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November 13, 2012

The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Education and Department of Health and Human Services:
Final Requirements—Race to the Top—Early Learning Challenge; Phase 2*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Education and Department of Health and Human Services (the Departments), entitled “Final Requirements—Race to the Top—Early Learning Challenge; Phase 2” (RIN: 1810-AB15). We received the rule on October 26, 2012. It was published in the *Federal Register* as final requirements on September 20, 2012. 77 Fed. Reg. 58,301.

The final rule implements requirements for Phase 2 of the Race to the Top—Early Learning Challenge (RTT–ELC) program. In Phase 2, the Departments will make awards to certain states that applied for, but did not receive, funding under the RTT–ELC competition held in fiscal year (FY) 2011 (FY 2011 RTT–ELC competition). Specifically, the Departments will consider eligible the five highest scoring applicants that did not receive funding in the FY 2011 RTT–ELC competition, each of which received approximately 75 percent or more of the available points under the competition. The Departments take this action to fund down the slate of the FY 2011 RTT–ELC competition and to establish the information and assurances that the five eligible applicants will need to provide in order to receive funding under Phase 2 of the RTT–ELC program.

The final requirements are effective October 22, 2012. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day delay requirement, any rule that the agency for good cause finds that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. § 553(d)(3), 808(2). Accordingly, the Departments believe there is good cause for making the final requirements effective on October 22, 2012. The Departments must award funds under this authority to qualified applicants by December 31, 2012, or the funds will lapse. Even on an expedited timeline, the Departments believe it is impracticable to adhere to a 60-day delayed effective date for the final requirements and make grant awards to qualified applicants by the December 31, 2012, deadline. When the 60-day delayed effective date is added to the time the Departments will need to receive applications (approximately 45 days), review the applications (approximately 21 days), and finally approve applications (approximately 28 days), according to the Departments, it will not be able to award funds authorized under the Department of Education Appropriations Act, 2012 to applicants by December 31, 2012. The Departments have therefore determined that, pursuant to section 808(2) of the CRA, the 60-day delay in the effective date generally required for congressional review is impracticable, contrary to the public interest, and waived for good cause.

Enclosed is our assessment of the Departments' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the Departments complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Michael Gross
Assistant General Counsel for
Regulatory Services
Department of Education

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF EDUCATION AND
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
"FINAL REQUIREMENTS—RACE TO THE TOP—
EARLY LEARNING CHALLENGE; PHASE 2"
(RIN: 0938-AQ98)

(i) Cost-benefit analysis

Under Executive Order 12,866, the Departments have assessed the potential costs and benefits of this regulatory action and have determined that these requirements will not impose significant additional costs to state applicants or the federal government. According to the Departments, most of the requirements contained in this notice involve re-affirming state commitments and plans already completed as part of the FY 2011 RTT–ELC competition or other federal education programs. Similarly, the Departments state that other requirements, in particular those related to maintaining conditions for reform required under the FY 2011 RTT–ELC competition, require continuation of existing commitments and investments rather than the imposition of additional burdens and costs. The Departments believe those states that are eligible for Phase 2 awards will incur minimal costs in developing plans and budgets for implementing selected activities from their FY 2011 RTT–ELC competition proposals, because in most cases such planning will entail only revisions to existing plans and budgets already developed as part of the FY 2011 RTT–ELC application process and not the development and implementation of entirely new plans and budgets. In all cases, the Departments believe that the benefits resulting from the requirements for the Phase 2 RTT–ELC award process will exceed their costs.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

In its submission to the Comptroller General, Education did not include an analysis of the final requirements under the Act.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

In its submission to the Comptroller General, Education did not include an analysis of the final requirements under the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The Departments published a notice of proposed requirements (NPR) for this program in the *Federal Register* on June 20, 2012. 77 Fed. Reg. 36,958. The NPR contained background information and the Departments' reasons for proposing the particular requirements and assurances for Phase 2 of the RTT–ELC program. Twelve parties submitted comments. The Departments summarized and responded to those comments.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The Departments state that these final requirements contain information collection requirements; however, because the eligible applicants for Phase 2 RTT–ELC awards are fewer than 10, according to the Departments, these collections are not subject to approval under the Act.

Statutory authorization for the rule

The final rule is authorized by sections 14005 and 14006 of the American Recovery and Reinvestment Act of 2009, as amended by section 1832(b) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, and the Department of Education Appropriations Act, 2012 (Consolidated Appropriations Act, 2012, Division F, Title III).

Executive Order No. 12,866 (Regulatory Planning and Review)

The Departments determined that the final requirements are “economically significant” and subject to review by the Office of Management and Budget review under section 3(f)(1) of Executive Order 12,866.