On April 1, 2014, a committee of negotiators that included two NACUA members reached consensus on language implementing the Clery Act amendments in the Violence Against Women Reauthorization Act of 2013 (VAWA) (also known as Campus SaVE). Among other things, Campus SaVE expanded reporting of campus crimes to include dating violence, domestic violence, and stalking, in addition to adding national origin and gender identity to categories of reportable hate crimes. The law also required changes to institutional policies and added education, notice, prevention, and awareness training requirements.

Nominated by the National Association of Independent Colleges and Universities (NAICU), with endorsement from NACUA, members Dana Scaduto, General Counsel at Dickinson College, and Jerry Blakemore, Vice President and General Counsel at Northern Illinois University, were selected by the Department of Education to represent institutional attorneys on the negotiated rulemaking committee. They were supported throughout the process by NACUA staff, as well as a team of NACUA members who are experts on the Clery Act.

The U.S. Department of Education will use the consensus language in its Notice of Proposed Rulemaking (NPRM), which it intends to publish this summer for public comment. Because consensus was reached, negotiators and the persons and entities they represent may not raise objections to the consensus language when the NPRM is published. According to the timeline outlined by the Department of Education, the regulations are expected to be finalized on or before November 1, 2014 and will take effect July 1, 2015, meaning changes related to the final regulations will occur in your institution’s October 1, 2015 annual security report. If the final regulations are not published by November 1, 2014, implementation will be delayed beyond July of 2015.

The summary below includes comments, noted in italics, provided by NACUA members who were either part of the experts group or who participated directly as negotiators. None of the information that follows is intended as legal advice. As a reminder, regulations can only be modified when doing so does not exceed the scope of the statute and is consistent with statutory intent. Throughout negotiations, the Department of Education’s Office of General Counsel advised the committee whether particular issues were appropriate for regulation.

Proposed changes that will be included in the NPRM include the following:

- Definitions (Incidents)
  - Crimes. Incidents meeting the definition of dating violence, domestic violence, or stalking are considered crimes “for the purposes of Clery Act reporting.” (pp. 3, 4, 8)
  - General Definitions. The consensus language adds, among others, definitions of dating violence, domestic violence, sexual assault, and stalking (pp. 4-9). Of note:

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1 The Department of Education issued guidance on May 29, 2013 saying the following: “. . . [f]inal regulations to implement the statutory changes to the Clery Act will not be effective until after the Department completes the rulemaking process. Until those regulations are issued, we expect institutions to make a good faith effort to comply with the statutory requirements in accordance with the statutory effective date (March 7, 2014). The Department expects that institutions will exercise their best efforts to include statistics for the new crime categories for calendar year 2013 in the Annual Security Report due in October of 2014. We understand, however, that institutions may not have complete statistics for the year when the statistics must be issued and reported to the Department.”


- **Dating violence.** The existence of a social relationship is based on the “reporting party’s statement” with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved. Dating violence does not include acts covered by the definition of domestic violence. (p.3)
  - *Comment:* The proposed language regarding a “reporting party” was intended to clarify how a situation would be viewed upon initial receipt of a report of dating violence. The reference to domestic violence was added to prevent double counting of the same behavior as both dating violence and domestic violence.

- **Sexual assault.** An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s Uniform Crime Reporting (UCR) program. (p.7)

- **Stalking.** The definition of stalking refers to a “reasonable person” as “a reasonable person under similar circumstances and with similar identities to the victim.” (p.8)
  - *Comment:* NACUA member negotiators suggested this language, which was a significant improvement from earlier language that could have been viewed as overly subjective. Moreover, this language is consistent with the legal definition of “reasonable person” but is particularly inclusive for those affected by acts of sexual violence.

- **Streamlining of Clery Definitions.** The committee streamlined Clery definitions to avoid redundancy and provide consistency with UCR definitions. The consensus language adopts the UCR definition of rape, which is: “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” This definition also (1) removes the reference to carnal knowledge and (2) removes the element of force, replacing it with “without consent.” (pp.40-42)

- **Definitions (Prevention, Awareness, Programs, and Campaigns)**
  - *Prevention Programs.* Prevention programs must be, among other requirements, “culturally relevant, inclusive of diverse communities and identities, sustainable, responsive to community needs, and informed by research or assessed for value, effectiveness, or outcome.” (p.6)
  - *Comment:* Institutions will be required to prove that the methods they use to offer prevention and awareness programs and campaigns are based on solid foundations, either verified through existing research or based on an assessment at the institution itself. The consensus language breaks down the requirements for such programs and campaigns with particularity which, while providing substantial guidance, may also create compliance challenges.

  - *Awareness programs.* Defined as “community-wide or audience-specific programming, initiatives, and strategies that increase audience knowledge and share information and resources to prevent violence, promote safety, and reduce perpetration.” (p.30)

  - *Bystander intervention.* Defined as “safe and positive options that may be carried out by an individual or individuals to prevent harm or intervene when there is a risk of dating violence, domestic violence, sexual assault, or stalking.” Includes “recognizing situations of potential harm, understanding institutional structures and cultural conditions that facilitate violence, overcoming barriers to intervening, identifying safe and effective intervention options, and taking action to intervene.” (p.30)

  - *Ongoing prevention and awareness campaigns.* Defined as “programming, initiatives, and strategies that are sustained over time and focus on increasing understanding of
topics relevant to and skills for addressing dating violence, domestic violence, sexual assault, and stalking…” (pp.30-31)

- **Primary prevention programs.** Defined as programming, initiatives, and strategies informed by research or assessed for value, effectiveness, or outcome that are intended to stop dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions.” (p.31)

