WHO’S WHO

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What Do You Do When Your University Knocks on Your Door?
TWO MAJOR CONCERNS

1. Research Misconduct
   – Fabrication
   – Falsification
   – Plagiarism

2. Conflict of Interest
   – Financial Conflict of Interest
   – Conflict of Commitment
WHAT IS RESEARCH MISCONDUCT?

- Governed by both federal regulations and University policies
- Process for determining whether scientists or researchers engaged in fabrication, falsification, or plagiarism
- Research misconduct inquiries and investigations are conducted by Universities and Hospitals
  - When there are federal funds, HHS’s Office of Research Integrity has oversight
TYPES OF RESEARCH MISCONDUCT

- Fabrication is making up data or results and recording or reporting them.

- Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

- Plagiarism is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.
In addition to making a finding of fabrication, falsification, or plagiarism, a finding of research misconduct requires:

- Significant departure from accepted practices of the research community
- Intent (the misconduct must have been intentional, knowing, or reckless)
- Proof by a preponderance of the evidence

Honest error and differences of opinion are not research misconduct
WHAT IS A CONFLICT OF INTEREST?

- Typically a Financial Conflict of Interest (FCOI), or a Conflict of Commitment

- Both University policies and federal regulations require disclosure of actual and potential Conflicts of Interest
  - University policies generally apply to all employees
  - Federal regulations generally apply when scientists, researchers, or other scholars seek and/or obtain federal grants (e.g., NIH, NSF, etc.)
INCREASED GOVERNMENT SCRUTINITY

- August 23, 2018: NIH Director Francis S. Collins issues “Statement on Protecting the Integrity of U.S. Biomedical Research” expressing three areas of concern:
  - Failure to disclose resources from other organizations, including foreign governments
  - Diversion of IP to other entities
  - Sharing confidential information with foreign entities

- July 10, 2019: NIH issues notice NOT-OD-19-114, reminding grant applicants and recipients to disclose:
  - All resources and other support, regardless of monetary value
  - Any foreign component
  - FCOI, including financial interests received from foreign entities
In practice, NIH is focusing on affiliations with China, particularly connected to the “Thousand Talents Plan”

Most (but not all) of the matters being investigated involve ethnic Chinese scientists

- NIH has investigated at least 180 scientists from more than 65 institutions for policy violations related to foreign ties
  - 21 cases have been referred to the HHS OIG for debarment
  - Nearly every scientist under investigation is well-funded and established (i.e., not postdocs or students)

NIH is working closely with several federal agencies, including the DOJ, FBI, State Department, and DHS
“This is not xenophobic racism, this is not targeting and this is not stigma. This is real theft.”
Most Universities follow this process:

1. Allegations (either directly or referral from ORI)
2. Preliminary review and assessment
3. Inquiry
4. Investigation
5. Appeal
6. ORI Oversight Review

COI issues do not follow the same in-depth process and vary based on University policy
Research Misconduct findings can result in various actions, including but not limited to:

- Corrections or retractions of published works
- Employment action, up to and including termination
- Imposition of supervision or assurance requirements
- Suspension or termination of a federal grant
- Suspension or debarment from obtaining federal funds

Findings of COI disclosure violations can result in various actions, including but not limited to:

- Employment action, up to and including termination
- Criminal charges
CASE STUDIES: RESEARCH MISCONDUCT

- Chinese-American, tenure-track professor accused of research misconduct by department chair
  - No finding of research misconduct
  - Non-renewal of contract despite lack of finding

- Former graduate student accused of research misconduct in thesis
  - Finding of research misconduct and recommendation to revoke doctorate

- Tenured department chair
  - No finding of research misconduct against the respondent, but findings of research misconduct against others in the lab
  - Permanent restriction of research privileges despite lack of finding against respondent
CASE STUDIES: COI

- Chinese-American, tenured professor
  - Criminal charges of wire fraud for allegedly submitting false COI forms
  - Criminal charges of program fraud for allegedly receiving federal funds while also employed by a Chinese institution under the “Thousand Talents” program

- Chinese-American, tenured professor
  - University made findings of COI violations based on affiliation with Chinese university recommended by another professor at the U.S. institution
  - Despite finding violations, with our help, university agreed that the actions did not rise to levels necessitating sanctions

- Department chair indicted for participating in “Thousand Talents” and allegedly lying about his affiliation
COMMON MISCONCEPTIONS

- The University/my colleagues are helping me through this process
  - The University has its own interests and obligations and your colleagues have obligations to the University
  - The University may be feeling pressure from governmental agencies

- Hiring a lawyer will make the University think I want to sue
  - There are many reasons to hire a lawyer, and universities understand that you are entitled to representation

- An employment lawyer said I don’t have a case against the university
  - It is important to ensure you hire the right lawyer
HOW CAN A LAWYER HELP?

