

ED Announces New System for Institutions to Report Foreign Ownership, Contracts and Gifts

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On June 22, the United States Department of Education [announced](#) its new information collection system for postsecondary institutions that participate in the Title IV programs to comply with the foreign owner, contract and gift reporting obligations under Section 117 of the Higher Education Act (20 U.S.C. § 1011f). The announcement caps several months of effort by ED to significantly expand the type of information collected on schools' foreign gifts and contracts, including through its latest information collection request from April 2020, and comes at a time when ED is increasing its review and enforcement of foreign gift reporting requirements under the HEA. In light of ED's renewed focus on enforcing compliance with these requirements, we encourage all Title IV-eligible degree-granting schools to focus on ensuring compliance with the new reporting requirements well in advance of the July 31 reporting deadline.

Scope of the statutory gift reporting requirement

The foreign gift reporting requirement has been a part of the HEA for some time, but in recent months both Congress and the Department of Education have indicated they believe foreign gifts and contracts have been underreported by many institutions. The requirement applies to all US-based degree-granting institutions that participate in the Title IV programs, as long as the institution provides a program for which it either awards a bachelor's degree or higher, or a 2-year program that is intended to be fully creditable towards a bachelor's degree.

Under the HEA, covered institutions must report to ED two types of foreign relationships:

1. any foreign ownership or control by a foreign source; and
2. any gifts from, or contracts with, a foreign source that are valued at \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year.

A "foreign source" includes any foreign corporate or government entity or a foreign national, including the following:

- A foreign government or agency of a foreign government;
- A legal entity, governmental or otherwise, created solely under the laws of a foreign state or states;
- An individual who is not a citizen or a national of the United States, territory or protectorate; and
- An agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source.

In the past, institutions were required to report foreign ownership, control, gifts and contracts via Question 71 on their electronic application (E-App) to participate in the Title IV programs. Question 71 is the last question on the E-App, and – in line with the language of the HEA – only asked for basic information, including the name and country of the foreign source, the date of the contract or gift and the dollar amount of the contract or gift.

New, more detailed foreign gift, contract and ownership reporting information

Under ED's new guidance, institutions are required to report via a [separate electronic portal](#) rather than through Question 71, and must report significantly more information.

As before, institutions that are foreign owned or controlled, in whole or in part, or receive gifts from or enter into contracts with foreign sources above the \$250,000 threshold are required to file disclosures with the Department of Education twice a year on an ongoing basis – on January 31 and July 31. The next deadline for covered institutions with foreign sources to report will be July 31, and institutions will be expected to do so using the new form available through the portal.

The new form significantly expands the type of information collected regarding each foreign source owner, gift or contract. If an institution, or any part of an institution, is owned or substantially controlled by a foreign source, it must disclose (1) the foreign source, (2) the date on which the foreign source assumed ownership or control and (3) any changes in program or structure resulting from the change in ownership or control.

For gifts and contracts, institutions must now provide considerably more detailed information, including: (1) the name of

the foreign source and which type of foreign source it is; (2) the address of the foreign source; (3) the terms of the gift or contract (dates and amounts); and (4) the recipient, including any and all intermediaries, for gifts or the domestic party or contracts. For restricted gifts and contracts, institutions must identify additional details about the gift or contract terms and provisions.

Importantly, ED clarified that institutions must report foreign gifts and contracts to any legal entity (e.g., a foundation) that operates substantially “for the benefit or under the auspices of an institution,” such as a private foundation that supports a public university, on the basis that, in such scenarios, there is “a rebuttable presumption” that when the legal entity receives a foreign source gift or contract, it is for the benefit of the institution. ED specifically stated that institutions have a duty, to “conduct reasonable due diligence” when they receive the benefit of a contract or gift from any entity to determine whether the gift or contract is from or with a foreign source. ED clarified that institutions are not required to report any gift to or contract between a foreign source and an entity if the institution did not receive a benefit from the gift or contract.

Enforcement and penalties

Information regarding foreign gifts submitted to the Department of Education is subject to 18 U.S.C. § 1001, which provides that whoever knowingly and willfully falsifies or makes any materially false or fraudulent statement or representation may be subject to fines and imprisonment. Furthermore, if a school fails to discharge the statutory obligations of Section 117, ED may request that the Department of Justice commence an investigation and enforcement action to compel compliance, which includes the right to recover from the institution associated costs of any investigation.

ED’s expanded information collection effort with respect to foreign gifts appears to be in response to recent Congressional scrutiny on foreign gifts in higher education (particularly investments from China and those submitted in connection with the many Confucius Institutes that have been organized on American campuses) and coincides with ED’s recent string of high-profile public investigations into several universities alleging they failed to comply with the HEA’s gift reporting requirement. Since June of last year, ED has launched 10 such investigations at private and public nonprofit universities. These investigations include extensive record requests, in many cases going back several years, as well as interviews.

In light of ED’s recent enforcement activity in relation to foreign gift and ownership reporting, and the cost and burden of responding to a DOJ investigation, we encourage schools to thoroughly audit their foreign contract and funding sources with the review of internal or external counsel.

If you have any questions regarding complying with these requirements, please do not hesitate to contact us.

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