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EPA Docket Center
1200 Pennsylvania Ave., NW
Mail Code 28221T
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OAR-2016-0544

Re: Comments On Behalf of CVR Energy, Inc.

CVR Energy, Inc. (“CVR”) submits these comments in response to EPA’s Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation dated November 10, 2016 (hereinafter “Proposed Denial”).¹

I. INTRODUCTION

Congress created the Renewable Fuel Standard (“RFS”) program to wean this country off of foreign oil and to lower greenhouse gas emissions. Ten years later, the program is achieving neither of these goals. The RFS is not meeting its goals because of EPA’s decisions to obligate refiners and importers based on the volume they produce and import, leaving blenders unobligated and integrated refiners under-obligated. This decision has destroyed competition in the market and diverted hundreds of millions of dollars each year away from the program and into the pockets of unobligated or under-obligated parties with no legal obligation or financial incentive to promote the program’s goals.

CVR has never had to comply with any EPA regulatory program as poorly designed as the RFS. The RFS program has distorted the American transportation fuels marketplace in a manner that dis-incentivizes necessary investments in blending and retail distribution and that transfers hundreds of million dollars in wealth from small to large businesses. What’s more, these market distortions provide virtually no incremental benefit to human health or the environment.

¹ *Notice of Opportunity to Comment on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation*, 81 Fed. Reg. 83,776 (Nov. 22, 2016); U.S. EPA, *Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* (2016) (EPA Docket ID No. EPA-HQ-OAR-2016-0544-0120) [hereinafter “Proposed Denial”].

The fundamental issue with the current RFS program is that a majority of the companies controlling the blending of petroleum and renewable fuels have either absolutely no compliance obligation, or—due to their position in the marketplace—have a disproportionate ability to generate Renewable Identification Numbers (“RINs”) above and beyond their compliance obligation. Both parties are “RIN-long” and “fuel-agnostic.”

Right now, there are effectively four types of companies participating in the RFS program’s RIN market: (1) obligated small refineries and merchant refineries, like CVR and Valero; (2) large foreign and domestic refiners, like Shell, BP, Chevron and Exxon (“integrated refiners”); (3) unobligated blenders, like Murphy USA and Cumberland Farms; and (4) unobligated market speculators. At the outset of the program and every year since, integrated refiners and unobligated blenders have been handed a windfall because they are immediately long RINs (i.e., they own more RINs than they need for compliance) and have the ability to blend renewable and petroleum-based fuels, and they control the downstream retail sale of their product. These parties can then sell their excess RINs in the marketplace for hundreds of millions of dollars in windfall profits (a fact that is evident on the face of their disclosures to the Securities and Exchange Commission). They sell their RINs to market speculators who buy and sell RINs for profit, driving up prices for merchant and small refineries. Meanwhile, merchant refineries—who are obligated parties under the RFS, and who have little to no opportunity to blend the petroleum fuel that they produce with renewable fuel—must spend hundreds of millions of dollars purchasing RINs from their unobligated or under-obligated counterparts.

In this way, the RFS program regulates parties that have no control over the production or sale of renewable fuel, while allowing those parties who do exercise such control to reap millions of dollars in windfall profits. As one study pointed out, this is akin to placing the burden for meeting fuel economy standards on an automotive parts supplier, rather than the automobile manufacturer itself.² It makes little sense, and yet it has been tolerated for the better part of a decade.

Moreover, because integrated refiners and unobligated blenders are able to reap millions of dollars in windfall profits from the sale of excess RINs, they have little incentive to invest in additional blending and retail distribution infrastructure. Unobligated parties can choose to blend or not blend, while obligated parties must meet their renewable volume obligation (“RVO”) – and buy RINs regardless of their price.

² NERA ECONOMIC CONSULTING, EFFECTS OF MOVING THE COMPLIANCE OBLIGATION UNDER RFS2 TO SUPPLIERS OF FINISHED PRODUCTS 31-32 (2015) (prepared for Valero Energy Corp.) [hereinafter “NERA 2015 Report”], provided here as Attachment 1.

In addition to creating economic distortions and perverse economic incentives in the marketplace for American transportation fuels, the current RFS program has several other serious problems, including:

- It is undermining the economic viability of almost fifty percent of the refining capacity in this country, which every President for the last century has seen as fundamental to national security;
- It is increasing American reliance on foreign biofuels while simultaneously causing American refineries to export their fuel overseas to avoid RFS compliance;
- It is forcing small and merchant refiners to defer capital projects, delay maintenance, reduce staffing, and freeze employee benefits;
- It is encouraging speculation and volatility in the RIN market by parties with no interest in the program other than generating profits from buying and selling RINs; and
- It is hurting small retailers and consumers for the benefit of large retail distribution chains.

This must stop. The U.S. Department of Energy (“DOE”) back in 2011 foresaw this regulatory train-wreck coming, but neither the DOE nor EPA have done anything to resolve it. In fact, notwithstanding the wealth of evidence in the numerous petitions that have been submitted to EPA requesting a change in the point of compliance, the agency would rather bury its head in the sand and deny the petitions.

As discussed in further detail below, not changing the definition of obligated party would be illegal, illogical, and would put the nation’s security and economic stability at risk. EPA must change the definition of obligated party to include refiners, importers and blenders, based on the volume of fuel they sell across the rack, to ensure that the companies that control renewable fuel blending actually have the obligation to increase the penetration of renewable fuels into the marketplace.

II. THE CURRENT RFS IS HARMING CVR, DISTORTING THE MARKET AND UNDERMINING CONGRESS’ GOALS FOR THE PROGRAM

EPA’s implementing regulations place the compliance obligation on refiners and importers based on the volume of transportation fuel they produce or import. Each year these refiners and importers must generate or purchase enough RINs to meet their RVO. But EPA’s RFS regulations allow RINs to be separated through blending, regardless of whether or not the party is obligated. And because - at the outset of the program - the blending infrastructure was

owned and controlled primarily by third-party blenders (like Murphy USA and Cumberland Farms) and integrated refiners (like Chevron, Shell and BP), these parties immediately obtained windfall RIN profits from EPA's regulatory decision to exclude blenders as obligated parties.

EPA made this initial point of obligation decision back at the outset of the RFS program because - according to EPA - it was administratively less burdensome to only have to regulate refiners and importers and not blenders. In a 2010 rulemaking, EPA acknowledged that its initial administrative-ease rationale for obligating refiners and importers, but not blenders, was "no longer valid" and that imposing the obligation on "alternative" points in the fuel-supply chain would "more evenly align a party's access to RINs with that party's [RFS program] obligations."³ Nonetheless, EPA left the definition of "obligated party" unchanged in that rule and has refused to broaden the definition of obligated party since that time.

These early decisions created latent defects in the regulatory scheme, but these defects did not become apparent until EPA raised the volume mandates above the E10 blendwall in 2013. Nonetheless, back in 2011, these latent defects were foreseen by the Department of Energy in a 2011 report for Congress.⁴ While this report focuses on the impact of the RFS program on small refineries, many of its conclusions are based on small refineries' inability to blend renewable fuel to generate RINs, a plight that CVR and other larger merchant refiners also suffer. In its study, DOE described the consequences of these latent defects as follows:

As the RFS mandate increases, obligated parties will demand more RINs, adding upward price pressure. As the mandate increases, increasing the supply of RINs becomes difficult or nearly impossible. In anticipation of the blend wall, obligated parties may stockpile RINs through discretionary blending in anticipation of a shortage of blending opportunities. Those parties that are short, i.e. cannot generate enough RINs through their own facilities to meet their RVO, will need to purchase RINs and could suffer significant economic hardship. Declining ethanol prices would probably be favorable to refiners/blenders that predominately blend ethanol rather than purchase RINs for blending. Many small refiners do not retain control over the blending of their products, and must purchase additional RINs. Obligated parties that rely on purchasing RINs

³ *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010).

⁴ U.S. DEP'T OF ENERGY, OFFICE OF POLICY AND INT'L AFFAIRS, SMALL REFINERY EXEMPTION STUDY: AN INVESTIGATION INTO DISPROPORTIONATE ECONOMIC HARDSHIP (March 2011) [hereinafter "DOE Study"], provided here as Attachment 2; U.S. DEP'T OF ENERGY, OFFICE OF POLICY AND INT'L AFFAIRS, *ADDENDUM TO THE SMALL REFINERY EXEMPTION STUDY: AN INVESTIGATION INTO DISPROPORTIONATE ECONOMIC HARDSHIP* (May 2014), provided here as Attachment 3.

would be adversely affected when the blend wall is reached and their RINs inventory has been depleted.⁵

This is exactly what happened. In 2013, EPA set the volume mandates above the E10 blend wall, biodiesel had not significantly expanded, and RIN prices soared from several cents to \$1.50/RIN.

At this point, EPA should have initiated a rulemaking. Instead, EPA doubled down on the latent defects in the RFS regulations and published a report claiming that “merchant” refiners are not harmed by high RIN prices based on two theories: (1) that, if they were harmed, merchant refiners would have been making investments in fuel blending and distribution infrastructure; and (2) that merchant refiners did not have a higher cost of compliance because all obligated parties are generally recovering their RIN costs in the price of the petroleum fuels they produce.⁶

A. CVR is Harmed By The Definition of Obligated Party

CVR is engaged in both refining and fertilizer manufacturing, through its ownership in CVR Refining, LP, a merchant refiner with refineries in Kansas and Oklahoma, and CVR Partners, LP, a fertilizer manufacturer with plants in Kansas and Illinois. CVR Refining’s refineries are obligated parties under the RFS, and CVR Partners’ plants produce products for which demand is driven in part by biofuel consumption. Thus, CVR is uniquely situated in that it sees both ends of the spectrum when viewing the RFS, and it is clear to us that the RFS is not working as intended.

As described in testimony, meetings, correspondence, and comments over the past several years CVR is substantially and unnecessarily harmed by the current definition of “obligated party” in 40 C.F.R. § 80.1406, its disproportionate leniency towards gasoline over diesel fuel, and EPA’s decision to allow unobligated blenders and integrated refiners to buy, sell, and trade RINs for profit. Since 2013, these flaws in the RFS program have literally cost CVR hundreds of millions of dollars and, if unchanged, threatens to put the continued viability of its refineries in jeopardy.

⁵ DOE Study at 17-18 (emphasis added).

⁶ DALLAS BURKHOLDER, OFFICE OF TRANSP. AND AIR QUALITY, A PRELIMINARY ASSESSMENT OF RIN MARKET DYNAMICS, RIN PRICES, AND THEIR EFFECTS 3 (May 14, 2015) [hereinafter “Burkholder I”], provided here as Attachment 4.

B. The Definition of Obligated Party Is Harming The Entire RFS Program

The Clean Air Act directs EPA to design and implement an RFS program that increases the use of renewable fuels in the American fuels market. By defining “obligated party” to include refiners and importers based on their production and importation rather than their rack sales, and leaving non-refining blenders unobligated, EPA created an enormous loophole in the program. Integrated refiners have more RINs than they need for compliance and blenders have no compliance obligation; all of the RINs they generate from blending may be sold for profit and the proceeds may be used in whatever manner they choose. They will act in the best interests of their companies—blending or not blending, investing or not investing in production or blending infrastructure—without regard to renewable fuel mandates.

Integrated refiners and unobligated blenders vehemently oppose becoming more obligated or newly obligated, respectively, because of the loss of windfall RIN profits and because they do not want to participate in the volatile RIN market. But the windfall RIN profits were never theirs to keep. RINs were intended to be a compliance tool and not a profit center. In any event, the volatile RIN market will settle down when fair competition is restored to the rack and market speculators are kicked out as discussed in section III.B.2.

C. The Definition of Obligated Party Is Undermining The Goals Set By Congress

When Congress passed the Energy Policy Act of 2005 (“EPAct 2005”), including the RFS mandate, it explained that the purpose of the legislation was to reduce American dependence on foreign sources of energy and to reduce greenhouse gas emissions.⁷ The first line of EPAct 2005, describes it as “[a]n Act [t]o ensure jobs for our future with secure, affordable, and reliable energy.”⁸ The Energy Independence and Security Act of 2007, which directed EPA to amend the RFS program, described similar goals:

“[t]o move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government . . .”⁹

⁷ See 151 Cong. Rec. S7451-77 (daily ed. June 28, 2005).

⁸ See Public L. 109–58, 109th Congress (dated Aug. 8, 2005), available at <https://www.gpo.gov/fdsys/pkg/PLAW-109publ58/pdf/PLAW-109publ58.pdf>.

⁹ See Public L. 110–140 110th Congress (dated Dec. 19, 2007), available at <https://www.gpo.gov/fdsys/pkg/PLAW-110publ140/pdf/PLAW-110publ140.pdf>.

