Tax reform and international presence

2018 Tax Compliance Summit

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Facilitator

Kathy Pitts
Exempt Organization Tax Services
Ernst & Young LLP
kathy.pitts@ey.com
+1 205 305 5737

Topics

- Tax Cuts and Jobs Act (TCJA)
  - Overview
  - Key provisions directly affecting exempt organizations
  - State implications
- International presence

TCJA overview

What's in the TCJA?

Lower rates

The final US tax reform legislation includes a significant reduction in the business tax rate as well as individual tax rates.

Broader tax base

To pay for the proposed lower rates, the TCJA includes a wide array of base-broadening provisions (e.g., limitations on deductions). The base-broadening provisions extend to both business and individual taxation.

New international tax system

Republicans were unified in moving toward a territorial system of taxation, with the TCJA imposing a transition tax (or toll charge) on previously untaxed accumulated foreign earnings, with the rate determined by whether the earnings are in cash or noncash assets.

Timing

- **White House:** Republican Framework released on September 27
- **Congress:** Budget resolution — October 26
- **House:** Legislative language — November 2; passage — November 16
- **Senate:** Legislative language — November 9; passage — December 2
- **Reconcile bills:** December 15
- **Final Senate and House votes:** December 19/December 20
- **Signing by President:** December 22

Next steps in process

- Joint Committee on Taxation "Bluebook" explanation
  - Often helpful, but not binding
- Treasury Department and IRS begin regulatory process
  - Representatives from Treasury's Office of Tax Policy, IRS Chief Counsel and operating divisions develop guidance (notices and regulations)
- Technical corrections bill
  - Requires bipartisan support

What to do now

- Understand TCJA, monitor guidance and regulatory developments
- Assess and model implications
- Develop formal implementation plan across finance and tax departments
- Evaluate tax-planning strategies
- Identify whether third-party assistance is required
- Consider appropriate disclosures
- Engage in regulatory process; communicate with legislators and IRS about particular issues

Key elements in the TCJA
Business provisions

Corporate tax rate and corporate alternative minimum tax (AMT)

- 21% tax rate, effective 1/1/2018
- Eliminates corporate AMT

Interest expense deduction

- Limits deduction to net interest expense that exceeds 30% of adjusted taxable income (ATI). Initially, ATI computed without regard to depreciation, amortization or depletion. Beginning in 2022, ATI would be decreased by those items. Regulated utilities are generally excepted.

Expensing

- Allows immediate write-off of “qualified property” placed in service after 9/27/2017 and before 2023. The increased expensing would phase-down starting in 2023 by 20 percentage points for each of the five following years. Eliminates original use requirement. “Qualified property” excludes certain public utility property and floor plan financing property. Taxpayers may elect to apply 50% expensing for the first tax year ending after 9/27/2017.

Key elements in the TCJA
Business provisions

Net operating losses (NOLs)

- Limits NOLs to 80% of taxable income for losses arising in tax years beginning after 2017. Repeals carryback provisions, except for certain farm and property and casualty losses; allows NOLs to be carried forward indefinitely.

Like-kind exchanges

- Limits to exchanges involving real property only. Current law applies to exchanges if property disposed of on or before 12/31/2017 or the property received in the exchange is received on or before such date.

Dividends received deduction (DRD)

- Reduces the deduction for dividends received from other than certain small businesses or those treated as “qualifying dividends” from 70% to 50%. Reduces the deduction for dividends received from 20%-owned corporations from 80% to 65%.

