

Online Learning Across State Borders
*Assessing state regulation of out-of-state
schools*

January 2011

**Continuing and Professional Education Learning
Collaborative (CPE-LC)**
**Online Higher Education Learning Collaborative
(OHE-LC)**

- **Introduction**
- **State Regulation Categorization**
 - Online Learning
 - Recruitment and Marketing
- **Institution Licensing Volume**
- **Conclusions and Recommendations**

Overview- focus & context

- **Focus**: This study provides an overview of state regulations for out-of-state universities and colleges recruiting, enrolling and serving state residents in online programs, and current school licensing volume. There is also discussion of state regulation of in-person recruitment and marketing by out-of-state schools more generally
- **Context**: In the United States, states play an established role in authorizing the operation of higher education institutions within their borders:
 - In order to obtain accreditation or access to federal funds, universities and colleges must be authorized to operate in their home state
 - Historically, a school from one state wishing to operate in another must gain approval from the host state
 - In most cases, “operate” meant some form of conventional physical presence, such as a campus or center
 - Distance learning has always been a grey area, raising questions as to whether or not such activity constitutes physical presence
 - The recent surge in online learning and institutions with a national footprint, with hundreds of thousands of students enrolled across state lines, has pushed the distance learning “challenge” to state regulation to the forefront
 - To date, state regulation of out-of-state distance learning, and other non-standard forms of “operation” by out-of-state schools, has been patchy and inconsistent

Overview- Why is this issue suddenly in the limelight?

- **Federal Intervention**- On 28th October 2010, the U.S. Department of Education released the final “Program Integrity” rules under the latest round of negotiated rulemaking. The following language was an unexpected addition to the draft:
 - *“If an institution is offering postsecondary education through distance or correspondence education in a State in which it is not physically located, the institution must meet any State requirements for it to be legally offering distance or correspondence education in that State. An institution must be able to document upon request from the Department that it has such State approval.”*
 - In some respects, this ruling acknowledges the status quo. Historically states have authority over a higher education institution's license to operate, and states are free to determine approval processes for out-of-state schools judged to in some sense "operate" in the state. In other respects, this is uncharted territory. This is the first formal federal statement on state regulation and out-of-state distance learning
 - It is important to note that this rule applies to **ALL** Title IV eligible schools, whether public, private or for-profit, 2 or 4-year, regionally or nationally accredited
- In line with the regulations as a whole, this rule will go into force July 1, 2011
 - Commentary from the Department suggests that by that date schools must be able to show, upon request, that approvals are either in place, in process, or that the state does not require approval (WCET Blog1/12/2011)
 - The Department’s “Program Integrity” rules are designed to protect public funds for higher education. The Department’s ultimate sanction for schools judged non-compliant is loss of Title IV funding eligibility

Overview- Why is this issue important now?

- **Significance**- Eduventures estimates that in Fall 2010 online headcount in higher education drew close to 2.5 million people. To date, most of this activity has taken place without direct state oversight of out-of-state schools. Federal intervention raises the following questions:
 - Is it practical for the many hundreds of universities and colleges that now offer online programs across state lines to seek approval from up to fifty separate jurisdictions? Should it matter whether a school has one student in a state versus thousands?
 - Is state-by-state oversight the best means to protect consumers when the activity in question crosses state lines?
 - Is multi-jurisdiction oversight the best way to raise school quality, and avoid duplication of effort? Is this approach more likely to cause confusion, raise costs and create bureaucracy than meaningfully impact consumer protection?
 - Are there “Commerce Clause” implications, and how might they be resolved?
 - What are the prospects for inter-state reciprocity and collaborative agreements to find an alternative solution?
 - Might strict enforcement of state-by-state regulation dampen online market growth, and potentially limit consumer choice?
 - For schools that in some sense “operate” beyond conventional physical presence in multiple states without formal approval, what is the strategic response?

Overview- The Eduventures Report

- **Rationale-** Eduventures has tracked the expansion of online higher education for over a decade, and has long been involved in discussions concerning state regulation. Post-federal intervention, when many of our school clients expressed concern about next steps, we saw an opportunity to pull together some foundational data and commentary to help higher education leaders make decisions
- **Methodology:** Eduventures reviewed regulations and licensing volume in all 50 states plus District of Columbia. Eduventures 2007 study “Understanding the National Online Higher Education Market”, which included analysis of state regulation, and the 2006 Dow Lohnes report “The State of State Regulation of Cross-Border Postsecondary Education” provided useful historical benchmarks. Where regulations were unclear, Eduventures contacted the regulator concerned
 - N.B. Throughout this report, the word “licensed” is used as a generic term to indicate permission to operate. Individual state regulators may use a different term. “Pure” online refers to a state asserting jurisdiction over an out-of-state school which enrolls a state resident in its online/course program, even if the school has no physical presence of any form in that state
 - ***Disclaimer-*** While Eduventures has made every effort to locate and explain all relevant regulation, precise application by specific activity is often less than transparent. Readers are advised to seek legal counsel on specific activities, states and circumstances. Moreover, a number of states are in the process of reviewing their arrangements

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State regulation is inconsistent, complex and “behind” online boom

