Public Interest Comment¹ on
The Department of Education’s Proposed Rule:
Violence Against Women Act
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The George Washington University Regulatory Studies Center
Retrospective Review Comment Project

The George Washington University Regulatory Studies Center strives to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Education’s (ED) proposed rule implementing and updating the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) as amended by the Violence Against Women Act Reauthorization of 2013 (VAWA) does not represent the views of any particular affected party or special interest, but is designed to evaluate whether the ED’s proposal incorporates plans for retrospective review, pursuant to Executive Order 13563.

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at http://research.columbian.gwu.edu/regulatorystudies/research/integrity.
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Introduction

In March 2013 President Obama signed the VAWA reauthorization, part of which amended the campus safety standards for higher education institutions. The proposed rule includes updates and amendments VAWA made to the Clery Act aimed at increasing campus safety, specifically regarding sexual assault. All institutions that participate in title IV programs pursuant to the Higher Education Act (HEA) are subject to the new regulations, as their participation is contingent on complying with the Clery Act.3

One of the most significant regulatory actions in the statute and proposed rule requires institutions to collect and publish statistics about the number of reported instances of dating violence, domestic violence, sexual assault, and stalking. Other significant changes include revising definitions of terms such as rape and stalking and requiring institutions to provide prevention and awareness programs.4

Institutions are also required to describe and provide for disciplinary hearings to handle accusations of sexual assault. This includes informing students and employees about all types of proceedings, all possible sanctions that might result, protective measures available, and ensuring that participating officials are impartial and properly trained.5

As a part of its ongoing Retrospective Review Comment Project, the Regulatory Studies Center examines significant proposed regulations to assess whether agencies propose retrospective review as a part of their regulations, and submits comments to provide suggestions on how best to incorporate plans for retrospective review into their proposals. To facilitate meaningful retrospective review after the promulgation of a final rule, multiple government guidelines instruct agencies to incorporate retrospective review plans into their proposals during the rulemaking process.

Incorporating Retrospective Review into NPRMs

Through a series of Executive Orders, President Obama has encouraged federal regulatory agencies to review existing regulations “that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with

3 79 FR 35418, “The Clery Act requires institutions of higher education to comply with certain campus safety- and security-related requirements as a condition of their participation in the title IV, HEA programs. Notably, VAWA amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking and to include certain policies, procedures, and programs pertaining to these incidents in their annual security reports.”
4 79 FR 35418
5 79 FR 35418, 35419
what has been learned.” On January 18, 2011, President Obama signed Executive Order 13563, Improving Regulation and Regulatory Review, which reaffirmed the regulatory principles and structures outlined in EO 12866. In addition to the regulatory philosophy laid out in EO 12866, EO 13563 instructs agencies to consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.\(^6\)

This ex-post review makes it possible for the government and the public to measure whether a particular rule has had its intended effect. In his implementing memo on retrospective review, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, stated the importance of designing regulations to facilitate their evaluation:

> With its emphasis on “periodic review of existing significant regulations,” Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. To promote that culture, *future regulations should be designed and written in ways that facilitate evaluation of their consequences* and thus promote retrospective analyses and measurement of “actual results.” To the extent permitted by law, agencies should therefore give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.\(^7\) [Emphasis added]

This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.” In its 2013 Report to Congress on the Benefits and Costs of Federal Regulations, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to the flaws of ex ante analyses. According to that report, the result of systematic retrospective review of regulations:

> should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-


after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and importantly, rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.

Retrospective Review Requirements

To evaluate whether ED’s proposal was “designed and written in ways that facilitate evaluation of [its] consequences,” we measure it against five criteria:

- Did ED clearly identify the problem that its proposed rule is intended to solve?
- Did ED provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did ED commit to collecting information to assess whether its measureable metrics are being reached?
- Did ED provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?
- Did ED write its proposal to allow measurement of both outputs and outcomes to enable review of whether the standards directly result in the outcomes that ED intends?

Identifying the Problem

The first of the “Principles of Regulation” outlined by President Clinton in EO 12866 makes it clear that, as a first step, agencies must be able to identify the problem that justifies government action through regulation:

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

This step is crucial to the formulation of any policy. Without knowledge of the problem that the agency is trying to address, the public cannot assess whether the policy or regulation at hand has had the intended effect, which is key in retrospectively evaluating regulation. ED identifies four goals that the proposed regulation will accomplish. It will:

- Expand reporting of crime statistics to capture a more accurate picture of dating violence, domestic violence, sexual assault, and stalking on our nation’s campuses;
- Strengthen institutional policies related to these crimes;
- Provide greater support and accommodations for victims; and
• Protect the rights of both parties (accuser and accused) during institutional disciplinary proceedings.\(^8\)

But ED does not state the precise problems these results are addressing. While campus safety is an obvious goal of this regulation, ED does not examine why existing measures are inadequate nor does it address whether this is a private market failure among the institutions, or a failure of existing regulatory policies. However, it does indicate that the rule will provide potential and current students and employees the opportunity make a more informed decision about institutions.\(^9\) This implies that information asymmetry could be the “failure of private markets” this rule is attempting to solve. Without a clear problem identification it is both difficult to measure the outcome and to know if the requirements are reasonable ways to address the issues.

**Measurement Criteria**

In order to measure the success of this rule following implementation, it is necessary for ED to define what constitutes a “success.”

ED does not offer measures for evaluating the rule, nor does it define what a successful outcome for the proposed regulation would look like. Given the large number of substantive changes in this rule, measuring outcomes and tying them (individually and in combination) to the elements of the rule is important for evaluating its success. ED, though it does mention EO 12866 and EO 13563,\(^10\) does not address retrospective review.

In addition to the goals stated above, ED mentions two regulatory benefits it expects from the proposed regulation.

• First, we expect students and prospective students and employees and prospective employees to be better informed and better able to make choices in regards to higher education attendance and employment because the proposed regulations would improve the method by which crimes on campuses are counted and reported.

• Second, we would provide further clarity on students’ and employees’ rights and procedures by requiring institutions to design and disclose policies and institutional programs to prevent sexual assault.\(^11\)

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\(^8\) 79 FR 35422  
\(^9\) 79 FR 35419  
\(^10\) 79 FR 35447, 35448  
\(^11\) 79 FR 35448
Implicit in the first outcome is a causal link between standardized information on campus crime and more informed choices by current and prospective students and employees. To inform retrospective review of the requirements, if implemented, ED should develop measures of whether the information influenced the target population’s behavior.

While the second benefit is not an outcome in and of itself, ED appears to assume that more clarity and transparency regarding policies will motivate institutional efforts to reduce campus violence overall. ED should provide measures that it will use to evaluate whether campus violence decreases and to determine whether the new requirements are appropriately tailored to addressing the issue. For example, does the required disclosure lead to competition among campuses on safety grounds and reduce crime rates?

ED provides many new definitions in the proposed rule, including definitions for programs to prevent dating violence and new definitions of rape, sexual assault, and stalking. New definitions are helpful in providing clarity and can update outdated or ineffective standards used in criminal proceedings, but without measurement criteria it is difficult to assess if they are effective. For example, ED provides a condensed definition of rape similar to the updated FBI definition. Making definitions uniform across government agencies is a good goal because it reduces confusion and prevents double counting crimes. However, as the new ED definition is not exactly the same as the FBI’s, it is important that ED evaluate the effectiveness and clarity of its definition. ED should develop measures to see if the new definitions address the issues with the old ones and if they are effective as applied in the institutions.

The proposed rule requires institutions to have disciplinary processes in place and makes it clear that institutions must not bias disciplinary hearings against either the accused or the victim and must give them both the same information and the same opportunities to counsel in the hearings. But ED does not mention how it will measure if the disciplinary hearings are effective or how it will make sure that they are not biased. Given that higher education institutions have an interest in keeping their sexual assault statistics low, ensuring a fair and unbiased procedure is a necessary component if the proposed rule is going to require the institutions to administer the proceedings.

12 79 FR 35422
13 79 FR 35418
14 79 FR 35436
15 79 FR 35422
16 79 FR 35423
Information Collection

OMB’s Paperwork Reduction Act (PRA) regulations require agencies to “ensure that each collection of information … informs and provides reasonable notice to the potential persons to whom the collection of information is addressed of … an estimate, to the extent practicable, of the average burden of the collection (together with a request that the public direct to the agency any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden).”17

ED estimates that the proposed regulations will create a total paperwork burden for the participating institutions of 77,725 hours annually, which will cost $2,840,849.18 This means that approximately 9,716 eight hour work days will be consumed implementing this regulation each year. Under the PRA, federal agencies must both minimize the burden and maximize the utility of information required.19 Since the rule appears to be aimed at addressing what ED has implicitly identified as a problem of asymmetric information, additional information collection and reporting may be the appropriate solution. However, information, like other goods, involves costs as well as benefits, and it is incumbent upon ED, pursuant to the PRA as well as EOs 12866 and 13563, to weigh the burdens against the benefits. Before issuing a final rule, ED should evaluate the utility of the individual information collection requirements against their costs, considering the comments it receives from affected institutions. If the rule is implemented, ED should commit to evaluating the actual burdens of the required collections as well as the effect of that information on campus safety.

Timeframe

The text of the proposed rule does not include a timeframe for retrospective review. In the final rule, ED should identify a timeframe for review, indicating how soon after implementation it will begin to measure the progress of its stated metrics. ED will need to seek OMB approval of its information collection every three years, so that will provide a reasonable period for it to evaluate both the burden and the utility of the requirements.

Measure Linkages

In the final rule, ED should not only identify a set of metrics, but make clear how the measures it identifies address the problems that the rule intends to solve. As noted above, without a clearer definition of success or improvement, establishing linkages will be difficult. ED needs to know what it is measuring before it can determine if the measures adequately address the issue.

17 5 CFR Part 1320.8(b)(3)(iii)
18 79 FR 35449
19 5 CFR Sec. 3501.6
As ED commits to measuring the effects of this rule, it should also be aware of mediating factors that may have contributed to or undermined the stated metrics absent the rule. For example, as the public becomes more aware of sexual assault issues on campuses, institutions, students, and employees may respond with their own programs and procedures that could affect statistics. While the increase in information available could be attributed to the rule, if institutions are providing different information or programs from the requirements, ED should evaluate if it is requiring the most relevant information.

ED should also consider the link between how an institution handles the sexual assault cases and its reported statistics. What incentives might the new requirements provide regarding both reporting and handling of cases? Determining linkages between the rule and the measured outcomes is necessary to understand the effect of the rule, as well factors beyond ED’s control.

**Review of Previous Standards**

Since this proposed rule is a part of the VAWA reauthorization, it is not the first time sexual assault issues have been addressed by regulation. Problems with lack of measurement and ineffective measures have been identified, but are not addressed in the reauthorization or the proposed rule. A March 2002 Government Accountability Office (GAO) report found that previous measurement attempts “demonstrated a variety of methodological limitations, raising concerns as to whether the evaluations will produce definitive results.”

The Department of Justice Inspector General (OIG) also found many issues with grants given by VAWA to implement its programs. In a review of 22 different VAWA grantees, “21 were found to have some form of violation of grant requirements ranging from unauthorized and unallowable expenditures, to sloppy recordkeeping and failure to report in a timely manner.”

The proposed rule does not mention how it would address issues such as these and provide better measures to prevent similar issues. Addressing sexual assault on campus is an important concern and a failure to adequately provide measures or to monitor success or failure of programs prevents the rule from reaching its stated goals.

**Recommendations**

The proposed rule addresses important issues that deserve recognition. Implicit in the rule is that increased reporting of crime statistics, better definitions, and improved and transparent

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disciplinary processes will lead to more informed members of university communities and ultimately reduce campus crimes. However, ED has not adequately explained the causal linkages between its requirements and these outcomes.

Given the large paperwork requirements involved in this rule, ED needs to provide measures for reviewing both its burden estimates and the utility of the information required. ED should commit to reviewing the new requirements (individually and in combination) and evaluating if they effectively address the problem of sexual assault on campuses. The rule fails to address previous measurement issues with VAWA standards and does not address how it will evaluate the success of the proposed requirements. Not addressing these problems with the proposed rule will make measurement difficult and prevent the rule from complying with the retrospective review requirements of EO 13563.