



October 3, 2017

VIA ELECTRONIC SUBMISSION

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

Dear Secretary DeVos:

As a result of President Trump's executive orders, 13771 and 13777, the Office of Advocacy (Advocacy) has begun an effort to hear first-hand from small businesses across the country about specific federal regulatory burdens facing their businesses. As you know, under the Regulatory Flexibility Act (RFA), agencies are required to consider the impact of their regulations on small entities when promulgating federal regulations.¹ We believe the RFA and consideration of small business economic impacts is a good place to start when an agency is selecting rules that are being reviewed for reform or elimination.

We have been hosting roundtables throughout the country and would like to inform you of the specific concerns and regulations that we heard about from small businesses.

At a roundtable held earlier in the year in Baton Rouge, LA, Advocacy heard from a career college on its concerns with the Department of Education's Gainful Employment regulation (34 CFR § 66.403, *et seq.*). The stated objective of the regulation is to require schools to ensure their career training programs actually prepare students for good-paying jobs that allow them to pay

¹ Advocacy was established pursuant to 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), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the 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. 5 U.S.C. § 601 *et seq.*

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 written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. Small Business Jobs Act of 2010 (PL 111-240) § 1601.

for their student loans. The small business owner stated that he supports the overall objective of the regulation with respect to ensuring quality educational programs, however the requirements and associated metrics bear little rational connection to measures of quality.

The small business owner stated that the regulatory requirements are not applied uniformly, because whether a program falls under these requirements is based on a school's federal tax status. For public institutions and private institutions that are classified as non-profit, only programs that do not lead to a degree fall under these new requirements. All other programs provided by these institutions are exempt. For private institutions without a non-profit tax classification, all programs offered must meet these new requirements, regardless of whether the program leads to a certification or a degree.

Small businesses are also concerned that regional wage variations make the regulation's measurements unworkable. The small business proffered as an example, that certified Medical Assistants earn \$10,000 more per year if they live and work in Massachusetts than if they live and work in Louisiana. Hence, the same program, with the same costs, and the same student debt would likely meet the regulation's requirements in Massachusetts yet fail in Louisiana.

Small businesses are concerned about their school's limited control over the data used to calculate compliance. The earnings data used to calculate a program's gainful employment rate is provided in aggregate form to the Department of Education by the Social Security Administration (SSA). Small businesses say that the actual earnings specific to each student are not provided to the Department of Education or the school. All the school receives is the list of student names that are included in the cohort. The school is not allowed to review or challenge the actual earnings data provided by the SSA to the Department of Education. The only thing a school can review and challenge is the list of student names.

Although a school is permitted to collect student specific alternative earnings data (non-SSA data) to contest the aggregate data supplied by SSA; the school is given a short timeframe to appeal and cannot see disaggregated SSA data. Additionally, the other acceptable forms of alternative earnings data are practically impossible for a school to obtain, especially smaller institutions. The system of using aggregate data from the SSA, does not allow for the consideration of special or unique circumstances. For instance, if a graduate is not able to continue working or chooses not to work, the school has no recourse.

The Department of Education's establishment of rulemaking committees to rework the Gainful Employment regulation through a negotiated rulemaking, in addition to allowing colleges and universities an extra year, until July 1, 2018 to comply with the regulation is a step in the right direction.

The Office of Advocacy looks forward to working with your agency to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their voice in this regulatory reform process. We hope that you will consider the feedback we have received on the Gainful Employment regulation as the rule is reworked. Advocacy would be happy to meet with you or your representative so that we may detail the concerns and help suggest less burdensome

alternatives for small business as rules are being considered for revision. I have provided the contact information for Assistant Chief Counsel Rosalyn Steward below.

As we continue to hear from small businesses across the country at our regional regulatory reform roundtables or through our outreach from our regulatory reform website, we will update you with additional summaries from those locations. Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as an important part of the process.

Sincerely,

/s/ Major L. Clark, III

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

Assistant Chief Counsel Rosalyn Steward
rosalyn.steward@sba.gov
202.205.7013

Copies to:

Elizabeth McFadden
Deputy General Counsel & Regulatory Reform Officer
U.S. Department of Education