BOARD OF REGENTS

SUMMARY OF ITEM FOR ACTION,
INFORMATION OR DISCUSSION

TOPIC: Proposed BOR Policy VIII-15.0 — Policy on High Impact Economic Development Activities

COMMITTEE: Committee of the Whole

DATE OF COMMITTEE MEETING: September 18, 2015

SUMMARY: State ethics law limits University System of Maryland employees' ability to participate in technology transfer and commercialization activities that are an important part of the USM's strategic plan and state objectives. Board of Regent procurement policy limits the institutions' ability to engage and interact with entities that are working to commercialize or develop intellectual property that institutions create, own and license.

In 2012, House Bill 442 was signed into law. The legislation, originally proposed by the USM, provides flexibility and relief from state ethics law and procurement practices to help facilitate and encourage technology transfer and commercialization activities that are expected to result in a significant economic impact for the institution, USM or the State of Maryland. These activities are referred to in the legislation and the policy as "High Impact Economic Development Activities" (HIEDA).

To meet the criteria to be certified as a High Impact Economic Development Activity, there must be a reasonable expectation that one of six distinct economic benchmarks are met, including the generation of more than $1,000,000 in additional annual revenue, the creation of at least twenty new jobs, the commercialization of a promising new technology or product, or the establishment or relocation to the state of a new company, amongst others.

The proposed policy, required by the legislation to implement the flexibility granted under the statute, establishes a process through which institutions may request certification from the Chancellor to be designated as a HIEDA activity or entity.

A review by the Chancellor's staff will include the following due diligence:

- an assessment of the plausibility of the activity or entity in achieving the economic activity benchmarks;
- a review of the organizational documents associated with the creation of any new entity;
- a review of the business plans and financial proformas;
- an assessment of the impact on current institutional employees; and,
- a review of any institutional plans for managing conflicts of interest that may be identified.

It is important to note that the policy provides for ongoing monitoring and oversight, including annual audits of financial statements.

In addition, the policy provides a five-year window for achieving the benchmark it claims as a basis for its HIEDA status, and if not met, the status is then revoked or reconsidered.

ALTERNATIVE(S): The Board of Regents could decide not to adopt the proposed policy, and not take advantage of the flexibility available through the HIEDA legislation.

FISCAL IMPACT: There is no financial impact associated with approval of the proposed policy.

CHANCELLOR'S RECOMMENDATION: That the Board of Regents approve the proposed Policy on High Impact Economic Development Activities, as presented.

COMMITTEE RECOMMENDATION:	DATE:
BOARD ACTION:	DATE:
SUBMITTED BY: Joseph F. Vivona (301) 445-1923	

VIII – 15.00 – Policy on High Impact Economic Development Activities
(Approved by the Board of Regents **_________**)

I. Purpose

A. Title 12-104.1 of the Education Article of the Laws of Maryland establish the term High Impact Economic Development Activities and requires the Board of Regents to adopt a policy that:
   1. establishes policies governing the establishment of High Impact Economic Development Activities (HIEDA) to ensure that the institution's participation in a HIEDA entity advances the interest of the institution, the University System of Maryland (USM) and the State;
   2. sets requirements for recognition of High Impact Economic Development Activities by the Board of Regents;
   3. requires an annual audit of High Impact Economic Development Activities involving a separate entity;
   4. articulates the expectation that institutions adopt safeguards and controls with respect to business and contracting practices, managing potential and actual conflicts of interest, and other fundamental ethical and business practice standards for oversight and interaction with High Impact Economic Development Activities; and
   5. acknowledges a fundamental obligation, whether or not explicitly covered by University System of Maryland (USM) by-laws, to avoid practices that deviate from those commonly accepted within the academic community for proposing, conducting, or reporting academic research.

B. Nothing in this policy shall exempt an institution, entity, or individual from Federal law, including laws and regulations related to conflicts of interest in sponsored research, and nothing herein shall be interpreted in such a way that jeopardizes the primary mission of public educational institutions.

C. The intent of this policy is to implement provisions of the legislation in such a way that enhances institutional ability to invest in, create, and participate in activities that result in an economic benefit to the institution, USM and State of Maryland in a manner that facilitates the commercialization of intellectual property and/or the use of other assets created or owned by the institution or System while establishing certain basic business controls relating to ethics law requirements, procurement practices, and review, approval and periodic reporting requirements as appropriate.

