MORE THAN INNOVATION AND COMPETITION: THE LATEST PROPOSED MONITORING AND ENFORCEMENT MECHANISMS TARGETING FOREIGN INFLUENCE IN U.S. RESEARCH

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Policy and Regulatory Alert

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I. INTRODUCTION

On 8 June 2021, the Senate passed an expansive bipartisan bill aimed at enhancing the country's scientific research and development capabilities. In response to emerging technological competition from foreign innovation sources, the U.S. Innovation & Competition Act (USICA) contemplates devoting US$250 billion to the National Science Foundation, thereby ensuring that the United States maintains its "position as the most innovative and productive nation on Earth."[1]

Yet this recent bill is more than just a financial incentive to innovate. Importantly for funding recipients, including research institutions and academic medical centers, this legislation contains significant research security measures to safeguard American technology and intellectual property. These proposed measures would formally exclude researchers who participate in foreign talent recruitment programs from participating in federally funded research projects. The bill would also augment the government's pre-award scrutiny of federal grants and other transactions involving potential foreign partnerships. In addition, the bill would enhance the government's post-award accountability tools for penalizing disclosure violations that have formed the core of a series of criminal investigations at U.S. institutions in recent years.[2]

While this proposed legislation represents a significant funding opportunity, research institutions will also need to equip themselves with robust compliance programs designed to accommodate the various guardrails of government oversight that the legislation, if enacted, creates or reinforces. Beyond the specific measures designed to root out and punish trade secret theft at American research institutions, the bill's funding measures also provide insight as to the types of research areas that the U.S. views as critical in the geopolitical race for technological advancement.

II. KEY COMPONENTS OF THE BILL

The USICA would establish several significant means for detecting and penalizing the influence of perceived national security threats in U.S. research efforts, including:

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- Creating the Federal Research Security Council (Security Council) to develop federally funded research grant-making policy and management guidance that protects the national and economic security interests of the United States;
- Banning federally funded researchers from participating in foreign talent recruitment programs;
- Requiring the imposition of economic sanctions in response to the foreign theft of U.S. intellectual property or cyberattacks;
- Requiring the Committee on Foreign Investment in the United States (CFIUS) to review foreign gifts to, or contracts with, higher education institutions in excess of US$1,000,000;
- Amending the United States Code to create a separate federal crime for "federal grant application fraud"; and
- Restricting immigration for certain aliens deemed to be a national security risk, especially concerning sensitive technologies.

The bill further designates, among other allocations, US$52 billion for semiconductor production; US$80 billion for artificial intelligence, robotics, and biotechnology; and US$1.5 billion for wireless technologies. Research institutions receiving federal grants that have potential applications in any of these areas should be attuned to this increase in funding, as it signifies the U.S. government's perspective that these technologies are priority development areas and, by extension, constitute priority espionage targets for U.S. adversaries.

III. How Will This Impact Research Institutions?

The USICA serves as the latest chapter in the growing trend of government scrutiny of federal grant awards and the institutions that receive them. As reviewed in our prior alerts (available here and here),[3] the U.S. Department of Justice (DOJ) has previously prioritized coordination among enforcement authorities to bring cases relating to actual or attempted economic espionage at American research institutions. Over the last several years, institutions—classified as "non-traditional collectors" of national security information—have been caught in the middle between an active enforcement environment and the researchers that they employ.[4]

If passed, this bill would formalize uniformity of approaches to foreign influence across grant-making agencies through the Security Council within the Office of Management and Budget. This Security Council would be asked to "develop[] and implement[], across all Executive agencies that award research and development grants, awards, and contracts, a uniform application process for grants"; "[d]evelop[] and implement[] policies and provide guidance to prevent malign foreign interference from unduly influencing the peer review process for federally funded research and development"; and "[i]dentify[] or develop[] criteria for sharing among Executive agencies and with law enforcement and other agencies, as appropriate, information regarding individuals who violate disclosure policies and other policies related to research security."[5] Given these functions, the Security Council would conceivably reconcile differences in approach that previously existed, thereby harmonizing agencies' ability to more seamlessly share information with each other and, if necessary, with the DOJ.

