

MEMORANDUM

February 17, 2010

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

TO: SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

FROM: STEPTOE & JOHNSON, LLP

RE: NEW REQUIREMENTS UNDER THE RENEWABLE FUELS STANDARD II

On February 3, 2010, the Environmental Protection Agency (“EPA”) issued a final rule to implement the renewable fuels standard mandated by the Energy Independence and Security Act of 2007 (“EISA”).¹ The new program, known as “RFS2,” mandates the use of 36 billion gallons of renewable fuels by 2022, with distinct obligations for advanced biofuels, biomass-based diesel, and cellulosic biofuels. For the first time, an “eligible fuel” is defined by the lifecycle greenhouse gas (“GHG”) profile of the fuel, in contrast to gasoline or diesel fuel.

The following memorandum provides an overview of the changes to the previous renewable fuel standard (“RFS1”), and outlines the new requirements issued under the RFS2.

EXECUTIVE SUMMARY

Many of the mechanical regulatory requirements of the RFS1 program will remain largely, or in some cases entirely, unchanged. These provisions include the distribution of renewable identification numbers (“RINs,”) separation of RINs, use of RINs to demonstrate compliance, provisions for exporters, recordkeeping and reporting, deficit carryovers, and the valid life of RINs. Of note, blenders who add biofuels to finished gasoline or diesel will continue to be excluded as RFS “obligated parties” despite their active participation in the RFS program. Those blenders can sell all of the RINs they receive with biofuel to either obligated parties (refiners and importers) or other individuals participating in RIN trading.

¹ EPA has posted a wealth of regulatory and scientific information on the RFS2 on its website. See <http://www.epa.gov/OMS/renewablefuels/>

While many aspects of the previous program remain, the RFS2 program makes significant changes to the existing RFS1 program's substantive requirements. Major changes to the RFS1 program include:

- Expansion of the applicable renewable fuel volume (“RVO”) obligations²
- Separation of RVOs into four separate categories of renewable fuel
- New definitions of renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel
- A new requirement that renewable fuels meet certain lifecycle emission reduction thresholds
- A new definition of renewable biomass from which renewable fuels can be made; the new definition includes certain land use restrictions
- Expansion of the types of fuels that are subject to the standards to include diesel.
- A determination that the EPA will issue a waiver for the amount that obligated parties fall short of meeting the cellulosic biofuel requirement
- Provisions that allow municipal solid waste (“MSW”) to be included as renewable biomass in some circumstances, provided that reasonable separation has first occurred
- A determination that renewable fuel from existing facilities is exempt from the lifecycle GHG emission reduction threshold of 20% up to a baseline volume for that facility that will be established at the time of registration

BACKGROUND ON THE RENEWABLE FUELS STANDARD PROGRAM

Overview

The current RFS1 was established under the Energy Policy Act of 2005 (“EPAAct”), which amended the Clean Air Act by establishing the first national renewable fuels standard.³ In 2007, Congress passed the Energy Independence and Security Act of 2007 (“EISA”), which dramatically expanded the RFS and required EPA to promulgate new regulations to implement these changes. The final rule addresses those changes..

Under the renewable fuels standard program, Congress required EPA to set an annual volume obligation representing the amount of renewable fuels to be introduced into the United States as motor fuel. Each fuel refiner, blender,⁴ or importer (together,

² See the ‘Renewable Volume Obligation’ section below for a full discussion.

³ Pub. Law 109-58 (2005). The Energy Policy Act of 2005 added section 211(o) to the Clean Air Act (CAA).

⁴ Under the RFS2, the term blender includes an entity which combines traditional fossil fuels blendstocks to create a finished gasoline or an “unfinished” gasoline. An unfinished gasoline is a combination of hydrocarbons that become a “finished” gasoline when combined with an oxygenate blended downstream from the refiner or importer.

“obligated parties”) must acquire sufficient renewable fuels credits, known RINs,⁵ each year to meet certain volume requirements. The RFS1 program established a market in which RINs could be traded.⁶ The program also established registration, recordkeeping, and reporting requirements for all renewable fuels producers and obligated parties.⁷ The RFS2 program generally maintains many elements of the RFS1 program, such as regulations governing the generation, transfer, and use of RINs, however it also adds new requirements, as discussed below.

Mandatory Registration or Re-Registration

All parties that intend to generate RINs, own and/or transfer them, or use them for compliance purposes after July 1, 2010 will need to register or re-register under the RFS2 provisions and modify their information technology (“IT”) systems to accommodate the changes.⁸ These changes include redefining the D code within the RIN that identifies which standard a fuel qualifies for⁹, adding a process for verifying that feedstocks meet the renewable biomass definition¹⁰, and calculating compliance with four standards rather than one.¹¹ EPA's registration system is available now for parties to complete the registration process.¹²

Obligated Parties

Obligated parties under the final RFS2 regulations are those that produce or import finished gasoline or unfinished gasoline that becomes finished gasoline upon the

⁵ RINs are a 38-character numeric code generated by renewal fuels producers and importers that are assigned to batches and transferred to buyers of the fuel. See the ‘Renewable Identification Number’ Section, below, for more information.

⁶ 40 C.F.R. §80.1127

⁷ 40 C.F.R. §80.1150

⁸ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

⁹ See ‘Assigning a D Code’ section below for a full discussion.

¹⁰ See ‘Changes in Renewable Fuel Definitions’ section below for a full discussion.

¹¹ See ‘Renewable Volume Obligation’ section below for a full discussion.

¹² Further details on this process and registration forms can be found at: <http://www.epa.gov/otaq/regs/fuels/fuelsregistration.htm>

addition of an oxygenate blend downstream from the refinery or importer.¹³ Unfinished gasoline includes reformulated gasoline blendstock for oxygenate blending (“RBOB”), and conventional gasoline blendstock designed for downstream oxygenate blending (“CBOB”). Parties downstream of a refinery or importer would only be obligated parties to the degree that they use non-renewable blendstocks to make finished gasoline, RBOB, CBOB, or diesel fuel.

Obligated parties have the responsibility of acquiring sufficient RINs each year to meet their RVO requirements.¹⁴ The EPA agreed with SIGMA’s assertion in comments to the Notice of Proposed Rulemaking (“NPRM”) that the obligated parties should remain the producers and importers of non-renewable fuels. The EPA noted that the market will provide opportunities for parties who are in need of RINs to acquire them from parties who have excess.

Of note, parties that produce motor vehicle, nonroad, locomotive, and marine (“MVNRLM”) diesel fuel, but not gasoline, will be newly obligated parties and may need to establish new compliance programs, such as the EPA Moderated Transaction System (“EMTS”),¹⁵ for the RFS program for the first time.¹⁶

¹³ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

¹⁴ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

¹⁵ See the EPA Moderated Transaction System (“EMTS”) section below for further detail on compliance with this system.

¹⁶ “Diesel fuel” includes any distillate fuel that meets the definition of MVNRLM diesel fuel, including any subcategories such as MV (motor vehicle diesel fuel produced for use in highway diesel engines and vehicles), NRLM (diesel fuel produced for use in nonroad, locomotive, and marine diesel engines and equipment/vessels), NR (diesel fuel produced for use in nonroad engines and equipment), and LM (diesel fuel produced for use in locomotives and marine diesel engines and vessels).

The RFS for Obligated Parties

Renewable Volume Obligation

Obligated parties will demonstrate compliance with the RFS2 by meeting a renewable volume obligation (“RVO”) through the accumulation of RINs.¹⁷ Each gallon-RIN counts as one gallon of renewable fuel for compliance purposes. Obligated parties must determine their RVOs at the end of a calendar year based on the volume of gasoline or diesel fuel they produce and import during the year, and they must demonstrate compliance with their RVOs in an annual report that is due two months after the end of the calendar year. The four RFS2 RVOs for each obligated party will be calculated on the basis of all gasoline and diesel produced or imported on and after January 1, 2010, through December 31, 2010. Obligated parties will be required to demonstrate by February 28, 2011 that they obtained sufficient RINs to satisfy their 2010 RVOs.

Calculating RVOs

The calculation of the RVOs under RFS2 follows the same format as the formulas in the RFS1 regulations,¹⁸ with one modification. The standards for a particular

¹⁷ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

¹⁸ (a) The Renewable Volume Obligation for an obligated party is determined according to the following formula: $RVO_i = (RFStd_i * GV_i) + D_{i-1}$ Where:

- RVO_i= The RVO for an obligated party for calendar year i, in gallons of renewable fuel.
- RFStd_i= The RFS for calendar year i, determined by EPA pursuant to 80.1105, in percent.
- GV_i= The non-renewable gasoline (“*and diesel*” as added by the RFS2) volume, which is produced or imported by the obligated party in calendar year i, in gallons.
- D_{i-1}= Renewable fuel deficit carryover from the previous year, per §80.1127(b), in gallons.

(b) The non-renewable gasoline volume for a refiner, blender, or importer for a given year, GV_i, specified in paragraph (a) of this section is calculated as follows:

$$GV_i = \sum_{x=1}^n G_x - \sum_{y=1}^m RB_y$$

Where:

- x = Individual batch of gasoline (“*and diesel*” as added by the RFS2) produced or imported in calendar year i.
- n = Total number of batches of gasoline (“*and diesel*” as added by the RFS2) produced or imported in calendar year i.
- G_x= Volume of batch x of gasoline produced or imported, in gallons.
- y = Individual batch of renewable fuel blended into gasoline in calendar year i.
- m = Total number of batches of renewable fuel blended into gasoline in calendar year i.
- RB_y= Volume of batch y of renewable fuel blended into gasoline, in gallons.

compliance year must be multiplied by the sum of the gasoline *and diesel* volume produced or imported by an obligated party in that year rather than only the gasoline volume as under the RFS1 program. Because an obligated party's RVO is based on its total production and importation of gasoline and diesel fuel at the end of the year, obligated parties will have to anticipate their total yearly production in order to meet its RVO.

Changes to the RVO Framework

While the final RFS2 rule maintains many aspects of the RVO framework, it makes five primary changes to the volume requirements of the RFS1 program.¹⁹ First, it implements the Congressional requirement to substantially increase the required volumes of the various fuels and extend the timeframe over which the volumes ramp up through 2022. The volume requirements in EISA are shown in **Table 1**. Second, it divides the total renewable fuel requirement into four separate categories, each with its own volume requirement. Third, it requires, with certain exceptions applicable to existing facilities, that each of these mandated volumes of renewable fuels achieve certain minimum thresholds of GHG emission performance. Fourth, RVOs are now calculated to include based on production or importation of both gasoline and diesel fuels, rather than gasoline alone. Fifth, it requires that all renewable fuel be made from feedstocks that meet a new definition of "renewable biomass," including certain land use restrictions.

The new volume requirements are not exclusive, and are "nested" requirements. The nested nature of the requirements allows any renewable fuel that meets the requirement for cellulosic biofuel or biomass-based diesel to be valid for meeting the advanced biofuel requirement. Similarly, any renewable fuel that meets the requirement for advanced biofuel is also valid for meeting the total renewable fuel requirement. While certain RINs satisfy the requirements of more than one standard, obligated parties are prohibited from using single RINs to meet two RVOs in any given year. A RIN with a D code of 3 can be used to meet three of the four standards, but an obligated party can only use that RIN to meet the requirements of one standard in a given year. For example, if an obligated party has 10 RINs that each satisfy the requirements for cellulosic biofuel and advanced biofuel, the obligated party may apply the RINs, in any combination, to the cellulosic and advanced biofuel volume obligations, so long as no RIN is used twice.

After 2010, future standards will be set each year through a notice-and-comment rulemaking process. A notice of proposed rulemaking ("NPRM") will be released each year by Summer, and a final rule will be issued by November 30 of each year that sets the standards applicable to the following year.

40 C.F.R. §80.1107(a).

¹⁹ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

Renewable Identification Number (“RIN”)

Under RFS2, each RIN will continue to represent one gallon of renewable fuel in demonstrating compliance with RVOs. Consistent with the approach under RFS1, a RIN will continue to have unique information similar to the 38 digits in RFS1.²⁰ Each batch-RIN generated will continue to uniquely identify not only a specific batch of renewable fuel, but also every gallon-RIN assigned to that batch.²¹ The RIN will continue to be defined as follows:

RIN: KYYYYCCCCFFFFBBBBRRDSSSSSSSSEEEEEEEE

Where:

K = Code distinguishing assigned RINs from separated RINs
YYYY = Calendar year of production or import
CCCC = Company ID
FFFFF = Facility ID
BBBBB = Batch number
RR = Code identifying the Equivalence Value
D = Code identifying the renewable fuel category
SSSSSSS = Start of RIN block
EEEEEEE = End of RIN block²²

The RFS2 program will go into effect on July 1, 2010. Because the start date is in the middle of the year, RINs generated in the first half of the year are generated under the RFS1 requirements, and RINs generated in the second half of the year are generated under the RFS2 requirements. All of these RINs will be valid for meeting the 2010 annual standards, even though they have different D codes.²³ The EPA implemented a mechanism for distinguishing between these two categories of RINs in order to appropriately apply them to the standards. Obligated parties must ensure to use the appropriate D codes.

²⁰ The only difference in the RIN code under RFS2 is the new D Code. See ‘Meeting 2010 Standards’ and ‘Assigning a D Code’ sections below for a full discussion.

²¹ See the ‘Meeting 2010 Standards’ section below for a full discussion.

²² Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010))

²³ See ‘Assigning a D Code’ section below for a full discussion.

Deficit and Excess RINs²⁴

If an obligated party acquires more RINs than it needs to meet its RVOs, then in general it can retain the excess RINs for use in complying with its RVOs in the following year, subject to a 20% rollover cap, or transfer the excess RINs to another party. If an obligated party has not acquired sufficient RINs to meet its RVOs, then under certain conditions it can carry a deficit into the next year. Deficit carryovers cannot occur with respect to any of the four individual RVOs two years in succession. They can, however, occur as frequently as every other year for a given obligated party for each RVO. Non-obligated parties may not carry RINs over to the next year.

CHANGES IN THE RENEWABLE FUEL STANDARD PROGRAM

Changes in Renewable Fuel Definitions

The definitions in RFS2 include a general definition of renewable fuel but, unlike RFS1, the EPA included a separate definition of “Renewable Biomass” that identifies the feedstocks from which renewable fuels may be made. Another difference in the definitions of renewable fuel is that RFS2 contains three subcategories of renewable fuels: (1) Advanced Biofuel, (2) Cellulosic Biofuel and, (3) Biomass-Based Diesel. Each must meet threshold levels of reduction of greenhouse gas emissions.

²⁴ These general rules apply under the RFS2, but there are three additional rules that apply during the transition period. These rules apply only during the transition period, and not after 2011.

- (1) The EPA prohibits obligated parties from carrying over a biomass-based diesel deficit into 2011 larger than that based on the 0.65 billion gallons volume requirement for 2010. This is the amount that would have been permitted had the EPA been able to implement the biomass-based diesel requirements in 2009. In practice, this means that deficit carryovers from 2010 into 2011 for biomass-based diesel cannot not exceed 57% (0.65/1.15) of an obligated party's 2010 RVO.
- (2) The EPA will allow excess 2008 biodiesel and renewable diesel RINs that were not used for compliance purposes in 2008 to be used for compliance purposes in 2009 or 2010.
- (3) Obligated parties will be allowed to use excess 2008 and 2009 biodiesel and renewable diesel RINs for compliance with the 2010 combined standard of 1.15 bill gal, so long as the sum of all previous-year RINs (2008 plus 2009 RINs) does not exceed 20% of their 2010 obligation, and the 2008 RINs do not exceed 8.7% of their 2010 obligation

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“**Renewable Fuel**” is defined as fuel produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel. The definition of “Renewable Fuel” now refers to “transportation fuel” rather than referring to “motor vehicle fuel,” and now includes heating fuel and jet fuel. “Transportation fuel” is also defined, and means fuel used in motor vehicles, motor vehicle engines, nonroad vehicles or nonroad engines (except for ocean-going vessels).

“**Advanced Biofuel**” is a renewable fuel other than ethanol derived from corn starch and for which lifecycle GHG emissions are at least 50% less than the gasoline or diesel fuel it displaces.

“**Cellulosic biofuel**” is renewable fuel derived from any cellulose, hemicellulose, or lignin each of which must originate from renewable biomass. It must also achieve a lifecycle GHG emission reduction of at least 60%, compared to the gasoline or diesel fuel it displaces. The RFS1 definition of “cellulosic biomass ethanol” included only ethanol, whereas the RFS2 definition of cellulosic biofuels includes any biomass-to-liquid fuel such as cellulosic gasoline or diesel in addition to ethanol.

“**Biomass-based diesel**” includes both biodiesel (mono-alkyl esters) and non-ester renewable diesel (including cellulosic diesel). The RFS2 added three restrictions to the “biodiesel” definition. First, the final rule requires that such fuel be made from renewable biomass. Second, its lifecycle GHG emissions must be at least 50% less than the diesel fuel it displaces. Third, the statutory definition of “Biomass-based diesel” excludes renewable fuel derived from co-processing biomass with a petroleum feedstock.

The definition of “**additional renewable fuel**” identifies fuel produced from renewable biomass that is used to replace or reduce fossil fuels used in heating oil or jet fuel.

Fuels that are Subject to the Standards

Gasoline

The final rule covers both reformulated gasoline blendstock for oxygenate blending (“RBOB”) and unfinished conventional gasoline designed for downstream oxygenate blending (“CBOB”), such as sub-octane conventional gasoline.²⁵

²⁵ No other unfinished gasoline or blendstock, such as butane or naphtha produced in a refinery, or exported gasoline, is included in the obligated volume, except where the blendstock is combined with other blendstock or gasoline to produce finished gasoline, RBOB, or CBOB. However, any ethanol added to RBOB or CBOB at a refinery's rack or terminal downstream from the refinery or importer will be excluded from the volume of gasoline used by the refiner or importer to determine the obligation.

Diesel

Any party that produces or imports petroleum-based diesel fuel that is designated as motor vehicle, nonroad, locomotive, and marine diesel fuel (“MVNRLM”) (or any subcategory of MVNRLM) will be required to include the volume of that diesel fuel in the determination of its RVO under the RFS2 rule.²⁶ As such, diesel fuel that is designated as heating oil, jet fuel, or any designation other than MVNRLM or a subcategory of MVNRLM, will not be subject to the applicable percentage standard and will not be used to calculate RVOs. The rule does not include fuels for use in ocean-going vessels.²⁷

Other Transportation Fuels

Transportation fuels other than gasoline or MVNRLM diesel fuel (natural gas, propane, and electricity) will not be used to calculate the RVOs of any obligated party.

Generation of Renewable Identification Numbers

The RFS2 program will continue to use the same programmatic structure – the RIN system -- with modifications to reflect EISA’s enactment. RINs remain the currency for trading and compliance. A RIN is generated for every gallon of renewable fuel produced or imported into the United States and an obligated must acquire enough RINs to satisfy its RVO. Standard-value RINs are transferred with every batch of renewable fuel until it is either: (1) obtained by an obligated party; or (2) blended into a batch of gasoline. Once a RIN is “separated” from a batch of renewable fuel it can be used for compliance purposes, banked, or traded on the open market. RINs are valid for the year they are created and the following compliance year. There are no limits placed on who can buy, sell or trade for RINs.

²⁶ “Diesel fuel” includes any distillate fuel that meets the definition of MVNRLM diesel fuel, including any subcategories such as MV (motor vehicle diesel fuel produced for use in highway diesel engines and vehicles), NRLM (diesel fuel produced for use in nonroad, locomotive, and marine diesel engines and equipment/vessels), NR (diesel fuel produced for use in nonroad engines and equipment), and LM (diesel fuel produced for use in locomotives and marine diesel engines and vessels). Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), available at <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

²⁷ “Fuels for use in ocean-going vessels” means residual or distillate fuels other than MVNRLM intended to be used to power large oceangoing vessels (*e.g.*, those vessels that are powered by Category 3 (C3), and some Category 2 (C2), marine engines and that operate internationally).

Under RFS2, each RIN will continue to be generated by the producer or importer of the renewable fuel, as in the RFS1 program. RINs can only be generated if the person generating the RIN can show that the feedstock from which the fuel was made meets the definition of renewable biomass and meets the land restriction requirements. Under the final rule, EPA is requiring only that producers that generate RINs have the requisite records documenting that their fuel is produced from feedstocks meeting the definition of renewable biomass. Similar feedstock affirmation and recordkeeping requirements apply for both RIN-generating domestic renewable fuel producers and RIN-generating foreign producers or importers. Non-RIN generating producers need not maintain any paperwork related to their feedstocks and their origins. SIGMA opposed this result.

In order to determine the number of RINs that must be generated and assigned to a batch of renewable fuel, the actual volume of the batch of renewable fuel must be multiplied by the appropriate “Equivalence Value”.²⁸

Equivalence Values

EPAct stipulated that every gallon of cellulosic ethanol should be treated as if it were 2.5 gallons for RFS compliance purposes. While EPAct did not stipulate similar value for other renewable fuels, EPA believes it is consistent with the intent of Congress to treat different renewable fuels differently and to provide incentives for use of renewable fuels in certain circumstances.²⁹ EPA proposed that “Equivalence Values” be assigned to renewable fuels based on their energy content in comparison to the energy content of ethanol and adjusted for their renewable content. The Equivalence Value would be the number of RINs generated for one gallon of the renewable fuel.

The RFS2 slightly modified the Equivalence Value calculation, which is now:

$$EV = (R / 0.972) * (EC / 77,000)$$

Where:

EV = Equivalence Value for the renewable fuel, rounded to the nearest tenth.

R = Renewable content of the renewable fuel. This is a measure of the portion of a renewable fuel that came from a renewable source, expressed as a percentage, on an energy basis.

EC = Energy content of the renewable fuel, in Btus per gallon.³⁰

²⁸ See ‘Equivalence Value’ section below for a full discussion.

²⁹ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

³⁰ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at*

Under this new formula, Equivalence Values assigned to specific types of renewable fuel under RFS1 will continue unchanged under RFS2. However, non-ester renewable diesel will be required to have a lower energy content of at least 123,500 Btu/gallon in order to qualify for an Equivalence Value of 1.7.

Assignment of D Codes

Under RFS2, RINs continue to have the same number of digits and code definitions as under RFS1. The “D code”³¹ will continue to identify the standard to which the RIN could be applied. However, an important change under the RFS2 is that the D code is required to be filled in with one of the four values corresponding to the four different renewable fuels categories. Thus, a producer or importer must know which D code to assign to those RINs, in order to generate RINs for a renewable fuel that meets the various eligibility requirements. Under the RFS2 program, a producer or importer would determine the appropriate D code using a table in the regulations, called the “lookup table.” The table would list various combinations of fuel type, production process, and feedstock, and the producer or importer would choose the appropriate combination representing the fuel he is producing and for which he is generating RINs. Parties generating RINs would be required to use the D code specified in the lookup table and would not be permitted to use a D code representing a broader renewable fuel category.³²

RINless Biofuel

Contrary to SIGMA’s suggestion, RFS2 permits U.S. manufacturers to produce biofuels and enter them into the domestic stream of commerce without generating a corresponding RIN. Similarly, the final regulations permit biofuels for which no RIN has been or will be generated to be imported into the United States.³³ Therefore, under RFS2, transportation fuel consumed in the United States will fall within one of three categories: fuel subject to the standards (gasoline and diesel), fuel for which RINs are generated and will be used to meet those standards, and RINless biofuel.

<http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

³¹ One of the 38 digits in a RIN.

³² The system would provide a mechanism for dealing with multiple, simultaneous pathways. For example: (1) two different types of fuel made from the same feedstock, (2) two different feedstocks used to produce the same fuel type, (3) processes that use both renewable feedstocks and fossil fuels.

³³ A foreign producer that wishes to import fuels into the U.S. for which RINs have not been and will not be generated, will not be subject to any of the registration, recordkeeping, reporting or inspection requirements.

Meeting the 2010 Standards

The four RFS2 applicable percentages are determined based on the four volume mandates covered by the final rule. The RVO for a refiner or importer will be determined by applying these percentages to the volume of gasoline and diesel fuel it produces and imports during calendar year 2010. The volume requirements are achieved by obtaining the appropriate number of RINs for each RVO. There is no separate RFS1 RVO requirement for 2010, but RINs generated in 2009 and 2010 under the RFS1 program can be used to meet the RFS2 volume obligations for 2010.

While EISA established the renewable fuel volumes shown in **Table 1**, it also requires that EPA set the standards based on these volumes each November for the following year. In the case of the cellulosic biofuel standard, EISA required that the standard be set based on the volume projected to be available during the following year. If the projected cellulosic volume is lower than the level shown in **Table 1**, then EISA allows the EPA to also lower the advanced biofuel and total renewable fuel standards each year accordingly.

Under the final rule, the 2010 cellulosic biofuel standard is 5 million gallons (6.5 million ethanol equivalent), which is significantly less than the volume EISA required for 2010. EPA will make cellulosic credits available to obligated parties for end-of-year compliance, should they need them, at a price of \$1.56 per gallon (gallon-RIN). While the cellulosic standard for 2010 was lowered, the EPA did not find it necessary to also lower the advanced biofuel and total renewable standards for 2010.

The final rule also includes special provisions to account for the 2009 biomass-based diesel volume requirements. In November 2008, EPA used the new total renewable fuel volume of 11.1 billion gallons as the basis for the 2009 total renewable fuel standard issued under the RFS1 regulations. While this approach ensured that the total mandated renewable fuel volume required by EISA for 2009 was used, the RFS1 program did not provide a mechanism for implementing the 0.5 billion gallon 2009 requirement for biomass-based diesel. To address this issue, the EPA combined the 2010 biomass-based diesel requirement of 0.65 billion gallons with the 2009 biomass-based diesel requirement of 0.5 billion gallons, to require that obligated parties meet a combined 2009/2010 requirement of 1.15 billion gallons by the end of the 2010 compliance year.

The resulting 2010 standards are shown in the table below. These standards represent the fraction of a refiner's or importer's gasoline and diesel volume which must be renewable fuel.

Standards for 2010³⁴

Cellulosic biofuel	0.004%
Biomass-based diesel	1.10%
Advanced biofuel	0.61%
Renewable fuel	8.25%

Verifying Feedstocks

The final rule changed the definition of “renewable fuel” to require that it be made from feedstocks that qualify as “renewable biomass.”³⁵ Therefore, under the RFS2, renewable fuel producers may only generate RINs for fuels made from feedstocks meeting the definition of renewable biomass.³⁶ There are three options for domestic and foreign renewable fuel producers to verify that their feedstocks comply with this requirement.

³⁴ Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

³⁵ EISA’s definition of the term “renewable biomass” limits the types of biomass as well as the types of land from which the biomass may be harvested. The definition includes: planted crops and crop residue from agricultural land cleared prior to December 19, 2007 and actively managed or fallow on that date; planted trees and tree residue from tree plantations cleared prior to December 19, 2007 and actively managed on that date; animal waste material and byproducts; slash and pre-commercial thinnings from non-federal forestlands that are neither old-growth nor listed as critically imperiled or rare by a State Natural Heritage program; biomass cleared from the vicinity of buildings and other areas at risk of wildfire; algae; and, separated yard waste and food waste. Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

³⁶ The statutory definition of “renewable biomass” does not include a reference to municipal solid waste (“MSW”) as did the definition of “cellulosic biomass ethanol” in the Energy Policy Act of 2005 (“EPAct”), but instead includes “separated yard waste and food waste.” “Renewable biomass” does include incidental contaminants related to customary feedstock production and transport that are present in feedstock that otherwise meets the definition. Final Rule: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program (signed Feb. 3, 2010), *available at* <http://www.epa.gov/OMS/renewablefuels/rfs2-preamble.pdf> (to be codified at 40 C.F.R. pt. 80) (effective July 1, 2010)

The first option requires renewable fuel producers to satisfy renewable biomass recordkeeping and reporting requirements for their individual facilities. As an alternative, the second option allows renewable fuel producers to form a consortium to hire an independent third-party to conduct an annual renewable biomass quality-assurance survey, based on a plan approved by EPA. The third option is an “aggregate compliance approach” applicable only to domestic crops and crop residues. EPA deems renewable fuel producers using domestically grown crops and crop residue as feedstock to be in compliance with the renewable biomass requirements. Those producers need not comply with the recordkeeping and quarterly reporting requirements established for the non-crop based biomass sector. However, EPA will annually review USDA data on lands in agricultural production to determine if this option should continue.

For renewable fuel producers using feedstocks other than planted crops or crop residue from agricultural land that do not choose to participate in the third-party survey funded by an industry consortium, individual producers are required to (1) obtain documentation about their feedstocks from their feedstock supplier(s), and (2) take the measures necessary to ensure that they know the source of their feedstocks, and (3) demonstrate to EPA that they have complied with the definition of renewable biomass.

EPA’s renewable biomass reporting requirements for producers who generate RINs include a certification on renewable fuel production reports that the feedstock used for each renewable fuel batch meets the definition of renewable biomass. Additionally, producers will be required to include with their quarterly reports a summary of the types and volumes of feedstocks used throughout the quarter, as well as maps of the land from which the feedstocks used in the quarter were harvested.

Expanded Registration Process for Producers and Importers

Under the RFS1 program, all producers and importers of renewable fuel who produce or import more than 10,000 gallons of fuel annually must register with EPA’s fuels program prior to generating RINs. Due to the revised definitions of renewable fuel, the RFS2 expands the registration process for renewable fuel producers and importers by requiring domestic and foreign producers, as well as importers of renewable fuel that generate RINs to provide information on their feedstocks, facilities, and products. The registration procedures will be integrated with the new EPA Moderated Transaction System.³⁷

Domestic Renewable Fuel Producers

In order to determine whether or not their fuel is eligible for generating RINs, renewable fuel producers will generally need to have at least basic information about the origin of their feedstocks, to ensure they meet the definition of renewable biomass. With respect to products, the EPA requires producers to provide information on the types of

³⁷ See the ‘EPA Moderated Transaction System’ section below for further detail on compliance with this system.

renewable fuel and co-products that a facility is capable of producing. With respect to feedstocks, producers must provide to EPA a list of all the different feedstocks that their facility is likely to use to convert into renewable fuel. With respect to the producer's facilities, two types of information must be reported to the Agency. First, producers must describe each facility's fuel production processes (e.g., wet mill, dry mill, thermochemical, etc.), and thermal/process energy source(s). Second, the producer must provide information in order to determine what production volumes would be deemed to be in compliance with the 20% GHG threshold.³⁸

Every renewable fuel producer must have the on-site engineering review of their facility performed in conjunction with his or her initial registration for the new RFS program. The engineering reviews must be conducted by independent third parties who can maintain impartiality and objectivity in evaluating the facilities and their processes. Additionally, the on-site engineering review must be conducted every three years thereafter to verify that the fuel "pathways" established in the initial registration are still applicable.³⁹ These requirements apply unless the renewable fuel producer updates its facility registration information to qualify for a new RIN category (i.e., D code), in which case the review needs to be performed within 60 days of the registration update. Finally, producers are required to submit a copy of their independent engineering review to EPA, for verification and enforcement purposes.

Foreign Renewable Fuel Producers

Under RFS2, foreign producers of renewable fuel must meet the same requirements as domestic producers, including registering information about their feedstocks, facilities, and products, as well as submitting an on-site independent engineering review of their facilities at the time of registration for the program and every three years thereafter. These requirements apply to all foreign renewable fuel producers who plan to export their products as part of the RFS2 program, whether the foreign producer generates RINs for their fuel or an importer does.

If a foreign producer generates RINs for renewable fuel it exports to the United States, the ethanol must be dewatered and denatured by the foreign producer prior to leaving the production facility and prior to the generation of RINs. Also, the foreign

³⁸ For those facilities that would qualify as grandfathered but are not in operation EPA is allowing until May 1, 2013 to submit and receive approval for a complete facility registration.

³⁹ For both domestic and foreign producers of renewable fuel, the "lookup table" identifies individual fuel "pathways" comprised of unique combinations of the type of renewable fuel being produced, the feedstock used to produce the renewable fuel, and a description of the production process. Each pathway is assigned to one of the D codes on the basis of the revised renewable fuel definitions provided in EISA and the EPA assessment of the GHG lifecycle performance for that pathway. A description of the process used for determining the associated D code can be found in 'Assignment of D Codes Section', above.

producer must strictly segregate a batch of renewable fuel and its associated RINs from all other volumes of renewable fuel as it travels from the foreign producer to the importer.

Foreign producers, like domestic producers, must also undergo an independent engineering review of their facilities, conducted by an independent third party who is a licensed professional engineer (“P.E.”), or foreign equivalent who works in the chemical engineering field. The independent third party must provide to EPA documentation of his or her qualifications as part of the engineering review, including proof of an appropriate P.E. license or foreign equivalent. The third-party engineering review must be conducted by both foreign producers who plan to generate RINs and those that do not generate RINs but anticipate their fuel will be exported to the United States by an importer who will generate the RINs.

Foreign producers may choose not to participate in the RFS2 program and thus neither generate RINs nor provide information to the importer for the importer to generate RINs. The foreign producer can still export biofuel to the United States. Under these circumstances, however, the biofuel would not be renewable fuel under RFS2, no RINs could be generated by any party, and thus the foreign producer would not be subject to any of the registration, recordkeeping, reporting, or attest engagement requirements.

Renewable Fuel Importers

Importers may only generate RINs for renewable fuel if the foreign producer has not already done so. An importer may have an agreement with a foreign renewable fuel producer for the importer to generate RINs if the foreign producer. If an importer receives fuel without RINs, the importer may only generate RINs for that fuel if they can verify the fuel pathway and that the feedstocks meet the definition of renewable biomass. They must also have sufficient information about the feedstock and process used to make the renewable fuel to allow them to identify the appropriate D code from the lookup table for the RINs they generate. Therefore, in order to generate RINs, the importer will be required to obtain this information and documentation from a foreign producer.

Where a foreign producer generates RINs, the importer must rely on the foreign producer to provide documentation to support any claims for the producer’s decision to generate RINs. Foreign producers who generate RINs must be registered with EPA under the RFS2 program, and must have conducted an independent engineering review.

Process and Timing

The forms for expanded registration for renewable fuel producers and importers, as well as forms for registration of other regulated parties, are available electronically. Paper registration forms will only be accepted in exceptional cases. Registration forms must be submitted and accepted by the EPA by July 1, 2010, or 60 days prior to production or importation of any renewable fuel, whichever dates come later. The producer must update his registration information within seven (7) days of the change. However, if the fuel producer changes its fuel pathway in a manner that would result in a

change in its RIN category (and thus a new D code), such an update would need to be submitted at least 60 days prior to the change, followed by submittal of a complete on-site independent engineering review of the producer's facility also within 60 days of the change.

Specific Changes to Recordkeeping and Reporting Requirements

Recordkeeping

Recordkeeping, including product transfer documents (“PTDs”), will support the enforcement of the use of RINs for compliance purposes. Parties must keep copies of all PTDs they generate and receive, as well as copies of all reports submitted to EPA and all records related to the sale, purchase, brokering or transfer of RINs for five years. Also, obligated parties must keep copies of records that relate to program flexibilities, such as small business-oriented provisions. Upon request, parties are responsible for providing their records to the EPA.

Reporting

Timing: Producers and importers who generate or take ownership of RINs shall submit RIN Transaction Reports and/or RIN Generation Reports quarterly.⁴⁰ EMTS⁴¹ will be used by all parties to record “real time” generation of RINs and transactions involving RINs starting July 1, 2010.⁴² Quarterly reports that include RIN Activity Reports and, with EMTS, simplified reporting and certification of the RIN Generation and RIN Transaction Reports must also be submitted.

RIN Generation Report: All renewable fuel producers and importers above 10,000 gallons per year must report to EPA on each batch of their fuel and indicate whether or not RINs are generated for the batch. The final rule envisions the RIN Generation Report as a more general report on renewable fuel production that captures information on all batches of renewable fuel, whether or not RINs are generated for them.

RIN Transaction Report: Under the RFS2, there are two changes to the RIN Transaction Report. First, for reports of RINs assigned to a volume of renewable fuel, the volume of renewable fuel must be reported. Second, RIN price information must be submitted for transactions involving both separated RINs and RINs assigned to a renewable volume. This information was not collected under RFS1.

⁴⁰ Specifically, renewable fuel exporters and obligated parties shall submit their RIN Transaction Reports quarterly, and RIN owners shall submit their RIN Transaction Reports quarterly.

⁴¹ See the EPA Moderated Transaction System (“EMTS”) section below for further detail on compliance with this system.

⁴² “Real time” means recordation within five (5) business days of generation or any transaction involving a RIN.

Attest Engagement

Producers of renewable fuels, obligated parties, exporters, and any party who owns RINs must arrange for an annual attest engagement. The purpose of an attest engagement, which is similar to a financial audit, is to receive third party verification of information reported to EPA. The attest engagement report for any given year must be submitted to EPA by no later than May 31 of the following year. As with the RFS1 program, an attest engagement must be conducted by an individual who is a Certified Public Accountant (“CPA”) or Certified Internal Auditor (“CIA”), who is independent of the party whose records are being reviewed, and who will follow agreed-upon procedures to determine whether underlying records, reported items, and transactions agree. The CPA or CIA will generate a report on its findings.

The EPA will accept an attest engagement performed by a foreign accountant who holds an equivalent credential to an American CPA or CIA. A written explanation as to the foreign accountant’s qualifications and the equivalency of the credential must accompany the attest engagement.

Production Outlook Reports

Starting in 2010, the EPA will require annual production outlook reports from all domestic renewable fuel producers, foreign renewable fuel producers who register to generate RINs, and importers of renewable fuels.⁴³

The EPA Moderated Transaction System

EMTS is essentially a database maintained by the EPA to monitor RIN transfer activities between interested parties. EPA’s goal in developing EMTS is to eliminate duplicate RINs and other problems associated with the current RIN system by centralizing this aspect of the RFS. EMTS is strictly a RIN tracking and managing tool designed to facilitate reporting under the RFS program, primarily through product transfer documents (the commercial documents used to memorialize transactions of RINs between a buyer and a seller in the market). The information reported via EMTS is merely a subset of the information required to be maintained by regulated parties. However, if any party engages in a RIN transaction, they must report the sale, and particularly the price of the sale, to the EPA through the EMTS.

After RINs have entered the system, parties may then trade them based on agreements outside of EMTS. Only some specifying information will be needed to trade RINs, such as RIN quantity, fuel type, RIN assignment, RIN year, RIN price or price per gallon. The unique identification of the RIN will exist within EMTS, but parties

⁴³ The full list of requirements for the production outlook reports is provided in the Regulations. *See* 40 CFR §80.1449.

engaging in RIN transactions will no longer have to worry about incorrectly recording or using 38-digit RIN numbers. The actual items of transactional information covered under RFS2 are very similar to those reported under RFS1. The RIN price is one of the new pieces of transactional information required to be submitted under RFS2.

EMTS is still under development, but a Beta Version is being tested on a very limited basis.⁴⁴ EMTS will be optional for calendar year 2010 and mandatory for calendar year 2011.⁴⁵ EMTS will start on July 1, 2010, when the RFS2 RINs are required to be generated. EPA will allow five days for both parties to receive or provide necessary documentation in order to interact with EMTS accurately and timely.⁴⁶ Parties who use EMTS must first register with EPA in accordance with the RFS2 registration program. Parties must establish an account with EMTS by July 1, 2010 or 60 days prior to engaging in any transaction involving RINs, whichever is later.

Retail Dispenser Labeling for Gasoline with Greater than 10 Percent Ethanol

In our response to the NPRM, SIGMA urged the EPA not to allow a waiver on the requirement for new labels on retail dispensers of >E10 percent ethanol blends. In the final rule, the EPA decided to defer finalizing a labeling requirement at this time. The EPA will continue to study what measures might be appropriate to prevent misfueling with >E10 blends.

⁴⁴ A Sample EMTS Transactions:

1) Seller logs into EMTS and posts a sale of 10,000 RINs to Buyer at X price. For this example, assume the RINs were generated in 2010 and were assigned to 10,000 gallons of “Renewable fuel (D=6)”. Seller’s RIN account for “Renewable fuel (D=6)” is put into a “pending” status of 10,000 with the posting of the sale to Buyer. Buyer receives automatic notification of the pending transaction.

2) Buyer logs into EMTS. Buyer sees the sale transaction pending. Assuming it is correct, Buyer accepts it. Upon acceptance, Buyer’s RIN account for “Renewable fuel (D=6)” RINs is automatically increased by 10,000 2010 assigned RINs sold at X price.

3) After Seller has posted the sale and Buyer has accepted it, EMTS automatically notifies both Buyer and Seller that the transaction has been fully completed.

⁴⁵ A Beta Version of the EMTS is available at:
<http://www.epa.gov/oms/renewablefuels/epamts.htm>

⁴⁶ “Real time” will be defined as within five business days of a reportable event (e.g., generation and assignment of RINs, transfer of RINs).

Penalties

Any person who violates any prohibition or requirement of the final rule is subject to civil penalties of up to \$37,500 per day and per each individual violation, plus the amount of any economic benefit or savings resulting from each violation. Under the rule, a failure to acquire sufficient RINs to meet a party's renewable fuels obligation constitutes a separate day of violation for each day the violation occurred during the annual averaging period.

In addition, the regulation prohibits any party from creating or transferring invalid RINs. This applies regardless of the good faith belief of a party that the RINs are valid. In this situation, the obligated party that used the invalid RINs will be required to deduct any invalid RINs from its compliance calculations. There is no "good faith" provision to RIN ownership. An underlying principle of RIN ownership is still one of "buyers beware" and RINs may be prohibited from use at any time if they are found to be invalid. An obligated party is liable for violating the standard if the remaining number of valid RINs was insufficient to meet its RVO, and the obligated party might be subject to monetary penalties if it used invalid RINs in its compliance demonstration.

Other Significant Provisions

Small Producer Exemptions

Under the RFS1 rule, parties who produce or import less than 10,000 gallons of renewable fuel in a year are not required to generate RINs for that volume, and are not required to register with the EPA if they do not take ownership of RINs generated by other parties. These producers and importers are also exempt from registration, reporting, recordkeeping, and attest engagement requirements.

The EPA also finalized a temporary exemption for renewable fuel producers that produce less than 125,000 gallons of renewable fuel each year from new production facilities. These producers are not required to generate and assign RINs to batches of renewable fuel for a period of up to three years, beginning with the calendar year in which the production facility produces its first gallon of renewable fuel. Such producers are also exempt from registration, reporting, recordkeeping, and attest engagement requirements as long as they do not own RINs or voluntarily generate and assign RINs.

ADDITIONAL INFORMATION

If you have any questions regarding the final rule, please contact either Tim Columbus at (202) 429-6222 or Elizabeth Glidden (202) 429-1308.

Table 1

EISA Renewable Fuel Volume Requirements
(billion gallons)

Year	Cellulosic biofuel requirement	Biomass-based diesel requirement	Advanced biofuel requirement	Total renewable fuel requirement
2008	n/a	n/a	n/a	9.0
2009	n/a	0.5	0.6	11.1
2010	0.1	0.65	0.95	12.95
2011	0.25	0.80	1.35	13.95
2012	0.5	1.0	2.0	15.2
2013	1.0	A	2.75	16.55
2014	1.75	A	3.75	18.15
2015	3.0	A	5.5	20.5
2016	4.25	A	7.25	22.25
2017	5.5	A	9.0	24.0
2018	7.0	A	11.0	26.0
2019	8.5	A	13.0	28.0
2020	10.5	A	15.0	30.0
2021	13.5	A	18.0	33.0
2022	16.0	A	21.0	36.0
2023+	B	B	B	B

A = To be determined by EPA through a future rulemaking, but no less than 1.0 billion gallons.

B = To be determined by EPA through a future rulemaking.