SPRING 2012

Contacts:

Amy C. Foerster
Co-Chair

James A. Keller
Co-Chair

William E. Manning
Co-Chair

James D. Taylor, Jr.
Vice Chair

Saul Ewing LLP

Higher Education Practice

Higher Education Highlights

The Newsletter of the Higher Education Practice

Contents

Will the U.S. Supreme Court Uphold Race-Based Affirmative Action?

By Christina D. Riggs

The United States Supreme Court will evaluate the issue of race-based affirmative action in higher education for the first time since 2003. The case, styled *Fisher v. The University of Texas at Austin*, has the potential to eliminate any consideration of race in university admissions.

Petitioner Abigail Fisher, a white female, brought suit in 2008 after she was denied admission to the University of Texas at Austin (UT), claiming she was discriminated against on the basis of race.[1] Fisher challenges UT's admission policy, which considers race among other factors, violates the Constitution's promise of equal protection.

UT's Challenged Race-Conscious Admissions Policy

Like many universities, UT has continually revised its admissions program in an effort to comply with controlling judicial precedent and legislative mandates. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 222 (5th Cir. 2011) ("*Fisher II*"). Until 1996, UT selected candidates using two criteria: Academic Index and race. Id. UT's use of race as an admissions criterion ended in 1996 when the Fifth Circuit ruled race-conscious admissions programs unconstitutional. *Id.* at 223 (citing *Hopwood v. Texas*, 78 F.3d 932, 934–35 (5th Cir. 1996)).

In response to *Hopwood*, UT deployed a Personal Achievement Index (PAI) to be considered along with the applicant's Academic Index. The PAI looked beyond test scores to identify otherwise qualified applicants. Although the PAI was facially race-neutral, it was "designed in part to increase minority enroll-

1 In the lower courts, Fisher was joined by plaintiff Rachel Multer Michalewicz, another white female who was denied undergraduate admission to UT. Ms. Michalewicz did not join in Fisher's petition for certiorari.

ment." *Fisher II*, 631 F.3d at 223. Also in response to *Hopwood*, the Texas Legislature enacted the Top Ten Percent Law, which mandates that the top 10 percent of students graduating from in-state public high schools must be automatically admitted to any Texas state university, including UT. *Id.* Similar to UT's PAI, "the Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose." *Id.* at 224.

Years later, UT's admissions process changed again following the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which effectively overruled *Hopwood*. *Id.* at 225. In *Grutter*, by a 5-4 decision, the Supreme Court upheld a race-conscious admissions policy at the University of Michigan's law school, finding the schools' policy was sufficiently narrowly tailored to meet a compelling government interest, namely, a diverse student body. *Id.* at 308-09. In doing so, the Court accepted the school's stated need for diversity, but cautioned that race-conscious admissions plans are acceptable only when the university makes individualized considerations in which race is part of a holistic determination. *See id.* at 336-37.

In response to *Grutter*, UT adopted a new admissions policy reintroducing racial and ethnic preferences as one of many "special circumstances" or factors that UT considers in scoring an applicant's PAI. *Id.* at 226, 229. As a result, UT effectively added racial considerations back into the affirmative action mix.

District and Appellate Courts Uphold UT's Admissions Policy But Closely Examine the Teachings of *Grutter*

At the district court level, Fisher argued that UT's revised policy resulted in the denial of her application because of her race, as she had academic credentials exceeding those of admitted minority candidates. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009) ("*Fisher I*"). UT defended its limited consideration of race as a "narrowly tailored" means to achieve racial diversity, consistent with *Grutter*. *See id.* at 602. The district court agreed and granted summary judgment in favor of UT. *Id.* at 612.

On appeal, a panel of the Fifth Circuit Court of Appeals affirmed the district court's holding, albeit with a special concurrence expressing strong disapproval of the *Grutter* precedent. *See Fisher II*, 631 F.3d at 248.[2] In affirming the district court, the Fifth Circuit rejected three arguments posed by Fisher, namely, that: (1) UT's true motive was racial balancing, as opposed to an increase in educational classroom diversity; (2) facially race-neutral alternatives, like the Top Ten Percent Law, were not actually race-neutral; and (3) UT's minority enrollment already surpassed a critical mass, such that UT's race-conscious measures were no longer necessary. *See id.* at 234. Interestingly, the Fifth Circuit's ruling concludes, "We are satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported by the 'serious, good faith consideration' required by *Grutter*." *Id.* at 247.

Fisher petitioned for rehearing *en banc*. *See Fisher v. University of Texas at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) ("*Fisher III*"). In a sharply divided vote of nine to seven, the Fifth Circuit denied the request to rehear the matter *en banc*, but not without a vehemently worded dissent. *Id.* The dissent to the rehearing denial argued that the panel decision misapplied *Grutter* in three ways:

> First, it adopts a new 'serious good faith consideration' standard of review, watering down *Grutter's* reliance on strict narrow tailoring. Second, it authorizes the University's race-conscious admission program although a race-neutral state law (the Top Ten Percent Law) has already fostered increased campus racial diversity. Finally, the panel appears to countenance an unachievable and unrealistic goal of racial diversity at the class room level to support the University's race-conscious policy.

Id. at 303 (Jones, C.J., dissenting).

Judge Jones's stirring dissent, coupled with Judge Garza's strong concurrence to the lead opinion, was indicative of an

2 At the circuit level, Judge Higginbotham wrote the lead opinion ruling that UT's policy was consistent with *Grutter's* precedent. Judge King concurred to note that he did not join in the lead opinion to the extent that it called into question the constitutionality of the Top Ten Percent Law. *Id.* at 248. Judge Garza wrote an extensive concurrence expressing the view that *Grutter* was wrongly decided and urging the Supreme Court to revisit the use of race in university admissions. *Id.* at 248 ("I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the error.") (Garza, J., concurring).

ongoing struggle over the constitutionality and application of *Grutter*'s teachings. It is, most likely, this struggle that positioned the matter for review by the United States Supreme Court.

The Supreme Court Grants Certiorari

On February 21, 2012, upon a petition filed by Fisher, the United States Supreme Court granted certiorari on the question of:

> Whether [the] Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permits the University of Texas at Austin's use of race in undergraduate admissions decisions?

Fisher v. Univ. of Tex. at Austin, Civil Action No. 11-345. The *Fisher* case supplies the High Court with a platform to not only reexamine *Grutter*'s rationale, but to declare an end to the era of race-conscious admissions programs entirely. We can project a possible outcome based on the Justices' historical treatment of this issue.

Roadmap to the Anticipated Outcome in *Fisher*

Justice O'Connor, in her majority opinion in *Grutter*, predicted the day would come when "the use of racial preferences will no longer be necessary" in admission decisions to foster educational diversity. Of course, Justice O'Connor expected that day to arrive in "25 years," or 2028. *Grutter*, 539 U.S. at 310. The Court's decision to revisit the issue now — less than a decade after *Grutter* — may accelerate Justice O'Connor's deadline. Why the new timetable? A shift in the Court's composition is the likely cause.

Retired Justice O'Connor cast the deciding vote in *Grutter*'s 5-4 decision, but her seat was filled by Justice Samuel Alito, Jr. Justice Alito, along with conservatives Chief Justice Roberts, Justice Scalia and Justice Thomas, has been skeptical of government programs using race to achieve integration. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007) (limiting the use of race to achieve integration in public school districts); *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658 (2009) (limiting use of race as a consideration in hiring and promotion decision). By contrast, Justices Ginsburg, Breyer and Sotomayor have been more favorable to such programs. *Parents Involved*, 551 U.S. at 803 (Justices Breyer and Ginsburg dissenting); *Ricci*, 129 S. Ct. at 2689 (same).[3]

In light of this Court's new composition, and the recusal of Justice Elena Kagan (who previously advocated for UT as U.S. Solicitor General), the *Fisher* outcome may hinge on Justice Anthony Kennedy, the key swing voter on today's Court. How might Justice Kennedy rule? His dissent in *Grutter* is telling. There, Justice Kennedy accepted the idea that racial diversity can be a compelling state interest justifying an affirmative action program, but only if achieved through a narrowly tailored "system where individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392-93 (Kennedy, J., dissenting).

This carefully worded dissent suggests that the anticipated *Fisher* decision may simply restrict or further refine (as opposed to eliminate) the use of racial and ethical preferences in the admissions process. If so, the specific outcome in *Fisher* will turn on whether or not UT's program is narrowly tailored to achieve a diverse student body. On the other hand, despite Justice Kennedy's carefully worded decisions, it is important to note that he has never voted to uphold an affirmative action program. And, as a result, he could side with strict conservatives — resulting in a wholesale elimination of affirmative action.

The justices are expected to hear oral arguments in October or November and issue a decision in the spring or summer of 2013. Stay tuned.

3 The Court's majority decision in *Ricci* reversed a decision by Justice Sotomayor, who had been part of a unanimous panel on the U.S. Court of Appeals for the Second Circuit which endorsed the lower-court ruling upholding the use of race consideration in hiring and promotional practices.

This article was written by Christina D. Riggs, a member the Firm's Higher Education Practice. Christina can be reached at 215.972.7810 or criggs@saul.com.

UCLA and Professor Face Fines and Criminal Charges in the Aftermath of Fatal Lab Fire

By Amy L. Piccola

The Lab Fire

UCLA principal investigator Dr. Patrick Harran hired Sheharbano "Sheri" Sangji as a research assistant on October 13, 2008. Sangji graduated with a bachelors degree in Chemistry from Pomona College on May 28, 2008 and had worked for the four-month period between her graduation and employment at UCLA as a Synthetic Chemist at Norac Pharma. While at Norac, Sangji was closely supervised and did not perform any independent lab work. Four days after she was hired by UCLA, Dr. Harran assigned Sangji to complete a reaction to produce Vinyllithium, which was to be used in furtherance of research Dr. Harran was conducting. The reaction, which is classified as a moderately complex procedure, involves the use of a number of highly flammable/volatile solvents and reagents. Sangji performed the work under the supervision of a postdoctoral researcher.

On December 29, 2008, Sangji was attempting to conduct the same Vinyllithium reaction, this time on a scale three times larger than the first reaction and without supervision. While performing the work, Sangji was using a two-inch long needle to extract t-butyl lithium, a chemical compound that ignites instantly when exposed to air, instead of the one to two foot long needle specified by the compound's manufacturer. During the extraction, the plunger of the syringe became dislodged from the syringe barrel, causing the t-butyl lithium to be released, spilling onto Sangji's torso and hands and immediately catching fire. Sangji, who was wearing a synthetic sweater, not a protective lab coat, ran in the opposite direction of the lab's emergency shower. Another researcher attempted to extinguish the flames using his lab coat. When this failed, the second researcher poured water on Sangji from a nearby sink. Sangji sustained second and third degree burns over approximately 43 percent of her body and inhalation injuries from exposure to the t-butyl lithium. Sangji succumbed to her injuries in January 2009.

The Investigation & Fines

The California Division of Occupational Safety and Health ("Cal/OSHA") investigated Sangji's accident, concluding that Sangji had not been properly trained and was not wearing protective clothing at the time of the incident. Cal/OSHA also reported that UCLA had not appropriately addressed deficiencies noted in an annual internal safety inspection of Dr. Harrn's lab that took place in October 2008. As a result of the investigation, Cal/OSHA fined UCLA $31,875 for violation of workplace regulations.

UCLA did not contest the findings or appeal the fine. Two months later, the University announced the results of an inquiry by a campus-wide laboratory safety committee. The 87-page Report to the Chancellor made recommendations for training and internal inspections, and suggested an increase in accountability and oversight. As a result of that Report, UCLA adopted a more encompassing policy on the required use of personal protective equipment, dramatically increased the number of internal lab inspections and created a comprehensive lab safety manual and chemical hygiene plan. In March 2011, UCLA launched a new Center for Laboratory Safety to develop additional best practices for lab safety.

In January 2012, a December 2009 report by Cal/OSHA, which had not been previously released, was obtained by the *Los Angeles Times*. The 95-page report painted a far bleaker picture of the cause of the lab fire than had previously been made public. The Report squarely placed the blame for the incident on UCLA and Dr. Harran. The Cal/OSHA investigator who authored the report wrote, "it is apparent that the laboratory safety practices utilized by UCLA. . . were so defective as to render the University's required Chemical Hygiene Plan and Injury and Illness Prevention Program essentially non-existent." The Report went on to say, "Dr. Harran simply disregarded the open and obvious dangers presented in this case and permitted Victim Sangji to work in a manner that knowingly caused her to be exposed to a serious and foreseeable risk of serious injury or death."

The Criminal Charges

Not satisfied with the civil penalties assessed to UCLA and in light of the December 2009 Cal/OSHA investigation, the Los Angeles District Attorney on December 27, 2011 on the eve of the expiration of the statute of limitations charged Dr. Harran and UCLA with three felony counts of "Willful Violation

of Occupational Health and Safety Standard Causing the Death of An Employee." The Felony Complaint alleges that UCLA and Dr. Harran:

- failed to provide hazard training;
- had an injury and illness protection program that did not include methods for correcting unsafe conditions; and
- did not require workers to wear appropriate clothing.

If found guilty, Dr. Harran faces up to four and a half years in prison, while UCLA faces a maximum of $4.5 million in fines. UCLA issued a press release on the day it was served with the Complaint, asserting that the charges against it and Dr. Harran are "outrageous" and "appalling." UCLA pointed to its full cooperation with Cal/OSHA and its internal efforts to increase safety as evidence of a lack of willfulness and criminal conduct.

On April 11, arraignment was postponed for Dr. Harran and the UC Regents until June 7 to allow plea negotiations to continue.

Next Steps for Schools

Within six months of Sangji's death two other students, one at Texas Tech University ("TTU") and the other at Yale University, were victims of lab accidents. The TTU student suffered severe burns, lost several fingers and perforated an eye as the result of a lab explosion, while the Yale student died after an accident involving a lathe. The U.S. Safety and Hazard Investigation Board ("CSB"), on the heels of the TTU explosion, identified "a lack of good practice guidance" for universities. CSB made a series of recommendations to higher education institutions in general, including:

- Developing procedures to verify that research-specific hazards are evaluated and mitigated;
- Creating comprehensive guidance on managing hazards unique to laboratory chemical research;
- Requiring research-specific written protocols and training; and
- Tracking of near-misses and previous incidents to provide opportunities for education and improvement.

To reduce the risk of criminal liability in the wake of the UCLA indictments, we suggest that higher education institutions:

- provide comprehensive hazard training, including training specific to particular research;
- develop safety procedures and standards, including, for example, requiring all workers to wear appropriate PPE;
- create mechanisms to enforce safety procedures and guidelines; and
- perform regular inspections, ensuring compliance with both the institution's safety guidelines and state and federal workplace regulations.

This article was written by Amy L. Piccola, a member the Firm's Commercial Litigation Practice. Amy can be reached at 215.972.8405 or apiccola@saul.com.

Law School Dean Subject to Personal Liability under Civil Rights Act of 1871 for Alleged Political Discrimination in Faculty Hiring

By Ira M. Shepard

In what the Eighth Circuit Court of Appeals described as its first opportunity to address a political discrimination claim, the Court reversed a U.S. district court's decision granting summary judgment in favor of the Dean of the University of Iowa College of Law, holding that the public law school's Dean was not entitled to immunity from suit under the Civil Rights Act of

1871. *Wagner v Jones*, 8th Cir., No.10-2588, December 2011.

In *Wagner*, a law school faculty applicant was a registered Republican and had a history of working for socially conservative organizations such as the National Right to Life Committee. At the time of her application for a full-time teaching position at the University of Iowa College of Law she had served for five years as a part-time associate director at the writing center. Prior to that, she taught advanced legal research, writing and analysis at the George Mason University School of Law outside of Washington, D.C. for two years. The Iowa law school advertised two vacancies for full-time legal analysis, writing and research instructors, seeking candidates with prior successful teaching experience. The plaintiff applied for the two openings which were non-policy-making faculty positions.

In political discrimination cases, non-policy-making employees or applicants have the threshold burden to produce sufficient direct or circumstantial evidence from which a rational jury could find that political affiliation was a substantial or motivating factor behind the adverse employment action. At that point the employer must articulate a nondiscriminatory basis for the adverse action and prove by a preponderance of evidence that it would have taken the action without regard to the plaintiff's political affiliation.

Here the plaintiff alleged that after she became one of three finalists for the two open positions she underwent a full day interview, which included a presentation to the full faculty and interviews with selected faculty and students. All the students who interviewed her gave her the highest possible ratings and seven faculty members complimented her on her presentation. Only one of the law school's 50 professors was a registered Republican. The faculty recommended to the Dean that the Dean hire one of the other two finalists alone and that the other position not be filled. The Dean accepted the faculty's recommendation.

The Court concluded that a "reasonable" Dean could not have believed under these circumstances that denying the plaintiff the position was lawful and took no action to prevent the faculty's impermissible consideration of the plaintiff's political beliefs in making the hiring decision. The Dean stated she always followed the faculty's recommendations and that was a nondiscriminatory rationale. While the district court agreed, the Court of Appeals did not, pointing out that the Dean produced no evidence that she was required to follow the faculty's recommendations. The Court of Appeals further concluded that in these circumstances the Dean may be individually liable as a supervisor under Section 1983 for her own acts and omissions and the plaintiff is entitled to go forward with a trial allowing a jury to consider whether the Dean's failure to intervene and reject the faculty's recommendation constituted political discrimination. A motion for rehearing *en banc* was denied.

This article was written by Ira M. Shepard, a member the Firm's Higher Education Practice. Ira can be reached at 202.342.3419 or ishepard@saul.com. Saul Ewing's Higher Education lawyers have significant experience advising on faculty hiring, tenure and disciplinary matters, and our members are available at any time to answer any questions you have about this or other employment-related developments. The author serves as general counsel to CUPA-HR.

Tax-Exempt Bonds Have Been Issued, Now What?

By George T. Magnatta and Silvia A. Shin

When weighing the most cost effective way of raising money for capital projects, higher education institutions often turn to the tax-exempt bond market. Conduit issuers, such as a state or local government or an economic development authority, will issue tax-exempt bonds and loan the proceeds of such bonds to a qualifying "conduit" borrower such as a 501(c)(3) higher education institution. Oftentimes it takes months of negotiation and planning to reach settlement on the bonds, and once the bonds have closed, most conduit borrowers provide a collective sigh of relief, find themselves ready to relax from the "closing" frenzy and move forward with spending the proceeds for the proposed capital project without much thought

to post-issuance compliance with certain requirements of the Internal Revenue Code of 1986, as amended (the "**Code**").[1]

In an ongoing initiative emphasizing the need to implement and maintain a post-issuance compliance program, the Internal Revenue Service ("**IRS**") has stated that failure by an issuer or other party (i.e., a conduit borrower) to comply "with any applicable federal tax requirement with respect to [tax-exempt bonds] jeopardizes the preferential tax status of those bonds."[2] The IRS strongly encourages issuers (and conduit borrowers) to actively monitor compliance throughout the entire period their bonds remain outstanding in the hopes that such due diligence will significantly improve an issuer's ability to: (i) identify noncompliance; (ii) prevent violations from occurring; or (iii) timely correct identified violations.[3]

In light of the IRS' post-compliance initiatives and the fact that bond documents customarily place all responsibility for post-issuance compliance with the conduit borrower and obligates the conduit borrower to indemnify the issuer for the results of any failure to comply, it is becoming more common in industry practice to shift the responsibility for adopting, implementing and maintaining a post-issuance compliance policy onto the shoulders of the conduit borrower.

IRS Post-Compliance Initiatives

Recent materials from the IRS indicates the importance the IRS is attaching to post-issuance compliance related to "tax-advantaged bonds" (i.e., tax-exempt, tax credit or direct pay bonds). These IRS materials include (1) new standards for settlement under the Voluntary Closing Agreement Program ("**VCAP**"), (2) a summary checklist for written procedures for post-issuance compliance, and (3) new reporting procedures on IRS Form 8038 and IRS Form 990 (particularly Schedule K).

1. VCAP Updates

VCAP allows issuers (on behalf of conduit borrowers) to disclose voluntarily to the IRS the existence of a federal tax law violation relating to tax-advantaged bonds and to negotiate a settlement or other resolution that usually results in a more favorable outcome than if the IRS discovered the violation during an audit.

In August 2011, the IRS released revisions to Section 7.2.3 of the Internal Revenue Manual[4] ("**IRM**"), which provides guidelines for VCAP (the "**VCAP Revisions**").[5] One important aspect of the release of the VCAP Revisions is that it appears that the IRS for the first time created specific consequences that differentiate between those issuers (on behalf of conduit borrowers) that have established written procedures for post-issuance compliance and those that have not. Section 7.2.3.2.1 of the IRM specifically directs that an issuer (including any entity that joins the issuer in requesting VCAP) upon submission of a VCAP request must affirmatively or negatively state whether it has adopted comprehensive written procedures for post-issuance compliance with provisions of the Code for tax-advantaged bonds. The guidelines further note that to the extent an issuer (and presumably for this purpose includes a conduit borrower) has appropriate written compliance procedures in place, that fact will be an equitable factor that will receive consideration in determining appropriate resolution terms with respect to VCAP requests. Additionally, Section 7.2.3.4.4 of the IRM generally provides that issuers/conduit borrowers that adopt and use such procedures to identify a violation will be allowed to treat the date of the discovery of the violation as the date of the violation.[6] This preferential adjustment of a shortened period would reduce the closing agreement fee an issuer (and thus a conduit borrower in the case of a conduit financing) would need to pay to resolve its VCAP request.

2. Written Procedures for Post-Issuance Compliance

On its web page for the "Tax Exempt Bond Community," the IRS has expressed the notion that issuers should adopt written procedures for post-issuance compliance, applicable to all bond issues, that go beyond reliance on the representations and covenants issuers make in the tax certificates they provide at closing. It is not a stretch to presume this applies to conduit

---

1 Such requirements relate primarily to (i) qualified use of proceeds and of bond-financed facilities and (ii) arbitrage yield restriction and rebate. Qualified use requirements require monitoring of the various direct and indirect uses of bond-financed facilities over the life of the bonds and calculations of the percentage of nonqualified uses. Arbitrage requirements also require monitoring over the life of the bonds to determine (i) whether the yield on investments acquired with bond proceeds are properly restricted and (ii) whether the issuer must pay a yield reduction payment and/or rebate payment.

2 *See* Internal Revenue Service, *TEB Post-Issuance Compliance: Some Basic Concepts* available at http://www.irs.gov/taxexemptbond/article/0,,id=243503,00.html

3 Id.

4 While the Internal Revenue Manual is an internal publication of the IRS and does not carry the formal authority of an IRS revenue ruling or the Treasury Regulations, it is generally regarded as "authoritative" on points that it covers.

5 VCAP Revisions can be found at: http://www.irs.gov/irm/part7/irm_07-002-003.html

6 *See* Internal Revenue Service, *TEB VCAP Resolution Standards: Some Basic Concepts* available at http://www.irs.gov/taxexemptbond/article/0,,id=242387,00.html

borrowers as well. Reference to reliance on the bond documents, without more, will not qualify as written procedures that satisfy the IRS' expectations.[7]

Instead, the IRS emphasizes that written procedures for post-issuance compliance should include the following "key characteristics":

- Due diligence review at regular intervals;
- Identifying the official or employee responsible for review;
- Training of the responsible official/employee;
- Retention of adequate records to substantiate compliance (*e.g.*, records relating to expenditure of proceeds);
- Procedures reasonably expected to timely identify noncompliance; and
- Procedures ensuring that the issuer will take steps to timely correct noncompliance.[8]

The IRS provided further guidance in the VCAP Revisions with respect to the content of an issuer's (or conduit borrower's) written procedures. In particular, as set forth in Section 7.2.3.4.4 of the IRM, the IRS expects that, ***at a minimum***, written procedures of an issuer or conduit borrower will contain the following:

1. the identification of the official(s) with responsibility for monitoring compliance;
2. a description of the training provided to such responsible official(s) with regard to monitoring compliance;
3. the frequency of compliance checks which must be at least annually;
4. the nature of the compliance activities required to be undertaken;
5. the procedures used to timely identify and elevate the resolution of a violation when it occurs or is expected to occur;
6. the procedures for the retention of all records material to substantiate compliance with the applicable federal tax requirements; and
7. an awareness of the availability of VCAP and other remedial actions to resolve violations.

3. New Reporting Procedures Reflects IRS' Focus on Post-Issuance Compliance

In April 2011, the IRS released a revised version of Form 8038 (Information Return for Tax-Exempt Private Activity Bond Issues), which for the first time asked the issuer to indicate if the issuer has established written procedures: (1) to ensure that all nonqualified bonds will be remediated in accordance with the Code and the Treasury Regulations and (2) to monitor the requirement of section 148 of the Code (pertaining to arbitrage and rebate).

The IRS has put in place an additional compliance measure with respect to qualified 501(c)(3) conduit bonds. Over the last several years, the IRS has developed (and refined) a new Schedule K to Form 990, the federal information return for 501(c)(3) organizations. Schedule K is a means by which the IRS can gain access to certain information relevant to the post-issuance activities of 501(c)(3) organizations. Part III of Schedule K now requests information relating to an organization's private business use and unrelated trades or businesses with respect to facilities financed by tax-exempt bonds issued after 2002. It also now asks whether the organization has adopted management practices and procedures to ensure post-issuance compliance with its tax-exempt bond liabilities. Additionally, a new Part V (Procedures to Undertake Corrective Action) asks the organization to confirm whether it has established written procedures to ensure that violations of federal tax requirements are timely identified and corrected through VCAP if self-remediation is not available under applicable regulations.

Conclusion

Recent IRS post-issuance compliance initiatives indicate the IRS' focus on ensuring written procedures for post-issuance compliance are in place for both issuers and conduit borrowers. Conduit borrowers are strongly encouraged to develop and adopt written procedures for post-issuance compliance and not rely solely on representations and covenants made in the bond documents. Additionally, it is important that compli-

7 *See* Section 7.2.3.4.4 of the IRM.
8 *See* Internal Revenue Service, *TEB Post-Issuance Compliance: Some Basic Concepts.*

ance checks are conducted at least annually by the person designated to monitor compliance pursuant to those written procedures. The benefits of having a workable post-issuance compliance policy in place may (1) help minimize the likelihood for tax law violations and (2) enhance the ability to identify promptly the occurrence of such a violation, and take appropriate remedial action to preserve the tax-exempt status of the affected bonds.

This article was written by George T. Magnatta and Silvia A. Shin, members the Firm's Higher Education Practice. George can be reached at 215.972.7126 or gmagnatta@saul.com. Silvia can be reached at 302.421.6896 or sshin@saul.com.

Understanding and Avoiding Pitfalls Surrounding Research Misconduct

By Joshua W. Richards

The recent decision by the Virginia Supreme Court in *Cuccinelli v. The University of Virginia*[1] arose from investigative demands issued to the University of Virginia seeking information relating to the research of climate scientist Dr. Michael Mann, who taught at UVA from 1999 to 2005. While employed by UVA, Dr. Mann received a series of federal grants to fund his research on climate change. Amidst allegations that some climate scientists had falsified data to indicate a dramatic upturn in the earth's surface temperatures as a result of the use of fossil fuels, the Virginia Attorney General launched an investigation into the grants Dr. Mann received while employed by UVA.

In contrast to ordinary research misconduct cases, *Cuccinelli* involved a state attorney general investigation. However, although *Cuccinelli* raises some unorthodox issues generally absent from garden-variety research misconduct issues, it is nonetheless a reminder of many of the potential pitfalls that accompany federal grants to fund research. The federal regulations governing such grants require universities to implement specific policies to prevent and remediate research misconduct. Failure to properly implement and follow such policies can have severe consequences, up to and including debarment from eligibility for future grants. What follows is a very basic primer on the rules and regulations surrounding research misconduct.

1. What is research misconduct?

> *"Sustained public trust in the research enterprise requires confidence in the research record and in the processes involved in its ongoing development."*
>
> — December 6, 2000, Notice of Final Policy in the Federal Record from the Office of Science and Technology Policy in the Executive Office of the President.

Consistent with this sentiment, the federal government is focused intently on how funds distributed in federal grants are used and ensuring that such funds are not misused. How does the government define research misconduct? Federal agencies will take action against any "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research or in reporting research results."[2] Research misconduct *does not* include honest error or difference of opinion.[3]

In most cases, investigations of research misconduct are performed by the Office of Research Integrity ("ORI"), which is responsible for enforcing research integrity on behalf of the Public Health Service and the Secretary of Health and Human Services. The National Science Foundation's Office of the Inspector General ("OIG") will also take action to pursue any misconduct associated with NSF-funded grants.

2. What procedures should you have in place to address misconduct?

All universities and research institutions receiving federal grants to fund research should have in place a written policy

1 *Cuccinelli v. Rector, Visitors of Univ. of Virginia*, — S.E.2d —, No. 102359, 2012 WL 686880 (Va. Mar. 2, 2012).

2 45 C.F.R. § 689.1(a); *see also* 42 C.F.R. § 93.103. The parallel citations used throughout this article refer to both Chapters 42 and 45 of the Federal Register, which describe the Department of Health and Human Services and the National Science Foundation's policies on research misconduct, respectively. Both agencies prohibit and punish research misconduct and the regulations pertaining to each agency substantially mirror one another.

3 45 C.F.R. § 689.1(b); 42 C.F.R. § 93.103(d).

governing allegations of research misconduct and how they are investigated.[4] Such policy should encourage whistleblowers to come forward if they suspect research misconduct.[5] Federal regulations require institutions to have systems in place so that individuals are able to report misconduct confidentially and without retaliation.[6] If an organization is too small to handle its own research misconduct proceedings, it may enlist ORI's assistance in developing and implementing a process for handling research misconduct consistent with federal regulations.[7]

Each institution's research misconduct policy should explain how a whistleblower reports suspected misconduct and provide for rigorous documentation of the allegation. The university's policy should explain: (1) to whom the whistleblower should report the suspected misconduct; (2) what will constitute evidence for or against an allegation in the subsequent inquiry; (3) how such evidence should be obtained; (4) who will review/investigate the allegation; (5) what the whistleblower's role will be; and (6) how much time the entire investigatory process is expected to take.[8]

3. Investigation once misconduct is reported or suspected

While federal agencies have ultimate oversight authority for federally funded research, research institutions bear primary responsibility for the prevention and detection of research misconduct.[9] When an institution has cause to suspect research misconduct, that institution is responsible for the inquiry, investigation and adjudication of the allegations.

This responsibility comes with distinct advantages. If an institution commences an inquiry and investigation of alleged research misconduct promptly, government agencies that might otherwise conduct an inquiry—generally ORI or OIG, depending on the grant—will defer their own investigations.[10]

The institution's investigation has three phases. First, the institution should conduct an initial inquiry. Second, if warranted, the institution will conduct a formal investigation. If the investigation does not exonerate the accused, the institution should proceed to a disposition (and possibly sanction) the accused.

An institution's own investigation should begin with an initial inquiry into the alleged misconduct, and ideally be completed within 90 days with an NSF-funded grant[11] and 60 days if the grant is funded by a division of HHS.[12] Before launching an inquiry, an institution must make a good-faith effort to notify the accused, in writing, that an inquiry is underway. On or before the date the accused is notified of the allegations against him or her, the institution should also take custody of all research records and evidence needed to conduct the research misconduct proceeding and keep them in a secure location.[13]

If the initial inquiry reveals that the allegations have no substance and no further investigation is warranted, the institution need not proceed further. However, if the institution concludes that subsequent investigation is needed, a formal investigation should be commenced in compliance with the terms of the policy discussed above,[14] and notice should be provided to both the complainant, if any, and the accused.[15]

The investigation itself should result in appropriate action necessary to ensure the integrity of the research and the rights and interests of the subjects and the public, while providing appropriate safeguards for subjects of allegations and for whistleblowers.[16] The institution must inform the applicable government agency immediately if the initial inquiry reveals facts warranting a further investigation, and it should keep the agency informed during the pendency of the investigation.[17]

---

4 42 C.F.R. § 93.301.

5 45 C.F.R. § 689.4(d); *see also* 42 C.F.R. § 93.108; 42 C.F.R. § 93.300.

6 45 C.F.R. § 689.4(a)(4). Such whistleblowers are also protected by rulings from state and federal courts

7 42 C.F.R. § 93.303.

8 *See generally* 42 C.F.R. § 93.001 et seq.; 45 C.F.R. § 689.1 et seq.

9 45 C.F.R. § 689.4(a).

10 *Id.* at § 689.6. Note also that agencies will occasionally insist on performing their own investigations of allegations, most often when there is a need to act quickly to protect the public interest, such as when public health and safety are at stake.

11 45 C.F.R. § 689.4(b)(1). Extensions of the 90-day period are available for good cause.

12 42 C.F.R. § 93.307(g).

13 42 C.F.R. § 93.307(b).

14 45 C.F.R. § 689.2(b); 42 C.F.R. § 93.307(a).

15 42 C.F.R. § 93.308.

16 45 C.F.R. § 689.4 (a)(1)-(4).

17 45 C.F.R. § 689.4(b)(2)-(3).

If the inquiry yields sufficient evidence to justify a formal investigation, the institution should complete its investigation and reach a disposition within 180 days.[18]

A determination of research misconduct requires a finding that the misconduct was committed intentionally or knowingly and in reckless disregard of known practices.[19] Moreover, the allegations must be proved by a preponderance of the evidence,[20] *i.e.* a finding that it is more probable that the factual allegations of misconduct are true than not true.

4. Requirement to Report to a Federal Agency

Research institutions must notify the applicable federal agency or agencies if an initial inquiry into an allegation of misconduct involving federally-funded research leads to sufficient evidence to proceed to an investigation.[21] When the investigation is complete, the institution must forward a copy of the evidence, the investigative report, recommendations made to the institution's adjudicating official, and the subject's written response to the recommendations, if there is one. The institutions must also inform the agency about the decision of the adjudicating official and about any corrective action.[22] If there is any immediate risk to public health or safety, research activities should be suspended during the pendency of the investigation.[23] Likewise, if there may be violations of criminal or civil law, or if there is a risk to the public health or safety, the institution must notify the appropriate federal agency promptly.

