

## CLIENT ALERT

### Department of Education Issues Notice "Clarifying" its Authority to Enforce Section 117 Reporting Requirements

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Last Spring, [we reported](#) on the U.S. Department of Education's reinvigorated enforcement of Section 117 of the Higher Education Act of 1965. On November 13, 2020, the Department, perceiving inadequate institutional compliance, issued a notice designed to clarify its enforcement authority under Section 117. *See* 85 Fed. Reg. 72567. The notice has the effect of incorporating the foreign gifts and contracts reporting requirements of Section 117 into institutions' Program Participation Agreements (PPA). Colleges and universities should thoroughly evaluate the reporting requirements and their compliance efforts in light of the Department's recent focus on and clarifications regarding Section 117.

Section 117, enacted in 1986 to address concern over the growing number of financial arrangements between American universities and foreign sources, requires institutions of higher education receiving federal funding to report to the Department of Education contracts with and gifts from a foreign source that, alone or combined, are valued at \$250,000 or more in a calendar year. 20 U.S.C. § 1011(f). But the actual requirements were arguably unclear, and enforcement was lax, largely attributable to the absence of formal rulemaking by the Department interpreting Section 117 – leaving institutions to rely on two Dear Colleague Letters, one issued in 1995 and the other in 2004, that offer no significant interpretive guidance.

Rather than elucidate the Department's interpretation of the statute's requirements, the notice clarifies the Department's enforcement authority regarding the provision – and construes Section 490 of the HEA, which prescribes PPA requirements, to encompass the foreign gifts and contracts reporting requirements of Section 117. Specifically, the Department points to the language in 20 U.S.C. § 1094(a)(17) requiring institutions, via PPAs, to agree to “complete surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) *or any other Federal postsecondary institution data collection effort, as designated by the Secretary*” (emphasis added). Per the Department's interpretation, where an institution fails to report Section 117 information timely and accurately, the institution has failed not only to comply with its Section 117 reporting requirements, but also to comply with a requirement in its PPA, which enables the Department to implement a range of corrective measures, including termination of an institution's eligibility for Title IV participation, and empowers the Secretary to subpoena administratively information from institutions when investigating possible Section 117 violations.

The new notice follows a string of sub-regulatory guidance issued “to ensure that institutions comply with the statutory disclosure requirement and provide the public with information as Congress has intended.” *See* 85 Fed. Reg. 72567. The Department's concern that institutions are failing to comply with the dictates of Section 117 is predicated on departmental investigations that “have preliminarily shown that institutions have failed to disclose approximately \$6.5 billion of gifts from and contracts with foreign sources.” *See* 85 Fed. Reg. 72567. To that end, in September 2019, the Department issued an [initial proposed Information Collection Request \(ICR\)](#) under the Paperwork Reduction Act, foregoing full-fledged rulemaking consistent with the Administrative Procedure Act. Institutions and stakeholders objected, arguing that the September 2019 ICR exceeded the scope of the statute. The Department, in response, issued a [pared down ICR in December 2019](#), which was further revised on [February 10, 2020](#).

Institutions and stakeholders again objected, arguing that the February 2020 ICR exceeded the statutory authority of Section 117 in two key ways. First, the February 2020 ICR required reporting of detailed “disaggregated information from each” gift or contract, despite the text of the statute requiring the reporting of only aggregate amounts of gifts and not the identity of the individual or entity making the gift or entering into the contract. Second, the ICR required institutions to report foreign gifts or contracts that benefit the institution if made through separate “intermediaries,” even though such legal entities may not be controlled by the institution. Furthermore, the ICR included language threatening criminal penalties for, *e.g.*, fraud and false statements. In April 2020, the White House Office of Management and Budget approved the proposed expansion of reporting requirements despite these objections.

Several months later, on June 22, 2020, the Department formally unveiled a new online collection portal, including the strictures described above. The Department explained that, because it was “not receiving sufficient information to determine compliance with Section 117’s provisions,” the portal was necessary to “help higher education institutions come into compliance with Section 117.” Secretary DeVos underscored the reporting requirement’s “transparency and accountability” rationale as necessary to “protect academic freedom and our country’s national security and economic future.” The November 13, 2020, notice builds on the collection portal, expanding the potential consequences of failure to comply with the reporting requirements.

The incoming Administration, though likely less averse to international cooperation in higher education, cannot ignore statutory law. But a Biden Administration might more closely adhere to the statutory text – or de-prioritize enforcement. In the meantime, institutions should continue to comply with Section 117 reporting requirements. Comments to the notice must be received by the Department on or before December 14, 2020.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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