right to hear complaints from students: Recommendations 3.a - 3.c in the attached document further this goal.

Student complaint procedures are among the most important tools government officials have to monitor postsecondary institutions, ensuring that these schools live up to the reasonable expectations of consumers and abide by established legal standards. While it is appropriate, as a general procedure, for complaints to be referred to institutions, it is dangerous for the department to legally require itself to do so. The severity, volume, or nature of some complaints may justify a direct inquiry or investigation without first referring the complaints and awaiting an institution's reply to the complainant. It is for this reason that we strongly recommend that §49-1.6(a), §49-1.6(b), §49-2.7(a) and §49-2.7(b) be stricken from the proposed regulation. We recommend, instead, a general agreement to follow the SARA procedures with the department retaining the right to follow up on complaints as it deems appropriate given the circumstances.

4. Making sure students get what they pay for: Recommendation 4.a in the attached document furthers this goal.

Under SARA, participating states are required to have “clear and well-documented policies for addressing catastrophic events,” including “processes to ensure that students receive the services for which they pay,” in the event of an institutional closure. States have some flexibility to determine how to comply, through methods such as “tuition assurance funds, surety bonds, teach-out provisions or other practices deemed sufficient to protect consumers.”¹⁴ The suggested addition of §49-1.7(d)(ii) explicitly addresses this requirement and ensures that New York has the authority to establish and finance whichever approach it determines is appropriate.” This authority is particularly important because, under SARA, a New York based institution can enroll an unlimited number of students beyond the state's borders, while the state is responsible for ensuring that students get what they pay for. Our recommended addition gives NYSED the ability to determine how to ensure that the resources exist to cover this potential liability.

¹⁴ National Council for State Authorization Reciprocity Agreements, “Unified State Authorization Reciprocity Agreement,” December 1, 2015, http://nc-sara.org/files/docs/UNIFIED_SARA_AGREEMENT_2015-FINAL_Approved_120115.pdf.

Conclusion

Given the tremendous inadequacies of the current regulation of online postsecondary education, we appreciate the Education Department's leadership in developing a comprehensive system to ensure more appropriate protections for New York residents enrolling in distance learning programs provided by institutions based both in-state and out-of-state. While this goal could be achieved by adopting subpart 49-2 only, without participating in SARA, we recognize the intense desire of New York institutions to gain easier access to students in other states. Our modest recommendations would help to address some of the problems with SARA, contributing to an overall regulatory package that represents a major improvement that will benefit New Yorkers who enroll in online postsecondary programs in the hopes of improving their job prospects and earning potential.

Again, we thank you for the opportunity to submit these comments.

Authorize NY Higher Education Institutions to Participate in SARA and Approve Out-of-State
Institutions for Distance Learning (NY-ADR)

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RULE MAKING ACTIVITIES EDUCATION DEPARTMENT PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

I.D No. EDU-18-16-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is
hereby given of the following proposed rule:

Proposed Action: Addition of Part 49 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not
subdivided), 210-c and 212(3); Finance Law, section 97-III; L. 2015, ch. 220

Subject: Authorize NY Higher Education Institutions to participate in SARA and approve
out-of-state institutions for distance learning.

Purpose: The purpose of the proposed amendment is to set forth the requirements for
authorization of New York State higher education institutions to participate in State
Authorization Reciprocity Agreement (SARA) and the requirements for the approval of
out-of-State institutions, who do not participate in SARA to provide distance education to New
York residents.

Text of proposed rule: A new Part 49 is added to the Regulations of the Commissioner of
Education, effective July 27, 2016, to read as follows:

Part 49

Post-Secondary Distance Education

Subpart 49-1

*Approval of New York State Degree-Granting Institutions to Operate Under a State
Authorization Reciprocity Agreement (SARA).*

§ 49-1.1. Definitions.

For purposes of this Subpart:

*(a) Accredited shall mean holding institutional accreditation from an accreditor recognized
by the U.S. Department of Education.*

*(b) Approved or Approval means the Department has granted approval for an institution to
operate distance education programs under the terms of the state authorization reciprocity
agreement (SARA), pursuant to section 210-c of the Education Law.*

*(c) Complaint means a formal complaint received by the Department in writing that asserts
that an institution has violated the terms and policies of SARA and/or the provisions of this*

Subpart, are being violated by a person, institution, state, agency or other organization or entity operating under SARA.

(d) Distance education means instruction offered by any means where the student and faculty member are in separate physical locations. It includes, but is not limited to, online, interactive video or correspondence courses or programs. It does not include intrastate distance education activity.

(e) Institution means a postsecondary higher education institution that is authorized by the Regents to confer degrees in New York State.

(f) Legal domicile means the state in which the institution's principal campus holds its institutional accreditation and, if applicable, it's federal Office of Postsecondary Education Identifier (OPEID) number.

(g) State authorization reciprocity agreements or SARA means an agreement among member states, districts and U.S. territories that establishes comparable national standards for interstate offering of post-secondary distance-education courses and programs.

(h) SARA policies and standards means the SARA Policies and Standards February 17, 2016 as adopted by National Council of State Authorization Reciprocity Agreements, 3005 Center Green Drive, Suite 130 Boulder, Colorado 8030 - Available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York, 12234.

§ 49-1.2. Institutional Eligibility Requirements. To be eligible for approval to operate under SARA an institution shall:

(a) be legally domiciled in New York State and be authorized by the Board of Regents to confer post-secondary degrees in New York State and offer registered degree programs in New York State;

(b) possess and maintain institutional accreditation, by an accrediting body recognized by the U.S. Secretary of Education, including distance education within the scope of its recognition;

(c) for non-public institutions only, possess a financial responsibility index score from the U.S. Department of Education that is 1.5 or above;

(d) agree to be bound by the SARA policies and standards [and these regulations](#) and to be responsible for the actions of any third-party providers used by the institution to engage in operations under SARA;

1.a

(e) agree to remain responsible for compliance with the requirements of SARA and applicable laws and regulations, regardless of whether the institution engages in operations under the agreement itself, or through a third-party provider;

(f) agree to notify the department of any adverse actions by its accreditor or any negative changes to its accreditation status;

(g) agree to notify in writing all students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, whether or not the course or program meets requirements for licensure or certification in the state where the student resides. If an institution does not know whether the course or program meets licensure requirements in the student's state of residence, the institution may meet this requirement by informing the student in writing and providing the student the contact information for the appropriate state licensing board(s);

(h) agree, in cases where the institution cannot fully deliver the instruction for which a student has contracted, to provide a reasonable alternative for delivering the instruction or reasonable financial compensation for the education they did not receive;

(i) agree to provide any data requested by the department, to the extent permitted by applicable law, to assist the department in resolving any complaints arising from its students and to abide by decisions of the department, in order for the department to effectively monitor any activities under the agreement;

(j) upon application submission, pay to the department any state fees for application review and SARA participation as prescribed in section 49-1.7 of this Subpart;

(l) pay an annual SARA participation fee to the National Council for SARA (NC-SARA), as required by the SARA policies and standards and these regulations; ~~and~~

1.b

(m) report any other information required by SARA and/or this section; and.

2.a

(n) Agree to provide data requested by the Department for the purposes of monitoring activities or responding to or resolving complaints.

§ 49-1.3. Initial Application for Approval to Operate Under SARA.

(a) An institution may apply to the department for approval to operate under SARA on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-1.7 of this Subpart.

(b) All complete applications will be reviewed by the department to determine whether the institution meets the eligibility requirements set forth in this section. Following the department's review on an institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this section. The term of approval shall be one year from the date of notification of approval, and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet the requirements set forth in this section. If an institution's application for participation in SARA is disapproved, the department will provide the institution with a written reason for such disapproval. The institution may appeal any disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position. . An institution that has been disapproved, may reapply to the Department no earlier than 180 days from the date of disapproval.

(3) Provisional approval. The department may, at its discretion, provisionally approve institutions for participation in SARA, subject to the specific terms for provisional approval identified in the SARA policies and standards.

§ 49-1.4. Application for Renewal of Approval to Operate Under SARA.

(a) An institution may apply to the department for renewal of its approval to operate under SARA on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-1.7 of this section no later than 60 days prior to the expiration of its existing term of approval. An extension of the submission period for renewal of approval may be granted at the discretion of the Commissioner.

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with the SARA policies and standards and these regulations. Following such review, the department will

1.c

make a determination consistent with the options and procedures identified in section 49-1.3(b) of this Subpart. The institution may appeal such disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Department, and submit additional information in support of its position.

(c) Institutions that do not apply for renewal before expiration of its approval are no longer approved to operate under SARA.

(d) Institutions no longer approved to operate under SARA may reapply to the Department no earlier than 180 days from the date of disapproval or non-renewal.

§ 49-1.5. Loss of Eligibility and Removal.

(a) The department may remove an institution from approval to operate under SARA, based on a finding that the institution is no longer eligible or is out of compliance with SARA policies and standards, or is out of compliance with these regulations. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position. An institution that is removed from eligibility during an approval period shall receive no fee refund, except as otherwise provided in section 49-1.7 of this Subpart.

1.d

§ 49-1.6. Complaints. Complaints against New York State institutions operating under SARA shall follow the following procedures:

~~(a) Complaints against a New York State institution shall first be subject to an institution's own procedures for resolving complaints.¶~~

3.a

~~(b) If a person bringing a complaint to an institution is not satisfied with the outcome of the institutional process for handling complaints, a complaint (except for complaints about grades or student conduct violations) may be made to the department, on a form prescribed by the Commissioner.~~

(c) The department shall review and resolve complaints in accordance with the SARA policies and standards. While the department's general procedure will be to refer complaints to institutions' processes for handling complaints, the department reserves the right to investigate or take other action on complaints, at its discretion, due to the severity, volume or nature of the complaints;

3.b

(d) The department may impose as a penalty, refunds or other corrective action, to resolve complaints; and:

(e) Nothing in this section precludes the state from simultaneously using its laws of general application, including laws of consumer protection and fraud prevention, to pursue action against an institution that violates those laws, including an institution exempt under section 49-2.1(b), that violates those laws.

1.e

§ 49-1.7. Fee Schedule.

(a) New York State institutions seeking approval to operate under SARA shall be subject to the following annual fees to obtain and/or maintain state participation in SARA:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000
10,000 or more FTE enrollment	\$9,000

(b) The annual fees for approval to operate under SARA shall be due upon the submission of an application for initial approval or renewal as prescribed in sections 49-1.3 and 49-1.4 of this Subpart.

(c) If the department determines that an institution's application is disapproved; the institution will be refunded its annual fee, less \$2000, which represents the costs to the Department for application review.

(d) In addition to the fees prescribed in (a) of this section, institutions that have been approved by the Department to participate in SARA shall be subject to: (i) the annual fees required by the SARA policies and standards, which shall be made payable to the National Council for SARA; (ii) Fees or requirements to ensure, in the events of the closure or insolvency of an institution participating in SARA, the state has adequate funds to provide reasonable financial compensation for both in-state and out-of-state students who have not received services for which they paid. This may include funds to support tuition assurance funds, surety bonds, teach-out provisions or other practices deemed sufficient to protect consumers.

4.a

(e) The department shall periodically review, and if necessary revise this fee schedule to ensure that it is sufficient to meet the state administrative costs of State participation in SARA.

Subpart 49-2

Approval of Out-of-State Post-Secondary Institutions to Offer Distance Education to New York State Residents

§ 49-2.1 Approval of the Department.

(a) Any institution legally domiciled in a State other than New York State that seeks to offer any educational credit-bearing post-secondary instruction, courses, or degree programs through distance education to New York State residents shall obtain approval to operate in this State from the Department. This includes institutions that are operating in New York State under section 3.56 of the Rules of the Board of Regents (permission to operate) that seek to offer distance education programs in this State.

(1) Post-secondary institutions that enrolled New York State residents in its distance education programs on or before of the effective date of this Subpart, shall have six months from the effective date of this Subpart to seek and obtain department approval to continue to operate such programs to New York State residents. An extension of the six-month time period may be granted in limited circumstances, at the discretion of the Commissioner.

(2) All institutions with New York State residents enrolled in its distance education programs on or before the effective date of this Subpart, that have not received department approval by the expiration of the time period in paragraph (1) of this subdivision, must cease enrolling new students, and shall phase-out instruction for students who are currently enrolled in such programs until such students have completed the distance education program they are enrolled on the effective date of this section.

(b) Exemption. Any institution that is identified by a member state as participating in SARA is exempt from the application procedures and fees identified in this Part, and are instead subject to the SARA policies and standards and these regulations, if such institution annually provides data on the enrollment of New York residents.

2.b

§ 49-2.2. Definitions.

For purposes of this Subpart only:

(a) Accredited shall mean holding institutional accreditation from an accreditor recognized by the U.S. Department of Education.

(b) Approved or Approval means approval of an institution to offer its distance education programs to New York State residents.

(c) Complaint means a formal assertion in writing that the terms of approval are being violated by a person, institution, state, agency or other organization or entity operating under the terms of this agreement.

(d) Distance education means credit-bearing postsecondary instruction offered by any means where the student and faculty member are in separate physical locations. It includes, but is not limited to, online, interactive video or correspondence courses or programs. It does not include intrastate distance education activity.

(e) Institution means a degree-granting postsecondary entity legally domiciled in a state other than New York State.

(f) Interregional Guidelines for the Evaluation of Distance Education means the guidelines developed by the Council of Regional Accrediting Commissions (C-RAC) in February 2011, published by the Middle States Commission on Higher Education, 3624 Market Street, Philadelphia, PA 19104 - Available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234.

(g) Legal domicile or legally domiciled means the state in which the institution's principal campus holds its institutional accreditation and, if applicable, its federal Office of Postsecondary Education Identifier (OPEID) number.

§ 49-2.3. Institutional Eligibility. An institution applying to the Department for approval to offer credit-bearing post-secondary courses or degree programs to New York State residents through distance education pursuant to this Subpart must:

(a) be legally domiciled in a state other than New York or a United States territory and hold proper authorization from such state/territory to offer degree-granting programs and confer degrees in such state/territory;

(b) be a U.S. degree-granting institution that holds institutional accreditation from an accrediting association recognized by the U.S. Secretary of Education with distance education within its scope of recognition;

(c) possess a financial responsibility index score from the U.S. Department of Education that is 1.5 or above;

(d) agree to abide by the Interregional Guidelines for the Evaluation of Distance Education as defined in § 49-2.2(f) of this Subpart;

(e) agree to be responsible for the actions of any third-party providers used by the institution to offer distance education to New York State residents;

(f) agree to notify the department of any adverse actions by its accreditor or any negative changes to its accreditation status;

(g) agree to provide any data requested by the department, to the extent permitted by applicable law for the purposes of monitoring activities or responding to or resolving complaints;

(h) Agree to provide data requested by the department for the purposes of monitoring activities or responding to or resolving complaints. ~~agree to work with the Department, other state agencies, and accreditors to resolve any complaints, and to abide by decisions of the~~

~~Department or other state agencies regarding complaint resolution, including by not limited to paying any fines or other corrective actions imposed.~~

(i) agree to notify in writing all students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, that the institution outside of New York State, it is not able to recommend graduates for licensure or certification in New York State, does not know whether the course or program meets licensure requirements in New York State, and providing the student the contact information for the appropriate state licensing or certification board(s);

(j) agree, in cases where the institution cannot fully deliver the instruction for which a student has contracted, to provide a reasonable alternative for delivering the instruction or reasonable financial compensation for the education they did not receive;

(k) agree to pay a non-refundable fee as prescribed by the department, for the review and processing of an institution's application;

(l) If deemed approved by the Commissioner, agree to pay a non-refundable fee as prescribed by the department, for the maintenance of ongoing administrative costs; ~~and~~

(m) agree to cease and desist all operations, including offering any distance education programs to New York State residents, upon notification from the department that the institution has lost its eligibility to offer such programs under this Subpart;:-

(n) Waiver. The Commissioner, at her/his sole discretion, may waive one or more eligibility requirements identified in this section, provided that the institution can establish, in the determination of the Commissioner, that it has met the substantial equivalent of a requirement under this Subpart; ~~and~~:-

(o) Agree to annually report the number of students who are New York residents.

2.d

§ 49-2.4. Initial Application for Approval to Offer Distance Education.

