



## Fiscal Services

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# **REPORTING OF FOREIGN GIFTS AND CONTRACTS FEDERAL HIGHER EDUCATION ACT OF 1965, SECTION 117 FREQUENTLY ASKED QUESTIONS MAY 2021**

## **CONTENTS**

	Page Number
Foreign Source .....	2
Contracts .....	3
Gifts .....	4
Restricted Gifts and Contracts .....	4
Tuition and Royalties .....	5
Reporting Process .....	5
Correcting Reports .....	6

## **FOREIGN SOURCE**

### **Q1: What is a foreign source for purposes of the Higher Education Act (HEA) Section 117 reporting?**

**A1:** Under HEA, Section 117, 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<sup>1</sup> 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.

<sup>1</sup> Department of Education (ED) does not consider an individual who has dual citizenship that includes United States citizenship to be a foreign source under 20 U.S.C. 1011f(h)(2)(C).

### **Q2: How do I know if a source is a subsidiary or affiliate of a foreign entity?**

**A2:** ED requires institutions to perform due diligence and “make a good faith effort” to make the determination. Since affiliate relationships are not always obvious, Fiscal Services recommends:

- 1) that the GMU Reporting Unit make its own determination with information supplied by the sponsor/donor or with information otherwise at the unit’s disposition, including any GMU provided databases or by doing some research on the internet; or
- 2) that the GMU Reporting Unit request that the sponsor/donor certify whether or not they are a foreign source, including a subsidiary or affiliate of a foreign source.

### **Q3: Are institutions required to report gifts and contracts involving organizations outside of the direct control of an institution such as foundations, alumni associations, athletic booster clubs, student clubs and other affiliated groups?**

**A3:** An institution receiving the benefit of a gift from or a contract with a foreign source, even if through an intermediary<sup>2</sup>, must disclose the gift or contract. Additionally, where a legal entity (such as a foundation) operates substantially for the benefit or under the auspices of an institution, there is a rebuttable presumption that when that legal entity receives money or enters into a contract with a foreign source, it is for the benefit of the institution, and, thus, must be disclosed. Institutions have a duty, under Section 117, 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. If they do receive such a benefit and it meets the threshold amount, they must report the item to ED. However, 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.

<sup>2</sup> For purposes of Section 117 reporting, an intermediary is an entity, other than the institution, that receives a gift originating from a foreign source or enters into a contract with a foreign source and then passes to the institution part or all of the benefit of the gift or contract.

### **Q4: If we are receiving funds from a U.S. entity, but the funds’ prime sponsor is a foreign entity, do we report those funds?**

**A4:** Assuming that the U.S. entity is not an agent, affiliate or subsidiary of a foreign source, such transactions do not need to be reported. Section 117 of the HEA only addresses “contracts *with*” a foreign source (including affiliates or subsidiaries of a foreign source). In this case, GMU’s funding contract would be with a U.S. entity.

**Q5: Should we report funds that are originally U.S. but flow through a foreign entity?**

**A5:** Since GMU's contract is with the foreign entity, this is a reportable transaction. The foreign entity from which we receive the funds is the foreign source for the purpose of HEA Section 117 reporting.

**CONTRACTS**

**Q6: For contracts, should we report both funds paid to and funds received from a Foreign Source?**

**A6:** Only funds received from foreign sources need to be reported. Therefore, transactions where a GMU Reporting Unit is procuring goods or services from a foreign source does not need to be reported.

**Q7: Is an institution required to report the maximum potential amount of the contract once it is executed or wait to report the contract once the institution receives payments that reach the \$250,000 reporting threshold?**

**A7:** Section 117(a) requires that whenever an institution "enters into a contract with a foreign source, the value of which is \$250,000 or more, considered alone or in combination with all other contracts with that foreign source within a calendar year," it must be disclosed. Foreign gifts & contracts reporting requires us to report the total contract amount regardless of performance period and/or when payments are received. As soon as we enter<sup>3</sup> into a contract with a foreign source, we must report the total amount of the contract in that reporting cycle.

<sup>3</sup> We enter into a contract when the contract is signed by both parties.

**Q8: HEA Section 117 refers to gifts and contracts only so how do we report grants?**

**A8:** Grants are considered contracts for the purpose of HEA Section 117 reporting.

**Q9: Are revenue generating contracts to be reported?**

**A9:** All contracts for which a GMU Reporting Unit is receiving financial consideration from a foreign source should be included. This includes contracts in which GMU is providing a service for example, a contract whereby GMU will develop English language programs for a foreign source or train teachers of a foreign country institution etc.

**Q10: Are institutions required to report contracts that involve intellectual property license fees from a foreign licensee of a university patent; or Data Transfer Agreements (DTA); or Material Transfer Agreements (MTA)? If so, how do we determine a dollar amount to assign?**

**A10:** While each transaction should be evaluated independently, intellectual property license fees from a foreign licensee of a university patent and data or materials to be transferred via purchase, lease, or barter for use in research would generally be included in the statutory definition of "contract." Pending further clarification by ED, agreements that do not involve the provision of funds to GMU, or for which the valuation of materials provided to GMU is unknown, do not need to be reported. MTAs/DTAs should be included in HEA Section 117 reporting if they involve receipt from a Foreign Source of materials that have a known value.

**Q11: Are GMU Reporting Units required to submit true copies of contracts/agreements with foreign sources to Fiscal Services?**

**A11:** As of the publication of this guidance, institutions are not yet required to submit true copies of contracts/agreements to ED. However, units must submit copies of contracts/agreements to Fiscal Services. Fiscal Services will review the contracts/agreements to ensure accuracy and completeness of information.

