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OFFICE OF THE PROVOST AND
EXECUTIVE VICE PRESIDENT FOR ACADEMIC AFFAIRS

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November 4, 2019
(via www.regulations.gov)

Director, Information Collection Clearance Division
U.S. Department of Education
550 12th Street SW
PCP, Room 9089
Washington, DC 20202-0023

Re: Docket ID Number [ED-2019-ICCD-0114], Agency Information Collection Activities;
Comment Request; Foreign Gifts and Contracts Disclosures

Dear Director:

On behalf of the University of California (UC), thank you for the opportunity to comment on the U.S. Department of Education's proposed information collection requirements for implementing Section 117 of the Higher Education Act (HEA)(20 §U.S.C. 1011f), as published in the Federal Register on September 6, 2019 (Docket no. ED-2019-ICCD-0114) (the "Notice").

UC is committed to developing robust and innovative research collaborations while at the same time protecting our intellectual property and encouraging transparency with respect to our interactions with foreign entities. Still, we are concerned that the proposed information collection requirements expand the scope substantially beyond that currently required by statute, and thus respectfully request that the Department of Education consider scaling back the requirements. As proposed, the expanded information collection and reporting requirements would impose a significant administrative burden. Additionally, institutions have not been provided with the appropriate vehicle to comment on the proposed implementation of Higher Education Act (HEA) Section 117 reporting requirements, or with sufficient time to adjust should these go into effect for the January 31, 2020 report.

Administrative Burden

The "Supporting Statement for Paperwork Reduction Act Submission" ("Supporting Statement") accompanying the Notice indicates that purpose of the collection of information is enforcement of 20 §U.S.C. 1011f. However, the University is concerned that the proposed information collection requirements would substantially expand the scope of HEA Section 117, extending well beyond statutory language and congressional intent, and would impose an administrative burden far exceeding the estimated ten hours per response. For example, the "Paperwork Reduction Act (PRA) Burden Statement" ("Burden Statement") accompanying the Notice suggests that the following data would be required to be submitted, *none* of which is a statutory requirement under 20 §U.S.C. 1011f:

- Name and address of each foreign source, including substantial data concerning the legal or citizenship status of such foreign source
- Whether a gift donor or contract party is “substantially” controlled, financed, or subsidized by a foreign principal
- Duration of the applicable gift or contract
- “Domestic party” to an applicable gift or contract
- For a restricted or conditional gift or contract, a narrative description of *all* conditions or restrictions, *in addition to* the provision of information regarding the four types of conditions or restrictions specifically mentioned in 20 §U.S.C. 1011f.
- For a restricted or conditional gift or contract, verification of whether it was “for the purpose of or [having] the effect of influencing any program or curricula at the institution, either directly or indirectly”, and a description of such a purpose or effect, if applicable
- True copy of the applicable contract or gift agreement
- Certifications by the institution regarding compliance with certain anti-terrorism, sanctions, export control, anti-boycott and other trade laws and regulations outside the enforcement authority of the Department of Education
- Certification that the reported foreign source has not engaged in criminal activities violating federal law

We strongly believe that the collection of this extra data, in addition to that which is statutorily required by 20 §U.S.C. 1011f, for contracts or gifts to the University from foreign sources, would necessarily require a time and effort commitment far beyond the ten hours that the Supporting Statement claims would be sufficient for the preparation of the required reporting. For example, requiring entities to submit “a detailed description of all conditions or restrictions” would require a review of the documents for such descriptions (at levels beyond what is appropriate for most administrative staff), and possibly typing long sections into the Department’s systems, especially if OCR-ready (Optical Character Recognition) electronic copies are not available. Furthermore, the provision of such information would be redundant if the Department is also collecting a “true copy” of the gift or donation agreement, as is indicated in the Burden Statement.

We are also especially concerned about the proposal in Section 6 of the Burden Statement to require institutions to certify information about foreign sources that may not be readily known or available to the institutions. Under the Department’s proposed information collection requirement, institutions would be required to certify foreign source compliance with various anti-terrorism, sanctions, export control, anti-boycott and other trade laws and regulations, and further certify that reported foreign sources have not engaged in activities that violate federal criminal law. While contracts often include terms and conditions addressing these subjects, it is unreasonable to require institutions to independently verify and certify this information. How could we conclusively know that the sponsor/donor is in full compliance with all these regulations? Therefore, UC requests that the Department reconsider the addition of this

requirement. It would be far more reasonable (though still outside the scope of the HEA) to require that institutions verify that the sponsor/donor is not on a government restricted entity list.

The requirement to report gifts and contracts from *subsidiaries or affiliates* of foreign sources, which could include entities incorporated in the United States, is also problematic and contrary to other common federal regulatory approaches, such as the Department of Commerce and Department of State export control regulations. Because such entities are normally considered “U.S. Persons” for other regulatory purposes, universities may not currently identify them as foreign and may not be able to accurately capture these for Department of Education reporting purposes. Overall, information about a sponsor/donor relationship to a foreign entity may not be readily known, available or obtainable.

Moreover, the definition of “foreign source” in 20 §U.S.C. 1011f suggests that such gifts or contracts should only be reported in cases where the subsidiary/affiliate is *acting as an agent on behalf of* its parent foreign source. UC requests that the Department confirm that this is the case – that is, a subsidiary/affiliate acting entirely on its own behalf, and not as an agent of its foreign parent, would not be reported.

