

## Section 117 Foreign Gift and Contract Reporting Talking Points\*

- Institutions of higher education 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 are willing and anxious to comply with the law.
- Enacted in 1986, Sec. 117 requires colleges and universities to file reports twice a year with the Department of Education disclosing all gifts with a foreign government or non-governmental foreign source (i.e. citizens of foreign countries, foreign corporations) with a value of at least \$250,000. Section 117 also refers to and includes “contracts,” which may include grants and other agreements whereby an institution receives support from a foreign source. The Department has never issued formal regulations implementing Sec. 117 and only issued two “Dear Colleague” letters in 1995 and 2004, which provided limited guidance to institutions about their compliance obligations.
- Over the last year, interest in foreign gift and contract reporting has increased.
  - In January 2019, the American Council on Education (ACE) and other associations sent a letter to the Department of Education seeking clarification on several questions and hoping to open a dialogue with the Department.
  - In February 2019, the Senate Permanent Subcommittee on Investigations held a hearing on “China’s Impact on the U.S. Education System” which featured testimony from Deputy Secretary of Education Mitchell M. Zais regarding Sec. 117.<sup>1</sup>
  - In June and July 2019, the Department launched investigations on Sec. 117 at Georgetown and Texas A&M<sup>2</sup>, as well as Cornell and Rutgers Universities.<sup>3</sup>
  - After the announcement of the investigations, ACE and the other associations reminded the Department of the January 2019 letter and the need for clarification. The Department finally sent a response on July 3, 2019, but did not respond to the specific questions or agree to meet with the stakeholders.
  - Since that time there have been additional letters exchanged with the Department and the associations, which the Department has posted on a new Laws and Guidance website (created in September 2019), along with the investigatory letters.<sup>4</sup>
  - Recently, the Department launched an investigation against a fifth institution, the University of Maryland.<sup>5</sup>
- On September 6, the Department issued a proposed information collection request to “modernize” Sec. 117 reporting. This is not the same as a formal regulatory rulemaking process with required notice and comment. The Department does not need to incorporate any feedback from stakeholders.
- Overall, the proposed information collection will expand the reported information beyond what the law requires, force many more institutions to report, and significantly expand the administrative burden and cost on all schools. It will also likely have a chilling effect on foreign giving, particularly from individuals, and other legitimate contractual relationships with

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<sup>1</sup> <https://www.hsgac.senate.gov/imo/media/doc/2019-02-28%20Zais%20Testimony%20-%20PSI.pdf>

<sup>2</sup> <https://www.federalregister.gov/documents/2019/06/28/2019-13904/notice-of-investigation-and-record-requests>

<sup>3</sup> <https://www.govinfo.gov/content/pkg/FR-2019-07-19/pdf/2019-15425.pdf>

<sup>4</sup> <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>

<sup>5</sup> [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](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)

\*developed by ACE, AAU, APLU, and COGR

foreign sources. Finally, the Department has enormously underestimated the time it will take for institutions to comply with this vast and unnecessary expansion of the foreign gift reporting requirements. The following are more specific concerns:

- **This proposed information collection vastly exceeds what is required under Sec. 117.**
  - The proposed information collection is so vague as to be misleading. It is inconsistent in how it addresses the \$250,000 threshold and suggests that institutions would be required to report all foreign gifts and contracts, even those below the \$250,000 threshold. The “Statement of Support” in the regulatory package states “[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.” Recent letters to institutions have also demanded reports on all foreign gifts and contracts.
  - It significantly expands the definition of an “institution of higher education” included in the current Sec. 117 statute and would require 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.” Many of these entities are fully independent organizations, with their own reporting obligations.
- **It would require institutions to report information not covered by the Sec. 117 statute or the legislative history.**
  - The proposed information collection would require schools to upload “true copies” of gift agreements and contracts. Schools are not required by Sec. 117 to provide the Department with these documents. In addition, the proposed information collection includes no guarantee of confidentiality. This could lead to the publication of confidential donor information, intellectual property agreements and other proprietary information.
  - Because it would require “true copies” of gift agreements, the proposed information collection appears to prohibit anonymous gifts. Sec. 117 allows for the reporting of “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.”
  - The reference to ALL foreign gifts and contracts suggests that the Department expects institutions to report individual tuition payments from foreign students. This risks institutions violating FERPA and other privacy laws.
  - Under the proposed information request, schools would 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 “any changes in program or structure resulting from the change in ownership or control.” Foreign ownership disclosure may prove particularly difficult as institutions may not know or be aware of foreign ownership or control of U.S. entities from whom they receive donations or with whom they contract (e.g. research collaborators).

- Institutions would be required to certify that the reported foreign sources have not engaged in activities that violate federal criminal law, as well as certify compliance with anti-terrorism, sanctions, export control, anti-boycott and other trade laws and regulations that the Department has no authority to enforce.
- For restricted or conditional gifts or contracts, institutions would be required to verify and describe whether such a gift either “directly or indirectly” influenced any program or curricula at the institution. This is an exceptionally subjective question that will be difficult for institutions to answer because said impacts can be impossible to measure.
- **The Department enormously underestimates the administrative burden and costs for institutions to comply with this expansion of the foreign gift reporting requirements.**
  - By claiming that institutions will need just 10 hours on average to comply and that no cost burden will be imposed, the Department vastly underestimates the administrative burden and costs it proposes to impose. This is inaccurate at best and misleading at worst. It is not uncommon for schools to receive hundreds (or even thousands at large institutions) of gifts and contracts each year potentially covered by the reporting requirement. Even the act of uploading the data would take more than the 10 hours estimated.
- **In addition, the penalties now include criminal penalties, while the Sec. 117 statute itself only provides for civil liability.**
  - The “Paperwork Reduction Act (PRA) Burden Statement” in the regulatory package includes an acknowledgement that the person signing the report may be subject to fines and imprisonment if they knowingly or willfully falsify the report. The current statute only provides for a civil action that may be brought by the Attorney General, at the request of the Secretary, to request such court to compel compliance with the requirements of this section.