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May 4, 2021

The Honorable Rob Portman  
United States Senate  
448 Russell Senate Office Building  
Washington, DC 20210

The Honorable Tom Carper  
United States Senate  
513 Hart Senate Office Building  
Washington, DC 20210

Dear Senator Portman and Senator Carper,

On behalf of the American Council on Education, I write regarding the reintroduction of the “Safeguarding American Innovation Act.” While we strongly support the goal of safeguarding America’s research and scientific enterprise from foreign threats, we remain concerned that several provisions of this legislation would impede international partnerships, discourage international students from attending our institutions, and complicate efforts to enhance transparency of the financial relationships between institutions of higher education and foreign sources.

Following the July 2020 letter to the Senate Homeland Security and Governmental Affairs Committee,<sup>1</sup> which outlined our concerns, we engaged an immigration attorney to review the impact of Section 5, “Restricting the Acquisition of Goods, Technology, and Sensitive Information to Certain Aliens,” and Section 6, “Limitations on Cultural and Educational Exchange Programs,” on our institutions and international visitors. These provisions have serious implications for visa programs for our students and scholars, and would impose significant new requirements for colleges and universities.

The attached analysis, provided by immigration attorney Dan Berger, concludes that the changes envisioned in Section 5 are unnecessary given the broad authority the Department of State already has to regulate visas under current law and practice. We also remain concerned that this language could be used to keep out individuals seeking to come here to study in a broad range of science, technology, engineering, and mathematics (STEM) fields or carry out fundamental research, as well as possibly increasing administrative processing time for our students and scholars.

The analysis also identifies concerns in Section 6 regarding the implementation of these proposed new requirements, particularly with some of the broad and undefined terms included in the language as drafted. We worry that an administration could misuse such broad authority and take punitive actions for political reasons. Universities and industry already are required to comply with security requirements and, as necessary, develop security control plans for foreign nationals under existing export control rules. Therefore, these new requirements appear

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<sup>1</sup> July 21, 2020 letter to Senate HSGAC: <https://www.acenet.edu/Documents/Letter-Senate-HSGAC-Safeguarding-American-Innovation-Act-072120.pdf>

unnecessary and could be used to undermine valuable and important scientific activities.

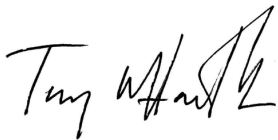
We also continue to have concerns regarding the low reporting threshold for foreign gift and contract reporting proposed in Sec. 7 of the bill as drafted. Again, we share the goal of achieving maximum transparency of the relationships colleges and universities have with foreign individuals and entities and identifying nefarious conduct or malign foreign influence.

However, lowering the threshold would undercut that goal. The Department of Education (ED) has been managing this program for more than 40 years and has never managed it well. At present, there is no ED office of foreign gift reporting and there are two separate databases maintained by the Department that show different numbers even though they draw from the same reports. Repeated efforts to discuss with the Department ways to improve compliance with Section 117 of the Higher Education Act have been refused.

More importantly, we firmly believe that gifts or contracts that will cause concern will be few and far between. Indeed, ED has never identified any instances of malign foreign influence through this reporting. In short, the Department is looking for a needle in a haystack. Lowering the reporting threshold will produce many more than the 7,000 annual reports currently received, including by dragging community colleges and small private institutions that have incidental programs into this reporting requirement. But dramatically increasing the size of the haystack will only reduce the attention and scrutiny that can be given to individual reports. The goal should be to find ways to focus attention in a strategic way on those reports that suggest potential concerns, not to merely increase the number of reports.

We hope to continue to work with you to improve these sections of the legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is written in a cursive, slightly slanted style.

