

Outstanding Questions on Section 117 Foreign Gift and Contract Reporting May 2021

In June 2020, the Department of Education (ED) launched a new electronic reporting portal for Section 117 in place of the E-App system that institutions have used for the last decade. While ED issued a short FAQ in June 2020 regarding Section 117 compliance through the new reporting portal,¹ there remain a number of questions from our members, including:

1. Will the June 2020 FAQ be updated, and will ED work with stakeholders to answer questions that may arise in the future? How should institutions submit questions for future FAQs?
2. How should an institution ask questions if they arise while completing the form? Previously, institutions called the FSA regional office, or after the ICR was updated, there was an email address and voice mail provided for questions. However, regional FSA offices are concerned about providing the wrong answer, and the email address/voice mail did not provide timely answers as institutions completed the ICR. Will there be a hotline or a point of contact provided for institutions to ask questions while completing the ICR?
3. How should institutions update records if they realize there were mistakes in previous reports? The ICR states that “Institutions with questions about how to amend or correct a report should contact Federal Student Aid customer support once the new web portal is operational.” But ED previously said institutions should contact the Department’s Office of General Counsel (OGC) as soon as they realize the need to update records. And the OGC has created a new Section 117 webpage that includes the new ICR². For the past decade, Section 117 has been housed under the Office of Federal Student Aid (FSA). Information on Section 117 is still included in the FSA handbook,³ and previous Dear Colleague letters and notices have been shared through the Information for Financial Aid Professionals (IFAP) system. Going forward, will communications to campuses come from OGC or FSA? Will those offices be coordinating on communications? Where should institutions look for the most up-to-date information?
4. How should institutions report gifts that are promised over a multiple-year period (for example, a \$1 million gift that will be distributed as \$200,000 each year for five years)? Such a gift never reaches the \$250,000 annual threshold for reporting. In addition, what should an institution do if the full amount is never

¹ <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-06-22/reminder-report-ownershipcontrol-and-contractsgifts-foreign-sources>

² <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>

³ <https://studentaid.gov/data-center/school/foreign-gifts>

received?

5. Is the \$250,000 reporting threshold met when an individual gift exceeds this amount or when the aggregate amount received from a country or specific foreign entity exceeds the threshold? Should the aggregate be calculated by the specific foreign entity or by the country?
6. There continue to be questions regarding intermediaries and how to report gifts or contracts to entities other than the institutions. It appears that ED expects institutions of higher education to report gifts received by organizations that are not part of the institution. Indeed, some 501(c)(3) organizations that may work closely with an institution are legally and financially separate organizations with their own Boards of Directors and therefore not covered by the definition of “institution” set forth in Section 117 (See 20 U.S.C. §1011f). There are also questions about gifts from U.S. foundations that take foreign donations. The issue goes beyond intermediaries. For example, a disease foundation may support research at an institution of higher education with foreign sources of funds. How far does an institution’s obligation to follow the color of the money go?
7. There is continuing confusion about so-called “money out” or vendor contracts where an institution contracts with a foreign company for products or services, as the statutory definition of contract does not explicitly exclude those contracts. Examples include: a contract between an institution and Sodexo, a French corporation, to provide dining hall services, and a contract to purchase access to research journals published by Springer Nature, a German corporation. Section 117 as enacted is not intended require reporting of these types of contracts. (See H.R. REP. No. 99-383, at 87-88). However, without carrying out rulemaking, ED has issued confusing messages on this and has encouraged institutions to evaluate each individual contract, which is incredibly burdensome especially for smaller institutions. The current FAQ states: “the Department interprets the definition to exclude a contract involving the transfer of funds from an institution to a foreign source. We note, however, that each transaction should be evaluated independently.”⁴ Will ED be issuing formal guidance on this issue?
8. There is also concern that the current ICR/Section 117 interpretation requires research institutions to include contracts that govern clinical trials. Foreign entities, such as pharmaceutical companies, may contract with U.S. research institutions. These contracts are often multi-year and may be terminated before conclusion. Clinical trials conducted in the United States are highly regulated by federal laws and regulations and by the laws in the state(s) where the study takes

⁴ See Q1 in the June 2020 FAQs here: <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-06-22/reminder-report-ownershipcontrol-and-contractsgifts-foreign-sources>.

place.⁵ Does Section 117 require reporting of such clinical trial contracts? Will ED be issuing formal guidance on this issue?

