

January 19, 2011

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: Comments on EPA's Proposed Settlement Agreements for Petroleum Refineries (75 Fed. Reg. 82,390 (December 30, 2010), Docket No. EPA-HQ-OGC-2010-1045) and Electric Utility Generating Units (75 Fed. Reg. 82,392 (December 30, 2010), Docket No. EPA-HQ-OGC-2010-1057)**

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the two Environmental Protection Agency's (EPA's) notices of proposed settlement agreement under the Clean Air Act published on December 30, 2010. In these notices, EPA invites public comment on settlement agreements that would require rulemaking under section 111(b) and 111(d) of the Clean Air Act for Petroleum Refineries and for Electric Utility Generating Units (EGUs). Advocacy is concerned that the timelines for rulemaking required by these settlement agreements do not provide sufficient time for EPA to fully comply with the Regulatory Flexibility Act (RFA), including, if necessary, the requirement to conduct a Small Business Advocacy Review (SBAR) in support of notices of proposed rulemaking.<sup>1</sup> Advocacy also would welcome the opportunity to discuss with EPA how they could set aside the time necessary to comply with the RFA in future negotiated settlement agreements or consent decree deadlines.

**The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.<sup>2</sup> The RFA,<sup>3</sup> as amended by the Small Business Regulatory Enforcement

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<sup>1</sup> 5 U.S.C. § 609(b).

<sup>2</sup> 15 U.S.C. § 634a, *et. seq.*

<sup>3</sup> 5 U.S.C. § 601, *et. seq.*

Fairness Act of 1996 (SBREFA),<sup>4</sup> 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,”<sup>5</sup> EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities,<sup>6</sup> and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule.<sup>7</sup>

## **Background**

On December 23, 2010, EPA announced proposed settlement agreements in litigation, brought by various States and NGOs, seeking regulations of Greenhouse Gas (GHG) emissions from EGUs and petroleum refineries. The settlement agreement would require EPA to propose, for each of these two sectors, New Source Performance Standards for GHG emissions under section 111(b) of the Clean Air Act and emissions guidelines for States under 111(d) of the Clean Air Act. EPA would propose regulations for EGUs by July 26, 2011 and issue final regulations by May 26, 2012. EPA would propose regulations for refineries by December 15, 2011 and finalize regulations by November 15, 2012. EPA published these settlement agreements for 30-day public comment on December 30, 2010.

Advocacy believes that both of these rulemakings would directly impact small entities. EPA has information from prior and current rulemakings, such as the ongoing rulemaking to establish Clean Air Act section 112 National Emissions Standards for Hazardous Air Pollutants (NESHAP) for EGUs and the recent rulemaking implementing the Renewable Fuel Standards under the Energy Independence and Security Act, identifying these small entities.

Advocacy therefore wants to ensure that EPA provides itself sufficient opportunity to comply with the requirements of the RFA. Advocacy has no information at this time that would indicate that EPA could or could not certify that either or both of these rules “will not, if promulgated, have a significant economic impact on a substantial number of small entities,” but in the absence of such information, advises EPA to allocate time for a Small Business Advocacy Review Panel, as required by 5 U.S.C. § 609(b) or as permitted by 5 U.S.C. § 609(c). EPA’s November 2006 guidance on the Regulatory Flexibility Act states that “the entire Panel process – once begun in earnest with focused small entity outreach, through SBA notifications, preparation for and convening of the Panel, and the

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<sup>4</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

<sup>5</sup> See 5 U.S.C. § 609(a), (b).

<sup>6</sup> Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

<sup>7</sup> 5 U.S.C. § 604, *as amended by the* Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

completion of the Panel Report – will usually take between four and ten months.” Advocacy also believes that the most productive Panels occur after EPA has done preliminary development and analysis of regulatory options before the initial outreach to Advocacy and the Small Entity Representatives. The Panel Report itself is intended to be an input into the Initial Regulatory Flexibility Analysis (IRFA), which should be completed and available for comment with the proposed rule.

Advocacy is therefore concerned that the proposed settlement agreements do not provide sufficient time for a full Panel process and subsequent development of an Initial Regulatory Flexibility Analysis prior to a robust interagency review under Executive Order 12866. Accounting for preliminary consideration and analysis of regulatory options, time for a Panel, at least two months for development of the IRFA and rule, and up to 90 days for EO 12866 interagency review, Advocacy believes that EPA should allow itself significantly more than a year to develop a proposed rule that fully complies with and benefits from the RFA.

Advocacy also hopes to discuss further with EPA a way to ensure that time for RFA compliance is considered by the courts and in negotiations over future settlement agreement and consent decree timelines. Advocacy believes that there have been instances in the recent past in which EPA felt it necessary to compromise its RFA compliance in order to meet these deadlines. Advocacy offers its assistance in planning for RFA compliance in advance of negotiations over rulemaking deadlines.

## **Conclusion**

For the reasons above, Advocacy advises EPA to request more time to complete the rulemakings required by the settlement agreement. Advocacy believes that the seven months provided for the EGU proposed rule and 11 months provided for the refineries proposed rule are not sufficient to allow for full compliance with the procedures required by the RFA, including an SBAR Panel Report and development of IRFA, or to ensure that the Administrator, in exercising her policy discretion, can benefit from the agency’s understanding of both rulemakings’ economic impact on small entities. Further, Advocacy welcomes a broader discussion with EPA on negotiated deadlines in settlement agreements and consent decrees.

Please do not hesitate to call me or Assistant Chief Counsel David Rostker ([david.rostker@sba.gov](mailto:david.rostker@sba.gov) or (202) 205-6966) if we can be of further assistance.

Sincerely,

/s/

Winslow Sargeant, Ph.D  
Chief Counsel for Advocacy

/s/

David Rostker  
Assistant Chief Counsel

cc: Cass R. Sunstein, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget