

June 5, 2023

Kun Mullan, PRA Coordinator  
Strategic Collections and Clearance, Governance and Strategy Division  
Office of Planning, Evaluation and Policy Development  
U.S. Department of Education  
400 Maryland Ave, SW  
Washington, DC 20202

**Re: Comment Request; Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Foreign Gifts and Contracts Disclosures, Docket ID Number ED-2022-SCC-0159**

Dear Coordinator Mullan:

On behalf of the American Council on Education and the undersigned higher education associations, I write to offer comments on the Information Collection Request (ICR) published in the *Federal Register* by the Department of Education (ED) on May 4, 2023, Docket No. ED-2022-SCC-0159. We appreciate the opportunity to again comment on the proposed ICR to be used to collect information for the Section 117 foreign gifts and contracts reporting requirement from our member institutions. This follows our February 27, 2023, comments on the proposed ICR.<sup>1</sup>

Higher education institutions and the federal government are aligned in their shared concern about improper foreign influence and research security. Section 117 reporting can and should be useful in this regard. We appreciate that the Department has fully moved Section 117 back to the Office of Federal Student Aid and created a new website that may better enable Section 117 compliance. However, the system remains in need of substantial additional work. While we have engaged extensively with the Department on the creation and implementation of the ICR, we continue to believe the system would be more useful if the Department more fully engaged directly with the stakeholder community in creating processes and answering questions about current Section 117 requirements.

In response to questions before the House Education and the Workforce Committee at a recent hearing, Secretary Cardona stated that the Department has received over 34,000 filings in the last two years and is on track to be the administration with the most Section 117 filings.<sup>2</sup> However, the Department continues to use a problematic and burdensome portal for these increasing reports; rejects our requests to engage in formal rulemaking to clarify reporting obligations; and continues to exceed its statutory authority under Section 117.

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<sup>1</sup> See February 27, 2023, comments: <https://www.acenet.edu/Documents/Comments-ED-Sec117-022723.pdf>.

<sup>2</sup> May 16, 2023 House Education and the Workforce full committee hearing “Examining the Policies and Priorities of the Department of Education”: <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409132>

Within the supplemental materials, ED also recognizes that the National Science Foundation (NSF) has a similar reporting requirement, established by the CHIPS and Science Act, and notes that it may be duplicative and that there needs to be consistency in approach to reduce burden. NSF recently issued a draft Proposal and Award Policies and Procedures Guide (PAPPG) that includes proposed implementation of this reporting requirement and incorporates many of the problematic terms and issues of Section 117.<sup>3</sup> Both ED and NSF should commit to engaging with the stakeholder community to ensure consistency in approach to reduce regulatory burden for institutions and work together to address the continuing confusion around definitions and expectations in what institutions are reporting.

In response to question (2) in the supplementary information of this notice regarding whether “this information [will] be processed and used in a timely manner,” we continue to believe that in support of the transparency goals of Section 117, steps must be taken to publish these reports in a more timely manner. We have heard from numerous institutions that the Department can take months to upload reports that have been submitted, thus providing an appearance that institutions are not reporting on time, as well as limiting the timely sharing of information for the public and policymakers. Given the increased number of reports the Department is receiving, as well as the continuing pressure from lawmakers to ensure institutions are in compliance with this reporting requirement, the Department needs to make a public commitment to posting this information in a timely manner.

Regarding question (3) “is the estimate of burden accurate [.]” we note that the Department has increased the estimated burden to complete the report from 10 hours to 20 hours (twice a year). We continue to believe that due to the complicated nature of the questions being asked, the inability to ask real-time questions to the Department while completing the report, and the need to collect the information from multiple sources on campus, as well as “intermediaries,” that the burden substantially exceeds this 20-hour estimate. In our February 27 comments, we shared the example of a large public research university, which has established processes to collect the information, and shows an average of 40 hours or more of staff time is needed twice a year to submit 35 to 40 disclosures. By comparison, prior to implementation of the new ICR, the process required no more than 10 hours of staff time at this institution.

For questions (4) “how might the Department enhance the quality, utility, and clarity of the information to be collected” and (5) “how might the Department minimize the burden of this collection on the respondents [.]” we continue to argue that the current reporting portal needs to be updated and streamlined. To ensure that any changes to the portal capture the array of stakeholder concerns, this should be done through close engagement and technical feedback from the higher education community, including the users who are uploading the information to the portal. In its response to comments, the Department argues that some changes are not possible due to potential security or data integrity issues, but does not further explain these concerns. The Department also asserts that changes cannot be made due to system limitations. Further, the Department is committed to “evaluating its ability to make improvements within the Reporting Portal ecosystem, as well as other ways to address the technical feedback from institutions.” While these various challenges with improving the reporting portal may be valid,

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<sup>3</sup> NSF’s proposed implementation of PAPPG Chapter VII.D.3 “Foreign Gifts and Contracts Disclosure”: [https://www.nsf.gov/bfa/dias/policy/papp/pappg24\\_1/FedReg/10339Bdataelements\\_fedreg.pdf](https://www.nsf.gov/bfa/dias/policy/papp/pappg24_1/FedReg/10339Bdataelements_fedreg.pdf)

it is clear that changes are necessary. Beyond these notice and comment opportunities through the ICR process, there has not been any opportunity to provide technical feedback on the portal. The Department should work more closely with the stakeholder community to make these much needed improvements to the portal, which would greatly reduce burden and enhance the quality of information being reported.

In addition, the ICR that the Department is seeking to finalize in this notice proposes to add language that would allow institutions to ask the Department to protect certain information from public release such as the “name and address of the foreign source” if the transaction is considered to be “a trade secret or commercial or financial information that is privileged or confidential and exempt from public disclosure pursuant to Freedom of Information Act (FOIA).” As we have consistently argued since our November 5, 2019, comment letter,<sup>4</sup> Section 117 does not require the reporting of the names of individual foreign donors. As discussed in our March 11, 2020, comment letter, the Department’s assurances of confidentiality under FOIA are insufficient, even with the new option available for institutions to request confidentiality.<sup>5</sup> As we previously stated: “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 released despite the Department’s promise of confidentiality.”<sup>6</sup>

Throughout this ICR process, we continue to believe the Department exceeds its statutory authority in several areas, including:

- *Reporting of “intermediaries”*  
Within the response to comments, the Department rejects our continuing concern that the Department exceeds its statutory authority in requiring the reporting of gifts or contracts to “intermediaries,” independent organizations that are completely, legally separate from the institution, with their own staff and governing boards. As we have continually stated in previous comments, institutions are unlikely to have any authority over such organizations and are unable to compel the release of data. The Department has argued that although it is not explicitly included in the statute, based on congressional intent and context, institutions must use “reasonable due diligence” in determining “that certain gifts or contracts benefiting the institution that were received from an intermediary organization originated from a foreign source, then it must submit the appropriate disclosure report.” We continue to believe this exceeds the statutory authority, but also this expansion creates a substantial uncertainty for institutions in trying to identify, gather, and report information from numerous “intermediaries.” The definition for intermediaries, and indeed the “due diligence” institutions will use, is broad and unspecific and will continue to be problematic for our institutions working diligently to comply with Section 117.
- *Names and addresses of individual donors*

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<sup>4</sup> <https://www.acenet.edu/Documents/Comments-Memo-Sec-117.pdf>

<sup>5</sup> <https://www.acenet.edu/Documents/Comments-Sec-117-revised-ICR-031120.pdf>

<sup>6</sup> *Id.* at 3-4.

We continue to be concerned about the reporting of names and addresses of individual foreign donors to the Department, although the Department continues to insist that sensitive information will not be made public. This is at odds with the statutory authority and common practice at many institutions of allowing all donors, including those living in other countries, to request confidentiality in their giving.

In addition, we continue to be concerned about the slippery constitutional slope created by the ICR requirement that institutions disclose in their Section 117 reporting the names of natural-person donors. Recently, in striking down a state's donor disclosure law applicable to nonprofits, the Supreme Court based its holding on the well-established First Amendment right of nonprofit organizations to not disclose confidential donor information because of the risk that public disclosure could potentially chill associational rights.<sup>7</sup>

If ED continues to ask for the names and addresses of individual donors, this must be addressed through a change in the statute. For example, the Internal Revenue Service (IRS) collects some donor information from tax-exempt entities including those organized under Sec. 501(c)(3) in the annual tax filing- IRS Form 990- of such entities. But there the Internal Revenue Code (IRC) specifically authorizes the IRS to collect such information but requires that such donor information be expressly excluded from public disclosure.<sup>8</sup> If ED wants to collect individual donor information, we continue to believe that Congress would need to grant specific statutory authorization in a manner similar to the IRC. And although the Department has added additional language for institutions to request the information be protected under FOIA requests, the Department cannot guarantee information won't be disclosed.

- *Section 117 as part of an institution's PPA*

In 2020, ED announced a Notice of Interpretation that incorporates failure to report Section 117-covered foreign gifts and contracts as a violation of the Department's Title IV Program Participation Agreement (PPA).<sup>9</sup> There is already an enforcement provision included in Section 117, in which ED can refer an institution to the Department of Justice to ensure compliance. To tie foreign gift reporting to financial aid for low-income students seemingly exceeds Congress' intent around Section 117.

Our associations and member institutions continue to be committed to responding to Section 117 reporting requirements, as these issues become even more important to the public and policymakers. We will continue to urge ED to work with higher education stakeholders in regular and substantial engagement on Section 117 reporting.

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<sup>7</sup> See *Americans for Prosperity Foundation v. Bona*, 141 S.Ct. 2373, \_ (2021)

<sup>8</sup> See 26 U.S.C. §§ 6104 (b) & (d)(3)(A)

<sup>9</sup> November 13, 2020 notice: <https://www2.ed.gov/policy/highered/leg/sec117-noi-final.pdf>

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell". The signature is written in a cursive, slightly slanted style.

Ted Mitchell, President

On behalf of:

American Association of Collegiate Registrars and Admissions Officers  
American Association of State Colleges and Universities  
American Council on Education  
Association of American Medical Colleges  
Association of American Universities  
Association of Catholic Colleges and Universities  
Association of Community College Trustees  
Association of Governing Boards of Universities and Colleges  
Association of Jesuit Colleges and Universities  
Association of Public and Land-grant Universities  
Association of Research Libraries  
Career Education Colleges and Universities  
Council for Advancement and Support of Education  
Council for Christian Colleges & Universities  
Council of Graduate Schools  
Council on Governmental Relations  
Council on Social Work Education  
EDUCAUSE  
NAFSA: Association of International Educators  
National Association of College and University Business Officers  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators