Foreign Gifts and Contract Disclosures
Summary of Public Comments with Responses

Introduction

The U.S. Department of Education received forty-one comments from individuals on the foreign gifts and contract disclosures information collection request. Below we group and respond to comments topically. We note that, if any question from the disclosure form is held invalid, the remainder of the questions will not be affected thereby. That is, we intend for questions on the form to be severable.

Statutory Authority

Comments: Some commenters challenged the Department's authority to collect information on foreign gifts and contracts arguing, *inter alia*, foreign sources other than foreign governments are entitled to anonymity. One commenter challenged the Department's statutory authority. Another commenter argued the proposed information collection was within the Department's authority and supported the Department's proposals, *inter alia*, to require institutions to disclose the name of the foreign source and to upload a copy of the gift or donation agreement, to protect colleges and universities from undue foreign influence.

Response: The Department's authority with respect to any given action is prescribed by statutory language, context, and intent. If a statute is silent or ambiguous with respect to a specific issue, then the Department's interpretation is entitled to deference and the question becomes simply whether government action is based on a permissible statutory construction.[1]

Section 117 is a disclosure statute requiring institutions to inform the public about certain gifts from and contracts with foreign sources and their U.S. agents. It specifies in 20 U.S.C. § 1011f (e) that "all disclosure reports required by this section shall be public records open to inspection and copying during business hours." Section 20 U.S.C. § 1011f (a)-(d) provides the items to include in the disclosure report as well as related information. This collection implements these sections and makes the disclosure report public pursuant to § 1011f (e).

In addition to requiring institutions to file disclosure reports, Section 117 includes an enforcement section, 20 U.S.C. § 1011f (f), under which the Department determines when "an institution has failed to comply with the requirements of the Act."

Reports by the Government Accountability Office, Congress, and the Department itself confirm institutions have generally failed to comply with Section 117 by either underreporting gifts from

[1] *Utility Air Regulatory Group v. Environmental Protection Agency,* 134 S. Ct. 2427, 2441, 2445–46 (2014); *City of Arlington v. FCC,* 133 S. Ct. 1863, 1868 (2013); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).

or contracts with foreign sources, or by failing to report entirely. *See, e.g., CHINA'S IMPACT ON THE U.S. EDUCATION SYSTEM,* Staff Report, Permanent Subcommittee on Investigations, United States Senate at 1, 3, 5, 70-77 (Feb. 2019) available at https://www.hsgac.senate.gov/imo/media/doc/PSI%20Report%20China's%20Impact%20on%20the%20US%20Education%20System.pdf ("Despite [the disclosure requirement at 20 U.S.C. 1011f], nearly 70 percent of U.S. schools that received more than $250,000 from Hanban failed to properly report that amount to the Department of Education…Foreign government spending on U.S. schools is effectively a black hole."). Additionally, there is evidence suggesting certain foreign sources demand and receive influence or control over institutions' programs and activities in exchange for gifts. *See, e.g., id.* at 6, 33-59. The Department has, for example, uncovered a confidential gift agreement promising millions of dollars from a foreign source in exchange for the institution's commitment to establish a comprehensive program promoting a particular religion.

The Department's information collection will support its enforcement activities and provide a basis for verifying institutions are disclosing information to the Department and public as Congress directed. Consequently, in this case the information needed by the Department to facilitate its review and determination of institutions' Section 117 compliance is appropriately obtained by way of an information collection pursuant to the Paperwork Reduction Act. Especially against the documented backdrop of widespread noncompliance, this information properly includes all true copies of gifts and donation agreements and contact information for each foreign source. As discussed subsequently, this enforcement information will not be made public in the disclosure reports.

Scope of Covered Contracts

Comments: Some commenters asserted that 20 U.S.C. § 1011f ("Section 117") and its legislative history at page 88 of H.R. REP. No. 99-383 limit the scope of the term "contracts" to only contracts involving funds or other support *received* by institutions. According to these commenters, the term "contracts" does not include contracts involving purchases *made* by institutions from foreign sources. These commenters requested clarification on whether the Department intended to require institutions to report all contracts, including, for example, equipment purchased by an institution from a foreign source. A separate commenter asked whether the types of contracts that must be reported would include an intellectual property license fee from a foreign licensee of a University patent or data or materials being transferred for use in research. Similarly, commenters asked whether in-kind contributions and/or services could qualify as a gift or contract.

Response: Section 20 U.S.C. 1011f(h)(1) defines "contract" as "any agreement for the acquisition by purchase, lease, or barter of property or services by the foreign source, for the direct benefit or use of either of the parties." The Department is bound by statutory text, construed in context and with a view to the words' place in the statutory scheme.[2] Although the

[2] *See National Ass'n of Manufacturers v. Dep't of Defense,* 138 S. Ct. 617, 629 - 631 (2018); *see also Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

Department must follow statutory text and not legislative history, we note the legislative history provides an example of a type of contract that would not have to be reported: a transaction in which an institution purchased equipment from a foreign source or leased property from a foreign source.

Based on the language "any agreement for the acquisition…by the foreign source….", the Department interprets the definition as excluding a contract involving the transfer of funds from an institution to a foreign source. While each transaction should be evaluated independently, for example, we believe that intellectual property license fees from a foreign licensee of a University patent and data or materials being transferred via purchase, lease, or barter for use in research would generally be included in the statutory definition of contract. Under 20 U.S.C. 1011f(h), in-kind contributions that consist of property or services would be a contract and in-kind contributions that consist of money or property would be a gift. Services are included within the definition of "contract" but are not included in the definition of a "gift."

Changes: None.

All Legal Entities

Comments: Some commenters were concerned that the scope of the term "institutions" could include organizations outside of the direct control of an institution such as alumni associations, athletic booster clubs, and student clubs and affiliated groups. These commenters noted that while these other organizations may be permitted to represent an official relationship with an institution, the institution does not exercise direct control over the governance of these organizations. These commenters asserted that 20 U.S.C. 1011f applies to institutions only and does not authorize the Department to ask for a list of all legal entities, including outside foundations or other organizations, that operate substantially for the benefit for or under the auspices of an institution.

Response: In the revised disclosure form, institutions are no longer required to list all legal entities (including foundations or other organizations) that operate substantially for the benefit for or under the auspices of your institution. Similarly, institutions are no longer required to disclose whether such other legal entities are owned or controlled by a foreign source.

Section 117 of the HEA states, "whenever any institution…receives a gift from or enters into a contract with a foreign source," in the requisite amount, the institution must file a disclosure report. The Department is aware that there are legal entities that exist for the purpose of serving as an intermediary for certain gifts or contracts, including gifts from or contracts with foreign sources. See http://www.usmf.org/files/resources/articles-of-incorporation.pdf and https://leadbyexample.tamu.edu/txam-foundation.html. The Department is bound by statutory text, construed in context and with a view to the words' place in the statutory scheme, and it believes the statute requires an institution receiving the benefit of a gift from or a contract with a foreign source, even if through an intermediary, to disclose the gift or contract.[3] At the very

[3]*See National Ass'n of Manufacturers,* 138 S. Ct. at 629 - 631; *see also Gundy*, 139 S. Ct. at 2123.

least, this is a reasonable interpretation of the statutory language aligned with the statutory purpose of transparency with regard to covered foreign source gifts and contracts.[4] Additionally, the Department is aware that some institutions' 'legal entities' purpose (as articulated in its articles of incorporation for example) is to serve as an intermediary for certain gifts or contracts. See http://www.usmf.org/files/resources/articles-of-incorporation.pdf and https://leadbyexample.tamu.edu/txam-foundation.html. Where a legal entity (e.g., 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.

Changes: We removed question 1.b and language requiring an institution to disclose whether any legal entity other than the institution is owned or controlled by a foreign source in question 1.c of the instrument. We also added language to items 2 and 4 to specify that an institution must report gifts and contracts when the benefit of the gift or contract is received by an institution through an intermediary.

Identifying the Foreign Source

Comments: Commenters asserted that questions 2, 3, 4 and 5.a.v-vii about a U.S. party's connection to a foreign government are not authorized by 20 U.S.C. 1011f and are not useful or necessary to aggregate the dollar amount of such gifts and contracts attributable to a particular country. Commenters noted that identifying whether a U.S. party is owned or controlled by a foreign source would require parties to complete a questionnaire, which would be burdensome. Some commenters were concerned that the terms "substantially financed," "substantially subsidized," "substantially controlled" "foreign principal" and "owned in substantial part" are vague and not defined in the proposed collection or in 20 U.S.C. § 1011f(h). Other commenters noted that some parties may have dual citizenship between the U.S. and another country which would further complicate an institution's ability to answer yes/no questions about whether a party is not a citizen or a national of the United States. Some commenters asserted that 20 U.S.C. 1011f does not require the disclosure of information about the citizenship of a foreign source donor in questions 2-5a.iii.

Response: We removed these questions but want to emphasize that there are instances where a U.S. citizen or a U.S. corporation could act as an agent on behalf of a foreign source and, thus, be considered a foreign source under 20 U.S.C. 1011f(h)(2). Gifts or contracts from an agent acting on behalf of a foreign source must be disclosed in accordance with 20 U.S.C. 1011f. Under the statute, institutions have a duty to exercise due diligence and to make a good faith effort to determine whether a gift or contract involves an agent acting on behalf of a foreign source. We believe that the term "agent" has a plain meaning, which can be informed by State law and the Foreign Agents Registration Act, 22 U.S.C. § 611 et seq, in appropriate cases.

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[4] *Utility Air Regulatory Group v. Environmental Protection Agency,* 134 S. Ct. 2427, 2441, 2445–46 (2014); *City of Arlington v. FCC,* 133 S. Ct. 1863, 1868 (2013); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).

We note that an individual who has dual citizenship that includes United States citizenship does not qualify as a foreign source under 20 U.S.C. 1011f(h)(2)(C). The Department understands that determining whether a U.S. party is acting as an agent of a foreign source may take time but 20 U.S.C. 1011f requires institutions do so when accepting gifts or contracts and does not provide an exception when institutions feel the process is too burdensome.

The questions that ask about whether a gift or contract involves an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof tracks language from 20 U.S.C. 1011f(h)(2)(C) and, therefore, we disagree with the commenters that this is not information that is required to be disclosed.

Changes: We are removing questions 2, 3, 4 and 5.a.v-vii.

Privacy Act

Comments: Some commenters asserted that, if personally identifiable information (PII) is being collected, a Privacy Act statement should be included on the instrument. These commenters asked the Department to provide a citation for the Systems of Record Notice and the date a Privacy Impact Assessment was completed.

Response: The Privacy Act requires agencies "maintain[ing] a system of records" to publish notice of the existence and character of the system in the Federal Register. 5 U.S.C. § 552a(e)(4). The Act defines a "system of record" as: "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The Act further defines "record" as: "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voice print or a photograph." 5 U.S.C. § 552a(a)(4) (emphasis added). In accordance with the purpose of 20 U.S.C. 1011f, the Department is collecting information about the financial relationship between U.S. universities and foreign sources. Additionally, the Department will not systematically retrieve that information by use of a personal identifier. As a result, the Department is neither collecting "records" nor "maintain[ing] a system of records" as those terms are defined in the Privacy Act. Furthermore, the Department intends to comply with all privacy-related legal requirements, including those related to Privacy Impact Assessments, as necessary and appropriate.

Changes: None.

True Copies

Comments: Some commenters asserted that the Department does not have statutory authority to ask for true copies of gifts or contracts involving a foreign source. These commenters also claimed that true copies would not be useful or necessary to aggregate the dollar amount of such gifts and contracts attributable to a particular country. One commenter asserted that it is necessary for institutions to disclose these true copies to the Department so that the Department

is capable of enforcing the legal requirements in 20 U.S.C. 1011f. Other commenters asserted that these documents contain confidential information that cannot be disclosed because disclosure is prohibited by the terms of the contract and, in some instances, state laws. Other commenters requested the Department clarify whether institutions can redact confidential information prior to submitting a true copy and whether the Department would withhold any confidential information within these true copies as exempt from a Freedom of Information Act (FOIA) request. Similarly, commenters noted that the Department did not include any mechanism for protecting the confidentiality of this information in response to question 7 of the supporting statement.

Response: The Department believes that it is consistent with the statute and necessary for institutions to submit true copies of gifts or contracts involving a foreign source for the Department to be able to determine whether it appears an institution has failed to comply with 20 U.S.C. 1011f (f). For these reasons, an institution cannot redact a true copy before submitting it. However, in response to concerns raised by commenters, the Department will not make the true copies publicly available, to the extent permitted by law. With regard to the comment on FOIA, the Department will treat these true copies as "business information" under 34 C.F.R. § 5.11(b)(1) and follow the procedures described therein (see 34 C.F.R. § 5.11(d)-(j)), including redacting, as appropriate. As for any contractual provisions or state laws that would prohibit an institution from disclosing a true copy to the Department, such provisions are *ultra vires* given the statutory disclosure requirements under 20 U.S.C. 1011f.

Changes: None.

Comments: One commenter asked whether and under what circumstances an institution would be required to make a new disclosure of a true copy of a contract as a result of a contractual amendment.

Response: The Department expects institutions will 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.

Changes: None.

The $250,000 threshold

Comments: Some commenters asserted that the statute does not require institutions to report individual, unrestricted, foreign gifts or foreign contracts that are under $250,000 unless the aggregate of multiple gifts or contracts within a calendar year from the same foreign source add up to at least $250,000. These commenters noted that the Department's response to question 2 of the supporting statement created some confusion as to whether we expected institutions to report every unrestricted gift or contract, including those that did not reach the $250,000 aggregate threshold. Another commenter asserted that the statute does not require institutions to report individual foreign gift or foreign contracts. Another commenter asked how institutions should report pledges and bequests, given that these are commitments by donors to make future gifts to an institution.

Response: We agree with these commenters' interpretation of the statute. The response in question 2 of the supporting statement was limited to "institutions subject to this information request" which does not include institutions that receive less than an aggregate of $250,00 from a particular foreign source within a calendar year. We note that the $250,000 threshold does not require institutions to report gifts from or contracts with a foreign source under $250,000 unless the aggregate value of all gifts from and contracts with that foreign source within a calendar year total at least $250,000. Where the aggregate value of all gifts from and contracts with that foreign source totals at least $250,000 within a calendar year, we believe it is reasonable to interpret the statute as requiring disaggregated information about each related transaction because we interpret the "aggregate dollar amount" to include the disaggregated amounts (the aggregate by its very nature includes it disaggregated component parts). Moreover, the Department needs this information to verify Section 117 compliance. If an institution receives all or a portion of a pledge or bequest that meets the $250,000 threshold (including in the aggregate) within a calendar year, that portion of a pledge or bequest must be disclosed.

Changes: We have clarified the statement in the supporting statement to specify that institutions must report only gifts from and contracts with a foreign source, the value of which is $250,000 or more, considered alone or in combination with all other gifts from and contracts with that foreign source within a calendar year.

Name and Address

Comments: Some commenters asserted that 20 U.S.C. 1011f does not authorize the Department to ask the name or address of a foreign source. Some commenters noted that certain parties prefer to remain anonymous and that requiring disclosure of a party's name would create a disincentive for some donations. Other commenters noted that sometimes it is nearly impossible for an institution to obtain the name or address of an anonymous party.

Response: The Department believes it requires the name and address of foreign sources to verify an institution's compliance with Section 117 and the statute does not carve out an exception for institutions to withhold the name or address of an anonymous party. However, the Department will not make the name and address part of the publicly available disclosure report. As for anonymous parties to a transaction reported pursuant to 20 U.S.C. 1011f, their names and addresses must be shared with the Department 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, the Department will withhold a party's name and address (excepting country) from becoming part of the public disclosure report.

Changes: The Department will continue to collect the names and addresses of parties involved in section 117 transactions; however, the Department will not make this information part of the public disclosure report.

Duration

Comments: Some commenters noted that the disclosure form asked for the "duration" of a gift or contract, rather than the "date" and that this was inconsistent with the terminology used in 20 U.S.C. 1011f.

Response: We have changed the form accordingly.

Changes: We have replaced the term "duration" with references to "dates" throughout the form.

Student Tuition

Comments: Commenters noted that foreign students currently pay tuition directly and under some circumstances, the tuition is paid by other individuals, institutions or governments. These commenters requested clarification on whether institutions must disclose payments of tuition and fees. Another commenter stated that FERPA and its implementing regulations prohibit disclosure by institutions of student tuition and other cost of attendance payments absent student consent.

Responses: We would generally consider instances where a foreign source pays tuition for a student or students as meeting the definition of contract under 20 U.S.C. § 1011f(h)(1). That said, an institution would only need to report this type of contract if the $250,000 threshold is met by a given foreign source. We note the threshold would likely be met in situations where a foreign source pays tuition for multiple students and the aggregate amount exceeds the $250,000 threshold. We believe that this information collection is consistent with all applicable laws, including FERPA.

Changes: None.

Certifications

Comments: Some commenters asserted that 20 U.S.C. § 1011f does not authorize the Department to require an institution to make the certifications from 6(a) through 6(g) as part of this statutory disclosure. These commenters stated that the Department has no role with regard to any of these laws and no authority to enforce them. Similarly, commenters asserted that the penalties for knowingly or willfully failing to provide accurate information would be significantly expanded to potentially include imprisonment and that there is no authority provided by 20 U.S.C. 1011f for imposing criminal penalties for failure to comply with this disclosure requirement.

Responses: We agree the identified certifications are not authorized by statute. We disagree that the Department is expanding penalties by highlighting that submission of a disclosure report may be subject to 18 U.S.C. § 1001.

Changes: We are removing the unauthorized certifications from section 6 of the proposed disclosure form. The 18 U.S.C. § 1001 notification has been retained.

Burden estimate

Comments: There were a number of commenters that asserted the Department's proposed estimate of ten burden hours per institution per year was an underestimate of the time and resources an institution would have to spend on this disclosure. Some of these commenters pointed out that the Department's estimate did not factor in the time and resources needed for an institution to develop entirely new systems and procedures to accurately collect this information

and, the additional employees an institution may have to hire in order to provide this information. Although many commenters asserted that the Department underestimated the burden very few commenters provided any insight into the amount of burden they believed this information collection would impose. Another commenter noted that the supporting statement for Paperwork Reduction Act submission referred to five submissions per year, when calculating the annual burden; however, 20 U.S.C. 1011f provides that these disclosures need to be made only two times per year, at most. Another commenter asserted that the proposed estimated time it would take the Department to review the disclosures (2 hours) was also an underestimate.

Responses: We appreciate the commenters' concern about the amount of burden that may be associated with this disclosure. Initially, we recognize that although the Department has been collecting this information through the e-Application information collection, these are first-time burden estimates for the collection of this information through a stand-alone information collection vehicle. As with all information collections, we will revise these estimates if needed over time as the Department and institutions gain experience. We also note that the estimates reflect average burden estimates and may not reflect the variance in time and resources needed for some institutions vis a vis others. As for the commenters who asserted that this collection of information would be costly because it would require institutions to update their systems and paperwork in order to have the information sought, our investigations thus far show that institutions generally already have ready access to the information needed to make the statutory disclosures. Furthermore, 20 U.S.C. 1011f has required the disclosure of gifts from and contracts with foreign sources for many years now and the Department has had a mechanism in place to collect this data through the e-Application. Thus, we believe that institutions are already tracking this money through their existing financial systems. To the extent that an institution cannot pull the information necessary to discharge their statutory disclosure obligations from its existing financial systems and related processes, that may signal deficiencies in the institution's internal control over financial reporting that merits attention from those charged with governance. With that said, based on consideration of public comment and internal deliberation, the Department has doubled the amount of time we estimate an institution will need to disclose the information covered in the new, stand-alone collection vehicle from 10 hours to 20 hours per response. The Department does not expect its internal review processes to change as a result of moving this disclosure report from the e-App to a stand-alone form and, therefore, we still estimate that it will take the Department two hours to review the disclosures submitted through this information collection. Regarding the comment on whether the five submissions captured in our burden estimate conflicts with the statutory requirement to submit this information to the Department only twice per year, we wish to clarify that the five submissions were meant to reflect transactions involving five different foreign sources and not how many times each year an institution would submit this information to the Department. An institution may have more than one response as part of its entire submission for one of the two reporting deadlines each year (January 31 or July 31), if the institution received a gift or contract that met the $250,000 threshold from more than one foreign source.

Changes: We are revising the instrument and supporting statement to reflect 20 hours of burden.

Definition of Restricted or Conditional Gift or Contract

Comments: Some commenters asserted that the questions asking for information about whether a restricted or conditional gift was for the purpose of or had the effect of influencing any program or curricula in 4.d.v, 5.e.v, 4.d.v.1, and 5.e.v.1 is not authorized. These commenters stated that this question does not pertain to any prong of the statutory definition of the term "restricted or conditional gift or contract." These commenters believed that it was particularly inappropriate for the Department to require institutions to determine whether a restricted or conditional gift influenced any program or curricula either directly or indirectly given the statutory restriction regarding control of school curriculum in 20 U.S.C. § 1232a. Other commenters asserted that the "direct or indirect" influence over an institution is too vague and subjective. Another commenter suggested that the Department should re-order question 4 so that institutions are asked to identify whether the gift meets any of the restrictions or conditions outlined in 4.d before institutions provide the information required in 4.c. This commenter thought that since the information in 4.c would not need to be reported if the gift or contract does not meet the criteria outlined in the statute (and set out in 4.d) then question 4.d should appear before 4.c.

Response: We appreciate the commenters input and are removing the questions about influence of any program or curricula from this instrument at this time. As for the suggestion to re-order question 4, the Department does not believe this is necessary because institutions do not need to report gifts or contracts that do not qualify as a restricted or conditional gift or contract regardless of the order of the questions.

Changes: We are removing questions 4.d.v and 5.e.v.

Need to Collect this Information

Comments: Some commenters asserted that the GAO reports the Department cited as evidence of the need for this information collection did not sufficiently relate to reporting under 20 U.S.C. 1011f. Commenters also asserted that the congressional report the Department cited as further support for the need for this information collections had flaws because the report is not an audit report conducted by independent public auditors in accordance with Government Auditing Standards and therefore lacks the reliability and assurance provided by an independent audit report. Other commenters asserted that the Department's actions appear to be politically motivated. Other commenters questioned why the Department needs this information collection for enforcement purposes given that the statute provides the Department of Justice with the authority to take legal action in Federal court. Other commenters referred to a 2015 Report of the Task Force on Federal Regulation of Higher Education, created by a bipartisan group of U.S. Senators, which proposed removing the foreign gift and contract reporting requirement altogether because foreign gift reporting is "unrelated to the central areas of federal concern in higher education" and that "in many cases, there are other ways to locate this information, such as through public information and open records law."

Response: The United States Senate Permanent Subcommittee on Investigations released a Staff Report titled "China's Impact on the U.S. Education System" in February 2019. In addition, the U.S. Government Accountability Office ("GAO") has issued three reports since August 2016 summarizing investigations into the relationship between China and U.S. universities. While

there were differences in the objectives, scope, and methodology employed by Congress and GAO to conduct their reviews, their reports revealed a shared concern: the relationship between China and U.S. universities was both imbalanced and opaque.

The Department responded to that shared concern by engaging in a holistic review of activities related to Section 117, including opening compliance investigations into six institutions and engaging in a comprehensive internal control evaluation of the Department's Section 117-related business processes and systems. The numerous disturbing facts uncovered in each compliance investigation are consistent with Congressional findings of widespread failure among institutions to comply with their Section 117 obligations. That is, the statute and e-Application have not resulted in compliance. In addition, the Department's internal control evaluation exposed weaknesses in the control activities designed to ensure institution compliance with Section 117 and those intended to detect instances of non-compliance. The review thus revealed a problem demanding immediate and aggressive corrective action, including issuance of this information collection and implementation of a new electronic system to ensure institutions efficiently discharge their statutory disclosure obligations. The Department must collect this information to be able to fulfill its enforcement duty to refer to the Attorney General when it has determined an institution has failed to comply with the requirements of Section 117. The Department's preliminary review is detailed in the Department's November 27, 2019, letter to the Senate Permanent Subcommittee on Investigations, https://www2.ed.gov/policy/highered/leg/foreign-gifts.html. With regard to the comment stating the Department could otherwise obtain access to the requested information, institutions are statutorily required to report it—the Department does not have any discretion in that regard. Moreover, we are not aware of an alternative data source that would yield all the statutorily required data.

Prior Guidance

Comments: Some commenters noted that the Department's prior guidance interprets the statute more narrowly and does not suggest that the Department has the authority to collect such a broad range of information here.

Response: The purpose of this information collection request is to provide greater clarity on the information institutions must report under 20 U.S.C. 1011f than the prior guidance. To the extent that institutions believe any aspects of the prior guidance are inconsistent with this information collection request, they should report the information requested in the form associated with this information collection request.

Changes: None.

Alternatives

Comments: Some commenters asserted that the Department should focus on training and outreach to institutions regarding the existing statutory disclosure requirements instead of proceeding with this information collection request. One commenter suggested the Department should withdraw the proposed information collection request pending the results of a self-study of the statutory and current agency guidance. Some commenters suggested that the Department

delay implementation of any new information collection requirement or submission method for a reasonable time to allow institutions sufficient opportunity to update procedures accordingly and provide staff training. Other commenters suggested various ways that the Department could make the electronic reporting system efficient and user-friendly.

Response: Section 117 imposes disclosure requirements on institutions and oversight obligations on the Department. For over 30 years, the Department has relied on the statute and guidance to assist institutions in fulfilling their statutory disclosure obligations. Recent reports by oversight entities and information gathered through several compliance investigations demonstrated the need to revise this approach to improve compliance with statutory requirements. At all steps in this process, the Department has considered alternatives, including those specified by the commenters, to achieve the goal of ensuring that institutions are disclosing gifts and contracts from foreign sources when required. We determined the most effective means of enabling institutions to comply with 20 U.S.C. 1011f would be to clarify the specific information they must disclose. The need for improvement is immediate. The Department is working very hard to implement an electronic system to streamline the reporting and public disclosure process and will work to improve that system moving forward.

Procedural Issues

Comments: Some commenters asserted that the Department's approach to clarifying what must be disclosed under 20 U.S.C. 1011f through the use of an information collection request is in direct contradiction with Executive Order (EO) 13891 on "Promoting the Rule of Law Through Improved Agency Guidance Documents." Other commenters believe the Department should clarify 20 U.S.C. 1011f by issuing new guidance, or clarification to previous guidance, rather than through this information collection request.

Response: As explained in section 1 of EO 13891, the EO is designed to ensure that an agency generally does not announce new obligations through a guidance document. The EO reflects a policy concern that guidance documents do not always go through notice and comment and they are not always published in the Federal Register. Here, the Department's information collection request was published in the Federal Register and we have provided an opportunity for notice and comment, in accordance with the Paperwork Reduction Act (PRA). Furthermore, we believe that the PRA process is the proper process to follow when, as is the case here, the Department is merely collecting information pursuant to a statutory requirement.

Changes: None.

Comments: Some commenters suggested the Department clarify 20 U.S.C. 1011f through negotiated rulemaking under 20 U.S.C. 1098. Other commenters believe that that Department is required to conduct notice-and-comment rulemaking under the Administrative Procedure Act before it may require institutions to disclose this information and that the Department's action is a legislative rule disguised as an information collection.

Response: The requirement to conduct negotiated rulemaking is limited to rulemakings for Title IV of the HEA and, thus, does not apply. The Department believes it is appropriate to use the Paperwork Reduction Act process because we are collecting necessary information to implement a statutory provision—this is the precise action for which the PRA was designed to be employed. We engaged in significant analysis to ensure we did not include any legislative rules in this package. Please note, we may engage in notice and comment rulemaking in this space moving forward.

Changes: None.

Miscellaneous

Comments: One commenter noted that questions 2.d and 4.e asked for "Recipient" and questions 3.c and 5.c asked for "Domestic Party." The commenter wondered whether any party other than the reporting institution identified in question 1 should be identified as the "Recipient" or "Domestic Party."

Response: We expect the recipient of a gift to be the institution as well as any and all intermediaries. We have clarified this in the collection instrument. Because the institution must report any contract between a legal entity and a foreign source when the institution receives the benefit of a contract, the domestic party may be the institution or another legal entity.

Comments: None.

Response: After internal deliberations, we have revised questions 2-5.a.1 to more closely track the language of 20 U.S.C. 1011f(h)(2). Specifically, we deleted language describing what constitutes a foreign government for the purposes of disclosure. The revised form now asks whether the gift or contract was with a foreign government, including but not limited to any agency but no longer specifies that a foreign government could also include a foundation, or sovereign wealth fund of a foreign government or a person acting on its behalf. We note that in some instances a foundation or a sovereign wealth fund of a foreign government, or a person acting on its behalf could still meet one of the prongs of the definition of "foreign source" under 20 U.S.C. 1011f(h)(2), depending on the circumstances.

Changes: We have revised questions 2-5.a.1 to ask whether the gift or contract was with a foreign government, including but not limited to any agency, but these questions no longer specify that a foreign government could also include a foundation, or sovereign wealth fund of a foreign government or a person acting on its behalf.