

February 27, 2023

**SUBMITTED VIA FEDERAL eRULEMAKING PORTAL**  
**([www.regulations.gov](http://www.regulations.gov))**

Dr. Miguel Cardona, Secretary of Education  
U.S. Department of Education  
Attention: Beth Grebeldinger  
Manager of the Strategic Collections  
and Clearance Governance and Strategy Division  
400 Maryland Ave. SW  
Room 6W203  
Washington, DC 20202-8240

**Re: Comment on the Department’s Proposed Agency Information Collection Activities;  
Comment Request; Foreign Gifts and Contracts Disclosures**

**Agency/Docket Number: ED-2022-SCC-0159**

**Document Number: 2022-28119**

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education appointees who are experts in education law and policy, including the Department’s foreign gifts and contracts disclosure enforcement obligations.

### **Proposal to Shift Section 117 Enforcement from OGC to FSA**

On Dec. 27, 2022, the U.S. Department of Education (“Department” or “ED”) published a data collection notice (“Notice”) of its intent “to collect the required information from institutions regarding foreign gifts and contracts as specified in the Higher Education Act of 1965 (HEA), as amended. Section 117 of the HEA (codified at 20 U.S.C. 1011f) provides that institutions of higher education must file a disclosure report with the Secretary of Education on January 31 or July 31, whichever is sooner, under certain circumstances.”<sup>1</sup> The Notice explained that “[w]ith this request for a new collection, the Department would be returning the collection of this information to FSA,

---

<sup>1</sup> 87 Fed. Reg. 79,293 (Dec. 27, 2022).



which is the office with primary responsibility for the administration of Section 117 within the Department going forward.”<sup>2</sup>

The Department’s shift of Sec. 117 data collection and related investigative responsibilities from the Office of the General Counsel (“OGC”) to the Office of Federal Student Aid (“FSA”) would:

- Jeopardize the Department’s tremendous Sec. 117 enforcement successes that have occurred since 2019, including revealing billions of dollars in previously undisclosed foreign gifts and contracts to American colleges and universities;
- Task an agency component, FSA, with a critical enforcement task for which it is neither staffed nor for which it has legal expertise;
- Remove Sec. 117 enforcement responsibilities from OGC, which is staffed with attorneys, legal staff, and other regulatory experts, and has properly initiated and guided multiple civil investigations pursuant to Sec. 117;
- Lead to diminished foreign gifts and contracts records disclosures by non-compliant colleges and universities, which will be far less likely to voluntarily provide Sec. 117 data and records to FSA than to OGC;
- Undermine the national security interests of the country by reducing the availability of critical disclosures to the Department regarding foreign financial involvements in America’s colleges and universities (and related dual-use research products);
- Give a dangerous green light to foreign adversaries to re-access critical research faculty and research products developed at our colleges and universities, despite the FBI’s clear warnings about the continuing vulnerability of America’s colleges and universities to espionage.

The Department’s proposal would severely diminish the Department’s Sec. 117 enforcement and investigatory capabilities by shifting relevant data collection to an agency component with extremely limited expertise, legal capacity, and related enforcement experience: FSA. FSA’s self-identified role regards “policies on federal financial aid for education, and distributing as well as monitoring those funds”<sup>3</sup> and FSA’s primary responsibility is “award[ing] more than \$120 billion a year in grants, work-study funds, and low-interest loans to approximately 13 million students.”<sup>4</sup>

---

<sup>2</sup> *Id.*

<sup>3</sup> See <https://www2.ed.gov/about/landing.jhtml?src=ft>.

<sup>4</sup> See <https://www2.ed.gov/about/offices/list/fsa/index.html>.



In appointing the current Chief Operating Officer of FSA,<sup>5</sup> the Secretary correctly described FSA’s limited role as “managing the student financial assistance programs authorized under Title IV... including grants, work-study and loans for students attending college or career school.”<sup>6</sup> FSA reports directly to the Department’s Under Secretary, who reports to the Secretary.

