



Federal Update for Higher Education

May 14, 2025

Bricker 
Graydon

- This information is good as of now. In an hour, it might not be. Stay tuned for new Executive Orders (EOs) and judicial or legislative responses.
- The political aspects of this are undeniable, but our first priority is simple: clarity.
- Remember not to lose the forest for the trees. What is the big picture? That will help guide our next steps.

Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.
- No, we aren't recording this – because we expect things to shift quickly.

Agenda... What has happened since May 1?

- Dear Colleague Letters
- Task Force to Combat Anti-Semitism
- Title IX Investigation
- Foreign Funding Investigations
- Assistant Secretary of Postsecondary Education Nominated
- Grant Certifications
- New Grant Funding Lawsuit
- College Endowment Tax Proposals
- Perkins Coie Update

Dear Colleague Letters

- May 1 – Dear Colleague Letter makes it easier to change accreditors from a federal approval standpoint
- May 5 – Dear Colleague Letter accompanies announcement that Involuntary collections on student loans are resumed (pause was initiated due to COVID-19)
 - Institutions are asked to reach out to all former students and remind them of their obligation to repay any federal student loan that is not in deferment or forbearance prior to June 30, 2025
 - ED collects repayment data by institution and will be publishing data on rates of nonrepayment by institution
 - Failure to keep cohort default rates low could result in loss of eligibility for federal student assistance

New Task Force to Combat Anti-Semitism Investigation

- May 6 – Task Force review regarding antisemitic violence at the University of Washington based on incidents occurring May 5th involving protesters demanding divestment from Boeing due to military contracts
 - Protesters allegedly barricade/occupied an engineering building on campus for hours, set property on fire, and shouted death threats to law enforcement
- Other news agencies report:
 - 34 protesters were arrested
 - 21 students were suspended
 - Student group was suspended
 - \$1 million in damage to building and equipment
 - Protests forced a lockdown

Task Force Update: Columbia

- News agencies report a group of protesters took over Butler Library on campus
 - 80 individuals arrested
 - 65+ students interim suspended
 - 33 individuals no-trespassed
 - Videos show vandalism/graffiti inside the library
 - Two university safety officers injured
- May 8 – Task Force praises actions taken by Columbia with regard to the "unlawful, violent and disgraceful takeover of Butler Library" on May 7, in part because public safety "acted swiftly, and at a danger to themselves, to secure the library and remove the radical protesters that had seized it."

Task Force Update: Harvard

- May 6 – ED says no new research grants unless it complies with ED demands
- May 13 – Eight agencies announce termination of approximately \$450 million in grants.
 - "Harvard's campus, once a symbol of academic prestige, has become a breeding ground for virtue signaling and discrimination. This is not leadership; it is cowardice. And it's not academic freedom; it's institutional disenfranchisement. There is a dark problem on Harvard's campus, and by prioritizing appeasement over accountability, institutional leaders have forfeited the school's claim to taxpayer support. As a result, eight federal agencies across the government are announcing the termination of approximately \$450 million in grants to Harvard, which is in addition to the \$2.2 billion that was terminated last week."
- Lawsuits are still pending

Harvard Correspondence (1 of 2)

- May 5 – Sec. McMahon sends letter to Harvard (posted on X) that included the following:
 - "Where do many of these 'students' come from, who are they, how do they get into Harvard, or even into our country—and why is there so much HATE? These are questions that must be answered, among many more, but the biggest question of all is, why will Harvard not give straightforward answers to the American public?"
 - "The Harvard Corporation, which is supposed to competently and professionally manage Harvard's vast academic, financial, and physical resources, is run by strongly left-leaning Obama political appointee Penny Pritzker, a Democrat operative, who is catastrophic and running the institution in a totally chaotic way."
 - "Given these and other concerning allegations, this letter is to inform you that Harvard should no longer seek GRANTS from the federal government, since none will be provided."
- The copy-edited version of this letter was NOT actually sent back to ED by Harvard. (It was an online joke.)

Harvard Correspondence (2 of 2)

- May 12 – Harvard responds to Sec. McMahon
 - "Harvard's efforts to achieve these goals [academic freedom, freedom of thought/expression] are undermined and threatened by the federal government's overreach into the constitutional freedoms of private universities and its continuing disregard of Harvard's compliance with the law. It ignores the many meaningful steps we have taken and will continue to take to live up to our principles and improve the lives of people across the country and throughout the world."
 - "Harvard will not surrender its core, legally-protected principles out of fear of unfounded retaliation by the federal government."
 - "I must refute your claim that Harvard is a partisan institution. It is neither Republican nor Democratic. It is not an arm of any other political party or movement. Nor will it ever be."

New Title IX Investigation

- May 8 – Western Carolina University
 - "This investigation comes amid allegations that WCU has openly refused to comply with Title IX and to ensure sex-separated intimate spaces in federal funded institutions of higher education. There are also credible reports that WCU allowed a male to room with a female in a girls' dormitory and that WCU opened an investigation against a female student for asking a male student to leave a female locker room."
- Note:
 - 20 USC 1686 states, "[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."
 - 34 CFR 106.33 states, "A recipient *may* provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." (amended May 19, 2020)

- May 9 - Dr. David Barker is the nominee. He has been a professor and on the Iowa Board of Regents.
 - Per ED: "During his tenure, he has played a key role in advancing cost control measures, promoting academic freedom, and ending discriminatory DEI programs."
 - Joni Ernst, U.S. Senator for Iowa, states that he "led the fight on the Iowa Board of Regents to undo restrictive COVID-19 mandates on students."

Wikipedia notes he is a former economist for the Federal Reserve who operates a real estate and finance company. Publications include the book, *Welcome to Free America*.

Next Round: Higher Ed Certifications

- Institutions are being asked to certify that they are in compliance with federal law and EOs in order to continue receiving grant funding.
 - What your lawyer thinks is compliant and what the government thinks is compliant may differ, and also be different than what the government thinks is compliant in a few weeks or months from now
 - If you are found to falsely sign the form, you could be pursued through the False Claims Act
 - If you don't sign the form, you will likely lose federal funding

- *NAACP v. U.S. Dep't of Educ.*, D.D.C. 1:25-cv-01120
 - April 3 – ED notifies all states and school districts that they will be required to certify compliance with Title VI and *SFFA v. Harvard* or they will lose federal funding
 - April 15 – Complaint filed alleging that certification requirement would prohibit activities that are actually legal
 - April 24 – Court grants preliminary injunction under the Fifth Amendment for being unconstitutionally vague "because the certification requirement conditions serious financial and other penalties on insufficiently defined conduct"

Side note: States varied on their responses prior to the Preliminary Injunction being issued...

- *American Council of Learned Societies v. McDonald*, S.D.N.Y. 1:25-cv-03657
 - Filed May 1st seeking injunctive relief due to DOGE allegedly "indiscriminately terminat[ing] the vast majority of the [National Endowment of the Humanities] grants"
 - Notified 1,500 NEH grantees that their awards had been terminated
 - 75% of NEH workforce was laid off
 - Challenge based on:
 - President must spend funds that Congress appropriates
 - Administrative Procedure Act – arbitrary and capricious "in every way that agency action can be arbitrary and capricious"
 - DOGE has no lawful authority
 - Pretrial conference scheduled for September 4, 2025(!)

