This statement is submitted on behalf of the Society of Independent Gasoline Marketers of America ("SIGMA") and the National Association of Convenience Stores ("NACS"). It supplements the oral testimony delivered by R. Timothy Columbus on behalf of SIGMA and Paige Anderson on behalf of NACS at the Environmental Protection Agency's ("EPA's" or the "Agency's") hearing on the Renewable Fuel Standard ("RFS" or the "Program") held in Kansas City, Kansas on June 25, 2015.

Members of SIGMA and NACS generally support the Environmental Protection Agency's proposed rule outlining proposed 2014, 2015, and 2016 renewable volume obligations ("RVOs") under the RFS ("Proposed Rule" or "Proposal")[1]. The Proposal appropriately recognizes that the RFS has the potential to cause substantial problems in the retail fuels market if left unchanged. The Proposal addresses these potential problems without undermining the principles on which the Program is premised – diversifying fuel supply, increasing the overall fuel supply, encouraging domestic fuel production, and lowering fuel costs for American consumers.

I. INTRODUCTION

A. Overview of SIGMA and NACS

SIGMA and NACS collectively represent approximately 80% of retail fuel sales in the United States.

SIGMA represents approximately 260 independent chain retailers and marketers of motor fuel. SIGMA members represent significant diversity within the industry. While 92 percent are involved in gasoline retailing, 66 percent are involved in wholesaling, 36 percent transport product, 25 percent have bulk plant operations, and 15 percent operate terminals Member retail outlets come in many forms including travel plazas, traditional "gas stations," convenience stores with gas pumps, cardlocks, and unattended public fueling locations. Some members sell gasoline over the Internet, many are involved in fleet cards, and a few are leaders in the mobile refueling movement.

NACS is an international trade association representing more than 2,200 retail and 1,800 supplier company members. NACS member companies do business in nearly 50 countries worldwide, with the majority of members based in the United States. The U.S. convenience store industry, with approximately 1.8 million employees and 151,000 stores across the United States, posts nearly $700 billion in total sales, and accounts for approximately $500 billion in motor fuel sales alone each year.

B. The Retailer's Objective

These associations' members' sole objective is to sell what their customers want to buy. As new fuels enter the market, they want to be able to sell those fuels lawfully and with minimal volatility and risk. While agnostic on which liquid fuel they sell to satisfy consumer demand, they do have a bias: they believe it is best for the American consumer

[1] 80 Fed. Reg. 33100 (June 10, 2015).

and America's industrial position in the world marketplace to have reasonably low and stable priced energy.

II. SIGMA AND NACS SUPPORT EPA'S PROPOSAL

A. Adapting to an Evolving Market

Congress last revised the RFS in 2007. Those revisions were premised upon an expectation of (1) a rise in demand for gasoline and (2) widespread availability of cellulosic ethanol by 2013. Neither of those expectations has been met.

In 2007, the nation consumed approximately 150 billion gallons of gasoline; demand was expected to increase at an annual rate of approximately 1.3% through 2030.

In reality, gasoline demand has diminished –the Energy Information Administration has found that in 2014, 136.78 billion gallons of gasoline were consumed in the United States, approximately 4% less than the record high of 142.35 billion gallons consumed in 2007.[2] Higher corporate average fuel economy ("CAFE") standards combined with a struggling economy have lowered the country's gasoline usage. In addition, the country has not experienced the growth in flex fuel vehicles and sales of E85 (gasoline with a concentration of 51-83% ethanol) that was anticipated.

At the same time, the cellulosic biofuel industry continues to transition from research and development and pilot scale operations to commercial scale facilities. This process has taken significantly longer than Congress expected when it revised the RFS in 2007.

Notwithstanding these unanticipated market realities, the statutory RFS volume targets continue to increase annually. If left in place, these targets could only be met if more ethanol is blended into every gallon of gasoline.

At the present time, the market is simply unable to blend more ethanol into gasoline. This is true for two related reasons:

i. *Insufficient Demand*

More than anything else, the number one trait of any successful retailer is an ability to identify what his or her customers want to buy, and then sell that product at a cost that enables the retailer to earn a profit. Fuel retailers' customers do not purchase products because members of SIGMA and NACS sell them; members of SIGMA and NACS sell products because their customers purchase them. To date, very few retailers that sell mid-high ethanol-gasoline blends such as E15 or E85 have seen substantial sales of these products. Quite the opposite, most retailers that sell E15 or E85 have yet to see

[2] Energy Information Administration, "Frequently Asked Questions," How Much Gasoline does the United States Consume?, *available at* http://www.eia.gov/tools/faqs/faq.cfm?id=23&t=10 (last accessed June 22, 2015).

substantial sales of these products. Indeed, even consumers with flex-fuel vehicles that are compatible with E85 tend to purchase E10.

Although E85 can be sold for less dollars-per-gallon than the more widely available E10, this price differential does not generate sufficient demand to justify the investment. Because E85 provides vehicles fewer miles per gallon ("MPG") than E10, it must be sold at a discount in order to be priced equal to gasoline on a dollar per British Thermal Unit (BTU) basis. Even if E85 is sold on an equal dollar per BTU basis as E10, for E85 to infiltrate the market on a more widespread basis, there likely would have to be an *additional* discount to justify consumers having to stop and purchase the product more frequently relative to E10. The economics are simply not present in most places in the United States for this level of price discounting and market infiltration to occur.

It is important to keep in mind that of the various mandates contained in the RFS, there is no mandate for consumers to purchase anything. Unless there is a substantial increase in consumer demand for higher fuel blends, retailers will naturally be reluctant to make the investments that are necessary in order to sell them.

ii. *Retailer Liability*

Beyond insufficient demand, retailers' liability concerns act as a further disincentive to selling fuel blends with higher concentrations of ethanol.

Occupational Safety and Health Administration ("OSHA") regulations require retailers to use equipment that has been listed by a nationally recognized testing laboratory as compatible with the fuel the equipment is storing and dispensing.[3] The primary testing laboratory is Underwriters Laboratories ("UL"). However, prior to 2010 UL had not listed a single dispenser as compatible with any ethanol concentration greater than 10%. Further, under UL's policy, no device listing can be revised. Consequently, retailers who wish to sell any gasoline containing more than 10% ethanol (such as E15 or E85) must acquire a new dispenser that has been listed as compatible with the product if they have not purchased new dispensers in the last five years. Dispensers can cost upwards of $20,000 and many retailers are understandably disinclined to dispose of functional and modern dispensers in order to sell a new fuel for which demand is at best uncertain.[4]

It is relatively feasible to convert dispensers to ensure compatibly with higher levels of ethanol-blended fuel because one can determine the compatibility of units at a particular location. More complicated is determining the compatibility of underground storage

[3] 29 C.F.R. 1926.152(a)(1) ("Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids.") "Approved" is defined at 29 C.F.R. 1910.106(35) ("Approved unless otherwise indicated, approved, or listed by a nationally recognized testing laboratory.") *See also* 29 C.F.R. 1910.7 (definition and requirements for a nationally recognized testing laboratory).

[4] The two primary device manufacturers (Gilbarco and Wayne-GE) have obtained UL listing for retrofit kits for some of their units to upgrade their compatibility to accommodate fuels containing up to 25% ethanol. These units are currently available for $2,000 - $4,000 per kit and may be available for more than 50% of the dispensers in the market. This reduces the costs for many retailers, but the expense still equates to nearly 10% of a store's annual pre-tax income – a significant risk given uncertain consumer demand.

equipment. Retail fueling facilities can often change hands several times after a tank system is installed, leaving the current owner uncertain of the listing status of underground equipment. This equipment can include the underground storage tank itself, connecting pipes and fittings, submersible equipment and other ancillary units. It is essential that retailers be able to demonstrate that these units are certified as compatible with all fuels that are stored in them. Replacing them, however, is extraordinarily expensive. When a retailer opens the surface of an outlet to address underground equipment issues, costs can quickly exceed $100,000 per location.

a. *A Recent NREL Study Does Not Mitigate Retailers' Liability Concerns*

An examination of the shortcomings of a recent National Renewable Energy Laboratory ("NREL") study regarding infrastructure compatibility with E15[5] illustrates the various liability concerns that retailers face in considering whether to store and sell gasoline-ethanol blends greater than E10. This study, which was commissioned by the Renewable Fuels Association, addressed the compatibility of E15 with equipment at refueling stations. The study generally concluded that E15 is compatible with most existing equipment, and suggested that retailers can therefore store and dispense E15 in such equipment. This is misleading. In fact, the study's conclusion that E15 is compatible with most existing equipment in no way changes or minimizes retailers' liability concerns. These concerns are grounded in the requirement that retailers store and dispense E15 and higher blends in equipment that is *approved by UL* as compatible with such fuels.

Thus, as a practical matter, the NREL study's core shortcoming is the fact that it examines *one* issue – the compatibility of E15 with equipment at refueling stations – in order to reach conclusions about *another* issue – whether retailers can lawfully store and dispense E15 without risk of liability. Indeed, even if – hypothetically – all retail infrastructure could store and dispense E15 without the risk that E15 could damage such infrastructure, retailers that market E15 would be exposed to legal liability on a number of fronts:

- *UL Listing* – The NREL study states that UL listing is not necessary in order to store and sell E15. It has no legal basis for reaching this conclusion. As an initial matter, OSHA regulations require flammable liquids – such as gasoline – to be stored in "approved" containers.[6] "Approved" refers to a listing by a nationally recognized laboratory.[7] In addition, a large number of state and local regulations and fire codes, as well as retailers' bank covenants, also require equipment to be listed by UL as compatible with the fuels they store or dispense. Thus, storing

[5] K. Moriarity and J. Janowitz, "E15 and Infrastructure." National Renewable Energy Laboratory, May 2015, *available at* http://www.nrel.gov/docs/fy15osti/64156.pdf.
[6] 29 C.F.R. 1926.152(a)(1).
[7] 29 C.F.R. 1910.106(35). *See also* 29 C.F.R. 1910.106(36) (defining the term "listed" by cross-referencing the definition of "approved").

E15 or any other fuel in equipment that is not listed by UL, could generate liability exposure.

- *Recordkeeping* – Retail fueling facilities can often change hands several times after a tank system is installed, leaving the current owners uncertain of the listing status of underground equipment. As the NREL report notes, "There is no regulation that requires station owners to keep records of their equipment, making determination of compatibility challenging for stations without equipment records." As a practical matter, without the ability to verify that their equipment is UL listed to store E15 or other ethanol blends, the retailer is assuming liability risk if he or she stores such fuels.

- *Misfueling* – Assuming a retailer's equipment is listed as compatible with E15, there is still liability exposure if customers misfuel. EPA's rule authorizing the sale of E15 restricts its use to vehicles manufactured after 2001 and prohibits its use in earlier models or small engines.[8] EPA issued a misfueling mitigation rule requiring the placement of dispenser decals near the E15 selector and requiring additional measures, but there are no *physical* applications available to prevent the consumer misfueling. Further, it is expected that a sizeable percentage of consumers may not know in what year their vehicles were manufactured.

  This puts retailers in a precarious situation. If they offer E15 and a consumer uses that fuel in a non-approved engine, retailers are exposed to the threat of being charged with a violation of the Clean Air Act and subject to fines of up to $37,500 per violation. Even if the retailer is fully compliant with EPA's misfueling mitigation requirements, he or she may be subject to civil litigation under the Act's private right of action provision. Further, because many engine manufacturer owner's manuals and warrantees do not authorize the use of E15, the retailer may be threatened with liability for engine damage or for selling a fuel that voids the consumer's warranty. The simple threat of litigation deters many retailers from offering the higher blends.

- *Automobile Warranties* – Many engine manufacturer owner's manuals and warrantees do not authorize the use of E15. Retailers may be subject to liability for engine damage or for selling a fuel that voids the consumer's warranty. This exposure could threaten a facility's economic viability.

B. Blend Wall

If the RFS's volume obligations exceed the volume of renewable fuel the market can absorb, the market will have hit the so-called "blend wall." The blend wall represents the point at which there is an insufficient supply of renewable fuel that can be delivered to consumers. It would lead to a significant increase in the price of fuel and would inflict

[8] *See* 40 C.F.R. 80.1504; *see also* EPA, Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs. 77 Fed. Reg. 44406 (July 25, 2011).

substantial harm on the United States' economy. This damage would be caused by a shortage of Renewable Identification Numbers ("RINs"), which are used to ensure compliance with the RFS's volume obligations. RINs are essentially an artificial commodity that has become an integral component of manufacturers' ability to produce and import fuel. If the market reaches the blend wall, there will not be enough RINs to allow obligated parties to satisfy their volume obligations under the RFS. This will result in significantly elevated prices for RINs that are available. For those obligated parties that would inevitably be unable to acquire sufficient RINs, they could face fines from the Agency or might make other decisions to lower their obligations under the program by reducing or exporting production. All of these situations will add costs to fuel production and, as happens in every industry, these costs will be passed down to retailers and ultimately will be absorbed by consumers.