Terry W. Hartle  
Senior Vice President

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**To:** Peter McDonough, Vice President and General Counsel  
**From:** Dan Berger, Partner, Curran, Berger & Kludt  
**Date:** April 28, 2021  
**Re:** Memorandum regarding the Safeguarding American Innovation Act

This memorandum, prepared at the request of the American Council on Education, offers my assessment of aspects of the proposed Safeguarding American Innovation Act (SAIA). I understand that you intend to share this memorandum with Senate offices as they prepare to consider the legislation.

My analysis is informed by various drafts and redline versions of the SAIA that I have reviewed, as well as [your organization's comments](#) on the legislation from the last Congress, [S. 3997](#).<sup>1</sup> Specifically, I have focused on Section 5 and Section 6 of the SAIA regarding immigration-related provisions, including the overlap of export control and immigration law. Although the drafts and redlines vary, I have substantial concerns that the language in the underlying bill is overbroad and unnecessary.

Immigration law is often a balancing of national security concerns and promotion of international exchange. The SAIA has visa provisions that threaten to discourage exchange and commerce, while not clearly adding to national security. My analysis focuses on the specific legal issues involved, and I leave it to others to comment on the many benefits that international students and scholars bring to the United States (including their own knowledge gained from research done abroad).

**Section 5: Restricting the Acquisition of Goods, Technology, and Sensitive Information to Certain Aliens**

Overall, I question whether the additional authority granted to the Department of State (DOS) under Section 5 is needed for export control screening during visa applications at U.S. consulates abroad. Understandably, a good part of the internal DOS guidance for consular officers on export control is classified, but the public-facing [Foreign Affairs Manual](#) shows significant authority. Consular officers already “run the names” during a visa application and evaluate applicants [based on their field of study](#) or [affiliation with an “entity.”](#)

The process involves an interagency Security Advisory Opinion (SAO) process called a [Visa Mantis check](#). Over my 25 years working with universities on immigration matters, I have seen the SAO and Visa Mantis process at work, with a significant number of students and scholars delayed at any given time. While [arguably overreaching](#) in some situations, Visa Mantis certainly is a powerful tool for DOS to deny visas where there are export control or national security concerns.<sup>2</sup>

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<sup>1</sup> I did not comment on the non-immigration sections of SAIA discussed by a *Chronicle of Higher Education* reporter at <https://www.getrevue.co/profile/latitudes/issues/strategic-competition-edition-557776>

<sup>2</sup> Note also that consular officers have a general ability to deny a visa based on a subjective finding that the applicant does not meet the eligibility required for the visa category under INA Section 214(b). That decision does not require explanation, and in my

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Moreover, the two main technology transfer statutes already have enforcement mechanisms:

**DOC Export Administration Regulations (EAR, 15 CFR §770 – 774)**

The DOC Bureau of Industry and Security (BIS) governs commercial and dual-use items and technology, including software and encryption items. BIS’s regulations are called the Export Administration Regulations (EAR). Part 774, Supplement 1, is the Commerce Control List (CCL). The CCL is used to classify commercial items, technology, and some dual-use items. BIS is responsible for issuing licenses to foreign persons for the release of technology controlled under the EAR.

**DOS International Traffic in Arms Regulations (ITAR, 22 CFR §120-130)**

The DOS Directorate of Defense Trade Controls (DDTC) governs defense articles and services and technical data, including space and satellite-related articles. DDTC’s regulations are called the International Traffic in Arms Regulations (ITAR). Part 121 of the ITAR is called the U.S. Munitions List (USML). The USML is used to classify defense articles and services, technical data, and some dual-use items.

Consular visa applications can be denied without explanation and with very limited if any right to review due to the so-called [Doctrine of Consular Non-Reviewability](#). Therefore, any new screening at consulates should be carefully considered and clearly defined.

Additional and specific areas of concern in Section 5 include:

1. Subsection (iv) refers to a “governmental direct action that seeks to undermine the integrity and security of the United States research community.” That is overbroad and could potentially include anyone returning to a country where universities and industry are largely under government control since that person will likely be working for the government directly or indirectly.
2. There are new and undefined phrases in the SAIA legislation and drafts that will have a negative and far-reaching impact on visa processing. For example, “economic security” is a novel addition to the legal framework of export control and subject to political interpretation (perhaps based on a trade dispute happening at the time).<sup>3</sup> The factors listed are unclear and open-ended—“other associations and collaborations that pose a national or economic security threat based on intelligence assessments” could refer to almost any type of organization. The phrases “through any exclusions for items normally subject to export controls” and “sensitive information” are also undefined and unclear. There is not even a provision requiring DOS to issue clarifying regulations before implementation, as is common in legislation. Such lack of definition will likely lead to confusion in higher education and vastly different interpretations with future administrations.
3. There are no timelines or processing goals attached to these additional screenings and restrictions. DOS has never committed to a particular time frame for an SAO or Visa Mantis check, but there is not even hortatory language stating that DOS should prioritize allowing students or professors to get to class on time, supporting research in the United States, or that DOS, IRS, etc. should allocate resources to support those goals.
4. Section 5 subsection (a)(i)(III) seems to eliminate the longstanding “fundamental research exemption,” which covers the vast majority of international scholars. The basic idea is that research intended for publication is not a security threat because it will be widely available. Export control infrastructure on campuses has been

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experience I believe has been used in a small number of cases where an officer felt that an applicant had a motive in coming to the United States that was not consistent with study or research. See <https://fam.state.gov/fam/09FAM/09FAM040310.html>

<sup>3</sup> See page 17 noting Huawei as a particular economic security threat. [https://www.dhs.gov/sites/default/files/publications/21\\_0111\\_economic-security-assessment-annual-report.pdf](https://www.dhs.gov/sites/default/files/publications/21_0111_economic-security-assessment-annual-report.pdf)

based on this principle. In particular, consider a new tenure-track professor hired to conduct research in a particular field. We can expect that scholar to move in different directions through the course of his or her career, with side projects and new interests. As long as all of the work is intended for publication, the scholar can pursue intriguing avenues of scientific investigation. There is no evidence to support the elimination of the fundamental research exemption, which would also suddenly and dramatically add to the workload of compliance officers on campus.

5. There is not enough technical assistance to colleges and universities, best practices guidelines, or safe harbors to help guide compliance. That should be a priority before additional vague restrictions are added. For example, the American Immigration Lawyers' Association has asked for guidance on export control<sup>4</sup> and has not received clear answers. One request was for guidance on how to avoid discrimination, and the curt answer was "best advice is to be careful not to interpret ITAR as allowing discrimination." Another request was for best practice guidance, to which the response was simply "it may come down to a business decision/risk assessment."

At this point, colleges and universities do not have formal federal guidance on whether a screening software such as [Visual Compliance](#) is recommended or whether it is unnecessary since a similar screening is likely done by the government as part of the SAO Visa Mantis process<sup>5</sup>. DOC and DOS have not provided recommendations for smaller schools that may find such software quite expensive. And if such software is used, which international students and scholars should be run through it? The [GAO last year found](#) that universities needed better and more guidance. It is simply not fair to create new restrictions on universities without offering sufficient technical assistance, best practice guidance or safe harbors to support compliance.<sup>6</sup>

6. In general, I support the reporting requirement in subsection (e) but note that SAIA implements the rules and calls for reporting after. I recommend study and opportunity for comment before implementation, and regular reporting and liaison after to coordinate and refine. Overall, the reporting structure is looking back after the horse has left the barn, rather than proactively providing front-end guidance. Any new immigration restrictions should be carefully tailored to address documented concerns.

Subsection (e)(3) calls for additional biometrics capture, including facial recognition, and only asks for cost-benefit analysis.<sup>7</sup> As stated in an interdisciplinary comment submitted on a proposed biometrics regulation last year there are significant privacy and discrimination issues with the use of facial recognition technology.<sup>8</sup> Subsection (e)(3) if kept should be amended to include study of non-economic issues.

