



Office of General Counsel
THE TEXAS A&M UNIVERSITY SYSTEM

October 20, 2015

MEMORANDUM

TO: Texas A&M University System chief research officers

James Joyce, PhD., Associate Executive Director
Texas A&M Sponsored Research Services

SUBJECT: House Bill 1295 and Texas Education Code sections 51.954 and 51.955

House Bill 1295 took effect on September 1, 2015. The bill added Texas Education Code sections 51.954 and 51.955, which address requirements relating to the disclosure of sponsors and data generated in the performance of sponsored research. Following is guidance for the implementation of these statutes.

Texas Education Code Section 51.954

A faculty member or other employee or appointee of The Texas A&M University System or one of its members who conducted or participated in sponsored research must conspicuously disclose the identity of each sponsor of the research in any public communication the content of which is based on the results of such sponsored research.

To whom does this apply?

- Any faculty member or other employee or appointee of the System or one of its members, including non-faculty research scientists and engineers, who conducted or participated in the sponsored research the results of which are being communicated.
- It does not apply to other System or member employees who did not participate in the sponsored research, such as administrators and communications personnel.

What is "sponsored research" for purposes of this statute?

- Research that is:
 - Conducted under a contract with or a grant from an individual or entity, other than the System member conducting the research, for the purpose of the research; and

- In which payments received or the value of materials received under the contract or grant, or under a combination of more than one such contract or grant, constitutes at least 50% of the cost of conducting the research.

Who is a "sponsor" for purposes of this statute?

- Any entity that contracts for or provides money or materials for research.
- This includes sponsors of any type (federal, state, private, industry, etc.) other than the System member itself.
- A provider of in-kind support in the form of materials (but not services or other support) is considered a sponsor.
- There is no minimum dollar threshold below which an entity is not considered a sponsor. If an entity provides any funding or in-kind materials, it is a sponsor.

What is a "public communication" for purposes of this statute?

- An oral or written communication intended for public consumption or distribution, including:
 - Testimony in a public administrative, legislative, regulatory, or judicial proceeding;
 - Printed matter including a magazine, journal, newsletter, pamphlet, or report; or
 - Posting on the internet.
- The above list from the statute of examples of disclosures is not exclusive. The term "communication intended for public consumption or distribution" is very broad. It may also include presentations at academic conferences, class lectures, and other discussions where there is not a reasonable expectation of confidentiality, if the content of the communication is based on the results of a specific sponsored research project or projects. Disclosure would not be required for communication about the general field in which sponsored research may have been conducted.
- A media interview would be considered a "public communication" since it is intended for public distribution so sponsors must be conspicuously disclosed during that process, even though the ultimate decision as to whether to include that information in the final product is out of the interviewed faculty member or employee's control.

What makes a disclosure "conspicuous?"

- The statute does not say, but generally a conspicuous disclosure is one that is written, displayed, or presented in such a manner that a reasonable person should have noticed it.
- For written disclosures, using one or more of the following will make the disclosure more conspicuous:
 - Separating the disclosure from the main text by space, a border, symbols, or other marks
 - A heading
 - A contrasting font or color
 - Bolding or italicizing
 - A larger font size
- For oral disclosures, what is conspicuous depends upon the circumstances. At a minimum, the disclosure must be reasonably understandable to the listener.

Sponsored research contract negotiators should watch for contract provisions that prohibit the System member from using the sponsor's name without permission. Since researchers are now required under this new law to identify sponsors in public communications, allowing the sponsor to prevent the researcher from using its name would be allowing the sponsor to prevent the researcher from disseminating information about research results. Like any requirement that the

sponsor approve publications, such a position would be inconsistent with the System member's mission as a public institution of higher education.

Texas Education Code Section 51.955

A state agency may not enter into a research contract with an institution of higher education that contains provisions precluding public disclosure of final data generated under the contract unless the agency reasonably determines that disclosure would adversely affect public safety, protection of the institution's intellectual property rights, publication rights in professional scientific publications, or the institution or a third party's valuable confidential information.

A state agency may not adopt a rule based on research conducted under a contract with an institution of higher education unless the agency has made the research results and all supporting data publicly available or reasonably determines that disclosure would adversely affect public safety, protection of the institution's intellectual property rights, publication rights in professional scientific publications, or the institution or a third party's valuable confidential information.

Sponsored research contract negotiators should be prepared for Texas state agency sponsors being reluctant to agree to contract provisions that would preclude public disclosure of the research data and be able to articulate how disclosure would adversely affect the System member's intellectual property rights, publication rights in professional scientific publications, and/or the System member or a third party's valuable confidential information. Public disclosure that reveals a patentable invention establishes a strict deadline for filing a U.S. patent application, making that process more difficult, and would result in the invention becoming unpatentable in most foreign countries. A public release of data that divulges other unpatented intellectual property such as knowhow or computer source code would likely result in the State of Texas, through the System member, losing any commercial potential that resulted from the funding and effort expended on the research. The value of a publication about the research in scientific literature would be diminished if the data were disclosed prematurely. Confidential information that derives value from not being generally known would clearly be adversely affected by public disclosure. Public safety may also be a concern with some subject matter.

When the System member is subcontracting sponsored research to another institution of higher education, the System member should not include contract provisions that would preclude public disclosure of the research data unless the System member reasonably determines that disclosure would adversely affect public safety, protection of the institution's intellectual property rights, publication rights in professional scientific publications, or the institution or a third party's valuable confidential information.

If you have any questions about either of these statutes, please contact Warren DeLuca at (979)458-6154 or wjdeluca@tamus.edu.

Warren DeLuca
Warren J. DeLuca *AR*
Assistant General Counsel

cc: Texas A&M University System chief executive officers
Ray Bonilla
Scott A. Kelly
Steven R. Garrett
R. Brooks Moore