November 5, 2019

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 September 6, 2019, Docket No. ED-2019-ICCD-0114. While our comments address specific areas of concern with the ICR, we also offer some general observations about the proposed information collection.

As a contextual comment, the higher education community takes seriously recent security concerns raised by federal policymakers regarding undue foreign influence. We share a strong interest with the government in safeguarding the integrity of government-funded research and intellectual property resulting from it. Furthermore, encouraging, enabling, and protecting academic freedom and free speech from untoward influence and/or interference – foreign or domestic – is a cornerstone of American higher education.

The Statute – Section 117:

Section 117 (Sec. 117) of the Higher Education Act of 1965 (HEA) is titled "Disclosures of Foreign Gifts" and was enacted as part of the HEA reauthorization in 1986. Its application and scope are limited to (i) institutions "owned or controlled by a foreign source;" and (ii) institutions that are the beneficiaries of gifts and contracts from a foreign source – government, corporation, other non-government entity, or foreign citizen – "the value of which is $250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year." Colleges

and universities are required to file reports twice a year with the Department. See 20 U.S.C. § 1011f.

Once an institution determines per subsection "a" that it is subject to Sec. 117's reporting requirement, it looks to subsections "b" and "c" of the law to determine the nature and extent of the information it is to report to the Department. These subsections, respectively entitled "Contents of report" and "Additional disclosures for restricted and conditional gifts," are specific and limited.

There are aspects of Sec. 117 that could have benefited from formal regulations to clarify the statutory language and enable institutions to understand better their reporting obligations. However, the Department has never engaged in a formal rulemaking process or issued regulations on Sec. 117. Instead, the Department has only issued two "Dear Colleague" letters in 1995 and 2004, which provide limited guidance to institutions about their compliance obligations.

The legislative history of Sec. 117 is instructive about congressional intent in enacting Sec. 117 and the limited scope of the statute. According to the report of the House Committee on Education and Labor regarding Sec. 117:

> "H.R. 3700 substantially incorporates H.R. 3190, Congressman Robert Matsui's bill requiring colleges and universities to disclose information about ***large grants*** they receive from foreign sources. Introduced on August 1, 1985, H.R. 3190 is intended to promote clarity of academic purpose by avoiding the distortion that may occur in an academic program when ***large gifts*** are given to the institution from a foreign entity without public knowledge of that gift."

H.R. REP. No. 99-383, at 87-88 (emphasis added). The focus on "large grants" and "large gifts" in the legislative history is consistent with the $250,000 threshold specified in the statute.

Information Collection Request – General Concerns:

We recognize that institutions must abide by Sec. 117's statutorily required reporting requirement. However, the Department's proposed information request has two fundamental and related flaws.

First, aspects of the proposed information collection would go far beyond the plain language of Sec. 117, clearly directing institutions to make disclosures – with no statutory basis – of a vastly expanded amount of information and documents. Second, the manner in which other aspects of the proposed information collection is organized and written makes the information collection

subject to differing reasonable interpretations, with some of those interpretations also well beyond what Sec. 117 requires. For instance, the proposed information collection could be misread to require reporting of all gifts and contracts with foreign sources, not just those that meet the statutory monetary threshold, which in turn would require many more institutions to report to the Department than would be required to report with the threshold, and dramatically, and unnecessarily, expand the reporting requirements for all institutions. Taken together, these shortcomings put institutional administrators and staff in the unenviable position of being confused by the proposed information collection's directives concerning how an institution should comply with Sec. 117, while at the same time being threatened with criminal prosecution if they "willfully" fail to accurately disclose the information and documents as described in the information collection.

Moreover, there would be a significant increase in burden and cost to institutions to address the volume and nature of the additional information, with no discernable benefits. The Department has greatly underestimated the time it will take for institutions to comply with this vast and unnecessary expansion of the foreign gift reporting requirements. At the same time, the Department's information collection request requires such a large amount of information that it will actually undermine, as opposed to increase, the transparency of the relationships colleges and universities have with foreign individuals and entities, and efforts to identify nefarious conduct or inappropriate relationships. The Department's actions also risk a chilling effect on foreign giving and the willingness of foreign entities to enter contractual agreements with colleges and universities.

These concerns arise in the context of an apparently unprecedented attempt by the Department to expand statutory reporting requirements. The Department's information collection request exceeds its authority under Sec. 117 and is therefore arbitrary and capricious and unlawful. While the Department has authority under Sec. 117 and its general authority under the Higher Education Act to "fill in the blanks" of the statute, it must do so through a notice and comment regulatory process under the Administrative Procedure Act (APA). Instead, the Department is seeking to bypass that process under the auspices of the Paperwork Reduction Act (PRA) and expand the nature and scope of Sec. 117 obligations beyond those authorized by Congress.

Moreover, the Department's approach to clarifying Sec. 117 through the use of an information collection request is in direct contradiction with Executive Order (EO) 13891 on "Promoting the Rule of Law Through Improved Agency Guidance Documents," signed by President Trump on October 9, 2019. 84 Fed. Reg. 55,235 (Oct. 15, 2019). This EO directs federal agencies to "treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract."

The EO further states that "[a]gencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process. . . ." *Id.* The information collection request—which effectively creates new reporting obligations under Sec. 117 and new penalties for noncompliance—circumvents the rulemaking process called for in the APA and therefore is in direct violation of Executive Order 13891.

Ultimately, the proposed information collection will do little to advance the congressional goal of bringing greater transparency and accountability to the relationships colleges and universities have with foreign entities. Indeed, by swamping the Department with such an enormous amount of information about relationships that universities have with every foreign entity (including those from allied nations such as the United Kingdom and Canada) it will actually make it more difficult to effectively identify, evaluate, and assess gifts and relationships that should be of real concern. In effect, it will be more difficult for the Department to sort the reported information to identify the valuable and potentially problematic from the benign and unimportant.

1) Proposed Information Collection Request Exceeds Statutory Authority

a) Drafting That Could be Read to Imply that <u>All</u> Foreign Gifts and Contracts are to be Reported:

The $250,000 threshold. Sec. 117 states that schools are required to report twice a year gifts from, or contracts with, a foreign source of $250,000 or more, considered alone or in combination with other such gifts or contracts with that foreign source. As noted above, the legislative history of Sec. 117 confirms this focus on substantial gifts or contracts, indicating that the intent of the reporting is "to promote clarity of academic purpose by avoiding the distortion that may occur in an academic program when *large gifts* are given to the institution from a foreign entity without public knowledge of that gift." *Id.* (emphasis added).

In contrast to the statutory language and the legislative history of Sec. 117, the Department's "Supporting Statement for Paperwork Reduction Submission" published as part of this information collection request is exceptionally vague regarding the $250,000 threshold: instead of specifically referring to that threshold, in paragraph two it references "institutions subject to this information request" being required to "disclose fully **all** foreign money funneled to them, and for this information to be made readily available to the public." Supporting Statement, p. 2 (emphasis added). Accordingly, this gives rise to the question of whether the Department's proposed information collection assumes that institutions are required to report **all** foreign gifts and contracts, even those below the $250,000 threshold. Of course, this is not the case. Such an

interpretation, which exceeds statutory authority, would require even modest alumni donations with a value well below the $250,000 threshold to be reported if the alumnus is a foreign citizen. And presumably, institutions would need to report even token gifts that are exchanged during visits with foreign institutions. This was never the statutory intent, and it conflicts with the existing $250,000 statutory threshold contained in Sec. 117.

Recommendation:

The Department should explicitly state that the information collection request applies only to foreign gifts and contracts of at least $250,000, alone or in combination with other gifts or contacts with that foreign source, as specified in the statute.

Scope of "contracts." The Sec. 117 definition of a "contract" (i.e., "any agreement for the acquisition by purchase, lease, or barter of property or services by the foreign source, for the direct benefit or use of either of the parties[.]") is offered within the context of gifts, grants, and contracts for the purpose of providing funds and other support ***to*** institutions. This is consistent with the statute's legislative history. Indeed, in explaining the kinds of contracts contemplated for reporting under Sec. 117, the committee report states that

> "[U]nder the definition of contract, the Committee does ***not*** intend the language of this section to require reporting of contracts and grants made ***by*** institutions of higher education ***to*** foreign sources. For example, a university would not have to report a transaction in which it purchased equipment from a foreign source or leased property from a foreign source."

Supra at 88 (emphasis added).

The proposed information collection does not explicitly state that contracts calling for payments to be made ***by*** the institution to foreign sources are excluded, and we believe that this could be a source of confusion. We ask the Department to clarify that such contracts are not reportable. Absent such clarity, we believe the current language risks instilling uncertainty and confusion.

In the same vein, under the statutory definition of contract (which covers the acquisition by purchase, lease, or barter of property or services), we believe that schools are not required to report matriculation and tuition contracts with foreign students. In order to reduce any possible confusion, we ask the Department to indicate that tuition and cost of attendance payments from foreign students are excluded.

Recommendation:

The Department should explicitly state that contracts where an institution is purchasing services, equipment, or other products from a foreign corporation or U.S. subsidiary of a foreign corporation do not need to be reported. In addition, we ask the Department to clarify that institutions are not required to report tuition or other cost of attendance payments by foreign students.

b) The Definition of "Institution" Could be Read as Unlawfully Expanded Beyond Sec. 117:

The Department's request could be reasonably interpreted to significantly expand the definition of an "institution" contained in Sec. 117. The proposed information collection would require the reporting of gifts to "all legal entities (including foundations or other organizations) that operate substantially for the benefit or under the auspices of the institution." The request would expand the definition of "institution" of higher education to include university foundations, university hospitals, athletic boosters, research entities, alumni organizations, so-called "supporting organizations," and other related entities, even if they are organized as a separate legal entity under the Internal Revenue Code's (IRC) Sec. 501(c)(3) and/or Sec. 509(a)(3). Under the Department's request, the university will bear the reporting obligation but it may likely have no legal authority to compel the requisite information from one of these separate but related entities.

In contrast to the proposed request, Sec. 117 defines an "institution" much more 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."

This statutory definition of "institution" is largely consistent with Section 101 of the HEA, which provides the general definition of an institution of higher education. However, Sec. 117 expands the general HEA definition to include any **subunit** of the institution that receives federal financial assistance. By definition a "subunit" is a distinct and separate part of a larger entity. Any entity that is chartered, established, or organized separately from and operates independently of another entity simply cannot be a subunit of that entity. Accordingly,

university foundations, university hospitals, athletic boosters, alumni organizations, so-called supporting organizations, and other related entities – each of which would be organized as a separate legal entity under IRC Sec. 501(c)(3) and/or Sec. 509(a)(3) – would not be a "subunit" of the institution subject to reporting requirements under Sec. 117.

If it so chooses, the Department may be able to elaborate on the Sec. 117 definition of an institution by specifying the meaning of the term "subunit" through a notice and comment regulatory process under the APA.[1] The Department has never regulated Sec. 117, including the definition of an institution. Accordingly, the Department has no legal authority to circumvent that process as it seeks to do so through the proposed information collection request.

Recommendation:

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

c) Penalties Beyond What the Statute References:

Sec. 117 contains a very specific enforcement protocol. First, at the request of the Secretary of Education, the Attorney General may institute a civil action to compel compliance against any institution that has failed to comply with the requirements of the statute. Second, institutions that knowingly or willfully fail to comply with the requirements of the statute can be forced to pay "the full costs to the United States of obtaining compliance, including all associated costs of investigation and enforcement." See § 1011f(f). Yet, the Department's information collection request instead refers to criminal penalties, potentially including imprisonment under a federal fraud and false statements law.

Where, as here, the proposed information collection would direct institutions to make disclosures with no statutory basis and also leave well-meaning campus administrators and staff to consider aspects of it that are subject to differing reasonable interpretations, one thing is certain: individuals will be in the unenviable position of being confused and conflicted by the proposed information collection's directives as they take steps to meet their institution's Sec. 117 obligations. The Department's threat of criminal prosecution in this context – when the statute itself speaks only to civil and administrative remedies – is disconcerting. This heavy-handed messaging risks compromising the sort of

[1] For example, the Department has regulated the general HEA definition of an institution of higher education to include students who are not high school graduates if they are beyond the age of compulsory school attendance.

cooperative engagement with campus administrators and staff that the Department professes to seek and encourage.

