Section 117 of the Higher Education Act

Presentation by the U.S. Department of Education

Introductory Remarks

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AGENDA

117 Discussion Topics

- Foreign Sources
- Transaction Amount
- Gift Reporting
- Contract Reporting
- Restricted Gifts and Contracts
- Covered Institutions and Entities
- Reporting Portal and System
- Compliance Generally

FOREIGN SOURCES

What constitutes a "foreign source"?

- Section 117 defines **four "types"** of foreign source:

    i. a foreign government, including an agency of a foreign government;
    ii. a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states;
    iii. an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof; and
    iv. an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source.

Foreign Sources

How do you determine the country of attribution for a foreign source?

- Section 117 states that the country to which a gift or a contract is attributable "is the country of citizenship, or if unknown, the principal residence for a foreign source who is a natural person, and the country of incorporation, or if unknown, the principal place of business, for a foreign source which is a legal entity."

Foreign Sources

The Department has stated that institutions must conduct "reasonable due diligence" when they receive the benefit of a contract or gift from any entity to determine whether the gift or contract is from or with a foreign source. How might an institution meet this standard?

- Must make a **good faith effort**
  - ✓ Foreign source determination may be achieved by:
    - ✓ Gathering information **directly from a counterparty**
    - ✓ Gathering information through **independent research**
- Reasonable due diligence **may vary**
  - ✓ **More diligence** may be appropriate when transactions involve a "new" foreign source
  - ✓ **Less diligence** may be appropriate when transactions involve a "repeat" foreign source

Foreign Sources

When must an institution report a contract or a gift from a multinational company or a U.S. entity with a foreign parent company?

- Reportable if counterparty is acting as an agent of a foreign source
- Evaluate the degree to which the foreign parent or affiliate(s) exercise control
  - ✓ Consider the formal relationship between the parties
  - ✓ Consider the practical realities of how the parties interact
    - ➢ Direction, supervision, or management by foreign entity
    - ➢ Both generally and in the context of specific gift or contract

Foreign Sources

When must an institution report a contract or a gift from a multinational company or a U.S. entity with a foreign parent company? (cont.)

- Always exercise **reasonable due diligence**
  - ✓ Consider **consulting public records**
  - ✓ Consider **the terms of the specific contract / agreement** (e.g., indemnification clause)
  - ✓ Consider **directly asking the counterparty**

Foreign Sources

Conversely, if the gift comes from a foreign subsidiary of a U.S.-based corporation or parent company, does it need to be reported?

- Foreign subsidiaries of U.S.-based corporations **may** constitute foreign sources by virtue of their satisfying the definition of a foreign legal entity (*see* 20 U.S.C. § 1011f(h)(2)(B)).

Foreign Sources

Do institutions have to report the identity of foreign sources to the Department?

- Yes, to the extent that the institution **has or could reasonably obtain** the foreign source's identity.
- As the Department has previously stated, unless otherwise required by law, foreign source names and addresses (other than country) will be withheld from inclusion in the public disclosure report.

Foreign Sources

If a foreign source has requested anonymity, must an institution report the identity of that foreign source to the Department?

- Yes, to the extent that the institution **has or could reasonably obtain** the foreign source's identity.
  - ✓ For **direct anonymous gifts**, institutions would have knowledge of the identity and be required to disclose it.
  - ✓ For anonymous gifts received from an entity or person **on behalf of a third party** who wishes to remain anonymous, institutions must exercise due diligence and make a good faith effort to understand the source of the gift.

Transaction Amount

TRANSACTION AMOUNT

Does an institution need to report any information if it does not have any gifts and contracts exceeding $250,000?

- No.
- Institutions are not required to file a disclosure report indicating that they were not involved in any reportable transactions.

Transaction Amount

When and how should an institution report contracts with indeterminate values?

- Contracts must be valued **when "enter[ed] into."**

- Institutions should use a **reasonable valuation methodology** based on information available at the time the contract is entered into.

TRANSACTION AMOUNT

The Department stated that institutions are required to report in-kind exchanges as part of a gift or contract, such as textbooks or materials for a specific program. Does the Department require an institution to adopt a specific valuation method for in-kind exchanges?

- No.
  - ✓ In general, the value of property should be the fair market value of the property.
  - ✓ Institutions are not required to use a specific methodology or approach to determining fair market value.

Gift Reporting

Gift Reporting

When must an institution report a gift from a foreign source?

- Section 117 requires institutions to report gifts **upon receipt**.

Gift Reporting

For pledged gifts, what should an institution do if the full amount is never received?

