

Education

National Security, Sanctions, and Export Controls

Congress Targets Foreign Funding within American Colleges and Universities

By: [Ishan K. Bhabha](#), [Rachel K. Alpert](#), and Maura Smyles

On June 8, 2021, the Senate passed the US Innovation and Competition Act, a sweeping bipartisan bill that aims to promote America's economic competitiveness and national security by investing nearly \$250 billion into scientific research and technological innovation. Lawmakers are particularly intent on combating China's growing economic influence by bolstering domestic production of emerging technologies and preventing unauthorized foreign access to US intellectual property. The bill also contains several provisions that could significantly impact American colleges and universities, particularly institutions engaged in major research projects with foreign funding sources.

Foreign funding is critical to American higher education institutions. Between January 1, 2014 and June 30, 2020, US colleges and universities reported receiving more than \$16 billion in foreign gifts and contracts,^[1] over \$1 billion of which came from Chinese sources.^[2] Accordingly, the higher education community should be closely monitoring legislative developments and be prepared to implement new compliance mechanisms should the bill become law.

How Does the Legislation Address Foreign Funding in Higher Education?

There are three key provisions in the US Innovation and Competition Act that address foreign funding for higher education institutions. The first would require prior Committee on Foreign Investment in the United States (CFIUS) review of certain non-federally funded research projects. The second would lower the threshold for mandatory disclosure of foreign gifts and contracts. The third would require universities to collect and maintain data on any foreign gifts or contracts received by individual faculty and staff. Each provision is briefly discussed below.

1. Requirement for prior CFIUS review of non-federally funded research projects

Section 3138 of the bill would amend the Defense Production Act of 1950 to require prior CFIUS review of certain foreign gifts to and research contracts with institutions of higher education. A gift or contract would be subject to this mandatory review process if it (1) "relates to research, development, or production of critical technologies and provides the foreign person potential access to any material nonpublic technical information"^[3] and (2) equals or exceeds \$1 million in a single year or comes from a foreign source whose aggregate gifts to and contracts with the institution exceed \$1 million in a two-year period.^[4] Additionally, "a restricted or conditional gift or contract that establishes control" and exceeds the stated monetary thresholds would fall within the scope of CFIUS jurisdiction but would not be subject to a mandatory filing. The Secretary of Education would be added to CFIUS specifically to review transactions involving universities, and the importance of academic freedom would be added as a review criteria.

Numerous amendments to this provision were introduced during Senate negotiations. One such amendment would have narrowed the CFIUS review process to cover only gifts or contracts from the Chinese government, the Chinese Communist Party, entities organized under Chinese law, or Chinese nationals.^[5] Another would have similarly narrowed the national security review process to only gifts

and contracts that come from China, but would have called on the Biden administration to come up with its own screening process within 90 days rather than rely on the existing CFIUS review process.^[6] Ultimately, however, the Senate opted to retain the broad requirement of CFIUS review for both Chinese and non-Chinese funding sources.

2. Lowers the reporting threshold for the disclosure of foreign gifts and contracts

Section 6124(a) would amend the Higher Education Act of 1965 to lower the reporting threshold for disclosure of foreign gifts and contracts from \$250,000 to \$50,000. Universities would also have to disclose any foreign contracts with undetermined monetary value and any restricted or conditional gifts or contracts that involve a foreign source. All disclosure reports would then be made available to the public in a searchable electronic database.

If an institution knowingly and willfully fails to disclose a gift or contract with a foreign source, it may be subject to a fine ranging from \$250 to the full amount of the undisclosed gift or contract. If the same institution continues to knowingly and willfully violate the law for three consecutive years, it may be subject to an additional fine between \$100,000 and twice the amount of the undisclosed gift or contract.

Finally, if an institution fails to comply for a third consecutive year—regardless of knowledge or intent—it may be subject to a fine from \$250 to the full amount of the undisclosed gift or contract.

3. Requires universities to collect information about gifts and contracts to individual faculty and staff

Section 6124(b) would require institutions with research and development expenditures of \$5 million or more in any of the last five years to collect data on any foreign gifts or contracts received by *individual* faculty and staff members. These disclosures would then have to be maintained in a searchable database for at least five years. There appears to be no monetary threshold to trigger the disclosure requirement, meaning that even a \$15 lunch purchased by a foreign colleague would need to be reported to the university, entered into its database, and maintained for five years.^[7] Finally, covered institutions would be required to “maintain a plan to effectively identify and manage potential information gathering by foreign sources through espionage targeting faculty, professional staff, and other staff engaged in research and development.” The only guidance the bill provides as to how a university would go about identifying and managing foreign espionage on its campus is to use “periodic communications” and enforcement of the policy regarding disclosures by faculty members of any foreign gift or contract.

The bill establishes the following sanctions for knowing and willful noncompliance with the requirements of Section 6124(b):

- First violation: fine between \$250 and \$1000
- Second violation in consecutive year: fine between \$1,000 and \$25,000
- Additional violation(s) in consecutive year(s): fine between \$25,000 and \$50,000

Moreover, any institution that fails to comply with this provision for two consecutive years would be required to submit a compliance plan to the Secretary of Education. If the institution still fails to comply for a third consecutive year—regardless of knowledge or intent—it would be fined between \$250 and \$25,000.

