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Foreign Influence and Higher Education Institutions

The Trump administration has advanced a number of initiatives to address the concern that foreign entities may be using the academic research institutions in an attempt to compromise the United States' economic competitiveness and national security. In past month, both Harvard and Yale received letters from the U.S. Department of Education (USED) that they were being investigated for failing to report hundreds of millions of dollars in contracts and foreign gifts. USED is seeking extensive records related to grants, gifts, contracts, and overseas programming.

Several Federal agencies in addition to the USED, including the Department of Energy (DOE), and the Justice Department, the National Science Foundation (NSF), the National Institute of Health (NIH), have been actively investigating and critiquing the foreign investments that higher education institutions receive. USED has invoked Section 117 of the Higher Education Act as the basis for its enforcement actions. Section 117 requires certain institutions that participate in Title IV student assistance programs to submit disclosure reports about gifts received from any foreign source, contracts with a foreign entity, and any ownership interests in or control over the institution by a foreign entity. While this statute has been in place for decades, the Trump administration is the first to regularly enforce this ambiguous provision stating that universities must be transparent about foreign funds. Higher education institutions should act to have the regulations updated and clarified.

In addition to USED's intense scrutiny and enforcement on disclosure of foreign investment, the National Science and Technology Council (NSTC) formally established the Joint Committee on the Research Environment (JCORE) last May. JCORE is leading across agencies coordinating outreach and engagement, establishing and coordinating disclosure requirements, developing best practices for academic research institutions, and developing methods for identification, assessment, and management of risk. JCORE is led by Director of Office of Science and Technology Policy (OSTP) Director Kelvin K. Droegemeier, a researcher and

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former university vice president for research, along with representatives from DOE, NIH, NSF, and the National Institute of Standards and Technology. Director Droegeheimer stated in a letter to the research community that “over the past seven years, some nations have exhibited increasingly sophisticated efforts to exploit, influence, and undermine [U.S. based] research activities and environments.” OSTP has been holding meetings at academic institutions across the nation to consult with researchers and students on matters of research security and other topics. It also requested input on “actions that Federal agencies can take, working in partnership with private industry, academic institutions, and non-profit/philanthropic organizations, to maximize the quality and effectiveness of the American research environment.”

Faced with this increase in regulatory promulgation and enforcement, it is critical that higher education institutions engage on at least the following levels:

Awareness and Training

There are a myriad of laws, regulations and agency policies that all impact how higher educational institutions comply on issues regarding potential foreign influence. Not only are USED, DOE, NSF, NIH, OSTP, and JCORE involved in regulating and administering on these issues, but the Department of Defense, (DOD), the Department of State (DOS), the Department of Commerce (DOC), the Department of Health and Human Services (DHHS), the National Aeronautics and Space Administration (NASA), the Office of Foreign Assets Control (OFAC), and the White House have all promulgated policies that affect higher educational institutions in this area. Michael Best has a team of attorneys that are well versed in the laws and regulations governing these issues and advise our education institution clients on the legal, policy, and regulatory issues that impact our clients' actions. We assist our educational clients in developing awareness and training programs for their staff to identify and handle foreign influence issues in the rapidly evolving regulatory environment.

Contact Jeffrey Peterson of Michael Best for more information.

Developing and Maintaining Compliance Practices

An ounce of prevention is worth a pound of cure, and nowhere is this more true than in the development of effective compliance programs. The DOJ has promulgated standards for assessing the effectiveness of corporate compliance practices, and our attorneys have assisted clients in designing and implementing internal procedures to ensure compliance with regulatory requirements consistent with best practices and to detect and correct practices that may run afoul of the applicable standards. Combining our expertise in those standards with the experience of assisting clients in the creation of effective compliance programs, Michael Best can help your organization stay on the straight and narrow.

Contact Daniel Vaccaro of Michael Best for more information.

Responding to Investigations

Requests from regulatory agencies such as USED, JCORE, DOJ, and any other governing bodies create risks for institutions and their personnel. It is critical that an organization respond to investigatory requests in a manner that mitigates those risks and protects its interests. Michael Best team members, including former prosecutors and regulatory counsel, have experience replying to government investigations and can employ best practices to help our clients respond promptly and resolve any governmental inquiry.

Contact James Fieweger of Michael Best for more information.

Engagement with U.S. Administrative Agencies and Congress

Higher education institutions must prioritize engagement with the administration and Congress to protect their interests and create balanced requirements that eliminate uncertainty and foster innovation. Higher education institutions should determine how they might be impacted and proactively engage with the administration and Congress to ensure that current and future requirements and restrictions related to foreign investment are made in collaboration with the research community and are balanced, clear, and further, rather than obstruct, research.

Contact Sarah Helton of Michael Best Strategies' federal policy team for more information.

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