

June 22, 2020

# Senate Introduces the “Safeguarding American Innovation Act,” Targeting Foreign Influence and Unreported Foreign Ties in Research

Last Thursday, June 18, a long-awaited, bipartisan bill to address the federal government’s concerns about “foreign influence” in research, the “Safeguarding American Innovation Act,” was introduced in the Senate.<sup>i</sup> Led by Senators Rob Portman and Tom Carper, the Chairman and Ranking Member of the Permanent Subcommittee on Investigations (PSI) of the Senate Committee on Homeland Security and Governmental Affairs, the bill follows extensive effort by the PSI and others in the Congress to better protect U.S. national and economic security by seeking to document and address foreign state efforts, thought to be largely those of the People’s Republic of China (PRC), that may involve direct and indirect attack on basic and other research activities. The bill, the “Safeguarding American Innovation Act” (“Proposed Legislation”), is important for universities, academic medical centers and industry, as it

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- authorizes new limits on visiting foreign scientists,
- expands law enforcement authority over grant compliance (making certain grant compliance failures a crime) and federal grant-reporting duties, and
- lowers the reporting threshold for foreign gifts to institutions of higher education.

As of this writing, the Proposed Legislation has fourteen co-sponsors in the Senate, though no companion bill in the House.

Congress, the Department of Justice, the Federal Bureau of Investigation, the National Institutes of Health (NIH), the National Science Foundation (NSF), and other federal agencies have focused in the last several years on exposing the methods and efforts of foreign countries to threaten U.S.-funded research. Last year, the Senate PSI cited PRC as “the most aggressive” in its efforts to use “non-traditional collectors” like U.S. investigators to obtain access to U.S. research results.<sup>ii</sup> The NIH and NSF and other federal research funders have emphasized that the issues of concern to them are not limited to the PRC, however, and that they are not limited to researchers of certain ethnic backgrounds or political affiliations.

Strategies to address these government-wide concerns found in the Proposed Legislation include:

- establishing a Federal Research Security Council tasked with developing uniform standards across the federal research agencies;
- criminalizing the failure to provide material information on foreign relationships in federal research grants;
- protecting certain sensitive technologies;
- denying visas to certain foreign collaborators; and
- expanding the Section 117 foreign gifts reporting obligations for academic institutions.

The major provisions of the Proposed Legislations are outlined below, and the accompanying table compares provisions of current law with the amendments in the Proposed Legislation. In all, the Proposed Legislation attempts to limit the

openness of the U.S. research enterprise, provide uniformity across the federal research agencies, coordinate enforcement mechanisms among various federal agencies, and ensure that institutions crack down on any potential bad actors.

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## Establishing the Federal Research Security Council

Reflecting a push for more harmonization in the federal research grant-making process that has been energized by concerns around foreign influence, the Proposed Legislation establishes a “Federal Research Security Council” (the “Council”) within the Office of Management and Budget (“OMB”) to address grants policy and other issues. The Council would be chaired by a senior official of OMB, with support from two designated advisors – the Director of the White House Office of Science and Technology Policy as the “lead science advisor” and the Director of the National Counterintelligence and Security Center as the “lead security advisor.” The Chair’s duties under the bill appear to be delegable, making the prospect of shared leadership by these two individuals feasible. Other members specified in the Proposed Legislation include representatives from science, research, and security agencies across the federal government, including the Departments of Energy, Health and Human Services, Defense, Homeland Security, and Justice, as well as the National Science Foundation, the National Institutes of Health, the Federal Bureau of Investigation, the Office of the Director of National Intelligence, and others. The Chair has authority to add representatives from other executive agencies.

