International Online Regulations: A Brave New World

Pietrina Scaraglino, Moderator, Deputy General Counsel, New York University
Gregory Ferenbach, Counsel, Hogan Lovells
Alyssa Greenwald, Associate General Counsel, Yale University
Michael Gradisher, VP Regulatory & Legal Affairs, Pearson Online Learning Services
Worldwide Trends Driving Online Education

- Widespread internet access
- Rising household incomes: new middle class in developing world
- Rapidly growing demand for higher education
- Perceived economic opportunities with U.S. degrees
Worldwide Trends Driving Online Education

• Potential lower costs associated with online programs
• Generally benign regulatory environment
• Rise of “Pathway” programs
• Widespread use of local recruiters
• Growth in physical migration of students around the world
Worldwide Trends Driving Online Education

- Increase in English language proficiency
- Growth of “shared services” model to deliver at scale (e.g. OPM’s)
- Increased physical presence of U.S. institutions abroad
  - International programs and on-ground campuses export institutional “brands”
International Higher Education Trends: Brazil as an Example

Context - Higher Education Market Dynamics
Distance education, long a staple of the US and some EU markets, is showing signs of growth in emerging markets.

Brazilian Private Higher Education Enrolment, Distance vs. On-campus, 2003-16

Strong online operations will be required across most to all geographies within the next five years.

Source: Parthenon/E&Y
U.S. Higher Education Environment

• Decreasing US student enrollments, especially among traditional age students

• Decreasing support for public institutions
  – International students provide full-pay revenue

• Increasing competition in domestic online program offerings
U.S. Higher Education Environment

• More robust and “scalable” online infrastructure
  – Contracts with third-party providers
  – Contracts with local recruiters
  – Increased internet marketing and advertising capabilities
  – English language programs
  – Online business programs
U.S. Higher Education Environment

• New learning technologies and pedagogies (e.g. competency-based; AI; “micro-degrees”)

• Limited U.S. regulations governing U.S. institutions’ international online educational activities (with some exceptions)…
U.S. Higher Education Environment is Protectionist

- The U.S. regulates non-U.S. institutions via
  - Institutional accreditation restrictions
  - Programmatic accreditation restrictions
  - SARA membership
  - State regulations
  - ED regulations permit foreign institution’s access to Title IV but favor U.S. institutions (no Title IV access for non-US online programs)
U.S. Legal Issues to Consider

• U.S. Embargoes
  – Limit most transactions (including enrolling online students) with the Crimea region of Ukraine, Cuba, Iran, North Korea, and Syria
  – Rules have changed/become more permissive in recent years
    • Cuba: can provide online courses to undergraduates students
U.S. Legal Issues to Consider

- Iran: can provide undergraduate online courses in the humanities, social sciences, law and business; but can provide undergraduate online STEM courses only if these courses are at the introductory level.
  - Regulations complicated, differ by country and frequently change
  - Institutions must implement protections to verify and limit student enrollment by location
U.S. Legal Issues to Consider

• Additional Sanctions-Related Issues
  – U.S. regulations also restrict all transactions with certain individuals/entities
  – Most institutions already use vendors/software to screen for these restricted persons
  – Need to integrate this screening into online program registration process, even though risk may be low
U.S. Legal Issues to Consider

• Foreign Corrupt Practices Act (FCPA)
  – Should always consider for international activities, particularly those that involve vendors/partners
  – Prohibits directly or indirectly offering or giving payments or anything of value to foreign government officials in order to gain an improper business advantage
  – Government official is broad so could include foreign partners at state-owned universities
U.S. Legal Issues to Consider

– Anything of value also broad and could include, for example, giving favorable treatment in admissions

– Improper business advantage is similarly broad and includes trying to obtain any economic benefit

– Example: U.S. institutions may need certain foreign government approvals to conduct online programs and these potential interactions need to be monitored for FCPA compliance
Foreign Legal Issues to Consider

Approvals and Registrations

• Online education is usually regulated at the national/federal level
• Some is provincial (Canada, for example)
• Many jurisdictions do not require approval for 100% online degree programs (yet)
  – However, physical and other business presence (particularly on-site faculty) usually triggers requirements and approvals
Foreign Legal Issues to Consider

• Many countries do not recognize credentials earned online (China, for example)

• A credential or certification may be subject to local country requirements
  – Less so with regard to non-degree or technology programs (coding)
  – More so with regard to traditional degrees/services (medical professions)
Foreign Legal Issues to Consider

- Data protection
- Foreign laws often broader than FERPA
- GDPR is just one, but the most notable, example
- GDPR applicability: Marketing and/or providing online programs to students in the EU
- Points to consider for GDPR Compliance Plan
  - Map data collection/data use
  - current practices of marketing online programs or enrolling students may need to be modified
  - privacy policies or notices may need to be added
  - data protection agreements with vendors
Foreign Legal Issues to Consider

