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The U.S. Environmental Protection Agency Proposes Renewable Fuel Standards for 2014 that Reduce Advanced Biofuel and Total Renewable Fuel Volumes

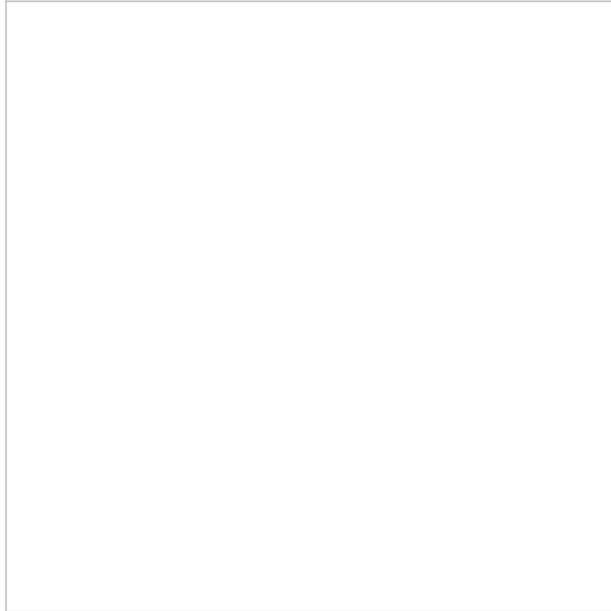
November 20, 2013

On November 15, 2013, the U.S. Environmental Protection Agency (the “EPA”) proposed the renewable fuel percentage standards for 2014. Based on the pressures created by both the limited availability of qualifying renewable fuels and practical restrictions on the volume of ethanol that can be consumed in gasoline (the “blendwall”), the EPA is, for the first time, proposing to set the advanced biofuel and total renewable fuel volumes at less than the applicable volumes set forth in the Clean Air Act, with the proposed total renewable fuel volume being almost 3 billion gallons (ethanol-equivalent) lower than the statutory volume. A 60-day public comment period for the proposed rule will open when the proposal is published in the Federal Register, which is expected before year end. See our August 6, 2013 Alert for information about the 2013 renewable fuel standards, [The U.S. Environmental Protection Agency Issues Renewable Fuel Standards for 2013 and Further Reduces Cellulosic Biofuel Volume](#).

Under Section 211(o) of the Clean Air Act, the EPA is required to annually set renewable fuel percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel (which includes cellulosic biofuel and biomass-based diesel), and total renewable fuel (which includes advanced biofuel) for all gasoline and diesel produced in or imported into the U.S.

during the following year. The renewable fuel standards are expressed as volume percentages and are used by each refiner, blender or importer to determine its renewable fuel volume obligations. The EPA sets the applicable percentages so that, if each regulated party meets the percentages, and if projections of gasoline and diesel use for the year are accurate, then the amount of renewable fuel, cellulosic biofuel, biomass-based diesel and advanced biofuel used will meet the required volumes on a nationwide basis. Thus, to set the renewable fuel percentage standards, the EPA must first specify the required volumes for each fuel type.

The statutory 2014 volumes and proposed 2014 volumes and percentages are set forth below; all volumes are ethanol-equivalent, except biomass-based biofuel, which is actual.



Cellulosic Biofuel

The Clean Air Act requires that the EPA base the standard for cellulosic biofuel on the volume of cellulosic biofuel projected to be produced during the relevant year. On January 25, 2013, the D.C. Circuit vacated the EPA's 2012 standard for cellulosic biofuel. *American Petroleum Institute v. EPA*, No. 12-1139 (D.C. Cir. Jan. 25, 2013). The court found that the EPA's projection of the volume of cellulosic biofuel to be produced in 2012 was not neutral, but was tilted in favor of promoting growth in the cellulosic biofuel industry. Following the court's ruling, the EPA removed the 2012 requirement for cellulosic biofuel. The EPA currently is proposing to remove the 2011 requirement for cellulosic biofuel as well.

As has always been the case, the proposed volume standard for cellulosic biofuel is much lower than that set by the Clean Air Act, which, for 2014, is 1.75 billion gallons (ethanol-equivalent). When the EPA sets the applicable volume for cellulosic biofuel below the volume specified in the Clean Air Act, the EPA is required to offer waiver credits that can be purchased in lieu of acquiring cellulosic biofuel Renewable Identification Numbers ("RINs"). The EPA will set the price for cellulosic biofuel waiver credits in the final rule. For the 2013 compliance period, the price is \$0.42 per credit.

Biomass-Based Diesel

The Clean Air Act specifies the volumes of biomass-based biofuel only through 2012. The EPA has proposed to keep the 2013 volume for biomass-based biofuel (mostly biodiesel) of 1.28 billion gallons (actual) for 2014 and 2015. The biomass-based biofuel volume of 1.28 billion gallons is equivalent to 1.92 billion gallons ethanol-equivalent of biodiesel, and counts toward the total advanced biofuel standard.

Advanced Biofuel and Total Renewable Fuel

The Clean Air Act authorizes the EPA to set volumes for advanced biodiesel and total renewable fuel that are below those specified in the statute. The EPA has advanced two arguments justifying such action for the 2014 volumes. First, when EPA sets the cellulosic biofuel volume below the volume specified in the Clean Air Act, the EPA is authorized to reduce the applicable volumes of advanced biofuel and total renewable fuel by the same or a lesser amount. The EPA also has general authority under Section 211(o)(7)(A) to waive the statutory volumes based on economic or environmental harm or inadequate domestic fuel supply.

According to the EPA, the total volume of renewable fuel as ethanol that could reasonably be made available to and consumed by vehicles as either E10 or higher ethanol blends was not a limiting factor for years prior to 2014. However, for 2014 and later years, the EPA expects that the total volume of ethanol that can be consumed and the total volume of non-ethanol renewable fuels that could reasonably be available will be less than the statutory volumes for advanced biofuel and total renewable fuel. Therefore, as explained by EPA, the proposed 2014 and future-year volumes for advanced biodiesel and total renewable fuel will address “two important realities”:

- Limitations in the volume of ethanol that can be consumed in gasoline given practical constraints on the supply of higher ethanol blends to the vehicles that can use them and other limits on ethanol blend levels in gasoline [and]
- Limitations in the ability of the industry to produce sufficient volumes of qualifying renewable fuel[.]

To determine the applicable volume for total renewable fuel, the EPA projects the volume of ethanol that could reasonably be consumed as E10 and higher ethanol blends, and then adds to that the volume of all non-ethanol renewable fuels that could reasonably be expected to be available. For advanced biofuel, the EPA sums the ethanol-equivalent volumes of cellulosic biofuel, biomass-based diesel, and the additional non-ethanol advanced biofuels that could reasonably be expected to be available and be consumed. The EPA requested comment on this approach for setting the applicable volumes for advanced biodiesel and total renewable fuel, as well as two alternative approaches:

(1) lowering the statutory volumes for advanced biofuels only to the extent that additional volumes are not projected to be available, and using the

general waiver authority to ensure that the total volume of renewable fuel would address supply concerns associated with the blendwall, and

(2) making reductions in advanced biofuel and total renewable fuel that are equal to the proposed reductions in cellulosic biofuel, and using the general waiver authority to make further reductions to the total renewable-fuel requirement necessary to address the blendwall.

In a separate but related rulemaking, the EPA also has requested comments on a petition submitted by the American Petroleum Institute and the American Fuel & Petrochemical Manufacturers requesting that the EPA waive, in part, the statutory 2014 applicable volumes. The EPA expects to issue its determination on the petition at the same time it issues its final rule on the 2014 renewable fuel standards.

Conclusion

The current proposal marks the first time the EPA has addressed the “blendwall” with respect to the renewable fuel standards. The EPA hopes that by using its Clean Air Act authority to adjust the applicable volumes for advanced biofuel and total renewable fuel, it can continue to support growth in renewable fuels, while addressing the practical constraints on the consumption of ethanol and availability of other biofuels. The proposal will not be without controversy and we will update on further developments as the comment period proceeds.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Eric Rothenberg, an O'Melveny partner licensed to practice law in Missouri and New York, Mark Caterini, an O'Melveny partner licensed to practice law in New York, and John Renneisen, an O'Melveny counsel licensed to practice law in the District of Columbia, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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