(a) An institution shall apply to the department for approval to offer distance education on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-2.8 of this Subpart.

(b) All properly submitted applications will be reviewed by the department to determine whether an institution meets the eligibility requirements set forth in this section. Following the department's review on an institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this section. The term of approval shall be one year from the date of notification of approval, and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet all of the requirements set forth in this section. If an institution's application to offer distance education in this State is disapproved, the department will provide the institution with a written reason for disapproval. Within 10 days of the date of the written notification of disapproval. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position.

An institution that has been disapproved, may reapply to the Department no earlier than 180 days from the date of disapproval.

§ 49-2.5. Renewal Application.

(a) An approved institution that seeks to renew its approval authority shall apply to the department on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in of section 49-2.8, no later than 60 days prior to the expiration of its existing term of approval. An extension of the submission period for renewal may be granted at the discretion of the Commissioner.

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with eligibility requirements and other indicators of good standing. Following such review, the department will make a determination on the renewal application consistent with the options in section 49-2.3(b) of this Subpart. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner; and submit additional information in support of its position.

(c) Institutions that do not apply for renewal before the expiration of its approval period are no longer approved to operate distance education programs in this State.

§ 49-2.6. Loss of Eligibility and Revocation.

(a) The department may revoke an institution's approval authority under this Subpart, based on a finding that the institution no longer meets the requirements of this Subpart and/or based on any one or number of complaints received, that raise a substantial question as to the institution's ability to offer distance education programs to New York State residents. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner; and submit additional information in support of its position.

An institution that has had its approval revoked during an approval period receives no fee refund, except as otherwise provided for in section 49-2.7.

§ 49-2.7. Complaints. Complaints relating to an institution that has been approved by the Department to offer distance education to New York residents shall follow the following procedures:

~~(a) Complaints against an approved institution shall first be subject to institution's own procedures for resolving complaints.¶~~

3.c

~~(b) If a person bringing a complaint against an institution is not satisfied with the outcome of the institutional process for handling complaints, a complaint (except for complaints about grades or student conduct violations) may be made to the department, in a form prescribed by the Commissioner.~~

(c) The Department shall review such complaints and may impose as a penalty, refunds or other corrective action, to resolve complaints.

(d) Nothing in this section precludes the state from simultaneously using its laws of general application, including laws of consumer protection and fraud, to pursue action against an institution that violates those laws.

§ 49-2.8. Fee Schedule.

(a) Institutions seeking approval from the Department to offer distance education to New York State residents under this Subpart shall be subject to the following state fees:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

(b) The total annual fee of \$17,000 shall be due upon the submission of an application for approval or renewal as required by this Subpart. The annual application review fee is non-refundable. Upon a department determination to disapprove an application; the department will refund the annual approval fee.

(c) The department shall periodically review, and if necessary revise this fee schedule to ensure that it is sufficient to meet the state administrative costs of approval and oversight of out-of-state distance education programs offered pursuant to this Subpart.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, Room 148, 89 Washington Avenue, Albany, New York 12047, (618) 474-8966, email: legal@nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, Room 979, 89 Washington Avenue, Albany, New York 12047, (518) 408-1118, email: regcomments@nysed.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law(Ed.L.) 101(not subdivided) charges the Department with the general management and supervision of the educational work of the State.

Ed.L. 207(not subdivided) grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Ed.L. 210-c, as added by Chapter 220 of the Laws of 2015, sets forth the requirements for the State to enter into interstate reciprocity agreements for postsecondary distance education, including the State Authorization Reciprocity Agreement (SARA) and establishes the requirements for institutional eligibility for admission to SARA.

Ed.L. 212(3) authorizes the Department to charge fees for licenses and permits.

Ed.L. 215 authorizes the Commissioner to require reports from schools under State educational supervision.

State Finance Law 97-III, as added by Chapter 220 of the Laws of 2015, establishes the interstate reciprocity for post-secondary distance education account and authorizes the state comptroller to receive for deposit any appropriation and/or fees for services and expenses incurred by the State Education Department in conducting evaluations of post-secondary distance education conducted pursuant to the interstate reciprocity agreement and processing any complaints related thereto and for participating in such interstate agreement. It also authorizes and directs the State to receive for deposit to the credit of such account, any appropriation and/or fees established in regulations for expenses incurred by the department in conducting evaluations, processing complaints and/or other administrative functions related to postsecondary distance education conducted by the department for out-of-state institutions seeking approval to offer distance education in New York.

Chapter 220 of the Laws of 2015 authorizes the Department to enter into interstate reciprocity agreements and/or regional compacts for post-secondary distance education programs and to charge a fee to participating in-state institutions and non-participating out-of-state institutions that offer distance education.

2. LEGISLATIVE OBJECTIVES:

The proposed addition of Part 49 to the Commissioner's Regulations is necessary to implement Chapter 220 of the Laws of 2015 and establishes the procedures and process for New

York State higher education institutions to participate in SARA and for the approval of out-of-state institutions to provide distance education to New York residents.

3. NEEDS AND BENEFITS:

Providing State oversight for interstate postsecondary distance education has proved challenging, due to the patchwork of different regulations across individual states, and limited individual State capacity to monitor these activities. For example, many states require detailed approval and review processes and annual fees amounting to tens of thousands of dollars or more for New York State IHEs seeking to offer distance education to their residents. New York State, on the other hand, has not previously required out-of-state institutions of higher education to be approved to offer distance education to New York residents. Thus, while it is currently costly and cumbersome for New York State's IHEs to offer distance education in other states, it is disproportionately easy for out-of-state IHEs to offer distance education to New York residents without any initial screening or quality assurance approvals required.