The Council’s duties include standardizing the federal grant application process and increasing oversight of federally funded research. To that end, the Council is tasked with developing: (1) “a uniform grant application process” for all agencies that award “research and development grants,” which is defined broadly in the bill, (2) “a uniform and regular reporting process for identifying persons participating in federally funded research and development or that have access to nonpublic information, data, research findings, and research and development grant proposals,” and (3) “criteria ... for sharing and receiving information” on “Federal research risks in order to mitigate such risks....” The Council is tasked also with developing and implementing a strategic plan to address and manage federal research security risks as well as actions to reduce these risks.

Additionally, the Council, along with the Director of the National Counterintelligence and Security Center, is tasked with establishing a process for issuing warnings to the U.S. research community and the public concerning vulnerabilities in international scientific cooperation that can undermine the U.S. research community or pose risk to federally funded research in general. While the Proposed Legislation does not state how the Council will gather the information for such warnings, all public warnings must describe any (i) activities by a foreign country to undermine U.S. research activities or misappropriate federally funded research; (ii) efforts by strategic competitors to exploit a foreign country’s research enterprise that places at risk the science and technology of the foreign country or U.S.-funded research; and (iii) practices of a foreign country’s research enterprise that do not align with U.S. scientific values, including openness, reciprocity, and merit-based competition.

While it is too soon to predict how the bill would be implemented across the government and the impact it will have, we expect that, if passed into law, Council would bring increased uniformity to the way that federal research grants are awarded and monitored. Further, the public warning process may aid compliance offices at research institutions and academic medical centers, as the warnings will provide a guide for the types of behaviors to flag when reviewing disclosures from their researchers. That said, the individual statutory mandates and institutional missions of individual funding agencies may limit complete standardization.

## Criminalizing the Failure to Provide Foreign Compensation and Material Information in Federal Grant Applications

The Proposed Legislation introduces “Federal Grant Application Fraud” as a separate crime under Title 18 of the U.S. Code, making clear that it is a crime to provide false information or withhold material information in a federal grant application. Section 4 of the Proposed Legislation specifically makes the failure to disclose the receipt of “any outside compensation, including foreign compensation” unlawful. It is important for academic institutions and investigators to note that “foreign compensation” is broadly defined to include monetary compensation, as well as non-monetary benefits such as titles, access to laboratories or other resources, and “other benefit[s]” received from a foreign government, a foreign government institution, or a foreign public enterprise. Foreign entities are likewise broadly defined to include foreign government factions, subnational administrative entities, institutions subject to the control of, or regulation by a foreign government, as well as businesses over which a foreign government directly or indirectly exercises a dominant influence.

Given the Proposed Legislation’s broad definitions, we expect some challenges as institutions modify their existing policies to protect investigators from risks. As is the current position of entities like the National Institutes of Health and the National Science Foundation, award recipients and researchers should consider erring on the side of disclosure regarding any engagements with foreign entities. The value of this approach may become acute if the Proposed Legislation is enacted. Noncompliance risks significant new penalties including fines, imprisonment for not more than five years, or both (in addition to possible treble damages under the False Claim Act) Investigators would also be prohibited from receiving a federal grant for five years starting on the date a sentence is imposed.

## Denying Visas to Certain Visiting Collaborators

The Proposed Legislation introduces new grounds for restricting the entry into the U.S. of certain foreign researchers, which could interfere with the efforts of entities serving as visa sponsors to bring in foreigners to assist with research activities.

Current law provides for the inadmissibility of certain aliens who seek to enter the U.S. to engage in unlawful activity, including espionage, sabotage, violation of export laws, or violent overthrow of the U.S. government.<sup>iv</sup> The Proposed Legislation additionally provides for the inadmissibility of aliens who seek to acquire export-controlled goods, technologies, or sensitive information if the Secretary of State has determined that such acquisition by a category of aliens that includes such alien would be contrary to an articulable national security interest of the U.S. In implementing this new ground for inadmissibility, the Department of State, in cooperation with other federal agencies, will be required to establish criteria for determining whether aliens meet this new classification after considering factors such as the alien’s affiliation with foreign entities seeking to misappropriate domestic research or undermine the integrity and security of the U.S. research community. The Secretary of State will also be required to report to Congress on the application of these criteria and the use of machine-readable documents in the visa application process.

