

Congress of the United States
Washington, DC 20515

January 21, 2010

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Sunstein,

On December 7, 2009, the U.S. Environmental Protection Agency took one of the most far-reaching actions ever taken by a federal agency. That action was EPA's rule finding that carbon dioxide endangers public health and welfare.¹ To protect jobs and small businesses, we request that the Office of Information and Regulatory Affairs (OIRA) take steps to ensure that this action and related actions and proposals are reconsidered and, at a minimum, withdrawn unless and until EPA complies with the Regulatory Flexibility Act (RFA).

On the basis of EPA's endangerment finding, virtually every economic activity undertaken in America stands to come under the thumb of federal regulation. The first wave of follow-on regulatory actions, in fact, is already underway or foreordained by the terms of the Clean Air Act. These actions begin with EPA's and the Department of Transportation's proposed new light vehicle emission standards,² continue through greenhouse gas (GHG) pre-construction and operating permit requirements for stationary sources and extend as far as the mind can contemplate.

In these ways, EPA threatens to burden our economy with vastly expanded regulation not contemplated by Congress when it passed the Clean Air Act. In the depths of the current, historic recession and in the face of dramatically high levels of unemployment, this is unwise and injures America's workers and economy.

The burdens of EPA's actions will fall especially heavily on small businesses – employers that are critical to the job creation on which America depends to recover from recession. Because the Clean Air Act imposes permitting requirements on sources that emit as low as 100 or 250 tons of identified pollutants per year, by EPA's own estimate, millions of small sources never before required to be under Clean Air Act permits will now have to be covered.³

¹ "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act," EPA Docket No. EPA-HQ-OAR-2009-0171, RIN 2060-ZA14 (Dec. 7, 2009).

² "Proposed Rulemaking to Establish Light-Duty Vehicle Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (Sept. 28, 2009).

³ "Proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55292, 55302 (Oct. 27, 2009) ("Tailoring Rule").

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The permitting regimes will be expensive, many small businesses may not be able to obtain permits readily, and state and federal authorities will be overwhelmed by the administrative challenges of absorbing these businesses into the Clean Air Act regulatory scheme.

In a nod to the difficulties small businesses will confront, EPA proposes a "Tailoring Rule" through which it seeks to delay for a handful of years the imposition of requirements on sources emitting less than 25,000 tons of carbon dioxide per year. This limited delay is plainly insufficient. Moreover, it and EPA's other GHG actions appear to be in violation of the RFA, which Congress passed specifically to protect small businesses from excessively burdensome regulation. As the Office of the Chief Counsel for Advocacy within the Small Business Administration (SBA-OA) pointed out to the EPA Administrator (and, by copy, to OIRA) on December 23, 2009, EPA has failed to convene Small Business Advocacy Review Panels before imposing its rules, failed to develop and evaluate regulatory alternatives to minimize its actions' impacts on small businesses and inappropriately certified that its GHG actions will not impact small businesses.⁴

The need for RFA compliance could hardly be plainer. On the very face of EPA's proposed Tailoring Rule, EPA claims that the rule will avoid more than *\$38 billion* of impacts that would otherwise fall on small sources during the suspension of the CAA's 100 and 250 tons-per-year standards.⁵ What is more, the Tailoring Rule itself may be intended to serve as an end run around the RFA's requirements. In that, it fails both statutorily and practically. As the Office of the Chief Counsel for Advocacy points out, even the Tailoring Rule undershoots the mark, leaving more than a thousand small entities outside the scope of its exception.⁶

It need not and should not be this way. The Office of Management and Budget and OIRA hold substantial authority over the federal regulatory process under Executive Order 12866, Executive Order 13422 and other authorities. Executive Order 12866, for example, requires that agencies write their regulations to impose the least burden on society, including businesses of different sizes. It would be impossible for OIRA to ensure compliance with this basic tenet of E.O. 12866 if EPA and other agencies were not to assess the impacts of their rules under the RFA. OIRA could and should have exercised its authority to guide the EPA to an outcome that protected small business consistent with the requirements of the RFA and as directed by the SBA's Office of the Chief Counsel for Advocacy.

⁴ Letter from Susan Walthall, Acting Chief Counsel, Office of the Chief Counsel for Advocacy, Small Business Administration to the Honorable Lisa Jackson, Administrator, U.S. Environmental Protection Agency (Dec. 23, 2009) (SBA-OA Letter). A copy of this letter, which contains a detailed discussion of EPA's violations, is attached at Tab A.

⁵ Tailoring Rule, 74 Fed. Reg. at 55,338.

⁶ SBA-OA Letter at 7.

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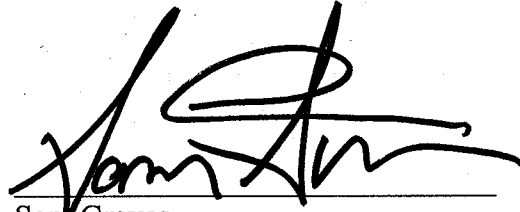
At a minimum, OIRA should now exercise that authority to ensure that EPA will reconsider its actions and, at a minimum, not impose its massive contemplated regulatory burdens on small businesses unless and until it complies with the RFA. We request OIRA to do so and provide us with all relevant information and documents concerning OIRA's role in the review and approval of EPA's actions to date with regard to RFA compliance and the assessment of impacts on small business.

We look forward to your prompt response to these requests, which we ask you to provide no later than February 1, 2010. If you have any questions concerning our requests, please feel free to contact Daniel Flores, Minority Chief Counsel for the Committee on the Judiciary's Subcommittee on Commercial and Administrative Law and Barry Pineles, Minority Chief Counsel for the Committee on Small Business. Mr. Flores may be reached at (202) 226-8685 and Mr. Pineles may be reached at (202) 225-5821.

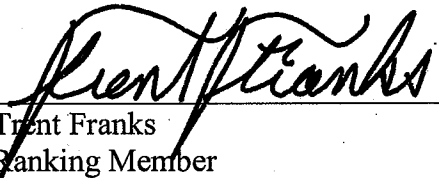
Sincerely,



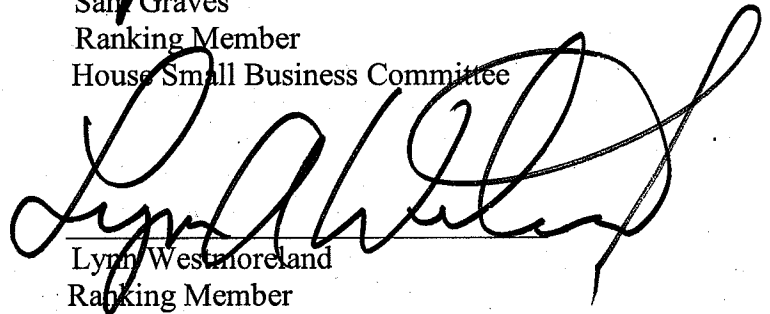
Lamar Smith
Ranking Member
House Judiciary Committee



Sam Graves
Ranking Member
House Small Business Committee



Trent Franks
Ranking Member
Judiciary Subcommittee on Commercial
and Administrative Law



Lynn Westmoreland
Ranking Member
Small Business Subcommittee on
Regulations and Healthcare

cc: The Hon. John Conyers, Jr.
The Hon. Nydia M. Velázquez
The Hon. Steve Cohen
The Hon. Kathy Dahlkemper

Enclosure