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FERPA AND THE IMMIGRATION AND NATURALIZATION SERVICE: A GUIDE FOR UNIVERSITY COUNSEL ON FEDERAL RULES FOR COLLECTING, MAINTAINING AND RELEASING INFORMATION ABOUT FOREIGN STUDENTS

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I. INTRODUCTION

The devastating terrorist attacks against the United States on September 11, 2001, destroyed the World Trade Center in New York City, badly damaged the Pentagon, and took the lives of thousands of individuals. As more details became available about the terrorists who hijacked four U.S. planes to carry out these deadly attacks, universities around the U.S. struggled with the news that several of the hijackers had entered the U.S. on, or had later applied for, "student" visas. University officials began to grapple with new questions presented by these attacks: What responsibilities do the universities have to report foreign students who never enroll? Should universities be responsible for more stringent review of foreign applicants, and would such increased scrutiny of foreign students be lawful? Finally, as FBI officials appeared on university campuses nationwide to request information about the foreign students enrolled at these schools, university attorneys sought to definitively answer this question: What obligations does a university have to provide information about foreign students to the government?

This article seeks to answer the latter question by examining the complex interaction of the Immigration and Naturalization Act (INA), the Immigration and Naturalization Service (INS) regulations and the Family Educational Rights and Privacy Act of 1974 (FERPA). These laws, particularly as

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amended in 2001 – 2002, combine to control whether and how universities must report information about foreign students to the INS or other government agencies and how universities should respond to requests for information about foreign students.

First, this article will review some basic information about the three typical types of “student” visas. Next, it will examine federal laws and regulations requiring universities to maintain and report specific information about students holding such visa status. Finally, it will explore how FERPA impacts these reporting requirements and requests for information about foreign students.

II. OVERVIEW OF STUDENT VISAS

A. *Background: Some Immigration Basics*

Before delving into the rules surrounding the release of information about foreign students, a brief overview of general immigration terms and “student” visas may be useful.

The entry of foreign nationals into the U.S. is governed primarily by two different agencies within the U.S. government: the INS and the Department of State. Both play important roles. The INS reviews visa petitions from individuals and organizations within the U.S. and determines whether it is appropriate to approve a certain visa status for an individual. The Department of State (through U.S. Consulates outside the U.S.) reviews applications for visas from individuals overseas who wish to enter the U.S. For some types of visas, an application must be made to the INS and be approved before an individual can go to a U.S. Consulate to obtain the visa in his or her passport. For other types of visas, the individual may make the application at the U.S. Consulate without first obtaining INS approval.

The two agencies work together to regulate whether, and for how long, an individual may enter and remain in the U.S. Generally, an individual may be prevented from entering the U.S. by either of the two agencies. Two frequently encountered scenarios illustrate this point:

Example 1: Foreign Citizen wishes to enter the U.S. as a Tourist.

If a foreign national wishes to enter the U.S. to visit friends and tour the country, he might apply at the U.S. Consulate in his home country for a “B-2” tourist visa for temporary entry.¹ The Consulate has the discretion to deny the visa if the consular officer believes that the applicant does not qualify for the tourist visa. If the visa is granted at the Consulate, the individual will travel to the U.S. and upon arrival, an INS official will inspect him at the airport or other “port of entry” to the U.S. If the INS official determines that the individual does not properly meet

1. Actually, citizens of many countries are not required to obtain a tourist visa, but instead may enter the U.S. under the “visa waiver” program. 8 U.S.C. § 1187 (2000). 8 C.F.R. § 217.1 (2002) allows the nationals of about 20 countries with low incidences of visa fraud and visa overstays to visit the U.S. for business or pleasure for up to 90 days without a visa. See 8 C.F.R. § 217.2 (2002) (listing countries eligible for the visa waiver program).

the requirements for a "B-2" visa,² the INS may deny him entry into the country despite the Consulate's approval of his visa. Thus, the individual must convince both the Consulate and the INS that his visit is legitimate.

Example 2: Foreign Citizen is hired by U.S. Employer for Specialty Occupation.

Another frequently encountered scenario is that of an employer who wishes to hire a foreign citizen for a professional position. In this instance, the employer would file a petition with the INS requesting approval for an "H-1B" work-authorized visa.³ If the INS grants the petition, the foreign employee would then need to apply for an H-1B visa stamp at the U.S. Consulate before entering the U.S. If the Consulate feels that the individual is not truly qualified for this type of visa, the Consulate could deny the visa and the individual would be unable to enter the country despite INS approval. The individual would also face inspection from the INS officials at the port of entry, just as the tourist did.

Increased security precautions implemented over the last year and a half may delay the process for some individuals. Nationals of certain countries are subject to security "name checks" that must be performed before a visa can be issued,⁴ and other security clearances may apply if the individual will be performing work or research in specific security sensitive areas.⁵

Ideally, this system ensures that only those individuals who are qualified for a particular type of visa enter the U.S. in that status. Consider how the system works in relation to visas issued to individuals for the purpose of entering the U.S. to study.

There are three types of visas that could be issued to an individual wishing to enter the U.S. in order to study: the F-1 visa (academic study), the J-1 visa (exchange visitor), and the M-1 visa (vocational training).⁶ Each is appropri-

2. For example, the INS official might question the individual regarding the intent of his visit and learn that the visitor does not really intend to return to his home country after visiting, but instead plans to remain and work in the U.S. This would be a reason for the INS official to refuse him entry on the tourist visa. *See* 8 U.S.C. § 1101(a)(15)(B) (2000) (tourists must intend to visit the U.S. temporarily and then return to their foreign residence).

3. There are a number of different categories of work-authorized visas. H-1B is a common work-authorized visa for professionals.

4. Although the State Department will not release the list of countries, published reports and anecdotal evidence suggest that nationals of Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Lebanon, Libya, Malaysia, Morocco, Omar, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates and Yemen are subject to this clearance process, which may take several months.

5. *See, e.g.*, D.O.S. Unclassified Telegram, June 23, 2001, Ref (A) 00 STATE 109 673, (B) 99 STATE 158241, (C) 00 STATE 220555 (discussing special security clearance procedures required for various nationalities and groups) (on file with author).

6. As discussed *infra* note 51, individuals in other visa categories are also entitled to enroll in universities. The F, J, and M visa categories are all specific "student" visas.

ate for a particular type of study, and each has special aspects that will be discussed in more detail below. All three types are “nonimmigrant” visas. A nonimmigrant visa is a visa issued to an individual who intends to enter the U.S. and remain for a specific period of time to accomplish a specific purpose – attending school, for example.⁷ An immigrant visa, in contrast, is issued to an individual who intends to enter the U.S. and remain indefinitely as a permanent resident of the country.⁸

Each applicant for admission to the U.S. could be denied entry if he or she is considered “inadmissible.”⁹ Bases of inadmissibility include health-related grounds, certain criminal convictions, national security concerns, financial grounds (concern that the alien would become a “public charge”), and prior violation of immigration rules, among others.¹⁰ The basic requirements for eligibility, and the time period for which an individual holding each type of visa will be admitted to the U.S., are discussed below.

B. *The Three “Student” Visas*

1. F Visa: Student Status For Academic Study

The F-1 visa is the visa most often thought of as the “student” visa. In order to qualify for an F-1 visa, a prospective student must show that he or she:

- Has a foreign residence and does not intend to abandon that residence;
- Is a bona fide student qualified to pursue a full course of study;¹¹
- Is entering the U.S. temporarily and solely for the purpose of pursuing a course of study at an educational institution in the U.S.; and
- Will study only at an institution approved by the INS.¹²

The Consulate usually requires a prospective student to present Form I-20 A-B, which is issued by the university (or other institution at which the individual will study) and provides information about the course of study to be

7. 8 U.S.C. § 1101(a)(15) defines “immigrant” and “nonimmigrant” aliens. The term “alien” refers to any person who is not a U.S. citizen or national. 8 U.S.C. § 1101(a)(3) (2000).

8. Those who obtain lawful permanent residency are often informally referred to as “green card holders” in a reference to the color of the permanent alien card previously issued to lawful permanent residents. The document has actually not been green for many years, but the terminology lives on in common parlance.

9. 8 U.S.C. § 1182 (2000).

10. *See id.*

11. A “full course of study” for an F-1 student is defined by 8 C.F.R. § 214.2(f)(6) (2002) and is not limited to undergraduate or graduate work at an accredited college or university. A full course of study can include academic studies in a high school, junior college, or a language, liberal arts or fine arts nonvocational program. However, an F visa holder may *not* attend a public elementary school or publicly funded adult education program. He or she may only attend a public secondary school for 12 months upon full payment of the per capita cost of the schooling to the appropriate school board. *See* 8 U.S.C. § 1184(m)(1) (2000).

12. *See* 8 U.S.C. § 1101(a)(15)(F) (2000); and 8 C.F.R. § 214.2(f) (2002).

pursued by the individual.¹³ Issuance of the Form I-20 indicates that the prospective student meets all standards for admission and has been accepted for enrollment in a full course of study.¹⁴ Only schools who have applied for and been certified by the INS may issue Form I-20.¹⁵

In addition to these requirements, applicants are required to show that they have sufficient financial support to study and live in the U.S. without engaging in unauthorized employment to support themselves.¹⁶ If the individual is not fluent in English, the school may need to explain why fluency is not required for the course of study, or how fluency will be obtained.¹⁷

The Consulate will approve an F-1 visa within 60 days of the start of the school term.¹⁸ Upon entry to the U.S., the INS official examining the student will admit the student for a term defined as the duration of the status (indicated as “d/s” on the I-94 Admission/Departure Form).¹⁹ This is a unique

13. If an individual wishes to enter the U.S. more than 60 days before attending school, or wishes to enter the U.S. in order to choose a school to attend, it is possible for the individual to enter on a “visitor” visa (B-1/B-2) with the intention of changing his status to F-1. In such a case, the Consulate may issue a B-2 visa and mark it “Prospective Student.” See 9 FAM 41.61 n.9.1 (October 10, 2001). Before the individual’s authorized period of stay in B-2 status expires, the individual must change his or her status or, if he or she has decided against attending school in the U.S., depart the country. Despite the changes recently proposed by the INS to the student visa system (see *infra* Section II.C.2), the INS has announced that it intends to still allow prospective students to enter the U.S. as B nonimmigrants and change their status to that of a student, *as long as* they clearly state their intent to study in the U.S. at the time they enter the U.S. and are examined by an INS official. The INS official will then note “Prospective Student” on the individual’s I-94 Form (Arrival/Departure Record), a white card which is issued to each arriving alien and stapled into his or her passport. See Press Release, INS Proposes Significant Changes to Rules Governing Visitors and Students (Apr. 8, 2002), available at <http://www.ins.gov/graphics/publicaffairs/newsrels/visa.htm> (last visited Jan. 31, 2003).

14. See 8 C.F.R. § 214.3(k) (2002).

15. Application for INS certification and authority to issue Form I-20’s is made on INS Form I-17. To be eligible for approval, an institution must show that it is a bona fide school and an established institution of learning with “the necessary facilities, personnel and finances to conduct instruction in recognized courses” and that it is in fact engaged in instruction of those courses. 8 C.F.R. § 214.3(e)(1) (2002). Under recently issued regulations, a school must have been enrolled in the Student and Exchange Visitor Information System (SEVIS) (discussed *infra*, at Section III.C.) before January 30, 2003 in order to continue issuance of Form I-20s. See 67 Fed. Reg. 60107 (proposed Sept. 25, 2002) (to be codified at 8 C.F.R. pts. 103 and 214).

16. See 22 C.F.R. § 41.61(a) (2002).

17. Volume nine of the Foreign Affairs Manual instructs consular officers that “if English proficiency is required for pursuing the selected course of study and no arrangements have been made to overcome any English-language deficiency, the consular officer must determine whether the alien has the necessary proficiency” by conducting the visa interview in English and testing the applicant’s ability to speak and understand written and spoken English. 9 FAM 41.61 n. 5.1 (October 10, 2001).

18. Under recently finalized rules, the student will not be admitted to the U.S. more than 30 days prior to the start of his or her course of study. See 67 Fed. Reg. 76256, 76262, 76271 (Dec. 11, 2002) (amending 8 C.F.R. § 214.2(f)(5) (2002)).

19. See 8 C.F.R. § 214.2(f)(1)(i) (2002). The I-94 form is completed by every alien seeking admission to the U.S. at the time of his or her application to the border. A portion of the form is stapled into the alien’s passport and reflects the alien’s name, date of birth,

aspect of F-1 visas; usually, the I-94 card indicates a definitive end point for an authorized period of stay. In that case, an individual wishing to remain in the U.S. longer than the date indicated on the I-94 must apply to INS for an extension or change of status. For F-1 students, the duration of the status indication allows them to continue their studies (for example, to proceed from a bachelor's to a master's program) past the originally anticipated date of completion without filing a formal application with the INS to extend their stay.²⁰

2. J Visa: The Exchange Visitor

The J-1 visa is issued for a multitude of purposes²¹ and covers not only students but also scholars, physicians, and individuals receiving training in a variety of fields. In order to qualify for a J visa, an individual must show that he or she:

- Has a foreign residence and does not intend to abandon that residence;
- Is a bona fide trainee, student, professor or research scholar, short-term scholar, non-academic specialist, foreign physician, international visitor, teacher, government visitor, camp counselor, au pair or summer student in a travel or work program; and
- Is entering the U.S. to participate in an Exchange Program designated by the Department of State.²²

A J-1 visitor must have sufficient funds to maintain him or herself and sufficient fluency in English to participate in the designated program. He or

country of citizenship, the visa status in which he or she was admitted, and the period of time for which the alien is authorized to remain in the U.S.

20. Although the student is not required to request an extension of status with the INS, he or she must ensure that he or she has a current Form I-20. If the student is remaining in an educational program beyond the date originally estimated for completion of the program, he or she must apply to the institution's Designated School Official (DSO) before the completion date noted on Form I-20. 8 C.F.R. § 214.2(f)(7)(iii) (2002) (amended by 67 Fed. Reg. 76256, 76272 (Dec. 11, 2002)). If the student meets requirements for program extension eligibility (including a requirement that the student has continually maintained status and that the delay in completion of the program is due to "compelling academic or medical reasons" (not including suspension for academic reasons), the DSO may issue a new Form I-20. *See generally* 8 C.F.R. § 214.2(f)(7)(iii) (2002). A student continuing at a different educational level must obtain a new Form I-20 for the new program. *See* 8 C.F.R. § 214.2(f)(5)(ii) (2002). Similarly, a student who is maintaining status may transfer to a different educational institution pursuant to 8 C.F.R. § 214.2(f)(8) (2002). Under the new SEVIS rules, all these changes must be entered into SEVIS. Retention and Reporting of Information for F, J, and M Nonimmigrants, 67 Fed. Reg. 76256 (Dec. 11, 2002) (to be codified at 8 C.F.R. pts. 103 and 214).

21. The various purposes of visitation are set forth in 8 U.S.C. § 1101(a)(15)(J) (2000) and 9 FAM 41.62 n.4 (October 10, 2001) and include teaching, studying, observing, conducting research, consulting, and receiving training, such as post-graduate training. The J visa program also covers more than 20,000 youths from abroad who are placed as au pairs with American host families seeking child care. *See* 22 C.F.R. § 62.31 (2002).

22. 8 U.S.C. § 1101(a)(15)(J) (2000); and 8 C.F.R. § 214.2(j) (2002).

she must also maintain certain minimum amounts of medical insurance for accident and illness.²³

The J-1 visitor, like the F-1 student, must have the intention to return to the home country after completion of the training or short-term teaching.²⁴ Indeed, some J-1 visitors are subject to a requirement that they return to their home country or country of last residence for a period of two years upon completion of their training in the U.S.²⁵ Unlike F-1 students, who might be able to change their status to a different classification and remain in the U.S. after completion of their studies, some J-1 visitors are subject to the two year home residency requirement and thus are ineligible to apply for an immigrant visa (green card) or a change of status to certain other nonimmigrant categories, unless and until they have returned home and physically resided in their home country for a two year period following departure from the U.S.²⁶

Like the F-1 student, the J-1 student is generally admitted to the country for the "duration of status." Exchange visitors are authorized to remain in the U.S. up to the ending date on the DS-2019,²⁷ plus 30 days for travel.²⁸ As long as the J visitor engages only in activities authorized by Form DS-2019, and the DS-2019 is valid, the INS considers the J visitor to be in good status.

3. M Visa: The Vocational Student

The M visa is issued to students who wish to attend established vocational or nonacademic institutions (other than language training programs, for which students normally obtain F visas).²⁹ For example, a student attending a vocational high school or enrolling in a community college's associate degree

23. For specific information on the insurance coverage required of exchange visitors, see 22 C.F.R. § 62.14 (2002).

24. 8 U.S.C. § 1101(a)(15)(J) (2000).

25. In general, a J visa holder will be subject to a two year foreign residency requirement if 1) his or her participation in the J-1 program was financed by an agency of his or her home government or by an agency of the U.S. government; or 2) he or she has skills that the Department of State has designated as critical within his home country. See 8 U.S.C. § 1182(e) (2000); and 62 Fed. Reg. 2,448,22,516 (Jan. 16, 1997) (most recent Department of State Skills List, governing programs beginning on or after March 17, 1997).

26. 8 U.S.C. § 1182(e) (2000); and 8 C.F.R. § 248.2(c) (2002). Not all J-1 visitors are subject to this requirement and even those who are may apply for a waiver (approvals of waivers are usually difficult to obtain). The INS can only grant a waiver of the two year residency requirement after a favorable recommendation is made by the Department of State. The bases for granting a waiver include persecution on account of race, religion or political opinion should the person return to the home country; exceptional hardship to the U.S. citizen or lawful permanent resident spouse or child of the J-1 visitor; a request by a U.S. agency showing that it is in the public interest for the J-1 individual to remain in the United States and that compliance with the two year residency requirement would be clearly detrimental to a program of official interest to the U.S. agency; issuance of a "no objection" letter from the J-1 visitor's home country; and others. See generally 8 U.S.C. § 1182(e) (2000); and 22 C.F.R. § 41.63 (2002).

27. Prior to September 1, 2002, this form was known as Form IAP-66.

28. 8 C.F.R. § 214.2(j)(1)(ii) (2002).

29. 8 C.F.R. § 214.2(m) (2002).

program would properly apply for an M-1 visa.³⁰ In practice, the M visa operates similarly to the F visa and has many of the same eligibility requirements. To be eligible for an M visa, a prospective student must show that he or she:

- Has a foreign residence which he or she does not intend to abandon;
- Is a bona fide student qualified to pursue a full course of study;³¹
- Is entering the U.S. temporarily and solely for the purpose of studying at an established place of study in the U.S.; and
- Will study only at an institution approved by the INS.³²

Prior to receiving an M visa at the U.S. Consulate overseas, the student must show a Form I-20M-N issued by the institution at which the student intends to study.

Like the F student, the M student should have adequate English language skills to pursue the proposed course of study, or have made appropriate arrangements for additional English study.

Although the eligibility requirements (and, as discussed below, many of the reporting requirements) are similar or identical for F and M students, there are several important distinctions. The M student is generally admitted to the U.S. for a single year or the time necessary to complete the proposed study (whichever is shorter).³³ Unlike the F and J students, who are admitted for the duration of their status, the M student's Form I-94 (issued upon entry to the U.S.) will indicate a specific end date, at which point the student's authorized term of stay in the U.S. ends.³⁴ In addition, an M student may not

30. The M visa recently gained notoriety as the type of visa for which Mohammed Atta and Marwan Al-Shehhi, two of the September 11th terrorists, applied. Mr. Atta entered the U.S. as a visitor, applied to change his status to M visa, and began classes at Hoffmen Aviation International flight school. See *INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi: Hearing Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 107th Cong. 63 (2002) (statement of James W. Ziglar, Comm'r, Immigration and Naturalization Service). The revelation that Mr. Atta had been able to obtain flight training before he was approved for M student status led to the INS's recently promulgated regulations barring individuals who enter the U.S. in visitor status from taking classes before a change of status is granted. See discussion *infra*, at Section II.C.2.

31. A "full course of study" for a M visa student is different from a "full course of study" for an F visa student, and is defined to include study at a community college or junior college of at least twelve semester hours per term; study at a post-secondary vocational or business school (other than a language training program) for an associate's degree; study in a vocational curriculum of at least 18 clock hours of attendance per week of classroom instruction or 22 hours per week of shop or lab work; and study in a vocational or nonacademic high school for the minimum number of hours per week for normal progress towards graduation. See 8 C.F.R. § 214.2(m)(9) (2002).

32. 8 U.S.C. § 1101(a)(15)(M) (2000); and 8 C.F.R. § 214.2(m) (2002).

33. 8 C.F.R. § 214.2(m)(5) (2002).

34. The M student is usually given, on the Form I-94, the lesser of: the time it takes to complete the program of study plus an additional 30 days in which to depart the U.S., or one year. 8 C.F.R. § 214.2(m)(5) (2002).

transfer from one school to another after 6 months in M status and may not, at any time, change educational goals.³⁵

C. *Obtaining Student Visa Status*

The steps needed to obtain F, J, or M status vary greatly depending on whether the prospective student is, at the time of the application, outside the United States in his or her home country, or inside the U.S. in some other lawful nonimmigrant status.

1. Student is Outside the U.S.

In most instances, the student will be outside the U.S. residing in his or her home country. In that case, the process is as follows:

- Student applies to and is accepted to an educational institution in the U.S.
- The U.S. institution issues a form to the student (Form I-20A-B for the F-1, Form DS-2019 for the J-1, and Form I-20M-N for the M-1).
- The student takes this form to the U.S. Consulate in his or her home country and applies for the appropriate visa.
- Once the visa is issued, the student arrives at a U.S. border, is inspected by an INS official, and enters the U.S.³⁶

As long as the student is outside the U.S., no prior application to or approval from the INS is required to obtain the student visa from the Consulate. This is not the case if the student is inside the U.S. in another nonimmigrant status and wishes to change status.

2. Student is in the U.S. and Wishes to Change Status

If an alien is present in the U.S. in another nonimmigrant status and wishes to change to student status, he or she must follow these steps:

- Student applies to and is accepted to an educational institution in the U.S.
- The U.S. institution issues a form to the student (Form I-20A-B for the F-1, Form DS-2019 for the J-1, and Form I-20M-N for the M-1).
- The student sends this form, with Form I-539 (Application to Change Status) to the INS Service Center with jurisdiction over his or her area of residence.³⁷ INS approves or denies the change of status application.³⁸

35. See 8 C.F.R. § 214.2(m)(11)(i) – (12) (2002).

36. See generally INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi: Hearing Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary, 107th Cong. 63 (2002) (statement of James W. Ziglar, Comm'r, Immigration and Naturalization Service).

37. See generally 8 C.F.R. § 248 (2002).

38. *Id.*

Changing status within the U.S. raises additional issues for the prospective student. To be eligible for changing nonimmigrant status, the applicant must be in a lawful nonimmigrant status and must file the application in a timely fashion (i.e., before his or her prior status expires).³⁹ Although it often takes many months for INS to act on an application for change of status, until recently the student was not prohibited from starting classes before the application was approved (or indeed even filed).⁴⁰

Since September 11, 2001, many commentators have criticized the INS rules allowing an individual who entered the U.S. in B-1/B-2 status (visitor for business or pleasure) to change his or her status to that of a student, and to remain in the U.S. and take classes as a student while the application for a change of status is pending. A timely filed application of change of status allows the applicant to remain in lawful legal status in the United States while the application is pending, so long as he or she has not otherwise violated his or her prior nonimmigrant status, retains nonimmigrant intent, and is not the subject of proceedings to remove him or her from the U.S.⁴¹ Thus, until recently an applicant could enter the U.S. as a visitor, begin taking classes at a university before filing a change of status application, and then file a change of status application and legally remain in the United States while the change of status is pending, even after his or her original period of authorized stay has expired.⁴²

Widespread public attention was drawn to this aspect of the immigration rules upon revelations that Mohammed Atta, the suspected "ringleader" of the September 11th attacks, had taken this very approach.⁴³ Atta apparently entered the U.S. on a B-2 tourist visa, applied for a change of status to M visa and took flight lessons while waiting for the INS to adjudicate his request.⁴⁴ Subsequent publication of the INS's notification to the flight school (exactly six months after September 11th) that Mr. Atta's requested change of status

39. 8 C.F.R. § 248.1 (2002). *See also* 8 C.F.R. § 248.2 (2002) (listing certain classes of non-immigrants who are ineligible for change of status).

40. 8 C.F.R. § 248.1(c) (2002) (amended by requiring that individuals in B1/B2 status who are requesting a change of status to F-1 or M-1 be approved for such status *before* beginning a course of study). 67 Fed. Reg. 18062 (interim final rule Apr. 12, 2002) (to be codified in 8 C.F.R. pts. 214 and 248).

41. 8 C.F.R. § 248.1(b) (2002).

42. *See* 8 C.F.R. § 248.1(a) and (b) (2002). *See also* INS (Pearson) Memorandum, March 3, 2000 ("The Service has designated as a period of stay authorized by the Attorney General the entire period during which a timely filed nonfrivolous application [for extension or change of status] has been pending with the Service. . ."). This type of applicant should be distinguished from the prospective student who enters the U.S. on a B-1/B-2 visitor visa to tour schools, interview, and make a decision on which school to attend. Those individuals are designated as "Prospective Students" on their Form I-94s and can easily change status to a student status.

43. Chitra Ragavan, Douglas Pasternak and Edward Pound, *Coming to America*, U.S. NEWS AND WORLD REPORT, Feb. 18, 2002, at 16.

