

103 International Research Security and Compliance: Hot Topics for 2023

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I. Introduction and Overview

- A. International Research and University Activities - Background
- B. Recent Developments:
 - NSPM – 33 and Research Security
- C. Focus Areas for Compliance Programs
 - Travel registries, FCPA, Section 117, Section 887 and Privacy
- D. Recent Legislation: CHIPS ACT
- E. Export Controls and OFAC Screening Update

I. NSPM -33 Background

National Security Presidential Memorandum, NSPM-33:

Was initially issued in the the final days of the Trump Administration. The Biden Administration issued updated implementation guidance to federal agencies regarding NSPM-33 in January and August, 2022. First, the Guidance set forth a number of policy goals to federal agencies.

- **Reaffirm core values:** *openness, transparency, honesty, equity, fair competition, objectivity, and democratic values*
- **Acknowledged the seriousness of the challenge:** *some foreign governments are attempting to acquire our most advanced knowledge and technologies*
- **Communicated 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.*

I. NSPM -33 Background

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

II. NSPM -33 Updated Guidance

Recent Developments regarding NSPM 33 requirements

Guidance for Implementing NSPM-33

NATIONAL SCIENCE AND TECHNOLOGY COUNCIL



GUIDANCE FOR IMPLEMENTING NATIONAL
SECURITY PRESIDENTIAL MEMORANDUM 33
(NSPM-33) ON NATIONAL SECURITY
STRATEGY FOR UNITED STATES
GOVERNMENT-SUPPORTED RESEARCH AND
DEVELOPMENT

A Report by the

Subcommittee on Research Security

Joint Committee on the Research Environment

January 2022

<https://www.whitehouse.gov/wp-content/uploads/2022/01/010422-NSPM-33-Implementation-Guidance.pdf>



Harmonization for
agencies



Nondiscriminatory &
equitable approach



Guidance



Transparency for
disclosures

Key Areas

1. Disclosure Requirements and Standardization
2. Digital Persistent Identifiers
3. Consequences for Violation of Disclosure Requirements
4. Information Sharing
5. Research Security Program

Research Security Programs

NSPM-33 requires a certification from research organizations awarded in \geq \$50 million per year in total Federal research funding must establish a research security program:

Required Elements:

- Cybersecurity
- Foreign travel security
- Research security training
- Export control training

Program must include:

- Research security point of contact
- Program documentation
- Institutional certification

Research Security Program Timeline

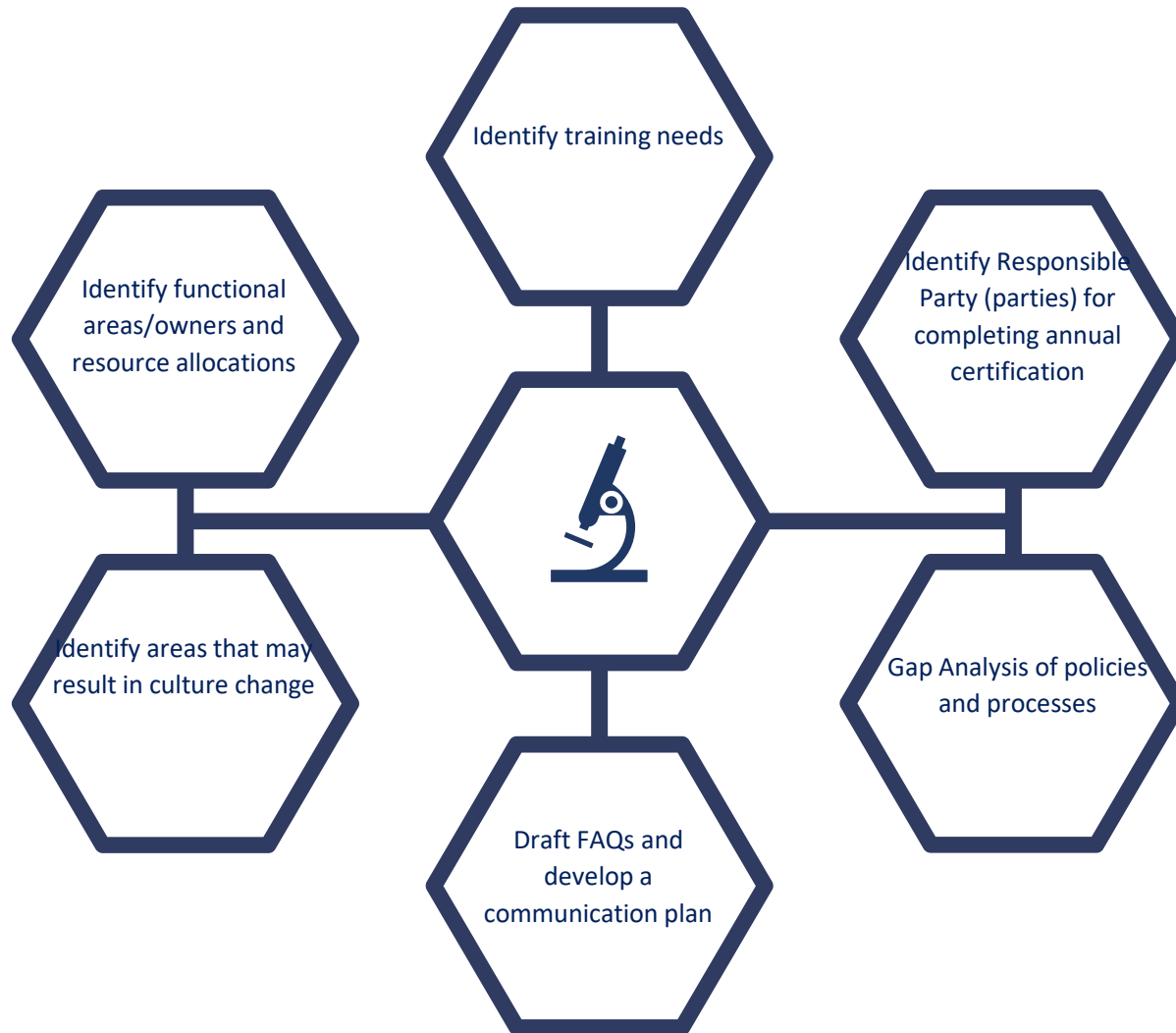


Designated Research Security Point of Contact

- Draft Research Security Program Standard requires maintenance of description of research security program on publicly-accessible website
- Covered research organizations “must designate a research security point of contact and provide publicly accessible means to contact that individual, such as a website.”
- Universities could consider different positions to be designated research security point of contact:
 - Chief Compliance Officer
 - Research Compliance Officer
 - CISO
 - Research Security Officer
- Consider Research Security Officer as “research security point of contact” to strategize and implement of University’s research security efforts



What should Institutions of Higher Ed be doing?



- Review Research Security Program requirements
- Review current processes as they relate to functional areas
- Identification of responsible officials for areas of guidance
- Determine any areas of development & resources
- Determine if you need a working group and output (i.e., series of recommendations to President, Provost, and VPR; FAQs to PIs; presentations to Compliance Committees)

II. Focus Areas for Compliance Programs

II. Focus Areas for Compliance Programs

Anti-Corruption/FCPA

- The definition of a “foreign official” is expansive
 - Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.
- Updated DOJ Resource Guide to FCPA, July 2020
 - Due the pandemic, this didn’t receive the attention it otherwise would have
 - It can be used as a catalyst to start a discussion about your FCPA program/process
- How are you screening for anti-corruption risk? If the DOJ asked, what would you show them?
 - A simple but effective way is to use the travel registry to screen if an activity is in a high-risk country

II. Focus Areas for Compliance Programs

Review the design of your *mandatory* International Travel Registry*

- Is it capturing all the information you need?
- Is it capturing all the international travel that is occurring?
- Is it notifying all the right individuals/Departments?

*If you don't have one, go get one! Pull together a working group with individuals from Risk Management, Safety, Research, Export, Anti-corruption/FCPA, Privacy, Finance, and OGC.

II. Focus Areas for Compliance Programs

Higher Education Act, Section 117

- [Section 117](#) of the *Higher Education Act of 1965* (HEA)
 - Requires institutions of higher education that receive federal financial assistance to disclose semiannually to the U.S. Department of Education any gifts received from and contracts with a foreign source that, alone or combined, are valued at \$250,000 or more in a calendar year.
- Department of Education, Information Collection Request, Dec 27, 2022.
 - Retains most changes that were implemented by the Trump Administration
 - Clarifies that “money out” arms length commercial transactions do not need to be reported
 - Requires the university to report the name and address of anonymous donors.
 - Requires “reasonable due diligence” for intermediaries
 - A Section 117 violation will also now be considered a violation of the Program Participation Agreement
 - Currently does NOT lower the reporting threshold or require reporting to Treasury/CIFIUS
- Anticipate new Guidance from the Department Summer 2023 – and keep an eye on Congress!

II. Focus Areas for Compliance Programs

NDAA 2019, Section 889

- Prohibits government contractors from using telecommunications or video surveillance equipment, systems, or services produced or provided by five Chinese companies and their subsidiaries and affiliates:
 1. Huawei Technologies Company
 2. ZTE Corporation
 3. Hytera Communications Corporation
 4. Hangzhou Hikvision Digital Technology Company
 5. Dahua Technology Company
- NOT a prohibition on use in federal contracts – it is prohibition on use by federal contractors
- This has been showing up on government audits (particularly DOD)
- Areas for Compliance to consider
 - Do you have a policy or webpage covering this?
 - Have you worked with IT and Procurement to review past purchasing activities?
 - Consider your international collaborations – your international partners may be using these companies, and that may or may not be acceptable

II. Focus Areas for Compliance Programs

Privacy

- **Global**
 - Over 130+ countries have some type of personal data privacy law
- **European Union/European Economic Area – GDPR**
 - To transfer data to the United States, you must have a legal basis.
 - There is no “Privacy Shield” program (as it was invalidated by the “*Schrems II*” case in July 2020)
 - Current EU-US Data Privacy Framework
 - Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities, October 22, 2022
 - Both the European Parliament and European Data Protection Board issued non-binding resolutions calling on the European Commission to reject the EU-U.S. Data Privacy Framework
 - Currently, the most common way to legally transfer data is to add the EU Standard Contractual Clauses to any contracts involving personal data.
- **China**
 - Personal data is covered by a trio of laws - Cybersecurity Law ("CSL"), the Personal Information Protection Law ("PIPL") and the Data Security Law ("DSL").
 - Similar to GDPR in many respects, but with increased direct oversight by the government (Cybersecurity Administration of China (the "CAC"))

III. CHIPS Act

Key Provisions of the CHIPS ACT

What is the CHIPS Act of 2022?

The Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS Act), signed into law on August 9, 2022, is designed to boost US competitiveness, innovation, and national security. The law aims to catalyze investments in domestic semiconductor manufacturing capacity.

III. CHIPS Act

Key Definitions

[Sec. 10638](#). Definitions.

Provides definitions for the following:

Covered Individual – an individual who contributes in a substantive, meaningful way to the scientific development or execution of a research and development project proposed to be carried out with a research and development award from a federal research agency and is designated as a covered individual by the federal research agency.

Foreign Country of Concern – means **China, North Korea, Russia, Iran**, or any other country determined to be a country of concern by the Secretary of State

III. CHIPS Act

New Financial Reporting Requirements

Sec. 10339B. Foreign Financial Support.

Institutions must annually report to NSF, in the form of a summary document, current financial support, including gifts and contracts, of ***\$50,000 and above*** the institutions receives directly or indirectly from a foreign source associated with a ***foreign country of concern (China, North Korea, Russia, Iran,*** or any other country determined to be a concern by the Secretary of State). ***All financial supporting documents must be retained by the institutions and true copies may be requested by NSF as a result of summary document review. Institutions who fail to comply with this section may be subject to reduction or termination of awards.***

III. CHIPS Act

Foreign Talent Recruitment Programs

Sec. 10631. Requirements for Foreign Talent Recruitment Programs.

