



December 19, 2019

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Department of Education  
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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 Gift and  
Contracts Disclosure – Docket No. ED-2019-ICCD-0154**

Dear Ms. Valentine and Mr. Ray,

On behalf of the American Council on Education and the undersigned higher education associations, I write to offer comments on the revised proposed Information Collection Request (ICR) published in the *Federal Register* by the Department of Education (Department) on December 17, 2019, Docket No. ED-2019-ICCD-0154.

Before commenting on the revised proposed ICR, it is important to reiterate some key contextual points from our initial comment letter of Nov. 5, 2019: The higher education community is deeply committed to protecting our institutions from illicit technology transfer and undue foreign influence. We recognize that institutions have an obligation to report foreign gift and contract information under Section 117 (Sec. 117) of the Higher Education Act of 1965 (HEA). At the same time, we are dedicated to preserving the principles of academic freedom, free speech, and intellectual exploration which are fundamental to American higher education. We genuinely believe that it is possible to reconcile efforts to guard against improper foreign influence while remaining true to our foundational principles.

With regard to the Department's revised proposed ICR, we recognize that the Department has made changes to the original ICR, including clarifying ambiguity

related to the \$250,000 threshold, limiting reporting to an “institution” as defined in the law, limiting “contracts” to incoming-money agreements, and eliminating several certifications.

Nonetheless, we believe that the Department’s revised proposed ICR continues to clearly exceed the specific statutory authority set out in Sec. 117 by significantly expanding the disclosure reporting required under the statute. In a purported effort to obtain the information required under Sec. 117, the revised proposed ICR casts an expansive net through mandatory disclosures never contemplated or authorized under the statute. Further, without statutory authorization, the revised proposed ICR seeks information and documents that potentially include confidential and proprietary information which the Department may not be able to protect from disclosure to the public.

First, Sec. 117 provides specific directives for what is to be reported regarding foreign gifts and contracts from individuals or entities in excess of \$250,000. The law mandates **only** the reporting of **aggregate** amounts of such gifts, and it does **not** require the reporting of the **identity** of the individual or entity providing the gift or entering into the contract. Rather, Sec. 117 requires reporting of those gifts and contracts to be **categorized by the country** based on citizenship or the “principal residence” if the citizenship country is unknown. (The name of the donor or contracting entity is only required when the counterparty is a foreign government.) For restricted and conditional gifts, there is some additional reporting required beyond the amount, including the date and a description of the conditions or restrictions. But even in these cases, Sec. 117 does not direct that the name of the donor or contracting party be disclosed (except for when the donor or contracting party is a foreign government). See 20 U.S.C. § 1011f(b)&(c).

Nonetheless, despite comments offered to the Department underscoring this unambiguous statutory limitation, the revised proposed ICR would require detailed “disaggregated information from each” gift or contract, **including** the date received, recipient (including any and all intermediaries), contract start and end dates, and **the names and addresses of all donors or contracting entities**. Nonsensically, the Department asserts that “the statute does not carve out an exception for institutions to withhold the name or address of an anonymous party.” Department’s Summary of Public Comments and Responses (Summary of Responses), unnumbered p. 7. Of course the statute contains no exception for disclosure of names and addresses: Why would the statute include an exception for something that is not required? The Department says that it “will not make [the names and addresses of a foreign source] part of the public disclosure report.” Department’s Summary of Public Comments and Responses (Summary of Responses), unnumbered p. 7. This promise of confidentiality is an assertion of authority at odds with the specific public inspection requirements in

the statute. In addition, there are not sufficient exceptions to FOIA to prevent the release of this information.<sup>1</sup> The very real risk of disclosure of this personal identifying information will undoubtedly have a chilling effect on donations. For restricted and conditional gifts and contracts, the ICR also exceeds the statutory reporting requirements, again requiring a detailed description of all conditions or restrictions, the recipient, including any and all intermediaries, and the contract start and end dates. This effort to expand disclosure reporting beyond the statutory requirements exceeds the Department's authority and is therefore unlawful.

### **Recommendation:**

#### **The Department should adhere to what the statute requires for the reporting of gift and contract information.**

Second, the revised ICR still contains the unauthorized mandate that institutions upload "true copies" of gift instruments and contract agreements to the Department's information collection portal for all reportable gifts and contracts. Obviously, combined with the reporting mandate discussed above, this would create a "belt and suspenders" means of demanding information far in excess of what Sec. 117 requires.<sup>2</sup> Neither the Department's justifications nor its confidentiality assurances stand up to examination.

