

COMPLIANCE ALERT

OCTOBER 8, 2019

PROPOSED CHANGES TO HIGHER EDUCATION ACT OF 1965 §117 FOREIGN CONTRACTS AND GIFTS REPORTING REQUIREMENTS

The purpose of this compliance alert is to raise awareness of the substantial proposed changes to the Higher Education Act §117 Foreign Contracts and Gifts Reporting requirements that may go into effect by the end of 2019.

CURRENT REQUIREMENTS

The Higher Education Act of 1965, Section 117 (HEA §117), is a federal law that requires most 2-year and 4-year postsecondary schools to report ownership or control by foreign sources

and contracts with or gifts from the same foreign source that, alone or combined, have a value of \$250,000 or more for a calendar year.ⁱ Institutions must file a disclosure report on January 31 or July 31, whichever is sooner, after the date of receipt of the gifts, date of the contract, or date of ownership or control. Disclosure reports are submitted through the Department of Education's Federal Student Aid E-App portal by each campus' Financial Aid Directors' office.

PROPOSED CHANGES

On September 6, 2019, the Department of Education (DoE) published a proposed revision to its collection of information under HEA §117 with an open comment period until November 5, 2019.ⁱⁱ In the Supporting Statement for Paperwork Reduction Act Submission, DoE states that its current "Application to Participate in Federal Student Financial Aid Programs" has not collected sufficient information to enforce 20 U.S.C. 1011fⁱⁱⁱ and that there is evidence that institutions are failing to file required disclosures to the Department under the current approach. DoE believes that "making these questions more detailed and moving them into a separate information collection instrument will help to ensure that institutions comply with the statutory disclosure requirement."

KEY TAKEAWAYS

The proposed changes may eliminate the current \$250K dollar threshold; expand the definition of institution of higher education to include alumni associations, foundations, academic medical centers; require true copies of foreign gifts & contracts- making this information disclosable to the public.

The proposed changes substantially differ from most Higher Education organization's current interpretations of HEA §117 requirements.^{iv} Campuses should review the attached "Paperwork Reduction Act (PRA) Burden Statement" that details the proposed changes. [Appendix A] After the comment period ends on November 5, 2019, DoE may move to post the final requirements with a 30-day deadline making the new requirements final by the January 31, 2020 filing deadline.

A few of the substantial proposed changes are listed below:

1. Expand collection to all foreign gifts and contracts with no dollar amount threshold (currently, its \$250K total or in the aggregate from the same foreign source.)
2. Require true copies of foreign gifts and contracts, which would be disclosed to the public. This requirement would mean any proprietary information in contracts or anonymous donors would be disclosed.
3. Expand the definition of institution of higher education to include: alumni associations, hospitals, foundations, etc.
4. Requires institutions of higher education to certify that foreign entities UC receives gifts from or contract with are in compliance with U.S. laws and policies.
5. Penalties include prison (currently fines only).

ENFORCEMENT ACTIONS

On June 14, 2019, the DoE published a "Notice of Investigation and Record Requests" in the federal register detailing the investigations opened into Georgetown University and Texas A&M University related to the universities' reports of defined gifts and contracts, including restricted and conditional gifts or contracts, from or with a statutorily defined source.^v DoE subsequently opened investigations into Rutgers, Cornell, and most recently, the University of Maryland.^{vi}

DEFINITIONS

Foreign Source: the term "foreign source" means-

- (A) a foreign government, including an agency of a foreign government;
- (B) a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states;
- (C) an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof;
- (D) an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source;

Gift: the term "gift" means any gift of money or property;

Contract: the term "contract" means any agreement for the acquisition by purchase, lease, or barter of property or services by the foreign source, for the direct benefit or use of either of the parties;

Restricted or Conditional Gift or Contract: the term "restricted or conditional gift or contract" means any endowment, gift, grant, contract, award, present, or property of any kind which includes provisions regarding-

- (A) the employment, assignment, or termination of faculty;
- (B) the establishment of departments, centers, research or lecture programs, or new faculty positions;
- (C) the selection or admission of students; or

(D) 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.