Investment Income Tax (1 of 2)

- Part of the "One Big, Beautiful Bill" - being drafted by committees
 - Section 112021 – Excise tax on investment income of private colleges and universities based on student-adjusted endowment
 - Student-adjusted endowment will not include students in the calculation if they are do not meet the requirements under HEA Section 484(a)(5)

Student-Adjusted Endowment	Excise Tax Rate
\$500,000 - \$749,999	1.4% (current rate)
\$750,000 - \$1,249,999	7%
\$1,250,000 - \$1,999,999	14%
\$2,000,000+	21%

Investment Income Tax (2 of 2)

- Part of "One Big, Beautiful Bill" - being drafted by committees
 - Section 112022 – Excise tax on investment income of certain private foundations under IRC 4940(a)

Size of Private Foundation (in assets)	Excise Tax Rate
\$0 - \$49,999,999	1.39% (current rate)
\$50,000,000 - \$249,999,999	2.78%
\$250,000,000 - \$4,999,999,999	5%
\$5,000,000,000+	10%

Foreign Funding Investigations

- May 8, 2025 – Department of Education Notified UPenn that it would be initiating an investigation regarding the University's Foreign Funding Compliance
- "The Department's review of UPenn's Sec. 117 foreign funding disclosures submitted to the Department reveals that incomplete, inaccurate, and untimely disclosures may have been submitted by UPenn, in possible violation of its foreign source funding statutory disclosure obligations."
- The Department said that Penn:
 - Failed to report any foreign funding until February 2019
 - That Penn's foreign funding amounted to \$358 million through 2017
 - That from 2018-2025 Penn's foreign funding grew to \$2.3 billion
 - That Penn "masked" the identities of approximately 176 donors.
 - That Penn failed to "promptly" report 61 disclosures of the 115 disclosures submitted in January 2025
 - Between July 2021 and July 2024, 90 transaction disclosures included "erroneous identifications of restricted and/or conditional foreign gifts and contracts, indicating insufficient reporting diligence by UPenn"
- Additional investigations at Harvard and University of California (Berkley)

Reporting Foreign Contracts and Gifts (revisited)

- Section 117 of the Higher Education Act requires certain disclosures regarding gifts and contracts from foreign sources if they exceed \$250,000 in the aggregate. 20 U.S.C. 1011f(a)
- The institution must report the gift or contract either on January 31 or July 31, whichever is sooner. And update reporting.
- See reporting requirements and analytical framework for determining country of origin.
 - Special reporting requirements for restricted or conditional gifts (1011f(c)(1) and (2)).
- Investigation costs recoverable under 20 U.S.C. 1011f(f)(2)

Termination of Tax-Exempt Status of Terrorist Supporting Organizations (Sec. 112209).

Overview:

- Authority: Grants the Secretary of the Treasury the power to terminate tax-exempt status.
- Scope: Targets organizations deemed to support terrorism.
- Immediate Effect: Termination can take effect immediately.

Concerns About Due Process:

- Unilateral Decision: No court order or independent review required.
- No Formal Hearing: Organizations lack the right to a formal hearing (court appeal possible)
- Use in combination with Foreign Gifts investigations? April 23, 2025 - "Transparency Regarding Foreign Influence At American Universities" Executive Order.

Perkins Coie Update (1 of 2)

- U.S. Dist. Ct for DC issued an Order May 2, 2025, granting Perkins Coie's Motion for Summary Judgment and Declaratory and Permanent Injunctive Relief
- Quotes William Shakespeare's Henry VI - "The first thing we do, let's kill all the lawyers," discusses John Adams representation of British soldiers charged with murder for the Boston Massacre, and quotes political philosopher Alexis de Tocqueville

Perkins Coie Update (2 of 2)

- Declared EO 14230 titled, "Addressing Risks from Perkins Coie LLP" to be unlawful because it violates the 1st, 5th, and 6th Amendments to the US Constitution
- 4 overarching constitutional challenges:
 - EO violated the 1st Amendment rights of the firm and its clients due to unlawful retaliation, viewpoint discrimination, and compelled disclosures;
 - EO violated the firms' right to due process under the 5th Amendment;
 - EO violated the firms' clients right to counsel under the 5th and 6th Amendments;
 - EO violated the firm's right to equal protection of the law because it singled the firm out

Upcoming Higher Ed Webinars



Free: Title IX Litigation Update – May 29, 2025

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