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DATE: October 8, 2020

TO: California Community College CEOs

FROM: Marc LeForestier
General Counsel

RE: **Trump Administration Actions related to Diversity, Equity, and Inclusion
2020-09 Advisory**

This memorandum responds to concerns the Chancellor's Office has received from California community college stakeholders concerning diversity, equity, and inclusion efforts, and whether they are affected by recent Trump Administration actions to impose right-wing orthodoxy upon discussions of race in America. Among other things, the Trump Administration is intimidating federal contractors, grantees, and institutions of higher education in an attempt to interfere with training activities related to diversity, bias, and systemic racism. Each action is briefly described below. For the reasons explained, the California Community Colleges should not be dissuaded from any of our current activities related to diversity, equity, and inclusion.

1. *U.S. Department of Education Investigation of Princeton University.*

On September 2, 2020, Princeton University President Eisgruber issued an open letter to the Princeton community in which he described "plans to combat systemic racism at Princeton" and indicated that "[r]acial justice demands the scholarly and practical attention of this University." The letter contained the following passage:

Racism and the damage it does to people of color nevertheless persist at Princeton as in our society, sometimes by conscious intention but more often through unexamined assumptions and stereotypes, ignorance or insensitivity, and the systemic legacy of past decisions and policies. Race-based inequities in America's health care, policing,

education, and employment systems affect profoundly the lives of our staff, students, and faculty of color.

Racist assumptions from the past also remain embedded in structures of the University itself. For example, Princeton inherits from earlier generations at least nine departments and programs organized around European languages and culture, but only a single, relatively small program in African studies.

(Eisengruber Letter, Sept. 2, 2020, emphasis added.)¹ The U.S. Department of Education extracted the underscored language from its context in the Eisengruber Letter, and construed it as an admission that "Princeton's educational program is and for decades has been racist." (USDOE Letter, Sept. 16, 2020.) And based on this alleged admission, the USDOE has launched an investigation of whether "Princeton's nondiscrimination and equal opportunity assurances in its Program Participation Agreements from at least 2013 to the present" and its "nondiscrimination and equal opportunity claims to students, parents, and consumers" may have been false. USDOE has demanded an extensive production of records by the university and the appearance of university officials for in-person examinations. And it has threatened to recover up to \$75 Million in federal funds and to impose fines.

The USDOE's allegations blur the lines between the meaning of unlawful discrimination in law, and the societal discussion of, and efforts to address, systemic racism that have taken root in the wake of George Floyd's murder. As the California Community Colleges move forward with actions to improve diversity, equity, and inclusion on campus, discussions of systemic and societal racism, and their effects on college communities, will continue to be a necessary and important element of this work.

This work is not unlawful, and does not constitute an admission that past practices have been unlawful. Please inform the Chancellor's Office of General Counsel in the event the USDOE

¹ On June 3, 2020, Michael A. Grinston, Sergeant Major of the United States Army, James C. McConville, General, United States Army Chief of Staff, and Ryan D. McCarthy, Secretary of the United States Army, issued a joint "Message to the Army Community About Civil Unrest" which began, "Over the past week, the country has suffered an explosion of frustration over the racial divisions that still plague us as Americans. And because your Army is a reflection of American society, those divisions live in the Army as well." We view the Eisengruber Letter as very much aligned with the sentiment expressed in the U.S. Army Message.

communicates with your college regarding your diversity, equity, and inclusion work. The Chancellor will take all appropriate actions to support community colleges.

2. *White House OMB Memoranda on Training in the Federal Government & Presidential Executive Order on Combating Race and Sex Stereotyping*

The White House has issued a series of three documents which purport to prohibit the "promotion" of "divisive concepts." Setting aside the obvious First Amendment implications of the President prohibiting the promotion of "concepts," the descriptions of these "divisive concepts" are subject to a range of interpretations, rendering the prospect of meaningful enforcement uncertain. Each document is described, in turn, below.

a. OMB Memorandum M-20-34 "Training in the Federal Government"

On September 4, 2020, the Office of Management and Budget (OMB) released Memorandum number M-20-34 entitled "Training in the Federal Government" which among other things, signaled a new Administration policy to end the use of federal funds for training that it deems to be "divisive, anti-American propaganda." The memorandum directed federal agencies to identify contracts or other agency spending involving training on critical race theory and white privilege, or "that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil." In addition, federal agencies were directed to find ways to cancel contracts for such training.