The definition of “obligated party,” which allows unobligated blenders and integrated refiners to reap windfall profits and game the RIN market, directly undermines these statutory purposes. The current structure of the RFS program allows unobligated blenders and integrated refiners to drive up RIN prices for their own economic benefit, which not only hurts merchant and small refineries, but also inhibits the domestic production of biofuels, incentivizes foreign biofuel imports, disincentivizes E15 and E85, and seriously jeopardizes the financial viability of almost half of this nation’s oil refining capacity. None of these things helps further the Congressional purposes in creating the RFS program.

1. The Definition of Obligated Party Is Incentivizing Foreign Biofuel, Which Does Not Promote Energy Independence and Security

Congress did not intend for dependence on foreign oil to be replaced with dependence on foreign biofuel. Renewable fuel was intended to come from domestic production and EPA is authorized to lower Congress’ statutory volumes in the event of inadequate domestic supply.¹⁰ Despite Congress’ intent, EPA has allowed foreign biofuels to become an increasingly large percentage of the renewable fuels used to comply with the RFS program to make up for deficiencies caused by the definition of obligated party.

The current definition of obligated party threatens U.S. national security. As retired U.S. Navy Commander, Kirk S. Lippold, explained in his letter to EPA, “[e]very Presidential Administration dating back to FDR has found that domestic refining capacity is a critical element to national security preparedness and planning.”¹¹ Maintaining the current definition of obligated party and allowing merchant and small refiners to collapse under the weight of the RFS program threatens the consistent and affordable production of transportation fuel in the United States. Further, the volatility created by the implementation of the RFS program, including its frequent delays and attendant spikes in RIN prices, constrain the U.S. domestic refining industry.¹² This volatility makes the U.S. military more subject to unanticipated fuel costs and resulting budget shortfalls.¹³

According to the RIN generation information on EPA’s website, approximately 18% of the cellulosic, 22% of the biomass-based diesel, and 60% of the “other advanced” RINs generated in 2015 were from fuel imported into the United States. And in 2016, U.S. biodiesel imports totaled 709.9 million gallons, nearly doubling the 2015 total of 355.63 million gallons.

¹⁰ 42 U.S.C. § 7545(o)(7).

¹¹ Letter from Cdr. Kirk S. Lippold, to U.S. EPA, Re: Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-420-D-16-004, November 2016, at 2 (Feb. 8, 2017) (Document ID No. EPA-HQ-OAR-2016-0544-0143).

¹² *Id.* at 4.

¹³ *Id.*

Despite the loss of the biodiesel blender's tax credit on Dec. 31, 2016, foreign producers are still finding ways to tap into the U.S. market. Recent data indicates that foreign imports of advanced biofuels will continue to increase throughout 2017 unless the fundamental market distortions that fail to incentivize domestic production are addressed.¹⁴

2. *The Definition of Obligated Party Is Not Incentivizing the Development of Low-GHG Fuels*

While the amount of ethanol produced and used in the U.S. transportation fuel supply since the RFS program was implemented has increased, the amount of advanced renewable fuels produced and used has not. Ethanol has been in the U.S. transportation fuel pool for decades due to its high octane and because it is less expensive than petroleum hydrocarbons. While the RFS has led to some increases in the use of ethanol, it has not incentivized any meaningful growth of advanced biofuels. Revising the definition of obligated party will lead to increased production and use of advanced renewable fuels and will further the goal of the RFS program to increase the use of low-GHG fuels by incentivizing the development of advanced biofuels as discussed in section V.B.3.

III. PETITIONERS ARE NOT SEEKING TO “SHIFT” THE COMPLIANCE OBLIGATION FROM REFINERS AND IMPORTERS TO BLENDERS

As a starting point, it is important to understand CVR's request. CVR is urging EPA to obligate the “position holder,” as that term is defined in the IRS regulations. The position holder is the refiner, importer, *or* blender that holds the inventory position in the fuel immediately prior to its sale to retail. Obligating the parties that control the decision whether or not to blend is the only way to incentivize more investments in renewable fuel use. If integrated refiners and unobligated blenders were obligated on the volume of fuel they sell across the rack, they would need RINs for compliance and would be incentivized to secure them in ways that would encourage the program to grow.

CVR proposes that EPA define the term “obligated party” to include refiners, importers, and blenders who own petroleum fuel at the bulk terminal or truck loading terminal, just before the fuel is sold at retail (i.e., “position holders” as that term is defined under in the IRS regulations).¹⁵ Specifically, CVR urges EPA to change the definition of “obligated party” as follows:

The term “obligated party” means the refinery, importer or blender that is:

¹⁴ Jordan Godwin, OPIS Biofuels Update, *Strong Biodiesel Import Carries into 2017, Even After Tax Credit Expiration* (Feb. 9, 2017).

¹⁵ 26 C.F.R. § 48.4081-1.

(a) the position holder (as defined by IRS regulations) that holds title to the gasoline or diesel fuel immediately prior to the sale or removal from a registered terminal with a valid IRS issued terminal control number (“TCN”) or a refinery rack with a valid IRS issued refinery control number (“RCN”). An Obligated Party is required to report such sales or removals on IRS Form 720 – Quarterly Federal Excise Tax Return on Line 60 for diesel, Line 62 for gasoline and Line 105 for dyed diesel; or

(b) the enterer of gasoline and diesel into the United States outside of the bulk transfer/terminal system (as defined by IRS regulations) and is required to report amounts on Form 720 Line 60 for diesel and Line 62 for gasoline.¹⁶

“Refiner” and “refinery” are already defined terms in the general fuels provisions, but “blender” is not.¹⁷ EPA could either revise the definition of “refiner” or “refinery” as applied in the RFS regulations or add a definition of “blender” to obligate the position holder.

For example, EPA could define “blender” in the RFS regulations as “position holders,” as defined in Internal Revenue Service regulations, an entity that holds title to gasoline and diesel fuel prior to sale from a bulk transfer/terminal system. By virtue of owning fuel or blendstock, “position holders” control the decision as to when and where gasoline or diesel proceeds downstream to a wholesaler, retailer or customer, including specifically whether such gasoline or diesel or blendstock will be blended with renewable fuel. As described in greater detail in AFPM’s comments, EPA has previously used similar statutory discretion when it declined to consider a “party that simply blends renewable fuel into gasoline or diesel fuel, as defined in 80.1407(c) or (e)” to be an obligated party.¹⁸ As AFPM explains, if EPA has legal authority to exclude a subset of downstream parties, it likewise has authority to include a subset of upstream parties in the definition of blender.

Alternatively, EPA could revise the definition of “refiner” or “refinery” in 40 C.F.R. § 80.2 as it applies in the RFS program to include “position holders.” For example, EPA could reasonably interpret that a “position holder” is a subset of the term “refiner” since they are a person who “controls” a facility at which gasoline or diesel is produced by virtue of owning the hydrocarbons used in gasoline and diesel at the point of blending and producing gasoline and diesel.¹⁹

¹⁶ *Id.*

¹⁷ 40 C.F.R. § 80.2(h),(i).

¹⁸ *See* Comments Submitted by the American Fuel & Petrochemical Manufacturers on the Proposed Denial; *see also* 40 C.F.R. § 80.1806(a)(1).

¹⁹ *See* Comments Submitted by the American Fuel & Petrochemical Manufacturers on the Proposed Denial.

Finally, EPA could interpret its authority to impose renewable fuel obligations on “refiners” and “blenders” to be inclusive of parties who act in conjunction with a “refiner” or “blender” in the supply of transportation fuels to the market. As noted above, EPA has used its general authority to implement the RFS program to impose obligations on numerous other parties who are not refiners, blenders or importers or who may, in some cases, only hold legal title to RINs. Therefore, EPA may properly require a party directly associated with the sale or introduction of transportation fuel into commerce to be an obligated party.

CVR is not seeking to “shift” the compliance obligation from refiners and importers to blenders, as EPA claims.²⁰ Describing it this way looks and sounds daunting, but what CVR is seeking is not. Most - if not all - of these newly obligated parties are already registered in the EPA’s Electronic Moderated Transactions System (“EMTS”) and have had years of practice using it to record their RIN sales.

The change would not add a thousand or more new parties,²¹ as EPA suggests, but would make all parties RIN-neutral as compared to their competitors, instead of RIN-long or RIN-short. RVOs would be based on rack sales rather than refinery production, aligning the point of obligation with the point of compliance. The biggest impact would be on already obligated integrated refiners.

If for any reason, EPA does not believe that it has the legal authority to obligate “position holders,” then it must obligate all blenders to fix the problems that are preventing the program from meeting its goals. While the number of obligated parties would increase if all blenders were obligated, the complexity of the program would not. Blenders are already registered in EMTS and participating in the RIN market by separating and selling RINs.

A. The Agency’s Administrative Convenience Does Not Justify Maintaining the Status Quo

In its Proposed Denial, EPA argues that changing the definition of obligated party would increase the administrative complexity of the program.²² Currently there are approximately 100 obligated parties, and EPA thinks this number could increase to 1,100 or more if the definition of obligated party is changed. EPA’s notion is unfounded. As Valero explained in its petition for rulemaking, a study conducted by the Oil Price Information Service (“OPIS”) found that the number of obligated parties will likely decrease if EPA revises the definition of obligated

²⁰ See, e.g., Proposed Denial at 12, 41 n.104, 42.

²¹ *Id.* at 40.

²² See *id.* at 37-42.

party.²³ OPIS recently submitted comments to the docket on the Proposed Denial, which reconfirmed this finding.²⁴

Obligating “position holders” would not significantly increase the number of obligated parties, but it wouldn’t matter even if it did. EPA runs an SO₂ and NO_x allowance trading program that includes thousands of American power plants, each of which has a compliance obligation. An RFS program with 1,100 obligated parties would pale in comparison to this program. If EPA can administer an enormous allowance trading program for the electricity sector, it can manage a much smaller program for the refining industry.

Moreover, EPA says in its Proposed Denial that “all else being equal, placing the point of obligation on a small number of relatively large obligated parties is preferable to placing it on a large number of relatively small entities.”²⁵ This may have been true at the outset of the program but now we know that all else is not equal. Hundreds of millions of dollars is being siphoned away by unobligated blenders and integrated refiners to the detriment of merchant and small refiners and biofuel producers. Certainly, adding administrative complexity to the RFS program is more than a fair trade off for the enormous burden that the current renewable fuels market is imposing on the American economy.

In any event, parties that are sophisticated enough to separate and sell RINs are sophisticated enough to keep track of their RVOs and other RFS obligations. As EPA acknowledged in the Proposed Denial, “virtually all downstream blenders are currently subject to RFS registration, recordkeeping and reporting requirements associated with their role as RIN owners.”²⁶ Parties that will be newly obligated are already active participants in the RIN market, are registered with EMTS, and submit RIN activity reports. Therefore, their reporting and recordkeeping obligations may increase, but they will not be new or foreign.

What is more, according to EPA’s own data, 82% of the RINs separated in 2016 were separated by obligated parties.²⁷ Because merchant and small refiners are only able to separate RINs for a very small percentage of their obligation, large integrated refiners and others with wholesale and retail operations are separating RINs well beyond their obligation. The net effect

²³ The Valero Energy Corporation, *Petition for Rulemaking: Renewable Fuel Standard Definition of Obligated Party* – 40 C.F.R. § 80.1406, at 36 (June 13, 2016) (EPA Docket ID No. EPA-HQ-OAR-2016-0544-0008).

²⁴ Letter from Robert Gough, Oil Price Information Service, to U.S. EPA (Feb. 21, 2017) (EPA Docket ID No. EPA-HQ-OAR-2016-0544-0154).

²⁵ *Id.* at 39 (emphasis added).

²⁶ *Id.* at 38.

²⁷ See Letter from Ronald Minsk, to U.S. EPA, Re: EPA Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017: Docket ID No. EPA-HQ-OAR-2015-0111, at 8, n. 17 (Jul. 24, 2015) (attached as Ex. B to Document ID No. EPA-HQ-OAR-2016-0544-0008) [hereinafter, “Minsk Letter”].

is that obligated parties as a whole blended about 82% of the finished product entering the racks in 2016. Requiring the remaining 18% to become obligated parties and adding them to the EMTS would not be overly complicated. In its proposed REGS rule, EPA has already proposed to make changes to the EMTS system. EMTS changes associated with changing the definition of obligated party will be well worth the effort and would be no more difficult than making the changes EPA has already proposed to make related to the REGS rule.