Key elements in the TCJA
Compensation provisions

- Eliminates many deductions and exclusions for certain **fringe benefit** expenses:
  - Business entertainment activities and membership dues
  - Transportation or commuting expenses (even if provided under a tax-qualified subsidy program)
  - Employee achievement awards if the award is paid in cash, gift cards, meals, lodging, tickets, securities or other similar items
- Employer-provided eating facilities are no longer exempt from the 50% deduction limitation; in 2026, deductions are completely disallowed for employer-provided eating facilities and meals provided for the convenience of the employer
- Adds a **new income inclusion deferral election** allowing deferral of tax for options and restricted stock units issued to qualified employees of private companies; applies after 2017

Key elements in the TCJA
Individual provisions

Individual income tax rates

- Lowers rates to 10%, 12%, 22%, 24%, 32%, 35% and 37%; adjusts rate bracket thresholds
- Roughly doubles standard deduction; suspends deduction for personal exemptions; repeals overall limitation on itemized deductions; repeals all miscellaneous itemized deductions subject to the 2% floor under present law

State and local tax deduction

- Caps deduction at $10,000, which can be taken for the aggregate of state and local property and income taxes (or state and local sales taxes)

AMT

- Retains the individual AMT
- Increases the exemption amounts ($70,300 single/ $109,400 married filing jointly) and phase-out thresholds ($500,000 single/$1m married filing jointly)

Mortgage interest deduction

- Caps deduction at $750,000 of debt; $1m for debt incurred before 12/15/2017. Reverts back to $1m 1/1/2026, regardless of when debt incurred. Available for second homes
- Eliminates deduction for interest on home equity debt

Key elements in the TCJA
Individual provisions

Medical expense deduction

- Applies to expenses that exceed 7.5% of adjusted gross income (AGI) in 2017 and 2018, and expenses that exceed 10% of AGI thereafter

Estate tax

- Retains estate, gift and generation-skipping transfer taxes; doubles $10m basic exclusion and indexes it for inflation

Child tax credit

- Increases child tax credit to $2,000 per qualifying child (of which $1,400 refundable); phase-out starts at AGI over $400,000 (mfj). New $500 nonrefundable dependent credit

ACA individual mandate

- Reduces shared responsibility payment (individual mandate) to zero, effective beginning in 2019
- Provision does not sunset

Key elements in the TCJA
Individual provisions

Charitable donations

- Retains deduction for charitable donations and increases the AGI limitation for charitable contributions from 50% to 60%

Section 529 plans

- Allows distributions of up to $10k per student tax-free from 529 accounts to be used for elementary, secondary and higher tuition

Deductions for higher education

- Continues to allow graduate students to exclude the value of reduced tuition from taxes
- Continues to allow deductions for student loan interest and for qualified tuition and related expenses

Tax-free retirement vehicles

- Retains retirement savings options such as 401(k)s and Individual Retirement Accounts (IRAs)
- Generally repeals rule allowing IRA contributions to one type to be recharacterized as a contribution to the other type

Key elements in the TCJA
Individual provisions

Capital gains and dividends

- Net capital gains and qualified dividends would continue to be taxed at the current 0%, 15% and 20% rates, and also would continue to be subject to the 3.8% net investment income tax

Gain from sale of principal residence

- Retains current law ownership period for the exclusion of gain from the sale of a principal residence

Deductions

- Repeals deductions for tax preparation, moving expenses and alimony payments (after 2018)
- All itemized deductions subject to the 2% floor would be repealed (e.g., home-office deductions, license and regulatory fees, dues to professional societies)

Other credits

- Retains adoption credit

Key provisions impacting exempt organizations

Adjustments to charitable giving incentives

- Various changes to individual income taxes that may alter individuals' incentives to make charitable gifts, including:
  - Doubled standard deduction at $24,000 for joint returns; $12,000 for single filers
  - Repealed limit on itemized deductions for certain high-income taxpayers
  - Increased 50% AGI limitation for charitable contributions to 60%
  - Retained estate, gift and generation-skipping taxes; doubled basic exclusion to $10m, indexed for inflation
  - Eliminated charitable deduction for college-event seating rights

Provisions not in TCJA, may resurface

- Clarification of unrelated business taxable income (UBTI) treatment of entities treated as exempt from taxation under Section 501(a) ("dual status" entities)
- Income from sale or license of name or logo treated as UBTI
- Modifications to tax on excess benefit transactions
- Modifications to prohibition of candidate support or opposition by Section 501(c)(3) organizations
- Repeal of exempt status of private activity bonds

