THE FORUM ON EDUCATION ABROAD

The Forum on Education Abroad

To: Forum Institutional Members
From: The Forum on Education Abroad
Re: Changes to U.S. Federal Financial Aid Regulations and the Impact on Study Abroad
Date: 10/3/2011

In August, 2011 the Forum was contacted by some of its institutional members regarding changes to U.S. financial aid regulations and how these changes were impacting the relationship between study abroad provider organizations and Australian universities. The Forum has investigated this issue and is taking action to remedy it. The Forum began to research the issue by contacting U.S. and Australian colleagues and by hiring a consultant who is an expert on financial aid and study abroad. The consultant researched the new regulations and contacted key people involved with the issue, and submitted a report to the Forum. The consultant's report forms the basis of this document, which is intended to be of assistance to Forum members who are either impacted by the new regulations or simply want to learn more about the issue.

The Issue

Several Forum members reported that at least one Australian university cancelled contracts with study abroad program providers for accepting American students for non-degree study abroad because of an interpretation of new U.S. Federal Financial Aid regulations that took effect July 1, 2011.

Australian and New Zealand universities in particular find several of the new Federal financial aid regulations troubling. Of most concern are the regulations related to the issuing of Federal Stafford Loans to eligible U.S. students pursuing degrees at universities in Australia and New Zealand. The problem viewed as applying to study abroad is the paying of what is perceived as incentive compensation to third-party providers for the recruitment of students. Only universities that are *eligible institutions,* i.e., institutions participating in U.S. Department of Education (ED) loan programs, are affected by the new regulations.

Background

As far as can be determined, the only U.S. organizations having contracts cancelled are those that the Forum would define as *study abroad program providers*. These are for-profit or non-profit organizations that recruit students from outside the organization to participate in study abroad programs.

The perceived violation of the U.S. Federal Financial Aid regulations occurs when study abroad program providers negotiate a per-student reduction in the tuition charged to each accepted student. This discount could be considered *incentive compensation* paid in return for recruiting students. This is true even when the provider passes on the tuition reduction directly on to the students, or uses it to cover the cost of other services, thus helping to reduce the overall cost to the student participant.

In May 2011, the AEI (Australian Education International, a division of the Embassy of Australia) held a meeting for Australian and New Zealand university representatives, prior to the NAFSA annual conference in Vancouver, BC. Participants report that the conversation centered around the new Department of Education (ED) Federal Financial Aid regulations, including the ban on incentive compensation. It was specifically asked of a Department of Education representative who attended the meeting if study abroad students were covered by this new restriction. A definitive answer to this question was not reported.

On June 8, 2011, AEI held a lunch meeting in Washington, DC for Australian and New Zealand university representatives to discuss financial aid issues and the new regulations. Representatives from ED also attended the luncheon. A memo written after the meeting by AEI, "Outcomes of Australian and New Zealand Universities Financial Aid Lunch" states the following about the meeting and the issue of incentive compensation:

> Every participating university was concerned about the lack of clarity around the new regulations banning incentive compensation payments to third-party providers. One university said that they would stop working with third-party providers altogether due to these new regulations. Other universities said that they would continue using agents... the US Department of Education noted that they could not provide specific advice on revised agent contracts, but that they were looking for universities to act in good faith and show that they are trying to comply with the new regulations. In light of this, participants decided to explore the possibility of receiving funding from the Australian and New Zealand Financial Aid Association (ANZFAA) to seek joint legal advice on creating a template contract that complies with the new regulations.[1]

However, one person who attended the meeting in Washington stated that a definitive answer was given to the question of whether this new regulation applies to study abroad and/or exchange students as well as degree-seeking students. They noted that a clear response was provided by David Bergeron, Deputy Assistant Secretary for Policy, Planning and Innovation, U.S. Department of Education, Office of Post-Secondary Education. In answer to a question about whether the incentive compensation rule covers both full degree and study abroad and exchange students, he advised, "yes, it covers all U.S. students, everywhere."

This conclusion led at least one Australian university to send out letters cancelling contracts with U.S. study abroad program providers effective July 1, 2011.

---

[1] *Outcomes of Australian and New Zealand Universities Financial Aid Lunch Washington DC, 8 June 2011, 12:30-2.00pm* (Australian Education International, Australian Government): 1.

Regulatory Context and Changes

Federal Financial aid is governed by the Higher Education Act of 1965, which must be reviewed and reauthorized every five years. The last reauthorization was P.L. 110-315, the *Higher Education Opportunity Act*, passed in 2008.[2] At each review and reauthorization, the Department of Education reviews the new statute and adjusts regulations governing the use of Federal Financial Aid. The new regulations effective July 1, 2011 change the rules that must be followed by schools that sign *Program Participation Agreements (PPA)* with ED to participate in aid programs. Failure to abide by the PPA can lead to the loss of Federal aid for eligible students; ED can also demand that aid already awarded be refunded to the U.S. treasury.

