



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

November 27, 2019

The Honorable Rob Portman, Chairman
Permanent Subcommittee on Investigations
Homeland Security and Government Affairs Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Portman:

I write to update you on the U.S. Department of Education's ("Department's") activities under Section 117 of the Higher Education Act, as amended, 20 U.S.C. § 1101f ("Section 117"). Section 117 does not bar American institutions of higher education from soliciting and accepting money from, or entering into contracts with, foreign governments, companies, persons, or their agents; however, with limited exceptions, Section 117 does require colleges and universities to disclose transparently their foreign money and contracts to the Department and to all American citizens.

By way of background, your Subcommittee released a Staff Report titled "China's Impact on the U.S. Education System" in February 2019. Important findings included: (1) Foreign government spending on U.S. schools generally "is effectively a black hole" because U.S. colleges and universities fail to report foreign money as required by law; (2) the Communist Chinese government invests strategically in U.S. education through Confucius Institutes and other vehicles; (2) the public lacks an accurate or complete picture of China's overall spending because U.S. colleges and universities "routinely" fail to report foreign money (nearly 70% of colleges and universities failed to report in this case); and (4) the Chinese money comes with "strings that can compromise academic freedom." Specifically:

The Chinese government approves all teachers, events, and speakers. Some U.S. schools contractually agree that both Chinese and U.S. laws will apply. The Chinese teachers sign contracts with the Chinese government pledging they will not damage the national interests of China. Such limitations attempt to export China's censorship of political debate and prevent discussion of potentially politically sensitive topics. Indeed, U.S. school officials told the Subcommittee that Confucius Institutes were not the place to discuss controversial topics like the independence of Taiwan or the Tiananmen Square massacre in 1989. As one U.S. school administrator explained to the Subcommittee, when something is "funded by the Chinese government, you know what you're getting."

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See *CHINA'S IMPACT ON THE U.S. EDUCATION SYSTEM*, Staff Report, Permanent Subcommittee on Investigations, United States Senate at 1, 3, 5, 71-76 (Feb. 2019) available at <https://www.hsgac.senate.gov/imo/media/doc/PSI%20Report%20China's%20Impact%20on%20the%20US%20Education%20System.pdf> (the “China Report”).

On February 28, 2019, U.S. Department of Education Deputy Secretary Dr. Mitchell M. Zais testified before the Subcommittee.

Thereafter, responding to Congressional findings and in support of our obligation to enforce Section 117, the Department opened six Section 117 investigations. See 84 Fed. Reg. 31052 (Jun. 28, 2019); 84 Fed. Reg. 34878 (July 19, 2019); <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>. These investigations, though nascent, have revealed disturbing facts.¹

- The six investigated universities collectively failed to report in excess of \$1.3 billion from foreign sources (including China, Qatar, and Russia) over the past seven years despite their clear legal duty to do so under Section 117.
- One university received research funding from a Chinese multinational conglomerate to develop new algorithms and advance biometric security techniques for crowd surveillance capabilities.
- One university had multiple contracts with the Central Committee of the Communist Party of the People’s Republic of China (“CPC”).
- One university accepted funds from the arm of a foreign government to create an “academic” center expressly for the dissemination of propaganda and to conduct other “soft power” information activities.
- According to a public declaration filed in Texas state court by a high-ranking official of an arm of the Qatari government and a letter from their U.S. law firm, Qatari “donations” to American colleges and universities are made strategically to advance Qatari interests, and recipients of such “donations” agree to keep the purposes and amounts of such donations secret. Apparently, similar provisions are often part of foreign money agreements. Unfortunately, the Department cannot confirm whether donors and recipients use such provisions to justify nonreporting and nondisclosure of foreign source donations to the U.S. government and the American taxpayers.

¹The Department’s general policy is not to comment on the status or findings of ongoing investigations. Consequently, we will not publicly disclose the name of each specific university associated with each found fact at this time.

- Another university had a relationship with Kaspersky, a Russian company that has been banned from contracting with the U.S. Government.
- Another university promotes a “Talents” program through a Chinese company with close ties to the Communist government.
- Another university received gifts from a foundation suspected of acting as a propaganda and influence front for the Chinese Communist government.
- Five of six universities reviewed have or had multiple contracts with the Chinese telecommunications company Huawei, a company that has been the subject of U.S. national security and trust concerns and banned from access to federal broadband subsidies for posing a national security risk.²

Although the Department’s investigations are preliminary and few in number, we share our preliminary concerns and conclusions to alert you to what appears to be a problematic lack of transparency and accountability regarding the solicitation and receipt of large amounts of foreign money by at least some of our colleges and universities. The evidence we have reviewed to date tracks Congressional findings that American colleges and universities have provided unprecedented levels of access to foreign governments, corporations, and persons without adequate oversight.³ Therefore, with reference to certain foreign governments, companies, persons, or their agents, Congress may wish to scrutinize more closely the goals and methods of foreign money sources, the significant efforts and corporate mechanisms some colleges and universities take and use to solicit and channel foreign money, the influence and effect foreign money may have on research and curricula, and the extent to which foreign money might provide the means for access to sensitive U.S. government research and/or create insider threats.