Excise tax based on investment income
Private colleges and universities

- **Prior law:** Section 4940 excise tax on investment income that applies to private foundations does not apply to public charities such as colleges and universities.
- **New Section 4968 of Code:** Effective for tax years beginning after December 31, 2017, “applicable educational institution” is subject to 1.4% excise tax on net investment income.
- Applicable educational institution:
  - Eligible educational institution for purposes of Hope and Lifetime Learning credits
  - Not a state college or university
  - At least 500 tuition-paying students during prior year
  - Investment assets valued at end of prior year of at least $500,000 per student
- Net investment income is determined using rules “similar to” Section 4940(c).
  - Interest, dividends, rents, royalties, and similar, plus
  - Net capital gain, minus
  - Expenses incurred in producing investment income and managing property used to produce income
- Assets and income of related entities are attributed to educational institution.

UBTI separately computed for each trade or business

- **Prior law:** UBTI is calculated by aggregating revenue from all unrelated trades and businesses and subtracting deductions connected with producing.
- **New provision:** Section 512(b)(12), effective for tax years starting after December 31, 2017, requires determining UBTI separately for each business. Thus, an unrelated trade or business’s revenue can only be offset using deductions directly connected with that particular trade or business.
  - NOLs of a particular business could offset future income from that business, but not from other businesses.
  - NOLs arising in tax years beginning before January 1, 2018, carried forward to a tax year beginning after that date are not subject to provision and can be applied to UBTI generally.
- Key question for regulatory guidance: “What constitutes a separate business?”

Excise tax on excess tax-exempt organization executive compensation

- New Section 4960 provides, for taxable years beginning after December 31, 2017, an “applicable tax-exempt organization” is subject to 21% excise tax on:
  - Remuneration over $1m paid to a covered employee
- Applicable tax-exempt organization:
  - Exempt from tax under Section 501(a); a farmers’ cooperative described in Section 521(b)(1); has income excluded from tax under Section 115; or is a political organization described in Section 527
- A covered employee is an employee who:
  - Was one of the five highest compensated employees of organization for tax year

    or
  - Was a covered employee of the organization (or predecessor) for any preceding tax year beginning after December 31, 2016
- Excess parachute payment:
  - Compensation paid on account of separation from service if present value of aggregate amount exceeds three times the base amount, which is the five-year average
  - Excise tax is imposed on full amount above the base

UBTI for amount of certain fringe expenses

- New Section 512(a)(7) effective for amounts paid after December 31, 2017 — organizations subject to unrelated business income tax rules must increase UBTI by expenses of providing certain fringe benefits that would be nondeductible for a taxable entity.
- Fringe benefits subject to rule:
  - Expenses for commuter highway vehicle transportation, transit passes and qualified parking if benefits are excludable from employee income under 132(f).
  - On-premises athletic facility expenses increase UBTI if facility is primarily for benefit of highly compensated employees.
- Expense considerations:
  - Employee pretax salary reduction (excludable under 132(f)) likely to be treated as UBTI.
  - Post-tax reimbursements of commuting expenses that do not qualify for exclusion under 132(f) should not generate UBTI.
- Other considerations:
  - Many organizations may be subject to state or local laws requiring employers to provide some form of transportation subsidy.

Repeal of exempt status of advance refunding bond issuances

- **Prior law:** Section 103 excludes from gross income interest on any state or local bond which is classified generally as either a governmental or private activity bond. This includes refunding bonds, but with limits on advance refundings.
- **Summary of new provision:** It removes income exclusion for bonds issued after December 31, 2017, issued to advance refund another bond.
- **Key takeaway:** Interest from initial issuance of qualified 501(c)(3) bonds continues to be tax exempt, but interest on bonds issued as part of an advance refunding of those bonds is not.
  - Entities may not be able to refinance outstanding debt except as part of a current refunding and retain their tax-exempt benefit under Section 103.

State income tax implications

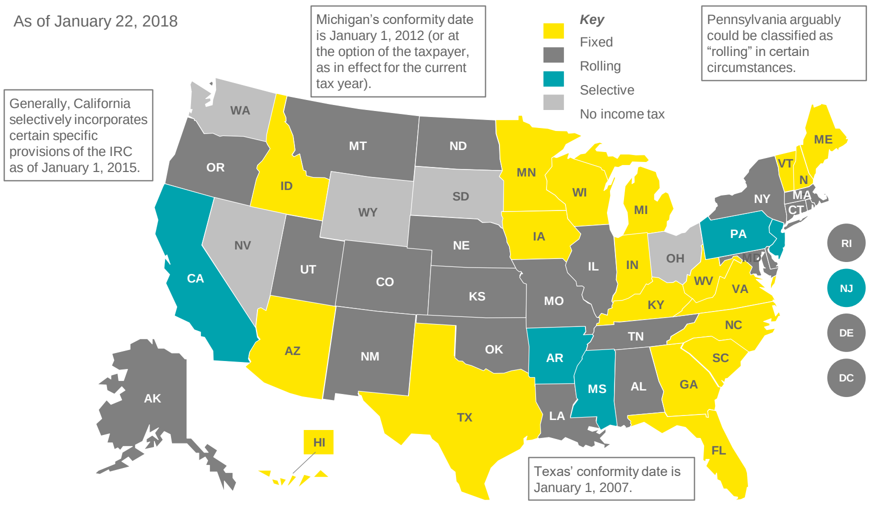
State income tax
Will states conform to federal tax law changes?

- Federal income tax reform:
  - Broadens the tax base
  - Reduces tax rates
  - Repeals deferral of foreign earnings
  - Taxes untaxed accumulated foreign earnings and moves to a territorial system
- Internal Revenue Code (IRC) and resulting federal taxable income (FTI) typically is the starting point to determine state taxable income:
  - When IRC changes (e.g., base expansion, elimination of deductions, modifications of credits), state tax base may change as well.
- States differ on federal conformity:
  - State conformity dates are key:
    - "Fixed"/"Static" conformity states = generally not automatic (consider whether/when to conform)
    - "Rolling" conformity states = generally automatic (consider whether to decouple)
    - "Selective" conformity states = generally adopt only certain specific provisions, typically as of a specific date, or make significant changes to IRC provisions.

State income tax
Will states conform to any federal tax law changes?

- Even where conformity applies, states have history of decoupling from unfavorable federal provisions, such as federal bonus depreciation.
- States generally don't conform to federal income tax rate reductions:
  - State income taxes generally rise as federal tax base expands, unless states align tax rates with federal rate reductions.
- Generally, all states (except Vermont) must have a balanced budget and must address impact of conforming to federal income tax law changes.

State income tax
Conformity to IRC (corporate income tax)



International presence

Why do we need to think differently?

Outside "safe haven" of home country …

- Unfamiliar laws of foreign country
- Evolving regulatory landscapes
- Lack of organizational structure
- Challenging to monitor activities
- Financial controls over foreign transactions
- Different time zones, languages and customs

Internal administration
Single point of contact?

Role of central administration

- *Proactively* support key functional areas — legal, compliance and risk management, HR and cash management
- Oversight of activities to reduce financial and reputational risks
- Set policy and procedural guidance
- Provide strategic direction (president/provost)
- Fulfill university reporting obligations

Potential compliance issues abroad (most common)

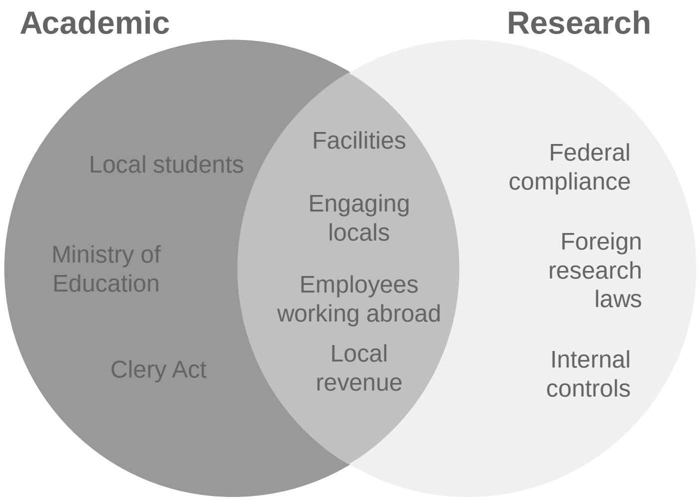
As an employer

- Those paid as contractors may qualify as employees
- University employees traveling abroad have immigration, tax and Social Security obligations
- Labor and employment laws for those hired locally

