



September 25, 2009

BY ELECTRONIC MAIL

Attn: Docket No. EPA-HQ- OAR-2005-0161  
U.S. Environmental Protection Agency  
Air and Radiation Docket and Information Center  
Mail Code 2822T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**RE: Comments on EPA's Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24903 (May 26, 2009)**

To Whom It Concerns:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA's) proposed rulemaking, "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program" (RFS2), 74 Fed. Reg. 24,903 (May 26, 2009).

As discussed below, Advocacy, on behalf of small business fuel refiners, is concerned that (1) the RFS2 standard is not technically feasible because many of the mandated renewable fuels are not currently commercially available, (2) the uncertainty caused by renewable fuel availability and with the Renewable Identification Number (RIN) trading market reduces small refiner planning and budgeting horizons, and (3) because of Greenhouse Gas (GHG) reduction concerns even more uncertainty and volatility is introduced to an already untenable situation for small refiners. Advocacy accordingly recommends that EPA either delay or phase-in the implementation schedule for small refiners until the above-referenced issues can be addressed.

**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>1</sup> The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> 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,”<sup>4</sup> federal agencies are required by the RFA to assess the impact of the proposed rule on small entities,<sup>5</sup> and to consider less burdensome alternatives.

## **I. Background.**

In 2007 EPA instituted the Renewable Fuels Standard (RFS) program and promulgated the RFS1 rule, implementing the Energy Policy Act of 2005 which mandates the amount and type of renewable fuel, or biofuel, that must be blended annually into U.S. petroleum fuel stocks. The new Renewable Fuels Standard rule (RFS2) implements the Energy Independence and Security Act (EISA) of 2007, which ramps up the amount of biofuel to be blended and introduces new requirements for certain specific varieties of biofuel to be included in petroleum fuels.

In 2008 a Small Business Advocacy Review Panel (the Panel) was convened on the RFS2 rulemaking. In the panel outreach, Small Entity Representatives (SERs) expressed concern over their ability to meet the blending requirements, either by buying and blending fuels themselves or by buying “credits” in a trading market that EPA will administer that emanate from the blending of other refiners. The issues raised in this comment reflect and expound upon the concerns expressed by SERs during the SBAR panel as reflected in the panel report.

## **II. The General Practicability and Implementation Schedule of RFS2**

Small entity fuel refiners have expressed concern over the general impracticability of the rapid implementation schedule of the RFS2 program. Many commercially unavailable and untested fuels are required to be blended into petroleum fuel stocks in the near future, and small refiners are concerned that they will be disadvantaged in the marketplace by the uncertainty caused by this situation.

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<sup>1</sup> 15 U.S.C. § 634a, *et. seq.*

<sup>2</sup> 5 U.S.C. § 601, *et seq.*

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

<sup>4</sup> *See* 5 U.S.C. § 609(a),(b).

<sup>5</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.

**a. EPA Should Institute a Temporary Delay of Implementation of the RFS2 Rule for Small Refiners**

In the RFS1 program, EPA included a temporary exemption for small refiners (including those that do and do not operate small refineries) through December 31, 2010. The RFS2 Panel recommended that EPA propose a delay in the effective date of the standards until 2014 for small entities, essentially following the format of RFS1.<sup>6</sup> EPA claims, however, that since Congress has defined small refineries in the CAA and the EISA specifically delays implementation for these small refineries, they do not have the authority to provide the additional delay requested by the SERs. Advocacy believes that the statutory language in the EISA does not interfere with EPA's ability, under the provisions of the Regulatory Flexibility Act (RFA), to grant relief to regulated small entities upon which the rule will have a significant economic impact.

A delay in implementation for small refiners would lessen the regulatory burden of this rule. Small refiners will most likely be buyers, not producers, of either biofuel feedstocks or, more likely, biofuel credits or Renewable Identification Numbers, in the market for renewable fuels. Until the new system is in place and RIN trading begins, no one can know what their availability will be in the trading market. Even if RINs are available for small refiners to purchase, the price may be prohibitive for small refiners, especially for some of the more exotic fuel types prescribed for blending by EISA. Due to this uncertainty regarding the availability of renewable fuels for small refiners, a delay would reduce the costs and risks of compliance. Otherwise, if RINs are unavailable for sale, small refiners will be unable to meet the requirements and risk going out of business. Advocacy believes that EPA should, at minimum, reexamine the issue of delayed implementation for small refiners.

**b. EPA Should Consider a Phase-in for Small Refiners**

During the RFS2 Panel, the SERs also suggested a phase-in of obligations for small refiners. By phasing in compliance requirements over a brief time period, EPA could lessen the burden of regulation and promote compliance. EPA has stated that a phase-in of obligations is beyond their authority as Congress specifically stated that the renewable fuel obligation shall "consist of a single applicable percentage that applies to all categories of persons specified as obligated parties."<sup>7</sup> However, it is not clear that Congress intended the single standard to apply at all points in time, as the rule requires different and increasing annual blending

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<sup>6</sup> Panel Report, 3.

<sup>7</sup> CAA section 211(o)(3)(B)

obligations every year at least through 2022, the final year dictated by Congress in the statute. Advocacy suggests that EPA reexamine the feasibility of phasing in the requirements on small refiners for a brief period.

### **III. The Durability and Availability of RINs**

Small business refiners are particularly concerned that RINs will not be available when needed to meet the blending requirements of the rule. No mechanism is currently in place in the rule to address the possibility that the RIN market will not be viable, and that small refiners without in-house blending capacity will be unable to meet the requirements. Furthermore, small refiners are concerned that without more durable RINs that can be carried from year to year they will be unable to navigate the potential volatility in the market for renewable fuels.

#### **a. There is Significant Uncertainty Regarding the RIN Market**

Refiners have the burden of obtaining and tracking RINs within the system. No one yet knows what will happen in this market because it is not fully functional yet, and current blending requirements under RFS1 are relatively easily met compared to the requirements under RFS2. There is uncertainty pertaining to the production of renewable fuels in sufficient quantities to meet the requirements of EISA, the availability of RINs for purchase, and the efficiency and success of the RIN market structure. Some of the fuels required by this rule cannot be or are not produced utilizing the current technological and scientific knowledge of the industry. There are large start-up and research costs associated with attempting to produce these fuels. EPA should look into flexibilities for small refiners that will take these uncertainties into account, such as delayed or phased-in implementation, if possible.

#### **b. There is Uncertainty Surrounding the Availability and Durability of RINs**

It is clear that most small refiners will not be producers, but buyers, in the RIN market. Since numerous types of RINs related to certain types of renewable fuels are not yet technologically feasible, it is possible that these products and associated RINs will not be available for purchase in the market at the time they are required by the EISA. For small refiners, an additional danger is that only large producers will have the ability and resources to produce or source the needed quantities of these exotic biofuels in order to meet compliance requirements. Again, delayed or phased in implementation schedules would alleviate some of the uncertainty and give the market a chance to mature prior to the most

vulnerable and dependent refiners being required to meet blending mandates.

Additionally, the durability of RINs affects small refiner compliance costs by increasing uncertainty and reducing planning horizons. EPA hopes to encourage sales of RINs by implementing an expiration date. Large firms have a large percentage of the fuel market, and will likely wield significant power in the RIN market as well. Expiration dates on RINs might actually benefit large firms, likely to be suppliers of RINs, because they reduce the ability of firms that are net RIN buyers to smooth compliance costs by buying RINs when they are relatively cheap to meet compliance requirements when they are more expensive.

A remedy for this asymmetry would be to exempt small refiners from the RIN expiration, essentially creating a clearing house for RINs. Large producers will be able to sell their extra RINs that are due to expire before they can be used at a discount to smalls, thus making up some of the cost of production and producing a benefit for large firms that would otherwise lose the entire cost of the RIN upon expiration. Smalls will then be able to comply with the standard and also hold on to excess RINs for future years when the market is tighter. Such a system will align incentives in a way to best clear the market. Furthermore, small refiners have such a small percentage of the market that their actual RIN collection will create no measurable impact (equivalent to a rounding error) on the entire market.

**c. EPA Should Report on the Feasibility of the RIN Trading System**

In addition to the potential breakdowns in the trading market identified above, other technical imperfections create uncertainty in the RIN system. The current RFS1 RIN trading system has encountered many implementation issues. RIN numbers consist of a large number sequence, increasing the chance of incorrect reporting or transposition. Therefore, many RIN reports have incorrect numbers, not because of fraud, but because of error. Such errors in data tracking can impede the ability of refiners to comply with the rule and EPA's ability to track the targets or enforce the requirements. Additionally, errors are costly to all parties involved.

While the EPA plans to create an automated, real-time system, it does not yet exist. Until such a system is in full operation, the incidence and cost of reporting error is likely to increase as blending requirements increase dramatically under RFS2. SERs have requested an analysis of the RIN system in order to better understand the market and its feasibility and efficiency.

#### **IV. EPA Needs to Address Biofuel Issues Created Through New Greenhouse Gas Standards and Limitations**

During the panel SERs pointed out issues with the availability of “exotic” renewable fuels, those made using methods that are not yet commercially viable. New information since the panel only exacerbates these concerns. In the analysis included with the proposed rule, EPA included lifecycle effects of land use implications on greenhouse gas emissions for all of the covered biofuels. Renewable fuels are required to achieve greenhouse gas (GHG) emissions reductions of 20% compared to traditional fossil fuels. This new analysis used a long time span (30 years) to determine which renewable fuel sources met the 20% reduction requirement over their production lifetime. Soybean-based biodiesel, while coming close to the 20% threshold does not meet these criteria, but is a readily available biofuel that could have gone a long way toward meeting the standard’s blending requirements. This additional GHG reduction requirement adds significant cost and uncertainty to a rule that is already costly and filled with uncertainty for small entities.

Given that the production, price, and availability of RINs are very uncertain, further narrowing the types of renewable fuels acceptable for compliance will further decrease the availability of RINs. RFS2 was designed with a focus on the importance of energy independence and security rather than greenhouse gas emissions reductions. Areas within the United States that currently grow soybeans and produce soybean-based diesel will be drastically affected by the elimination of this fuel from certification for blending. EPA should consider waivers to assist these regions in compliance.

Additionally, the approval and selection of renewable fuel technologies will create limitations on innovation. These limitations would put restraints on potentially beneficial and cost-effective improvements. Any time a regulation picks winners and losers within an industry, innovation and competitive market actions are hindered. While the EPA is constrained by the language of the EISA, there should be additional efforts to promote positive technological advancement instead of locking in specific technologies and feedstocks in the production of renewable fuels.

#### **V. E15 Waiver and Implications: The Industry is Faced with Hitting the “Blend Wall”**

The current standard for gasoline production in most regions of the U.S. is ten percent Ethanol (E10) blended into petroleum-based fuel. Under the blending requirements in RFS2, the E10 market will be saturated by approximately 2014 while ethanol production requirements continue to rise. There is significant uncertainty regarding what will happen then. Businesses are already worried about producing more ethanol than the fuel industry can blend and use (e.g., the so-called “blend wall”), and there is already a petition by large manufacturers to go beyond 10 percent ethanol and blend ethanol in quantities to produce E15 in order to have a market for the additional required ethanol.

However, E15 is still unproven as a safe and viable fuel for gasoline powered cars, trucks, and engines. EPA should not approve the E15 waiver until definitive research has been conducted showing the viability of E15 for safe and effective use. Small refiners are concerned that the blending requirements will force them to produce E15 as the only alternative for the volume of ethanol that they must use, and doing so will cause damage to gasoline powered engines that will result in legal liability for the fuel producers. If E15 is shown to have negative long-term consequences for gasoline engines, millions of potentially affected customers could threaten the viability of small refiners through legal action. Until engine and vehicle producers certify their vehicles as safe for E15 use, and E15 is found through extensive research not to be harmful for already produced engines, EPA should not approve any E15 waiver and should instead find alternative methods for mitigating the blend wall stalemate.

## **VII. Energy Independence vs. Greenhouse Gas Emissions Reductions**

Small refiners are concerned that RFS2 mandates, under the auspices of the EISA, could, in fact, threaten regional energy security and independence within the U.S. Many of the small refiner SERs that served on the RFS2 SBAR panel serve isolated regions of the U.S. without many substitute fuel suppliers, or serve as primary suppliers to military bases or installations. If the requirements of the RFS2 program interfere with the ability of these refiners to meet the demands of their isolated and unique customers, it could have the unintended consequence of disrupting U.S. energy markets rather than making them more independent and secure. This could happen if, for instance, limited supplies of RINs for some of the exotic biofuels cause refiners to be unable to release sufficient fuel supplies because they cannot meet the blending requirements. Any relief for such conditions that might be acquired via petition would likely not be available in time, and thus fuel supply disruptions could occur. SERs related to Advocacy a case from 1992 wherein an Amoco refinery in the isolated intermountain west region was closed because of the cost of meeting clean air regulations, almost immediately raising the price of gasoline in Denver by twenty cents a gallon. This kind of disruption could be devastating if it occurred in the current economic climate. EPA should consider the energy independence and security impact of this rule on geographically isolated regions of the country and military bases and installations, and find flexibility options to alleviate these potential problems before they happen.

We look forward to working with you to ensure that the final RFS 2 rule minimizes the regulatory burden on small refiners and other small entities.

Please do not hesitate to call me or Assistant Chief Counsel Keith Holman ([keith.holman@sba.gov](mailto:keith.holman@sba.gov) or (202) 205-6936) if we can be of further assistance.

Sincerely,

Shawne C. McGibbon  
Acting Chief Counsel for Advocacy

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