II. General

A. A High Impact Economic Development Activity is one that advances the economic interests of the state of Maryland through Job creation, technology transfer or commercialization, or increased sponsored research funding or other revenues. A High Impact Economic Development Activity means an initiative, transaction, or other undertaking by the University System of Maryland or one of its constituent institutions to create or facilitate one of the following:

(1) 20 or more new jobs in the State of Maryland;
(2) The award or completion of at least $1,000,000 in externally funded research or other projects;
(3) The establishment or relocation of one or more new companies to be registered or incorporated in the State and doing business in the State;
(4) The production of at least $1,000,000 of annual gross revenue;
(5) The licensing and potential commercialization of a promising new technology or other product; or
(6) An academic program to meet workforce demand in a documented labor shortage field.

B. High Impact Economic Development Activities may involve disposition of real or personal property assets, or the creation or investment in new and distinct entities. This policy sets forth the requirements for any relationship between High Impact Economic Development Activities and the state and its institutions.

C. Present or former System officials and employees may participate in High Impact Economic Development Activities. The Maryland Public Ethics Law (specifically the General Provisions Article §5-525) applies to educational institutions engaged in research or development, which includes High Impact Economic Development Activities established under Education Article §12.104.1. In situations where participation by present or former System officials and employees give rise to conflicts of interest, the requirements and provisions of §5-525 are to be used to manage and mitigate the risks and exposures associated with those relationships and participation.

III. Creation and Recognition of High Impact Economic Development Activities

A. Presidents of institutions and the Chancellor, or their designees, may seek approval to have an activity certified as a High Impact Economic Development Activity by submitting a request for certification to the Chancellor. The request is to include:

1. The type of activity (disposition of real or personal property assets important to the activity, establishment of a new entity, or other)
2. A description of the economic implications of the proposed activity on the State or the System
3. Identification of the specific criteria for which the High Impact Economic Development Activity will be certified and the expected timeframe for which the criteria cited will be achieved
4. If the High Impact Economic Development Activity calls for the creation or investment in a new and distinct entity, a detail of institutional or System resources required either through investment in return for an equity ownership position, use of institutional resources, and the expected benefit to the institution, the USM and the State.

5. If an entity is to be created, the legal form of the entity, proposed organizational documents such as articles of incorporation and by-laws, its initial and projected ownership, governance structure, the benefit or motivation for creating or requiring a new entity, and the expected business or contractual relationships, if any, between the System and its institutions, and the new entity to be formed.
6. A business plan covering no less than the first five years of operation of a High Impact Economic Development Activity.
7. If institution or System staff or faculty are to participate in a High Impact Economic Development Activity, a detail of the positions or staff members, their planned participation, identification of any personal or monetary benefit that the System staff or faculty could potentially realize from the activity, and whether or not potential conflicts of interest concerning state employees have been reviewed by institutional conflict of interest committees (with any resulting conflict of interest management plan proposed).
8. The potential impact on current institution employees who may not participate as employees of the proposed entity; and
9. Approval or conclusion of the Conflict of Interest Committee consideration.

B. No activity or entity will be certified as a High Impact Economic Development Activity if the criteria above are not projected to be met within the first five years of operation as reflected in the business plan. An activity certified as a High Impact Economic Development Activity that does not meet any of the enumerated criteria within five years of certification will have that certification reviewed by the Chancellor concluding with a revised determination as to the appropriateness of continuing the certification.

C. Within 45 days from submission of a request for certification, the Chancellor, or designee, will (1) certify the activity as a High Impact Economic Development Activity, (2) deny the request, or (3) defer certification pending resolution of outstanding and unresolved issues or review requirements. This action will be formalized in writing from the Chancellor to the institution President.

D. The Chancellor will inform the Board of Regents of the recognition of new High Impact Economic Development Activities at its next scheduled and routine meeting of the Board of Regents. The Chancellor will provide prompt notice to the Board of Public Works of any High Impact Economic Development Activities certified under this policy.

E. On or before October 1 of each year, a report will be sent to the Board of Public Works, the Senate Finance Committee, the House Economic Matters Committee, the Senate Budget and Taxation Committee, and the House Appropriations Committee on the High Impact Economic Development Activities undertaken during the preceding fiscal year.

IV. Requirements associated with High Impact Economic Development Activities

A. High Impact Economic Development Activities involving disposition of real or personal property

1. Board of Regents Authority. The Board has the authority to administer various statutorily-mandated processes related to the disposition of real and personal property as part of a HIEDA activity to facilitate the timely review and comment regarding those activities, consistent with §§5-310 and §§10-305 of the State Finance and Procurement Article, Chapter 450 of the Laws of 2012 vested authority in the Board of Regents to administer those review and comment processes.

    a. Under this authority, the USM will establish a protocol for any HIEDA certified the by Chancellor for review and comment regarding the disposition of real and personal property by the following legislative committees and State agencies:
        i. Budget committees of the General Assembly;
        ii. The Maryland Historic Trust;
        iii. The Department of Planning;
        iv. The Department of the Environment and
        v. The Department of Natural Resources.

    b. In addition, any declaration of real property as surplus and its disposition shall be submitted to the Board of Public Works.

    c. Individual agency and committee reviews may occur concurrently to the extent determined appropriate by the USM.

    d. Each review agency and legislative committee shall have a review and comment period of no less than 30 days.

2. USM Review Process. In consultation with institution representatives, the USM will develop procedures to administer the protocol for securing the statutorily-mandated review and comments of the relevant legislative committees and State agencies.
    a. When an institution submits documentation to the Chancellor for a HIEDA certification, it shall include a description of any institution real or personal property that would be declared surplus and disposed of as part of the HIEDA transaction and an explanation as to why the disposition is significant to the HIEDA.
    b. In light of the unique characteristics of HIEDA, the USM will evaluate each transaction individually on its merits and shall develop a specific time line and sequence for the necessary review process.
    c. The process shall ensure compliance with Board of Regents policies VIII - 4.00 through VIII – 4.02 on the acquisition and

disposition of real property shall apply to all institution real property transactions.

B. High Impact Economic Development Activities involving the creation or investment in a new entity

1. Audits of High Impact Economic Development Activity entity financial statements

Any High Impact Economic Development Activity that involves the creation of a new entity or an investment in an already established entity will be required to prepare financial statements for the entity. During the initial or development stage, the entity may have financial statements compiled or reviewed by an independent accountant, until the year the entity achieves a size of having assets of more than $500,000 at year-end, or revenues of at least $500,000, at which point the entity is to have the financial statements audited by an independent accountant in accordance with generally accepted auditing standards. The entity is to provide annual financial statements, compiled, reviewed or audited, as required annually to the chancellor's office no later than October 1.

2. Conflicts of Interest

a) A present or former official or employee of a constituent institution of the System may have a relationship (as defined herein) with a High Impact Economic Development Activity entity, which relationship would otherwise be prohibited by the conflict of interest provisions of the Ethics Law, if such relationship is disclosed, managed, and approved by the President of the educational institution in accordance with the institution's conflict of interest procedures developed pursuant to this Policy so as to protect the integrity and objectivity of the educational institution's academic and research enterprise and comply with any applicable federal law, regulation, or policy.

b) "Relationship" means any interest, service, employment, gift, or other benefit or relationship with an entity that would be prohibited by Title 15, Subtitle 5 of the State's Public Ethics Law if not disclosed and approved pursuant to this Policy and procedures adopted pursuant to it. "Relationship" includes any relationship of the spouse or other relative of an officer or employee if such relationship creates restrictions on the officer or employee under the conflict of interest provisions of the Ethics Law.

c) The Chancellor, a Vice Chancellor, a President, or a Vice President or one holding a similar such position may have such a relationship only if the Board of Regents makes the following findings:

    i. that participation by, and the financial interest or employment of, the official is necessary to the success of the High Impact Economic Development Activity; and

ii. that any conflict of interest can be managed consistent with the purposes of relevant provisions of the Public Ethics Law.

