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## COLLEGES AND UNIVERSITIES TO ASK FOR REPRIEVE FROM NEW DOE POLICY SHIFT TOWARD ENFORCEMENT OF FOREIGN GIFT REPORTING REQUIREMENTS

College campuses have not been immune to the COVID-19 epidemic wreaking havoc on the national economy. As colleges grapple with how to handle the crisis, several higher education institutions sent a memo to Congress asking federal lawmakers to give DeVos "the authority to waive compliance with significant and/or costly new regulatory requirements that may be introduced in this period, as institutions' ability to come into compliance will necessitate a substantial outlay of resources that are better allocated to other purposes at this time."

Among the new requirements concerning colleges are new proposed procedures for reporting foreign gifts and contracts, that have come in the wake of the Department of Education's ("Department") more vigorous enforcement of Section 117 of the Higher Education Act. These new procedures and investigations could impose harsher requirements on institutions.

### INVESTIGATIONS

Section 117 of the Higher Education Act mandates that "[w]henver any institution...receives a gift from or enters into a contract with a foreign source,

the value of which is \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year, the institution shall file a disclosure report."

While Section 117 has existed for decades, the Department first signaled its intent to crack down on foreign gift reporting with a series of letters to institutions including Georgetown University and Texas A & M University in June 2019, followed by Cornell and Rutgers University in July. The letters notified the institutions that the Department was investigating their compliance with the foreign gift and contract reporting requirements specified in Section 117.

This sudden uptick in investigations was likely inspired by a February 2019 Senate Permanent Subcommittee on Investigations Report finding that about 70% of colleges and universities that received funding over \$250,000 from the Chinese Government failed to report the funding.

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The Department's increased scrutiny of foreign gifts to institutions of higher education appears to be part of a broader agenda to monitor more closely and deter foreign influence over U.S. research.

Following the initial wave of investigations in 2019, colleges and universities reportedly disclosed \$6.5 billion in previously unreported foreign funds. But the Department did not stop there. In February 2020, the Department started investigations into Yale and Harvard University with letters insinuating that both had failed to report foreign gifts and contracts despite their significant presence and connections abroad.

The Department's recent investigations have garnered frustration and pushback from the higher education community. Because of a lack of guidance from the Department, colleges and universities trying to comply with their Section 117 reporting obligations are often left to speculate as to exactly what information must be reported. Indeed, the American Council on Education (ACE) wrote to the Department three times in 2019 requesting that the Department issue regulations to clarify the reporting requirements under Section 117. A July letter emphasized, "It is patently unfair to enforce requirements that do not exist in writing." Despite repeated requests, to date, the Department has not issued clarifying regulations.

### INFORMATION COLLECTION

Besides investigating individual colleges and universities, the Department of Education is trying to revamp the existing mechanisms for collecting information under Section 117. The Paperwork Reduction Act of 1995 requires the Department of Education to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB) describing the proposed information collection before implementing it. The public and other federal agencies get a chance to comment. Over the last year, the Department of Education has submitted three separate information collection drafts, the most recent of which was submitted in February 2020 and has yet to be approved by the OMB.

The most concerning part of the new reporting system is that it would require institutions to report the names and addresses of all donors and contracting entities. In a comment submitted on behalf of ACE and over a dozen other higher education associations, ACE argued that this mandate implicates confidentiality issues and exceeds the scope of the Department's statutory authority under Section 117, the text of which requires only that covered institutions report the aggregate amounts of the gifts, not the identities of the individual donors or contracting entities.

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The information collection would also require colleges and universities to report foreign gifts to entities that operate for the benefit of the institution, such as foundations and alumni associations. The Department reasons that allowing institutions to avoid reporting such gifts would contravene the statutory text and purpose of Section 117 because these organizations often act as intermediaries between foreign entities and higher education institutions. ACE and other representatives of the interests of colleges and universities have objected that this requirement goes beyond the narrow scope of “institutions” properly subject to Section 117’s reporting requirements.

While it remains to be seen whether the OMB will approve the information collection or whether the Department will promulgate regulations to clarify the reporting requirements under Section 117, one thing is clear—the Department’s enforcement efforts are unlikely to relent anytime soon. As a result, colleges and universities should examine their policies and procedures for reporting foreign gifts and contracts to prepare for the possibility of more expansive disclosure requirements.

### TAKEAWAYS

The Department does not appear to be swayed by the ongoing criticisms of its efforts. In a recent press release, Secretary of Education Betsy DeVos was steadfast in her position:

“This is about transparency. If colleges and universities are accepting foreign money and gifts, their students, donors, and taxpayers deserve to know how much and from whom. Moreover, it’s what the law requires. Unfortunately, the more we dig, the more we find that too many are underreporting or not reporting at all. We will continue to hold colleges and universities accountable and work with them to ensure their reporting is full, accurate, and transparent, as required by the law.”