



Foreign Engagement Reporting Brief

Understanding Proposed Changes to
Section 117 Compliance

University Research Forum

University Research Forum

Project Director

Jackson Nell

Contributing Consultant

Jon Barnhart

Managing Director

Ann Forman Lippens

Legal Caveat

EAB Global, Inc. ("EAB") has made efforts to verify the accuracy of the information it provides to partners. This report relies on data obtained from many sources, however, and EAB cannot guarantee the accuracy of the information provided or any analysis based thereon. In addition, neither EAB nor any of its affiliates (each, an "EAB Organization") is in the business of giving legal, accounting, or other professional advice, and its reports should not be construed as professional advice. In particular, partners should not rely on any legal commentary in this report as a basis for action, or assume that any tactics described herein would be permitted by applicable law or appropriate for a given partner's situation. Partners are advised to consult with appropriate professionals concerning legal, tax, or accounting issues, before implementing any of these tactics. No EAB Organization or any of its respective officers, directors, employees, or agents shall be liable for any claims, liabilities, or expenses relating to (a) any errors or omissions in this report, whether caused by any EAB Organization, or any of their respective employees or agents, or sources or other third parties, (b) any recommendation by any EAB Organization, or (c) failure of partner and its employees and agents to abide by the terms set forth herein.

EAB is a registered trademark of EAB Global, Inc. in the United States and other countries. Partners are not permitted to use these trademarks, or any other trademark, product name, service name, trade name, and logo of any EAB Organization without prior written consent of EAB. Other trademarks, product names, service names, trade names, and logos used within these pages are the property of their respective holders. Use of other company trademarks, product names, service names, trade names, and logos or images of the same does not necessarily constitute (a) an endorsement by such company of an EAB Organization and its products and services, or (b) an endorsement of the company or its products or services by an EAB Organization. No EAB Organization is affiliated with any such company.

IMPORTANT: Please read the following.

EAB has prepared this report for the exclusive use of its partners. Each partner acknowledges and agrees that this report and the information contained herein (collectively, the "Report") are confidential and proprietary to EAB. By accepting delivery of this Report, each partner agrees to abide by the terms as stated herein, including the following:

1. All right, title, and interest in and to this Report is owned by an EAB Organization. Except as stated herein, no right, license, permission, or interest of any kind in this Report is intended to be given, transferred to, or acquired by a partner. Each partner is authorized to use this Report only to the extent expressly authorized herein.
2. Each partner shall not sell, license, republish, distribute, or post online or otherwise this Report, in part or in whole. Each partner shall not disseminate or permit the use of, and shall take reasonable precautions to prevent such dissemination or use of, this Report by (a) any of its employees and agents (except as stated below), or (b) any third party.
3. Each partner may make this Report available solely to those of its employees and agents who (a) are registered for the workshop or program of which this Report is a part, (b) require access to this Report in order to learn from the information described herein, and (c) agree not to disclose this Report to other employees or agents or any third party. Each partner shall use, and shall ensure that its employees and agents use, this Report for its internal use only. Each partner may make a limited number of copies, solely as adequate for use by its employees and agents in accordance with the terms herein.
4. Each partner shall not remove from this Report any confidential markings, copyright notices, and/or other similar indicia herein.
5. Each partner is responsible for any breach of its obligations as stated herein by any of its employees or agents.
6. If a partner is unwilling to abide by any of the foregoing obligations, then such partner shall promptly return this Report and all copies thereof to EAB.

Foreign Engagement Reporting Context

Statutory Basis and Regulatory Environment

Federal foreign gift and contract reporting requirements for universities stem from Section 117 (Sec. 117) of the Higher Education of 1965 as amended in 1986. The statute requires higher education institutions to disclose, through semi-annual reporting, gifts and contracts received from a foreign entity that meet or exceed a threshold of \$250,000 in total value.

Congress originally intended Sec. 117 to foster transparency in universities' international relationships while balancing academic freedom, due process, and national security. Under Sec. 117, the Department of Education (the Department) oversees the reporting regime by collecting institutional disclosures, making those disclosures publicly available, and enforcing compliance. Sec. 117 grants the Department the ability to promulgate regulations related to disclosures and to enforce the statute through civil suits.

Important Sec. 117 Definitions

Term	Definition
Foreign Source	<ul style="list-style-type: none"> • Foreign governments • Companies and organizations incorporated abroad • Individuals who are not US citizens • Agents of foreign entities
Gifts	<ul style="list-style-type: none"> • Any donation of money or property • Includes conditional or restricted gifts
Contract	<ul style="list-style-type: none"> • Any agreement between entities to purchase, lease, or barter property and/or services
Higher Education Institution	<ul style="list-style-type: none"> • Any entity that is authorized by states to provide education beyond secondary school • Any school that awards bachelor's or more advanced degrees • Any entity that is accredited • Any entity that receives federal financial assistance • Any foreign-owned/controlled education entity operating in the US

Shift in Sec. 117 Regulatory Environment

Under multiple administrations, the Department placed Sec. 117 on the periphery of their regulatory attention and universities responded accordingly by loosely complying. Renewed attention on foreign interference at universities created an energized focus from the Department to enforce compliance and recalibrate Sec. 117's regulatory environment.