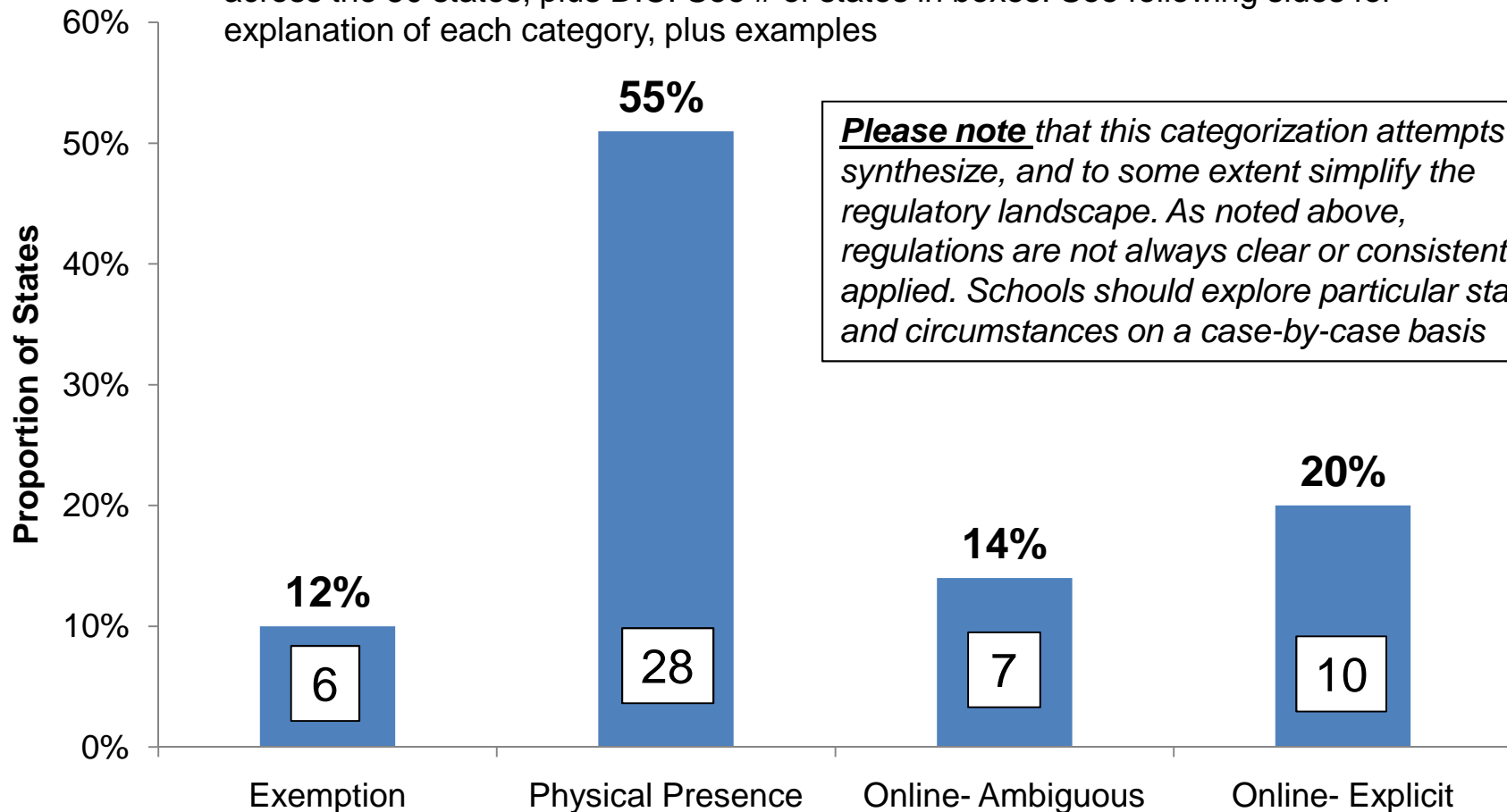
- **Some states regulate, some don't.** The majority of states do not have regulation that takes into account the contemporary scale of online higher education across state borders. Ten states (AL, AR, IL, IN, KY, LA, MN, NM, WI, and WY) explicitly assert jurisdiction over “pure” online, and only MD, NH, PA, RI, SC, and VA appear explicitly to disavow jurisdiction
 - Most state regulation of out-of-state higher education assumes forms of physical presence, but aside from branch campuses and in-person recruitment other forms of physical presence are rarely spelt out
 - Few states explicitly exempt “pure” online delivery, but equally there is little evidence that many states wish to regulate such delivery when no conventional physical presence is involved
- **Online scale exceeds state licensure.** At present, the scale of cross-border online higher education far exceeds out-of-state licensing volume; and there is no consistent pattern of licensing by state, school type or school activity. Licensing is a revenue source for states, but also raises capacity issues around awareness and enforcement. For many state regulators, comprehensive enforcement of rules seen to encompass “pure” online learning from out-of-state schools would require considerable additional resources
- Aside from a sub-section of wholly online schools, almost all cross-border online higher education operates without regard to any asserted/implied state jurisdiction

Definitions, institutional type and regulator powers/interpretation are crucial to understanding state regulation

- **Conventional physical presence often important for “online” programs.** Where online-related licensing does exist, forms of physical presence that complement wholly online delivery, whether recruitment, instruction or support, are where online delivery often most clearly triggers state jurisdiction.
- **Treatment of For-Profits.** Only RI bars for-profits from offering degrees, but a number of states have distinct rules for proprietary schools, and/or bundle all such institutions under a “career school” category even if some grant doctoral degrees and others are cosmetology or truck driving schools
- **More than one regulator.** In some states (e.g. TX), two regulators claim oversight of out-of-schools, and it is not always clear, nor do the regulators necessarily agree where authority lies
- **Interpretation.** Some state statutes pre-date online learning, and contemporary application may be as much case-by-case interpretation by officials as the letter of the rules. Equally, schools have cited cases to Eduventures where different staff employed by the regulator offered contradictory interpretations of regulations
- **Non-state territory.** Many states do make full or partial exceptions for military bases and (less explicitly) Tribal nations

Majority of states restricted to physical presence; explicit coverage of online uncommon; ambiguity elsewhere

This chart shows Eduventures interpretation of the character of out-of-state licensing across the 50 states, plus D.C. See # of states in boxes. See following sides for explanation of each category, plus examples



Category 1: Exemption (12% of states covered- 6)

- Six states (AK, CA, CO, DE, HI, UT) do not require out-of-state schools to seek licensure and instead rely on regional (and in some cases also national) accreditation as an indication of quality
 - In some cases (AK, HI), accreditation permits the school to operate in the state; although a handful of out-of-state schools have branch campuses, then listed by the regulator as authorized
 - In CA, CO, DE, and UT, an out-of-state school must seek exemption on the basis of accreditation. Some school licenses in CO and UT suggest application for exemption triggered by online activity
- In CA, recent regulation (2009) cites a blanket regional accreditation exemption until 2016, and a permanent exemption for regionally accredited schools of a certain standing (e.g. default rate, time in existence, accredited). Even this exemption still requires compliance with certain regulations (details available on request). Many out-of-state regionally accredited schools are in fact listed as licensed in the state- which may suggest perceived advantage relative to non-regionally accredited schools
- States in this category make no substantive reference to out-of-state schools offering distance learning in-state, and there is no evidence in terms of regulation or licensed schools to suggest assertion of jurisdiction over “pure” online or complementary physical presence
- Yet a number of wholly online schools/branches have obtained formal exemption-positioning exemption as a form of licensure, in terms of operational advantage

Category 2: Physical Presence (55% of states- 28)

- In these states (CT, DC, IA, ID, KS, MA, MD, ME, MI, MS, MT, NC, ND, NE, NH, NJ, NV, OH, OK, OR, PA*, RI, SC, SD, VA, VT, WA, WV) physical presence of some form, whether a branch campus/center, in-person recruitment activity or some other instructional/marketing activity is a trigger for licensure
- Beyond branch campus/center and in-person recruitment, state regulations tend not to spell out other possible instances of physical presence; nor do most states indicate what form of presence triggered licensure for each school
- In Eduventures view, branch campuses/centers and in-person recruitment explain the vast majority of licensure volume in these states. Schools are sometimes licensed with respect to brief in-state residential colloquia or B2B relationships. In other cases, recruitment partnerships with in-state institutions is the trigger. A remote faculty member teaching online does not appear to trigger licensure
- States in this category are judged to not assert jurisdiction over “pure” online delivery or related marketing and recruitment not targeted at and without in-person presence in the state. See slide 15ff for further commentary on this issue

*PA told Eduventures that it is currently reviewing its standards and requests that institutions contact the appropriate state authorities directly for more information

Category 3: Online- Ambiguous (14% of states- 7)