The bill's call for a wind down in federal funding for all researchers who participate in foreign talent recruitment programs underscores institutions' need to take stock of their respective disclosure and affiliation policies and oversight procedures. Section 2303 of the USICA provides a one-year period to wind down involvement in foreign

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government talent recruitment programs. As highlighted in previous alerts,[6] those programs have formed the basis for many criminal investigations into clinical and basic science faculty around the United States.[7] Based upon the text and comments surrounding the bill, it appears that the U.S. government wants institutions to get out of the business altogether of having their researchers collaborate with peers located in, or otherwise associated with, foreign geopolitical adversaries—and it wants institutions to police such collaboration. Specifically, Section 2303(a)(3) instructs "institutions receiving funding" to require funding recipients "to prohibit awards from being used by any individuals participating in a foreign government talent recruitment program of the People's Republic of China, the Democratic People's Republic of Korea, the Russian Federation, or the Islamic Republic of Iran … to the extent practicable."

Of course, the contours of what is "practicable" to enforce remains to be seen. Similarly, the bill does not precisely define who constitutes a "participant" in a talent recruitment program and how such a participant might improperly "use" an award. Nor does it specify a mechanism or information repository through which research institutions will be able to identify participants in a prohibited foreign talent program. Nonetheless, Section 2303 represents the logical conclusion to a steady crescendo of suspicion of such talent programs. Research institutions may want to take active steps to assess the extent to which investigators and researchers on federally funded grants maintain affiliations with potentially sensitive affiliations abroad, including foreign talent recruitment initiatives.

Potential modifications to the federal criminal statutory regime and restrictions on researcher affiliations further underscore the effect of the DOJ's recent criminal prosecutions on policymaking. The legislative push to curb foreign influence does not end here. The USICA also establishes a new, separate federal crime for federal grant application fraud. Section 4494 of the USICA provides that it "shall be unlawful for any individual to knowingly prepare or submit a Federal grant application that fails to disclose the receipt of any outside compensation, including foreign compensation, by the individual." In addition to a fine and potential incarceration, an individual who violates this new law will be prohibited from receiving any federal grants for a five-year period following sentencing. Historically, most criminal investigations involving alleged nondisclosure of foreign collaborations hinge upon theories that researchers knowingly made "false statements" to their institutions and, by extension, to grant-making agencies. The bill thereby creates a new crime more closely tethered to the grant submission process and arguably creates liability not only for the researcher who prepares an application but also the institution that submits it for consideration.

The bill also enhances oversight through new disclosure and review obligations involving gifts and contracts from foreign sources. The bill contemplates review by CFIUS for "any gift to an institution of higher education from a foreign person, or the entry into a contract by such an institution with a foreign person" that "relates to research, development, or production of critical technologies and provides the foreign person potential access to any material nonpublic technical information."[8]

Separately, the bill provides that institutions must "file a disclosure report described in which the institution receives a gift from, or enters into a contract with, a foreign source, the value of which is US$50,000 or more, considered alone or in combination with all other gifts from, or contracts with, that foreign source within the calendar year."[9] The bill further requires faculty and staff to disclose any gifts from any foreign source and for the institution to maintain a policy regarding such disclosures.

Advocacy groups acting on behalf of higher-education institutions contend that these provisions would ultimately detract from American innovation by unnecessarily overextending the monitoring resources of both CFIUS and

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the institutions themselves.[10] Increases in transaction review and disclosure obligations, advocates argue, would disincentivize donors and collaborators from contributing to U.S. research endeavors, thereby decreasing technological advancement in critical research fields.

The tension between oversight and ensuring an ecosystem for innovation is likely to reappear when the House considers the USICA. While it remains possible that the degree of CFIUS involvement may change as the bill moves through the legislative process, research institutions are likely to be asked to disclose more information regarding foreign-source gifts and contracts than under prior regulations. As a result, research institutions would do well to review their existing control environments regarding foreign gifts and faculty/staff disclosures to understand how to operationalize this added requirement.

IV. WHAT COMES NEXT?

While the Senate has spoken and President Biden has expressed his support for the bill,[11] hurdles remain to the enactment of the USICA. Debate in the House of Representatives could reshape the proposed legislation before it becomes law, particularly in light of continued concerns over targeting and potential misconduct in the DOJ's investigation of a Chinese researcher in Tennessee.[12]

However, regardless of the debate that will ensue on Capitol Hill, it remains clear that Congress is inclined to take action that minimizes hurdles to nimble information sharing and increases accountability for actual or perceived attacks on American economic and security interests.

