

Update on General Services Administration's Certification Proposal Impacting Federal Funds Recipients

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On January 28, the General Services Administration (“GSA”) [published](#) a proposed update to Federal Financial Assistance General Representations and Certifications to the Federal Register. The new proposed certification includes three main components: (1) that recipients do not engage in illegal discriminatory practices (the “Anti-Discrimination Provision”); (2) that recipients will not provide support to “illegal aliens” (the “Immigration Provision”); and (3) that recipients will not fund, subsidize, or facilitate “violence, terrorism, or other illegal activities” threatening public safety or national security (the “Public Safety Provision”).

The proposed language requires recipients to certify that they:

- “Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs...Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs.” The proposed certification lists practices that may constitute a violation, including “race-based scholarships or programs,” “preferential hiring or promotion practices,” “access to facilities or resources based on race or ethnicity,” and segregation in facilities, resources, or through program eligibility.”
- “Will not knowingly bring or attempt to bring to the United States, transport, conceal, harbor, shield, hire, or recruit for a fee an illegal alien; and will not induce an alien to enter or reside in the United States with reckless disregard of the fact that the alien is illegal”; and
- “Will not fund, subsidize, or facilitate violence, terrorism, or other illegal activities that threaten public safety or national security.”

The comment period has now closed, with over 2,300 comments submitted by the March 30 deadline. A wide range of stakeholders submitted comments, including higher education groups, civil-rights organizations, disability advocates, state attorneys general,

local government groups, and non-profits, as well as individuals. Overall, the comments overwhelmingly opposed the new certification proposal.

The comments raised five main areas of criticism: **first**, the proposed certification is impermissibly vague and duplicative of existing certifications and civil rights law; **second**, the proposal circumvents Administrative Procedure Act (“APA”) requirements; **third**, the certification threatens lawful speech and independent academic judgment; **fourth**, the certification conflicts with other legal obligations; and **fifth**, the certification raises institutions’ exposure under the False Claims Act. These criticisms are explored in more detail below.

VAGUE AND DUPLICATIVE

Commenters, including the National Council of Nonprofits, [noted](#) that all three provisions of the proposed certification are vague. For instance, they argued that the Anti-Discrimination Provision does not sufficiently define which DEI practices are illegal, raising the risk of inconsistent enforcement and failing to provide recipients with clear notice of their obligations. They also argued that the proposed certification does not sufficiently identify which activities would fall under the Immigration or Public Safety Provisions. Commenters, including the [American Council on Education](#), also noted that the proposed certification may duplicate existing requirements because federal funding recipients already must certify compliance with civil rights laws, including Title VI and VII of the Civil Rights Act of 1964.

IMPROPER CIRCUMVENTION OF THE APA

To the extent that the proposed certification is not duplicative of existing obligations and imposes new ones, some commenters argued that it violates the APA and the Paperwork Reduction Act (“PRA”). The ACLU’s [comment](#) stated that the proposed certification runs contrary to PRA’s purpose to “minimize unnecessary and inefficient burdens on the public.” A cohort of state [attorneys general](#), led by California and New York, observed that, if the proposed certification is a new substantive requirement, it violates the APA by bypassing its notice-and-comment procedures, being arbitrary and capricious, and exceeding the GSA’s statutory authority.

THREAT TO LAWFUL SPEECH AND ACADEMIC INDEPENDENCE

Commenters also flagged free speech and academic independence concerns. The National Academy of Education (“NAE”) [argued](#) that the Anti-Discrimination Provision implicates recipients’ First Amendment rights by seeking to “prohibit the consideration of race in a wide variety of situations—some of which are clearly permissible.” The NAE comment stated that GSA’s proposed revisions could chill recipients’ protected speech. It also flagged that the proposed certification may undermine “core institutional and pedagogical purposes” that are served by inclusive practices and educational diversity.

CONFLICT WITH OTHER LEGAL OBLIGATIONS

The American Council on Education, along with other commenters, noted that the new certification requirement may conflict with state and local anti-discrimination laws to which recipients may be subject. The ACLU pointed to the Head Start program as another potentially conflicting obligation because the program promotes “cultural competence” and requires “linguistically and culturally appropriate” services. The Anti-Discrimination Provision lists the use of cultural competence requirements as an example of a potentially violative practice.

HEIGHTENED FALSE CLAIMS ACT EXPOSURE

Finally, commenters, including the ACLU, noted the heightened risk of False Claims Act liability if the proposed certification goes into effect. The False Claims Act could expose recipients to severe penalties, including treble damages, and the threat of *qui tam* private civil actions.

KEY TAKEAWAYS & NEXT STEPS

The comments to the proposed certification indicate broad opposition among commenters, including higher education groups, both to the substance of the proposed certification and to the burden that it would impose. The proposed certification has not yet gone into effect and must undergo review by the Office of Management and Budget (“OMB”) pursuant to the PRA. It is likely that the certification will be subject to legal challenges, including on the grounds set out in the comments.

Please do not hesitate to contact us with any questions.



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