

December 14, 2020

Levon Schlichter
U.S. Department of Education
Office of the General Counsel
400 Maryland Avenue, SW
Room 6E-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,

On behalf of the American Council on Education (ACE) and the undersigned higher education associations, I write to offer comments on the Department of Education's Notification of Interpretation (NOI) published in the *Federal Register* on November 13, 2020, Docket No. ED-2020-OGC-0165. Initially, and as important context, ACE and the higher education community reiterate two points made in prior comments regarding this Department's action relating to Section 117 (20 U.S.C. 1011f) of the Higher Education Act (HEA) of 1965 (Section 117). First, we take seriously the risk to our institutions, and to the country, from illicit technology transfer and undue foreign influence. Second, we continue to be committed to working with the Department to enable and support institutional compliance with obligations to report statutorily required foreign gift and contract information under Section 117.

At the same time, the undersigned associations, along with our nation's colleges and universities, continue to stress the importance of sustaining the strength and vitality of the pillars of American higher education: academic freedom, free speech, and intellectual exploration. We strongly believe that it is possible to work together to reconcile efforts to guard against improper foreign influence while remaining true to these foundational principles.

However, despite our repeated pleas over the past two years, the Department has refused to engage meaningfully and constructively with the higher education community regarding Section 117. That stance has been counterproductive to the Department's professed objectives and contributed to the erosion of the public's confidence in the ability of the Department and the higher education community to work collaboratively to achieve mutual goals. For example, in public communications and a recently released report regarding Section 117 investigations of institutions, the Department misleadingly asserts that there is vast underreporting by colleges and universities of foreign gifts and

contracts.¹ The Department also charges falsely, and based purely on erroneous speculation, that institutions are affirmatively trying to hide foreign money received through related intermediaries and are acting in ways that undermine our national security.²

In fact, for the past several years, the higher education community has actively responded to concerns expressed by the Administration and Congress regarding undue foreign influence, including working closely with the array of national security and science agencies. Examples include 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 cooperating with the FBI when faculty or researchers are alleged to have engaged in misconduct related to undue foreign influence.

Section 117 Notice and Comment Rulemaking is Needed

Going forward, we believe the Department could resolve much of the uncertainty and confusion around Section 117 and institutions' attendant reporting obligations if the Department would finally agree to engage with the stakeholder community, specifically through a rulemaking process that will allow for notice and comment. In this way, we can work together to achieve what colleges and universities certainly want, and the Department should want: a clear understanding of institutional obligations, and legitimate Department expectations, under Section 117. If the rulemaking process is undertaken collaboratively to implement regulations that are faithful to Section 117's requirements and limitations, we believe the Department could improve Section 117 compliance considerably and eliminate concerns about Department overreach. Consistent with this proposed approach and for the reasons outlined below, the Department should withdraw the NOI.

¹ In its report on Section 117 institutional compliance, the Department asserts that there is vast Section 117 underreporting. This assertion is based on the finding by the Senate Permanent Subcommittee on Investigations report that nearly 70 percent of schools that received funding from China for Confucius Institutes did not report that funding. At that time, there were approximately 100 Confucius Institutes (CIs) in all of higher education. See, [PSI report on China's Impact on the U.S. Education System](#), p. 70. Many CIs were legitimately organized as separate 501(c)(3) organizations, which were not covered by the reporting obligations of Section 117. The Department misleadingly magnifies that narrow finding to claim that "up to 70% of all U.S. colleges and universities fail to comply with the law, and those that do substantially underreport." Department of Education, "Institutional Compliance with Section 117 of the Higher Education Act of 1965," p. 6. This is the primary basis for the Department's disingenuous and false assertion about Section 117 underreporting.

² "[T]here is very real reason for concern that foreign is money buys influence or control over teaching and research. Disclosure and transparency might mitigate the harm to some extent. However, the evidence shows the industry has at once massively underreported while also anonymizing much of the money it did disclose, all to hide foreign sources (and, correspondingly, their influence on campus) from the Department and the public." See page 3, Department of Education report "Institutional Compliance with Section 117 of the Higher Education Act of 1965" <https://www2.ed.gov/policy/highered/leg/institutional-compliance-section-117.pdf>.