**Tax**

- Non-profit status may be irrelevant
- Sales tax or value added tax (VAT)
  
  **Example:** some countries require students to withhold taxes on tuition payments, which may impact local pricing
- One factor in whether or not a program is subject to local sales tax in a country may be whether the program is entirely pre-recorded or has live teaching
Foreign Legal Issues to Consider

Tax

• Inadvertently creating a taxable physical presence of “permanent establishment” (PE)
• Existence of PE could expose institution to income tax
• The test of whether or not online activities will create a PE in a particular country depends on the local laws and whether or not the country has entered into a tax treaty with the United States
• Similar factors in determining PE as those in determining whether institution needs to be licensed or receive other prior approvals
• Foreign Payment Issues
Case Study: China

Over 170 million 18 to 24 year olds
Case Study: China

• Technically not “open”
  – But there has been no effort so far by the Chinese government to prohibit offering online courses to Chinese residents

• Online degrees issued by non-Chinese universities are not officially recognized
Case Study: China

• U.S. institutions physically operating in China are subject to data privacy and other country laws

• Restrictions on how much currency can be sent outside of China
  – Current limit is $50K
Case Study: India

Over 150 million 18 to 23 year olds
Case Study: India

- Currently no laws or regulations governing online courses offered by non-Indian institutions
- Like China, no physical locations allowed without a local partner for degree programs
- Foreign degrees earned online are not recognized in India
Case Study: India

- Data protection laws generally don’t apply if servers are in the U.S.
- Non-Indian institutions are subject to a 10% tax on tuition fees and online courses may be subject to a 14% service tax
  - Each to be remitted by students
Case Study: United Kingdom

Over 4 million 20 to 24 year olds
Case Study: United Kingdom

- Online courses that do not lead to a UK credential need not be licensed
  - It is possible to obtain voluntary validation of quality assurance
- Foreign degree recognition at local institution’s discretion or through application to National Recognition Information Centre
Vendor Support of Online Programs

• Vendors offer expertise in:
  – Instructional design/course development
  – Marketing/recruiting
  – 24/7 help desk support
  – Online platform/course hosting
  – Non-academic student counseling

• Outsourcing affects the compliance calculus
OPM Providers

• “Online program management” providers offer “soup to nuts” support for online programs
• Usually includes financial support for program start-up costs, leading to longer contracts
• Resulting long-term partnership requires intentional compliance planning/monitoring
Permissible Vendor Business Models

• Incentive compensation concerns may arise for tuition-sharing arrangements under Title IV regulations
• Generally no such concerns for tuition-sharing arrangements that are 100% international
• Some indication this might change at the accreditation level, though
Vendor Contracts

• Vendor contracts should expressly allocate respective compliance responsibilities

• Subcontracting out program management/support ≠ subcontracting compliance responsibility

• As a best practice, there should be a governance structure to raise compliance issues
Vendor Regulatory Compliance

• Vendor/institution compliance concerns may align:
  – Program approval requirements
  – Marketing restrictions

• Or may be separate and distinct:
  – Institutional responsibility for student data
  – Vendor responsibility for prospective student data
Vendor Regulatory Compliance

• The institution remains in charge of its compliance “ship”
• Guides the vendor on institutional concerns
• It’s all about good process
  – Know your compliance concerns in advance
  – Contractualize expectations/obligations
  – Communicate, communicate, communicate!
Vendor Data Privacy Concerns

- Vendors marketing an institution’s programs typically generate a separate database of prospective students.
- Vendor must follow data privacy laws/disclose its own privacy policies to prospective students.
- Vendors may also have read-only access to institution’s student information systems – should be narrowly-tailored.
Building a Compliance Program

• First, understand your school’s international footprint
  – What activities abroad could create a business presence in a given country?

• Audit existing online offerings
  – What is already being offered outside the U.S.?

• Identify target countries
Building a Compliance Program

• Establish a protocol for interested departments to launch online programs abroad.

• Formalize a compliance program with clear ownership for each issue.

• Key stakeholders include:
  – Academics
  – Tech/IT
  – Legal/Compliance
Building a Compliance Program

• Implement strict procedures to verify student location
  – From initial enrollment and during the entire program
• Obtain signed acknowledgements of disclosure receipt
• Notify U.S. accreditors and state regulators
Building a Compliance Program

• Develop enrollment agreements with appropriate disclosures
  – Data privacy/consent to transfer of data
  – Taxes
  – Degree Recognition
  – English Language proficiency
Building a Compliance Program

• Implement strict policies and procedures for local recruiters and third party vendors
• Obtain any required country approvals prior to advertising or marketing
• Limit marketing and advertising to approved countries
• Create partnerships with local institutions where necessary
QUESTIONS?