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EPA Proposes to Cut 2020 and 2021 Volumes for the Renewable Fuel Standards Program, While Aiming to Increase 2022 Volumes

On December 7, 2021, the U.S. Environmental Protection Agency (“EPA”) signed and submitted for publication in the Federal Register its proposed rule for setting renewable fuel percentage standards.¹ The proposed rule sets the annual renewable fuel volumes and percentage ranges for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for gasoline and diesel transportation fuel that is produced or imported in the years 2020, 2021, and 2022. While EPA proposes to retroactively cut 2020 volumes and to reduce 2021 volumes compared to its previous proposal, EPA seeks to increase 2022 volumes. In addition, EPA does not anticipate granting any of the pending petitions by small refiners for economic hardship waivers. EPA Administrator Regan characterized these actions as fostering growth for the Renewable Fuel Standard (“RFS”) program by setting ambitious levels for 2022.² Moreover, the terms of this proposal may be impacted by the recent release of COVID-19 assistance funds for biofuels from the Department of Agriculture and provisions in the Build Back Better package that includes nearly \$1 billion to expand biofuel infrastructure and the agricultural product market.

BACKGROUND

The RFS program, as codified in Section 211(o) of the Clean Air Act,³ was enacted to promote the production and use of clean renewable fuels and United States energy independence. Introduced in 2006 through the Energy Policy Act of 2005 (“EPAAct”) 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 One of the waiver provisions—which is also referred to as the “reset” rule—



requires a permanent modification of the statutory volume requirements of the RFS program if certain conditions are met.⁶ According to that rule, if EPA reduces the statutory volumes, for any fuel category, by at least 20% in two consecutive years or by at least 50% in a single year, EPA is required to modify or “reset” the statutory volume requirements. EPA’s December 7, 2021, proposed new rule is issued pursuant to the “reset” rule.⁷

PROPOSED RULE – 2020 RENEWABLE FUEL VOLUME REQUIREMENTS

In early 2020, EPA had previously adopted annual renewable fuel volumes and percentages for the compliance year 2020.⁸ The rulemaking also set the 2021 volume for biomass-based diesel at the same values as used for 2020.

EPA’s December 7, 2021, proposed rule, if adopted, would now retroactively cut (i) 2020 cellulosic biofuel volumes from 0.59 billion gallons to 0.51 billion gallons, (ii) 2020 advanced biofuel volumes from 5.09 billion gallons to 4.63 billion gallons, and (iii) 2020 total renewable fuel volumes from 20.09 billion gallons to 17.13 billion gallons. This retroactive reduction addresses reduced actual consumption of renewable fuels and transportation fuels in the United States in 2020 during the COVID-19 pandemic.⁹ The biomass-based diesel volume, however, remains unchanged at 2.43 billion gallons.

PROPOSED RULE – 2021 RENEWABLE FUEL VOLUME REQUIREMENTS

EPA missed its deadline under Section 211(o)(3)(B)(i) of the Clean Air Act to publish a proposed rulemaking for 2021 volumes and to set annual renewable fuel volume obligations (“RVO”) by more than a year. This delay has been attributed to significant challenges and changes in the refining and ethanol industries due to the COVID-19 pandemic, which made it difficult for EPA to determine the renewable fuel volume obligation for the 2021 compliance year.¹⁰

For the 2021 compliance year, EPA proposes to set cellulosic biofuel volume at 0.62 billion gallons, advanced biofuel volumes at 5.20 billion gallons and the total renewable fuel volumes at 18.52 billion gallons. These 2021 volumes are higher than the retroactive cut-backs for 2020, but lower than originally proposed volumes for 2020. The biomass-based diesel volume for 2021 remains unchanged compared to 2020 at 2.43 billion gallons. These 2021 volume projections are based on actual renewable fuel use in 2021 where data was available and are used to project renewable fuel use for the remainder of the year.¹¹

PROPOSED RULE – 2022 RENEWABLE FUEL VOLUME REQUIREMENTS

For the compliance year 2022, EPA proposes an increase of renewable fuel volumes compared to previous years: Cellulosic biofuel volume is proposed to be set at 0.77 billion gallons, advanced biofuel volume at 5.77 billion gallons, total renewable fuel volume at 20.77 billion gallons, and biomass-based diesel at 2.76 billion gallons.¹² EPA acknowledges that these volumes reflect the potential for growth in the volume of renewable fuel produced and consumed in the U.S., energy security, and potential climate change benefits.

Following a challenge in court of EPA’s 500 million gallons reduction in total renewable fuel volumes for compliance year 2016,¹³ EPA now intends to restore the 500 million gallons it had waived improperly based on a finding of inadequate domestic supply. EPA therefore proposes a supplemental total renewable fuel volume for 2022 and 2023 in the amount of 250 million gallons each.¹⁴

PROPOSED RULE – DENIAL OF SMALL REFINERY EXEMPTIONS

EPA further expects that all pending petitions¹⁵ by small refineries for economic hardship waivers will be denied. Referencing the 10th Circuit ruling in *Renewable Fuels Ass’n v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *rev’d in part sub nom., HollyFrontier Cheyenne Refining, LLC, v. Renewable Fuels Ass’n*, 114 S. Ct. 2172 (2021), and EPA’s



observations from the renewable identification numbers market, EPA takes the position that the small refineries are unable to show the disproportionate economic hardship required for a waiver.¹⁶

NEXT STEPS

After missing the statutory deadline to set annual renewable RVOs for two consecutive years, EPA is positioned to finalize the proposed 2020-2022 volumes for the RFS program in early 2022. EPA will hold a virtual public hearing on January 4, 2022¹⁷ and will accept public comment through February 4, 2022.

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, Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Proposed Rule (December 7, 2021), available at <https://www.epa.gov/sites/default/files/2021-12/documents/rfs-2020-2021-2022-rvo-standards-nprm-2021-12-07.pdf> (herein “Proposed Rule”).

² EPA Proposes Comprehensive Set of Biofuels Program Updates and Improvements (Dec. 7, 2021), available at <https://www.epa.gov/newsreleases/epa-proposes-comprehensive-set-biofuels-program-updates-and-improvements>.

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 See 42 U.S.C. § 7545(o)(7)(F).

⁷ Proposed Rule at 6-7, 16-18, 23.

⁸ 85 Fed. Reg. 7016 (Feb. 6, 2020).

⁹ Proposed Rule at 7, 28-31.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 8, 31-33.

¹² *Id.* at 8, 33-37.

¹³ *Americans for Clean Energy (ACE) v. EPA*, 864 F.3d 691 (D.C. Cir. 2017).

¹⁴ Proposed Rule at 8-9, 47-53. EPA intends that obligated parties would submit a single annual compliance report for both the 2022 annual standards and the supplemental standard. *Id.* at 53.

¹⁵ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

¹⁶ Proposed Rule at 59-60. The proposed rule also includes a proposal to allow for the production, transfer and use of biointermediates (*i.e.*, proto-renewable fuel produced from renewable biomass) to generate qualifying renewable fuel under the RFS program. See Proposed Rule at 10, 64-83.

¹⁷ 86 Fed. Reg. 70426 (December 10, 2021).