The Department proposes to move control of this collection (as reflected by the Office of Management and Budget’s control number) from OGC to FSA. OGC reports directly to the Secretary, its leadership is Senate-confirmed, and it has the “broad statutory mission” to “provide legal assistance to the Secretary concerning the programs and policies of the Department” in “carrying out the duties of the Department” including “the provision of legal advice, litigation, and legislative services.”<sup>7</sup>

### **The Department’s Section 117 Enforcement Efforts Since 2019**

On its website, the Department continues to publicly describe the importance of Sec. 117:

Over 30 years ago, Congress enacted Section 117 of the Higher Education Act of 1965 (HEA) in light of concerns about the growing financial relationship between U.S. universities and foreign sources. Congress balanced academic freedom and national security by mandating financial transparency through required reporting of contracts with and gifts from a foreign source that, alone or combined, are valued at \$250,000 or more in a calendar year.<sup>8</sup>

Beginning in 2019, led by OGC attorneys, the Department initiated nineteen civil investigations<sup>9</sup> to determine compliance by particular universities with Sec. 117’s simple reporting requirements. Indicative of Congress’s resolve regarding the Department’s enforcement efforts, the statute authorizes civil action against non-compliant IHEs upon the Secretary’s request “[w]henver it appears that an institution has failed to comply with the requirements of [Sec. 117], including any rule or regulation promulgated under this section.”<sup>10</sup> OGC, unlike FSA, is comprised largely of attorneys and other staff with particular legal and regulatory expertise. FSA, in accord with its mission, is staffed with personnel trained in the execution of federal student aid programs – subject matter thoroughly apart from Sec. 117.

The Department reported to the U.S. Senate’s Homeland Security and Government Affairs Committee’s Permanent Subcommittee on Investigations that OGC’s investigations had quickly

---

<sup>5</sup> See <https://www.ed.gov/news/press-releases/us-department-education-announces-richard-cordray-chief-operating-officer-federal-student-aid>.

<sup>6</sup> See <https://www.ed.gov/news/press-releases/us-department-education-announces-richard-cordray-chief-operating-officer-federal-student-aid>.

<sup>7</sup> See <https://www2.ed.gov/about/offices/list/ogc/index.html>.

<sup>8</sup> See <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>.

<sup>9</sup> See <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>.

<sup>10</sup> 20 U.S.C. § 1011f(f)(1).



determined that compliance failures were widespread, resulting in Department efforts to clarify reporting requirements, establishment of a simplified reporting portal in June 2020,<sup>11</sup> issuance of an information collection reporting requirement to improve reporting accuracy,<sup>12</sup> expansion of inter-agency consultation processes, and increased enforcement efforts.

OGC's actions were in direct response to a Staff Report entitled "CHINA'S IMPACT ON THE U.S. EDUCATION SYSTEM" issued by the U.S. Senate's Permanent Subcommittee on Investigations ("Senate Report").<sup>13</sup> The bipartisan Senate Report found that:

- *Foreign government spending on U.S. schools is "effectively a black hole" because U.S. colleges and universities fail to report foreign gifts and contracts as required by Sec. 117;*
- *The Chinese government, in particular, makes strategic investments to impact U.S. education through Confucius Institutes and other information-related vehicles;*
- *China had provided over \$158 million of funding to place and operate Confucius Institutes on American campuses, often coming with "strings that can compromise academic freedom;"*
- *Because U.S. colleges and universities "routinely" fail to report foreign gifts and contracts, the American people lack an accurate and complete picture of foreign influence, including from the Chinese government;*
- *Academic freedom at U.S. colleges and universities may be compromised by undisclosed foreign gifts and contracts.*<sup>14</sup>

In November 2019, the Department responsively informed the Senate Permanent Subcommittee of its concerns regarding widespread Sec. 117 compliance failures, describing its initial findings that IHE Sec. 117 "reporting has been generally underinclusive and inaccurate" and that, in response to OGC's inquiries, "[s]everal IHEs are correcting their non-compliance as a result" of investigations, "apparently anticipating that correcting current non-compliance carries no penalties under existing law."<sup>15</sup> OGC's investigations revealed the lengths to which many IHEs went to operate "through financially opaque captive foundations, foreign campuses, and other structures to generate revenue, including from foreign sources."<sup>16</sup>

---

<sup>11</sup> See <https://sa.ed.gov/cas/CASWeb/pages/Authentication.faces>.

<sup>12</sup> 85 Fed. Reg. 72,567 (Nov. 13, 2020).

<sup>13</sup> "China's Impact on the U.S. Education System," U.S. Senate Permanent Subcommittee on Investigations (Feb. 2019), available at <https://www.govinfo.gov/content/pkg/CHRG-116shrg36158/html/CHRG-116shrg36158.htm>.

<sup>14</sup> *Id.* at 1-3, 5, 71-76.

<sup>15</sup> See <https://www2.ed.gov/policy/highered/leg/psi-nov27-2019.pdf>.

<sup>16</sup> *Id.* at 3.



Significantly, the Department’s report to the Senate Permanent Subcommittee noted the compliance failures of IHEs despite extremely sophisticated IHE foreign financial tracking capabilities:

Although IHEs investigated by the Department appear to have extremely sophisticated systems for managing, soliciting, and tracking contributions, grants, and contracts over time and from many thousands of sources, foreign and domestic, it appears they have not deployed similar systems with respect to Section 117 reporting.

The Department has received data from several IHEs at a very high level of granularity (*e.g.*, individual contributions from foreign sources of \$100 or less), suggesting IHEs certainly have the capability to track and transparently report all foreign sources of money. It does not appear that these IHEs, each financially sophisticated and well-resourced, followed basic American Institute of Certified Public Accountants (“AICPA”) guidance for Section 117 financial reporting (*e.g.*, independent third-party audits integrated with contracts, gift agreements and other relevant instruments).<sup>17</sup>

Senior Departmental officials were called to testify before the Senate Permanent Subcommittee. In February 2019, Deputy Secretary Dr. Mitchell M. “Mick” Zais testified regarding the ongoing threat to America’s education system posed by undisclosed foreign gifts and contracts, particularly from China, and the commensurate need to effectively enforce Sec. 117’s simple reporting requirements.<sup>18</sup>

The Department’s civil investigations and other enhanced enforcement efforts continued, revealing truly remarkable widespread Sec. 117 disclosure failures that were widely publicized by the Department as part of its ongoing effort to increase compliance by IHEs.<sup>19</sup>

In October 2020, the Department published a report by OGC entitled “Institutional Compliance with Section 117 of the Higher Education Act of 1965” (“Compliance Report”).<sup>20</sup> The Compliance

---

<sup>17</sup> *Id.* at 4.

<sup>18</sup> Zais, Mitchell “Mick” M., <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2019-02-28%20Zais%20Testimony%20-%20PSI.pdf>.

<sup>19</sup> Aruna Viswanatha and Melissa Korn, “Top Universities Took Billions in Unreported Foreign Funds, U.S. Finds,” THE WALL STREET JOURNAL (Oct. 20, 2020), <https://www.wsj.com/articles/top-universities-took-billions-in-unreported-foreign-funds-u-s-finds-11603226953>.

<sup>20</sup> “Institutional Compliance with Section 117 of the Higher Education Act of 1965,” U.S. Department of Education, Office of the General Counsel (Oct. 2020), available at <https://www2.ed.gov/policy/highered/leg/institutional-compliance-section-117.pdf> (Compliance Report).



Report revealed that the Department’s enhanced enforcement efforts, including the opening of its civil investigations, had produced stark results: records of more than \$6.5 billion in previously undisclosed foreign gifts and contributions (\$3.8 billion of which foreign gifts were reported by IHEs via the Department’s new reporting portal between June and October 2020 [created under the direction of OGC]).<sup>21</sup>

The Compliance Report found that since June 2020, approximately \$350 million in foreign gifts and contracts were disclosed to the Department by IHEs that had no prior history of submitting Sec. 117 transactions – indicating a tremendous *increase* in compliance following the Department’s enforcement efforts.<sup>22</sup> It noted patterns of extremely evasive reporting behavior by particular IHEs:

[O]ur investigations confirm a Senate subcommittee’s finding that Section 117 reporting is systemically underinclusive and inaccurate.[] This is extremely troubling because the evidence shows that institutions have sophisticated systems for managing, soliciting, and tracking contributions, grants, and contracts over time and from many thousands of sources, foreign and domestic.