As a reporting entity

- University activities qualify as fixed place of business in foreign country (permanent establishment (PE))
- Registration requirements
- Tax filings requirements
- Value-added tax (VAT) and other statutory reporting

Academic vs. research
More overlap with compliance risks than you may think



Risks

- Risk factors relate to:
  - Duration of activities in country
  - Annual recurrence of activities
  - Use of space/infrastructure
  - Presence of employees for extended period
  - Engagement of local employees
  - Repatriation of cash
  - Related tax compliance issues

Identifying risks
Asking the right questions

- What is the activity and where?
- How long is it? Recurring?
- Are we paying anyone for services?
- Are our employees spending more than a few weeks there?
- Do we have office or classroom space?
- Do we perform any service (including education) in a foreign country for which we're paid?

Risks to consider

- Collaborative partners
- Permanent establishment
- Human capital
- Other

Collaborative partners

- Third-party “outsource” — partnering with foreign university/study-abroad company — under full control of partner
- “Hybrid” model — shares resources with foreign partner institution
- “Go-it-alone” — own campus or facility abroad

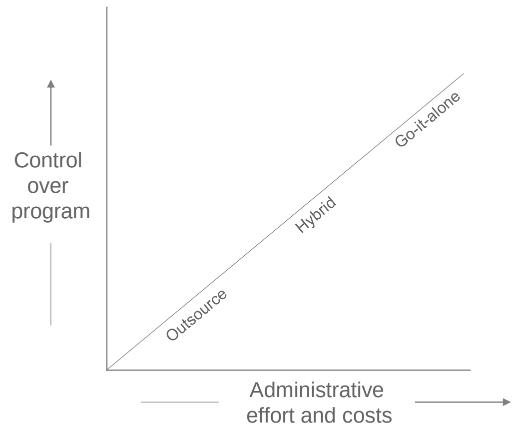
Common structuring approaches

Examples of US university operating strategies:

- Identifying a local “partner” to operate through
- Establishing agreement with host country government (e.g., Memorandum of Understanding)
- Engaging a professional employment organization (PEO)
- Registering a “branch office” of the university
- Formation of a nongovernmental organization (NGO)
- Formation of a subsidiary (for-profit or not?)

Risk
High
Low

Collaborative partners



Risk factors with collaborative partners

- Partner — “blind reliance” regarding legal/regulatory responsibilities
  - Local country requirements (e.g., statutory filings, tax returns)
- Reputational factors:
  - Agreement should benefit university (“It sounded great at the time …”)
  - Unauthorized use of university name
  - Partner fails to fulfill obligations
- Difficulty of terminating arrangement
- Domestic compliance may still apply
  - (Office of Foreign Assets Control (OFAC), US Export Control Act, Foreign Corrupt Practices Act (FCPA))

Common assumptions (which may get us in trouble)

- "We've been doing this for a long time and never been in trouble."
- "Our foreign partners take care of everything and are responsible for issues, not us."
- "Educational or research activities don't require registration and are nonprofit abroad too."
- "Our foreign contractors would never turn on us."
- "Employees on US payroll don't have to pay taxes abroad."
- "Other schools are doing it this way … they must be doing it right."

What is permanent establishment (PE)?

- Generally defined as a country's determination that university has a fixed place of business in the country
- Specifically defined in tax treaties (roughly 70 countries)
  - If no tax treaty, defined in local laws
- Common "triggers"
  - Income-generating activities (executive education, curriculum development contracts, certificate or degree programs, research, etc.)
  - Use of facilities (renting office or other space)
  - Duration of program (typically greater than six months)
  - Negotiation or execution of contracts on behalf of university
  - Employment of local nationals (even as contractors)
- PE requires reporting university activities (submit tax filing)

Tax treaties

- What's great about them?
  - Easy to find; well organized on IRS website
  - Definition for permanent establishment
  - Defines and often extends number of days US citizen can work in country without tax issue (immigration may still be an issue)
  - Information regarding tax exemptions which may apply for teaching or research
- And not so great …
  - Not written for higher education/not-for-profit audience
  - Don't address all issues with registration or human resources
  - Only about 70 countries covered
    - Tax treaty for Malta (fewer people than smallest US state)
    - None for Singapore, Hong Kong, most African countries

Overview of HR issues

High

Risk level

- **Hiring independent contractors** (Admin burden – low)
- **Immigration – US employees and third-country nationals (TCNs)** (Admin burden – med)
- **Taxation – US employees and TCNs** (Admin burden – very high)
- **Locally hired employees** (Admin burden – high)

Faculty and staff working abroad (compliance considerations only)

- Immigration — visas and work permits
- Individual taxation
  - Could start on Day 1, most likely 90–183 days
  - Advances and personal bank accounts
  - Social insurances may also apply
- Report of Foreign Bank and Financial Accounts (FBAR) reporting (for individuals)
  - Beware of using personal bank accounts to transact university business
- Ensure familiarity with local health and safety issues

Immigration

- It applies to expats (US employees working abroad) and TCNs.
- Visas often require a local host to sponsor.
- Without correct visa, employee is *illegally entering country.*
- "Tourist" visas are commonly not a legally compliant form of documentation for employees working in a foreign country.
- University may be considered responsible by local authorities.
- Tax treaties do not offer benefits for immigration!

Summary of options to support employees abroad

- Standard treaty exemption period?
- Do teaching or research exemptions apply? (application often required)
- "Manage" days working in foreign country (employees on US payroll only)
- Special exemption granted by foreign gov't? (bilateral agreements)
- Third-party "partner" (university, subcontractor or other locally registered org)
- Professional employment organization (PEO)
- Nonresident employer registration (NRE), engaging payroll provider
- Registration (e.g., branch, subsidiary), engaging payroll provider
- *Not* a recommended option!
  - Telling the employee it is their responsibility to report and pay their own taxes

Local employee considerations

- Employment contracts (often required by law, and in local language)
  - Use a professional services firm.
- Understand termination regulations before hiring
- Compensation and benefits
  - Local laws and customs relate differently to local nationals, US expats, third-country nationals and contractors.
  - You should consider compensating based on completing milestones vs. salary.
  - You should understand what benefits are mandatory in-country, then what incrementally is "market norm."
  - A comparison with a US benefit plan can be a factor in evaluating local benefits, but shouldn't be the only one.
  - You should not hire as employee but pay as a vendor or contractor.
    - That is, cash or AP

Engaging individuals in a foreign country

- Employee vs. contractor — No.1 compliance issue today
- Assume that employee vs. contractor classification in foreign country is as stringent as US.
- Agreement that individual is a contractor does not determine classification
- Countries taking aggressive measures to encourage "whistle-blowers"
  - Fines often far exceed cost of hiring as employee

Tips on hiring a contractor

Don't do this		*Do this!*
Pay for time worked	→	Pay for milestone or task
Give them tools	→	Worker provides own tools
Worker self-employed	→	Work for company (three or more people)
Paid leave (vacation)	→	No "employee" benefits
Supervise and direct daily	→	Flexibility to set own hours
Nothing in writing	→	Contract stating terms
Require contractor to perform all work	→	Work can be performed by others at worker's discretion
Executing contracts/making decisions	→	No decision-making on behalf of university!

Other risk areas

- Accounting and bookkeeping compliance
- Cash management practices
  - Wire transfers, cash receipts, cash advances
  - Restrictions on repatriation of funds
- Making resources available
- Internal controls
- Additional policies to consider
- Discovery — potential discovery of regulatory violations by local officials

US regulations and reporting considerations

Not an all-inclusive list!

- IRS reporting
  - Form 990 Schedule F (n/a for public institutions)
  - Unrelated business income?
- FinCEN Form 114sp.(FBAR)
- Clery Act
  - May apply to guest houses and other nontraditional facilities
  - Consider adding incident reporting requirements to agreements
- FCPA
- US Export Control Act
- OFAC

Making resources available

- Website for students (outbound)
  - Opportunities for study abroad and fellowships
  - Forms, waivers, school contacts
  - Links to US State Dept, Centers for Disease Control and Prevention (health, vaccinations info)
  - Emergency procedures
- Website for faculty and staff
  - Policies and procedural docs or links
  - Activities by country
  - School and central admin contacts

Internal controls and A-133

A-133 definition:

- Transactions are properly recorded and accounted for →
- Transactions are executed in compliance with laws and grant agreements →
- Funds and assets are safeguarded from unauthorized use →

In layman's terms:

- Follow university policies
- Approval of transactions
- Segregation of duties
- Documentation is readily available for inspection
- Invoices, POs, receiving
- Timecards
- Employment agreements
- Job descriptions

Internal controls and A-133

Audits of federal grant operations are becoming much more common, especially in Africa and the Middle East!

- **Common finding No. 1:** procurement noncompliance
  - Failure to monitor procurement sources
- **Common finding No. 2:** subrecipient monitoring
  - Failure to provide oversight and training to foreign subrecipients
- **Common finding No. 3:** lack of documentation
  - No time and effort reporting by overseas project personnel
  - No records of taxes paid, pending exemption
  - No record of retention policy applied abroad

Examples of policies to consider

Typically already in place for home campus:

- Code of conduct (e.g., conflict of interest, discrimination)
- Transaction authority (cash disbursements)
- Signing contracts/obligating the university
- Use of institutional property
- Gift receipts
- Travel
- Data privacy

Examples of policies to consider

Policies which often need to be written specifically for international:

- Opening and maintaining bank accounts
- Procurement
- Hiring of independent contractors abroad
- Leasing or purchasing office space
- Global mobility (incl. hiring of employees abroad)
- Compliance with US Export Control Act, Office of Foreign Assets Control and Foreign Corrupt Practices Act

Going global — other considerations

- Alignment with university’s strategic vision and mission
- US accreditations of foreign programs
- Endowment-foreign investment reporting
- Gifting by foreign sources

War stories

- Large US research nonprofit debarred by United States Agency for International Development (USAID) — inadequate internal controls
- Independent contractors come forward in EU claiming to be employees
  - Settlements in excess of $500,000
  - Six US universities in recent years — study-abroad contractors
- Foreign partner noncompliance
  - Multimillion-dollar tax issue
  - Non-registration, no filings, illegally hiring contractors
- Dedicated international tax unit in Nigeria
  - Audits activities of nonresident companies in order to assess PE risks, related tax implications
- University employee detained in India
  - Stopped at border when flying back to US
  - Prevented from leaving country until university activity disclosed

War stories

What happened in-country	How it was detected
Local team made double payments — one to a vendor and one to a personal account.	New finance director detected the fraud.
Local finance team member created fabricated travel receipts for reimbursement.	Home campus finance team was suspicious of large $$ amounts being paid.
Local finance team colluded to produce fake hotel receipts and steal travel advance funds.	Home campus finance team spotted inconsistencies and initiated outside audit.
Generators and vehicles purchased for significantly more than market value from executive director's relative and profit was split.	Review of transactions by university's US internal audit team during routine audit.

Why the shakedown?

- US federal agencies under scrutiny by media and public for how federal monies are spent
- US and foreign governments budget constraints — looking for revenue opportunities
- Countries creating “whistle-blower” laws to encourage contractors to come forward

Let’s recap …

- Alignment with entity’s strategic vision and mission
- Single point of contact acts as liaison for schools/departments, and works closely with central admin offices to make sure of consistent messaging and timely follow-up
- Include General Counsel’s office with activities requiring analysis
- Assess risks at onset of activity and over activity life
- Internal controls/documentation, policies and procedures
- Consult with advisors with local-country expertise

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