

Department of Education - Information Collection Request
Section 117 – Foreign Gifts and Contracts Disclosures
Background and Issues of Concern
Working Draft – 9/26/19

Information Collection Request - Process:

On September 6, 2019, the Department of Education (Department) published a proposed information collection request concerning foreign gifts and contracts disclosures required under Section 117 of the Higher Education Act of 1965 (HEA). The Department's request was issued in accordance with the Paperwork Reduction Act (PRA), to give "the public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and *minimize the public's reporting burden.*" *Id.* (emphasis added).

The Department is required, of course, to act in a manner which aligns with the Administrative Procedure Act (APA). That said, this information collection request is a stand-alone action and not part of proposed regulation, which would be published as a Notice of Public Rulemaking subject to the APA's notice and comment requirements. Accordingly, while the public has 60 days to file comments, the Department is only required to "evaluate" those comments; it does not have to respond publicly to concerns raised in filed comments. It also does not need to incorporate into the final version of the information collection any feedback contained in filed comments from the public. Once the information collection request is in final form, the Department forwards it to the Office of Management and Budget (OMB), which provides the public 30 days to offer comments, in this instance likely via in-person meetings, and then OMB has another 60 days to approve the final information collection request, send it back to the Department to be revised, or, in a very rare outcome, disapprove the information collection request.

Section 117 – Foreign Gifts and Contracts Disclosures:

Enacted in 1986, Sec. 117 requires colleges and universities to file reports twice a year with the Department regarding gifts from or contracts with a foreign source - government, corporation, other non-government entity, or foreign citizen - "the value of which is \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year."

Unfortunately, the statutory language of Sec. 117 is ambiguous in significant parts. Here are several examples of uncertainties under the statute:

- Is the \$250,000 reporting threshold met only when an individual gift exceeds this amount or when the aggregate amount received from a country or specific foreign entity or person exceeds the threshold?

- What should be considered under the Sec. 117 definition of an “institution” of higher education? Specifically, are non-profit educational, cultural, or research entities which are legally organized and separate from a higher education institution obligated to comply with the reporting requirements? For example, does the reporting obligation apply to a separate foundation that manages an endowment and disburses funds from it to support the university with funding for student financial aid, scientific research, athletics, etc. if the foundation is a separate 501(c)(3) organization governed by its own fully independent board?
- What should be considered under the Sec. 117 definition of a “gift?” Is a gift limited only to “money or property?” Are in-kind gifts or donations covered?
- What should be considered under the Sec. 117 definition of a “contract?” Does the definition of “contract” apply to services provided by the college or university (or related entity) to a foreign source like a corporation or foreign individual?

Moreover, the statutory ambiguities are compounded by the fact that the Department has never issued formal regulations implementing Sec. 117. Instead, the Department has only issued two “Dear Colleague” letters in 1995 and 2004, which provide limited guidance to institutions about their compliance obligations. Unfortunately, those “Dear Colleague” letters were recently removed from the Department’s website that displays information about foreign gifts and contracts.

Information Collection Request – General Concerns:

The higher education community takes seriously recent security concerns raised by Federal policy makers regarding foreign influence. We share a strong interest with the government in safeguarding the integrity of government-funded research and protecting academic freedom and free speech from foreign influence and/or interference. We also take seriously our responsibility to ensure transparency around the relationships U.S. colleges and universities have with foreign entities.

However, the Department’s proposed information collection request would vastly exceed the scope of Sec. 117, extending well beyond its statutory language and congressional intent. Indeed, we believe that the Department’s information collection request quite blatantly exceeds its authority under Sec. 117 and the general authority delegated to the Department under the Higher Education Act.¹ The proposed information collection will expand the reported information beyond what Congress authorized, require many more institutions to report to the Department, and significantly expand the administrative burden on those schools. It will also likely have a chilling effect on foreign giving, particularly from individuals. The Department has also enormously underestimated the time it will take for institutions to comply with this vast and unnecessary expansion of the foreign gift reporting requirements.

¹ In legal terms, the Department’s request is an unlawful, *ultra vires* action.

Ultimately, the proposed information collection will do little to advance the Congressional goal of bringing greater transparency to the relationships colleges and universities have with foreign entities and efforts to identify any nefarious conduct. It also will undermine the Department's ability to process and/or effectively use the information it will collect. When you are trying to find a needle in a haystack, you don't make the haystack bigger.

Information Collection Request – Specific Concerns:

1. The Department's proposed information collection implies that institutions would be required to report **all** foreign gifts and contracts, even those below the \$250,000 threshold. It may conceivably require disclosure of even an alumni contribution well below the \$250,000 threshold if the alumnus is a foreign citizen. Indeed, this broad interpretation is bolstered by the Department's "Statement of Support" which says "[t]he plain language and Congressional purpose of Section 117 is for the institutions subject to this information request to disclose fully **all** foreign money funneled to them, and for this information to be made readily available to the public." (Emphasis added).
2. The Department's proposed information collection goes well beyond what the statute requires. For example, it would expand the statutorily directed reporting of the "principal residence for a foreign source" of gifts from foreign individuals, and would now require institutions to report the **name and address** of such individual foreign donors. Practically speaking, this would also preclude any anonymous gifts from foreign individuals.
3. Institutions would be required to upload to the Department's information collection portal a "true copy" of any gift or donation agreements, contracts, and restricted or conditional gift agreements and contracts with foreign sources, with no guarantee of confidentiality. Such agreements may include proprietary information that institutions are contractually obligated not to disclose.
4. The Department's request would significantly expand the statutory definition of an "institution" of higher education. The proposed information collection would require the reporting of gifts to "all legal entities (including foundations or other organizations) that operate substantially for the benefit or under the auspices of the institution." For example, institutions may be required to report payments for health care services made by a foreign individual receiving treatment at a university hospital. This would also appear to include all independent foundations and other organizations that operate substantially for the benefit of a college or university, even if they do not receive any foreign funds. The schools may have no way to collect the required information from such entities if they are legally independent.
5. Schools will be required to verify whether any "institution, **or any part thereof**, including any legal entity (including foundations or organizations) that operates substantially for the benefit for or under the auspices of [the] institution is owned or

substantially controlled by a foreign source; and then will have to identify the foreign source, the date the foreign source assumed ownership or control, and “any changes in program or structure resulting from the change in ownership or control.” The foreign ownership disclosure may prove particularly difficult to comply with as institutions may not know or be aware of foreign ownership or control of U.S. entities, such as U.S. subsidiaries of foreign corporations, from whom they receive donations or with whom they contract (e.g. research collaborators).

6. The Department’s request creates more questions than it answers: Would tuition payments made by foreign students be subject to the reporting requirements as every international student tuition payment is made pursuant to a contractual relationship between an institution and a student? Are in-kind gifts required to be reported by institutions? If so, how will “in-kind” be defined? For example, will a research university need to report the contributions of a foreign research scholar to a research project as an in-kind gift? Would institutions need to report token gifts that are exchanged during visits from foreign institutions?
7. For restricted or conditional gifts or contracts, institutions will be required to verify and describe whether “the restricted or conditional gift [was] for the purpose of or did it have the effect of influencing any program or curricula at the institution, either directly or indirectly.” For example, if a foreign individual, corporation, or foundation made a gift to an institution to establish a lecture series or scholar-in-residence program which brought prominent foreign scholars, authors, or public figures to campus, it would quite easily have the effect of directly or indirectly influencing programs or curricula at the institution.
8. Institutions will be required to certify compliance with certain anti-terrorism, sanctions, export control, anti-boycott and other trade laws and regulations that the Department has no authority to enforce, and they will be required to certify that the foreign sources have not engaged in activities that violate federal criminal law. Schools have no way to know this.
9. The Department’s request would broaden the penalties for knowing or willful failure to provide accurate information, which are limited in the statute to fines for costs incurred by the government for obtaining compliance, including the costs of investigations and enforcement, to potentially include imprisonment.
10. By claiming that institutions will take 10 hours on average and impose no cost burden to complete the required reporting, the Department vastly underestimates the administrative burden resulting from this proposed information collection. It is not uncommon for schools to receive hundreds of gifts each year potentially covered by the reporting. Even the act of uploading the data would take more than the 10 hours estimated. It will also require very expensive databases on campus to comply with this requirement.