In preparation for such action, academic and private research institutions that receive federal funding should consider assessing the sufficiency of their internal control environments to identify, document, and track financial and nonfinancial support that the institution and its researchers receive from foreign sources, particularly those from China, Russia, North Korea, and Iran. Relevant support would include affiliations with foreign talent recruitment programs regardless of whether such affiliations have resulted in pecuniary support.

Furthermore, institutions should consider pressure testing their internal procedures for preparing and submitting federal grants. Such an exercise would permit institutions to better assess whether—in practice—their compliance departments are capturing all relevant information regarding foreign support for key research personnel. Coupled with scheduling future monitoring efforts at regular intervals, this action can help to prepare institutions to adapt in a quickly evolving research compliance environment.

FOOTNOTES

[1] Press Release, The White House, Statement of President Joe Biden on Senate Passage of the U.S. Innovation and Competition Act (June 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/. Additionally, on 22 June 2021, Congress released a discussion draft of the Cures Act 2.0 providing several new policy proposals, including funding for a new biomedical grant making agency under the National Institutes of Health, called ARPA-H.

[2] *See*, e.g., Press Release, U.S. Dep't of Justice, Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download; Press Release, U.S. Dep't of Justice,

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Former Cleveland Clinic Employee and Chinese "Thousand Talent" Participant Arrested for Wire Fraud (May 14, 2020), https://www.justice.gov/opa/pr/former-cleveland-clinic-employee-and-chinese-thousand-talents-participant-arrested-wire-fraud; Press Release, U.S. Dep't of Justice, University of Arkansas Professor Arrested for Wire Fraud (May 11, 2020), https://www.justice.gov/opa/pr/university-arkansas-professor-arrested-wire-fraud; Press Release, U.S. Dep't of Justice, Researcher at University Arrested for Wire Fraud and Making False Statements About Affiliation with a Chinese University (Feb. 27, 2020), https://www.justice.gov/opa/pr/researcher-university-arrested-wire-fraud-and-making-false-statements-about-affiliation; Press Release, U.S. Dep't of Justice, Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases (Jan. 28, 2020), https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related; Press Release, U.S. Dep't of Justice, University of Kansas Researcher Indicted for Fraud for Failing to Disclose Conflict of Interest with Chinese University (Aug. 21, 2019), https://www.justice.gov/opa/pr/university-kansas-researcher-indicted-fraud-failing-disclose-conflict-interest-chinese.

[3] See also Christopher L. Nasson et al., When DOJ's China Initiative Entangles US Research Orgs, LAW360 (Mar. 11, 2020), https://www.law360.com/articles/1252347/when-doj-s-china-initiative-entangles-us-research-orgs.

[4] Press Release, U.S. Dep't of Justice, Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), https://www.justice.gov/opa/speech/file/1107256/download.

[5] United States Innovation and Competition Act of 2021, S. 1260, 117th Cong. [hereinafter *USICA*], § 7903(b) (2021).

[6] *See* Nasson et al., supra note 3.

[7] Id.

[8] USICA § 3138(a)(1)(B)(vi).

[9] *Id*. at § 6124(a).

[10] Barbara R. Snyder et al., Letter to Senator Bob Menendez and Senator James E. Risch, (Apr. 20, 2021), https://www.aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Science%20%26%20-Security/ForRel%20Section%20138%20Assn.%20Ltr.%20FINAL.pdf

[11] Press Release, The White House, Statement of President Joe Biden on Senate Passage of the U.S. Innovation and Competition Act (June 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] *See* Aruna Viswanatha, Trial of Scientist Accused of Hiding China Work Ends in Hung Jury, WSJ (June 17, 2021) https://www.wsj.com/articles/trial-of-scientist-accused-of-hiding-china-work-ends-in-hung-jury-11623879264; Shawna Chen, FBI China spy probe faces backlash as case against professor ends in mistrial, AXIOS (June 26, 2021) https://www.axios.com/china-spying-trump-investigation-1aff8036-ec27-44dc-a4e7-f3adb3055447.html.

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