CONSIDERATIONS

As noted above, campuses should review the attached “Paperwork Reduction Act (PRA) Burden Statement” that details the proposed changes and consider expanding their collection of information in preparation for the January 31, 2020 filing deadline. Information on all sources of foreign monies should be collected, including gifts earmarked for tuition, donations to Confucius Institutes, etc.

Chief Ethics and Compliance Officers and Audit Directors should make sure, at a minimum, that the following offices are part of the information collection process: Financial Aid, University-affiliated foundations, Real Estate, Education Abroad, Business Contracts, Development/ Institutional Advancement, Technology Transfer or Licensing, Sponsored Projects Offices, and all corresponding Academic Medical Center offices.

Full details on current HEA §117 reporting requirements, developed by Research Policy Analysis and Coordination, in coordination with ECAS, Federal Government Relations, Institutional Advancement, and Student Financial Support is forthcoming.

ⁱ [https://uscode.house.gov/view.xhtml?req=\(title:20%20section:1011f%20edition:prelim\)#priorprovisions-note](https://uscode.house.gov/view.xhtml?req=(title:20%20section:1011f%20edition:prelim)#priorprovisions-note)

ⁱⁱ <https://www.federalregister.gov/documents/2019/09/06/2019-19296/agency-information-collection-activities-comment-request-foreign-gifts-and-contracts-disclosures>

ⁱⁱⁱ <https://www.regulations.gov/document?D=ED-2019-ICCD-0114-0002>

^{iv} <https://www.acenet.edu/Documents/Letter-ED-Associations-Response-on-Section-117.pdf>
<https://www.acenet.edu/Documents/Summary-Sec-117-and-ED-comment-request.pdf>

^v <https://www.federalregister.gov/documents/2019/06/28/2019-13904/notice-of-investigation-and-record-requests>

^{vi} https://www.washingtonpost.com/local/education/federal-government-investigates-foreign-gifts-to-the-university-of-maryland/2019/10/02/176f03d6-e538-11e9-b403-f738899982d2_story.html

APPENDIX A

FULL TEXT OF THE PAPERWORK REDUCTION ACT (PRA) BURDEN STATEMENT

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is 1801-NEW. Public reporting burden for this collection of information is estimated to average 10 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this collection is *mandatory*, unless there are no disclosures to report under 20 U.S.C. 1011f. If you have any comments concerning the accuracy of the time estimate, suggestions for improving this individual collection, or if you have comments or concerns regarding the status of your individual form, application or survey, please contact Kevin Slupe, 400 Maryland Ave SW, room 6E-323, Washington D.C. 20202, (202)-401-6273 directly.

Foreign Gifts and Contracts Disclosures

This information collection implements Section 117 of the Higher Education Act (HEA) codified at 20 U.S.C. § 1011f and related authorities. Section 20 U.S.C. § 1011f-defined institutions must file this information collection by January 31st and July 31st of each year for the preceding six-month period, whenever a disclosure is required under 20 U.S.C. § 1011f(a). For purposes of this information collection:

As provided in 20 U.S.C. § 1011f(b)(1), a gift or contract is “attributable” to 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.

“Contract” has the meaning given at 20 U.S.C. § 1011f(h)(1).

“Foreign source” has the meaning given at 20 U.S.C. § 1011f(h)(2).

“Gift” has the meaning given at 20 U.S.C. § 1011f(h)(3).

“Institution” has the meaning given at 20 U.S.C. § 1011f(h)(4).

“Restricted or conditional gift or contract” has the meaning given at 20 U.S.C. § 1011f(h)(5).

