BREAKOUT SESSION #08

Foreign Gift and Contract Reporting

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AGENDA

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2. Transaction Amount
3. Gift Reporting
4. Contract Reporting
5. Restricted Gifts or Contracts
6. Covered Institutions and Entities
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FOREIGN SOURCES

FOREIGN SOURCE DEFINITION

- Section 117 defines four “types” of foreign sources:
  - a foreign government, including an 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 or a trust territory or protectorate thereof; and
  - an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source.

COUNTRY OF ATTRIBUTION

- Section 117 states that the country to which a gift or a contract is attributable "is the country of citizenship, or if unknown, the principal residence for a foreign source who is a natural person, and the country of incorporation, or if unknown, the principal place of business, for a foreign source which is a legal entity."

- Institutions must 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.

REASONABLE DUE DILIGENCE

- Must make a good faith effort
  - Foreign source determination may be achieved by:
    - Gathering information directly from a counterparty
    - Gathering information through independent research
- Reasonable due diligence may vary
  - More diligence may be appropriate when transactions involve a "new" foreign source
  - Less diligence may be appropriate when transactions involve a "repeat" foreign source
- Frequently Asked Questions | Knowledge Center
  - INS-Q3
  - FS-Q5

REPORTING A GIFT FROM A MULTINATIONAL CORPORATION OR A U.S. ENTITY WITH A FOREIGN PARENT COMPANY

- Reportable if counterparty is acting as an agent of a foreign source
- Evaluate the degree to which the foreign parent or affiliate(s) exercise control
  - Consider the formal relationship between the parties
  - Consider the practical realities of how the parties interact
  - Direction, supervision, or management by foreign entity
  - Both generally and in the context of the specific gift or contract

REPORTING A GIFT FROM A MULTINATIONAL CORPORATION OR A U.S. ENTITY WITH A FOREIGN PARENT COMPANY (CONT)

- Always exercise reasonable due diligence
  - Consider consulting public records
  - Consider the terms of the specific contract/agreement (e.g., indemnification clause)
  - Consider directly asking the counterparty

GIFTS FROM A FOREIGN SUBSIDIARY OF A U.S. CORPORATION

- Foreign subsidiaries of U.S.-based corporations may constitute foreign sources by virtue of their satisfying the definition of a foreign legal entity (*see* 20 U.S.C. § 1011f(h)(2)(B)).

IDENTITY OF FOREIGN SOURCES

- Do institutions have to report the identity of foreign sources to the Department?
  - Yes, to the extent that the institution has or could reasonably obtain the foreign source's identity.
  - Even if the foreign source requests anonymity.
  - As the Department has previously stated, unless otherwise required by law, foreign source names and addresses (other than country) will be withheld from inclusion in the public disclosure report.

TRANSACTION AMOUNT

NO GIFTS OR CONTRACTS OF $250,000 OR MORE

- Does an institution have to report any information if it does not have any gifts and contracts of $250,000 or more?
  - No.
  - Institutions are not currently required to file a disclosure report indicating that they were not involved in any reportable transactions.

CONTRACTS OF INDETERMINATE VALUE

- When and how should an institution report contracts with indeterminate values?
  - Contracts must be valued **when "enter[ed] into."**
  - Institutions should use a **reasonable valuation methodology** based on information available at the time the contract was entered into.

IN-KIND EXCHANGES

- Institutions are required to report in-kind exchanges as part of a gift or contract, such as textbooks or materials for a specific program.
  - Institutions are not required to adopt a specific valuation method for in-kind exchanges.
  - In general, the value of property should be its **fair market value**.

GIFT REPORTING

WHEN TO REPORT

- Gifts from a foreign source must be reported upon receipt.

PLEDGED GIFTS

- For pledged gifts, what if the full amount is never received.
  - Only the portion of a pledged gift that is **actually received** is reportable.
- If an institution receives all or a portion of a pledge that meets the dollar threshold (including in the aggregate) within a calendar year, that portion of the pledge must be disclosed.

MULTI-YEAR GIFTS

- For gifts that are promised over a multi-year period
  - Look to the reporting threshold.
  - The threshold applies per foreign source and per calendar year.
  - Aggregate.
    - Gift amounts actually received in a calendar year, plus
    - The total value of contracts entered into in the same calendar year.

MULTIPLE GIFTS

- Institutions may receive multiple gifts from a foreign source that are individually valued at less than the $250,000 reporting threshold but, in the aggregate, meet or exceed the $250,000 threshold.
- Disclosures must reflect the details of each discrete transaction involving a foreign source.

CONTRACT REPORTING

CLINICAL TRIAL CONTRACTS AND OTHER REPORTING

- Section 117 requires reporting of clinical trial contracts, such as contracts between research institutions and pharmaceutical companies.
- Limited circumstances in which other reporting requirements could alleviate the need to file a separate Section 117 disclosure report.
  - An institution can file a copy of a disclosure report filed with a state or other federal agency when that other report reflects “substantially similar” requirements to Section 117.

UPDATING OR AMENDING CONTRACT DISCLOSURES

- For previously disclosed contracts, the actual value of the contract may differ from the reported value at the time the institution entered into the contract.
- Reasonably valued contracts need only be reported once.
- Institutions should file updates when previously reported information is determined to be materially inaccurate.
  - Qualitative and quantitative factors.

CONTRACTS FOR PURCHASES

- Are institutions required to report contracts involving purchases made by institutions from foreign sources, such as equipment purchased by an institution from a foreign source?
  - "Money-out", arms-length transactions are generally not reportable.
  - Institutions should consider the information available at the time of each transaction to determine whether it was arms-length.
    - Transactions well below market value – even if "money out" – may be reportable.

CONTRACTS INVOLVING INTELLECTUAL PROPERTY

- Institutions are required to report contracts involving an intellectual property license fee from a foreign licensee of an institutional patent or data or materials to be transferred for use in research.

SUBCONTRACTS

- Section 117 does not distinguish between contracts and subcontracts.
- As with all transactions, consider two threshold questions:
    - Does the transaction involve a foreign source?
    - Is the monetary threshold met or exceeded?

RESTRICTED GIFTS OR CONTRACTS

DEFINITION OF RESTRICTED OR CONDITIONAL GIFTS OR CONTRACTS

- A gift or contract is considered "restricted or conditional" only if it includes provisions regarding:
  - the employment, assignment, or termination of faculty;
  - the establishment of departments, centers, research or lecture programs, or new faculty positions;
  - the selection or admission of students; or
  - 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.

ADDITIONAL DISCLOSURES FOR RESTRICTED OR CONDITIONAL GIFTS OR CONTRACTS

- The statute requires additional disclosures for restricted and conditional transactions, including a description of such conditions or restrictions.
- At minimum, the institution must provide a detailed or narrative description of the conditions or restrictions that make the individual transaction meet the Section 117 definition (20 U.S.C. § 1011f(h)(5)).
  - A detailed or narrative description is required only for the conditions or restrictions that make the individual transaction meet the statutory definition.
  - Institutions need not provide descriptions for other conditions or restrictions.
- Not adequate to simply identify which of the four enumerated restrictions or conditions is applicable.

SPECIAL EXCEPTION

- Are there any circumstances in which a school can aggregate transactions for reporting purposes?
    - Generally, transaction-based reporting is required.
    - One exception:
        - Restricted or conditional contracts with the same foreign source for payment of tuition (and related fees) for students from a specific country.

COVERED INSTITUTIONS AND ENTITIES

WHO MUST FILE

- All schools meeting the Section 117 definition of "institution" that are involved in one or more reportable transactions.
- Foreign source owned or controlled institutions must file two disclosure reports per year.
- Intermediaries do not have an independent reporting obligation.
  - Institutions may have to report on behalf of intermediaries.

DEFINITION OF AN INTERMEDIARY

- An intermediary is a legal entity other than an institution that engages in a reportable transaction that benefits an institution.

- 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 by the institution.

ORGANIZATIONS OUTSIDE OF THE INSTITUTION'S DIRECT CONTROL

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

- Institutions have a duty to exercise reasonable due diligence to determine the source of the funds received from any entity.

- If a legal entity receives a gift from or enters into a contract with a foreign source, an institution does not need to report the transaction if it did not benefit from the transaction.

REPORTING PORTAL AND SYSTEM

PORTAL LOCATION AND AUTHORIZED USERS

- https://sa.ed.gov/cas/CASWeb/pages/Authentication.faces
- Users authorized by an institution's Primary Destination Point Administrator (PDPA).
  - For more information about Destination Point Administrators, please see the SAIG Enrollment Site at https://fsawebenroll.ed.gov/.

MULTIPLE USERS AND DRAFTS

- Multiple individuals that have been approved to access the system can submit disclosure reports on behalf of an institution.
- A user cannot see submissions (draft or final) created or submitted by other users.
- Third parties, such as outside accountants or consultants, may submit disclosure reports on behalf of an institution so long as they have been authorized by an institution's PDPA to submit disclosure reports on its behalf.

CORRECTION OF ERRORS

- In order to correct any errors in a prior disclosure report, an institution must send an email to the Foreign Gifts Access Team (ForeignGiftsAccess@ed.gov) that includes:
  - OPEID of the institution;
  - Approximate date of the incorrect submission (if known); and
  - Application ID number for the incorrect submission (which can be found on the home page of the reporting portal under "My Submitted Entries," in the first column next to the incorrect submission).

WHO DO I CONTACT

- For technical questions or access issues related to the Section 117 electronic reporting portal, contact ForeignGiftsAccess@ed.gov.

- For all other questions related to Section 117, contact ForeignSourceReporting@ed.gov.

GENERAL RULES

FILING DATES

- Institutions may submit disclosure reports at any time.
- Institutions must submit disclosure reports in accordance with the two statutory deadlines (January 31 and July 31).
    - The applicable deadline will depend on the date on which a transaction becomes reportable.
    - For reportable transactions occurring between January 1 and June 30, an institution should provide disclosure reports by July 31.
    - For reportable transactions occurring between July 1 and December 31, the institution should submit reports by January 31.

PREVIOUSLY UNREPORTED TRANSACTIONS

- An institution should file a disclosure report as soon as it identifies a reportable transaction that was not disclosed or that a previously disclosed transaction was not properly reported.

- An institution that did not submit disclosure reports in accordance with the statutory deadlines is not in compliance with Section 117.

QUESTIONS?

- For technical questions or access issues related to the Section 117 electronic reporting portal, contact ForeignGiftsAccess@ed.gov.
- For all other questions related to Section 117, contact ForeignSourceReporting@ed.gov.