Through participation in SARA, New York is advancing a multi-layered approach to quality assurance and consumer protection in New York. SARA sets minimum quality standards for the provision of postsecondary distance education where there were previously no requirements. In addition, under SARA, the Department will have new staff capacity specifically dedicated to the quality review and complaint management processes for interstate postsecondary distance education. In collaboration with the four higher education sectors, and to complement the Department's efforts, the State will benefit from a national network of support from other SARA state portal agencies responsible for the same.

Proposed Amendment: New York State IHEs and SARA – Proposed Subpart 49-1

By joining SARA, the Department will be setting minimum initial quality and accountability standards, as agreed to through the SARA policies and standards, for New York State IHEs to offer credit-bearing postsecondary distance education in other SARA states. Under the terms of SARA, out-of-state IHEs participating in SARA will be held to the same initial quality and accountability standards in order to receive approval to offer distance education to New York State residents.

When the Department, on behalf of the State, joins SARA, it will begin accepting applications from New York State IHEs for voluntary participation in SARA. Subpart 49-1 of the proposed regulations provides for procedures and fees for New York State IHEs to participate in SARA and set for the eligibility requirements for institutions seeking to participate in SARA, consistent with Ed.L. § 210-c and the national policies and standards of SARA.

Once New York State institutions apply and are approved by the Department for participation in SARA, they will be authorized to offer their registered distance education programs in all other states that are participating in SARA without any additional costs in any of the other states in which they wish to operate. There are currently 36 states participating in SARA and several others are considering joining and/or pursuing the necessary state legislation to do so.

Once the Department joins SARA, it will be responsible for managing a complaint process for complaints received against New York State IHEs offering distance education under the SARA agreement. Other states that participate in SARA have established comparable State processes for managing complaints for IHEs from other states that participate in SARA which will provide the Department with a national network of support for quality assurance and complaint management across SARA states.

The fee structure presented in the draft regulations reflects the costs required by the Department to carry out the administrative and oversight work of SARA on behalf of New York State IHEs and the costs to maintain State-level membership which is required for the State to participate in SARA. This fee structure is reasonable in relation to the type and nature of the work required of the Department to carry out required SARA activities, including a robust complaint management process. Since there are currently 36 states participating in SARA, this annual Department fee will be significantly lower than the costs for New York State IHEs to seek individual state approval to offer their distance education program outside of New York State.

Approval of Distance Education for Non-SARA IHEs – Proposed Subpart 49-2

While SARA sets minimum initial quality and accountability standards for offering interstate credit-bearing postsecondary distance education, there remain a few states that are not in SARA. Additionally, there may be a number of IHEs in SARA states that have elected not to join SARA. For those IHEs that are not in SARA and that seek approval to offer distance education to New York State residents, the Department would be responsible for initial screening and ensuring that these non-SARA IHEs meet the same or comparable initial quality and accountability standards as IHEs approved to operate under SARA.

Subpart 49-2 of the proposed regulations provides for procedures and fees to enable out-of-state IHEs that are not in SARA to obtain approval to offer credit-bearing distance education instruction, courses, or programs to New York residents. The minimum eligibility and quality standards set forth in this Subpart are comparable to those expected for IHEs that participate in SARA. So, in other words, an out-of-state institution that does not meet the standards to participate in SARA would not meet the standards established in this section and would not be approved to offer distance education to New York residents.

The fee structure presented in this Subpart of the proposed regulations reflects the costs required by the Department to carry out the initial and quality review of out-of-state applicants, the costs to maintain a basic level of oversight and data collection, and the costs associated with renewal reviews. This fee structure is reasonable in relation to the type and nature of the work required of the Department, and is comparable to those currently charged by other states for New York State IHEs to receive approval (for example, Michigan charges annual fees of \$10,000; Oregon charges biennial fees of \$7,000 and requires a separate surety bond).

There are many out-of-state IHEs that currently enroll New York State residents in credit-bearing postsecondary distance education programs. In order not to disadvantage New York State residents who are currently enrolled in these programs, the proposed regulation includes the following:

Grace Period

The proposed regulation includes a six-month grace period from the effective date of the regulation for an out-of-state IHE to actively work toward obtaining Department approval. During this period, an IHE may continue to operate its distance education programs to students currently enrolled in its programs. However, if the IHE does not obtain approval during this grace period, the institution will be prohibited from enrolling additional New York State residents until such time as approval is granted.

Phase-out Period

Should an out-of-state IHE currently enrolling New York residents chose not to apply for approval, or be disapproved by the Department for offering credit-bearing postsecondary distance education to New York residents, the IHEs will be prohibited from enrolling new

students from New York and the IHE will only be allowed to offer its distance education programs to New York residents who are currently enrolled in its programs for the purposes of course or degree completion and phasing out of its operation in New York.

