DEPARTMENT OF EDUCATION

34 CFR Part 668

[Docket ID ED–2020–OGC–0165]

The Department's Enforcement Authority for Failure to Adequately Report Under Section 117 of the Higher Education Act of 1965, as Amended

AGENCY: Office of the General Counsel, Department of Education.

ACTION: Notification of interpretation; request for comments.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority for failure to adequately report under section 117 of the Higher Education Act of 1965, as amended (HEA).

DATES: This interpretation is effective November 13, 2020. Comments must be received by the Department on or before December 14, 2020.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Help.''
- *Postal Mail, Commercial Delivery, or Hand Delivery:* The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about the interpretation, address them to Levon Schlichter, U.S. Department of Education, 400 Maryland Avenue SW, 6E–235, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Levon Schlichter, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E–235, Washington, DC 20202–5076. Telephone: (202) 453–6387. Email: *Levon.Schlichter@ed.gov.*

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding this interpretation. We will consider these comments in determining whether to take any future action. See **ADDRESSES** for instructions on how to submit public comments.

During and after the comment period, you may inspect all public comments about the interpretation by accessing *Regulations.gov.* Due to the novel coronavirus 2019 pandemic, the Department buildings are currently not open to the public. However, upon reopening, you may also inspect the comments in person at 400 Maryland Ave. SW, 6E–251, Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. To schedule a time to inspect comments, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the interpretation. To schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background: Section 117 of the HEA (20 U.S.C. 1011f) provides that institutions of higher education (IHEs) must file a disclosure report with the Secretary of Education, on January 31 or July 31, whichever is sooner, whenever the institution is owned or controlled by a foreign source or receives a gift from or enters into a contract with a foreign source, the value of which is $250,000 or more, considered alone or in combination with all other gifts from or contracts with that foreign source within a calendar year.

The current version of this disclosure requirement was adopted in 1998, *see* Public Law 105–244, Higher Education Amendments of 1998, Title I, sec. 102(a), adding HEA Title I, sec. 117 (Oct. 7, 1998); but a substantially similar disclosure requirement has been in place since 1986. *See* Public Law 99–498, Higher Education Amendments of 1986, Title XII, sec. 1206, adding HEA Title XII, sec. 1207 (Oct. 17, 1986) (then codified at 20 U.S.C. 1145d).

We have attempted to collect Section 117 information via our approved Application to Participate in Federal Student Financial Aid Program (e-App), Office of Management and Budget (OMB) Control Number 1845–0012, but did not receive sufficient information to faithfully enforce the statute. Consequently, on February 10, 2020, we established a new information collection request (ICR) pursuant to the Paperwork Reduction Act (OMB Number 1801–0006). This new collection is necessary to ensure institutions provide congressionally mandated transparency with respect to covered gifts from and contracts with foreign sources, the public has ready and meaningful access to this information, and the Secretary receives more detailed information about covered gifts or contracts involving a foreign source and ownership or control of the institution by a foreign source, to determine whether it appears an institution has failed to comply with the requirements of 20 U.S.C. 1011f.

The prior reporting by institutions through the e-App plainly did not collect sufficient information to determine compliance with 20 U.S.C. 1011f, to encourage institutions full reporting of covered gifts and contracts from foreign sources, and to provide members of the public with statutorily mandated access to accurate information regarding institutions' gifts from and contracts with foreign sources. Government Accountability Office reports (see *https://www.gao.gov/assets/700/696859.pdf; https://www.gao.gov/assets/700/697156.pdf;* and *https://www.gao.gov/assets/680/679322.pdf*); a comprehensive congressional report regarding the operation of Chinese government propaganda centers on U.S. campuses (see *http://www.hsgac.senate.gov/download/majority-and-minority-staff-report_-chinas-impact-on-the-us-education-system*); and evidence obtained by the Department through its civil investigations, confirm the majority, and perhaps the vast majority, of institutions failed to file required disclosures to the Department when institutions were using the e-App to submit Section 117 information. For example, our investigations regarding potential noncompliance with Section 117 have preliminarily shown that institutions have failed to disclose approximately $6.5 billion of gifts from and contracts with foreign sources. Therefore, we issued an ICR to ensure that institutions comply with the statutory disclosure requirement and provide the public with information as Congress has intended.

Through this notification of interpretation, the Department clarifies

its enforcement authority with respect to institutions that fail to report accurate and complete Section 117 information.

