March 11, 2020

Stephanie Valentine
PRA Coordinator
Director of the Information Collection Clearance Division
Department of Education
550 12th Street, SW, PCP, Room 9089
Washington, DC 20202-0023

RE: Agency Information Collection Request – Foreign Gift and Contracts Disclosure – Docket No. ED-2019-ICCD-0114

Dear Ms. Valentine,

On behalf of the American Council on Education and the undersigned higher education associations, I write to offer comments on the proposed Information Collection Request (ICR) published in the *Federal Register* by the Department of Education (Department) on February 10, 2020, Docket No. ED-2019-ICCD-0114 (hereinafter referred to as "Feb. 2020 ICR").

As we have previously stated in response to prior versions of the Department's ICR, the higher education community takes seriously the risk to our institutions from illicit technology transfer and undue foreign influence. As part of efforts to protect against such risks, we are committed to complying with our obligations to report foreign gift and contract information under Section 117 (Sec. 117) of the Higher Education Act of 1965 (HEA). However, as we have repeatedly suggested, the interests of both the government and the higher education community are best served by sufficient guidance from the Department about the requirements of Sec. 117 compliance through a full-fledged regulatory notice and comment process, something which has never been provided. Indeed, Chairman Portman called for new guidance for Sec. 117 in his opening statement and the Department acknowledged the need for such guidance during testimony in February 2019 at a hearing of the Senate Permanent Subcommittee on Investigations.[1]

With regard to the Department's Feb. 2020 ICR, we recognize that the Department has incorporated changes from the revised ICR issued in December, which narrowed the information being sought and that the Department intends to address the issue of "true copies" of gift and contract agreements through a

[1] Senate Permanent Subcommittee on Investigations hearing entitled, "China's Impact on the U.S. Higher Education System" (Feb. 2019). https://www.hsgac.senate.gov/subcommittees/investigations/hearings/chinas-impact-on-the-us-education-system.

separate notice and comment rulemaking. Nonetheless, we continue to believe that the Department's Feb. 2020 ICR still exceeds the disclosure reporting required under the statutory authority set out in Sec. 117 in two key ways.

- **No statutory basis for requiring reporting of individual names:**

First, Sec. 117 specifically addresses reporting requirements for foreign gifts and contracts from individuals or entities in excess of $250,000. As we stated in response to the Dec. 2019 ICR, the law mandates ***only*** the reporting of ***aggregate*** amounts of such gifts, and it does ***not*** require the reporting of the ***identity*** of the individual or entity providing the gift or entering into the contract. Rather, Sec. 117 requires reporting of those gifts and contracts to be ***categorized by the country*** based on citizenship or the "principal residence" if the citizenship country is unknown. The name of the donor or contracting entity is only required when the counterparty is a **foreign government**. For restricted and conditional gifts, there is some additional reporting required beyond the amount, including the date and a description of the conditions or restrictions. But even in these cases, Sec. 117 does not direct that the **name** of the donor or contracting party be disclosed (except for when the donor or contracting party is a foreign government).[2] See 20 U.S.C. § 1011f(b)-(c). Despite the specific statutory language, the Feb. 2020 ICR—like the Dec. 2019 ICR—require reporting of detailed "disaggregated information from each" gift or contract, including the date received, recipient (including any and all intermediaries), contract start and end dates, and ***the names and addresses of all donors or contracting entities***. Notwithstanding the Department's assertions to the contrary, the proposed reporting of "names" of individual foreign donors is not required or authorized anywhere in the statute. This effort to expand disclosure reporting beyond the statutory requirements exceeds the Department's authority and is therefore unlawful. If the Department wants such authority, Sec. 117 needs to be amended.[3]

[2] The Department reiterates a baffling assertion from its Dec. 2019 ICR that "the statute does not carve out an exception for institutions to withhold the name or address of an anonymous party." Dec. 2019 Summary of Responses, unnumbered p. 7. This makes no sense. The statute contains no exception for disclosure of names and addresses for the simple reason that it does not require the reporting of such information.

[3] The absence of statutory authority for the Department's proposed ICR requiring institutions to report names and addresses of individual donors puts institutions of higher education at risk of breaching the European Union's General Data Protection Regulation (GDPR), which could result in fines of up to 20 million Euros. The GDPR requires organizations—even ones located outside the EU—that process and hold the personal data of EU subjects to carefully protect such data. Although one of the lawful bases for processing personal data is "legal obligation," the ICR—in absence of statutory authority or even promulgated full regulation—potentially exposes colleges and universities to significant fines for disclosure without a satisfactory lawful basis under the GDPR, which defines "personal data" to include any information that relates to an identified or identifiable natural person, including a person's name, address (physical or email), personal phone number, IP address, or other unique identifier. Moreover, the GDPR mandates that certain "special categories" of personal data—such as information about an individual's political opinions or religious or philosophical beliefs—receive an even higher level of protection. It is not difficult to envision that a gift to a university might, for example, reveal an EU-resident donor's religious

- **Offering FOIA protection does not overcome the statute's expectation that no names would be required:**

The Department's promise of confidentiality under FOIA provides little assurance because it appears to be inconsistent with the Department's FOIA regulations. More specifically, the Department asserts that FOIA requires it to withhold donor names and addresses as confidential "business and financial information" under FOIA Exemption 4, but such an assertion ignores that the boundaries of Exemption 4 as applied to a particular fact pattern are subject to adjudication beyond the control of the Department. More specifically, FOIA-exemption claims are subject to a process by which the government addresses a party's request for disclosure of another party's documents or information, with litigation as the ultimate recourse for a decision in that regard. The Department's own FOIA regulations demonstrate that Exemption 4 does not in and of itself mandate or assure nondisclosure. Under those regulations, the submitter (here a college or university) is required to use "good faith efforts to designate, by appropriate markings. . . any portion of its submission that it considers to be business information protected from disclosure under Exemption 4. . . ." Blanket designations are not considered a "good faith effort." See 34 C.F.R. §§ 5.11(c)(1), (3). The Department then considers such a request in accordance with a step-by-step process. The process begins with Department notification to the submitter that a party has made a FOIA request for information that the submitter designated as confidential business information. The submitter then has an opportunity to object to disclosure by way of detailed written grounds (with failure to object constituting a waiver of rights). Id § 5.11(d)-(f). If the Department determines to disclose the submitter's information, the submitter is left with the option to bring a lawsuit, a costly endeavor with an unpredictable outcome. Id. § 5.11(j).

Even if the Department determines that FOIA Exemption 4 applies to the submitter's information, the requester may file a lawsuit to compel disclosure of the submitter's business information—again, a process with unpredictable results. Id. § 5.11(h). Complying with this process for the countless records potentially covered by Sec. 117 reporting would be extremely burdensome for both the Department and institutions.

In short, FOIA Exemption 4 is simply not a guarantee that information will be secure from release under FOIA. Administrative FOIA review and FOIA litigation are inherently unpredictable processes that depend on interpretative judgments, and thus would present a high risk that donor names and addresses might be

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beliefs, possibly subjecting him or her to negative personal or professional repercussions that could chill such charitable giving.

released despite the Department's promise of confidentiality. Moreover, in the context of potential FOIA litigation, the Department's promise may well be construed as inconsistent with the specific public inspection requirements in Sec. 117. Id at 5.11(g); 20 U.S.C. § 1011f(e). This could leave institutions and donors with no confidentiality protections whatsoever. If the Department believes that our analysis concerning the FOIA confidentiality protections is incorrect, then the Department should clearly specify why this analysis is wrong and how it intends to protect the reported information under Department's FOIA regulations.