4. COSTS:

a. Costs to State government: The 2016-2017 State Budget appropriated funds to the Department for the purposes of implementing SARA and Chapter 220 of the Laws of 2015. The also authorizes the Department to charge any necessary fees for services and expenses incurred by the Department in conducting evaluations, processing complaints or performing other administrative functions related to the review of post-secondary distance education conducted by out-of-state institutions seeking approval to offer distance education to students in New York who do not participate in an interstate reciprocity agreement. This revenue will allow the Department to obtain the staff necessary to effectively evaluate, approve and oversee these distance education programs. Without this additional staff, the Department will not be able to perform these additional duties necessary to participate in SARA. Because the law authorizes the Department to establish fees consistent with the cost of implementing the proposed amendments, the new law will be self-supporting and therefore have no significant impact on the State's Financial Plan.

b. Costs to local government: The proposed amendment does not impose any costs on local governments.

c. Costs to private regulated parties: Subpart 49-1 contains the fee schedule that applies to New York State IHEs choosing to seek approval to operate under SARA, based on the institutions total full-time equivalent (FTE) enrollment as follows:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000
10,000 or more FTE enrollment	\$9,000

Subpart 49-2 contains the fee schedule that applies to out-of-state institutions seeking approval from the Department to offer distance education to New York residents as follows:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

d. Costs to regulating agency for implementation and continued administration: See above.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon any local government, except as otherwise provided or in the Paperwork section in section 6.

6. PAPERWORK:

The proposed amendment involves an application process for New York State IHE's seeking participation in SARA and an application process for out-of-state institutions seeking approval to offer distance education to New York residents.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendment implements Chapter 220 of the Laws of 2015. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

There are no federal standards governing reciprocity agreements for state authorization of distance education.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be presented for adoption at the July 2016 Regents meeting, after publication of a Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act. If adopted at the July 2016 meeting, the proposed amendment will take effect on July 27, 2016.

Regulatory Flexibility Analysis

(a) Small businesses:

1. EFFECT OF RULE:

If adopted by the Board of Regents at the July 2016 Board of Regents meeting, the proposed amendment will take effect on July 27, 2016. At this time, there will be a six-month grace period which is included in the proposed regulation, allowing out-of-state institutions to work toward obtaining Department approval. If the institution does not obtain approval during this period, the institution will be prohibited from enrolling additional New York state residents until such time as approval is granted. In addition, there will be a phase-out period which applies to out-of-state IHEs currently enrolling New York State residents who choose not to apply for approval—these IHEs will be prohibited from enrolling new students from New York State and the IHE will only be allowed to offer its distance education programs to New York State residents who are currently enrolled in its programs for the purposes of course or degree completion and phasing out of its operation in New York.

2. COMPLIANCE REQUIREMENTS:

Providing State oversight for interstate postsecondary distance education has proved challenging, due to the patchwork of different regulations across individual states, and limited individual State capacity to monitor these activities. For example, many states require detailed approval and review processes and annual fees amounting to tens of thousands of dollars or more for New York State IHEs seeking to offer distance education to their residents. New York State, on the other hand, has not previously required out-of-state institutions of higher education to be approved to offer distance education to New York State residents. Thus, while it is currently costly and cumbersome for New York State's IHEs to offer distance education in other states, it is disproportionately easy for out-of-state IHEs to offer distance education to New York State residents without any initial screening or quality assurance approvals required.

Through participation in SARA, New York State is advancing a multi-layered approach to quality assurance and consumer protection in New York State. SARA sets minimum quality standards for the provision of postsecondary distance education where there were previously no requirements. In addition, under SARA, the Department will have new staff capacity specifically dedicated to the quality review and complaint management processes for interstate postsecondary distance education. In collaboration with the four higher education sectors, and to

complement the Department's efforts, New York State will benefit from a national network of support from other SARA state portal agencies responsible for the same.

Proposed Amendment:

New York State IHEs and SARA – Proposed Subpart 49-1

By joining SARA, the Department will be setting minimum initial quality and accountability standards, as agreed to through the SARA policies and standards, for New York State IHEs to offer credit-bearing postsecondary distance education in other SARA states. Under the terms of SARA, out-of-state IHEs participating in SARA will be held to the same initial quality and accountability standards in order to receive approval to offer distance education to New York State residents.

When the Department, on behalf of the State, joins SARA, it will begin accepting applications from New York State IHEs for voluntary participation in SARA. Subpart 49-1 of the proposed regulations provides for procedures and fees for New York State IHEs to participate in SARA and set for the eligibility requirements for institutions seeking to participate in SARA, consistent with § 210-c of the Education Law and the national policies and standards of SARA.

Once New York State institutions apply and are approved by the Department for participation in SARA, they will be authorized to offer their registered distance education programs in all other states that are participating in SARA without any additional costs in any of the other states in which they wish to operate. There are currently 36 states participating in SARA and several others are considering joining and/or pursuing the necessary state legislation to do so.

Once the Department joins SARA, it will be responsible for managing a complaint process for complaints received against New York State IHEs offering distance education under the SARA agreement. Other states that participate in SARA have established comparable State processes for managing complaints for IHEs from other states that participate in SARA which will provide the Department with a national network of support for quality assurance and complaint management across SARA states.

The fee structure presented in the draft regulations reflects the costs required by the Department to carry out the administrative and oversight work of SARA on behalf of New York State IHEs and the costs to maintain State-level membership which is required for the State to participate in SARA. This fee structure is reasonable in relation to the type and nature of the work required of the Department to carry out required SARA activities, including a robust complaint management process. Since there are currently 36 states participating in SARA, this annual Department fee will be significantly lower than the costs for New York State IHEs to seek individual state approval to offer their distance education program outside of New York State.

Approval of Distance Education for Non-SARA IHEs – Proposed Subpart 49-2

While SARA sets minimum initial quality and accountability standards for offering interstate credit-bearing postsecondary distance education, there remain a few states that are not in SARA. In addition, there may be a number of IHEs in SARA states that have elected not to join SARA. For those IHEs that are not in SARA and that seek approval to offer distance education to New York State residents, the Department would be responsible for initial screening and ensuring that these non-SARA IHEs meet the same or comparable initial quality and accountability standards as IHEs approved to operate under SARA.

