



February 15, 2019

Via regulations.gov

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Comments on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Proposed Rule; 83 Fed. Reg. 61462 (November 29, 2018).

Dear Secretary DeVos:

The U.S. Small Business Administration’s Office of Advocacy (Advocacy) respectfully submits the following comments in response to the Department of Education’s (Department) November 29, 2018 notice of proposed rulemaking entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” Advocacy is concerned that the Department has relied upon an inappropriate size standard to perform the economic analysis required by the Regulatory Flexibility Act (RFA), and that there are certain deficiencies in the Initial Regulatory Flexibility Analysis required by the RFA. Advocacy recommends that the Department reconsider this rulemaking in order to consult with our office on the appropriate definition for small entities and the required elements of an Initial Regulatory Flexibility Analysis (IRFA).

About the Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration

to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

The Department proposes to amend the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance regulations to provide appropriate standards for how recipients must respond to incidents of sexual harassment.¹ The Department asserts that the proposed regulations would specify how educational institutions covered by Title IX must respond to incidents of sexual harassment consistent with Title IX's prohibition against sex discrimination, and would clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the designation of a coordinator to address sex discrimination issues, and the adoption of grievance procedures.² The Department's Initial Regulatory Flexibility Analysis (IRFA) lacks certain elements required by the RFA, such as adequately assessing whether the economic impact on small entities is likely to be significant and consider significant alternatives that may minimize the burden on small entities while still achieving agency objectives.

Advocacy's Comments

The RFA requires an agency to prepare an IRFA unless the agency can certify that the rulemaking will not have a significant economic impact on a substantial number of small entities.³ The IRFA must include sufficient analyses to measure and consider the regulatory impacts of the proposed rule on small entities, as well as any significant alternatives that would minimize the impact of the rule on small entities while still achieving its objective.⁴ The Department proposes to use an alternative size standard without the necessary consultation with the Office of Advocacy.⁵

The Department Must Consult with the Office of Advocacy on any New Size Standard

The Department proposes to use enrollment data to define small postsecondary educational institutions, and correctly notes that the SBA size standards define proprietary institutions of higher education as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000.⁶ Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population below 50,000.⁷

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

² *Id.*

³ 5 U.S.C. § 603(a).

⁴ *Id.* at § 603(c).

⁵ *Id.* at § 601(3).

⁶ 13 C.F.R. § 121.201.

⁷ *Id.*

Although the Department correctly summarizes the size standards for various small entities subject to the rule, the Department also states that “[p]ublicly available data from the National Center on Education Statistics' Common Core of Data indicate that, during the 2015-2016 school year, 99.4 percent of local educational agencies had *enrollments* of less than 50,000 students.”⁸ (emphasis ours.) The Department then cites to a lack of “data to identify which public and private, nonprofit institutions qualify as small.” It is unclear why the Department references enrollment numbers. Both the RFA and the Small Business Act define small governmental jurisdictions, including small school districts, as those with a *population* of 50,000 or less.⁹

The RFA specifically provides that “the term ‘small business’ has the same meaning as the term ‘small business concern’ under Section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”¹⁰

Therefore, the Office of Advocacy respectfully requests that the Department reconsider the proposed rule in order to consult with Advocacy on an appropriate size standard and take comment on that size standard if it differs from the size standard set by the Small Business Administration, before proceeding to a final rule.

The Proposed Rule Does Not Adequately Describe the Impact on Small Entities.

The RFA states that “whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretive rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). Such analysis shall describe the impact of the proposed rule on small entities.”¹¹

That analysis must contain (1) the reasons why the rule is being considered, (2) the objectives and legal basis for the rule, (3) a description and estimate of the numbers of small entities subject to the rule, (4) a description of the recordkeeping required by the rule and the type of professional skill required, (5) a description of all federal rules that duplicate, overlap, or conflict with the rule, and (6) a description of any significant alternative that would accomplish the stated objectives and that minimize any significant impact on small entities. Advocacy disagrees with the Department’s analysis to the extent that it does not adequately capture the potential economic impact on small institutions. Some costs are estimated, but the Department makes no distinction between large and small educational institutions and the costs are assumed to be the same for large and small entities, which is generally not a sound assumption. Small entities generally have smaller economies of scale, so a cost that may seem minimal to a larger entity can be disproportionately larger for one that is small.

⁸ 83 Fed. Reg. at 61490.

⁹ 13 C.F.R. § 121.201.

¹⁰ 5 U.S.C. § 601(3).

¹¹ 5 U.S.C. § 603(a).

The Department Should Consider Significant Alternatives to Reduce the Potential Impact on Small Entities

Section 603(c) of the RFA requires agencies to include in their IRFA a description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while accomplishing the agency's objectives.¹² While the agency did note a few alternatives in a different section of the rule,¹³ the alternatives considered were not specific to small entities and were rejected by the Department because they would not accomplish the objective of the rulemaking. Alternatives to be considered under the RFA must reduce costs and accomplish the stated objectives.¹⁴

Conclusion

The Department must consult with Advocacy on its different size standard before proceeding with this rulemaking. Advocacy recommends that the Department publish for public comment an IRFA that includes sufficient analyses to measure and consider the regulatory impacts of the proposed rule as well as significant alternatives, that will give interested parties enough information to file meaningful comments. Please do not hesitate to contact me or Assistant Chief Counsel Rosalyn Steward at 202-205-7013 if you have any questions.

Sincerely,

/s/ Major Clark, III

Major Clark, III
Acting Chief Counsel
Office of Advocacy

/s/ Rosalyn C. Steward

Rosalyn C. Steward
Assistant Chief Counsel
Office of Advocacy

cc: The Honorable Neomi Rao
Administrator, Office of Information and Regulatory Affairs,
Office of Management & Budget

¹² 5 U.S.C. § 603(c).

¹³ See, e.g., 83 Fed. Reg. at 61490.

¹⁴ *Id.*; see also A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act, (2017), pp. 37-40, for a discussion of significant alternatives.