One example of the continuing disconnect between the Department's Section 117 "interpretation" and reality is the circular reasoning the NOI uses to justify the Department's Section 117 overreach. The NOI ironically invokes congressional intent to characterize the February 2020 information collection request (ICR) seeking institutional information in excess of what Sec. 117 (20 U.S.C. 1011f) permits as being "necessary" "to determine whether it appears an institution has failed to comply with the requirements of 20 U.S.C. 1011f." The NOI does not explain how demanding more information than Congress authorized collecting under 1011f would help the Department to assess compliance with what 1011f actually requires, nor does it explain how congressional intent could support an expansion of the Department's authority beyond the statutory scope of reporting.

Most concerning, the NOI, which took immediate effect on November 13, 2020, asserts that failure to report Section 117 foreign gifts and contracts is a violation of the Department's Title IV program participation agreement (PPA). Violation of a PPA could result in an institution losing its 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.

The NOI is Inconsistent With the HEA

With reference to the enclosed legal memorandum by Hogan Lovells US LLP (Hogan Memorandum), prepared at ACE's request to share with the Department, we categorically dispute the NOI's contentions that:

- "[a]n institution's failure to adequately report Section 117 gifts and contracts is a violation of an institution's participation in the HEA programs and PPA under 20 U.S.C. 1094(a)(17)";
- to investigate an alleged Section 117 violation the Department may utilize 20 U.S.C. 1097a, which authorizes the Department "to require by subpoena the production of... documentary evidence pertaining to participation in any program under [Title IV of the HEA]"; and,
- that "where an institution fails to report Section 117 information timely and accurately... the Department has authority to implement a range of corrective measures..., including termination of the institution's Title IV participation."

The NOI's assertion of new, expanded enforcement authority is not only unsupported by statute, it is also unnecessary, because Congress specified an enforcement provision: Section 117 authorizes the Department to refer an institution to the Department of Justice to compel compliance. In addition, following a finding of knowing or willful failure to comply, a school would be required to reimburse the U.S. Treasury for the full cost of obtaining compliance. Congress never intended for an institution's Section 117 noncompliance to result in the Department terminating an institution's eligibility for Title IV funding.

As the Hogan Memorandum underscores, Congress gave the Department the authority to revoke access to federal financial student aid for Title IV violations, but not as a Section 117 "corrective measure." Congress included foreign gift reporting in Title I of

the HEA more than 30 years ago. If Congress wanted it to be tied to student financial aid, it would have placed the provision in Title IV or at least referred to compliance with it as a Title IV requirement (as it did for Integrated Postsecondary Education Data System surveys). The authority the Department claims in the NOI is for Congress to give, not for the Department to assume.

The NOI is Procedurally Invalid

The NOI's claim that it is merely an interpretative rule does not make it so. The Administrative Procedure Act requires that whenever an agency promulgates a "legislative rule," it must undergo notice and comment rulemaking. Nothing in the statute, or in Title IV's implementing regulations, provides any basis for the Department to pronounce by an NOI that meeting Section 117 data collection requirements is a condition of Title IV eligibility. As noted in the Hogan Memo, embracing the NOI's assertion that a violation of Section 117 is also a per se violation of Title IV would enable the Department "to convert any federal reporting requirement—regardless of where codified and the agency with authority to enforce it—into a Title IV violation," and "completely rewrite the statute that Congress actually passed."

Similarly, the NOI's premise that the Department may give itself power to subpoena confidential materials when Congress enacted an enforcement mechanism that did not grant it that authority defies reason. If Congress wanted the Department to have that power, it would have given it to the Department. The self-authorized Section 117 subpoena power referenced in the NOI is an improper end run around the statute by the Department."³

The NOI also references reporting requirements for Title VI International and Foreign Language Education programs, that were included in Section 638 of the Higher Education Act, as part of the 2008 reauthorization. Similar to Section 117, the Department has never promulgated regulations under this provision. There is a concern that the statute references fiscal year, as opposed to the calendar year required by Section 117. If there is a separate reporting requirement for Title VI, the Department needs to promulgate sensible and aligned regulations around that provision. Again, the use of rulemaking would allow the Department the ability to engage with stakeholders to create clear regulations going forward.

³ The Department's earlier, withdrawn proposed information collection request, which would have required "true copies" of gift agreements and contracts, also was clearly outside the existing statute, forcing the Department to remove it from the final ICR. As we noted at the time, "Based on the language of Section 117 concerning the content of required reports, the Department has no legal authority to require institutions to produce a "true copy" of any gift or donation agreements, contracts, and restricted or conditional gift agreements as part of required biannual reporting."

November 5, 2019 ACE community comments on the Department's ICR:
<https://www.acenet.edu/Documents/Comments-Memo-Sec-117.pdf>.

The Department Should Cooperatively Engage with Stakeholders

At its core, this NOI continues the lack of cooperation demonstrated by the Department's actions around Section 117 over the past two years. Instead of engaging in the customary dialogue associated with rulemaking to clarify the reporting requirements and mechanisms collaboratively with colleges and universities, the NOI carries forward a disengaged and combative approach, reflected in the Department's expansive and burdensome investigations of 12 major public and private universities, which are well beyond the narrow focus of Section 117 foreign gift and contract reporting. Several of the institutions investigated had reasonably tried to comply with Section 117 for many years. Other institutions had contacted the Department before the investigations were initiated, to update their records after discovering reporting oversights.

This approach is having a chilling impact on institutional engagement with the Department, further inhibiting Section 117 compliance. Institutions are afraid to ask questions aimed at improving their compliance, lest they be next on the list to be investigated. In addition, there is concern that the subpoena provisions of the NOI may be retroactively applied to ongoing investigations, further discouraging collaboration with the Department.

The NOI, and the Department's continuing punitive and non-responsive approach regarding Section 117 compliance, runs counter to the goal of enhanced transparency of foreign gift and contract reporting. We repeat our request for the Department to engage with stakeholders to promulgate clear guidance based on the existing statute through a formal rulemaking process, with notice and comment, and for the Department to withdraw the NOI. This will allow for greater understanding and increased transparency for the Department, institutions of higher education, and policy makers.

Sincerely,



Ted Mitchell
President

Attachment: December 11, 2020 Memorandum to Peter McDonough, Vice President and General Counsel, ACE from Hogan Lovells

On behalf of:

American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium

Association of American Colleges and Universities
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Independent California Colleges and Universities
Association of Independent Colleges and Universities in Massachusetts
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Coalition for International Education
College and University Professional Association for Human Resources
Council for Advancement and Support of Education
Council of Graduate Schools
Council of Independent Colleges
Council on Governmental Relations
EDUCAUSE
Hispanic Association of Colleges and Universities
NAFSA: Association of International Educators
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators



MEMORANDUM

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TO Peter McDonough
Vice President and General Counsel

ORGANIZATION American Council on
Education

FROM Stephanie Gold
Joel Buckman
Megan Wilson

DATE December 11, 2020

SUBJECT **Section 117 of the Higher Education Act / U.S. Department of Education's
Notification of Interpretation, 85 Fed. Reg. 72,567 (Nov. 13, 2020)**

As requested, this memorandum outlines certain legal shortcomings in the U.S. Department of Education's ("ED") November 13, 2020 "notification of interpretation" ("NOI") regarding its enforcement authority with respect to Section 117 of the Higher Education Act of 1965 ("HEA"). We understand that you will share this memorandum with ED as part of ACE's comments on the NOI.

Section 117 is a stand-alone foreign gift and contract reporting statute that appears in Title I of the HEA. The statute specifies who must file reports (higher education institutions that receive federal financial assistance broadly defined and not limited to Title IV); when institutions must file reports (biannually); the contents of the reports (generally aggregate information by country); and the remedy for noncompliance (the U.S. Department of Justice ("DOJ") may bring an enforcement action, and, for "knowing and willful" violations only, recover the costs of investigation and enforcement). Congress specified no other penalties (monetary or otherwise) and no investigative role for ED.

Apparently unsatisfied with the foreign gift and contract reporting statute that Congress enacted, ED asserts in the NOI that a violation of Section 117 is also a per se violation of Title IV, which carries with it the potential for administrative subpoenas from ED and significant monetary penalties (including fines and the loss of Title IV funding). For the reasons described below, the NOI is invalid under the Administrative Procedure Act ("APA") because it is a legislative rule that requires negotiated rulemaking. It is also substantively wrong because it rests on a strained interpretation of Section 487(a)(17) of the HEA that seems incompatible with the text and structure of the HEA and its legislative history. It would also prove too much: It would allow ED to convert any federal reporting requirement—regardless of where codified and the agency with authority to enforce it—into a Title IV violation. In Section 117's case, it would completely rewrite the statute that Congress actually passed.

From a practical perspective, there is no need for ED to adhere to the procedurally invalid and strained interpretation outlined in the NOI. The NOI reflects the culmination of the Trump administration's efforts to call attention to and improve compliance with Section 117. For many years Section 117 did not receive the attention it deserved. In part as a result of ED's efforts, including its new reporting portal and its administrative investigations, the higher education community's awareness of Section 117 and compliance has improved markedly. Institutions under investigation cooperated with ED's voluntary information requests to the point that ED received "important and actionable information" which enabled it to write a detailed report about its findings.¹ Institutions are ready and willing to comply with Section 117. What is needed now is not the NOI and the threat of draconian enforcement and penalties, but for ED to initiate notice and comment rulemaking under Section 117 to clarify institutions' reporting obligations under the existing statute. It is Congress' job, not ED's, to make changes to Section 117's penalties and enforcement mechanisms.²

I. Legal Background: Section 117 and Section 487

A. Section 117 (20 U.S.C. § 1011f)

Congress enacted Section 117 in 1986 as part of the "General Provisions" of the HEA (now Title I).³ Title I is broader than Title IV, which contains the specific requirements that apply to institutions that participate in the federal student financial aid programs authorized by Title IV.

Section 117 provides that higher education institutions that receive any federal financial assistance—without mention of Title IV specifically—must file certain foreign gift and contract reports.⁴ Specifically, any such institution must file a "disclosure report" regarding a "gift" or "contract" with a "foreign source" if the value of the gift or contract is \$250,000 or more (considered alone or in combination with all other gifts and contracts with the foreign source in a calendar year).⁵ Congress prescribed the contents of required reports. For gifts and contracts that are not restricted or conditional, Section 117 requires only that an institution report aggregated amounts received from each foreign government or attributable country.⁶ "All disclosure reports required . . . shall be public records open to inspection and copying during business hours."⁷

Section 117 provides that ED "may promulgate regulations to carry out this section," but assigns enforcement authority to DOJ.⁸ "Whenever it appears that an institution has failed to comply with the requirements of this section . . . a civil action may be brought by the Attorney General, at the

¹ See ED, Institutional Compliance with Section 117 of the Higher Education Act of 1965 (Oct. 2020), available at <https://www2.ed.gov/policy/highered/leg/institutional-compliance-section-117.pdf>.

² Indeed, members of Congress already have proposed potential amendments to Section 117. See, e.g., S.3313 – Foreign Influence Transparency Act, available at <https://www.congress.gov/bill/116th-congress/senate-bill/3313#:~:text=This%20bill%20addresses%20foreign%20influence,or%20of%20the%20fine%20arts>.

³ See Pub. L. No. 99-498, tit. XII, § 1206, 100 Stat. 1269, 1577 (Oct. 17, 1986) (adopting Section 1206, "Disclosures of foreign gifts," as part of Title XII – "General Provisions" in the 1986 reauthorization of the HEA), available at <https://law2.house.gov/statutes/pl/99/498.pdf>.

⁴ See 20 U.S.C. § 1011f(a), (h)(4).

⁵ See *id.* § 1011f(a).

⁶ *Id.* § 1011f(b).

⁷ *Id.* § 1011f(e).

⁸ See *id.* § 1011f(f)–(g).

request of the Secretary” to compel compliance.⁹ An institution must bear the “full costs to the United States of obtaining compliance, including all associated costs of investigation and enforcement,” but only if DOJ proves that an institution’s noncompliance was “knowing” or “willful.”¹⁰ There are no other penalties under Section 117. ED has never promulgated regulations under Section 117.¹¹

Congress enacted Section 117 in 1986.¹² The only significant change Congress has made since then is the addition in 1998 of a requirement that foreign-owned institutions file certain reports.¹³ Section 117 has remained stable in terms of whom it requires to report, what it requires to be reported, and the enforcement mechanism and penalties for noncompliance for the past nearly forty years.

B. Section 487 (20 U.S.C. § 1094)

In contrast to Section 117, Section 487 is part of Title IV. Section 487 specifies that to participate in Title IV an institution must enter into a program participation agreement with ED that contains a number of required provisions.¹⁴

The NOI focuses on one such provision that requires Title IV participants to “complete surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal postsecondary institution data collection effort, as designated by the Secretary, in a timely manner and to the satisfaction of the Secretary.”¹⁵ ED’s implementing regulations merely parrot the statutory language—in ED’s words, “without substantive modifications.”¹⁶ Congress enacted the relevant portion of Section 487 in 1992. At the time, both Section 117 and IPEDS existed.¹⁷ Congress created the National Center for Education Statistics (“NCES”) in 1974, which phased in IPEDS between 1986–1989 before there was any statutory requirement that institutions respond to the IPEDS surveys.¹⁸

⁹ Id. § 1011f(g).

¹⁰ Id.

¹¹ See, e.g., Statement of General Mitchell M. “Mick” Zais, Deputy Secretary, U.S. Department of Education (ED), Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations (Feb. 28, 2019), available at <https://www.hsgac.senate.gov/imo/media/doc/2019-02-28%20Zais%20Testimony%20-%20PSI.pdf> (“Over the 30-plus years that the disclosure requirements have been in place, the Department has not issued any regulations under this provision of the statute.”).

¹² See supra n.3.

¹³ See Pub. L. No. 105-244, tit. I, § 117, 112 Stat. 1581, 1593 (Oct. 7, 1998), available at <https://www.govinfo.gov/content/pkg/PLAW-105publ244/pdf/PLAW-105publ244.pdf>.

¹⁴ 20 U.S.C. § 1094.

¹⁵ Id. § 1094(a)(17).

¹⁶ See 59 Fed. Reg. 9,526, 9,538 (Feb. 28, 1994); 34 C.F.R. § 668.14(a)(19) (“It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions”).

¹⁷ See ED, The History and Origins of Survey Items for the Integrated Postsecondary Education Data System (2016–17 Update), 7–9 (Mar. 2018), available at https://nces.ed.gov/ipeds/pdf/NPEC/data/NPEC_Paper_IPEDS_History_and_Origins_2018.pdf.

¹⁸ See id.

Unlike Section 117, Title IV contains detailed enforcement mechanisms, including the ability of ED to fine an institution or terminate, limit, or suspend the institution's participation in Title IV.¹⁹ Congress has also granted ED the authority to issue administrative subpoenas to enforce Title IV's requirements.²⁰

C. The NOI

In the second half of the Trump administration, ED increased its focus on Section 117. It launched administrative investigations and created a new reporting portal. In the twilight of the Trump administration, ED announced that it would issue the NOI. ED published the NOI in the Federal Register on November 13, 2020. "Through this notification of interpretation," the NOI explained, "the Department clarifies its enforcement authority with respect to institutions that fail to report accurate and complete Section 117 information."²¹

The NOI asserts that a violation of Section 117 would constitute a per se violation of Title IV because it results in a violation of the program participation agreement requirement (Section 487).²² ED cites Section 487(a)(17) in particular and emphasizes the language that references "*any other Federal postsecondary institution data collection effort*".²³ According to the NOI, "in light of widespread underreporting," the Secretary "clarifies via this notification that the Section 117 information collection is part of a 1094(a)(17) 'Federal data collection effort, as designated by the Secretary' to ensure the public understands ED's enforcement authority."²⁴

The NOI claims that because Congress has referred to Section 117 as a "data requirement," the Secretary may designate compliance with it as a condition of the program participation agreement.²⁵ It also emphasizes that Congress never expressly excluded Section 117 from Section 487(a)(17).²⁶

II. The NOI is a procedurally invalid legislative rule characterized as an interpretation

For the reasons explained in part III, the NOI is incompatible with the HEA as a matter of substance. However, the NOI also suffers from a fatal procedural flaw. Under the APA, the NOI is a legislative rule masquerading as an interpretation of Section 487(a)(17) of Title IV. The APA requires that whenever an agency promulgates a "legislative rule," it must undergo notice and comment rulemaking. See 5 U.S.C. § 553. The HEA adds to that baseline requirement a further obligation for ED to implement negotiated rulemaking when developing "proposed regulations for this subchapter" (i.e., Title IV). 20 U.S.C. § 1098a. The NOI fails to satisfy either requirement.

A legislative rule "is one that has 'legal effect' or, alternately, one that an agency promulgates with the 'intent to exercise' its 'delegated legislative power' by speaking with the force of law." Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 83 (D.C. Cir. 2020). Notice-and-comment rulemaking is required before an agency may promulgate a legislative rule. See 5 U.S.C. § 553. An interpretive

¹⁹ See 20 U.S.C. § 1094; 34 C.F.R. part 668, subpart G.

²⁰ See 20 U.S.C. § 1097a (granting ED subpoena authority to enforce "this subchapter" (i.e., Title IV of the HEA)).

²¹ 85 Fed. Reg. 72,567, 72,567–68 (Nov. 13, 2020).

²² See id.

²³ Id. at 72,568 (italics in original).

²⁴ Id. at 72,568.

²⁵ Id. at 72,568 (citing 20 U.S.C. § 1132-7).

²⁶ Id. at 72,568.

rule, by contrast, is one that “‘derive[s] a proposition from an existing document,’ such as a statute, regulation, or judicial decision, ‘whose meaning compels or logically justifies the proposition.’” Id. (quoting Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010)). Notice-and-comment rulemaking is not required for an interpretive rule, “[b]ut that convenience comes at a price: Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’” See Perez v. Mortgage Bankers Ass’n, 575 U.S. 92, 97 (2015) (internal citation omitted).

The NOI claims to interpret Section 487(a)(17), which requires higher education institutions to complete surveys as part of IPEDS as a condition of Title IV eligibility and authorizes the Secretary to “designate[]” additional surveys. Nothing about the statute or the regulation (which parrots the statute) provides any principle from which to divine the postsecondary data collections that are required as a condition of Title IV eligibility. The sole trigger is the Secretary’s designation. An “interpretive rule” is not interpretive if it purports to interpret a “vague or vacuous term” in a statute because such terms “‘in themselves do not supply substance from which the propositions can be derived’”. See, e.g., Catholic Health Initiatives, 617 F.3d at 494–95 (internal citation omitted).²⁷

The NOI explains in a conclusory manner why Section 117 qualifies as a “postsecondary institution data collection effort” contemplated by Section 487(a)(17). Even if that were correct—it is not, for the reasons explained part III—that would at best qualify Section 117 as one of the data collections that ED could designate as a Title IV requirement under the statute. But nothing in Section 487(a)(17) tells ED which such data collections to designate as a condition of Title IV eligibility or guides ED’s designation decisions. Congress left that to ED, which is a quintessential delegation of legislative authority and a paradigmatic case for when notice-and-comment rulemaking is required. See Hocor v. U.S. Dep’t of Agric., 82 F.3d 165, 170 (7th Cir. 1996) (“Even if, despite the doubts that we expressed earlier, the eight-foot rule is consistent with, even in some sense authorized by, the structural-strength regulation, it would not necessarily follow that it is an interpretive rule. It is that only if it can be derived from the regulation by a process reasonably described as interpretation.”).²⁸ “Where,” as here, “Congress has specifically declined to create a standard,” the agency “cannot claim its implementing rule is an interpretation of the statute.” See Mendoza v. Perez, 754 F.3d 1002, 1022 (D.C. Cir. 2014).

Section 487(a)(17) is a classic case of Congress conferring legislative authority on ED. If ED intends to try to exercise such authority—that is, to “designate[]” new surveys as part of “federal postsecondary institution data collection” efforts that institutions must complete to be eligible for Title IV—it must seek to do so by way of negotiated rulemaking. ED failed to do that here, and the NOI is invalid for this procedural reason alone.

²⁷ See Catholic Health Initiatives, 617 F.3d at 494–96 (holding “there is no way an interpretation of ‘reasonable costs’ can produce the sort of detailed—and rigid—investment code” set forth in an agency handbook); see also Paralyzed Veterans, America v. D.C. Arena, 117 F.3d 579, 588 (D.C. Cir. 1997) (agency guidance that purported to construe a regulation allowing “additional reasonable conditions” on park permits to include a detailed list of property that could not be stored in a park qualified as a procedurally invalid legislative rule).

²⁸ See also Id. at 169 (“[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes (or requires—it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency.”).

III. The NOI's interpretation is incompatible with the HEA as demonstrated by its text, structure, and history and would produce results Congress did not intend

Even if the Department had pursued the NOI through the correct APA procedure, the NOI is incompatible with the text, structure, and history of the HEA. The power ED claims in the NOI would allow it, at the stroke of a pen, to transform any of the myriad federal reporting requirements applicable to colleges and universities into Title IV violations, a result Congress almost certainly never intended.

Start with the text of Section 487(a)(17). An institution must agree to “complete surveys conducted as a part of . . . (IPEDS) or any other Federal postsecondary institution data collection effort, as designated by the Secretary, in a timely manner and to the satisfaction of the Secretary.” 20 U.S.C. § 1094(a)(17) (emphasis added). The NOI focuses entirely on the phrase “any other . . . data collection effort.” ED claims that because Section 117 is arguably a “data collection,” it must be permissible for ED to convert a Section 117 violation into a Title IV violation. But ED fails to reckon with the plain meaning of what Section 487(a)(17) actually requires institutions to do. Namely, institutions must complete “surveys” conducted as part of IPEDS or other data collections to ED’s satisfaction.²⁹ Even if Section 117 is in some sense a “data collection,” it does not require institutions to “complete surveys.” Rather, Section 117 requires institutions to file certain “disclosure reports,” the contents of which are enumerated by Section 117 itself. Indeed, Section 117 bears no resemblance to the IPEDS surveys, which, since before Congress even enacted Section 487(a)(17), the NCES prepares each year, sends to institutions, and requests institutions to complete.³⁰ The plain text of Section 487(a)(17) undermines the NOI.