Subpart 49-2 of the proposed regulations provides for procedures and fees to enable out-of-state IHEs that are not in SARA to obtain approval to offer credit-bearing distance education instruction, courses, or programs to New York State residents. The minimum

eligibility and quality standards set forth in this Subpart are comparable to those expected for IHEs that participate in SARA. So, in other words, an out-of-state institution that does not meet the standards to participate in SARA would not meet the standards established in this section and would not be approved to offer distance education to New York residents.

The fee structure presented in this Subpart of the proposed regulations reflects the costs required by the Department to carry out the initial and quality review of out-of-state applicants, the costs to maintain a basic level of oversight and data collection, and the costs associated with renewal reviews. This fee structure is reasonable in relation to the type and nature of the work required of the Department, and is comparable to those currently charged by other states for New York State IHEs to receive approval (for example, Michigan charges annual fees of \$10,000; Oregon charges biennial fees of \$7,000 and requires a separate surety bond).

There are many out-of-state IHEs that currently enroll New York State residents in credit-bearing postsecondary distance education programs. In order not to disadvantage New York State residents who are currently enrolled in these programs, the proposed regulation includes the following:

Grace Period

The proposed regulation includes a six-month grace period from the effective date of the regulation for an out-of-state IHE to actively work toward obtaining Department approval. During the grace period, an IHE may continue to operate its distance education programs to students that are currently enrolled in its programs. However, if the IHE does not obtain approval during this grace period, the institution will be prohibited from enrolling additional New York State residents until such time as approval is granted.

Phase-out Period

Should an out-of-state IHE currently enrolling New York State residents chose not to apply for approval, or be disapproved by the Department for offering credit-bearing postsecondary distance education to New York residents, the IHEs will be prohibited from enrolling new students from New York State and the IHE will only be allowed to offer its distance education programs to New York State residents who are currently enrolled in its programs for the purposes of course or degree completion and phasing out of its operation in New York State.

3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on small governments.

4. COMPLIANCE COSTS:

Subpart 49-1 contains the fee schedule that applies to all New York State IHEs seeking approval to operate under SARA, including those that are small businesses with less than 100 employees, based on the institutions total full-time equivalent (FTE) enrollment as follows:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000
10,000 or more FTE enrollment	\$9,000

Subpart 49-2 contains the fee schedule that applies to out-of-state institutions, including small businesses with less than 100 employees, seeking approval from the Department to offer distance education to New York state residents as follows:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on either New York State IHEs or out-of-state IHEs, including small businesses.

6. MINIMIZING ADVERSE IMPACT:

The rule seeks to address the needs of small businesses in New York by making the fees dependent on full-time enrollment in the school.

7. PARTICIPATION OF SMALL BUSINESSES:

The Department has solicited comment on the proposed amendment from institutions of higher education in New York State that are small businesses with less than 100 employees.

(b) Local governments:

The purpose of the proposed addition of new Subparts 49-1 and 49-2 (together, Part 49) of the Commissioner's Regulations is to implement Chapter 220 of the Laws of 2015 and authorize the Department to establish policies and procedures to approve New York State higher education institutions to participate in State Authorization Reciprocity Agreement (SARA) and to approve out-of-state institutions, who do not participate in SARA, to provide distance education to New York State residents. Because it is evident from the nature of the rule that it does not affect local government; no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The purpose of the proposed amendment is to implement Chapter 220 of the Laws of 2015 and establish the requirements for authorization of New York State higher education institutions to participate in State Authorization Reciprocity Agreement (SARA) and the requirements for the approval of out-of-State institutions, who do not participate in SARA to provide distance education to New York residents.

2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

Providing State oversight for interstate postsecondary distance education has proved challenging, due to the patchwork of different regulations across individual states, and limited individual State capacity to monitor these activities. For example, many states require detailed approval and review processes and annual fees amounting to tens of thousands of dollars or more for New York State IHEs seeking to offer distance education to their residents. New York State, on the other hand, has not previously required out-of-state institutions of higher education to be approved to offer distance education to New York State residents. Thus, while it is currently costly and cumbersome for New York State's IHEs to offer distance education in other states, it is disproportionately easy for out-of-state IHEs to offer distance education to New York State residents without any initial screening or quality assurance approvals required.

Through participation in SARA, New York State is advancing a multi-layered approach to quality assurance and consumer protection in New York State. SARA sets minimum quality standards for the provision of postsecondary distance education where there were previously no requirements. In addition, under SARA, the Department will have new staff capacity specifically dedicated to the quality review and complaint management processes for interstate postsecondary distance education. In collaboration with the four higher education sectors, and to complement the Department's efforts, New York State will benefit from a national network of support from other SARA state portal agencies responsible for the same.

Proposed Amendment:

New York State IHEs and SARA – Proposed Subpart 49-1

By joining SARA, the Department will be setting minimum initial quality and accountability standards, as agreed to through the SARA policies and standards, for New York State IHEs to offer credit-bearing postsecondary distance education in other SARA states. Under the terms of SARA, out-of-state IHEs participating in SARA will be held to the same initial quality and accountability standards in order to receive approval to offer distance education to New York State residents.

When the Department, on behalf of the State, joins SARA, it will begin accepting applications from New York State IHEs for voluntary participation in SARA. Subpart 49-1 of the proposed regulations provides for procedures and fees for New York State IHEs to participate in SARA and set for the eligibility requirements for institutions seeking to participate in SARA, consistent with § 210-c of the Education Law and the national policies and standards of SARA.