**Q12: Under what circumstances would a GMU Reporting Unit be required to make a new disclosure, to Fiscal Services, of a true copy of a contract with a foreign source as a result of a contractual amendment.**

**A12:** Fiscal Services expects GMU Reporting Units to submit a new true copy of an amended contract only when an amendment substantively changes the terms of the contract and not when an amendment is technical in nature.

## **GIFTS**

**Q13: Are in-kind contributions reportable?**

**A13:** In-kind contributions with a known value should be included in HEA Section 117 reporting.

**Q14: How should institutions value gifted property?**

**A14:** In general, the value of property should be the fair market value of the property.

**Q15: Must we report the gift donor name of a foreign source that has requested anonymity?**

**A15:** Yes however, GMU Reporting Units should clearly indicate that the gift was anonymously provided as ED commits to not making anonymous donors' identities or addresses available to the public.

**Q16: How must an institution report the names and addresses of anonymous donors when it is nearly impossible for an institution to obtain the name or address of an anonymous donor?**

**A16:** An institution is required to report the names and addresses of anonymous donors to the extent that the institution has or could reasonably obtain the donor's identity. However, in all instances, including gifts and contracts involving anonymous parties, ED will withhold a party's name and address (excepting country) from becoming part of the public disclosure report. Institutions must make a reasonable effort to obtain a donor's identity. The reasonableness standard is well established by law.

## **RESTRICTED GIFTS AND CONTRACTS**

**Q17: What is a "restricted or conditional gift or contract"?**

**A17:** Per HEA Section 117, a restricted or conditional gift or contract is one that meets one or more of the four conditions below:

- (1) the gift/contract requires the employment, assignment, or termination of faculty;
- (2) the gift/contract requires the establishment of departments, centers, research or lecture programs, or new faculty positions;
- (3) the gift/contract requires the selection or admission of students; or
- (4) the gift/contract requires 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.

**Q18: Do research agreements meet the definition of a restricted or conditional gift or contract?**

**A18:** Research contracts (which include grants) from a foreign source in support of a research project proposed and defined by GMU must be reported under HEA Section 117, but do not normally meet the definition of a “restricted or conditional gift or contract.” An example of a contract that does meet the restricted/conditional definition is one that requires the *establishment of an institute or center* as a condition of funding, as opposed to generalized support for a variety of research projects or students.

**Q19: For "restricted or conditional gifts or contracts", how are institutions interpreting the following part of the ED definition “the employment, assignment, or termination of faculty”? Is it enough if a faculty member is paid from the grant, or does the grant have to create a new faculty position?**

**A19:** As described above in the answer to Question 18, contracts or grants in support of a GMU proposed and defined scope of work do not generally fall into the category of restricted/conditional. While the sponsor may require that we obtain their prior approval for a change in the Principal Investigator or other key personnel, these awards do not normally dictate that we must hire a particular person(s), and GMU normally retains full control of whom it decides to employ. The prior approval requirements normally focus on having a knowledgeable person leading the project. Therefore, the mere fact that a GMU employee is paid under a research contract or grant does not mean that the contract/grant should be considered restricted/conditional. However, if the *purpose* of the award is for the “employment, assignment, or termination of faculty”, then it should be reported as restricted/conditional. Likewise, a gift that establishes an endowed chair usually does not create a new position, but rather normally provides support for the chair holder’s scholarly activities. Only those that would require the creation of a new position would be considered “restricted”.

## **TUITION AND ROYALTIES**

**Q20: Are tuition payments made by foreign students to the University considered reportable?**

**A20:** ED sees tuition payments as “contracts” between the foreign student and the University, but are reportable under HEA Section 117 only if they meet the \$250,000 threshold, which would almost never be the case for an individual student’s tuition. ED notes that the threshold could be met in situations where a foreign source pays tuition for multiple students and the aggregate amount exceeds the \$250,000 threshold.

**Q21: Should we report royalties received from a foreign source?**

**A21:** Yes, ED has indicated that licensing agreements fall under the definition of “contracts” under HEA Section 117, and as such are reportable.

## **REPORTING PROCESS**

**Q22: How do we calculate and report amounts aggregated by foreign source?**

**A22:** Institutions must report contracts with or gifts from a foreign source that have a value of \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year. GMU Reporting Units must report **ALL** foreign source gift and contract activities (regardless of the dollar amount) to Fiscal Services. Fiscal Services will then consolidate the information and determine what meets the threshold and needs to be reported to ED. GMU Reporting Units must use the final contract signature date<sup>4</sup> or gift acceptance date to determine which contracts or gifts to report in a given reporting period.

<sup>4</sup> Contract signature date is the date when both parties have signed the contract. In the event that the dates vary, use the latter of the two dates.

## **CORRECTING REPORTS**

**Q23: What if a GMU unit missed submitting foreign gift and contract activities to Fiscal Services? Or what if some information got omitted in the unit's report submission?**

**A23:** As soon as the GMU Reporting Unit becomes aware that information was omitted or not submitted to Fiscal Services, the unit must immediately report this information to Fiscal Services without further delay.

**Q24: How should we correct an incomplete or incorrect (over-inclusive or under-inclusive) report? Do we file the missed report through the reporting portal? Should we provide any other communication to Department of Education with our missed report?**

**A24:** Currently the Department of Education has not provided any guidance on how to report corrections. In the event that a correction needs to be made to a submitted report, Fiscal Services will contact the Department of Education for further guidance on submitting corrections at [ForeignSourceReporting@ed.gov](mailto:ForeignSourceReporting@ed.gov).