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August 31, 2017

Via Electronic Filing – www.regulations.gov

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

RE: Renewable Fuel Standard Program: Standards for 2018 and Biomass Based Diesel Volume for 2019 (EPA-HQ-OAR-2017-0091; FRL-9964-86-OAR; RIN 2060-AT04)

Dear Administrator Pruitt,

Our clients, the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”), submit these comments in response to 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 (hereinafter referred to collectively as “the associations”) support EPA’s proposed rule because it appropriately recognizes that without adjusting the congressionally mandated renewable volume obligations (“RVOs”), the RFS could cause substantial upheaval in the retail fuels market. Moreover, the Proposal seeks to address these potential problems without undermining the principles on which the Program is premised – diversifying and increasing the fuel supply, encouraging renewable fuel production and related environmental benefits, and lowering fuel costs for American consumers. As such, NACS and SIGMA support the Agency’s proposed use of its cellulosic waiver authority and encourage EPA to also make use of its general waiver authority (See Section III.B). However, the associations have concerns that the proposed RVOs may not be achievable because of efforts by the domestic biodiesel industry to impede importation of biodiesel from non-domestic sources.

¹Environmental Protection Agency, Proposed Rule, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 34206 (July 21, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-07-21/pdf/2017-14632.pdf> [hereinafter *Proposed Rule*].

Last year, when NACS and SIGMA endorsed the Agency's proposed RVOs as reasonable and appropriate, the associations assumed that EPA had properly exercised its waiver authority and were confident that biomass-based diesel blending would be more than sufficient to provide adequate liquidity to the D6 market as well as the D4 and D5 market. Since the filing of that comment letter,² however, circumstances have changed. Of particular importance, trade actions filed by the domestic biodiesel industry threaten the flow of foreign biodiesel into the United States after September 1, 2017. In light of this concern, which is discussed in further detail in Section III.C of this letter, it is not clear that the assumptions reflected in the notice of proposed rulemaking – that approximately one third of the nation's biodiesel supply will be satisfied by foreign supply – are valid.³ This is important because imported biodiesel has been a significant component of the RFS. The availability of this fuel has made blending biodiesel attractive by making such blending cost competitive, thereby allowing retailers to offer a product at retail that is cost competitive for consumers. To the extent the economics of biodiesel change, due to the trade cases and issues relating to the biodiesel blenders' credit, there will be a decrease in the blending of biodiesel. As a result, this decreased biodiesel blending will limit RIN market liquidity, raising serious concerns for the viability of the Program.

From the associations' perspective, the primary objective of this proposal must be to achieve the statute's goals while not violating the blend wall.⁴ Given the importance of biodiesel to the Program, it is essential that EPA communicate with the Department of Commerce, the International Trade Commission, and the National Economic Council about this matter. It is imperative that the President be aware of the impact of the Commerce Department's recommended remedy in the biodiesel trade cases on the RFS. If there is a substantial increase in the price of diesel, which the associations believe will occur if the D4, D5, and D6 market are disrupted, it will have an undisputed negative effect on the nation's economy. Everything in this country moves by diesel fuel, which powers rail and truck transport. Any change in the diesel marketplace will lead to a ripple effect through every level of manufacturing in the country.

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. In light of the disruptions to the RIN market that have already occurred because of the biodiesel trade cases, NACS and SIGMA urge the Agency to evaluate the proposed numbers and consider lowering those numbers further.

In addition to the aforementioned concerns that are expanded upon in the comments below, NACS and SIGMA provide feedback regarding the objectives of the Program and Renewable Identification Number market transparency.

² NACS and SIGMA, Comments on Renewable Fuel Standard Program Proposed Rule (EPA-HQ-OAR-2016-0004; FRL-9946-90-OAR) (July 11, 2016), Comment ID No. EPA-HQ-OAR-2016-0004-1808, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0004-1808>.

³ See Proposed Rule, *supra* note 1, at 34206, 34233. The Proposed Rule mentions the tax credit as an impact but does not consider the trade cases in sufficient detail.

⁴ NACS and SIGMA define the blend wall as the point at which there are insufficient RINs to fulfill obligated parties' RVOs.