While the Proposed Legislation does not mention the PRC specifically, it bears resemblance to other recent efforts to restrict the entry of PRC researchers into the United States. On May 27, 2020, a bill introduced by Senators Tom Cotton (R-AR) and Marsha Blackburn (R-TN) proposed prohibiting PRC citizens from receiving visas related to graduate and post-graduate scientific research.<sup>v</sup> Similarly, on May 29, 2020, President Donald Trump issued a proclamation suspending the entry into the U.S. of any PRC researcher affiliated with the PRC’s “military-civil fusion strategy,” which the proclamation described as acquiring and diverting foreign technologies, specifically critical and emerging technologies, to incorporate into and advance the PRC’s military capabilities.<sup>vi</sup> The provisions of the Proposed Legislation are broader than either of these two measures because they can be applied to both PRC nationals and aliens of other nationalities. Nevertheless, the PRC appears to be the immediate focus of the drafters, as evidenced by Senator Portman’s remarks when introducing the Proposed Legislation, in which he criticized actions of the PRC government.<sup>vii</sup>

## Protection of Sensitive Technology

The Proposed Legislation requires sponsors of certain foreign scientists to take new steps to prevent the unauthorized release of nationally important technologies, which could restrict a sponsor's ability to include foreign scientists in research involving these technologies.

Current law authorizes the President to promote and support educational and cultural exchange programs with foreign individuals in order to strengthen international cooperative relations.<sup>viii</sup> The Proposed Legislation provides that, in exercising this authority, the President must protect technologies regulated by export control laws important to national security and economic interests by requiring sponsors of foreign exchange scientists to (i) disclose whether the scientists will have released to them controlled technology or technical data regulated by export control laws; (ii) provide a plan that establishes appropriate program safeguards to prevent unauthorized release of controlled technology or technical data regulated by export control laws; and (iii) demonstrate that programs that will release controlled technology or technical data to an exchange visitor at the sponsor organization through exchange visitor programs have received appropriate governmental authorization. If enacted, these provisions would place new burdens on research sponsors seeking to collaborate with foreign scientists and require new policies. The goal of the provisions, as Senator Portman stated when introducing the Proposed Legislation, is to “help streamline the process for the State Department and for the research institutions.”<sup>ix</sup> Much will be left to the discretion of the State Department.

## Expanding the Section 117 Foreign Gifts Reporting Obligations for Academic Institutions

The Proposed Legislation requires colleges and universities to report foreign gifts of \$50,000 or more (the current threshold is \$250,000),<sup>x</sup> either alone or when combined with other gifts and contracts with the same foreign source in a calendar year, to the Department of Education. This is a dramatic reduction in the threshold for reporting, but it is not unique to the Proposed Legislation. Senators Portman, Rubio and Cotton introduced legislation in March, the Foreign Influence Transparency Act, which was a re-introduction of legislation Senators Rubio, Cotton and others proposed in 2018, which provides the same reduction.<sup>xi</sup> The Proposed Legislation adds the requirement of filing disclosure reports when a foreign source gains ownership of, or control over, an institution. These reports would then be made electronically available to the public on a searchable database rather than simply as public records open to inspection as is currently the case.

Of note, the Proposed Legislation expands the term “gift” to include “human resources, or payment of any staff” as well as gifts of money or property. It also expands the definition of “restricted or conditional gift or contract” to cover gift or contract provisions establishing institutes or instructional programs. Given these broadened definitions, institutions will need to be diligent about tracking and disclosing ties with foreign entities, even if not explicitly monetary. While it is unclear how the Department of Education may implement this section, if enacted, new regulations from the Secretary of Education with more detailed reporting instructions, particularly relating to how institutions can protect their proprietary information while maintaining transparency in their disclosures, would normally be expected.

