



November 5, 2019

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

Re: Proposed Information Collection Request – Foreign Gifts and Contracts Disclosures
Docket No. ED-2019-ICCD-0114

Dear Ms. Valentine:

I'm writing to provide comments on the proposed information collection request titled *Foreign Gifts and Contracts Disclosures* on behalf of the Council for Advancement and Support of Education (CASE). The proposed information collection request (ICR) was published by the Department of Education (Department) on September 26, 2019 (Docket No. ED-2019-ICCD-0114). We appreciate the opportunity to provide our comments and recommendations to the Department.

CASE is the global association for professionals in advancement – alumni relations, communications, fundraising, marketing and advancement services – who share the goal of championing education to transform lives and society. Today, CASE's membership includes more than 3,600 colleges and universities, primary and secondary independent and international schools, and nonprofit organizations in 82 countries around the world, with 2,910 of our member institutions located in the United States. CASE helps its members build stronger relationships with their alumni and donors, raise funds for campus projects, market their institutions to prospective students, and foster public support of education.

Given our role in representing development officers and staff at U.S. colleges and universities, our comments will be focused on the foreign gift disclosure portion of the proposed ICR. CASE is a signatory to and strongly supports comments on the proposed ICR submitted to the Department by the American Council on Education (ACE). ACE's comments cover both foreign gifts and contracts.

Summary of Comments and Recommendations

While CASE strongly supports transparency around the relationships that colleges and universities have with foreign governments, individuals and entities, **it is critical that any federal reporting or other requirements do not discourage anyone who wants to make a difference from making legitimate charitable gifts to educational institutions.** Unfortunately, the Department's ICR, as proposed, would have a chilling effect on giving from foreign individuals and organizations to U.S. colleges and universities.

CASE recommends that the Department:

- Adhere to statutory language and clearly state that institutions are only required to disclose gifts from foreign sources the value of which is \$250,000 or more, considered alone or in combination with all other gifts from that foreign source,

- Ask institutions to only report information that is required by statute and should not request name and address information,
- Eliminate the requirement to upload true copies of gift or donation agreements,
- Eliminate Question 1(b) and limit reporting to the definition of institution as set out in the statute,
- Require institutions to only report additional information on restricted or conditional gifts that meet the criteria outlined in the statute, re-order the proposed ICR to avoid confusion in how this information is reported, and eliminate Question 4(v),
- Eliminate the certification requirements listed in Questions 2(a), 4(a), and 6 on the proposed ICR, and
- Adhere to the enforcement actions and penalties as outlined in the statute.

Our comments also include several issues in need of further clarification to ensure that colleges and universities can comply fully with statute. For these issues, CASE recommends that the Department launch a formal regulatory rulemaking process to provide needed guidance.

Giving to U.S. Colleges and Universities

In 2018, U.S. colleges and universities reported \$46.7 billion in charitable contributions according to the most recent CASE Voluntary Support of Education (VSE) survey¹. Institutions receive charitable gifts from a variety of sources including alumni and non-alumni individuals, corporations, and foundations. These contributions support critical needs such as student financial aid/scholarships, academic programs, faculty, research, and facilities. According to the 2018 VSE Survey, an average of 38 percent of restricted gifts to endowment supported student financial aid.²

Institutions often receive gifts from foreign individuals and entities, particularly from alumni or others who have a close affinity with an institution. In the 2017/18 academic year, international students represented 5.5 percent of total student enrollment, the highest percentage of international students on record at U.S. institutions.³ International student exchange has long been part of the U.S. higher education experience, and those students develop deep bonds with their American alma maters.

Section 117

Section 117 of the Higher Education Act requires higher education institutions that receive federal funding to file a report with the Secretary of Education disclosing any gifts received from, or contracts with a foreign source valued at \$250,000 or more. The statute also requires further disclosure for restricted or conditional gifts/contracts and for institutions who are owned or controlled by a foreign entity.

Though Section 117 was enacted as part of the reauthorization of the Higher Education Act in 1986, the Department has not issued regulations on how institutions should interpret and comply with the statute.

¹ 2018 CASE Voluntary Support of Education (VSE) Survey <https://www.case.org/trending/2018-vse-survey-results>

² From the roughly 500 respondents who answered this question in the 2018 CASE VSE Survey <https://www.case.org/resources/giving-us-higher-ed>

³ Institute of International Education <https://www.iiie.org/Research-and-Insights/Open-Doors/Data/International-Students/Enrollment>

The only limited guidance available to institutions are two Dear Colleague letters issued in 1995 and 2004. As a result, our member institutions have been left to interpret the statute on their own.

