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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY

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U.S. Environmental Protection Agency
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Attn: Docket # EC—2000—007
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Establishment of Electronic Reporting; Electronic Records (66 Fed. Reg. 46162 (August 31, 2001))

Dear Sir or Madam:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) was established by Congress pursuant to Public Law 94-305 to represent the views of small business before Federal agencies and Congress. One of the primary functions of the Office is to measure the impacts of Government regulation on small entities and make recommendations for eliminating excessive or unnecessary regulation of small entities.

On August 31, 2001, the U.S. Environmental Protection Agency (EPA) issued a proposed rule for electronic record keeping and reporting. The rule also set forth the conditions under which EPA would accept electronic records. These conditions would require the retrofit of existing record keeping systems to permit audit trails and long-term archiving.

EPA proposed to certify this proposed rule pursuant to § 605 of the Regulatory Flexibility Act (RFA), in lieu of convening a Small Business Advocacy Review (SBAR) Panel (§ 609 of the RFA) and preparing an analysis that evaluates the potential impacts on small

entities and considers alternatives (§ 603 of the RFA). The Agency head may do this if the proposed rule is not expected to have a significant economic impact on a substantial number of small entities. However, there must be a factual basis for the decision.[1] As discussed below, Advocacy believes that EPA has failed to supply such a factual basis and provide adequate public notice for the proposal, therefore our recommendation is for EPA to withdraw at least the record keeping requirements of the proposal for further analysis. If after withdrawal and further analysis, EPA believes regulation is still appropriate, EPA should convene a panel and prepare the appropriate analysis, unless EPA can certify the new proposal, in which case the Agency would be required to provide a factual basis for the decision.

1. EPA's failure to comply with the RFA.

The RFA requires that a certification be supported by a set of facts. Advocacy believes that EPA based its certification on facts that are unsubstantiated at best or erroneous at worst. Because EPA has failed to provide a factual basis for certification, EPA failed to comply with the RFA when it certified the rule.

a. The record keeping provisions would NOT be voluntary

EPA based their certification on two "facts:" 1) compliance is voluntary; and 2) the volunteers would eventually save money. As for fact 1, even if the regulated entities could choose between keeping their records in paper form or keeping them electronically, small businesses would have no choice but to keep records in paper form because of the cost. According to EPA's contractor, the cost of the low-end compliant system to keep electronic records would be "prohibitive," and small businesses would not volunteer to purchase these systems.[2]

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[1] See 5 U.S.C. § 605(b).

[2] Chaudet et al. "Cross-Media Electronic Reporting and Records Rule: Cost-Benefit Analysis." A report prepared by the Logistics Management Institute for the EPA under GSA Contract GS-35F-4041G, March 2001, p. 5-2.

Unfortunately, the regulated entities may not have a choice. EPA would define virtually every record as an electronic record, and every electronic record would be subject to the proposed record keeping requirements under this proposed rule. Proposed 40 C.F.R. § 3.3 would define any data that is created, modified, maintained, archived, retrieved or distributed by a computer as an electronic record. Proposed § 3.100(a) states that EPA would accept only those electronic records that are created on electronic record keeping systems that meet the proposed requirements. Therefore, any regulated entity that uses a computer to keep records for EPA would be subject to the proposed requirements, and many small businesses use computers at least in part to keep such records.

b. The record keeping provisions would <u>NOT</u> save money.

The second fact EPA used to support certification is that, overall, this proposal would reduce burden for those regulated entities that volunteer to comply. However, a closer inspection of the analysis reveals that EPA arrived at this conclusion by making an inappropriate cost-benefit comparison. EPA compared the benefits of electronic *reporting* with the costs of electronic *record keeping*, when it should be evaluating each provision independently of the other. If EPA compared the costs and benefits of just the record keeping provisions, there would be no cost savings.[3]

EPA's comparison is not appropriate because electronic record keeping systems would not be required for electronic reporting and where such record keeping systems could be used, small entities would not be able to use them, because they don't have them and they would not choose to purchase them.

EPA offered three means for electronic reporting: web forms, EDI, XML. Access to the Internet is all that is required to use the web forms,[4] but to use EDI and XML, which are fully automated systems for environmental monitoring, collection, and data storage, facilities would have to have a sufficient volume of reports to make these technologies

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[3] *Id.*
[4] *Id.* p. 3-5.

cost effective. According to EPA's contractor, only "Fortune 1000" firms would have the volumes to justify EDI.[5] Advocacy doubts that smaller companies could use XML either, because they would not have the volumes over which to spread the very large up-front equipment and set-up costs.

2. The record keeping provisions are fundamentally flawed.

Under the Administrative Procedure Act (APA), EPA must give the public adequate notice for a proposal and a meaningful opportunity for comment.[6] However, the public has not been given adequate notice, because EPA stated the proposed electronic record keeping requirements would be voluntary[7] but would mandate the proposed requirements for every regulated entity that uses a computer.[8] EPA has also stated that these proposed record keeping requirements are necessary, but the Government Paperwork Elimination Act does not require them,[9] and EPA has yet to define the problem that it tried to address with those requirements or provide evidence that a problem exists. Advocacy is raising this concern because most small businesses are not aware that under this proposal, they would be prohibited from using a computer to keep records for EPA regulations unless and until they make large investments to meet the proposed rule. Before finalizing a rule that may or may not be necessary, small businesses should be notified of this and have an adequate opportunity to comment.

Further, EPA cannot cure the problems of the proposal with anything less than another proposal. EPA cannot simply modify the proposal and finalize it, because the required changes would be too substantial. It is not a straightforward exercise to define the term "electronic record." If the definition were too restrictive, paper records would not be permitted. If insufficiently restrictive, every regulated entity would print everything to avoid being subject to an expensive and complicated rule. Similarly, EPA cannot fix the

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[5] *Id.* pp. 3-4 and 3-5.
[6] See 5 U.S.C. § 553.
[7] See 66 Fed. Reg. 46162.
[8] See Proposed 40 C.F.R. § 3.3 and § 3.100(a).
[9] See Public Law 105-277.

problem with a Notice of Data Availability. Simply describing potential problems of the proposal and seeking additional comment would not be an adequate remedy. If EPA is wrong, and the proposed record keeping requirements are mandatory, 100% of the 1.2 million facilities that report to EPA (not the mere 0.5% EPA assumed) would have to comply and the annual cost would be approximately $28 billion (1.2 million facilities x $23,000/facility/year).[10]

3. EPA should withdraw the record keeping conditions for further analysis.

EPA failed to comply with the RFA. The proposal is fundamentally flawed. Therefore, EPA should withdraw at least the record keeping requirements of the proposed rule. If EPA would like to move forward with the provisions that explicitly allow for electronic signatures wherever signatures are required and electronic records wherever papers are required, EPA could finalize just those provisions, but the value of such action would not be clear. These provisions may address the yet-to-be determined legal barriers against electronic record keeping that may exist in some jurisdictions. However, Advocacy has not been able to identify even one single facility where legal barriers exist for electronic record keeping. On the contrary, a review of EPA regulations has revealed there are 36 Clean Air Act regulations that explicitly allow electronic record keeping.[11] Nevertheless, Advocacy recognizes that theoretically, there may be barriers to electronic record keeping and would support removing these barriers, but the other record keeping provisions have not been justified and should be withdrawn.

In addition, prior to re-proposal, EPA should prepare an appropriate analysis of the problem EPA is trying to address and release the analysis to the public. Without this information, it will be difficult to identify alternatives that would address that problem

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[10] EPA estimates that a facility would have to spend $40,000 for equipment and set up for the "low-end" compliant system and an additional $17,000 annually to operate and maintain this system. Chaudet et al., p. 3-7. With a 7% percent discount rate and a 10-year period over which to recover the equipment and set-up costs, the cost per year would be about $5,700 per facility. Therefore, $5,700 + $17,000 ~ $23,000 and $23,000 x 1.2 million ~ $28 billion.

[11] Duvall, Mark. "Proposed Establishment of Electronic Reporting; Electronic Records Rule." This testimony of the Dow Chemical Company was presented at a public hearing held by EPA regarding the above captioned rule in Washington D.C., October 29, 2001, Attachment A.

and also reduce burden. EPA should also work with industry to identify an appropriate solution.

If EPA cannot establish a factual basis for the RFA certification, EPA should convene a SBAR panel and prepare an appropriate analysis that evaluates the potential impacts on small entities and considers alternatives.

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If there are any questions, please feel free to contact my staff member, Austin Perez at (202) 205-6936. We stand ready to assist EPA in developing alternatives that protect the environment and preserve the viability of small entities.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Austin R. Perez
Assistant Advocate for Environmental and Energy Policy