C. EPA's Waiver Authority

EPA's Proposal wisely takes advantage of its statutory authority to avoid the blend wall and associated economic harm. Specifically, the Agency has proposed to invoke its waiver authority under section 211(o)(7)(A)(ii) of the Clean Air Act – wherein it can lower annual volume obligations where there is "inadequate domestic supply" – to bring the 2014, 2015, and 2016 RVOs in line with what it projects the market could reasonably absorb (*i.e.*, to avoid reaching the blend wall).

As discussed further below, SIGMA and NACS support EPA's efforts to exercise its waiver authority under this "inadequate supply" prong; in addition, however, SIGMA and NACS urge EPA to simultaneously exercise its complimentary waiver authority under Section 211(o)(7)(A)(i), the so-called "severe economic harm" prong. Under this provision, EPA can revise the statutory RVOs when implementation of the requirement would severely harm the economy or the environment of a State, region, or the United States.

i. *Insufficient Supply*

There are presently significant impediments affecting the ability to distribute, blend, dispense, and consume renewable fuels. The "inadequate supply" waiver authority encompasses these scenarios. In evaluating the "supply" of a product, such as renewable fuel, SIGMA and NACS agree with EPA that supply is best understood in terms of the person or place *using* the product.

In the motor fuels market, various parties interact across several industries to make renewable fuel available for use by the ultimate consumers as transportation fuel. Supplying renewable fuel to obligated parties and terminal blenders is one part of the process, while supplying renewable fuel to the ultimate consumer as part of their transportation fuel is a different aspect of this process. While a source can have a capacity to *produce,* regardless of whether it has a market for that product, the concept of "supply" does not occur in isolation, but in reference to the person intending to make use of that product. NACS and SIGMA share EPA's belief that the inadequate supply waiver

provision should be interpreted as authorizing EPA to consider the adequacy of supply to all of the relevant parties, including the adequacy of supply to the ultimate consumer or renewable fuel blended into transportation fuel.[9]

This makes particular sense in light of the fact that the RFS is designed to increase the use of renewable fuel by consumers. The very definition of renewable fuel requires that the fuel be "used to replace or reduce the quantity of fossil fuel present in a transportation fuel."[10] It would have been illogical for Congress to direct EPA to consider supply without regard to distribution capacity. The Agency therefore rightfully determined that it has authority under section 211(o)(7)(A)(ii) to consider the full range of constraints – including fuel infrastructure, demand, liability, and other constraints – that could result in an inadequate supply of renewable fuels to consumers.

ii. *Severe Economic Harm*

In addition to its waiver authority under section 211(o)(7)(A)(ii), EPA's complimentary waiver authority under 211(o)(7)(A)(i) also offers a sufficient basis for revising the 2014-2016 RVOs. Under this "economic harm" authority, EPA can revise the statutory RVOs when implementation of the requirement would severely harm the economy or the environment of a State, region, or the United States. For the reasons outlined below, it is quite clear that EPA has authority under this provision as well as the inadequate supply provision.

The Agency's interpretation of its "economic harm" waiver authority is most fully explored in a 2008 decision denying a waiver request submitted by the State of Texas.[11] This interpretation was reaffirmed in the Agency's 2012 decision denying waiver requests that were submitted by several states.[12]

EPA has generally interpreted the statutory prerequisite that "implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States" as limiting its waiver authority to situations when "implementation of the RFS program itself [causes] the severe economic harm,"[13] rather than situations where implementation of the program would significantly *contribute* to severe economic harm.

The economic harm that would result upon the fuels market reaching the blend wall would be directly caused by the RFS. Unlike previous waiver requests that have been predicated upon intervening economic factors (*e.g.*, droughts), the blend wall is an artificial dilemma that emanates solely from the RFS.