Proposed Sec. 117 Changes

On September 6th, 2019, the Department published an information collection activity announcement, seeking comment on its request to gather additional data from universities to better enforce compliance with Sec. 117. Recently, the Department has come under scrutiny from the White House and Congress for its perceived failure to regulate, investigate, and protect US national security interests in higher education. Responding to pressure, the Department sought to recalibrate Sec. 117 policy and compel that universities prioritize their reporting obligation. The Department has launched multiple investigations into institutional compliance and asserted greater regulatory energy in both rhetoric and action on Sec. 117.

The Department claims it currently does not have sufficient information to assess compliance—and proposes creating a standalone “informational collection instrument” to better capture foreign monetary data and ensure that universities adequately report. After receiving several comments and questions from industry and professional associations, the Department released a revised information collection activity announcement on February 10th, 2020 that clarified some language but remained committed to gathering substantially more information than previously required.

Proposed Sec. 117 Change



Added Compliance Burden

Foreign tuition sources are considered reportable contracts and need to be disclosed if the total value meets or exceeds \$250,000



Monitor student tuition payments, sponsored scholarships, and other tuition-tied grants, including sums spread across multiple students, for foreign origin and reporting value threshold

Definition of contracts is broadened to include “intellectual property license fees from a foreign licensee of a University, patent and data or materials being transferred via purchase, lease, or barter for use in research”



Compile and disclose more voluminous, often internally dispersed, and sensitive information to the Department

Definition of reporting scope is clarified to include gifts and contracts received by an institution through a legal intermediary, such as a foundation



Build sufficient data gathering and disclosure identification infrastructure to capture intermediary engagements

Require detailed information on every reported engagement, including contract conditions/restrictions, donor identities, and connections to national governments



Centralize added information from across the institution as well as standardize front-end due diligence and vetting procedures

Report unredacted true copies of gift agreements and contracts



Record eligible paperwork and maintain central true copy documentation

Potential Broader Impacts for Universities

The Department believes that changing Sec. 117 reporting requirements does not represent a material policy change and that universities will not face any meaningful added administrative burden or disruptions to their operations. However, some changes may impact higher education's existing regulatory and operational environment as their gifts and contracts receive elevated scrutiny and further constraints around disclosure. Below are the Department's actions and corresponding broader impact for universities.

Government Policy Action

Higher Education Impact

- | | | | |
|---|--|---|---|
| 1 | Request for details on foreign engagements and scrutiny over terms and conditions |  | Partnerships Inhibition
Suppresses international activities, partnerships, and collaborations by adding new formal and informal barriers |
| 2 | Mandate to disclose donor identities and agreements |  | International Giving Disruption
Removes donor confidentiality, un.masks previously anonymous donors, and constrains eligible and interested donor pool |
| 3 | Requirement to keep true copies of agreements and informal pressure to elevate partner vetting |  | Compliance Burden and Unfunded Mandate
Adds administrative as well as a due diligence burden that universities are not equipped to handle without substantial investments in resources |
| 4 | Broader scope of institutional reporting mandate to intermediary pass-through entities |  | Interference in Institutional Relationships with Foundations and Affiliated Organizations
Mandated reporting of intermediary gifts and contracts received by foundations or affiliated organizations would pose new governance and operating challenges |
| 5 | Elevated enforcement rhetoric and actions |  | Liability and Risk Escalation
Dramatically expands institutional regulatory and compliance risk as well as legal liability for individual institutional leaders |
| 6 | Review of institutional financial records and processes |  | Financial Practices Scrutiny
The Department calls into question existing institutional accounting and tax practices as suspect due to their failure to fully disclose necessary financial transactions, potentially having implications on institutional audits, creditworthiness, and accreditation |
| 7 | Blanket reporting obligation regardless of foreign source |  | A Blunt Tool
Sec. 117 indiscriminately impacts activities with allied and neutral nations, not just adversarial actors |
| 8 | Universal compliance expectations for all institution's regardless of size or capacity |  | Amplified Impacts for Small Institutions
Smaller institutions often have not invested in export control and compliance apparatuses to the same extent as large R1s have but may now have to do so for Sec. 117 reporting purposes, especially if the Department pursues a broad reporting interpretation. |

Strategic Considerations for Universities

Like all proposed regulations, universities should proceed forward on an evidence-based foundation that follows due process and aligns with agency and industry guidance. The Department's proposed changes to Sec. 117 reporting will likely undergo further iteration following the notice and comment process as well as potential litigation or administrative procedure requirements.

Thus, in the interim, institutions should evaluate their existing procedures with the assumption that additional scrutiny and more rigorous enforcement are likely forthcoming. Below are several strategic considerations for institutions to evaluate their existing protocols and proactively mitigate their potential compliance risk.



Examine the Status Quo

- ✓ Determine which offices conduct Sec. 117 reporting, what data sources they use, how they assess foreign status, what their standard operating procedure is for acquiring all necessary disclosure information, and what information is shared with the Department
- ✓ Examine donor databases to identify what country of origin information is stored, who records that information, and what steps, if any, are made to confirm that information
- ✓ Quantify existing administrative burden and costs related to Sec. 117 reporting
- ✓ Understand how the institution vets gifts/contracts, what due diligence is conducted, what considerations for Sec. 117 reporting, export control, and other compliance requirements are made, and who makes as well as signs off on gifts/contracts that are Sec. 117 reportable
- ✓ Crosscheck donor database information with Sec. 117 disclosures as well as donor information disclosed on IRS Form 990, Schedule B (for private institutions) to ensure alignment and consistency



Mitigate Potential Risk

- ✓ Designate a central contact or office to own all Sec. 117 related questions, train impacted units/staff, ensure interdepartmental collaboration, and manage the reporting process
- ✓ Ensure databases of donors, vendors, and partners record country of origin information and flag for potential Sec. 117 reporting
- ✓ Keep true copies of all foreign gift agreements and contracts
- ✓ Disclose names of foreign entities who reach dollar threshold in semi-annual reports (if not already doing so)
- ✓ Vet all gifts and contracts with elevated scrutiny on Sec. 117 disclosure, export control, and potential undue foreign influence
- ✓ Develop an institutional communications strategy around Sec. 117 disclosures that promotes internal awareness and advocates for external institutional interests



Sources and Further Reading

General Background

Compilation of News Articles and Press Reporting on Sec. 117 Changes

Resource	Description
<u>Trump Administration Reviewing Foreign Money To US Colleges</u>	(June 2019) <i>Associated Press</i> coverage of one of the first Sec. 117 investigations at Georgetown and Texas A&M
<u>Official: Foreign Gift Investigation Found 'Disturbing Facts'</u>	(December 2019) <i>Inside Higher Ed</i> article covering the Department of Education's preliminary findings on Sec. 117 compliance
<u>'Moving the Goalposts': What You Need to Know About DeVos's Closer Scrutiny of Foreign Gifts</u>	(February 2020) <i>The Chronicle of Higher Education's</i> detailed reporting on recent Sec. 117 investigations, impactful policy changes, and industry reactions
<u>Education Department Investigating Harvard, Yale Over Foreign Funding</u>	(February 2020) <i>The Wall Street Journal's</i> reporting on opened Sec. 117 investigations at Harvard and Yale

Federal Policy, Actions, and Considerations

Compilation of Documents Related to Sec. 117 Changes

Resource	Description
<u>China's Impact On The U.S. Education System</u>	(February 2019) US senate staff report on Chinese interference in higher education that promoted the Department of Education to review Sec. 117 compliance and reporting requirements
<u>Regulatory Comments from the Council for the Advancement and Support of Education (CASE)</u>	(November 2019) CASE's feedback to the Department of Education's proposed rule changes that calls out specific issues with the change that would negatively impact universities
<u>Report to Congress on Sec. 117 Enforcement and Investigative Findings</u>	(November 2019) The Department of Education's outlining of their initial findings related to Sec. 117 compliance
<u>U.S. Department of Education Launches Investigation into Foreign Gifts Reporting at Ivy League Universities</u>	(February 2020) Press release from the Department of Education providing updates on their Sec. 117 investigations and claiming to have uncovered over \$6 billion in unreported gifts and contracts
<u>Department of Education's Sec. 117 Website</u>	(February 2020) The Department of Education's depository for all regulatory materials and public disclosure reports, including investigative letters to universities
<u>Proposed Information Collection Change Related to Sec. 117</u>	(February 2020) Federal Register site that hosts the notice, supplementary material, and public comment submissions
<u>Proposed Sec. 117 Information Collection Form</u>	(February 2020) Copy of the form that the Department expects universities to complete as a part of their reporting obligation
<u>Department of Education's Supporting Statements and Response to Public Comments</u>	(February 2020) The Department of Education's documented rationale behind the form change as well as their responses to public comments following the initial proposed changes in September 2019



Washington DC | Richmond | Birmingham | Minneapolis | New York

202-747-1000 | eab.com