

**Higher Education Emergency Relief Fund (HEERF)
Summary of Public Comments on
Required Proprietary Institution Certification Form
Following 60 Day Review Period**

Section I: Overview

On May 28, 2021, the U.S. Department of Education (“Department”) published a Notice of Proposed Information Collection Request (Notice) in the Federal Register (86 FR 28818) inviting comments by July 27, 2021 on the Required Proprietary Institution Certification Form which had previously received approval under emergency processing by OMB on May 10, 2021 under control number 1840-0855. Two respondents submitted comments, one of which was responsive and is addressed below. The Department reviewed all comments carefully and is not making any changes to the Required Proprietary Institution Certification (RPIC) form.

Section II: Comment Response

Comment: A respondent questioned the legal basis for the Department to require completion of the form as part of their application to receive HEERF American Rescue Plan (ARP) (a)(4) grant funds.

First, respondent argues that the Department had defects in the information collection under the Paperwork Reduction Act (PRA). Specifically, respondent argues that the Federal Register notice fails to provide a brief statement summarizing the data collection and how it will be used, that imposition of the form is an impermissible deviation from past practice in earlier rounds of HEERF grant funding, and that the 180-day length of approval under emergency processing is more than the regulatory maximum granted under the PRA’s implementing regulations.

Second, respondent argues that the Department had defects in the information collection under the Administrative Procedure Act (APA). Specifically, respondent argues that the Federal Register notice fails to adequately describe why the Department has found proprietary institutions to be at heightened risk and how the information will be used by the Department. Respondent argues that lack of public disclosure describing the Department’s rationale is arbitrary and capricious under the APA.

Finally, respondent argues that the Department exceeded its statutory authority in imposing the information collection. Respondent argues that the ARP statute does not impose this requirement, the Higher Education Act of 1965, as amended, does not permit this information collection, and that the information collection seeks to impermissibly hold certain owners personally liable for the conduct of their institutional grantees.

Discussion: The Department thanks the respondent for its comment but declines to discontinue this information collection or make changes to the RPIC form.

First, the Department notes that the Federal Register notice published is compliant with the publication requirements under 44 U.S.C. § 3507. The published notice specifically redirected all

interested parties to a Docket ID (ED-2021-SCC-0079) on [regulations.gov](https://www.regulations.gov). On [regulations.gov](https://www.regulations.gov), interested parties can review the form and instruments, a copy of the notice itself, and responses to the supporting statement that meet the requirements of 44 U.S.C. § 3507. Much of the federal government, and the Department specifically, utilizes [regulations.gov](https://www.regulations.gov) to provide the public a one-stop location to be able to access regulatory and information collection documents and respond with a comment if desired. Additionally, the Department notes that with the release of ARP HEERF (a)(4) grant funds on May 10, 2021, the third round of HEERF grant funding, it had been more than a year since the first release of HEERF grant funds to proprietary institutions in April 2020. During this time, as noted below, the Department learned through program implementation specific challenges proprietary institutions encountered, or were more likely to encounter, to successfully carrying out the HEERF grant program. As such, the Department retains discretion and authority to make changes in program design in response to an assessment of risk, which the Department carries out for grant programs pursuant to 2 CFR § 200.206. That is, the Department retains the authority to adjust its risk-based requirements pursuant to 2 CFR § 200.206(c) when risk-evaluation indicates that it may be merited. Finally, OMB approved the 180-day emergency period in its Notice of Action (NOA) for 1840-0855 received by the Department on May 10, 2021. OMB has discretion for extended emergency approvals exceeding 90 days in accordance with 44 U.S.C. § 3507(j)(2).

Second, respondent is conflating the applicability of the APA to a process governed by the PRA. If a rule is more properly classified as an “information collection” mechanism, that rule is not subject to APA notice-and-comment procedures and instead falls under the ambit of the PRA. *See Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 54 (D.D.C. 2018). “Collection of information” is defined as “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency” that call for either “answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States,” or “answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.” 44 U.S.C. § 3502(3)(A)(i)–(ii). In this case, the RPIC form clearly meets the definition of a collection of information, such that review is subject to the requirements of the PRA and does not implicate the APA. The collection of information pursuant to the agency’s responsibility as a steward of federal funds is not a rulemaking. Additionally, the Department has demonstrated reasons for concluding that proprietary institutions carry additional risk in their administration of HEERF grant funds, such as: (a) proprietary institutions were almost universally new federal grantees, with many being unaware and inexperienced with the requirements associated with administrating federal grant programs, (b) this was demonstrated during the year of HEERF implementation, in which proprietary institutions were overrepresented in improper payment grant issues, including accruing excessive interest on HEERF grant funds (46 percent of issues flagged by our payment integrity monitoring application while only representing 29 percent of institutions), overrepresented in quarterly reporting issues (making up approximately 2/3 of institutions with issues in December 2020), and were overrepresented on lists of institutions that were closed or closing and but had not informed OPE of their closure (29 institutions were identified as closing in January 2021 of which 25 were proprietary). Given the Department’s concern regarding these grant requirements, and the challenges posed by, in some cases, institutions closing without notification to their HEERF grant program officer, the Department

created this form as part of its overall risk management strategy to help ensure that it could follow up with appropriate parties and hold those parties accountable if the Department identified issues with a proprietary institution's administration of HEERF grant funds. Furthermore, this action was buttressed by the Department's Office of the Inspector General (OIG) issuing a [flash report](#) in May 2021 in which OIG specifically identified risks associated with closed or closing proprietary institutions misusing HEERF grant funds. Lastly, respondent suggests that since there are only student funds available under ARP HEERF (a)(4), it is difficult to mismanage those funds because they must only go to students. The Department disagrees given the experience and frequency of possible improper payment issues flagged by our G5 grants system and impermissible excess interest accumulation in which, as noted above, proprietary institutions are overrepresented by as a class.

Finally, respondent's comment does not recognize the Department's authority to appropriately monitor the risk of its grantees and impose appropriate monitoring and accountability systems to specifically address those concerns. *See, e.g.*, 2 CFR §§ 200.206 and 200.208. This authority predates the HEERF grant programs and is an essential part of the Department's oversight authority for all its grant programs. Here, because of the aforementioned concerns identified concerning proprietary institutions' administration of HEERF grant funds, the Department utilized its authority under 2 CFR §§ 200.206 and 200.208 to help mitigate the risk identified with these entities. As such, this information collection neither exceeds the Department's information collection authority, nor its general enforcement authority as a steward of federal grant funds.

Action Taken by ED: None.

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