

Attachment A: Questions & Answers

What is a reportable foreign source?

Q1: What is a Foreign Source for purposes of HEA Section 117? Are U.S. subsidiaries and affiliates considered to be a Foreign Source?

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 who is not a citizen or a national of the United States or a trust territory or protectorate thereof; and
- d. An agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a Foreign Source;¹

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).²

The term includes subsidiaries and affiliates (see subsection D) of a foreign legal entity acting on behalf of a Foreign Source. While there might be circumstances in which a subsidiary or affiliate of a foreign entity is not acting on behalf of that foreign entity, for ease of reporting and consistency, UCOP advises campuses to treat all affiliates and subsidiaries of foreign legal entities as Foreign Sources for purposes of HEA Section 117 reporting.

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, for all transactions entered into after December 31, 2019, UCOP recommends that: 1) the UC unit make its own determination with information supplied by the sponsor/donor or with information otherwise at the unit’s disposition, including any UC provided databases or use of third-party resources such as World-Check One or 2) the UC unit request that the sponsor/donor certify whether or not they are a Foreign Source, including a subsidiary or affiliate of a Foreign Source. Note that the campus can request negative certification as an option (e.g., where the sponsor/donor certifies that they are *not* a Foreign Source, including a subsidiary or affiliate of a Foreign Source).

Q3: If we’re receiving funds from a U.S. entity, but the funds’ prime sponsor is a foreign entity, do we report those funds?

A3: 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

¹ [20 USC § 1011f\(h\)\(2\)](#)

² See “Response to Public Comments (60-day notice)”, page 5, on ED’s [HEA Section 117 site](#).

Source). In this case, UC's funding contract would be with a U.S. entity.

- Q4: For contracts, should we report both funds paid to and funds received from a Foreign Source?
- A4: Only funds received from Foreign Sources need to be reported. This is consistent with recent statements from the Department of Education.^{3, 4} Therefore, transactions where UC is procuring goods or services from a Foreign Source do not need to be reported.
- Q5: HEA Section 117 refers to Gifts and Contracts only; how do we report grants?
- A5: Grants are considered Contracts for the purpose of HEA Section 117 reporting.
- Q6: Are revenue generating contracts to be reported?
- A6: All contracts for which UC is receiving financial consideration from a Foreign Source for the provision of goods or services by UC should be included. This includes contracts in which UC is providing a service, e.g., architectural design and construction service contracts, conference services agreements, laboratory service agreements, etc.
- Q7: Are Material/Data Transfer Agreements (MTAs/DTAs) to be reported and if so how do we determine a dollar amount to assign?
- A7: Pending further clarification by ED, agreements that do not involve the provision of funds to UC, or for which the valuation of materials provided to UC 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. ED expects institutions to make a good-faith effort to determine the fair market value of the materials but is currently not specific about the methodology for determining the value.⁵
- Q8: Are in-kind contributions reportable?
- A8: In-kind contributions with a known value should be included in HEA Section 117 reporting. ED expects institutions to make a good-faith effort to determine the fair market value of the in-kind contributions but is currently not specific about the methodology for determining the value.⁶
- Q9: A grant appears to be covered under 117(h)(5) as a "restricted or conditional gift or contract" when it includes provisions that, among other things, establish research programs (117(h)(5)B).

- a. Do research agreements meet the definition of a Restricted or Conditional Gift

³ For example, see the second paragraph of this [letter from ED to ACE](#): "Section 117 of the Higher Education Act (HEA) of 1965 requires your members to report **all foreign moneys that flow or are funneled to them**, whether directly or through their affiliates." [emphasis added].

⁴ [ED Response to Public Comments, December 17, 2019](#)

⁵ See, for example, Q5 in Appendix B to ED's June 22, 2020 "[Electronic Announcement](#)".

⁶ See, for example, Q5 in Appendix B to ED's June 22, 2020 "[Electronic Announcement](#)".

or Contract? Do agreements in which foreign entities pay to participate in affiliate membership programs in which our research results are presented meet the definition of a Restricted or Conditional Gift or Contract?

- b. Do renewals, supplemental and continuing awards for existing centers fall under this category?

A9: Per HEA Section 117, a Restricted or Conditional Gift or Contract is one that requires the establishment of “departments, centers, research or lecture programs, or new faculty positions.” Research Contracts (which include grants) from a Foreign Source in support of a research project proposed and defined by UC must be reported under HEA Section 117, but do not normally meet the definition of a “Restricted or Conditional Gift or Contract.” Likewise, in agreements for affiliate membership programs, members are generally not in the position of requiring that UC establish any research or lecture programs, rather, they are invited by UC to participate in a University program, over which the University has full control and discretion, including whether or not to establish or maintain such program. As such, in general, membership affiliate agreements with a Foreign Source do not fall into the definition of Restricted/Conditional, though they too must be reported to ED if, in combination with other grants and contracts from a single Foreign Source, they meet the \$250,000 reporting threshold.

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.

By their very nature, agreements providing funds for an existing program are not requiring the *establishment* of a program; however, it would be prudent to include such agreements if the same Foreign Source is providing renewal, continuation, or supplemental funds for the same purpose as the original contract or gift from that Foreign Source establishing the program.

Note that agreements described here in this question ARE reportable, even if they may not meet the definition of a *Restricted or Conditional Gift or Contract*.

Q10: How do we determine the description to be entered for Restricted or Conditional Gift or Contracts?

A10: You should first determine the condition(s) that makes the Gift or Contract “restricted or conditional” in accordance with the definition for a Restricted or Conditional Gift or Contract. These condition(s) are listed below.

- a. the gift/contract requires the employment, assignment, or termination of faculty;
- b. the gift/contract requires the establishment of departments, centers, research or lecture programs, or new faculty positions;
- c. the gift/contract requires the selection or admission of students; or
- d. 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.

Upon determining which of the above condition(s) are applicable, you should enter a

brief description of the *specific* terms which meet the above condition(s).

- Q11: Should we report contracts and grants by project period, or by budget period? For example, if we enter into a \$600K contract for a five-year period, it is less than \$250K value in any given calendar year (budget period) since it will be spread over five years. However, if we use the project period then we are reporting the \$600K amount in the year of signing the contract.
- A11: ED has indicated that institutions should report the full amount of the contract in the ED reporting period in which it is signed⁷. This will also eliminate the burden of tracking a contract over time, and the risk of an appearance of non-compliance, even though individual performance periods might not meet the reporting threshold. For example, if the \$600K, five-year contract was executed in March, campuses should report the full \$600K on the next HEA 117 report, due at the end of July.
- Q12: Should we report gift pledges by the total amount pledged, or by the actual amount received?
- A12: Following the same reasoning as in the previous question, campuses should report the total pledged amount in the ED reporting period in which the pledge is made.
- Q13: When should we report Contracts with a Foreign Source for which the value is unknown at the time of execution (for example, indefinite delivery/indefinite quantity contracts)?
- A13: Such Contracts do not need to be reported unless their value, alone or in combination with other Gifts or Contracts with the same Foreign Source, meet the \$250K threshold in any given calendar year. However, at the time of execution, it is often difficult, if not impossible, to estimate their total value over the life of the agreement, especially if the Contract has no fixed end date. Therefore, to aid in compliance, UCOP recommends that campuses track ongoing payments received under these Contracts and report them at the time the reporting threshold is met for that Foreign Source.
- Q14: How do we calculate amounts aggregated by Sponsor?
- A14: Institutions must report contracts with or gifts from the same 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. Pertinent campus departments should submit reports of all foreign source gifts and contracts (regardless of the amount) to the campus coordinating office, who will then sum up all the values to determine if the thresholds have been met. UCOP recommends using the final Contract signature date or Gift acceptance date to determine which Contracts or Gifts to report in a given reporting period. The examples below show how a campus should calculate the totals. Note that reporting of start and end dates are only required for

⁷ See "[Response to Public Comments \(30-day notice\)](#)", p7-8: "If the institution determines that the contract has the potential to meet the threshold, then Section 117(a) requires the institution to report the contract at the time that the institution "enters into" it."

Contracts; only the receipt date is required for Gifts.