All investigative subjects have produced data at a very high level of granularity (e.g., individual contributions from foreign sources of \$100 or less), demonstrating their capability to track from foreign sources exists. Therefore, it is hard to understand, for example, how Yale University could have simply failed to report any foreign gifts or contracts for four years or Case Western Reserve University for 12 years, precisely when both were rapidly expanding their foreign operations and relationships – including with China and Iran.<sup>23</sup>

The Department noted that “[h]istorically, fewer than 300 of the approximately 6,000 U.S. institutions self-report foreign money each year” and that the “risk to academic freedom, integrity, and independence posed [by] such contributions has been historically ignored by regulators and overlooked or downplayed by the beneficiaries of foreign largess.”<sup>24</sup>

### **The Department’s Complex Investigations Revealed Widespread Compliance Failures by IHEs**

The Department’s investigations revealed that the “Chinese Communist Party sends students ‘under the guise of international scientific collaboration to systematically target critical technologies to advance China’s national security interests’[]” and that it “also lures international scholars to advance its causes through the Thousand Talents Program designed to attract foreign

---

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2-3.

<sup>24</sup> *Id.* at 7.



scholarship by providing them research funding, salaries, and laboratory space, among other perks.”<sup>25</sup>

The Department’s findings regarding the vulnerability of research and development technologies at colleges and universities were alarming, noting that “foreign adversaries are likely targeting specific institutions for their [research and development] and technologies.”<sup>26</sup> The Department warned:

American universities, commonly those with research prowess, often house licensing offices. These offices assess compliance with U.S. domestic and international laws and regulations, such as export and import controls. While the Department appreciates these compliance efforts, foreign governments may be strongly motivated to recruit former university licensing officers to gain insider knowledge of American licensing processes.

A former senior employee at one of the investigated universities’ licensing offices now holds a senior position in a Chinese company where he works on international licensing matters...university staff could eventually provide insider knowledge to foreign actors like the Chinese government, in effect increasing foreign government access to American research...American professionals possessing experience in regulating American institutions’ research and development projects may be recruited and hired by the Chinese government (or its intermediaries) to serve the Chinese government’s research interests.<sup>27</sup>

Citing several ongoing U.S. Department of Justice investigations of undisclosed foreign government access to faculty and research products at several prominent IHEs, the Department noted that “robust enforcement” of Section 117’s disclosure requirements are “*essential because hostile governments and their instrumentalities have targeted the higher education sector for exploitation to infiltrate cutting-edge American research projects, influence curricula, and gain access to systems and information....*”<sup>28</sup>

The Department cautioned that “America’s adversaries have long exploited the openness of American society, our deeply held belief in free inquiry and academic freedom, and the misjudgments of some higher education industry leaders to advance their institutional interests at the risk to American security.”<sup>29</sup>

Thanks to the Department’s (OGC’s) enhanced enforcement efforts, the University of Pennsylvania (“UPenn”) was required to report a stunning increase in its receipt of reportable

---

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 27.

<sup>27</sup> *Id.* at 27.

<sup>28</sup> *Id.* at 7 (emphasis added).

<sup>29</sup> *Id.* at 11.



foreign gifts and contracts – up 389% between 2018 and 2019 alone,<sup>30</sup> although it failed to identify the donors for approximately \$27.1 million of those gifts and contracts.<sup>31</sup> Foreign source gifts and contracts to UPenn amounted to at least \$258 million during the same period.<sup>32</sup> This is merely one of hundreds of examples of proper Sec. 117 enforcement by OGC leading to greater IHE transparency for the consideration of the American people and its elected officials – although UPenn’s foreign transactions were particularly notable because of the timing in the increase of anonymous and other contributions from China.

The Department’s findings regarding compliance failures included a description of an IHE (name redacted in the public version of the Compliance Report) which had “admitted that its disclosures to the Department failed to document more than \$760 million in funding” and noted that university officials used the word “dumbfounded” to explain their disclosure obligations and failures and that this typified “broader reporting errors across institutions.”<sup>33</sup>

Department officials described the complexity of their investigations as including the review of massive IHE financial records, including contracts, financial records, and institutional practices,” including reporting inconsistencies between Sec. 117 reports to the Department and information obtained through IHE IRS Form 990s (“Generally, institutions are well-funded, influential research producers, very often with opaque foreign gift and contract reporting practices...Incoming and outgoing institutional dollars recorded by Form 990s demonstrate that foreign influence on institutions is measured by millions and billions of dollars”<sup>34</sup>).

In addition to instituting multiple civil investigations of IHEs, modernizing the reporting portal, and working closely with IHEs to enable accurate, fulsome, and timely Sec. 117 disclosures, the Department issued guidance that reflected both the Department’s enforcement obligations and the seriousness with which the Department viewed Sec. 117 compliance. For example, in November 2020, it issued a Notice of Interpretation (“NOI”) to “clarify the Department’s enforcement

---

<sup>30</sup> On Feb. 1, 2017, the University of Pennsylvania announced the formation of the “Penn Biden Center for Diplomacy & Global Engagement (“Biden Center”), which subsequently opened a Washington, D.C. office in June 2018. *See* “Vice President Joe Biden to lead the Penn Biden Center for Diplomacy and Global Engagement,” *Penn Today* (Feb. 1, 2017), <https://penntoday.upenn.edu/spotlights/vice-president-joe-biden-lead-penn-biden-center-diplomacy-and-global-engagement>.

<sup>31</sup> “Penn received 389% more foreign donations in 2019 than in 2018, DP analysis finds,” *THE DAILY PENNSYLVANIAN* (Apr. 20, 2021), <https://www.thedp.com/article/2021/04/foreign-donations-penn-analysis-china>.

<sup>32</sup> Catherine Dunn, “Penn got \$258 million in foreign money, and there may be more it hasn’t disclosed,” *THE PHILADELPHIA INQUIRER* (Feb. 24, 2020), <https://www.inquirer.com/business/university-pennsylvania-foreign-donations-china-saudi-arabia-20200224.html>.

<sup>33</sup> Compliance Report at 15.

<sup>34</sup> *Id.* at 14.





authority for failure to adequately report under [Sec. 117].”<sup>35</sup> The NOI indicated that Sec. 117 compliance is part of an IHE’s program participation agreement and that disclosure failures could result in “fines, limitations, suspensions, or termination of the institution’s Title IV participation” pursuant to 20 U.S.C. § 1094(a)(17) (“Institutions Are Required Under Their Program Participation Agreements (PPA) To Report Section 117 Data”<sup>36</sup>).

More recently, in July 2022, the Department issued additional guidance<sup>37</sup> further clarifying when “contracts” are to be valued (at the time of execution), when gifts are to be valued (the amount received by the IHE), which arms-length transactions are reportable, the efforts IHEs are required to make to determine whether a gift or contract came from a foreign source (“good faith effort”) and that the Department requires IHEs to report transactions involving intermediaries where the intermediary operates substantially for the benefit or under the auspices of the IHE (e.g., foundation).

According to the Department, the webinar at which it first presented these additional guidelines was organized by the American Council on Education (“ACE”),<sup>38</sup> the largest higher education trade association and one which has long adamantly opposed the Department’s Section 117 enforcement efforts (discussed *infra*) on behalf of its IHE members.<sup>39</sup>

### **FBI Director Wray’s Warnings on China’s Growing Threat to American Universities**

In April 2021 testimony before the Senate Select Committee on Intelligence, after noting that the FBI opens a new investigation linked to China’s government “every 10 hours” and has more than 2,000 ongoing investigations that are related to China, Federal Bureau of Investigation (“FBI”) Director Christopher Wray warned that:

I don’t think there is any country that presents a more severe threat to our innovation, our economic security and our democratic ideas. And the tools in their toolbox to influence our businesses, *our academic institutions*, our governments at all levels are deep and wide and persistent.<sup>40</sup>

---

<sup>35</sup> 85 Fed. Reg. 72,567 (Nov. 13, 2020).

<sup>36</sup> *Id.* at 72,568.

<sup>37</sup> See <https://www2.ed.gov/policy/highered/leg/section117-webinar-202206.pdf>.

<sup>38</sup> ACE identifies itself as “the major coordinating body for the nation’s colleges and universities” and is well-known as the foremost lobbying organization for IHEs against the Department’s Section 117 compliance enforcement efforts. See <https://www.acenet.edu/About/Pages/default.aspx>.