While 20 §U.S.C. 1011f indicates that the threshold for reporting applicable gifts or contracts is \$250,000 or more from a single foreign source, alone or in aggregate with all other gifts or contracts from that source, the Supporting Statement introduces some potential ambiguity regarding this threshold. Section 1 of the Supporting Statement references the current statutory threshold, but Section 2 implies that *all* foreign gifts or contracts should be disclosed. This would expand the scope of the information collection far beyond the requirements of 20 §U.S.C. 1011f and would necessarily require a statutory change for implementation. Therefore, we request that the Department confirm that there is no intent to remove or change the current HEA threshold. This confirmation would alleviate any confusion that has arisen in the higher education community regarding discrepancies between the HEA and the Department’s Supporting Statement.

UC also requests clarification on the definition of several terms included in the proposed information collection requirements. For example, the Burden Statement does not define “domestic party” with regard to a contract with or a gift from a foreign source. It is also unclear how the Department defines “substantial” in the context of determining whether a donor or contract party is “substantially” controlled, financed, or subsidized by a foreign principal. Clarity on these definitions is important to reduce potential burden associated with attempting to comply with ambiguous requirements and ensure consistency amongst institutions.

Privacy

The Department’s proposed information collection requirement raises a number of privacy-related concerns. Under the proposal, personal identifiers such as the name and address of individual donors, including those that choose to donate anonymously, would have to be disclosed. How will the Department protect the privacy of individual donors? Additionally, the proposed information collection may actually be in conflict with Department of Education

regulations in this regard. For example, the Privacy Act of 1974 prohibits using a personal identifier to retrieve and release public records.

Similarly, providing a full copy of gift and contract agreements not only poses a significant administrative burden, but it potentially infringes on privacy and confidentiality as well. Under the proposed procedures, institutions would be required to submit to the Department a copy of all applicable contracts and gifts, with no guarantee of confidentiality. Such agreements (particularly agreements with industry partners) may also include proprietary information that institutions may be contractually obligated not to disclose and which would otherwise be protected under the Freedom of Information Act (FOIA) or other similar state laws. Institutions, therefore, could potentially be placed in a position of having to breach contractual terms in order to comply with the Department's information collection requirements.

Therefore, it is essential that the Department provide clarity on exactly which submitted information will be publicly available, not least so that potential donors and contractors can be made aware of this at an early stage. Further, UC requests that the Department address whether institutions can redact confidential information prior to submission, and if not, whether the Department will abide by FOIA and seek feedback from donors and contractors on whether the copies contain information that is exempt from disclosure in accordance with FOIA (and any applicable state public records laws). In either scenario, redactions require consultation with donors and contractors, significantly increasing administrative burden.

UC is also concerned that the implementation of such procedures will have a negative effect on legitimate (and often long-standing) relationships between institutions and foreign sources, whether they be donors or contract parties. The knowledge that detailed, often personal or proprietary, information about such sources – including an actual copy of a donor agreement or other contract – will be provided to the Department and perhaps made publicly available, will likely result in a reduction of the number of such gifts and contracts. This will be detrimental to institutions' continued successful and positive engagement with the international community and the advancement of science and education. We strongly urge the Department to reconsider the requirement to upload copies of contracts and gifts.

Penalties

According to the Burden Statement, the penalties for knowingly or willfully failing to provide accurate information would be significantly expanded to potentially include imprisonment. This goes beyond, and in fact appears to be in conflict with, the enforcement provisions of 20 §U.S.C. 1011f, which state that a civil action may be brought to compel compliance. UC believes that penalties should apply to the institution submitting the required information, and not extend to those individuals submitting that information in their institutional capacity, especially since, as described above, the individuals may not reasonably know with certitude that all the information collected is completely accurate.

Method of Implementation and Notification

Currently, the information required to be delivered to the Department under 20 §U.S.C. 1011f is submitted as part of the institution's "Application to Participate in Federal Student Financial Aid

Program (e-App).” However, the Supporting Statement indicates that a new online collection instrument will be developed specifically for the 20 §U.S.C. 1011f information submission. The increased information collection, together with the implementation of a new submission portal, represents a considerable change from current practice. Institutions need time to adjust. We also believe that it is important that reporting institutions are consulted on and participate in the development of the new collection instrument. This would help ensure that the portal functions as efficiently and smoothly as possible both for the institutions submitting information and for the Department in meeting its statutorily mandated HEA Section 117 collection requirements.

Beyond the concerns raised above regarding the potential direct effects of the proposed information collection, we are also concerned about how these changes are being communicated – that is, as a Burden Statement rather than under proposed rulemaking, which we strongly believe is the appropriate process in this regard. The information indicated in the Burden Statement is far beyond what is statutorily required, and represents a substantial expansion over the currently statutorily required information and considerable additional administrative burden. We request that the Department revisit these decisions, the purpose and intent of the HEA Section 117, and work with the higher education community to find alternatives that would meet the goals of Section 117 reporting. Should the Department choose to go forward, UC minimally asks that the implementation of any new information collection requirement or submission method be delayed for a reasonable time to allow institutions sufficient opportunity to update procedures accordingly and provide staff training. This also ensures a greater likelihood of increased and accurate compliance, which is the stated intent of the Notice.

We again thank the Department of Education for the opportunity to provide comments and are available for further consultation.

Sincerely,



Michael T. Brown, Ph.D.
Provost and
Executive Vice President for Academic Affairs

cc: UC President Janet Napolitano
UC Federal Government Relations Associate Vice President Chris Harrington

