

LEGAL UPDATES

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New U.S. Department of Education Section 117 Foreign Source Reporting Investigation & Information

Update on June 22, 2020:

On June 22, ED unveiled its new online portal for college and university reports of foreign gifts and contracts.

Original post on May 5, 2020:

Mid-pandemic, the U.S. Department of Education (ED) has weighed in on controversial new requirements for reporting college and university foreign gifts and contracts. ED has:

Published the disclosure form it included with its February 10, 2020 revised proposed Information Collection Request (ICR);

Posted responses to public comments on its proposed Information Collection Requests [here](#) and [here](#); and

Announced an investigation of the University of Texas System related to the system's reports of foreign gifts and contracts.

Section 117 of the Higher Education Act

Section 117 of the Higher Education Act, 20 U.S.C. § 1011f, (Section 117) requires U.S. institutions of higher education receiving Federal funding to report any gifts from, or contracts with, "foreign sources" with an aggregate value of \$250,000 or more in a twelve-month period. ED compiles information from those results in a public report.

The text of Section 117 requires “institutions” to report aggregate dollar amounts, the country to which the gift is attributable, the amount received, the date, and a description of any conditions or restrictions. Section 117 includes an express enforcement mechanism, by which ED may seek enforcement from the Attorney General through a civil action.

Although Section 117 has been in effect since 1998, ED never issued regulations, provided extremely limited guidance (the last issuing in 2004), and took no significant steps to enforce reporting requirements until 2019.

Information collection request

ED’s ICR expanded on these requirements. The ICR requires the names of foreign sources, and copies of gift and contract documents. It calls for institutions to report on gifts to—and contracts with—entities outside of the institution that operate “substantially for the benefit or under the auspices of an institution” (like foundations). And the form includes an “acknowledgement” that knowing and willful falsification is subject to criminal prosecution under 18 U.S.C. § 1001.

Comments

A robust series of comments (to both the revised and an earlier proposed Information Collection Request issued over the holidays) criticized ED’s expansion of Section 117 requirements as overreach and outside the scope of ED’s authority.

Commenters also expressed concern about ED’s ability to maintain donor privacy and the confidentiality of the additional information. They objected to what is essentially a requirement that they collect citizenship information on all donors and contract partners. Commenters emphasized that the new disclosures may violate gift and contract agreements, and have a chilling impact on institutional relationships.

Finally, institutions objected to ED suggesting it may pursue criminal prosecution despite Section 117’s express and limited civil enforcement path.

ED’s responses

In response to the comments, ED provided clarifications and made some changes to requested information, including the following key points.

ED defended its authority to require the requested information. ED said it needs the information to verify compliance with Section 117, suggesting this is necessary to prevent undue influence from foreign sources on U.S. institutions of higher education. In its most recent set of comments, ED conceded (changing course from the earlier comments) that no regulation requires a true copy of gift or contract documents.

On privacy and confidentiality, ED said it will “strictly adhere” to the Freedom of Information Act (FOIA) requirement that it withhold confidential financial and business information, and that it “does not consider” donor name and address to be reportable. At the same time, ED acknowledged that (1) FOIA requests must be balanced on a case-by-case basis, and (2) there are no guarantees a future administration will not take a different view. ED dismissed gift/contract provisions requiring confidentiality as “*ultra vires*.”

ED also dismissed institutions’ concerns about the chilling effect of expanded reporting as “speculative,” noting “Congress has already determined that the interests in national security outweigh such an obstacle to fundraising.”

In line with Section 117, ED clarified that institutions only need to report gifts and contracts of \$250,000 or more in the aggregate during the applicable period. Where multiple transactions are aggregated to meet the threshold, ED will require disaggregated information about each. ED also commented that, if a contract has the potential to meet the threshold, an institution should report it in the time period when it enters the contract.

ED provided some guidance around the meaning of ambiguous terms and open questions. For example, ED said that the term “agent” shall have its plain meaning, but pointed to state law and the Foreign Agents Registration Act as guidance. ED noted that, when considering whether a gift or contract is with a “foreign source,” “institutions have a duty to exercise due diligence and to make a good faith effort to determine whether a gift or contract involves an agent acting on behalf of a foreign source,” though it may take time to do so. ED announced its interpretation of Section 117’s definition of “contracts” as excluding those involving the transfer of funds from an institution to a foreign source.

ED retained the 18 U.S.C. § 1001 acknowledgement on its form, but removed other certifications from an earlier draft form that ED conceded are outside the scope of Section 117.

UT System investigation

On April 24, ED added the UT System to the list of institutions it is investigating for potential Section 117 violations.

ED’s letter to the UT System indicates the investigation focuses on the system’s Galveston National Laboratory, which ED says has “substantial contractual relations” with a Chinese biocontainment laboratory owned by China’s Academy of Sciences. ED’s letter requests documents, including:

Copies of any agreements with listed entities, including the biocontainment laboratory and a number of Chinese institutions of higher education as well as other organizations;

The identities of faculty and staff who worked with those entities, including their contact information, positions held, and a description of their work;

All records relating to the biocontainment laboratory and other Chinese entities and individuals; and

All records (not limited to agreements) related to gifts or foreign contracts with any foreign sources.

As in other investigations, the document request calls for significant detail beyond that required in even ED's newly issued requirements for Section 117 reporting.

What this means to you

Institutions of higher education, particularly those who receive significant foreign gifts or contract/research funding, should work to ensure compliance with Section 117.

ED may issue additional guidance, particularly when it releases a promised new reporting portal, and legislative or litigation pushback on the interpretations provided in ED's comment requests may alter requirements. We will continue to monitor developments.

Contact us

If you have questions about these reporting requirements, contact Annie Cartwright, Scott Schneider, or your Husch Blackwell attorney.