

Proposed Rule Making Provides Opportunities for Colleges and Universities in New York State to Consider Strategic Transactions with Out-of-State Institutions

January 24, 2024

Recognizing that colleges and universities in New York State require access to a greater range of strategic options in order to address the evolving higher education landscape, particularly in light of ongoing enrollment, financial, and operational challenges they may be facing, the New York State Education Department has proposed an amendment to the Rules of the Board of Regents (the “Rules”) which would allow an independent, not-for-profit New York State institution of higher education (“IHE”) to merge or consolidate, or enter into a sole member structure, with a “highly qualified out-of-state institution of higher education.” Prior to the proposed amendment, there was not a clear mechanism under the New York State Education Law (“Education Law”) or the Rules allowing a New York State IHE to consummate these types of strategic transactions with an out-of-state institution.

This new rule, if adopted, will provide new pathways for private New York IHEs to expand. And, importantly, the new rule offers critically needed alternatives for New York IHEs that may not have the financial strength to continue independently.

The proposed rule adds a new section (*f*) to Section 3.59 of the Rules. Under the proposed rule, an independent, not-for-profit college or university authorized to grant degrees in New York State and a “highly qualified out-of-state institution of higher education” wishing to merge or consolidate, or establish a sole member structure, must enter into a written agreement and submit an application to the Department under Sections 223 or 219, respectively, of the Education Law. The highly qualified out-of-state IHE must apply to the Board of Regents for a charter as an education corporation and for degree granting authority. The application must demonstrate that the out-of-state IHE and the resulting chartered corporation meet the requirements for a provisional or absolute charter and for obtaining authorization to offer degree programs, except that the highly qualified out-of-state IHE and the resulting chartered corporation will not be required to have a New York State-based governing board independent of the highly qualified out-of-state IHE. The Board of Regents will determine whether the out-of-state IHE and the resulting chartered corporation will hold provisional or permanent authorization to offer degree programs.

For purposes of the proposed amendment, a “highly qualified out-of-state institution of higher education” means an independent, not-for-profit IHE that: (1) is authorized to offer degree programs in a United States state or territory other than New York State, for at least 25 years, (2) is currently certified to participate in Title IV federal student aid programs, without provisional status or sanction, for the past 5 years, and (3) has been accredited for at least 10 years without any adverse actions being taken during such time, by an accrediting agency recognized by the United States Department of Education.

If the proposed transaction is approved, prior to recruiting or enrolling students in any program that is not currently registered to the New York IHE, the out-of-state IHE and resulting chartered corporation must apply for new program registration for each such new program, as well as a master plan amendment, if applicable.

The Notice of Proposed Rule Making was published in the New York State Register on January 24, 2024. Public comments will be accepted for sixty (60) days-until March 24, 2024. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at its May 2024 meeting. If adopted, the rule will become effective as of May 22, 2024.

Cullen and Dykman LLP’s Higher Education Practice Group is here to assist you in connection with evaluating and carrying out a variety of strategic transactions, including mergers, consolidations, and sole membership structures. If you have questions regarding any aspect of higher education law and/or whether this proposed new rule may impact or create opportunities for your institution, please feel free to contact [Dina Vespia](#), [Kevin P. McDonough](#), or [Deirdre Mitacek](#).

Please note this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and the recipient.

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