U.S. SMALL BUSINESS ADMINISTRATION

OFFICE OF ADVOCACY

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August 30, 2018

Via regulations.gov

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

Re: Comments on General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program Proposed Rule; 83 *Fed. Reg.* 37242 (July 31, 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) July 31, 2018 notice of proposed rulemaking entitled "General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program." Advocacy is concerned that the Department has certified that the proposed rule will not have a significant economic impact on a substantial number of small entities without providing a sufficient factual basis for the certification as required by the Regulatory Flexibility Act. Advocacy recommends that the Department publish for public comment either a supplemental certification with a valid factual basis or an Initial Regulatory Flexibility Analysis (IRFA) before proceeding with this rulemaking.

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

Section 455(h) of the Higher Education Act of 1965, as amended (HEA), authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Current regulations in 34 CFR 685.206(c) governing defenses to repayment have been in effect since 1995 but were rarely exercised until recently. Those regulations specify that a borrower may assert as a defense to repayment any act or omission of the school attended by the borrower that would give rise to a cause of action against the school under applicable state law.

On November 1, 2016, the Department published final regulations (the 2016 final regulations) on the topic of borrower defenses to repayment.[1] The 2016 final regulations were developed following negotiated rulemaking and after receiving and considering public comments on a notice of proposed rulemaking. Certain provisions of the 2016 final regulations were delayed until July 1, 2019.[2]

On June 16, 2017, the Department published a notification in the Federal Register announcing its intent to establish a negotiated rulemaking committee under section 492 of the HEA to revise the regulations on borrower defenses to repayment of federal student loans and other matters, and on the authority of guaranty agencies in the Federal Family Education Loan Program to charge collection costs to defaulted borrowers under 34 CFR 682.410(b)(6).[3] The proposed rule that is the subject of this comment letter was developed from this negotiated rulemaking.

The Department now proposes to create Institutional Accountability regulations that would amend the regulations governing the William D. Ford Federal Direct Loan (Direct Loan) Program to establish a federal standard for evaluating and a process for adjudicating borrower defenses to repayment for loans first disbursed on or after July 1, 2019, and provide for actions the Department may take to collect from schools financial losses due to successful borrower defense to repayment discharges. The Department also proposes to rescind certain amendments to the regulations already published but not yet effective.

In this case, the Department has certified under the RFA that the proposed regulation will not have a significant economic impact on a substantial number of small entities. The Department supports this certification by stating that the impact to institutions would be minimal, but offers no concrete data specific to small institutions to support this statement.

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.

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[1] 81 Fed. Reg. 75926 (November 1, 2016).
[2] 83 Fed. Reg. 6458 (February 14, 2018).
[3] 82 Fed. Reg. 27640 (June 16, 2017).

The certification must be supported by a factual basis. Advocacy questions the Department's factual basis underlying the certification of this proposed rule.

The Department Does Not Provide a Valid Factual Basis for Certification under the RFA

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. Such analysis shall describe the impact of the proposed rule on small entities."[4]

Under section 605(b) of the RFA, an agency may avoid the requirement of producing an IRFA if the agency certifies that a proposed regulation will not have a significant economic impact on a substantial number of small entities. In addition, the agency must provide a factual basis in support of the certification.[5] The RFA requires the agency to conduct an analysis that demonstrates it has considered the potential effects of the regulations on small entities as part of its certification.[6] A certification is not intended for agencies to avoid considering alternatives that would minimize the economic impacts on small entities.[7] At a minimum, the factual basis should include: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial or the economic impact is not significant under the RFA.

The Department's certification states:

> The effect of the proposed regulations would be to update financial statements submitted to the Department to comply with the new FASB standards and to reduce liabilities at some institutions associated with borrower defense claims. The Department expects the impact of the proposed financial responsibility regulations would be a *de minimis* increase in paperwork burden for private nonprofit and proprietary institutions. The Department asserts that the economic impact of the paperwork burden would be minimal to small institutions.[8]

The Department estimates costs in other portions of the proposed rule, but those costs are estimated for all institutions, and assumed to be the same for large and small entities, which is generally not a sound assumption. The Department also "asserts that the economic impact of the reduced liability, if any, would be minimal and entirely beneficial to small institutions."[9] The Department again offers no concrete data to support this statement.[10] 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.

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[4] 5 U.S.C. § 603(a).
[5] *Id.* at § 605(b).
[6] *Id.*
[7] *Id.*
[8] 83 Fed. Reg. 37242 at 37304 (July 31, 2018).
[9] *Id.*
[10] *Id.*

The Department Should Analyze Significant Alternatives to Explore Whether the Economic Impact Can Be Minimized

Small entities have expressed concerns to Advocacy that the Department should have analyzed the proposed rule's impact on small institutions and considered reasonable alternatives. For example, including an early claim resolution process would minimize the potential costs of litigating borrower defense claims that could otherwise have a disproportionate impact on small entities. Additionally, allowing borrowers to bring affirmative claims against institutions up to three years after the date of graduation and applying a clear and convincing evidentiary standard would also minimize potential costs. Currently, the Department requires institutions to maintain student data for three years after a student's graduation, but if a borrower may bring a claim at any point in repayment, schools must maintain student data for decades, which can be costly for small institutions. The record contains no information on how high this cost could be. The need to maintain student data will impose significant liability on small institutions for cybersecurity and student privacy. The concerns that small entities have communicated to Advocacy indicate that there could potentially be significant costs to small institutions as a result of these proposed regulations, and these costs should be acknowledged and analyzed by the Department.

Conclusion

Advocacy recommends that the Department publish for public comment either a supplemental certification with a valid factual basis or an IRFA before proceeding with this rulemaking. By publishing for comment a supplemental certification or an IRFA, the Department will satisfy the requirements of the RFA and 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,

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

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U.S. Small Business Administration

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