Requires OSTP, in coordination with the interagency working group (established under Section 1746 of the FY20 NDAA) to distribute ***a uniform set of guidelines for federal research agencies regarding foreign talent recruitment programs.*** Policy guidelines will prohibit all personnel of each federal research agency from participating in a foreign talent recruitment program and define and describe the characteristics of a foreign talent recruitment program. In accordance with Section 223 of the FY21 NDAA, ***covered individuals must disclose if they are party to a foreign talent recruitment program contract, agreement, or arrangement. Covered individuals may not participate in a malign foreign talent recruitment program.***

III. CHIPS Act

Foreign Talent Recruitment Programs

[Sec. 10632](#). Malign Foreign Talent Recruitment Program Prohibition.

Requires each federal research agency to establish a policy as part of the research grant proposal process which requires covered individuals ***to certify they are not a part of a malign foreign talent recruitment program at the time the proposal is submitted or annually thereafter for the duration of the award. Institutions applying for such an award must certify that each covered individual who is employed by the institution has been made aware of the requirements.*** A description of the federal research agency's proposed policy is to be published and available for public comment. Policies that are developed should not prohibit international collaborations (scholarly presentations, publishing written materials regarding scientific information not otherwise controlled, participation in international conferences/exchanges, writing a recommendation letter for a foreign student, etc.) unless such activities are funded, organized, or managed by an academic institution or a foreign talent recruitment program on the lists developed in Section 1286(c) of the FY19 NDAA. ***Recipient institutions must provide training on the risks of malign foreign talent recruitment programs to covered individuals, including those who are participating in international collaboration type-activities.***

III. CHIPS Act

Foreign Talent Recruitment Programs

Malign Foreign Talent Recruitment Program – means any program, position, or activity that includes compensation in the form of cash or certain in-kind compensations in exchange for the individual (1) engaging in the unauthorized transfer of U.S. intellectual property, materials, data products, or other nonpublic information to the government of a foreign country or foreign entity; (2) being required to recruit trainees or researchers to enroll in a program, position or activity; (3) establishing a lab or company, accepting a faculty position; or undertaking any other employment or appointment in a foreign country or with a foreign entity if activities are in violation of the standard terms and conditions of a federal research and development award; (4) being unable to terminate the foreign talent recruitment program contract or agreement except in extraordinary circumstances; (5) being limited in the capacity to carry out a research and development award or required to engage in work that would result in substantial overlap or duplication of federally funded work; (6) being required to apply for and successfully receive funding from the sponsoring government’s funding agencies with the sponsoring foreign organization as the recipient; (7) being required to omit acknowledgement of the recipient institution with which the individual is affiliated, or the federal research agency sponsoring the research and development award, contrary to the institutional policies or standard terms and conditions of the federal research and development award; (8) being required to not disclose to the federal research agency or employing institution the participation of such individual in such program, position, or activity; (9) having a conflict of interest or conflict of commitment contrary to the standard terms and conditions of the federal research and development award.

III. CHIPS Act

Foreign Talent Recruitment Programs

Malign Foreign Talent Recruitment Program – (B) a program that is sponsored by (i) a foreign country of concern or an entity based in a foreign country of concern, whether or not directly sponsored by the foreign country of concern; (ii) an academic institution on the list developed under section 1286(c)(8) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note; Public Law 115-232); or (iii) a foreign talent recruitment program on the list developed under section 1286(c)(9) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note; Public Law 115-232).

Special Note: Review Immigration/Visa status of Faculty engaged in international activities, including teaching and research (for example China’s “R” Visa).

III. CHIPS Act

Foreign Talent Recruitment Programs

[Sec. 10633](#). Review of Contracts and Agreements.

Each federal research agency has the authority to require, upon request, that ***an institution provide supporting documentation, including copies of contracts, grants, or any other agreement specific to foreign appointments, employment with a foreign institution, participation in a foreign talent recruitment program, for all covered individuals in a research and development award application.*** Upon review and in consultation with an institution, if a contract, grant, or agreement is determined to interfere with the capacity for agency supported activities or create duplication with agency-supported activities, the research agency and institution can initiate the substitution or removal of a covered individual from the award, reduce the award funding amount, or suspend/terminate the award. Each federal research agency should take necessary steps to protect the privacy of all covered individuals, provide justification for the action, and afford subjects an opportunity to provide comments and rebuttal, and an opportunity to appeal before final administrative action is taken.

IV. Export Controls, OFAC and Screening Processes

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Export Controls Regulations

in October 2022, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) issued a new regulation regarding the **Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification**. <https://www.federalregister.gov/documents/2022/10/13/2022-21658/implementation-of-additional-export-controls-certain-advanced-computing-and-semiconductor>

The new regulation requires a BIS export license for any U.S. person to provide information that would "support" the development or production of any chip at a "facility" in China that also produces certain advanced chips, regardless of whether such information is "subject to the Export Administration Regulations ("EAR") or **"not subject to the EAR"**. 87 FR 62186.[\[2\]](#)

BIS had not yet decided whether the new regulation would apply to export control "exclusions" under the EAR, such as the results of fundamental research, published and publicly available information, or are released by instruction in a catalog course or associated teaching laboratory of an academic institution

IV. Export Controls, OFAC and Screening Processes

Export Controls - Self Disclosure

Continuing the U.S. Department of Commerce's Bureau of Industry and Security (**BIS**) efforts to bolster enforcement and compliance, on April 18, 2023, BIS issued a memorandum announcing significant changes to its voluntary disclosure program.

According to the recent memorandum, the Department of Commerce, Office of Export Enforcement will consider failure to self-disclose as an aggravating factor should a "significant possible violation [be] uncovered by a party's export compliance program but no [voluntary self-disclosure] [be] submitted." Accordingly, **"companies and universities should carefully weigh any decision not to disclose significant possible violations."**

IV. Export Controls, OFAC and Screening Processes

Export Control and OFAC Screening Processes

Department of Commerce and Office of Foreign Assets Control have continued to add individuals and organizations to various sanctions lists.

Discussion:

What and who should you screen against Department of Commerce, OFAC and other government sanction lists?

When should you screen?

How should you screen?

V. Diversity and Inclusion

Discrimination, harassment and even violence against Asian members of the University Community are a real and significant concern.

For example, in an article entitled, “Criminalizing China”, Professor Margaret K. Lewis of Seton Hall University argues that law enforcement initiatives, such as the FBI’s “China Initiative,” are problematic. Professor Lewis argues that by using “‘China’ as the glue connecting cases under the Initiative’s umbrella creates an overinclusive conception of the threat and attaches a criminal taint to entities that have an even tangential nexus to ‘China.’” Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145 (2020).

<https://scholarlycommons.law.northwestern.edu/jclc/vol111/iss1/3>

Recent studies indicate that Asian scientists are rethinking the “American dream” See Long a cornerstone of US chemistry, Asian faculty and students are pondering their future in the US in the wake of physical and verbal attacks and government targeting of scientists who collaborate with China. See Andrea Widener, Chemical and Engineering News (May 10, 2021)

<https://cen.acs.org/policy/Asian-chemists-scientists-discrimination-collaboration-suspicion-attacks/99/i17>

V. Diversity and Inclusion

In response to these incidents and concerns over racial discrimination, a number of University leaders have published letters to their University communities, reaffirming their institution's commitment to principles of diversity and inclusion.

For example, **Massachusetts Institute of Technology (MIT) President L. Rafael Reif, while acknowledging the risk of inappropriate foreign influence in research, warned against creating a toxic atmosphere for ethnically Chinese researchers in the process of mitigating these risks.** According to President Reif:

Looking at cases across the nation, small numbers of researchers of Chinese background may indeed have acted in bad faith, but they are the exception and very far from the rule. Yet faculty members, post-docs, research staff and students tell me that, in their dealings with government agencies, they now feel unfairly scrutinized, stigmatized and on edge – because of their Chinese ethnicity alone.

Nothing could be further from – or more corrosive to – our community's collaborative strength and open-hearted ideals. To hear such reports from Chinese and Chinese-American colleagues is heartbreaking. As scholars, teachers, mentors, inventors and entrepreneurs, they have been not only exemplary members of our community but exceptional contributors to American society. I am deeply troubled that they feel themselves repaid with generalized mistrust and disrespect

See <https://news.mit.edu/2019/letter-community-immigration-is-oxygen-0625>

Questions?

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