Title 34, Subsection VI, Part 668 of the Code of Federal Regulations contains the general provisions regulating the Office of Post-Secondary Education's student assistance programs. Subpart B §668.14 outlines the terms to be followed by the institution signing a PPA. Section §668.14(b)(22)(i) says:

> (22)(i) It will not provide any commission, bonus, or other incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, 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.
> (A) The restrictions in paragraph (b)(22) of this section do not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.[3]

Prior to the reauthorization in 2011, a set of exceptions, called *safe harbor provisions*, had followed the above paragraphs. These have all been rescinded, primarily because ED found that some schools were using them to circumvent the intent of the law. The key safe harbor provision for this discussion involved this exception:

> Payments to third parties, including tuition sharing arrangements, that deliver various services to the institution, even if one of the services involves recruiting or admission activities or the awarding of title IV, HEA program funds, provided that the individuals performing the recruitment or admission activities,

---

[2] Government Printing Office. *110th Congress Public Law 315 Higher Education Opportunity Act*. http://www.gpo.gov/fdsys/pkg/PLAW-110publ315/html/PLAW-110publ315.htm (accessed August 22, 2011).

[3] "Student Assistance General Provisions." *Code of Federal Regulations.* Title 34, Part 668, Subpart B, Sec. 668.14 (2011). http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=4c84cb8c08fd535969b860aa74bf6395&c=ecfr&tpl=/ecfrbrowse/Title34/34tab_02.tpl (accessed August 23, 2011).

> or the awarding of title IV, HEA program funds, are not compensated in a manner that would be impermissible under paragraph (b)(22) of this section.[4]

Since most study abroad program providers offer a bundle of services that include orientation, providing housing, facilitating the provision of official transcripts, etc., it was believed that they would, if affected at all, fall under this safe harbor provision. The removal of this safe harbor provision has contributed to the reevaluation of the regulations.

Discussion

AEI sent several comments to ED during the regulatory revision process' question and answer period. An examination of the October 29, 2010 Federal Register notes that the concerns expressed about incentive compensation was heard by ED:

> **Federal Register**/Vol. 75, No. 209/Friday, October 29, 2010/Rules and Regulations, page 66576:
>
> *Comment:*…Many commenters offered suggestions regarding the safe harbors reflected in current § 668.14(b)(22)(ii)(K) and (b)(22)(ii)(L), which both involve payments to third parties for shared services…Several commenters expressed concern about the affect these regulations will have on third parties who provide services to assist students who study abroad...
> *Discussion:* The Department understands the value of partnerships between institutions and entities that provide various support and administrative services to these institutions. Such arrangements are permitted under these regulations as long as no entity or person engaged in any student recruitment or admission activity or in making decisions about the award of financial aid (as defined in § 668.14(b)(22)(iii)(C)) is compensated in any part, directly or indirectly, based upon success in securing enrollments or the award of financial aid.[5]

The key words here are "**based upon success in securing enrollments or the award of financial aid**." If study abroad program providers do not make final admission decisions, or do not decide which students are eligible to receive Federal aid, it can be argued that the study abroad program provider is not receiving compensation for successfully admitting students, or for awarding them aid.

In addition, study abroad program providers generally provide several services available to anyone interested in study abroad. Some of these services, like maintaining current information about the host institution, soliciting and providing comments or evaluations from past students, and advising about enrollment prerequisites and educational costs, are made available to anyone visiting the study abroad program provider's website. Prospective students, their parents, and

---

[4] Government Printing Office. *105th Congress Public Law 244 Higher Education Amendments of 1998*. http://www.gpo.gov/fdsys/pkg/PLAW-105publ244/pdf/PLAW-105publ244.pdf (accessed August 18, 2011).
[5] "Institutions and Lender Requirements Relating to Education Loans; Final Regulations" Federal Register 75 (October 29, 2009): 66875. http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi (accessed August 22, 2011)

others do not even have to identify themselves to use these materials. This would seem to place compensation earned by study abroad providers in the category of "permitted under these regulations" regardless of the form that compensation takes.

Further clarification can be found in a March, 2011 *Dear Colleague Letter* sent by Eduardo M. Ochoa of ED. Dear Colleague Letters are official publications used to inform or explain, such as when there is a change in the maximum award allowed Pell Grant recipients. Dear Colleague Letters also provide guidance about or clarification of Department of Education regulations.