44. *Id.*

had been approved did not help the INS's public image and led to strong calls for a change in these rules.⁴⁵

In April 2002, the INS announced that the rules governing visitors and students were changing to prohibit nonimmigrant visitors admitted under B-1/B-2 visas from taking classes until their application for change of status is approved.⁴⁶ This interim rule, published on April 12, 2002, took effect immediately upon publication.⁴⁷ Another rule change proposed at the same time provides that visitors to the U.S. (whether business visitors or tourists) will only be admitted to the U.S. for "a period of time that is fair and reasonable for the completion of the purpose of the visit."⁴⁸ Previously, visitors were given an authorized stay of six months.⁴⁹ Under the proposed rules, most visitors would be granted stays of far less than six months. Furthermore, the proposed rules would prohibit a student from changing status from a B visitor to student, *unless* the individual had declared his intention to study at the time of entry and had an I-94 marked "Prospective Student."⁵⁰

This rule change, if enacted, would make it significantly more likely that a prospective student will apply for a visa in his or her home country rather than applying to change his or her status from visitor to student while remaining in the U.S.

D. *Other Foreign Students*

Universities may also have many foreign national students who are in the U.S. in another nonimmigrant status, which allows them to attend school. These students could include lawful permanent residents (i.e. "green card" holders), individuals who are dependents of holders of a nonimmigrant em-

45. See Mark Potter and Rich Phillips, *Six Months After Sept. 11, hijackers' visa approval letters received*, March 13, 2002, available at <http://www.cnn.com/2002/US/03/12/inv.flight.school.visas/> (last visited Jan. 31, 2003); and Jonathan Peterson and Patrick J. McDonnell, *INS Sharply Cuts Length of Tourist, Student Visa Stays*, LOS ANGELES TIMES, April 9, 2002, at A1. See also Ziglar Testimony, *supra* note 36.

46. See Press Release, INS Proposes Significant Changes to Rules Governing Visitors and Students (Apr. 8, 2002), available at <http://www.ins.gov/graphics/publicaffairs/newsrels/visa.htm> (last visited Jan. 31, 2003).

47. *Id.* (The interim final rule, published in 67 Fed. Reg. 18062 (interim final rule proposed Apr. 12, 2002) (to be codified in 8 C.F.R. pts. 214 and 248), requires a change of status from B1/B2 to F-1 or M-1 before beginning a course of study.)

48. See Press Release, INS Proposes Significant Changes to Rules Governing Visitors and Students (Apr. 8, 2002), available at <http://www.ins.gov/graphics/publicaffairs/newsrels/visa.htm> (last visited Jan. 31, 2003). See also 67 Fed. Reg. 18065 (Apr. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 235 and 248).

49. *Id.*

50. *Id.* at 67 Fed. Reg. 18061. For additional information on these rule changes, see *supra* note 13 and accompanying text.

ployment-based visas,⁵¹ or even individuals in the U.S. illegally.⁵² However, as we will see below, most (if not all) of the reporting rules set forth by INS apply only to those students who hold a J, F, or M visa.

III. REQUIREMENTS FOR MAINTAINING AND REPORTING INFORMATION ABOUT FOREIGN STUDENTS TO THE INS AND DOS

The U.S. government has admitted that it does not have accurate records showing where – or whether – the approximately 547,000 individuals holding student status are attending school.⁵³ Although several attempts have been made to keep track of this information, past efforts have generally either been unsuccessful or abandoned in the face of political opposition from schools and the overwhelming nature of such a task. In 1979, the Iranian hostage crisis prompted the implementation of rules, described below, that

51. Spouses and children (limited by immigration law to only those children who are unmarried and under 21 years of age) of individuals who are lawfully present in a nonimmigrant status in the U.S. are issued dependent status linked to the primary visa-holder's status. See 8 U.S.C. § 1101(b)(1) (2002) (definition of child); and 8 C.F.R. § 214(a)(2) (2002) (listing nonimmigrant classifications for primary visa-holder and for spouse and children). These dependents could lawfully attend school in that status. For example, the spouse and child of a professional worker employed in the U.S. on an H-1B visa would be issued H-4 visas; the spouse and child of a multinational transfer employee employed in the U.S. on L-1 status would be issued L-2 visas, etc. However, the final rule governing SEVIS restricts the ability of individuals who are dependent on F-1 and M-1 students (F-2 and M-2 spouses and children) to attend school. See 67 Fed. Reg. 76256, 76266, 76275 (2002) (amending 8 C.F.R. § 214.2(f)(15)(ii) (2002); and 8 C.F.R. § 214.2 (m)(17) (2002) (stating that F-2 and M-2 spouse may not engage in full time study, and that a F-2 or M-2 child may engage only in study through high school completion)). Thus, for these individuals, a desire to study full time at a post-secondary institution would necessitate a change of status.

52. The question of whether federal law does or can bar undocumented aliens from attending U.S. universities is a controversial one. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that it violated the equal protection doctrines of the Constitution for a state to deny school-aged undocumented aliens the right to a free (primary) education on the basis of their immigration status (or lack thereof). Although the state of California recently attempted to ensure that post-secondary education could be denied to undocumented aliens in Proposition 187, that attempt was struck down by a federal court. See *League of United Latin Amn. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that federal law preempted § 8 of Proposition 187, which denied post-secondary education to illegal aliens). 8 U.S.C. §§ 1611, 1621, and 1622 provide that post-secondary education federal and state “benefits” may not be given to non-qualified (illegal) aliens. However, most commentators have interpreted this law as referring to tuition benefits rather than the “benefit” of attending school at all. See, e.g., Ellen Badger and Stephen Yale-Loehr, *They Can't go Home Again: Undocumented Aliens and Access to U.S. Higher Education*, available at <http://www.twmlaw.com/resources/general42cont.htm> (last visited Jan. 31, 2003).

53. Kate Zernike and Christopher Drew, *A Nation Challenged: Student Visas, Efforts to Track Foreign Students are Said to Lag*, N.Y. TIMES, January 28, 2002, at A1. The estimated number of foreign students attending institutions in the United States is currently 547,867, according to a report by the Institute of International Education. *DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists; Foreign Students, Visa Processing under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816, 1820 (Dec. 3, 2001) (on file with author).

required schools to report certain information about individuals who, according to INS records, had entered the U.S. to attend that school.⁵⁴ However, the program was only in place for a few years in the 1980s before it was discontinued because of the INS's inability to deal with the massive amounts of information provided.⁵⁵ Since that time, various procedures for tracking foreign students have been proposed and some, as described below, have been adopted and made law.

A. *Reporting to the INS about F-1 and M-1 Students: Historical Background*

The INS set forth specific rules governing recordkeeping and reporting requirements for F-1 and M-1 students. Section 214.3(g) of 8 C.F.R. sets out the records that an educational institution must maintain for each F or M student for whom the school has issued a Form I-20A or I-20M. The school must keep this documentation "until the school notifies the Service . . . that the student is not pursuing a full course of study."⁵⁶

Pursuant to the regulation, a school approved to issue Form I-20's for F-1 or M-1 students must maintain the following information for each F or M student to whom the school has issued a Form I-20:

- Name;
- Date and Place of Birth;
- Country of Citizenship;
- Current Address;
- Status (Full or Part-time Student);
- Date of Commencement of Studies;
- Degree Program and Field of Study;
- Whether the student has been certified for optional Practical Training (and if so, the beginning and end dates of certification);
- If the student has terminated studies, date of termination and reason if known;
- Number of credits completed each semester;
- Photocopy of the student's I-20 I.D.; and
- All documents reviewed before issuing the Form I-20 (listed in 8 C.F.R. § 214.3(k) and including the student's written application to the school, transcripts or other records of courses taken, proof of financial responsibility for the student, and other supporting documents).⁵⁷

54. *Tracking International Students in Higher Education: Policy Options and Implications for Students: Hearing Before the Subcomm. on 21st Century Competitiveness and the Subcomm. on Select Education of the House Education Comm.*, 107th Cong. 107-36 (2001) (statement of Michael Becraft, Acting Deputy Comm'r, U.S. Immigration and Naturalization Service). Also available at http://www.ins.usdoj.gov/graphics/aboutins/congress/testimonies/2001/103101_becraft.pdf.

55. *Id.*

56. 8 C.F.R. § 214.3(g)(1) (2002).

57. See 8 C.F.R. § 214.3(g) (2002).

An INS officer is authorized to request any of this information on any student or class of students.⁵⁸ Upon the school's demand, the request will be in writing.⁵⁹ The school must respond within three work days of the INS request, if the request relates to an individual student.⁶⁰ If the request relates to a group of students, the school is allowed ten days to respond.⁶¹ However, if the INS requests information on a student who is being held in INS custody, the school must respond orally on the same day the request is made.⁶² The INS will subsequently provide a written notification of such a request, if the school asks for such documentation.⁶³

The regulations also set forth a procedure for schools to regularly report information about foreign students on F and M visas to the INS. Regulations provide that at regular intervals determined by the Service (but no more often than once per session), each school approved for issuance of I-20 forms will be sent a list of the F and M students who, according to Service records, are attending the school.⁶⁴ Within sixty days of receipt of this list, the designated school official (DSO) is required to note on the list whether or not each student listed is pursuing a full course of study.⁶⁵ In addition, the DSO must provide names and current addresses of all F and M students not listed and other information "specified by the Service as necessary to identify the students and determine their immigration status."⁶⁶

The reporting requirement set forth in 8 C.F.R. § 214.3(g) depends entirely on the Service sending out a list of F and M students in the first place. The Service has not issued a list to schools since the Spring of 1988.⁶⁷

B. *Reporting to the Department of State about J-1 Exchange Visitors: Historical Background*

Unlike F-1 and M-1 students, J-1 exchange visitors are not subject to 8 C.F.R. § 214.3(g). However, J-1 visa holders (both students *and* other individuals in J-1 status, which often includes members of research staff and faculty at a university) are subject to 22 C.F.R. § 62.10(e), which sets forth rules for the sponsoring organization. Among other requirements, these regulations provide that the sponsor must:

- Ensure that the activity in which the exchange visitor is engaged is consistent with the category and activity listed on the exchange visitor's Form DS-2019 (formerly Form IAP-66);

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 8 C.F.R. § 214.3(g)(2) (2002).

65. *Id.*

66. *Id.*

67. See NAFSA Practice Advisory 2001-D (November 21, 2001) at 8 (on file with author).

- Monitor the progress and welfare of the exchange visitor to the extent appropriate for the category; and
- Require the exchange visitor to keep the sponsor apprised of his or her address and telephone number, *and maintain such information*.⁶⁸

Pursuant to 22 C.F.R. § 62.15, exchange visitor program sponsors must submit a report to the Department of State with the following information:

- Summary of activities in which exchange visitors engaged;
- Description of reciprocity activities;
- Description of cultural activities provided for the exchange visitors in the U.S.;
- Proof of compliance with the insurance coverage requirements (set forth in 22 C.F.R. § 62.14);
- Report of usage of Form DS-2019⁶⁹ (including the number of blank DS-2019 forms received in the reporting year, the number and document numbers of DS-2019 forms voided or destroyed during the year, the total number of DS-2019 forms issued that were *not* used for entry to the U.S., and the total number and document identification numbers of all remaining blank DS-2019 forms held by the sponsor); and
- Number of exchange visitors participating in sponsor's J-1 program for the reporting year.⁷⁰

In addition, the regulations state that the J-1 sponsor shall, "to the extent lawfully permitted," provide information to the Department of State regarding exchange visitor programs and "all information, reports, documents, books, files, and other records requested."⁷¹ Sponsors are also required to notify DOS in writing if the exchange visitor is terminated from the program or withdraws from the program more than 30 days prior to its anticipated expiration date (as stated on Form DS-2019).⁷²

68. 22 C.F.R. § 62.10(e) (2002) (emphasis added).

69. Although these regulations refer to Form DS-2019, the relevant form was formerly known as Form IAP-66.

70. 22 C.F.R. § 62.15 (2002).

71. 22 C.F.R. § 62.10(f) (2002).

72. 22 C.F.R. § 62.13 also requires the sponsor to provide written notification if: it changes its address, telephone, fax, composition, responsible officers for the exchange program, ownership or organizational control, financial circumstances, or it loses licensure or accreditation, or has a loss or theft of Forms DS-2019, or is engaged in litigation related to the exchange program or terminates the program. Sponsors are also required to notify the Department of State by telephone and in writing of "any serious problem or controversy which could be expected to bring the Department of State or the sponsor's exchange visitor program into notoriety or disrepute." 22 C.F.R. § 62.13(b) (2002).

C. *Brave New World of SEVIS: Recording and Reporting Requirements about F, J, and M Aliens Pursuant to the IIRIRA §641, amended by the USA PATRIOT Act §416 of 2001 and enhanced by Border Security and Visa Entry Reform Act of 2002*

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 641 of IIRIRA⁷³ directed the INS, in connection with the Secretary of State and the Secretary of Education, to develop and conduct a program for collection of information on students and exchange visitors in the United States.⁷⁴ Unlike 8 C.F.R. § 214.3(g), which only applied to F and M students, §641 covered F, J, and M students.

In June 1997, the INS began to develop a program that would implement §641.⁷⁵ First, the INS instituted a pilot program: the Coordinated Interagency Program Regulating International Students (CIPRIS) Pilot Project, which ran between June 1997 and October 1999.⁷⁶ Participants in the pilot program included the Atlanta Hartsfield Airport and District Office, the Texas Service Center, 21 education institutions, and the Department of State.⁷⁷

Based on lessons learned from CIPRIS, the INS developed the National Student and Exchange Visitor Program (SEVP) during the summer and fall of 2000.⁷⁸ SEVP, often referred to by the name of its proposed automated system (the Student and Exchange Visitor Information System, or SEVIS), was originally scheduled to be deployed in a phased, geographic fashion over an extended time period.⁷⁹ As we are all aware, however, in September 2001, the U.S. was attacked by terrorists. Once again, suspicion fell on individuals

73. 8 U.S.C. § 1372(a) (2000).

74. This provision of the Act was enacted partially as a response to the February 1993 bombing of the World Trade Center. In that case, the individual accused of driving the truck bomb into the World Trade Center had entered the U.S. on a student visa but had never attended the English language school in which he was supposed to enroll. At least one other individual who was later convicted of conspiracy in the bombing plot had entered the U.S. on a student visa but had dropped out of his university. See, e.g., Rick Montgomery, *Focus Shifts from Visas to More Tracking of Foreign Students*, KANSAS CITY STAR, Nov. 22, 2001, at A30; and Ben Fox, *INS arrests foreign students in San Diego in first-of-its-kind crackdown*, ASSOCIATED PRESS, Dec. 12, 2001 (on file with author). Section 641 envisioned a program in which schools collected information only on foreign students of certain nationalities, and those nationalities are to be listed by the INS. As of the date of this writing, the INS has not yet designated a list of nationalities, and the pilot program required participating schools to gather information on students of *all* nationalities.

75. See Frequently Asked Questions, Student and Exchange Visitor Program, *available at* <http://www.ins.usdoj.gov/graphics/services/tempbenefits/sevpqa.htm> (last visited Feb. 24, 2003).

76. *Id.*

77. *Id.*

78. *Id.*

79. See January 10, 2002 INS memo to NAFSA, *available at* <http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/sevpnews1.htm> (last visited Jan. 31, 2003).

who had entered the country on foreign student visas.⁸⁰ As a result, in October 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act).⁸¹ In May 2002, the Enhanced Border Security and Visa Entry Reform Act of 2002 was enacted.⁸² Both acts included provisions directed at F, J, and M visa holders.

Section 416 of the USA PATRIOT Act required SEVIS to be fully implemented by January 2003.⁸³ In addition, information collected must now include the date and port of entry of the student. Thus, with the additions from the USA PATRIOT Act, IIRIRA §641 will now require schools to collect and maintain the following information about each F, J, or M student who is from a designated country:⁸⁴

- Name and address of the alien;
- Type of visa;
- Date on which visa was issued or change of status was granted;
- Date of entry to U.S.;
- Port of entry to U.S.;
- Current academic status of alien (full-time, part-time, and whether alien is satisfying terms and conditions of program); and
- Any disciplinary action taken by the sponsor against the alien, or any change in alien's participation in the program, as a result of the aliens being convicted of a crime.⁸⁵

The INS announced its intention to put SEVIS into action by or before the Congressionally mandated deadline of January 2003.⁸⁶ Accordingly, on May

80. Hani Hanjour, one of the September 11th terrorists, apparently entered the U.S. on a Form F-1 visa in December 2000, but never attended the school that had issued him an I-20. Chitra Ragavan, Douglas Pasternak and Edward T. Pound, *Coming to America*, U.S. NEWS AND WORLD REPORT, Feb. 18, 2002, at 16. Instead, he allegedly steered American Airlines Flight 77 into the Pentagon. Rick Montgomery, *Focus Shifts from Visas to More Tracking of Foreign Students*, KANSAS CITY STAR, Nov. 22, 2001, A30.

81. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, §507, 115 Stat. 272 (2001).

82. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §1, 116 Stat. 543 (2002).

83. 8 U.S.C. § 1272(a) (2000).

84. The INS has thus far designated all countries for SEVIS rather than singling out only a few.

85. Under the final rule governing SEVIS, schools must also use SEVIS to note the student's enrollment; start date of the next term; failure to enroll or to take a full course-load; and graduation date and any change of address. 67 Fed. Reg. 76256, 76279 (Dec. 11, 2002) (to be codified at 8 C.F.R. pts. 103 and 214). SEVIS will also comprehend the additional reporting requirements of the Customs Border Security Act, Pub. L. No. 107-173, 116 Stat. 933. *Id.*

86. See *Tracking International Students in Higher Education: Policy Options and Implications for Students: Hearing Before the Subcomm. on 21st Century Competitiveness and the Subcomm. on Select Education of the House Education Comm.*, 107th Cong. 107-36 (2001) (statement of Michael Becraft, Acting Deputy Comm'r, U.S. Immigration and Naturalization Service). Also available at <http://www.ins.usdoj.gov/graphics/aboutins/congress/>

16, 2002, the INS issued a proposed rule for implementation of SEVIS,⁸⁷ and on July 1, 2002, the Service issued an immediately effective interim rule establishing eligibility criteria for preliminary enrollment in SEVIS.⁸⁸ Eligible schools were permitted to choose to preliminarily enroll in SEVIS and begin using the system prior to the mandatory January 2003 date. As of September 11, 2002, 1,921 schools were in “various stages” of the enrollment process, and at least 736 were using the SEVIS system to issue and monitor student records.⁸⁹ An interim rule issued on September 25, 2002, provided certification and enrollment procedures for schools who did *not* engage in preliminary enrollment.⁹⁰ However, in part due to the fact that the INS did not release a final SEVIS rule until December 11, 2002, the INS was forced to grant a “grace period” on January 29, 2003.⁹¹

How does SEVIS work? Once a school is enrolled (and a school *must* be enrolled at this time to have the ability to issue Forms I-20 and DS-2019), the school will create necessary forms for F, J, and M students exclusively through the electronic SEVIS system.⁹² Once the Form I-20 is issued through SEVIS, the system should thereafter be updated with information about the students’ admissions to the U.S. and any changes to the students’ records.

testimonies/2001/103101_becraft.pdf (last visited Jan. 31, 2003). See, e.g., *Immigration and Naturalization Service’s Implementation of the Foreign Student Tracking Program: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary*, 107th Cong. 107-105 (2002) (testimony of Janis Sposato, Assistant Deputy Executive Assoc. Comm’r, Immigration Services Div., U.S. Immigration and Naturalization Service) (disputing Department of Justice’s Office of the Inspector General’s report of May 20, 2002 “The Immigration and Naturalization Service’s Contacts with Two September 11 Terrorists: A Review of the INS’s Admissions of Mohammed Atta and Marwan Alshehhi, its Processing of their Change of Status Applications, and its Efforts to Track Foreign Students in the United States.” That report questioned INS’s ability to implement SEVIS by the January 2003 deadline.).

87. 67 Fed. Reg. 34862 (proposed May 16, 2002) (to be codified at 8 C.F.R. pts. 103 and 214).

88. 67 Fed. Reg. 44343 (July 1, 2002).

89. *Immigration and Naturalization Service’s Implementation of the Foreign Student Tracking Program: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary*, 107th Cong. 107-105 (2002) (testimony of Janis Sposato, Assistant Deputy Executive Assoc. Comm’r, Immigration Services Div., U.S. Immigration and Naturalization Service). According to INS, over three thousand schools were admitted to use SEVIS as of January 1, 2003. INS Notice: “SEVIS Grace Period”, Jan. 29, 2003 (on file with author).

90. See 67 Fed. Reg. 60107 (proposed Sept. 25, 2002) (to be codified at 8 C.F.R. pts. 103 and 214).

91. See 67 Fed. Reg. 76256 (Dec. 11, 2002); INS Notice: “SEVIS Grace Period”, Jan. 29, 2003 (noting that INS would continue to accept non-SEVIS forms until February 15, 2003) (on file with author).

92. The final rule does allow schools until August 1, 2003, to enter all existing students into SEVIS. New students, however, must only be issued SEVIS forms after January 30, 2003. See 67 Fed. Reg. 76256, 76259 (Dec. 11, 2002). The Department of State has also issued a rule specifying the enrollment process in SEVIS for exchange visitor programs. See 22 Fed. Reg. 76307 (Dec. 12, 2002).

The final rule also took a more restrictive attitude towards reinstating any student to visa status who has failed to comply with applicable rules.⁹³

The final rule, released in December 2002, provided that schools who did not undergo preliminary enrollment must undergo certification review and enroll in SEVIS prior to January 30, 2003, or lose their ability to enroll new F or M students.⁹⁴

In April and May 2002, Congress passed additional legislation that would further enhance the collection and maintenance activities of SEVIS. The Enhanced Border Security and Visa Entry Reform Act of 2001⁹⁵ was passed by unanimous vote in the Senate on April 18 and passed the House on May 8, 2002. The President signed the legislation into law on May 14, 2002. This legislation adds to the list of items schools must collect for F, J and all foreign students to include: the date of the foreign student's enrollment in the program; the degree program and field of study of the foreign student; and the date of the foreign student's termination of study and reason for termination.⁹⁶ It would also require INS to establish electronic monitoring of foreign student information, including:

- The acceptance of a foreign student by a U.S. educational institution or exchange visitor program;
- The issuance of a visa for the foreign student or exchange visitor;
- The entry of the student into the U.S.;
- The notification to the institution that the student has entered the U.S.;
- The registration of the student into the program; and
- Any change in school or termination of studies or participation in the program.⁹⁷

In addition, the law requires universities (or other sponsors) to inform the INS within 30 days of the registration deadline for each academic term if the foreign student has not enrolled for classes or otherwise begun participation in the program.⁹⁸ Because SEVIS is functional at this time, this article will

93. The rule provides that an F or M student will not be eligible for reinstatement unless he or she applies within 5 months of falling out of status. 67 Fed. Reg. 76256, 76264-65 and 76278 (Dec. 11, 2002) (amending 8 C.F.R. § 214.2(f)(16) (2002)). Furthermore, even within that time period, reinstatement will only be considered if the student can show that a failure to reinstate would create "extreme hardship" or that the drop out of status was caused by circumstances beyond the student's control such as "serious injury or illness, closure of the institution, or natural disaster." *Id.*

94. Requiring Certification of all Service Approved Schools for Enrollment in the Student and Exchange Visitor Information Services, 67 Fed. Reg. 60107 (proposed Sept. 25, 2002) (to be codified at 8 C.F.R. pts. 103 and 214).

95. See Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

96. See *id.*

97. *Id.* at § 501(a)(1)(3).

98. *Id.* at § 501(a)(1)(4).

not address the Interim Student and Exchange Visitor Authentication System (ISEAS) in detail.⁹⁹

Section 501(c) of the Border Security Act mandated that as of September 11, 2002, the Department of State could not issue F, J, or M visas unless the sponsoring institution had provided the Department with "electronic evidence of documentation of the alien's acceptance at that institution."¹⁰⁰

Regulations implementing this requirement were issued on September 18, 2002,¹⁰¹ and created the Interim Student and Exchange Visitor Authentication System or ISEAS.¹⁰² ISEAS is a web-based application that allows sponsors of F, J, or M students to electronically inform the Department of State about the individuals sponsored by that institution. Until the U.S. Consulate receives the verification, it is not free to issue the appropriate visa to the student, even if all other eligibility criteria have been demonstrated.

ISEAS was intended to remain in place only until SEVIS is fully implemented. At that point, SEVIS will presumably incorporate the tracking and monitoring of information within that system.¹⁰³

D. *What about other Foreign Students?*

Although INS does not require schools to report information about other foreign citizen students (for example, the dependents of persons in nonimmigrant status in the U.S.), schools do keep track of this information for other purposes. The Integrated Postsecondary Education Data Survey (IPEDS), which is governed by federal law applying to program participation agreements for institutions receiving federal financial aid, requires data on enrollment in numerous categories, including non-resident alien status.¹⁰⁴ Accordingly, a post-secondary institution should have in place a process for tracking and providing information for the IPEDS survey.

99. When the INS provided the two-week grace period for SEVIS compliance, ISEAS did continue during that time. See Dept. of State Table 026911, Jan. 30, 2003 (on file with author) (noting that ISEAS would continue until SEVIS was fully implemented).

100. *Id.* at §501(c).

101. The service noted in its SEVIS proposed rule that "[A]lthough not identical, all of [the data elements required by the Border Security Act] are reflected in the current SEVIS requirements. If this legislation is enacted, the Service will review it to determine what, if any new statutory reporting requirements are created. If necessary the Service will impose any such additional requirements after this proposed rule is published by incorporating those statutory requirements (without further rulemaking notice) into any interim or final rule implementing SEVIS." 67 Fed. Reg. 34862, 34865 (proposed May 16, 2002) (to be codified at 8 C.F.R. pts. 103 and 214). See final rule, 67 Fed. Reg. 76256 (Dec. 11, 2002).

102. 67 Fed. Reg. 58693 (proposed Sept. 18, 2002) (to be codified at 22 C.F.R. pt. 41). As one might expect, the fact that the regulations followed the deadline prohibiting issuance of visas without electronic verification by a week created some confusion and resulted in some students being "stranded" at U.S. Consulates, unable to obtain visas until electronic verification was received via a system not yet functional.

103. See *supra* note 101 and accompanying text. At the time of this writing, it is unclear whether SEVIS has in fact been fully implemented such that ISEAS could stop operation.

104. 20 U.S.C. § 1094(a)(17) (2002).

IV. INTERACTION AND IMPACT OF FERPA

Most of the regulations discussed above, that require universities to maintain and report to various governmental agencies information about foreign students, do not explicitly address how these rules interact with the Family Educational Rights and Privacy Act of 1974 (FERPA).¹⁰⁵ FERPA protects the privacy rights of students¹⁰⁶ by prohibiting universities from releasing any “personally identifiable information”¹⁰⁷ from student “educational records” without the student’s prior written consent.¹⁰⁸ Therefore, each existing or proposed law or rule requiring a university to release information about a student to a third party, and every third party (whether governmental or private) request for information about a student, must be examined to ensure that the provision does not violate FERPA. But how do FERPA and the immigration laws work together?

To understand the complex interaction of FERPA and the immigration rules, one must first understand that there is no single overriding rule governing this situation. FERPA does not provide that it trumps all federal immigration laws, nor do the immigration regulations uniformly note that they supercede FERPA.¹⁰⁹ Instead, each rule or type of request for information must be examined to determine whether it will be barred by FERPA.

105. A notable exception is §641 of IIRIRA, which explicitly notes that FERPA “shall not apply to aliens [who are nationals of countries designated by the Attorney General and have or are applying for F, J, or M status] to the extent that the Attorney General determines necessary to carry out the program.” 8 U.S.C. § 1372(2) (2002). The Attorney General has not issued guidance to exactly what extent he believes is “necessary to carry out [SEVIS].” It seems clear, however, that universities may comply with SEVIS’s requirements without fearing that such cooperation will expose them to charges of FERPA violations.

106. FERPA applies only to those individuals who are “students” as defined in 20 U.S.C.A. § 232g(a)(6) (West Supp. 2002): “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does *not include a person who has not been in attendance at such agency or institution.*” 20 U.S.C.A. § 1232g(a)(6) (West Supp. 2002) (emphasis added). Accordingly, it should be remembered that FERPA prohibitions do *not* apply to applicants to an institution, whether or not accepted, who do not enroll in the institution.

107. 34 C.F.R. § 99.3 (2002) defines personally identifiable information as:

- The student’s name;
- The name of the student’s parent or other family member;
- The address of the student or student’s family;
- A personal identifier, such as the student’s social security number or student number;
- A list of personal characteristics that would make the student’s identity easily traceable; or
- Other information that would make the student’s identity easily traceable.

108. See 20 U.S.C.A. § 1232g(b) (West Supp. 2002).

109. As will be seen below, only in one instance (IIRIRA §641) did Congress specifically provide universities with a waiver of FERPA when providing information about foreign students. Even in that case, the command was subject to certain restrictions and reservations.

A. ERPA: Relevant Exceptions

Every university attorney is familiar, at least to some extent, with the basic provisions of, and exceptions to, FERPA. However, a brief discussion and review of the most relevant exceptions and exemptions to the FERPA prohibition on disclosing personally identifiable information from student records without consent is useful before examining how FERPA affects each federal rule requiring reporting of information and the types of potential requests for information.

1. Directory Information

Perhaps the most important exception, for "directory information," is contained within section 1232g(b) itself: the school is only prohibited from disclosing personally identifiable information "other than directory information."¹¹⁰ The other exceptions are enumerated in 34 C.F.R. § 99.31.¹¹¹

Directory information "means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed."¹¹² The Code of Federal Regulations lists specific pieces of information that can be directory information, such as:

the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.¹¹³

An institution may disclose directory information, however, if and only if it has given "public notice" to the parties (parents of students in attendance and eligible students themselves) that the institution has designated such information as directory information and will reveal it *unless* the parent or eligible student requests that such information not be divulged.¹¹⁴ The school may designate a specific period of time in which the student must notify the institution of his or her objection.¹¹⁵

Although FERPA provides that a student may request that directory information not be disclosed about him or her, that provision applies *only while*

110. 20 U.S.C.A. § 1232g(b)(1) (West Supp. 2002). *See also* Family Educational Rights and Privacy Act, 34 C.F.R. § 99.37 (2002) (discussing conditions applicable to disclosing directory information).

111. Other exceptions include, *inter alia*, release of information to other school officials for legitimate educational interests, to various officials in connection with application for financial aid, to organizations conducting research to further educational goals, and others. 34 C.F.R. § 99.31 (2002).

112. 34 C.F.R. § 99.37 (2002).

113. *Id.*

114. *Id.*

115. *Id.*

*the student is enrolled at the university.*¹¹⁶ A school is not required to honor a request by a student who is no longer enrolled, as long as the request is made after the individual has ceased enrollment.¹¹⁷

2. Compliance with Judicial Order or Subpoena

a. FERPA regulations: 34 C.F.R. § 99.31(9)

A second relevant exception to FERPA is found in 34 C.F.R. § 99.31(9), which provides that a school may release protected information without consent in order to comply with a judicial order or lawfully issued subpoena.¹¹⁸

While compliance with a judicial order or subpoena appears fairly self-explanatory, there are a few points counsel should consider with this exception. First, counsel should ensure that the judicial order or lawfully issued subpoena has been issued in compliance with state laws and regulations and is indeed enforceable in their jurisdiction. Secondly, if the order or subpoena appears to be lawfully issued and enforceable, counsel must make “a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action.”¹¹⁹ This is the case unless the subpoena or order was the result of action by a federal grand jury or for law enforcement purposes, and the court or issuing agency has specifically ordered that the contents of the subpoena not be disclosed.¹²⁰

b. New Law: USA PATRIOT ACT addition to FERPA

The September 11th attacks resulted in a significant addition to FERPA’s language specifically targeted for the investigation and prosecution of terrorism. In section 507 of the USA PATRIOT Act, Congress amended FERPA to add a provision authorizing the Attorney General to apply for and obtain, *ex parte*, an order requiring an educational agency or institution to provide:

education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title.¹²¹

To qualify for this *ex parte* court order, the Attorney General must “certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain” relevant information for the government investigation or prosecution.

116. 8 C.F.R. § 99.37(b) (2002).

117. *Id.*

118. 34 C.F.R. § 99.31(9) (2002).

119. *Id.*

120. 8 C.F.R. § 99.31(9)(ii)(A)–(B) (2002).

121. USA PATRIOT Act of 2001, Pub. L. No. 107-56, §507, 115 Stat. 272 (2001) (amending FERPA to add subsection (j) to 20 U.S.C.A. § 1232(g)).

3. Health and Safety Emergency Exception

This exception provides that personally identifiable information may be disclosed without prior consent if "knowledge of the information is necessary to protect the health or safety of the student or other individuals."¹²² This exception is to be strictly construed.¹²³ Does this exception apply to government requests for information about foreign students within the scope of a government investigation involving terrorism? The exception was traditionally seen as an emergency measure to be used sparingly. In the wake of the September 11th attacks, however, several practitioners hypothesized that the "health and safety exception" could be more broadly construed to allow government law enforcement officials access into a wide array of student educational records on the basis that it was necessary to protect the health and safety of Americans. Indeed, the Family Policy Compliance Office (the Department of Education office which governs the administration of FERPA) stated in the days following the September 11th attacks that the health and safety emergency provision could be used in national emergencies such as September 11, 2001.¹²⁴

The Family Policy Compliance Office has issued guidance as to how the health and safety emergency exception should be applied in the wake of the September 11th attacks. On April 12th, it discussed whether the health and safety exception could be utilized to respond to requests for information about foreign students if the request is part of a terrorism investigation.¹²⁵ The guidance stated that the exception *could* apply to

nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude and specificity of information concerning the emergency. [T]his exception is temporarily limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student's education records.¹²⁶

At the time of this writing, it appears inadvisable to rely upon a broad interpretation of the "health and safety" exception. This exception is designed to be preventive in nature and to allow universities to release information in order to prevent future harm, not to respond to law enforcement efforts to prosecute past actions. Without knowledge of a specific threat that could be averted upon the release of student information, counsel would be well advised to be cautious and, in accordance with 34 C.F.R. § 99.37(c), con-

122. 34 C.F.R. § 99.36(a) (2002).

123. 34 C.F.R. § 99.36(c) (2002).

124. See, e.g., CUA Counsel Online, <http://counselonline.cus.edu/topics.cfm> (last visited Jan. 31, 2003). Telephone interview with Kathy Wolan, Family Policy and Compliance Office, April 9, 2002.

125. U.S. Dept. of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities, April 12, 2002, available at http://www.ed.gov/offices/OM/fpc/docs/ht_terrorism.doc, p. 3 (last visited Jan. 31, 2003).

126. *Id.*

tinue to interpret the health and safety exception narrowly. This is particularly true in light of the language, discussed above, included in the USA PATRIOT Act regarding the availability of *ex parte* orders in connection with the investigation and prosecution of terrorism crimes. If a true emergent need for the information exists, the government now has the ability to obtain an order for the information, *ex parte* and without even providing a specific factual basis to the court for the need for the information.¹²⁷ This ability should in most cases obviate the need for reliance on the health and safety exception.

V. CONCLUSION: PRACTICAL GUIDANCE— APPLICATION OF FERPA TO REPORTING REGULATIONS AND REQUESTS

With these exceptions in mind, let us consider how FERPA applies to the reporting requirements discussed above and to requests by third parties for information about foreign students. In the wake of the September 11th attacks, an American Association of Collegiate Registrars and Admission Officers survey found that 220 of 1,188 institutions responding to an October 4, 2001, question had been contacted by government officials requesting information on foreign students.¹²⁸ Clearly, university counsel need to be prepared for requests as the investigation continues, and in the event of another attack.

A. *Application to Reporting Requirements of 8 C.F.R. § 214.3(g) and 22 C.F.R. § 62.10(e)*

Readers will recall that 8 C.F.R. § 214.3(g), discussed *supra* at Section III.A., requires educational institutions to maintain, provide upon request, and regularly report (if requested) information about its F and M students to the INS. As noted above, the INS has not requested regular reporting for many years. However, institutions should be prepared to respond to INS requests for information about specific students or a group of students pursuant to this regulation, and/or to report if the INS reinstates the reporting requirements.

Similarly, 22 C.F.R. § 62.10(f) requires institutions to provide information “to the extent lawfully permitted,” to the Department of State regarding J-1 exchange visitors.¹²⁹ Institutions are also required to notify the Department

127. Although Section 507 of the USA PATRIOT Act requires that the Attorney General certify that “specific and articulable” facts exist supporting the government belief that the requested education records contain information relevant to a terrorism investigation or prosecution, the act itself does not appear to contemplate that the Attorney General must actually supply the court with these facts, but may simply certify that the facts exist. USA PATRIOT Act of 2001, Pub. L. No. 107-56, §507, 115 Stat. 272 (2001).

128. Margie Watson, *Law Enforcers not Asking Rutgers for Foreign Students' Data*, UNIVERSITY WIRE, Nov. 27, 2001 (on file with author). Should there be another terrorist threat or attack, universities should expect additional requests for information.

129. 22 C.F.R. § 62.10(f) (2002).

of State if the exchange visitor terminates his program more than 30 days prior to the anticipated end date.¹³⁰

Does FERPA allow the university to provide this information? Yes. Why? Because the institution may provide personally identifiable information without violating FERPA to the extent that the student has given his or her consent to providing the information. Per his or her I-20 or DS-2019 form, the student has given consent to providing this type of information.

In the case of an F and M student, the Form I-20 itself provides the student's consent for the university to provide "any information which is needed by INS pursuant to 8 C.F.R. § 214.3(g) to determine [the students] nonimmigrant status." In the case of J-1 visitors, Form DS-2019 provides a wider consent: authority for "the [DOS approved] sponsor and any educational institution named on the Form IAP-66 [now DS-2019] to release information to [DOS] relating to compliance with Exchange Visitor Program regulations." This consent also explicitly references that it is designed to serve for the purpose of 20 U.S.C. § 1232g (FERPA).

Does the consent provided by the Form I-20 or Form DS-2019 qualify as "consent" under FERPA? 34 C.F.R. § 99.30 requires a "signed and dated written consent" that must:

- Specify the records that may be disclosed;
- State the purpose of the disclosure; and
- Identify the party or class of parties to whom the disclosure may be made.¹³¹

The forms appear to satisfy these requirements.¹³² However, the university must note that *each of these consents only allows release of information to certain organizations. Form I-20 allows for release of certain information to INS; Form DS-2019 allows for release of certain information to the Department of State. Therefore, it is unlikely that either of these forms alone would allow the sponsoring institution to release student information protected by FERPA to other bodies.*

The university should also remember that, whenever a disclosure is made under this provision, the institution is obligated to provide the eligible student with a copy of the records provided, upon request.¹³³

B. *Application to Reporting Requirements Pursuant to IIRIRA §641 (SEVIS)*

As noted above, §641 of IIRIRA explicitly provided that FERPA "shall not apply to aliens described in subsection (a) of this Section, to the extent

130. 22 C.F.R. § 62.13 (2002).

131. 8 C.F.R. § 99.30 (2002).

132. See also U.S. Dept. of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities, April 12, 2002, available at http://www.ed.gov/offices/om/fpc/hot_topics.html, p.3. (concurring that this consent is sufficient for FERPA)

133. 8 C.F.R. § 99.37(c) (2002).

that the Attorney General determines necessary to carry out the program.”¹³⁴ Accordingly, compliance with the SEVIS program should not expose an educational institution to charges of violating FERPA.

C. *Application to Requests for Information from Other Governmental Agencies*

The harder case is when another government agency – the FBI, police, or state agency – requests information about a particular student or a group of students. In these cases, it is important to note that IIRIRA §614, relevant sections of the Code of Federal Regulations discussed above, the Form I-20 and DS-2019, all prohibit providing information to groups or individuals other than those specifically authorized. As noted above, in the days immediately following September 11th, some universities relied upon the “health and safety” exception to FERPA to provide such information when it appeared that the request was related to the investigation of those terrorist attacks. However, now that the immediacy of that event has passed, universities are well advised to take a cautious approach and require a subpoena before releasing information about their students that has not been designated as “directory information.” An analysis of any request should consider the following:

- Is the requested information directory information?
- Has the student provided consent for the release of *this* information to *this* requesting agency on Form I-20 or Form DS-2019?
- Does the university have *specific* knowledge of a health/safety threat, to the student or to others, that the provision of this information to the requesting body would likely prevent?¹³⁵

If the answers to these questions are no, the institution should require a lawfully issued court order or subpoena before providing the requested information. The broad provisions of USA PATRIOT Act should provide government requesters with ample ability to obtain an *ex parte* order for release of the documents. A university requirement for a judicial order should not significantly delay or impede a government investigation.

D. *Final Thoughts*

This area of law is rapidly changing. Even during the course of making final edits to this article, ISEAS was implemented and rules relating to SEVIS were published. New security clearances have resulted in delays in visa issuance for many individuals, and a new “National Security Entry-Exit

134. §641(c)(2) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

135. In cases where specific information is available but the institution is uncertain of whether the health and safety exception applies, the Family Policy and Compliance Office officials are available for guidance at 202-260-3887.

Registration System” has imposed “special registration” requirements for some aliens.¹³⁶

In addition, the INS is considering barring any individual who entered the U.S. in B visitor status from changing status to student.¹³⁷ If implemented, the rule would prohibit a prospective student from entering in B status and then changing status to that of a student, unless the individual identified himself as a prospective student at the time of entry.¹³⁸ Other rule changes and additional pieces of legislation are sure to follow as the U.S. considers how the INS will be incorporated into the new Department of Homeland Security and what changes to the admission of foreign citizens will best protect our nation from threats to our security. As these changes are implemented, university attorneys and staff must be careful and attentive to ensure that their organization keeps pace with this rapidly changing area.

136. See also 67 Fed. Reg. 66765 (Nov. 6, 2002) (expanding special registration to certain nationals of Iran, Iraq, Libya, Syria and Sudan who are already present in the U.S.); 67 Fed. Reg. 70525 (Nov. 22, 2002) (requiring special registration for certain nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen); 67 Fed. Reg. 77641 (Dec. 18, 2002) (requiring special registration for certain nationals of Pakistan and Saudi Arabia); and 68 Fed. Reg. 2363-03 (Jan. 16, 2003) (requiring special registration for certain nationals of Bangladesh, Egypt, Indonesia, Jordan and Kuwait).

137. 67 Fed. Reg. 18065 (proposed Apr. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 235, and 248).

138. *Id.* at 18066-67, 18068.