



December 11, 2020

Levon Schlichter  
U.S. Department of Education  
Office of the General Counsel  
400 Maryland Avenue, SW  
Room 6E- 3 235  
Washington, DC 20202-5076

Docket No. ED-2020-OGC-0165

Dear Mr. Schlichter:

On behalf of the Association of American Universities (AAU), comprising America's leading research universities, we write to express concern with the Department of Education's November 13, 2020 Notice of Interpretation (NOI) regarding its enforcement authority with respect to an institution's failure to adequately report under Section 117 of the Higher Education Act (HEA) of 1965, as amended. In addition to these comments, AAU supports and agrees with comments submitted by the American Council on Education.

This ultra vires interpretation provided in the NOI allows the Department of Education to take enforcement action and discontinue an institution's access to Title IV federal financial student aid if the Department determines an institution has failed to adequately report foreign gifts and contracts as mandated by Section 117 of the HEA. This interpretation of Section 117 enforcement authority far exceeds the statutory authority Congress granted to the Department and neglects the process contained in statute whereby the Department may refer compliance issues to the Department of Justice. In the NOI, the Department also gives itself power to subpoena confidential materials. We believe this, too, goes beyond their statutory authority under Title I of the HEA.

AAU member universities recognize the importance of disclosing foreign gifts and contracts and want to work with the Department to ensure proper compliance, particularly after years of sparse guidance and inconsistent enforcement. To help institutions understand Section 117 compliance requirements, the higher education community has sought clarification in several recent letters to the Department<sup>1</sup> and subsequent comments on the Department's September 2019 Information Collection Request (ICR).<sup>2</sup>

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<sup>1</sup> <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Science-Security/Sec-117-letter-Dept-of-Ed.pdf>  
<https://www.aau.edu/key-issues/follow-letter-department-education-regarding-section-117-interpretation>  
<https://www.aau.edu/key-issues/aau-associations-respond-department-education-response-letter-section-117-guidance>

<sup>2</sup> <https://www.aau.edu/key-issues/aau-joins-higher-ed-community-letter-department-education-section-117-foreign-gift>  
<https://www.aau.edu/key-issues/aau-submits-comments-hea-section-117-foreign-gift-and-contract-reporting-requirements>

Much confusion still exists among our institutions concerning Section 117 compliance. Additionally, the Department has never engaged in a rulemaking process with stakeholders to promulgate clear guidance and a legitimate rule based on the existing statute. Undertaking a typical rulemaking process for developing clear guidance on Section 117 compliance is vital to ensuring accurate and transparent institutional disclosures.

Rather than address legitimate questions and concerns, the Department has instead alleged<sup>3</sup> institutions are purposely hiding information about foreign money received through affiliated institutional entities and have launched expansive, burdensome, and costly investigations into several universities. These dubious claims, the Department's adversarial tone, and the related actions they have taken against universities have undermined our national security and have misinformed policymakers and the public. Moreover, they have had a chilling effect on communication between universities and the Department for fear an institution may be investigated if they seek to correct reporting errors. This runs counter to the goal of enhanced transparency of foreign gift and contract reporting.

AAU and our member institutions continue to actively respond and work closely with other federal agencies, including the intelligence and security agencies to address areas of mutual concern regarding foreign government interference. AAU's efforts to address this threat include a joint survey with the Association of Public and Land-grant Universities (APLU) to collect [effective practices](#) from our member campuses in several areas including institutional disclosure. In addition, AAU has strongly advocated for support of Section 1746 of the FY20 NDAA which requires OSTP to coordinate with federal science, intelligence, and security agencies, including the Department of Education, on issues including institutional disclosure and reporting of foreign funding sources and gifts.

We therefore urge the Department to withdraw the NOI and instead work with the higher education community and initiate a rulemaking process to clarify concerns and reach mutual understanding of Section 117 reporting requirements. This will ensure greater compliance and facilitate increased transparency, which has long been sought by all involved and that is essential to the public trust.

Thank you for considering our views.

Sincerely,

A handwritten signature in blue ink that reads "Barbara R. Snyder". The signature is fluid and cursive, with the first name "Barbara" being the most prominent part.

Barbara R. Snyder  
President

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<https://www.aau.edu/key-issues/aau-associations-comment-foreign-gifts-and-contracts-reporting-proposed-information>

<https://www.aau.edu/key-issues/aau-comment-letter-sec-117>

<sup>3</sup> <https://www2.ed.gov/policy/highered/leg/institutional-compliance-section-117.pdf>