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EPA Audit of RIN Market Signals Increased Scrutiny and Enforcement

Recently, EPA's Office of Inspector General ("OIG") issued a notice of its audit of the agency's oversight of the Renewable Fuel Standards Renewable Identification Number ("RIN") market.¹ This is the latest in a string of agency actions aimed at improving the integrity of the RFS program and the RIN market. Participants could expect increased scrutiny and enforcement and potentially heftier penalties.

On September 17, 2021, EPA's Director of Environmental Investment and Infrastructure in the Office of Audit notified the Acting Assistant Administrator for the Office of Air and Radiation about its planned audit.² Specifically, the notice identified EPA's use of potential data quality controls of EPA's Moderated Transaction System and Quality Assurance Program ("EMTS"), the platform through which participants submit their transactions—essentially the RIN market. There has been longstanding concern about the potential manipulation of this market. To address this, EPA issued market reform rules starting in 2020 that require disclosure of RIN holdings above a specific threshold and additional RIN pricing information for certain transactions.³ The agency believed the latter would "improve the quality and reliability of our price data."⁴ The OIG's recent announcement is a natural extension to verifying how these rules are working, presumably for additional reforms or enforcement of non-compliance.

Another signal of increased scrutiny was the 2019 Memorandum of Understanding ("MOU") between the IRS and EPA to share tax and fuel credit data.⁵ Under this MOU, IRS provides aggregate quarterly tax and credit data to allow EPA to compare against its data. If applicable, the IRS and EPA Criminal Investigations Division may jointly investigate instances of RIN and tax fraud.⁶

In addition, there has been reporting, though not confirmed by EPA, that the forthcoming required volume obligations of renewable fuels will be lower for 2020, 2021, and 2022 than anticipated.⁷ EPA had previously set



annual renewable fuel volumes for 2020 in a rule that took effect in April 2020.⁸ EPA's recent proposal made on August 26, 2021, which is still under review by the Office of Management and Budget, may now retroactively lower volumes for 2020.⁹ The reporting is based on a leaked document indicating the overall total renewable fuel volume for 2020 to be 17.129 billion gallons, compared to the current rule of 20.09 billion gallons.¹⁰ For 2021, the total volume would be 18.628 billion gallons; and for 2022, the total volume would be 20.765 billion gallons. Retroactive reductions are also indicated for advanced biofuel and cellulosic biofuel from 2020 levels.

If these lowered requirements take effect, it would be reasonable to expect greater scrutiny and stricter enforcement of these lower volumes in line with the administration's "whole-of-government approach" to climate issues.¹¹ The RFS program is specifically mentioned as an enforcement area to address emissions and greenhouse gases in EPA's recent strategic plan.¹² These are current agency tools independent of any additional legislative mandates. Significant penalties could also attach. For instance, over the past few years, enforcement cases have resulted in eight figure penalties.¹³

All these factors set the stage for the potential for increased enforcement following the results of the OIG audit.

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 Memorandum from Mike Davis, Office of Audit, to Joseph Goffman, Office of Air and Radiation (September 17, 2021), available at https://www.epa.gov/system/files/documents/2021-09/epaoig_notificationmemo_9-17-21_renewable.pdf.

² *Id.*

³ Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 26980 (June 10, 2019).

⁴ *Id.* at 27018.

⁵ Memorandum of Understanding between the Internal Revenue Service and the United States Environmental Protection Agency (July 2019), available at <https://www.epa.gov/sites/default/files/2019-09/documents/rfs-mou-irs-epa-redacted-2019-08-29.pdf>.

⁶ *Id.*

⁷ Stuart Parker, *Leaked RFS Blending Volumes Point Toward Major Blow For Biofuel Sector*, InsideEPA.com, Sept. 22, 2021, <https://insideepa.com/daily-news/leaked-rfs-blending-volumes-point-toward-major-blow-biofuel-sector>.

⁸ *E.g.*, Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7016 (Feb. 6, 2020); EPA Submitted Proposed Renewable Fuel Standards to OMB, King & Spalding Client Alert, Aug. 31, 2021, available at <https://www.kslaw.com/news-and-insights/epa-submitted-proposed-renewable-fuel-standards-to-omb>.

⁹ *See id.*

¹⁰ Stuart Parker, *Leaked RFS Blending Volumes Point Toward Major Blow For Biofuel Sector*, InsideEPA.com, Sept. 22, 2021, <https://insideepa.com/daily-news/leaked-rfs-blending-volumes-point-toward-major-blow-biofuel-sector>.

¹¹ *E.g.*, EPA, *Draft FY 2022-2026 EPA Strategic Plan at 4*, Oct. 1, 2021, available at <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>.

¹² *Id.* at 34 (“To advance Agency efforts to tackle the climate crisis and mitigate greenhouse gas (GHG) emissions, EPA will target violators of ... the Renewable Fuel Standard, and regulations that apply to oil and gas sources and landfills. EPA will make effective use of civil judicial litigation and, if appropriate, administrative orders to achieve suitable remedies.”).

¹³ *E.g.*, *In re PES Holdings LLC et al.*, Case No. 19-11626 (Bankr. D.Del. May 1, 2020) (debtors required to purchase and retire more than 161 million RINs up to \$22 million); *U.S. v. NGL Crude Logistics, LLC*, Case No. 2:15-cv-1038-LRR (N.D. Iowa Sept. 27, 2018) (defendant required to pay \$25 million civil penalty and retire 36 million valid RINs).