



COUNCIL FOR ADVANCEMENT
AND SUPPORT OF EDUCATION®

1307 New York Avenue, NW
Suite 1000
Washington, DC 20005-4701 USA
+1-202-328-2273 (CASE)

OFFICE OF THE PRESIDENT

March 11, 2020

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

Paul J. Ray
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue NW
Washington, DC 20503

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

Dear Ms. Valentine and Mr. Ray:

I'm writing to provide comments on the proposed information collection request (ICR) titled *Foreign Gifts and Contracts Disclosures* on behalf of the Council for Advancement and Support of Education (CASE). The U.S. Department of Education (Department) is submitting the proposed ICR to the U.S. Office of Management and Budget (OMB) for review and approval. A notice was published in the *Federal Register* by the Department on February 10, 2020 (Docket No. ED-2019-ICCD-0114).

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.

As with our comments submitted to the Department on November 5, 2019¹ and December 27, 2019²,

¹ CASE November 5, 2019 comments <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0031>

² CASE December 27, 2019 comments <https://www.case.org/system/files/media/file/CASE%20Comments%20on%20Revised%20Information%20Collecti%20on%20Request%20Docket%20No.%20ED-2019-ICCD-0154.pdf>

our focus is on the foreign gift disclosure portion of the ICR. CASE is a signatory to and strongly supports comments on the ICR submitted to the Department by the American Council on Education on March 11, 2020. ACE's comments cover both foreign gifts and contracts.

Summary of Comments and Recommendations on Proposed ICR

While CASE strongly supports transparency around the philanthropic support that colleges and universities receive from foreign governments, individuals and entities, we reiterate that **it is critical that any federal reporting or other requirements do not discourage reputable philanthropists who want to make a difference from making legitimate charitable gifts to U.S. educational institutions.**

We acknowledge that the Department has removed the requirement for institutions to submit true copies of gift agreements with foreign sources from the ICR and will pursue a separate rulemaking process on the gift agreement issue. While this decision removes one of our major concerns in the short-term, the Department has still not addressed two other major concerns.

CASE recommends the Department and OMB make the following changes to the proposed ICR:

- Ask institutions to only report information that is required by statute and eliminate the requirement to provide donor name and address information in the disclosure report, and
- Adhere to the definition of institution as outlined clearly in the statute in determining entities required to file disclosure reports.

If approved without further changes, the ICR will have a chilling effect on giving from foreign individuals and organizations to U.S. colleges and universities. This will, in turn, have direct impact upon these institutions, who are held in such high regard in the U.S. and globally, in their work to advance education.

Donor Names and Addresses and Donor 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 the Association of Fundraising Professionals, Association of Healthcare Philanthropy, and the Giving Institute 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."³ The CASE Principles of Practice for Fundraising Professionals at Educational Institutions includes a

³ <https://www.case.org/resources/donor-bill-rights>

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.⁴

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.

In the Summary of Public Comments with Responses, the Department states it “believes it requires the name and address of a foreign source to verify an institution’s compliance with Section 117.”⁵ The statute, however, is unambiguous and clearly does not require the name and address of a foreign source except in cases where an institution is owned or controlled by a foreign source. Even where Congress specifically asked institutions to provide additional information on restricted and conditional gifts, they did not require institutions to provide name and address information.

Also in the Summary of Public Comments with Responses, the Department states that “the statute does not carve out an exception for institutions to withhold the name or address of an anonymous party.”⁶ While accurate, it is also not surprising that the statute does not speak directly to donor anonymity because Congress did not require institutions to report any donor names and addresses outside of the specific situation where an institution is owned or controlled by a foreign source.

While the Department has now stated that it will not make donor name and address information part of the publicly available disclosure report, we remain concerned that such information could be subject to

⁴ 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

⁵ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0002>, page 7

⁶ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0002>, page 7

legal challenges under the Freedom of Information Act.⁷ Section 117 plainly states “all disclosure reports required by this section shall be public records open to inspection and copying during business hours.”⁸

Through the proposed ICR, the Department is putting institutions at risk of violating institutional commitments and legal requirements to protect donor confidentiality and anonymity. The Department’s actions would also discourage foreign individuals and organizations from making legitimate charitable gifts to U.S. colleges and universities.

Recommendation: The Department should ask institutions to only report information that is required by statute and eliminate the requirement to provide donor name and address information in the disclosure report.

Definition of Institution

Section 117 specifically defines an institution as “any institution, public or private, or, if a multicampus 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 foundations⁹, 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.

While the Department eliminated the question asking institutions to “list all legal entities (including foundations or other organizations) that operate substantially for the benefit for or under the auspices of your institution,” the Department creates a significant new problem by including the following text in the ICR and its Summary of Public Comments with Responses:

“The Department is aware that the stated purpose and/or function of some legal entities (as articulated in articles of incorporation, for example) is to serve as an intermediary for foreign source gifts to or contracts with an institution. See <http://www.usmf.org/files/resources/articles-of-incorporation.pdf> and

⁷ Answer to Question 10 in initial supporting statement <https://www.regulations.gov/document?D=ED-2019-ICCD-0114-0002> and page 7 of Summary of Public Comments and Response <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0002>

⁸ The American Council on Education’s March 11, 2020 comments, which we support, include a more thorough discussion of how the Department’s promise of confidentiality is inconsistent with the Department’s own FOIA regulations.

⁹ Institutionally related foundations are the separately incorporated organizations that accept charitable gifts and manage institutional endowments on behalf of most public colleges and universities.

<https://leadbyexample.tamu.edu/txam-foundation.html>. Allowing foreign sources and institutions to avoid disclosure by using intermediaries to transfer funds and benefit would be contrary to plain statutory language, context, and purpose. Therefore, foreign source gifts to or contracts with an intermediary that benefit an institution are reportable.”¹⁰

We strongly disagree with the Department’s assertion that institutions are required under statute to report gifts made to separate legal entities for several reasons.

First, as we noted above, Section 117 includes a specific three-pronged definition of institution that does not reference nor mention institutionally related foundations, alumni associations, real estate foundations, university hospitals/health centers, athletic foundations/clubs, or other research organizations. There is a clear definition of the entity that is required to file disclosure reports and related entities are not mentioned.

Second, the Department’s language specifically points to the articles of incorporation of two institutionally related foundations and labels them “intermediaries.” Institutionally related foundations are more than merely intermediaries or pass through entities. Most foundations actively raise and manage private support and steward charitable gifts on behalf of their college or university. They also have separate governing boards.

Third, the Department seems to suggest that institutionally related foundations are established solely to allow colleges and universities to avoid disclosing foreign gifts. This is not accurate. Most institutionally related foundations were established in the early twentieth century, many years prior the enactment of Section 117 in the 1980s.¹¹ Additionally, institutionally related foundations typically raise and/or manage all gifts made to their primary institutions regardless of whether the donor is a domestic or foreign individual or entity.

Fourth, the Department’s language is overly vague. One could make an argument that any gift made to separate legal entity affiliated with a college or university would “benefit the institution,” resulting in institutions being required to report gifts and seek gift agreements from a long list of related entities. This would substantially increase the administrative burden of complying with the ICR.

Fifth, and most importantly, the Department is asking colleges and universities to compel separate legal entities (third parties) to share gift data so that the institution can meet its reporting obligation. As we noted in previous comments, while some colleges and universities may be able to obtain this information, many institutions will likely not have this authority, particularly if the Department requires names and addresses to be submitted. In the case of institutionally related foundations, donors, whether foreign or domestic, typically make gifts to the foundation, not to the college or university.

Recommendation: The Department should adhere to the definition of institution as clearly outlined in the statute in determining entities required to file disclosure reports.

Conclusion

Once again, we urge OMB and the Department to make the following changes to the ICR:

¹⁰ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0003>

¹¹ The first institutionally related foundation was established in 1891 to support the University of Kansas.

- Ask institutions to only report information that is required by statute and eliminate the requirement to provide donor name and address information in the disclosure report, and
- Adhere to the definition of institution as outlined clearly in the statute in determining entities required to file disclosure reports.

We appreciate the opportunity to share our comments with OMB and the Department and would welcome the opportunity to meet with appropriate staff to discuss our comments in further detail. Thank you for your thoughtful consideration of the points made herein.

Yours sincerely,

A handwritten signature in cursive script that reads "Sue Cunningham".

Sue Cunningham
President & CEO