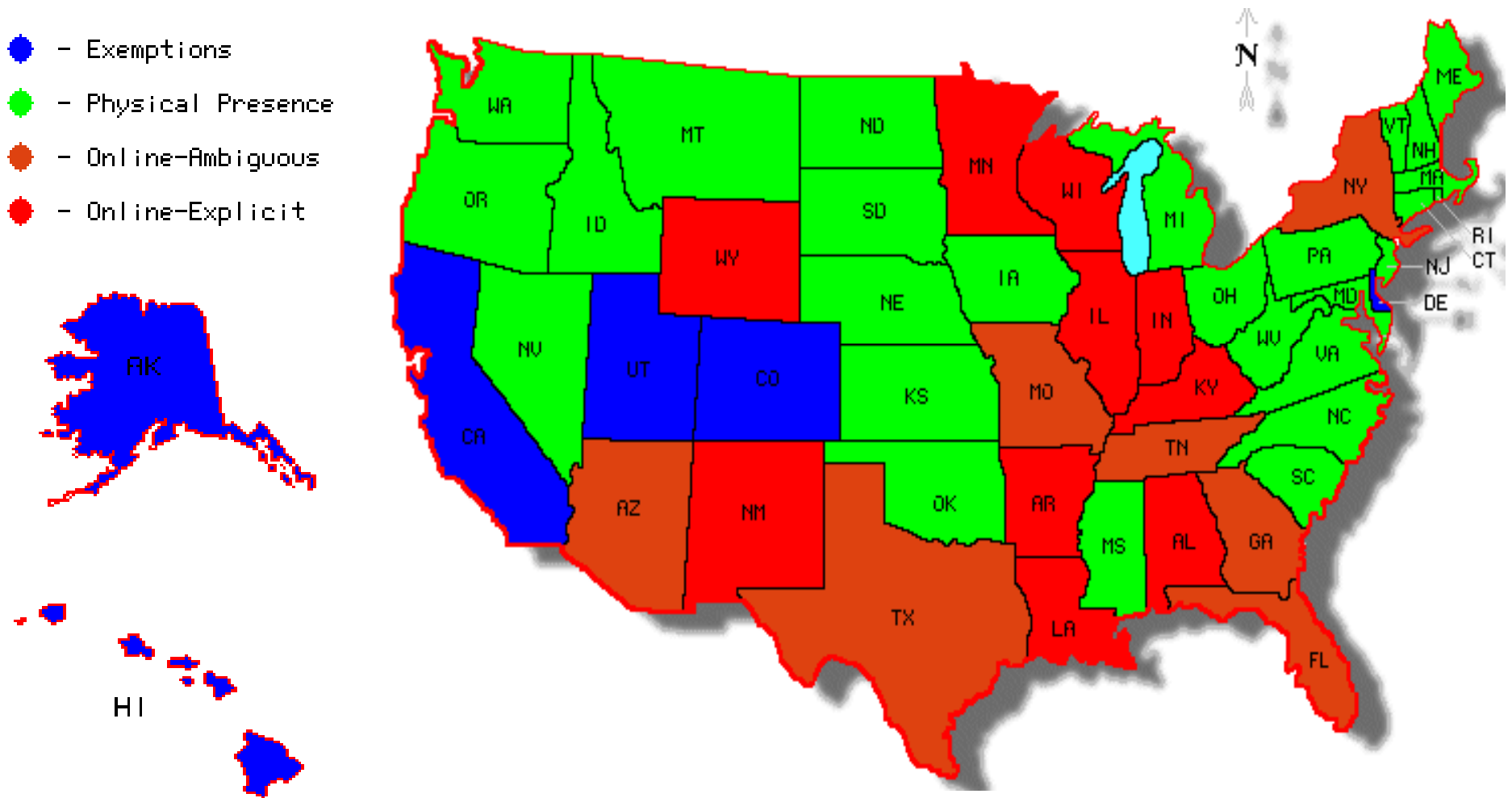
- States in this category (AZ, FL, GA, MO, NY, TN, TX) fall into a grey area between more conventional “Physical Presence” and “Online- Explicit”. Regulatory language is broad enough but vague enough to suggest the possibility of jurisdiction over “pure” online delivery
 - For example, AZ states "it is illegal to advertise, recruit students for, and/or operate vocational and degree programs in the State of Arizona without an appropriate license."
 - GA regulations unclear but online-specific licensure held by some institutions which also have campus locations
 - MO says: requiring two or more students to interact with each other or faculty within the state constitutes physical presence
- Some of these states feature licensed wholly online schools (AZ, FL, GA, TN), while others do not. Even among those that do, patterns by school are inconsistent and incomplete. Only AZ, GA, and TN feature a nationally significant number of licensed online-oriented out-of-state schools
- All of these states assert explicit jurisdiction over in-person recruiting, which may in many cases be a more important and substantive licensure issue

Category 4: Online- Explicit (20% of states- 10)

- In these states (AL, AR, IL, IN, KY, LA, MN, NM, WI, and WY) regulatory language suggests explicit jurisdiction over “pure” online delivery
 - AR says: "Any non-public or out-of-state postsecondary education institution offering course/degree programs customarily offered at college and universities must obtain certification from the Arkansas Higher Education Coordinating Board (AHECB) before offering distance delivery college-level courses/degree programs to Arkansas students." AR maintains a separate list of licensed distance learning schools
 - KY says: "An out-of-state college that is operating or soliciting using on-line instruction to Kentucky residents shall be considered to have an online campus which shall be licensed separately as an instructional site."
 - In AR, a nationally significant number of wholly online schools/branches are licensed; while in KY, a smaller number are licensed. In AR, it is notable that both Strayer and Phoenix are licensed, separately, both for in-state campuses and for distance learning
 - Other states, such as AL, with regulations that predate online delivery interpret regulatory definitions to assert jurisdiction over wholly online institutions
- Despite asserted jurisdiction and relative high licensing volume among wholly online schools/branches, institutions licensed in these states represent a tiny fraction of total U.S. schools enrolling in-state residents in online programs. This emphasizes that Category 4 states are relatively uncommon and exhibit limited coverage to date

Summary of State Regulation of Out-of-State Online Higher Education

- - Exemptions
- - Physical Presence
- - Online-Ambiguous
- - Online-Explicit



N.B. Summary based on Eduventures interpretation. Each state and school representation should be considered on a case-by-case basis

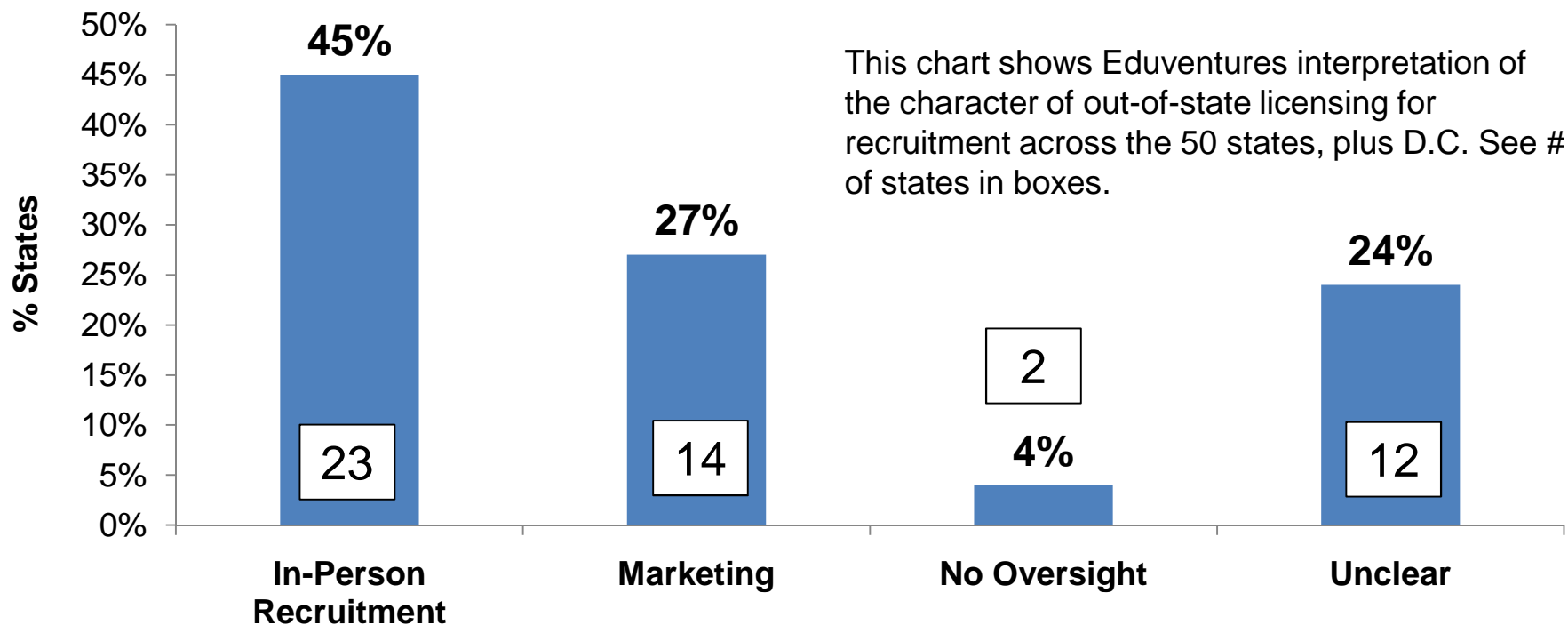
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Recruitment Activities –oversight varies by activity

- As noted above, few state regulations go into detail about particular recruitment or service activities; but a majority appear to view any kind of in-person recruitment as presence.
- Based on current state regulations, the 2006 Dow Lohnes survey, and evidence concerning the nature of licenses listed in each state, Eduventures categorized states by jurisdiction over recruitment:
 - A. In-Person Recruitment.** States regulate for the presence of an in-person recruiter (not explicitly for other marketing)
 - B. In-Person Recruitment plus Marketing.** States regulate for the presence of an in-person recruiter and for marketing in the state (e.g., through direct mail to prospective students, billboards, internet advertising, etc.). States in this category are typically the strictest regarding recruitment oversight.
 - C. No Oversight.** States do not assert oversight over out-of-state institutions (e.g., Alaska and Hawaii)
 - D. Unclear.** States in this category are not clear regarding their stance on recruitment

In-person recruitment viewed as presence for many states , and some seek to also regulate other marketing

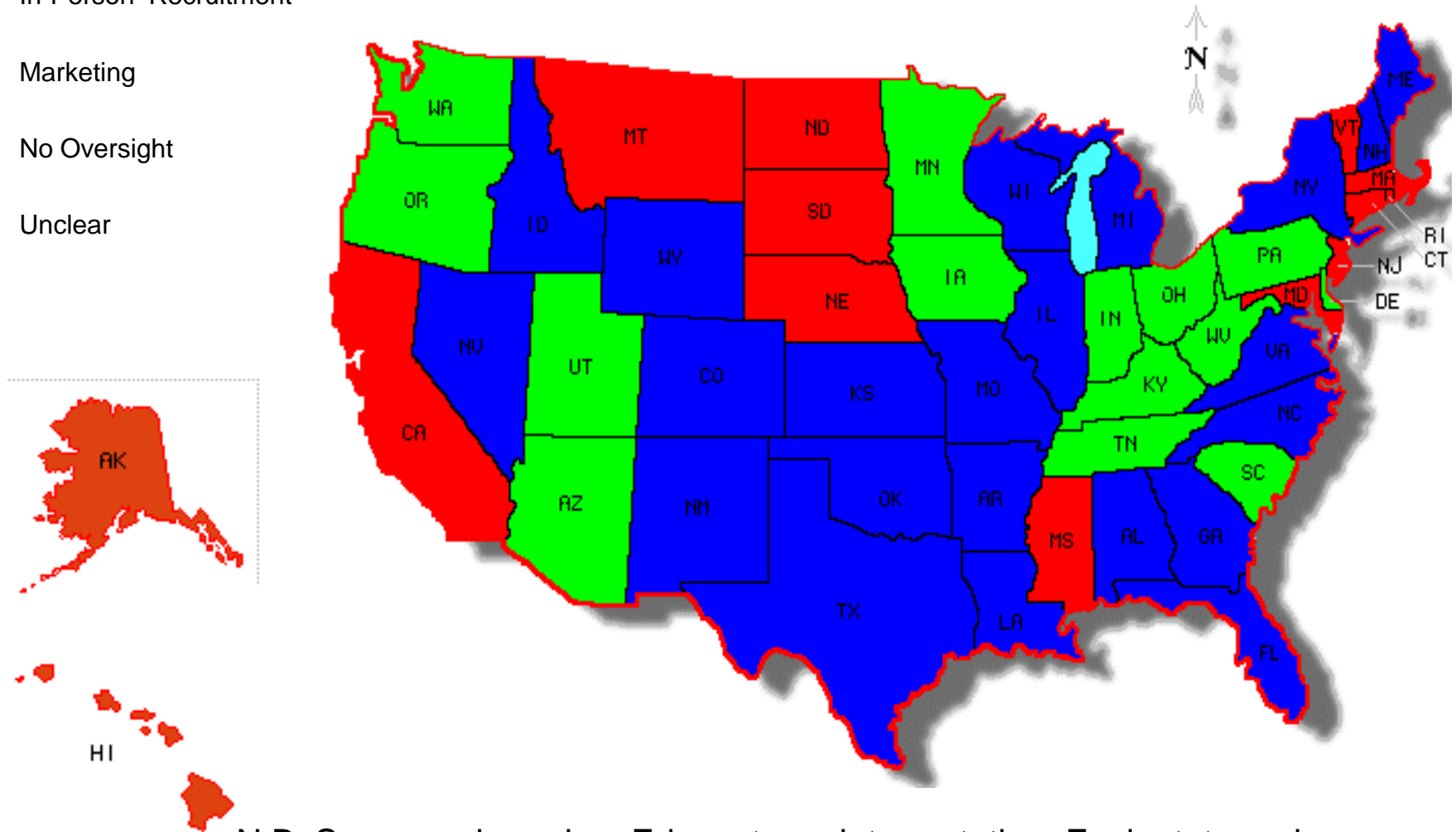
- There is little evidence that states' positions have changed significantly on these issues in recent years; but some conversations with state regulators suggest oversight over recruitment will tighten in the near term (e.g., North Dakota cited that it plans to discuss increased regulation over in-state recruitment going forward).



Please note that this categorization attempts to synthesize, and to some extent simplify the regulatory landscape. Regulations are not always clear or consistently applied. Schools should explore particular states and circumstances on a case-by-case basis

State Oversight of Recruitment Activities

- In-Person Recruitment
- Marketing
- No Oversight
- Unclear



N.B. Summary based on Eduventures interpretation. Each state and school representation should be considered on a case-by-case basis

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Licensing volume across schools, and by school type, complements state categorization

- How many schools have out-of-state licenses for nonconventional presence? Which types of schools?
- In 2007, Eduventures tallied all out-of-state schools that appeared to be licensed for activity aside from conventional physical presence, or where conventional presence existed but the school was also known to be active online. The strictly online focus of the 2007 study somewhat undercounted total out of-state licensing volume (e.g. omitted some campus and recruitment-based licensing). To account for this, the 2007 tally has been modeled upwards to permit a more accurate comparison with 2010/11 volume
- Between 2007 and 2010/11, the number of states asserting jurisdiction over online and other nonstandard forms of presence has increased somewhat, and related licensing volume has increased significantly but remains piecemeal and inconsistent
 - Some schools, primarily for-profits, see strategic value in seeking out licensure in states where assertion of jurisdiction is possible, while others only pursue licensure when formally requested to do so by a particular state
 - To date, the cost/benefit analysis between freedom to operate versus regulatory burden has yet to emerge in any clear way- from either the consumer, state or school perspective

Change in volume significant overall, but inconsistent across states

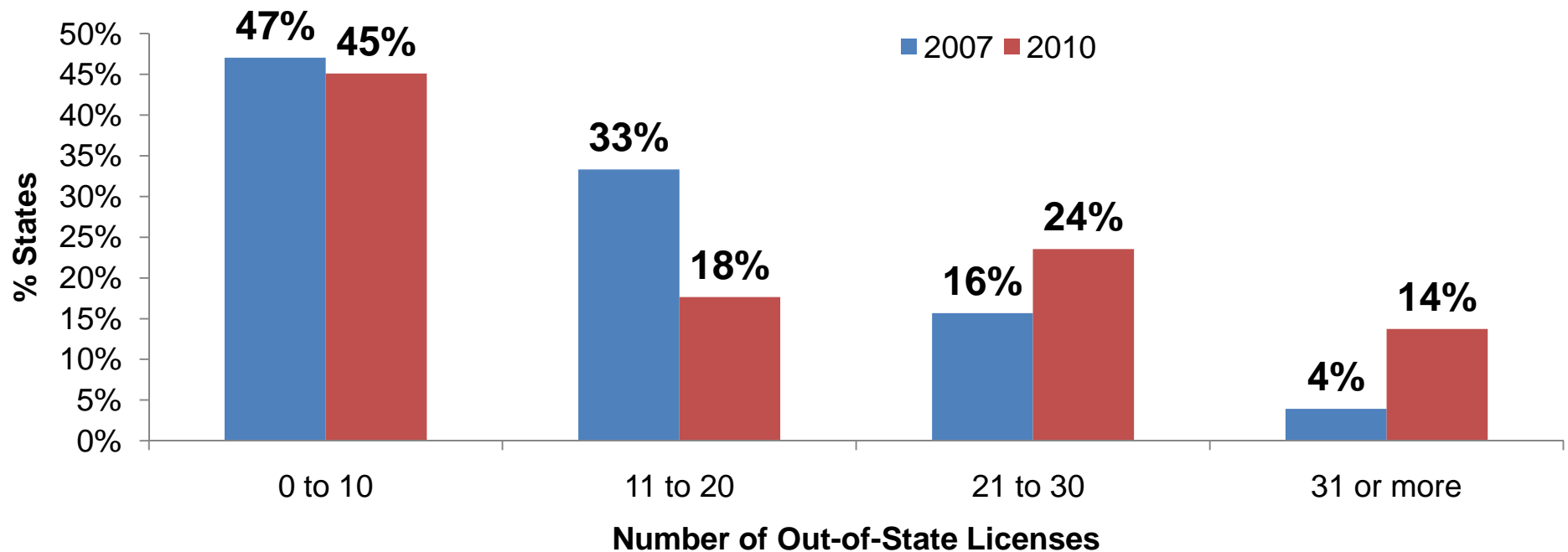
- From 2007 to 2010/11 out-of-state licensing volume increased by 35%. However, this shift can be explained by large increases in only a few states and disguises relative stability elsewhere
 - The vast majority of licenses are held by four-year institutions. Only a handful of community colleges and other two-year institutions are included on state lists. Less-than-two-year schools are excluded from this analysis. While for-profits are most visible, private and public schools are also licensed
 - The total number of institutions licensed increased by 83% from 2007-2010/11. This emphasizes that many more schools are now actively involved with state regulators; but this total still represents less than 10% of all Title IV eligible four-year institutions, up from <5% in 2007. This volume represents an estimated <20% of all four-year schools active online at program level (see slide 24ff for more detail by licensing type)

Licensing Volume and %	2007	2010	# Change 2007-2010	% Change 2007-2010
Estimated Total # Out-of-State Licenses	610	823	213	35%
Estimated Total # of Institutions	134	245	111	83%
Proportion of 4-Year (Title IV participating) Degree-Granting Institutions Holding Out-of-State Licenses (2,796 institutions as of 2009)	4.8%	8.6%	N/A	N/A

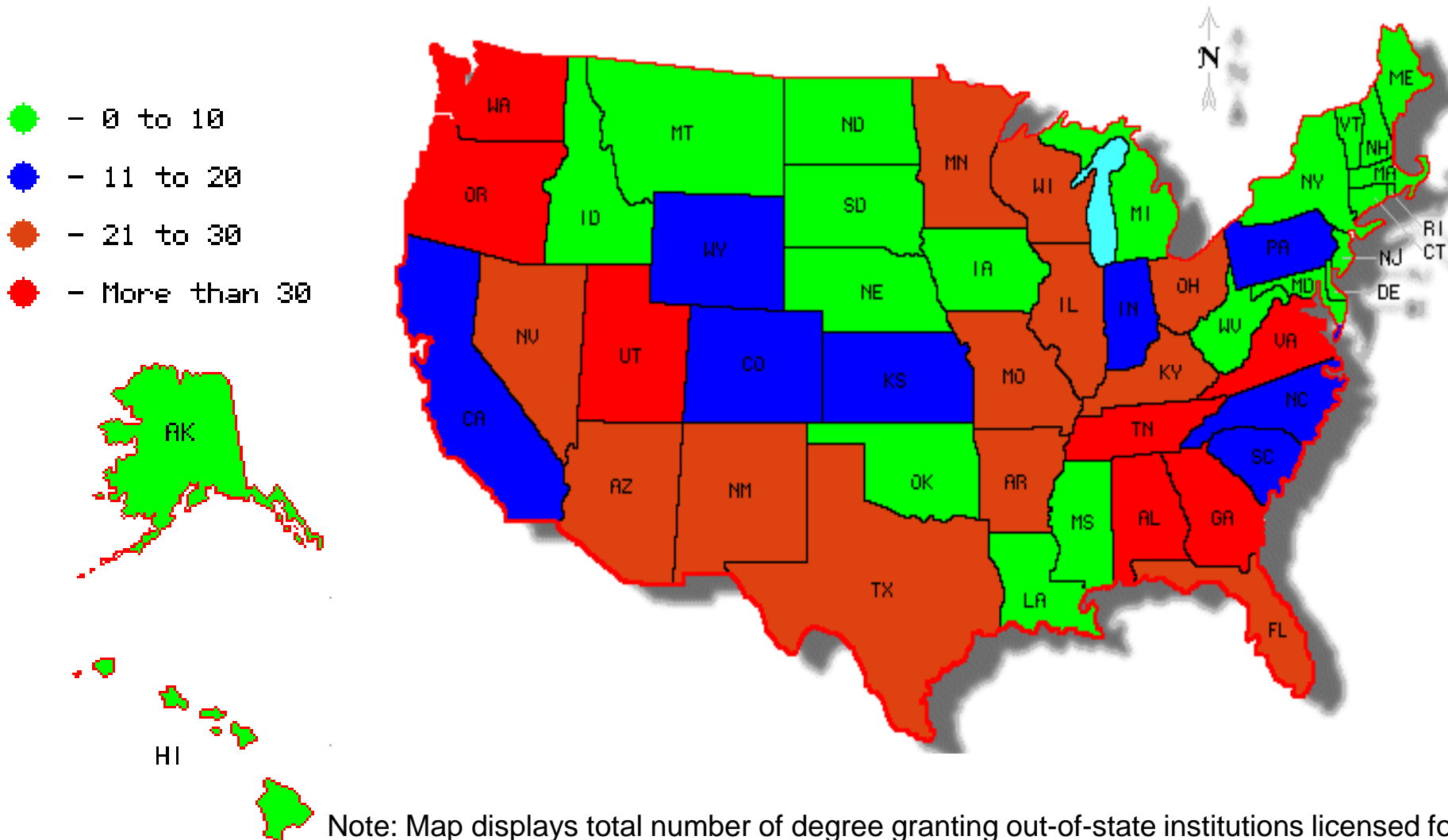
In 2010, only about one-third of states had 20+ out-of-state degree-granting institutions licensed, but proportion has risen over recent years

- The majority of states have 0 to 10 out-of-state licenses, but the proportion in this range has dipped slightly from 2007 to 2010 (47% to 45%). During this same period, however, the proportion of states which have 31 or more institutions holding out-of-state licenses increased significantly (4% to 14%)
- Oregon exhibits the most out-of-state licenses for degree-granting schools (59), followed by Virginia (39), and Georgia (38). Montana did not report any out-of-state institutions licenses

Number of Out-of-State Licenses Held Per State, 2007-2010



Volume of Out-of-State School Licenses, 2010/11

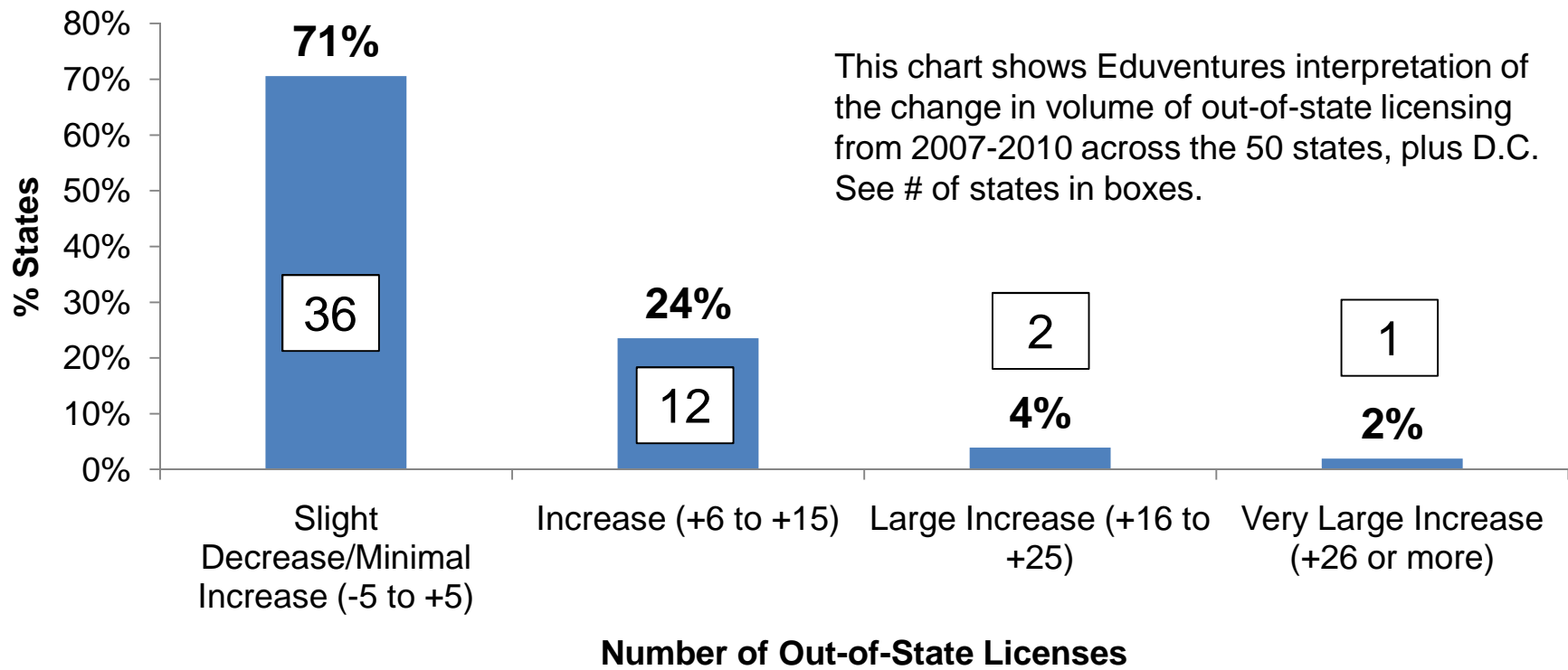


Note: Map displays total number of degree granting out-of-state institutions licensed for any reason (including physical presence and/or online presence).

