



December 27, 2019

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
Acting 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 Request – Foreign Gifts and Contracts Disclosures
Docket No. ED-2019-ICCD-0154

Dear Ms. Valentine and Mr. Ray:

I'm writing to provide comments on the revised proposed information collection request (ICR) titled *Foreign Gifts and Contracts Disclosures* on behalf of the Council for Advancement and Support of Education (CASE). The revised ICR was published in the *Federal Register* by the U.S. Department of Education (Department) on December 17, 2019 (Docket No. ED-2019-ICCD-0154). The Department is requesting the Office of Management and Budget (OMB) conduct an emergency review of the revised ICR for approval on January 2, 2020.

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 initial comments submitted to the Department on November 5, 2019, our focus is on the foreign gift disclosure portion of the revised ICR.¹ CASE is a signatory to and strongly supports comments

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

on the revised ICR submitted to the Department by the American Council on Education (ACE) on December 19, 2019.² ACE's comments cover both foreign gifts and contracts.

Opposition to Emergency Review

CASE urges OMB to deny the Department's request for emergency review and approval of the revised ICR. We support ACE's December 17, 2019 letter which outlines in detail how the Department's request fails to satisfy the requirements for OMB emergency review set forth in the Paperwork Reduction Act (PRA).³ Moreover, it is particularly problematic that the shortened emergency ten day public comment period is taking place while most colleges and universities are closed or short-staffed during the holiday break. This unnecessarily short period for comment will make it difficult for many institutions to submit substantive feedback and comments on an ICR that significantly expands their reporting obligations.

We note that the Department announced on December 23, 2019 its intention to allow colleges and universities to use either the new reporting system (if approved by OMB) or the existing system for filing disclosure reports due January 31, 2020.⁴ While this announcement is certainly welcome, it eliminates the Department's rationale provided to OMB to review and approve the revised ICR on an emergency basis. Given that colleges and universities can use the existing system to file their required January 31, 2020 disclosure reports, we urge OMB to deny the Department's request for emergency review and approval and proceed with a full 30-day public comment period on the revised ICR.

Summary of Comments and Recommendations on Revised ICR

While CASE strongly supports transparency around the relationships that colleges and universities have with 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.**

While we recognize and appreciate that important clarifications have been made in response to public comments, the Department has not addressed fundamental problems with the proposed ICR. 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

In addition to our recommendation that OMB denies the Department's request for emergency review, CASE recommends the Department make the following changes to revised 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,
- Eliminate the requirement to upload true copies of gift or donation agreements, and
- Adhere to the definition of institution as outlined clearly in the statute in determining entities required to file disclosure reports.

² <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0056>

³ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0049>

⁴ <https://ifap.ed.gov/eannouncements/122319Section117oftheHigherEducationAct.html>

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 revised 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.

In the Summary of Public Comments with Responses posted with the December 17, 2019 notice, 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.

As we stated in our November 5, 2019 comments, institutions take the responsibility of protecting donor confidentiality very seriously. 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.⁶

In the Summary of Public Comments with Responses (page 7), the Department states that “the statute does not carve out an exception for institutions to withhold the name or address of an anonymous party.”⁷ 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.

After initially stating that they could not pledge to keep any of the data collected through the proposed ICR confidential, the Department now commits to not make donor name and address information part of the publicly available disclosure report.⁸ While we appreciate this recognition of the importance of protecting donor information, we are not convinced that the Department will be able to do so particularly since the statute clearly states “all disclosure reports required by this section shall be public records open to inspection and copying during business hours.” Through the revised ICR, the Department is putting

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

⁶ See CASE’s Nov. 5, 2019 comments on the proposed ICR for a more detailed discussion of protecting donor information

<https://www.case.org/system/files/media/file/CASE%20Comments%20on%20Proposed%20Information%20Collection%20Request%20Docket%20No.%20ED-2019-ICCD-0114.pdf>

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

⁸ 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>

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.

Gift Agreements

Section 117 describes the contents of the disclosure report that must be filed by colleges and universities. Though the statute does not include nor reference such a requirement, Questions 2(e) and 4(f) of the revised ICR would still require institutions to upload a "true copy of the gift or donation agreement."

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."⁹

Typically, gift agreements contain a description of the gift, its purpose, future considerations, and recognition opportunities. More complex gift agreements may 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 names and addresses similarly apply to gift agreements. In addition, asking all institutions subject to Section 117 reporting to upload these agreements would be significantly burdensome. Many institutions would likely have to revisit gift agreements with foreign donors that include sensitive information or confidentiality clauses if this requirement remains in the ICR, potentially jeopardizing current and future gifts from these donors.

In the Summary of Public Comment and Response, the Department states that it "believes that it is consistent with the statute and necessary for institutions to submit true copies of gifts or contracts involving a foreign source for the Department to be able to determine whether it appears an institution has failed to comply with 20 U.S.C. 1011(f)."¹⁰ As noted above, the requirement to submit gift agreements is not consistent with the statute. Additionally, as ACE points out in its December 19, 2019 comment letter, the Department could seek to obtain gift agreements and other documentation through normal compliance reviews of institutions.¹¹

As with donor names and addresses, the Department now states that it "will not make true copies [of gift agreements] publicly available, to the extent permitted by law."¹² While we appreciate this recognition of the importance of protecting donor information, we are not convinced that the Department will be able

⁹ CASE Reporting Standards & Management Guidelines for Educational Fundraising, 4th Edition

¹⁰ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0002>, page 6

¹¹ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0056>, page 3

¹² 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>

to keep gift agreements from being publicly disclosed since the statute clearly states “all disclosure reports required by this section shall be public records open to inspection and copying during business hours.”

Ultimately, if gift agreements with foreign donors are required to be submitted to the Department, 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.

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 foundations¹³, 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 we acknowledge that 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 created a significant new problem by including the following text in the revised 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 <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.”¹⁴

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

¹³ Institutionally related foundations are the separately incorporated organizations that accept charitable gifts and manage institutional endowments on behalf of most public colleges and universities.

¹⁴ <https://www.regulations.gov/document?D=ED-2019-ICCD-0154-0003>

First, as we noted above, the statute includes a specific three-pronged definition of institution that does not reference nor mention 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.¹⁵ 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 and agreements so that the institution can meet its reporting obligation. As we noted in our November 5, 2019 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 and gift agreements to be submitted. In the case of institutionally related foundations, donors, whether foreign or domestic, typically make gifts and enter into gift agreements with the foundation, not 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

We appreciate the opportunity to share our comments with OMB and the Department on the revised ICR both through this letter and over the phone on December 23, 2019. We also appreciate the Department's review of our November 5, 2019 comments and subsequent decision to clarify several of the issues/concerns we identified in those comments as part of the Summary of Public Comments with Responses.

¹⁵ The first institutionally related foundation was established in 1891 to support the University of Kansas.

Once again, we urge OMB to deny the Department's request for emergency review and approval of the ICR and that the Department make the following changes to revised 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,
- Eliminate the requirement to upload true copies of gift or donation agreements, and
- Adhere to the definition of institution as outlined clearly in the statute in determining entities required to file disclosure reports.

We would welcome the opportunity to meet with OMB and Department 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