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<sup>4</sup> See question 17, AILA Minutes from Joint Liaison Meeting with ICE HSI and DOJ IER, *AILA Doc. No. 19011532* (November 13, 2018), and more recently Question 25, AILA Minutes from Joint Liaison Meeting with ICE HSI, DOJ IER, DHS CRCL, and USCIS, *AILA Doc. No. 21012630* (October 27, 2020). On file with the author.

<sup>5</sup> AAU and APLU have identified effective practices regarding research security and the use of screening software, see: <https://www.aau.edu/key-issues/actions-taken-universities-address-science-and-security-concerns>. Some universities are using software like Visual Compliance to scan restricted parties before purchasing software, before entering new partnerships, or hosting foreign visitors. However, the purchase and use of this new software may be prohibitively expensive and burdensome for smaller institutions that do not carry out the same amount of research as an R-1 university.

<sup>6</sup> Regardless of whether there are new requirements, I support renewed liaison between higher education and the US government to discuss trends, issues and concerns over the complex and rapidly evolving area of export control. To the end, I strongly support reinstating the [Homeland Security Academic Advisory Council](#).

<sup>7</sup> I note that subsection (e)(1) of the reporting requirement refers to "supplementary documents provided by a visa applicant," but there is no guidance on what types of documents could be submitted to help DOS/DOC evaluate an export control issue.

<sup>8</sup> Docket No. USCIS-2019-0007, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services; Friday, September 11, 2020, pp.56338 – 56422. Comment on file with author.

## Section 6: Limitations on Cultural and Educational Exchange Programs

Sections 6(a) and (b) create a new requirement for J-1 program sponsors (such as colleges and universities) to certify compliance with export control regulations. This parallels the certification requirement for H-1B and O-1 status added after September 11. See top of page 6 of [Form I-129](#) (the form used to sponsor H-1B and O-1 petitions):

*With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:*

- *A license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or*
- *A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data to the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.*

It took time for colleges and universities to adapt to the 2002 H-1B and O-1 certification requirement—the international offices preparing those immigration petitions did not have export control expertise. Even a decade later, campuses were still refining their internal procedures in the absence of best practice guidance from the federal government. In 2011, I edited a book on immigration options for academics, and asked two experts at the California Institute of Technology to explain the H-1B and O-1 certification requirements<sup>9</sup> because I felt there was still a strong need for guidance.

Over the past two decades, the [U.S. government has issued general guidance](#), and campuses have developed [positive coordination](#) between export control experts (such as an office of sponsored research) and international offices. At first, there was concern that export control checks for those in humanities and social sciences would be unnecessary and burdensome, but the certification now works relatively smoothly. If an additional certification requirement is added for J-1 exchange visitors, there must be adequate lead time and additional resources. The number of J-1 students and scholars is dramatically greater than the number of H-1B and O-1 scholars. Also some J-1s are unpaid or working on external funding,<sup>10</sup> making certification more complex.

Subsection C is unprecedented and extremely concerning as it adds a requirement to submit an export control plan for a particular exchange visitor. There is only one example of this kind of upfront plan that I am aware of in academic research and/or private industry, and that is [narrowly targeted](#) at those working on rocket launch technology.<sup>11</sup> Expanding such a broad, poorly defined requirement to all J-1 exchange students and scholars in all fields does not seem necessary or practical.

### **Relation and impact of May 2020 Presidential Proclamation 10043 *Proclamation on the Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People's Republic of China***

In 2020, President Trump issued a [proclamation](#) barring entry to the United States of Chinese citizens who are or have been affiliated with the Chinese military. The proclamation mirrors several of the provisions in the SAIA bills—

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<sup>9</sup> Marjory Gooding and Daniel B. Smith, *The Intersection of Export Control and Immigration Regulations at Research Universities and National Laboratories*, AILA Immigration Options for Academics and Researchers 2 Ed. (2011). On file with the author.

