

U.S. regulation of "foreign schools": Selected considerations for institutions participating in the U.S. Student Assistance Programs

15 February 2019

Under U.S. federal law, known as the Higher Education Act (HEA), eligible U.S. students may receive federal student aid to help pay for education expenses incurred to attend approved higher education institutions, including under certain circumstances institutions located outside the United States. The aid is typically in the form of a loan from the U.S. government provided through the Federal Direct Loan (Direct Loan) Program. Public and private nonprofit institutions located outside the United States are eligible to participate as "foreign schools" in the Direct Loan Program if they offer academic programs that are comparable to those offered by an eligible institution in the United States and meet certain other eligibility requirements.¹

Foreign schools approved to join the Direct Loan Program must enter into a binding legal agreement (known as a program participation agreement) that establishes a fiduciary relationship with the U.S. Department of Education (ED). By signing the program participation agreement, a participating institution agrees to:

- Ensure that U.S. students applying for Direct Loans meet all eligibility criteria.
- Follow all applicable ED regulations related to the Direct Loan Program.
- Agree to meet certain "administrative capability" standards and become subject to certain audits.
- Submit required documents and reports in a timely manner.
- Repay to ED loan funds if a student withdraws before finishing an academic term and reimburse ED for certain costs if the school erred in approving the loan.

This alert focuses primarily on the second bullet point above – ED's rules related to the U.S. federal student aid programs, including the Direct Loan Program. This alert provides an introduction to selected regulations, explains how they apply to a foreign school and its academic programs, and describes the foreign school's legal obligations under the program participation agreement to comply with the rules. Notably, in some instances, these regulations apply to all of

¹ For-profit institutions may be eligible only if they are free-standing graduate medical, veterinary, or nursing schools.

the foreign school's degree programs, certificates, and short courses – even if such programs are not themselves approved as part of the Direct Loan Program.

Incentive compensation

The incentive compensation rule generally forbids an institution that participates in the U.S. federal student financial aid programs from paying any employee or a third party based on success in securing enrollments if the employee or third party is performing recruiting or admissions activities or is making decisions about the award of financial aid (known as covered activities).² The institution specifically agrees when it signs the program participation agreement that it will not "provide any (1) commission, bonus, or other incentive payment; (2) based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid; (3) to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the award of Title IV HEA program funds."³

- The incentive compensation rule applies equally to payments to an outside entity and payments to an institution's own employees. For example, the rule applies to external recruiters hired to identify students who may be interested in enrolling in the institution's programs.
- Whether or not a person or entity is performing covered activities depends on the facts of the situation.⁴ Certain activities are "always" covered activities subject to the incentive payment ban, including: "[r]ecruitment activities, ...: [t]argeted information dissemination to individuals; [s]olicitations to individuals; [c]ontacting potential enrollment applicants; [a]iding students in filling out enrollment application information" and "[s]ervices related to securing financial aid, including: [c]ompleting financial aid applications on behalf of prospective applicants." Other related activities generally are not subject to the ban, such as certain marketing activities, certain student support services, and policymaking by senior officials.
- If the third party performs any one or more of the covered activities, then – unless an exception applies – the payment arrangement must comply with the rule. There are certain exceptions to the rule – for example, a school may pay incentive compensation in connection with the recruitment of foreign students residing in foreign countries who are not eligible to receive U.S. federal aid. An institution may also pay in exchange for collection of student contact information or for a number of "clicks" on a website, provided that such payment is not based on the number of students who apply or enroll. Under certain limited circumstances, known as the "bundled services" rule, an institution may have a tuition-sharing arrangement with a third party that performs a variety of services for the institution, including covered activities.⁵
- ED policy is that the incentive payment rule applies to the foreign school as a whole – not just to those programs that participate in the U.S. student financial aid programs.
- Violation of the incentive compensation rule can carry substantial monetary fines and penalties, including the loss of eligibility to participate in the U.S. student aid program as a foreign school. Current ED policy is that violation of the rule (and the related program participation agreement) taints all student aid disbursed, and therefore the institution may be

² 34 C.F.R. § 668.14(b)(22).

³ Id.

⁴ ED has provided some limited guidance about which activities are "covered activities." See Dear Colleague Letter GEN-11-05 (March 17, 2011), found [here](#).

⁵ Id. at pg. 11.

liable to reimburse the U.S. government for all of its financial losses in connection with federal student aid disbursed while the unlawful arrangement was in place.