Implications for Colleges and Universities

Many within the higher education community have raised concerns about these provisions,^[8] and for good reason. The most obvious issue is the operational burden imposed by the bill’s rigorous reporting requirements. Covered institutions would have to invest significant resources into developing and implementing compliance plans, training faculty and staff, and setting up databases for the required disclosures. They would then have to enforce the reporting requirements against individual faculty and

staff members. Given the highly decentralized nature of many research universities, that may be no small feat. Once these massive amounts of data are collected, colleges and universities would have to maintain records of each transaction for at least five years, or face severe sanctions.

The legislation also raises concerns about the role of politics in the approval process for scientific research projects. The American Council on Education (ACE) aptly noted that the CFIUS review process “could lead to research projects being denied funding for political reasons, not on their scientific merit.”^[9] By introducing discretion and uncertainty into decisions about research funding, including potential policy shifts between administrations, the proposed CFIUS review process threatens to impede a university’s ability to plan and rely upon multi-year funding streams for its major research activities. Such activities are already subject to US export controls requirements, which serve to limit the ability of foreign donors and contractors to gain access to critical technology, without the additional hurdle of CFIUS review.

Finally, the bill’s requirements would likely have a disparate impact on schools of different sizes, with smaller schools facing disproportionately high compliance costs. Without the resources to invest in developing and implementing a compliance plan, smaller schools may have to forbid their faculty and staff from accepting foreign funding altogether. Such a result would seem to undermine, rather than advance, Congress’ goal of expanding research and development activities throughout the nation.

What's Next?

The US Innovation and Competition Act now moves to the House, where its future is uncertain. Two related bills have been introduced in the House,^[10] but neither has advanced past the committee stage. If and when Congress agrees on a final version of the bill, it is expected to be signed by the President, who has already publicly announced his support.^[11]

If enacted, the law’s foreign funding provisions would not be immediately effective. First, CFIUS would need to implement the legislation through revised regulations and a pilot program.^[12] The regulatory process would present an opportunity for colleges and universities to weigh in about the implementation of the provisions that pertain to institutions of higher education.

In the meantime, universities should consult experienced counsel to develop compliance plans with respect to their foreign funding sources. Even if the provisions that regulate university funding are ultimately removed from the final legislation, the broad bipartisan support for these provisions in the Senate suggests that the regulation of foreign research funding is of great political interest. Institutions should take measures now to prepare for potential investigations and audits. Jenner & Block has substantial experience counseling institutions of higher education on compliance programs, including those related to sources of funds, in representing institutions in government-facing investigations, and providing guidance on the CFIUS regulatory framework and review process.



Contact Us



Ishan K. Bhabha

ibhabha@jenner.com | [Download V-Card](#)



Rachel K. Alpert

ralpert@jenner.com | [Download V-Card](#)

Meet our Education Team

Meet our National Security, Sanctions, and Export Controls Team

Practice Leaders

Ishan K. Bhabha

Co-Chair, Education

ibhabha@jenner.com

[Download V-Card](#)

Terri L. Mascherin

Co-Chair, Education

tmascherin@jenner.com

[Download V-Card](#)

Paul Feldberg

Co-Chair, National Security,
Sanctions, and Export Controls

pfeldberg@jenner.com

[Download V-Card](#)

Rachel K. Alpert

Co-Chair, National Security,
Sanctions, and Export Controls

ralpert@jenner.com

[Download V-Card](#)

Amb. David Pressman

Co-Chair, National Security,
Sanctions, and Export Controls

dpressman@jenner.com

[Download V-Card](#)

Lee S. Wolosky

Co-Chair, National Security,
Sanctions, and Export Controls

lwolosky@jenner.com

[Download V-Card](#)

[1] Foreign Gift and Contract Report, US Department of Education, <https://studentaid.gov/data-center/school/foreign-gifts>.

[2] *Id.*

[3] S. 1260, 117th Cong. § 3138(a)(1) (2021).

[4] *Id.*

[5] S. Amdt. 2050, 117th Cong. (2021).

[6] S. Amdt. 2079, 117th Cong. (2021).

[7] American Council on Education, Talking Points: US Innovation and Competition Act of 2021 (May 20, 2021), <https://www.acenet.edu/Documents/Talking-Points-US-Innovation-and-Competition-Act-of-2021.pdf>.

[8] *Id.*

[9] *Id.*

[10] Endless Frontier Act, H.R. 2731, 117th Cong. (2021); National Science Foundation for the Future Act, H.R. 2225, 117th Cong. (2021)

[11] Press Release, The White House, Statement of President Joe Biden on Senate Passage of the US Innovation and Competition Act (Jun. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/statement-of-president-joe-biden-on-senate-passage-of-the-u-s-innovation-and-competition-act/>.

[12] S. 1260, 117th Cong. § 3138(d)-(e) (2021).

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