The Board shall promptly notify the State Ethics Commission in writing of any approval given under this paragraph. In the event that the Commission disagrees with any approval and provides notice to the Board within 30 days of the Commission's receipt of notice of the approval, the Board shall reexamine the matter. The Board shall adopt procedures for handling requests for approvals under this paragraph.

d) If the above conditions are not met, this Policy does not exempt a former or present official or employee from any of the provisions of the State Ethics Law.

e) Nothing in this Policy allows an exemption on the part of any official or employee of the System from the provisions of §5-505 ("Solicitation or acceptance of gifts of honoraria") of the General Provisions Article. Further, an official or employee of the System may not (1) represent a party for contingent compensation in any matter before the Board of Regents or before the State's Board of Public Works, or (2) intentionally misuse his or her position with the System for personal gain or for the gain of another person.

f) The approval of a relationship under this policy does not relieve the official or employee from the obligation to comply with other System and institution policies, including the System Policy on Professional Commitment of Faculty.

g) The Chancellor is encouraged to consult periodically with the Maryland Department of Business & Economic Development and with Federal agencies that regulate federally-funded research concerning the implementation of this policy.

3. Conflict of Interest Procedures

a) Each institution shall develop procedures based on the above policy and the purposes of the Maryland Public Ethics Law as stated at Title 5 of the General Provisions Article of the Maryland Annotated Code. The procedures shall be approved by the Office of the Attorney General and approved as to conformity with Maryland Public Ethics Law by the State Ethics Commission. The approved procedures shall be filed with the Office of the Chancellor. An institution may simply extend the procedures in place for research and development conflicts of interest to also manage conflicts of interest in proposed High Impact Economic Development Activities.

b) Procedures shall:

i. Require timely disclosure of any relationship. The disclosure shall be filed with the State Ethics Commission, and maintained as a public record at the institution.

ii. Subject to paragraph (v.), require review of all disclosed relationships by a designated official who shall determine what further information must be disclosed and what restrictions shall be imposed in order to manage, reduce, or eliminate any actual or potential conflict of interest. The designated official shall also determine whether or not the disclosed relationship represents a harmful interest. If so, approval shall not be granted. A harmful interest means an interest which is found to be so influential as to impair impartiality in the conduct of the research, the interpretation of the results of the research, and/or the determination of research or other professional and employment priorities.

iii. Include guidelines to ensure that relationships do not improperly give an advantage to entities with which the relationships exist, lead to misuse of institution students or employees for the benefit of such entities, or otherwise interfere with the duties and responsibilities of the official or employee maintaining the relationship.

iv. Subject to paragraph (v.), require that each relationship be approved or disapproved by the president of the institution, with such determination to be the final decision prior to submission for certification as a HIEDA to the Chancellor.

v. Require that any relationship maintained by the President or a Vice President, by the Chancellor or a Vice Chancellor, and by one holding any other position designated by the Board of Regents be approved by the Board of Regents.

4. **Conflict of Interest Reporting Requirements**

Institutions are to submit to the Chancellor in a format determined by the Chancellor a quarterly report which shall include all approvals granted under this Policy. The Board of Regents shall report to the Governor, the Legislative Policy Committee of the General Assembly, and the State Ethics Commission, the number of approvals granted under this Policy and how this Policy and the procedures adopted pursuant to it have been implemented in the preceding quarter.

C. High Impact Economic Development Activities and USM Procurement Policies and Procedures

a) Title 12-104 of the Education Article as it relates to the creation of High Impact Economic Development Activity entities states in part:

i. "Division II of the State Finance and Procurement Article does not apply to transactions between an entity established, financed, or operated under this subsection and the institution or consortium of institutions that established, financed or operated the entity"

ii. It further states that the Board of Regents shall adopt policies and procedures that include requirements for "Adequate safeguards with regard to conflicts of interest, proper contracting practices and other fundamental ethical and business practice standards".

b) A HIEDA entity shall not be used for the acquisition of goods and services in place of a procurement process that would have otherwise been competitive.

c) The suspension of provisions of Division II of the State Finance and Procurement Article is limited to the acquisition of goods and services the entity would make available through its normal operation for its approved and intended purpose consistent with this policy.

d) The acquisition of goods and services from the HIEDA entity under (a)(i) above is limited to the institution establishing the entity.

e) The creation of a consortium for the purpose of establishing, funding and operating a HIEDA entity shall be vetted and approved through the certification process consistent with Section III above.