

November 6, 2023

The Honorable Virginia Foxx
Chairwoman
Committee on Education & the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington D.C. 20515

The Honorable Bobby Scott
Ranking Member
Committee on Education & the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington D.C. 20515

Dear Chairwoman Foxx and Ranking Member Scott,

On behalf of the American Council on Education and the undersigned higher education associations, I write to offer comments on the “Defending Education Transparency and Ending Rogue Regimes Engaging in Nefarious Transactions (DETERRENT)” Act. We appreciate the opportunity to provide feedback on this legislation and the work of your staffs to engage with the community on this issue. As you know, we have worked over the past several years to educate our members regarding the reporting obligations in Section 117 of the Higher Education Act and continue to engage with the U.S. Department of Education to clarify and improve Section 117 reporting. Since 2018, when issues with foreign gift reporting were raised by Congress and policymakers, there has been a substantial increase in Section 117 reporting. In response to questions before the House Education and the Workforce Committee at a February 2023 hearing, Secretary Cardona stated that the Department has received over 34,000 filings in the past two years and is on track to receive the most Section 117 reports of any administration.¹ In addition, our institutions continue to work with the federal research agencies to implement new reporting disclosure requirements for individual researchers and our institutions under NSPM-33, which is targeted at improving research security and addressing concerns around federal funding. We are also engaged in implementing new requirements for institutions under the recently passed CHIPS and Science Act.²

Our colleges and universities take seriously both international scientific collaboration and the economic and national security threats posed by foreign adversaries. Since 2018 when these concerns were first raised, our institutions have taken steps to address research security. As well as complying with new federal research security requirements, universities have strengthened relationships with local FBI field offices and other agencies that have informed the development of risk criteria and comprehensive review processes for grants, contracts, and foreign gifts. Institutions have also developed templates to guide faculty and staff as they review and consider entering into partnerships and/or agreements with foreign entities, including prompts with the intent of mitigating potential risks; protecting core academic values

¹ May 16, 2023 House Education and the Workforce full committee hearing “Examining the Policies and Priorities of the Department of Education”: <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409132>.

² See AAU list of “Action Taken to Address Foreign Security Threats, Undue Foreign Interference and Protect Research Integrity at U.S. Universities”: <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Science-Security/Actions-Taken-Research-Security.pdf>

such as free speech, academic freedom, reciprocity, and other ethical considerations; and ensuring compliance with export-control laws and other federal requirements.³

We appreciate that the DETERRENT Act would make Section 117 an annual report, rather than the current biannual requirements, which would better align it with the new National Science Foundation (NSF) foreign gift reporting requirement.⁴ We also appreciate that the legislation recognizes individual tuition payments and certain outgoing contracts from our institutions used to purchase goods from foreign companies do not represent potential conflicts and are exempted from reporting. This is especially important since the DETERRENT Act would lower the reporting threshold from \$250,000 to \$50,000 for some gifts and contracts, but \$0 for certain countries of concern and foreign entities of concern, which will greatly increase the reporting burden on our institutions.

Additionally, we appreciate the alignment of definitions (i.e. “countries of concern” and “foreign entities of concern”), lists of Department of Defense (DOD) regulations (i.e. “entities of concern”), and lists that have only recently been published to help to guide our institutions’ efforts to address research security concerns. We also support the language clarifying record retention and translations of gift and contract agreements, which provides important guidance to our institutions regarding retention of records. However, we have significant concerns about the overly burdensome expansion of Section 117 of the Higher Education Act proposed in the DETERRENT Act, including the lowering of the reporting threshold and the creation of new reporting within Section 117.

The new Section 117a, “Prohibition on Contracts with Certain Foreign Entities and Countries,” would require institutions to receive a waiver from the Department of Education before beginning a contract with a country of concern (currently the People’s Republic of China, Russia, North Korea, and Iran) or a foreign entity of concern.⁵ The Department of Education does not currently have the expertise to carry out the review of contracts, many of which will likely focus on scientific research not under the jurisdiction of the Department. The Department lacks the technical expertise to assess risks associated with the critical technologies. Our institutions abide by the regulations and requirements maintained by the U.S. Department of Commerce⁶, the U.S. Department of the Treasury⁷ and the U.S. Department of State,⁸ regarding U.S. partnerships, exports controls, and purchases from foreign entities.

³ See May 2020, AAU-APLU “Actions Taken by Universities to Address Science and Security Concerns”: <https://www.aau.edu/key-issues/actions-taken-universities-address-science-and-security-concerns>

⁴ See June 23 comments on NSF Proposal and Award Policies and Procedure Guide (PAPPG): <https://www.acenet.edu/Documents/Comments-NSF-PAPPG-Foreign-Gifts-061223.pdf>

⁵ Foreign entity of concern currently included in DOD June 2023 guidance: <https://media.defense.gov/2023/Jun/29/2003251160/-1/-1/1/COUNTERING-UNWANTED-INFLUENCE-IN-DEPARTMENT-FUNDED-RESEARCH-AT-INSTITUTIONS-OF-HIGHER-EDUCATION.PDF>

⁶ Department of Commerce, Bureau of Industry and Security Entity List: <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>

⁷ Department of Treasury, Office of Foreign Assets Control, Sanctions Lists: <https://ofac.treasury.gov/about-ofac>

⁸ Department of State Directorate of Defense Trade Controls, including the International Traffic in Arms Regulations (ITAR): https://www.pmdtdc.state.gov/ddtc_public/ddtc_public

This new review by the Department of Education is also unnecessary in light of provisions of the CHIPS and Science Act, passed by Congress last year. The NSF was specifically authorized to create a new reporting portal for universities regarding certain gifts and contracts from countries of concern, and the NSF Chief of Research Security is tasked with evaluating these gifts and contracts for threats to research security. The position of NSF Chief of Research Security and the NSF Office of Research Security and Policy were both newly authorized in the CHIPS and Science Act. The Department of Education has no equivalent position or office. Creating a new approval process at the Department of Education seems both duplicative and unnecessary given the resources invested in the NSF for these specific purposes.