1. Institution ID No.

- a. List all campuses.
 - b. List all legal entities (including foundations or other organizations) that operate substantially for the benefit for or under the auspices of your institution.
 - c. Is the institution, or any part thereof, including any legal entity (including foundations or organizations) that operate substantially for the benefit for or under the auspices of your institution owned or substantially controlled by a foreign source? (Y/N)
 - i. If yes, then identify:
 1. The foreign source
 2. The date on which the foreign source assumed ownership or control
 3. Any changes in program or structure resulting from the change in ownership or control
2. Gifts from a foreign source.
- a. Name of the foreign source.
 - i. Is the donor a foreign government, including but not limited to any agency, foundation, or sovereign wealth fund of a foreign government, or person acting on its behalf? (Y/N)
 1. If yes, provide the name and address of the foreign government
 - ii. Is the donor a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states? (Y/N)
 - iii. Is the donor an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof? (Y/N)
 - iv. Is the donor a person, including a subsidiary or affiliate of a foreign legal entity, who acts as an agent of a foreign government, a legal entity created solely under the laws of a foreign state or states, or an individual who is not a citizen or national of the United States or a trust territory or protectorate thereof? (Y/N)
 1. If yes, provide the name and address of the foreign government, legal entity, or individual.
 - v. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and owned in whole or substantial part by a foreign principal? (Y/N)
 - vi. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially controlled by a foreign principal? (Y/N)
 - vii. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially financed or subsidized by a foreign principal? (Y/N)
 - b. Foreign source address including country of origin.
 - c. Gift terms.
 - i. Amount.
 - ii. Duration.
 - d. Recipient.
 - e. True copy of the gift or donation agreement (UPLOAD PDF)
3. Contracts with a foreign source.
- a. Name of the foreign source.
 - i. Is the party a foreign government, including but not limited to any agency, foundation, or sovereign wealth fund of a foreign government, or person acting on its behalf? (Y/N)
 1. If yes, provide the name and address of the foreign government.
 - ii. Is the party a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states? (Y/N)

- iii. Is the party an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof? (Y/N)
 - iv. Is the party a person, including a subsidiary or affiliate of a foreign legal entity, who acts as an agent of a foreign government, legal entity created solely under the laws of a foreign state or states, or individual who is not a citizen or national of the United States or a trust territory or protectorate thereof? (Y/N)
 - 1. If yes, provide the name and address of the foreign government, legal entity, or individual.
 - v. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and owned in whole or substantial part by a foreign principal? (Y/N)
 - vi. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially controlled by a foreign principal? (Y/N)
 - vii. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially financed or subsidized by a foreign principal? (Y/N)
 - b. Foreign source address including country of origin.
 - c. Domestic party
 - d. Contract terms.
 - i. Amount.
 - ii. Duration.
 - e. True copy of the contract (UPLOAD PDF)
4. Restricted or conditional gifts from a foreign source.
- a. Name of the foreign source.
 - i. Is the donor a foreign government, including but not limited to any agency, foundation, or sovereign wealth fund of the foreign government, or person acting on its behalf? (Y/N)
 - 1. If yes, provide the name and address of the foreign government.
 - ii. Is the donor a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states? (Y/N)
 - iii. Is the donor an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof? (Y/N)
 - iv. Is the donor a person, including a subsidiary or affiliate of a foreign legal entity, who acts as an agent of a foreign government, a legal entity created solely under the laws of a foreign state or states, or an individual who is not a citizen or national of the United States or a trust territory or protectorate thereof? (Y/N)
 - 1. If yes, provide the name and address of the foreign government, legal entity, or individual.
 - v. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and owned in whole or substantial part by a foreign principal? (Y/N)
 - vi. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially controlled by a foreign principal? (Y/N)
 - vii. Is the donor a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially financed or subsidized by a foreign principal? (Y/N)
 - b. Foreign source address including country of origin.
 - i. For gifts received from a foreign source other than a foreign government, the country of citizenship, or if unknown, the principal residence for a foreign source