B. EPA Is Legally Required To Make the Change Requested By the Petitioners

1. It Is No Longer “Appropriate” To Leave Blenders Unobligated And Integrated Refiners Under-Obligated

The Clean Air Act twice directs EPA to impose renewable fuel obligations on refineries, importers, and blenders, “as appropriate” to ensure that the statutory volumes are met.²⁸ It is no longer (and likely never was) appropriate to exclude blenders from a compliance obligation and to over-allocate RINs to integrated refiners.

Changing the definition of obligated party as petitioners have requested will make the RFS obligation proportional to the amount of fuel that a party controls at the blending point. Over 80% of U.S. transportation fuel is controlled at the blending point by refiners and importers. All refiners will remain obligated after the alignment, but the obligation proportions will shift to better align obligations with the amount of fuel over which parties control blending. Obligating parties based on the volume they control at the blending point, rather than the volume of fuel they produce at the refinery, will incentivize parties with the ability to blend to do so.

2. The Current RIN Market Is Illegal

Under the Clean Air Act, any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel “that is greater than” the quantity required under the Act may generate RINs.²⁹ A person that generates RINs may use them for compliance or transfer all or a portion of the RINs to another person “for the purpose of complying” with the RFS program.³⁰ In the regulations implementing RFS1, EPA confirmed the statutory intent:

According to the Act, we must promulgate regulations that include provisions for a credit trading program. The credit trading program allows a refiner that overcomplied with its annual RVO to generate credits representing the excess

²⁸ 42 U.S.C. §§ 7545(o)(2)(A)(iii)(I), (o)(3)(B)(ii)(I).

²⁹ 42 U.S.C. § 7545(o)(5)(A)(i).

³⁰ *Id.* § 7545(o)(5)(B).

renewable fuel. The Act stipulates that those credits can then be used within the ensuing 12 month period, or transferred to another refiner that had not blended sufficient renewable fuel into its gasoline to satisfy its RVO. In this way the credit trading program permits current blending practices to continue wherein some refiners purchase a significant amount of renewable fuel for blending into their gasoline while others do little or none, thus providing a means for all refiners to economically comply with the standard.³¹

Despite this clear statutory language, EPA allows entities to generate RINs from blending any volume of renewable fuel into the U.S. transportation fuel supply, not just volumes above the statutorily mandated levels, and allows entities to trade RINs to other parties for any purpose, not just for the purpose of complying with the RFS. These deviations from the clear language of the Clean Air Act have allowed sophisticated financial traders with no obligations under, or material involvement in, the RFS program to buy and sell RINs for profit and manipulate RIN prices for their own financial gain.

Market speculators buy, sell and withhold RINs, hoping to get much higher prices as the time nears when refineries are obligated to retire RINs for compliance. Unfortunately, this kind of speculation has not been limited to third party market speculators alone. Rather, it has proliferated among RIN-long obligated parties, some of whom have created their own trading desks devoted to RIN speculation and trading. This practice has been described by one Wall Street expert as “the mother of all short squeezes.”³² These entities have no ability to expand renewable fuel use and participate in the market solely to earn a profit from speculating on a compliance credit that merchant and small refineries disproportionately need for compliance.

Speculation also occurs because of the extraordinary value of the RIN market, which was estimated at around \$16 billion in 2014 alone.³³ The high value of the RIN market is a function of EPA’s decision to disregard 42 U.S.C. § 7545(o)(5)(A)(i) and allow parties to generate RINs from blending below statutory levels. A non-obligated party can generate RINs by blending 1% ethanol with gasoline in the face of a 10% mandate. Had EPA, in accordance with Section 7545(o)(5), allowed RINs to be generated only for volumes blended in excess of the statutory

³¹ *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program*, 72 Fed. Reg. 23,900, 23,929-930 (May 1, 2007).

³² Letter from Carl C. Icahn, Chairman, Icahn Enterprises L.P., to Gina McCarthy, Administrator, EPA, and Janet McCabe, Acting Assistant Administrator, EPA (Aug. 9, 2016), provided here as Attachment 5.

³³ This value is based on the number of RINs generated in 2014, as provided by EPA at <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2014-renewable-fuel-standard-data>; the price of 2014-vintage RINs on August 1, 2016, as provided by the Oil Price Information Service (“OPIS”); and the price EPA set for cellulosic waiver credits for compliance year 2014. These calculations exclude the small number of cellulosic diesel RINs generated in 2014 because prices for these RINs are not readily available from OPIS. If cellulosic diesel RINs were included, the value of the RIN market would be even higher.

volumes/percentage standards, the RIN market would be a small fraction of its current size and would not be attracting market speculators.

Market speculators have no place in the RIN market. Their participation is illegal and does not further any of the goals of the program. Over the past two months, the price of RINs has dropped by 50%. The only thing that has happened in the past two months is speculation that EPA may change the definition of obligated party and the impending confirmation of Administrator Pruitt. In addition to changing the definition of obligated party, EPA must exclude market speculators from the RIN market.

IV. THE DYSFUNCTIONAL RIN MARKET IS A RESULT OF MISALIGNED INCENTIVES

In its Proposed Denial, EPA summarily dismisses Petitioners' claims that high RIN prices indicate that the RIN market is not functioning as Congress intended.³⁴ EPA claims instead that the RFS was designed to affect fundamental change in the fuels marketplace and that RINs were intended to be the mechanism to affect that change.³⁵ High RIN prices are therefore good, according to EPA, because they incentivize renewable fuel use. But, even if high RIN prices were incentivizing more renewable fuel use (which actually isn't happening), these statements are inaccurate and contradict numerous prior statements by EPA in the RFS1 and RFS2 rulemakings in which RINs were described solely as a compliance tool.

RINs were never intended to drive infrastructure investments. In the preamble to the proposed RFS1 rule, EPA explained the purpose of the RIN program and stated:

In this way the credit trading program would permit current blending practices to continue wherein some refiners purchase a significant amount of renewable fuel for blending into their gasoline while others do little or none, thus providing a means for all refiners to comply with the standard.³⁶

In promulgating RFS2, EPA reiterated its compliance tool rationale from the RFS1 rulemaking, stating:

³⁴ Proposed Denial at 15.

³⁵ *Id.*

³⁶ *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program*, 71 Fed. Reg. 55,552, 55,577 (Sept. 22, 2006) (emphasis added).

[the existing RIN system] met our goals of being straightforward, maximizing flexibility, ensuring that volumes are verifiable, and maintaining the existing system of fuel distribution and blending.³⁷

Additionally, EPA explained in the Summary and Analysis of Comments that:

. . . the RIN transfer mechanism should focus first on facilitating compliance by refiners and importers, and doing so in a way that imposes minimum burden on other parties and minimum disruption of current mechanisms for distribution of renewable fuels.³⁸

There are countless statements like these indicating that EPA never intended for high priced RINs to act as a mechanism to incentivize production or infrastructure. It would have been counterintuitive and bad policy since the parties in the RIN market, merchant and small refineries, are the least able to bring about any change.

As EPA said in the RFS1 final rule, RINs “permit current blending practices to continue wherein some refiners purchase a significant amount of renewable fuel for blending into their gasoline while others do little or none, thus providing a means for all refiners to economically comply with the standard.”³⁹ During the RFS2 rulemaking, EPA noted that its approach in RFS1 was predicated on the belief “that there would be an excess of RINs at low cost” and that the “ability of RINs to be traded freely between any parties once separated from renewable fuel would provide ample opportunity for parties who were in need of RINs to acquire them from parties who had excess.”⁴⁰ EPA’s post-hoc rationalization for high RIN prices is unsupported by the regulatory history of the RFS.

A. High RIN Prices Do Not (And Will Not) Incentivize Increased Renewable Fuel Blending

High RIN prices over the past four years have not led to significant increases in renewable fuel blending for the simple reason that the parties reaping the windfall profits from high RIN prices have no legal obligation or financial incentive to increase renewable fuel blending. EPA acknowledged this fact in the 2014-2016 final rule. EPA explained that even if RIN prices increased substantially, there would only be small increases in the amount of renewable fuel blended. EPA stated:

³⁷ 75 Fed. Reg. at 14,684 (emphasis added).

³⁸ Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, Summary and Analysis of Comments, EPA 420-R-07-006 at 5-4 (April 2007) (emphasis added).

³⁹ 72 Fed. Reg. at 23,929-30 (emphasis added).

⁴⁰ Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,903, 24,963 (May 26, 2009) (emphasis added).

if EPA were to increase the total renewable fuel volume requirement significantly, we would expect to see sharply higher RIN prices, but sales volumes of E85 would be expected to see only modest increases that would be insufficient to enable the market to reach the statutory targets.⁴¹

The market constraints have, as EPA intended in the 2014-2016 final rule, driven up the price of RINs for small and merchant obligated refiners and, simultaneously, the windfall profits of integrated refiners and unobligated blenders.

EPA's policy to rely on exempt parties to meet the statutory volumes and overcome market constraints will not work because neither has a legal obligation or financial incentive to do so. As Ronald Minsk, the former Special Assistant to the President for Energy and Environment on the staff of the Economic Council at the White House described it:

At many distribution facilities, however, obligated parties long on RINs are the largest customers, and in a position to effectively block installation of infrastructure to promote large scale E85 blending. Once the RIN-long party has met its own RVO, it has little incentive to participate financially in the expansion of blending infrastructure to allow for higher level blends (E85 and E15) or additional advanced renewable fuels (B5-B20) because they are already [sic] have the RINs they need and do not want additional blending to lower the value of their excess RINs.⁴²

NERA Economic Consulting came to a similar conclusion in a 2015 report that it prepared for Valero Energy Corporation:

[A]s the blender carries no exposure to the RFS obligation, it has less incentive to expand its blending infrastructure to allow for higher level blends (E85 and E15) or additional advanced renewable fuels (B5-B20). In fact, doing so would be contrary to the blenders' financial interest, as the more renewable fuel the blender purchases and blends, the more RINs will be created and those excess RINs will decrease the value of RINs.⁴³

In other words, integrated refiners and unobligated blenders are instead using their windfall profits to invest in their own businesses, rather than removing the market constraints that keep

⁴¹ *Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017*, 80 Fed. Reg. 77,420, 77,459 (Dec. 14, 2015).

⁴² Minsk Letter at 7.

⁴³ NERA 2015 Report at 18.

the value of their excess RINs as high as possible. The current rule structure incentivizes them to do so.

B. High RIN Prices Have Encouraged Fraud, Waste, And Abuse In The RIN Market

In addition to failing to incentivize increased renewable fuel blending, high RIN prices have encouraged fraud, waste, and abuse in the RIN market. As explained in a paper published by Doug Parker, the former director of EPA's Criminal Investigation Division, the current definition of obligated party has led to significant fraud in the RFS program due to the extended chain of custody between the producer, the blender and the refiner.⁴⁴ Mr. Parker updated his paper in February 2017, noting that the fraud would continue without more transparency and direct engagement and responsibility by aligning the compliance obligation with the point of compliance, and thereby shortening the chain of custody.⁴⁵ Ramon Benavides, a RIN trader, similarly concluded that the lack of transparency in the RIN market is allowing speculators to abuse the market and that revising the definition of obligated party would increase transparency and reduce market abuse.⁴⁶ A recent study by Charles River Associates ("CRA") concludes that the elasticity of supply and demand in the current RIN market is low.⁴⁷ This means that the supply of and demand for RINs does not readily respond to changes in the price of RINs. Thus, the RIN market does not function in a way that increases the use of renewable fuels. Instead, the RIN market encourages hoarding, speculation, manipulation, and fraud.

Rampant fraud in the RIN market has cost regulated entities and taxpayers millions of dollars over the past several years. RIN fraud cases that have formally been pursued by the United States have resulted in approximately \$271 million in documented fraud losses and an additional \$71 million in seizures of illicit profits by federal authorities.⁴⁸ EPA should be highly motivated to address this issue by shortening the chain of custody, bringing the compliance obligation closer to the point of compliance.

⁴⁴ See DOUG PARKER, WHITE PAPER ADDRESSING FRAUD IN THE RENEWABLE FUEL MARKET AND REGULATORY APPROACHES TO REDUCING RISK IN THE FUTURE (Sept. 4, 2016) [hereinafter "Parker I"], provided here as Attachment 6.

⁴⁵ Doug Parker, E&W Strategies, *Update to: September 4, 2016 White Paper Addressing Fraud in the Renewable Fuels Market and Regulatory Approaches to Reducing this Risk in the Future* (Feb. 3, 2017) [hereinafter "Parker II"].

⁴⁶ RAMON M. BENAVIDES, GLOBAL RENEWABLE STRATEGIES AND CONSULTING, LLC, THE US RENEWABLE IDENTIFICATION NUMBER: RINS TRADING MARKET at 8.

⁴⁷ CHARLES RIVER ASSOCIATES, MARKET FRICTIONS AND THE RINS POINT OF OBLIGATION (Feb. 2016).

⁴⁸ Parker I at 7.

C. Merchant And Small Refineries Are Not Passing Through Their RIN Costs Through Higher Prices For Their Blendstocks

DOE in its 2009 and 2011 Small Refinery Exemption studies predicted that high RIN prices would harm refineries that rely on purchasing RINs to comply with the RFS. EPA has now rejected DOE's findings, claiming that regardless of the price a refiner pays for RINs (\$1 per RIN two months ago or 42 cents last week), RIN costs are fully passed through and recovered in higher prices paid for the refiners' blendstock. This is a market impossibility which has now been disproven by multiple studies.

1. Full Pass Through Is Not Occurring

Under EPA's theory, the RIN market is working as intended and refiners' compliance costs are the same whether they blend or buy RINs because the refineries' RIN costs are fully passed through in the wholesale fuel prices they receive for their petroleum blendstocks. Under this theory, blenders' margins would not change when RIN prices increase because fluctuations in RIN prices would be reflected in the prices they pay for fuel in the wholesale market. Conversely, if blenders' margins increase when RIN prices increase, it would be indicative of blenders capturing RIN value. This would be solid evidence that merchant and small refineries are not fully passing through their RIN costs, thereby putting refiners that purchase RINs for compliance at an extreme competitive disadvantage relative to integrated refiners that control their fuel to retail.

To back up its theory that refineries' are fully passing through their RIN costs, EPA has consistently relied on a fundamentally flawed July 2015 study by Knittel, Meiselman, and Stock ("June 2015 KMS study").⁴⁹ The 2015 KMS study found that most, but not all, of the RIN cost was passing through. The 2015 KMS study has been fully refuted by multiple other studies that have found much less pass-through, including but not limited to ones conducted by Charles River Associates ("CRA"). In fact, a separate analysis just released by Professor Alex Holcomb from the University of Texas, El Paso surveys all of the empirical literature and finds that, "[t]aken as a whole, the results seem to be strongly suggestive of less than perfect pass-through, with a significant amount of time-series and geographical variation in the estimated level of pass-through."⁵⁰

More specifically, CRA was tasked with replicating the KMS analysis and extending the KMS time period for the study beyond the date the blendwall was reached in the marketplace

⁴⁹ See Christopher Knittel, et al., *The Pass-through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard* (June 2015) [hereinafter "June 2015 KMS Study"].

⁵⁰ Alex Holcomb, Market Analysis of the Proposed Change to the RFS Point of Obligation (Feb. 21, 2017) at 10 [hereinafter "Holcomb Analysis"].

(which is when the price of RINs shot up). While CRA was able to replicate the KMS results for periods before the blendwall was reached; it found just the opposite once the blendwall was reached. In other words, there is not significant pass through of RIN prices to wholesale prices in today's post-blendwall market. Because the June 2015 KMS study is not representative of today's market conditions post blendwall, it would be arbitrary and capricious for EPA to rely on the June 2015 KMS study now. Although CRA shared its findings with EPA before EPA issued the Proposed Denial, and CRA's findings are in the docket, EPA made no reference to the CRA study or even discussed the shortcomings of the 2015 KMS study in its Proposed Denial.⁵¹

As confirmation of the shortcoming of KMS's June 2015 analysis and in light of CRA's findings, KMS revamped their study in November 2016 and abandoned the comparisons used in the original study. KMS tried again to show full RIN cost pass through by developing a new model to confirm their conclusion of nearly full pass-through.⁵² However, even that model clearly shows that pass-through is only about 70%, which means that merchant refiners are having to pay the other 30% as a penalty. This penalty is tantamount to doubling the federal income tax on merchant refiners fuel and giving the extra "tax" proceeds to their competitors.

In any event, based on the Holcomb and CRA analyses of KMS' studies, KMS is clearly trying to demonstrate that the RIN market is working, and in doing so, is abandoning sound economic principles.

2. Market "Frictions" Prevent Full Cost Pass Through

Merchant and small refiners cannot fully "pass through" their RIN costs, as EPA has concluded, because they do not control the racks or retail and their market competition has no RIN costs to pass through. In fact, their competition is gaining RIN value simply by controlling the racks and retail. In written testimony prepared for Congress, the President and CEO of the Renewable Fuels Association ("RFA") explained why merchant and small refineries cannot pass through their RIN costs:

RINs are primarily traded in a "closed loop" market amongst parties in the gasoline supply chain. That is, a party buying a detached RIN [merchant refineries] will incur an additional cost, but the counterparty selling the RIN [exempt blenders and integrated refiners] will simultaneously incur a profit. In this manner, one party's RIN expense is exactly offset by the counterparty's RIN

⁵¹ CHARLES RIVER ASSOCIATES, RE-EXAMINING THE PASS-THROUGH OF RIN PRICES TO THE PRICES OF OBLIGATED FUELS (Oct. 2016) (Docket ID No. EPA-HQ-OAR-2016-0544-0067) [hereinafter "CRA Response to June 2015 KMS Study"].

⁵² Christopher Knittel, et al., *The Pass-through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard: Analysis of Post-March 2015 Data* (Nov. 2016) [hereinafter "Nov. 2016 KMS Study"].

revenue, and the net effect is no impact to the consumer. Second, the gasoline market is highly competitive and market actors are compelled to match, or undercut, the wholesale selling prices of their competitors. Thus, a refiner who has purchased RINs on the open market cannot markup the selling price of its gasoline to recoup RIN expenses if it wishes to remain competitive with other refiners who profited from the sale of detached RINs. In short, there are winners and losers in the RIN market, but because the system is essentially a closed loop, retail gasoline prices are unaffected. A number of refiners and blenders substantiated the “zero sum” nature of the RIN market in financial earnings statements.⁵³

Merchant refineries, including small refineries, are marginal suppliers at many or most of the pipeline terminals they supply. When an integrated refiner’s product reaches a pipeline terminal, the refiner will supply its own local stations and then decide whether to ship the rest of its production further down the line, exchange product with another refiner, sell product to another refiner or sell product to a non-refining marketer. If a merchant or small refiner is to capture any sales above the rack, it must match or beat the integrated refiner’s price. Yet, consistent with the RFA’s statements and the NERA Report, the integrated refiner has no pressure to recover RIN costs since it has little to no RIN costs and may have RIN revenues. It gets all the RINs it needs when blending to supply its franchised retail locations even if the fuel blended is received from another refiner or purchased from a merchant or small refiner.

As EPA recognizes and noted by other experts, “in a highly competitive frictionless market, the point of obligation would not matter.”⁵⁴ Rack sellers or blenders would separate the RIN and the RIN value would be fully reflected in the price of blendstocks at the wholesale level. The cost of the RIN would be a marginal cost for all refiners and importers equally. “Under these assumptions with perfect competition, there would also be no scope for RIN market prices to diverge from fundamental values, which would (at the margin) reflect the cost of substituting additional renewable fuels” at the level to meet the RVO.⁵⁵ However, the efficiency of the RFS compliance mechanism becomes significantly impaired if the intermediate RIN market is inefficient. This inefficiency results in market distortions, which causes the harms described by many commenters.

⁵³ *The Renewable Fuel Standard – Implementation Issues Before Subcomm. on Energy and Power on the Energy and Com. Comm.*, 114th Cong. (2016), written witness statement of Bob Dinneen, Renewable Fuels Association at 5 (June 22, 2016), available at <https://energycommerce.house.gov/hearings-and-votes/hearings/renewable-fuel-standard-implementation-issues>.

⁵⁴ CHARLES RIVER ASSOCIATES, MARKET FRICTIONS AND THE RINS POINT OF OBLIGATION 2 (Feb. 2016) [hereinafter “CRA Market Frictions Report”].

⁵⁵ *Id.* at 2.

CRA and Professor Holcomb analyzed the operation of the RIN market from an economic perspective to assess the efficiency of the RIN market and its impact on the RFS program.⁵⁶ Both concluded that there are significant frictions in the market that are harming small and merchant refineries. CRA explains that potential frictions in the RIN market are similar to those that can exist in other commodity markets; however, unlike other commodity markets, the RIN market is unregulated, not transparent, highly volatile, and vulnerable to a high level of speculation, manipulation and fraud.⁵⁷

Professor Holcomb's recent market analysis also looked at studies of blender margins compared to RIN price fluctuations and found that "[t]he results suggest that blenders in the branded market capture anywhere from 44-63% of the RIN value, and blenders in the unbranded market capture up to 56% of the RIN value."⁵⁸ If blenders are capturing RIN value, economic theory suggests that the RIN market is broken. Both Professor Holcomb and CRA also concluded that aligning the RFS obligation at the rack where compliance takes place can dramatically improve pass-through of the RIN value to the consumer, as discussed below, and increase the penetration of higher blends of renewable fuels.⁵⁹

Another study looked at OPIS reported rack averages of BOB and E10 at Mitchell, South Dakota in 2014 and 2015.⁶⁰ Examining this data in conjunction with Chicago ethanol prices and known RIN prices conclusively shows that the RIN costs are not being passed through. During this two year time period, the average price of E10 was 213.12 cents per gallon, BOB was 217.54 cents per gallon, ethanol (in Chicago) was 184.23 cents per gallon and D6 RINs were 51.92 cents per gallon.⁶¹ Using this data, for example, a blender or integrated refiner that controlled the rack could blend 0.9 gallons of BOB for 195.79 cents with 0.1 gallons of ethanol for 18.42 cents and obtain 0.1 RINs, which would be worth 5.19 cents.⁶² Taken together this would allow the blender or integrated refiner to create a gallon of E10 for a cost of 209.02 cents per gallon. But E10 at this exact location was selling for 213.12 cents per gallon.⁶³ The blender and integrated refiner can then just pocket the 4.1 cents difference, or undercut the mom and pop retailer who has no ability to blend and must purchase E10 for 213.12 cents per gallon.⁶⁴

⁵⁶ See CRA Market Frictions Report; see also Holcomb Analysis.

⁵⁷ CRA Market Frictions Report at 2-3.

⁵⁸ Holcomb Analysis, at 9.

⁵⁹ *Id.* at 12.

⁶⁰ See Comments of Neufeld Consulting, LLC, Re: Docket ID No. EPA-HQ-OAR-2016-0544: Proposed Denial of Petitions to Change the RFS Point of Obligation, at 10 (Feb. 22, 2017).

⁶¹ *Id.* (See Slide 6 of Attached PowerPoint, "161107 Three Perspectives.ppsx").

⁶² *Id.* (See Slide 8 of Attached PowerPoint, "161107 Three Perspectives.ppsx").

⁶³ *Id.*

⁶⁴ *Id.*

EPA has also argued that high RIN prices will cause small and merchant refineries to blend more, but this is also nonsensical. Because of capacity limitations on pipelines and at terminals, there is little opportunity for new participants or increased participation in these segments of the fuel supply chain. As Murphy explains to investors, this tight space for shipping refined product gives some parties advantages over others:

So what's the differentiated capability that sets us apart? It's our fuel supply chain. And the way we do that is 50% of the gallons we sell are sourced through proprietary barrels, meaning we buy them from the refiners in the refining centers, we ship them through the pipeline systems for which we have access through our historical shipper status. And that takes decades to build. If you wanted to get in this business tomorrow, you could not go and get pipeline access on most of these pipelines. We take that into mostly third-party terminals. We blend it with ethanol. That captures the RIN. And that leaves us with a landed cost of supply when you add that supply advantage plus the RINs, that's going to be advantaged over our competitors.⁶⁵

It is commercially impossible to expect a merchant or small refiner to leverage line space, terminal positions and then steal retail level supply from historically positioned integrated refiners or blenders like Murphy. Even those refiners that boast that they positioned themselves to blend more fuel, did so by consolidation with historic footprints.⁶⁶

Left unchanged, EPA's RFS program will pressure RIN-short refiners out of the business or result in re-integration of the refining and marketing sectors. This could be disastrous for the U.S. economy. As Professor Holcomb concluded in his analysis: "the overall economic hardship currently being imposed on refiners by the RIN mandate has placed a significant number of jobs—both directly and indirectly supported by the refiners—at risk."⁶⁷ Professor Holcomb's analysis went further:

If you categorize refiners according to the degree of financial risk they face, all else equal, it is likely to be the East Coast and Mid-con refiners that face the most risk. . . . In particular, failure of any of the East Coast refiners could give rise to a significant supply shock in the East Coast fuel market, given that the domestic supply to the East Coast is already relatively constrained. . . . If one, or more, of

⁶⁵ Raymond James 37th Annual Investors Conference Transcript at 4 (Mar. 8, 2016), *available at* http://ir.corporate.murphyusa.com/phoenix.zhtml?p=irol-eventDetails_pf&c=251856&eventID=5219848.

