

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2501 Rayburn House Office Building
Washington, DC 20515-0515

February 22, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202

Dear Secretary Cardona:

The Committee on Small Business is investigating the U.S. Department of Education's (DoE) implementation of the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), and Executive Order 13272 (EO13272).¹ Republicans on this Committee wrote to you last Congress and you failed to respond. We write today to request additional documents and information.

As mentioned in our last letter, the RFA, SBREFA, and EO13272 were designed to provide small businesses notice of proposed agency rules that affected their business and provide them the opportunity to participate in the process.² Despite this stated goal, it seems that some agencies are failing to properly implement these measures to the detriment of small businesses across the country. In fact, your agency received a letter from the Office of Advocacy (Advocacy) in the Small Business Administration (SBA) on September 12, 2022, noting that your Initial Regulatory Flexibility Analysis (IRFA) for the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance rule was insufficient.³ According to Advocacy, DoE understated the costs to small educational institutions and other small entities subject to the rule.⁴

As you are well aware, agencies across the federal government are provided discretion when determining a regulation's impact on the small businesses. Agencies are required to produce an IRFA in proposed rules only after the agency determines the proposed rule is expected to have a "significant impact" on a "substantial number of small entities."⁵ If not, the

¹ 5 U.S.C. §§ 601-12; Pub. L. No. 104-121 (Mar. 29, 1996); Proper Consideration of Small Entities in Agency Rulemaking, 67 Fed. Reg. 53,461 (Aug. 16, 2002).

² 5 U.S.C. §§ 601-12.

³ Letter from Major L. Clark, III, Deputy Chief Counsel, and Rosalyn Steward, Asst. Chief Counsel, Office of Advocacy, U.S. Small Bus. Admin., to Miguel Cardona, Sec'y, U.S. Dept. of Ed. (Sept. 12, 2022) *available at* <https://cdn.advocacy.sba.gov/wp-content/uploads/2022/12/06084851/Comment-Letter-Title-IX-9.12.22-508c.pdf>.

⁴ *Id.*

⁵ 5 U.S.C. § 603(a).

agency simply certifies the rule will not have a significant economic impact on a substantial number of small entities and provides a “factual basis for such certification.”⁶ That certification is published in the Federal Register and reported to the Chief Counsel for Advocacy at SBA at the time the proposed or final rule is published for public comment.⁷

If the agency determines that the proposed rule will have a significant impact on a substantial number of small entities, section 212 of SBREFA requires agencies to publish one or more small entity compliance guides for each rule, or group of rules.⁸ Additionally, in the final rule, the agency needs to publish a Final Regulatory Flexibility Analysis (FRFA) that includes but is not limited to “a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.”⁹

Small businesses across America deserve to know how the DoE is working to consider small businesses in their rulemaking process. We therefore request the following documents and information, as soon as possible but no later than March 10, 2023:

1. Identify any central DoE position or office, if one exists, responsible for ensuring that DoE complies with the RFA, SBREFA, and EO13272.
2. Identify any DoE positions or offices responsible for reducing the regulatory burden on small businesses.
3. Provide all small entity compliance guides produced or in use at the agency within the last calendar year.
4. Provide the agency’s definition of “significant impact” and “substantial number of small entities” from 2010 until present, including any and all changes over that time and the justifications for those changes.
5. Provide the name, docket number, and citation of all rules, proposed and final, that that the agency certified as having no significant impact on a substantial number of small entities from 2020 to present.
6. All documents and communications relating to the agency’s determination of whether there was a “significant impact” on a “substantial number of small entities” for all proposed and final rules from 2020 until present.
7. All documents and communications detailing any and all factors the agency considers when determining whether the proposed rule will have a “significant impact” on a

⁶ 5 U.S.C. § 603(b).

⁷ *Id.*

⁸ Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, § 212 (as amended by the Small Business and Work Opportunity Act of 2007, Pub. L. 110-28 § 8302).

⁹ 5 U.S.C. § 604(a)(4).

“substantial number of small entities” and the weight of each factor given in the determination.

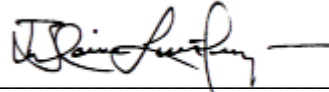
8. All documents and communications relating to consideration of alternate rule proposals when the agency has determined a proposed or final rule has a substantial impact on a substantial number of small entities from 2020 until present.
9. All documents and communications relating to instances where input from mandated SBREFA panels compelled the agency to amend a proposed rule, with supporting documents, from 2020 to present.
10. All documents and communications relating to the standards the agency uses to determine its “factual basis” to support a determination that a proposed rule would not have a significant impact on a substantial number of small businesses.

To schedule the delivery of responsive documents or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate “problems of all types of small business” under House Rule X. Thank you in advance for your cooperation with this inquiry.

Sincerely,



Roger Williams
Chairman
Committee on Small Business



Blaine Luetkemeyer
Vice Chairman
Committee on Small Business



Beth Van Duyne
Chairman
Subcommittee on Oversight,
Investigations, and Regulations



Pete Stauber
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Aaron Bean
Member of Congress
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Nick LaLota
Member of Congress
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business

The Honorable Dean Phillips, Vice Ranking Member
Committee on Small Business