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- 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.
- ii. For gifts received from a foreign government, the name of the foreign government.
- c. Restricted or conditional gift terms.
 - i. Amount.
 - ii. Date.
 - iii. Duration.
 - iv. Detailed description of all conditions or restrictions.
 - d. Specific restricted or conditional gift provisions.
 - i. Do the restrictions or conditions concern or relate to the employment, assignment, or termination of faculty? (Y/N)
 - ii. Do the restrictions or conditions concern or relate to the establishment of departments, centers, research or lecture programs, or new faculty positions? (Y/N)
 - iii. Do the restrictions or conditions concern or relate to the selection or admission of students? (Y/N)
 - iv. Do the restrictions or conditions concern or relate to 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? (Y/N)
 - v. Was the restricted or conditional gift for the purpose of or did it have the effect of influencing any program or curricula at the institution, either directly or indirectly? (Y/N)
 1. If yes, please describe.
 - e. Recipient.
 - f. True copy of restricted or conditional gift agreement (UPLOAD PDF)
5. Restricted or conditional contract with a foreign source.
- a. Name of the foreign source.
 - i. Is the party a foreign government, including but not limited to any agency, foundation, or sovereign wealth fund of the foreign government, or person acting on its behalf? (Y/N)
 1. If yes, provide the name and address of the foreign government.
 - ii. Is the party a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states? (Y/N)
 - iii. Is the party an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof? (Y/N)
 - iv. Is the party a person, including a subsidiary or affiliate of a foreign legal entity, who acts as an agent of a foreign government, a legal entity created solely under the laws of a foreign state or states, or an individual who is not a citizen or national of the United States or a trust territory or protectorate thereof? (Y/N)
 1. If yes, provide the name and address of the foreign government, legal entity, or individual.
 - v. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and owned in whole or substantial part by a foreign principal? (Y/N)
 - vi. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially controlled by a foreign principal? (Y/N)
 - vii. Is the party a legal person created under the laws of any State, trust territory, or protectorate of the United States and substantially financed or subsidized by a foreign principal? (Y/N)
 - b. Foreign source address including country of origin.

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- i. For contracts received from a foreign source other than a foreign government, 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.
 - ii. For contracts received from a foreign government, the name of the foreign government.
 - c. Domestic party.
 - d. Restricted or conditional contract terms.
 - i. Amount.
 - ii. Duration.
 - iii. Date.
 - iv. Narrative description of all conditions or restrictions
 - e. Specific restricted or conditional contract provisions.
 - i. Do the restrictions or conditions concern or relate to the employment, assignment, or termination of faculty? (Y/N)
 1. If yes, please describe.
 - ii. Do the restrictions or conditions concern or relate to the establishment of departments, centers, research or lecture programs, or new faculty positions? (Y/N)
 1. If yes, please describe.
 - iii. Do the restrictions or conditions concern or relate to the selection or admission of students? (Y/N)
 1. If yes, please describe.
 - iv. Do the restrictions or conditions concern or relate to 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? (Y/N)
 1. If yes, please describe.
 - v. Was the restricted or conditional gift for the purpose of or did it have the effect of influencing any program or curricula at the institution, either directly or indirectly? (Y/N)
 1. If yes, please describe.
 - f. True copy of the restricted or conditional contract (UPLOAD PDF)
 6. For each foreign source, does the institution certify:
 - a. Each gift, contract, restricted or conditional gift or contract complies with Executive Order 13224? (Y/N)
 - b. Foreign source is not owned or controlled by and does not act for or on behalf of persons subject to subsections 1(b), 1(c), or 1(d)(i) of Executive Order 13224? (Y/N)
 - c. Foreign source does not assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, research and related activities that violate 22 U.S.C. Chapter 39, or 15 CFR 730 et seq., or 22 CFR Subchapter M? (Y/N)
 - d. Foreign source has not engaged in or provided material support to and does not engage in or provide material support to any person who engages in, activities prohibited by 18 U.S.C. §§ 2339, 2339A, 2339B, 2339C, and 2339D? (Y/N)
 - e. Foreign source is not listed as a country requiring cooperation with an international boycott pursuant to 26 U.S.C. § 999(a)(3)? (Y/N)
 - f. Foreign source is not engaged in "boycott participation and cooperation" as defined at 26 U.S.C. § 999(b)(3)? (Y/N)
 - g. Foreign source is not on the Entity List at 15 CFR Part 744? (Y/N)
 7. Attribution.

- a. Foreign source other than government.
 - i. NATION/AMOUNT
 - b. Foreign government
 - i. NATION/AMOUNT
8. Total from all foreign sources this reporting period.
- a. Gifts.
 - b. Contracts.
 - c. Restricted or conditional gifts.
 - d. Restricted or conditional contracts.
 - e. Aggregate.
9. Acknowledgement: This information collection is subject to 18 U.S.C. § 1001, which provides that whoever knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, may be subject to fines and imprisonment. (Y/N)