Recommendation:

The Department should limit referenced enforcement in the information collection request in a manner consistent with the statute.

2) Requires Reporting of Information not Covered by the Statute or Legislative History

Sec. 117 principally requires reporting of "aggregate" information. The law contains ***no*** language calling for reporting of individual, corporate or other organizational identities. The statute creates ***no*** obligation to provide any documents containing such identities. And, Sec. 117 certainly creates ***no*** obligation to provide specific terms of a gift, grant, or contract other than as specifically described in Sec. 117(c) - "Additional disclosures for restricted and conditional gifts." Nonetheless, the proposed information collection would demand that colleges and universities provide information and documents to the Department that far exceed Sec. 117 statutory requirements.

a) Requires "True Copy" of Gift Agreements and Contracts:

Sec. 117 specifies the contents of reports that institutions shall file with the Department: "1) For gifts received from or contracts entered into with a foreign source other than a foreign government, 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. (2) For gifts received from or contracts entered into with a foreign government, the aggregate amount of such gifts and contracts received from each foreign government. (3) In the case of an institution which is owned or controlled by a foreign source, the identity of the foreign source, the date on which the foreign source assumed ownership or control, and any changes in program or structure resulting from the change in ownership or control." See § 1011f(b).

Under the Department's proposed information collection request, institutions would be required to upload to the Department's information collection portal a "true copy" of any gift or donation agreements, contracts, and restricted or conditional gift agreements. However, Sec. 117 does not authorize the Department to require institutions to produce gift or contract agreements, which will include the name and address of the donor or contracting party, nor does the

Department attempt to collect such information in any other information collection request. If implemented as proposed, this requirement will be enormously burdensome and costly. It will create significant compliance work, particularly for larger institutions, where there could be hundreds or more of such documents during each six month reporting time frame, spread out across campuses in the U.S. and abroad, in numerous academic and administrative offices as well as university foundations, university hospitals, athletic boosters, research entities, alumni organizations, so-called "supporting organizations," and other related entities which the Department is now including in an expanded definition of "institution." This burden will be exacerbated if the Department expects institutions to report all gifts, contracts, or restricted/conditional gifts even if below the Sec. 117 threshold of $250,000. Indeed, the breadth of information demanded covers a virtually limitless universe of transactions.

Based on the language of Sec. 117 concerning the content of required reports, the Department has no legal authority to require institutions to produce a "true copy" of any gift or donation agreements, contracts, and restricted or conditional gift agreements as part of required biannual reporting.

Recommendation:

The Department should remove the requirement in the proposed information collection request that institutions produce true copies of gift, contract, and restricted or conditional gift agreements.

b) Lack of Confidentiality Risks Disclosure of Intellectual Property Agreements and Proprietary Information:

The information collection request requiring institutions to upload "true" copies of all contracts provides no guarantee of confidentiality. Indeed, in its supporting statement for the paperwork reduction action submission, the Department "makes no pledge about the confidentiality of the data because the authorizing statute makes no provision for same."[2] Supporting Statement, p. 5. It appears the Department plans to upload all submitted contracts to its planned web portal. This presents a huge risk of disclosure of agreements containing intellectual property and proprietary information to a limitless universe of consumers, including foreign actors, some with potentially nefarious intentions, at a time when Congress and federal national security and science agencies are worried about illicit foreign technology transfers from higher education.

[2] It is ironic that the Department claims the statute provides it no authority to confer confidentiality over the requested data while breaching the confines of the statute elsewhere in so many fundamental ways.

It also will potentially expose colleges and universities to liability since they will be forced to upload agreements to a public web portal that may include proprietary information which institutions are legally and/or contractually obligated not to disclose. Moreover, this requirement will have a detrimental effect on the willingness of many foreign corporations, investment partners, or other entities to enter into contractual agreements with colleges and universities, as institutions will have to inform potential contracting partners that all contract agreements must be produced to the federal government to be made public. Finally, this disclosure requirement will invariably and needlessly undermine universities' competitive advantages particularly in the areas of executive education and technology transfer, potentially harming the research endeavor. The Department has no authority under Sec. 117 to create such a profound risk of disclosure of intellectual property agreements and proprietary information.

In addition, if the Department moves forward with its apparent effort to post contract agreements on a publicly available web portal, it may violate the Freedom of Information Act (FOIA), which protects business information (privileged or confidential trade secrets and commercial or financial information) from disclosure, provided the submitting institution cites the business exemption. See 5 U.S.C. § 552(b)(4). While the Department has the authority to determine the applicability of this exemption, it cannot simply waive the business information exemption across the board, exposing all protected information. Rather, it must engage in a careful waiver determination on a case-by-case basis which includes due process rights for the submitting institution.

Recommendation:

The Department should remove the requirement in the proposed information collection request that institutions produce true copies of gift, contract, and restricted or conditional gift agreements.

c) Raises Significant Privacy Concerns Regarding Individual Donors and Potentially Conflicts with State Privacy Laws:

With regard to disclosure of gifts from foreign individuals, Sec. 117 provides that institutions are to report "the aggregate dollar amount of such gifts . . . 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*." (emphasis added). Yet, the information collection request seeks to expand this text by requiring institutions to report a personal identifier – *the name and address* – of such individual foreign donors, and fails to follow the statute which specifies that the "principal residence" need only be disclosed if the donor's citizenship country is unknown. Practically speaking, this would preclude any anonymous gifts from foreign individuals, even

very modest gifts, which is likely to have a chilling effect on the willingness of such donors to make charitable contributions at a time when affordability is a key issue on campuses and among policymakers. It is also at odds with common practice and long-standing policy at many institutions of allowing all donors, including those living in other countries, to request confidentiality in their giving.[3] Moreover, the disclosure of individual donor names and addresses may violate some state statutes that preserve donor confidentiality by exempting their information from disclosure under state freedom of information acts.

Recommendation:

The Department should only require reporting in the proposed information collection of individual donor information as specified in the statute.

d) Statute Does Not Require Disclosure of Foreign Student Tuition Payments:

As discussed above, Sec. 117 does not require reporting of tuition or other cost of attendance payments by foreign students as a contract with a foreign source. If the Department were to seek to require disclosure of such payments, the Department's proposed information collection would violate the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the Department's FERPA regulations, 34 C.F.R. § 99. In general, both FERPA and the implementing regulations prohibit disclosure by institutions of student tuition and other cost of attendance payments absent student consent. The Department may not find safe harbor in the one relevant exception to this general prohibition as it relates to the enforcement of or compliance with federal legal requirements. Here, the relevant legal requirements that institutions must comply with are those that Congress specified in Sec. 117 which do not address disclosure of tuition and other cost of attendance payments by foreign students. Therefore, the Department is bound by the language of Sec 117.

Recommendation:

The Department should explicitly state in the information collection request that institutions are not required to report tuition and other cost of attendance payments by foreign students.

[3] Private institutions are required to list the names, addresses, and contributions of donations totaling $5,000 or more on their Internal Revenue Service Form 990, Schedule B, but institutions are not required to disclose the names and addresses of donors to the public as part of the public inspection availability requirements of the Form 990 and its numerous schedules.

e) Seeks Information Unknown to Schools and Requires Unreasonable and Unjustifiable Certifications Making Compliance Virtually Unverifiable:

The Department's information collection request would also impose a number of unreasonable and unjustified certification requirements on institutions of higher education, including under a number of civil and criminal statutes which the Department has no authority to interpret or enforce, that will make compliance incredibly difficult, if not outright impossible.

With regard to unrestricted gifts and contracts, and restricted or conditional gifts from foreign sources, the information collection request asks a series of seven specific "yes or no" questions about each source, including whether it is a legal entity created solely under the laws of a foreign state or is an individual not a citizen of the United States. In general, institutions will not be able to provide definitive answers to these questions because they do not ask foreign donors or entity partners to identify their country of citizenship or incorporation when they accept such gifts or enter into contracts. As is explicitly permitted under current law, institutions use the primary address of the donor as the best available proxy for country of citizenship or incorporation when identifying reportable gifts and contracts. Indeed, Sec. 117 specifically states that institutions can report "country of origin" based on principal residence or place of business where the donor's country of citizenship or incorporation is unknown. In violation of Sec. 117 language, the Department's information collection request does not appear to permit that option.

In addition, two of these questions ask institutions to verify whether a foreign entity is substantially owned, controlled, or financed by a foreign source. While in some instances, it may be relatively easy to determine whether a U.S. entity is controlled by a foreign source because the information is well-known or publicly available. In many cases, it will not be obvious and may be difficult or impossible to confirm whether a U.S. entity is substantially owned, controlled, or financed by a foreign principal. To comply with this new requirement, institutions will need to ask all U.S. donors and parties with whom institutions enter into contracts to confirm that they are not "substantially" owned, controlled, or financed by a foreign principal and rely on their representations, or undertake considerable and expensive due diligence to verify the information independently. Again, none of this is required under Sec. 117.

For restricted or conditional gifts or contracts, institutions will be required to verify and describe whether "the restricted or conditional gift [was] for the purpose of or did it have the effect of influencing any program or curricula at the institution, either directly or indirectly." This requirement is vague, unmanageable, and beyond the scope of Sec. 117. For example, if a foreign

individual, corporation, or foundation made a gift to an institution to establish a lecture series or scholar-in-residence program which brought prominent foreign scholars, authors, or public figures to campus, it would quite easily have the effect of directly or indirectly influencing programs or curricula at the institution, but the nature of that influence, especially any "indirect" influence, will be impossible to measure. Sec. 117 does not require an institution to disclose whether a restricted or conditional gift or contract influences the institution and therefore the Department has no authority to require such a verification.

Institutions will also be required to certify compliance with a list of anti-terrorism, sanctions, export control, anti-boycott, and other trade laws and regulations, and they will be required to certify that the foreign sources have not engaged in activities that violate federal criminal law. Notably, the Department has no role with regard to any of these laws and no authority to enforce them. The purpose of requiring such disclosure is beyond the statutory requirements and unnecessary. Indeed, some of the required certifications go beyond compliance with law and would necessitate significant due diligence to verify the information independently and/or would require foreign sources to certify that they are in compliance with the requirements. In many instances, institutions would have to rely on the foreign source's certification as the basis for their certifications.

Recommendation:

The Department should only require institutions to report gifts, contracts, and restricted or conditional gifts in the information collection request as specified in the statute and should remove the proposed certifications.

3) Burden and Cost of Reporting Vastly Underestimated

In its burden statement for the Paperwork Reduction Act, the Department estimates that the "[p]ublic reporting burden for this collection of information is estimated to average 10 hours per response, including time for reviewing instructions, search existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information." Burden Statement, p. 1. The Department's supporting statement indicates that this 10-hour reporting estimate will break down to "take a professional staff employee at an institution of higher education nine hours to complete the disclosure and it would take a Senior [institutional] Administrator one hour to review and approve the disclosure report." *Id*. at 6. The Department vastly underestimates the administrative and cost burden resulting from this proposed information collection.

As previously discussed, it is not uncommon for universities and colleges—which are highly decentralized operations—to receive hundreds of gifts or enter into contracts each year potentially covered by the reporting. In addition, schools will have to upload "true" copies of all relevant gift agreements, contracts, and restricted or conditional gift agreements. If institutions are required to report all foreign gifts and contracts regardless of the $250,000 statutory threshold, the number of gifts and contracts each six-month period may go from fewer than a hundred to thousands, particularly at large institutions.

If institutions are required to establish whether each U.S. entity with which they have a gift agreement or contract is substantially owned, controlled, or financed by a foreign principal, significant time and financial resources will have to be devoted to conduct due diligence, particularly in light of the challenges under federal and state law for determining beneficial owners. As universities have many such relationships, it is reasonable to believe that this requirement will necessitate several hundred hours per report. And if institutions are required to conduct due diligence and run reports on whether foreign sources have complied with U.S. anti-terrorism, sanctions, export controls, and anti-boycott laws, this will undoubtedly add substantial time for each gift or contract.