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 2,200 retail and 1,600 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 2016, the fuel wholesaling and convenience industry employed more than 2.3 million workers and generated \$549.9 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Of those sales, approximately \$317 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 160 million people per day—around half of the U.S. population—and the industry processes over 73 billion payment transactions per year. Nevertheless, the convenience store and fuel retail industry is truly an industry of small businesses. Approximately 63 percent of convenience store owners operate a single store, and approximately 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 lawfully 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,⁵ but the infrastructure liability concern is legitimate (*see* Appendix A for more details) and

⁵ 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, which expired at the end of 2016, has successfully stimulated production and driven consumer acceptance of biofuels by lowering the cost to consumers. The blenders' credit created a strong incentive for

is a further disincentive to selling higher concentrations of ethanol. 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. NACS AND SIGMA GENERALLY SUPPORT EPA'S PROPOSAL

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, 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 2017* found that petroleum consumption was projected to remain flat due to improvements in energy efficiency offsetting growth in the transportation sector. The report also noted that growth in liquid biofuels was "constrained by relatively flat transportation energy use and blending limitations."⁶ Further growth remains unclear as increasing retail gasoline prices may lead consumers to drive fewer miles. Prices aside, higher corporate average fuel economy ("CAFE") standards combined with a struggling economy have also 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. The Agency noted as much in its Proposal, saying that, "slower-than-expected development of the cellulosic biofuel industry" has "slowed progress towards meeting Congressional goals for renewable fuels."⁷

Furthermore, recent developments in the biodiesel space, namely the loss of the biodiesel blender's credit and trade actions prosecuted by the National Biodiesel Board, are likely to generate substantial decreases in biomass-based diesel imports and lead to decreased blending of biodiesel.

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 or if enough biodiesel is blended so that D4 RINs will be available to retire D5 and D6 obligations. This is just not feasible in light of the current

downstream fuel marketers to blend renewable fuel into the fuel supply while lowering prices at the pump for consumers.

⁶ U.S. Energy Information Administration. *Annual Energy Outlook 2017*, at 10 (January 5, 2017), [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf).

⁷ Proposed Rule, *supra* note 1, at a34207.

disruptions to the biodiesel market, insufficient consumer demand, and retailer liability concerns (See Appendix A for further information on these last two points).⁸

III. ADDITIONAL COMMENTS ON PROPOSAL

The associations offer the following additional comments on (A) the blend wall, (B) EPA's waiver authority, (C) biomass-based diesel and advanced biofuel RVOs, (D) the Renewable Identification Number market.

A. The 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 Identification Numbers ("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.⁹

B. EPA's Waiver Authority and Avoiding the Blend Wall

In its rulemaking finalized in 2015, EPA recognized the existence of the blend wall and how it acts as a constraint in achieving greater renewable fuel usage.¹⁰ 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 cellulosic waiver authority under section 211(7)(D)(i) of the Clean Air Act – wherein it can reduce the applicable volume of cellulosic

⁸ It is ironic that the National Biodiesel Board would ask EPA to increase the biodiesel RVOs while simultaneously seek to impede the flow of biodiesel into the United States.

⁹ 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").

¹⁰ EPA, Final Rule, 80 Fed. Reg. 77420 (Dec. 14, 2015), at 77449 (noting that "[c]onstraints including but not limited to the E10 blendwall, are real and can only be partially overcome by a responsive market in the near term").

biofuel if the projected production volume is less than the minimum applicable statutory volume, and also lower the applicable volume of renewable fuel and advanced biofuels – to bring the 2018 RVOs in line with what it projects the market could reasonably absorb (*i.e.*, to avoid reaching the blend wall). In the Proposal, the Agency sagely recognizes that the RVOs Congress set forth in 2007 bear no rational relationship to current market conditions. While only time will tell how close EPA has balanced the need to promote renewables while staying under the blend wall, SIGMA and NACS certainly agree with the Agency that the statutory RVOs were not achievable and should be lowered to more reasonable levels, as EPA has proposed.¹¹

i. EPA's General Waiver Authority

The Agency has requested comment on whether it would be appropriate for EPA to exercise its general waiver authority in the final rule in addition to the cellulosic waiver authority.¹² The question is particularly relevant in light of the recent court case, *Americans for Clean Energy v. EPA*,¹³ where the D.C. Circuit held that EPA misused its waiver authority under the “inadequate domestic supply” prong.¹⁴ In the associations’ view, if EPA can provide credible evidence that the nation would pierce the blend wall – defined as “the point at which there is an inadequate supply of RINs to cover obligated parties’ obligations” – absent a reduction in the applicable volume requirements, the Agency should invoke its general waiver authority under the “severe economic harm” prong.¹⁵ Even though the D.C. Circuit denied EPA the ability to consider actual demand for renewable fuels when setting RVOs, EPA should remember that the RFS does not require consumers to buy these products. Thus, increasing the requirements past a realistic level of absorption would, in fact, threaten the economy by artificially raising fuel costs.

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, EPA has authority under this provision.

¹¹ We should note that NACS and SIGMA continue to have concerns with the U.S. Energy Information Administration’s (“EIA”) data upon which EPA relies. This data may overestimate the amount of gasoline consumption in the United States by underestimating the amount of fuel component exports. EPA and EIA should closely examine this data to ensure the gasoline consumption data is accurate, as these figures play a significant role in EPA’s determination on how much renewable fuels can be blended into the fuel supply.

¹² *Proposed Rule*, *supra* note 1, at 34209, 34213.

¹³ *Americans for Clean Energy et al. v. U.S. Environmental Protection Agency*, No. 16-1005, U.S. Court of Appeals for the D.C. Circuit (July 28, 2017), *available at* [https://www.cadc.uscourts.gov/internet/opinions.nsf/5F1D8BC9815C4C698525816B00543925/\\$file/16-1005-1686284.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/5F1D8BC9815C4C698525816B00543925/$file/16-1005-1686284.pdf).

¹⁴ 42 U.S.C. §7545 (7o)(7)(A)(ii); 211(o)(7)(A)(ii) of the Clean Air Act.

¹⁵ 42 U.S.C. §7545 (7o)(7)(A)(i).

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.¹⁶ This interpretation was reaffirmed in the Agency's 2012 decision denying waiver requests that were submitted by several states.¹⁷ 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,¹⁸ 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:

First, it states that its waiver authority is limited to situations where there is "a generally high degree of confidence that there *will* be severe harm as a result of the implementation of the RFS."¹⁹ 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 for 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.²⁰ 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. What's more, given diesel fuel's

¹⁶ EPA, Notice, Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47168 (August 13, 2008)[hereinafter *Texas Notice*]

¹⁷ EPA, Notice, Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70752 (November 27, 2012).

¹⁸ *Texas Notice*, *supra* note 16, at 47171.

¹⁹ *Texas Notice*, *supra* note 16, at 47171(emphasis added).

²⁰ 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.

critical role in transportation and manufacturing, the possible “harm to the economy as a whole” is a very real concern in light of the imminent negative consequences from the domestic biodiesel industry’s trade cases (See Section III.C).

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.”²¹

For the reasons discussed above, if EPA has the requisite evidence to support utilizing its general waiver authority, SIGMA and NACS encourage EPA to ground its waiver authority under both the cellulosic waiver *as well as* the “economic harm” prong of Clean Air Act section 211(o)(7)(A) general waiver authority. Moreover, EPA should take into account that even though the D.C. Circuit denied EPA the ability to consider actual demand for renewable fuels when setting RVOs, the RFS does not require consumers to buy these products. Thus, increasing the requirements past a realistic level of absorption would, in fact, threaten the economy by artificially raising fuel costs.

ii. Reasons to Support Use of Waiver Authority

The Agency has specifically requested comment on the extent to which considerations on energy security and independence support the use of EPA’s general waiver authority. First, it is important to note that “energy security” is different from “energy independence.” Energy security generally refers to the nation’s uninterrupted access to energy sources at an affordable price.²² Energy independence, on the other hand, refers to the nation’s independence or self-sufficiency vis-à-vis domestic energy resources. Thus, the availability of affordable biodiesel from Argentina, a stable, politically friendly nation, is something that enhances our energy security but does not necessarily promote our energy independence. In contrast, the significant output of North American crude oil production that we have today promotes our energy independence—a reality that was not true a decade ago when the principle source of the country’s crude oil (certainly at the margins) was from the Middle East, a highly volatile region.

The RFS was created pursuant to the Energy Policy Act of 2005 (“EP Act”),²³ which was subsequently modified by the Energy Independence and Security Act of 2007 (EISA).²⁴ The EP

²¹ Texas Notice, *supra* note 16, at 47172.

²² See <https://www.iea.org/topics/energysecurity/subtopics/whatisenergysecurity/>.