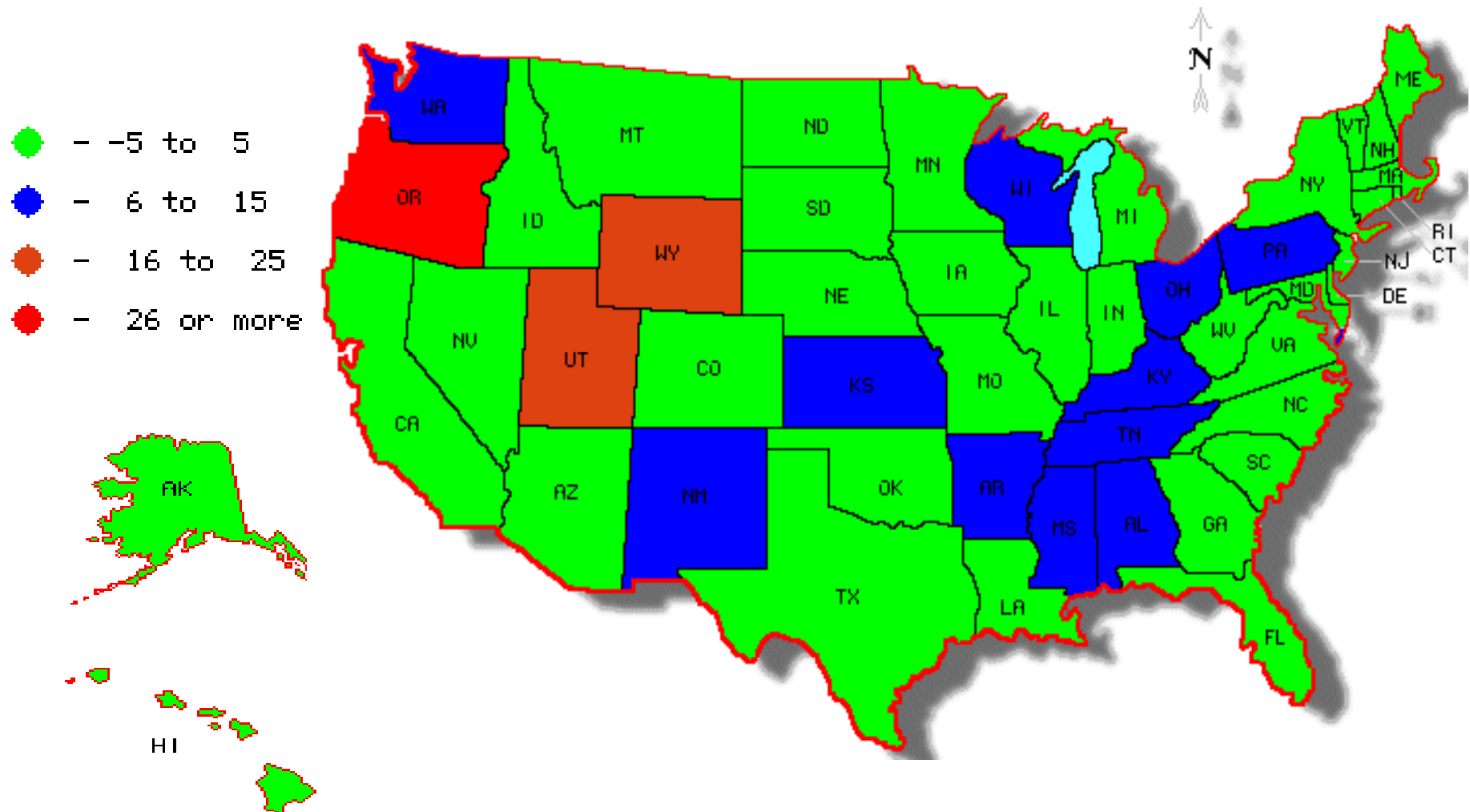
While overall licensing volume increased about 35% from 2007 to 2010/11, the majority of states experienced only slight shifts

- The change in out-of-state licensing volume can be attributed to large increases in a few states, specifically Oregon (+30), Utah (+19), and Wyoming (+18); out-of-state licensing volume from 2007 to 2010 has remained relatively stable in most states

Change in Volume of Out-of-State School Licenses, 2007-2010/11



Change in Volume of Out-of-State School Licenses, 2007-2010/11



Note: Map displays total number of degree granting out-of-state institutions licensed for any reason (including physical presence and/or online presence).

Licensing Volume by Type-state and school Web sites often ambiguous

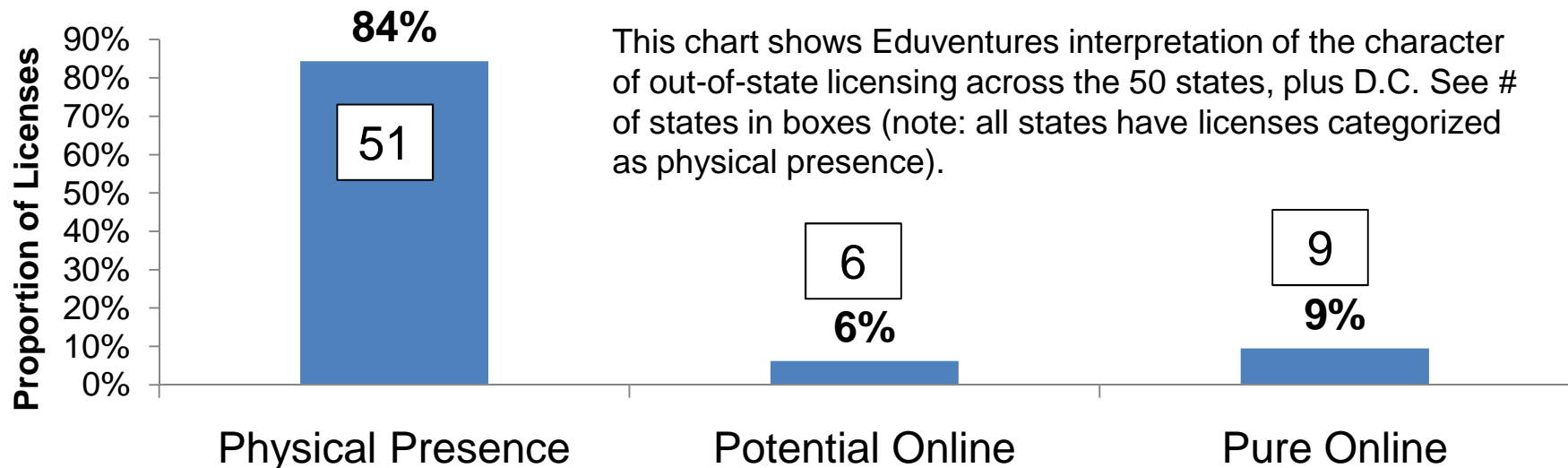
- As noted above, it remains exceptional for a school with online programming to be licensed in any state other than it's home state and any states where a branch campus/center is located. Eduventures estimated licensing volume for degree-granting institutions by state based on three categorizations of license. Assessment remains ambiguous, since many states do not publicize the specific activities for which a school is and is not licensed
- A. License for Physical Presence.** A school's physical presence (for campus/center and/or in-person recruitment reasons) in a particular state triggered the license
- B. License for "Potential" Online Presence.** In state's categorized as 'Exemption' or 'Online-Ambiguous', a school's license may be triggered for online reasons (i.e. out-of-state institutions do not have physical presence in a state and are known to be active online). There is not enough detail on state or school Web sites to address ambiguity for these licenses. Licenses in this category could be placed in either category A or C if additional information were available
- C. License for "Pure" Online Presence.** In state's categorized as 'Online-Explicit', a school's license is known or strongly appears to be triggered for online reasons (i.e. out-of-state institutions do not have physical presence in a state and are known to be active online)

Licensing Volume by Type- “pure” online licensing rare

- An estimated 2,300 degree-granting (2- and 4-year) schools offer online programming as of 2010, but only 56 (2.4%) of schools have “pure”/“potential” online out-of-state licenses. Among online active 4-year schools, the ratio is estimated to be <5%
 - Of the 823 total licenses, 694 (84%) can be attributed to physical presence; the remaining can be attributed to “potential” online delivery (n=51) or “pure” online delivery (n=78) reasons.
 - Among “pure” online licenses, for-profits are significantly over-represented compared to nonprofits