⁶⁶ Stephen Cunningham and Jim Polson, *Hess Sells Gasoline Stations to Marathon for \$2.6 Billion* (May 22, 2014), *available at* <https://www.bloomberg.com/news/articles/2014-05-22/marathon-petroleum-to-acquire-hess-retail-unit-for-2-87-billion>.

⁶⁷ Holcomb Analysis, at 2.

the East Coast refiners were to cease production it will likely result in a shortage of fuel along the East Coast, because there is no additional pipeline capacity available to allow for an increase in supply. . . Similar shocks to the Central U.S. market are likely to occur if a major refiner filed for bankruptcy in the Mid-con market.⁶⁸

Such potentially disastrous impacts could be avoided by moving the point of obligation to the racks.

3. Blenders Are Capturing RIN Value and Not Passing It Along To Incentivize E85

EPA's premise has always been that when RIN prices increase, that increase will pass through to consumers and raise the price of gasoline as compared to renewable fuels. These price signals will thereby incentivize renewable fuel use at the retail level. This is the way California's Low Carbon Fuel Standard works. But if this were occurring through the RFS program, E85 should be much cheaper on a per energy basis than E10. Yet even EPA has acknowledged that this isn't occurring.

As NERA pointed out in a recent report:

The evidence that the E10-E85 price spread does not respond to changes in RIN prices implies that the blender, the party that actually sells E10, E85, or other blends to retailers or wholesalers is not responding to the financial incentive of obtaining additional RINs from E85 sales when the RIN price rises. The lack of response in the fuel price spread means that RIN economics do not affect the blender's decision process about the relative pricing of finished fuels. In other words, the blender is not passing through the value of the RIN to the retailer in order to encourage greater E85 sales, and RIN profits are being retained by the blender.⁶⁹

This is yet another example of why the RIN market is not functioning properly.

D. The Winners Under The RFS's Dysfunctional System Are Admitting In Public Filings That They Are Reaping Windfall Profits From RINs

Those most competitively advantaged by the definition of obligated party are integrated refiners and exempt (non-refining) blenders for all of the reasons described above. Integrated

⁶⁸ Holcomb Analysis, at 15-16.

⁶⁹ NERA 2015 Report at 20.

refiners generally blend more fuel than they produce, generate more RINs than they need for compliance, and bank or sell their excess RINs. They control their product to retail and, therefore, do not have to share RIN value with exempt blenders. Because they generate more RINs than they need for compliance, they are partially subsidized at the rack and are able to compete with exempt blenders. Exempt blenders have a complete RIN subsidy, rather than a partial RIN subsidy. These are the “winners” under EPA’s regulatory scheme and their financial reports reflect it, as do numerous market analysts’ reports.

In a recent report, Charles River Associates (“CRA”) examined the correlation between blender margins and RIN prices and concluded that blenders are capturing approximately 50% of RIN price increases.⁷⁰ Similarly, Goldman Sachs is advising its investors that there are clear winners and losers within the refining industry in a “tightened” RIN market, which Goldman expects will continue as a result of EPA setting ambitious volumetric goals.⁷¹ The winners will be the refineries with the least RIN exposure and the losers will be the refineries with the most RIN exposure. RIN exposure is tied to whether the refiner has wholesale and retail distribution. Goldman Sachs also predicted that an increase in RIN prices would directly correlate to an increase in EBITDA for exempt blender Casey’s General Stores.

In fiscal year 2016, Casey’s reported a 3.0% increase in fuel margins due to RIN sales:

The Company’s fourth quarter fuel margin was helped by our ability to sell approximately 12.7 million renewable fuel credits for \$9.1 million. For the year, we sold 57.1 million renewable fuel credits for \$31.0 million. For the fiscal year, same-store gallons increased 3.0% with an average margin of 19.6 cents per gallon.⁷²

Casey’s also reported improvements in 2014 total gross profit margins compared to fiscal year 2013 due to RIN sales:

Total gross profit margin was 15.6% for fiscal 2014 compared with 14.8% for the prior year. The fuel margin increased to 4.8% in fiscal 2014 from 4.2% in fiscal 2013 primarily due to the increase in the value of the renewable fuel credits sold.⁷³

⁷⁰ CHARLES RIVER ASSOCIATES, EVALUATING THE RESPONSE OF BLENDER MARGINS TO RIN PRICE CHANGES: A NEW APPROACH TO DETERMINING PASS-THROUGH 3 (Jan. 2017).

⁷¹ Wes Swift, Platts, *RIN Prices Jump on Analyst Prediction of Tighter Market* (June 29, 2016), available at <http://www.platts.com/latest-news/agriculture/houston/rin-prices-jump-on-analyst-prediction-of-tighter-21849499>.

⁷² Casey’s General Stores, Inc., Annual Report (Form 10-K) 16 (June 27, 2016).

⁷³ *Id.* at 18.

Similarly, in 2013 and 2014, Murphy USA reported that revenues from the sale of RINs more than covered negative margins in its product supply and wholesale operations:

Total product supply and wholesale margin dollars excluding Renewable Identification Numbers (RINs) were a negative \$13.3 million in the 2014 period compared to a negative \$14.5 million in the same period of 2013. Also affecting operating income for Q3 2014 was income generated by the sale of RINs of \$25.2 million compared to \$31.8 million in the 2013 period. During Q3 2014, 52 million RINs were sold at an average selling price of \$0.48 per RIN.

For the first nine months of 2014, the sale of RINs generated income of \$66.1 million, compared to \$74.8 million during the same period last year. During the first nine months of this year, 141 million RINs were sold at an average selling price of \$0.47 per RIN.⁷⁴

In 2016, Murphy cited RIN sales as having a significant positive impact on its 2014 and 2015 operating income:

Also impacting operating income positively in the year ended December 31, 2015 was sale of RINs of \$117.5 million compared to \$92.9 million in the prior year. . . . Also impacting operating income positively in the year ended December 31, 2014 was sale of RINs of \$92.9 million compared to \$91.4 million in the prior year.⁷⁵

In 2016, Murphy warned its investors that revising the definition of obligated party under the RFS program could significantly impact the profits the company makes from selling RINs:

In recent years, we have benefited by our ability to attain RINs and sell them at favorable prices in the market; these prices have remained relatively steady in 2015 due to significant uncertainty about how government standards could be modified as they impact RINs. In fact, once the new standard was announced late in 2015, RIN prices jumped in response and have held steady since that time frame. A significant decline in revenues from RINs in future periods could adversely affect our results of operations, and the impact could be material.

In recent months, independent refiners have filed litigation to change the way the Renewable Fuel Standard (RFS) is administered in an attempt to shift the burden for compliance from the refiners to blenders. Under the RFS, which requires an

⁷⁴ *Murphy USA Reports Strong Retail Margins in Q3, Details RIN Sales*, OPIS ETHANOL UPDATES: BIOFUELS UPDATE (Nov. 7, 2014) [hereinafter *Murphy USA Press Release*].

⁷⁵ Murphy USA, Inc., Annual Report (Form 10-K) 34-35 (Feb. 26, 2016) [hereinafter “Murphy USA 2015 10-K”].

annually increasing amount of biofuels to be blended into the fuels used by U.S. drivers, refiners are obligated to obtain RINs either by blending biofuels into gasoline or through purchase on the open market. This litigation is attempting to shift that burden of having the RINs to the blender rather than the refiner. If this burden were to be shifted, the Company would potentially have to utilize the RINs it obtains through its blending activities to satisfy a new obligation and would be unable to sell the RINs to other obligated parties. This could have a significant impact on the profitability of our current business model should this change ever be implemented unless we were able to pass these costs along to consumers or other parties.⁷⁶

Casey's General Stores made a similar disclosure in its December 2016 10-Q filing, noting that "certain oil refiners and other interested parties" initiated legal challenges to the definition of "obligated party" under the RFS and that "[a]ny change in the existing RFS regulations, whether as a result of EPA rulemaking or other legal challenge, could materially and adversely affect the market price for RINs and/or our ability to sell our RINs to other parties."⁷⁷

A recent study examined the non-refining blender windfall, looking at Pilot, Flying J, and Loves.⁷⁸ The report explained how the exemption in the definition of obligated party for unobligated blenders allowed these companies to double their profit margins by selling RINs.⁷⁹ A similar article published by OPIS examines this study and reports that large retailers are realizing nearly double the profit margins of average convenience stores by trading RINs.⁸⁰ The small retailers' study concluded that large retailers' average net profit margins are growing more quickly than small retailers' and that this disparate growth is threatening competition in the retail fuel industry.⁸¹ As small retailers have explained, the large retailers are using these extraordinary profits to upgrade and acquire new retail outlets at the expense of the mom and pop retailers.

While DOE did not study the impact of the RFS program on small retailers, a recent study concluded that small retailers are competitively disadvantaged relative to large retailers in a similar manner. Unobligated blenders, like Murphy USA, are using their windfall RIN revenues to lower prices at the pump, upgrade their stations, and buy new ones.⁸² Numerous

⁷⁶ *Id.* at 14.

⁷⁷ See Casey General Stores, Inc., Quarterly Report (Form 10-Q) 18-19 (Nov. 7, 2016).

⁷⁸ See RAMON M. BENAVIDES, RENEWABLE FUEL INCENTIVES: ESTIMATION OF LARGE RETAILERS' MARGINS.

⁷⁹ *Id.*

⁸⁰ Edgar Ang, OPIS, *Pilot/Flying J, Loves Nearly Double Profit Margin from Selling RINs: Study* (Feb. 17, 2017).

⁸¹ BERNARD L. WEINSTEIN, SOUTHERN METHODIST UNIVERSITY, RENEWABLE IDENTIFICATION NUMBERS (RINs) TRADING UNDER THE RENEWABLE FUELS PROGRAM: UNINTENDED CONSEQUENCES FOR SMALL RETAILERS at 7 (Aug. 2016), provided here as Attachment 7.

⁸² See Section IV.

small retailers submitted individual comments urging EPA to stop them before it's too late. This report is consistent with MUSA's reported trajectory on RIN revenues and retail acquisitions:⁸³

| Year | RIN Revenues | Average RIN price | # of Retail Outlets |
|------|--------------|-------------------|---------------------|
| 2011 | \$3MM | Not known | 1,128 |
| 2012 | \$8.9MM | Not known | 1,165 |
| 2013 | \$91.4MM | 0.53 | 1,203 |
| 2014 | \$92.9MM | 0.48 | 1,263 |
| 2015 | \$117.5MM | 0.54 | 1,335 |

The market distortion is also apparent in the lack of public reporting. For example, if integrated refiners' costs of compliance were having a materially adverse impact on their operations, U.S. Securities and Exchange Commission laws would require that those effects be disclosed. The absence of any statements about the cost of compliance with the RFS is direct evidence that higher RIN prices are not having a material impact on integrated refineries that blend their own transportation fuel and those that blend more than they produce. For example, for 2015, Marathon Petroleum, an integrated refiner, reported:

Other income increased \$1 million in 2015 compared to 2014 and \$59 million in 2014 compared to 2013. Other income in 2015 was comparable to 2014. The increase in 2014 was primarily due to higher gains on sales of excess Renewable RINs of \$74 million, partially offset by an \$11 million impairment in 2014 of an investment in a company accounted for using the cost method.⁸⁴

The "losers" under EPA's regulatory scheme are merchant refiners like CVR, Monroe Energy, LLC ("Monroe"), Philadelphia Energy Solutions Inc. ("PES"), PBF Energy, Inc. ("PBF"), small independent refineries, and small "mom and pop" retailers. As NERA has noted, "the merchant refiner is at a disadvantage because it has no facilities that produce RINs so it must . . . pay a bid-ask spread and commission on every RIN it purchases, which puts [it] at a strategic disadvantage to the integrated refiners," forcing the losers to buy over-priced RINs from those who can blend. This much is evident in the public securities filings from merchant refiners. For example, in its 2016 10-K, Monroe, an obligated party and merchant refiner, cites RIN costs as an important factor for its recorded loss in 2016:

⁸³ In this table, "Not known" indicates information that is not available in MUSA's annual SEC reports.

⁸⁴ Marathon Petroleum Corp., Annual Report (Form 10-K) 58 (Feb. 26, 2016).

The refinery recorded a loss of \$125 million in 2016, compared to profits of \$290 million and \$96 million recorded in 2015 and 2014, respectively. The refinery's loss in 2016, compared to profits in the preceding two years, was primarily due to higher RINs costs and lower distillate crack spreads.

A refinery is subject to annual EPA requirements to blend renewable fuels into the gasoline and on-road diesel fuel it produces. Alternatively, a refinery may purchase renewable energy credits, called RINs, from third parties in the secondary market. Because the refinery, operated by Monroe, does not blend renewable fuels, it has purchased its entire RINs requirement in the secondary market. We recognized \$171 million, \$75 million and \$111 million of expense related to the RINs requirement in 2016, 2015 and 2014, respectively. RINs expense increased during 2016 primarily as a result of a significant increase in the unit cost of RINs from approximately 58 cents per RIN during 2015 to 84 cents per RIN during 2016.⁸⁵

Similarly, in a 2015 SEC filing, PES, another large merchant refiner, reported the significant negative impact that RIN costs have on the refinery's income:

In 2013 and 2014, refining experienced significantly higher RINs costs than in prior periods, which had a significant impact on our results of operations. We incurred approximately \$19.0 million, \$31.5 million and \$116.3 million in RINs costs during the years ended December 31, 2011, 2012 and 2013, respectively, and approximately \$101.4 million and \$95.7 million for the nine months ended September 30, 2013 and 2014, respectively.⁸⁶

In discussing the renewable fuels standard, PBF, another large merchant refiner, reported a similar impact:

We have seen a fluctuation in the cost of RINs required for compliance with the RFS. We incurred approximately \$171.6 million in RINs costs during the year ended December 31, 2015 as compared to \$115.7 million and \$126.4 million during the years ended December 31, 2014 and 2013, respectively. The fluctuations in our RINs costs are due primarily to volatility in prices for ethanol-linked RINs and increases in our production of on-road transportation fuels since 2012. Our RINs purchase obligation is dependent on our actual shipment of on-

⁸⁵ Delta Air Lines, Annual Report (Form 10-K) 36 (Feb. 13, 2017).

⁸⁶ Philadelphia Energy Solutions, Inc., Registration Statement under the Securities Act of 1933 (Form S-1) 77 (Feb. 17, 2015).

road transportation fuels domestically and the amount of blending achieved which can cause variability in our profitability.⁸⁷

PBF is one of the northeast refineries that curtailed production recently due to poor refining margins and high RIN costs.⁸⁸

Although EPA has been apprised of the gross market distortion caused by the current definition of obligated party, it attributes the windfall profits to general profitability, as opposed to market distortion caused by its implementing regulations and retention of the current definition. There is no ambiguity in the source of the reported windfall profits in the financial statements of exempt blenders. As described above, exempt blenders expressly attribute these windfall profits to “RIN sales.” These public statements cannot be reconciled with EPA’s conclusions that merchant refineries are recovering their RIN costs in the petroleum fuels market or there would be nothing to report.

RIN prices have fallen dramatically over the past several months, which proves that the market is manipulated and even at current levels, 40 cent RINs, the prices are still significantly higher than their intrinsic value – the cost of blending – thereby rewarding integrated refiners and unobligated blenders with windfall profits at the expense of merchant and small refiners.

E. High RIN prices harm the U.S. Economy

The current definition of obligated party and the resulting fraud, waste, and manipulation of the RIN market results in artificially high RIN prices that harm the U.S. economy. In order to reduce their RIN obligations under the RFS program, refiners are reducing their transportation fuel production by exporting gasoline and diesel outside of the United States or otherwise limiting their transportation fuel production.⁸⁹ In February 2015, PES commented in a public filing that they export finished products to manage RFS2 compliance requirement cost:

The amount of RINS we are obligated to purchase is impacted by our total barrels of gasoline and distillate produced and the obligation is reduced by blending renewable fuels at third party fuel terminals and by exporting gasoline and distillate.⁹⁰

⁸⁷ PBF Energy, Inc., Annual Report (Form 10-K) 37 (Feb. 29, 2016).

⁸⁸ *Northeast Refiners Under Pressure From High Inventory, Expensive RINs*, OPIS PRICE WATCH ALERT(July 7, 2016).

⁸⁹ *See, e.g.*, NERA 2015 Report at 21-22.

⁹⁰ Philadelphia Energy Solutions Inc., Registration Statement under the Securities Act of 1933 (Form S-1) (Feb. 17, 2015) (emphasis added).

In the past few years, several refiners including Valero, Shell, and Marathon have significantly expanded their refined petroleum product export operations.⁹¹ Any volume of transportation fuel that is exported is excluded from the obligated party's RVO and reduces their compliance obligation for both gasoline and diesel. CVR's refineries are located in Kansas and Oklahoma. Because of their inland location and the absence of infrastructure that allows shipment of products from refiners in this region to waterborne export terminals, exporting product is not a viable option for CVR to reduce its RIN obligation.

In the alternative, some refineries are altering their product slates, making specialty lube oils, ECA marine fuel, and asphalt to reduce their output of transportation fuel. These market reactions are clearly indicative of an exorbitant and unreasonable cost of compliance, and merchant and small refineries are least able to avoid the harm.

The actions refiners are taking to reduce the amount of transportation fuel they produce and distribute in the United States is contrary to the purpose of the RFS program—to increase U.S. energy independence. If this trend continues, the U.S. will face a shortage of domestically-produced transportation fuel, which will increase fuel prices for consumers.

F. Merchant and Small Refineries Are Deferring Capital Projects And Reducing Personnel Costs In Order To Buy RINs

The high cost of RINs has taken an extraordinary toll on merchant and small refiners. Several such refiners have indicated that they are deferring capital projects, deferring maintenance, and delaying turnarounds to preserve cash to buy RINs and continue operating. EPA should carefully consider the ramifications of ignoring the competitive distortion caused by the current definition of obligated party. Restraints on capital projects and job losses caused by excessive RFS compliance costs threaten refineries' abilities to maintain reliable and safe operations. Some refiners are already considering shut down options, which would have a dramatic impact on consumer costs and national security.

A large merchant refiner, Philadelphia Energy Solutions, late last year reduced its staffing levels, froze pension contributions, and reduced healthcare benefits, attributing the majority of the decline to the costs of RINs.⁹²

In appendix B-5 to the DOE Study, DOE explained that not only is it more expensive for merchant and small refiners to comply, but also that its exempt competition – integrated refiners

⁹¹ See Patti Domm, *US Becoming 'Refiner to the World' as Diesel Demand Grows*, CNBC (Aug. 7, 2013), available at <http://www.cnbc.com/id/100943620>.

⁹² Barbara J. Powell, *Refiner Cuts Costs, Offers Buyouts as Ethanol Credits Rise*, BLOOMBERGMARKETS (Sept. 8, 2016), available at <https://www.bloomberg.com/news/articles/2016-09-08/philadelphia-energy-ceo-says-finances-significantly-stressed>.

with RINs in excess of their RVOs and unobligated blenders – have a competitive advantage over merchant and small refineries that could “significantly impair the profitability of non-blending small refineries.”⁹³

| Values in Cents per Gallon | Average Values (over 11 months) | | | Marginal Values (December) | | |
|------------------------------|---------------------------------|---------------------------------|----------------------------|------------------------------|---------------------------------|----------------------------|
| | Company A Blends to meet RVO | Company B Buys RINs to meet RVO | Company C has RINs to sell | Company A Blends to meet RVO | Company B Buys RINs to meet RVO | Company C has RINs to sell |
| Gasoline Price | 200.00 | 200.00 | 200.00 | 200.00 | 200.00 | 200.00 |
| Ethanol Price | 190.00 | n/a | 190.00 | 190.00 | n/a | 190.00 |
| Price Difference | 10.00 | n/a | 10.00 | 10.00 | n/a | 10.00 |
| Fuel margin/gallon of E10 | 1.00 | n/a | 1.00 | 1.00 | n/a | 1.00 |
| VEETC (cpg of E10) | 4.50 | n/a | 4.50 | 4.50 | n/a | 4.50 |
| RINs Price (cpg of ethanol) | n/a | 1.50 | 1.50 | n/a | 15.00 | 15.00 |
| RINs Price (cpg of E10) | n/a | 0.15 | 0.15 | n/a | 1.50 | 1.50 |
| Blender Margin (cpg of E10) | 5.50 | n/a | 5.65 | 5.50 | n/a | 7.00 |
| Total Cost (cpg of E10) | 194.50 | 200.15 | 194.35 | 194.50 | 201.50 | 193.00 |
| Advantage vs. B (cpg of E10) | 5.65 | | 5.80 | 7.00 | | 8.50 |

As shown in the table above, when RINs are 1.5 cents per gallon (cpg), the integrated refiner has a cost advantage over the small refiner of 5.65 cpg and the integrated refiner with excess RINs or the unobligated blender has an advantage over the small refiner of 5.8 cpg. When RINs prices go to 15 cpg, the integrated refiner’s advantage over the small refiner grows to 7.00 cpg and the integrated refiner with excess RINs or the unobligated blender’s advantage grows to 8.50 cpg. D6 RINs are currently trading under 50 cents and were trading at over \$1 per RIN just three months ago. This alone is proof that the RIN market is speculative and subject to manipulation, a fact that EPA can no longer ignore.

V. THE CURRENT DEFINITION OF OBLIGATED PARTY IS ACTUALLY AN IMPEDIMENT TO MORE RENEWABLE FUEL USE

According to EPA’s data on RIN separation, since 2011 the growth in RIN separation by blenders has dwarfed the growth in RIN separation by obligated parties. Between 2011 and 2016, obligated parties have only increased their D6 RIN separation by 0.05%, while blenders have increased their D6 RIN separation by 99%. And for D4 RINs, obligated parties have increased their RIN separation by 76% between 2011 and 2016 while blenders have increased their RIN separation by 380%.

While EPA might think that incentivizing blenders to separate RINs makes sense, it doesn’t. Blenders only control a small portion of the available rack space; it is the integrated

⁹³ DOE Study at B-5.

refiners that control the vast majority of the market. If EPA really wants to increase blending, it needs to create incentives for integrated refiners to separate RINs, and the only way to do that is to obligate them on the volume of fuel they sell across the rack and not the volume of fuel they produce.

A. Parties Cannot Blend What They Do Not Produce; The Diesel Disparity Must Be Removed

An individual refiner's RVOs are based on the refinery's combined gasoline and diesel production, which is then multiplied by the applicable percent standard for each of the four categories of renewable fuel.⁹⁴ This approach creates a diesel disparity, making it more difficult for refineries that produce a higher percentage of diesel than the industry average to meet their RVO through blending. Before adopting this approach, EPA considered an alternative approach that would have "more readily aligned the RFS obligations with the relative amounts of gasoline and diesel produced or imported by each obligated party." This alternative approach would have created gasoline-specific and diesel-specific standards and corresponding RVOs.⁹⁵ Although acknowledging that this approach would more readily align the compliance obligation with the type of fuel produced, EPA rejected it because it would "unnecessarily complicate the program."

According to the Department of Energy, the diesel disparity creates a "more difficult compliance pathway" for refiners that produce proportionally more diesel because fewer RINs are generated from blending:

While ethanol blending at 10 percent is already common, biodiesel is normally blended at 5 percent or less due to a lack of market acceptance. Therefore, refineries that disproportionately favor diesel production over gasoline inherently have a more difficult compliance pathway, as the percentage of renewable fuel available to blend into diesel is much lower than the 10 percent of ethanol that can be blended into gasoline.⁹⁶

If the diesel disparity were removed, all refineries that blended 100% of the fuel they produce would be able to satisfy their obligation through blending (or at least come close).

The diesel disparity not only advantages refineries that produce more gasoline and less diesel than the industry average, but it prevents more renewable fuel blending. You cannot blend ethanol into diesel.

⁹⁴ 40 C.F.R. § 80.1407.

⁹⁵ 74 Fed. Reg. at 24,953.

⁹⁶ DOE Study at 34 (emphasis added).

B. RIN-Long Parties Have No Incentive To Increase Renewable Fuel Use and RIN Short Parties Have No Means To Do So

1. Merchant and Small Refineries Are Incentivized, But Unable To Increase Renewable Fuel Use

In the Burkholder report, EPA concluded that merchant refiners were not experiencing hardship from having to purchase RINs in lieu of blending or they would be investing in blending and distribution infrastructure.⁹⁷ Burkholder's conclusion presupposes that merchant refiners: (1) are not making investments in blending and distribution infrastructure; (2) have opportunities and capital to do so, but choose not to; and (3) that doing so is necessary and appropriate to increase renewable fuel use.

But EPA's summary statement that merchant refiners are not investing in renewable fuel blending and distribution infrastructure is nonsense. Merchant and small refiners are doing as much as is economically and geographically feasible to secure blending opportunities. They have, for example, secured pipeline and terminal space to blend at terminal racks; partnered with biodiesel producers for the delivery of biodiesel; invested in blending facilities at refinery racks; and offered E85 blends. We are certain that EPA's conclusion is contradicted by the EMTS data, but that data is not shared with the public. EPA's decision to protect speculators by maintaining an opaque EMTS system has created an environment that is ripe for manipulation and fraud. If EPA were to make public the names of those using the system, their overall ownership of RINs, and allow all their transactions in the EMTS to be public information, speculators would flee from the scene like cockroaches when the lights come on. We might all be surprised by the number of under-obligated parties that run for the hills as well. This change should be implemented as a part of any action taken by EPA.

Merchant and small refiners' ability to blend is constrained by a number of factors that EPA failed to acknowledge in the Burkholder report. For one thing, the companies that currently own lucrative blending positions are not anxious to be displaced of their positions. The blending positions are already held by integrated refiners and unobligated blenders, blending to meet their compliance obligation or blending with no obligation and generating excess RINs that they can sell for windfall profits. Even if integrated refiners and unobligated blenders were willing to be displaced, RIN-short merchant and small refiners lack the capital to invest in displacing them.

Ultimately, acquiring an existing blender, starting up a blending operation, or securing pipeline or terminal space is an expensive proposition for a RIN-short refiner. NERA reported that one company paid \$40 million for a single petroleum products terminal in Portland, and that building terminals "[r]equires similar expenditure and more time than acquiring terminals,"

⁹⁷ Burkholder I at 3.

which have large sunk costs and may be more complicated due to zoning and environmental requirements. And even once terminal space is acquired, a merchant refiner would have to arrange for distribution of its product through pipelines, barges, or trucks, making the ultimate cost of the acquisition much greater than the cost of terminal space itself.

2. *Most Retail Is Controlled By RIN-Long Parties, Integrated Refiners and Unobligated Blenders With No Incentive to Push E15 or E85*

CVR has no ability to influence the products sold at retail or any incentives offered to consumers to encourage the use of particular fuels, like E15 or E85. In a report prepared by the Renewable Fuel Association, RFA observed that less than 1% of "...oil-branded retail gas stations offer E15 or E85."⁹⁸ RFA explains that most retail gas stations carrying the "Big 5" oil company brand or other oil refiner brands have not invested in offering E15 or E85. Independent/unbranded stations, including those owned by unobligated blenders like Kum & Go and Kwik Trip, according to the report, offer E15 or E85 at only one-quarter of their stores. NERA similarly notes that, under the existing regulatory design, terminals, blenders, and retailers have little incentive to invest in E85 infrastructure "because under RFS2 they do not have any obligation to blend fuels with higher concentrations of renewable fuels."⁹⁹

In other words, the companies that own or control retail through contracts, franchise, and branding agreements have chosen not to push higher ethanol blends. It is patently obvious that if these parties were obligated on the volume of fuel sold at the rack, they would be doing everything in their power to generate RINs for compliance. They are not doing so now because they have more RINs than they need for compliance or have no compliance obligation at all. The following table from a report prepared by Baker & O'Brien shows the RIN holdings disparities or, as EPA described it, [from the final 2014-2016 rule – not allocated evenly]:

In its 2015 10-K, Murphy USA bragged to investors about earning \$117 MM in one year selling RINs to obligated parties. \$117 MM was 85% of the company's net profits in that year, excluding net income from a capital gain arising from the sale of their Herford, TX ethanol plant in Q4, came from selling RINs. The RFA's report identifies MUSA as an "oil refiner branded station." In fact, MUSA is an exempt (non-refining) blender. In its report, RFA indicated that only 9 of MUSA's 1,128 stores offered E15 or E85, which is consistent with statements in MUSA's 10-K. MUSA is using its RIN revenues to buyback company stock, upgrade existing retail outlets and acquire more stores. MUSA is not investing in E15 or E85 at its retail outlets because it has no legal or financial incentive to do so.

⁹⁸ RENEWABLE FUELS ASSOCIATION, PROTECTING THE MONOPOLY: HOW BIG OIL COVERTLY BLOCKS THE SALE OF RENEWABLE FUELS (July 2014) [hereinafter *RFA Report*], provided here as Attachment 8.

⁹⁹ NERA 2015 Report at 32.

Cumberland Farms is another example of the lack of incentive to increase E15 and E85 use, even though it is in the best position to do so. Cumberland Farms is an exempt (non-refining) blender like MUSA and “among the largest retail convenience store chains in the country.”¹⁰⁰ Cumberland Farms purchases in bulk, blends at the rack, and its suppliers are the position holders. Cumberland Farms describes itself as “fuel-agnostic.” It views its job as safely and legally supplying the fuels that its customers demand, “without particular regard to what that fuel is made from.”¹⁰¹ Cumberland Farms describes its failed experiment at trying to push E15 and E85 at its retail outlets:

Cumberland Farms has attempted to sell E85; that experiment has largely failed, because demand is simply insufficient to support a thriving and efficient market for a boutique fuel like E85. This is attributable to factors beyond the RFS: there are not enough flex vehicles on the market, and not enough consumers who want to put E85 into their flex vehicles—because, e.g., they know that they will get fewer miles per gallon compared to E10. Similarly, our reluctance to embrace E15 has little to do with RIN pass-through. Rather, significant concerns with liability and infrastructure compatibility would make adoption of E15 far more costly than the market can presently justify.¹⁰²

Cumberland Farms has the luxury of being “fuel-agnostic” because it is unobligated. It tried its “experiment” with E15 and E85, the experiment failed because consumers didn’t want those fuels, and it has gone back to supplying the fuel that its customers prefer. It has this luxury because it does not need RINs for compliance.

Other unobligated retailers, such as Wawa and Sheetz, likewise have no incentive to increase E15 or E85 use because they are not obligated parties under the RFS. For instance, Wawa notes that it is not an obligated party, that the majority of its stations are required to supply reformulated gasoline with ethanol (mostly E10) under other provisions of the Clean Air Act and that it does not offer E85 fuel.¹⁰³ Likewise, Sheetz states that it is “currently the largest seller of E15 in the U.S. today,” but argues that a lack of consumer acceptance, among other things, is to blame for the lack of increase in use of higher ethanol blends such as E15 and

¹⁰⁰ Letter from David Masuret and Matthew Durand, Cumberland Farms, Inc., to U.S. EPA, Re: Opposition to Petition(s) for Rulemaking to Change the Definition of an Obligated Party under the Renewable Fuel Standards, 40 C.F.R. § 80.1406 (Nov. 2, 2016) (Document ID No. EPA-HQ-OAR-2016-0544-0055).

¹⁰¹ *Id.* at 9.

¹⁰² *Id.*

¹⁰³ See Letter from Brian Schaller, Wawa, Inc., to U.S. EPA, Re: Opposition to Petition for Rulemaking to Change Definition of Obligated Party Under the Renewable Fuel Standards, 40 C.F.R. § 80.1406, at 3-4 (Aug. 14, 2016) (Document ID No. EPA-HQ-OAR-2016-0544-0066).

E85.¹⁰⁴ However, in his comments in this docket, Mr. Minsk has demonstrated that, if parties controlling blending become obligated parties, they will need additional RINs to comply with the RFS and will have additional incentive to market and sell E85.¹⁰⁵

Until EPA incentivizes Cumberland Farms, Wawa, and Sheetz to generate RINs, it will continue to supply its customers with the fuel they prefer without regard to the goals of the RFS and all the while pocketing windfall profits from selling RINs to CVR and other merchant and small refineries. You can bet that Cumberland Farms is also using its windfall RIN revenues to destroy small retailers, but unlike MUSA, it's "a family owned company" and what it does with its RIN revenues are not public.

3. *Changing the Definition of Obligated Party Is The Only Way To Increase Cellulosic Biofuel Production*

The fuel that has fallen furthest behind Congress' RFS goals is cellulosic biofuel due to lack of investment in research and development to bring it to large scale commercialization. The parties best positioned to invest in research and development (R&D) are integrated refiners with a documented history of having the resources and the business interests to maintain R&D within the company portfolio. Although they have the means and historic interest in doing so, they currently have no incentive to do so. In fact, some of these companies heavily invested in renewable fuel research in the early-to-mid 2000s but have significantly scaled back their investments in recent years.

Chevron is one example. "Chevron's biofuels plan wound up in the cross-hairs of cost analysts in 2009 when they determined it would be a better bet to buy renewable fuel credits rather than keep trying to make the product, according to [former Chevron Vice President of Biofuels Technology Paul] Bryan and two other former employees."¹⁰⁶ Although Chevron had planned to embark on a biofuels project with Catchlight Energy LLC and Weyerhaeuser Company in 2010, that project was ultimately scrapped.¹⁰⁷ "While still promoting its commitment to renewable energy, the second largest U.S. oil company quietly shelved most of its biofuels work in 2010."¹⁰⁸ A former Catchlight executive cited Chevron's changed attitude

¹⁰⁴ Letter from Michael Lorenz, Sheetz, Inc., to U.S. EPA, Re: Opposition to Petition for Rulemaking to Change Definition of Obligated Party Under the Renewable Fuel Standards, 40 C.F.R. § 80.1406, at 1, 3-4 (Aug. 15, 2016) (Document ID No. EPA-HQ-OAR-2016-0544-0060).

¹⁰⁵ Ronald Minsk, Comments on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation: Docket ID No. EPA-420-D-16-004, at 23-24.

¹⁰⁶ See Ben Elgin et al., *Chevron Defies California on Carbon Emissions*, Bloomberg, available at <https://www.bloomberg.com/news/articles/2013-04-18/chevron-defies-california-on-carbon-emissions> (Apr. 18, 2013, 12:01 A.M.).

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

toward renewable energy as a reason the project was abandoned: “After the [Chevron] cost analysts’ report . . . Chevron no longer wanted to be a leader in biofuels.”¹⁰⁹ Catchlight’s Board of Directors stated in a 2010 internal business plan that there was “no urgency” to commercialize biofuels and, “in the absence of mandates,” the first biofuels plant should be “driven by financial returns.”¹¹⁰

Chevron’s public filings paint a similar picture: Chevron showed an initial interest in cellulosic and biofuel research but subsequently lost interest in such endeavors. For example, Chevron’s 2008 Corporate Responsibility Report states that in 2008 it “partnered with universities and research institutions on different projects related to . . . cellulosic (nonfood-crop) biofuels.”¹¹¹ As part of its description of Chevron’s operations, the report noted that Chevron “develop[s] and commercialize[s] the energy resources of the future, including biofuels and other renewables.”¹¹²

Similarly, BP significantly reduced its R&D spending on cellulosic ethanol in recent years. “BP made the biggest cuts, reporting a 41% drop in its research and development spending for 2013-15, in part because of its decision to stop work on advanced cellulosic ethanol.”¹¹³ Like Chevron, BP’s sustainability reports support the notion that the company’s interest in biofuels research declined significantly in recent years. For example, BP’s 2012 report acknowledges an abandoned cellulosic project but states a continued interest in cellulosic research: “In 2012 we cancelled plans to build a commercial-scale cellulosic ethanol plant in Florida and refocused our cellulosic strategy on research, development and technology licensing.”¹¹⁴ In its 2013 report, the term “cellulosic” is only mentioned once. Yet, on their websites and in other forums, these companies continue to tout their biofuel expertise and high levels of investment in biofuels. Indeed, Chevron refers to itself as having a “high level of expertise” in biofuels.¹¹⁵

Changing the definition of obligated party should encourage integrated oil companies to press forward with previously abandoned research and development on advance cellulosic biofuels.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Chevron Corporate Responsibility Report 2008 at 7 (May 2009), *available at* <https://www.usasean.org/sites/default/files/uploads/aboutus/csr/members-reports/Chevron.pdf>.

¹¹² *Id.* at 6.

¹¹³ See Ed Crooks, *Research cutbacks hit oil groups’ ability to invest*, FINANCIAL TIMES, *available at* <https://www.ft.com/content/172d583c-1ab6-11e6-8fa5-44094f6d9c46> (May 15, 2016).

¹¹⁴ BP Sustainability Review 2012 at 15 (Mar. 20, 2013), *available at* http://www.bp.com/content/dam/bp/pdf/sustainability/group-reports/BP_Sustainability_Review_2012.pdf.

¹¹⁵ Chevron, *Feature: Biofuels - Turning Trash into Treasure*, *available at* <https://www.chevron.com/stories/biofuels> (last visited Feb. 15, 2017).

4. *EPA Underestimates Very Real Obstacles to Greater E85 Use*

There are very significant obstacles to greater market penetration of E85 that will not be overcome until EPA changes the definition of obligated party. There are relatively few flex fuel vehicles (“FFV”) that can accommodate E85; it is a less energy efficient fuel and because of its poor fuel economy, consumers are required to refill more often. EPA’s notion that voluntary price discounts by RIN-long parties and increased availability at retail are sufficient incentives to encourage its use are unrealistic.

A report for Growth Energy, a trade association representing the ethanol industry, explains that “without any other pathways for expanded ethanol consumption, 10% would indeed be a ‘blendwall’ – RIN prices would soar without any additional ethanol being consumed.”¹¹⁶ For Growth Energy, the answer was simple, if RIN prices soar, the “value transferred to blenders of E85 will result in lower prices at the pump for higher-renewable fuel products.”¹¹⁷ To be effective in increasing E85 use, the E85 prices would need to be substantially lower than E10 prices. Otherwise, consumers have no motivation to switch.

The Growth Energy report acknowledges that blenders have the option of holding onto the revenue they obtain through RIN sales or decreasing the price. The report then concludes that higher RVOs will cause RIN prices to rise to the level where “blenders face stronger incentives to reduce E85 prices (i.e., reduce their margins) in order to drive needed volumes.”¹¹⁸ What the report did not consider is how efficiently and quickly the RIN revenue would be passed through if blenders did not “have the option of holding onto the revenue they obtain through RIN sales” because they needed the RINs for compliance. The report also failed to consider the impact on merchant and small refiners forced to buy \$2-3/RINs. The Growth Report is similar to EPA’s proposed REGS rule which tries to increase renewable fuel use without addressing the primary obstacle: the fact that blenders have the option to retain the RIN value, rather than the legal obligation and financial incentive to pass it along.

Moreover, and as noted above, Mr. Minsk has conducted a thorough analysis demonstrating that shifting the point of obligation would encourage (currently) RIN-long parties to sell more E85. His analysis demonstrates that, under the current system, retail stations affiliated with RIN-long parties are less likely to sell E85, and that the opposite is true for retail fueling stations affiliated with RIN-short obligated parties.¹¹⁹ In other words, there is an

¹¹⁶ MARC CHUPKA, J. MICHAEL HAGERTY, NICHOLAS POWERS & SARAH GERMAIN, THE BRATTLE GROUP, PEEKING OVER THE BLENDWALL: AN ANALYSIS OF THE PROPOSED 2017 RENEWABLE VOLUME OBLIGATIONS at 5 (July 11, 2016), provided here as Attachment 9.

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* at 15.

¹¹⁹ Ronald Minsk, Comments on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation: Docket ID No. EPA-420-D-16-004, at 23-24.

economic incentive for RIN-short parties to blend and sell fuel that contains more than 10 percent renewable fuel. Moving the point of obligation to the rack will make parties who are currently RIN-long, RIN-short, thereby providing every obligated party with the same incentive to blend more renewable fuel. Moreover, because many of the parties that are currently RIN-long are affiliated with retail fueling stations, they will have the incentive to offer this higher content renewable fuel at those stations.

VI. REVISING THE DEFINITION OF OBLIGATED PARTY WILL NOT CAUSE DISADVANTAGEOUS BUSINESS REALIGNMENT

Revising the definition of obligated party will not cause disadvantageous business realignment or otherwise result in significant market disruptions. In fact, the opposite is true. Very few, if any, of the currently obligated parties will no longer be obligated. The single largest change will be that integrated refiners' RVOs will increase to match the fuel they sell at the rack, not just the fuel they produce at their refineries. And exempt (non-refining) blenders will incur an RVO when they sell product at the rack. Merchant and small refiner RVOs will stay the same or decrease to match the product they sell at the rack. Importers' RVOs should not change. In other words, the system would become RIN-neutral, as it should be.

A. Investments made by the current obligated parties will not be devalued by a change in the definition of obligated party

EPA claims that changing the definition of obligated party would disrupt the investment-backed expectations of the entities that blend renewable fuel. EPA argues that parties regulated by the RFS program have made significant investment decisions about their participation in the program and some have sought to increase their access to RINs by acquiring positions at pipeline terminals or investing in blending infrastructure downstream of terminals.¹²⁰

First, EPA overstates the extent to which entities made deliberate investments to position themselves in the RFS program. Most of the parties that are reaping windfall profits under the current definition of obligated party are doing so based on their historic rack positions. In other words, integrated refiners have always been integrated and exempt (non-refining) blenders have always held positions at the rack. These parties did not invest in acquiring these facilities in order to increase their access to RINs; they already owned the facilities and their windfall revenues have been bestowed upon them by the structural misalignment in the RFS program. Therefore, EPA should not overstate the extent to which these investments were made in reliance on windfall RIN revenues.

¹²⁰ Proposed Denial at 46.

A host of different companies have made investments in renewable fuel blending including merchant and small refineries. Integrated refiners and exempt (non-refining) blenders have certainly expanded their holdings, but these investments will not be lost by virtue of becoming a newly obligated, or more obligated, party. Owning blending and distribution infrastructure, regardless of an obligated party's status, will always be advantageous as the program's volumes increase over time. As described in comments submitted by current position holders, there are a number of advantages to maintaining these positions, including cost savings, greater control over the entity's fuel supply, and tax benefits.

Many of the entities that have made investments to acquire terminal space or blending infrastructure are refiners trying to reduce their reliance on the RIN market. These entities are already obligated parties and they are using the RINs they generate from blending to satisfy their RVOs. Under CVR's proposed definition of obligated party, these entities would continue to be obligated and would use the RINs they generate from blending to meet their RVOs. Revising the definition of obligated party would not materially change their position in the RFS program.

B. Current position holders will not abandon their positions at pipeline terminal racks

Unobligated blenders and their trade association submitted comments to EPA claiming that they would stop buying fuel above the rack and move further downstream if EPA changes the definition of obligated party, reducing competition at the rack.¹²¹ These statements are disingenuous. These entities acknowledge that they receive significant advantages by holding positions at the terminal rack, including the ability to purchase fuel in bulk at a discount, the ability to better control their fuel supply, and advantages related to the collection of taxes.¹²²

These entities claim that the costs associated with complying as an obligated party outweigh the benefits of holding a position at the rack.¹²³ These parties' claims that they will give up significant advantages associated with their rack positions tell us two things. First, they perceive a significant harm associated with becoming an obligated party, which they simultaneously claim does not exist. Second, companies always act in their best economic interest. By realigning the obligation, the newly obligated and more obligated will not suffer the harm that merchant and small refineries suffer. They will have the ability to control whether and to what extent they blend to meet their RVO. By leveling competition at the rack, exempt parties will not be able to undercut their pricing in reliance on windfall RIN revenues and RIN costs will

¹²¹ Letter from R. Timothy Columbus to Gina McCarthy, Administrator, EPA (Aug. 15, 2016); letter from RaceTrac to Gina McCarthy, Administrator, EPA (Aug. 17, 2016); letter from QuikTrip to Gina McCarthy, Administrator, EPA (Aug. 17, 2016); letter from Pilot Flying J to Gina McCarthy, Administrator, EPA (Aug. 16, 2016).

¹²² Proposed Denial at 47.

¹²³ *Id.*

in fact be passed through to consumers in the same manner as California's low carbon fuel standard. Therefore, they will never face the same distorted competition and harm that refiners and importers without the ability to blend face every day.

In addition, by cutting market speculators out of the RIN market, they will avoid the extreme market volatility that has plagued merchant and small refineries for the past several years.

C. Market re-integration is incentivized under the current rule structure and is already occurring

EPA acknowledged in the Burkholder report that soaring RIN prices in late 2012 and 2013 did not result in investments in infrastructure.¹²⁴ In his report, James Stock reached the same conclusion and also acknowledged that soaring RIN prices put some refiners at risk.¹²⁵ Ronald Minsk goes one step further in concluding that even if high RIN prices could achieve EPA's objectives, it would be inefficient and adversely affect competition:

EPA's current view is that the parties facing ever increasing costs for RINs will be incentivized to build new infrastructure or to invest in blending operations. To me, it is inappropriate to presume this as a path to compliance. This is akin to telling a product's manufacturer that it also must become its distributor. Stated differently, EPA expects that RIN pricing will become so severe, that it will reverse the last 20 years of de-integration in the refinery industry. EPA aims to have a RIN price that substantially alters the current market to force disadvantaged parties to enter into new business models, whereby they would participate in the entire fuel supply chain from production to bulk distribution, through terminals and ultimately to the point of sale to the retail consumer, thus gaining access and control of the volumes of renewable fuels blended and sold to consumers. It is hard to envision how this is beneficial for the refining sector as a whole, renewable fuel producers, consumers, or the RFS.¹²⁶

¹²⁴ Burkholder I at 12; JAMES H. STOCK, COLUMBIA UNIV. CT ON GLOB. ENERGY POLICY, THE RENEWABLE FUEL STANDARD: A PATH FORWARD 3-4 (April 2015) [hereinafter "Stock Report"].

¹²⁵ "In theory, RIN prices provide support for and promote the use of renewable fuels. In practice, during 2013 and 2014, uncertainty surrounding RFS policy combined with the E10 blend wall has resulted in high RIN prices without seeing significant advances either in the amount of ethanol in the fuel supply or in accelerating investment in domestic, low-greenhouse gas, second-generation advanced liquid fuels. The result has been postponed investment, both in the development and production of advanced biofuels and in dispensing infrastructure for higher blends. At the same time, volatile RIN prices expose some refiners and importers to RIN price uncertainty while doing little to promote renewables." Stock Report at 3-4.

¹²⁶ Minsk Letter at 7 (emphasis added).

Refinery acquisitions of blending assets necessarily entail a vertical component because they combine two stages of the supply chain under common control. Therefore, the current rule structure encourages vertical integration because it encourages RIN short refiners to acquire downstream blending assets. It also encourages horizontal integration because RIN-short refiners will no longer be able to compete and will be acquired by their RIN-long competitors or shut down. Therefore, the current rule structure encourages both horizontal and vertical integration. In fact, this is already occurring. In 2016 alone, two small refineries were acquired by larger entities.

Changing the definition of obligated party to restore a level playing field will discourage horizontal and vertical integration. When competition at the rack equilibrates, no party will have an advantage over another, incentivizing integration. Integrated refiners and currently exempt (non-refining) blenders will generate the RINs they need from blending and will not be incentivized to change their business models to acquire upstream or downstream assets.

Therefore, EPA's fear that changing the definition of obligated party will result in re-integration of the refining industry ignores the fact that this is already occurring.

VII. CONCLUSION

The RFS program has already and will continue to force merchant and small refineries to cut capital spending, implement hiring freezes, lay off employees and not hire contractors. These refineries have already - or will - defer maintenance, extend turnaround cycles, and stop making investments in their refineries necessary to remain competitive and profitable until they eventually shutdown or are acquired by integrated refiners that have captured their markets through price discounts and balance sheets inflated with RIN revenues. Small retailers face the same distorted competition and are shutting down because of their inability to compete with large, retail distribution chains discounting their fuel using their windfall RIN revenues.

All of this will occur without any corresponding benefit to the RFS program, national security or the environment. As RIN prices increase and merchant and small refiners and small retailers shut down or are acquired, integrated refiners, distributors, and blenders will control the market and charge whatever they choose for transportation fuel.

EPA seems to believe that the entities advocating for a change to the definition of obligated party must demonstrate that the benefits of revising the definition "are sufficiently large" and that any disruption that may be caused would need to be "worthwhile" before EPA will even open a rulemaking to consider revising the definition of obligated party.¹²⁷ While the petitioners and numerous other entities have clearly proven in comments submitted to EPA in

¹²⁷ Proposed Denial at 12.

recent RFS rulemakings and at meetings with EPA that revising the current definition of obligated party will eliminate a substantial hardship on merchant refiners and allow the RFS program to achieve the goals that Congress set for it, these persons were not obligated to prove these issues to EPA. Instead, EPA is obligated to issue regulations that are reasonable, to determine whether the appropriate party is obligated when it issues the annual renewable fuel volumes, and to respond to petitions for rulemaking and reconsideration in a manner that is not arbitrary or capricious.

We urge EPA to grant the petitions and initiate a rulemaking to change the definition of obligated party to obligate parties based on the volume of fuel that they sell at the rack (“position holders”), not on the volume they produce. Doing so will not shift the compliance obligation from refiners and importers to blenders. It will distribute the RFS compliance obligation more evenly among the appropriate parties.

Thank you for considering CVR’s comments.

Very truly yours,

/s/ John J. Lipinski

Jack Lipinski
Chief Executive Officer

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