General Observations

CASE is cognizant of national security concerns raised by undue foreign influence. CASE is also committed to safeguarding academic freedom. Our Global Policy Framework, approved by the CASE Board of Trustees in 2018, specifically states our support for policies around the world that preserve institutional autonomy and academic freedom.⁴

While CASE strongly supports transparency around the relationships that colleges and universities have with foreign governments, individuals and entities, **it is critical that any federal reporting or other requirements do not discourage anyone who wants to make a difference from making legitimate charitable gifts to educational institutions.**

Unfortunately, the Department's ICR, as proposed, would have a chilling effect on giving from foreign individuals and organizations to U.S. colleges and universities. We are particularly concerned that the proposed ICR goes beyond what is required in statute. For example, under the proposed ICR institutions would 1) have to provide donor names and addresses, including the names of donors who requested anonymity, and 2) be required to upload copies of true gift or donation agreements. Both the disclosure of donor names and addresses and gift agreements is not addressed nor required in Section 117.

Proposed ICR Exceeds Statutory Authority

While the proposed ICR provides some clarity for institutions in reporting foreign gifts, it exceeds statutory authority. In multiple instances the Department asks institutions to provide information in the ICR that is not required nor addressed in Section 117. Our concerns and recommendations are listed below.

Gifts Subject to Disclosure

The proposed ICR could be interpreted by institutions to require the reporting of all gifts from foreign sources, regardless of size. In the supporting statement accompanying the proposed ICR, the Department states, "The plain language and Congressional purpose of Section 117 is for the institutions subject to this information request disclose fully all foreign money funneled to them, and for this information to be made readily available to the public."⁵

However, Section 117 makes it clear that institutions are only required to file a disclosure report when such institution receives a gift from a foreign source "the value of which is \$250,000 or more, considered alone or in combination with all other gifts or contacts with that foreign source within a calendar year."⁶ Additionally, the \$250,000 threshold is not referenced anywhere in the proposed ICR, further giving the impression that institutions must report all gifts from foreign sources, regardless of size.

Expanding the ICR to include all foreign gifts would significantly increase the number of institutions who must file disclosure reports. In addition, the Department would be inundated with additional paperwork/information on many small gifts, the disclosure of which would provide little to no value in the Department's enforcement efforts. Finally, asking institutions to report all gifts from foreign sources, regardless of size, would be a significant administrative burden for colleges and universities, particularly

⁴ CASE Global Policy Framework <https://www.case.org/resources/public-policy>

⁵ Answer to Question #2 in Supporting Statement, <https://www.regulations.gov/document?D=ED-2019-ICCD-0114-0002>

⁶ 20 U.S.C. § 1011f

for smaller institutions that are not currently subject to the requirement under the statutory \$250,000 threshold. Of those institutions responding to the 2018 VSE Survey, the average gift of an alumnus is \$2,007.⁷

Recommendation: The Department should adhere to statutory language and clearly state that institutions are only required to disclose gifts from foreign sources the value of which is \$250,000 or more, considered alone or in combination with all other gifts from that foreign source.

Donor Identity and Anonymity

Section 117 requires institutions to “report the aggregate dollar amount of such gifts and contracts attributable to a particular country. The country to which a gift is attributable is the country of citizenship, or if unknown, the principal residence for a foreign source who is a natural person, and the country of incorporation, or if unknown, the principal place of business, for a foreign source which is a legal entity.” Section 117 does not require institutions to provide the names and addresses of foreign donors.

Questions 2(a) and 4(a) on the proposed ICR go beyond the statutory language by requiring institutions to provide the name and address of the foreign source. This would violate institutions’ commitment to donor confidentiality and would preclude institutions from accepting anonymous gifts from foreign sources.

Institutions take the responsibility of protecting donor confidentiality very seriously. The Donor Bill of Rights, endorsed by CASE and others, states that donors have the right “to be assured that information about their donations is handled with respect and with confidentiality to the extent provided by law.”⁸ The CASE Principles of Practice for Fundraising Professionals at Educational Institutions includes a section on confidentiality, recognizing that fundraising professionals should, “safeguard and respect donor and prospective donor information.” Institutions protect donor information so that donors are not subject to unwanted recognition or publicity, solicitations, retribution, and fraud.

Many donors also request anonymity when making gifts to colleges and universities. An individual may request to remain anonymous for a variety of reasons, including a desire to avoid public recognition or publicity for their gift. If institutions lose the ability to preserve anonymity, these donors will likely avoid making charitable gifts to U.S. colleges and universities.

Beyond the institutional commitment to protecting donor confidentiality and anonymity, both state and federal law recognize the importance of protecting donor information. While institutions and institutionally related foundations must list the names, addresses and gift amounts of donors who contributed \$5,000 or more on the Internal Revenue Service Form 990, the IRS is not authorized to disclose donor names and addresses when making the form open for public inspection. Institutions are also permitted to redact name and address information when they post or make their Form 990s available for public inspection. At the state level, many states exempt donor identity and information from freedom of information act and/or public records laws for public colleges and universities.⁹

⁷ Calculated by CASE staff using data from the 2018 CASE VSE Survey

⁸ <https://www.case.org/resources/donor-bill-rights>

⁹ For example, the State of Florida law protects the identity of donors who desire to remain anonymous. Florida Statutes Section 1004.28(5)

http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1004/Sections/1004.28.html

Institutions also must be compliant with data privacy laws and regulations outside of the United States, particularly when it comes to engaging with foreign individuals and organizations. The European Union's recently implemented General Data Protection Regulation outlines rights for EU data subjects, including the right to know how personal data is being used and disclosed by an institution.

The proposed ICR makes it clear that the Department intends to make all information submitted by institutions, including donor names and addresses, available on the Department's website. Additionally, the supporting statement makes it clear that the Department is not pledging to keep any of the data collected through the proposed ICR confidential.¹⁰ Through the proposed ICR, the Department is putting institutions at risk of violating institutional commitments and legal requirements to protect donor confidentiality and anonymity. It would also discourage foreign individuals and organizations from making legitimate charitable gifts to U.S. colleges and universities.

Recommendation: The Department should only ask institutions to report information that is required by statute. The Department should not request name and address information in the proposed ICR.

Gift Agreements

Questions 2(e) and 4(f) of the proposed ICR would require institutions to upload a "true copy of the gift or donation agreement." Section 117 does not include nor reference a requirement for institutions to share gift agreements with the Department.

Gift agreements typically document the terms of a gift between an institution and a donor. The *CASE Reporting Standards and Management Guidelines for Educational Fundraising*, the common set of definitions and standards used by U.S. educational institutions to report fundraising performance, notes that, "gift agreements are complex and vary by institution and the circumstances of each gift."¹¹ Gift agreements typically contain a description of the gift, its purpose, future considerations and recognition opportunities. More complex gift agreements could also include specific information on how the gift is being made, how it will be managed and invested, specific payment terms for pledges, terms for naming gifts or gifts to establish endowed scholarships or chairs, future plans of the institution and the identity of heirs for certain planned gifts.

The institutional and legal considerations mentioned in the section above on donor identity and anonymity similarly apply to gift agreements. In addition, uploading these agreements would be significantly burdensome for institutions, particularly if the Department requests that all foreign gifts be disclosed versus gifts at the statutory threshold of \$250,000 or above. Many institutions would not even have gift agreements for smaller gifts under a certain threshold.

The Department would also end up with hundreds and hundreds of pages of additional documentation full of sensitive information uploaded and displayed without context on its website. Ultimately, if gift agreements with foreign donors are required to be disclosed in this way, many donors will avoid making such gifts to U.S. colleges and universities.

Recommendation: Eliminate the requirement to upload true copies of gift or donation agreements from the proposed ICR.

¹⁰ Question 10, supporting statement <https://www.regulations.gov/document?D=ED-2019-ICCD-0114-0002>

¹¹ CASE Reporting Standards & Management Guidelines for Educational Fundraising, 4th Edition

Definition of Institution

Section 117 specifically defines an institution 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 school;
- (B) provides a program for which the institution 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 the institution’s subunits.”

The statutory definition does not include nor reference institutionally related foundations¹², alumni associations, real estate foundations, university hospitals/health centers, athletic foundations/clubs, or other research organizations. These affiliated organizations typically have separate 501(c)3 charitable status and are governed by their own boards.

Though the statutory definition of institution is referenced, the proposed ICR asks institutions in 1(b) to “list all legal entities (including foundations or other organizations) that operate substantially for the benefit for or under the auspices of your institution.” By including this question, institutions could reasonably conclude that the Department expects them to disclose gifts from foreign sources to these entities. While some institutions or systems may be able to obtain this information from affiliated entities, many institutions would likely not have authority to compel separate legal organizations to provide the information. Gathering this data would also significantly increase the administrative burden of complying with the proposed ICR.

Recommendation: To avoid confusion and adhere to statute, the Department should eliminate Question 1(b) on the proposed ICR and limit reporting to the definition of institution as set out in the statute.

Restricted and Conditional Gifts

According to Section 117, restricted or conditional gift “means any endowment, gift, grant, contract, award, present, or property of any kind which includes provisions regarding –

- (A) the employment, assignment, or termination of faculty;
- (B) the establishment of departments, centers, research or lecture programs, or new faculty positions;
- (C) the selection or admission of students; or
- (D) the award of grants, loans, scholarships, fellowships, or other forms of financial aid restricted to students of a specified country, religion, sex, ethnic origin, or political opinion.”

Institutions of higher education must report the “amount, the date, and a description of such conditions or restrictions” of restricted or conditional gifts that meet or exceed the \$250,000 reporting threshold.

¹² Institutionally related foundations are the separately incorporated organizations that accept charitable gifts and manage institutional endowments on behalf of most public colleges and universities.

Question 4 on the proposed ICR appears to require institutions to report all restricted or conditional gifts from foreign sources. If this is the Department's intention, the proposed ICR would go beyond the requirements of the statute.

To avoid confusion and remain consistent with the statute, Question 4 should be re-ordered so that institutions are required to identify whether the gift meets any of the restrictions or conditions outlined in 4(d) before institutions provide the information required in 4(c) (amount, date, duration and description of all conditions and restrictions). If the gift does not meet the criteria outlined in the statute, it would not be considered a restricted or conditional gift for purposes under Section 117. Thus, institutions would not be required to report the information in 4(c).

Question 4(v) asks "Was the restricted or conditional gift for the purpose of or did it have the effect of influencing any program or curricula at the institution, either directly or indirectly? (Y/N)" This question, which is not identified as a provision in the statute, is vague and would be difficult or impossible for an institution to determine. What does the Department mean by influencing? A gift funding a new faculty position would likely influence a program or curricula at an institution. But so would a gift funding a new building for an academic program. An argument could be made that every gift would have some direct or indirect influence on a program or curricula at a college or university. We do not see the value in asking institutions to answer such a question.

Recommendation: The Department should only require institutions to report additional information on restricted or conditional gifts that meet the criteria outlined in the statute. The proposed ICR should be re-ordered to avoid confusion in how this information is reported. Question 4(v) should be eliminated from the proposed ICR.

Additional Certifications

Under current law, institutions rely on the primary address provided by the donor when determining whether a gift is subject to disclosure. Section 117 allows institutions to use the principal address of the foreign source or the principal place of business if country of citizenship or incorporation are unknown.

Questions 2(a) and 4(a) of the proposed ICR asks institutions a series of yes/no questions about the citizenship and/or legal status of foreign sources. Institutions typically do not ask foreign donors for information on their country of citizenship or incorporation, making it impossible for institutions to answer these questions. Some donors may have dual citizenship between the U.S. and another country which would further complicate an institution's ability to answer these yes/no questions.

Additionally, Question 6 of the proposed ICR asks institutions to certify that foreign sources or entities making gifts comply with laws and regulations related to terrorism, sanctions, trade and other activities that are outside the jurisdiction of the Department. These certifications are not referenced nor required in the statute. It would be incredibly difficult and time consuming for institutions to make these certifications. In some instances, institutions would have to ask foreign individuals and entities to certify that they are in compliance.

Recommendation: The Department should eliminate the certification requirements listed in Questions 2(a), 4(a), and 6 on the proposed ICR.

Proposed Penalties

Section 117 outlines clear enforcement actions the Department and the federal government generally can pursue for knowing and willful failure to comply with the requirements of the statute. These actions

include taking institutions to court to compel compliance and potentially requiring institutions to pay all government costs associated with obtaining compliance, “including all associated costs of investigation and enforcement.”

The proposed ICR goes beyond the statute by potentially subjecting individuals to fine and imprisonment under 18 U.S.C. § 1001. There is no legitimate reason or rationale to significantly increase the penalties tied to the statute. Any confusion over what institutions should or should not be reporting is largely attributable to the lack of clear guidance or regulations.

Recommendation: The Department should revise the proposed ICR to clarify that institutions are subject to the enforcement actions and penalties as outlined in the statute.

Issues in Need of Further Clarification

While we appreciate the Department’s intention to facilitate compliance with Section 117 through the proposed ICR, there are still several issues in need of clarification to ensure that colleges and universities can comply fully with statute. We recommend that the Department launch a formal regulatory rulemaking process to address these issues and provide guidance.

Reporting

Section 117 requires institutions to report gifts of \$250,000 or above received from foreign individuals and entities and to aggregate gifts made from a single source for reporting purposes.

Assuming the Department reiterates the \$250,000 reporting threshold outlined in statute, it is still unclear whether the reporting requirement is triggered when an institution receives multiple gifts from separate individuals and/or entities from a single country that on their own do not meet or exceed \$250,000, but when combined meet or exceed the reporting threshold. For example, if an institution received five gifts of \$60,000 from five separate individuals who are citizens of Country A, would the institution need to disclose that it received \$300,000 total from foreign sources in Country A?

Definition of a Gift

Section 117 defines a gift simply as “any gift of money or property.” Colleges and universities, however, often receive charitable gifts that are not easily defined as money or property. The *CASE Reporting Standards and Management Guidelines for Educational Fundraising* define a gift as “a contribution received by an institution for either unrestricted or restricted use in the furtherance of the institution for which the institution has made no commitment of resources or services other than, possibly, committing to use the gift as the donor specifies.”¹³

For example, are institutions required to report in-kind gifts received from a foreign source that meet or exceed \$250,000? What about services provided as a gift to an institution that meet or exceeds the reporting threshold? Our interpretation of the law would be that in-kind gifts and services would not be reportable.

Additionally, how should institutions report pledges and bequests? Pledges and bequests are commitments by donors to make future gifts to an institution. If a foreign source announces a pledge commitment that meets or exceeds the reporting threshold, when should an institution report the pledge? Should it be the year the commitment is made? The year when the aggregate number of pledge payments exceeds the reporting threshold? Or the year when the pledge is fully realized? And, if yearly

¹³ CASE Reporting Standards & Management Guidelines for Educational Fundraising, 4th Edition

payments on a pledge commitment never meet or exceed \$250,000, but the cumulative pledge commitment meets or exceeds \$250,000, do institutions have to report these pledge payments at all?

Restricted or Conditional Gifts

Assuming the Department adheres to the \$250,000 reporting threshold and the definition of restricted and conditional gifts as outlined in statute, how would an institution treat a \$50,000 restricted gift from a foreign individual or entity that meets the requirements as a restricted or conditional gift under Section 117? Assuming this is a single gift from one individual/entity in a calendar year, our interpretation would be that reporting this gift would not be required. However, if this gift was one of five gifts from one foreign source in a particular year, and the sum total of the gifts from this source exceeds the \$250,000 threshold, would the institution be required to disclose the restriction on the \$50,000 gift even though the gift, by itself, did not meet or exceed the threshold?

Administrative Burden

In several areas the proposed ICR exceeds the statutory requirements of Section 117. If the Department requires institutions to report all gifts from foreign sources, to attempt to obtain gift information from institutionally related foundations, alumni associations, university hospitals and health centers, research foundations, and other affiliated entities, and to attempt to certify compliance with the laws and regulations outlined in Question 6, the administrative burden for an institution will go well beyond the Department's estimate of 10 hours in the supporting statement. Additionally, the number of disclosure reports received will significantly exceed the estimate cited by the Department. It would also be difficult, if not impossible for Department staff to review each report in two hours or less as estimated in the supporting statement.

If the Department adheres to statutory language and redesigns the proposed ICR to be consistent with the statute, the Department's estimates of administrative burden will be more accurate. We also feel that adhering to statutory language and pursuing a formal rulemaking process on issues in need of further clarification would enhance the quality, utility, and clarity of the information being collected.

Conclusion

Once again, we appreciate the opportunity to share our comments with the Department on the proposed ICR. We urge the Department to accept our recommendations and provide guidance on questions in need of clarification. We would welcome the opportunity to meet with Department staff to discuss our comments in further detail. We also stand ready to work with you, our higher education association colleagues, and our member institutions to ensure that colleges and universities can fully comply with the law.

Yours sincerely,



Sue Cunningham
President & CEO