So does the HEA’s structure and the plain language of Section 117. Where, as here, there are two separate statutes, it is necessary to read both in context and to seek to harmonize the two. See, e.g., National Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007). It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (internal citations omitted). It is also well-established that, in most contexts, ““a precisely drawn, detailed statute pre-empts more general remedies.” . . . when Congress enacts a specific remedy when no remedy was previously recognized . . . the remedy provided is generally regarded as exclusive.” Hinck v. United States, 550 U.S. 501, 506 (2007) (internal citations omitted). And a “statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.” Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

Here, Section 117 is a stand-alone reporting statute that appears in Title I of the HEA. It contains its own reporting requirements, its own enforcement mechanism, and its own penalties, and it makes no specific mention of Title IV assistance. Had Congress intended to give ED an investigative role or subpoena authority under Section 117, it would have done so explicitly. Instead, it tasked DOJ with enforcement and gave ED no subpoena authority in Section 117 or Title I (as

²⁹ For example, in 1992, the year Congress added Section 487(a)(17), it required the “Secretary of Education, in cooperation with the Administrator of the Environmental Protection Agency” to conduct a study of the extent to which asbestos, lead in drinking water, or radon gas pose a threat to the health and safety of students and employees of institutions of higher education. The study “shall include a survey of a representative sample of institutions of higher education in order to assess how widespread such hazards are.” 106 Stat. 821 (July 23, 1992).

³⁰ See <https://surveys.nces.ed.gov/ipeds/>.

opposed to Title IV).³¹ See Bobreski v. E.P.A., 284 F. Supp. 2d 67, 76 (D.D.C. 2003) (“[B]ecause each statute except the SDWA contains some form of subpoena authority enacted elsewhere in the same legislation as its whistleblower provision, Congress’ omission of whistleblower subpoena authority appears to be intentional.”).³² Similarly, had Congress intended to condition Title IV participation on Section 117 compliance, it would have included an explicit reference to Section 117 in Section 487 (just as it did in 1992 with IPEDS), or enacted a parallel foreign gift and contract reporting requirement elsewhere in Title IV (just as it did in 2008 in Title VI of the HEA³³). Congress never did. Instead, Congress enacted Section 117 as a stand-alone statute untethered to Title IV.

Far from harmonizing Section 117 and Section 487(a)(17), as required, the NOI undercuts the enforcement mechanism and penalty Congress enacted in Section 117. In Section 117, Congress tasked DOJ to enforce Section 117 and created a penalty tailored to the general nature of the reports Section 117 requires. The primary remedy is for DOJ to bring a suit to require submission of the required reports. See 20 U.S.C. § 1011f(f). The only circumstance in which an institution can face monetary liability under Section 117 is for a “knowing” or “willful” violation. Id. § 1011f(f)(2). Even then, Congress limited the penalty to repayment of the government’s cost of obtaining compliance. Id. Not so under the NOI, ED could fine an institution up to \$58,328 per violation of Section 117 regardless of whether “knowing” or “willful,” or even terminate an institution’s participation in Title IV. See 20 U.S.C. § 1094; 34 C.F.R. part 668, subpart G. Congress does not repeal specific, tailored statutory provisions with more general subsequent enactments. E.g., Traynor v. Turnage, 485 U.S. 535, 548 (1988) (holding it is not permissible to infer a statutory repeal “unless the later statute ‘expressly contradict[s] the original act’ or unless such a construction ‘is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.’”) (internal citations omitted). It is not possible to square the NOI’s penalties with the tailored approach Congress actually enacted in Section 117. See Radzanower, 426 U.S. at 153.³⁴

Nor is there a reason for ED to try. By definition, all Title IV participants receive federal financial assistance and therefore are already subject to Section 117. There is no separate reason under Title IV for ED to interpret it as requiring compliance with Section 117 (for example, institutional eligibility requirements), and the NOI cites none. The only justification the NOI offers is alleged noncompliance with Section 117 by institutions generally. 85 Fed. Reg. at 72,567–68. At best, that would be an argument for Congress to consider changes to Section 117. It provides no basis for ED to replace the statute Congress actually passed with one ED prefers. See EC Term of Years Tr. v. United States, 550 U.S. 429, 434 (2007) (“Resisting the force of the better fitted statute requires a good countervailing reason, and none appears here.”).