The Department believes the facts raise several preliminary concerns:

1. Data reviewed by the Department, including IRS Form 990 tax returns, confirm that many non-profit institutions of higher education (“IHEs”) are multi-national, multi-billion dollar enterprises. These IHEs often operate, *inter alia*, through financially opaque captive foundations, foreign campuses, and other structures to generate revenue, including from foreign sources. With few exceptions, Section 117 requires IHEs to report this revenue.
2. The IHE’s Section 117 reporting has been generally underinclusive and inaccurate. Data received in response to our investigatory demands does not align with data previously reported and submitted to our systems. Several IHEs are correcting their non-compliance

² See generally Federal Communications Comm’n, “FCC Bars Subsidies for Equipment Posing National Security Threats” (Nov. 22, 2019) available at <https://www.fcc.gov/document/fcc-bars-subsidies-equipment-posing-national-security-threats>

³ See, e.g., China Report at 79.

as a result of our investigation, apparently anticipating that correcting current non-compliance carries no penalties under existing law. At least some IHEs appear to believe their disclosure and transparency obligations to the U.S. government and U.S. taxpayers must be qualified by their desire to expand financial relationships with foreign governments, corporations, and persons, including anonymous foreign donors. Increased enforcement resources and authorities may be needed to most effectively carry out Section 117's statutory purpose.

3. Although the IHEs investigated by the Department appear to have extremely sophisticated systems for managing, soliciting, and tracking contributions, grants, and contracts over time and from many thousands of sources, foreign and domestic, it appears they have not deployed similar systems with respect to Section 117 reporting. The Department has received data from several IHEs at a very high level of granularity (*e.g.*, individual contributions from foreign sources of \$100 or less), suggesting IHEs certainly have the capability to track and transparently report all foreign sources of money. It does not appear that these IHEs, each financially sophisticated and well-resourced, followed basic American Institute of Certified Public Accountants ("AICPA") guidance for Section 117 financial reporting (*e.g.*, independent third-party audits integrated with contracts, gift agreements and other relevant instruments).
4. The IHEs solicit foreign governments, corporations, and persons in a variety of ways, including institutional fundraising operations, quasi-entrepreneurial activities by professors and administrators, and foundations and alumni organizations. Some of these foreign governments, corporations, and persons are hostile to the United States and may be seeking to project "soft power," steal sensitive and proprietary research and development data and other intellectual property, and spread propaganda.⁴

⁴*Compare* China Report at 3, 75 with Report of the United Kingdom House of Commons Foreign Affairs Committee, "A cautious embrace: defending democracy in an age of autocracies" at 17 (Nov. 4, 2019) ("we were surprised that the FCO...*did not identify academia as being a distinct area at risk of influence by autocracies*") (emphasis added) available at <https://publications.parliament.uk/pa/cm201920/cmselect/cmfaff/109/109.pdf>; Parton, "China–UK Relations Where to Draw the Border Between Influence and Interference?" Royal United Services Institute for Defence and Security Studies (Feb. 2019) available at https://rusi.org/sites/default/files/20190220_chinese_interference_parton_web.pdf. According to one UK-based source, "There is growing concern that Confucius Institutes are an arm of Chinese 'soft power' and propaganda, aimed at promoting the Chinese Communist Party (CCP)'s propaganda and stifling its critics around the world." "China's Confucius Institutes: A Report of the Conservative Party Human Rights Commission" at 5 (Feb. 2019) available at http://www.conservativehumanrights.com/news/2019/CPHRC_Confucius_Institutes_report_FEBRUARY_2019.pdf. Our preliminary review suggests some American IHEs relentlessly pursue funds from autocracies such as China and Qatar, even opening foreign campuses in exchange for donations, without evident systems in place to mitigate the identified risks, including the heightened insider threat risk, associated with such activities.

5. The IHEs use foreign gifts to subsidize scholarships for foreign students at domestic and foreign campuses, but there is no evidence foreign gifts and contracts correlate with reduced tuition and other costs for American students, parents, and taxpayers who generally subsidize the higher education sector through the Title IV, Higher Education Act student loan program and various Federal research grants.
6. Our investigations do not include cybersecurity practices. However, we note the higher education industry apparently has a poor cybersecurity record and posture. In 2018, the higher education sector was ranked 17th out of 17 major industries by the information technology SecurityScorecard.⁵ This is a matter of concern because IHEs are heavily invested in overseas operations. Evidence from at least one of the investigated IHEs suggests foreign campuses' IT networks are interconnected with the domestic IT networks, with the possibility that foreign persons might have access to the IHE's entire information domain. This creates a risk that students and faculty on foreign campuses may circumvent U.S. government vetting while retaining substantially unrestricted access to IHE information networks. All investigated IHEs receive American government research funding. The insider threat risk presented by hostile foreign actors also may be an appropriate subject for further Congressional inquiry.