Section 117b, “Institutional Policy Regarding Foreign Gifts and Contracts to Faculty and Staff,” would require some institutions of higher education (those with more than \$50 million in federal research and development funding or institutions receiving Title VI funding) to develop a policy to compel research faculty and staff to report foreign gifts valued over \$480 and contracts over \$5,000, as well as requiring institutions to create and maintain publicly available, searchable databases with that information. This raises both privacy and security concerns for our faculty and staff, as it allows their private financial transactions to be made public and potentially spotlights specific faculty and staff to be targeted by foreign adversaries. Institutions of higher education must take steps to educate faculty and staff about concerns of foreign influence to enhance their vigilance and the existing research agency conflict of interest and conflict of commitment policies, which have been significantly strengthened in recent years. This provision, however, will result in collection of an ocean of data, much of it trivial and inconsequential, while doing little to address the fundamental concerns regarding research security and foreign influence. In addition, institutions are already working to comply and implement NSPM-33, which requires a standardization of information reported by federally funded faculty regarding foreign gifts and contracts. Further, this would perpetuate a perception that common joint activities with our foreign partners are problematic by their nature. This requirement would have a chilling effect on and discourage U.S. researchers from participating in important international scientific collaborations—including ones with entities based in countries that are strong U.S. allies like Canada, the United Kingdom, and Australia.

Section 117c would create new “Investment Disclosure Reports” for certain institutions of higher education (private institutions with endowments over \$6 billion or with “investments of concern” above \$250 million). These institutions would need to report those investments with a country of concern or a foreign entity of concern on an annual basis to the Department of Education. The reported investments would then be made public on a searchable database. Similar to our concerns with 117a and 117b, it is unclear what national security or foreign malign influence threat this provision is trying to address. Our institutions are in compliance with Treasury rules regulating our investments, including the recent Executive Order 14105⁹ regarding outbound investments in certain sensitive technologies in countries of concern. It is unclear how this will address additional issues of national security, beyond existing federal requirements. It is also unclear why endowments at certain private institutions of higher education would be specifically called out as a national security concern when investments made by other non-profits, government grantees and private government contractors are not

⁹ Executive Order 14105 “Addressing U.S. Investments in Certain National Security Technologies and Products in Countries of Concern”: <https://www.govinfo.gov/content/pkg/FR-2023-08-11/pdf/2023-17449.pdf>

made public. In addition, the disclosure of this material on a searchable, public database raises a concern about the disclosure of proprietary, investment information, which no other industry is currently required to make public. We do not believe Section 117c is helpful or workable as drafted.

Section 117d establishes new fines regarding compliance with Section 117 reporting and the new subsections of Section 117. The legislation would put into statute the tie between Section 117 and an institution's Program Participation Agreement (PPA). For the past several years, the Department of Education has linked PPAs to Section 117 compliance. However, this legislation goes further by directly tying fines for non-compliance to percentages of funding through the Higher Education Act, which we interpret as connecting it to an institution's Title IV federal student aid funding. By tying the new proposed fines to Title IV, this would punish students for compliance issues at institutions, specifically compliance with foreign gift reporting, which is not likely impacting individual students. The tie to an institution's PPA, as well as the investigatory efforts by the Department of Education, are sufficient tools for enforcing compliance of other portions of the Higher Education Act.

We strongly encourage the final bill to also include language that requires the Department of Education to carry out negotiated rulemaking on Section 117, in order to ensure that the Department engages fully with the stakeholder community and clarifies important questions around definitions to ensure the reports are completed in the most useful way possible for policymakers, interested public parties, and the national security agencies.

We appreciate the efforts in the DETERRENT Act to clarify Section 117 and codify compliance rules the Department of Education has previously used sub-regulatory guidance to explain. However, we urge you to consider the potentially detrimental impacts of Sections 117a, 117b, 117c, and 117d, and strike those sections. If the bill includes those problematic provisions as it moves forward, we will likely oppose the legislation, while we do support clarification and strengthening existing Section 117 provisions.

We look forward to working with you on this important legislation as it moves forward in Congress.

Sincerely,



Ted Mitchell, President

Cc: Solomon Chen, Policy Advisor, House Education and the Workforce Committee
Amaris Benavidaz, Professional Staff Member, House Education and the Workforce Committee

On behalf of:

American Association of Colleges and Universities
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Catholic Colleges and Universities
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Consortium of Universities of the Washington Metropolitan Area
Council for Advancement and Support of Education
Council of Graduate Schools
EDUCAUSE
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators