



P2 Foreign Gifts and Contract Reporting: Section 117 and Beyond

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Overview

1. Background of HEA Section 117 and How We Got Here
2. Section 117 Compliance Processes and Issues
University of California System
3. Beyond: Research Security Activities
 - Pending Legislation
 - NSPM-33 Implementation and Expected Overall National Security Activities Involving Universities
 - University of California Research Security Approach
 - *US v Xiao*, a Case Study
4. Panel Discussion and Questions
5. *PPT Appendix: Additional Resources and Information*

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1. Background of HEA Section 117 and How We Got Here

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Section 117 of the Higher Education Act: Adoption and Requirements:

The current version Section 117 of the Higher Education Act (HEA), 20 USC 1011f, was adopted in 1998. Under Section 117:

Reporting Requirements: Any institution of higher education that is owned or controlled by a **foreign source**, or that receives a gift from or enters into a contract with a **foreign source**, the value of which is \$250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year, must file a disclosure report with the Department of Education.

Reporting Deadlines: Disclosure Reports are due in July and January each year.

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Section 117 of the Higher Education Act: Adoption and Requirements

Foreign Source: includes a foreign government, including an agency of a foreign government; a legal entity, governmental or otherwise, created solely under the laws of a foreign state or states; an individual who is not a citizen or a national of the United States or a trust territory or protectorate thereof; and an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source.

Examples: Under Section 117, Institutions must report foreign source gifts, tuition funding, research grants, and other contracts where the institution receives funds or items in kind.

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Section 117: Enforcement Background

For decades was largely ignored by DOE, and “regrettably” by some colleges as well, according to the American Council on Education (ACE). However:

- Beginning in **June 2019**, the DOE began issuing Notices of Investigation and Record Requests to Universities regarding their compliance with Section 117 of the HEA. By August 2020, a dozen universities had received these notices and requests from the DOE.
- In **October 2020**, DOE issued a report alleging universities had not disclosed billions of dollars from foreign sources, which they were obliged to do under federal law.

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Section 117: Enforcement Background

- In **November 2020**, the DOE issued a “**Notice of Interpretation**” of the HEA in the Federal Register to clarify the DOE’s enforcement authority to:
 - (a) **subpoena information** from universities when investigating potential violations of Section 117; for a university’s failure to adequately report under section 117, and
 - (b) **impose a range of penalties** against an institution for violating Section 117, including termination of its participation in Title IV programs and funding.

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- In **June 2020**, the DOE opened a Section 117 reporting portal that included a new, lengthy and complex checklist of information that universities were required to provide as part of the disclosure process.
- DOE continued to issue Notices of Investigation and Record Requests under Section 117 up until the very end of the Trump Administration, and by **January 2021 it had opened investigations involving 19 universities.**

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- In January 2021, the DOE General Counsel wrote a letter to the U.S. Senate Homeland Security and Government Affairs Committee outlining its concerns regarding University compliance with Section 117:
 - a. Foreign government spending on U.S. schools generally “is effectively a black hole” because U.S. colleges and universities massively fail to report foreign money as required by law;
 - b. The Chinese Communist Party invests strategically in U.S. education through Confucius Institutes and other vehicles;
 - c. 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
 - d. The Chinese money comes with “strings that can compromise academic freedom.”

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Section 117 Under the Biden Administration

- Under the Biden Administration, the DOE has not publicly closed many of the investigations the Trump administration started. It has also not rescinded any of the policies the previous administration enacted, nor issued further clarity on reporting requirements that have been requested by university organizations, such as ACE.
- Currently, Congress is debating legislation that would make Section 117 mandates even stricter.

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2. Section 117 Compliance Processes and Issues

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- University of California system

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Systemwide Guidance and Risk Mitigation



- Formal guidance issued in December 2020
- Encourage UC campuses to assess and strengthen processes for complying with the Section 117 reporting requirements
- Includes reporting requirements, UC Office of the President recommendations for risk mitigation, compliance checklist
- Coordinated effort across UC system to align processes and understand challenges

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Data Collection



- Campuses encouraged to adopt procedures to ascertain in advance whether a sponsor/donor is a Foreign Source.
- Campus coordinating unit calls for data twice a year
- Relevant offices submit to coordinating unit the required data for all Foreign Source Contracts and Gifts received
- Campus coordinating unit makes the determination if the \$250,000 threshold is met after reviewing all data sources

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Compliance Review and Submission



- Vet sponsors or donors through Visual Compliance or similar tool to identify any potential sponsors or donors on federal restricted party lists
- Utilize internal audit function to verify all data accuracy and completion prior to submission
- Coordinating unit verifies through compliance check-list that all steps are completed
- Coordinating unit or responsible person in Financial Aid Office enters data into DoE submission portal

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Common Questions and Issues



- In-kind contributions [determining fair market value]
- Membership agreements
- Reporting by project period or by budget period
- Monies pledged vs actual amount received
- Reporting gift donor name of a foreign source requesting anonymity

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3. Beyond: Research Security Activities

- Pending Legislation
- NSPM-33 Implementation and Expected Overall National Security Activities Involving Universities
- University of California Research Security Approach
- *US v Xiao*, a Case Study

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United States Innovation and Competition Act of 2021

- Passed in mid-2021 with bipartisan backing in the **Senate**. Express goal is to counter Chinese influence in higher education.
- Enhanced reporting requirements for foreign funds received by universities:
 - Lowers reporting threshold (\$250,000 to \$50,000)
 - Third party translation of restricted and conditional gifts.
 - Universities with \$5 million or more in R&D expenditures must create a searchable database for all foreign gifts/contracts to staff and faculty.
 - \$1 million in funding would be scrutinized by the Committee on Foreign Investment in the United States.
 - Separate reporting to CFIUS in addition to the current Section 117 requirements for gifts or contracts \$1,000,000+ going back two calendar years.

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COMPETES Act- 2022

- Passed the **House of Representatives** in February 2022.
- Modest modifications to the USICA:
 - Reporting threshold lowered less substantially (\$250,000 to \$100,000 or \$250,000 in total over previous 3 years)
 - Disclosure of foreign gifts and contracts to faculty and staff mostly more limited:
 - Requires \$50 million in federal science and engineering funding in any of the last five years.
 - Requires \$50,000 reporting threshold
 - Creates new 5-year data collection requirement for reportable gifts and contracts (post negotiated rulemaking over DoE regs)
 - No CFIUS provisions.

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Where do things stand?

- Conference Committee appointed in Spring of 2022.
- Goal: Resolve differences and pass final legislation by July 4, 2022, to avoid the midterm elections.
- High priority for administration and Congress.

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NSPM-33 Implementation Guidance

The White House Office of Science and Technology Policy (OSTP) released guidance to federal agencies for implementing National Security Presidential Memorandum-33 (NSPM-33).

The guidance specifically focuses on five key areas addressed by NSPM-33:

1. disclosure requirements and standardization
2. digital persistent identifiers
3. consequences for violation of disclosure requirements
4. information sharing
5. research security programs

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NSPM-33 Implementation Guidance Goals

- **Reaffirm core values:** *openness, transparency, honesty, equity, fair competition, objectivity, and democratic values*
- **Acknowledge the seriousness of the challenge:** *some foreign governments are attempting to acquire our most advanced knowledge and technologies*
- **Communicate and apply policies in a clear and uniform way:** *policies must not fuel xenophobia or other forms of discrimination*
- **Continue welcoming international students, scholar and collaborations:** *the openness is among the country's greatest strengths.*

Source: OSTP

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Instructions to Federal Agencies

Among some of the specifics contained in the guidance are that federal agencies shall:

- Establish **standardized disclosure requirements** across federal agencies for researchers to the maximum extent practicable;
- Develop **standardized reporting forms and instructions** that will enable use of tools such as electronic curricula vitae (CVs) and digital persistent identifier services (DPIs).
- Adhere to **specific guidelines for determining appropriate consequences** for violations of disclosure requirements.
- Adhere to specific guidelines for **sharing information** about violations and potential violations with each other **consistent with due process, privacy consideration, and other applicable law**. Information sharing will take place through a centralized government portal – SAM.gov

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Research Security Programs

The guidance outlines more specifics on how research organizations awarded more than \$50 million in a given year are to meet the research security program requirements called for in NSPM-33.

Specifically:

- Cybersecurity. Agencies should require that research organizations satisfy the cybersecurity element of the research security program requirement by applying the following basic safeguarding protocols and procedures.
- Foreign travel security. Agencies should require that research organizations maintain international travel policies for faculty and staff traveling for organization business, teaching, conference attendance, research purposes, or any offers of sponsored travel that would put a person at risk.

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Research Security Programs *continued*

- Research security training. Agencies should require that, as part of their research security programs, research organizations provide training to relevant personnel on research security threat awareness and identification, including insider threat training where applicable.
- Export control training, as appropriate. Agencies should require that research organizations conducting R&D that is subject to export control restrictions provide training to relevant personnel on requirements and processes for reviewing foreign sponsors, collaborators and partnerships, and for ensuring compliance with Federal export control requirements and restricted entities lists.

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Research Security Programs *continued*

- Agencies should require that research organizations designate a **research security point of contact**.
- Research organizations should be required to maintain a **description of the research security program**, and to provide such documentation within 30 days of a request from a research agency that is funding an R&D award or considering an application for R&D award funding to that research organization.
- Research organizations should be provided **flexibility to structure** the organization's research security program to best serve its particular needs, and to leverage existing programs and activities where relevant.

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Highlights of UC processes and tools

Training

Mandatory briefing for UC researchers taken every two years.

- Ethics and Compliance Briefing for Researchers
Topics: UC ethical values, Conflicts of Interest, NIH Other Support & Foreign Component, NSF Current & Pending, Export Controls and UC Conflict of Commitment

Five-minute video shorts are provided as education and awareness resources for researchers and administrators across UC.

- Disclosures: Conflicts of Interest & Conflict of Commitments
Topics: Conflict of interest and conflict of commitment disclosure requirements for federal funding, UC and California state
- Talent Recruitment Programs
Topic: Recognizing risks related to talent recruitment programs
- International Collaborations
Topics: Export controls, restricted parties
- Data Security Awareness
Topics: Cybersecurity, threat awareness, research data security, and export controls

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Highlights of UC processes and tools *continued*

Foreign Influence Audit and Scoping Document

- ECAS designed and conducted an audit to evaluate the system of internal controls in place to manage risks identified by the federal government related to foreign influence. To see the scope and procedures used to conduct the audit, [click here](#).

Cybersecurity Audit

ECAS' Cybersecurity Audit Team (CAT) Performs ongoing audits to assess systems and controls in place to protect research data and other highly sensitive information throughout the system, including the following:

- Systemwide Vulnerability Assessment and Penetration Testing Audits – Research and Emerging Technology
- Systemwide Threat Detection and Identification Audit
- Systemwide Critical Infrastructure Audits
- Systemwide Cyber-Resiliency Audit

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Highlights of UC processes and tools *continued*

Travel messages

International UC travelers, including researchers, receive auto-generated messages addressing health and safety. ECAS added notifications corresponding to countries of travel to alert travelers to potential export control requirements, research data security, sanctions, and other risks. See the full text of the travel notifications [here](#).

Infographics and alerts

Communication and risk awareness products for researchers and support staff covering activities researchers undertake, the associated risks and resources for support.

One page on global engagement

Topics: Conflict of interest and conflict of commitment disclosure requirements, export controls, cyber security, data security

NIH Foreign component

Topic: Prior approval and disclosure requirements

NIH Other support

Topic: grant disclosure requirements

NASA China

Topic: China affiliation restriction

Russia, Belarus and Specifics Regions of Ukraine

Topics: Sanctions and export controls

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NSPM-33 Implementation – current status

- Agencies have established consensus on standardized forms. OSTP plans on publishing proposed disclosure formats and instructions at the end of May for public comment, prior to adopting any standards.
- This process is being completed utilizing the government standard process for forms through the Office of Information and Regulatory Affairs. That includes 60 day public comment period.
- The Research Security Program certification will go through the same process of agency consensus, form, public comment.
- OSTP will provide an opportunity for public review of research security program standards toward the end of August or beginning of September.

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US v Ming Qing Xiao, a Case Study

When universities, their faculty and staff engage in foreign activities, compliance obligations under Section 117 of the HEA and many other regulatory regimes may be triggered.

As an exercise, let's look at a case study – US v Xiao to examine different possible compliance issues and how they might be addressed proactively.

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US v Ming Qing Xiao, a Case Study

Xiao Ming Qing is a tenured professor of mathematics at a midwestern university. He is on a nine month contract and his contractual time commitments include teaching, research and publication and service to the university. As part of his commitment, his department has assigned him responsibility for engaging with the Mathematics Department of Shenzhen University with the goal of developing a joint graduate program in Mathematics.

Professor Xiao worked diligently with colleagues at Shenzhen with the goal of developing a joint graduate program. As part of these efforts, he periodically taught classes at Shenzhen and co-authored a number of peer reviewed articles with Shenzhen faculty. His CV and bio-sketch note that he has served as a Guest Professor at Shenzhen from 2016 to present.

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US v Ming Qing Xiao, a Case Study

Professor Xiao disclosed on his COI/COC form that he taught classes at Shenzhen on a consulting basis during winter and summer breaks, when he had no effort obligations at SIU. Shenzhen reimbursed him his travel costs as a Guest Professor.

Professor Xiao applied for a sabbatical in 2017 which involved engaging in international travel and meeting with and collaborating on research with colleagues in the UAE and China. In his application he noted that he had received “a 4 year research grant from the Guangdong Government that ran from 2017 to 2021.” The sabbatical application was reviewed and approved by his chairperson and dean.

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US v Ming Qing Xiao, a Case Study

In 2019, Professor Xiao applied for and received a 3 year NSF grant in which he committed to one month of his time to the NSF project. The grant application included no reference to the Guangdong grant or any other existing or pending research grants. His department chair and dean and the OSP reviewed the NSF grant application and approved it prior to the application being filed with the NSF. Professor Xiao was awarded the NSF grant.

Professor Xiao was later indicted by the Justice Department as part of the “China Initiative.”

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Compliance Matrix – Foreign Influence

| | | |
|--|---|--|
| Immigration | Foreign and International Laws | Export Controls (EAR, ITAR) and Trade Sanctions (OFAC) |
| Conflict of Interest/Commitment | Higher Education Act – Disclosure of Foreign Gifts | NSPM 33 and NSF, and Federal Grant Application and Disclosure Requirements |
| IRS Form 990 Schedule F Foreign Activities | Uniform Guidance 2 CFR 200.403(i) Effort Reporting | IRS Schedule B and FBAR Reporting Foreign Accounts |

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4. Panel Discussion and Questions

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DISCUSSION AND QUESTIONS

What are the Section 117 and other compliance issues in US v. Xiao and how might you have addressed them if you learned these facts prior to Professor Xiao's indictment?

All Other Session Questions and Discussion?

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APPENDIX ADDITIONAL RESOURCES AND INFORMATION

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ADDITIONAL RESOURCES

1. U.S. Department of Education

- U.S. Department of Education, Office of General Counsel, October 2020, Institutional Compliance with Section 117 of the Higher Education Act of 1965. [Link](#) (This page includes links to the reporting system and the reporting checklist created by the DOE)
- The Department's Enforcement Authority for Failure to Adequately Report Under Section 117 of the Higher Education Act of 1965, as Amended. [Link](#)

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ADDITIONAL RESOURCES

2. University Webpages and Policies

- Temple University Reporting Matrix (attached)
- [University of California HEA Section 117 Guidance, Q&A, Definitions, and Compliance Checklist](#)
- [George Washington University Policy and Procedures](#)
- [University of South Carolina Policy, Procedure, and Reporting Form](#)

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ADDITIONAL RESOURCES

2. University Webpages and Policies

- NYU Global Support Webpage [Link](#)
- NYU Advisors on Foreign Activities [Link](#)

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ADDITIONAL RESOURCES

3. State Reporting Materials

- [Pennsylvania Foreign Gift Disclosure Law](#)
- [Pennsylvania Foreign Gift Disclosure Form](#)
- [Florida Foreign Gift Disclosure Law](#)
- [New York Foreign Gift Disclosure Law](#)

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Sampling of States

- **Pennsylvania**

- \$100,000 reporting threshold
- Covers gifts and research contracts, but not tuition payments.
- Annual reporting (w/ tax filing)
- Similar but not the same data as Section 117
- Privacy questions
- Limited accessibility

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Sampling of States

- **Florida**

- \$50,000 reporting threshold
- Covers gifts and contracts and prohibits private schools from receiving funding in certain circumstances from “countries of concern.”
 - Broader for state universities.
- Reporting twice/year
- Enhanced screening for state universities dependent on budget and countries of affiliation
- Enhanced reporting for state funding and accreditation related to “countries of concern”

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Sampling of States

- New York
 - \$100,000 threshold
 - End of fiscal year reporting.
 - Similar disclosure as Section 117
 - Similar access as Pennsylvania
- State Tax Reporting?

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ADDITIONAL RESOURCES

4. Other Resources on Federal Regulations

- **FinCEN Report of Foreign Bank and Financial Accounts (FBAR) Electronic Filing Requirements [Link](#)**
- **NSPM 33 [Link](#)**
- **Office Science and Technology Blog, *Clear Rules for Research Security and Researcher Responsibility*, Eric Lander, August 10, 2022 [Link](#)**
- **Counsel on Government Relations Comment on NSF PAPPG, July 29, 2019. [Link](#)**

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Thank you for joining our session today.
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