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New Phase of EPA's Renewable Fuel Standard Program: Updated Targets for 2023 - 2025 and New Credit System for EVs

On December 1, 2022, the U.S. Environmental Protection Agency (“EPA”) announced its proposed rule under the Renewable Fuel Standard (“RFS”) program. For the first time, EPA establishes renewable fuel volumes and percentage standards itself instead of relying on statutorily mandated targets (referred to as the “set” rule).¹ Further, the set rule proposes a system for generating Renewable Identification Numbers from qualifying renewable electricity (“eRIN”). In addition, EPA proposes several changes to better assist with the implementation of the existing RFS program, such as enhancing the third-party oversight provisions or updating procedures for the apportionment of RINs when feedstocks qualifying for multiple types of code are converted to biogas.²

EPA will hold a virtual public hearing on January 10, 2023 for the set rule, and registration for attendance is required by January 3, 2023.³ The deadline for submitting comments on the set rule is February 10, 2023.

RFS PROGRAM BACKGROUND

The RFS program, as codified in Section 211(o) of the Clean Air Act,⁴ 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 (“EPAct”) and modified through the Energy Independence and Security Act of 2007 (“EISA”),⁵ the statute prescribes annual volume targets for most 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.⁶ The CAA provides volume targets for biomass-based diesel through 2012, and since then EPA has been setting biomass-based diesel (“BBD”)



volume requirements in an annual rulemaking. The CAA provides volume targets for total renewable fuel, cellulosic biofuel, and total advanced biofuel through 2022, after which EPA must establish or “set” the volume targets via rulemaking, which is the purpose of the present proposed rule, and the first time EPA is setting volume targets for these renewable fuels under its own authority.⁷

EPA’s DECEMBER 1, 2022 PROPOSED “SET” RULE

a. 2023 – 2025 Volume Targets

The set rule ushers EPA into a new phase of its RFS program because for the first time EPA is setting volume targets independent of statutorily enumerated volumes for cellulosic biofuel, total renewable fuel, and total advanced biofuel, and also proposes targets for multiple years.⁸

In coordination with the Departments of Agriculture and Energy, EPA proposes the following volume targets for three years, 2023 to 2025, in billion RINs, which are higher than prior year volumes:⁹

	2023	2024	2025
Cellulosic biofuel	0.72 ¹⁰	1.42	2.13
Advanced biofuel	5.82	6.62	7.43
Renewable fuel	20.82	21.87	22.68
Supplemental volume requirement	0.25	n/a	n/a

EPA proposes the supplemental volume requirement to complete the agency’s response to the D.C. Circuit Court of Appeals’ remand of EPA’s 2016 annual rule where the agency reduced the total renewable fuel volumes for compliance year 2016 by 500-million-gallons. In the Final Rule from June 2022, which was described in our [previous alert](#), EPA set a 250-million-gallon supplemental standard for 2022 to restore the reduction. In that Final Rule, EPA indicated it would set another 250-million-gallon standard to complete the restoration, which EPA is undertaking in this present proposed rule.¹¹

For BBD, the Clean Air Act provides volume targets through 2012, and EPA has set the BBD requirements in its annual rulemakings since 2013. EPA sets the BBD targets for three years, 2023 to 2025, in physical billion gallons (not billion RINs):¹²

	2023	2024	2025
Biomass-based diesel	2.82	2.89	2.95

In a departure from previous rulemakings, EPA is setting volume standards for three years. EPA writes that setting standards for three years “is appropriate as it will provide the market with the certainty of demand needed for longer term business and investment plans.”¹³ EPA continues that projecting out any farther out is difficult and uncertain and believes proposing volume requirements for three years “strikes a reasonable balance between certainty in our projections and providing certainty for investment.”¹⁴ In further recognition of the importance of certainty for the regulated community, EPA also specifically requests comment on establishing standards for 2026 as well.

In addition to establishing annual volume requirements, EPA is directed by the CAA to establish percentage standards that apply to obligated parties.¹⁵ Obligated parties “multiply percentage standards by the sum of all



non-renewable gasoline and diesel they produce or import to determine their Renewable Volume Obligations (“RVOs”). The RVOs are the number of RINs that the obligated party is responsible for procuring to demonstrate compliance with the RFS rule for that year.”¹⁶ Consistent with the multi-year approach for setting volume targets, EPA also adopts multi-year percentage standards in the proposed rule:¹⁷

	2023	2024	2025
Cellulosic biofuel	0.41%	0.82%	1.23%
Biomass-based diesel	2.54%	2.60%	2.67%
Advanced biofuel	3.33%	3.80%	4.28%
Renewable fuel	11.92%	12.55%	13.05%
Supplemental standard	0.14%	n/a	n/a

Once adopted, the applicable percentage standards for 2023 to 2025 would be added to the RFS regulations at 40 C.F.R. § 80.1405(a).

b. RINs From Renewable Electricity (“eRINs”)

EPA also proposes a framework for how eRINs would be implemented and managed under the RFS program, with eRIN generation proposed to begin on January 1, 2024. The proposal addresses which parties can generate eRINs, how to prevent double-counting of eRINs, and specifies data requirements for eRIN generation.¹⁸ EPA also proposes revising the equivalence values for renewable electricity. Equivalence values are unique to each biofuel and determine how many RINs can be generated for each physical gallon and how each gallon counts towards meeting the applicable standards.¹⁹ As stated in 40 C.F.R. § 80.1415, the current value is 22.6 kWh/RIN, and EPA proposes a change to 6.5kWh/RIN, which EPA believes more accurately reflects use of electricity as a transportation fuel.

Background: Approved Pathway for eRINs

Renewable fuels under the RFS program can be both liquid and non-liquid biofuels, such as renewable compressed natural gas (renewable CNG) or renewable liquified natural gas (renewable LNG), used as transportation fuel.²⁰ EPA established a framework to incorporate non-liquid biofuels through its 2010 final rule (referred to as the RFS2 Program).²¹ The RFS2 Program treated renewable electricity differently than renewable CNG/LNG, but in certain circumstances, renewable electricity qualified as a renewable fuel. The RFS2 Program established regulatory provisions for renewable electricity RIN generation “in anticipation of a future action in which EPA would provide a RIN-generating pathway for electricity made from renewable biomass and used as transportation fuel.”²² While EPA acknowledges that renewable electricity has been part of the RFS program since 2010, and EPA established a RIN-generating pathway for electricity made from biogas in 2014,²³ EPA has not, yet, registered any party to generate RINs from renewable electricity.²⁴ In this proposed rule, EPA acknowledges that it is now ready to create a regulatory program for eRINs.²⁵

Summary: Generation of eRINs

EPA designated the vehicle original equipment manufacturer (“OEM”) to be the sole eRIN credit generator. An OEM may generate eRINs based on new and previously sold light-duty electric vehicles (“EVs”)²⁶ it sold by establishing contracts with generators of electricity produced from qualifying biogas. The eRINs would “represent the quantity of renewable electricity determined to be used by both new and previously sold



(legacy) light-duty electric vehicles for transportation, provided that sufficient renewable electricity has been produced and contracted by the OEM.”²⁷

EPA’s proposal envisions the key players in the eRIN generating supply chain to be the biogas producer, the electricity generator, and the OEM: (1) biogas producers (for example, landfills or agricultural digesters) would produce biogas under EPA-approved pathways for biogas to electricity under the RFS program; (2) renewable electricity generators would either use biogas directly supplied to their electrical generation units (for example, a landfill or digester with an onsite electrical generation unit) or procure renewable natural gas to generate renewable electricity placed on an electrical grid serving the conterminous U.S.; and (3) OEMs would determine the electricity consumption of their EVs in the in-use fleet (for both new and legacy EVs), and acquire through bilateral contracts with renewable electricity generators the exclusive RIN-generating ability for the renewable electricity generated by the renewable electricity generators that is sufficient to cover the fleet’s in-use electricity consumption.²⁸ OEMs would then be able to generate the eRINs representing the lesser of the quantity of electricity used by their in-use EVs fleets and the renewable electricity generated from renewable electricity generators under their bilateral contract with that OEM.²⁹

Even though only OEMs would be allowed to generate eRINs, EPA expects that the value of eRINs would be distributed to multiple parties after generation, including to refiners and fuel importers with RFS obligations.³⁰

EPA explains its proposal in detail as well as the alternative proposal, which focuses on facilitating greater access to charging infrastructure, for which EPA seeks comment.³¹

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. King & Spalding further has broad experience in counseling OEMs with regard to the environmental regulatory requirements for EVs and representing OEMs before EPA and the California Air Resources Board.

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¹ EPA, EPA-HQ-OAR-2021-0427, Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes (Nov. 30, 2022), available at <https://www.epa.gov/system/files/documents/2022-12/rfs-set-rule-nprm-2022-11-30.pdf> (hereinafter “Proposed set rule”). On December 13, 2022, EPA published a notice of public hearing in the Federal Register. 87 FR 76194 (Dec. 13, 2022), available at <https://www.federalregister.gov/documents/2022/12/13/2022-26943/public-hearing-for-rfs-standards-for-2023-2025-and-other-changes>.

² Proposed set rule at 15 – 16.

³ See EPA website, available at <https://www.epa.gov/renewable-fuel-standard-program/proposed-renewable-fuel-standards-2023-2024-and-2025> (stating that attendees must register via email to RFS-Hearing@epa.gov, and a separate registration form must be submitted for each individual person by January 3, 2023).

⁴ 42 U.S.C. § 7545(o).

⁵ Energy Policy Act of 2005 (P.L. 109-58); Energy Independence and Security Act of 2007 (P.L. 110-140).

⁶ 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).

⁷ Proposed set rule at 24.

⁸ Id. at 10; at 24, n. 14.

⁹ Id. at 11.

¹⁰ EPA specifies that the proposed cellulosic volume requirements include projected volumes for eRINs for years 2024 and 2025, but does not include any projection for eRINs for 2023. Proposed set rule at 15.

¹¹ Proposed set rule at 11.

¹² Id.

¹³ Proposed set rule at 12.

¹⁴ Id.

¹⁵ Id. at 166. Obligated parties are producers and importers of gasoline and diesel, as defined by 40 CFR 80.1406(a).

¹⁶ Proposed set rule at 166.

¹⁷ Id. at 31, 173.

¹⁸ Id. at 14.

¹⁹ Id. at 309.

²⁰ Id. at 173.

²¹ 75 FR 14670, 14729 (March 26, 2010).

²² Proposed set rule at 174.

²³ 79 FR 42128 (July 18, 2014).

²⁴ Proposed set rule at 174.

²⁵ Id. at 175.

²⁶ In the proposed rule, EPA defines “light-duty electric vehicles” as follows: “For purposes of this preamble, by light-duty vehicle (sometimes referred to as light-duty cars and trucks), we mean collectively light-duty vehicles and light-duty trucks as defined in 40 CFR 86.1803-01. By electric vehicle or EV, also for purposes of this preamble, we mean collectively electric vehicles and plug-in hybrid electric vehicles as defined in 40 CFR 86.1803-01. A light-duty electric vehicle is a vehicle that is both a light-duty vehicle (i.e., light-duty vehicle or light-duty truck) and an electric vehicle (i.e., electric vehicle or plug-in electric hybrid vehicle).”

²⁷ Proposed set rule at 178.

²⁸ Id. at 247.

²⁹ Id.

³⁰ Id. at 178.

³¹ Id. at 179, 204.