Example 1

A campus receives the following three distinct contracts from Foreign Source A in the January - June reporting period.

- Award 1 – Contract \$90,000 Received 2/3/19 (Start Date 2/2/2019 – End Date 11/30/2019)
- Award 2 – Grant - \$100,000 Received 3/8/2019 (Start Date 1/12/19 – End Date 12/30/2019)
- Award 3 – Clinical Trial - \$110,000 Received 6/1/2019 (Start Date 3/3/2019 – 3/3/2024)

Since the aggregate of all Gifts and Contracts by Sponsor (\$300,000) for the time period to be reported exceeds \$250,000, the campus would report all three transactions.

Example 2

In the January - June reporting period, a campus receives a total of \$200,000 from Foreign Source B, and \$60,000 from the same Foreign Source in the July - December reporting period.

The campus would not be required to include Foreign Source B in the Jan - June report. However, because the tally from the first six months of a calendar year rolls over to the next six months of a calendar year for the purpose of determining whether a Foreign Source should be reported, the entire \$260,000 should be reported in the July - December report.

Example 3

In the January - June reporting period, a campus receives a total of \$800,000 from Foreign Source C, and \$300,000 from the same Foreign Source in the July - December reporting period.

Since the campus should have already reported the \$800,000 from Foreign Source C in the January - June report, only the additional \$300,000 needs to be reported in the July - December report. In other words, values previously reported should not be repeated.

Example 4

A campus reported \$800,000 in support from Foreign Source D in the January - June reporting period, and then receives another award for \$60,000 in the July - December period.

The campus should report the additional \$60,000 in the July - December report because it needs to capture all amounts in excess of \$250,000 in a calendar year.

Q15: Are gifts from Donor Advised Funds reportable? For example, if UC receives funding from, Fidelity Charitable DAF (a US entity), should we report gifts provided by a foreign donor?

A15: A Donor Advised Fund (DAF) is a charitable giving vehicle created to manage charitable

donations on behalf of organizations, families or individuals. Donors may make recommendations on how the donation is distributed, but they relinquish ownership of the donation. Legally, UC receives the donation from the DAF, not from the entity or person who made a contribution to the DAF. Therefore, gifts from a DAF need not be reported under HEA Section 117, unless the DAF itself is foreign.

Q16: Must we report the Gift Donor name of a Foreign Source that has requested anonymity?

A16: To the extent that the campus has or could reasonably obtain the donor's identity, ED expects that their information be reported.⁸ The campus should clearly indicate that the Gift was anonymously provided and request that the information be treated as confidential by ED, as ED has stated that it will not make anonymous donors' identities or addresses available to the public⁹.

Q17: Do we need to report Huawei USA funding?

A17: Gifts and Contracts from subsidiaries and affiliates of foreign legal entities acting on behalf of a Foreign Source are reportable. As discussed above in Q/A #1, for ease of reporting and consistency, UCOP advises campuses to treat ALL affiliates and subsidiaries of foreign legal entities as Foreign Sources for purposes of reporting under Section 117 of the HEA. Thus, Gifts and Contracts from Huawei USA that meet or exceed the reporting threshold (in aggregate, in a calendar year) should be included in campus reports.

Q18: For "Restricted or Conditional Gifts or Contracts", how are campuses 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?

A18: As described above in the answer to Question 8, Contracts or grants in support of a UC proposed and defined scope of work do not generally fall into the category of Restricted/Conditional. While the sponsor often requires 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 UC 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 UC employee is paid under a research contract or grant does not mean that the contract/grant should be considered Restricted/ Conditional. If, however, the *purpose* of the award is for the "employment, assignment, or termination of faculty" (rather than for the performance of a research project, for example), 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."

⁸ See "Response to Public Comments (60-day notice)" on ED's [HEA Section 117 site](#); also Appendix B to ED's June 22, 2020 "Electronic Announcement".

