

The Uncertain Future of the Renewable Fuel Standard: Litigation and Regulatory Change in the New Administration

The new Administration faces consequential near-term court decisions and policy choices as it charts a future course for the RFS.

- The outcome of pending court challenges to the 2014-2016 RFS Rule will be consequential, and could present a significant test for the new Administration.
- The new Administration is poised to tackle several important policy issues, including whether to change the point of obligation for the RFS and how to balance competing stakeholder interests in setting the next round of annual volume requirements.
- Congressional action is possible but unlikely, such that EPA will continue to play the lead role in shaping the program's future.

The Renewable Fuel Standard (RFS), now in its second decade, will undergo critical challenges in the near future. Within the past few years, the country has reached the so-called E10 “blendwall” — the point at which the transportation fuel supply is fully saturated with fuel that is 10% ethanol by volume — after which the rapid integration of still more renewable fuel into the transportation supply becomes more challenging. In the face of those challenges, the U.S. Environmental Protection Agency (EPA) recently invoked a novel use of its authority under the Clean Air Act (CAA) to waive, in part, otherwise statutorily required volumes of renewable fuel if there is an “inadequate domestic supply.” Renewable fuel producers have objected, and the D.C. Circuit will soon rule on the legality of EPA’s use of this waiver authority — with potentially significant consequences for the future of the RFS program given any outcome. Meanwhile, the new Administration is confronted with several other key policy choices concerning the RFS — such as whether to change the so-called “point of obligation” for the program’s requirements from refiners and importers to blenders, distributors or other parties; and, how to balance competing interests in setting annual volume requirements going forward. This *Client Alert* explains these parallel developments, highlights their legal and policy significance, and identifies potential opportunities for stakeholder engagement.

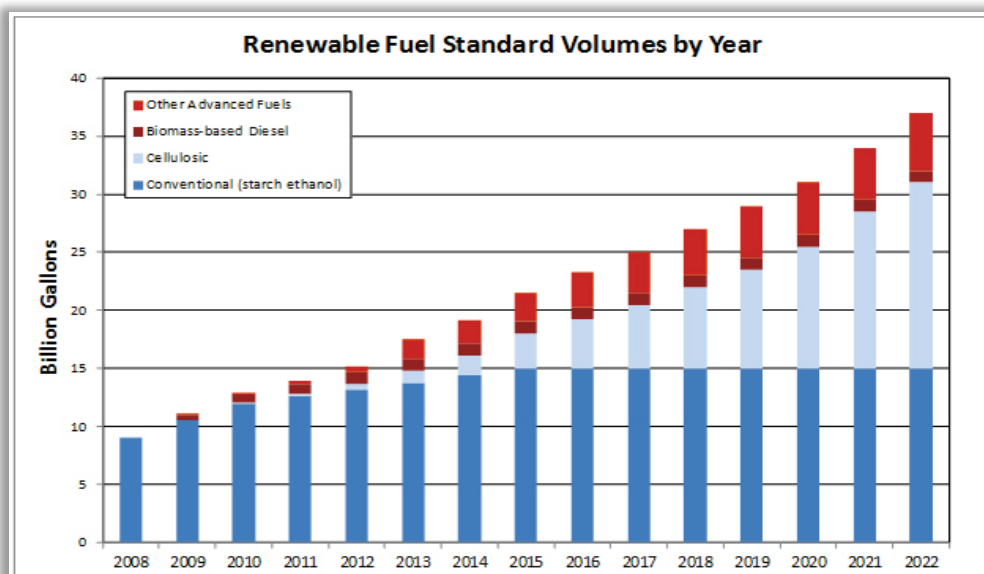
RFS Basics

The RFS, codified as an amendment to the CAA and administered by EPA, was first enacted under the Energy Policy Act of 2005 and substantially expanded by the Energy Independence and Security Act of 2007 (EISA). In brief, the purpose of the RFS program is to encourage the accelerated integration of renewable fuels into the nation’s transportation fuel supply. The RFS accordingly requires that transportation fuel (gasoline and diesel) sold or introduced into commerce in the United States contain increasing volumes of a suite of biofuels: cellulosic biofuel, advanced biofuel, biomass-based diesel, and “conventional” cornstarch ethanol. Importantly, the statute’s fuel-blending benchmarks are specified by statute, and they increase annually up to a total of 36 billion gallons in the year 2022 (subject to EPA’s

waiver authorities, explained below).¹ EPA is required to set the volume amounts for biomass-based diesel after 2012 and for the cellulosic biofuel, advanced biofuel and total renewable fuel categories after 2022, based on consideration of six statutory factors.²

To qualify as a “renewable fuel” under the RFS, a fuel must be derived from “renewable biomass” as defined by the statute. Renewable fuels under the RFS are categorized by their feedstock and lifecycle greenhouse gas (GHG) reductions, relative to conventional (nonrenewable) transportation fuel. A renewable fuel must achieve at least a 50% GHG reduction to be considered an “advanced biofuel” and at least a 60% GHG reduction to be considered a “cellulosic biofuel.” “Biomass-based diesel” must meet certain definitional requirements and must achieve at least a 50% GHG reduction.³ The RFS prescribes four separate volumetric requirements for each year, one each for cellulosic, advanced, biomass-based diesel and total renewable fuel. These standards are “nested” such that a fuel that achieves a greater GHG reduction can be used to meet the standards for a fuel with lower GHG reductions. For example, a gallon of cellulosic biofuel satisfies the cellulosic biofuel mandate, the advanced biofuel mandate and the total renewable fuel standard. Cellulosic biofuels, biomass-based diesel and other biofuels meeting the “advanced” definition all qualify both as “advanced” and as part of total renewable fuel requirement. Cornstarch ethanol, however, can only be used to meet the total renewable fuel standard — it does not fit into the advanced category or any nested subcategories.

In enacting the RFS, Congress established an ambitious statutory schedule for increasing volumes of renewable fuels. As captured in the following chart, the statutory RFS volumes contemplate the rapid development and use of cellulosic fuels (which were not yet commercially produced when the statute was enacted in 2007) to exceed 15 billion gallons annually by 2022, and likewise the development and increasing use of other advanced renewables along with roughly a billion of annual gallons of biomass-based diesel. To the extent the remainder of the total renewable fuel requirement is supplied by cornstarch ethanol, the statute would require an increase to 15 billion gallons per year of such fuel by 2015 and maintenance at that level through 2022.



Source: U.S. Department of Energy, Alternative Fuels Data Center

These statutory requirements are formally implemented through annual Renewable Volume Obligation (RVO) rulemakings that EPA undertakes. In essence, EPA is charged to determine volume obligations for the categories of renewable fuel — that is to say, either to adopt the statutorily contemplated amounts or, under specified conditions discussed in the section on waiver authorities below, to prescribe lesser amounts than those represented in the foregoing chart. In the RVO rulemakings, EPA translates the volumetric requirements into percentages of transportation fuel for which an obligated party is responsible, and makes its determination based in relevant part on estimates of total anticipated transportation fuel use as well as a projected volume of cellulosic fuel production by the Energy Information Administration (EIA). The statute requires EPA to set annual volume requirements no later than each November for cellulosic biofuel, advanced biofuel and total renewable fuel for the following year, and for biomass-based diesel fuel 14 months in advance of a new obligation year.

The RFS statute provides that “[t]he renewable fuel obligation ... shall ... be applicable to refineries, blenders and importers, as appropriate”⁴ and separately that EPA regulations implementing the RFS program “shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate.”⁵ When EPA promulgated the foundational “RFS1” regulation implementing the RFS program in 2007, the agency determined that the “obligated parties” responsible for compliance with the renewable volume obligations would be petroleum refiners and importers, as opposed to parties that blend or subsequently distribute renewable fuels.⁶ EPA retained this approach in the “RFS2” rule promulgated in 2010 to implement the amendments enacted as part of EISA.⁷ This issue is discussed at greater length below in the section on the point of obligation.

To satisfy their obligations, refiners and importers must provide evidence of blending of renewable fuels with conventional fuels, which is satisfied through obligated parties’ collection of what are known as Renewable Identification Numbers (RIN). RINs function as tradeable credits created to administer and enforce the RFS. Each qualifying gallon of renewable fuel is given a unique RIN (a 38-character number issued at the point of biofuel production or the port of importation) that EPA uses to regulate compliance with RFS. Upon the blending of renewable fuels with other fuels, RINs become “separated” from the blended fuel itself. In other words, an obligated party will “collect” RINs through blending activities and can thereafter provide those RINs in sufficient volumes as evidence to EPA that the party satisfied its renewable obligation. RINs are “tradeable,” however, which is to say that a party for whom the costs of satisfying a renewable obligation are higher can, in lieu of blending, purchase them from a party for whom the costs are comparatively lower. Allowing RINs to be bought and sold among obligated parties provides some built-in regulatory flexibility in the RFS program. RINs are likewise “bankable,” so an obligated party may use RINs it acquired in a previous year to satisfy its renewable obligation in a subsequent year (subject to a limit of 20% of the party’s obligation). Similarly, a party can run a negative balance of RINs for one year and then compensate for its deficit by collecting more RINs in the next year sufficient to discharge its deficit.

RFS Waivers

In addition to the flexibilities described above, the RFS statute provides EPA certain waiver authorities — referred to here as the Cellulosic Waiver, the General Waiver and the Biomass-Based Diesel Waiver provisions — that permit (and in some cases require) EPA to adjust the statutory annual volume requirements under certain circumstances.

Under the Cellulosic Waiver provision, EPA *must* reduce the statutory cellulosic biofuel mandate for a given year by November 30 of the preceding year if the projected production capacity for a given year is less than what is contemplated by the statute.⁸ EPA is instructed to determine this production capacity

projection “based on” the yearly commercialization estimates that the EIA is required to provide.⁹ EPA has historically also surveyed domestic and foreign sources of biofuel to help establish its projections for the coming year’s cellulosic biofuel production volumes.¹⁰ If EPA exercises its Cellulosic Waiver authority to reduce the cellulosic biofuel volume requirements, the Administrator *may* also reduce the volumes of advanced biofuel and renewable fuel by the same or lesser volume.¹¹

EPA has reduced cellulosic volumes based on projected production for each year from 2010 through 2017, precisely because projected and actual cellulosic biofuel production has in fact been substantially below what Congress seems to have anticipated in 2007. Beginning in 2013, EPA has relied on this Cellulosic Waiver authority to reduce advanced and total renewable fuel volumes, although by a lesser amount than the reduction in cellulosic volumes — with the effect of requiring non-cellulosic advanced fuels to fill a portion of the requirements that would otherwise be met by cellulosic fuels. The D.C. Circuit has upheld such an approach, holding that this use of the cellulosic waiver provision is discretionary, and that, in the absence of any express or implied statutory directive as to particular factors, EPA has broad discretion about whether and in what circumstances to exercise use of the waiver.¹²

The RFS General Waiver provision gives the EPA Administrator the authority to waive annual RFS requirements — not tied to cellulosic fuels — in whole or in part, if EPA determines that there is an “inadequate domestic supply” to meet the statutory mandate, or that implementation of the requirement would “severely harm the economy or environment of a state, a region, or the United States.”¹³ EPA may issue such a General Waiver either on its own initiative, or in response to a petition by a state or fuel provider,¹⁴ though before doing so, the Administrator is to consult with the Secretaries of Agriculture and Energy and allow for public notice and the opportunity for comment on the proposed use of the waiver.¹⁵ If a General Waiver is granted, any adjustment applies to the total renewable fuel requirement for the relevant year.¹⁶ EPA has twice declined waiver petitions by states seeking a waiver on the severe economic harm rationale, in 2008 and 2012.¹⁷

Finally, the Biomass-Based Diesel Waiver gives the EPA Administrator authority to reduce the amount of biomass-based diesel required for up to 60 days if the Administrator determines that there are significant market circumstances (including feedstock disruptions) “that would make the price of biomass-based diesel fuel increase significantly.”¹⁸ Here again, the Administrator is to consult with the Secretaries of Energy and Agriculture prior to issuing such a waiver. If the Administrator issues a Biomass-Based Diesel Waiver, the Administrator also may reduce the volumes of advanced biofuel and renewable fuel by the same or lesser volume.¹⁹ As of this writing, this authority has not been used.

The Blendwall and EPA’s Rationale for a Use of its General Waiver Authority

As noted, EPA has utilized the Cellulosic Waiver authority to waive (in part) cellulosic biofuel volumes each year since 2010, owing to lower than anticipated production of cellulosic biofuels in particular during that period. From 2010 to 2013, EPA declined to use this authority to reduce the advanced or total renewable fuel requirements by the same or lesser amount — effectively allowing other qualifying biofuels to fill part of the gap left by cellulosic.

After 2013, EPA took a somewhat different approach. First of all, although the RFS statute contemplates that EPA will issue annual volume requirements at the end of each calendar year for the following year, EPA did not meet this deadline for the 2014 and 2015 rules. Instead, EPA issued the final renewable obligations for years 2014, 2015 and 2016 together all at once, in December of 2015 (2014-2016 Rule). In setting the RVOs for years 2014-2016, EPA for the first (and only) time used its General Waiver authority — specifically the “inadequate domestic supply” rationale — to waive total renewable fuel volumes.²⁰ This

use of the General Waiver reflected EPA's response not only to a slower than anticipated production of cellulosic fuels specifically, but also to a more global constraint relating to the so-called E10 "blendwall" and the difficulty associated with introducing into the transportation fuel supply the full quantities of renewable fuels prescribed in the RFS statute once the blendwall is reached.²¹

To explain, E10 (gasoline that is 10% ethanol by volume) is the only ethanol blend currently approved for use in all on-road vehicles in the United States.²² Nearly all of the roughly 140 billion gallons of gasoline used for transportation purposes today contains 10% ethanol by volume.²³ Introducing the still higher levels of renewable fuel required by the RFS statute would therefore require use of higher ethanol blends (that is, E15 or E85) or non-ethanol renewable fuels. And while EPA in 2010 and 2011 approved E15 for use in model year 2001 and newer vehicles (which currently constitute roughly 85% of vehicles in use), E15 is sold only at a small number of gas stations nationwide (according to EPA, in the range of a few hundred out of some 152,000 stations), possibly due in part to consumer concerns related to vehicle warranties that do not explicitly permit the use of E15.²⁴ As for E85, the fuel can be used in flex-fuel vehicles, but for a variety of reasons, the retail market for E85 currently remains relatively small as well.²⁵

The RFS's statutorily prescribed renewable volumes approached the limitations associated with the E10 blendwall for the first time in 2014.²⁶ EPA responded in the 2014-2016 Rule by reducing total renewable fuel volume to a level consistent with what EPA projected could reasonably be supplied to consumers given the constraints on further increased ethanol consumption. Here, EPA's analysis proceeded in several steps: first, EPA determined the projected cellulosic biofuel projection (or actual production, in the case of past years, given that the rule was promulgated after all of 2014 and most of 2015 had passed) and set the cellulosic requirement at this level. EPA separately set the biomass-based diesel requirement for the relevant years. EPA next identified the level of advanced biofuel production (*i.e.*, cellulosic, biomass-based diesel, and other advanced biofuels) "reasonably attainable" for each of the years in question; EPA then used the cellulosic waiver authority to reduce the advanced biofuel requirement to this level, and used the authority to reduce total renewable fuel by the same amount. Finally, EPA determined the level of total renewable fuel that could be achieved based on the sum of all non-ethanol renewable fuels and the amount of ethanol that could reasonably be consumed in the relevant year — based primarily on its assessment of potential E10 and E85 consumption. EPA gave little consideration to E15 because of the small level of sales and the small amount of incremental ethanol consumed through this lower ethanol blend. Then — and here is the rub — EPA applied its General Waiver authority to reduce the total renewable fuel requirement to this level, finding that the constraints associated with the blendwall resulted in an "inadequate domestic supply" of renewable fuels.

In thus utilizing the General Waiver authority, EPA read "inadequate domestic supply" to "encompass the full range of constraints that could result in an inadequate supply of renewable fuel to the ultimate consumers," including constraints affecting the ability to produce or import qualifying fuels and the ability to distribute, blend and consume such fuels in vehicles.²⁷ EPA explained that the statutory term "supply" in this context is ambiguous, and that EPA read the term in this context — consistent with the RFS's focus on actual incorporation of renewable fuel into transportation fuel, not just production of such fuel — to encompass the ability to supply fuel to ultimate consumers.

Although our focus here is on EPA's action in the 2014-2016 Rule, it's important to recognize that for the following year, 2017, EPA invoked the Cellulosic Waiver to reduce the cellulosic biofuel, advanced biofuel and total renewable fuel volume requirements without invoking a General Waiver.²⁸ For the 2017 RFS, in other words, EPA reduced cellulosic volumes by the difference between the statutory level and the projected level of cellulosic production, and determined that reducing advanced and total volume

requirements by a lesser amount was sufficient to address continuing concerns with the blendwall, given EPA's projections of increasing ethanol consumption, including increasing consumption of E85, for 2017.

Litigation over EPA's Use of the General Waiver Authority: A First Challenge for the New Administration

Stakeholders representing both fossil fuel and refining interests on the one hand, as well as biofuels producers on the other, have challenged the 2014-2016 Rule. They brought suit in the DC Circuit, and these petitions for review were consolidated in the case *Americans for Clean Energy, Inc. (ACEI), et al. v. EPA, et al.*²⁹ While the parties raise a broad range of claims, a principal contention of the petitioners representing ethanol producers is that EPA's interpretation of its General Waiver authority stretches the language of the statute too far, and is thus unlawful. In particular, they argue that that EPA has effectively read the term "supply" to mean, instead, demand. EPA argues in response that the term "supply" is ambiguous, and with a focus on supply to the ultimate consumer, the term is reasonably understood to include the entire chain of production and delivery.³⁰

The case has been briefed and argued, and the D.C. Circuit is likely to issue a decision in the next few months. Whatever the outcome, this case will shape RFS policy in an important way. If EPA's use of its "inadequate domestic supply" General Waiver authority is upheld, EPA could continue to use this approach as appropriate in rulemaking for 2018 and beyond. Alternatively, EPA may instead seek to continue to rely exclusively on the Cellulosic Waiver authority as it did in the 2017 rule. If the court instead rejects EPA's use of its General Waiver authority, the court would likely remand the 2014-2016 Rule to EPA for new rulemaking. This could present a significant policy test for the new Administration, forcing EPA to consider — at least as it now retrospectively looks at 2014, 2015 and 2016 — potential alternative approaches to address concerns related to the E10 blendwall, such as reliance on the "severe economic harm" rationale for exercise of its General Waiver authority. In either event, the losing parties likely will petition the Supreme Court for *certiorari* — particularly on the relatively discrete issue of statutory interpretation related to the General Waiver authority.

The RFS Point of Obligation – Another Test for the New Administration

The proper scope of EPA's General Waiver authority is not the only ongoing controversy related to the RFS. EPA now faces a contentious decision in response to requests by some obligated parties to shift the "point of obligation" for RFS requirements from refiners and importers to blenders and/or distributors.

As explained above, EPA in its foundational RFS1 and RFS2 rules (promulgated in 2007 and 2010, respectively) defined the "obligated parties" responsible for compliance with RVOs as refiners and importers, notwithstanding statutory language that would allow EPA to include blenders and distributors among those bearing renewable obligations. EPA did so in large part on the grounds that placing the point of obligation upon refiners and importers rather than blenders and distributors renders the RFS program administrable, given that the number of blenders and distributors far exceeds that of refiners and importers. For example, in the 2006 RFS1 proposed rule, EPA noted that there were at that time approximately 1,200 ethanol blenders, as compared to 100-200 refiners and importers. So EPA reasoned that adding ethanol blenders as obligated parties would "greatly expand the number of regulated parties and increase the complexity of the RFS program beyond that which is necessary to carry out the renewable fuels mandate under the Act."³¹ Likewise in 2010, EPA concluded that no change to the point of obligation was necessary, because "the market will provide opportunities for parties who are in need of RINs to acquire them from parties who have excess," adding that "a change in the designation of

obligated parties would result in a significant change in the number of obligated parties and the movement of RINs.”³²

The practical significance of bearing the point of obligation became more acute as RIN prices climbed in late 2012.³³ As explained above, obligated parties either generate or purchase RINs to equal the number of gallons in their annual obligation.³⁴ RIN prices remain low (in the early years of the RFS program RIN prices were as low as 1 cent) when transportation fuel markets have ample room to bear more renewables and when blending renewable into the fuel supply poses little problem, especially when gasoline prices are high. But if the market does not easily accommodate renewable fuels, such as when the blendwall has been hit, or when gasoline prices are very low (such that mixing in relatively expensive renewables is not attractive), blending is a burden. In that scenario, the process of producing and blending biofuels is solely motivated by the need to satisfy RFS requirements, not underlying market conditions. Without an underlying market demand, producers would rather not blend, which puts pressure on RIN prices, as buying a RIN becomes for some preferable to blending. In turn, higher RIN prices incentivizes renewable production because producers are motivated to produce in order to have RINs to sell.

A substantial increase in RIN prices (to well over a US\$1) motivated some obligated parties to call for EPA to alter the point of obligation. In 2014, certain obligated parties and other stakeholders filed formal petitions for reconsideration or revision of the definition of “obligated party,” while others filed comments on the point of obligation issue with EPA in connection with the annual RFS volume determinations. Some urged EPA to shift the point of obligation from them to those parties that blend renewable fuel into transportation fuel, while others argued that the point of obligation should be on those that distribute the fuel — parties that hold title to the gasoline or diesel fuel immediately prior to sale at the terminal.³⁵ Those seeking a redefinition of obligated party maintained that shifting the point of obligation to parties downstream of refiners and importers in the fuel distribution system would align compliance responsibilities with those best positioned to make decisions on how much renewable fuel is blended into the transportation fuel supply in the United States.³⁶

EPA construed these requests to alter the point of obligation as petitions for a new rulemaking on the subject, and in November 2016, issued a Proposed Denial of Petitions for Rulemakings to Change the RFS Point of Obligation and solicited comment on the proposed denial.³⁷ EPA’s Proposed Denial maintained that the current structure of the RFS program is working to incentivize the production, distribution and use of renewable transportation fuels in the United States, while providing obligated parties a number of options for acquiring the RINs they need to comply with the RFS standards. EPA further described that regulatory simplicity counsels in its favor, as there are fewer refiners and importers relative to the number of blenders and distributors. EPA also pointed out that obligated parties have already made reliance investments, and that there is greater potential for non-compliance with a change because some downstream distributors may not know how to comply. Finally, EPA noted that a change would not address the real challenge to renewable fuel markets, which concerns the blendwall and cellulosic developments. Altogether, EPA was not persuaded by petitioners’ arguments concerning the allocation of costs as a real economic matter.³⁸

The comment period on the Proposed Denial has closed and EPA’s final response to the petitions for rulemaking remains pending. At this time, there is no specific deadline by which EPA must take final action. There were early indications in the Trump Administration that EPA may be more amenable to arguments for reforming the point of obligation, and there were some reports of a possible Executive Order on the subject. Whether this is the case remains to be seen. EPA’s position articulated in its

Proposed Denial comports with its final brief and April 24, 2017 oral argument in the *ACEI v. EPA* litigation, in which EPA invoked *Chevron* deference to defend its position that the point of obligation lies with the appropriate parties and need not be reexamined in each annual volumes rule.³⁹ Thus it is entirely possible EPA will not alter the point of obligation, though whatever approach EPA ultimately takes will almost certainly face judicial challenge.

Other Key RFS Issues Pending in the New Administration

Meanwhile, the new Administration faces several other key policy issues concerning the RFS. First, EPA must continue to set annual standards — beginning with the 2018 RVO and the 2019 biomass-based diesel requirements, both of which are required by statute to be completed by November 2017. At the time of this writing, EPA has yet to submit a draft proposed rule for these obligations to the Office of Information and Regulatory Affairs for interagency review, suggesting that EPA will not meet its November deadline to finalize the rules after notice and comment.

As the new Administration moves ahead with implementation of the RFS, it must determine what policy balance it intends to strike between renewable fuel producers and refiners and conventional fuel producers. During his campaign, President Donald Trump vowed to protect the RFS, assuring voters in Iowa that he would support the program, and he has reiterated his support since taking office.⁴⁰ In contrast, during the campaign, then-Oklahoma Attorney General, now EPA Administrator Scott Pruitt called the program "unworkable."⁴¹ During his confirmation hearings, however, Mr. Pruitt indicated a commitment to "administer the [RFS] program according to the intent of Congress" and to keep the program's rulemakings on schedule.⁴² The 2018 RVO and 2019 biodiesel rulemakings will present an early signal of how the new Administration intends to navigate the controversial task of setting annual volume requirements going forward.

Additionally, the new Administration will need to determine what stance to take with regard to a variety of issues related to RFS program implementation, including approval of new renewable fuel "pathways" and other issues. For example, in November 2016, EPA issued a proposed rule referred to as the "Renewables Enhancement and Growth Support Rule", which, in general terms, would facilitate renewable development and compliance with the RFS program.⁴³ The proposed rule contemplates, for example, clarifying E85 requirements, harmonizing RFS and motor vehicle emissions requirements, offering additional RFS credit options, and incorporating additional biofuels (such as those produced using a biointermediate) into the RFS program. EPA extended the comment period for this rule, which ended in February.⁴⁴

Prospects for Legislative Reform

The transition to single-party control of both chambers of Congress and the White House also raises the prospect of legislative reform of the RFS. There have been numerous attempts to amend the RFS program in recent years, and one may expect further activity this Congress. In fact, several bills have already been introduced.

Earlier this year, Rep. Michael Burgess (R-TX) reintroduced the "LEVEL Act," or Leave Ethanol Volumes at Existing Levels Act.⁴⁵ This legislation, first introduced in 2011, seeks to amend the RFS to set the applicable volume of renewable fuel for each calendar year to 7.5 billion gallons. In addition, the bill includes a prohibition on the authorization of higher ethanol blends such that the EPA Administrator may not, in any way, allow the introduction into commerce of gasoline that contains more than 10-volume-percent ethanol by weight. Further, any waivers granted prior to enactment of this bill allowing the general use of gasoline containing more than 10-volume-percent ethanol would be repealed. EPA would also be

called upon to conduct and submit to Congress, not more than two years after enactment, a study of the effects of higher ethanol blends.⁴⁶

In January 2017, Rep. Jim Sensenbrenner (R-WI) introduced two bills seeking to alter the RFS. The first, H.R. 777, calls for a comprehensive assessment of the scientific and technical research on the use of mid-level ethanol blends. The measure aims to require EPA to enter into an agreement with the National Academy of Sciences to provide “a comprehensive assessment of the scientific and technical research on the implications of the use of mid-level ethanol blends, comparing mid-level ethanol blends to gasoline blends containing 10 percent or 0 percent ethanol.”⁴⁷ Prior to submission of this assessment, any waiver granted under section 211(f)(4) of the CAA allowing for the sale of mid-level blends for use in vehicles would have no force or effect.⁴⁸ The EPA would also be directed to grant no new waivers under the regulation until after the submission of the report.⁴⁹ The second, H.R. 776, calls for the volume of cellulosic biofuel mandated under the RFS to be limited to — until a comprehensive study is completed — to what is commercially available.⁵⁰

In addition, several pending bills would completely eliminate the RFS altogether.⁵¹ Congressman Bob Goodlatte (R-VA) has reintroduced the Renewable Fuel Standard Elimination Act, which would repeal the RFS in its entirety.⁵² Congressman Goodlatte has also reintroduced the Renewable Fuel Standard Reform Act, which would eliminate corn-based ethanol requirements, place a 10% cap on the amount of ethanol that can be blended into conventional gasoline, require EPA to set cellulosic biofuels targets at levels produced by the industry, and decrease the total volume of renewable fuel content in gasoline sold or introduced into commerce from 2017 through 2022.⁵³

Rep. John Shimkus (R-IL), Chair of the Environment Subcommittee of the House Committee on Energy and Commerce, has announced his intention to take up RFS reform this Congress.⁵⁴ While there is broad interest in this effort, similar efforts in recent Congresses have failed to advance through Committee, let alone to the floor. Few if any observers predict a different result in this Congress, absent a significant change — such as a D.C. Circuit or Supreme Court decision rejecting EPA’s use of the “inadequate domestic supply” waiver authority.

Conclusion

The RFS program faces a number of continuing challenges. How EPA responds to those challenges, including those associated with the so-called E10 blendwall, will be shaped in part by litigation now before the D.C. Circuit on EPA’s recent exercise of the “inadequate domestic supply” General Waiver authority — with a decision likely in the coming months and the possibility of litigation before the Supreme Court. Yet the new Administration has before it other consequential policy issues as well, including its pending final decision on whether to change the point of obligation for the RFS, impending deadlines for the next cycle of annual volume requirements, and broader issues concerning RFS implementation. With legislative reform of the RFS program unlikely under current circumstances, the Administration’s near-term policy decisions will be important for the foreseeable future of the program.

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Endnotes

- ¹ See Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 Stat. 1067; 42 U.S.C. § 7545(o) (2006); 42 U.S.C. § 7545(o) (2010).
- ² 42 U.S.C. § 7545(o).
- ³ 42 U.S.C. § 7545(o)(1)(B)-(G).
- ⁴ 42 U.S.C. § 7545(o)(3)(B)(ii).
- ⁵ 42 U.S.C. § 7545(o)(2)(A)(iii).
- ⁶ See U.S. Environmental Protection Agency (EPA), “Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule,” 72 Fed. Reg. 23,900, 23,924 (May 1, 2007).
- ⁷ See EPA, “Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule,” 75 Fed. Reg. 14,670, 14,867 (Mar. 26, 2010).
- ⁸ 42 U.S.C. § 7545(o)(7)(D).
- ⁹ 42 U.S.C. § 7545(o)(3)(A).
- ¹⁰ See EPA, “Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards,” 75 Fed. Reg. 76,790, 76,792 (Dec. 9, 2010) (codified at 40 C.F.R. pt. 80).
- ¹¹ 42 U.S.C. § 7545(o)(7)(D)(i).
- ¹² *Monroe v EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014) (“In the absence of any express or implied statutory directive to consider particular factors, EPA reasonably concluded that it enjoys broad discretion regarding whether and in what circumstances to reduce the advanced biofuel and total renewable fuel volumes under the cellulosic biofuel waiver provision”).
- ¹³ 42 U.S.C. § 7545(o)(7)(A).
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ 42 U.S.C. § 7545(o)(7)(B).
- ¹⁷ See EPA, “Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard,” 73 Fed. Reg. 47,168 (Aug. 13, 2008); EPA, “Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard,” 77 Fed. Reg. 70,752 (Nov. 27, 2012).
- ¹⁸ 42 U.S.C. § 7545(o)(7)(E).
- ¹⁹ 42 U.S.C. § 7545(o)(7)(E)(i).
- ²⁰ U.S. EPA, “Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017; Final Rule,” 80 Fed. Reg. 77,420 (Dec. 14, 2015) [herein after “2014-2016 Rule”].
- ²¹ *Id.* at 77,422-24.
- ²² *Id.* at 77,456.
- ²³ See U.S. Energy Information Administration, “Almost All U.S. Gasoline is Blended with 10% Ethanol” (May 4, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=26092>.
- ²⁴ 2014-2016 Rule at 77,463.
- ²⁵ *Id.* at 77,460-61.
- ²⁶ The program’s arrival at this juncture was hastened by the fact that actual gasoline consumption is substantially lower than was projected when EISA was enacted in 2007; because the RFS annual requirements are expressed in terms of gallons, the point at which these requirements exceeded 10% of the transportation fuel supply came earlier than would have been expected at the time of enactment.
- ²⁷ 2014-2016 Rule at 77,435.
- ²⁸ U.S. EPA, “Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018; Final Rule,” 81 Fed. Reg. 89,746 (Dec. 12, 2016).
- ²⁹ *Americans for Clean Energy (ACEI), et al. v. EPA, et al.*, No. 16-1005 (D.C. Cir. 2016).
- ³⁰ *Id.*; see U.S. EPA, “Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule,” 75 Fed. Reg. 14,670 (March 26, 2010); Energy Independence and Security Act of 2007, PL 110-140, December 19, 2007.
- ³¹ U.S. EPA, “Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program,” 71 Fed. Reg. 55,553 (Sept. 22, 2006).
- ³² U.S. EPA, “Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule,” 75 Fed. Reg. 14,670, 14,722 (March 26, 2010).
- ³³ See *InformaEconomics*, “Retail Gasoline Price Impact on Compliance with the Renewable Fuel Standard” (March 25, 2013) (“RIN prices have increased in 2013 to levels that are multiples of any prices experienced previously. As reported by the Oil

Price Information Service (OPIS), between January 2 and March 22, the average daily price for conventional ethanol RINs generated in 2013 was \$0.37, reaching a daily high of \$1.06 on March 11. By comparison, the average price for 2012 was \$0.03.”) http://ethanolrfa.3cdn.net/9a854002332b90e05e_tum6b12ys.pdf

³⁴ *Id.*

³⁵ On January 27, 2014, Monroe Energy LCC (Monroe) filed a petition to revise 40 C.F.R. pt. 80.1406 to change the RFS point of obligation, and on January 28, 2016, Monroe filed a petition for reconsideration of the regulation. On February 11, 2016, Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Lion Oil Company; Ergon-West Virginia, Inc.; Hunt Refining Company; Placid Refining Company LLC; U.S. Oil & Refining Company (together, the Small Refinery Owners Ad Hoc Coalition or Coalition) filed a petition for reconsideration of 40 C.F.R. pt. 80.1406. On February 12, 2016, Valero Energy Corporation and its subsidiaries (Valero) filed a petition to reconsider and revise the rule. On June 13, 2016, Valero submitted a petition for rulemaking to change the definition of “obligated party.” On August 4, 2016, the American Fuel and Petrochemical Manufacturers (AFPM) filed a second petition for rulemaking to change the definition of obligated party. On September 2, 2016, Holly Frontier also filed a petition for rulemaking to change the definition of obligated party.

³⁶ *Id.*

³⁷ U.S. EPA, “Notice of Opportunity to Comment on Proposed Denial of Petitions for Rulemakings to Change the RFS Point of Obligation,” 81 Fed. Reg. 83,776 (Nov. 22, 2016); *see also* U.S. EPA, “Proposed Denial of Petitions for Rulemakings to Change the RFS Point of Obligation”, EPA-420-D-16-004 (Nov. 10, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0120>.

³⁸ *Id.* *See also* U.S. EPA, “Extension of Comment Period: Proposed Denial of Petitions for Rulemakings to Change the RFS Point of Obligation,” 81 Fed. Reg. 95,551 (Dec. 28, 2016).

³⁹ *Americans for Clean Energy (ACEI), et al. v. EPA, et al.*, No. 16-1005, D.E. 1661194 (filed Feb. 14, 2017).

⁴⁰ *See, e.g.*, Devin Henry, “Trump Reaffirms Support for Ethanol in Industry Letter”, The Hill (Feb. 21, 2017), <http://thehill.com/policy/energy-environment/320534-trump-reaffirms-support-for-ethanol-in-industry-letter>.

⁴¹ *See, e.g.*, Ben Wolfgang, “Trump, EPA Nominee Differ on Renewable Fuel Program”, Washington Times (Feb. 5, 2017), <http://www.washingtontimes.com/news/2017/feb/5/trump-pick-for-epa-scott-pruitt-opponent-of-federa/>.

⁴² U.S. Senate Committee on Environment and Public Works. “Hearing on Nomination of Attorney General Scott Pruitt to be Administration of the U.S. Environmental Protection Agency” (Transcript), at 57 (Jan. 18, 2017).

⁴³ U.S. EPA, “Proposed Rule: Renewables Enhancement and Growth Support Rule,” 81 Fed. Reg. 80,828 (Nov. 16, 2016).

⁴⁴ *Id.*

⁴⁵ H.R. 119 (Burgess, Jan 3, 2017).

⁴⁶ H.R. 119 (Burgess, Jan 3, 2017).

⁴⁷ H.R. 777 (Sensenbrenner, Jan. 31, 2017).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ H.R. 776 (Sensenbrenner, Jan. 31, 2017).

⁵¹ *See* Renewable Fuel Standard Repeal Act, S. 1195, 113th Cong. (as proposed by Sen. Barrasso, June 20, 2013); Renewable Fuel Standard Elimination Act, H.R. 3098, 112th Cong. (as proposed by Rep. Goodlatte, Oct. 5, 2011) (reintroduced April 10, 2013); Remove Incentives for Producing Ethanol Act of 2011, H.R. 426, 112th Cong. (as proposed by Rep. Flake, Jan. 25, 2011).

⁵² H.R. 1314 (Goodlatte et al., March 2, 2017); *see also* H.R. 703 (Goodlatte et al., Feb. 4, 2015).

⁵³ H.R. 1315 (Goodlatte et al., March 2, 2017).

⁵⁴ Press Release, Congressman John Shimkus (R-IL), “Shimkus Selected to lead Panel Overseeing EPA” (Jan. 9, 2017), <https://shimkus.house.gov/media-center/press-releases/shimkus-selected-to-lead-panel-overseeing-epa>.