

International online programs: Know the pitfalls

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Thanks to the rapid development and widespread acceptance of online programs over the last decade, American universities and their respective business partners now offer degree or non-degree programs entirely online around the world. The international market is appealing to U.S. institutions for many reasons. These include

- decreasing domestic U.S. enrollments;
- funding pressures, particularly on public institutions;
- a desire to leverage domestic brands;
- newly developed technologies and pedagogies; and
- concerns that international student enrollment in the United States has stalled, in part due to immigration policies of the current administration.

While many international students still come to the United States to study, and many traditional-age American students study abroad, the delivery of online education linked to world-class brands is fast becoming a "hot" growth area.

When considering online programs abroad, several important U.S. and non-U.S. legal and compliance issues arise. A few of the most common issues are discussed below. This alert concerns online-only programs; the compliance challenges are very different and more complex if a university also establishes a physical presence abroad.

Key U.S. legal issues to consider

Offering online programs internationally implicates certain U.S. legal requirements. First, the U.S. bars trade with certain sanctioned countries. U.S. export control laws and regulations prohibit most transactions with Iran, Cuba, North Korea, Syria, and the Crimea region of Ukraine, which may include restrictions on enrolling online students from those countries. In order to comply with these complex trade regulations, institutions often need policies and procedures to identify, verify, and limit student enrollment on the basis of geographic location or require third-party vendors who are handling enrollment to do so.

U.S. student aid regulations under the Higher Education Act, or HEA, sometimes also apply to international ventures. Any additional locations in a country outside the United States must generally be approved by the institution's accreditor, home state, and the U.S. Department of Education. If considering a partnership with a school in another country (many of which participate in federal student financial aid programs under Title IV of the HEA), U.S. institutions should be aware that Title IV regulations contain strict limitations on offering Title IV aid for

programs in which a partner in another country utilizes telecommunications technologies (e.g., online instruction).

U.S. higher education institutions must adhere to the Foreign Corrupt Practices Act, or the FCPA, whenever engaged in international activities. The FCPA prohibits directly or indirectly offering or giving payments or anything of value to foreign government officials in order to gain an improper business advantage. Under the FCPA, the term "government official" is broadly defined and could include employees of public universities in other countries. "Anything of value" is also defined broadly, for example, giving favorable treatment in admissions to foreign government officials or their relatives could also violate the FCPA even though there is no payment exchanged for admission. Many U.S. companies have found themselves in trouble with the FCPA not because of the actions of their own employees, but because of the actions of their consultants, vendors, or partners who interface with foreign government officials. Universities operating internationally increasingly take a sophisticated approach to address FCPA compliance, including diligence on business partners, training for staff, and robust policies and procedures.

Certain non-U.S. legal issues to consider

Non-U.S. laws and regulations pertaining to online programs vary considerably by country and are evolving. A few notable trends and issues are already clear.

An initial issue is proper authorization to offer the program. The good news here is that, so far, many jurisdictions currently do not require prior approval to offer a 100 percent online program; however, establishing a physical presence (such as on-site faculty or instruction) usually triggers the need for host country approval and potentially other local business registrations as well as tax considerations.

Many countries, including China and India, do not fully recognize credentials earned online, especially from a foreign university. This disadvantage creates an important disclosure issue for students who may, for example, wish to apply for work in their home country's government or industry only to find they do not meet the job's credential requirements.

Another important consideration is data security and privacy. Many countries have stronger privacy laws than the United States, which could affect the collection and use of personal data from students participating in online programs. A well-known international example is the European Union's new General Data Protection Regulation (GDPR), part of a wave of EU privacy legislation intended to change the use and flow of personal data worldwide.

It is also important to consider trademark protection in target countries, especially where marketing and recruitment campaigns accompany an online program. Invalidating bad-faith trademark registrations of trademark squatters can take years to resolve.

U.S. universities must also consider other countries' tax requirements. In addition to applicable U.S. requirements, many countries seek to tax students and institutions directly. Even U.S. institutions that are nonprofits may have to pay sales tax or value added tax (VAT) when collecting tuition or fees from international students in online programs.

Another and arguably more significant tax concern is whether providing online education to students in another country inadvertently creates a taxable physical presence or "permanent establishment" (PE) of the U.S. university in that country. A PE would expose the institution to corporate income tax on certain revenues attributable to that country. The test of whether or not online activity creates a PE in a particular country depends on local law and whether a tax treaty with the United States is in effect.

U.S. institutions frequently enter into collaborative degree programs aimed at international students (who are not Title IV eligible) with an online delivery component where the non-U.S. institution collects tuition and then shares some tuition revenue with the U.S. school. Foreign tax

withholding requirements often apply to such payments coming from the non-U.S. institution, which other countries often view as taxable service payments.

Finally, there may be restrictions on individuals who are in-country making payments to an entity outside the country, and such restrictions may pose hurdles for online students in certain countries. In some countries, like China, making payments over a certain value to foreign companies requires prior government approval. If students must go through such approval processes, there is risk not only of long payment delays and lost enrollments, but also of additional governmental scrutiny.

Conclusion

Given the above considerations, a U.S. institution contemplating the launch of an online initiative abroad must do its business and legal due diligence and design an ongoing compliance program. The laws and regulations concerning online programs internationally have been slow to develop, but are expected to evolve rapidly in response to the changing global marketplace.

We are available to respond to questions.

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