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Client Alert

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EPA's Proposed Renewable Fuel Standards for 2019

On July 10, 2018, the Environmental Protection Agency ("EPA") released its proposed rule for renewable fuel volume requirements for 2019 under the Renewable Fuel Standard ("RFS") program.[1] Although the proposed total requirement for 2019 is 590 million gallons more than the requirement for 2018, it is much less than the expected statutory amounts when the program was enacted. Relying on its cellulosic waiver authority, EPA is proposing to reduce the statutory total renewable fuel requirement by 8.12 billion gallons. If the proposed requirement becomes final, EPA would have the opportunity to modify the statutory amounts in subsequent years under the statutory "reset" authority. The agency is also soliciting comments on ways to minimize potential manipulation of the RIN market for future rulemaking. The comment period is open through August 17, 2018 and a public hearing will be held on July 18, 2018.[2]

BACKGROUND

Enacted in 2006 to promote the integration of renewable fuels and energy independence, the RFS program requires the incorporation of renewable fuels into gasoline sold or introduced into commerce in the United States on an annual basis according to a schedule of increasing volumes beginning in 2006 and ending in 2022, with rulemaking to determine amounts in later years.[3] The two categories of renewable fuels required by the RFS program are conventional biofuel (*e.g.*, cornstarch ethanol) and advanced biofuel (*e.g.*, ethanol derived from biomass other than cornstarch). Together, they make up the total renewable fuel requirement. Advanced biofuel is further delineated into cellulosic biofuel and biomass-based diesel—each with its own target volumes. These requirements are "nested" within each of the categories and, as a result, the advanced biofuels can be used to meet the requirements for multiple RFS categories.[4] Each year EPA implements these requirements through annual rulemaking to either adopt the statutory amounts or assign lesser amounts under certain waiver provisions.

PROPOSED REQUIREMENTS FOR 2019

Using the cellulosic waiver, the proposed requirements for 2019 would reduce the total renewable fuel volume to 19.88 billion gallons from the 28 billion gallons in the statutory schedule and reduce the advanced biofuel volume to 4.88 billion gallons from the 13 billion gallons in the statutory schedule.[5] Under this waiver provision, EPA is required to determine the "projected volume" that will be produced in a given compliance year; and if the "projected volume" is less than the statutory amount, EPA must reduce the requirements for cellulosic biofuel to the "projected volume" for that compliance year. Further, if the cellulosic biofuel requirement is reduced, EPA may also reduce the required volumes for total renewable fuel and advanced biofuel by the same or lesser amount, which is what EPA has done in proposing the 2019 rule.[6] EPA has relied on this waiver authority in previous years, most recently for 2018, to reduce the requirements for total renewable fuel and advanced biofuel, and its discretion has been upheld by the D.C. Circuit.[7]

EPA determined the projected volume for cellulosic biofuel for 2019 to be 381 million gallons—8,119 million gallons less than the statutory amount and proposes to reduce the requirements for total renewable fuel and advanced biofuel by the same quantity. And effectively, the proposed volume requirement for conventional renewable fuel would be 15 billion gallons.

Notably, the current proposal for 2019 represents more than a 20% reduction from the statutory amount. Should this requirement become final later this year, it will be the second consecutive year that EPA has reduced the total renewable fuel requirements by more than 20%.[8] As a result, EPA would trigger a statutory obligation to modify the statutory volume requirements in the remaining years of the schedule, often referred to as the "reset" authority. Under this provision, when EPA's requirements, for any fuel category, either waive 20% or more of the statutory amount for two consecutive years, or waive 50% or more of the statutory amount for one year, EPA must revise the rest of the statutory schedule through rulemaking.[9] Within one year of the final rule triggering the reset and 14 months before the start of the compliance period, the statute directs EPA to promulgate rules and set volumes based on the following six statutory factors: (1) impact on the environment; (2) impact on energy security; (3) expected annual rate of future renewable fuel production; (4) impact on infrastructure and deliverability; (5) cost to consumers; and (6) other factors such as job creation, agricultural commodities prices, food prices, and rural development.[10] (Biomass-based diesel requirements are already determined through this statutory process.[11])

Prior final rules for cellulosic and advanced biofuels have already triggered this "reset" provision, but EPA, to date, has not initiated any such rulemaking. Despite an announcement last year that the agency has "initiate[d] the required technical analysis to inform a reset rule," the 2019 proposal is silent on this issue.[12] It is possible that 2020 could be the first year subject to the reset rule if both the 2019 requirements and the reset volumes are finalized by November 1, 2018.

EPA is also soliciting comment as to whether further reductions in 2019 volumes could be justified under the general waiver authority.[13] Under this waiver authority, the EPA Administrator, in consultation with the Secretaries of Agriculture and Energy, can reduce the renewable fuel requirements, in whole or in part, if EPA determines that "implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States" or that "there is an inadequate domestic supply."[14] EPA is specifically requesting comment on the former condition—*i.e.*, severe economic harm to warrant further reductions.[15]

Lastly, the proposed rule is requesting additional input for improving the market for Renewable Identification Numbers ("RIN") to inform future proposed rulemaking.[16] Concerns over the transparency and vulnerability of the RIN market were raised with EPA during a prior RFS rulemaking. It was suggested that EPA increase the amount of data made publicly available, both increasing the type of data available and the frequency with which it is posted. In response, EPA is considering increasing the frequency of the release of data that is currently publicly available. To address the potential

for market manipulation, EPA is considering several ideas such as limiting the purchase of RINs to obligated parties, requiring public disclosure if a party holds a certain threshold percentage of the RINs in the market, and requiring compliance on a monthly basis so RINs are retired more frequently. The current proposed rule seeks additional comment on the impact of such changes and other regulatory changes to improve market operations for future rulemaking in this regard.

CONCLUSION

EPA's proposed standards for 2019 is an increase from 2018 volume requirements, but still remain lower than the statutory amounts. If the proposed requirements become final, the reset authority will be triggered to allow EPA to modify the remaining years in the statutory schedule. Stakeholders have the opportunity to comment on the proposed requirements and regulatory changes to improve the RIN market. King & Spalding represents clients on a variety of RFS-related compliance and enforcement issues.

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[1] Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 32,024 (July 10, 2018).
[2] Public Hearing for Standards for 2019 and Biomass-Based Diesel Volume for 2020 under the Renewable Fuel Standard Program, 83 Fed. Reg. 31,098 (July 3, 2018).
[3] Energy Policy Act of 2005 (P.L. 109-58); Energy Independence and Security Act (P.L. 110-140); 42 U.S.C. § 7545(o). When the RFS program was established, the statutory schedule reflected expectations of year over year increases in total renewable fuel volumes, due in large part to anticipated increases in advanced biofuels, namely cellulosic biofuel. Beginning in 2006 with a 4 billion gallon total renewable fuel requirement, the schedule ends in 2022 requiring 36 billion gallons of total renewable fuel, which includes requirements for 21 billion gallons of advanced biodiesel, 16 of which are required for cellulosic biofuel. *Id.*
[4] For example, cellulosic biofuel can meet the cellulosic biofuel requirement, the advanced biofuel requirement, and the total renewable fuel requirement. 42 U.S.C. § 7545(o)(2).
[5] 42 U.S.C. § 7545(o)(2)(B).
[6] 42 U.S.C. § 7545(o)(7)(D)(i).
[7] *See Monroe Energy, LLC v. E.P.A.*, 750 F.3d 909, 915 (D.C. Cir. 2014).
[8] *See* Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 58,486 (Dec. 12, 2017); 42 U.S.C. § 7545(o)(2)(B).
[9] 42 U.S.C. § 7545(o)(7)(F).
[10] *Id.*; 42 U.S.C. § 7545(o)(2)(B)(ii).

[11] *See e.g.*, Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 58,486 (Dec. 12, 2017); Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016).
[12] Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 34,206 (July 21, 2017).
[13] *See* 42 U.S.C. § 7545(o)(7)(A).
[14] *Id.*
[15] EPA previously relied on the general waiver authority in establishing requirements for 2014–2016 after a finding of "inadequate domestic supply." The final rule, however, was challenged in the D.C. Circuit, which issued a ruling last year vacating EPA's decision and remanding the rule to EPA on the basis of its interpretation of "inadequate domestic supply." *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017). The court held that EPA incorrectly considered demand-side or consumption constraints in determining "inadequate domestic supply." *Id.* at 737. Rather, EPA must "consider *supply-side* factors affecting the volume of renewable fuel that is available to *refiners, blenders, and importers* to meet the statutory volume requirements" in making its determination. *Id.* at 696. The agency notes in the current proposed rule that it is considering the issues raised in the court's decision and will respond in a separate process and explicitly is not requesting comment at this time. Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. at 32,027.
[16] RINs are generated when a gallon of renewable fuel is created; these numbers are used to demonstrate compliance with the RFS requirements and can act as tradeable credits. *See* 40 C.F.R. § 80.1426. Following the end of each compliance year, the RINs are retired and submitted to the EPA by the obligated party, which is defined as any refiner or importer of gasoline or diesel fuel. 40 C.F.R. §§ 80.1406, 80.1451.