Interpretation:

Institutions Are Required Under Their Program Participation Agreements (PPA) To Report Section 117 Data

Section 20 U.S.C. 1094(a)(17) of the HEA provides that in order to be an eligible institution for the purposes of any program authorized under the subchapter, an institution must enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirement: The institution will complete surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or *any other Federal postsecondary institution data collection effort,* as designated by the Secretary, in a timely manner and to the satisfaction of the Secretary.

The program participation agreement requirement was adopted in 1986, *see* Public Law 99–498, Higher Education Amendments of 1986, Title IV, sec. 407(a), adding HEA Title IV, sec. 487 (Oct. 17, 1986); and subsection (a)(17) was added in 1992, *see* Public Law 102–325, Higher Education Amendments of 1992, Title IV, sec. 490 (July 23, 1992).

On April 29, 1994, the Department promulgated 34 CFR 668.14 to implement the 1992 amendments. See 59 FR 22425; see also 59 FR 9526, 9538 (Feb. 28, 1994) (notice of proposed rulemaking explaining that the regulatory text is ''without substantive modifications'' from 20 U.S.C. 1094(a)(17)). Section 668.14(b)(19) provides that by entering into a program participation agreement, an institution agrees that it will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or *any other Federal collection effort,* as designated by the Secretary, regarding data on postsecondary institutions.

The Secretary, in light of widespread underreporting, clarifies via this notification that the Section 117 information collection is part of a 1094(a)(17) ''Federal data collection effort, as designated by the Secretary'' to ensure the public understands ED's enforcement authority. The requirement that institutions ''file a disclosure report with the Secretary'' comes within the plain and ordinary public meaning of 20 U.S.C. 1094(a)(17) at the time of its enactment. *See Bostock* v. *Clayton County,* 140 S.Ct. 1731, 1749 (2020). Indeed, a substantially similar foreign gift reporting requirement had already been in place for six years when Congress added Section 1094(a)(17) in 1992. *See* Public Law 99–498, Higher Education Amendments of 1986, Title XII, sec. 1206, adding HEA Title XII, sec. 1207 (Oct. 17, 1986) (then codified at 20 U.S.C. 1145d). And when Congress expanded that reporting requirement in 1998, it did not exempt the new Section 117 from Section 1094(a)'s requirements. Congress' consistent understanding is reflected in statutory language adopted in 2008, when Congress incorporated Section 117 standards into Title VI, and expressly referred to Section 117 reporting as a ''data requirement.'' *See* 20 U.S.C. 1132–7; Public Law 110–315, Higher Education Opportunity Act, Title VI, sec. 622, adding HEA sec. 638 (Aug. 14, 2008). Finally, to the extent it is relevant, we note that there is nothing in the legislative history of 20 U.S.C. 1094(a)(17) suggesting that Congress intended to narrow the plain meaning of the words ''any other Federal postsecondary institution data collection effort.''

Under 20 U.S.C. 1094(a)(17), where an institution fails to report Section 117 information timely and accurately, the institution has failed to comply with its reporting obligations under 20 U.S.C. 1011f and failed to comply with a requirement in its PPA. Under 20 U.S.C. 1094(a), the Department has authority to implement a range of corrective measures for an institution that violates its PPA, including termination of the institution's Title IV participation. We note that under 34 CFR 668.81 through 668.99 institutions have administrative appeal rights when the Department imposes fines, limitations, suspensions, or termination of the institution's Title IV participation.

The Department Has Authority to Administratively Subpoena Information From Parties When Investigating Possible Violations of Section 117

An institution's failure to adequately report Section 117 gifts and contracts is a violation of an institution's participation in the HEA programs and PPA under 20 U.S.C. 1094(a)(17). Therefore, in addition to obtaining records and employee interviews under 34 CFR 668.24 in furtherance of any investigation about the sufficiency of an institution's Section 117 reporting, under 20 U.S.C. 1097a, ''the Secretary is authorized to require by subpoena the production of information, documents, reports, answers, records, accounts, papers, and other documentary evidence pertaining to participation in any program under [Title IV of the HEA].'' Consistent with applicable law, the Secretary is also authorized to share such evidence with other agencies of the U.S. Government for law enforcement and other lawful purposes.

Title VI Reporting

For institutions that receive Title VI funds, 20 U.S.C. 1132–7 imposes a reporting obligation that is similar to Section 117. While the monetary threshold is almost identical in Section 117 and 20 U.S.C. 1132–7, they reference different time periods. Section 117 requires IHEs to disclose reportable transactions greater or equal to $250,000 occurring within a *calendar year* while 20 U.S.C. 1132–7 requires IHEs to disclose reportable transactions greater than $250,000 occurring during a *fiscal year.* Institutions that receive Title VI funds and participate in the HEA programs are advised to be mindful of this temporal difference when designing corporate compliance processes since failure to adequately report under 20 U.S.C. 1132–7 may result in administrative enforcement actions similar to those described above for failure to comply with Section 117 reporting requirements and 20 U.S.C. 1094(a)(17).

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

Reed D. Rubinstein,

Principal Deputy General Counsel delegated the authority to perform the functions and duties of the General Counsel for the Office of the General Counsel.

[FR Doc. 2020–23526 Filed 11–12–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AQ92

Administrative Procedures: Guidance Documents

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is establishing in regulation its processes and procedures for issuing guidance documents. This final rulemaking will implement the mandates of Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

DATES: This rule is effective December 14, 2020.

FOR FURTHER INFORMATION CONTACT: Richard Murphy, Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue NW, Washington, DC 20420, (202) 714–8507. (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: On October 9, 2019, the President signed Executive Order (E.O.) 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

Section 4 of the E.O. mandates that each agency finalize regulations to set forth processes and procedures for issuing guidance documents. This rule complies with that mandate by adding part 5 to title 38 Code of Federal Regulations (38 CFR part 5). Part 5 is titled ''Administrative Procedures: Guidance Documents,'' and informs the public about VA's general processes and procedures for issuing guidance documents. Prior to this rulemaking, VA has not previously published procedures relating to the issuance of guidance documents.

5.0 Purpose

VA is stating the purpose of part 5 in § 5.0, which is to provide VA's processes and procedures for issuing and managing guidance documents in accordance with E.O. 13891. Section 4 of the E.O. requires each agency to finalize regulations or amend existing regulations to set forth processes and procedures for issuing guidance documents within 300 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of the E.O.. OMB issued its memorandum, M–20–02, on October 31, 2019. Section 4 of the E.O.; shall require that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract; and shall include procedures for the public to petition for withdrawal or modification of a particular guidance document. For significant guidance documents, section 4 of the E.O. contains additional requirements. These include that there must be a period of notice and comment of at least 30 days and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to public interest. Significant guidance documents must be approved on a non-delegable basis by the agency head or agency component head appointed by the President. They must be reviewed by OIRA under E.O. 12866 before issuance, and they must comply with applicable requirements for significant regulatory actions set forth in E.O.s. 12866, 13563, 13609, 13771, and 13777.

5.10 Definitions Relating to Guidance Documents

Section 5.10 is the definitions section. The section generally tracks the requirements of E.O. 13891, as applied to VA. Because the definition of guidance document is broad, this rule clarifies that a guidance document is an agency statement of general applicability (*i.e.,* it applies to more than just one person, event, or transaction), that is intended to have a future effect on the behavior or actions of regulated parties (to include non-VA actors), and that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. The section mirrors the exclusion in section 2(b)(i)–(vi) of the E.O. for those documents that VA does not consider guidance documents.

VA is mirroring the definition of significant guidance document to that provided in section 2(c) of the E.O. with minor clarifying edits.

VA is also defining VA to mean the Department of Veterans Affairs.

5.15 Procedures for Issuing Guidance Documents

VA is implementing the requirements of section 4(a)(i) and (iii) of the E.O. in § 5.15. We are stating the requirements of section 4(a)(i) in paragraph (a)(1) by stating that each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. VA is adding sample language of the disclaimer for guidance documents as follows: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Paragraph 5.15(a)(2) states the information that must be included in each guidance document. VA is stating that a guidance document must include the following information: The term guidance; the agency or office issuing the document; to what and to whom the document applies; the date of issuance; title and unique identification number of the document; citation to statutory or regulatory authority that the guidance document interprets or applies; a short summary of the subject matter covered at the beginning of the guidance document; the statement required under paragraph (a)(1) of this section; and as applicable, the guidance document being revised or replaced.

Paragraph 5.15(b) states the procedures for significant guidance documents as required in section 4(a)(iii) of the E.O. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Further, unless the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply to significant guidance documents. Paragraph (b)(1) states that VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Paragraph (b)(2) states that the Secretary or a VA component head appointed by