International Online Regulations: A Brave New World

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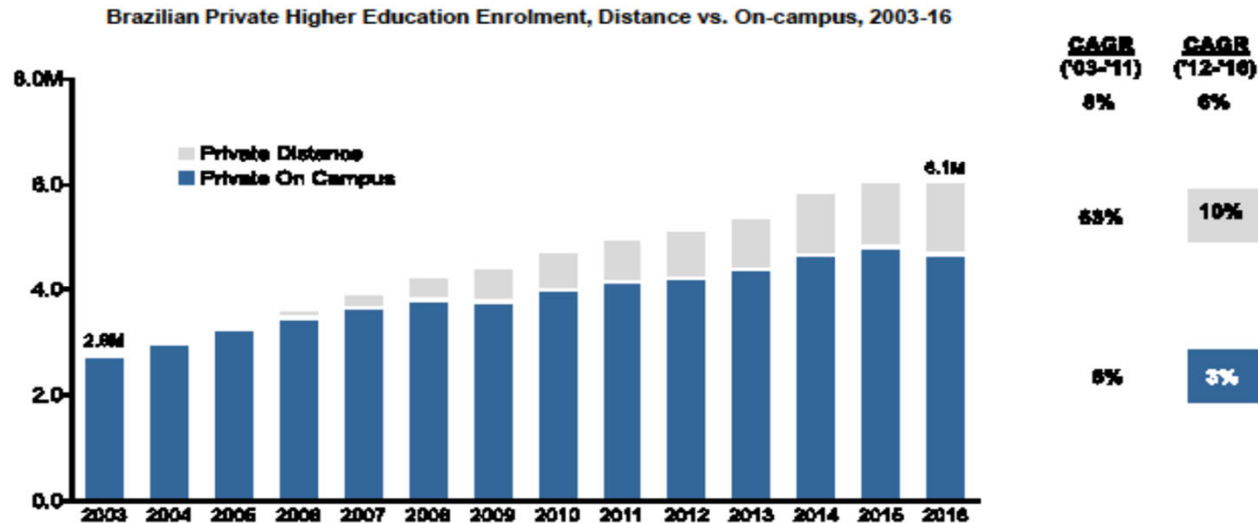
Strong online operations will be required across most to all geographies within the next five years

Source: Censo Educação Superior, MEC, EY-Parthenon

EY-Parthenon | Page 4

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

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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)…

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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 <u>not</u> 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
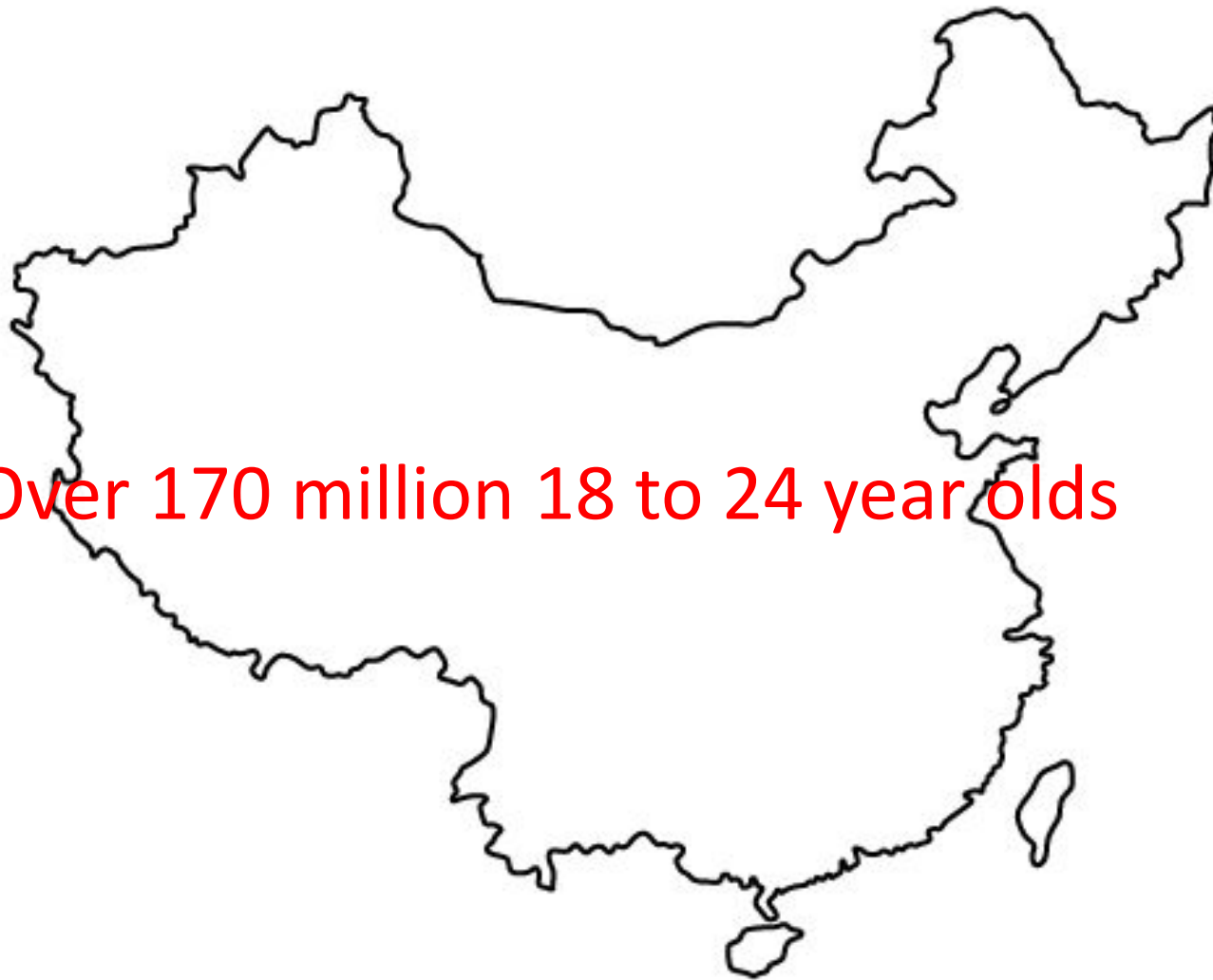
Case Study: China

- 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

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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

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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

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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?