- Only the portion of a pledged gift that is **actually received** is reportable.

- If an institution receives all or a portion of a pledge or bequest that meets the $250,000 threshold (including in the aggregate) within a calendar year, that portion of a pledge or bequest must be disclosed.

Gift Reporting

How should institutions report gifts that are promised over a multiple-year period (for example, a $1 million gift that will be distributed as $200,000 each year for five years)?

- Look to the **$250,000 reporting threshold**.
  - ✓ The threshold applies **per foreign source, per calendar year**.
  - ✓ Aggregate the following:
    - ➢ Gift amounts **actually received** in a calendar year; and
    - ➢ The total value of contracts **entered into** in a calendar year.

Gift Reporting

Institutions may receive multiple gifts from a foreign source that are individually valued at less than the $250,000 reporting threshold but, in the aggregate, exceed $250,000. Can an institution file a single disclosure with the aggregate amount, or must an institution file disclosures individually for each gift?

- Disclosures must reflect the details of **each discrete transaction** involving a foreign source.

Contract Reporting

Contract Reporting

Does Section 117 require reporting of clinical trial contracts, such as contracts between research institutions and pharmaceutical companies?

- Yes.

- The statute describes the limited circumstances in which other reporting requirements could alleviate the need to file a separate Section 117 disclosure report. Specifically, an institution can file a copy of a disclosure report filed with a State or other federal agency only when that other report reflects “substantially similar” requirements to Section 117.

Contract Reporting

For previously disclosed contracts, the actual value of the contract may differ from the reported value at the time the institution entered into the contract. When must an institution update or amend its disclosure report to reflect changes in the value over the life of the contract?

- Generally, reasonably valued contracts **need only be reported once**.
- Institutions should file updates when previously reported information is determined to be **materially inaccurate.**

Contract Reporting

Are institutions required to report contracts involving purchases made by institutions from foreign sources, such as equipment purchased by an institution from a foreign source?

- "Money-out", arms-length transactions are generally **not reportable.**
- Institutions should consider the information available at the time of each transaction to determine whether it was arms-length
  - ✓ Transactions well below market value – even if "money out" – may be reportable

Contract Reporting

Are institutions required to report contracts involving an intellectual property license fee from a foreign licensee of a University patent or data or materials to be transferred for use in research?

- Yes.

Contract Reporting

If a foreign contract involves subcontracts to other institutions, how should subcontracts be reported? Should the institution receiving the contract submit a report for the total amount, or will institutions receiving contracts be required to submit individual reports if the amount of the subcontract is over $250,000?

- Section 117 **does not distinguish between contracts and subcontracts.**

- As with all transactions, **consider two threshold questions**:
  - ✓ Does the transaction **involve a foreign source**?
  - ✓ Is the monetary threshold **met or exceeded**?

Restricted Gifts and Contracts

Restricted Gifts and Contracts

What constitutes a "restricted or conditional gift or contract"?

- A gift or contract is considered "restricted or conditional" **only if it includes provisions regarding**:

  - ✓ the employment, assignment, or termination of faculty;
  - ✓ the establishment of departments, centers, research or lecture programs, or new faculty positions;
  - ✓ the selection or admission of students; **or**
  - ✓ the award of grants, loans, scholarships, fellowships, or other forms of financial aid restricted to students of a specified country, religion, sex, ethnic origin, or political opinion.

Restricted Gifts and Contracts

The statute requires additional disclosures for restricted and conditional transactions, including a description of such conditions or restrictions. What level of detail is required for this description?

- At minimum, provide a **detailed or narrative description** of the conditions or restrictions that make the individual transaction **meet the Section 117 definition** (20 U.S.C. § 1011f(h)(5)).
- A detailed or narrative description is required for only the conditions or restrictions that make the individual transaction meet the statutory definition.
  - ✓ Institutions need not provide descriptions for other conditions or restrictions.

Restricted Gifts and Contracts

The statute requires additional disclosures for restricted and conditional transactions, including a description of such conditions or restrictions. What level of detail is required for this description? (cont.)

- However, an institution **may not**:
  - ✓ Simply identify which of the four enumerated restrictions or conditions are applicable to a transaction.
  - ✓ Withhold entirely a description from the public disclosure report.

RESTRICTED GIFTS AND CONTRACTS

Are there any circumstances in which a school can aggregate transactions for reporting purposes?

- Generally, transaction-based reporting is required.

- One exception:
  - ✓ Restricted or conditional contracts with the same foreign source for payment of tuition (and related fees) for students from a specific country.

Covered Institutions and Entities

Covered Institutions and Entities

Who is required to file disclosure reports?