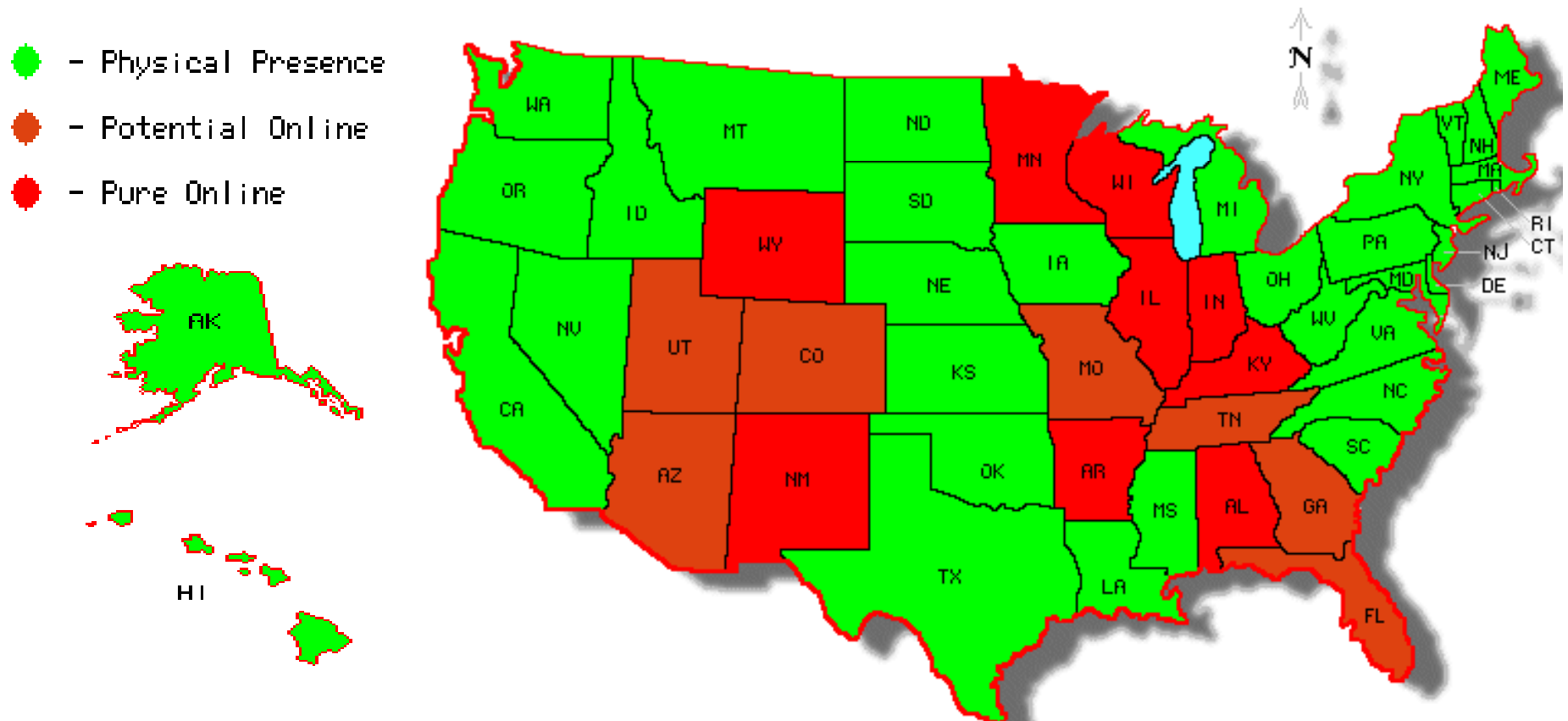
2010/11	# Licenses	# Schools	% Licenses Held by For-Profits
“Potential” Online	51	34	53%
“Pure” Online	78	36	63%

Categorization of Licensing Volume by Type, 2010/11



Type of Out-of-State Licenses by State, 2010/11

- This map emphasizes that in 2011 most states appear to not yet be actively licensing “pure” online delivery, and even states to the contrary exhibit low license volume
- A handful of for-profit schools, notably 100% or vast majority online, such as Capella University, Grand Canyon University, and Walden University are most visible on the “pure” list, although also show up on “Physical Presence” lists for other activities



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Tension between federal requirement and current practice

- **Major Gap**. There is a major gap between current out-of-state licensing type and volume and the new explicit federal expectation that every school obtaining Title IV funds for out-of-state distance students gain necessary approvals or be in process in each relevant state by 1 July 2011
 - This gap is partly a matter of limited state clarity and enforcement on licensing requirements for nonstandard forms of presence, not least around distance education; but also suggests that the vast majority of online programming takes place with no reference to non-home state oversight
- **For-Profit v. Nonprofit**. Current licensing volume disproportionately features large for-profit schools; the category of school that is often most visible, most scrutinized by regulators, and best structured for compliance. It remains rare for a nonprofit school active online, even at scale, to have an out-of-state license
 - This may point to some states, perhaps informally, effectively exempting all or most nonprofits from oversight. Given the limited resources of many state regulators, licensing volume may be driven by visibility or complaints rather than activity. However, this calls into question the validity of targeting some school types rather than others, or treating certain school groups differently
- **Value**. There is very little evidence of schools using licensure for marketing purposes, beyond basic statement; nor clear evidence that state-by-state jurisdiction positively impacts consumer protection or institutional quality

What should schools do now? Eduventures suggests the following:

- 1) **Haste Unwise?** Given piecemeal and inconsistent licensing in most states of nonstandard forms of physical presence, and inconclusive cost/benefit data, at present for many schools the most strategic approach may be to keep a watching brief. Federal intervention has forced many schools and states to review this issue, and the coming months may see a growing number of states exempt certain schools/activities as the most practical way to accommodate the rules. The anticipated “Dear Colleague” letter from the Department may also prove relevant
- 2) **Focus.** If certain states are particularly important markets, exhibit particularly explicit or far-reaching jurisdiction, and/or competitors are licensed, proactive pursuit of licensure may be wise. For the largest schools by online headcount, a focused approach may mean almost national review
- 3) **Existing Licenses.** Schools should review regulations for states in which they are licensed for physical presence to ensure full coverage for wholly online delivery. Distinct physical and online licensing in AR, and a lawsuit in TX against arguing online infringement despite licensed campuses strike cautionary notes
- 4) **Advocacy.** Consider joining The Presidents’ Forum, a group of senior leaders from for-profit and nontraditional nonprofit schools that has long sought to work with all parties to arrive at a practical solution to these issues

Out-of-State Schools, Online Delivery & State Regulation- potential next steps

Eduventures will continue to follow this issue, and keep members updated. Going forward, for members of Eduventures Learning Collaboratives, we would be pleased to discuss possible extensions to this report, such as:

- 1) Provide more detail on specific language for a particular state
- 2) Provide more detail on which schools are licensed where
- 3) Provide more clarity on military base and Tribal Nation recruitment
- 4) As a supplement to this report, we will shortly make available a list of state regulators with URLs

Please contact the authors:

Richard Garrett, Managing Director, CPE-LC & OHE-LC rgarrett@eduventures.com

Marina Brauch, Research Analyst, CPE-LC & OHE-LC, mbrauch@eduventures.com

N.B. A number of important related studies are underway, notably an update of the Dow Lohnes report from 2006, and a Lumina funded project led by The Presidents' Forum

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- Please address any comments to the authors- see previous slide

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- Eduventures works with 300+ universities and colleges nationwide, across six membership programs, and Eduventures Consulting Services
- Eduventures helps member schools to answer key questions, grow revenues, and better serve their students
- Eduventures Learning Collaboratives are:
 - Academic Leadership
 - Continuing & Professional Education (CPE-LC)
 - Development
 - Enrollment Management
 - Online Higher Education (OHE-LC)
 - Schools of Education
- The present report grew out of research and discussions within our CPE-LC and OHE-LC memberships, serving Deans and Directors of Continuing Education and Distance Education. Close to 200 schools are members of one or both of these programs
- For questions about Eduventures reports and services, please contact Joe Michie at jmichie@eduventures.com or **617-532-6063**