



July 26th, 2013

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Upton and Ranking Member Waxman:

We are writing to respond to several of the questions you posed in the fifth White Paper addressing the implementation of the Renewable Fuel Standard (RFS2). We appreciate the committee's support for the RFS2 to date, and your bipartisan efforts to improve its effectiveness in meeting the long-term goals established for the program in the Energy Independence and Security Act of 2007.

Imperium Renewables (IRI) and Renewable Biofuels (RBF) are the two largest independent biodiesel producers in the United States. Our two companies alone have a combined annual name-plate production capacity of approximately 280 million gallons, with 180 million gallons-per-year of capacity at the Renewable Biofuels facility in Port Neches, Texas, and 100 million gallons-per-year of capacity at Imperium Renewables' facility in Grays Harbor, Washington. As biodiesel producers, we have invested hundreds of millions of dollars in facilities designed to produce clean, sustainable biodiesel that meets the stringent standards of the RFS2 program. We continue to invest in research and development for the next generation of biofuels. We are confident that the biofuels industry, which is still in its early stages, can deliver the volumes of advanced biofuels mandated by the Congress in the 2007 Act. Below are our comments on several of the questions posed by the Committee.

1. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

With respect to the annual volumetric requirement for biomass based diesel, there have been significant delays in finalizing this requirement. However, some of these delays appear to be beyond the control of the EPA, as the review and comment periods by other agencies and by the Office of Management and Budget, while thorough, have often been much too lengthy. We believe these delays can be addressed administratively either by starting the process earlier, or by

setting the volumetric requirement for a two-year period in a single rulemaking. Having the volumetric requirement determined for a two-year timeframe would provide more certainty and visibility to all stakeholders in the biofuels industry and would allow for better planning, encourage investment, and facilitate compliance. **We do not believe that any statutory changes are needed in the RVO-setting process to allow for this process.**

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed?...Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

The 2007 Act provides a mechanism for the Administrator to reduce the mandated cellulosic biofuel volumes “to the projected volume available during the calendar year.” In fact, EPA has made significant reductions for the past several years, while maintaining the overall volumetric requirement for advanced biofuels. Biodiesel and other biomass-based diesel and jet fuels are classified as Advanced Biofuels and have been available in sufficient quantities to meet the total mandated Advanced Biofuel and total renewable fuel volumes, and our industry can continue to meet these mandates in the out years as they are increased. There are over 3 billion gallons of installed capacity in the domestic biodiesel industry alone – this translates to 4.5 billion Advanced Biofuel-equivalent RINs available to the obligated parties to meet the Advanced Biofuel requirements. In addition, the EPA has moved to increase the number of eligible feedstocks and production processes that qualify under the RFS2, and will continue to do so in the future. With these moves, the biomass-based diesel fuels can continue to meet all requirements of the Advanced Biofuel category.

We strongly oppose requiring the EPA to reduce the Advanced Biofuel requirements and total renewable fuel volumes when it lowers the cellulosic biofuel volume. Such reductions would critically harm the existing biodiesel industry, greatly hamper capital availability for all companies that produce Advanced Biofuels, and will delay the essential development and commercialization of the next generation of Advanced Biofuels that will help meet the goals of RFS2.

3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA’s proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

Chairman Upton and
Ranking Member Waxman
July 26, 2013
Page 3

Our companies are committed to maintaining the highest integrity of our business, our RIN generation practices and the RFS2 program itself. We want and need RFS2 to be a viable and successful federal program that achieves the congressional intent of the 2007 Act.

To that end, as producers, we have advocated for several years for increased transparency in the RIN marketplace, on both the supply and demand side, as the most effective and cost-efficient means for reducing RIN fraud. The proposed Quality Assurance Program (QAP) rule acknowledges that RIN fraud was not widespread, but was the result of a few parties selling large numbers of invalid RINs when they had produced no fuel. The best solution for resolving this issue is clearly greater transparency in the posting of RIN generation, as well as RIN retirement, as this would be the most cost-effective way for the industry to self-police and to assist the EPA in maintaining a viable program that achieves the 2007 Act's goals for the nation.

In the comments we submitted to the EPA on the proposed QAP, we suggested the **EPA should disclose monthly plant-by-plant RIN generation and should publish such information on a rolling 30-day basis. We would also strongly urge the EPA to adopt a similar reporting regime for the retirement of RINs by obligated parties and exporters.**

We also support requiring RIN separators to include additional records related to qualifying separation events within their quarterly reports. IRI and RBF believe this is of critical importance and strongly support the requirement for this information to be published quarterly so as to enhance RIN market transparency.

IRI and RBF are extremely concerned about the potential for fraud in foreign production and subsequent imports of D4 RINs from international biodiesel producers. EPA currently lacks the funding necessary to field the adequate number of international inspectors to effectively monitor QAP auditors of foreign-based production of eligible fuels, and monitor the foreign producers themselves. This lack of direct and on-the-ground oversight and verification by EPA personnel will greatly enhance the potential for a range of fraudulent activities, will provide foreign entities an unfair and potentially illegal competitive advantage, and will make entry of fraudulent RINs into the marketplace more likely. **As a result, we encourage the Congress to provide enough financial support to double EPA's biofuels enforcement capacity, or look for other viable solutions to address the potential fraud from foreign RIN production.**

Finally, we do not believe that the QAP program should relieve the obligated parties of their need for the appropriate due diligence in order to comply with their volumetric requirements.

Chairman Upton and
Ranking Member Waxman
July 26, 2013
Page 4

In closing, we want to reiterate our appreciation for your leadership on the RFS2 program vital to the domestic biodiesel industry. If you or your staff members have any questions about our comments, please be sure to contact our federal affairs representative, Bob Van Heuvelen, at 202-534-4920 or at bob@vhstrategies.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Plaza', with a large, stylized flourish at the end.

John Plaza
CEO, Imperium Renewables

A handwritten signature in blue ink, appearing to read 'Jonathan Phillips', with a long horizontal line extending to the right.

Jonathan Phillips
COO, Renewable Biofuels

Representative Upton, Representative Waxman,

I am a recently retired Navy Captain with a master's degree in strategy and a bachelor's degree in physics. I have served as a strategic planner on the Joint Staff, and as a war college strategy instructor and CJCS chair. My career has been national security and I have researched and published on the topic of energy and its linkage to national security. I appreciate that the Committee is seeking input from subject matter experts and stakeholders and I hope you will consider me to be both.

I have written an article in Strategic Studies Quarterly, the Air Force's peer-reviewed strategy forum, on the topic of biofuels and national security (<http://www.au.af.mil/au/ssq/fullarticle.asp?id=31>). I have also authored a paper published by the Waterloo Institute for Complexity and Innovation that takes a holistic and comprehensive look at biofuels from the domains of physics, chemistry, biology, agronomy, history, the environment, geopolitics, and economics (<http://wici.ca/new/resources/occasional-papers/#no.4>). I have found that it is essential to integrate across all of these disciplines to truly answer the question of the net value of biofuels to national security. The latter document has 182 endnotes comprising more than 200 citations from US government reports and recent, peer-reviewed scientific journal articles, as well as formulae and explanatory text. The paper was meant to be a comprehensive reference document. The statements of fact I make below are supported by research fully disclosed and explained in these two publications.

1. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

History and the courts have shown that EPA mandates for biofuels have had little connection with reality. EPA's charter is to protect the land, air, and water resources of the nation, not to distort agricultural and fuel markets with policies that are uninformed by either agricultural or energy expertise.

The "Renewable Fuel Standard (RFS)" is a misnomer because corn ethanol is only about 20% renewable when all the fossil fuel inputs such as ammonia fertilizer from natural gas and petroleum-based herbicides and pesticides and refined petroleum tractor fuel and natural gas processing plant and biorefinery fuel and coal power plant electricity are properly accounted. Likewise the GHG reductions turn out to be marginal or even negative when compared to directly refining petroleum into fuel instead of using it inefficiently to grow and process corn into ethanol. **The EPA has irrationality declared sugar cane ethanol to be an "advanced biofuel"** even though one of the principal criteria for such fuels is that they be derived from non-food biomass. Sugar is a global food commodity, and declaring sugar cane ethanol to be an advanced biofuel has put the US in the position of subsidizing the importing of Brazilian ethanol and contributing to direct food competition and higher food prices. **Importing ethanol is a step away from energy independence, especially since the distorted market created by these RFS**

subsidies also has incentivized exporting the displaced gasoline to other nations instead of using it at home.

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

See above.

3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

EPA has neither the manpower nor the infrastructure to administer a sound RIN program. With the state of current government funding, the massive IRS itself is saying it cannot even verify citizens' income for eligibility for Healthcare enrollment. **RINs are a recipe for corruption that have already proven themselves to be ripe for abuse.** The only solution to prevent widespread fraud is the abolish them.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

No surprises here, it is the "blendwall" conflict between the RVO and the 10% blending limit. This conflict exists because the US reduced its overall gasoline consumption, which is a good thing from every perspective including GHG emissions, pollution emissions, and energy security. It is essential to note that adding ethanol to fuel reduces fuel economy and increases emissions per mile travelled, which are contrary to all "clean and green" goals. EPA's failure to predict and accommodate increasing fuel efficiency and reduced fuel consumption in the RVOs, even as it administered higher CAFÉ standards, display how its left hand does not know what the right hand is doing. This pattern of reduced gasoline consumption and increased fuel efficiency also happens to be an exact parallel of the US economic response to the oil shocks of 1973 and 1979-80. **If EPA considered history and economics, they would be better prepared to make sound regulations and policy today.**

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

RINs create a pseudo market for fuel (or a market for pseudo fuel depending on one's perspective), and thus **distort the markets and add needless layers of complexity and potentials for increased price volatility for both RINs and ethanol and gasoline, as well as corn and soy and livestock**. They link the volatility of the agricultural markets to the volatility of the fuels markets. All of these negative symptoms can be cured by abolishing RFS.

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

See above.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

Prices shape behavior. Distorting prices with subsidies and mandates and tax policies has resulting in increasing exports of US gasoline and unprecedented imports of foreign ethanol. The increase in agriculture necessary for biofuel production is also increasing US demand for imported fertilizer minerals including phosphate (11% imported from Morocco, an Islamic kingdom in N. Africa where Al Qaeda is resurgent), ammonia (45% imported), and potash (75% imported). **The US is currently more dependent upon foreign fertilizer minerals that are essential for both our food and biofuels than we are for Persian Gulf oil** (11% of US crude oil). These actions that reduce our energy and overall national security should not be blamed on refiners or biofuel farmers or markets, but on those who distorted the markets and steer all Americans toward behaviors that hurt rather than help.

The label of "renewable" is terribly misused. As mentioned above, biofuels are fertilized by ammonia made from natural gas and require non-renewable phosphate and potash mineral nutrients and are treated with herbicides and pesticides made from petroleum and processed in mills and biorefineries powered by natural gas and electricity from coal and nuclear plants. They are only fractionally renewable. **According to federal law (16 CFR 260.15) producers of such partially renewable products should have to buy Renewable Energy Credits (REC) to cover the non-renewable portions of their energy content before being able to use the label of "renewable" and claim any grants or subsidies or benefits such as EPA RINs and Treasury tax credits and Farm Program subsidies. The exact percentage of renewable content and GHG reduction for US corn ethanol and soy biodiesel and all other biofuels should be calculated from rigorous lifecycle analyses in accordance with ISO 14040, 14044, and 14067.** Many studies published since 2008 have attempted this and found that claims of renewability and GHG reductions are hugely inflated and often completely spurious. So-called "drop-in" hydrotreated renewable fuels like those purchased by the military and the commercial airlines require the addition of huge amounts of fossil fuel energy and hydrogen derived from natural gas to be transformed into true hydrocarbons compatible with tactical military vehicles and jet

engines. These fuels require several times more fossil fuel energy input than they yield in output so are less “renewable” than straight refined fossil fuels.

US corn ethanol and soy biodiesel have always been and continue to be more expensive than gasoline and diesel fuel when compared on an equal-energy basis. Energy is directly proportional to the distance a vehicle will travel and to MPG. **As of Jan 2013, the US Department of Energy reported that, on an equivalent energy content basis, ethanol was \$1.19 more a gallon than gasoline and biodiesel was \$0.82 more a gallon than petroleum diesel**

(http://www.afdc.energy.gov/uploads/publication/alternative_fuel_price_report_jan_2013.pdf). American Automobile Association surveys of pump prices reflect that E85 and biodiesel are consistently more expensive on an MPG-corrected basis than the highest-octane gasoline and conventional diesel (<http://fuelgaugereport.opisnet.com/index.asp>). If the prices of ethanol and biodiesel are plotted out against those of gasoline and petroleum diesel over the past 8 years, they are not only consistently much higher, but show the same degree of volatility. **The higher price per joule or BTU of ethanol translates into an additional \$8.1 billion that Americans paid for miles per gallon not put into their gas tanks in 2012, making the total cost \$14.2 billion to displace 9.5% of our motor gasoline volume (6.4% of its energy content) with corn ethanol** --and the cheaper petroleum gasoline being displaced is ironically being exported to Venezuela and Europe and other countries. Congress' crazy market-distorting subsidies has increased US exports of refined petroleum instead of using it domestically to reduce our foreign dependence, and simultaneously we are importing ethanol from Brazil. As the DoE report reveals, ethanol has clearly increased the pump price of E10 gasoline per unit of energy delivered into the gas tank, not reduced it. The same is true for B5 blends of biodiesel. When the impacts on food prices are taken into account, particularly the huge increases in livestock feed cost by diverting corn into ethanol, Americans are paying billions of dollars more, and it's far worse for the poor of the world whose food prices have skyrocketed. Deforestation, water scarcity, eutrophication of ground water, nitrate poisoning of soil, abusive labor practices, "green grabbing" of land and water rights in the world's poorest countries, soil erosion, the loss of natural biodiverse habitats and carbon sinks to industrially farmed GMO monocultures -- there is no upside to this story.

The pursuit of biofuels sounds good to the ears, but when subjected to rigorous analysis, it is found to be hurting rather than helping the environment, the climate, and the economy. We need those who make rules and policies and regulations to stop doing things just because they sound good, and instead require rigorous, ISO-compliant analyses to inform their decisions and provide assurance of the desired outcomes. DoE is a better agency to deliver sound energy analysis policy than EPA, and **Congress should consider removing the responsibility for**

implementation of RFS and related energy efficiency programs such as CAFÉ standards from EPA to DoE



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Ranking Member
Committee on Energy and Commerce
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Dear Chairman Upton and Ranking Member Waxman:

On behalf of more than 39,000 grower members of the National Corn Growers Association, we appreciate the opportunity to comment on this fifth White Paper, "Implementation of the RFS," from the House Committee on Energy and Commerce. The Renewable Fuel Standard (RFS) program is an ongoing success. Since its implementation in 2005 and revision in 2007 as RFS2, it has increased national energy security by creating a market for renewable fuel as a substitute for petroleum-based fuel thereby accelerating the nation's progress toward energy independence. In addition, the RFS program has contributed to the reduction of greenhouse gas emissions thereby reducing the nation's contribution to global climate change. This program has and will continue to have an overall positive impact on the U.S. economy, our national security and the nation's health.

The following text, excerpted from the web site of the U.S. Department of Energy - Energy Information Administration (EIA),¹ nicely explains the purpose and function of the RIN and RVO systems, the main subjects of this White Paper. The Renewable Fuel Standard, created through the Energy Policy Act of 2005 (EPAct) and revised in 2007, sets a target for the use of 36 billion gallons of renewable fuels by 2022. Each year, the RFS calls for increasing volumes of renewable fuels. For 2013, the RFS calls for 16.55 billion gallons of renewable fuels, including specified targets of cellulosic, biodiesel, and advanced biofuels, as well as an overall target. Renewable Identification Numbers (RIN) and Renewable Volume Obligations (RVO) are the mechanisms used by the EPA to implement the RFS program. RVOs are the targets for each refiner or importer of petroleum-based gasoline or diesel fuel while RINs allow for compliance flexibility.

The RVOs are applied to each obligated party's actual supply of gasoline and diesel fuel to determine its specific renewable fuel obligation for that calendar year. Obligated parties must meet their RVOs by surrendering RINs within 60 days after the end of each calendar year. RINs

¹ <http://www.eia.gov/todayinenergy/> on June 3, 2013

are used both for recordkeeping and flexibility in meeting the separate RFS targets. Each RIN is a 38-character alphanumeric code assigned to each gallon of renewable fuel that is produced in or imported into the United States. RINs are valid for the year in which they are generated. However, up to 20% of a year's mandate can be met with RINs generated in the previous year. When renewable fuels are blended into gasoline and diesel fuel or sold to consumers in neat form (typically 100% biofuel), the RIN representing the renewable attribute of the fuel becomes separated from the physical biofuel and can be used for either compliance purposes or traded. Separated RINs have a market value attached to them and provide flexibility for obligated parties in meeting their RVOs. Obligated parties have the option to either acquire RINs by purchasing and blending physical quantities of biofuels, or by purchasing already separated RINs and submitting them to the EPA for compliance.

Responses to the questions regarding the implementation of the RFS follow.

1. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

NCGA supports the current process used by the EPA to set annual volume obligations for required blenders. This method allows for an evaluation of the current technologies and provides a means to adjust blender requirements accordingly. However, for planning purposes, it would greatly benefit blenders to obtain the requirements in the year prior to the annual requirement. There are no statutory changes needed as the EPA controls when the RVO levels are released.

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

During the past seven years the RFS has been responsible for reducing 205 million metric tons of CO₂, which is the equivalent of taking 39 million cars off the road.² Continued and expanded replacement of fossil fuels with lower GHG emitting renewable transportation fuel will lead to even greater advances in CO₂ reductions. In the process of achieving the RFS goal of utilizing over 13 billion gallons of ethanol from corn starch, private and public research labs will continue to invest in the development of new technologies that further enhance the efficiency of conventional biofuels and the realization of second generation advanced and cellulosic biofuels. Such investment in conventional biofuels has resulted in the development of combined heat and power, corn oil separation, cold-cook processing, and corn expressed enzymes that continue to reduce the CO₂ emissions of conventional biofuels in comparison to gasoline since 2008.³

Corn starch ethanol has been the primary source of biofuel produced to meet past RFS volume requirements. Cellulosic and advanced biofuels were designed to provide an even greater savings

² Renewable Fuels Association

³ Mueller, S. et al. (2013). 2012 Corn ethanol: emerging plant energy and environmental technologies, available: http://www.erc.uic.edu/PDF/mueller/2012_corn_ethanol_draft4_10_2013.pdf

in GHG emissions. However, the speed of market introduction of advanced and cellulosic biofuels has been slower than anticipated. History has many examples of technological advancements taking longer than planned. Per capita passenger miles for air travel was less than 50 in 1950 and today it is approximately 1600. Electrification (electricity to households) took 63 years for 100 percent of U.S. households to obtain, flush toilets took 80 years, refrigerators took 60 years and the radio took 25 years.⁴

The RFS was crafted to allow for cellulosic technology to catch up with the volume requirements by integrating a system for the EPA to adjust the volumes based on the projected levels of the respective fuels, the RVO system, described above. The annual RVO system has sufficiently allowed annual modifications based on projections and does not need to be changed. The EPA has sufficient authority and should be allowed to continue to determine, based on their extensive evaluation processes, to change or not change the advanced biofuel and/or the total renewable fuel volumes when it adjusts the cellulosic biofuel volume.

Stability of the RFS provides incentive for continued investment in the development of advanced and cellulosic biofuels, which have the ability to reduce the carbon footprint of transportation fuels to even greater levels. Without the requirements of the RFS, low carbon fuels would no longer have market certainty and investment in process technologies would essentially be lost and with it the energy security upon which the RFS was established.

3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

The method by which the EPA tracks RINs has proven over time to be effective. Less than 1 percent of all RINs generated in 2010 and 2011 were fraudulent. These were confined to one type of RIN (biomass-based diesel) and EPA caught and appropriately prosecuted those committing the fraud and abusing the tracking system. EPA's system works.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

In recent months, the price of separated Renewable Identification Numbers (RINs) has escalated and is a perceived problem with the RFS. The cost of RINs was expected to fluctuate based on the supply and demand of the respective biofuel. Until recently, the cost of corn starch RINs was tenths of a cent per gallon and now conventional (corn starch derived ethanol) D6 RINs are near \$1.30 per gallon. The cost of the D6 RIN has increased as the usage and subsequent production

⁴ Moore, S and Simon, J (1999). "The Greatest Century that Ever Was: 25 Miraculous Trends of the Past 100 Years." The Cato Institute: Policy Analysis, No. 364.

of corn starch ethanol in gasoline has reached a 10 percent by volume level (i.e., the perceived ‘blend wall’).

RINs are used for both recordkeeping and flexibility in meeting the separate RFS biofuel targets. When renewable fuels are blended into gasoline or diesel fuel or sold to consumers in neat form (i.e., 100% biofuel), the RIN representing the renewable attribute of the fuel becomes separated from the physical biofuel and can be used for either compliance purposes or traded. Separated RINs have a market value attached to them and provide flexibility for obligated parties in meeting their required volume obligations (RVOs). Obligated parties have the option to either acquire RINs by purchasing and blending physical quantities of biofuel, or by purchasing already separated RINs and submitting them to the EPA for compliance.⁵ The obligated parties are the ones who pushed for this flexibility as EPA was developing the program.

The escalated RIN prices are most likely the result of speculation and lack of investment in infrastructure. Some of this is driven by uncertainty in the final RVO number required in 2013, which has yet to be provided to the industry. This speculation is largely confined between RIN generators and RIN consumers and is not reflected in consumer fuel prices. Additionally, RIN prices have been influenced by the limited amount of ethanol blended in transportation fuel, artificially capped by the petroleum industry to 10 percent. Increasing ethanol blends, as allowed by the current law, would significantly lessen pricing impact on RINs and is completely within the control of obligated parties.

Congress understood when the RFS was originally designed that a blend higher than 10 percent would be required to consume the increasing levels of biofuel as stated in the Federal Register: “To meet today’s RFS2 requirements we are going to need to see growth in FFV and E85 infrastructure as well as changes in retail pricing and consumer behavior.”⁶ Additionally, since the RFS was originally designed, E15 (15% ethanol), has been tested and approved for 2001 and newer vehicles (nearly 85% of the vehicle motor fleet). Given the great variability in the means by which gasoline and ethanol make it from the producers to the retailer, the value of the RIN often does not make it to the retailer and/or the consumer. Often times, the petroleum manufacturer controls the supply of ethanol added to the gasoline blendstock. If blenders were to increase the amount of ethanol in gasoline to 15 percent (for use by nearly 85 percent of the light duty vehicles on the road today) or 85 percent (for the nearly 18 million flex fuel vehicles), the value of the RIN would shrink in response to the demand. To date, the E85 market has been relatively insignificant. This is purely a function of limited E85 fueling infrastructure and/or the unwillingness to offer E85 at competitive prices.

The Department of Energy – EIA explains that RIN prices should drive the blending of more ethanol into fuel: “Ethanol RIN values may also increase in order to provide an incentive for blenders to lower the retail price of E85 gasoline relative to E10 gasoline, given E85's lower energy content. A higher ethanol RIN price makes it more economical for the blender to add greater volumes of ethanol to gasoline blendstock.” The EIA goes on further to explain: “In addition to being used for recording RFS compliance, RINs are part of the value of each gallon of biofuel to which they are attached. The value of RINs, which derives from the RFS program,

⁵ EIA website

⁶ 40 CFR Part 80 (March 26, 2010)

provides an economic incentive to use renewable fuels. If RIN prices increase, blenders are encouraged to blend greater volumes of biofuels, based on their abilities to sell both the blended fuel and the separated RIN. If a biofuel is already economical to blend up to or above the level required by the RFS program, such as ethanol was from 2006 through much of 2012, one would expect the RIN price to be close to zero. When the biofuel is more costly than nonrenewable fuels but is needed to meet RFS standards or must be blended in greater volumes to be economic, *the RIN value should increase to a point at which firms will increase biofuel blending.”*

Since blenders, who are often tied to or represent the petroleum manufacturers, do not want to blend ethanol past the 10 percent by volume level, this has greatly restricted the market and resultantly greatly increased the price of RINs. There is a very simple resolution to this problem and that is to blend ethanol in the gasoline fuel supply to levels greater than 10 percent.

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

As stated, the market has and will continue to drive the cost of the RINs, as designed. If more ethanol is blended into the fuel, the high RIN cost is expected to shrink. In a functioning market, higher RIN costs should motivate buildout of E15 and E85. Oil companies would rather protect their market share and use their market power to artificially limit ethanol to 10 percent than comply with the RFS so as not to drive up RIN prices. It is important that the program be allowed to work as designed so that domestically produced, renewable fuel can be utilized as planned.

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

Impacts from the current RIN allocation system are mixed. There are cases where obligated parties are able to meet their required volumes. Likewise there are examples where large independent retailers are accruing RINs through blending, yet they are not obligated parties. We urge caution in changing rules regarding obligated parties. The ultimate solution to the higher RIN prices is to increase the volumes of renewable fuel offered to consumers. To accomplish this, the market must have adequate gasoline blendstock from the producers as well as incentives to retailers to offer higher blends.

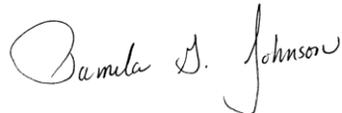
7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

The RFS is working as intended. It is reducing the nation's dependence on foreign oil, helping the balance of trade, providing renewable domestic sources of fuel and providing jobs in renewable fuel facilities throughout the country. Notably, even with these improvements in

energy security, the United States still imported over 800 million gallons of finished gasoline in 2012.⁷

In summary, we strongly believe the RFS is doing exactly what it was intended to do. It is successfully driving adoption of renewable fuel alternatives to petroleum, supporting jobs across the country, and ensuring the United States remains a global leader in developing new renewable energy sources while decreasing GHG emissions here at home. We urge the Committee to stay the course and support this important piece of transformational energy policy.

Sincerely,

A handwritten signature in cursive script that reads "Pamela D. Johnson".

Pam Johnson, President
National Corn Growers Association

⁷ http://www.eia.gov/dnav/pet/pet_move_impcus_a2_nus_EPOBGCO_im0_mbbl a.htm



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July 26, 2013

U.S. House Committee on Energy and Commerce
Chairman Fred Upton
Ranking Member Henry Waxman
2125 Rayburn House Office Building
Washington, DC 20515

Submitted via Email: RFS@mail.house.gov

RE: Committee White Paper on Renewable Fuel Standard Implementation Issues

Dear Chairman Upton and Ranking Member Waxman:

Once again we appreciate the opportunity to weigh in on this series of white papers issued by the Committee on Energy and Commerce as you review the Renewable Fuel Standard (RFS). We appreciate your efforts to better understand the issues related to the RFS, especially as it relates to biodiesel. We believe the RFS is already one of the most effective U.S. energy policies in recent history and look forward to working with both Congress and the Administration as this country continues its shift toward a true “all of the above” energy policy that will stimulate domestic production while strengthening our economic, energy and environmental security.

The National Biodiesel Board (NBB) is the national trade association representing the biodiesel industry and the coordinating body for research and development in the United States. Since 1992 when it was founded, NBB has developed into a comprehensive industry association that works closely with a broad range of stakeholders including industry, government and academia. Before we discuss the relevant questions highlighted by the Committee, it is important to note that the Biomass-based Diesel section of the RFS is working as intended. Biodiesel is the first EPA-designated Advanced Biofuel to be produced on a commercial scale across the country, and it has exceeded its RFS targets over the past two years. It is made from a diverse mix of feedstocks – including recycled cooking oil, agricultural oils such as soybean and canola oil, and animal fats, with new feedstocks like algae and camelina developing each year. Most biodiesel producers can seamlessly move from one feedstock to another, giving the industry tremendous flexibility.

As with all of these white papers, it is important to understand the scale and perspective of the biodiesel marketplace. In 2011 and 2012, the U.S. biodiesel industry produced about 1 billion gallons each year. In 2013 the RFS requires 1.28 billion gallons; we estimate that we are on track to exceed 1.5 billion gallons this year. By comparison, the diesel pool is nearly 60 billion gallons, the gasoline pool is nearly 133 billion gallons, and the ethanol pool is approximately 13.5 billion gallons (biodiesel made up 1.6 percent of the diesel pool in 2012).

This fifth E&C white paper has raised seven questions. As representatives of the U.S. biodiesel industry, we are pleased to offer our responses below.

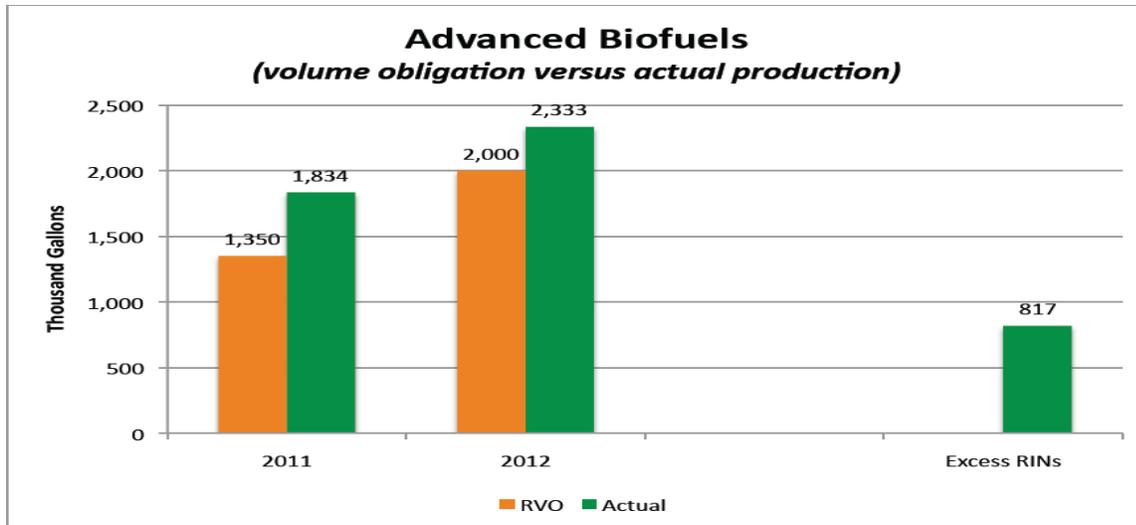
1. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

Generally, EPA's annual RVO-setting process works well, with a few exceptions. The issue of timeliness is important to the private sector, both from a biofuels and petroleum fuels perspective. The Energy Independence and Security Act (EISA) created specific time requirements for the EPA to establish the RVO for the following year. For conventional biofuels, advanced biofuels and cellulosic biofuels the deadline for setting the requirement is November 30 of the year prior to the year the RVO is applicable. For the Biomass-based Diesel program, EPA is required to set the RVO 14 months prior to date the RVO will apply (October 31 – 14 months before the RVO takes effect). So, if EPA were timely with the RVO announcements, the currently pending 2013 RVO's would have been announced last November; the 2014 RVO's for conventional biofuels, advanced biofuels and cellulosic biofuels would be announced on or before November 30, 2013; the 2014 RVO for Biomass-based Diesel would have been announced last October; and the 2015 RVO for Biomass-based Diesel would be announced on or before October 31, 2013.

We believe the fuels industry would be in a much better position to successfully implement the RFS if the RVO were finalized in a timelier manner. One suggestion we have offered to help resolve this concern is for the EPA to propose and finalize RVOs for multiple years simultaneously. For example, we have asked that the EPA propose its 2014 and 2015 volumes at the same time.

Under the program, EISA set forth specific volume standards for both cellulosic (D3, D7) and conventional renewable fuels (D6) through 2022. Biodiesel, which is a Biomass-Based Diesel (D4) within the Advanced Biofuel (D5) category, has a minimum volume standard set through 2012. The minimum volume for Biomass-based Diesel is 1.0 billion gallons. Starting in 2013, there is no automatic increase to the Biomass-based Diesel requirement. Rather, EPA proposes a rule and our industry works with EPA, the White House and Obligated Parties to set future volume requirements

Since 2010, under RFS2, the program has delivered more than 2 billion gallons of Advanced Biofuels to consumers in the U.S. marketplace and more than 800 excess RINs.



- 2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit’s decision to vacate EPA’s 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?**

NBB does not have a position on the annual RVO for cellulosic biofuels. However, NBB does not believe the EPA should necessarily be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic volumes. Biodiesel can be used as a D4 RIN (Biomass-based Diesel), a D5 RIN (Advanced Biofuel); and a D6 RIN (conventional biofuels). In 2013, it is anticipated we will produce between 1.6 – 1.9 billion gallons of biodiesel. Because of biodiesel’s higher energy content, this converts to as much as 2.85 billion RINs (1.9 billion gallons x 1.5 = 2.85), which can be used in the D4, D5 or D6 pool. Other fuels such as renewable diesel also produce RINs that qualify for the D4, D5 and D6 pools; and sugarcane ethanol produces D5 and D6 RINs. This means that the advanced biofuels industries are already producing at more than the minimum required “advanced” numbers under the program.

Rather than “require” EPA to “reduce the advanced and total renewable fuel volumes when it lowers the cellulosic volume,” we would urge that the EPA be allowed to continue to exercise its “reasonable” discretion on setting the appropriate annual advanced volume amount consistent with the U.S. Court of Appeals for the District of Columbia Circuit, which rejected a challenge by the American Petroleum Institute to reduce the Advanced Biofuels volume requirement under the Renewable Fuel Standard (RFS).

The case involved the 2012 standards, and the court clarified two issues related to the RFS:

1. It upheld EPA's authority to maintain the "Advanced Biofuels" program of the RFS, even if the "Cellulosic Biofuels" program is reduced; and

2. It determined that the EPA has the authority to set the cellulosic program at a reasonable volume so long as EPA's determination of the volume requirement is adequately grounded.
3. On the cellulosic component, the court ruled that the EPA has the authority to establish reasonable cellulosic requirements but vacated the specific 2012 volume, ruling that the requirement was not sufficiently grounded in facts regarding expected production.
4. Regarding the advanced requirement, the court stated: "The [EPA] adequately grounded its determination in historical data on sugarcane ethanol imports and biodiesel production, as well as governmental and non-governmental projections for future production of those fuels. See 77 Fed. Reg. at 1,331-37. We find especially relevant EIA's projection of 300 million gallons of sugarcane ethanol imports for 2012 and EPA's estimation of 2.4 billion gallons in U.S. biodiesel production capacity. See id. at 1,332, 1,334. These data plausibly suggest that some combination of the two sources of advanced biofuels will be available to make up for the shortfall in cellulosic biofuel. Moreover, in sharp distinction with cellulosic biofuel, there appears to be no great obstacle to the production of advanced biofuel generally ..."

NBB supports EPA's proposal to maintain the statutory volume for Advanced Biofuels in 2013. In the future, if EPA should decide a reduction is warranted, it must meet the appropriate procedural and substantive requirements in the statute, and as directed by the US Court of Appeals for the District of Columbia. Any proposed reduction in the Advanced Biofuel volume should not be based strictly on a proposal to reduce the cellulosic biofuel standard. The biodiesel industry has exceeded its volume obligations each year since the RFS2 was implemented, and we have accounted for the vast majority of Advanced Biofuel produced in the U.S. to date.

3. **How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?**

The National Biodiesel Board (NBB) commends EPA on its efforts to address concerns regarding RIN liquidity that has recently hampered the biodiesel market. EPA has undergone extensive stakeholder outreach in developing its Proposed Rule for the RFS Renewable Identification Number (RIN) Quality Assurance Program, 78 Fed. Reg. 12,158 (Feb. 21, 2013) (referred to as "Q-A-P Proposal"). While NBB continues to believe that a strong enforcement program is the solution to address concerns regarding fraudulent RINs, it has taken numerous actions to promote RIN integrity. NBB does not oppose the creation of an affirmative defense from civil penalties for parties obtaining invalid RINs in good faith, and also generally supports EPA providing guidance to the industry as to the level of due diligence that is required to constitute "good faith." NBB also generally supports the additional proposed revisions that will better address potential violations of the regulations downstream of RIN generation.

To review NBB's complete comments to the EPA on its Proposed Rule for the RFS Renewable Identification Number (RIN) Quality Assurance Program, 78 Fed. Reg. 12,158 (Feb. 21, 2013) (referred to as "Q-A-P Proposal", (attached).

As EPA finalizes the rule it must keep in mind its obligation to ensure that the mandated volumes are met. Additionally, the auditor charged with implementing the Q-A-P should be truly independent from the parties it audits, but also from the RIN program in general. More important, as NBB has consistently indicated to EPA, any "affirmative defense" should relate solely to civil penalties, and should not affect RIN replacement, which is properly the ultimate responsibility of the obligated party. Seeking to impose any RIN replacement on the auditor will create additional costs ultimately borne by the renewable fuel producer, undermining the purposes of the quality assurance program to level the playing field and, in fact, may engender more opportunities for fraud, rather than less. As the rule is finalized, it is important to remember that it was the petroleum sector – the obligated parties under the RFS – that pressed for the RFS to include a "liquid" RIN market to provide more flexibility for compliance. EPA should take the time to ensure that reforms will be workable and effective, and not merely rush through the rulemaking process in response to complaints from market stakeholders.

The RFS is still a relatively new program and strong enforcement will create disincentives for criminals to try to manipulate the system. Our industry took very aggressive measures working closely with EPA and the petroleum industry to address fraudulent RINs. We developed and deployed a robust and comprehensive RIN Integrity program that has effectively addressed the problem. Two of the three cases of fraud were resolved in court and two criminals are sitting in jail. The third case is pending.

Perspective is important, and we must remember that the three cases are isolated and that the vast majority of biofuel producers are honest companies producing quality fuels for the U.S. marketplace. What we have seen is no different from fraud in other financial markets where criminals have come in and found a way to take advantage of the system. The only good news with these cases is that the scam has now come to light and will be very difficult to repeat going forward.

Current RIN Fraud issues took place in 2009, 2010 and 2011. Public EPA enforcement began in late 2011. Now in 2013, most obligated parties have taken steps to eliminate invalid RINs from their compliance reports. In 2012 and 2013, obligated parties have been doing what they should have been doing in 2009, 2010 and 2011. They have been inspecting and requiring audits of the biofuel producers from which they purchased biodiesel and RINs.

We want to highlight the work NBB has done to create NBB's RIN Integrity Task Force. When created it was comprised of biodiesel producers, petroleum companies and independent third party blenders and marketers. We also had the benefit and distinction of having participation from staff members from the EPA. At its core the task force assisted in moving all industry partners down the path of focusing on industry solutions to addressing RIN Fraud. The task force was the first to outline the steps of an industry audit – where the task force agreed to the appropriate elements of a RIN audit. We are pleased the EPA largely included in its proposed rule similar elements of what has become known as the "Quality Assurance Plan" or Q-A-P.

The NBB supports the concept of a Quality Assurance Plan – one that is implemented by an independent auditor.

Specifically, we are not interested in seeing obligated parties being fined or penalized for unwittingly using RINs they thought were valid – and we have been steadfast in our commitment to creating an affirmative defense for obligated parties and other in the chain who handle or transfer RINs. However, by the same token, we believe obligated parties should be required to exercise an appropriate level of due diligence before they submit RINs for compliance. We are committed to ensuring that the gallons required under the RFS – the real gallons -- are produced and sold in the U.S. as envisioned by Congress.

We are concerned about the requirements on the Auditor. The EPA has a difficult task in creating the appropriate balance within the proposed rule – relating to the role of the auditor – the entity that will stand in the place of EPA to determine whether RINs are valid – or more importantly – invalid.

In order for them to do so in the purest way possible, the auditor should maintain a level of independence in the fuels marketplace. This is important. An auditor – the company that implements that Q-A-P – will be conflicted if the company also has a monetary gain from the RINs that the auditor deems valid. By definition an auditor must be independent.

In the renewable fuels space a number of consulting companies are in the business of assisting biofuels companies and providing EPA compliance services. Many of these same companies provide services that include the selling, buying, trading and separating RINs for biofuels producers and others. In the last 12 months or so, some of these companies have been providing auditing services on behalf of either the biofuels sector or the petroleum sector. As you know, our industry has been completing a number of private sector audits and other programs to determine whether RINs can be used for compliance. Without calling into question the veracity of any of these companies, NBB is concerned about the independence of auditors. There are billions of dollars at stake annually in RIN transactions. If we don't have independent auditors, we may be expanding rather than curtailing the opportunity for fraud under the RFS, and we have urged the EPA to establish strong requirements to ensure objective, independent auditing.

Finally, information transparency is important, not only to the biodiesel industry, but to all sectors of the fuels and biofuels marketplace. Currently the market lacks one major component that can assist all in doing a better job of self-policing fraudulent activity. That component is information. Nearly every participant in the RFS program, either required or voluntary, would be better able to determine the validity of RINs generated, assigned or retired if all participants had access to more information on a consistent basis.

Today EPA publishes monthly RIN generation reports. The information is useful, but the industry needs more information to gain better perspectives on what is really happening in the marketplace. For example, in order for the biofuels sector and the companies that use our products to better read the market it is useful to match up information from the supply side with information from the demand side. On the supply side, information disclosing the volume of gallons of biodiesel, or all biofuels for that matter, together with the corresponding RINs being

generated and separated on a consistent basis each month, and making this information available to all in a consistent, timely manner, would provide the entire system with better information on the RINs markets. This information should be made available on the same day of each month, every month and be made available on a regional basis, rather than a plant-by-plant basis, consistent with the Petroleum Administration for Defense Districts (PADDs).

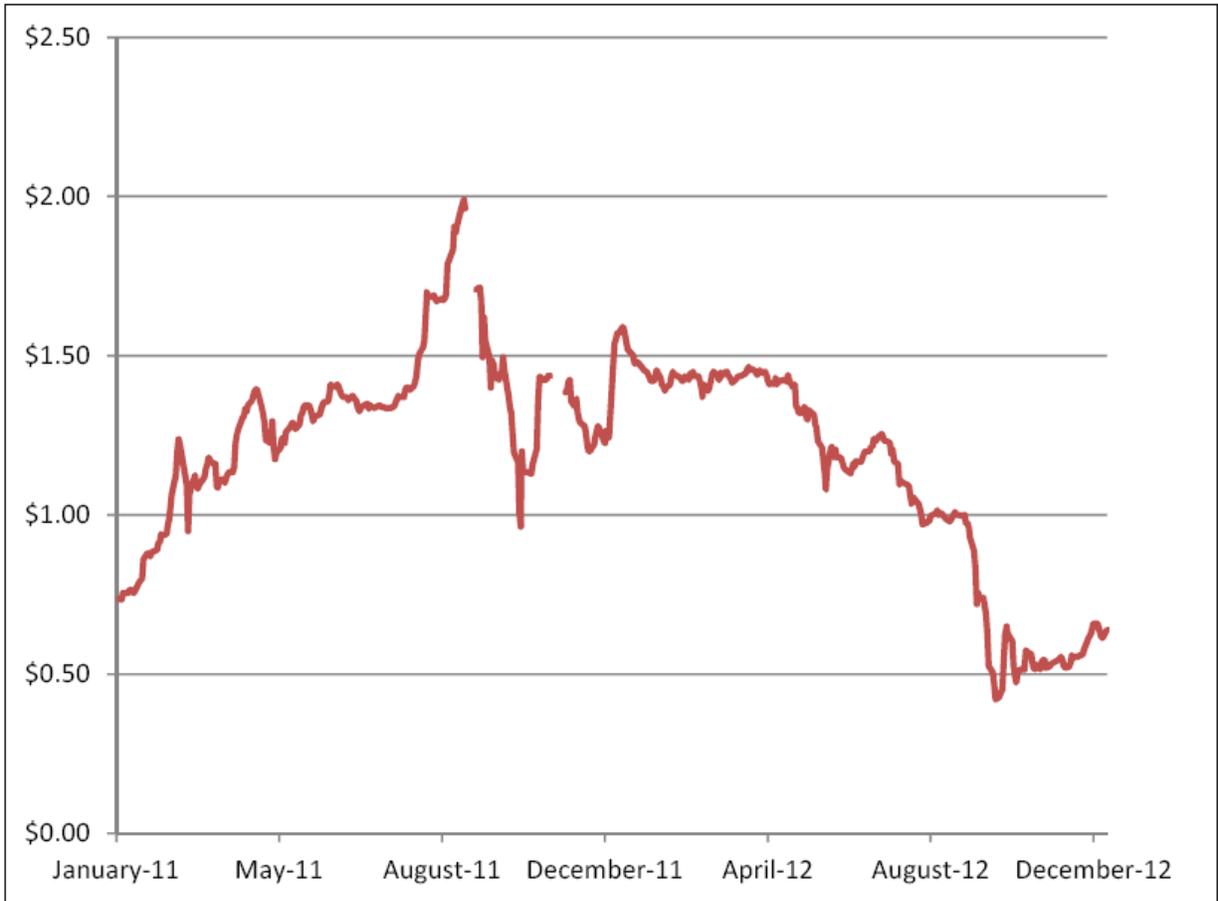
Additionally on the demand side, information on the volume of biofuels, together with the actual number of RINs assigned and retired on a monthly basis – those RINs that are being used or set aside to be used – by obligated parties for compliance should also be made available on the same day of each month, every month and be made available on the same regional basis consistent with the same PADD system.

Making this information publicly available would provide dramatically more useful information to determine whether monthly production and consumption is in line with what is possible and more importantly, what is likely from each PADD. If there are anomalies in the information, then the marketplace will readily identify irregularities. In addition this type of information will likely reduce speculation of whether there are too many or too few RINs available.

Finally, it is anticipated that EPA will finalize the regulatory rule this fall. The proposed rule created a temporary framework that is in place for 2013, so obligated parties are already benefitting from the audit program. With these measures in place, we are confident that the issue of RIN fraud for biodiesel will be effectively addressed.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

NBB cannot speak to the rise in ethanol RIN prices. However, since the Biomass-based Diesel (BBD) program began in 2010 under the RFS, D4 RINs have remained relatively stable. See the “Spot BBD RIN Prices, 2011-2012” Chart from the recent CRS Report.



Source: "Ethanol and Gasoline Component Spot Market Prices," *OPIS Ethanol & Biodiesel Information Service*, various editions (January 10, 2011-January 7, 2013).

Notes: Average of daily high and low prices reported by OPIS. Most biofuels are sold under contract, and thus spot prices may not reflect the value of all RINs traded at any given time.

However, in recent months, biodiesel RIN prices (D4) have followed ethanol RIN prices (D6) higher. The reason for this is that the annual standards are nested; the same D4 RIN can be used to comply with the Biomass-based diesel, advanced biofuel and conventional biofuel obligation. So a D4 RIN that can be used to replace a D6 RIN will trade at a price that is nearly the same as the D6 RIN.

RINs are an excellent example of how the RFS program creates added flexibility for obligated parties and discretionary blenders. The standard allows obligated parties to purchase either qualifying fuel (wet gallons) to meet their volume obligation or to acquire an equivalent amount or number of RINs.

It is evident that with the implementation of the RFS2 and development of EMTS that RIN values are working to provide a positive financial market for both obligated and non-obligated parties to use and sell biodiesel. RINs have become a valuable asset. A discretionary blender can use the value to offset the cost of wet gallons as well as any incremental cost they might face, since they do not have to retire the RIN and can instead sell the RIN back into the marketplace.

This practice can substantially reduce the out-of-pocket expense for the wet gallon. The result is a significant increase in the blending margins and an increased profit opportunity. Many, if not almost all, share a portion of this savings with the end consuming market (i.e. diesel consumers). The end result is an increased amount of biodiesel available at a price that is both profitable and marketable. Again, the system works as intended. Here are comments from various marketers regarding the importance of RIN's and how they are used to create cost savings to their customers. This is happening without any measurable loss in energy content between biodiesel and petroleum diesel:

Michael Whitney, Loves Truck Stops:

“The impact on biodiesel blending/use on diesel prices has been significant albeit indirect. Over the course of the past year delivered biodiesel prices have been lower than diesel prices. Accordingly, wholesale marketers of diesel have been able to offer biodiesel blends at the rack at a discount to clear diesel (diesel without biodiesel). These discounts have varied over the course of the year from as little as \$0.0025 (1/4 of a cent) to as much as 4-5 cents per gallon.”

Carlo Luri, General Manager of Bently Biofuels in Minden, NV.
(Feb. 24, 2012, The Record Courier, Nevada)

“The reason we invested in biofuels in the beginning is that we expected fuel prices to go up long term,” he said. “When you have a commodity like fuel impacted by so many different things in the world, it's not just the continued escalation of prices, but price volatility. The price of fuel can jump up, but it also can come down just as fast. We have to be able to weather the upturns and the downturns. We've been able to sell biodiesel for less than petroleum for almost a year now.”

With a retail station located off Buckeye Road, Bently Biofuels offers ethanol and biodiesel blends. Their biodiesel is made by refining used cooking oil collected from local restaurants.

“Looking at the pricing structure right now, the higher the percent of biodiesel, the lower the price,” Luri said.

In other words, the company's B5 blend, with 5 percent biodiesel and 95 percent petroleum, mirrors the greater oil market. On Monday, the blend, which can be used in any diesel engine, was selling for \$3.96 a gallon. On the same day, Bently's B20 blend, which is used in government fleets and newer pick-up trucks, was selling a cent lower than B5 at \$3.95 a gallon, and B50 was being offered at \$3.91 a gallon.

B100, which is primarily offered in the summer, would be selling for about \$3.85 a gallon in the current market, Luri said.

Kevin Cassidy, Sapp Brothers Travel Centers, Peru, IL

“In my view, RIN's have created stability in the sale and use of biodiesel. Tax incentive programs offered either at the state or federal level are precarious, and do not serve the same

function as the RIN within the RFS. I am more optimistic than ever that this system can create some permanence for biodiesel because we can sell a product that qualifies for the program and, most important to our business, makes economic sense for both our company and our customers.”

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

In the D4 RIN market, the price of the RIN has followed closely the fundamental cost of adding the appropriate blending infrastructure that assists in adding biodiesel to diesel fuel.

The Biomass-based Diesel program has worked well and has effectively moderated the price of the RIN. First, back in 2007 when we worked with Congress to draft the legislation we made responsible choices about the structure of our program. The Biomass-based Diesel program is structurally different than other sections of the RFS in a fundamental way.

First, we don't have an automatic mandate on the annual volume requirement. In other words, the statute does not dictate what our volume requirement will be each year. Rather, the statute set a minimum amount of 1.0 billion gallons in 2012. To increase the requirement, we must work with EPA, the petroleum sector and others each year -- through the regulatory process -- to establish the appropriate volume. In 2013, EPA set the volume for Biomass-based Diesel at 1.28 billion gallons -- adopting an increase of 280 million gallons above the minimum requirement of 1.0 billion gallons. This represents modest, sustainable and achievable growth for the biodiesel industry, and we are already on track to exceed the requirement and produce some 1.5 billion gallons in 2013. Currently, we are working through a similar process to determine the appropriate volume level for 2014 and perhaps 2015.

In any event, the annual RVO process for biodiesel has the effect of stabilizing the program and the RIN price for D4 RINs.

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

We are not aware of any obligated parties that are not able to generate sufficient D4 RINs. However, generally, the NBB does not support any changes to how obligated parties meet their annual volume obligation. Unless obligated parties are required to actually purchase the fuel required under the statute, EPA should not eliminate or substantially change the RIN requirements.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

No. While consumer demand for fuels has dropped due to weak economic conditions and better fuel economy, the RFS is simply changing the mix of fuels provided to consumers and creating cleaner, renewable blends that are helping consumers by diversifying the marketplace, creating jobs, increasing domestic refining capacity, and reducing harmful emissions.

We hope you find our suggestions helpful. Thank you for your consideration, and please don't hesitate to contact me with any questions or for further comment.

Sincerely,



Anne Steckel
Vice President of Federal Affairs

The Honorable Fred Upton
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via email at: rfs@mail.house.gov

July 26, 2013

Dear Chairman Upton and Ranking Member Waxman:

Novozymes, a leader in biotechnology and innovation, is pleased to respond to your request for information regarding implementation of the Renewable Fuel Standard (RFS). We strongly believe that the standard as written is working because Congress designed it with immense flexibility.

We disagree with the premise that “it has been more than five years since the RFS was last revised, and there is now a wealth of actual implementation experience with it.” The initial regulations implementing the RFS were not final until 2010 and several pathway approvals are still pending. Yet, renewable fuel has displaced petroleum in 10 percent of our gasoline supply, with 13 billion gallons in 2012. That production supported jobs for, and employed, more than 360,000 Americans, while reducing the need for imported oil by more than 462 million barrels. In 2012, using renewable fuel slashed greenhouse gas emissions by 33.4 million metric tons.

The RFS has spurred billions of dollars of investment in the renewable fuel sector, benefiting drivers, rural communities and our nation’s economy. Novozymes and its partners alone have invested more than \$1 billion in bringing advanced renewable fuels and technologies to market. In Virginia, for example, a company called Fiberight has built a waste-to-fuel plant, converting household trash into fuel that powers our cars, trucks and buses.

Many first generation renewable fuel producers are first-movers and investors in second-generation fuels and technologies, and the major growth is now in cellulosic and advanced fuels. Today, there are more than 250 facilities in 36 states across the country.

In addition, the RFS has accelerated cutting-edge research and development. Advancements in enzyme and catalyst technologies have driven down the costs of operations for businesses and the cost of feedstock – both of which translate into lower prices for consumers. Over a mere five-year period, Novozymes’ work has reduced the cost of enzymes required for advanced biofuels by 90

percent. The industry continues to make push towards producing cellulosic biofuel at prices competitive with petroleum fuels, as recognized in a number of independent financial¹ and academic studies.²

Implementation and Administration of Cellulosic Biofuels

The RFS's flexibility is a large part of this this success. Recognizing conditions change over a 15-year period, Congress smartly built flexibility into the Standard, ensuring it can respond to the market and keep benefitting consumers.

EPA has the regulatory authority to adjust the RVOs as necessary to properly forecast future production in a way that continues to drive development of the advanced and cellulosic biofuel producers and is not burdensome to obligated parties. This process gets more efficient every year. Stakeholders can request waivers from EPA and have exercised that ability. EPA has continuously approved and adjusted pathway options for multiple processes, feedstocks and end products. Renewable Identification Number (RIN) fraud and accounting was addressed successfully with input from stakeholders.

The numbers speak for themselves: The RFS is working. The Standard is adjusting to the market conditions. Consumers are benefitting.

EPA should resist efforts the obligated parties' push to reduce RFS obligations based on blendwall claims. The blend wall does not exist. Multiple avenues exist for blending additional volumes of biofuel into the nation's fuel supply. E15 blends are approved and ready for use, and production of flex fuel vehicles ("FFVs"), that can use various blends of renewable fuels up to 85%, continues to increase. These options, combined with the introduction of new "drop-in" fuel molecules, provide the flexibility needed for RFS compliance. Obligated parties have had more than five years to begin establishing the infrastructure necessary to ensure renewable fuels can reach consumers – and consumers could in turn benefit – but have taken few steps to do so. We cannot now reward them for inaction.

EPA should not be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volumes. The Agency's resources are better-spend researching and approving more cellulosic and advanced biofuel pathways. Expediting the approval of new

¹ Cellulosic Ethanol Heads for Cost-Competitiveness by 2016, <http://about.bnef.com/press-releases/cellulosic-ethanol-heads-for-cost-competitiveness-by-2016/>

² Brown, T., Brown, R. "A review of cellulosic biofuel commercial-scale projects in the United States." *Biofuels, Bioprod. Bioref.* (2013) DOI:10.1002/bbb.1387

feedstocks, will help the industry produce cellulosic biofuel volumes, such as the recent final rule on giant reed and napier grasses.

Finally, Congress needs to understand its budget decisions have an impact on EPA's ability to implement the Standard. In its proposed Department of the Interior, Environment, and Related Agencies Appropriations Act for Fiscal Year (FY) 2014, the U.S. House Appropriations Subcommittee for Interior, Environment, and Related Agencies reduced EPA's overall funding by 34 percent from FY 2013 levels and capped personnel levels for the agency at 1992 levels. In doing so, Congress is taking away the resources EPA needs to keep the RFS nimble and flexible.

Renewable Identification Numbers

We know the Committee is concerned about RINs. We are, too. But importantly the rapid increase in RIN prices in 2013 has occurred in the absence of a final rule on 2013 RVOs. RIN prices for conventional biofuels (corn ethanol) began to climb in late January, *following* the publication of the proposed 2013 RVOs. Prices peaked in early March, *following* the compliance deadline for the 2012 RVOs.³ RIN prices have again peaked in July, after the final rule for the 2013 RVOs was transmitted from EPA to the White House Office of Management and Budget for interagency review. This trend suggests regulatory uncertainty is contributing to speculative activity in RIN trading.

The delay in the rulemaking for the 2013 RVOs could have been caused in part by legal and legislative challenges to the RFS by petroleum refiners and producers, including last year's waiver debate. Lack of certainty has a negative effect on RIN prices and the commercialization of cellulosic biofuels. It chills investment in the industry; further, it slows other regulatory rulemaking procedures necessary for the industry's progress toward commercial scale production. One of the most positive actions the Committee can take is to urge EPA to quickly issue the 2013 and 2014 RVOs.

The RFS is the nation's only national energy policy. Tamper with it and we will dampen the country's ability to lead on energy development.

The RFS creates jobs, wealth for families and communities and savings for drivers. It is the single most effective and important federal policy in place to drive capacity building in the renewable fuels sector. Congress designed a smart, flexible Standard and, as its rules are only three years old, we encourage it to let them work. Cellulosic and advanced biofuels are stepping into full-

³ Energy Information Administration, Today In Energy, "What caused the run-up in ethanol RIN prices during early 2013?", June 13, 2013, at <http://www.eia.gov/todayinenergy/detail.cfm?id=11671>.

scale deployment. Just last year, for example, Novozymes invested more than \$200 million in the US and inaugurated the country's largest enzyme plant dedicated to renewable fuels in Blair, Nebraska. The advanced manufacturing plant created 100 career positions and 400 construction jobs. Biorefineries in United States, China, Italy and Brazil will use enzymes made at our Nebraska plant. The recently-opened M&G facility in Crescentino, Italy is using enzymes we make in Blair.

Our US investment – and that of many industry peers – is driven in large part because of the RFS. Cellulosic biofuels remains our largest global R&D effort with more than 150 employees. The EPA is providing consistent, balanced implementation of the RFS. Advanced biofuel developers and investors are spending capital in the space. Consumers will experience the benefits.

Thank you for the continued opportunity to discuss our nation's energy policy. We look forward to working with you as this process moves forward. If there is additional information Novozymes can provide, please do not hesitate to ask.



Cc: Congressman Lee Terry
Congressman G.K. Butterfield



**OUTDOOR POWER EQUIPMENT
INSTITUTE**

July 17, 2013

via electronic mail rfs@mail.house.gov

The Hon. Fred Upton, Chairman
Energy & Commerce Committee
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

The Hon. Henry Waxman, Ranking Member
Energy & Commerce Committee
U.S. House of Representatives
2204 Rayburn House Office Building
Washington, DC 20515

re: White Paper #5 (Implementation Issues) on RFS – Questions for Stakeholder Comment

Dear Chairman Upton and Ranking Member Waxman,

I am pleased to provide comments in response to the committee's 5th and final paper on the current and future state of the Renewable Fuel Standard. I would also note that the following input is to be considered in conjunction with our response to the 1st committee paper "Blend Wall/Fuel Compatibility Issues" (April 4, 2013).

The Outdoor Power Equipment Institute (OPEI) is a major international trade association representing the manufacturers and their suppliers of small engines, utility vehicles, and consumer and commercial outdoor power equipment. These products are commonly found in most American households and include products such as lawnmowers, garden tractors, trimmers, edgers, chain saws, snow throwers, tillers, leaf blowers, generators, and powerwashers. While small engines and outdoor power equipment consume a small percentage of the nation's fuel supply, their ownership by the American consumer is ubiquitous. Additionally, many of these same products are made for commercial use by contractors, farmers, utility crews, parks and recreation, states and municipalities, and fire and emergency rescue personnel. Many of these products have long service lives which can exceed a decade, resulting in an estimated 250 million legacy products currently in use.

Our members understand and appreciate the work Congress has done on energy independence, reducing demand on foreign sources of oil while increasing the use of biofuels. Our members offer a full range of products powered by different sources or fuels including battery, electric, propane, CNG, diesel and gasoline electric hybrids, solar and biodiesel, as well as gasoline with 0 to 10 percent ethanol. OPEI members are not anti-ethanol, but outdoor power equipment and small engines are not designed, warranted, or EPA-approved to operate on gasoline containing more than 10% ethanol. OPEI fully supports the development and use of biofuels, from any feedstock, which are intended for use as "drop-in" fuels. Drop-in fuels by definition meet existing gasoline specifications and are ready to "drop-in" to infrastructure, minimizing compatibility issues. These fuels are capable of satisfying the additional growth in biofuel use, while also providing a safe and highly performing general purpose fuel for both legacy and newly manufactured small engines and outdoor power equipment. As an example, OPEI-member engine manufacturer Briggs & Stratton has conducted testing with a drop-in isobutanol blended gasoline which demonstrated evidence that such fuels can provide the performance and operational criteria necessary, without demonstrating any negative effects.

Most recently, OPEI provided comments on EPA rulemaking for Tier 3 fuel standards (attached)¹ which call for comments on a proposed E15 certification fuel for motor vehicles. In these comments, OPEI makes clear its concerns with certification fuels containing greater than 10% ethanol, and recommends a continued harmonization path with California Air Resources Board (CARB) E10 certification test fuel for 2020 and later model years. Furthermore, in concert with EPA/CARB E10 certification test fuel harmonization, OPEI also recommends that longer-term certification test fuel rulemaking for small spark-ignited engines be postponed until the future of the RFS and retail fuel marketplace is clear.

OPEI also recently filed comments on EPA rulemaking for technical amendments to misfueling mitigation plans for E15 (attached)², in which OPEI raised concerns with the inadequate misfueling protections provided by EPA to-date, as part of the agency's obligations under the partial waiver for E15. OPEI asks that the committee review these recent comments to EPA as they illustrate OPEI objections to what can only be characterized as the premature introduction of E15 into the general fuel supply.

The RFS was based on market assumptions which do not reflect current (or near-term) market realities; annual domestic gasoline consumption is decreasing instead of increasing, flex-fuel vehicle demand is below the estimates forecasted to produce demand for mid-level and high-ethanol blends, and advanced and "drop-in" biofuel production has not materialized. In the absence of these market factors, EPA was compelled to grant the partial waiver for E15 to meet the statutory targets of the RFS, without proper consideration of all the concerns raised by OPEI and others. OPEI is equally concerned that with gasoline consumption falling, E15 will not provide compliance with current RFS targets and will require EPA to approve the introduction of incremental increases of ethanol into the general fuel supply, complicating further both the compliance requirements of manufacturers and misfueling risks to consumers of outdoor power equipment and small engines. The certain misfueling will result in economic harm to consumers and manufacturers, voided product warranties, and potential injury to consumers.

For these reasons the OPEI and its members urge the Energy & Commerce Committee to work on reform legislation to align domestic goals for biofuel use with the market's ability to distribute, retail, and consume such fuels. We recommend that reform legislation serve to repeal the partial waiver for E15, and maintain gasoline blended with only up to 10% ethanol as the general purpose domestic fuel. The legislation should also require that all considerations to increase domestic biofuel levels in the future be subject to EPA rulemaking whereby the market's ability to safely distribute, retail, and consume such fuel is determined and planned for.

We appreciate the opportunity to provide comments to the committee.

Best regards,



Kris Kiser
President & CEO
kkiser@opei.org

cc: Members of the House Committee on Energy & Commerce
attachments

¹ OPEI letter, July 1, 2013 (EPA-HQ-OAR-2011-0135 – Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards)

² OPEI letter, July 15, 2013 (EPA-HQ-OAR-2012-0401 – Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards)



Sent Electronically

July 23, 2013

Honorable Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn HOB
Washington, DC 20515-6115

Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
2125 Rayburn HOB
Washington, DC 20515-6115

Re: Potential RFS Impacts on Pine Chemicals Industry

Dear Chairman Upton and Ranking Member Waxman:

The **Pine Chemicals Association** would like to thank the House Energy and commerce Committee for their recent review of the federal renewable fuels standard (RFS) and we appreciate the opportunity to add our comments to this very important policy. Thank you for accepting comments from stakeholders such as our Association which represents the pine chemicals industry.

The pine chemicals industry in the United States utilizes co products from pulp mills that supply the papermaking process. These co products are the natural chemicals of the pine tree. The industry employs complex distillation processes to separate and purify "value add" chemicals which are then sold "as is" or further processed into an array of useful chemicals. Nearly 1900 workers are employed in pine chemical production in the United States with an annual payroll of approximately 93 million dollars. Products valued at almost \$ 2 billion are shipped annually and imports and exports of our products produce a trade surplus of almost \$300 million each year, contributing positively to our economy. Our industry has operated in the US since the mid 1940's but with substantial investments in R&D, has grown by taking advantage of many new products and technology innovations.

Our concern is the provisions in the RFS which encourage the use of bio-based feed stocks as fuels and provides both mandates and incentives for the use of biomass for fuel. Our primary feed stocks, Crude Tall Oil (CTO) and Crude Sulphate Turpentine (CST) are in finite supply and as co-products have little elasticity in supply. If our raw materials are artificially valued based on the RFS incentives or mandates our industry would likely be impacted in a very negative way.

CTO in particular can be used as a biofuel or burned directly as is, but we would contend that this is a very inefficient use of the material. If this use is encouraged, the consequence would be quite negative for many jobs, the economy and our industry. Such a change in the use of CTO would provide little or no advantage to the environment as replacement chemicals for our

primary markets are generally petroleum fuel based, thereby completely defeating the purpose of utilizing this biomass as a fuel in the first place.

CTO is normally fractionated into rosin, fatty acids and other co-products. These in turn are used in printing inks, paints and coatings, adhesives, lubricants, synthetic rubber, oilfield chemicals, paper sizing, food additives and many other applications. Residues remaining after all value add chemicals are removed, are then utilized as a fuel, generally in the processing plants.

We are not asking for assistance, only a level playing field to allow our critical raw material to be sold based on market demand, without artificial influences on the market.

While the current Renewable Fuels Standard does not specifically call for the use of our feed stocks, neither are they excluded. EPA reviews applications for RFS "pathways" and determines their eligibility on an individual basis. This classification could potentially threaten the viability of our industry. That is why a level playing field should be maintained. We urge you to allow normal economic competition, not government incentives to set this market.

We respectfully request the RFS policy clearly direct that CTO and CST should not qualify under the RFS2 regulations as eligible materials for fuels or for the production of cellulosic biofuels, biodiesel, or advanced biofuels. Valuable biomass materials, such as our feed stocks, can be better utilized in a free market to produce value-added chemicals or products and should not be burned as a fuel simply to satisfy one policy goal at the expense of another.

Our industry is a long standing positive example for the development of high technology chemicals from renewable sources and for the efficient use of biomass raw materials. We urge you take this into consideration as you develop this legislation. If you have any questions, or if you would like to discuss these comments in more detail, please contact me at (904) 434 0249. My email is cwmorris@pinechemicals.org .

The Pine Chemicals Association Inc. is a non-profit organization representing CTO and CST processing companies in the United States and around the world as well as other producers and consumers of pine chemical products.

Respectfully,



Charles W. Morris, President and COO

July 26, 2013

The Honorable Fred Upton
Chairman
Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry A. Waxman
Ranking Member
Energy and Commerce Committee
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Submitted via email at: rfs@mail.house.gov

RE: POET-DSM Advanced Biofuels, LLC comments on the U.S. House of Representatives Committee on Energy and Commerce white paper on the Renewable Fuel Standard (RFS) and “Implementation Issues”

Dear Chairman Upton and Ranking Member Waxman:

POET-DSM Advanced Biofuels, LLC (hereinafter, “POET-DSM”) is pleased to comment on the white paper on the RFS and “Implementation Issues” that the Energy and Commerce Committee released on July 11, 2013 (hereinafter, White Paper).¹ The White Paper is the fifth in a series of analyses by the Committee on the RFS.

About POET-DSM

POET-DSM Advanced Biofuels is a 50/50 joint venture, created by POET, LLC (“POET”), based in Sioux Falls, South Dakota, and Royal DSM (“DSM”), based in the Netherlands. This joint venture is targeted to begin operation in early 2014 of its first commercial-scale cellulosic ethanol facility, located in Emmetsburg, Iowa, called Project LIBERTY. The capital expenditure by the joint venture in Project LIBERTY amounts to approximately \$250 million.

DSM is a global life-sciences and materials-sciences company. DSM has more than 140 years of experience in biotechnology development and a proven track record of scaling up

¹ See “Renewable Fuel Standard Assessment White Paper: Implementation Issues,” available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20130711RFSWhitePaper5.pdf>.

industrial operations. The company is the industry technology leader in converting cellulosic biomass to ethanol using proprietary enzymes and yeasts.

POET, one of the largest ethanol producers in the world, is a leader in biorefining through its efficient, vertically-integrated approach to production. The 25+ year-old company produces more than 1.6 billion gallons of ethanol annually from 27 production facilities nationwide. POET is also the world's largest producer by volume of distillers' dried grains with solubles (DDGS), a highly nutritious animal feed produced as a co-product of ethanol production.²

The POET-DSM joint venture intends to extend cellulosic technology to the remaining 26 plants in the POET network and to license this technology to build other plants in the United States and globally.

Preface

The RFS is increasing the use of domestically-produced renewable fuels and meeting Congress' goals of enhancing our nation's energy security, providing fuel choices to the American public, developing a much needed source of rural employment, and reducing the emissions of greenhouse gases and other harmful pollutants from petroleum.

Ethanol's attractiveness as a domestically-produced, affordable, renewable, and environmentally-friendly fuel has led to a dramatic increase in its use and consequent production over the past decade.

Despite ethanol's many benefits, incumbent petroleum interests have been fighting the RFS for years and seek to impose an artificial "blendwall" capping the percentage of ethanol in gasoline at 10% by volume. However, after extensive study EPA approved the sale of E15 in October of 2010, and manufacturers like Ford and GM warrant their new vehicles for the use of E15.³ Furthermore, over 230 million vehicles on the road today are approved for E15 use.⁴ Moreover, over 14 million flex-fuel vehicles (FFVs) on the road today can use gasoline-ethanol blends that contain up to 85% ethanol (E85).⁵ Also, auto manufacturers have found that mid-level ethanol blends that contain 16-50% ethanol (MLEBs) provide a "sweet spot" in terms of a

² For more information on POET, see <http://www.poet.com>.

³ See, e.g., Martin Ross, *Ford, GM E15 warranties driver for adoption?* (October 4, 2012), available at <http://farmweeknow.com/story-ford-gm-e15-warranties-driver-adoption-0-63816>.

⁴ See, e.g., <http://www.growthenergy.org/ethanol-issues-policy/e15/>.

⁵ See, e.g., <http://www.ethanolrfa.org/pages/e-85> and <http://www.ffv-awareness.org/>.

cost-effective fuel that can provide octane benefits (enabling greater engine efficiency) and lower vehicle emissions.⁶

Growth in ethanol use is readily feasible—including increased use of E15, MLEBs and other ethanol blends—with relatively modest EPA and other governmental agency support (under existing statutory authority). Petroleum industry obstructionism regarding ethanol blends must be dismissed as an often factually-inaccurate attack designed to limit the market share of cost-effective, clean-burning, renewable biofuels.

POET-DSM appreciates the opportunity to comment on this White Paper. Responses to the specific questions raised in the White Paper are below.

Questions for Stakeholder Comment

- 1. Does EPA’s annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?***

EPA’s annual RVO-setting process as structured under the existing statute is suitable. However, EPA should publish rules for proposed and final RVO obligations in a more timely fashion each year, consistent with the statutory deadlines. EPA’s timeliness in publishing these RVO rulemakings should be improved to provide more certainty and stability to the market. But this does not involve a problem with the statutory design. No statutory changes are needed to address EPA’s annual RVO process.

- 2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit’s decision to vacate EPA’s 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?***

Regarding the first question in this set of issues, yes, cellulosic biofuel provisions in the RFS are working. Most significantly, cellulosic biofuels are now starting to scale up in terms of

⁶ Ethanol cost-effectively provides a high-octane, clean-burning fuel that is important for meeting recently-tightened corporate average fuel economy (CAFE) and greenhouse gas emissions standards promulgated by EPA. EPA has noted that MLEBs could “help manufacturers that wish to raise compression ratios to improve vehicle efficiency, as a step toward complying with the 2017 and later light-duty greenhouse gas and CAFE standards.” See EPA proposed rule, *Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards*, 78 Fed. Reg. 29,816, 29,825 (May 21, 2013).

commercial production. For instance, EPA has found that the “cellulosic biofuel industry in the United States continues to make significant advances in its progress towards large scale commercial production.”⁷ Various commercial-scale cellulosic facilities are coming online over the next year, including the POET-DSM Project LIBERTY. As noted above, the POET-DSM joint venture aims to extend cellulosic technology to the remaining 26 plants in the POET network and beyond that to other plants in the United States and globally. Statutory changes must not be made to weaken the biofuels use targets in the RFS, as doing so would jeopardize the production of next generation cellulosic biofuels. Importantly, the RFS *already contains* an adjustment mechanism whereby, if a projection of cellulosic ethanol production in an upcoming year is below the RFS target, EPA is required to reduce that target.⁸ No RFS statutory changes should be made.

Regarding the second question in this set of issues, yes, EPA has modified its cellulosic biofuel standard-setting process appropriately following the D.C. Circuit’s 2012 decision on this matter.⁹ Importantly, EPA’s standard-setting process was largely *upheld* by the D.C. Circuit. Furthermore, following that court decision, EPA has otherwise made the appropriate modifications to its methodology, as evident in EPA’s 2013 RVO proposed rule.¹⁰ In particular, in making its cellulosic biofuel projection in the RVO proposed rule, EPA carefully assessed projections of the Energy Information Agency (as required). EPA also interviewed cellulosic biofuel producers and tracked the progress of individual biofuel production facilities.¹¹ POET-DSM supports EPA’s rigorous cellulosic biofuel projection methodology, as conferring with producers and closely monitoring the production of individual facilities adds to the robustness of EPA’s projections.

Finally, EPA should *not* necessarily be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume. In particular, if sufficient domestic advanced biofuels are available, there is no need to reduce advanced biofuel and total renewable fuel volumes when non-cellulosic advanced biofuels can “make up the difference” if there is a shortfall in cellulosic biofuel production in any given year.

If statutory changes are made to reduce the RFS target volumes, this could have a severe, adverse consequence on renewable fuel producers and agricultural communities. Regulatory predictability (i.e. maintaining the RFS targets *as-is*) is essential to encourage continued investment in cellulosic and other advanced biofuels.

⁷ See EPA proposed rule, *Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards*, 78 Fed. Reg. 9,282, 9,284 (February 7, 2013).

⁸ See CAA § 211(o)(7)(D).

⁹ See *Am. Petroleum Inst. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013).

¹⁰ 78 Fed. Reg. 9,282.

¹¹ *Id.* at 9,290-94.

- 3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?**

EPA has proposed a voluntary RINs quality assurance program, which provides obligated parties an affirmative defense should RINs later be found invalid.¹² This proposal is becoming a de facto standard even before EPA's final rule is published. POET believes that a voluntary quality assurance program, if appropriately crafted, can effectively and efficiently address the concerns of RIN market participants.

Furthermore, concerns regarding RINs quality should not be overblown. As the Renewable Fuels Association (RFA) has noted regarding ethanol-based RINs, in the 32 months since the RFS2 regulations took effect, over 35 billion renewable fuel (D6) RINs were generated and to its knowledge not a single one has been alleged or found to be fraudulent by EPA.¹³ Rather, past concerns regarding RINs quality have focused on a limited number of entities in the biodiesel market.

- 4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?**

Because ethanol has provided a cost-effective fuel (as both an oxygenate and octane enhancer, as well as gasoline replacement), more ethanol has been produced than mandated by the RFS over the last several years.¹⁴ Accordingly, RIN prices have been near zero (aka free) for much of that time. However, for the RFS to actually incentivize renewable fuel production, RINs should not have zero value. Otherwise, the RFS would not be promoting the environmental, energy-security and agricultural development benefits of the RFS. Hence, some RINs price increase in 2013 should be expected. This does not, however, imply an increase in gasoline prices at the pump, because ethanol is less expensive than gasoline (and offers a

¹² EPA proposed rule, *RFS Renewable Identification Number (RIN) Quality Assurance Program*, 78 Fed. Reg. 12,158 (February 21, 2013).

¹³ See RFA comments to EPA Docket EPA-HQ-OAR-2012-0621.

¹⁴ See, e.g., EIA, *U.S. ethanol production and the Renewable Fuel Standard RIN bank* (June 5, 2013), available at <http://www.eia.gov/todayinenergy/detail.cfm?id=11551>. Therein, EIA noted that "Ethanol production and use grew beyond levels called for by the RFS as early as 2006."

variety of valuable octane and oxygenate benefits), and many other factors influence overall gasoline prices.¹⁵

The degree of the increase in future RIN prices is substantially within the control of the petroleum industry. Refiner complaints about RIN prices are misplaced because these refiners have knowingly failed to prepare for blending E15 and higher-level ethanol blends, and worse-still have actively fought the introduction of E15 and higher-level ethanol blends to protect petroleum market share. Refiners fight to maintain the blend wall and are willing to let RIN prices increase as they continue to erect every hurdle possible to maintain the blend wall and their monopoly in the liquid fuels market.

In fact, the RINs shortage is to a large extent self-imposed as the refiners would rather pay a high price for the limited number of RINs in the market (over the short term) than blend ethanol into products such as E15 and generate RINs themselves. Furthermore, as noted above, petroleum industry fear-mongering regarding E15 damaging vehicles is misplaced, given EPA's extensive study of the relevant issues and, as noted above, major manufacturers like Ford and GM warranting new vehicles for E15.

Additionally, in the near future, refiners that do take action and are comparative early-movers and substantially increase blending of E15 are likely to make significant profits as other refiners delay action. A likely outcome over the next year is significantly increased blending of E15. Additionally, future RFS costs can be also avoided by the increased blending and use E85 in the short term. Furthermore, in the medium-term, the increased blending of MLEBs can cost-effectively provide octane benefits (enabling greater engine efficiency) and lower vehicle emissions, helping auto manufacturers offer superior vehicles and meet their CAFE and emissions standards.

Also, the inherent economic and environmental advantages of ethanol as a fuel, as compared to gasoline, must not be overlooked. Ethanol's benefits as an oxygenate and octane enhancer are among the reasons why more ethanol has been used than required by the RFS over the last six years. And these and other benefits will only increase with greater ethanol use. For instance, according to a recent MathPro refinery study, increasing the fuel octane to 92 AKI from 88 AKI using increased ethanol blends (e.g., E30) would reduce the cost of transportation fuel by up to \$30 billion per year.¹⁶ Additionally, improving the fuel distribution infrastructure

¹⁵ For example, EIA notes that the "single biggest factor in the price of gasoline is the cost of the crude oil from which it is refined" and that other main costs include refining costs and profits, distribution and marketing costs and profits, and taxes. See EIA, *Factors Affecting Gasoline Prices* (February 6, 2013), available at http://www.eia.gov/energyexplained/index.cfm?page=gasoline_factors_affecting_prices.

¹⁶ MathPro Inc., *Analysis of the Refining Costs and Associated Economic Effects of Producing 92 AKI Gasoline in the U.S. Refining Sector* (October 30, 2012).

to accommodate higher ethanol blends is cost-efficient. A recent Stillwater Associates study estimates the cost of updating pump infrastructure nationwide to accommodate higher blends such as E30 at a range of only 0.0024 cents per gallon to 0.0056 cents per gallon on a 15-year amortized basis.¹⁷

Thus, government action to try to manipulate RFS compliance costs is unnecessary, and moreover could have a severe, adverse consequence on renewable fuel producers as well as the entire rural/agricultural community. The RFS market should be allowed to work as designed. Regulatory predictability (i.e., maintaining the RFS targets *as-is*) is essential to encourage continued investment in cellulosic and other advanced biofuels and achieve Congress' goals of enhancing our nation's energy security, providing fuel choices to the public, developing a much needed source of rural employment, and reducing emissions from transportation fuel.

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

As RIN prices increase, it becomes even more cost-effective to blend biofuels, which can benefit consumers at the pump. For instance, the EIA has found that a "higher ethanol RIN price makes it more economical for the blender to add greater volumes of ethanol to gasoline blendstock."¹⁸ Furthermore, ethanol "RIN values may also increase in order to provide an incentive for blenders to *lower the retail price* of E85 gasoline relative to E10 gasoline."¹⁹ Higher RIN prices should similarly incentivize the increased production of E15 and MLEBs.²⁰ As blending increases, consumers can benefit at the pump and obligated parties will more easily meet their RFS requirements.

Importantly, refiners exert a great deal of influence over the retail sector (e.g., gas stations), and as long as refiners actively fight the implementation of the RFS, achieving Congress' energy security and environmental goals through the RFS may be slow at best. In particular, certain petroleum companies have franchise contracts that prohibit their retail franchisees from offering certain blends of higher ethanol content fuels. This practice is

¹⁷ Stillwater Associates, *The Cost of Introducing an Intermediate Blend Ethanol Fuel for 2017- and- Later Vehicles* (October 17, 2012).

¹⁸ EIA, *What caused the run-up in ethanol RIN prices during early 2013?* (June 13, 2013)(emphasis added), available at <http://www.eia.gov/todayinenergy/detail.cfm?id=11671>.

¹⁹ *Id.*

²⁰ As an example of RIN prices promoting biofuels production and use, the EIA has found that ethanol production has recovered from lowered levels during last year's drought (when ethanol producers, and other users of corn, moderated corn use due to higher corn prices) due to "strong demand for" RINs. See EIA, Short Term Energy Outlook (p. 9), <http://www.eia.gov/forecasts/steo/archives/Jun13.pdf>.

discriminatory to renewable fuels, is contrary to Congressional goals in enacting the RFS, and should be eliminated. Furthermore, this highlights how refiner concerns regarding high RIN prices are self-inflicted. Through misguided policy attacks on the RFS, fighting the distribution of E15, and interfering with gas station distribution of biofuels, refiners create RIN price increases and then, rather than respond to the market signal, complain to Congress about high RIN prices.

Finally, as noted above, refiners that are comparative early-movers and substantially increase blending of E15 soon are likely to make significant profits if other refiners delay action. There is no need to adjust RFS volumetric targets outside of the statutory RFS provisions that already exist.

6. *Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?*

No statutory changes are warranted regarding the RFS compliance obligations. Importantly, flexibility is already built into the statute. For instance, as noted above, the RFS already contains an adjustment mechanism whereby, if a projection of cellulosic ethanol production in an upcoming year is below the RFS target, EPA is required to reduce that target. Additionally, RINs from a prior year can be used for compliance in the following year, creating a “bank” of RINs. Thus, over 2 billion RINs banked for compliance have been available for use in 2013.²¹ Moreover, obligated parties can “carry forward” a deficient to the following year.²² Thus, for instance, a deficit in 2014 could be carried forward into 2015.

Accordingly, statutory provisions applicable to obligated parties should *not* be modified to provide relief for entities unable to generate sufficient RINs. This could remove any effective requirement for the petroleum industry to comply with the RFS. And the current market structure is workable. Virtually every market in the United States can currently blend ethanol profitably into gasoline. Even though this profit potential exists for blending, we continue to see active resistance to increased blending, meaning the RFS must remain intact in order to create a level access to the transportation fuel market for renewable fuels. Furthermore, hundreds of millions of dollars have been invested in next generation biofuels facilities, and

²¹ See, e.g., EIA, *U.S. ethanol production and the Renewable Fuel Standard RIN bank* (June 5, 2013), *supra*, noting that “The available bank of corn ethanol RINs was estimated at 2.1 billion gallons after the drawdown for 2012 RFS compliance purposes, while the total supply of all banked RIN classifications (including biomass-based diesel and advanced biofuels) was estimated at 2.7 billion gallons.”

²² See CAA § 211(o)(5)(D).

these and existing biofuel facilities are a significant source of rural employment and economic development. The RFS should be left to work as-is.

7. *Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?*

The RFS is only incentivizing refiners to make less gasoline available to the American market to the extent they are unwilling to compete with renewable fuels for market share, or otherwise blend affordable, clean-burning renewable fuels. The fact is that increased ethanol use has been saving the public money by providing a lower-cost source of octane and oxygenate. And, as noted above, increased ethanol use can further reduce costs.²³

While the export or non-production of transportation fuel creates a lower RVO, these RVOs are hardly the key driving force in a refinery determining whether to produce a product for the United States market. Refiners will evaluate the profitability of the “marginal” gallon they produce whether sold in the domestic or export market. If a refiner is running at 100% capacity, then it is possible that some products could be shifted from domestic to export if the refiner believes the export market is more profitable. Independent of the RFS, the increase in domestic crude production and excess refinery capacity has led to increased gasoline exports. In any event, domestically-produced biofuels can result in a “win-win” for the U.S. economy, with transportation fuels used domestically that are blended with affordable biofuels, freeing up some gasoline for however it may be best used (including possibly for export). Finally, gasoline stocks remain well above a year ago with less demand.²⁴ The United States remains well supplied with gasoline as well as biofuels.

²³ See e.g., MathPro Inc., *supra*.

²⁴ See e.g., EIA, Short-Term Energy Outlook: U.S. Crude Oil and Liquid Fuels (July 9, 2013) available at http://www.eia.gov/forecasts/steo/report/us_oil.cfm.

Conclusion

In conclusion, the RFS has been a significant success and—left *as-is*—will provide even more economic, energy security, and air quality benefits. If petroleum industry obstructionism and fear-mongering can be put aside, a ready pathway exists to meeting existing RFS targets, including the widespread increased use of E15, an increased production and sale of FFVs, and an expanded alternative fuel retail distribution infrastructure. Relatively modest EPA and other governmental agency support (under existing statutory authority) should be employed to achieve these goals. Otherwise, regulatory consistency in line with Congressional intent in enacting the RFS is essential to promoting the widespread use of both conventional (e.g., starch-based) and cellulosic biofuel. The RFS statutory provisions should be left as-is.

POET would welcome the opportunity to further discuss these issues and solutions to the nation’s transportation energy needs.

Sincerely,



Steve Hartig
General Manager
POET-DSM Advanced Biofuels Licensing



James Moe
Chairman of the Board
POET-DSM Advanced Biofuels



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July 26th, 2013

To: Ben Lieberman
House Majority Staff
RFS@mail.house.gov
(202) 225-2927

Subject: Response to RFS White Paper on Implementation Issues

Propel Fuels, the leading renewable fuel retailer on the west coast, would like to take this opportunity to show our support for the federal Renewable Fuel Standard. We thank the House of Representatives for its leadership in drafting these white papers, framing the debate appropriately, and taking steps to ensure that this critical program continues to stay in place, providing new opportunities for choices at the pump and protecting our national security.

When the ethanol industry voluntarily offered to give up the \$0.45/gallon Volumetric Ethanol Excise Tax Credit (VEETC) in 2010, many considered it a death blow to renewable fuel retailers like us. And for a time, we struggled with the changing economics of selling higher level blends of ethanol (E85) and biodiesel (B20). However, with the help of the Federal Renewable Fuel Standard (RFS), and the California Low Carbon Fuel Standard (LCFS), we are now finally starting to see the economics return to the business and provide some much needed benefit to our stations, and our customers – the American public.

Throughout this time, the RFS has been under attack, although this year the rhetoric has started to reach a fever pitch. We would like to share our perspective on the RFS implementation issues below.

- 1) We believe that EPA's annual RVO-setting process works well, and that any adjustments to the program should be handled administratively. We do not believe that any statutory changes are necessary, as the program is functioning exactly as it was intended to, by using market price signals to encourage investment in meeting the RFS.
- 2) Though the advanced renewable fuels industry has been slower to produce the volume of fuel expected, the cellulosic biofuel provisions in the RFS is working well, as EPA has exercised appropriate discretion in modifying the program requirements for cellulosic fuels based on market availability. We do not believe that this program needs any statutory changes.

The EPA has modified the cellulosic biofuel standard-setting process for 2013 and future years appropriately following the DC Circuit's decision to vacate the EPA's 2012 standard.

The only further changes needed, would be for the EPA to release future RVOs in a more timely manner, to give the market the time needed to make the necessary investments required to deliver the volumes.

We believe that the EPA should not be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume. We believe that there are enough sources of advanced biofuels to cover for any shortfalls in the cellulosic category, keeping the program on track in the aggregate to meet the renewable fuels goals set by Congress.

- 3) The EPA could improve its enforcement of the RIN credit trading program by using the past performance as an indicator for reliability, i.e. a rating system such as that used in other online trading platforms. Propel for instance, has a 100% compliance record for annual attestations. Our diligence in selecting fuel providers has enabled us to have 100%



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reliable compliance for the past 5 years. All parties would greatly benefit from increased transparency and more information about participants throughout the entire supply chain. As an example, we consider ourselves to be an extremely reliable counterparty for RIN buyers, and would benefit from allowing RIN buyers to have more information about our reliability.

Obligated parties should not necessarily need to verify the integrity of RINs. If they need to request any additional information, it should only be for a third – party (EPA) confirmation of their reporting record. In this case, yes – a third party RIN quality assurance program would address all of the concerns of RIN market participants.

4) The rise in ethanol RIN prices in 2013 is a demonstration of the program working exactly as it was intended to do. When the RFS was initiated, target volumes were set significantly above the industry’s ability to deliver, in order to incentivize investment in new production, new distribution, and new vehicle capabilities. The RIN mechanism exists to provide a market-based price incentive to all participants to increase the amount of renewable fuel used in this country. Many companies like ours have made major investments in the renewable fuels marketplace based on the understanding that RIN credits would increase in value, and that we would be rewarded by the market for taking the risk and making the investment to support the RFS.

There is a very simple way to keep RFS compliance costs down – the expansion of infrastructure capable of delivering higher blends of ethanol like E15 and E85 will generate many more RIN credits, and with greater supply of RINs on the market, the prices will moderate. In addition, obligated parties can collect a RIN “for free” with every additional gallon of renewable fuel that they purchase and blend into their infrastructure. To date, most of the obligated parties have elected not to make any investment in additional renewable fuel capability, effectively betting that others would make the investments, or that they would be able to weaken or eliminate the RFS by claiming economic hardship. Obligated parties are simply encountering the consequences of their decision not to participate in helping meet the goals of the RFS.

Any move by the government to limit the cost of compliance would have two key consequences: First, it would punish the small companies that have actually invested in making more renewable fuels available to the public by limiting the returns on their investment, and at the same time would reward major oil companies for their efforts at stonewalling and resisting bipartisan legislation passed by Congress. Second, it would significantly undermine the function of the marketplace, and would kill the incentive for participants to continue making the investments necessary to achieve the goals of the RFS.

5) Increases in RIN prices are likely to affect the production / marketing of renewable fuels. Elevated RIN prices have already spurred significant new interest in investment in the market, as small businesses are more confident that they will see a return on the investment into fueling infrastructure. Increased infrastructure availability will lead to more fuel being marketed, which will generate more RINs and lower the cost per RIN to an appropriate level. History has proven the efficacy of financial incentives in encouraging new investment. For example, the biodiesel industry has struggled for years with thin margins, high capital costs, and uncertain Congressional support where the biodiesel tax credit was revoked and then reinstated many times. Now, production volumes have never been higher, and more production volume is being built. The same is true of ethanol production – the incentive has driven investment in this industry for years, and now that the values of the credits are high, there is renewed interest in scaling up production technologies, and increasing production volumes.

The incentive needs to be maintained over the long term, for technologies to stay profitable and really start to displace gallons of gasoline. Programs like the RFS only function well if there are genuine penalties for non-compliance, and there is no penalty if Congress does not continue to fully support the program in its current form. Obligated parties have now had more than five years to prepare themselves for the increased volumes of renewables required by the RFS. Instead of making the necessary investments in our country’s future, they have effectively done nothing but enjoy



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record profits and are now looking to be bailed out. When Congress passed the Renewable Fuels Standard, this is what our nation signed up for – a real change, and a true departure from the technologies of the past and business as usual. The more that the RFS is defended and maintained, the greater the likelihood of cellulosic ethanol, renewable diesel, and other next-generation fuels making their way to the rack, the pump, consumers' cars, improving our nation's energy security and preserving our environment.

6) The provisions applicable to obligated parties should not be modified to provide relief for entities unable to generate sufficient RINs. Any attempt to shield certain organizations from the consequences of their own investment decisions will punish the companies who have made the investments necessary to comply with the law. There are many commercial opportunities available to obligated parties to meet their requirements. Any obligated party that has done nothing over the last five years to prepare for increased RIN prices does not deserve to be bailed out by the Congress at the expense of others who have complied. The RFS functions properly by providing a disincentive for non-compliance which leaves obligated parties no other choice but to blend gallons of renewable fuels, which is the entire purpose of the RFS.

7) The solution to the challenge of increasing RIN prices should not be the reduction of gasoline production. If the obligated parties invested as much time, money, and energy into developing the renewable fuels market as they have in fighting the RFS, there would likely be an abundance of RIN credits available in the marketplace. Any obligated party that chooses to cut gasoline supplies to the US market in order to avoid investment in renewable fuels infrastructure is choosing to punish consumers for the obligated parties' poor investment decisions.

We thank you for the opportunity to comment on this important program. Again, Propel Fuels would like to reiterate our strong support for the Renewable Fuel Standard. It is working, and we need to continue to support its implementation in order to effect long lasting positive change to our economy and our environment.

Sincerely,

Adam Walter,
Program Manager
Propel Biofuels, Inc.
650.241.7857

July 26, 2013

Via Electronic Filing

Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC

ATTN: Ben Lieberman & Alexandra Teitz

Re: Request for Comment on the Renewable Fuel Standard Implementation Issues

Dear Sir or Madam:

Renewable Energy Group, Inc. (REG) appreciates the opportunity to present comments to the Committee on Energy and Commerce on the Renewable Fuel Standard (RFS) implementation issues. RFS was expanded as part of the Energy Independence and Security Act of 2007 (EISA) (P.L. 110-140), which also created specific requirements for advanced biofuels, including biomass-based diesel. In so doing, Congress sought to further incentivize U.S. production and use of these fuels such as biodiesel. This policy has been an overwhelming success in the biodiesel sector, and has resulted in significant job creation and energy security benefits.

As a leading advanced biofuel producer, we have a strong interest in the continued success of the RFS. We support efforts to fully implement RFS program requirements. REG currently has more than 225 million gallons of annual biodiesel production capability at seven biorefineries and distribution capabilities at nineteen terminals across the country. We plan to build upon our leadership in the biodiesel industry and expand into the production of additional advanced biofuels. The experience REG has gained over the last 17 years in the biofuels industry, uniquely qualifies us to share comments on the RFS with you.

The Committee on Energy and Commerce solicited comment on seven topics and REG will weigh in on select elements relating to our expertise.

1. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

EPA's annual RVO process is well designed and, if implemented on a timely basis, provides stakeholders with an adequate amount of time for planning. That said, EPA has run behind schedule in recent years in establishing its annual RVOs. In the biomass-based diesel industry, the annual RVO process could be improved by creating a schedule for RVO increases which EPA would have to opt out of, similar to their existing waiver authority process.

The biomass-based diesel industry has significant additional domestic production capacity available. However, much of it is currently idled and cannot rapidly respond to incentives such as higher D-4 RIN prices or a late RVO. It is not possible for these facilities to restart production overnight. Adequate notice is required in order for proper maintenance and upgrades and time to hire staff, etc. With adequate notice the biodiesel industry will be able to provide significant additional quantities of advanced biofuels that help to mitigate the blend wall.

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

The RFS provisions governing cellulosic biofuels are working. Congress anticipated the need for flexibility in developing these next generation fuels and gave EPA a significant amount of flexibility to address the time needed to properly develop the infrastructure necessary to deliver these fuels to market. Moreover, Congress put in place a contingency provision that would address continuous future shortfalls. This provision takes effect in calendar year 2016. If these projects are not delivering at the level anticipated, EPA is then required to reduce the program accordingly going forward.

Congressional action in this area is not needed and would discourage needed capital investments at this critical juncture. To date, the regulatory stability surrounding the program has incentivized a significant number of projects that are projected to come online shortly. A report¹ by Environmental Entrepreneurs highlights these regionally and feedstock diverse projects ranging from cellulosic gasoline to renewable diesel located across the country including Florida, Mississippi, Louisiana, Kansas and Oregon.

EPA should not be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic volume. To date – more than adequate amounts of advanced biofuels, mostly biodiesel, have filled the void in the advanced pool. This trend can continue to help develop a strong and growing advanced biofuel industry.

3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence?

¹ Mary Solecki, Anisa Dougherty and Bob Epstein, *Advanced Biofuel Market Report 2012: Meeting U.S. Fuel Standards*, ENVIRONMENTAL ENTREPRENEURS
<http://www.e2.org/ext/doc/E2AdvancedBiofuelMarketReport2012.pdf> (last visited July 25, 2013).

Will EPA’s proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

Most fuel industry participants are aware of the history behind EPA’s proposed rulemaking to address RIN market fraud. RFS program stakeholders have worked with EPA, and we believe the regulatory process is the most appropriate and fastest vehicle for needed reforms. This is a difficult issue and a “one-size-fits all approach” is not appropriate given the diversity of interests within the program. Last March, REG’s Gary Haer, as Chairman of the NBB, co-chaired NBB’s RIN Integrity Task Force with David Blatnik of Marathon Petroleum. Together, they led a team through weeks and months of meetings with a goal of working together to resolve RIN fraud-related issues. One basic principle that all stakeholders agreed upon was that obligated parties should be given an affirmative defense when subject to notices of violation (NOVs) and we agreed to the basic elements of the audit plan for auditors. We’re pleased to say we agreed on more than we disagreed and you will find many of those recommendations highlighted in our comments and those of NBB to EPA as an attachment to this paper. We believe this will enhance RFS’s regulatory structure. The bottom line is that we are constantly working to improve RIN integrity and that the current system is adequate to address shortcomings with bad elements either currently being adjudicated or in jail.

Please see attached comments from REG and NBB to EPA regarding their proposed rulemaking on RIN integrity, which will provide an in-depth analysis of EPA’s proposed rulemaking. If EPA’s proposed rule is adopted with suggested changes, this should result in highly efficient enforcement of RIN markets.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

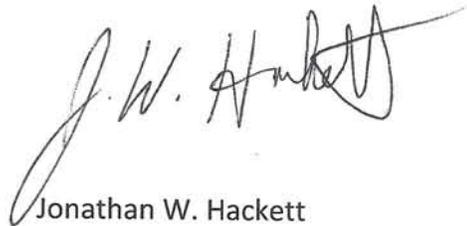
It isn’t clear whether the program is incentivizing obligated parties to make less gasoline available to the American market through increased exports or reduced refinery production. While exports of gasoline and diesel fuel are exempted from an obligated parties RVO, some market commentators have suggested (please see attached article) that the refining sector exports these products not because of the exemption for RFS compliance but because they receive higher profit margins for exported products due to booming demand in areas such as Asia and Latin America. This trend has potentially contributed to higher domestic gasoline prices by taking supply out of the U.S. market.

Refiners should be able to maximize profitable opportunities like other businesses. That said – the Energy Independence and Security Act of 2007 established the RFS to help promote fuel diversity and protect consumers from the effects of uncompetitive fuel markets with high barriers to entry. Expanding the range of products utilized to calculate annual RVOs, such as jet

fuel, could incentivize obligated parties to keep more fuel at home and blend domestic alternatives. This would help prevent frustrating Congressional goals.

The biodiesel industry has demonstrated its capability and capacity to meet increasing biomass-based diesel targets beyond the 1.28 billion gallons called for in 2013. REG also looks forward to continuing to work with all stakeholders, public and private, as we move forward with RFS goals and requirements. Please don't hesitate to contact Anthony Hulen (Anthony.Hulen@REGI.com) or myself (Jonathan.Hackett@REGI.com) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Hackett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jonathan W. Hackett
Director, Federal Affairs & Policy
Renewable Energy Group, Inc.

July 26, 2013

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives

Dear Chairman Upton and Ranking Member Waxman:

The Renewable Fuels Association (RFA) is the national trade association representing the U.S. ethanol industry. The RFA appreciates the opportunity to respond to the questions posed in the fifth white paper, “Implementation Issues,” as part of the Committee’s review of the Renewable Fuel Standard (RFS).

As we have noted previously, we believe strongly that the RFS provides both EPA and obligated parties with more than enough flexibility to address the sundry implementation issues that have arisen, including specifically the various issues addressed in this white paper. Consequently, we remain opposed to legislative changes to this important program.

1. Does EPA’s annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

The annual RVO-setting process is effective and allows EPA to adjust the required volumes of cellulosic and advanced biofuel annually based on the best available data of production capacity. No statutory changes are needed. As it developed the RFS provisions of the Energy Independence and Security Act of 2007 (EISA), Congress knew the timing of cellulosic and advanced biofuels commercialization was somewhat uncertain. Accordingly, Congress gave EPA significant authority and flexibility to set the standards annually based on the short-term outlook for the availability of these biofuels. Further, because the annual RVO is actually a *percentage*, the obligated party’s actual RIN obligation is somewhat sensitive to changes in gasoline and diesel demand that may occur over the course of the compliance year.

It is notable that EPA’s annual rulemaking to establish RVOs is an open and collaborative process. EPA first proposes the RVO levels based on its own analysis of the marketplace; the Agency asks for stakeholder input and comments on the proposed volumes. Then, after considering all comments from stakeholders, EPA makes any necessary modifications and finalizes the annual RVOs. In this way, affected industries and the public have the ability to provide significant input to EPA on the annual requirements.

The statute states that EPA must determine whether to adjust a particular year's cellulosic and advanced biofuels requirements by November 30 of the preceding year. This implies that EPA must publish its final rule specifying RVOs for the following year no later than November 30. Publishing the RVO requirements by this deadline allows adequate notice and preparation time for both obligated parties and renewable fuel producers. Unfortunately, EPA's publication of the final RVOs for 2012 did not occur until January 9, 2012, and the final 2013 RVOs still have not been published. The delay in publishing the 2012 and 2013 final RVOs has created some uncertainty in the marketplace and has made it more difficult for obligated parties and renewable fuel producers alike to plan ahead. However, this challenge is correctable by EPA. The Agency can and should ensure that it meets the November 30 deadline for final RVO publication every year.

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

While cellulosic biofuel production capacity has not materialized as rapidly as desired, the cellulosic biofuel provisions of the RFS have worked effectively and allowed EPA to adjust the required volumes as needed. Congress granted EPA broad authority to adjust the cellulosic biofuel requirements annually and the Agency has done so each and every year since the RFS2 became effective. Through the annual RVO-setting process, EPA has waived 98% of the cellulosic biofuel requirements from 2010-2013. However, EPA has effectively waived **99.8%** of the cellulosic biofuels requirements from 2010-2013 because it has required only 4.26 million waiver credits to be purchased, representing just 0.2% of the 1.85 billion gallons of cellulosic biofuels required by the statute from 2010-2013.¹

While we do not believe EPA acted inappropriately in setting the 2010-2012 cellulosic biofuel requirements, we note that the Agency's approach to proposing the 2013 cellulosic biofuel standard comports with the D.C. Circuit Court decision. EPA's proposed cellulosic biofuel requirement for 2013 was not "aspirational," nor was it intended to serve as "stretch goal" for cellulosic biofuel production. Rather, the proposed 2013 volume was based on the best available data and information available to EPA at the time regarding most likely actual production volumes.

EPA *should not* be required to reduce the advanced biofuel and total renewable fuel volumes when it waives the cellulosic biofuel volume. The statute clearly states that if EPA waives the cellulosic standard, it "...*may* also reduce the applicable volume of renewable fuel and advanced biofuels requirement...by the same or a lesser volume" (emphasis added). Congress explicitly gave EPA the authority to allow other biofuels to offset the shortfall in cellulosic biofuels resulting from a waiver. For the most part, EPA has used this authority effectively. In the 2010-2012 compliance years, EPA allowed other advanced biofuels to fill the "gap" created by the Agency's waivers of the cellulosic biofuel standard and it has proposed to do so again in 2013. This ensured that the *total* annual renewable fuel volumes set forth by Congress were satisfied. Requiring EPA to reduce the advanced biofuel and renewable fuel requirements when the

¹ <http://www.epa.gov/otaq/fuels/rfsdata/rfs2cellulosicwaivercredits.htm>

cellulosic biofuel requirement is waived could add uncertainty to the marketplace, undermine investment in advanced biofuels, and eliminate a key measure of administrative flexibility. The current flexibility afforded to EPA with regard to annually adjusting cellulosic biofuel, advanced biofuel, and renewable fuel requirements should be maintained.

3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

In general, EPA has done a good job of enforcing the RIN credit trading program. Since the beginning of the RFS2 program, only 0.3% of total RINs generated have been found to be fraudulent. Notably, not a single one of the 38.6 billion D6 RINs (typically generated from corn ethanol) have been found to be fraudulent. In the isolated cases where biodiesel RIN fraud did occur, EPA enforcement was swift and effective and the perpetrators of the fraud were successfully prosecuted. EPA has already demonstrated that it does in fact have the resources to effectively monitor the RIN program and take enforcement actions when necessary.

Dating back to adoption of the original RFS regulations, EPA has always made it clear that the RIN credit market would operate on a “buyer beware” basis and obligated parties should perform due diligence before entering into a RIN transaction. As the parties ultimately responsible for surrendering RINs to show compliance, obligated parties should play the primary role in verifying the integrity of RINs. Numerous services and tools are available to obligated parties in the marketplace today to facilitate due diligence on RIN generators and ensure the validity of RINs.

While we do not believe participation in EPA's proposed voluntary quality assurance program (QAP) will be necessary for the majority of renewable fuel producers and their counterparties, we believe the program will provide the additional level of RIN assurance that some market participants may feel is warranted. The requirements of the proposed QAP regulation, and the pre-approved QAP schemes already available in the marketplace, allow RIN buyers to access (in real time) extremely detailed information regarding RIN generation by renewable fuels producers.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

The rise in RIN prices in 2013 has been caused primarily by the refusal of most obligated parties to blend and market gasoline blends containing greater than 10% ethanol (E10). Potential future increases in compliance costs can absolutely be avoided—if an obligated party increases its use of renewable fuels, it simultaneously decreases its need to purchase detached RINs.

When it comes to RFS compliance, oil companies have a choice: purchase a gallon of ethanol (with a free RIN attached) *or* purchase a detached RIN from third parties or other oil companies who previously blended more ethanol than required. Unfortunately, most oil companies are choosing to purchase detached RINs and bank them rather than increasing their use of ethanol. This is occurring despite the existence of practical and economical options for increasing ethanol use. E15 and E85 blends are legally approved and offer a workable pathway for meeting increased RFS volumetric requirements. Only slight increases in E15 consumption would be needed in 2013 to satisfy this year's RFS obligations with physical gallons rather than banked RINs. If E15 accounted for **just 1%** of total gasoline sales in 2013, the RFS requirement for renewable fuel could be met strictly with physical gallons of ethanol.²

Ignoring all the data demonstrating the efficacy of E15 use in automobiles (including decades of E25 use in Brazil), oil companies and their surrogates have raised concern about a lack of automaker warranty coverage for E15. But the current automotive fleet is absolutely capable of consuming the marginally higher levels of ethanol that the RFS requires in 2013 and 2014 even if warranty coverage is not extended to the existing fleet. According to EIA, approximately 15 million flex-fuel vehicles are on the roadways today. Further, 30-35% of model year (MY) 2013 light duty vehicles include *explicit* coverage of blends up to E15 in their warranty statements and owners' manuals. By the end of 2013, there will be more than 20 million vehicles on the road that are unequivocally approved by the auto manufacturers themselves for E15 or E85 use—almost 10% of total vehicles. That number will grow in 2014, as additional automakers (e.g., Volkswagen) have announced plans to explicitly approve E15 use in new vehicles. Further, EPA's E15 waiver approval applied to MY2001 and newer vehicles. MY2001 and newer vehicles represent approximately 75% of the U.S. light duty automotive fleet and 85% of vehicle miles traveled. Less than half of these vehicles are still covered by a vehicle warranty in any case.

In recent weeks, a gallon of ethanol (with a free RIN attached) has sold for roughly 40-60 cents/gallon less than a gallon of gasoline. For 2012, ethanol's discount to gasoline averaged approximately 50 cents/gallon. Futures prices for ethanol and RBOB gasoline indicate an average discount of more than 50 cents/gallon persisting through December 2014. Thus, the argument that prices for ethanol (and attached RINs) are somehow contributing to higher gasoline prices is patently false. In fact, U.S. consumers are missing out on an opportunity for **lower gasoline prices** due to the oil industry's refusal to move to blends above E10. With ethanol priced 40-60 cents per gallon less than gasoline, a gallon of E10 would be 4-6 cents per gallon cheaper at the pump than a gallon of unblended gasoline. Meanwhile, a gallon of higher-octane E15 would be 6-9 cents per gallon cheaper.

We believe RIN price movements in 2013 have been exaggerated due to the facts that 1) speculators (who are neither renewable fuel producers nor obligated parties under the RFS) are allowed to participate in the RIN market; and 2) the RIN prices reported by popular trade publications are unscientific and likely represent a very small segment of the market. Due to the opacity of the RIN market, it is unclear just how significant the influence of speculative buying has been on RIN prices. Accordingly, RFA believes EPA should improve transparency around 1) the obligated parties' use of RINs, and 2) participation in the RIN

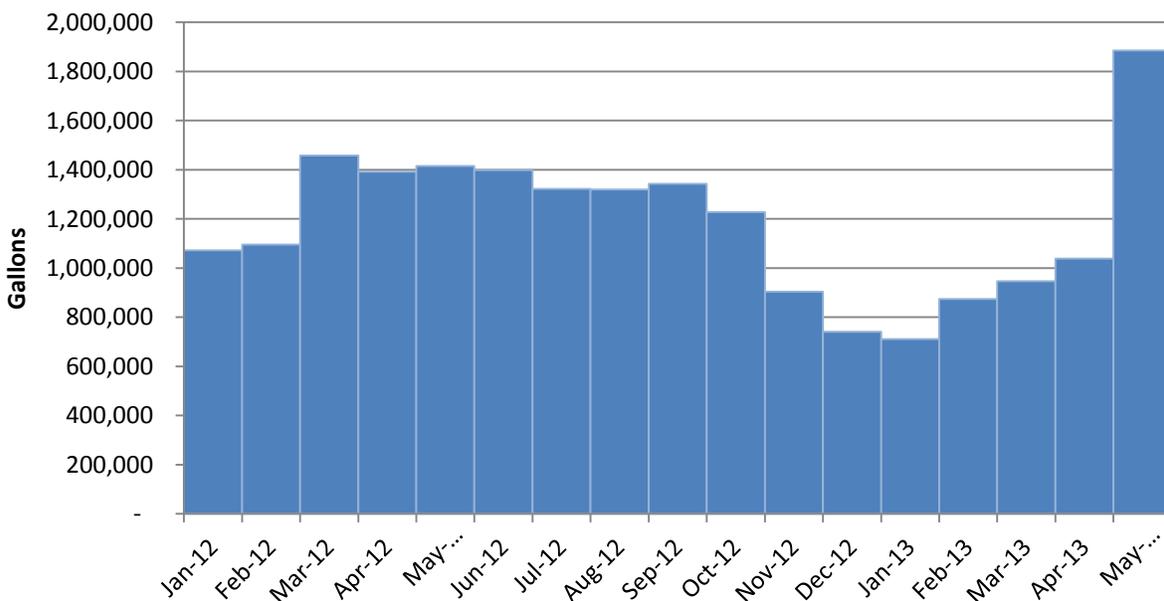
² Assumes gasoline demand of 133.8 billion gallons, 13.38 billion gallons of ethanol use at E10, and 200 million gallons of ethanol use at E85. Thus, 220 million gallons of ethanol would need to be consumed as E15 to meet the 13.8 billion gallon RFS requirement for "renewable fuel." This means 1.47 billion gallons of E15 would need to be consumed, which equates to 1.09% of projected gasoline demand. Does not account for impact of sugarcane ethanol imports that may be used to meet advanced biofuel standard.

market by non-obligated third parties who are not renewable fuel producers. We believe EPA should provide to the public information on annual company-level renewable volume obligations (RVOs), monthly data on company-level RIN separations and RIN retirements, and monthly disclosure of RIN transactions by non-obligated third parties who are not renewable fuel producers. This information could be shared via EPA’s existing EMTS data web site.

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

There is evidence that higher RIN prices have already encouraged greater production of renewable fuel and have driven increased usage of higher-level ethanol blends. Further, higher RIN prices are actually leading to *lower* fuel prices for consumers of E85 and other higher-level blends. Progressive fuel blenders, marketers and retailers are buying ethanol (with free RINs attached), blending it to make E85, separating the RINs from the gallons, and selling the RINs to refiners who have stubbornly chosen to buy RINs rather than physical gallons of ethanol. Thus, the sale of the RIN is allowing progressive retailers and marketers to reduce the price of the E85 for the consumer. In many cases in recent months, E85 has been priced \$0.80-\$1.00 per gallon or more below gasoline. In response to these discounts, consumer demand for E85 is increasing. While there is no reliable data available on national E85 sales, some state government agencies collect reliable data on E85 sales. Recent data from the Minnesota Department of Commerce, for example, shows that E85 sales nearly doubled from April to May (Figure 1). Certainly, higher RIN prices played a large role in this increase, as the value of RIN enabled progressive marketers and retailers to pass along increased savings to consumers.

Figure 1. Estimated Monthly E85 Sales in Minnesota



Source: Minnesota Department of Commerce

The market-driving benefit of the RFS credit program was recently affirmed by BP Biofuels CEO Phil New, who stated:

“[t]he conventional RIN markets are responding to the blend wall – exactly as could have been anticipated. The RIN markets are now starting to incentivize all members of the value chain to seek ways to resolve the blend wall. What had become a static, entrenched relationship is now starting to look much more fluid, as the incentives provided by the RIN markets provide a real prompt to innovation – not just on the supply side, but for the better demand side players as well.”³

Similar comments have come from oil industry economist Phil Verleger, who wrote:

- “In short, no RIN problem exists. Instead, the trouble has been created by the stubborn resistance of some refining companies...to the RFS program.
- “...refiners have resorted to “export blackmail” rather than try other solutions. One of these would be sales of E85 (85:15 ethanol/gasoline), which would alleviate the problem.
- “...the obvious solution to the RIN price problem involves no EPA intervention and no regulatory action at this point. It simply calls for boosting E85 sales.
- “Refiners and marketers could meet their RFS requirements by boosting E85 sales.”⁴

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

No, the provisions defining who is obligated under the RFS should not be changed. As a point of clarification, obligated parties generally do not “generate RINs,” as stated in the Committee’s question. Rather, a RIN is generated by renewable fuel producers to commemorate the production of a gallon of qualifying renewable fuel. The RIN is obtained by the obligated party, either through the purchase of a physical gallon of renewable fuel (with attached RIN) or through the purchase of a detached RIN from a third party of other obligated party who has over-complied.

At the request of the oil industry, the credit trading system was designed by Congress to allow compliance flexibility for those refiners who choose not to blend physical gallons of renewable fuel. The RIN system was intended to ensure that a national market would exist to address expected economic variations among regions in the country related to renewable fuels production and sales. The Senate Environment and Public Works Committee reported that the credit trading program was meant to “allow the ethanol to be used where it makes the most economic and environmental sense while providing a mechanism to transfer those credits back to the point of gasoline production or importation so that refiners, blenders, and importers can demonstrate compliance with the renewable fuels obligation.”

³ 8th Annual World Biofuels Markets, Beurs World Trade Center, Rotterdam, Netherlands, March 13, 2013, Biofuels Digest.

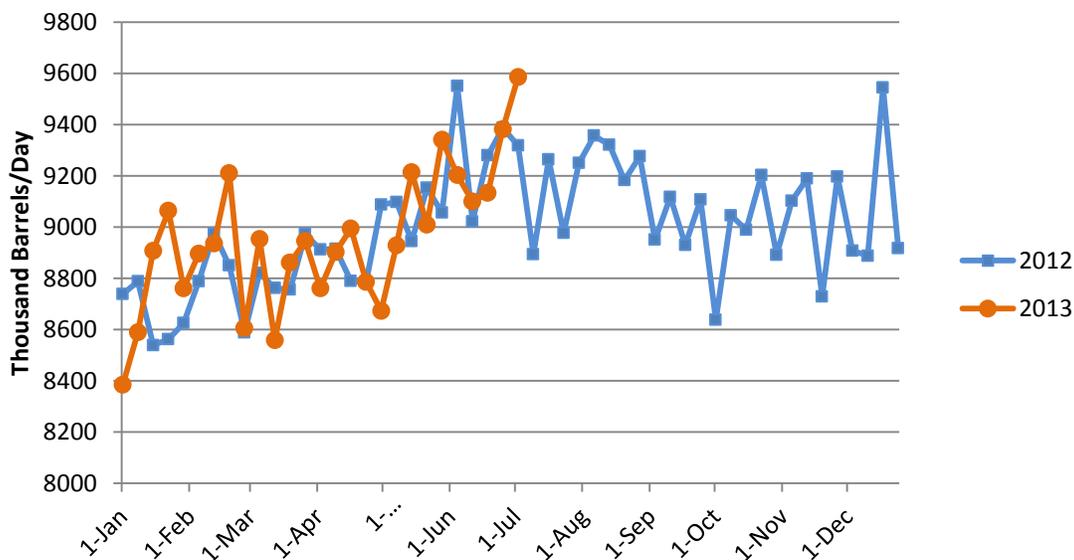
⁴ Philip K. Verleger, Jr., President, PKVerleger LLC. “The Price of RINs: How High! How Stupid!” March 2013.

The RIN program has worked effectively and has allowed obligated parties to efficiently demonstrate compliance. The program should not be revised to apply different compliance requirements to different refiners, as suggested by the Committee’s question. Such a program would cause extreme confusion, uncertainty, and fungibility problems in the marketplace, and would create an unlevel playing field in the refining sector.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

No. While refiners have threatened that they will purposely short the U.S. gasoline market in order to avoid RIN obligations, there is no evidence whatsoever that this has occurred. In fact, year-to-date gasoline production and U.S. deliveries have been *higher* than in 2012 when ethanol RIN prices averaged less than \$0.03 (Figure 2).

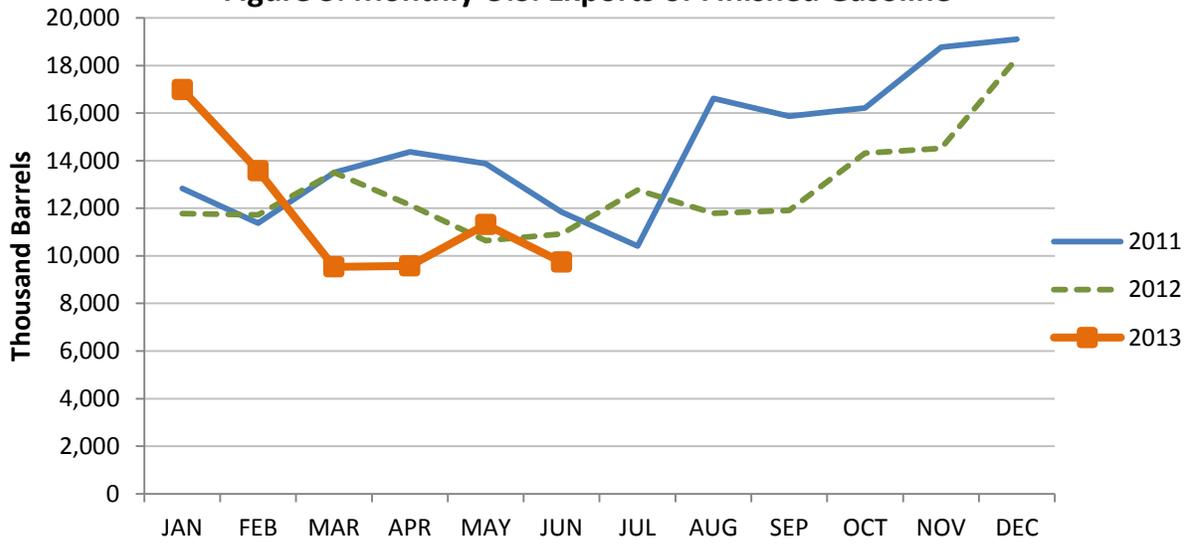
Figure 2. Weekly U.S. Refiner/Blender Net Production of Finished Motor Gasoline



Source: EIA

Refiners have similarly threatened that they will increase gasoline exports to avoid RIN obligations. This hasn’t happened either. Gasoline exports in 2013 have been similar to 2012 levels and *lower* than 2011 levels (Figure 3), indicating that refiners are not, in fact, ramping up exports to short the U.S. market and avoid RIN obligations.

Figure 3. Monthly U.S. Exports of Finished Gasoline



Source: EIA

While there is no indication that refiners have shorted the U.S. gasoline market, they continue to suggest that the RFS will cause them to do so. It is appalling that refiners would purposely and pre-meditatively reduce the available supply of U.S. gasoline (and increase consumer prices) simply to avoid blending more renewable fuels and lessening their compliance obligation with the RFS. If this behavior does in fact occur, American consumers should be made aware that pump prices are increasing simply because U.S. oil refiners are choosing to deny them access to greater volumes of renewable fuels.

* * * * *

Thank you again for the opportunity to comment. If there is any additional information you would like RFA to provide, please do not hesitate to ask.

Sincerely,

Bob Dinneen
President & CEO



Shell Oil Company
Government Relations
1050 K Street, NW, Suite 700,
Washington, DC, U.S.A.
202 466 1495

July 25, 2013

Representative Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Representative Henry Waxman
Ranking Member
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton and Ranking Member Waxman:

Thank you for the opportunity to comment on the Committee's white paper concerning the Renewable Fuels Standard's (RFS) implementation issues. As an obligated party and one of the world's largest producers and distributors of today's biofuels and investor in the research and development of advanced biofuels, Shell has a vested interest in ensuring that the RFS is implemented without a major disruption to the current fuel supply system. Problems with the implementation of this program could have severe adverse impacts on consumers and the economy and severely undermine long-term investments in cellulosic biofuels, including drop-in biofuels, that could provide a means to go beyond the blend wall limitations of ethanol.

In summary, Shell believes:

- Existing RFS mandates are higher than the ability of the fuel system infrastructure and vehicles to consume the renewable fuels. As a result, a situation referred to as the 'blend wall' has arisen, which will limit supplies of gasoline and diesel in the United States, adversely affecting consumers and the economy.
- Shell believes the RFS must be revised to address the blend wall and avoid limiting supplies of gasoline and diesel to U.S. consumers.
- Ultimately Shell believes Congress must address the issue. EPA's waiver authority is too limited to comprehensively address the issue, and the use of such waivers on an annual basis will create tremendous uncertainty for long-term investments in cellulosic renewable fuels. In the meantime, Shell recommends the EPA make a reduction in the advanced and general renewable mandates outlined in the RFS to mitigate the blend wall impact:
 - Reduce the advanced and general renewable RVOs for 2013 consistent with the reduction in cellulosic.

- Expedite issuance of the 2014 RVO proposal. Reduce the advanced and general renewable RVOs for 2014 when the cellulosic is reduced. Timeliness is key as this could provide some flexibility in 2013.
- Move forward expeditiously with the rulemaking to readjust the overall schedule of the RFS. Although this cannot be effective until 2016, clarity on the levels the sooner the better would provide more certainty to the industry.

Our responses to the questions posed by the Committee are below.

1. Does EPA’s annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

Answer: At present, the EPA’s annual RVO-setting process does not work well. As noted in the Committee’s white paper, as of this writing EPA has still not yet finalized the 2013 standards notwithstanding the fact that the year is more than half over and EPA was required to issue the final 2013 standards by November 2012. Unfortunately, it already appears that EPA is falling behind in meeting the November 2013 deadline for issuing the 2014 final standards. EPA’s failure to issue the standards in a timely fashion has had real world consequences. Uncertainty regarding the level of the 2013 and 2014 standards is likely having an impact on RIN prices in today’s market. RIN prices for the general renewable RINs, (i.e., D6 RINs) were approximately \$.02 per RIN in January 2013. In July 2013, they were above \$1.40.

Because the mandates in the law are expressed as volumes, there must be a means to convert the mandates into individual obligations for the obligated parties. That is why the law contains the annual standard setting mechanism. EPA could improve the situation by issuing the annual standards in a timely manner. But, beyond the delays in issuing the annual standards, there is an even bigger problem with expressing the volume mandates in terms of volumes -- it fails to take into account changes in gasoline demand. Thus, the RFS attempts to force an ever larger volume of renewable fuels into a shrinking pool of gasoline. This has accelerated the blend wall problem. EPA could address this to some extent in 2013 and 2014 by adjusting the advanced and general renewable fuel mandates when it adjusts the cellulosic standards. This remedy is limited however. As the mandates continue to escalate, EPA cannot remedy the blend wall problem merely by adjusting the advanced and general renewable standards when adjusting the cellulosic mandates. The gap will be too large to address the problem in this way.

As noted above, we have urged EPA to adjust the 2013 and 2014 standards to address the blend wall issue. But, ultimately, Congress will need to adjust the mandates to levels that are consistent with the ability of vehicles and infrastructure to consume the renewable fuels. EPA’s use of its waiver authority on an annual basis to adjust the standards will not provide the certainty needed to support investments in cellulosic biofuels. We also believe that at the same time, Congress should

consider other ways to incentivize investments in development and commercialization of cellulosic biofuels, and particularly drop-in biofuels (i.e., biofuels that are compatible with existing vehicles and infrastructure) such as revising the existing cellulosic biofuel producers tax credit to extend its life to better match the time horizon needed to support large investments in cellulosic biofuels. Congress should also consider extending the existing biomass-based diesel blenders credit to all cellulosic drop in biofuels.

- 2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?**

Answer: Notwithstanding the issues with EPA's implementation of the cellulosic provision thus far, we are generally supportive of the cellulosic provision. It creates a platform for investments in cellulosic biofuels and the provision itself has enough flexibility to allow EPA to make adjustments in the program to align the mandates with actual production. The waiver mechanism also creates investment certainty, by giving EPA a tool to make adjustments to balance supply and mandate levels, which in itself provides stability for investors.

However, as evidenced by the D.C. Circuit's decision to overturn EPA's 2012 cellulosic mandates, the provision has not worked perfectly thus far because EPA has not implemented it in an objective and balanced way. Going forward, we are hopeful that EPA will set the cellulosic standards at reasonable, achievable levels. We say this as a company that is pursuing opportunities in cellulosic biofuels. EPA's implementation of the provision in 2010-2012 has unfortunately resulted in a lot of criticism that undermines investor confidence in the technology and program. We are hopeful that they will not repeat the mistakes of the past in 2013.

- 3. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?**

Answer: We generally support EPA's proposed voluntary third-party quality assurance program, and believe that it will be sufficient to address the concerns of the market participants. We do have some concerns with EPA's proposal, however, and made several recommendations to EPA for improvements in the program. Our comments on this EPA proposal are attached.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

Answer: RINs available for compliance with the RFS mandates depend on consumption of renewable fuels in US transportation fuel. Thus, as the mandates exceed the ability of the vehicles and infrastructure to consume the mandated renewable fuels, the supply of RINs for compliance falls short. As the supply of RINs for compliance falls short of demand, it is not surprising that their price has risen. RINs are essentially permits to supply gasoline and diesel fuel for US consumption. Importers can only import as much gasoline and diesel fuel, and refiners can only supply as much gasoline and diesel fuel for US consumption as they have RINs to meet the obligation that supplying such fuel incurs. Given this, it is not surprising that there is strong demand for RINs.

It is important to understand that different obligated parties are affected differently by the blend wall. As we explained in our responses to an earlier white paper, first to be impacted are merchant refiners and importers that do not have facilities downstream to blend ethanol. These parties have always been primarily if not solely dependent on the RIN market. Thus, even if the total number of RINs available in 2013 seem sufficient to meet the overall industry demand for RINs, there are some parties, like merchant refiners, that are naturally short RINs. RIN demand from these parties is likely a major factor in the recent run up in RIN prices. They have very limited options. They can either purchase the RINs and supply gasoline and diesel for US consumption, or they can export the fuel or simply reduce production. As stated above, RINs are essentially permits to supply gasoline and diesel for US consumption.

Future increases in RFS compliance costs resulting from increasing RIN prices can be avoided by adjusting the mandates to levels that are compatible with vehicles and infrastructure. We recommend that the government adjust the mandate levels rather than attempt to impose price controls. Price controls often have unintended consequences such as supply disruptions.

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

Answer: RIN price is a reflection of renewable fuel consumption, not renewable fuel production. The cause of the current RIN price escalation is the limitations on consumption arising from vehicle and infrastructure incompatibility issues. In other words, the price of ethanol could stay flat because demand is constrained, but the price of RINs could rise because supply of RINs is constrained.

RIN price could have an effect on marketing of some renewable fuels. As we explained in response to a question in an earlier white paper, if the RIN price stays high enough (i.e., high enough to offset the 30% mileage penalty of E85 relative to gasoline) for long enough, that could cause independent retailers (over 95% of all retail stations in the US are independently owned and operated) to invest in infrastructure that is compatible with E85 (E15 is not likely given the vehicle incompatibility issue). In other words, RINs could make what is otherwise an uneconomic product – E85 – economic. However, at the same time, Congress and EPA should recognize that very high RIN prices are likely to result in reduced imports, increased exports, and reduced domestic production of gasoline and diesel fuel, as refiners and importers will include the RIN economics in their decisions. It should also be recognized that even if high RIN prices do cause some retailers to offer more E85, it is simply impossible to build enough E85 compatible infrastructure in time to address the blend wall problem. It could also be the case that this program could end up stranding retailers' investments in E85 infrastructure if they are induced to invest by high RIN prices, if those investments ultimately lead to lower RIN prices that result in E85 becoming uneconomic.

Higher RIN prices could help support investments in cellulosic biofuels, including drop in biofuels. Although such fuels are not a solution to the blend wall right now, eventually they will be a way to increase the consumption of biofuels above blend wall limitations because they don't suffer from the same infrastructure and vehicle compatibility issues that arise with ethanol blends. Congress should take a long term perspective on such fuels and create incentives that will create the right environment for long term investments.

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

Answer: The solutions to the problems created by the RFS will need to be comprehensive solutions that address the fundamental shortcomings in the legislation's design that in the end creates a level competitive playing field. We do not support proposals to carve out exemptions and preferences for some parties in the program. Any such provision is likely to create further market distortions and unintended consequences.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

Answer: It is. Right now as the RIN price escalates, it should not be surprising that refiners and importers are including those RIN economics in their decisions whether to import gasoline and/or

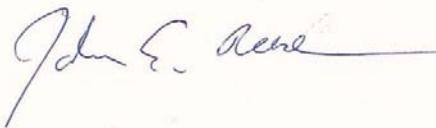
diesel in to the US, whether to export gasoline/diesel from the US, and how much gasoline and diesel to produce. But there is an even bigger problem on the horizon. If uncorrected, as the mandated levels continue to escalate beyond the ability of the vehicles and infrastructure to consume the renewable fuel, this will result in a short fall of RINs. Because RINs are permits to supply gasoline and diesel fuel to US consumers, the short fall of RINs will limit the supply of gasoline and diesel fuel. Refiners and importers can only legally supply as much gasoline and diesel fuel for US consumption as they have RINs to meet the obligations that supplying such gasoline and diesel incurs. This is explained in the attached comments to EPA concerning the 2013 RFS standards and the attached Shell one-pager.

Ultimately, Congress must act to revise the RFS to address the blend wall problem and create a stable regulatory program that will create the right incentives to support investments in cellulosic biofuels. In the mean time, EPA must use all of its existing tools to adjust the mandates to avoid the severe adverse impacts on consumers and the economy that will be caused by the blend wall.

* * *

In closing, although we generally support the RFS, we continue to strongly advocate for revising it to lower the mandates to levels that are consumable by vehicles on the road today and existing infrastructure. If the RFS is not revised, the blend wall will continue to limit the supply of gasoline and diesel in the U.S., have adverse impacts on consumers and the economy, and undermine the intent of the law, as well as investments in cellulosic biofuels that can deliver substantial greenhouse gas emission reduction benefits.

Sincerely,

A handwritten signature in blue ink that reads "John E. Reese". The signature is written in a cursive style and is positioned above a horizontal line.

John Reese
Downstream Policy and Advocacy Manager for North America

Attachments

R. Timothy Columbus
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July 26, 2013

TO: House Energy and Commerce Committee

FROM: Society of Independent Gasoline Marketers of America
National Association of Convenience Stores

RE: Renewable Fuel Standard Assessment White Paper – Implementation Issues

The Society of Independent Gasoline Marketers of America (“SIGMA”) and the National Association of Convenience Stores (“NACS”) applaud the Energy and Commerce Committee for conducting its review of the renewable fuel standard (“RFS” or the “Program”).¹ While SIGMA and NACS do not support the repeal of the RFS at this time, the manner in which it is being implemented must reflect market realities that Congress did not anticipate when it last revised the Program in 2007. If no adjustments are made, the motor fuels market will hit the “blend wall” – when the RFS’s annual renewable volume obligations (“RVOs”) exceed the volume of renewable fuel the market can reasonably absorb. This could cause gasoline and diesel prices to increase substantially, generating severe economic harm throughout the United States. The Environmental Protection Agency (“EPA” or the “Agency”) has the statutory authority to avoid this result by adjusting volume obligations such that the market does not hit the blend wall. It is incumbent upon Congress to determine whether the Agency will exercise its waiver authority. If it will not, legislation may be necessary.

1. *Does EPA’s annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?*

There are concerns with EPA’s annual RVO-setting process. Those concerns pertain to timing. Annual RFS standards need to be issued on-time. Market participants must know what is expected of them in advance. The EPA has consistently issued annual volume obligations after the statutory deadline Congress set. At the present time, EPA has not finalized the 2013 RVOs, even though the statutory deadline was November 30, 2012.

¹ SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel. NACS is an international trade association composed of more than 2,200 retail member companies and more than 1,600 supplier companies doing business in nearly 50 countries. The convenience and petroleum retailing industry has become a fixture in American society and a critical component of the nation’s economy. In 2012, the convenience store industry employed more than 1.84 million workers and generated \$700.3 billion in total sales, representing approximately 4.5 percent of the United States’ GDP – or one of every 22 dollars spent – in 2012.

Market participants must have ample time to adjust to their evolving regulatory obligations. This need is magnified when satisfying those obligations become more expensive. When RINs' availability decreases, as it has throughout 2013, it costs obligated parties more money to acquire them. Thus, as RINs' availability decreases, it becomes even more important for obligated parties to know what their obligations are, *i.e.*, how many RINs they will have to acquire to avoid violating the Clean Air Act ("CAA").

The Agency's delay in finalizing annual volume obligations, therefore, is increasingly problematic. Although the demand for gasoline and diesel fuel is diminishing, the statutory volume obligations continue to increase. In the near future, the number of available RINs will be less than the amount of renewable fuel the market can absorb. Without knowing how many RINs they will need to comply with the RFS, obligated parties simply cannot plan adequately. This inability to plan inevitably increases their costs of doing business. These increased costs are passed down to and absorbed by consumers.

2. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the D.C. Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic volume? What would be the consequences of such a change?

EPA must administer the cellulosic biofuel provisions in a manner that accounts for market realities while also encouraging investment and innovation. By substantially decreasing the annual cellulosic volume obligations every year, EPA has accounted for the fact that cellulosic biofuel is simply not available in the market to the extent Congress predicted in 2007. At the same time, by not eliminating the annual cellulosic volume obligations, EPA has not discouraged innovation.

This is a perfect example of the RFS's built-in flexibility. EPA should extend this approach beyond cellulosic RVOs and lower overall volume obligations to reflect the realities of the market. Specifically, the Agency should utilize its waiver authority to lower volume obligations such that they do not exceed the volume of renewable fuel that the market can reasonably absorb. This would avoid the economic harm that will otherwise befall consumers, while enabling the RFS to continue down a sustainable path and "bridge the gap" between the current fuels market and the future fuels market.

3. How can EPA improve its enforcement of the RIN credit training program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

Fraudulent RINs have generated a substantial amount of uncertainty in the motor fuels market. Although most members of SIGMA and NACS are not obligated parties, this uncertainty inevitably leads to higher costs for refiners and importers, and these costs are passed down to marketers and retailers – and ultimately to consumers in the form of higher prices at the pump.

EPA's proposed rule to mitigate RIN fraud² is seriously flawed. The objective is to minimize artificial increases in the price consumers pay at the pump, while insulating responsible market participants from the harm that fraudulently generated RINs cause. The proposed rule does not accomplish either objective.

Under the proposal, for RINs that have been verified according to an approved quality assurance plan ("QAP"), parties would have an affirmative defense against liability for civil violations filed by EPA for the transfer or use of invalidly generated RINs (but not RINs that become invalid after generation). The proposal specifies both the conditions under which invalid RINs must be replaced with valid RINs, and by whom they must be replaced. The proposal contains two QAP options: The first—"Option A"—contains stricter monitoring and audit requirements, but also insulates obligated parties from having to replace invalid RINs that are verified by a third-party auditor. The second QAP option—"Option B"—contains more lenient monitoring and audit requirements but obligated parties are responsible for replacing any invalid RINs verified under an Option B plan. The regulated community would have the option of choosing one of the new options or instead using the "buyer beware" approach in the existing regulations.

This is flawed. By forcing invalid RINs to be replaced, the Agency will simultaneously increase the demand for RINs while reducing the supply. This increases obligated parties' costs, which translates into higher prices at the pump. Further, by having multiple QAP options, the Agency is creating a tiered pricing system, wherein RINs generated under QAP-A will be valued higher than other RINs. This will lead major producers to utilize QAP B (or no QAP at all) because their balance sheets obviate the concern about replacing RINs, so it will be unnecessary to expend additional resources required under QAP-A. This will give them a competitive advantage over small producers.

To solve these problems, EPA should instead develop a system under which all producers are required to obtain and maintain EPA-certification before selling RINs. Under this scheme, any entity that purchases product from a certified producer (and does not tamper with the product after purchase) would be free of liability for any fraudulent RINs. In the event that there is tampering after purchase, the company that does the tampering should continue to be subject to penalties under the CAA.

4. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

RINs are essentially an artificial commodity that has become an integral component of manufacturers' ability to produce and import fuel. Although the demand for gasoline and diesel fuel is diminishing, the statutory volume obligations – *i.e.*, the number of RINs obligated parties

² 78 Federal Register 12158 (February 21, 2013).

must acquire to comply with the CAA – continue to increase. In the near future, the number of available RINs will be less than the amount of renewable fuel the market can reasonably absorb. This will lead to a shortage of RINs. As with any commodity that is in short supply, people have begun hoarding and trading RINs. This accounts for the dramatic increase in RIN prices throughout 2013.

Future increases in RFS compliance costs can be avoided if the EPA exercises its statutory waiver authority to lower volume obligations such that they do not exceed the volume of renewable fuel that the market can reasonably absorb.

5. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

Increases in RIN prices will affect the production and marketing of renewable fuels because it will artificially inflate the price consumers pay for those fuels. As described above, RINs are an integral component of producers' costs. As RIN prices increase, so too does their input costs for producing fuel. Producers recover this additional cost by incorporating it into the price at which they sell the fuel. This elevated cost is ultimately passed down to consumers at the retail level. Thus, increases in RIN prices increase producers' – and retailers – cost of goods sold. These costs are absorbed by consumers through higher gas prices.

Continuing increases in RIN prices – and thus prices at the pump – are not sustainable. The RFS must be implemented responsibly in a manner that accounts for market realities. Obligated parties cannot be required to purchase more RINs than are available. If the EPA exercises its waiver authority to bring RVOs in line with the amount of renewable fuel the market can reasonably absorb, RIN prices will return to the nominal levels they were at prior to 2013. This would put the RFS on a more sustainable path, and bridge the gap between today's fuels market and the fuels market Congress envisioned in 2007.

6. Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

The provisions of the RFS that are applicable to obligated parties should not be modified to provide relief for entities that are unable to generate sufficient RINs because doing so would distort the market. Instead, the annual volume obligations should be modified so that they are in line with the amount of renewable fuel the market can absorb. This would make RINs more readily available, and thereby obviate any purported need to modify provisions to provide relief for entities unable to generate sufficient RINs.

Providing relief for entities unable to generate sufficient RINs would distort the market. Specifically, making one category of obligated parties have to comply with obligations with which another category does not have to comply imposes different input costs on each category.

This disequilibrium would place certain obligated parties at a competitive advantage over their competitors. The government should not be in the business of picking winners and losers.

More importantly, providing relief in the manner this question contemplates would not address the underlying problem: If the market generates an insufficient number of RINs, whether or not obligated parties blend fuel with ethanol before selling it will not change the fact that the market is generating an insufficient number of RINs. A shortage in RINs will lead to higher costs for producers, retailers, and ultimately consumers.

The way to solve the underlying problem is to *lower the annual volume obligations such that they comport with the volume of renewable fuel that the market can reasonably absorb*. This way, the market will generate sufficient RINs so all obligated parties – whether or not they blend before selling – will be able to satisfy their obligations while operating on a level playing field.

7. Is the RFS incentivizing refiners to make less gasoline available to the American market, either through increased exports or reduced refinery production? If so, can anything be done to address this?

As we approach the blend wall, the RFS can in fact provide an incentive for refiners to produce less fuel for consumption in the United States. Indeed, if there is a RIN shortage, refiners have an incentive to lower the volume of fuel they make available in the U.S. so they can acquire sufficient RINs to meet their RVOs. Once obligated parties acquire sufficient RINs when RINs are in short supply, it may not be in their economic interest to make more fuel available to U.S. consumers because doing so would increase their obligations.

* * *

Again, NACS and SIGMA appreciate the opportunity to participate in the Committee's white paper process on the RFS. Please let us know if we can answer any questions about our responses or otherwise be of assistance.



July 26, 2013

The Honorable Fred Upton
Chairman
Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry A. Waxman
Ranking Member
Energy and Commerce Committee
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton and Ranking Member Waxman:

Virent is pleased to comment on the U.S. House of Representatives Committee on Energy and Commerce's fifth white paper reviewing the Renewable Fuel Standard (RFS2).

Virent is a Madison, Wisconsin based company that uses patented catalytic technology to convert plant-based materials into a range of products identical to those made from petroleum, including gasoline, diesel, jet fuel, and chemicals used to produce plastics and fibers. Key investors and partners include Shell, Cargill, Honda and The Coca-Cola Company. Please visit www.virent.com for more information.

As the committee is aware, the Renewable Fuel Standard was expanded as part of the Energy Independence and Security Act of 2007, which created specific requirements for advanced biofuels, including the biomass-based diesel, advanced, and cellulosic biofuels pools. The clear vision of Congress in drafting this statute was to enhance our nation's energy security by encourage the production of an entirely new range of fuels from a broad and diverse array of feedstocks. We agree that many factors including our ongoing reliance upon and venerability to the global petroleum market and the potential of second generation biofuels to meet these challenges makes this an appropriate time to assess the course and implementation of the RFS2 program. We applaud the committee's efforts in this regard.

Virent believes that the overarching policy stability provided by the RFS is vital to supporting the growth of our industry. However, the based upon many factors, including the evolving US energy landscape, the impending implications of the ethanol "blend wall", the emergence and promise of advanced, drop-in biofuels and the need to aggressively address climate issues make revision of the current standard essential. The RFS was successfully revised and improved once and further improvement is possible today. Virent believes that a thoughtful discussion of the issues, away from the entrenched positions on either end of the spectrum would be helpful. We encourage the Committee to seek additional input and hearing testimony from more moderated voices.



Based on Virent technology and positioning within the biofuels and biobased chemicals industry, we feel it is appropriate for us to comment on four (excluding questions 4, 5 and 7) of the seven questions posed by this white paper.

Question 1: Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

Virent believes that EPA's methodology which utilizes information from a multitude of sources, including input from producers, is sound. The flexibility provided to EPA by the RFS in administering this process is helpful and should allow the setting of an accurate and effective RVO each year. However, EPA needs to improve the timeliness of the release of these projections in order to allow all parties to more efficiently react and effect compliance strategies.

Question 2: Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

The largest issue with the cellulosic pool has been the slow deployment of new technology and the paucity of gallons produced to date. The EPA has generally done a good job of estimating production potential and the DC Court of Appeals decision has provided clear guidance to EPA regarding how to implement forward looking RVO in the future.¹ EPA could provide greater assistance to the nascent cellulosic industry by finding ways to expedite the approval process for new feedstocks and advanced biofuel pathways under the RFS.

The cellulosic waiver credit provisions should also be examined in light of the previously cited DC Court of Appeals ruling. Since EPA will no longer be able to set aspirational goals for cellulosic biofuel productions, the annual RVO should closely (if not exactly) match production volumes. One could envision a possible scenario where the waiver credit plus a D5 (advanced biofuel) RIN could be a less expensive compliance option than a D7 (cellulosic) RIN. Therefore, it would seem counterproductive to provide a compliance method like the waiver credit that could possibly allow some of the cellulosic volume produced to remain on the sideline and not be blended into the fuel market.

¹ U.S. Court of Appeals for the D.C. Circuit in *API v. EPA*, No. 12-1139 (D.C. Cir. January 25, 2013), available at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/A57AB46B228054BD85257AFE00556B45/\\$file/12-1139-1417101.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/A57AB46B228054BD85257AFE00556B45/$file/12-1139-1417101.pdf)



However, Virent believes that the RFS could be markedly improved and simplified if the current multi pool system (renewable and advanced, with advanced further subdivided into cellulosic, biomass based diesel and other advanced) were replaced by a purely performance based, technology neutral and renewable feedstock agnostic methodology.

One possible scheme would be to eliminate the current pools and replace them with a single pool that provides RIN credit based first on energy density (as in current law) coupled with additional RIN credit based on GHG performance. The GHG credit would increase exponentially for performance above the 20% GHG reduction threshold.

Such a system would be better able to meet the original intent of the RFS and have many positive effects, including:

- Allowing a wider array of biofuel technologies to enter the marketplace, including drop-in technologies with GHG performance between 20-60% reductions, or higher.
- Level the playing field between all biofuel molecules, processes, feedstocks and technologies and allow the marketplace to determine the “winner.” This would spur investment and job creation throughout the value chain.
- Incentivizing and rewarding incremental improvements in GHG performance.

However, for this type of system to be effective, Congress would first have to successfully address the ethanol blend wall by setting a standard for the percentage of ethanol allowed in the US gasoline pool. Furthermore, Congress should also consider eliminating the grandfathering provisions² for existing ethanol plants and consider updating the petroleum GHG baseline in order to account for the high carbon intensity crude oils (shale and tar sand production) now entering the US market.³

Finally, cellulosic biofuel production suffers from a lack of investment in additional capacity. The Committee should consider a provision that provides RIN compliance credit on a dollar-for-dollar basis to companies that demonstrate investment in increased production capacity in any given year.

Question 3: How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA’s

² Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, Federal Register, Vol. 75, No. 58 (Mar 26, 2010), available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-03-26/pdf/2010-3851.pdf>

³ GHG Emission Factors for High Carbon Intensity Crude Oils, NRDC Sept 2010. Available at: http://docs.nrdc.org/energy/files/ene_10070101a.pdf



proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

As noted by the committee, RIN credit trading is a “buyer beware” market. We support the proposed voluntary QAP as a tool to assist obligated parties in administering their compliance programs. However, this program should not be allowed to create unnecessary, duplicative and burdensome requirements on biofuel producers

Question 6: Should the provisions applicable to obligated parties be modified to provide relief for entities unable to generate sufficient RINs? Would such an approach apply different compliance requirements for refiners that blend ethanol and refiners that do not blend ethanol? What would be the justification for and potential consequences of such a change, including the potential for market distortions?

No, obligated parties have several avenues available to them to ensure compliance. The oil industry supported development of the RIN market as a tool to help meet their obligations in a flexible and cost-effective manner.⁴ The RIN market is currently working as predicted and should be allowed to function as designed.

Once again, we appreciate the opportunity to comment and hope this information is beneficial to the Committee as it continues its review of the RFS. If there are any questions please do not hesitate to contact me at (202) 507-1316 or david_hitchcock@virent.com.

Sincerely,



David M. Hitchcock
VP, Government Affairs

⁴ Comment submitted by Alfonse Mannato, American Petroleum Institute (API), on the Environmental Protection Agency (EPA) Proposed Rule: Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, November 12, 2006. <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0161-0185>.





BRAZILIAN SUGARCANE INDUSTRY ASSOCIATION

ETHANOL • SUGAR • ELECTRICITY

July 26, 2013

VIA ELECTRONIC MAIL

Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Re: UNICA's Comments on "Renewable Fuel Standard Assessment White Paper: Implementation Issues"

To Whom It May Concern:

The Brazilian Sugarcane Industry Association ("UNICA") appreciates the opportunity to provide these comments in response to the Committee on Energy and Commerce's *Renewable Fuel Standard Assessment White Paper: Implementation Issues* ("*RFS White Paper*").

UNICA is the largest organization representing sugar, ethanol, and bioelectricity producers in Brazil. UNICA's members are responsible for more than 50% of all ethanol production in Brazil and 60% of overall sugar production. UNICA's priorities include serving as a source for credible scientific data about the competitiveness and sustainability of sugarcane biofuels. The association works to encourage the continuous advancement of sustainability throughout the sugarcane industry and to promote ethanol as a clean, reliable alternative to fossil fuels. Sugarcane ethanol production uses 1.5% of Brazil's total land and reduces greenhouse gas ("GHG") emissions by 90% on average, compared to conventional gasoline. And thanks to our innovative use of ethanol in transportation and biomass for power cogeneration, sugarcane is now a leading source of renewable energy in Brazil, representing about 15% of the country's total energy needs. The scope of the industry is expanding existing production of a range of renewable fuels and chemicals and, with the help of innovative companies here in the United States and elsewhere, is beginning to offer bio-based hydrocarbons that can replace carbon-intensive fossil fuels.

Since Congress passed the Energy Independence and Security Act of 2007 ("EISA") and established a specific mandate for advanced biofuels, UNICA has played a critical and essential role in assisting the United States in achieving its renewable energy goals and thereby reducing GHG emissions. The sugarcane ethanol produced by UNICA's members provides significant GHG emissions reductions when compared to a gasoline baseline, and we are proud of the role that Brazilian sugarcane has played thus far in achieving the objectives and mandates of the EISA and the RFS2 program. The successful implementation of the EISA thus far is due in large part to the implementation flexibility that EPA and renewable fuel producers have under the EISA and the RFS2 implementing regulations. UNICA urges both Congress and EPA to maintain this flexibility and to avoid unnecessary requirements that will restrict the ability of Brazilian sugarcane ethanol producers and other foreign producers from participating fully in the RFS2 program by supplying much-needed advanced biofuels to the United States.

In further response to the *RFS White Paper*, UNICA provides the following answers to the Committee's questions:

I. Does EPA's annual RVO-setting process work well or are there concerns? If there are problems, are they correctable by EPA? Are any statutory changes needed?

As evidenced by the successful attainment of the EISA's volume mandates for renewable fuels and advanced biofuels each year since the RFS2 was implemented, the EISA's statutory provisions for setting the annual RVO are working well and statutory changes are not required. While the EISA includes aggressive goals for expanding the consumption of advanced biofuels—including cellulosic biofuels and biomass-based diesel—it also affords EPA significantly flexibility at the implementation stage to assure that these goals are met without disrupting the infrastructure for transportation fuels. EPA has used (or considered using) many of these instruments to facilitate the successful implementation of the RFS2 program.

In each year since the RFS2 program was implemented, EPA has relied on the waiver provisions of 42 U.S.C. § 7545(o)(7)(D) to waive a portion of the statutory volume of cellulosic biofuel after concluding that there was insufficient production to allow obligated parties to meet their statutory obligations. Significantly, these waiver provisions also provide EPA with discretion to determine whether an equivalent volume of advanced biofuels and total renewable fuels should also be waived. While EPA has not needed to rely on this additional waiver provision thus far, given the available supply of other advanced biofuels, its availability provides additional assurance that EPA has the flexibility necessary to successfully implement the annual RVOs. Likewise, while EPA has not relied on other waiver provisions in 42 U.S.C. § 7545(o)(7), their availability provides a backstop that ensures EPA can respond as necessary to changing market and environmental conditions.

At the same time, UNICA is concerned about EPA's recent delays in issuing final RVO rules, particularly in light of the uncertainty regarding cellulosic ethanol waivers and their impact on the volumetric requirements for other advanced biofuels such as Brazilian sugarcane ethanol. EPA is required by statute to complete the yearly RVO rulemaking by November 30 of the preceding calendar year. 42 U.S.C. § 7545(o)(7)(D)(i). The purpose of the November 30 deadline is to ensure that renewable fuel producers have sufficient time to respond to EPA's final rule and adjust fuel production accordingly. Thus, by delaying the 2013 RVO rulemaking—which still has not been finalized—EPA is limiting the ability of Brazilian sugarcane ethanol producers to adjust production in response to EPA's final decision. At the time of this submission, the 2013/2014 harvest season for Brazilian sugarcane, which began on April 1, is well underway. As a result, both sugarcane producers and ethanol mills have been forced to make production decisions for the 2013/2014 season (including between sugar and ethanol production and between hydrous and anhydrous ethanol) based on the content of EPA's proposed rule. Any change to the proposed rule will create challenges for the Brazilian sugarcane ethanol industry as it seeks to assist EPA in achieving Congress' goals for renewable fuel consumption. However, no statutory changes are required to correct these implementation challenges, as EPA already has a statutory obligation to issue final RVO rules in advance of each compliance year.

II. Are the cellulosic biofuel provisions in the RFS working well or do they need to be changed? Has EPA modified its cellulosic biofuel standard-setting process for 2013 and future years appropriately, following the DC Circuit's decision to vacate EPA's 2012 standard? If not, what further changes are needed? Should EPA be required to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume? What would be the consequences of such a change?

Because UNICA's members do not yet produce cellulosic biofuels at a commercial scale, we express no opinion with respect to the propriety of EPA's current process for setting standards for cellulosic biofuel. However, we do note that since the RFS2 program was implemented, Brazilian sugarcane ethanol producers have historically provided the vast majority of advanced biofuels necessary to replace the waived volumes of cellulosic biofuels, and we anticipate that Brazilian sugarcane ethanol, along with other advanced biofuels such as biomass based diesel produced from sugarcane and other renewable feedstocks will be available to do so in the future as well. As a result, we would strongly oppose any changes to the EISA that would require EPA to reduce the advanced biofuel and total renewable fuel volumes when it lowers the cellulosic biofuel volume.

When it passed the EISA in 2007, Congress made two significant changes to the RFS program that were intended to increase energy security and reduce GHG emissions. First, Congress extended and dramatically increased the statutory volume requirements for renewable fuels. Second, Congress established three nested subcategories of renewable fuels based on their superior lifecycle GHG emissions and included aggressive, technology-forcing statutory volume requirements for these subcategories. However, as described above, Congress gave EPA both the authority and the flexibility to reduce the required volume of cellulosic biofuel when "the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B)." 42 U.S.C. § 7545(o)(7)(D)(i). In the event that EPA waives a portion of the cellulosic biofuel mandate, the Agency also has the discretion to "reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser amount." 42 U.S.C. § 7545(o)(7)(D)(i). There is no reason for Congress to remove that flexibility and require EPA to reduce the volume of advanced biofuels in accordance with any reductions in the cellulosic biofuels mandate.

Congressional intent in creating these *advanced* biofuel categories and statutory volume requirements was to encourage innovation in biofuel technologies that would reduce GHG emissions as compared to the gasoline baseline (and as compared to traditional biofuels). Indeed, the stated purposes of the EISA include "increas[ing] the production of clean renewable fuels." See *also* 74 Fed. Reg. 24,904, 25,021 (May 26, 2009) (explaining that the RFS2 Rule's requirements "are designed to ensure significant GHG emissions reductions from the use of renewable fuels and encourage the use of GHG-reducing renewable fuels"). It would be inconsistent with these goals to require EPA to reduce the advanced biofuel volume along with any reduction to the cellulosic biofuel volume (presumably resulting in increased fossil fuel consumption) when there is sufficient volume of advanced biofuels available to make up for the waived portion of the cellulosic biofuel mandate. This is particularly true for advanced biofuels such as Brazilian sugarcane biofuels whose lifecycle GHG benefits exceed the 60% emissions threshold required for cellulosic biofuels. In other words, fulfilling the waived portion of the cellulosic biofuel mandate with Brazilian sugarcane ethanol and other advanced biofuels derived from sugarcane or similar feedstock will still achieve Congress' GHG reduction goals, while requiring EPA to reduce the volume requirements for advanced

biofuels and renewable fuels will needlessly forego these GHG reduction benefits. In addition, requiring EPA to reduce the required volumes of advanced biofuels in accordance with any waiver for cellulosic biofuel will add additional uncertainty into the advanced biofuels market and likely reduce investment in next-generation biofuels and production processes that offer even greater GHG reduction potential than what is realized with today's advanced biofuels. Thus, in any given year, if there is an insufficient volume of cellulosic biofuel available, but an ample volume of other advanced biofuels available with GHG emission reductions that are equal to or greater than the cellulosic threshold, EPA should have the flexibility to transfer the requirement from cellulosic to the other advanced biofuel categories with available supply. To do otherwise would undermine Congress' purpose for the EISA, encourage the increased use of fossil fuels, and impede the important clean energy innovation taking place in laboratories and pilot facilities around the world.

III. How can EPA improve its enforcement of the RIN credit trading program? Does EPA have the resources that would be required to oversee RIN production and enforce against production of invalid RINs? What role should obligated parties have in verifying the integrity of RINs and what additional information do they need to exercise due diligence? Will EPA's proposed voluntary third-party quality assurance program address the concerns of all RIN market participants? If not, what else is needed?

While UNICA is fully aware of recent concerns regarding RINs fraud and supports EPA efforts to ensure the validity of RINs, any actions taken by EPA to address RINs fraud must be narrowly tailored and must avoid unnecessary requirements that impede the production of valid and necessary renewable fuels. Specifically, EPA must avoid adding unnecessary requirements for sectors, such as the Brazilian sugarcane ethanol industry, where there is no evidence of RINs fraud. In fact, as the Renewable Fuels Association ("RFA") recently explained, "[o]ver the past several years, 34.4 billion ethanol RINs have been generated, 'and to our knowledge not a single one has been alleged or found to be fraudulent by EPA.'"¹ The lack of RINs fraud associated with ethanol can be attributed in large part to the fact that, unlike the biodiesel industry, ethanol RINs are never separated from the renewable fuels that generate them. As RFA explained "[t]he ethanol industry has not experienced fraud as the biodiesel industry has, largely because ethanol credits are assigned at the point of blending with gasoline and are never handled by the producers themselves."² Thus, expanding regulatory requirements further upstream to foreign producers is unnecessary, given the fundamental differences in the way that RINs are generated and retired in the ethanol sector.

To further instill confidence among both EPA and obligated parties, UNICA's members have taken proactive and binding steps and commitments to assure that Brazilian sugarcane ethanol is fully compliant with the RFS2 program and can generate valid RINs. In response to questions from importers and obligated parties, UNICA worked directly with EPA to ensure that Brazilian sugarcane ethanol producers maintained and could produce the necessary documentation to show that the ethanol they produced complied with all of the technical requirements that EPA imposes on foreign renewable fuel producers. As part of this process, UNICA met with EPA and educated the agency regarding the farming, harvesting, and production processes in Brazil and the many domestic recordkeeping requirements that together provided the

¹ Amanda Peterka, *Small Biodiesel producers still reeling as EPA sorts out fraud*, E&E Greenwire (Mar. 20, 2013) (quoting Geoff Cooper, Renewable Fuels Association).

² *Id.*

necessary records to demonstrate eligibility to participate in the RFS2 program. This process culminated in a letter from EPA acknowledging that the recordkeeping requirements proposed by UNICA would satisfy the technical requirements of the RFS2 program.³ As a result of this process, both fuel importers and obligated parties have every confidence that the Brazilian sugarcane ethanol imported to the United States is compliant with the RFS2 program's technical requirements and can be used to generate valid advanced biofuel RINs.

In light of this historical track record and proactive engagement with EPA, additional, mandatory requirements are unnecessary and should not be imposed on Brazilian sugarcane biofuel producers. As a result, UNICA does not believe that EPA's proposed quality assurance program ("QAP") is necessary to prevent RINs fraud with respect to Brazilian sugarcane ethanol. At the same time, however, UNICA appreciates that the proposed quality assurance program may alleviate the concerns of some RINs market participants with respect to other feedstocks. In light of these differential feedstock-based concerns, UNICA supports EPA's proposal to make the QAP voluntary and believes that EPA should take all necessary steps to ensure that program remains voluntary—both as a legal and as a practical matter—and does not become a *de facto* requirement for all renewable fuel producers. In addition, as explained in UNICA's comments to EPA, we urge the Agency to account for unique issues associated with the import of renewable fuels and to build into the QAP the flexibility needed to address specific issues associated with Brazilian sugarcane ethanol production, such as the temporal and spatial separation of ethanol production and RINs generation; the high costs associated with recordkeeping and reporting requirements; and country-specific differences in standards, titles, and certification programs. By adopting a voluntary and flexible QAP, EPA can balance the interests obligated parties who desire additional certainty, with those of renewable fuel producers who have taken proactive steps to ensure compliance and for whom additional oversight is not necessary.

For the same reasons, UNICA strongly opposes EPA's recent proposal to expand the mandatory regulatory compliance requirements in 40 C.F.R. § 80.1466 beyond entities that generate RINs from foreign renewable fuel to all foreign renewable fuel producers, regardless of whether they generate RINs. See 78 Fed. Reg. 36,042, 36,065 (June 14, 2013). At present, these regulations do not apply to Brazilian sugarcane ethanol producers because RINs associated with Brazilian sugarcane ethanol are generated by third parties at the port of entry to the United States. Several of these provisions, including facility-based segregation of ethanol shipments, dramatically increased bonding requirements, and limitations on evaporative loss during shipment will significantly increase the costs of compliance. In fact, if finalized the proposed regulations may prove practically infeasible, and will likely encourage Brazilian sugarcane mills to shift production to other markets. Given the important role that the Brazilian sugarcane ethanol industry plays in achieving the EISA's advanced biofuels mandate, finalizing this rule would likely threaten the United States' ability to meet the EISA's volume requirements. Therefore, in its comments on the proposal, UNICA urged EPA to withdraw this portion of the most recently proposed RFS2 amendments.⁴

³ Letter from John Weihrauch, Fuels Compliance Center, EPA, to Roger R. Martella, Jr., re: Recordkeeping Requirements for Brazilian Ethanol Producers Under the Renewable Fuel Standard Program, 40 CFR § 80.1454(c)(1) (July 25, 2012).

⁴ UNICA, *Comments on "Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards," Docket EPA-HQ-OAR-2012-0401* (July 15, 2013) (Attachment A).

IV. What is responsible for the rise in ethanol RIN prices in 2013? Can future increases in RFS compliance costs be avoided, and if so, how? If the government takes action to limit increases in RFS compliance costs, how might such action affect this market-based program?

As explained above, UNICA's members do not generate RINs and, therefore, are not directly involved in the RIN market. However, from our position as producers of renewable fuels, we believe that the increase in RINs prices is related primarily to ongoing uncertainties in the RFS program. These uncertainties involve (1) the ongoing viability of the RFS2 program in light of calls for dramatic change or even repeal, (2) implementation concerns with respect to the impending "blend wall" caused by the effective 10% cap on ethanol content in gasoline, and (3) EPA's delays in issuing yearly RVO standards. UNICA concurs with the comments made by other market participants, such as the Advanced Biofuels Association's ("ABFA's") Michael McAdams, who stated that EPA's timely actions in both 2013 and future year volume obligation "would help rapidly defuse much of the economic pressure" associated with the increasing RIN prices. Thus, any certainty and assurances that EPA or the Congress can provide to obligated parties and other RFS2 participants will alleviate the current "uncertainty premium" observed in RINs prices and allow them to return closer to historic levels.

V. Are increases in RIN prices likely to affect the production or marketing of renewable fuels? If so, how might this affect implementation of the RFS and RIN prices moving forward?

One of the primary effects of the increases in RIN prices will be an increase in renewable fuel production as producers seek to take advantage of the increased value placed on RINs. Significantly, production increases are likely among fuels and feedstocks that were "grandfathered" into the RFS2 program despite not meeting the 20% GHG reduction threshold that is typically required to qualify as a renewable fuel. These grandfathered fuels offer minimal GHG reduction benefits when compared to advanced biofuels (or even to the conventional corn-derived ethanol which have historically filled much of the general renewable fuel category under the RFS2). While it may not have been Congress' intent to promote such fuels, combining high RIN prices with the availability of the grandfathering clause is likely to promote the increased production of these fuels. Particularly in light of the impending blend wall, there is a risk that production of such fuels for the RFS2 market will decrease the available market share for other renewable fuels with superior GHG reduction characteristics and inadvertently impede the innovative development of next-generation biofuels that the EISA is intended to foster.

Respectfully Submitted,



Leticia Phillips
Representative – North America

ATTACHMENT A



BRAZILIAN SUGARCANE INDUSTRY ASSOCIATION

ETHANOL • SUGAR • ELECTRICITY

July 15, 2013

VIA EMAIL AND REGULATIONS.GOV

Air and Radiation Docket and Information Center
Environmental Protection Agency
Mailcode 6406J
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: UNICA's Comments on "Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards," Docket EPA-HQ-OAR-2012-0401

To Whom It May Concern:

The Brazilian Sugarcane Industry Association ("UNICA") appreciates the opportunity to provide these initial comments on the proposed rule, entitled "Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards" ("proposed RFS2 amendments"), 78 Fed. Reg. 36.042, published by the United States Environmental Protection Agency ("EPA") on June 14, 2013. As described below, EPA's proposed changes to the Renewable Fuel Standard ("RFS2") program's treatment and handling of Brazilian sugarcane ethanol will, if finalized as proposed, fundamentally change, challenge, and disrupt the ability of the Brazilian sugarcane industry to provide necessary feedstock and fuels to the United States.

For over six years, UNICA and the Brazilian sugarcane industry have worked collaboratively with EPA and the U.S. renewable fuel industry as one of the most important stewards of the renewable fuels sectors in the United States (to the extent that EPA itself has now indicated that it will rely on Brazilian sugarcane ethanol to the extent of 666 million gallons in 2013 in order to satisfy the RFS2 mandated volumes). It thus comes as an extraordinary shock and concern that EPA proposes to impose regulations for the first time on the Brazilian sugarcane industry that will not lead to any environmental or other benefits, but only will make it less likely—if not commercially impossible—for the Brazilian sugarcane industry to continue to trade with the United States and, in turn, assist the United States in satisfying its statutory and regulatory mandates for advanced biofuels consumption.

UNICA, from the outset of the RFS2 program, has enjoyed an extraordinary and mutually successful working relationship with EPA and with the American renewable fuel industry, and UNICA's members have demonstrated an unblemished record of commitment to the environment, regulatory compliance, and transparency. With respect, we urge the EPA to reconsider and withdraw the proposal as it applies to the Brazilian sugarcane industry and other foreign renewable fuel producers who do not generate Renewable Identification Numbers ("RINs"), and to finalize the rule without the proposed amendments. Today, we file these comments to highlight the significant concerns and problems with EPA's proposal, and intend to provide additional information to EPA in

upcoming weeks as part of the rulemaking docket here. We remain committed and available to work with EPA to address any questions and to ensure that EPA finalizes a rule that realizes EPA's goals without eradicating a critical source and supply of biofuels in the United States.

Introduction

UNICA is the largest organization representing sugar, ethanol, and bioelectricity producers in Brazil. UNICA's members are responsible for more than 50% of all ethanol production in Brazil and 60% of overall sugar production. UNICA's priorities include serving as a source for credible scientific data about the competitiveness and sustainability of sugarcane biofuels. The association works to encourage the continuous advancement of sustainability throughout the sugarcane industry and to promote ethanol as a clean, reliable alternative to fossil fuels. Sugarcane ethanol production uses 1.5% of Brazil's arable land and reduces greenhouse gas ("GHG") emissions by 90% on average, compared to conventional gasoline. And thanks to our innovative use of ethanol in transportation and biomass for power cogeneration, sugarcane is now a leading source of renewable energy in Brazil, representing about 15% of the country's total energy needs. The scope of the industry is expanding existing production of a range of renewable fuels and chemicals and, with the help of innovative companies here in the United States and elsewhere, is beginning to offer bio-based hydrocarbons that can replace carbon-intensive fossil fuels.

Since Congress passed the Energy Independence and Security Act of 2007 ("EISA") and established a specific mandate for advanced biofuels, UNICA has played a critical and essential role in assisting the United States in achieving its renewable energy goals and thereby reducing GHG emissions. As UNICA has previously explained, studies have shown that Brazilian sugarcane ethanol reduces GHG emissions by as much as 90% when compared to fossil fuels.¹ EPA has also recognized the GHG reduction benefits of Brazilian sugarcane ethanol and has classified it as an advanced biofuel under the RFS2 program. See 75 Fed. Reg. 14,670, 14,790-91 (Mar. 26, 2010).

In response, Brazilian sugarcane ethanol producers representing over four hundred different mills have made long-term commitments to supporting the United States' efforts to promote renewable fuels and have supplied the majority of undifferentiated advanced biofuels each year since the RFS2 program was implemented. Nearly all of the 1.5 billion gallons of fuel ethanol imported by the U.S. since EISA was passed have been from Brazilian sugarcane.² This support continues today, as EPA has

¹ See UNICA, Submission of Comments: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuels Standards Program, Docket EPA-HQ-OAR-2005-0161 (Sept. 25, 2009) at 7 ("RFS2 Comments") (citing Zuurbier, Peter and Jos Van de Vooren, eds., *Sugarcane Ethanol: Contributions to Climate Change Mitigation and the Environment*, (Wageningen, The Netherlands: Wageningen Academic, 2008)); see also UNICA, Comments on "Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards," Docket EPA-HQ-OAR-2012-0546 at 4-5 ("2013 RVO Comments").

² See EIA U.S. Imports by Country Data, available at http://www.eia.gov/dnav/pet/PET_MOVE_IMPCUS_A2_NUS_EPOOXE_IM0_MBBL_M.htm (last visited July 15, 2013). Note most ethanol imported from Caribbean and Central American countries to date has been Brazilian hydrous ethanol that was dehydrated in Caribbean countries in order to avoid a 54 cents per gallon import duty. For more information, see Brent D. Yacobucci, *Ethanol Imports and the Caribbean Basin Initiative (CBI)*, Congressional Research Service (CRS) Report RS21930 (2008).

projected that 666 million gallons of Brazilian sugarcane ethanol will be required to achieve the EISA's advanced biofuels requirement for 2013. See 78 Fed. Reg. 9282, 9298 (Feb. 7, 2013). The United States' demand for Brazilian sugarcane ethanol will only increase in coming years, given the aggressive increases in the advanced biofuels mandate that Congress included in the EISA. In fact, even after taking Brazilian sugarcane ethanol imports into account, EPA has already expressed concern that that producers may be unable to produce the additional 1 billion gallons of advanced biofuel needed to meet the 2014 requirement. *Id.* at 9301. Thus, as EPA has recognized, it cannot meet Congress' aggressive goals for renewable fuel consumption without the continued assistance of Brazilian sugarcane renewable fuels producers.

At the same time, UNICA and its members remain mindful of the increasing concerns EPA has expressed regarding fraud in specific parts of the RFS2 program that are unrelated to Brazilian sugarcane ethanol. Although there have not been any hints of allegations of RINs fraud against the Brazilian sugarcane industry, UNICA has worked proactively with EPA to ensure that the agency is satisfied that mill operators maintain and can provide the necessary documentation to show that the ethanol they produce meets the RFS2 requirements for renewable fuels and is eligible to generate RINs. Throughout that process, UNICA worked with EPA to help the agency understand the unique patterns and practices of Brazilian sugarcane farms and mills and the distinctions of industries that operate in nations thousands of miles away from the United States in order to facilitate the inclusion of Brazilian sugarcane ethanol in the RFS2 program. At the end of the mutual discussions, EPA and UNICA reached resolution that satisfied EPA's regulations regarding the documentation necessary to support RFS2 requirements while taking into account and recognizing the on-the-ground practices of Brazilian sugarcane farmers and mills.³

In its June 14, 2013 summary of the proposed RFS2 amendments, EPA explained that it proposes to (1) amend certain RFS2 program regulations related to biogas, compressed natural gas and liquefied natural gas pathways, renewable diesel, renewable naphtha, and renewable electricity, crop residue and corn kernel fiber, and advance butanol along with "several other [unspecified] amendments to the RFS2 program," (2) change the E15 misfiring rule, and (3) change the ultra-low sulfur diesel program. 78 Fed. Reg. at 36,042.

Critical to UNICA and the Brazilian sugarcane industry, however, among other changes to the RFS2 program not highlighted in the summary was EPA's proposal to expand the regulatory requirements currently applicable to foreign renewable fuel RINs generators to all foreign renewable fuel producers, regardless of whether they generate RINs. While EPA did not view this amendment as significant enough to warrant specific notice in the summary of the proposed rule, these changes, which will not offer any benefits to EPA or obligated parties, will have destructive impacts on the ability of Brazilian sugarcane ethanol producers who do not generate their own RINs to do business with the United States and supply sugarcane ethanol to domestic markets.

Given these devastating impacts to the relationship between our industry and the United States, UNICA regrettably for the first time in its six year relationship with EPA has no choice but to object to and oppose EPA's proposed amendments to 40 C.F.R. §

³ Letter from John Weihrauch, Fuels Compliance Center, EPA, to Roger R. Martella, Jr., re: Recordkeeping Requirements for Brazilian Ethanol Producers Under the Renewable Fuel Standard Program, 40 CFR § 80.1454(c)(1) (July 25, 2012).

80.1466 and urges EPA to withdraw these amendments from the final rule. These amendments will impose not only significant and costly obligations on UNICA's members but will also make compliance with the RFS2's requirements by UNICA's members practically infeasible. As a result, UNICA's members and other producers may be left with no choice but to decline to supply Brazilian sugarcane ethanol under the RFS2 program and look to other domestic and global markets instead, where demand has been increasing. We also note the proposed amendments would have a knock-on impact on the California Low Carbon Fuel Standard ("LCFS"), which also depends on Brazilian renewable fuels for its aggressive compliance goals.⁴

Further, the amendments are wholly unnecessary, both because there is no evidence of fraud or any other concern associated with Brazilian sugarcane ethanol and because they would not remedy any issues EPA seeks to address; to the contrary, EPA and UNICA have worked closely and directly in the past to establish specifically tailored protocols for documentation of the production of sugarcane ethanol in Brazil which have been rigidly implemented by the industry. In addition, the proposed RFS2 amendments are inconsistent with the purpose of the EISA because the continued import of Brazilian sugarcane ethanol is an essential component of the United States' efforts to comply with the EISA's statutory volume requirements for advanced biofuels and the proposed amendments would severely threaten the ability of Brazilian ethanol producers to supply the United States. Finally, the proposed RFS2 amendments raise a number of international trade issues because these additional requirements—which only apply to foreign producers—may be inconsistent with World Trade Organization ("WTO") policies. In light of these concerns and deficiencies, the only appropriate course is for EPA to withdraw the proposed rule and limit the scope of 40 C.F.R. § 80.1466 to foreign producers and importers who generate RINs.

Finally, in response to EPA's uncharacteristically short comment period of 30 days, UNICA requested a 30-day extension so that it could fully assess and explain to EPA the impact the proposed rule would have on its members and their ability to export sugarcane ethanol to the United States. While EPA declined to grant an overall 30-day extension of the comment period, it stated that it would "welcome any substantive comments you provide after the deadline" and "will review comments received in sufficient time before the completion of the final rule and take substantive information into consideration during our deliberations."⁵ In response to EPA's denial of our request to extend the comment period generally, UNICA submits these comments in accordance with EPA's July 15, 2013 deadline so that it can have the benefit of these arguments alongside other comments being filed on the deadline. As EPA permitted and allowed in the aforementioned letter, UNICA plans to shortly submit supplemental comments with additional data and analysis on why the proposed amendments should be withdrawn.

⁴ For further information on the role on Brazilian sugarcane biofuels on the LCFS, see ICF International, *California's Lower Carbon Fuel Standard: Compliance Outlook for 2020* (June 2013), available at <http://www.fuelinggrowth.org/californias-low-carbon-fuel-standard-compliance-outlook-for-2020/> (last visited July 15, 2013).

⁵ Letter from Christopher Grundler, Director, Office of Transportation and Air Quality, to Leticia Phillips, UNICA (July 10, 2013) (attached as Exhibit A).

I. Implementation of the Proposed Amendments to 40 C.F.R. § 80.1466 Will Dramatically Limit the Availability of Brazilian Sugarcane Ethanol to be Exported to the United States

A. Background: Brazilian sugarcane ethanol production and RIN generation

Since the RFS2 program began, the EPA, through the regulations, has required a logical, reasonable, and workable approach where RINs associated with Brazilian sugarcane ethanol have been generated by importers at the port of entry to the United States, and not on the ground in Brazil by the producers themselves. As a result, while Brazilian sugarcane ethanol producers are subject to numerous requirements under the RFS2 program, for good reason they have not specifically been subject to the requirements of 40 C.F.R. § 80.1466, which currently applies only to “RIN-generating foreign producers and importers of renewable fuels.” See 40 C.F.R. § 80.1466. One of the primary reasons that Brazilian sugarcane ethanol producers do not generate RINs is that only denatured ethanol is eligible to generate RINs under the RFS2 program. See 40 C.F.R. § 80.1101(d)(3) (“Ethanol covered by this definition [of renewable fuel] shall be denatured as required and defined in 27 C.F.R. parts 20 and 21. . . .”). Thus, until ethanol is denatured it is not considered a renewable fuel under the RFS2 program and, consequently, cannot generate RINs.

Unlike practices in the United States, it is uncommon for ethanol producers to immediately add denaturants to ethanol in Brazil. Instead, for Brazilian tax purposes, a coloring agent may be added to *anhydrous* ethanol to distinguish it from *hydrous* ethanol products. (The U.S. only uses anhydrous ethanol, where as Brazil uses hydrous ethanol neat for its flex-fuel vehicles.) Thus, denaturants are not added to ethanol (if at all) until long after the producer has relinquished custody of the ethanol to third parties, most often at the U.S. port of entry. (Brazilian export data corroborates this, showing that of the 300 million gallons of ethanol Brazil exported year-to-date, none of the anhydrous ethanol was denatured.⁶) Given prevailing local customs and infrastructure and their lack of use with denaturants, Brazilian sugarcane mills do not engage and have not engaged in the process of adding denaturants and generating RINs at the facility.

Instead, the common production and transportation process for Brazilian sugarcane ethanol exports is as follows: First, mills generate ethanol and sugar from sugarcane feedstocks that are located in close proximity to the mills. The ethanol produced by the mills is then transported to ports such as Santos (São Paulo state) and Paranagua (Parana state) by truck (or occasionally by rail),⁷ where it may be stored prior to shipment. Next, the ethanol is loaded onto tanker ships for transport to the United States. For logistical reasons and to increase efficiency, ethanol from multiple mills is typically comingled at intermediary storage facilities for transport to the United States. Because hydrous ethanol is not eligible for the RFS2 program, shipments of hydrous ethanol are typically dehydrated in a Caribbean CBI country, returned to the ship, and then transported to the United States.⁸ At the port of entry (or at times upon loading in a

⁶ See Brazilian Ministry of Trade & Development (MDIC)'s Secretary of External Trade (SECEX) data for NCMs 22071010, 22071090, 22072011, 22072019, 22071000, available at <http://alicesweb2.mdic.gov.br/> (requires free registration).

⁷ Brazilian ethanol producers are in the process of building pipelines that may be used to transport ethanol to port. While some pipeline infrastructure is operating, the pipelines' access to the ports will likely not be completed for another 18 months.

⁸ This dehydration process was most common prior to 2012, when the U.S. imposed a 54 cents per gallon tariff on fuel ethanol imports for non-CBI countries. As evidence of this change, less

vessel at the port of departure), the ethanol is transferred to the custody of the U.S. importer, who adds gasoline to denature the anhydrous ethanol (in accordance with 27 C.F.R. parts 20 and 21) and then generates D5, advanced biofuel RINs. The RINs are then transferred (along with the physical fuel ethanol) to obligated parties or other third parties. This process also offers efficiencies and economies of scale because, while hundreds of Brazilian sugarcane mills export ethanol to the United States, only a few large corporations are involved in importing Brazilian ethanol and generating RINs.⁹

This process has been followed consistently since the RFS2 program was implemented and is unlikely to change because it avoids any costly complications and does not require new significant infrastructure related to the production of denatured ethanol in Brazil. In addition, by delaying generation of RINs until the ethanol is ready for import, there are fewer RINs transactions and, accordingly, fewer opportunities for potentially fraudulent transfers through the separation of RINs from the underlying ethanol or other means. Furthermore, through contractual arrangements, Brazilian sugarcane ethanol producers and the importers/RINs generators have developed mutually acceptable and established means of allocating the risks associated with invalid RINs and other potential losses.

- B. Applying the requirements of 40 C.F.R. § 80.1466 to Brazilian sugarcane ethanol producers will not only dramatically increase compliance costs, but create potentially insurmountable challenges for ethanol producers to export to the United States*

As EPA explained in the preamble to the proposed RFS amendments, it is proposing a groundswell and unnecessary change that would “require the same requirements for foreign renewable fuel producers, and foreign ethanol producers that produce biofuel for which importers ultimately generate RINs, and for importers of renewable fuel.” 78 Fed. Reg. at 36,065. Thus, it is EPA’s intent that all of the requirements that currently apply to the importers of Brazilian sugarcane ethanol who generate RINs would apply equally to the hundreds of Brazilian sugarcane ethanol mills who produce the ethanol. However, as a result of the many intermediate steps between ethanol production and RINs generation for Brazilian sugarcane ethanol, these requirements will prove extraordinarily challenging for ethanol producers and, in many instances, may prove infeasible as a practical and pragmatic matter. The sections below describe some of the most significant challenges that the requirements included in 40 C.F.R. § 80.1466 will pose for Brazilian sugarcane ethanol producers.

1. Requiring segregated shipping from the mill to the port of entry into the United States will prove utterly infeasible and unworkable and is inconsistent with the goals of the RFS2 program

For Brazilian sugarcane ethanol producers, among the most onerous requirements in 40 C.F.R. § 80.1466 is the requirement to segregate batches of renewable fuel on a facility-by-facility basis until the fuels are imported to the United

than 7% of Brazil’s ethanol exports this year have gone to CBI countries. See *supra* note 2 for background.

⁹ Based on EIA’s Company level import data, these are the only companies that imported fuel ethanol into the United States since January 2012: BP, Cargill, Colonial, Flint Hills, Gavelon, Global, Lansing, Louis Dreyfus, Neco, Morgan Stanley, Murex, Phillips 66, Raizen, Shell, Sucden, Vitol. However, the vast majority of the imports during this period have been handled by three of these companies. See <http://www.eia.gov/petroleum/imports/companylevel/> for detailed data.

States. Pursuant to these regulations, each batch of renewable fuel must be designated as “RFS-FRRF” at the time the renewable fuel is produced,” *id.* § 80.1466(c)(1), and must “remain[] segregated from NON-RFS-FRRF another RFS-FRRF produced by a different foreign producer,” *id.* § 80.1466(d). Further, the regulations include a prohibition that states:

No person may combine RFS-FRRF with any Non-RFS-FRRF, and no person may combine RFS-FRRF with any RFS-FRRF produced at a different production facility, until the importer has met all the requirements of subsection (k) of this section.

Id. § 80.1466(j)(1). Thus, if these regulations were applied equally to Brazilian sugarcane ethanol producers, each facility’s ethanol designated for export to the United States would have to be segregated from other batches of ethanol, regardless of whether those other batches are or are not intended to be exported to the United States and used to generate RINs. In other words, all batches Brazilian sugarcane ethanol would effectively have to be shipped separately from hundreds of different mills to the port of entry to the United States if they originate from separate facilities, fundamentally disrupting the actual production of ethanol from the actual infrastructure in Brazil for transporting ethanol. The logistical demands associated with such detailed fuel segregation cannot be overstated and, as a practical matter, may render the export of Brazilian sugarcane ethanol infeasible.¹⁰

First, requiring the complete segregation of each batch of Brazilian sugarcane ethanol destined for export to the United States will require the exclusive use of trucks to transport the ethanol from the mill directly to the port of exit, in either Santos or Paranagua, because other transportation options all involve the commingling of ethanol from different facilities. While transportation by truck is not uncommon today, it is not often a straight shipment from the mill to the port of exit. For example, the use of transshipment storage tanks has been growing in recent years and offers a number of advantages as it increases the logistical efficiency of truck fleets in various regions. However this method as well the use of railcars typically involves the comingling of ethanol from different facilities and would, therefore, be rendered impracticable under the proposed amendments to 40 C.F.R. § 80.1466. Likewise, the shipment of ethanol to the ports by pipeline, which is scheduled to commence in the next 18 months, would effectively be barred, as pipeline shipments necessarily result in some comingling of fuels. In addition to the cost benefits that shipment by rail or pipeline can offer to ethanol producers, they produce fewer GHG emissions than transportation by truck. Thus, contrary to the overarching goal of the RFS2 program, applying 40 C.F.R. § 80.1466 to Brazilian sugarcane ethanol producers will have the perverse effect of increasing GHG emissions associated with Brazilian sugarcane ethanol and decreasing efficiencies.

Second, requiring segregated storage at the ports of exit will be extremely costly, is not today practical, and may prove technically infeasible. In order to ensure efficient transportation from Brazil to the United States, sugarcane ethanol is always stored in tanks at the port of exit until there is sufficient capacity to fill a transport vessel. However, the tankage capacity in ports of exit is limited and it is highly unlikely that there are

¹⁰ Cezary Podkul, *New EPA Rules Could Cripple Brazil-U.S. Ethanol Trading*, Reuters (July 13, 2013), available at <http://reut.rs/13VdS2C> (last visited July 15, 2013).

sufficient segregated storage tanks available to separately accommodate the many mills that currently export ethanol to the United States.

For example, in Santos, the most commonly used port in Brazil for ethanol exports, storage exclusive for ethanol may be limited to approximately 70 million gallons, divided among multiple storage tanks with capacities in the range of 1-2 million gallons. Likewise, in the port of Paranagua, ethanol storage is limited to less than 25 million gallons with similarly sized storage tanks. Given that an average mill (with a 2.4 million ton crush capacity) would be expected to produce approximately 1.5 million gallons of anhydrous ethanol for export each year, each mill would be required to have its own dedicated storage tank to comply with the fuel segregation requirements and amass a sufficient volume of ethanol to fill the storage tanks in the ports of exit and (as describe below) on the shipping vessels. Assuming that all of the capacity in Santos and Paranagua were dedicated to exports to the United States, storage may be limited to as few as 50 mills and at prohibitively high costs given segregation requirements. Thus, unless new tanks are built or existing tanks are retrofitted for segregated storage, there would be insufficient storage capacity to accommodate all of the mills and, for many of them, exports to the United States will become practically infeasible.

Third, requiring segregated storage on transport vessels will prove inefficient and, in some cases, economically infeasible. While transport vessels vary, the most common are chemical tanker ships that are capable of carrying approximately 10 million gallons in 10 or more separate tanks. According to EIA Company level data, in the last few years the average shipment of ethanol from U.S. to Brazil was in the 3 million gallon range. (Not all of these tanks will be filled with ethanol, as Brazilian production and U.S. demand both vary by season.) However, since each batch of ethanol is shipped to the port by truck, it follows logic that multiple trucks' shipments are needed to fill each compartment of the vessel, resulting in the comingling of ethanol from multiple batches and mills.

But even if segregation of fuels during transport is technically feasible it is highly inefficient, particularly if tanks cannot be filled completely. From an economic standpoint, it is inefficient to transport partially filled ships from Brazil to the United States. Because many of the transportation costs are fixed, ethanol producers are likely to be charged a much higher per-unit price for transportation, which could reduce or even eliminate altogether the expected narrow margins associated with exporting the ethanol to the United States. In the same manner, the GHG emissions associated with transporting ethanol from Brazil to the United States are largely fixed, and transporting at less than full capacity will increase the per-gallon GHG emissions for the shipment. Again, this inefficient transport directly contravenes the primary GHG reduction goals of the RFS2 program.

2. Bonding requirements will place significant financial burdens on mills relative to their capitalization/cash assets

Since the RFS2 program was first implemented, EPA has required foreign RIN generators to post a bond of \$0.01 per gallon of renewable fuel that the RIN generator had produced in the past (on an annual basis) or expects to produce during the calendar year. 40 C.F.R. § 80.1466(h). In addition to expanding the bonding requirements to non-RINs generating foreign renewable fuel producers, EPA has proposed to dramatically increase the size of the bond that foreign producers must post in response to the increasing value of the RINs. As a result, the revised bond requirements would

vary by D-code, and for D-5 sugarcane ethanol, the bond would increase to \$0.20 per gallon of ethanol. *Proposed* 40 C.F.R. § 80.1466(h), 78 Fed. Reg. at 36,076.¹¹

Applying this new bonding requirement to Brazilian sugarcane mills will add a substantial new cost that many mills may not be able to bear. For example a mill which exports 5 million gallons of sugarcane ethanol per year to the United States would be required to post a \$1 million bond, or twenty cents per gallon. Put another way, based on EPA's projections for Brazilian sugarcane ethanol imports for 2013, the industry would have to post a collective bond of \$133 million. While some associate the Brazilian sugarcane industry with large integrated companies, much of the ethanol sent to the United States comes from small, independent producers. These bonding requirements will have the effect of pricing the small, independent producers out of the export market and will also create a significant barrier to entry for new mills. These disproportionate impacts on small businesses raise significant equity and social justice concerns that must be carefully considered by the agency.

Moreover, EPA fails to fully consider whether these substantial bonds are necessary to protect against RINs fraud from Brazil. As described more fully below, there is no evidence of RINs fraud related to Brazilian sugarcane ethanol, and, given the other RFS2 documentation and monitoring regulations applicable to sugarcane ethanol production in Brazil, there is no apparent need to increase the bonds for these feedstocks. Furthermore, the proposed amendments fail to appreciate the fact that for sectors such as the Brazilian sugarcane industry, which do not generate their own RINs, EPA is now collecting a double-bond because the rules would classify both the renewable fuel producer and the importer/RIN generator as "foreign producers" subject to the bonding requirement. *See proposed* 40 C.F.R. § 80.1466(a), 78 Fed. Reg. at 36,076. Thus, if EPA truly believes that a \$0.20 per gallon bond is necessary, it should not effectively require a bond of \$0.40 per gallon from two separate sources. By requiring a double bond for Brazilian sugarcane ethanol, the proposed RFS2 amendments would add unnecessary and insurmountable burdens on small producers and needlessly lock up capital that could otherwise be put to use by the mills and importers.

3. Limitations on evaporative loss during shipment will pose significant burdens on Brazilian sugarcane ethanol producers and will paradoxically and illogically require them to retire RINs to account for losses that occur before any RINs are generated

As a means of controlling transportation losses and ensuring that all RINs are backed by renewable fuels that are available for blending by obligated parties, the RFS2 program requires foreign RINs generators to account for transportation losses through a comparison of load port and port of entry testing. 40 C.F.R. § 80.1466(e). In the event that transportation losses exceed 1% of the total volume of renewable fuel calculated at the load port, the RINs generator must retire a sufficient number of RINs to account for the transportation losses and ensure that when the RINs are transferred to obligated parties or other third parties, they are accompanied by an equivalent amount of physical renewable fuel. *Id.* § 80.1466(e)(2)(ii).

The proposed RFS2 amendments impracticably and inexplicably would also expand this loss accounting process to all foreign renewable fuel producers, regardless

¹¹ The calculation for the D-5 bond is as follows: Bond = 0.25 x (0.8 x Gallons of D-5 ethanol). *Id.*

of whether they generate any RINs. See *Proposed* 40 C.F.R. § 80.1466(e)(1)(i), 78 Fed. Reg. at 36,076. Extending this requirement to all Brazilian sugarcane ethanol producers is not only irrational, but will cause significant—and potentially insurmountable—burdens. At the outset, applying these RINs retirement obligations to Brazilian sugarcane ethanol producers is fundamentally inconsistent and at odds with the purpose of the comparative testing program in the first place. As described above, the purpose of the comparative testing program is to ensure that transportation losses do not leave a foreign renewable fuel producer with more RINs than it has gallons of renewable fuel. However, because RINs for Brazilian sugarcane ethanol are generated at the U.S. port of entry, *after* port of entry testing (and the addition of denaturant), the RINs will always be equal to the volume of Brazilian sugarcane ethanol that is available for import and sale to obligated parties. Thus, any transportation losses necessarily will diminish the number of RINs that can be generated by the importer, but cannot create a discrepancy between the RINs produced and the renewable fuel available for blending. Indeed compliance with the rule would be practically impossible, as no RINs are generated in Brazil to create the delta between what may be lost through evaporation in transportation. Thus, in the event that EPA moves forward and regulates all foreign renewable fuel producers under 40 C.F.R. § 80.1466, the agency must clarify that the obligation to retire RINs in response to evaporative losses does not arise until *after* the RINs are generated, and that foreign producers need not account for transportation losses that occur before that time.

In addition to the regulatory frivolousness and impossibility of the requirement, there are pragmatic concerns that distinguish far away generators of ethanol from their American counterparts. The export of sugarcane ethanol from the load port in Brazil to the port of entry in the United States is a long process and, in the case of hydrous ethanol, involves an intermediate step to dehydrate the ethanol in a Caribbean CBI country. This extended transport period and potential transfer and dehydration of the ethanol provides ample opportunity for evaporative losses to occur. As a result, it is conceivable, and in fact likely, that transportation losses will exceed 1%. The risk of exceeding the 1% evaporative loss threshold will be exacerbated by the requirement for segregated shipments, which will result in shipments in partially filled storage containers where evaporative loss is more likely to occur. Thus, there is a significant likelihood that Brazilian sugarcane ethanol producers will be required to retire sufficient RINs to account for the volume of ethanol that is lost through transport. This will create a significant hardship for Brazilian sugarcane ethanol producer because they do not generate RINs and, therefore, will have to purchase RINs on the open market. At a current price of over \$1 per gallon, retirement of D5, advanced biofuel RINs will be costly and could swallow the narrow margin under which Brazilian sugarcane ethanol producers operate.

This issue alone demonstrates the impracticality and the infeasibility of applying these regulations to ethanol producers in Brazil. Rather than make the regulatory obligations so complicated and burdensome to the point where exporters lose incentive to trade with the United States, EPA should reconsider and withdraw these proposed amendments to ensure the orderly continued export to the United States.

4. The additional obligations of 40 C.F.R. § 80.1466 will add to the regulatory burden faced by Brazilian sugarcane ethanol producers and exacerbate the challenges of complying with the proposed RFS2 amendments

The proposed RFS2 amendments require a number of additional requirements in beyond those described above. These requirements include: (1) conducting multiple independent, third-party audits, 40 C.F.R. § 80.1466(c), (d); (2) providing complete access to EPA inspectors and auditors and their agents, *id.* § 80.1466(f)(1); (3) appointing an agent in Washington D.C. for service of process, *id.* § 80.1466(f)(2); (4) accepting U.S. jurisdiction and the application of U.S. law to all disputes, *id.* § 80.1466(3)-(6); (5) obtaining assurances that all third-party custodians of renewable fuels will also comply with 40 C.F.R. § 80.1466(f); (6) waiving any claim to sovereign immunity in any judicial or administrative enforcement matter, *id.* § 80.1466(g); and (7) translating all documents submitted under the RFS2 program into English, *id.* § 80.1466(i). While these obligations may not be absolutely technically or economically infeasible under all circumstances,¹² they do create additional and entirely unnecessary regulatory burdens which will add incremental costs to participation in the RFS2 program and further reduce the margins associated with exporting Brazilian sugarcane ethanol into the United States without actual relevance to the Brazilian sugarcane industry or any additional benefits or protections under the RFS2 program. Thus, the impact of these requirements must also be taken into account in withdrawing these requirements in the final rule.

- C. *The significant and unnecessary additional costs of complying with 40 C.F.R. § 80.1466 will have a significant and detrimental impact on the export of Brazilian sugarcane ethanol to the United States*

Brazilian sugarcane mills serve a number of domestic and international markets, and export of ethanol to the United States only accounts for a fraction of total production. For example, in the 2012/2013 season in the South-Central region, the sugarcane harvest was divided almost equally between ethanol and sugar production.¹³ Further, only 15% of ethanol produced in Brazil is exported, while the remainder is used domestically.¹⁴ Currently, the United States accounts for approximately two-thirds of all ethanol exports, which is equal to approximately 5% of the total sugarcane production in Brazil. Given the many options for products and markets, mills make production adjustments each year in response to perceived market changes. Thus, in the future, mills are likely to shift production to other competing markets for sugar or ethanol if the costs of compliance with 40 C.F.R. § 80.1466 make these competing markets more favorable and attractive. In other words, even if Brazilian sugarcane ethanol imports to the United States are not technically impossible, the associated significant and unnecessary increase in compliance costs will almost certainly have the effect of shifting production toward other markets and reduce imports to the United States.

Any such reduction in Brazilian sugarcane ethanol will have immediate and detrimental effects in particular for the RFS2 program and compliance with the EISA. As

¹² In some circumstances, it may in fact prove infeasible to require third-party custodians to comply with 40 C.F.R. § 80.1466(f), since foreign renewable fuel producers have no direct authority over such third parties.

¹³ UNICA. *Final report of 2012/2013 harvest season, South-Central region*, p. 12, available at <http://www.unicadata.com.br/listagem.php?idMn=83>.

¹⁴ *Id.* at 15.

EPA explained in the proposed 2013 RVO rulemaking, the United States cannot achieve the EISA's volume mandate for advanced biofuels without substantial imports of Brazilian sugarcane ethanol. 78 Fed. Reg. at 9286 (“[W]e currently project that 666 mill gal of sugarcane ethanol would need to be imported in order to meet the advanced biofuel volume.”). Likewise, EPA has already expressed concern that the United States may be unable to achieve the EISA's mandate for 2014, even with a strong supply of Brazilian sugarcane ethanol. *Id.* at 9301. Thus, as explained below, while preventing RINs fraud is a laudable goal that UNICA fully supports, EPA should not take unnecessary measures that seek to address an aspect of a problem that does not even exist and will only result in burdens without benefits at the expense of achieving the Congressionally-mandated volume requirements for advanced biofuels.

Further, given the tight margins under which they operate and the opportunities in competing markets, Brazilian sugarcane ethanol mills will not export sugarcane to the United States unless they can pass on the costs of complying with 40 C.F.R. § 80.1466. Thus, to the extent that Brazilian sugarcane ethanol imports continue, the costs of compliance will be borne by obligated parties and ultimately retail consumers as a result of increased RINs prices. As Congress has recently noted, RINs prices “have risen dramatically since the beginning of the year,” and RIN affordability has emerged as a significant issue.¹⁵ Thus, applying 40 C.F.R. § 80.1466 to non-RIN generating foreign renewable fuel producers will result in one of two outcomes: an inability to achieve the EISA's statutory volume mandates or a significant increase in the cost of D5 RINs which will ultimately be passed on to consumers in the form of higher gas prices.

II. Applying 40 C.F.R. § 80.1466 to Foreign Renewable Fuel Producers Who Do Not Generate RINs Is Both Inconsistent with the EISA and Unnecessary to Ensure Compliance with the RFS2 Program

Regulation of all foreign renewable fuel producers under 40 C.F.R. § 80.1466 will have significant and detrimental impacts beyond just Brazilian sugarcane and on the RFS2 program as a whole. As described above, the practical impact of the proposed amendments will be to reduce the available supply of Brazilian sugarcane ethanol while simultaneously increasing the costs of advanced biofuel RINs. As an initial matter, these new requirements (and their associated costs) are wholly unnecessary as there is no evidence of RINs fraud associated with Brazilian sugarcane ethanol. Nor is there a significant risk of RINs fraud in light of the many voluntary programs that Brazilian sugarcane ethanol producers have already adopted in response to the RFS program and other domestic initiatives as well as the documentation protocols approved by EPA that the industry strictly follows. In addition, the imposition of these requirements on all foreign renewable fuel producers is contrary to the primary GHG reduction goals of the EISA because it will deter the export of Brazilian sugarcane ethanol to the United States and jeopardize the United States' compliance with the EISA's volumetric mandate for advanced biofuels. Finally, the mandatory extension of 40 C.F.R. § 80.1466 beyond RINs generators is inconsistent with the compliance and enforcement policies detailed in EPA's recently proposed RFS RINs Quality Assurance Program. Thus, EPA should eliminate the proposed amendments because they are unneeded and inconsistent with the policies that underlie the EISA and the RFS2 program.

¹⁵ United States House of Representatives, Committee on Energy and Commerce, *Renewable Fuel Standard Assessment White Paper: Implementation Issues 5* (July 11, 2013), available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20130711RFSWhitePaper5.pdf>

A. *It Is Unnecessary to Apply 40 C.F.R. § 80.1466 to Foreign Renewable Fuel Producers Who Do Not Generate RINs.*

EPA's primary justification for expanding the scope of 40 C.F.R. § 80.1466 to all foreign renewable fuel producers, regardless of whether they generate RINs, is an apparent but generalized concern that there is a heightened risk of RINs fraud among foreign producers. However, this purported justification demonstrates that the proposed rule is nothing more than a solution in search of a problem, as there is no evidence of history of RINs fraud associated with Brazilian sugarcane ethanol or that EPA's proposed solution would address any hypothetical concerns. In fact, as the Renewable Fuels Association ("RFA") recently explained, "[o]ver the past several years, 34.4 billion ethanol RINs have been generated, 'and to our knowledge not a single one has been alleged or found to be fraudulent by EPA.'"¹⁶ The lack of RINs fraud associated with ethanol can be attributed in large part to the fact that, unlike the biodiesel industry, ethanol RINs are never separated from the renewable fuels that generate them. As RFA explained "[t]he ethanol industry has not experience fraud as the biodiesel industry has, largely because ethanol credits are assigned at the point of blending with gasoline and are never handled by the producers themselves."¹⁷ Thus, the best defense against RINs fraud is not to expand regulatory requirements further upstream to foreign producers, but to push RINs generation further downstream to limit the number of RINs transactions that could separate RINs from the underlying fuel and permit fraud to occur. In other words, continuing the current practices of generating RINs at the port of entry and transferring Brazilian sugarcane ethanol and the associated advanced biofuel RINs in the same transaction are the best defenses against RINs fraud, not proposing to unnecessarily regulate the industry far away in Brazil itself.

In addition, industry best practices and other voluntary certification programs ensure that Brazilian sugarcane ethanol meets the RFS program's technical requirements for qualification as renewable fuel. For example, the "Green Ethanol Protocol" is a voluntary program to phase out sugarcane burning between 2014 and 2017.¹⁸ This protocol further reduces the lifecycle GHG emissions from sugarcane ethanol has been adopted by 155 mills representing 90% of the production in Sao Paulo State. Likewise, the voluntary Bonsucro production standard requires the adoption of industry best practices across economic, financial, environmental, and social dimensions.¹⁹ While the Bonsucro program has only been in place for two years, 28 mills representing nearly 7% of Brazilian production have already obtained certification,²⁰ and more mills are in the midst of the certification process now.²¹ These, and other programs like them are promoting sustainable, environmentally sound management practices that provide additional assurance that Brazilian sugarcane farmers and mills

¹⁶ Amanda Peterka, *Small Biodiesel producers still reeling as EPA sorts out fraud*, E&E Greenwire (Mar. 20, 2013) (quoting Geoff Cooper, Renewable Fuels Association).

¹⁷ *Id.*

¹⁸ UNICA, Green Protocol: 62.5 million ton reduction in CO2 emissions in Sao Paulo state (Nov. 26, 2009), <http://english.unica.com.br/noticias/show.asp?nwsCode=%7B7F608E66-EF83-4106-A405-0940D34E8851%7D> (last visited July 12, 2013).

¹⁹ See, generally, www.bonsucro.com (last visited July 15, 2013)..

²⁰ See Bonsucro: Certified Members, <http://bonsucro.com/site/certification-process/certified-members/> (last visited July 15, 2013). Calculations regarding the percentage of production that is currently certified was prepared by UNICA and is available upon request.

²¹ See Bonsucro: Candidate Members, <http://bonsucro.com/site/members/candidate-members/> (last visited July 15, 2013).

are taking the necessary steps to ensure compliance with the RFS2 requirements for foreign renewable fuels.

Further, UNICA's members have taken proactive and binding steps and commitments with EPA to assure that Brazilian sugarcane ethanol is fully compliant with the RFS2 program and can generate valid RINs. In response to questions from importers and obligated parties, UNICA worked directly with EPA to ensure that Brazilian sugarcane ethanol producers maintained and could produce the necessary documentation to show that the ethanol they produced complied with all of the technical requirements that EPA imposes on foreign renewable fuel producers. As part of this process, UNICA met with EPA and educated the agency regarding the farming, harvesting, and production processes in Brazil and the many domestic recordkeeping requirements that together provided the necessary records to demonstrate eligibility to participate in the RFS2 program. This process culminated in a letter from EPA acknowledging that the recordkeeping requirements proposed by UNICA would satisfy the technical requirements of the RFS2 program.²² As a result of this process, both fuel importers and obligated parties have every confidence that the Brazilian sugarcane ethanol imported to the United States is compliant with the RFS2 programs's technical requirements and can be used to generate valid advanced biofuel RINs.

Finally, the existing regulations in 40 C.F.R. § 80.1466 provide adequate assurances that EPA can identify instances of RINs fraud and, if necessary, take enforcement action. By virtue of generating RINs for foreign renewable fuels, importers of Brazilian sugarcane ethanol become subject to the requirements of 40 C.F.R. § 80.1466 and the full scope of EPA's jurisdiction under the RFS2 program. In the event that invalid RINs were generated, the importers would be obligated, in the first instance, to replace the invalid RINs and could be subject to additional enforcement action at EPA's discretion. Acceptance of this risk provides sufficient incentive for importers to ensure the validity of the RINs that they generate and, through contractual arrangements, allocate any perceived residual risk of invalidity among other upstream entities. These contractual agreements can dramatically reduce the costs of compliance in comparison to EPA's proposed amendments, particularly when the obligated party and importer have confidence in the validity of the RINs that are generated.

In sum, given the many safeguards that are already in place, there is simply no reason to suggest that there is a heightened risk of RINs fraud for Brazilian sugarcane ethanol producers that requires additional regulatory oversight.

B. The proposed amendments to 40 C.F.R. § 80.1466 are inconsistent with the purpose of the EISA because they will prevent the United States from achieving the EISA's volume mandate for advanced biofuels

When it passed the EISA in 2007, Congress made two significant changes to the RFS program that were intended to increase energy security and reduce GHG emissions. First, Congress extended and dramatically increased the statutory volume requirements for renewable fuels. For 2012, the last year covered under the original RFS program, the advanced renewable fuels mandate more than doubled from 7.5 to 15.2 billion gallons. Second, Congress established nested subcategories of renewable fuels based on their superior lifecycle GHG emissions and included aggressive,

²² Letter from John Weihrauch, Fuels Compliance Center, EPA, to Roger R. Martella, Jr., re: Recordkeeping Requirements for Brazilian Ethanol Producers Under the Renewable Fuel Standard Program, 40 CFR § 80.1454(c)(1) (July 25, 2012).

technology forcing statutory volume requirements for these subcategories. Clearly, Congressional intent in creating these *advanced* biofuel categories and statutory volume requirements was to encourage to the fullest extent possible the production and consumption of renewable fuels that offer superior GHG emissions reductions when compared to a gasoline baseline and other conventional renewable fuels. Indeed, the stated purposes of the EISA include “increas[ing] the production of clean renewable fuels.” See *also* 74 Fed. Reg. 24,904, 25,021 (May 26, 2009) (explaining that the RFS2 Rule’s requirements “are designed to ensure significant GHG emissions reductions from the use of renewable fuels and encourage the use of GHG-reducing fuels.”).

Despite these laudatory goals, many of the technology-forcing aspects of the EISA—most notably those for cellulosic biofuels—have failed to live up to expectations thus far, making it difficult to achieve the aggressive statutory volume mandates imposed by Congress. Thus, since the RFS2 program was first implemented, Brazilian sugarcane ethanol has played a critical and essential role in meeting the EISA’s mandate for undifferentiated advanced biofuels. Indeed, in each year since the RFS2 program began, Brazilian sugarcane ethanol has been the primary—and in some cases the only—source of undifferentiated advanced biofuel available to satisfy the EISA. Further, the prominent role of Brazilian sugarcane ethanol is projected to continue well into the future. EPA has already projected that 666 million gallons of Brazilian sugarcane ethanol will be required to meet the advanced biofuels mandate for 2013. See 78 Fed. Reg. at 9298. Given the rapid increases in the EISA’s requirements going forward—including an additional 1 billion gallon increase in advanced biofuels for 2014—the United States will require ever-increasing volumes of Brazilian sugarcane ethanol to comply with the EISA’s statutory mandate. See *id.* at 9301 (expressing concern that EPA may need to reduce the volume mandate for advanced biofuels in 2014). Thus to promote the EISA’s goals, EPA must adopt policies that promote the import of Brazilian sugarcane ethanol as a means of achieving the EISA’s mandate. In the absence of such policies, the United States is almost certain to fall short of the GHG reduction goals set by Congress in the EISA.

Rather than promoting the EISA’s primary goals and encouraging the import of Brazilian sugarcane ethanol, the proposed amendments to 40 C.F.R. § 80.1466 would directly impede those goals. As explained above, requiring all foreign renewable fuel producers to comply with 40 C.F.R. § 80.1466 would present both logistical and cost challenges that will make the export of Brazilian sugarcane ethanol to the United States prohibitively expensive—and in some cases, practically infeasible, if not impossible. While some larger integrated companies might have the capacity to continue exporting ethanol, provided they can pass the compliance costs on to their customers, smaller, independent producers will simply lack the resources, infrastructure, and ability to comply with the segregation and bonding requirements included in the amendments to 40 C.F.R. § 80.1466. Furthermore, even if some Brazilian sugarcane ethanol imports continue, the proposed amendments will introduce new inefficiencies associated with storage and transportation that will increase the lifecycle GHG emissions associated with Brazilian sugarcane ethanol. While UNICA is confident that Brazilian sugarcane ethanol will continue to qualify as an advanced biofuel, introducing these unnecessary inefficiencies is contrary to the spirit and purpose of the EISA and RFS2 program.

While EPA has a right to monitor enforcement of the RFS2 program, the heightened concerns it has expressed for some parts and sectors of the industry is not applicable to Brazilian sugarcane ethanol and, in any event, is not addressed by the solutions EPA proposes. Therefore, UNICA urges EPA to focus on the broader purpose

and goals of the EISA, which are to promote advanced renewable fuels as a means to reduce GHG emissions compared to a gasoline baseline. Such an approach would seek to maximize imports of Brazilian sugarcane ethanol and would avoid regulations such as the proposed amendments to 40 C.F.R. § 80.1466 that needlessly impede the import of this critical advanced biofuel.

C. Applying 40 C.F.R. § 80.1466 to all foreign renewable fuel producers is inconsistent with EPA's existing policy for addressing invalid RINs

The proposed amendments to 40 C.F.R. § 80.1466 mark the second time in less than four months that EPA has proposed regulatory changes to address concerns over RINs fraud. On February 21, 2013, EPA published the proposed "RFS Renewable Identification Number (RIN) Quality Assurance Program" ("proposed QAP rule"), which was focused solely on mitigating concerns regarding the risk of RINs fraud. While no final rule has been issued, the proposed QAP rule explained EPA's existing policy toward invalid RINs:

The fundamental basis of the Agency's treatment of invalid RINs is the concept of buyer beware, in which all regulated parties must take steps to verify that the RINs they acquire are valid, and all parties are liable for transferring or using invalid RINs.

78 Fed. Reg. at 12.160. Under this policy, it is the obligated parties who are ultimately responsible for ensuring that the RINs they retire are valid.

The proposed QAP rule seeks to increase liquidity in the RINs market and to provide obligated parties with greater assurances of the validity of the RINs that they purchase by incorporating third-party auditing programs. The third-party auditing programs would impose a number of obligations on renewable fuel producers which are similar to those in 40 C.F.R. § 80.1466, such as facility inspections and verification of renewable fuel volumes. Depending the type of audit involved, obligated parties would have a limited affirmative defense against liability if RINs that were approved through a third-party audit were later found to be invalid.

A primary purpose of the proposed QAP rule was to provide flexibility in the level of assurances that obligated parties could obtain. First, the entire QAP program would be voluntary, meaning that no renewable fuel producer, RIN generator, or obligated party would be compelled to participate in the auditing process. Second, two different third party auditing programs (along with the no audit alternative) offer obligated parties varying degrees of assurance regarding the validity of the RINs they purchase and varying degrees of liability protection in the event that the RINs are in fact invalid. Thus, under the proposed QAP rule, market forces would dictate the level of assurance that obligated parties would receive, and greater assurances of the validity of the RINs could be provided (at a market premium) if an obligated party were uncomfortable with the amount of risk associated with a particular feedstock or producer. By the same token, the proposed QAP rule would allow individual obligated parties and renewable fuel producers to forego the audit program entirely if they were sufficiently confident that the RINs associated with renewable fuel were valid.

In contrast to the proposed QAP rule's flexible, market-based approach that allows RFS participants to balance the costs and benefits assuring the validity of RINs,

the proposed revisions to 40 C.F.R. § 80.1466 purport to achieve many of the same goals through a mandatory process that would require each foreign producer to incur significant compliance costs without any consideration of whether obligated parties are willing to pay for that added assurance and without actually addressing the concerns that EPA is expressing. EPA fails to offer a reasoned explanation why the proposed QAP rule—which it endorsed for all renewable fuel producers only four months ago—is no longer sufficient to ensure the validity of RINs generated from foreign renewable fuels, and, with regret, UNICA believes it is arbitrary and capricious for EPA to radically depart from other compliance systems it has found sufficient without expressing a rational basis for these new burdensome requirements. Furthermore, by disrupting the RINs market and mandating expensive compliance obligations for foreign producers, EPA will make it more difficult for foreign producers to compete on a level playing field with domestic producers or to recoup the costs of compliance by increasing the price of their RINs. Thus, the proposed revisions to 40 C.F.R. § 80.1466 will dramatically diminish the competitiveness of foreign producers while providing little, if any, incremental benefit in comparison to the proposed QAP rule.

III. Applying 40 C.F.R. § 80.1466 to All Foreign Renewable Fuel Producers Is Inconsistent with the United States' International Trade Obligations under the WTO

The United States is bound by its international legal obligations under WTO rules to ensure that it does not discriminate against imports and does not take measures that restrict trade more than is necessary. Under Article III:4 of the General Agreement on Tariffs and Trade (“GATT”) 1994 and Article 2.1 of the Agreement on Technical Barriers to Trade (“TBT”), the United States must accord foreign-produced renewable fuels with treatment no less favorable than that accorded to domestically-produced renewable fuels. Further, under Article 2.1 of the TBT Agreement, the United States must ensure that its technical regulations are not more trade-restrictive than necessary to fulfill legitimate objectives. In addition, under Article XI:1 of the GATT, the United States is prohibited from imposing measures that act as quantitative restrictions on imports.

A panel of the WTO would most likely find that the proposed amendments to 40 C.F.R. § 80.1466 violate these legal obligations. In particular, the following three provisions would be vulnerable to challenge under WTO rules: (i) the requirement that foreign producers be subject to RIN certification, which is currently impossible for Brazilian producers to comply with, as RIN certification applies to ethanol that is denatured after the ethanol has left the Brazilian producers' control; (ii) the requirement to retire RINs to account for evaporative losses of ethanol for which RINs were never generated in the first instance, and which, as a practical matter, will provide Brazilian producers with fewer RINs than for equivalent fuel from domestic producers; and (iii) the requirement to post a bond (and thus incur financial costs), which will be imposed on Brazilian producers but will not be required of domestic producers. These proposed amendments, if adopted and applied, would discriminate against Brazilian ethanol, be more restrictive of the ethanol trade than is necessary, and act as quantitative restrictions against Brazilian ethanol. It would be difficult for the United States to defend these provisions based on environmental objectives, as these provisions would apply to arbitrarily Brazilian ethanol imports, despite the environmental benefits that accrue from using Brazilian ethanol instead of non-renewable fuels.

The WTO Appellate Body has recently found the United States to be in violation of the TBT Agreement in three cases concerning measures that have similarities to the

proposed amendments to 40 C.F.R. § 80.1466.²³ The case on country-of-origin labeling for meat is particularly relevant. In that case, the United States' recordkeeping and verification requirements were found to create an incentive for processors to use exclusively domestic livestock, and a disincentive against using like imported livestock. Although the measures had the legitimate objective of providing information to consumers, they imposed requirements that were a disproportionate burden as compared to the information conveyed to consumers. In an analogous manner, the proposed amendments to 40 C.F.R. § 80.1466 would be vulnerable for the same reasons because the requirements would pose a high burden on Brazilian ethanol that would be disproportionate to potential incremental improvements that may be achieved in certification.

IV. The Proposed Effective Date is Utterly Unrealistic and Unworkable and Will Bring to a Halt Brazilian Sugarcane Ethanol Imports to the United States

Despite the fact that EPA did not publish the proposed rule until June 14, 2013, it has inexplicably proposed to apply the rule retroactively by requiring all non-RIN generating foreign producers to demonstrate compliance by January 1, 2013. See proposed 40 C.F.R. § 80.1466(p)(1), 78 Fed. Reg. at 36,077. Retroactivity is not favored in the law, and Congressional enactments and administrative rules are not construed to have retroactive effect unless their language requires this result. *E.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 -163 (1928). Thus, Courts should be "reluctant" to find authority to apply regulations retroactively "in the absence of an express statutory grant." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). A key factor that courts consider with respect to retroactivity is whether a regulation "would impose new duties with respect to transactions already completed." *Landraf v. USI Film Products*, 511 U.S. 244, 280 (1994). In addition, courts may be more likely to apply a regulation retroactively when regulated parties had notice of the regulation far in advance of the effective date. See *National Petrochemical & Refiners Association v. EPA*, 630 F.3d 145, 163-64 (D.C. Cir. 2010).

Here the detrimental results associated with imposing a January 1, 2013 effective date dictate that the rule should not be applied retroactively. If EPA were to finalize the rule with this compliance date in place, all Brazilian sugarcane ethanol producers would immediately be deemed out of compliance, jeopardizing future Brazilian sugarcane ethanol imports to the United States. Such an approach would impose new requirements on prior RINs generation and RINs transactions that have already taken place in 2013, calling into question the validity of the RINs generated from Brazilian sugarcane ethanol so far this year. Moreover, there can be no argument that Brazilian sugarcane ethanol producers had adequate notice of the changes, since the effective date predates the *proposed* rule by more than four months. As an example of the challenges that this compliance date would pose, Brazilian sugarcane ethanol producers would be required to immediately post a collective bond of \$40 million or more, corresponding to the more than 200 million gallons of Brazilian sugarcane ethanol that have been imported to the United States so far this year. See *op. cit.* SECEX trade data.

²³ United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, United States – Measures Affecting the Production and Sale of Clove Cigarettes, and United States – Certain Country of Origin Labeling Requirements.

Setting a retroactive compliance date without an adequate compliance window and lead time would be arbitrary and capricious.

At a minimum, if EPA proceeds with the revisions to 40 C.F.R. § 80.1466, it must set a reasonable compliance date that will allow Brazilian sugarcane ethanol producers adequate lead time to decide whether to complete the many internal tasks and infrastructure investments needed to demonstrate compliance and to ensure that such infrastructure is built and put into place to comply with the new requirements. For example, it may take a significant amount of time to expand the storage capacity in the ports of Santos and Paranagua by adding new storage tanks and retrofitting existing tanks to ensure that ethanol exports to the United States are properly segregated. At a minimum, UNICA believes that EPA should provide foreign renewable fuel producers with no less than three full years to comply with new requirements following a final rule. Furthermore, in no case should the revisions become effective before January 1, 2015, as adoption of an earlier compliance date will jeopardize Brazilian sugarcane imports for a portion of the 2014 calendar year and potentially disrupt the 2014 RVO if there are insufficient quantities of advanced biofuel to meet the EISA's volume mandate. In sum, if EPA wishes to minimize the disruption associated with the proposed amendments to 40 C.F.R. § 80.1466, it must provide foreign producers with sufficient time to obtain the necessary approvals and implement to the new requirements.

Conclusion

UNICA appreciates the opportunity to submit these preliminary comments on EPA's proposed RFS2 amendments. UNICA is proud of the positive contributions that its members have made to the United States' achievement of the EISA's volume mandates for advanced biofuels. UNICA is also proud of the fact that there is no history of RINs fraud with respect to Brazilian sugarcane ethanol. In order to continue to promote Brazilian sugarcane ethanol and its significant GHG reduction benefits, we urge EPA to maintain the status quo that to this date has worked effectively at enabling the United States to rely on Brazilian sugarcane ethanol, to refrain from imposing additional regulatory requirements on Brazilian sugarcane ethanol producers, and to withdraw the proposed amendments to 40 C.F.R. § 80.1466. UNICA is standing by to provide further information or answer any questions that EPA may have and to continue its cooperative role with EPA in ensuring that the Agency adopts regulations that promote the realization and achievement of the goals set by Congress and EPA in implementing the RFS2 program.

Respectfully Submitted,



Elizabeth Farina
President & Chief Executive Officer



Leticia Phillips
Representative – North America

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 10 2013

OFFICE OF
AIR AND RADIATION

Ms. Leticia Phillips
Representative – North America
Brazillian Sugarcane Industry Association (UNICA)
1711 N Street, N.W.
Washington, D.C. 20036

Dear Ms. Phillips:

Thank you for your request for a 30-day extension of the comment period for the U.S. Environmental Protection Agency's Notice of Proposed Rulemaking, "RFS Pathways II and Technical Amendments to the RFS 2 Standards." In this Notice the EPA is proposing to amend certain renewable fuels standard program regulations to facilitate the introduction of new renewable fuels as well as improve implementation of the program.

We appreciate the concerns you have raised in your letter and look forward to working with interested stakeholders like UNICA as we move to a final rulemaking. At this time, we are not planning to extend the comment period as requested in your letter. However, we will welcome any substantive comments you provide after the deadline and will add those comments to the rulemaking docket. We will review comments received in sufficient time before completion of the final rule and take substantive information into consideration during our deliberations.

We look forward to future interactions with UNICA as we move forward with the rule. If you have any questions, please contact Joe Sopata of my staff at 202-343-9034 or sopata.joe@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Grundler".

Christopher Grundler, Director
Office of Transportation and Air Quality