³¹ See 20 U.S.C. § 1097a (granting ED subpoena authority to enforce “this subchapter” (i.e., Title IV of the Higher Education Act)); Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n, 316 F. Supp. 3d 349, 400 (D.D.C. 2018) (“The non-parallel structures of subsections (c)(1)–(2) and (f)(1)–(2) demonstrate that Congress knows how to limit the contents of filed statements to the FEC when that is the intention.”).

³² See also Independent Insurance Agents of America v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000).

³³ See Pub. L. No. 110-315, Higher Education Opportunity Act, Title VI, § 638, 122 Stat 3078, 3345 (Aug. 14, 2008), available at <https://www.govinfo.gov/content/pkg/PLAW-110publ315/pdf/PLAW-110publ315.pdf>.

³⁴ Cf. Branch v. Smith, 538 U.S. 254, 273 (2003) (“An implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute’”); Posadas v. National City Bank, 296 U.S. 497, 503 (1936) (“[T]he intention of the legislature to repeal must be clear and manifest”).

The legislative history likewise reinforces that Congress did not intend to condition Title IV participation on Section 117 compliance. The NOI emphasizes that when Congress added the language to Section 487(a)(17) requiring institutions to complete surveys as part of federal data collection instruments, it did not exempt Section 117. See 85 Fed. Reg. at 72,568. More salient, however, is that Congress did not specifically include a reference to Section 117. In 1992, both IPEDS and Section 117 existed.³⁵ Had Congress intended for Section 487(a)(17) to encompass Section 117, it could and would have included an explicit reference to Section 117 as it did for IPEDS.³⁶ The same goes for subsequent amendments and reauthorizations of the HEA. Congress' omission to do so, particularly when it enacted a parallel Section 117 requirement in Title VI of the HEA in 2008, only underscores that Congress never intended to tie Section 117 and Title IV together.

Finally, if ED's position in the NOI is correct, ED would have an incredible amount of power Congress almost certainly could not have intended. ED in effect claims that by merely publishing a memorandum in the Federal Register, it can convert any of the myriad Federal reporting requirements applicable to higher education institutions into a Title IV requirement. This might include, for example, reports required by the Internal Revenue Code and regulations,³⁷ anti-boycott reporting requirements,³⁸ and various reporting requirements in connection with federally funded research.³⁹ ED has no special expertise or ability to police compliance with such requirements. And there is no reason to think Congress would want to give ED the power to condition Title IV eligibility on compliance with such requirements to the "satisfaction of the Secretary," 20 U.S.C. § 1094(a)(17), much less to use its Title IV enforcement tools to investigate institutions' compliance with them. Congress does not hide elephants in mouseholes. See Gonzales v. Oregon, 546 U.S. 243 (2006); Am. Bar Ass'n v. FTC, 430 F.3d 457 (D.C. Cir. 2005).

* * *

In conclusion, the NOI presents significant legal flaws, and ED should abandon it. Instead, ED should use the rulemaking authority Congress gave it to interpret and implement Section 117. A notice-and-comment rulemaking process with stakeholder input would give ED the opportunity to understand what gaps in Section 117 need to be filled. Such process would result in better understanding by both ED and higher education institutions regarding Section 117 requirements and better overall compliance.

³⁵ See Pub. L. No. 99-429, Higher Education Amendments of 1986, Tit. XII (General Provisions), § 1209, 100 Stat. 1268, 1577 (Oct. 17, 1986), available at <https://law2.house.gov/statutes/pl/99/498.pdf>; https://nces.ed.gov/ipeds/pdf/NPEC/data/NPEC_Paper_IPEDS_History_and_Origins_2018.pdf.

³⁶ See Pub. L. No. 102-325, Higher Education Amendments of 1992, Title IV, § 490, 106 Stat. 448, 625 (July 23, 1992), available at <https://www.govinfo.gov/content/pkg/STATUTE-106/pdf/STATUTE-106-Pg448.pdf>.

³⁷ See, e.g., 26 C.F.R. § 1.6050S-1-S-4 (requiring institutions to report to the IRS qualified tuition and related expenses and student loan interest).

³⁸ See, e.g., 15 C.F.R. § 760.5 ("A United States person who receives a request to take any action which has the effect of furthering or supporting a restrictive trade practice or boycott fostered or imposed by a foreign country against a country friendly to the United States or against any United States person must report such request to the Department of Commerce in accordance with the requirements of this section.").

³⁹ See, e.g., 45 C.F.R. § 46.113 (requiring an Institutional Review Board to file a report with the relevant agency when it suspends human subjects research); 2 C.F.R. §§ 200.328-200.300.