

U.S. Department of Education provides notice of new, expanded Section 117 foreign gift and contract reporting requirements for higher education institutions

30 December 2019

On 17 December 2019, the U.S. Department of Education (ED) [published](#) in the Federal Register notice of a new [information collection request](#) (ICR) related to reporting requirements under Section 117 of the Higher Education Act ([20 U.S.C. § 1011f](#)). Section 117 requires an "institution" to file a disclosure report when it "receives a gift from" or "enters into a contract with" a "foreign source" that is valued at US\$250,000 or more, either alone or when combined with other gifts and contracts with the same foreign source in the same calendar year. *See* 20 U.S. C. §1011f. Because ED aims to implement the ICR in time for Section 117 reports due by 31 January, it has requested the Office of Management and Budget (OMB) to complete an emergency review by 2 January. If OMB approves the ICR, institutions will have the option to use the ICR for Section 117 reports due by 31 January 2020.

This alert summarizes ED's position on certain aspects of Section 117 compliance, as conveyed in its [Response to Public Comments](#) received after its September 2019 [initial ICR notice](#), and provides information on additional Section 117 developments.

Institutions will have the option to use the new reporting system (assuming OMB approves it) or the current reporting system for the January 2020 Section 117 report.

On 23 December 2019, ED issued an [electronic announcement](#) regarding Section 117 matters. In the announcement, ED announced that even if OMB approves the new system before 31 January, institutions will not be required to use it for the 31 January report. This is a reversal from ED's initial position – which was to require institutions to start using the new ICR for the 31 January report. Specifically, ED stated:

We are also announcing a new reporting system, and, if the associated information collection is approved by OMB under the Paperwork Reduction Act, institutions will have the option to use either the new or current system for the January 2020 report. The Department encourages institutions opting for January 2020 reporting using the current system to voluntarily supplement using the new system within a reasonable time. However, institutions are not obliged to do so.

ED will provide a link to the new system once it is live in January 2020.

In connection with the ICR submitted to OMB for review, ED provided additional information regarding its position on a range of matters related to Section 117.

According to materials submitted to OMB, the purpose of the ICR is "to provide greater clarity on the information institutions must report under [Section 117] than the prior guidance." ED will implement a new electronic system for Section 117 reporting (separate from the current mechanism), and "most of the information submitted" will be made available to the public "in substantially the same form that it is submitted by institutions," with certain limited exceptions. ED indicates that while it "engaged in significant analysis to ensure [it] did not include any legislative rules" in the ICR, ED "may engage in notice and comment rulemaking in this space moving forward." Set forth below are certain key positions ED conveyed in connection with the ICR.

- **Where a legal entity, such as 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.** For example, ED states that a foundation serving as an intermediary for receipt of foreign gifts or contracts that benefit an institution are captured by this rebuttable presumption.
- **With the new reporting system, if OMB approves it, institutions must provide unredacted "true copies" of each reportable gift and contract agreement, but ED will not publish such agreements.** ED states that agreements will not be made publicly available and that it will treat agreements as "business information" for Freedom of Information Act purposes. Agreement amendments must be provided "only when an amendment substantively changes the terms of the contract."
- **Institutions must provide the names and addresses of each foreign source, but ED will not ordinarily publish such information.** ED indicates that names and addresses of parties who wish to remain anonymous "must be shared with the Department to the extent that the institution has or could reasonably obtain the donor's identity." ED states that names and addresses of individuals and non-governmental entities will not be made publicly available.
- **Pledges and bequests must be reported "[i]f an institution receives all or a portion of a pledge or bequest that meets the US\$250,000 threshold (including in the aggregate) within a calendar year" (emphasis added).** If an institution receives all or a portion of a pledge or bequest that meets the monetary threshold (alone or in aggregate) within a calendar year, that portion of the pledge or bequest must be disclosed.
- **Tuition payments are reportable if Section 117's monetary threshold is crossed.** ED states that tuition payments are "contracts" under Section 117 and if a foreign source pays tuition for one or more students and the US\$250,000 threshold is met, the contract is reportable.
- **In-kind gifts and contracts are reportable.** ED states that "gifts" include "in-kind contributions that consist of money or property" and "contracts" include "in-kind contributions that consist of property or services."

- **Section 117 does not apply to "money-out" agreements.** Based in part on legislative history, ED indicates that contracts that involve the transfer of funds from an institution to a foreign source are not reportable.
- **Contracts include licensing agreements.** ED states that Section 117 captures "intellectual property license fees from a foreign licensee of a University patent" and "data or materials being transferred via purchase, lease, or barter for use in research."
- **Institutions must "exercise due diligence" and "make a good faith effort" to determine whether a U.S. citizen or a U.S. corporation is a foreign source's agent and therefore a foreign source for Section 117 purposes.** ED indicates that "the term 'agent' has a plain meaning," and that State law or the Foreign Agents Registration Act (22 U.S.C. § 611 *et seq.*) may also be informative. In connection with the term "foreign source," ED also states that an individual who has dual citizenship that includes United States citizenship is not a foreign source.

We are available to respond to questions.

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