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DEVELOPMENTS IN IMMIGRATION AND CUSTOMS ENFORCEMENT OF FOREIGN STUDENT VISA POLICY UNDER COVID-19

To Our Clients and Friends:

The COVID-19 pandemic has posed challenges for international students, and the universities and colleges they attend, as they prepare for the Fall 2020 school semester. Post-secondary education institutions responded to these challenges by considering the best interests, as well as the health and safety, of their students in shaping revised programming and remote learning opportunities. This Client Alert provides an overview of an Immigration and Customs Enforcement (“ICE”) policy that instructed international students they could not remain in the country if their schools provided only online classes; litigation brought against that policy, which led to a rescission of the challenged policy; and subsequent developments, including a new policy that would permit international students who were enrolled as of March 9, 2020 to reenter the country and attend an online-only school while prohibiting international students who would be new to the school from doing the same.

I. Overview of the Administration’s Challenged Policy

Citizens of foreign countries who wish to enter the United States to attend school must obtain a nonimmigrant F student visa. “F-1” students are international students who are enrolled in a “full course of study” in elementary, secondary, or post-secondary academic institutions. Ordinarily, a student may count no more than the equivalent of one class or three credits per term toward the “full course of study” requirement if the class is taken online. 8 C.F.R. § 214.2(f)(6)(i)(G).

On March 9, 2020, as the COVID-19 pandemic spread throughout the United States, ICE issued a guidance document stating that ICE “recognize[d] that schools are updating their emergency operations plans to minimize the potential impact of COVID-19 on the school,” including by “provid[ing] online instruction,” and that ICE intended to “be flexible with temporary adaptations.” Immigration & Customs Enforcement, *Broadcast Message: Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students* (Mar. 9, 2020). Four days later, ICE issued another guidance document to address the status of students whose schools “stop[ped] in-person classes” but would “offer[] online instructions.” Immigration & Customs Enforcement, *COVID-19: Guidance for SEVP Stakeholders* (Mar. 13, 2020). “Given the extraordinary nature of the COVID-19 emergency,” ICE exempted F-1 students from the rule that they must attend most classes in person, instead permitting F-1 students to attend *only* online courses and still remain in the United States. *Id.* At that time, many universities and colleges had suspended in-person instruction for the Spring 2020 semester. Following ICE’s guidance, many schools made plans to offer online instruction, in whole or in part, for the Fall 2020 semester.

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On July 6, 2020, ICE abruptly rescinded its March guidance. ICE directed that “[s]tudents attending schools operating entirely online may *not* take a full online course load and remain in the United States.” Students enrolled in such program were instructed to “depart the country” or else “potentially face immigration consequences.” ICE also instructed schools to submit operational change plans within weeks and to reissue visa-related forms for each of their F-1 international students within a month.

This abrupt rescission wreaked havoc on the universities and colleges who had been scrambling to provide a meaningful and appropriate Fall semester while facing the challenge of COVID-19. These schools were already having to adapt to new safety and security concerns, as well as juggle putting together a meaningful curriculum, evaluating housing options for students, and addressing a myriad of other challenges. The July 6th rescission failed to acknowledge or account for any of those obstacles.

II. Challenging the Policy in Court

Shortly after ICE announced its new policy, Gibson Dunn filed a lawsuit in the U.S. District Court for the District of Oregon challenging the policy as violating the Administrative Procedure Act on behalf of 20 universities and colleges from the western United States. *Univ. of Or. v. Dep’t of Homeland Security*, No. 6:20-cv-01127-MK (D. Or.). The schools argued that in promulgating the policy, ICE failed to consider the serious harms arising from its action, including forcing students to quickly relocate across the globe in the middle of a pandemic where they could face challenging conditions and lose educational opportunities. The schools sought a temporary restraining order and a preliminary injunction.

Several other plaintiff groups also brought cases across the United States challenging ICE’s new policy. *See State of California v. Dep’t of Homeland Security*, No. 4:20-cv-04592 (N.D. Cal.); *Regents of Univ. of Cal. v. Dep’t of Homeland Security*, No. 4:20-cv-04621 (N.D. Cal.); *President & Fellows of Harvard Coll. v. Dep’t of Homeland Security*, No. 1:20-cv-11283 (D. Mass.); *State of Washington v. Dep’t of Homeland Security*, No. 2:20-cv-01070 (W.D. Wash.); *John Hopkins Univ. v. Dep’t of Homeland Security*, No. 1:20-cv-01873 (D.D.C.); *Z.W. v. Dep’t of Homeland Security*, No. 8:20-cv-01220 (C.D. Cal.).

In a July 14, 2020 hearing held in Harvard and MIT’s case brought in Massachusetts, a DHS attorney announced that the agency would be rescinding the policy.

III. Subsequent Developments

On July 24, 2020, pursuant to its representation to the court in the aforementioned case, ICE issued new guidance. According to the revised guidance, active F and M students who were “in valid F-1 or M-1 nonimmigrant status on March 9, 2020, including those previously enrolled in entirely online classes who are outside of the United States and seeking to re-enter the country this fall,” will be permitted to count online classes toward a full course of study and may re-enter the United States, as they were under the March guidance. Immigration & Customs Enforcement, *Broadcast Message: Follow-up: ICE Continues March Guidance for Fall School Term* (July 24, 2020). In so doing, ICE restored the status quo and gave schools flexibility in determining how to structure the upcoming semester.

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The July 24 announcement, however, also included an important new limitation—“F and M students in new or initial status after March 9, 2020, will not be able to enter the United States to enroll in a U.S. school as a nonimmigrant student for the fall term to pursue a full course of study that is 100 percent online.” *Id.* ICE had not previously announced a policy regarding international students coming to the United States for the first time, but under the new guidance, those students are unable to enter or reside in the United States if their courses will be conducted fully online.

At this time, it is uncertain whether any schools will challenge the new July 24 guidance. Gibson Dunn will continue to monitor and assess any developments.

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Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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