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## United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP

WASHINGTON, DC 20510-6350

TELEPHONE: (202) 224-5175 FAX: (202) 224-5619

ZAK BAIG, REPUBLICAN STAFF DIRECTOR  
ANN JACOBS, DEMOCRATIC STAFF DIRECTOR

June 10, 2015

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Dear Administrator McCarthy:

We write to express our serious concerns that the U.S. Environmental Protection Agency (EPA) is failing to follow the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), as it proceeds with formulation and implementation of the president's controversial Clean Power Plan. As members of the Senate Committee on Small Business and Entrepreneurship, we are deeply troubled by evidence that EPA is failing to fully comply with the law, as well as the negative economic and long-term impacts that the agency's regulatory actions will have on small entities in America.

On April 30, 2015, EPA convened a Small Business Advocacy Review (SBAR) panel to address the "development of a proposed rulemaking that will regulate [CO<sub>2</sub>] emissions from [Electricity Generating Units] that are not part of an approved state plan for the emissions guidelines" under Section 111(d) of Clean Air Act (CAA). On May 8, 2015, the Small Business Administration's (SBA) Office of Advocacy (Advocacy) wrote a letter to EPA finding that the agency had not properly committed itself to the SBAR process.<sup>1</sup> It is absolutely essential for a federal agency to appropriately comply with all relevant laws during the rulemaking process.

As you know, the RFA requires EPA to convene a SBAR panel before publishing a proposed rule that the agency determines will have a significant economic impact on a substantial number of small entities.<sup>2</sup> In conducting a SBAR panel, EPA has 60 days to consider input from sources that include Advocacy and small entity representatives (SERs), to review relevant EPA background and analytical materials, and to prepare a report detailing the potential impacts of the rule on small entities and ways to reduce those burdens.<sup>3</sup> Yet Advocacy's May 8 letter raises genuine concerns regarding the extent to which EPA has complied with the RFA in conducting its panel on the proposed Clean Power Plan rule. We are particularly troubled to learn that "[m]aterials provided to the SERs on May 1 do not describe potential regulatory alternatives under development or economic impacts," and that the "description of the proposed rule is a

<sup>1</sup> Letter from Claudia Rogers, Acting Chief Counsel for Advocacy, to Gina McCarthy, Administrator, U.S. Env't'l. Protection Agency (May 8, 2015) (on file with the U.S. S. Comm. on Small Bus. and Entrepreneurship).

<sup>2</sup> 5 U.S.C. § 609 (1996).

<sup>3</sup> *Id.*

discussion of broad outlines of policies and factors EPA may be considering. . . which EPA has not released and to which the SERs have no access.”<sup>4</sup>

We are further troubled by Advocacy’s conclusion that the materials supplied by EPA provide “little information with which the SERs could evaluate the potential impact on their individual generating units or facilities,” which severely limits SERs’ abilities to discuss costs, benefits and alternatives to the rule.<sup>5</sup> In short, EPA failed to fully comply with the requirements of the RFA.

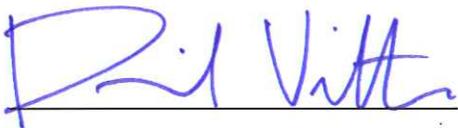
Roughly one month has passed since EPA received Advocacy’s letter, and we have been told that the agency has not yet responded to or otherwise modified its approach to the panel to address Advocacy’s concerns. Additionally, we have learned that EPA has been entirely unprepared for some of the SBAR panel’s meetings, thereby undermining productivity and making it appear as though EPA does not prioritize its obligations to small entities as it must do under the RFA.

Given the limited time remaining in the SBAR process, we request that EPA immediately provide a detailed account to Advocacy and to the members of the Senate Small Business Committee on how it intends to address the issues raised in Advocacy’s May 8, 2015 letter. Please direct this information to the Committee’s majority office, Senate Russell Room 428A, and/or to Luke Tomanelli at [Luke\\_Tomanelli@sbc.senate.gov](mailto:Luke_Tomanelli@sbc.senate.gov) by Friday, June 19, 2015.

Additionally, once Advocacy has confidence in the steps being taken by EPA to address its concerns, we also request that EPA provide a detailed briefing to this Committee on solutions to remedy this issue moving forward. Finally, the deadline for SERs to submit written comments to the proposed Clean Power Plan rule was Friday, May 29, 2015. We remind you that it is a statutory requirement that EPA thoroughly review and consider all SER feedback and incorporate it into the agency’s final rule.<sup>6</sup>

Congress clearly intended for the SBAR panel to provide necessary protections to small businesses. In order to adequately protect small entities throughout the rulemaking process in accordance with the law, the process must be thorough and must assess and incorporate the input of the small business community. As EPA proceeds with the SBAR panel, we strongly urge the agency to work cooperatively with Advocacy and the SERs. The integrity of this process – and the confidence that small entities have in it – requires no less.

Sincerely,



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<sup>4</sup> Letter from Claudia Rogers, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 609(b) (1996).

James R. Kinch

Mark

Michael B. Fuji

Jim S

Rand Paul

cc: Claudia Rogers, Acting Chief Counsel for Advocacy, Office of Advocacy, SBA