5. Sanctions

Sanctions against those found guilty of research misconduct can range from minimal corrective measures such as steps to amend the research record to increasingly stringent penalties including letters of reprimand, imposition of certification requirements to ensure compliance with the terms of a grant, suspension or termination of a grant, and/or suspension or debarment, including debarment of the institution.[24] This list is not exhaustive, and if criminal or civil fraud violations have occurred, the applicable agency will refer the findings for criminal prosecution and/or a civil fraud action.[25] ORI also publicly releases the names of people found guilty of misconduct on its web site.

Judicial review of final agency actions is governed by the Administrative Procedure Act,[26] and a reviewing court may set aside agency actions, findings, or conclusions only when they are arbitrary, capricious, an abuse of discretion, or contrary to law.[27] Accordingly, once the applicable government agency has elected to impose a sanction, it is very difficult to have such a sanction reversed.

6. Conclusion

As demonstrated by the foregoing, research institutions have strong incentives to implement and follow clear policies discouraging and remedying cases of research misconduct.

Interested readers can access the Office of Research Integrity or the Office of the Inspector General websites where recent dispositions against those found guilty of research misconduct are posted daily.[28] If you would like more detail on any matter discussed in this article or assistance in crafting or updating your own research misconduct policies, please do not hesitate to contact us.

This article was written by Joshua W. Richards, a member the Firm's Higher Education Practice. Joshua can be reached at 215.972.7737 or jrichards@saul.com.

18 45 C.F.R. § 689.4(b)(4).

19 45 C.F.R. § 689.2(c)(1)-(2).

20 45 C.F.R. § 689.2(c)(3); 42 C.F.R. § 93.106.

21 45 C.F.R. § 689.4(b)(5).

22 42 C.F.R. § 93.304; 42 C.F.R. § 93.315.

23 42 C.F.R. § 93.304.

24 45 C.F.R. § 689.3(a)-(c).

25 45 C.F.R. § 689.3(a).

26 *See* Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706; see also *City of Las Vegas v. Lujan*, 891 F.2d 927, 932 (D.C. Cir. 1989).

27 *See* 5 U.S.C. § 706(2)(A); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375 (1989).

28 http://ori.hhs.gov; http://oig.hhs.gov; http://www.nsf.gov/oig

Recent Decision Underscores Importance for Schools to Secure Related Internet Domain Names

By Cory S. Winter

A recent decision from the U.S. District Court for the Eastern District of Michigan, *American University of Antigua College of Medicine v. Woodward*, No. 10-10978, 2011 WL 6187429 (Dec. 5, 2011), serves as a good reminder that colleges and universities should secure Internet domain names related to the name of their school.

This case involved a website published by Steven Woodward ("Woodward"), a former student who was discharged from the American University of Antigua College of Medicine ("AUA"). Woodward's website, located at www.aua-med.com, was the manifestation of Woodward's dissatisfaction with the University. Woodward believed that the University misrepresented material information, including information about student safety, and published numerous scathing criticisms about AUA. Some of the more salacious claims included AUA's violations of students' civil rights, AUA's unethical conduct, and the plight of student safety on and off AUA's campus.

The University sued Woodward for trademark infringement, "cybersquatting," and defamation. The University sought a permanent injunction against Woodward that, if granted, would require Woodward to take down his website.

The University brought its trademark claim under the Lanham Act, 15 U.S.C § 1114. The Act prohibits trademark infringement by the use of an unauthorized mark "in connection with the sale, offering for sale, distribution, or advertising of any goods or services." The alleged infringer must use the mark for a commercial purpose; the commercial use of the lawful trademark holder is irrelevant. Based on this principle, the court summarily rejected the University's' Lanham Act claim because "Woodward [was] not selling, distributing, or advertising any goods or services on his website and the website does not contain links to any commercial sites."

The University's claim under the federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), fared no better. The ACPA prohibits "cybersquatting." This "occurs when a person other than the trademark holder registers the domain name of a well known trademark and then attempts to profit from this by either ransoming the domain name back to the trademark holder or by using the domain name to divert business from the trademark holder to the domain name holder." Succeeding under the ACPA requires a plaintiff to establish that: (1) it has a protectable trademark that (2) is distinctive or famous, (3) the defendant possesses identical or confusingly similar to ("or in the case of famous marks, dilutive of") the owner's mark, and (4) the defendant's use, registration, or trafficking of the domain name is (5) motivated by a bad-faith intent to profit.

The ACPA lists nine nonexclusive factors courts may use to determine whether a defendant had a bad-faith intent to profit. The court did not analyze those factors but instead followed precedent holding that websites published to critique goods or services are not prohibited under the ACPA. Regarding Woodward's website, the court noted that Woodward "is a disgruntled former medical student seeking revenge for his discharge from AUA's medical program. There is no evidence that he is seeking to profit from his use of the aua-med.com website . . . ." In other words, Woodward did not register his website with the intent of realizing pecuniary gain.

The University's defamation required a more complicated analysis, which involved analyzing Woodward's various statements as published on the website. The court found that many of Woodward's statements reflected his own opinions about the University and therefore, were not actionable. The court noted that Woodward posted a disclaimer on his website that clearly indicated that the site reflected his own opinions and not those of the University. Still, the court held that Woodward defamed the University by publishing statements like "AUA routinely commits fraud upon its students," "AUA commits criminal activities reportable to the FBI," "AUA breaches contracts," and "AUA conspires to commit fraud and violations of civil rights." The court issued a permanent injunction against Woodward as to the defamatory statements, requiring Woodward to remove those statements from his website.

Thus, though the University succeeded in persuading the court to issue a permanent injunction against Woodward for some of his defamatory content, the University did not persuade the court to shut down Woodward's website in its entirety and he retained the www.aua-med.com address.

What's a School to do when Faced with "Gripe" Sites?

The lesson colleges and universities should take away from *Woodward v. AUA* is two-fold.

- First, unless individuals are engaging in a commercial activity and are using the school's trademark to do so, courts are unlikely to pull the plug on a "gripe site." At best, the school may succeed in obtaining an injunction that requires the individual to remove defamatory content. This will require a significant investment of the school's time and money. Even so, a lawsuit brought against a current or former student could bring unintended consequences by calling attention and publicity to a website otherwise flying under the radar.
- Second, colleges and universities should liberally acquire Internet domain names that relate to their names, trademarks or other identifying characteristics. For students and other individuals, the low cost of claiming a domain name provides an enticing opportunity to make their gripes known in a very public way. It costs no more for schools to acquire available domain names that would otherwise be perfect for gripe sites (*e.g.* "doeuniversitysucks.com" or "doe-university.net" or "doeu.com"). While it may be impossible for any college or university to register a domain for every iteration of its name, initials, or likeness, maintaining an inventory of domain name registrations would serve schools well.

Finally, it is worth noting that no two "gripe sites" are alike. Indeed, while some may be published using an Internet domain name like Woodward's, others may be published using popular social-media sites like Facebook or Twitter. For that reason, schools should evaluate context of a particular site before initiating litigation. Some sites may implicate legal issues not discussed in this article — like copyright infringement — and may require special attention.

This article was written by Cory S. Winter, a member of the Firm's Higher Education Practice. Cory can be reached at 717.257.7562 or cwinter@saul.com.

December 2011 FERPA Revisions

By Nichole C. Alling

In December 2011, the Department of Education (DOE) released new regulations amending the Family Educational Rights and Privacy Act (FERPA). The new regulations went into effect on January 3, 2012, and focus on student evaluation data and directory information.

Changes made to the Audit/Evaluation & Studies Exceptions allow for greater disclosure of student information for use in longitudinal studies of student test and performance data. According to the DOE, the regulations "clarify who may receive student information to conduct evaluations of education programs, and under what circumstances these types of disclosures may occur," in order to, "facilitate effective research and evaluation of Federal- and State-supported education programs."

Prior to this change, educational authorities could only disclose education records to entities over which they had direct control; "[t]herefore under the Department's interpretation of its regulations, SEAs [state education agencies] were not able to disclose PII [personally identifiable information] from education records to many State agencies, even for the purpose of evaluating education programs under the purview of the SEAs."

Now, the regulations have been changed to allow state educational agencies to designate "authorized representatives" to conduct "audits, evaluations, or enforcement and compliance activities relating to education programs." State educational agencies may disclose personally identifiable information to such "authorized representatives" without consent. The changes also allow for the disclosure of personally identifiable information contained in educational records to be provided to research organizations for use in studies that benefit educational agencies, if a written agreement has been made with the state educational agency or other educational authority providing the personal information.

The new regulations also target the "Directory Information" exception by loosening directory restrictions and allowing educational institutions to adopt "limited directory information policies." These policies permit the disclosure of certain personally identifiable information to particular parties, or for specific purposes, where such information is for "more mundane uses," such as yearbooks. Limited directory information policies are discretionary. If implemented, educational institutions control how the policies are to be carried out. Should an institution elect to implement a limited directory information policy, it must "specify its policy" in a public notice to "parents and eligible students" in attendance at the educational institution.

The DOE released both parent (http://www2.ed.gov/policy/gen/guid/fpco/pdf/parentoverview.pdf) and school (http://www2.ed.gov/policy/gen/guid/fpco/pdf/sealea_overview.pdf) guides to the new regulations.

This article was written by Nichole C. Alling, a member the Firm's Commercial Litigation Practice. Nichole can be reached at 302.421.6885 or nalling@saul.com.

The Saul Ewing Higher Education Practice

Amy C. Foerster, Co-Chair
717.257.7573
afoerster@saul.com

James A. Keller, Co-Chair
215.972.1964
jkeller@saul.com

William E. Manning, Co-Chair
302.421.6868
wmanning@saul.com

James D. Taylor, Jr., Vice-Chair
302.421.6863
jtaylor@saul.com

Gianna J. Arnold
410.332.8913
garnold@saul.com

Jennifer Morgan Becnel-Guzzo
302.421.6805
jbecnel-guzzo@saul.com

Jennifer L. Beidel
215.972.7850
jbeidel@saul.com

Emily H. Bensinger
717.257.7576
ebensinger@saul.com

Gregory S. Bernabeo
215.972.7755
gbernabeo@saul.com

Jennifer A. DeRose
410.332.8930
jderose@saul.com

Robert L. Duston
202.342.3415
rduston@saul.com

Anthony P. Forte
215.972.7732
aforte@saul.com

Cynthia A. Giordano
202.295.6612
cgiordano@saul.com

George T. Magnatta
215.972.7126
gmagnatta@saul.com

Allison B. Newhart
215.972.7191
anewhart@saul.com

Sean T. O'Neill
215.972.7159
soneill@saul.com

Amy L. Piccola
215.972.8405
apiccola@saul.com

Christine M. Pickel
215.972.7785
cpickel@saul.com

Joshua W. Richards
215.972.7737
jrichards@saul.com

Christina D. Riggs
215.972.7810
criggs@saul.com

Nailah I. Rogers
717.257.7504
nrogers@saul.com

James G. Rosenberg
215.972.7865
jrosenberg@saul.com

Courtney L. Schultz
215.972.7717
cschultz@saul.com

Ira M. Shepard
202.342.3419
ishepard@saul.com

Silvia A. Shin
302.421.6896
sshin@saul.com

Frederick D. Strober
215.972.1985
fstrober@saul.com

Catherine E. Walters
717.257.7569
cwalters@saul.com

William W. Warren, Jr.
717.238.7698
wwarren@saul.com

Cory S. Winter
717.257.7562
cwinter@saul.com