This memorandum does not have any obvious impact on California Community Colleges because the OMB Memorandum applies to training programs within federal agencies.

b. Executive Order 13950 "Executive Order on Combating Race and Sex Stereotyping"

On September 22, 2020, the President issued Executive Order 13950, entitled "Executive Order on Combating Race and Sex Stereotyping." The Executive Order takes additional steps toward influencing the training activities of federal contractors and grantees. The Executive Order repeats the OMB Memorandum's claims that "instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country," including in components of the federal government and with federal contractors. The Executive Order states that such training "perpetuates racial stereotypes and division and can use subtle

coercive pressure to ensure conformity of viewpoint” and that research “suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.”

After critiquing diversity training for allegedly seeking to impose "conformity of viewpoint," the Executive Order establishes a forbidden list of “divisive concepts”² that may not be "promoted" in federal training. The Executive Order, and its focus upon the list of "divisive concepts," appears itself designed to exploit and widen existing political and racial tensions in society that were acknowledged in the U.S. Army Message referenced above. Nevertheless, the Executive Order acknowledges that the "Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law." The California Community Colleges do not dispute that.

Like the OMB Memorandum, the prohibitions set forth in the Executive Order apply to trainings offered within federal agencies and the Uniformed Services. However, federal agencies will also be required to downstream the prohibition through their contracting

² “Divisive concepts” means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual’s moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term “divisive concepts” also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

“Race or sex stereotyping” means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

“Race or sex scapegoating” means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

practices, requiring contractors and sub-contractors to abide by the prohibitions as a condition of contracting. These requirements would apply to contracts entered into 60 days after the date of the Executive Order, or November 20, 2020.

The Executive Order also requires all federal agencies to “review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the "divisive concepts.” Notably, Perkins funds are not a "grant" within the meaning of this Emergency Order. Federal agencies must also complete their grant review by November 20, 2020. Based on this timeline, it would appear that the provisions of the Executive Order would not apply to any federal grantees until those programs are identified by the respective federal agencies. And even then, the prohibition would only apply to the use of federal funds, so trainings paid for with state or local funds would not be implicated by a federal grant, regardless of their content.

California community college districts should carefully review any contracts they are negotiating with the Federal government. While a prohibition against training that promotes the "divisive concepts" may not be problematic because their description is subjective, it is possible that federal agencies may propose broader prohibition in new contract terms. Recipients of federal grants should also monitor the federal granting agencies to determine whether grants have been included in reports that are required to be submitted by the Federal agencies to OMB by November 20, 2020.

c. OMB Memorandum M-20-37 “Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All”

On September 28, 2020, the OMB released Memorandum Number M-20-37, entitled “Ending Employee Trainings that Use Divisive Propaganda to Undermine the Principle of Fair and Equal Treatment for All.” This memorandum builds on the concepts stated Memorandum M-20-34 and Executive Order 13950, implements the substantive requirements of the Executive Order, and indicates how the Executive Order will be enforced.

OMB Memorandum M-20-37 instructs federal agencies to apply the prohibition against the promotion of "divisive concepts" to future "federal grant making and cooperative agreement programs." This is an expansion upon the Executive Order, and the implications of this expansion should become clearer after November 20. In addition, each federal agency must designate a "senior political appointee" to certify that any federally-funded diversity training

curriculum meets the "standard of fair and equal treatment of individuals" and obtain approval of the training from the Office of Personnel Management. Finally, OMB Memorandum M-20-37 requires agencies to encourage their employees to report any agency-sponsored training session they believe promotes "divisive concepts" to the agency's Inspector General.

OMB Memorandum M-20-37 is focused on federal agency training, but will result in efforts to downstream the prohibition on promoting "divisive concepts" through federal contracting and grant processes. Violation of the memorandum or the Executive Order could result in debarment of a contractor or grantee.

3. *The 1776 Commission*

President Trump appeared at the National Archives Museum on September 17, 2020, and announced the formation of the 1776 Commission to further "patriotic education." This initiative is apparently a response to the New York Times' 1619 Project, which, among other things, provides free, online supplemental curricula to schools focused on the history and impacts of chattel slavery on the United States. According to President Trump,

"Our mission is to defend the legacy of America's founding, the virtue of America's heroes, and the nobility of the American character. We must clear away the twisted web of lies in our schools and classrooms, and teach our children the magnificent truth about our country. We want our sons and daughters to know that they are the citizens of the most exceptional nation in the history of the world."

While the President characterizes efforts to hold honest and probing conversations about societal racism as "propaganda," he own "mission" is to inculcate upon "our sons and daughters" the "magnificent truth" that America is "the most exceptional nation in the history of the world."

Under the United States Constitution, public education is among the reserved powers of the states, and neither the President nor any other agent of the federal government has power directly to require a state to implement a federal curriculum. Hypothetically, the federal government could in the future attempt to condition the receipt of federal funding upon implementation of a 1776 Commission curriculum, but that would require the assent of Congress.

The Chancellor's Office does not recommend the California Community Colleges take any action in response to the 1776 Commission.

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