Legal authorization, online education programs

In order to participate in the Direct Loan Program, a foreign school must demonstrate that it has proper legal authorization (from the relevant education ministry, council, or other agency in the country where the foreign school is located) to provide an educational program beyond the secondary education level and to award officially recognized degrees, certificates, or other credentials.⁶

There are certain academic programs that are not eligible for Direct Loan Program participation when offered by a foreign school, including:

- Programs offered in whole or in part through distance education (i.e., online education or telecommunications), correspondence, or direct assessment – except that foreign schools may use distance education technologies to "supplement and support" instruction offered in a classroom located in the foreign country where students and instructor are physically present.
- Programs for which any portion of the program is provided by an entity that is not eligible to participate in the Direct Loan Program.
- Programs offered in whole or in part in the United States, except that independent research done in the United States as part of a dissertation is permitted under certain limited circumstances.⁷

In all of these cases, ED has stated that a program that permits Direct Loan students to take an ineligible course for credit, regardless of whether the course is optional or required, is considered an ineligible program for Direct Loan purposes. The foreign school may therefore wish to offer two separate versions of the program, one of which does not contain any ineligible courses and would therefore be an eligible program. A foreign school should consider whether any adjustments to program design are necessary or desirable based on these prohibitions.

Even if a foreign school does not seek Direct Loan Program approval for an online program, there are other legal authorization challenges to consider. If a foreign school is offering educational programs through distance education to students in the United States, it is likely that one or more of the 50 individual states (plus the District of Columbia, Puerto Rico, and the other U.S. territories) where those students reside may require the foreign school to obtain authorization to offer programs to students residing in the state. Such state laws and regulations continue to change frequently, often through informal changes to agency guidance. And foreign schools are ineligible to participate in the U.S. state law reciprocity regime for distance education, known as the state authorization reciprocity agreement (SARA). As a result, foreign schools planning to offer online educational programs to students in the United States should develop a plan to obtain and monitor the necessary authorizations or risk potential action by the state agencies (e.g., fines, litigation, orders to cease activity).

Student privacy

The Family Educational Rights and Privacy Act (FERPA) is a U.S. federal law that applies to any institution that receives federal funds under a program that ED administers – including foreign schools that participate in the Direct Loan Program.⁸

⁶ 34 C.F.R. § 600.52.

⁷ ED, Foreign Schools Handbook, pp. 1-22 to 1-23 (Oct. 2016), found [here](#).

⁸ 34 C.F.R. part 99.

FERPA protects the privacy of students' education records, where "education records" includes those records that are (1) directly related to a student and (2) maintained by a postsecondary education institution or by a party acting for the institution.⁹ Education records include, among other things, admissions records (if the student was admitted), academic records, and any financial aid records pertaining to the student.

FERPA affords students the right to review and seek to have their education records amended and the right to some control over the disclosure of personally identifiable information from their education records. In general, unless one of several exceptions applies, the school may not disclose personally identifiable information from education records without the student's prior written consent.

Two common exceptions are referred to as the "directory information" and "school official" exceptions. The "directory information" exception permits the school to disclose personally identifiable information to a third party certain basic information the school has designated as "directory information" (e.g., name, address, ID number, registration status, email address, major field of study).¹⁰ The "school official" exception permits disclosure of personally identifiable information to a contractor or other party to whom the school has outsourced institutional functions so long as the arrangement satisfies certain requirements: (1) the third party must perform a service for which the school would otherwise use its own employees; (2) the third party must be under the direct control of the school with respect to the maintenance and use of education records; and (3) the third party must comply with requirements governing the re-disclosure of personally identifiable information.¹¹

FERPA does not create a private right of action against the school, but complaints may be filed with ED, and a school that fails to comply with FERPA may potentially forfeit its access to U.S. federal funding. Foreign schools should therefore establish policies and procedures to comply with FERPA, including with regard to notifying students of their rights and obtaining written consent before disclosing personally identifiable information. Foreign schools should also include appropriate contractual provisions in agreements with any relevant third parties to ensure that the agreements and the actions of the third parties comply with FERPA. For example, if the school intends to share personally identifiable information with a service provider, the contract should address the legal means – student consent or application of one or more exceptions – by which the school will do so.

In addition to FERPA, several states in the United States (including, notably, California) have developed their own student privacy laws, which vary dramatically from state to state. Foreign institutions that deliver online education programs to students in the United States should analyze their own practices in light of such laws.

⁹ 34 C.F.R. § 99.3.

¹⁰ 34 C.F.R. § 99.31(a)(11); 34 C.F.R. § 99.37.

¹¹ 34 C.F.R. § 99.31(a)(1)(i)(B).

Conclusion

Participation in the U.S. Direct Loan Program requires a foreign school to pay careful attention to compliance with ED regulatory requirements, including those described in this alert. In addition to those issues described above, be mindful that ED has detailed requirements related to:

- Arrangements with third-party servicers that administer any element of the institution's participation in the Direct Loan Program.¹²
- Misrepresentations by any school representative (including employees, agents, and third-party service providers) relating to three broad subject areas: (1) the nature of the school's education programs, (2) the school's financial charges, and (3) the employability of the school's graduates.¹³

Foreign schools must understand the requirements of these regulations and develop a compliance program related to the school's participation in the U.S. Direct Loan Program.

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¹² 34 C.F.R. § 668.25.

¹³ 34 C.F.R. § 668.71 et seq.

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