<sup>10</sup> With increased enforcement of Section 117 of the Higher Education Act of 1965 regarding foreign source of funds, there is already additional protection in this area. <https://www2.ed.gov/policy/highered/leg/foreign-gifts.html>

<sup>11</sup> Additional details can be found here: <https://www.dtsa.mil/SitePages/about-dtsa/directorates/export-control/Technology-Transfer-Control-Plan.aspx>

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the criteria are vague and make it extremely difficult to advise Chinese scholars on travel or timing of visa approval. When the proclamation was issued, DOS [explained](#) that the goal was to limit technology and intellectual property transfer to the Chinese military, addressing issues surrounding “military civil fusion.” The higher education community has [expressed reservations](#) about the scope and implementation of the proclamation. [DOS public-facing guidance](#) is mostly silent on the details, and [scholars are still debating](#) the effect.

The history of this proclamation bodes poorly for SAIA. The proclamation is a targeted effort aimed at a single country, and yet nearly a year in, there is little guidance for colleges and universities to advise Chinese citizens on coming to the United States. I cannot express strongly enough how challenging this uncertainty is for foreign nationals. Many are making a leap of faith to come to the United States, and the inability of attorneys and international advisers to give clear guidance to students and scholars is extremely discouraging. I have [written and spoken about this for international advisers](#) and [have been interviewed](#) about the negative repercussions of uncertainty.<sup>12</sup>

Because President Biden has not rescinded the proclamation, I assume it may continue. I suggest that efforts be made to fortify the proclamation and work out as much of the uncertainty as possible,<sup>13</sup> including ensuring there are sufficient resources and training at DOS and the Department of Commerce (DOC) to evaluate cases in a timely manner, coordination between DHS Customs and Border Patrol (CBP) and DOS to minimize the cases where a visa is granted but the scholar is stopped at the airport, regular liaison between the higher education community and DOS/DOC to spot trends and share ideas, some transparency on fields or Chinese universities of concern, and a review process for negative decisions. Until DOS and DOC can show that the proclamation is a robust balancing of national security and international exchange, I am extremely concerned about adding additional poorly defined restrictions through SAIA.

## Conclusion

Overall, I have serious concerns about Sections 5 and 6 and the effect on higher education. Section 5 contains numerous undefined and novel phrases and is unnecessary given broad authority to regulate visas under current law and practice. Rather Congress could require a study of export control compliance, resources for agencies providing SAOs to ensure they are done carefully but timely, and technical assistance to support compliance on campuses (including best practice guidance). If the presidential proclamation on China military-civil fusion remains, there should also be mandates for similar study, resources, and guidance on implementation of that proclamation.

For Section 6, I recommend that any certification requirement be phased in gradually with technical assistance and support, especially given the impact of the previous efforts around H1B and O-1 visas. Any new requirements for J-1 sponsors should also remove new, undefined terms and incorporate existing regulations that are understood by sponsors of visas (similar to the existing certification requirements for H1B and O-1 visas). In addition, subsection C should be eliminated entirely.

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<sup>12</sup> See also here about the lack of guidance on the COVID travel restrictions from Europe.

<https://www.forbes.com/sites/stuartanderson/2021/03/15/attorneys-question-logic-of-policy-blocking-business-visas-in-europe/?sh=29f043eb38d8>

<sup>13</sup> There have been few instances in which the Proclamation has been invoked given the continuing COVID travel ban from China. Proclamation 9984 of January 31, 2020, [85 FR 6709 \(February 5, 2020\)](#), effective February 2, 2020, continued by President Biden through Proclamation 10143 of January 25, 2021, [86 FR 7467 \(January 28, 2021\)](#). However, that is all the reason to use this time to create an infrastructure for implementation by using the few Chinese scholars receiving visas in China or through US consulates in third countries. Again, the fact that the Proclamation is still a black hole of public guidance argues against adding similar, broader restrictions through SAIA.