EPA's 2008 denial of Texas's waiver request also set forth three additional factors the Agency will consider:

---

[9] *See generally* 80 Fed. Reg. 33111-33112.
[10] *See* Clean Air Act §211(o)(1)(l).
[11] 73 Federal Register 47168 (August 13, 2008).
[12] 77 Federal Register 70752 (November 27, 2012).
[13] 73 Fed. Reg. 47171.

First, it states that its waiver authority is limited to situations where "there is generally a high degree of confidence that there *will* be severe economic harm as a result of the implementation of the RFS."[14] The Agency should certainly have a high degree of confidence that if prices at the pump increase substantially – as they will when the market reaches the blend wall – there will be almost immediate consequences on the American economy. Merrill Lynch, for example, estimates that every one cent increase in the retail price of gasoline amounts to $1 billion in lost consumer spending.[15] Thus, when the market reaches the blend wall, demand for RINs continues to outpace supply, and fuel producers' increased operating costs are passed down to consumers through higher prices for fuel, it will substantially detract from consumer spending in many areas of the economy and cause severe economic harm, particularly if it continues unabated for a prolonged period of time.

Second, the "harm" must be to the *economy as a whole* rather than one specific sector of the economy (*e.g.*, the livestock industry). The economic harm that would result upon reaching the blend wall would apply to the entire U.S. economy. The United States is a petroleum-based economy. When the retail price of motor fuel increases, it not only constricts household budgets, but it causes the price of *everything* that is transported or produced using motor fuel to escalate. The harm is not targeted to a narrow segment of the economy, nor is it offset by those few sectors that benefit financially from higher retail fuel prices.

Third, the Agency asserts broad discretion in determining whether to grant an "economic harm" waiver. EPA has cited the provision providing that EPA "may" waive the RFS volume requirements after finding that implementation of the RFS program would severely harm the economy. When Congress intends non-discretionary action, EPA argues, it typically employs a term like "shall." "Thus, EPA believes Congress intentionally gave EPA discretion in determining whether to grant or deny a waiver request, even in instances where EPA finds that implementation of the program would severely harm the economy … ."[16]

For the reasons discussed above, SIGMA and NACS encourage EPA to ground its waiver authority under both the "supply" prong *as well as* the "economic harm" prong of Clean Air Act section 211(o)(7)(A).

iii. *The Necessity of Avoiding the Blend Wall*

The Agency wisely recognizes that the RVOs Congress set forth in 2007 bear no rational relationship to current market conditions. The market simply cannot absorb the quantity

[14] 73 Fed. Reg. 47171 – 47172 (emphasis added).
[15] See Jeff Sommer, Numbers That Sway Markets and Voters, N.Y. Times, Mar. 3, 2012, at B4, *available at* http://www.nytimes.com/2012/03/04/your-money/rising-gasoline-prices-could-soon-have-economiceffects.html?pagewanted=all&_r=0.
[16] 73 Fed. Reg. 47172.

of ethanol required without administrative or regulatory changes to existing law. Thus, consistent with the flexibility that Congress granted the Agency, EPA proposes to utilize its waiver authority to avoid the blend wall and resulting harm to the Program and the economy at large. If finalized as proposed, the Proposed Rule will have three salutary effects:

First, it will achieve displacement of foreign fuel with domestic fuel without inflicting excessive costs on consumers.

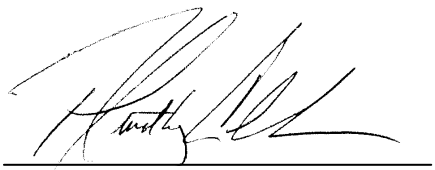
Second, it would relieve the burden of non-compliance from the obligated party community without making those entities produce less and/or export more fuel, either of which would increase the price at the pump domestically.

Third, it would preserve the benefits of a diverse fuel supply.

Finally, as a policy matter, EPA's waiver authority represents the proper allocation of responsibility between different branches of the federal government: Congress established statutory volume obligations for renewable fuels, and the task of setting appropriate annual volume obligations based on the market falls to experts at EPA, who are required to consult with their counterparts at the Departments of Agriculture and Energy. In other words, a waiver to avoid the blend wall is how both the RFS, and the government in general, is supposed to work.

III. CONCLUSION

SIGMA and NACS are grateful for the opportunity to submit this written testimony. Both associations stand ready to be of assistance to the Agency in its consideration of this matter.



R. Timothy Columbus
Counsel to SIGMA and NACS