- Provide guidance and advice on what to say and how to say it
- Assist in providing comments on draft and final reports and other submissions to the University and ORI to present client’s case favorably and to protect the record
- Ensure proceedings follow the proper process and client’s rights are protected
- Reputation restoration
- Settlement
What Do You Do When the FBI or DOJ Knocks on Your Door?
Through the DOJ’s China Initiative, Chinese nationals are under specific scrutiny for crimes related to the illegal transfer of intellectual property.

The primary basis of prosecution are fraud claims or crimes against the United States.

Overall, the majority of cases are reduced to wire/mail fraud and conspiracy charges, as the elements to theft of IP or misappropriation prove difficult to substantiate.
What is the Department of Justice’s China Initiative?
U.S. Department of Justice (DOJ) explains its China Initiative as focused upon:

“Identifying and prosecuting those engaged in trade secret theft, hacking, and economic espionage, the Initiative focuses on protecting our critical infrastructure against external threats through foreign direct investment and supply chain compromises, as well as combatting covert efforts to influence the American public and policymakers without proper transparency.”

https://www.justice.gov/opa/page/file/1223496/download
According to DOJ: “About 80 percent of all economic espionage prosecutions brought by the U.S. Department of Justice (DOJ) allege conduct that would benefit the Chinese state, and there is at least some nexus to China in around 60 percent of all trade secret theft cases.”

https://www.justice.gov/opa/page/file/1223496/download

China Initiative is led by DOJ’s National Security Division—responsible for countering nation-state threats to the United States.
COMPONENTS OF INITIATIVE

Attorney General set the following goals for the Initiative:

- Identify priority trade secret theft cases, ensure that investigations are adequately resourced, and work to bring them to fruition in a timely manner and according to the facts and applicable law.

- Develop an enforcement strategy concerning non-traditional collectors (e.g., researchers in labs, universities and the defense industrial base) that are being coopted into transferring technology contrary to U.S. interests.
COMPONENTS OF INITIATIVE

- Educate colleges and universities about potential threats to academic freedom and open discourse from influence efforts on campus

- Apply the Foreign Agents Registration Act to unregistered agents seeking to advance China’s political agenda, bringing enforcement actions when appropriate

- Equip the nation’s U.S. Attorneys with intelligence and materials they can use to raise awareness of these threats within their Districts and support their outreach efforts
COMPONENTS OF INITIATIVE

- Identify Foreign Corrupt Practices Act cases involving Chinese companies that compete with American businesses

- Increase efforts to improve Chinese responses to requests under the Mutual Legal Assistance Agreement with the United States

- Evaluate whether additional legislative and administrative authorities are required to protect our national assets from foreign economic aggression
TYPICAL CHARGES

- Mail Fraud/Wire Fraud - 18 USC 1343/1344
- “Program Fraud” - 18 USC 666(a)(1)(A)
- False Statement – 18 USC 1001
- Conspiracy to Defraud United States - 18 U.S. Code § 371
MAIL FRAUD/WIRE FRAUD

- The government must prove beyond a reasonable doubt:
  - Whoever intentionally defrauds another through a scheme or artifice by making materially false representations or promises.
  - The defendant must intend to defraud another of money, property, or honest services.
PROGRAM FRAUD

- Theft or bribery concerning programs receiving Federal funds

- The government must prove beyond a reasonable doubt:
  - Whoever, being an agent of an organization embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency.
The government must prove beyond a reasonable doubt:

- Whoever, to any branch or agency of the federal government, **knowingly and willfully**:
  
  1. Falsifies, conceals, or covers up by any trick, scheme, or device a material fact
  2. Makes any materially false, fictitious, or fraudulent statement or representation
  3. Makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.
The elements of a conspiracy under § 371 are

1. “The existence of an agreement
2. An overt act by a conspirator in furtherance of the objectives
3. An intent on the part of the conspirators to agree as well as to defraud the United States."
HOW CAN A LAWYER HELP?

- Lawyer meets and communicates directly with DOJ so that the client is not put position of making statements that may get used against them.

- Lawyer defends your rights during any investigation & prosecution

- Lawyer negotiates with DOJ seeking to avoid criminal prosecution and/or lower seriousness of charges if prosecution occurs.
QUESTIONS?
THANK YOU FOR ATTENDING!

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