9. The current ICR requires the reporting of the names and country of citizenship of anonymous donors, to the extent possible, which exceeds the statutory requirements⁶. The disclosure of foreign individual or entity donors would violate long established Supreme Court precedent that tax exempt organizations have the right to preserve donor anonymity under the First Amendment. The Internal Revenue Code explicitly preserves such donor anonymity consistent with the First Amendment. In addition, public disclosure of international donors could expose them to real risk, including physical or other harm, from the government or other foreign actors.

Will ED protect the names and citizenship of such donors as confidential? Will ED classify this information exempt from disclosure under the Freedom of Information Act (FOIA)? Can ED provide additional details or steps it will take to protect the data during transmittal and in the storage of this data?

10. According to ED, institutions need to exercise “due diligence” in gathering and reporting information for the purposes of Section 117. Can ED provide any additional information about how an institution can demonstrate “due diligence” in the gathering of this information? What about documentation requirements to demonstrate “reasonable due diligence?” How much documentation is required and how long must institutions retain such documentation to demonstrate that it satisfies the “due diligence” requirement?
11. Currently, when an institution submits a Section 117 report, it receives a notice that the information has been received and that it will be reviewed by FSA before it is posted publicly by the Department. It can then take some time before the information submitted is posted on the public website, in some cases up to six months. Will ED commit to posting that information in a timely manner once an institution has submitted it? Or will the Department indicate on the portal that an institution has submitted its information but ED is still reviewing the filing before posting? We know of at least one institution that didn’t see its information posted for at least six months, and this was not noted on the public website, leading to concerns that the institution had not filed its report in a timely manner.

⁵ Sponsors must obtain approvals from the relevant state and federal agencies before initiating the study. They must also provide regular and periodic updates as the study unfolds. In addition, at the completion of the study, clinical trial sponsors must comply with a robust reporting requirement that includes disclosing a summary of the clinical trial results and any adverse event information.

⁶ See Q8 in the FAQs: <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-06-22/reminder-report-ownershipcontrol-and-contractsgifts-foreign-sources>.

12. If a foreign contract involves subcontracts to other institutions, how should subcontracts be reported? Should the institution receiving the contract submit a report for the total amount, or will institutions receiving contracts be required to submit individual reports if the amount of the subcontract is over \$250,000?
13. How should an institution report a contract or a gift from a multinational company or a foreign entity with a U.S. parent company? For example, if an institution receives a gift from a company located in the United States but the parent company is headquartered in a foreign country, how should that be reported, and are there specified sources which institutions could rely on for such information? Conversely, if the gift comes from a foreign subsidiary of a U.S.-based corporation, does it need to be reported?
14. ED has clarified in the new ICR that institutions are required to report in-kind exchanges as part of a gift or contract, such as textbooks or materials for a specific program. What guidance can ED provide for institutions rendering a valuation of in-kind gifts or exchanges?
15. If an institution was not aware of the Department's requirements for reporting foreign sources until several years ago, will ED encourage the institution to file reports for past years? What is the recommended period of time to file past years' reports, and how should these be submitted? We notice that the ED website references 2013. Is it reasonable to report back to 2013? Again, how do we submit these reports?
16. ED currently maintains two databases for Section 117 reported information. One is an Excel spreadsheet maintained by FSA, and the other is a searchable database hosted by the OGC.⁷ The reports do not align regarding data. For example, the FSA Excel spreadsheet shows 7,160 gifts/contracts in 2019 and only 27 gifts/contracts for 2020. However, the OGC searchable website shows 825 gifts/contracts in 2019 and 2,994 gifts/ contracts in 2020. At a time when colleges and universities are trying to demonstrate to Congress and policymakers that we are committed to complying with Section 117, this is very confusing and not helpful for anyone looking at foreign gifts to institutions of higher education. Will ED commit to one database which includes all available data, and identify the office that will maintain it?
17. And finally, many of the outstanding questions around Section 117 could be answered through a rulemaking process, which would allow for honest

⁷ FSA Section 117 report: <https://studentaid.gov/data-center/school/foreign-gifts> and Section 117 searchable database: <https://sites.ed.gov/foreigngifts/>

stakeholder feedback and discussion. Will the administration commit to carrying out a rulemaking process for Section 117?