Subject to controlling federal and state statutes (including Section 117, the anti-terrorism and material support laws, and applicable international sanctions regimes), IHEs are free to solicit and accept money from any foreign government, corporation, or person they choose. Our statutory duty is appropriately narrow: Enforce Section 117 by collecting information, making that information readily available to the public, and, when appropriate, investigating and referring violators to the Department of Justice to enforce their compliance with their statutory reporting obligations to the Department. Section 117 is clear and all IHEs could have fairly complied with its requirements based on the evidence we have reviewed to date.⁶ Nevertheless, IHE foreign money underreporting demonstrates prior Administrations failed properly to execute the Department's enforcement duty.

⁵ See, e.g., SecurityScorecard, "2018 Education Cybersecurity Report" at 2-3 (Dec. 2018) available at https://explore.securityscorecard.com/rs/797-BFK-857/images/SSC-EducationReport-2018.pdf?mkt_tok=eyJpIjoiTXpreE9HUmXNRFF4TTJVNCIsInQiOiJTWnZ2p0ck8yWEErWFFESVJRRIRDQTIhbXM5RU5ZTCs5VFF2U2FIVThYekpPZ21ERHniQVhvTFZPMVwvVENSRDN4azlvcllTK01FVvkrUSDFkU01aNE9QcHp4MTVYZ0pPME4rUG5yZERjZFluYXNM2bEpneitiK2d3eXkreUJjVWYifQ%3D%3D.

⁶We have noted industry efforts, including communications with Congress and others, that seemingly blame underreporting on the Department and/or are designed to limit independent oversight of foreign money streams. See e.g., Letter from Terry Hartel, American Council on Education, to Dr. Mitchell Zais, U.S. Department of Education (July 12, 2019) available at <https://www.cogr.edu/sites/default/files/Final%20July%202019%20ACE%20Associations%20Response%20to%20ED%20on%20Section%20117.pdf>. Especially given the higher education industry's evident financial sophistication, we find these efforts and communications puzzling.

Secretary DeVos is correcting this historically lax oversight and under her leadership this Department is moving aggressively to remedy past failings. Specifically:

- The Department continues to investigate IHEs as necessary and appropriate.
- The Department has developed and released for public comment an information collection pursuant to the Paperwork Reduction Act (PRA), 84 Fed. Reg. 46943 (Sept. 6, 2019) to improve reporting accuracy and provide for meaningful public access to the data as required by law. Comments may be found at <https://www.regulations.gov/docket?D=ED-2019-ICCD-0114> and are currently under review. Also, the Department has created a dedicated Section 117 landing page on the Department's website. See <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>. We believe these steps will substantially improve IHE transparency and accountability.
- The Department is expanding the existing inter-agency consultation process to better highlight and address the challenges posed by American IHE's pursuit and receipt of foreign money and entanglements.
- The Department will continue working with your staff and other federal government stakeholders on potential amendatory language to address identified gaps in the statutory scheme.

The possible influence of foreign money over research and curricula at our taxpayer-subsidized colleges and universities is appropriately an issue of concern to Congress and many Executive Branch agencies, including this Department. In this regard, your Subcommittee's recent bipartisan report and hearing on China's Talent Recruitment Programs operating at several prominent U.S. institutions of higher education demonstrate Congress shares our concerns.⁷ Transparency through our proposed information collection and accountability through effective

⁷ See *Threats to the U.S. Research Enterprise: China's Talent Recruitment Plans*, Staff Report Permanent Subcommittee on Investigations, United States Senate (Nov. 2019), available at <https://www.hsgac.senate.gov/imo/media/doc/2019-11-18%20PSI%20Staff%20Report%20-%20China's%20Talent%20Recruitment%20Plans.pdf>. Notably:

The Chinese Communist Party plays a lead role in administering the Thousand Talents Plan. The Party recognized the need to control overseas talent recruitment efforts to ensure the program served its priorities. The Party created a "complex system of administration and oversight to coordinate its recruitment efforts." The Party is able to "exert exceptional" levels of control over the Thousand Talents Plan and other talent recruitment plans.

Id. at 2. Also, the evidence is Qatar, Saudi Arabia, and other foreign sources use donations and contracts with American IHEs to obtain information, purchase influence, and achieve strategic goals.

The Honorable Rob Portman
November 27, 2019
Page 7 of 7

government and public oversight are critical to safeguard the integrity of U.S. government-funded research; to preserve our national security and economic primacy; and to protect American students and citizens from the consequences of an imprudent pursuit of money from hostile foreign governments, corporations, and persons.

Going forward, our staff will be glad to work with your staff to schedule a confidential briefing regarding our factual findings and to present our suggestions for improved inter-agency coordination and deliverables.

Please feel free to contact Jordan Harding, Office of Legislation and Congressional Affairs, at 202-401-0020 if you have any questions.

Sincerely,

Reed D. Rubinstein
Principal Deputy General Counsel delegated
the Authority and Duties of the General Counsel