- **The Department will be jeopardizing safety as well as invading privacy without statutory authorization:**

In the event that this identifying information were to become public, it is not difficult to envision instances of a foreign individual or entity donor being exposed to real risk, including physical or other harm, from the government or other actors if the name of the donor is made public by the Department. Here are some potential examples:

- a foreign individual from a religious minority in his or her home country who makes a donation to a religiously affiliated college could be subject to reprisal and religious persecution;
- an individual donor from a country where many believe females should not be educated who makes a gift to support college tuition for young women;
- an individual or entity donation from a Middle Eastern country to support research on Islamic fundamentalism and its connection to ISIS or other designated terrorist groups;
- an individual or entity donation from Russia to support research on corruption under Vladimir Putin's regime; or,
- an individual or entity donation from a country plagued by regular kidnapping of the affluent or perceived affluent for ransom.

The primary takeaway is that the Department's blanket assertion of protection for these records under FOIA fails to recognize the practical realities of FOIA, the uncertainties of the FOIA process, and the arguments that might be asserted to undercut the treatment of donor information as confidential business information under Exemption 4. Instead, the Department's confidentiality promises are in fact illusory, presenting a very real risk of disclosure of this personal identifying information, which will no doubt have a chilling effect on donations.

Recommendation:

The Department should adhere to what the statute requires for the reporting of gift and contract information.

Second, we appreciate that the Department's Feb. 2020 ICR no longer requires institutions to "list all legal entities (including foundations or other organizations) that operate for the benefit for or under the auspices of [the] institution."[4] Nonetheless, we continue to believe that the Department is seeking reporting beyond its statutory authority.

The Feb. 2020 ICR indicates that institutions will have to report foreign gifts or contracts which benefit the institution if made through separate "intermediaries" even though such legal entities may be outside of their "direct control." The "rebuttable presumption" language in the Feb. 2020 ICR is an acknowledgement by the Department that institutions may—and, practically speaking, must in some cases—make their own good faith assessment whether an entity that operates substantially for the benefit of the institution is, in fact, sufficiently controlled by the institution to fall within the scope of the institution's Sec. 117 reporting requirements.

As we noted in our Nov. 5, 2019, comment letter, Sec. 117 defines an "institution" narrowly as "any institution, public or private, or if a multi-campus institution, any single campus of such institution, in any State that – (A) is legally authorized within such State to provide a program of education beyond secondary level; (B) provides a program for which it awards a bachelor's degree (or provides not less than a 2-year program which is acceptable for full credit toward such a degree) or more advanced degrees; and (C) is accredited by a nationally recognized accrediting agency or association and to which institution federal financial assistance is extended (directly or indirectly through another entity or person), or which institution receives support from the extension of Federal financial assistance to any of its subunits." However, because the Department has never regulated Sec. 117, including the definition of an institution, it is bound by the narrow definition of "institution" set out in the statute.

Recommendation:

The Department should limit reporting in the information collection request to the definition of institution set forth in the statute.

For the reasons set forth above, the Department's proposed information collection request unlawfully exceeds the authority granted to it by Congress in

[4] Feb. 2020 Summary of Responses, unnumbered p. 3.

Sec. 117. Accordingly, we recommend that the Department make changes to the proposed revised ICR to limit disclosure reporting to the requirements in the statute.

Thank you for your attention to this matter.

Sincerely,

Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Association of University Professors
American Council on Education
American Dental Education Association
Association of American Colleges & Universities
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges & Universities of Rhode Island
Association of Independent Colleges and Universities of Ohio
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Commission on Independent Colleges and Universities - New York State
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council of Graduate Schools
Council of Independent Colleges
Council of Independent Nebraska Colleges
Council on Governmental Relations
EDUCAUSE
Georgia Independent College Association
Independent Colleges of Indiana
Iowa Association of Independent Colleges and Universities
Iowa College Foundation
Missouri Colleges Fund, Inc.

National Association of College and University Business Officers
NAFSA: Association of International Educators
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges & Universities
South Carolina Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Wisconsin Association of Independent Colleges and Universities