In short, this will be an enormously burdensome, costly, and difficult task, particularly for larger institutions, where there could be hundreds or more of such documents during each six month reporting time frame. In addition, under the expanded definition of "institution" in the Department's request, schools will be challenged to obtain these documents likely spread across campuses and from related entities that are separately incorporated, over which they may have little, if any, control. Even the act of uploading the data would take more than the 10 hours estimated. It will also require the creation and maintenance of expensive databases on campus to comply with this requirement. Moreover, given the volume of information to be submitted to the Department by each institution, it is simply not credible for the Department to claim—as it does in its "Supporting Statement"—that it will take the Department no more than two hours to review each institution's disclosure report.

Finally, the imposition of this significantly expanded and costly burden is inconsistent with the PRA, the purpose of which is to, *inter alia,* ***minimize*** the collection burden from information collected by the federal government and to "ensure the greatest possible public benefit from and ***maximize*** the utility of information" collected by the federal government. See 44 U.S.C. § 3501 (emphasis added).

Conclusion:

For the reasons set forth above, the Department's proposed information collection request unlawfully exceeds the authority granted to it by Congress in Sec. 117. The Department's proposed collection under the PRA ignores the Department's statutory obligation under the Administrative Procedures Act to engage in a formal notice and comment process to promulgate rules to accompany Sec. 117. Indeed, the Department's approach to clarifying Sec. 117 appears to be in direct contradiction, as noted above, to Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents." The proposed information collection request seeks information not covered by the statute nor is it consistent with congressional intent. The Department has also enormously underestimated the time it will take for institutions to comply with this vast and unnecessary expansion of the foreign gift reporting requirements. Finally, by overwhelming the Department with an enormous quantity of information that it would be unable to effectively use, the proposed information collection will actually undermine the congressional goal of bringing greater transparency to the relationships colleges and universities have with foreign entities. Accordingly, we recommend that the Department make changes to the proposed information collection request as set forth above.

Also, please find attached a legal memorandum by Hogan Lovells LLP, prepared at ACE's request, regarding the Department's proposed information collection request. This memorandum has been sent separately to the Department's Acting General Counsel Reed Rubinstein by ACE's General Counsel.

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 Council on Education
American Dental Education Association
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 Pennsylvania
Association of Jesuit Colleges and Universities
Association of Public & Land-grant Universities
Association of Schools and Programs of Public Health
College and University Professional Association for Human Resources
Connecticut Conference of Independent Colleges
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
Independent Colleges of Indiana
National Association for College Admission Counseling
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NYS Commission on Independent Colleges and Universities
Oregon Alliance of Independent Colleges & Universities
Tennessee Independent Colleges and Universities Association

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November 4, 2019

Via Email (Reed.Rubinstein@ed.gov) and via FedEx
Mr. Reed Rubinstein
Acting General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Mr. Rubinstein,

This letter follows up on a series of exchanges between the Department and my ACE colleague, Terry Hartle. As you know, in August Mr. Hartle was advised by Deputy Secretary Mitchell Zais that you should be ACE's point of contact for future ACE communications with the Department regarding Section 117 (20 U.S.C. 1001f) – Disclosures of Foreign Gifts.

Respectfully, and in the spirit of cooperation, I write to directly share with you a perspective which informs ACE's strongly held view that the Department's interpretation of Section 117, and its proposed information collection, should be reconsidered. Please see the enclosed memorandum by Hogan Lovells LLP, prepared at my request.

Our comment letter, to be submitted shortly on behalf of many higher education associations, will speak in detail to higher education's concerns regarding the proposed information collection.

Very truly yours,

Peter G. McDonough
Vice President and General Counsel

cc: Diane Jones, Principal Deputy Under Secretary
Mitchell M. Zais, Deputy Secretary
Terry Hartle, Senior Vice President, American Council on Education

Hogan Lovells

MEMORANDUM

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TO Peter McDonough
Vice President and General Counsel

ORGANIZATION American Council on Education

FROM Hogan Lovells US LLP

DATE November 4, 2019

SUBJECT **Section 117 of the Higher Education Act / U.S. Department of Education's Proposed Information Collection Request**

This memorandum outlines certain legal flaws in the U.S. Department of Education's ("ED") September 6, 2019 proposed information collection request (the "information collection")[1] related to Section 117 of the Higher Education Act of 1965, as amended. Section 117 addresses the obligation of covered higher education institutions to submit to ED "disclosure reports" regarding certain gifts from and contracts with foreign sources. We understand that you intend to share this analysis with ED.

The information collection is an apparent attempt by ED to seize authority that Congress has not given it and to side-step the rulemaking authority that Congress has given it, and is in key respects contrary to the plain language of Section 117 and arbitrary and capricious. It is therefore unlawful under the Administrative Procedure Act ("APA"). For similar reasons, approval of the information collection would contravene the Paperwork Reduction Act of 1995, as amended ("PRA").

I. Section 117 specifically describes the contents of required reports.

Section 117 requires higher education institutions that receive federal financial assistance to file certain foreign gift and contract reports. Specifically, institutions must file a "disclosure report" regarding a "gift" or "contract" with a "foreign source" if the value of the gift or contract is $250,000 or more (considered alone or in combination with all other gifts and contracts with the foreign source in a calendar year).[2] Congress specified that "[a]ll disclosure reports required . . . shall be public records open to inspection and copying during business hours."[3]

Congress never intended that Section 117 require institutions to report all information regarding all gifts and contracts with all foreign sources to ED or to the public. To the contrary, Congress specified what the "disclosure report" "shall contain."[4] According to Section 117, the report's contents depend on whether the gift or contract is with a foreign government or not, and

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1 See 84 Fed. Reg. 46,943 (Sept. 6, 2019); see also https://www.regulations.gov/docket?D=ED-2019-ICCD-0114.

2 See 20 U.S.C. 1011f(a). This letter does not address the requirements for institutions that are owned or controlled by a foreign source.

3 Id. § 1011f(e).

4 Id. § 1011f(b)–(c), (h).

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whether it is "restricted or conditional" or not.[5] For each category, the report's contents are specifically described:

- Where a gift or contract is with a foreign government, an institution's report "shall contain" "the aggregate amount" of reportable gifts and contracts "received from each foreign government."[6] Where the counterparty is not a foreign government, an institution's report "shall contain" "the aggregate dollar amount of such gifts and contracts attributable to a particular country."[7]

- Where a gift or contract is "restricted or conditional," certain "additional disclosures" are required, the content of which again depends on whether the counterparty is a foreign government or not.[8] Where a foreign government is a counterparty, the institution "shall disclose" "the amount, the date, a description of such conditions or restrictions, and the name of the foreign government."[9] The same reporting requirement attaches to restricted or conditional gifts and contracts with non-governmental counterparties, except there is no requirement that an institution report the counterparty's name, just the counterparty's country.[10]

Not only does Section 117 specifically describe the contents of required reports, it generally requires only the disclosure of high-level, aggregated information—for gifts and contracts that are not restricted or conditional, Section 117 requires only that an institution report aggregated amounts received from each foreign government or attributable country. For restricted or conditional gifts and contracts, Section 117 additionally requires only that an institution report the amount of the gift or contract, plus the date and a description of the conditions or restrictions. Section 117 requires an institution to report a counterparty's name only when it is a foreign government.

Section 117 provides that ED "may promulgate regulations to carry out this section," but assigns enforcement authority to the U.S. Department of Justice ("DOJ") and is specific about the scope of that enforcement authority.[11] "Whenever it appears that an institution has failed to comply with the requirements of this section, . . . a civil action may be brought by the Attorney General, at the request of the Secretary," to compel compliance.[12] An institution must bear the "full costs to the United States of obtaining compliance, including all associated costs of investigation and enforcement," but only if DOJ proves that an institution's noncompliance was "knowing" or "willful."[13] There are no other penalties under Section 117.

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5 Id. § 1011f(b)–(c).
6 Id. § 1011f(b)(2).
7 Id. § 1011f(b)(1). "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." Id.
8 Id. § 1011f(c).
9 Id. § 1011f(c)(2).
10 Id. § 1011f(c)(1).
11 See id. § 1011f(f)–(g).
12 Id. § 1011f(f)(1).
13 Id. § 1011f(f)(2).

ED has never promulgated regulations under Section 117 despite its authority to do so. It has instead issued two Dear Colleague Letters ("DCLs").[14] Those DCLs largely reiterate the statute and provide technical directions regarding use of the E-App[15] to make reports but offer no significant interpretative guidance.[16]

II. The proposed information collection request goes well beyond the terms of the statute.

On September 6, 2019 ED published in the Federal Register a proposed information collection request under the PRA.[17] ED asserted that the information collection is "necessary to ensure that the Secretary receives sufficient information about gifts or contracts involving a foreign source . . . to be able to enforce 20 U.S.C. 1011f."[18] The proposed information collection "is *mandatory*, unless there are no disclosures to report under [Section 117]."[19]

Although ED justifies the new information collection as part of the need to enforce the statute,[20] it stated that "[w]e will publish the disclosures in substantially the same form that they are submitted by institutions of higher education on the internet," and that "[i]n accordance with the statutory language at 20 U.S.C. § 2011f [sic], we will make these disclosures public to ensure financial transparency regarding the relationship between U.S. universities and foreign sources."[21] Accordingly, the information collection constitutes the disclosure reports required by Section 117.

The proposed information collection, however, does not track the statutory language regarding the contents of a disclosure report under Section 117. Rather, it contemplates a detailed, line-by-line reporting of each reportable gift and contract together with the requirement that an institution upload a "true copy" of each such gift and contract.22 The line-by-line accounting is structured to require a significant number of data elements that Section 117 does not require an institution to report. For example:

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14 See, e.g., Statement of General Mitchell M. "Mick" Zais, Deputy Secretary, U.S. Department of Education (ED), Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (Feb. 28, 2019), available at https://www.hsgac.senate.gov/imo/media/doc/2019-02-28%20Zais%20Testimony%20-%20PSI.pdf ("Over the 30-plus years that the disclosure requirements have been in place, the Department has not issued any regulations under this provision of the statute. Instead, the Department has issued guidance to schools on their reporting responsibilities—specifically Dear Colleague Letters issued in February 1995 and October 2004") (internal citations omitted).

15 Electronic Application for Approval to Participate in the Federal Student Financial Aid Programs.

16 See DCL GEN-95-12 (Feb. 1, 1995) (Expired 6/97); DCL GEN-04-11 (Oct. 4, 2004).

17 See 84 Fed. Reg. 46,943 (Sept. 6, 2019); see also https://www.regulations.gov/docket?D=ED-2019-ICCD-0114.

18 Supporting Statement for Paperwork Reduction Act Submission at 1, available at https://www.regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0114-0002&attachmentNumber=1&contentType=pdf (hereafter, "Supporting Statement").

19 Paperwork Reduction Act Burden Statement at 1, available at https://www.regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0114-0003&attachmentNumber=1&contentType=pdf (hereafter, "Burden Statement").

20 Supporting Statement at 1–3.

21 Supporting Statement at 9.

22 See generally Burden Statement.

- Where Section 117 never requires an institution to report the name of a counterparty unless it is a foreign government and never requires an institution to report the address of a counterparty, the proposed information collection would require institutions to report names and addresses for all counterparties.[23]

- Where Section 117 requires an institution to report the "date" of a gift or contract only for restricted or conditional gifts or contracts, the proposed information collection would require institutions to report the "duration" for all gifts and contracts.[24]

- Where Section 117 generally requires only aggregate information by foreign government or attributable country, as applicable, the proposed information collection would require detailed information about each gift and contract and would require institutions to upload a pdf copy of each underlying legal instrument.[25]

In addition to the above data elements, the information collection would require institutions to make a number of affirmative certifications related to compliance with economic sanctions, antiboycott and terrorism-related laws, including Executive Order 13224; 22 U.S.C. Chapter 39; 15 C.F.R. § 730 et seq.; 22 C.F.R. Subchapter M; 18 U.S.C. §§ 2339, 2339A–D; and 26 U.S.C. § 999.[26] Section 117 says nothing about those laws, ED has no experience or authority to interpret those laws, and ED is not responsible for enforcing those laws.

