

Appendix B

Q1: 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?

A1: 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 the statutory text, construed in context and with a view to the words’ place in the statutory scheme. Although the 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: an arms-length 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 to exclude a contract involving the transfer of funds from an institution to a foreign source. We note, however, that each transaction should be evaluated independently.

Q2: Are institutions required to disclose payments of tuition and fees for foreign students paid directly by the student, or under certain circumstances, paid by other individuals, institutions, or governments?

A2: We generally consider instances where a foreign source pays tuition for a student or students to meet the definition of a “contract” under Section 117(h)(1). 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.

Q3: Are institutions required to report contracts involving an intellectual property license fee from a foreign licensee of a University patent or data or materials to be transferred for use in research?

A3: 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.”

Q4: 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?

A4: 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. (emphasis added). Therefore, whether a particular contract must be reported by an institution depends upon whether the value of the contract when it is signed, combined with the value of all other gifts and contracts with that foreign source, meets or exceeds the statutory threshold. Given the valuation challenges presented by certain contracts (e.g., indefinite delivery/indefinite quantity contracts), institutions may wish to consider simply reporting contracts whose values could meet or exceed the statutory threshold to avoid potential non-compliance.

Q5: How should institutions value property?

A5: In general, the value of property should be the fair market value of the property.

Q6: 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?

A6: An institution receiving the benefit of a gift from or a contract with a foreign source, even if through an intermediary, must disclose the gift or contract. Additionally, 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. 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 the Department. 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.

Q7: How is the term “intermediary” defined?

A7: For purposes of Section 117 reporting, an intermediary is an entity other than an institution that receives a gift originating from a foreign source or enters into a contract with a foreign source.

Q8: 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?

A8: 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, the Department 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.