



April 29, 2019

VIA REGULATIONS.GOV

The Honorable Andrew Wheeler
Administrator, U.S. Environmental Protection Agency
EPA Docket Center
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Comments on EPA’s proposed rule “Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations” (Docket ID No. EPA–HQ–OAR–2018–0775).

Dear Administrator Walker:

The U.S. Small Business Administration’s Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency’s (EPA) March 21, 2019, notice of proposed rulemaking on “Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations.”¹ Advocacy believes that EPA’s certification under 5 U.S.C. § 605(b) lacks a factual basis, in part because it does not recognize the directly regulatory impacts on small non-obligated companies that participate in the Renewable Fuel Standard (RFS) program. Advocacy recommends exempting small entities from all of the RIN Market reform proposals.

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 office 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.² The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),⁴ gives small entities a voice in the federal rulemaking process. For all rules that are

¹ 84 Fed. Reg. 10584 (March 21, 2019), Docket ID No. EPA–HQ–OAR–2018–0775.

² 15 U.S.C. § 634a, *et. seq.*

³ 5 U.S.C. § 601, *et. seq.*

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



expected to have a “significant economic impact on a substantial number of small entities,”⁵ EPA is required by the Regulatory Flexibility Act to conduct a SBREFA panel to assess the impact of the proposed rule on small entities,⁶ 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.⁷ 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.⁸

The Proposed Rule

EPA has combined two separable proposals into a single notice of proposed rulemaking. These two separate proposals are: (1) to permit E15 (gasoline with 15 percent ethanol content) to be sold year-round by granting a narrow waiver to fuel quality standards that apply during the summer months; and (2) to reform the market for Renewable Identification Number (RIN) credits required by the Renewable Fuel Standard (RFS) program.

The E15 proposal allows but does not require sale of higher ethanol blends than currently available during the summer months. EPA certifies this provision of the rule under 5 U.S.C. § 605(b) based on its voluntary nature and the implied lack of direct regulatory impacts. EPA has not provided a further factual basis for this certification.⁹

EPA has proposed reforms to the RIN Market that would place new restrictions on ways that obligated and non-obligated companies buy, sell and hold RINs. It made this proposal in response to allegations of market manipulation and hoarding in the RIN markets. It does not appear, and EPA does not allege, that any small entity has the scale or financial resources to make an impact on the RIN market, let alone engage in market manipulation.

Advocacy has informally consulted with small entities and their representatives and considered the likely impacts of these reforms on small entities. Advocacy believes there are some small entities that will be significantly harmed if one or more of these reforms are adopted as proposed. EPA prepared a screening analysis in support of its § 605(b) certification for these proposals, but

⁵ See 5 U.S.C. § 609(a), (b).

⁶ 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.C. § 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.

⁷ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁸ *Id.*

⁹ Advocacy notes that the plain language of § 605(b) does not distinguish between adverse and positive economic impacts on small entities. In this case, the additional regulatory flexibility of allowing E15 year-round could have a positive significant economic impact on a substantial number of small entities, and EPA has not conducted a screening analysis to preclude this possibility.

it considers only the economic impact on small gasoline and diesel fuel refiners (obligated companies) and does not consider economic impacts to small non-obligated entities.¹⁰

Advocacy Recommendations

EPA must remedy its compliance with the RFA for this proposed rule. It should conduct a comprehensive screening analysis that includes non-obligated companies for both the E15 provision and the RIN Market Reform provisions.

Because Advocacy believes that EPA may not be able to certify quickly this rulemaking under 5 U.S.C. § 605(b) because of the likely economic impacts of the RIN Market reform proposals on small entities, Advocacy strongly recommends that EPA exempt all small entities from these provisions. There is no information to suggest small entities contribute to market manipulation in the RIN market, and, by virtue of the size standards, they are too small to do so. Therefore, an exemption is consistent with the objectives of the rulemaking.

Advocacy looks forward to continuing to work with EPA on reducing regulatory burdens on small businesses and strives to be a resource to the agency for all small business-related concerns. If Advocacy can be of further assistance, please contact me or Assistant Chief Counsel David Rostker at (202) 205-6966 or david.rostker@sba.gov.

Sincerely,

/s/

Major L. Clark III
Acting Chief Counsel for Advocacy

/s/

David Rostker
Assistant Chief Counsel
Office of Advocacy

Attachment

cc: Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹⁰ Memorandum from Nick Parsons, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, "Screening Analysis for the Proposed Modifications to RFS RIN Market Regulations" (March 11, 2019) (available at [regulations.gov](https://www.regulations.gov), Document ID. EPA-HQ-OAR-2018-0775-0072).