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Louisiana's Higher Education Foreign Security Act of 2022 Signals Continued Scrutiny of Foreign Influence in American Academia

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On June 18, Louisiana Governor John Bel Edwards signed into law the Higher Education Foreign Security Act of 2022 (the "Act"), imposing new policy requirements on Louisiana postsecondary education institutions. The Act takes effect July 1, 2023, and requires covered institutions to establish policies governing foreign gift reporting, screening of foreign researchers, and international travel approval and monitoring. Although the Act is limited in scope to institutions of higher education in Louisiana, it shares some features with a gubernatorial executive order in Florida applicable to institutions there, and moreover, may presage similar actions by other state legislatures and governors. We could well have, over the next few years, a state-by-state patchwork of regulatory requirements applicable to researchers, students, and faculty from outside the U.S., as well as to scholarly activities and collaborations with researchers outside the U.S.

Overview of the Act

The Act applies to Louisiana colleges and universities, nonpublic postsecondary institutions that are members of the Louisiana Association of Independent Colleges and Universities, and any other entity offering a program of postsecondary education that has a physical presence in Louisiana and is required to report foreign gifts or contracts pursuant to 20 U.S.C. § 1011f, the federal statute governing disclosures of foreign gifts.

- **Foreign Gift Reporting**

The Act requires "postsecondary education institutions" to report, on a biannual basis, any gift of $50,000 or more received directly or indirectly (*i.e.*, through an intermediary) from a foreign donor. The reporting obligation extends to situations in which a covered institution receives multiple gifts totaling $50,000 or more over the course of a fiscal year. A "gift" is defined as a promise or provision of "any contract, gift, grant, endowment, award, scholarship, or donation of money or property of any kind."

Reports of gifts must include the following information:

- The amount of the gift and the date received;
- The contract start and end date, if the gift is a contract;
- The name, country of citizenship, and country of residence or domicile of the foreign source; and
- A copy of any gift agreement between the foreign source and the institution, signed by the foreign source and chief administrative officer of the institution, including a detailed description of the purpose for which the gift is to be used by the institution; the identities of the persons whom the gift is explicitly intended to benefit; and any applicable conditions, requirements, restrictions, or terms attached to the gift regarding the control of curricula, faculty, student admissions, student fees, or contingencies placed upon the institution to take a specific public position or to award an honorary degree.

The Act imposes annual auditing requirements on covered institutions. Effective July 1, 2024, on an annual basis, the internal auditor of a covered institution's Board of Regents will be required to inspect or audit a random sample of at least 5% of the total number of gifts disclosed. In addition, the Act imposes ad hoc auditing duties subject to requests by the governor, president of the Senate, or speaker of the House of Representatives of Louisiana.

Knowing, willful, or negligent failure to comply with the gift reporting requirements may subject the offending institution to civil penalties of 105% of the amount of the undisclosed gift, payable only from non-state funds of the institution.

- **Screening Foreign Researchers**

The Act requires screening of each person seeking employment in a research or research-related support position, as a graduate student for such position, or as a visiting researcher. The screening must include assessment of whether the applicant:

- Is a citizen of a foreign country and not a permanent resident of the United States;
- Is a citizen or permanent resident of the United States who has an affiliation with an institution or program in a "foreign country of concern" (discussed below); or
- Has at least one year of prior employment or training in a foreign country of concern, except for employment or training by an agency of the U.S. government.

Any applicant meeting the above criteria must submit various documentation to the academic institution, including (1) current passport; (2) most recently submitted Online Nonimmigrant Visa Application, DS-160; and (3) complete resume and CV (including details on current and pending research funding, non-university activities, and affiliations with institutions or programs in foreign countries of concern).

Any qualifying institution must maintain a policy for reviewing the veracity of the information provided (*i.e.,* "verifying all attendance, employment, publications, and contributions listed in the application prior to any offer of a position to the applicant"). Verification steps may include:

- Searching public databases for research publications and presentations;
- Searching public conflict–of-interest records to identify research publications that may have been omitted from the application;
- Contacting employers from the previous ten years to verify employment;
- Contacting all institutions of higher education attended to verify enrollment and educational progress;
- Searching public listings of persons subject to sanctions or other restrictions under federal or state law; and
- Requesting further investigation (including by the FBI and/or the Louisiana State Police) if any source raises security concerns about an applicant's relationship with a foreign country of concern.

Notably, the Act does not appear to prescribe what specific diligence steps a covered institution must take in respect of an in-scope applicant. Rather, the Act mandates that covered institutions develop and implement policies requiring the

performance of *some* level of due diligence. In practice, however, it is foreseeable that the illustrative diligence steps described in the Act may be interpreted as important (or indispensable) components of an effective institutional policy.

- **International Travel Approval and Monitoring Program**

The Act requires covered institutions receiving state appropriations and having a research budget of at least $10 million **to establish an international travel approval and monitoring program. The program must require preapproval and screening by the institution of any employment-related foreign travel and employment-related foreign activities of any faculty member, researcher, or any other research department staff.**

The Act requires travel preapproval to be based on the applicant's review and acknowledgment of guidance published by the institution relating to foreign countries of concern. The traveler also must commit to complying with the institution's limitations on travel and activities abroad and to obey all applicable federal laws. In addition, **each covered traveler must report any gifts of funds or promises to pay offered by a foreign country of concern or any entity representing the interests of a foreign country of concern.**

Covered institutions are required to maintain records of all foreign travel requests, reimbursed expenses, purposes of travel, and any payments or honoraria received during the travel.

Initial Observations & Open Questions

1. The Definition of "Foreign Country of Concern" Is Vague

The Act defines "foreign country of concern" to include "any country subject to any sanction or embargo program administered by the Office of Foreign Assets Control within the United States Department of [the] Treasury, including any federal license requirement; custom rules; export controls; restrictions on taking institution property, including but not limited to intellectual property abroad; restrictions on presentations, teaching, and interactions with foreign colleagues; and other subjects important to the research and academic property of the institution." The Act also references federal regulations prescribing export controls (including the International Traffic in Arms Regulations), underscoring that jurisdictions subject to those controls are included in the Act's definition of "foreign country of concern."

This definition could be read broadly to cover a wide range of jurisdictions, as even countries perceived to be friendly to the U.S. are subject to some level of export controls (*e.g.*, a license is required to export an item controlled under the International Traffic in Arms Regulations to *any* jurisdiction, subject to very limited exceptions).

- At minimum, at present, we would expect "foreign country of concern" to be interpreted to include China, Cuba, Iran, North Korea, Russia, Syria, Venezuela, and contested regions of Ukraine, which are the countries currently subject to comprehensive (or near-comprehensive) sanctions administered by the Office of Foreign Assets Control (OFAC).

- "Foreign country of concern" also could be interpreted to encompass the full scope of jurisdictions subject to a policy of denial for the export of defense articles and defense services: Afghanistan; Belarus; Burma; Cambodia; Central African Republic; China; Cuba; Cyprus; Democratic Republic of Congo; Eritrea; Ethiopia; Haiti; Iran; Iraq; Lebanon; Libya; North Korea; Russia; Somalia; South Sudan; Sudan; Syria; Venezuela; and Zimbabwe.

Given U.S. scrutiny of Chinese involvement in higher education—as well as scrutiny of Chinese investment in the United States more generally—it is foreseeable that the Act will be applied with particular focus on China.

2. The Act's Approach Is Aligned with Federal Government Scrutiny of Foreign Influence

Although adopted at the state level, the policy is consistent with a broader trend of scrutiny of foreign influence and investment across a range of federal bodies, including the Department of Justice (DOJ), the interagency Committee on Foreign Investment in the United States (CFIUS), the National Institutes of Health (NIH), the National Science Foundation (NSF), the Department of Energy (DOE), the Department of Defense (DoD), Department of the Treasury, Department of Commerce, Department of State, and the National Aeronautical and Space Agency (NASA), as well as by other state governments.

From national security reviews of foreign investments in U.S. businesses by CFIUS to disclosure requirements under the *Beneficial Ownership Information Reporting Requirements* final rule recently issued by the Financial Crimes Enforcement Network (FinCEN), to the DOJ's Strategy for Countering Nation-State Threats (which replaced the China Initiative), the United States appears embarked on a whole-of-government approach to monitor, and in some cases combat, the influence of China and other countries perceived as threats to the national security and/or economy of the United States.

3. Other States May Adopt Similar Laws

Other state legislatures, including in Indiana, have introduced bills imposing on public universities reporting requirements of ties to foreign countries and entities. **In June 2021, Florida Governor Ron DeSantis signed into law a measure that imposes reporting requirements on higher education institutions receiving foreign gifts greater than $50,000 in value and mandates rigorous screening of foreign researchers.** As such, although only institutions in Louisiana are required to comply with the Act, state-level legislative activity evinces broader support for efforts to monitor (and curb) certain foreign influence and investment in the United States.

4. The Act May Require the Development of Innovative New Compliance Programs

Generally, due diligence and restricted party screening of counterparties can be conducted—at reasonably low cost—with the assistance of commercially available software solutions or by external risk management consultancies (for which turnaround times can range from one to two days to several weeks, depending on scope of review). However, these solutions—whether purchased for internal use or engaged on a case-by-case basis—are not created equal.

For example, many risk management providers—whose primary client base, at least historically, has been composed of financial institutions and investors—have developed tiered service offerings that include:

- Screening against sanctions, debarment, and watch lists;
- Litigation and criminal history searches;
- Degree verification;
- Adverse media searches; and
- For a cost premium, discreet local source interviews concerning research subjects.

However, the scope of these offerings varies by provider and may be significantly affected by local law (*e.g.*, litigation and criminal records are not readily available in many jurisdictions) and custom (*e.g.*, certain countries provide a greater level of transparency than others in regard to criminal and employment records and other personally identifiable information).

In addition, the diligence steps described in the Act (*e.g.*, publications searches, employment verification)—while not necessarily prescriptive, depending on the law's interpretation—may not be within the scope of currently-offered commercial screening services. Unless a solution is developed that is tailored to the Act, covered institutions may need to rely on a patchwork of different processes and functions to fulfill their expectations. For example, the Act's expectations might be accomplished through a combination of a:

- Human Resources-driven processes to assess which applicants qualify for heightened scrutiny and contact references (*e.g.*, the prior employers and universities attended); and

- Research-driven processes to verify potential ties to foreign countries of concern and publication history.

Because the Act and similar legislative initiatives represent a relatively new and innovative approach to combating the influence of countries of concern, affected institutions (in Louisiana and elsewhere) may need to consider a combination of internal and external resources to achieve compliance on a prospective basis.