⁹ See ED's HEA Section 117 website: [Section 117 of the Higher Education Act of 1965](#)

- Q19: Should we report funds that are originally U.S. but flow through a foreign entity? If so, how should this be reported?
- A19: Since UC'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.
- Q20: Should start-up packages for investigators and institutional research grants be included?
- A20: If these are funded by a Gift or Contracts from Foreign Sources, then such start-up packages are reportable.
- 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 117¹⁰, and as such are reportable.
- Q22: Are tuition payments made by foreign students to the University considered reportable?
- A22: ED has stated that it generally considers instances where a Foreign Source pays a University to cover tuition for a student or students to meet the definition of a "contract" under Section 117, but that such contracts 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 would likely be met in situations where a Foreign Source pays tuition for multiple students and the aggregate amount exceeds the \$250,000 threshold.¹¹

Reporting Process

- Q23: Are UC campuses considered as independent entities, or is "The UC Regents" the entity that reports?
- A23: For the purpose of HEA Section 117 reporting, each campus submits reports for gifts and contracts received by that campus.
- Q24: Do systemwide initiatives housed at a particular campus report through the campus, or through UCOP?
- A24: The location that administers the program should manage the reporting.
- Q25: Are Gifts or Contracts received from Foreign Sources by affiliated overseas campuses,

¹⁰ See "Response to Public Comments (60-day notice)" on ED's [HEA Section 117 site](#); also Appendix B to ED's June 22, 2020 "Electronic Announcement".

¹¹ See "Response to Public Comments (60-day notice)" on ED's [HEA Section 117 site](#); also Appendix B to ED's June 22, 2020 "Electronic Announcement".

institutes, or programs reportable? Should these programs report on their own behalf or through their home campus?

- A25: Such Gifts or Contracts would be reportable, and should be reported through the overseas program's home campus; e.g., UCB reports for BEARS (Singapore), UCD reports for Chile Life Sciences Innovation Center (Chile), etc.
- Q26: Which office is responsible for the reporting of foreign Contracts and Gifts in accordance with Section 117 of the Higher Education Act?
- A26: At UC, the Financial Aid Offices currently submit the reports that include information on receipt of foreign Contracts or Gifts as required by HEA Section 117, though information to be included on those reports must be collected from all campus departments or units managing reportable transactions. The campus may, at its discretion, assign the coordinating function to another office. (Note that grants from Foreign Sources for financial aid must also be reported under HEA Section 117.)
- Q27: How can we ensure that we're collecting Gifts that are provided outside the Office of Development? If there are Gifts arrangements made for campus departments or projects that flow independently from the Office of Development, how can we find them?
- A27: Per UC policy, all gifts received by campus departments and by UC affiliated foundations should be reported to the campus Development Office. As such, the campus Development Office *should* have a full list of gifts received for that campus. Note that for Contracts, it is important to collect the information from the various offices / departments managing contracts because under current practices, these do not always get reported to a central office (see Background section of guidance for more details).
- Q28: Are the funds from a Foreign Source that are received by a university foundation reportable?
- A28: While UC's foundations are separate legal entities, and while gifts to the foundations are not normally considered gifts to the University, for the purposes of reporting under HEA Section 117, University campus reports should include donations to UC campus foundations that alone or in aggregate meet the reporting thresholds set out by Section 117. ED has stated that institutions must include in their reports Foreign Source funds received through legal entities that "exist for the purpose of serving as an intermediary for certain gifts or contracts," which would include UC affiliated foundations that fundraise for the benefit of UC.¹²
- Q29: Are campuses required to collect and upload true copies of agreements with foreign sources? How will the privacy and confidentiality of information in the agreements be protected from FOIA?

¹² See "Response to Public Comments (60-day notice)", pages 3-4, on ED's [HEA Section 117 site](#); also, Q6 in Appendix B to ED's "[Electronic Announcement](#)".

A29: ED has indicated that it will engage in negotiated rulemaking regarding the proposed collection and uploading of true copies of agreements with foreign sources. At this time, campuses should not provide such copies as part of their HEA Section 117 report. This guidance will be updated if and when a requirement to provide true copies is finalized.

Correcting Reports

Q30: What if a campus missed filing a report?

A30: According to previous ED guidance, the campus should immediately file the missed reports.¹³

¹³ This was in an [ED Dear Colleague Letter](#) from Oct. 4, 2004; although this letter has been rescinded as of June 22, 2020, we believe the policy rationale for this advice is still sound.