December, 14, 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.

Re: Notification of interpretation, request for comments on the Department’s enforcement authority for failure to adequately report under Section 117, Docket Number: ED-2020-OGC-0165

Dear Mr. Schlichter,

As president of the Association of Public and Land-grant Universities (APLU), I write to offer comments on the Notification of interpretation, request for comments on the Department’s enforcement authority for failure to adequately report under Section 117, Docket Number: ED-2020-OGC-0165 published in the Federal Register on November 13, 2020.

APLU is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of 246 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU’s agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 202 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct $46.8 billion in university-based research.

Our nation’s public research universities have a unique, long-standing partnership with the federal government conducting research on behalf of the American people. This research represents one of our nation’s greatest assets, which is why foreign governments may attempt to take advantage of our open and collaborative research ecosystem. APLU continues to work with our member institutions to help protect against foreign government interference, influence, and theft of research and the discoveries that come from it. We work closely with government agencies including the National Institutes of Health, National Science Foundation, Department of Energy, Department of Defense, the Federal Bureau on Investigation, and the White House Office of Science and Technology Policy to inform our membership on best practices for preventing inappropriate foreign interference and to work collaboratively to ensure appropriate compliance with security and disclosure regulations.
Although there is correspondence between higher education associations, including APLU, and the Department going back over the last two years\(^1\), the Department has refused to meet with our community to resolve issues around Section 117. It is unfortunate that the Department of Education chose not to fully engage with the higher education community to ensure common understanding and compliance with Section 117 (20 U.S.C. 1011f) of the Higher Education Act (HEA) of 1965 – a provision the Department had in fact never previously enforced. The Department’s reinterpretation of reporting responsibilities under Section 117 has created an unneeded adversarial environment between institutions and the Department. Indeed, the Department has launched investigations and made statements to the media about institutions that had voluntarily come forward to correct past reporting errors.

At a time when many institutions are facing significant financial and logistical challenges due to the COVID-19 pandemic, the Department deployed its new Section 117 information collection system for the July 2020 reporting deadline. APLU’s members report a significant increase in staff time and effort necessary to complete the new questionnaire. The previous system included six questions, the new system includes 31 questions regarding each individual reportable gift or contract. The Department has not released any analysis of the new reporting system and has instead moved forward with a new Notice of Interpretation (NOI) related to Section 117.

The Department’s NOI published on November 13, indicates that the Department now considers failure to report Section 117-covered foreign gifts and contracts as a violation of the Department’s Title IV program participation agreement (PPA). However, the Department fails to indicate where it derives such enforcement authorities under Title IV of the Higher Education Act. This new interpretation is inconsistent with the statutory HEA language written by Congress more than 30 years ago. The current statute as written does not give the Department the authority to revoke access to federal financial student aid for violations to Section 117. Indeed, current statute authorizes the Department to refer an institution to the Department of Justice to ensure compliance for Section 117. In addition, the statute already lays out appropriate recourse following a finding that an institution knowingly or willfully failed to comply, the institution would be required to reimburse the U.S Treasury for the full cost to the government for obtaining compliance.

APLU supports comments that were filed by the American Council on Education today that expand on shared concerns about the Department’s NOI regarding Section 117.\(^2\)

Institutions have repeatedly asked for cooperative advice, appropriate time to adopt needed business operation changes, and appropriate ways to correct previous reporting to ensure they are able to appropriately respond to and comply with Section 117. We again urge the Department to use the formal rulemaking process, with notice and comment, to promulgate clear guidance and appropriate compliance with Section 117.

APLU member institutions take seriously their responsibility to ensure compliance with federal regulations and reporting certain financial relationships with foreign entities is part of that

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compliance. We look forward to working with the Department and our member institutions to create clear, fair, and appropriate regulations.

Thank you for your consideration.

Sincerely,

Peter McPherson
President
Association of Public and Land-grant Universities