

December 17, 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-0154**

Dear Ms. Valentine,

On behalf of the American Council on Education and the undersigned higher education associations, I am writing in opposition to the Department of Education’s (the Department or ED) request for emergency processing of the new proposed Information Collection Request (ICR) concerning Foreign Gifts and Contracts Disclosures published in the *Federal Register* by the Department on December 17, 2019, Docket No. ED-2019-ICCD-0154. For the reasons discussed below, the Department’s request for emergency processing under the Paperwork Reduction Act (PRA) should be denied.

The Department asserts that it is entitled to emergency processing of its new Section 117 ICR for the following reasons: 1) in order for the Department to meet the statutory deadline for institutions to report disclosures by January 31, 2020; 2) increased interest from federal policy makers in the relationship between China and U.S. higher education, including the February 2019 report of the Senate Permanent Subcommittee on Investigations; 3) preliminary findings from the Department’s investigation of six institutions of higher education regarding foreign gift and contracts reporting; and, 4) the Department’s own failure to properly implement Section 117, a statute enacted in the mid-1980’s, to ensure compliance with foreign gift and contract reporting requirements.

The Department’s request for emergency review of its Section 117 ICR fails to satisfy the requirements for emergency review set forth in the PRA and its implementing regulations.

The PRA allows the Office of Management and Budget (OMB) to waive the statutorily required public comment period—here, 30 days—only if specified emergency conditions exist. See 44 U.S.C. § 3507(j)(1); 5 C.F.R. § 1320.13. OMB has indicated that emergency review is a “rare type of approval granted only when there is a time-sensitive need for the collection based on

very specific criteria for reasons outside of the agency’s control.” See Digital.Gov, *Types of PRA Clearance*, available at <https://pra.digital.gov/clearance-types>. Those “very specific criteria” are:

“[T]he agency cannot reasonably comply with the provisions of this subchapter because—

- (i) public harm is reasonably likely to result if normal clearance procedures are followed;
- (ii) an unanticipated event has occurred; or
- (iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed.”

44 U.S.C. 3507(j)(1).

None of those criteria exist with respect to ED’s ICR.

First, no public harm will result if normal clearance procedures are followed. Types of public harm recently recognized by OMB include ICRs related to disaster relief for students affected by hurricanes and wildfires, see 84 Fed. Reg. 45135 (Aug. 28, 2019) and registration of facilities that store explosives, see OMB ICR 200512-1140-001. The type of harm that is implicated in this case is a delay in the Department’s implementation of a new ICR for a legal requirement that has been in place for decades and for which there is already an existing ICR mechanism. This alleged harm is materially different in both nature and scale as compared to the other types of public harms that OMB has recognized; there simply is no public emergency here that warrants the circumvention of the legally prescribed manner in which the federal government is charged with trying to enact a reporting change of this type.

Second, no unanticipated event has occurred that would necessitate emergency review. The regulatory history makes clear that the type of unanticipated event that warrants emergency review must be outside the agency’s control. See 53 Fed. Reg. 16630 (May 10, 1998) (“emergency and expedited procedures exist to handle special and uncontrollable circumstances”). No events outside the Department’s control have recently occurred to warrant expedited review of the ICR. The OMB has specifically stated that “internal delays are not emergencies.” See Digital.Gov Guide, *Types of PRA Clearance*, available at <https://pra.digital.gov/clearance-types/>. An example of an OMB-recognized unanticipated event is a Congressional Review Act denial of a previous regulation. See 82 FR 13451 (Mar. 13, 2017) (approving an ED request for emergency review in response to the possibility that Congress would overturn a state funding regulation under the Congressional Review Act, which would be considered an unanticipated event out of ED’s control). No such event has occurred here.

Third, the normal clearance procedure is not reasonably likely to prevent or disrupt collection of information nor is the normal clearance procedure reasonably likely to cause a deadline to be missed. While institutions must file Section 117 reports by January 31 every year, no

statutory deadline applies to ED or binds its actions with respect to the ICR. The PRA's need for emergency review in the face of statutory deadlines relates to situations in which the agency, not the regulated party, would be out of compliance with a statute if the agency does not release an ICR by a certain date. See 83 Fed. Reg. 17405 (Apr. 19, 2018) ("This request for emergency clearance is based on missing a statutory deadline. The Appropriations Act requires that awards be made no later than June 1, 2018. The Appropriations Act became public law on March 23, 2018. There are 70 calendar days from March 23, 2018 to May 31, 2018. The June 1st date does not allow for a 30-day public comment period and 30-day OMB review period. Due to this shortened approval period we are also requesting no public comment period.") In contrast, the statutory deadline here applies to institutions. **Yet that deadline creates no emergency, as failure to approve the ICR in time does not prevent either ED or regulated institutions from satisfying the requirements of Section 117. ED has an existing mechanism by which institutions make Section 117 reports and that existing mechanism has been in place for years. Under ED's logic, ED could circumvent the need for OMB review by purposefully releasing ICRs shortly before statutory deadlines that apply to regulated entities and claim an emergency.** Such practice would offend the principle that emergency review is for "special and uncontrollable circumstances."

Furthermore, given the vast expansion of required information to be reported, the institutional processes necessary to identify and assemble the information to be reported, and the looming holiday break during which many institutions will be closed, the timing of the Department's effort will inhibit and in many cases practically preclude any meaningful modifications of campus processes for information gathering and uploading ahead of the next Section 117 reporting date of January 31. The Department has essentially assured that this will be the case since it is intending to mandate reporting via an entirely new – and at this point unavailable - information portal. Instead of clarifying reporting obligations for institutions, the Department's effort continues to ferment institutional uncertainty about the breadth and depth of legally required Section 117 reporting.¹ (See the attached November 4, 2019 letter to the

¹Additionally and curiously, we note that the current authority for E-App reporting of Section 117 information was approved without change by OMB on November 22, 2019 (OMB Control Number 1845-0012) with an expiration date of November 30, 2022. ED's Federal Student Aid office, as evidenced by the prefix "1845" in the OMB Control Number, has been and continues to be the agency's sponsor of this information collection.

The new information collection ED has proposed for Section 117 reporting indicates that the Office of General Counsel (OGC) will now be the agency's sponsor of this information collection. The prefix "1801" in the published OMB Control Number 1801-NEW identifies OGC as the sponsor.

OGC does not currently sponsor an information collection, and has not done so in nearly 20 years. This is not to suggest that OGC is ill-equipped and thus unable to do this work successfully. Rather, it is to say that a new and expanded information collection and a very short timeline coupled with inexperience is a reasonable concern of the higher education community, meriting cautious and calculated implementation, rather than hastily initiating a new process for use by institutions on or before January 31, 2020.

Department's Acting General Counsel Reed Rubinstein from ACE's General Counsel, enclosing a legal memorandum by Hogan Lovells LLP, prepared at ACE's request, regarding the Department's proposed information collection request.)

Because ED fails to satisfy any of the three criteria that could be used to establish the need for emergency review, it is similar to other requests that OMB has disapproved. See 2 Fed. Reg. 49344 (Aug. 28, 2007), *available at* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200710-3245-001# (denying Small Business Administration's request for emergency review of a new loan approval form in order to meet the agency's self-imposed deadline); 71 Fed. Reg. 41860 (July 24, 2006), *available at* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200608-2127-001 (rejecting National High Traffic Safety Administration's argument that a deadline for a media buy which Congress had provided funding constituted an emergency circumstance). The Department's request should be similarly denied.

Thank you for your attention to this matter.

Sincerely,



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 Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Hispanic Association of Colleges and Universities (HACU)
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators