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EPA Submitted Proposed Renewable Fuel Standards to OMB

On August 26, 2021, the Environmental Protection Agency (“EPA”) sent its proposed rule for setting renewable fuel percentage standards to the Office of Management and Budget (“OMB”) for review.¹ The proposed rule is expected to set the annual renewable fuel volumes and percentages for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for gasoline and diesel transportation fuel produced or imported in the years 2021 and 2022. Possibly, EPA’s proposed rule may also retroactively modify the 2020 standards.² It is anticipated that OMB will complete its review of EPA’s proposed rule in the next 60 days. Once OMB has completed its review, the proposed rule will be published in the Federal Register for public comment.

BACKGROUND

The Renewable Fuel Standards (“RFS”) program, as codified in Section 211(o) of the Clean Air Act,³ promotes the production and use of clean renewable fuels and greater United States energy independence. Introduced in 2006 through the Energy Policy Act of 2005 (“EPAct”) and modified through the Energy Independence and Security Act of 2007 (“EISA”),⁴ the statute prescribes annual volume targets for renewable fuels through 2022 and requires EPA to translate these targets into annual compliance obligations for obligated parties or to establish alternative lesser volume and percentage requirements in accordance with EPA’s statutory waiver authority.⁵ The RFS program covers two categories of renewable fuels: (1) conventional biofuel (i.e., renewable fuel that is ethanol derived from cornstarch) and (2) advanced biofuel (i.e., renewable fuel that is ethanol derived from biomass other than cornstarch), which includes further subcategories for cellulosic biofuel and biomass-based diesel.⁶



2020 RENEWABLE FUEL VOLUME AND PERCENTAGE REQUIREMENTS

EPA last adopted annual renewable fuel volumes and percentages under the RFS program for the compliance year 2020, a rule that took effect on April 6, 2020.⁷ Those 2020 volumes were 0.59 billion gallons for cellulosic biofuel, 2.43 billion gallons for biomass-based diesel, 5.09 billion gallons for advanced biofuel and 20.09 billion gallons for total renewable fuel.⁸ In addition, the respective 2020 percentage standards were 0.34% for cellulosic biofuel, 2.10% for biomass-based diesel, 2.93% for advanced biofuel and 11.56% for total renewable fuel. The rulemaking also set the 2021 volume and percentage for biomass-based diesel at the same values as used for 2020 (2.43 billion gallons and 2.10% percent). Earlier this year, EPA extended the RFS compliance deadline for the 2020 compliance year to January 31, 2022, and the associated deadline for submission of attest engagement reports for the 2020 compliance year to June 1, 2022.⁹ The extension had become necessary, at least in part, because of agency delay in promulgating the 2021 and future RFS compliance obligations. EPA had not yet proposed the 2021 RFS standards, including applicable volumes, but it acknowledged the importance to the obligated parties, particularly given the two-year lifespan of renewable identification numbers (“RINs”), that they understand their obligations for a given calendar year and their obligations before and after a given calendar year.¹⁰

Industry awaits confirmation whether the proposed rule EPA submitted to OMB on August 26, 2021, recommends retroactively adjusting previously set volumes and percentages for the 2020 compliance year.¹¹

2021 AND 2022 RENEWABLE FUEL VOLUME AND PERCENTAGE REQUIREMENTS

For the compliance year 2021, EPA had previously submitted proposed renewable fuel volume percentages to OMB for review in early 2020. However, the proposed rulemaking was never published or continued into a final rulemaking. This delay has been attributed to significant challenges and changes in the refining and ethanol industries due to the COVID-19 pandemic. The uncertain circumstances made it difficult for the agencies to determine the renewable fuel volume obligation for the 2021 compliance year.¹²

Pursuant to Section 211(o)(3)(B)(i) of the Clean Air Act, EPA’s deadline to set the annual renewable fuel volume obligations (“RVO”) is November 30 of the year preceding the compliance year. For the 2021 compliance year, EPA missed this statutory deadline. As such, the proposed rule EPA has now submitted to OMB on August 26, 2021, is expected to include a new proposal for the 2021 RVO, in addition to a proposal for the 2022 RVO. However, EPA has not yet confirmed which compliance years the proposed rule covers.

TIMELINE FOR OMB TO REVIEW EPA’S PROPOSED RULE FOR RENEWABLE FUEL STANDARDS

OMB is expected to complete its review of EPA’s proposed rule in the next 60 days.¹³ However, OMB may also act more quickly¹⁴ to allow for publication of the proposed rule in the Federal Register with sufficient time for a 30-day comment period and a public hearing before the statutory deadline to finalize the 2022 RVO by November 30, 2021, and also to avoid further delay in setting the 2021 RVO.

King & Spalding has significant expertise counseling clients on all facets of EPA’s RFS program, including representing clients in enforcement investigations initiated by EPA, defending clients in enforcement actions before EPA and the Department of Justice, representing clients in litigation on challenges to EPA’s RFS program, regulatory counseling, and transactional interfaces.



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¹ RIN 2060-AV11, available at <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>.

² See, e.g., U.S. EPA recommends lowering 2020 biofuel mandates retroactively, published August 26, 2021, available at <https://www.reuters.com/business/energy/us-epa-sent-annual-biofuel-blending-recommendations-white-house-2021-08-26/>; EPA Sends RFS Volumes Proposal to OMB, published August 26, 2021, available at <https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2021/08/26/epa-says-volumes-proposal-designed>.

³ 42 U.S.C. § 7545(o).

⁴ Energy Policy Act of 2005 (P.L. 109-58); Energy Independence and Security Act of 2007 (P.L. 110-140).

⁵ 42 U.S.C. § 7545(o)(2)(B) (stating statutory volume targets), § 7545(o)(3)(B) (mandating EPA to determine the annual renewable fuel obligation), § 7545(o)(7) (providing EPA with waiver authority).

⁶ 42 U.S.C. § 7545(o)(1)(B) (defining advanced biofuel), (D) (defining biomass-based diesel), (E) defining cellulosic biofuel) and (F) (defining conventional biofuel).

⁷ 85 Fed. Reg. 7016 (Feb. 6, 2020).

⁸ *Id.* at 7018.

⁹ 86 Fed. Reg. 17073 (Apr. 1, 2021).

¹⁰ *Id.* at 17073 and 17075-76.

¹¹ See *supra* note 2.

¹² See, e.g., <http://www.ethanolproducer.com/articles/17772/epa-misses-statutory-deadline-to-set-2021-rfs-rvos>.

¹³ See, e.g., <https://pra.digital.gov/clearance-process/#submit-request-to-omb-for-review>.

¹⁴ See <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>. There is no minimum period for review. The maximum period to complete the review is 90 days per Executive Order 12866 of September 30, 1993 (see Executive Order 12866 at Section 6.b, 58 Fed. Reg. 51735 (October 4, 1993)).