III. If implemented, the proposed information collection would be unlawful.

Where, as here, a statute requires a disclosure report, defines what the disclosure report "shall contain," and authorizes an agency to implement the statute by "promulgat[ing] regulations," the APA does not permit an agency to create new substantive obligations with respect to such report through a mandatory information collection instead of notice-and-comment rulemaking. In any event, an agency cannot, as ED seeks to do here, transform the reporting requirement in ways that are incompatible with the statute, arbitrary and capricious, or beyond its statutory authority.

A. ED's proposal is a procedurally invalid legislative rule dressed as a PRA information collection.

ED's proposal is a legislative rule disguised as a PRA information collection: It would impose new mandatory, substantive burdens on institutions by requiring disclosure of information that cannot be justified by Section 117 alone. Much of that information is confidential business and proprietary information. It would be "simply absurd" to call the information collection "anything but a rule 'by any other name.'" See Sugar Cane Growers Cooperative of Florida v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002). Because ED has not undergone notice-and-comment rulemaking, the information collection is therefore procedurally invalid under the APA.

The APA requires that a court "hold unlawful and set aside" any agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(d). The APA forbids an

23 Burden Statement at 2–6.
24 Id.
25 Id.
26 Id. at 6.

agency to promulgate a so-called "legislative rule"—a binding, substantive rule that has the force and effect of law—without first undergoing notice-and-comment rulemaking. See 5 U.S.C. § 553(b)–(c); Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1021 (D.C. Cir. 2000). To qualify as a legislative rule, a rule must be legally binding and alter the rights and obligations of regulated entities in ways that would not be justified by an existing statute or regulation. See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5–7 (D.C. Cir. 2011); Mendoza v. Perez, 754 F.3d 1002, 1021 (D.C. Cir. 2014) ("A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy.").[27] The label an agency decides to use is irrelevant; if the agency action is a legislative rule, notice-and-comment rulemaking is required. See Sugar Cane Growers, 289 F.3d at 96–98.

For example, in 2011, the United States Court of Appeals for the District of Columbia Circuit ruled that the U.S. Department of Homeland Security ("DHS") issued an invalid legislative rule when it implemented full body scanners at airport checkpoints without notice-and-comment rulemaking. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011). There, a statute required screening of all passengers for weapons, and DHS had promulgated a general regulation prohibiting entry to a boarding area "without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such area[]." Id. at 3 (quoting 49 C.F.R. § 1540.105(a)(2)). Without undergoing notice-and-comment rulemaking, HHS and TSA implemented full body scanners.

The D.C. Circuit concluded that DHS promulgated an unlawful legislative rule. "Of course," the court recognized, "stated at a high enough level of generality, the new policy imposes no new substantive obligations upon airline passengers: The requirement that a passenger pass through a security checkpoint is hardly novel . . . ." Id. at 6. But that missed the point: Because a full-body scanner intrudes upon privacy in a way a metal detector does not, "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." Id. "[T]he APA would be disserved if an agency with a broad statutory command (here, to detect weapons) could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation (here, requiring passengers to clear a checkpoint) and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations." Id. at 7.

So too here, except ED has never even bothered to issue a regulation, general or otherwise. As an initial matter, the proposed information collection has the force of law and imposes legal requirements. By its terms, it is mandatory, applies prospectively to all covered institutions, and constitutes an institution's Section 117 reports. See Natural Res. Def. Council v. E.P.A., 643 F.3d 311, 320–21 (D.C. Cir. 2011). And, because the information collection will require institutions to provide more information than what Section 117 requires and to certify that the information is accurate and complete under threat of criminal sanction, institutions are not free to provide only what Section 117 requires. See id.; see also Sugar Cane Growers, 289 F.3d at 96.

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27 See also Pacific Gas & Electric v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . A general statement of policy, on the other hand, does not establish a 'binding norm.'").

The information collection also radically transforms the disclosure reports required by Section 117. Where Section 117 generally requires only the aggregate amount of reportable gifts and contracts by attributable country or foreign government, the information collection requires detailed, individual reports about each reportable gift and contract, including details that have no basis in Section 117 (such as "duration"). And where Section 117 never requires the disclosure of the name or identifying information of a counterparty unless the counterparty is a foreign government, the information collection requires disclosure of the name and address of each and every counterparty. The information collection even goes so far as to require submission of each underlying legal instrument, which institutions generally treat as confidential business and proprietary information and Section 117 plainly does not contemplate. Because the information collection is legally binding and imposes new legal requirements that cannot be justified by Section 117, it is a legislative rule that requires notice-and-comment rulemaking.

B. The proposed information collection is substantively invalid because it is contrary to the statute, arbitrary and capricious, and beyond ED's authority.

Even if promulgated through notice-and-comment rulemaking, core aspects of the information collection would still be unlawful as contrary to the plain meaning of Section 117, arbitrary and capricious, and *ultra vires*. The information collection is therefore substantively invalid under the APA.

As an initial matter, the information collection is incompatible with the plain meaning of the statute. Agency action is routinely set aside as unlawful when it violates a statute. See Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2439 (2014) (agencies must "'stay[] within the bounds of their statutory authority'"); see also Natural Res. Def. Council, 643 F.3d at 322 (striking down a legislative rule "[b]ecause it violates the statute's plain language and our precedent").

In Section 117, Congress specified what the foreign gift and contract disclosure reports "shall contain," both in general and for restricted and conditional gifts. By its plain terms, in the absence of a restricted or conditional gift, Section 117 requires only an aggregate report of the total amount of all gifts and contracts attributable to a particular country. Reporting of information about individual gifts and contracts is required only when the gift or contract is restricted or conditional. Section 117 requires reporting of a counterparty's name only when the counterparty is a foreign government. ED's attempt to transform Section 117 into a statute that requires individual—rather than aggregate—reporting and disclosure of the names of all counterparties is incompatible with the statute and therefore unlawful. See, e.g., Bobreski v. E.P.A., 284 F. Supp. 2d 67, 76 (D.D.C. 2003) ("Because each statute except the [Safe Drinking Water Act] contains some form of subpoena authority enacted elsewhere in the same legislation as its whistleblower provision, Congress' omission of whistleblower subpoena authority appears to be intentional."). [28] Section 117

28 See also Independent Insurance Agents of America v. Hawke, 211 F.3d 638, 644–45 (D.C. Cir. 2000) ("Because § 92 expressly grants national banks located in small towns the general power to sell insurance as agent, reading § 24 (Seventh) to authorize the sale of insurance by all national banks transgresses both common sense and two traditional rules of statutory interpretation: the presumption against surplusage and expressio unius est exclusio alterius."); Citizens for Responsibility & Ethics in Wash. v. FEC, 316 F. Supp. 3d 349, 400 (D.D.C. 2018) ("The non-parallel structures of subsections (c)(1)–(2) and (f)(1)–(2) demonstrate that Congress knows how to limit the contents of filed statements to

demonstrates that Congress knew how to require institutions to provide individual information about a reportable gift or contract and to report the name of the donor when it wanted to, and ED has no authority to contradict Section 117 by requiring such information in all cases.

Similarly, because Section 117 generally requires aggregate "disclosure reports," it is contrary to the statute to require institutions to submit the underlying legal instruments. A disclosure "report" about "gifts and contracts" plainly contemplates something other than the underlying gifts and contracts themselves. Cf. Ass'n of Am. Railroads v. Surface Transp. Bd., 162 F.3d 101, 104 (D.C. Cir. 1998) (applying the plain meaning rule). Accordingly, even had ED promulgated regulations purporting to require what the information collection requires, the regulations would not pass muster because they would be incompatible with Section 117.

More generally, the information collection is unlawful because ED has offered no reasoned basis for promulgating it, and it therefore would not survive arbitrary and capricious review. See, e.g., Judulang v. Holder, 565 U.S. 42, 45 (2011) ("When an administrative agency sets policy, it must provide a reasoned explanation for its action."); North Carolina v. E.P.A., 531 F.3d 896, 930 (D.C. Cir.), on reh'g in part, 550 F.3d 1176 (D.C. Cir. 2008) (standards promulgated by agency "entirely arbitrary" because the agency based them on "irrelevant factors"). The only real rationale ED has offered for the information collection centers on its alleged obligation to enforce Section 117. But Congress assigned enforcement authority to DOJ, not ED. See 20 U.S.C. § 1011f(f). Congress did not even give ED subpoena authority in connection with Section 117.[29] Regardless, ED has offered no reasoned explanation for how or why enforcement concerns are an appropriate factor for ED to consider in defining what Congress intended a Section 117 report to contain.

Finally, ED seems to have no authority whatever to require institutions to provide certifications related to compliance with economic sanctions, anti-boycott and terrorism-related laws enforced by other agencies. When a federal agency acts in blatant excess of its statutory authority, that action is *ultra vires* and should be vacated. See, e.g., Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1168, 1175 (D.C. Cir. 2003) (agency action is *ultra vires* when it "exceed[s] the agency's delegated authority under the statute."); Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988) (agency violation of "'clear and mandatory'" statutory provision is *ultra vires*).

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In sum, if the information collection is implemented it would seem subject to challenge under the APA. The information collection is an unlawful legislative rule promulgated without notice-and-comment rulemaking. And the information collection is in certain key respects contrary to the plain language of the statute, without any reasoned basis, and *ultra vires*.

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the FEC when that is the intention, and § 30104(c) does not limit the information required to be disclosed by not-political committees to subsection (c)(2)(C).").

29 See 20 U.S.C. § 1097a (granting ED subpoena authority to enforce "this subchapter" (i.e., Title IV of the Higher Education Act)).

IV. If OMB were to approve the proposed information collection, such action would violate the PRA.

The proposed information collection is also contrary to the PRA. In deciding whether to approve an information collection request, OMB must adhere to its own regulations. See Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 87–92 (D.D.C. 2019) (vacating OMB's approval of a stay of a previously approved information collection).[30]

OMB's regulations provide, in pertinent part, that "OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." 5 C.F.R. § 1320.5(e). Although OMB will consider "necessary any collection of information specifically mandated by statute or court order," it will "independently assess any collection of information to the extent that the agency exercises discretion in its implementation." Id. OMB will not approve an information collection unless an agency can demonstrate that it has "taken every reasonable step to ensure that the proposed collection of information" is, among other things, "the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives." Id. § 1320.5(d)(1)(i).

Here, as detailed in Part III, the information collection is a legislative rule that fundamentally transforms and goes far beyond what Section 117 requires. The information collection is therefore not necessary to fulfill any statutory mandate, requirement, or any other legitimate objective. Accordingly, it would be contrary to OMB's PRA regulations to approve the information collection.

What is more, the information collection would violate OMB's specific protection for confidential information. OMB regulations provide that "unless necessary to satisfy statutory requirements or other substantial need," OMB will not approve information collections that require "respondents to submit proprietary, trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law." Id. § 1320.5(d)(2)(viii). ED's information collection proposes to require institutions to submit confidential and proprietary legal instruments. Because Section 117 plainly does not require submission of legal instruments—just reports, and, most often, aggregate reports—OMB should not approve the collection of such proprietary and confidential information. In addition, nothing in the information collection suggests that ED will provide any protection for such proprietary and confidential information.

OMB therefore should not approve ED's proposed information collection under its own PRA regulations.

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In conclusion, ED's proposed information collection presents significant legal flaws. Congress gave ED rulemaking authority to implement Section 117, and ED should use that authority. A notice-and-comment rulemaking process would give ED the opportunity to understand what gaps in Section 117 need to be filled and would produce a more accurate understanding of the burdens it

30 The PRA forbids judicial review of a decision by OMB to approve or not act upon a collection of information, but only when the information collection is "contained in an agency rule." *See* 44 U.S.C. § 3507; see Hyatt v. OMB, 908 F.3d 1165, 1170–71 (9th Cir. 2018).

imposes on colleges and universities. As it stands, ED's proposal is an improper legislative rule dressed as an information collection, and that information collection is in key respects contrary to Section 117 and the PRA.