²³ Pub.L. 109–58, enacted Aug. 8, 2005, <https://www.gpo.gov/fdsys/pkg/PLAW-109publ58/pdf/PLAW-109publ58.pdf>.

²⁴ Pub.L. 110-140, enacted Dec. 19, 2007, <https://www.gpo.gov/fdsys/pkg/PLAW-110publ140/pdf/PLAW-110publ140.pdf>.

Act was designed explicitly for energy security: “to ensure jobs for our future with secure, affordable, and reliable energy.” The EISA was designed with broader goals, including energy independence and security, the increased production of clean renewable fuels, and consumer benefits.²⁵

NACS and SIGMA believe it is important for EPA to consider both energy independence and energy security when adjusting RVOs. If one recognizes, as EPA does, that the nation’s infrastructure cannot support the blending of 15 billion gallons of ethanol to meet annual renewable volume targets, the nation’s ability to avoid hitting the blend wall, therefore, is dependent on the availability of advanced biofuel and biomass-based diesel. With this in mind, given the inability of the U.S. domestic biofuels industry to *consistently* produce sufficient volumes to meet the nation’s requirements at *competitive* prices, our ability to meet the RVOs relying solely on what the U.S. (and only the U.S.) biofuels industry can supply raises questions about the viability of the Program. Therefore, NACS and SIGMA urge the Agency to consider energy security and energy independence in tandem.

C. Biomass-Based Diesel and Advanced Biofuel RVOs

Provided the efforts of the domestic biodiesel industry to (1) impede biodiesel imports and (2) convert the blenders’ credit to a producers’ credit do not come to fruition, NACS and SIGMA believe EPA’s proposed RVOs look appropriate. Should either of these two efforts succeed, however, then the associations would have cause for concern about the proposed RVOs. This is because D4 RINs have been critical to fulfilling both D5 and D6 requirements—and any major disruption to biodiesel supply and biodiesel blending will disrupt the Program overall and increases the chance that the market will hit the blend wall.

i. Biodiesel Trade Cases

NACS and SIGMA are particularly concerned by the efforts of the domestic biodiesel industry to impede imports of biodiesel.²⁶ According to the Agency, “imported biofuel represented a significant percentage of the RINs available for compliance with the total renewable fuel volume requirements (8%), and especially the advanced biofuel (29%) and BBD

²⁵ “To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.”

²⁶ International Trade Commission, Biodiesel From Argentina and Indonesia; Determinations, 82 Fed. Reg. 22155 (May 12, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-12/pdf/2017-09629.pdf>; USDA Biodiesel/Renewable Diesel Market Presentation, *Biodiesel from Argentina and Indonesia*, Inv. No. 701-TA-571-572 and 731-TA-1347-1348 (Preliminary) (April 14, 2017); International Trade Commission Compiled Import Statistics from the Census Bureau, *Biodiesel from Argentina and Indonesia*, Inv. No. 701-TA-571-572 and 731-TA-1347-1348 (Preliminary) (April 14, 2017).; *Biodiesel from Argentina and Indonesia*, USITC Pub. 4690, Inv. No. 701-TA-571-572 and 731-TA-1347-1348 (Preliminary) (May 2017); *Biodiesel from Argentina: Critical Circumstances Allegation*, U.S. Department of Commerce Inv. No. A-357-820, C-357-821 (July 10, 2017); *Biodiesel from Argentina and Indonesia; Antidumping and Countervailing Duty Petitions on behalf of the National Biodiesel Board Fair Trade Coalition and its individual members*, Inv. No. 701-TA-571-572 and 731-TA-1347-1348 (Preliminary) (March 23, 2017).

(29%) volume requirements in 2016.”²⁷ While the proposed RVOs appear reasonable on first inspection, the Agency should consider the effects of anti-dumping/countervailing duties on future imports of biodiesel as well as any distortions that may already be present in the marketplace arising from the very filing of the petition. Since the Department of Commerce recently announced the imposition of preliminary duties on Argentine and Indonesian biodiesel, for example, biodiesel RINs jumped in price.²⁸

