

Talking Points on the Safeguarding American Innovation Act (May 2021)

Background

- The “Safeguarding American Innovation Act” co-authored by Sens. Portman (R-OH) and Carper (D-DE) includes several problematic provisions that would expand the authority of the State Department to deny visas on national security grounds, as well as create new requirements for the sponsors of J-1 visas for cultural and educational exchange programs. The bill would also lower the current Sec. 117 reporting threshold to \$50,000, from \$250,000. We have [previously communicated](#) our concerns about these provisions in letters and meetings with the Portman and Carper staff.
- We have also shared a [memo](#) from outside counsel outlining specific concerns with Section 5 and 6 and the possible impact on our international students and scholars.
- On April 29, Sens. Peters (D-MI), Chair of the Homeland Security and Governmental Affairs Committee (HSGAC), Portman, and Majority Leader Schumer (D-NY) had a [colloquy](#) on the Senate floor about the bill. During those comments, Senator Portman said he was committed to working with the committees of jurisdiction, including HELP, and that he was committed to working “with key stakeholders, including our institutions of higher education.”

Talking Points

Section 5

- Sec. 5 would amend the Immigration and Nationality Act (INA) to authorize State to deny visas based on the [suspicion](#) of activity, rather than on an actual violation of law. State already has authority to deny visas on national security concerns and to protect sensitive technology,¹ and we are concerned that this language could be used to keep out individuals who are coming to study in a broad range of STEM fields or carry out fundamental research, as well as possibly increasing administrative burden and processing times for our students and scholars. We worry especially about what an administration not supportive of international exchanges might do with this.
- Under existing law, visas can be denied without explanation and with very limited, if any, right to review due to the so-called [Doctrine of Consular Non-Reviewability](#).
- In addition, the bill includes new and undefined terms that would have a far-reaching adverse impact on visa processing. For example, the term “economic security” is a novel addition to the legal framework of export control and subject to potential misuse by an administration taking punitive actions for political reasons.
- Sec. 5 appears to eliminate the longstanding “fundamental research exemption,” which covers the vast majority of international scholars. There is no evidence to support the elimination of this exemption, which would also dramatically increase the workload of campus compliance officers.

Section 6

- We also have serious concerns with Sec. 6, which would increase the administrative hurdles for sponsors of J-1 educational and cultural exchange programs. As drafted, a sponsor, such as a college or university, would need to disclose to State whether an exchange visitor, “as a primary part of his or her exchange program, will have released to them controlled technology or technical data regulated by export control laws” through various activities in the

¹ The legal memo written for ACE by immigration attorney Dan Berger notes that the federal government has several existing mechanisms under which they can review visa applications for national security concerns and to protect sensitive technology, including the Visa Mantis screening tool, the Department of Commerce Export Administration Regulations, and the Department of State International Traffic in Arms Regulations (ITAR).

exchange program. It would also require sponsors to provide a plan to State that “establishes appropriate safeguards” and to submit an export control plan for a particular exchange visitor.

- Universities and industry are already required to comply with security requirements and, as necessary, develop security control plans for foreign nationals under existing export control rules.
- While we believe Sec. 6 should be removed entirely, it could be modified by:
 - Striking (b) which requires institutions to submit plans to the State Department that “establishes appropriate program safeguards to prevent the unauthorized release of controlled technology or technical data regulated by export control laws.” For institutions without a robust research program, this should not apply;
 - Strike (c) which would require J-1 sponsors to “demonstrate, to the satisfaction of the Secretary of State, that programs that will release controlled technology or technical data” only to approved visitors; and
 - phase in any new certification requirement for J-1 sponsors with technical assistance and support.

Section 7

- Sec. 7 amends Sec. 117 foreign gift and contract reporting by lowering the reporting threshold from \$250,000 to \$50,000. This would greatly increase the reporting burden and capture institutions which have not previously reported, such as smaller colleges and community colleges.
- The threshold should remain at or close to \$250,000, and there is no substantive reason to change it. Lowering the threshold will substantially increase the amount of data being reported, producing many more than the 7,000 annual reports currently received by ED.
- 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 ED that show different numbers even though they draw from the same reports. Repeated efforts to discuss with ED ways to improve compliance with Sec. 117 have been refused.
- 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. When looking for a “needle in a haystack,” dramatically increasing the size of the haystack will make the challenge of identifying nefarious conduct or malign foreign influence more difficult by reducing the attention and scrutiny that can be given to individual reports. The better approach is to find ways to focus attention in a strategic way on reports that suggest potential concerns.
- While SAIA exempts tuition from Sec. 117 reporting, the lower proposed threshold is likely to capture other gifts and contracts such as alumni giving which was never meant to be captured by reporting requirement and would not otherwise raise national security concerns. Also, the bill fails to explicitly exempt so-called “money out” contracts in which institutions purchase services or products from foreign corporations which do not raise national security concerns. Examples include: a contract between an institution and Sodexo, a French corporation, to provide dining hall services, or a contract to purchase access to research journals published by Springer Nature, a German corporation; clinical trials; and technology transfer agreements.
- We also remain concerned about the creation of a new fine in Sec. 117, without any safe harbor language for institutions which may have unknowingly been out of compliance, given the lack of formal rulemaking by the Department in previous years. As with the sanction currently under Sec. 117, it should only apply to institutions that knowingly or willfully fail to file a disclosure report.
- We appreciate the work of Senator Portman and his staff to include language that requires ED to carry out negotiated rulemaking around this important reporting requirement.