<sup>39</sup> See <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-07-08/reminder-reporting-deadline-section-117-higher-education-act-1965-updated-july-22-2022>.

<sup>40</sup> See <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-1>; see also Patrick Tucker, “FBI Opens a Case on Chinese Activity ‘Every 10 Hours,’ Intel Chiefs Say,” DEFENSE ONE (Apr. 14, 2021), <https://www.defenseone.com/threats/2021/04/fbi-opens-case-chinese-activity-every-10-hours-intel-chiefs-say/173376/> (emphasis added).



Dir. Wray spoke in further detail about the ominous foreign threat again in January 2022:

Much of the battleground we're [the FBI] contesting lies outside government's control: companies whose technology we're helping protect, *universities whose students and research we're helping protect*, local governments we're warning about foreign threats. None of them are equipped to deal with a threat this complex alone...<sup>41</sup>

In October 2022, at a press conference discussing indictments against Chinese intelligence officers, Dir. Wray noted that:

10 of the 13 individuals we're discussing today are Chinese intelligence officers and Chinese government officials. They're charged in three different cases that might seem at first glance to be about unrelated issues. However – and this is something I've been talking about for years – each of these cases lays bare the Chinese government's flagrant violation of international laws, as they work to project their authoritarian view around the world, including within our own borders....[they] lie, cheat, and steal their way into unfairly dominating entire technology sectors, putting competing U.S. companies out of business....The FBI has been reaching out to and warning...the communities that the Chinese government targets [including]...*Academia*.<sup>42</sup>

Dir. Wray has made remarkably clear through his words and the FBI's investigations that hostile actions against the U.S. by China are increasing, pose a critical threat to our national security, and that the Chinese government uses soft targets, *including American colleges and universities*, to acquire critical technologies and research products and to intimidate speech that is inconsistent with the Chinese Communist Party's policy dictates.

### **The Department's Proposal Ignores Bipartisan Alarm Regarding China's Threat to America**

Responding to the emerging threat described frequently by Dir. Wray, a large bipartisan majority of the U.S. House voted to establish the "Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party"<sup>43</sup> to "expose the [Chinese Communist Party's] coordinated whole-of-society strategy to undermine American leadership and American

---

<sup>41</sup> See <https://www.fbi.gov/news/speeches/countering-threats-posed-by-the-chinese-government-inside-the-us-wray-013122> (emphasis added).

<sup>42</sup> See <https://www.fbi.gov/news/speeches/director-wrays-remarks-at-press-conference-announcing-actions-to-disrupt-criminal-activity-by-individuals-associated-with-the-government-of-the-peoples-republic-of-china-102422> (emphasis added).

<sup>43</sup> See <https://clerk.house.gov/committees/ZS00>.



sovereignty while working on a bipartisan basis ... to identify long-overdue, commonsense approaches to counter CCP aggression.”<sup>44</sup>

China’s increased hostility to the U.S. was clearly demonstrated by its direct threats against then-Speaker of the House Nancy Pelosi, in response to her trip in 2022 to Taiwan: “We are closely following the itinerary of Speaker Pelosi. A visit to Taiwan by her would constitute a gross interference in China’s internal affairs...and lead to a very serious situation and grave consequences.... As for what measures exactly we will take...let’s wait and see if she dares making [sic] the visit.”<sup>45</sup>

U.S. Secretary of State Antony Blinken recently described China as the “most serious long-term” threat to “the world’s progress over the past 75 years,” noting that “[u]nder President Xi, the ruling Chinese Communist Party has become more repressive at home and more aggressive abroad” and that “we cannot rely on Beijing to change its trajectory.”<sup>46</sup>

In the face of this perilous and growing threat and despite the FBI’s clear warnings, the Department appears to have largely ceded control over its Sec. 117 enforcement policies to the lobbying organization that represents all of the IHEs the Department investigated and most of America’s remaining IHEs, as further demonstrated by the Notice.

Why would the Department diminish its now proven Sec. 117 enforcement capabilities despite the increasing threat to our colleges and universities by nefarious foreign governments, including China?

### **Implementing the Sec. 117 Enforcement Agenda of the Regulated Colleges and Universities**

On behalf of its IHE members, the American Council on Education has objected repeatedly and vociferously over many years to the Department’s previous efforts to enforce Section 117’s simple reporting requirements, despite the urgency of the Senate Report’s findings and the Department’s responsive investigations,<sup>47</sup> to which OGC patiently responded by noting that, ACE’s protestations aside, “Congressional intent and [Section 117’s] reporting obligations are plainly evident in the statutory text and that “all foreign monies flowing or funneled to [IHEs]...must be reported.”<sup>48</sup>

---

<sup>44</sup> Connor O’Brien and Gavin Bade, “House establishes tough-on-China select committee,” POLITICO (Jan. 10, 2023), <https://www.politico.com/news/2023/01/10/house-china-select-committee-00077312>.

<sup>45</sup> Jack Dutton, “China Threats Over Nancy Pelosi’s Muted Taiwan Visit – In Full,” NEWSWEEK (Aug. 1, 2022), <https://www.newsweek.com/china-threats-nancy-pelosi-taiwan-visit-in-full-1729716>.

<sup>46</sup> See <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/>.

<sup>47</sup> See [https://www.higheredcompliance.org/wp-content/uploads/2019/08/Letter-ActingEDGCRubenstein.Section-117.final\\_.8.9.19.pdf](https://www.higheredcompliance.org/wp-content/uploads/2019/08/Letter-ActingEDGCRubenstein.Section-117.final_.8.9.19.pdf).

<sup>48</sup> See <https://www2.ed.gov/policy/highered/leg/ace-3-sept6-2019.pdf>.



On November 18, 2020, in a letter to President-elect Biden, ACE instructed the incoming administration act “quickly” to “[h]alt the expanded reporting requirements, including the new Information Collection Request (ICR) and Notice of Interpretation (NOI) on Section 117 imposed by the Department of Education in its effort to expand those reporting requirements...”<sup>49</sup> In its letter, ACE claimed to represent the demands of approximately forty-six (46) higher education associations (identified in its letter).

On Dec. 14, 2020, in a fourteen-page letter to OGC, ACE complained bitterly of the Department’s civil investigations and related enforcement efforts and informed it of its preferred return to reduced compliance enforcement efforts that would be far less burdensome to IHEs, notwithstanding Section 117’s simple requirements.<sup>50</sup>

Following ACE’s November and December 2020 post-election demands, the Department’s enforcement of Section 117’s disclosure requirements appeared to weaken,<sup>51</sup> with IHEs reporting barely more than \$4 million in foreign gifts and contracts during the first reporting period of 2021 – compared with over \$1.5 billion during the previous reporting period (July 2020-January 2021).<sup>52</sup>

ACE’s anti-transparency lobbying efforts focused on the Department’s new political leadership have borne spectacular results for ACE (and particular IHEs, including several still under investigation) as grotesquely demonstrated by ACE’s announcement regarding the Department’s pending Sec. 117 enforcement policies.

In August 2022, the Department left it to ACE’s Senior Vice President to announce *to the Department* the Department’s cessation of its then-outstanding Section 117 investigations (to his member IHEs, including those under investigation) and that “Section 117 management will be transferred back to Federal Student Aid (FSA).”<sup>53</sup> The Department’s official Notice did not occur for another four months, on December 27, 2022.<sup>54</sup> Despite its many victories, ACE continued to object to the Department’s ongoing “Section 117 reporting requirements, similar to what was proposed in the November 2019 and December 2019 ‘Information Collection Request.’”<sup>55</sup>

---

<sup>49</sup> Letter to Joe Biden, President-Elect and Kamala Harris, Vice President-Elect, from the American Council on Education (ACE), <https://www.acenet.edu/Documents/Letter-Biden-Administration-Regulatory-Actions-111820.pdf>.

<sup>50</sup> See <https://www.acenet.edu/Documents/Comments-memo-ED-Section-117-121420.pdf>.

<sup>51</sup> Audrey Conklin, “US Colleges report fewer foreign gifts after Biden takes office, sparking concern from Rep. Gallagher,” *Fox News* (Nov. 5, 2021), <https://sites.ed.gov/foreigngifts/>.

<sup>52</sup> See <https://sites.ed.gov/foreigngifts/>.