This disclosure requirement is unprecedented in the history of the Department's routine collection of information from institutions. The "true copy" disclosure mandate would swamp the Department with thousands of documents from hundreds of institutions, making the effort to ensure compliance more difficult and undermining the law's goal of transparency. Rather than creating a needless and *ultra vires* requirement that will apply a burdensome and costly obligation on all institutions in violation of the Administrative Procedure Act and which lacks sufficient confidentiality protections, the Department could, consistent with its long-standing practice, obtain such documents where necessary through normal compliance reviews of institutions participating in the Department's student financial aid and other programs.

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<sup>1</sup> In addition, it is doubly ironic given that the Department explicitly stated in connection with its original ICR that the statute provides it **no** authority to confer confidentiality over the requested data. The Department's "Supporting Statement for Paperwork Reduction Submission," (Supporting Statement), p. 5.

<sup>2</sup> Allegedly to alleviate concerns commentators raised about privacy considerations and potential disclosure of intellectual property and proprietary information, the Department now promises not to make "the true copies publicly available, to the extent permitted by law," including a commitment to follow the FOIA "business information" disclosure exemption. Summary of Responses, unnumbered p. 6.

The Department's justification for this overreach is an assertion that it must demand reporting in excess of statutory requirements in order to ensure compliance with the statute. Summary of Responses, unnumbered pp. 2, 6. Aside from the intrinsically problematic nature of this assertion—which turns a compliance obligation into a perpetual investigation—the Department's claim that the “true copy” requirement will support its enforcement of Sec. 117 is specifically undercut by the plain language of the statute. Sec. 117 contains a very specific enforcement protocol. 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. See § 1011f(f). In short, Congress expressly assigned enforcement authority to the Department of Justice.

In addition, the Department's promises to maintain confidentiality represent a head-turning reversal from the original ICR, where ED explicitly stated that it had no statutory authority to provide confidentiality. Supporting Statement, p. 5. The Department was correct in its original position on this issue. Indeed, in light of Sec. 117's specific public inspection provisions as well as FOIA requirements, it is reasonable to foresee that this illusory promise of confidentiality will be easily pierced, creating the same breach of confidentiality disclosure concerns we originally raised.

**Recommendation:**

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

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. Accordingly, we recommend that the Department's request for emergency processing of the revised proposed ICR be denied; and that the Department make changes to the proposed revised ICR to limit disclosure reporting to the requirements in the statute and withdraw the proposed mandate requiring production of true copies of gift agreements and contracts.

Also, please find attached a legal memorandum by Hogan Lovells LLP, prepared at ACE's request, regarding the Department's original proposed information collection request, which is still applicable. This memorandum was 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,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is fluid and cursive, with a prominent initial "T" and a stylized "H".

Terry W. Hartle  
Senior Vice President

On behalf of:

American Association of Community Colleges  
American Association of State Colleges and Universities  
American Council on Education  
Association of American Medical Colleges  
Association of American Universities  
Association of Governing Boards of Universities and Colleges  
Association of Jesuit Colleges and Universities  
Association of Public & Land-grant Universities  
Council for Advancement and Support of Education  
Council on Governmental Relations  
Hispanic Association of Colleges and Universities  
National Association of College and University Business Officers  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators

November 4, 2019

*Via Email ([Reed.Rubinstein@ed.gov](mailto: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



## 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")<sup>1</sup> 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).<sup>2</sup> Congress specified that "[a]ll disclosure reports required . . . shall be public records open to inspection and copying during business hours."<sup>3</sup>

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."<sup>4</sup> According to Section 117, the report's contents depend on whether the gift or contract is with a foreign government or not, and

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

<sup>2</sup> 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.

<sup>3</sup> *Id.* § 1011f(e).

<sup>4</sup> *Id.* § 1011f(b)-(c), (h).

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whether it is “restricted or conditional” or not.<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup>
- 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.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> “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.<sup>12</sup> 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.”<sup>13</sup> 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”).<sup>14</sup> Those DCLs largely reiterate the statute and provide technical directions regarding use of the E-App<sup>15</sup> to make reports but offer no significant interpretative guidance.<sup>16</sup>

**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.<sup>17</sup> 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.”<sup>18</sup> The proposed information collection “is *mandatory*, unless there are no disclosures to report under [Section 117].”<sup>19</sup>

Although ED justifies the new information collection as part of the need to enforce the statute,<sup>20</sup> 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.”<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>
- 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.<sup>24</sup>
- 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.<sup>25</sup>

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.<sup>26</sup> 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

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<sup>23</sup> Burden Statement at 2–6.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> 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.”).<sup>27</sup> 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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<sup>27</sup> 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.”).<sup>28</sup> Section 117

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<sup>28</sup> 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.<sup>29</sup> 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).<sup>30</sup>

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

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<sup>30</sup> 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.