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The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 (EPA–HQ–OAR–2019–0136; FRL–9996–53–OAR; RIN 2060–AU42)

Dear Administrator Wheeler:

Our clients, the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA"), write to provide comment on the Environmental Protection Agency's ("EPA" or "the Agency") proposed annual percentage standards for biofuels under the Renewable Fuel Standard ("RFS" or "the Program.") Program.[1]

Overall, NACS and SIGMA (collectively, "the Associations") support EPA's Proposal as it appropriately takes into consideration the actual amount of biofuels available to the marketplace and adjusts blending levels accordingly using the Agency's statutory cellulosic waiver authority. The Associations appreciate that in utilizing this authority, EPA is able to maintain appropriate blending levels without undermining the market forces that drive the RFS program, including ensuring a diversified fuels market and supporting renewable fuels production. From the Associations' perspective, the primary objective of this proposal must be to achieve the statute's goals while not violating the blend wall.[2] Setting the RVOs above the level that can reasonably be absorbed and consumed by the market would be counterproductive to a successful RFS Program, and would result in significant market disruptions and higher prices for consumers.

[1]Environmental Protection Agency, Proposed Rule, *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021*, 84 Fed. Reg. 36762 (July 29, 2019), https://www.govinfo.gov/content/pkg/FR-2019-07-29/pdf/2019-15423.pdf [hereinafter *Proposed Rule*].

[2] NACS and SIGMA define the blend wall as the point at which there are insufficient Renewable Identification Numbers (RINs) to fulfill obligated parties' RVOs.

NACS and SIGMA remain concerned with the impact of the small refinery waiver process on the RFS. EPA has made significant improvements to the transparency of the process. However, more can and should be done to enhance transparency. As described in further detail below, the Associations urge the Agency to identify: (1) the standard for obtaining a waiver and the factors used to evaluate an application; and (2) the recipients of the waivers and the volumes of renewable obligations that have been waived for that recipient.

More detailed comments can be found below.

I. INTRODUCTION AND BACKGROUND

A. Overview of NACS and SIGMA

Collectively, NACS and SIGMA represent approximately 80 percent of retail motor fuel sales in the United States.

NACS is an international trade association representing the convenience store industry with more than 1,900 retail and 1,800 supplier companies as members, the majority of whom are based in the United States. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

In 2018, the fuel wholesaling and convenience industry employed approximately 2.36 million workers and generated $654.3 billion in total sales, representing approximately 3.2 percent of U.S. Gross Domestic Product. Of those sales, approximately $412.1 billion came from fuel sales alone. Because of the number of fuel and other transactions in which the industry engages, fuel retailers and marketers handle approximately one of every 30 dollars spent in the United States. Fuel retailers serve about 165 million people per day—around half of the U.S. population—and the industry processes over 60 billion payment transactions per year. Nevertheless, the convenience store and fuel retail industry is truly an industry of small businesses. Approximately 62 percent of convenience store owners operate a single store, and almost 75 percent of NACS' membership is composed of companies that operate ten stores or fewer.

The fuel wholesaling and convenience store market is one of the most competitive in the United States. SIGMA's and NACS' members operate on tiny margins (around 2 percent or less) and are unable to absorb incremental cost increases without passing them on to consumers.

B. The Retailer's Objective

These Associations' members' sole objective is to sell legal products, in a lawful way, to customers who want to buy them. As new fuels enter the market, retailers want to be able to sell those fuels legally and with minimal volatility and risk. While agnostic on which liquid fuel they sell to satisfy consumer demand, SIGMA's and NACS' members do have a bias: they believe it is best for the American consumer and America's industrial position in the world marketplace to have reasonably low and stable-priced energy.

Retailers cannot force consumers to buy a particular product. However, under the current structure of the RFS, retailers already have an incentive to blend as much renewable fuel as they can.[3] Concerns regarding the compatibility of retailers' infrastructure for blends above E10 are legitimate and constitute an impediment to selling higher concentrations of ethanol (*See* Appendix A). Setting the RVOs above the level that can reasonably be absorbed and consumed in the market would be counterproductive to a successful RFS Program and would result in significant market disruptions and higher prices for consumers.

II. COMMENTS ON THE PROPOSAL

NACS and SIGMA offer the following comments on (A) the proposed RVOs and (B) the small refinery waiver process.

A. Proposed RVOs

The last time Congress revised the RFS was 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. As the Agency itself has acknowledged, neither of those expectations has been met.[4]

Despite these unanticipated market realities, the statutory RFS volume targets continue to increase annually. If left in place unchanged, these targets could only be met if more ethanol is blended into every gallon of gasoline or if enough biodiesel is blended so that D4 RINs will be available to retire D5 and D6 obligations. With regard to ethanol in particular, the "blend more" option is not as simple as it sounds. Insufficient consumer demand, infrastructure limitations, and retailer liability concerns all mitigate substantial increases in ethanol blending (and consumption).[5]

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[3] For instance, SIGMA's and NACS' members have an incentive to blend increasing amounts of biodiesel into the fuel supply because they can use the value of the RINs to lower their costs of goods sold. In addition, for several years the existence of the biodiesel blenders' credit incentivized SIGMA's and NACS' members to blend biodiesel because it enabled them to offer biodiesel blends at a more cost competitive rate. Since 2005, there has been a biodiesel and renewable diesel blenders' tax credit of $1.00 for each gallon of biodiesel used in a qualified mixture. This tax credit has successfully stimulated production and driven consumer acceptance of biofuels by lowering the cost to consumers. The blenders' credit created a strong incentive for downstream fuel marketers to blend renewable fuel into the fuel supply while lowering prices at the pump for consumers.

[4] In 2007, demand for gasoline was expected to increase at an annual rate of approximately 1.3% through 2030. In reality, gasoline demand has diminished. The Energy Information Administration's Annual Energy Outlook 2018 found that petroleum consumption was generally projected to remain relatively flat. (*See* U.S. Energy Information Administration. *Annual Energy Outlook 2018*, at 44, (February 6, 2018), https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf.) In addition, 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.

[5] The Associations have repeatedly voiced these concerns in prior comment letters to the Agency. *See* the following: NACS and SIGMA, *Comments on Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-based Diesel Volume for 2017*. (Docket No.: EPA-HQ-OAR-2015-0111) (July 27, 2015), Comment ID No. EPA-HQ-OAR-2015-0111-1937, https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0111-1937; NACS and SIGMA, *Comments Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018*. (Docket No.: EPA-HQ-OAR-2016-0004) (July 11, 2016), Comment ID No. EPA-HQ-OAR-2016-

As such, the Associations have always supported the Agency taking into account market realities to ensure that the RFS's volume obligations do not exceed the volume of renewable fuel the market can absorb, which will result in the market hitting the so-called "blend wall."[6]

For the aforementioned reasons, the Associations support EPA's Proposal to use its cellulosic waiver authority under section 211(7)(D)(i) of the Clean Air Act – wherein it can reduce the applicable volume of cellulosic biofuel if the projected production volume is less than the minimum applicable statutory volume, and correspondingly lower the applicable volume of renewable fuel and advanced biofuels – to bring the 2020 RVOs in line with what it projects the market could reasonably absorb (*i.e.*, to avoid reaching the blend wall).[7] The Associations agree that the statutory RVO levels proposed by Congress are not appropriate for the projected 2020 domestic fuels market.

B. The Small Refinery Waiver Process Must Be Made More Transparent

Congress enacted the RFS to enhance the nation's energy independence and security while improving emissions characteristics of domestically consumed motor fuels. Historically, the Agency has administered the Program in a way that furthers those objectives. EPA has stimulated demand for renewable fuels through the Program by making those fuels more cost-competitive with petroleum-derived alternatives.

0004-1808, https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0004-1808; NACS and SIGMA, *Comments on Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*. (Docket No.: EPA-HQ-OAR-2017-0091) (August 31, 2017), Comment ID No. EPA-HQ-OAR-2017-0091-2545, https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0091-2545; and NACS and SIGMA, *Comments on Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*. (Docket No.: EPA-HQ-OAR-2018-0167) (August 17, 2018), Comment ID No. EPA-HQ-OAR-2018-0167-0523, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0167-0523.

[6] The blend wall represents the point at which there is an insufficient supply of RINs to allow obligated parties to satisfy their volume obligations under the RFS. Hitting the blend wall would lead to a significant increase in the price of fuel and would inflict substantial harm on the United States economy. This damage would be caused by a shortage of RINs, which are used to ensure compliance with the RFS's volume obligations. A RIN is 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. Nowhere is this price pass-through phenomenon more visible than in the retail fuel industry.