Additionally, the Proposed Legislation created new penalties for noncompliance. It would impose fines up to three times the amount of the gift or contract with the foreign source for repeated failing to file the required disclosure reports. Should the Proposed Legislation be enacted, institutions will need to modify existing disclosure policies and expand training and educating for faculty, so that all foreign gifts and contracts are disclosed comprehensively and in a timely manner to enable compliance with these new requirements.

This Alert summarizes key elements of the proposed legislation. For further information, please contact one of the authors or your usual Ropes & Gray advisory.

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<sup>i</sup> S. 3997, 116th Cong. (as introduced June 18, 2020); *see* 166 Cong. Rec. S3101, S3104 (daily ed. June 18, 2020).

<sup>ii</sup> U.S. Senate Permanent Subcomm. on Investigations, 116th Cong., Threats to the U.S. Research Enterprise: China's Talent Recruitment Plans 1 (2019); *see also* Jeffrey Mervis, *Fifty-four scientists have lost their jobs as a result of NIH probe into foreign ties*, *Science* (June 12, 2020), available at <https://www.sciencemag.org/news/2020/06/fifty-four-scientists-have-lost-their-jobs-result-nih-probe-foreign-ties>; Michael S. Lauer, NIH Deputy Director for Extramural Research, ACD Working Group on Foreign Influences on Research Integrity Update (June 12, 2020), available at <https://acd.od.nih.gov/documents/presentations/06122020ForeignInfluences.pdf>.

<sup>iii</sup> *See, e.g.*, Request for Information on the American Research Environment, 84 Fed. Reg. 65194 (Nov. 26, 2019); Joint Comm. on the Research Env't, Nat'l Sci. & Tech. Council, Summary of the 2019 White House Summit of the Joint Committee on the Research Environment (JCORE) (Nov. 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/11/Summary-of-JCORE-Summit-November-2019.pdf>.

<sup>iv</sup> *See* 8 U.S.C. § 1182(a)(3)(A)(i).

<sup>v</sup> *See Cotton, Blackburn, Kustoff Unveil Bill to Restrict Chinese STEM Graduate Student Visas & Thousand Talents Participants*, Tom Cotton: Arkansas Senator (May 27, 2020), [https://www.cotton.senate.gov/?p=press\\_release&id=1371&utm\\_medium=email&utm\\_source=FYI&dm\\_i=1ZJN,6W77X,1JDFZD,ROVI7,1](https://www.cotton.senate.gov/?p=press_release&id=1371&utm_medium=email&utm_source=FYI&dm_i=1ZJN,6W77X,1JDFZD,ROVI7,1).

<sup>vi</sup> *See Proclamation on the Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People's Republic of China*, The White House (May 29, 2020), [https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-nonimmigrants-certain-students-researchers-peoples-republic-china/?utm\\_medium=email&utm\\_source=FYI&dm\\_i=1ZJN,6W9VX,1JDFZD,RP8XK,1](https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-nonimmigrants-certain-students-researchers-peoples-republic-china/?utm_medium=email&utm_source=FYI&dm_i=1ZJN,6W9VX,1JDFZD,RP8XK,1).

<sup>vii</sup> 166 Cong. Rec. 112, 3055-57 (daily ed. June 17, 2020).

<sup>viii</sup> *See* 22 U.S.C. § 2452(b)(5).

<sup>ix</sup> 166 Cong. Rec. 112, 3057 (daily ed. June 17, 2020).

<sup>x</sup> 20 U.S.C. § 1011f (2006), available at <https://www.govinfo.gov/app/details/USCODE-2011-title20/USCODE-2011-title20-chap28-subchapI-partB-sec1011f>.

<sup>xi</sup> *See* S. 3313, 116th Cong. (as introduced Feb. 13, 2020); *see also* H.R. 5336, 115th Cong. (as introduced Mar. 20, 2018); S. 2583, 115th Cong. (as introduced Mar. 21, 2018).