Ochoa's Dear Colleague Letter (GEN-11-05), dated March 17, 2011, provides guidance about three areas of the October 29, 2010 final regulations, including the question of incentive compensation. Specifically:

> …the Department does not consider payment based on the amount of tuition generated by an institution to violate the incentive compensation ban if that payment compensates an unaffiliated third party that provides a set of services that may include recruitment services. The independence of the third party (both as a corporate matter and as a decision maker) from the institution that provides the actual teaching and educational services is a significant safeguard against the abuses the Department has seen heretofore. When the institution determines the number of enrollments and hires an unaffiliated third party to provide bundled services that include recruitment, payment based on the amount of tuition generated does not incentivize the recruiting as it does when the recruiter is determining the enrollment numbers and there is essentially no limitation on enrollment.
>
> With the statutory mandate in mind, the Department offers the following guidance with respect to certain possible business model:
> […]
> Example 2-B:
> A third party that is not affiliated with the institution it serves and is not affiliated with any other institution that provides educational services, provides bundled services to the institution including marketing, enrollment application assistance, recruitment services, course support for online delivery of courses, the provision of technology, placement services for internships, and student career counseling. The institution may pay the entity an amount based on tuition generated for the institution by the entity's activities for all bundled services that are offered and provided collectively, as long as the entity does not make prohibited compensation payments to its employees, and the institution does not pay the entity separately for student recruitment services provided by the entity.[6]

[6] U.S. Department of Education, Office of Postsecondary Education. "Implementation of Program Integrity Regulations" by Eduardo M. Ochoa . *Dear Colleague Letter GEN-11-05*, 11-12 (March 17, 2011). http://www.ifap.ed.gov/dpcletters/GEN1105.html (accessed August 23, 2011).

This reinforces the point made during the regulatory question and answer period that it is not forbidden to base compensation in part on tuition generated as long as the third-party provider is not otherwise affiliated with the institution or being compensated separately for recruitment services. Most study abroad program providers negotiate tuition reductions to help keep their services affordable for study abroad students either by collecting less from the student to pay tuition or by not charging as much for other services.

At least one legal opinion supports this interpretation of the Dear Colleague Letter. One U.S.-based program provider organization has had its legal counsel research the issue, and the following conclusion was drawn about incentive compensation:

> Mr. Ochoa's "Dear Colleague" Letter and the Q&A discuss tuition-sharing payments only in the context of recruiting, but I believe that its rationale extends to activities related to financial aid as well. In particular, the Q&A concludes that third parties with whom institutions contract for a variety of services, like (*provider organization*), do not make decisions on enrollment, and therefore those contracts do not present a significant potential for abuse with respect to student recruitment.

The program provider organization has turned to its overseas university partners to discuss their interpretation of the regulations in order to finalize its contracts.

Conclusions

1. New U.S. Federal financial aid regulations limiting the payment of incentive compensation for student recruitment activities could be interpreted to apply to study abroad program providers who receive tuition discounts for students they send to student loan-eligible institutions.

2. However, education abroad advocates could reasonably argue that recruiting and sending short-term, non-degree students abroad is not an activity that Congress meant to include in the prohibition against paying incentive compensation for recruitment.

3. Even though the new regulations have removed previous exceptions to the incentive compensation ban, clarifying language provided by ED in Mr. Ochoa's March, 2011 Dear Colleague Letter seems to exempt most study abroad program providers. Specifically, the letter explains that third-party providers that perform a set of services are not receiving a tuition discount purely for recruitment; therefore, discounts are not prohibited as long as certain conditions are met.

4. To date, it appears that only one Australian university has cancelled contracts with study abroad program providers. That institution has since decided it can reverse that action with a new contract containing clarifying language.

5. Colleagues in Australia and New Zealand have legitimate concerns about the new regulations, but these concerns revolve chiefly around the use of U.S. Federal student loans by degree-seeking American students. The changes in rules governing *Program Participation Agreements* do not constitute a legitimate concern. Rather, the issue appears to be the result of an overcautious reading of the new regulations.

6. It will be equally effective to focus on the intent of Congress and the explanatory language provided in the Dear Colleague Letter to ensure that both host institutions and study abroad program providers remain within the lawful boundaries governing the use of Federal financial aid.

Further Actions by the Forum

The Forum will advocate on behalf of its institutional members in the following ways:

1. Provide a written summary of the issue and the conclusions outlined in this document to any Forum member expressing concern or that requests the document.

2. Continue to monitor the issue to learn of new information and responses, and share this with Forum institutional members.

3. Conduct a survey of key member institutions (both study abroad program providers and Australian/New Zealand universities) to determine how the issue is being addressed and/or resolved.

4. Use the results of the survey to draft and issue best practice guidelines that institutions and organizations can use to review student placement contracts to ensure compliance with U.S. financial aid regulations.