- All schools meeting **the Section 117 definition of "institution"** that are **involved in one or more reportable transactions**.
- Foreign source owned or controlled institutions **must file two disclosure reports per year**.
- Intermediaries **do not** have an independent reporting obligation.
  - ✓ **But,** institutions may have to report on behalf of intermediaries.

Covered Institutions and Entities

The information collection states that foreign gifts to or contracts with an intermediary that benefit an institution are reportable. How is an "intermediary" defined?

- An intermediary is **a legal entity other than an institution** that engages in a reportable transaction that **benefits an institution**.

- Where a legal entity (e.g., a foundation) operates **substantially for the benefit or under the auspices of an institution**, there is **a rebuttable presumption** that when that legal entity receives money or enters into a contract with a foreign source, **it is for the benefit of the institution**, and, thus, must be disclosed **by the institution**.

Covered Institutions and Entities

Are institutions required to report gifts and contracts involving organizations outside of the direct control of an institution, such as alumni associations, athletic booster clubs, and student clubs and affiliated groups?

- Institutions have a duty to exercise reasonable due diligence to determine the source of the funds received from **any entity**.

- If a legal entity receives a gift from or enters into a contract with a foreign source, an institution does not need to report the transaction if it **did not benefit** from the transaction.

Reporting Portal and System

Reporting Portal and System

What system does an institution use to submit disclosure reports required by the statute?

- Since June 22, 2020, institutions have been required to report Section 117 information using the reporting system available at https://partners.ed.gov/ForeignGifts.

Reporting Portal and System

Who is permitted to submit disclosure reports on behalf of an institution?

- Users authorized by an institution's Primary Destination Point Administrator (PDPA).
  - ✓ For more information about Destination Point Administrators, please see the SAIG Enrollment Site at https://fsawebenroll.ed.gov/.

Reporting Portal and System

May third parties, such as outside accountants or consultants, submit disclosure reports on behalf of institutions?

- Yes (if they have been authorized by an institution's PDPA to submit disclosure reports on its behalf).
- Contact the Foreign Gifts Access Team for additional information at ForeignGiftsAccess@ed.gov.

Reporting Portal and System

Does the reporting portal allow for batch reporting or otherwise permit an institution to upload or import certain data fields for multiple submissions?

- No.

Reporting Portal and System

Can multiple individuals enter and submit records for an institution? Can a user view all drafts or submitted disclosure reports associated with the same institution?

- Multiple individuals that **have been approved** to access the system **can** submit disclosure reports on behalf of an institution.
- A user **cannot** see submissions (draft or final) created or submitted by other users.

Reporting Portal and System

Can a user access or otherwise save a copy of an institution's submission for purposes of recordkeeping?

- Yes; during the submission process, users can review, print, and/or save submissions.

Reporting Portal and System

If an institution identifies an error in a prior disclosure report, how can an institution amend, correct, or update that disclosure report?

- Institutions must **send an email to the Foreign Gifts Access Team** (ForeignGiftsAccess@ed.gov) that includes:
  - ✓ the **OPEID** of the institution;
  - ✓ the **approximate date of the incorrect submission** (if known); and
  - ✓ the **Application ID number** for the incorrect submission (which can be found on the home page of the reporting portal under "My Submitted Entries," in the first column next to the incorrect submission).

Reporting Portal and System

If I have questions about Section 117 requirements or use of Department reporting systems, who can I contact?

- For **technical questions or access issues** related to the Section 117 electronic reporting portal, contact ForeignGiftsAccess@ed.gov.
- For **all other questions** related to Section 117, contact ForeignSourceReporting@ed.gov.

Compliance Generally

Compliance Generally

Can an institution submit disclosure reports whenever they identify transactions they must report or are there particular times during the year when an institution must report the data?

- Institutions **may** submit disclosure reports at any time.
- Institutions **must** submit disclosure reports in accordance with the two statutory reporting deadlines (July 31 and January 31).
- Consider "unique" requirements posed by the January 31 deadline.
  - ✓ An institution may need to report a transaction that occurred between January 1 and June 30 on their January 31 disclosure report given that the threshold is based on a calendar year.

Compliance Generally

Based on this information, an institution may have additional gifts or contracts that it had not previously reported. Does the institution need to go back and file disclosure reports for those gifts and contracts now?

- **Yes,** an institution should file disclosure reports as soon as it identifies a reportable transaction that was not disclosed or that a previously disclosed transaction was not properly reported.
- An institution that did not submit disclosure reports in accordance with the statutory deadlines **is not in compliance with Section 117**.