Once New York State institutions apply and are approved by the Department for participation in SARA, they will be authorized to offer their registered distance education programs in all other states that are participating in SARA without any additional costs in any of the other states in which they wish to operate. There are currently 36 states participating in SARA and several others are considering joining and/or pursuing the necessary state legislation to do so.

Once the Department joins SARA, it will be responsible for managing a complaint process for complaints received against New York State IHEs offering distance education under the SARA agreement. Other states that participate in SARA have established comparable State processes for managing complaints for IHEs from other states that participate in SARA which will provide the Department with a national network of support for quality assurance and complaint management across SARA states.

The fee structure presented in the draft regulations reflects the costs required by the Department to carry out the administrative and oversight work of SARA on behalf of New York State IHEs and the costs to maintain State-level membership which is required for the State to participate in SARA. This fee structure is reasonable in relation to the type and nature of the work required of the Department to carry out required SARA activities, including a robust complaint management process. Since there are currently 36 states participating in SARA, this annual Department fee will be significantly lower than the costs for New York State IHEs to seek individual state approval to offer their distance education program outside of New York State.

Approval of Distance Education for Non-SARA IHEs – Proposed Subpart 49-2

While SARA sets minimum initial quality and accountability standards for offering interstate credit-bearing postsecondary distance education, there remain a few states that are not in SARA. In addition, there may be a number of IHEs in SARA states that have elected not to join SARA. For those IHEs that are not in SARA and that seek approval to offer distance education to New

York State residents, the Department would be responsible for initial screening and ensuring that these non-SARA IHEs meet the same or comparable initial quality and accountability standards as IHEs approved to operate under SARA.

Subpart 49-2 of the proposed regulations provides for procedures and fees to enable out-of-state IHEs that are not in SARA to obtain approval to offer credit-bearing distance education instruction, courses, or programs to New York State residents. The minimum eligibility and quality standards set forth in this Subpart are comparable to those expected for IHEs that participate in SARA. So, in other words, an out-of-state institution that does not meet the standards to participate in SARA would not meet the standards established in this section and would not be approved to offer distance education to New York residents.

The fee structure presented in this Subpart of the proposed regulations reflects the costs required by the Department to carry out the initial and quality review of out-of-state applicants, the costs to maintain a basic level of oversight and data collection, and the costs associated with renewal reviews. This fee structure is reasonable in relation to the type and nature of the work required of the Department, and is comparable to those currently charged by other states for New York State IHEs to receive approval (for example, Michigan charges annual fees of \$10,000; Oregon charges biennial fees of \$7,000 and requires a separate surety bond).

There are many out-of-state IHEs that currently enroll New York State residents in credit-bearing postsecondary distance education programs. In order not to disadvantage New York State residents who are currently enrolled in these programs, the proposed regulation includes the following:

Grace Period

The proposed regulation includes a six-month grace period from the effective date of the regulation for an out-of-state IHE to actively work toward obtaining Department approval. During the grace period, an IHE may continue to operate its distance education programs to students that are currently enrolled in its programs. However, if the IHE does not obtain approval during this grace period, the institution will be prohibited from enrolling additional New York State residents until such time as approval is granted.

Phase-out Period

Should an out-of-state IHE currently enrolling New York State residents chose not to apply for approval, or be disapproved by the Department for offering credit-bearing postsecondary distance education to New York residents, the IHEs will be prohibited from enrolling new students from New York State and the IHE will only be allowed to offer its distance education programs to New York State residents who are currently enrolled in its programs for the purposes of course or degree completion and phasing out of its operation in New York State.

3. COSTS:

Subpart 49-1 contains the fee schedule that applies to New York State IHEs seeking approval to operate under SARA, based on the institutions total full-time equivalent (FTE) enrollment as follows, including for IHEs in rural areas of this State:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000

10,000 or more FTE enrollment	\$9,000
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Subpart 49-2 contains the fee schedule that applies to out-of-state institutions seeking approval from the Department to offer distance education to New York state residents as follows:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

These fee schedules apply equally to all New York State IHEs and out-of-state institutions that voluntarily choose to participate, including those located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The rule seeks to address the issue of the current challenges of offering postsecondary distance education—including the “patchwork” of different regulations. It is currently costly and cumbersome for New York IHEs to offer distance education in other states, and it is disproportionately easy for out-of-state IHEs to offer distance education to New York State residents without any initial screening or quality assurance approvals required.

The new regulations apply equally to all IHEs throughout the State as well as out-of-state IHEs that choose to participate in SARA or offer distance education programs in New York State. This regulation accommodates those IHEs in rural areas of the State because it centralizes the costs of obtaining interstate authorization. Additionally, the costs for New York IHEs seeking to participate in SARA are relative to the institution’s full-time enrollment. Therefore, the Department has tried to accommodate further accommodating those IHE’s in rural areas of the State.

5. RURAL AREA PARTICIPATION:

Copies of the proposed amendment have been provided to Rural Advisory Committee for review and comment.

Job Impact Statement

The proposed addition of new Subparts 49-1 and 49-2 (together, Part 49) of the Commissioner’s Regulations implements Chapter 220 of the Laws of 2015 and authorizes the Department to establish policies and procedures to approve New York State higher education institutions to participate in State Authorization Reciprocity Agreement (SARA) and to approve out-of-state institutions, who do not participate in SARA, to provide distance education to New York State residents. Because the proposed amendment does not impact jobs in New York State, a detailed job analysis is not necessary. Accordingly, a job impact statement is not required and one has not been prepared.