



December 14, 2020

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

Re: Notice of Interpretation – Enforcement Authority for Failure to Adequately Report under Section 117 of the Higher Education Act, Docket No. ED-2020-OGC-0165-0001

Dear Mr. Schlichter:

I'm writing to provide comments on the notice of interpretation (NOI) titled *Enforcement Authority for Failure to Adequately Report under the Higher Education Act* on behalf of the Council for Advancement and Support of Education (CASE). The notice of interpretation was published in the Federal Register by the U.S. Department of Education (Department) on November 12, 2020 (Docket No. ED-2020-OGC-0165-0001) and is in effect as of November 13, 2020.

CASE is the global association for professionals in advancement – alumni relations, communications, fundraising, marketing, and advancement services – who share the goal of advancing education to transform lives and society. Today, CASE's membership includes approximately 3,400 colleges and universities, primary and secondary independent and international schools, and nonprofit organizations in 82 countries around the world, with 2,910 of our member institutions located in the United States. CASE helps its members build stronger relationships with their alumni and donors; raise funds for student aid, research, campus, and community projects; market their institutions to prospective students; and foster public support of education.

As with our comments submitted to the Department on November 5, 2019¹, December 27, 2019², and March 11, 2020³, our primary focus regarding Section 117 of the Higher Education Act of 1965 remains related to the foreign gift disclosure portion. CASE is a signatory to and strongly supports comments on the NOI submitted to the Department by the American Council on Education (ACE) also submitted on December 14, 2020.

Summary of Comments

As a global association committed to advancing education worldwide, CASE strongly supports transparency around the philanthropic support that colleges and universities receive from foreign governments, individuals, and entities.

However, as we have stated in our previous comments to the Department on Section 117, it is critical that any federal reporting requirements and enforcement measures do not discourage reputable

¹ [CASE Comments](#), November 5, 2019

² [CASE Comments](#), December 27, 2019

³ [CASE Comments](#), March 11, 2020

philanthropists who want to make a difference from making legitimate charitable gifts to U.S. educational institutions.

Unfortunately, the Department's NOI is counterproductive in supporting and ensuring institutional compliance and transparency with Section 117 foreign gift reporting and exceeds the statutory authority Congress granted the Department when it enacted Section 117. We also encourage the Department to launch a formal regulatory rulemaking process to provide needed guidance on Section 117.

Department's Interpretation of Enforcement Authority Is Misguided

CASE is most concerned that the Department, through the NOI, asserts enforcement authority that is not in Section 117. Specifically, the Department asserts the authority to implement a variety of enforcement measures for an institution that violates its Program Participation Agreement (PPA), including termination of the institution's Title IV participation.⁴ The loss of Title IV eligibility for receiving student financial aid funding would have detrimental effects on institutions and the students they serve, hindering their academic achievement, research and learning, and access to a well-rounded education.

The Department's assertion has no basis in the statute which is very clear on enforcement authority. The statute unambiguously directs the Department to refer enforcement actions to the Attorney General within the Department of Justice.⁵ Section 117 also states that an institution that knowingly or willfully fails to comply with the foreign gift and contract disclosure requirements can be subject to fines that include any related investigation and enforcement expenses.⁶ The statute does not reference authority for the Department to terminate an institution's Title IV participation.

Furthermore, though the NOI states that institutions have administrative appeal rights when the Department imposes fines, limitations, suspensions, or termination of the institution's Title IV participation, it is fundamentally unnecessary and improper to deny institutions Title IV eligibility for complications around Section 117 compliance. Colleges and universities should not be subject to such drastic penalties that are both ineffective in addressing Section 117 compliance violations and contrary to the Department's mission to "promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."⁷

Unfortunately, the NOI continues a troubling pattern of the Department overstepping its authority by going beyond congressional intent and what is required in Section 117. The Department's assertion of authority to administratively subpoena information when investigating possible violations of Section 117 in addition to impose fines, restrict Title IV grant funding, and other enforcement measures is overreaching and goes beyond the statute's enforcement provision.

Engagement with the Higher Education Community

If the Department is truly committed to increasing compliance with Section 117, we renew our request that the Department seek to engage collaboratively with the U.S. higher education community and pursue a formal rulemaking process. Though Section 117 was enacted as part of the reauthorization of the Higher Education Act in 1986, the Department has not issued regulations on how institutions should

⁴ [NOI, Enforcement Authority for Failure to Adequately Report under the Higher Education Act](#), U.S. Department of Education, November 13, 2020

⁵ [20 USC §1011f: Disclosures of foreign gifts](#)

⁶ Ibid.

⁷ [Overview and Mission Statement](#), U.S. Department of Education

interpret and comply with the statute. CASE, along with our member colleges and universities and higher education association colleagues, have repeatedly asked the Department to engage in a constructive and collaborative dialogue on Section 117. A formal rulemaking process would provide such an opportunity.

U.S. institutions of higher education are held in high regard worldwide. As a result of their impressive work and superb outreach, it has been proven that philanthropists who are passionate about the value of higher education, will support said institutions, thereby strengthening the sector for this country. Unfortunately, the Department has thus far declined to pursue engagement on this matter and instead taken an approach to this issue through regulatory pronouncements that go beyond congressional intent and the clear meaning of the statute. Instead of increasing transparency and encouraging compliance, the Department, through the NOI and other actions, is discouraging colleges and universities from seeking legitimate philanthropic gifts from foreign donors and discouraging foreign donors from making these gifts.

Conclusion

CASE continues to advocate that now, more than ever, education is the most effective way to advance humanity, maintain a civil society, and tackle myriad challenges that our world faces. We encourage the Department to consider the serious implications of the NOI and the chilling effect it could have on giving from foreign individuals and organizations to U.S. colleges and universities. We also reiterate our request that the Department launch a formal regulatory rulemaking process, with notice and comments, to provide needed guidance on Section 117.

We appreciate the opportunity to share our comments with the Department and would welcome the opportunity to meet with appropriate staff to discuss our comments in further detail. Thank you for your thoughtful consideration of the points made herein.

Yours sincerely,

A handwritten signature in cursive script that reads "Sue Cunningham".

Sue Cunningham
President & CEO