<sup>53</sup> See

<https://www.cogr.edu/sites/default/files/081622%20FINAL%20August%202022%20ED%20letter%20on%20117%20follow%20up.pdf>.

<sup>54</sup> 87 Fed. Reg. 247 (Dec. 27, 2022).

<sup>55</sup> *Id.*



Regrettably, the Department's Notice merely proposes to formalize an important part of ACE's transformative, anti-transparency August 2022 agenda.

On few previous occasions in modern American history has a federal agency with such a simple but critical enforcement task invited the chief lobbying organization opposing the Department's enforcement efforts to host events at which the Department would announce its evolving Sec. 117 enforcement policies and, stunningly, announce the Department's shifting of enforcement responsibilities from OGC to the ill-equipped FSA.

## CONCLUSION

The Department's proposal, if implemented, would sharply diminish the efficacy of a foreign gift and contract reporting system that, after neglect through multiple administrations, has finally produced far more accurate data for the benefit of the American people and elected officials, according to the Department's own public reports on its Sec. 117 enforcement efforts to combat previously widespread non-compliance and anti-transparency efforts by particular IHEs and industry lobbyists.

This proposal occurs at a time when gathering foreign threats to the United States are perhaps greater than in recent memory, particularly including well-documented threats from the Chinese Communist Party, which controls the Chinese government. Despite the Department's own public findings and repeated warnings from FBI Director Wray regarding the vulnerability of America's colleges and universities to Chinese espionage and influence, the Department now proposes to blithely ignore the utterly minimalist role it is obligated to play in regulating the receipt of foreign gifts and contracts by our colleges and universities.

Despite the Chinese government's direct threats to the safety of then-House Speaker Nancy Pelosi and recent bipartisan congressional determination to investigate China's ongoing threats to America's security interests, the Department appears unconcerned and apparently intends to proceed as if it bears no responsibility to the American people, in whose name it channels massive amounts of taxpayer dollars to American students and colleges and universities.

The proposal to move data collection and investigative responsibilities from OGC to FSA is remarkable for its disingenuousness. As the Secretary is fully aware, FSA is utterly unsuited to the task. FSA is no better able or professionally suited to lead the Department's Sec. 117 enforcement efforts than OGC is to administer student loans, grants, and work-study programs.

As vividly described in the Department's own Compliance Report and in its responses to inquiries by the U.S. Senate, IHEs have often sought to conceal qualifying foreign transactions from disclosure. Only through careful examination of tax records, contracts, and other financial documents by OGC attorneys did the Department successfully force exponential increases in IHE Sec. 117 compliance. There is simply no reason for the Department to transfer these important responsibilities to an agency component so utterly lacking in Sec. 117 expertise and enforcement capabilities.



Moving Sec. 117 enforcement responsibilities to FSA is an incongruent match at best and one that, by appearances, may have been made by higher education lobbyists who have long opposed the Department's effective enforcement of the law's transparency requirements. No matter how willing FSA as an agency component may be to take on this role, it is incapable of effectively leading enforcement efforts – and that appears to be precisely the point of the Department's proposed action.

The Department was correct in making vast improvements to its Sec. 117 enforcement obligations, beginning in 2019. Widespread compliance appears to have been replaced with considerably greater foreign gifts and contracts disclosures by IHEs. The Sec. 117 data collection system was successfully improved, reporting obligations substantially clarified, and yet the Department now proposes measures that would undermine critical Sec. 117 enforcement.

The foreign threat to academia has increased, not decreased, particularly from the Chinese government, as noted by Dir. Wray and the bipartisan U.S. Senate's Permanent Subcommittee on Investigations. With its proposal, the Department defiantly and inexplicably ignores this peril without explanation or apology, despite its own published findings in Oct. 2020.

DFI strongly urges the Department to withdraw its unnecessary and ill-advised proposal to shift Sec. 117 data collection and investigative and enforcement responsibilities from OGC to FSA.

Sincerely,

/s/ Robert S. Eitel

Robert S. Eitel, President and Co-Founder  
Defense of Freedom Institute for Policy Studies

/s/ Paul R. Moore

Paul R. Moore  
Senior Counsel  
Defense of Freedom Institute for Policy Studies