February 4, 2022

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

RE: Renewable Fuel Standard Program: RFS Annual Rules (EPA–HQ–OAR–2021-0324; FRL–8521–02–OAR; RIN 2060– AV11)

Dear Administrator Regan:

The National Association of Convenience Stores ("NACS") writes 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 supports 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. NACS appreciates 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 NACS' 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. In addition, NACS appreciates that EPA took into account the unprecedented decline in demand for fuel in 2020 due to the coronavirus pandemic.

[1]Environmental Protection Agency, Proposed Rule, *Renewable Fuel Standard Program: RFS Annual Rules*, Vol. 86, Fed. Reg. No. 242 (December 21, 2021), https://www.govinfo.gov/content/ pkg/FR-2021-12-21/pdf/202126839.pdf [hereinafter *Proposed Rule*].

[2] NACS defines the blend wall as the point at which there are insufficient Renewable IdentificationNumbers (RINs) to fulfill obligated parties' Renewable Volume Obligations ("RVOs").

NACS remains concerned with the impact of the small refinery exemption process under the RFS. EPA has improved the transparency of the process. However, more can and should be done to enhance transparency. As described in further detail below, NACS urges 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.

In addition, NACS is also concerned with how the RFS program will be implemented beyond the 2022 statutory volumes that Congress provided in the 2007 legislation and how the Program can be used to reduce the carbon intensity of liquid motor fuels.

More detailed comments can be found below.

INTRODUCTION AND BACKGROUND

Overview of NACS

NACS represent approximately 80 percent of retail motor fuel sales in the United States.

NACS is an international trade association representing the convenience store industry withmore than 1,500 retail and 1,600 supplier companies as members, the majority of whom are basedin the United States.

In 2020, the fuel wholesaling and convenience industry employed approximately 2.34 million workers and generated $548.2 billion in total sales, representing approximately 2.6 percentof U.S. Gross Domestic Product. Of those sales, approximately $292.6 billion came from fuel salesalone. 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. Approximately60 percent of convenience store owners operate a single store, and more than 70 percent of NACS' membership is composed of companies that operate ten stores or fewer.

The Retailer's Objective

NACS 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, 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 currentstructure of the RFS, retailers already have an incentive to blend as much renewable fuel as they can.[3] Setting the RVOs above the level that can reasonably be absorbed and consumed in the marketwould be counterproductive to a successful RFS Program and would result in significant market disruptions and higher prices for consumers.

COMMENTS ON THE PROPOSAL

NACS offers the following comments on the proposed RVOs, the small refinery waiver process, and the RFS program beyond 2022.

Proposed RVOs

The last time Congress revised the RFS was in 2007. Those revisions were premised uponan 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 have had annual increases. 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, andretailer liability concerns all mitigate substantial increases in ethanol blending (and consumption).[5]

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[3] For instance, 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 yearsthe existence of the biodiesel blenders' credit incentivized NACS' members to blend biodiesel becauseit 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 credithas 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 Association 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, NACS has 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 marketcan absorb, which will result in the market hitting the so-called "blend wall."[6]

For the aforementioned reasons, NACS supports EPA's Proposal to use its cellulosic waiver authority under section 211(7)(D)(i) of the Clean Air Act – wherein it can reducethe 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 RVOs in line with what it projects the market could reasonably absorb (*i.e.*, to avoid reaching the blend wall).[7] NACS agrees that the statutory RVO levels proposed by Congress were not appropriate for the projected domestic fuels market for 2020 and 2021, nor are they for 2022. The purpose in providing EPA waiver authority was also to give EPA a tool to adjust the RVOs in cases of unforeseen events that could impact the fuel marketplace. Clearly, the COVID-19 pandemic is such an example, and it is appropriate for EPA to consider this in adjusting the RVOs for 2020 and 2021 and determining the volumes for 2022.

The Small Refinery Waiver Process Must Be Made More Transparent

Congress enacted the RFS to enhance the nation's energy independence and security whileimproving emissions characteristics of domestically consumed motor fuels. Historically, the Agency has administered the Program in a way that furthers those objectives. EPA has stimulateddemand 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 priceof fuel and would inflict substantial harm on the United States economy. This damage would be caused by a shortageof RINs, which are used to ensure compliance with the RFS's volume obligations. A RIN is an artificial commoditythat 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 wouldinevitably be unable to acquire sufficient RINs, they could face fines from the Agency or might make other decisionsto 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 ultimatelywill 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]NACS appreciates that these exemptions may serve an important function in ensuring that small refineries are not unduly harmed by the RFS. Previously, NACS expressed concerns with the process by which these waivers have been considered and granted—a process which was severely lacking in transparency. NACS expressed concern that the Agency was not concurrently notifying all market participants when waivers were granted and hadnot provided information regarding the volumes waived—something that was leading to distortions in the RIN market. As was 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 informationnot available generally can make business decisions which disadvantage other market participants(a phenomenon in the securities markets that would constitute insider trading).

NACS was pleased when EPA announced small refinery exemptions on August 9, 2019, to both the public and exemption recipients and posted the information on the dashboard. Making these announcements simultaneously was critical to avoiding market distortions. However, NACS urges 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 andassess a waiver request. Without proper knowledge of how the waivers are being granted and to whom they are given, the market cannot function appropriately.

It should be noted that, despite these improvements to the small refinery waiver process, the RIN market began tomove *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. NACS urges EPA to maintain and increase the transparency of the small refinery exemption process to avoid such speculation.

The RFS Program Beyond 2022

As mentioned above, convenience and fuel retailers believe that certainty in the marketplace is important. Delays and extensions to compliance deadlines makes that goal difficult. As EPA looks at the RFS program beyond the congressionally mandated volume obligations which end in 2022, NACS urges the Agency to incorporate a consistent and transparent process in determining future volumes and obligations.

Consideration of these matters, however, should be accelerated with proposals and a public comment process. We have already passed the statutory deadline of November 2021 for EPA to establish the way in which the program will operate in 2023.[11] The market needs advance warning to adjust its operations to take into account EPA's decisions regarding the future of the program. These are not matters that lend

[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 waiverson 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.
[11] 42 U.S.C. § 7545(o)(2)(B)(ii).

themselves well to retroactive decisions.

This is particularly true because EPA has important decisions to make that go beyond the RVO numbers. Changes to the program following 2022 could help move the liquid fuel supply toward important climate-related goals. These may include using EPA's authority to establish e-RINs, considering carbon intensity within the program, and improved processes to new alternative fuel pathways. While EPA has discretion in some of these areas, it may need to seek legislation to fully realize its goals for the future of the program.

That is another reason why timing is so important. Rulemaking and, if necessary legislating, take time. We urge EPA to start the comment process on these issues soon.

CONCLUSION

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

Sincerely,

Paige Anderson

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National Association of Convenience Stores