NACS and SIGMA subscribe to the comments filed by the National Association of Truckstop Operators (“NATSO”) on this topic,²⁹ and urge EPA to contact the International Trade Commission, the Department of Commerce, and the National Economic Council about this matter and explain how disruptions of biodiesel imports will impact the nation’s diesel marketplace and the viability of the RFS itself.³⁰

ii. Impact of Biodiesel Tax Credit

As the Agency properly acknowledges in its Proposal, the expiration of the biodiesel blenders’ credit will have two primary impacts on the supply of renewable and biodiesel: it will decrease the economic incentives for blending biomass-based diesel (“BBD”) and it may lead to decreased imports of those products.³¹ Without a doubt, the expiration of the biodiesel blenders’ credit will decrease the incentive to blend BBD into the fuel supply. Before the biodiesel blenders’ credit expired,³² SIGMA’s and NACS’ members had an incentive to blend increasing amounts of biodiesel into the fuel supply because they were able to use the value of the RINs they separated through blending to lower their costs of goods sold and offer biodiesel blends at a more cost competitive rate to consumers. This tax credit, which expired at the end of 2016, successfully stimulated production and drove consumer acceptance of biofuels by lowering the cost to consumers. In other words, 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.

²⁷ Proposed Rule, *supra* note 1, at 34212.

²⁸ Department of Commerce, International Trade Administration, Preliminary Affirmative Countervailing Duty Determination (Argentina), 82 Fed. Reg. 40748 (Aug. 28, 2017); Department of Commerce, International Trade Administration, Preliminary Affirmative Countervailing Duty Determination (Indonesia), 82 Fed. Reg. 40746 (Aug. 28, 2017).

²⁹ NATSO, Comment Letter on Proposed Rule on the Renewable Fuel Standard Program: Standards for 2018 and Biomass Based Diesel Volume for 2019 (Aug. 31, 2017).

³⁰ Specifically, EPA should clarify that if the petitioners’ requested relief is granted, the result will negatively impact the ability of the Program to function.

³¹ Proposed Rule, *supra* note 1, at 34233.

³² From 2005 to 2016 there was a biodiesel and renewable diesel blenders’ tax credit of \$1.00 for each gallon of biodiesel used in a qualified mixture.

Of greater concern than the expiration of the credit, however, are the efforts to turn the blenders' credit into a producers' credit.³³ If such efforts are successful, they will do nothing to encourage the blending of biodiesel—they will only increase the profit margin of domestic producers while decreasing the stocks of domestic biofuel product available at competitive prices while simultaneously increasing the incentive for producers to export that product. Candidly, from that perspective, having a producers' credit is worse than have no blenders' credit at all.

D. The RIN Market

The Agency has also requested comment on whether and how the current RIN trading structure “provides an opportunity for market manipulation” and input on “potential changes to the RIN trading system that might help address...market transparency and liquidity.”³⁴ The associations believe that this question is based on a faulty premise – that somehow the RIN market is prone to manipulation and is not transparent.

While there may be bad actors in the RIN trading marketplace, NACS and SIGMA do not believe that the market, as currently structured, provides *per se* “an opportunity for market manipulation.” Certainly, there are parties that are buying, selling, and trading RINs aggressively, including entities that buy a significant number of RINs, sit on those large positions, and wait for the price to be right before selling—but that is not market manipulation, that is legal speculation.³⁵ Market manipulation is the deliberate or planned operation, transaction, or practice to artificially deflate or inflate the price of a product or commodity.³⁶ In other words, if entities were planning to buy and sell RINs from/to one another in an effort to move the price of the commodity itself, that would be manipulation. Neither NACS nor SIGMA, however, have seen evidence showing that such manipulation is occurring in the RINs marketplace.

NACS and SIGMA believe that the RINs market is remarkably transparent (far more so than other commodities markets, and a fraction of the size of other commodities markets) and structured to assist interested parties with price discovery. Today, entities looking to buy, sell, or trade in RINs can look up RIN prices on at least three pricing indexes (e.g., OPIS, Platts, or Argus)—and the RIN pricing responds and is reflective of market valuation. Moreover, the participation of third parties in the market enhances liquidity. If EPA were to restrict RIN market participation so that only obligated parties could purchase RINs from renewable fuel blenders, it would lead to a liquidity crunch where power shifted from the commodity itself to the buyer and the RIN would cease to function as a proper market signal. The absence of a reliable means of price discovery would place obligated parties in an impossible position in terms of pricing with respect to basis. Today, for example, the price of RINs is found in the crack spread and the

³³ American Renewable Fuel and Job Creation Act of 2017, H.R. 2383/S.944, 115th Cong. (2017).

³⁴ Proposed Rule, *supra* note 1, at 34211.

³⁵ This aggressive market participation is typical in gasoline and diesel markets.

³⁶ Commodity Futures Trading Commission, A Guide to the Language of the Futures Industry, http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_m.

anticipated RIN cost is reflected in the wholesale and spot market prices. If RINs ceased to serve as market signals, obligated parties would be left to guess at the cost of covering their obligations. This would significantly disrupt the RINs market and the broader fuels marketplace.

In addition to its price transparency, the current RIN market already exhibits many anti-manipulation safeguards present in the financial and commodity markets, including the registration of market participants with EPA under the EPA Moderated Transaction System (“EMTS”) and the reporting of trades for regulatory oversight purposes to the Agency when any party “sells, separates, or retires RINs.”³⁷ EMTS tracks and provides EPA with the data necessary to ensure the RIN market functions effectively and free from manipulation, a role in which it is assisted by the Commodity Futures Trading Commission (“CFTC”).³⁸ The Agency has all of the data that would be necessary to evaluate whether manipulation is occurring in the RIN market. While the associations appreciate the fact that resources are limited, if EPA is concerned that the RIN trading structure “provides an opportunity for market manipulation” and believes additional oversight is necessary, it should devote additional resources to evaluate the data it *already* possesses.

NACS and SIGMA urge EPA to leave the structure of the RIN market alone and instead focus on enforcement and actively monitoring the RIN marketplace to identify bad actors if they exist. If EPA does not want RINs to be an instrument to reflect the market value of an RFS obligation, the Agency will have to create or construct another mechanism. But unless it chooses to go down such a path, the Agency should focus its resources on oversight and enforcement.

IV. CONCLUSION

Thank you for the opportunity to provide these comments. NACS and SIGMA commend EPA for its responsible implementation of such a complex regulatory regime and stand ready to assist the Agency as it moves forward.

Respectfully,



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³⁷ 40 C.F.R. §1452; <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/how-use-emts-report-transactions-fuel-programs>.

³⁸ See Memorandum of Understanding between the Environmental Protection Agency and the Commodity Futures Trading Commission on the Sharing of Information Available to EPA related to the Functioning of Renewable Fuels and Related Markets (Mar. 17, 2016), <https://www.epa.gov/sites/production/files/2016-03/documents/epa-cftc-mou-2016-03-16.pdf>.

APPENDIX A

Those that contend that the RVOs should be set at higher levels to match the statutory requirements ignore two key factors: insufficient demand and retailer liability concerns.

A. Constraints on Increased Renewable Fuel Usage

SIGMA and NACS have devoted considerable resources to studying the renewable fuels marketplace on behalf of their customers, American consumers.³⁹ 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.

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. Motorists 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 selling mid to high level 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 seen minimal sales of these products. Indeed, retailers have found that even consumers with E85-compatible flex-fuel vehicles tend to purchase E10.

Although E85 normally can be sold for fewer dollars-per-gallon than the more widely available E10, this price differential does not generate sufficient demand to justify a retailer's capital investment costs. Because E85 provides vehicles fewer miles per gallon ("MPG") than E10, retailers must sell it 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, Congress did not include a mandate for consumers to purchase anything. While the U.S. Department of Agriculture is attempting to increase the number of retail outlets offering E15 and E85 through its Biofuel Infrastructure Partnership, the number of outlets selling these blends will not by itself generate notably greater E15 and E85 consumption. 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

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

³⁹ See generally, <http://www.fuelsinstitute.org/research.shtm>.

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.⁴⁰ 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.⁴¹ 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 in the last six years.⁴² 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.⁴³

It is feasible to convert dispensers to ensure compatibility 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.

⁴⁰ 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>.

⁴¹ 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).

⁴² 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, it costs 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.

⁴³ 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.

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.⁴⁴ 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.⁴⁵

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.

- *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.⁴⁶ 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.⁴⁷ Further, it is expected that a sizeable percentage of consumers may not know when their vehicles were manufactured.

⁴⁴ 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>.

⁴⁵ 40 C.F.R. §280.32.

⁴⁶ *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).

⁴⁷ *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>.

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.⁴⁸

- *Automobile Warranties* – As mentioned above, many engine manufacturer owner's manuals and warranties 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.

⁴⁸ See 42 U.S.C. § 7604.