1. The Department of Education recently announced a Notice of Interpretation (NOI) that incorporates failure to report Sec. 117 foreign gifts and contracts as a violation of the Department’s Title IV program participation agreement (PPA).¹ The PPA defines the terms and conditions that the institution must meet to begin and continue participation in federal student aid programs. Violation of a PPA could result in an institution losing their eligibility to accept federal student aid funds, as well as the ability for students receiving Pell Grants, federal student loans, and federal work-study to use those federal funds at that institution. While the NOI is effective immediately, the Department is accepting comments until December 14, 2020.

2. Sec. 117 was included as part of the Higher Education Act (HEA) in 1986, and for several decades no one paid much attention. Enacted to enhance transparency particularly for large foreign gifts, the reporting threshold has always been $250,000 per gift (or in combination with multiple gifts from the same source). The Department has never issued regulations for Sec. 117 and only issued two Dear Colleague letters in 1995 and 2004, which provided limited guidance to institutions about their compliance obligations. In January 2019, the major higher education associations wrote the Department to begin a dialogue to address confusion and specific concerns about Sec. 117 compliance.² The Department never responded to those compliance questions. Instead, the Department sent a letter to ACE in July 2019³ indicating that institutions did not need additional guidance.

3. There is already an enforcement provision included in Sec. 117, which the Department has never used. The current statute authorizes the Department to refer an institution to the Department of Justice to ensure compliance. Following a knowing or willful failure to comply, a school must reimburse the U.S. Treasury for the full cost of obtaining compliance. Congress has given the Department the authority to revoke access to federal financial student aid for a number of violations but not for Sec. 117. Congress put foreign gift reporting in Title I of the Higher Education Act more than 30 years ago. If Congress wanted foreign gift reporting to be tied to financial aid for low-income students it would have placed those requirements in Title IV.

4. Similarly, under the NOI, the Department is giving itself power to subpoena confidential materials without any promise that it will protect that confidentiality. Again, if Congress wanted the Department to have that power, lawmakers would have given it to them in the law.

5. The NOI also references reporting requirements for Title VI International and Foreign Language Education programs, which were included in Section 638 of the Higher Education Opportunity Act, the 2008 reauthorization of the Higher Education Act. Similar to Sec. 117, the Department has never promulgated regulations around this provision. Institutions have an existing obligation to report institutional gifts over

³ https://www.acenet.edu/Documents/ED-Section-117-Letter-to-ACE.pdf
$250,000 under Sec. 117. If there is a separate reporting requirement for Title VI, the Department needs to promulgate regulations around that provision.

6. Instead of engaging in remediation efforts with colleges and universities to correct insufficient or incorrect Sec. 117 reporting, the Department launched expansive and burdensome investigations of 12 major public and private universities well beyond the narrow focus of Sec. 117 foreign gift or contract reporting. Several of the institutions investigated had diligently tried to comply with Sec. 117 for many years. Other investigations where launched of institutions who contacted the Department to update their records after the institutions discovered reporting oversights. This is having a chilling impact on compliance because institutions are afraid to ask questions, lest they be next on the list to be investigated. In addition, there is concern that this NOI could be retroactively applied to these investigations, specifically the subpoena provisions.

7. In public communications and a recently released report on these investigations, the Department deceptively asserts that there is vast underreporting by colleges and universities of foreign gifts and contracts. The Department also dishonestly charges without any basis that institutions try to hide foreign money received through related intermediaries and are acting in ways that undermine our national security. These claims are completely dishonest and inconsistent with the actions of the higher education community. For the past several years, higher education has actively engaged in responding to concerns from the Administration and Congress around the issue of undue foreign influence. In particular, we have worked closely with the array of national security and science agencies. This includes two major academic summits organized with the FBI for over 75 higher education leaders; classified briefings for our presidents with the Director of National Intelligence; efforts to support the federal research agencies as they tighten compliance and disclosure requirements; engaging with the White House Office of Science and Technology Policy in interagency efforts to address these issues; and, working closely with the FBI when faculty or researchers are alleged to have engaged in misconduct related to undue foreign influence.

8. While colleges and universities want to comply fully with foreign gift and contract reporting requirements, the Department’s actions only make that more difficult. Instead of clarifying the current requirements so that they are clear and unambiguous, the Department has imposed an expanded information collection process that creates a vast array of new requirements far exceeding the language of the statute, and now created a potentially draconian sanction out of whole cloth. The Department’s continuing punitive and non-responsive actions towards Sec. 117 compliance have caused many institutions to be afraid to ask the Department for guidance on the reporting obligations and for help curing errors in reporting where they occur. This runs counter to the goal of enhanced transparency of foreign gift and contract reporting.

9. The Department should engage with stakeholders to promulgate clear guidance based on the existing statute through a negotiated rulemaking process. This will allow for greater understanding and increased transparency for the Department, institutions of higher education, as well as policy makers.