See U.S. Energy Information Administration, Michael Burdette and John Zyren, *Gasoline Price Pass-Through* (Jan. 2003), *available at* http://www.eia.gov/pub/oil_gas/petroleum/feature_articles/2003/gasolinepass/gasolinepass.htm (noting that "any change in price at the refinery, or any intermediate point of sale downstream, should be expected to affect prices at each successive sale").

[7] *Proposed Rule*, *supra* note 1, at 36764, 36766.

Notably, the Clean Air Act provides that small refineries may obtain relief from RFS blending requirements if such requirements would cause severe economic harm to the refinery.[8] The Associations appreciate that these exemptions may serve an important function in ensuring that small refineries are not unduly harmed by the RFS. Previously, the Associations expressed concerns with the process by which these waivers have been considered and granted—a process which was severely lacking in transparency. NACS and SIGMA expressed concern that the Agency was not concurrently notifying all market participants when waivers were granted and had not provided information regarding the volumes waived—something that was leading to distortions in the RIN market. As the Associations noted, lack of transparency increases both market uncertainty and the potential for market manipulation by providing unfair advantages to certain stakeholders that know about the waivers. In short, stakeholders who possess information not available generally can make business decisions which disadvantage other market participants (a phenomenon in the securities markets that would constitute insider trading).

NACS and SIGMA were pleased when EPA simultaneously announced small refinery exemptions on August 9, 2019, to both the public and exemption recipients and posted the information on the dashboard. However, the Associations still urge the Agency to enhance transparency by including the name of the refinery that has received the waiver in the notice and the volumes of renewable obligations that have been waived for that recipient. Moreover, EPA should also articulate the specific standards and criteria by which it determines that a particular entity qualifies for a waiver. The statute provides for a waiver to small refineries based on "disproportionate economic hardship" and "other economic factors."[9] It is imperative that other fuels market stakeholders understand the standard and specific criteria used by EPA to define and assess a waiver request. Without proper knowledge of how the waivers are being granted and to whom they are given, the market cannot function appropriately.

Despite these improvements to the small refinery waiver process, the RIN market began to move *before* the waivers were formally announced.[10] This phenomenon has been interpreted by some to indicate that certain parties were made aware of information material to the market in advance of EPA's public announcement. While the Associations are not commenting on the validity of that proposition, the Associations do urge EPA to maintain and increase the transparency of the small refinery exemption process to avoid such speculation.

[8] 42 U.S.C. §7545 (o)(9); 211(o)(9) of the Clean Air Act.

[9] *Id.*

[10] *See* Tweet from @OPISBiofuels on August 9, 2019 at 3:53pm: "RINs values are tumbling this afternoon with ethanol D6 RINs falling from 20cts/RIN earlier to 12cts/RIN at last look. Sources saying rumors regarding small refinery exemptions are behind the sharp collapse."; Meghan Vick, "EPA Will Reportedly Grant 30 SREs, Reject 6", *Pro Farmer* (Aug. 9, 2019, 3:51pm), https://www.profarmer.com/index.php/markets/news/epa-will-reportedly-grant-30-sres-reject-6; Humeyra Pamuk and Jarrett Renshaw, "U.S. EPA expected to grant 30 small refinery waivers on Friday-sources", *Reuters* (Aug. 9, 2019, 4:01pm), https://www.reuters.com/article/usa-ethanol-epa/us-epa-expected-to-grant-30-small-refinery-waivers-on-friday-sources-idUSL2N25516L.

IV. CONCLUSION

Thank you for the opportunity to provide these comments. NACS and SIGMA stand ready to assist the Agency as it moves forward.

Respectfully,

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APPENDIX A

Those that contend that the RVOs should be set at higher levels to match the statutory requirements ignore infrastructure and retailer liability concerns.

SIGMA and NACS have devoted considerable resources to studying the renewable fuels marketplace on behalf of their customers, American consumers.[11] That work has led to some firm conclusions about future renewable fuel usage, which we share here to inform the debate about the renewable market moving forward.

Infrastructure and Retailer Liability

When Congress enacted its fuel usage policies in 2005 and 2007, it fundamentally failed to address the critical components of achieving its goals, such as the fuels distribution network and its infrastructure. As a result, federal and state laws and regulations pose significant potential legal liabilities for selling fuel blends with concentrations of ethanol greater than E10.

As SIGMA and NACS have noted previously – and as EPA cited in its final rule for the 2014-2016 RVOs – retailer liability concerns are a key factor in fuel retailers' decision to not sell gasoline containing more than 10 percent ethanol.[12] 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.[13] 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 percent. Further, under UL's policy, no device listing can be revised. Consequently, retailers who wish to sell any gasoline containing more than 10 percent 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 since 2010.[14] Dispensers can cost upwards of $20,000 and many

[11] *See generally*, http://www.fuelsinstitute.org/research.shtm.

[12] EPA, Final Rule, Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass Based Diesel Volume for 2017, 80 Fed. Reg. 77420 (Dec. 14, 2015), at 77464 (noting that EPA "[does] not believe, based on past experience, that the core concerns retailers have with liability over equipment compatibility and misfueling would change if the RFS volume requirements were increased significantly…[and does] not believe that the E15 expansion can occur on the scale and timeframe that ethanol proponents believe it can."), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-12-14/pdf/2015-30893.pdf.

[13] 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).

[14] To sell higher ethanol blends, retailers must also ensure that the small component parts that allow fuels to be dispensed from an UST to a vehicle (e.g., overfill valve, tank probe, sump sensor, impact valve, etc.) are compatible with those blends. The costs of replacing these smaller items can rapidly add up into the many thousands of dollars. For example, in recent years it has cost approximately $2,100 to replace a tank probe, so if a retailer had four USTs at a particular site, it would cost about $8,400 just to replace the tank probes in those tanks. These costs serve as yet another deterrent for a retailer to invest in a fuel where demand is at best uncertain.

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.[15]

It is feasible to convert dispensers to ensure compatibly with higher levels of ethanol-blended fuel, but it is much more complicated to determine the compatibility of underground storage equipment for the many reasons described below.

- *Recordkeeping* – Retail fueling facilities often change hands several times after a tank system is installed, leaving the current owners uncertain of the listing status of underground equipment. Retail outlets have experienced significant turnover in recent history. Many retail gasoline outlets were once owned by major integrated oil companies. That is no longer the case, and those companies now own and operate fewer than 4% of the facilities. In fact, today when Americans fill up their tanks at a Shell or Exxon station, it is highly likely that gas station is a mom-and-pop operation. Further, for decades, there have been no regulations that require retail outlets to keep records for their underground equipment. With the turnover in the industry and lack of records on underground storage equipment, determining compatibility with higher ethanol content fuels is nearly impossible without breaking concrete, at which point costs can quickly exceed $100,000 per location.

  In 2015, EPA published a final rule updating its Underground Storage Tank ("UST") regulations.[16] Under the new regulations, UST owners and operators storing any regulated substance blended with greater than 10 percent ethanol or greater than 20 percent biodiesel must now demonstrate compatibility by either: (a) certification or listing of their system equipment or components by a nationally recognized testing laboratory (such as Underwriters Laboratories) for use with the fuel stored; (b) written explicit approval of the equipment or component by the manufacturer; or (c) another method that the implementing agency determines to be no less protective of human health and the environment than the other two options.[17]

  Failure to demonstrate compatibility with these regulations is a violation of the Resource Conservation and Recovery Act, which could subject retailers to penalties of up to $37,500 for each day of noncompliance. As a practical matter, without the ability to verify and proactively demonstrate that their equipment is UL-listed to store E15 or other ethanol blends, the retailer is assuming liability risk if it stores such fuels.

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[15] 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.

[16] Environmental Protection Agency, Final Rule, Revising Underground Storage Tank Regulations – Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training, 80 Fed. Reg. 41566 (July 15, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-07-15/pdf/2015-15914.pdf.

[17] 40 C.F.R. §280.32.

- *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.[18] 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 consumer misfueling.[19] Further, it is expected that a sizeable percentage of consumers may not know when 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 can be held responsible for violating the Clean Air Act and be subject to fines of up to $37,500 per violation. Even if the retailer is fully compliant with EPA's misfueling mitigation requirements, it may be subject to civil litigation under the Act's private right of action provision.[20]

- *Automobile Warranties* – As mentioned above, 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.

  The simple threat of enforcement actions or litigation deters many retailers from offering higher ethanol blends.

[18] *See* 40 C.F.R. 80.1504; *see also* EPA, Final Rule, 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, 76 Fed. Reg. 44406 (July 25, 2011).

[19] *See also* Federal Trade Commission, Final Rule, Automotive Fuel Ratings, Certification and Posting RIN 3084-AB390, 81 Fed. Reg. 2054 (Jan. 14, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-01-14/pdf/2015-32972.pdf.

[20] *See* 42 U.S.C. § 7604.