- **Risk reduction.** Defined as “options designed to decrease perpetration and bystander inaction, and to increase empowerment for victims in order to promote safety and to help individuals and communities address conditions that facilitate violence.” (p.31)

- **Reporting and Counting Guidelines**
  - **Hierarchy Rule.** The Hierarchy Rule does not apply to dating violence, domestic violence, stalking, and sexual assaults. (p.21)
    - **Comment:** The Department of Education proposed this language, which exempts dating violence, domestic violence, stalking, and sexual assaults from the Hierarchy Rule. Until now, arson was the only Clery Act crime that was exempt from the Hierarchy Rule. The change will result in multiple counting of the same incident.
  - **Stalking.** Clarifies how institutions should report incidences of stalking at the Clery location of both the stalker and the victim. It also addresses activities that span more than one calendar year. Addresses the difficulties in determining location and timing of the conduct. (p.19)

- **Policy Statements**
  - An institution’s annual security report must include a statement of policy regarding the institution’s programs to prevent dating violence, domestic violence, sexual assault, and stalking and of procedures the institution will follow when one of those crimes is reported. Of note, the statement on prevention programming includes:
    - **Confidentiality of Protective Measures.** The statement must include language about how the institution will protect the confidentiality of victims, but permits institutions to share information where necessary to provide accommodations or protective measures. (p.13)
    - **Definitions.** The statement must include the definitions of “dating violence,” “domestic violence,” “sexual assault,” “stalking,” and “consent” in the applicable jurisdiction. While the committee considered a more specific definition of consent, the definition was not included in the final consensus language.
      - **Comment:** For policy purposes, institutions are still free to use their jurisdiction’s definition of consent (if one exists) or they may use an institutional definition. For Clery Act notification purposes, institutions must at least use the definition of consent in the jurisdiction (if one exists). If your institution uses a definition that differs from the jurisdictional one, you may wish to provide Clery Act notification of your institutional definition as well. The purpose of this section is to promote awareness, for prevention programming purposes, of the jurisdictional definition, even if the institution does not otherwise use it. This approach was proposed by the NACUA negotiators in preference to adding an additional definition of consent in the regulations.
Disciplinary Proceedings

- **Advisors.** Institutions may not limit the choice or presence of an advisor for the accuser or the accused in any meeting or institutional proceeding; however, they may limit the extent to which the advisor may participate in the proceedings. Any allowances or limitations must be provided equally to both parties. (p.33)
  - Comment: The consensus language related to advisors is based on statutory language in VAWA. While NACUA negotiators suggested an alternative interpretation of the statute, the Department of Education supported a strict reading of the statutory language that does not permit institutions to limit the presence of an advisor at disciplinary proceedings.

- **Delays for Good Cause.** Institutions may extend a “reasonably prompt timeframe” for completing proceedings for good cause with written notice to the accused and accuser of the reason for the delay. (p.34)
  - Comment: NACUA member negotiators proposed the introduction of this concept, which was enhanced by useful comments from other members of the negotiating committee. This change provides greater clarity on a similar provision that appears on pages 12-13 of the April 4, 2011 Dear Colleague Letter on Title IX.

- **Disclosure of Sanctions and Rationale.** Notwithstanding FERPA, the result of any disciplinary proceeding must include both the sanctions and the rationale for the result. All sanctions that might be imposed by an institution must be listed in its policy statement. (pp.32, 35-36)
  - Comment: While NACUA negotiators suggested flexibility in the language to allow for sanctions appropriate to a particular incident, the consensus language does not include such flexibility. Compliance with this provision could prove challenging as institutions must prepare a comprehensive list of all sanctions.

- **Officials.** Institutions must include in their policies a statement that proceedings will be conducted by officials who receive training on dating violence, domestic violence, sexual assault, and stalking. (p.33)
  - Comment: The Department of Education intends to clarify in the preamble to the NPRM that students may be considered “officials” under this provision.

- **Protective Measures.** Institutions must describe in their policies the range of protective measures that the institution may offer following an allegation of dating violence, domestic violence, sexual assault, or stalking. (p.33)

- **Timely Notice and Access.** Institutions must (1) provide timely notice of meetings at which the accused, accuser, or both, may be present and (2) provide timely access to the accuser, accused, and appropriate officials to any information that will be used during disciplinary meetings and hearings. (p.35)

Other

- **Guidance Related to Title IX.** The consensus language decouples compliance with VAWA from sub-regulatory guidance related to Title IX (such as the April 4, 2011 Dear Colleague Letter). A previous version of the proposed regulations would have required an institution’s disciplinary proceedings to “comply with guidance issued by the U.S. Department of Education’s Office for Civil Rights”.
  - Comment: The Department of Education will address the relationship between the Clery Act and Title IX in the preamble to the NPRM. Decoupling of compliance with VAWA and sub-regulatory guidance related to Title IX in the Clery regulations was jointly recommended by NACUA member negotiators and some of the other negotiators.
Inclusive Language. Heteronormative he/she binary language was removed (e.g., “the person’s” instead of “his/her”).

Comment: This language was suggested by NACUA member negotiators and readily accepted by other negotiators and the Department of Education.

Additional resources that may be of interest include the following:

- Redline of VAWA amendments to the Clery Act
- The Department of Education’s page on the VAWA negotiated rulemaking
- The Department of Education’s question and answer page on the negotiated rulemaking process

Members who would like to learn more about the proposed regulations will have an opportunity to do so through a virtual seminar on the topic this spring (details will be posted on NACUA’s website when available) and at a session on the topic at NACUA’s Annual Conference in June. Panelists will include Dana Scaduto, Jerry Blakemore, and additional NACUA members who supported Dana and Jerry throughout the negotiated rulemaking process.