

Additionally, as a result of information we have received from the public, the Board proposes to amend part 740 to permit a fourth iteration of the official advertising statement, namely by stating “Insured by NCUA.” This change would provide FICUs with more flexibility without diminishing the purpose of the rule.

The current part 740 addresses conventional forms of advertising such as print, radio, and television. The Board requests comment about whether the regulation should be modified to facilitate the trend in advertising via new types of social media, mobile banking, text messaging and other digital communication platforms, including Twitter and Instagram. The comments should focus on specific recommendations that balance the regulation’s goal to inform the public with space and other constraints inherent in new forms of advertising.

## II. Regulatory Procedures

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities.<sup>7</sup> For purposes of this analysis, NCUA considers small credit unions to be those having under \$100 million in assets. The proposed amendments provide regulatory relief and thus do not impose a significant burden on small credit unions. Accordingly, NCUA has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (“PRA”) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.<sup>8</sup> For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. The proposed rule does not constitute a “collection of information” within the meaning of section 3502(3) and would not increase paperwork requirements under the PRA or regulations of the Office of Management and Budget.

### *Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

### *The Treasury and General Government Appropriations Act of 1999—Assessment of Federal Regulations and Policies on Families*

NCUA has determined that this proposed rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.<sup>9</sup>

### List of Subjects in 12 CFR Part 740

Advertisements, Credit unions, Share insurance, Signs and symbols.

By the National Credit Union Administration Board on September 28, 2017.

Gerard S. Poliquin,  
*Secretary of the Board.*

For the reasons discussed above, the NCUA Board proposes to amend 12 CFR part 740 as follows:

### **PART 740—ACCURACY OF ADVERTISING AND NOTICE OF INSURED STATUS**

- 1. The authority for part 740 continues to read as follows:

**Authority:** 12 U.S.C. 1766, 1781, 1785, and 1789.

- 2. Amend § 740.5 by revising paragraphs (a), (b), (c)(7) and (c)(8) to read as follows:

#### **§ 740.5 Requirements for the official advertising statement.**

(a) Each insured credit union must include the official advertising statement, prescribed in paragraph (b) of this section, in all of its advertisements, including on its main Internet page, except as provided in paragraph (c) of this section.

(b) The official advertising statement is in substance one of the following:

(1) This credit union is federally insured by the National Credit Union Administration;

(2) Federally insured by NCUA;

(3) Insured by NCUA; or

(4) A reproduction of the official sign as described in § 740.4(b) may be used in lieu of the other statements included in this section. If the official sign is used as the official advertising statement, an insured credit union may alter the font size to ensure its legibility as provided in § 740.4(b)(2).

(5) The official advertising statement must be in a size and print that is clearly legible and may be no smaller than the smallest font size used in other portions of the advertisement intended to convey information to the consumer.

(c) \* \* \*

(7) Advertisements by radio that are less than thirty (30) seconds in time;

(8) Advertisements by television, other than display advertisements, that are less than thirty (30) seconds in time;

\* \* \* \* \*

[FR Doc. 2017–21316 Filed 10–3–17; 8:45 am]

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 80**

[EPA–HQ–OAR–2017–0091; FRL–9968–70–OAR]

### **Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019; Availability of Supplemental Information and Request for Further Comment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Availability of supplemental information; request for further comment.

**SUMMARY:** This document provides additional data and an opportunity to comment on that data and potential options for reductions in the 2018 biomass-based diesel, advanced biofuel, and total renewable fuel volumes, and/or the 2019 biomass-based diesel volume under the Renewable Fuel Standard (RFS) program. In a July 21, 2017 notice of proposed rulemaking, the EPA proposed certain reductions in the statutory volume targets for advanced biofuel and total renewable fuel for 2018, and requested comment on further reductions based on various considerations. This document presents additional data on production, imports and cost of renewable fuel and several options for how we may consider such

<sup>7</sup> 5 U.S.C. 603(a).

<sup>8</sup> 44 U.S.C. 3507(d); 5 CFR part 1320.

<sup>9</sup> Public Law 105–277, 112 Stat. 2681 (1998).

data in establishing the final volume requirements using the waiver authorities provided by the statute.

**DATES:** Comments must be received on or before October 19, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2017-0091, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or

comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Julia MacAllister, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734-214-4131; email address: [macallister.julia@epa.gov](mailto:macallister.julia@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Outline of This Preamble

###### I. General Information

A. Does this action apply to me?

###### II. Overview

###### III. Costs and Supply of Advanced Biofuel

#### IV. Possible Further Reductions of 2018 Volume Requirements

##### A. General Waiver Authority

##### 1. Inadequate Domestic Supply

##### 2. Severe Economic Harm

##### B. Biomass-Based Diesel Waiver Authority

#### V. Consideration of Possible Reductions in the Biomass-Based Diesel Volume Requirement for 2019

#### VI. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

### I. General Information

*A. Would this rule, if finalized, apply to me?*

Entities potentially affected by the July 21, 2017 proposed rule <sup>1</sup> (the July proposal), should it become final, are those involved with the production, distribution, and sale of transportation fuels, including gasoline and diesel fuel or renewable fuels such as ethanol, biodiesel, renewable diesel, and biogas. Potentially regulated categories include:

Category	NAICS <sup>1</sup> codes	SIC <sup>2</sup> codes	Examples of potentially regulated entities
Industry .....	324110	2911	Petroleum Refineries.
Industry .....	325193	3869	Ethyl alcohol manufacturing.
Industry .....	325199	2869	Other basic organic chemical manufacturing.
Industry .....	424690	5169	Chemical and allied products merchant wholesalers.
Industry .....	424710	5171	Petroleum bulk stations and terminals.
Industry .....	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry .....	221210	4925	Manufactured gas production and distribution.
Industry .....	454319	5989	Other fuel dealers.

<sup>1</sup> North American Industry Classification System (NAICS).

<sup>2</sup> Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to engage in activities that may be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your entity would be affected by this rule, if finalized, you should carefully examine the applicability criteria in 40 CFR part 80. If you have any questions regarding the applicability of the July proposal to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

## II. Overview

On July 21, 2017, EPA proposed reductions in the statutory volume targets for advanced biofuel and total renewable fuel using the cellulosic waiver authority in Clean Air Act (CAA) section 211(o)(7)(D).<sup>2</sup> We proposed

using the maximum reduction permitted under that authority (considering the proposed cellulosic volume requirement) to reduce the 2018 volume targets for advanced biofuel and total renewable fuel to 4.24 and 19.24 billion gallons, respectively, in part by placing a greater emphasis on cost considerations than we have in the past. We requested comment on possible additional reductions in advanced biofuel (with corresponding reductions in total renewable fuel) using the general waiver authority in CAA section 211(o)(7)(A) or other authorities. Similarly, we requested comment on whether EPA should, in the final rule, reduce the 2019 volume requirement for biomass-based diesel (BBD)<sup>3</sup> to a level below the proposed level of 2.1 billion gallons.<sup>4</sup>

We did not specifically request comment in the proposed rule on a

possible reduction of the 2018 volume requirement for BBD, which was set at 2.1 billion gallons in 2016.<sup>5</sup> We did, however, request comment on the use of the general waiver authority or other authorities to reduce the advanced biofuel requirement for 2018, and BBD is not only nested within advanced biofuel but is also the predominant source of advanced biofuel. Therefore, considerations leading to a reduction of the advanced biofuel volume may also be relevant in reducing the 2018 BBD volume requirement. In this document we are providing additional information on renewable fuel costs and supply as well as possible options for the exercise of our waiver authorities based on these and other considerations.

We note that the statute also provides EPA the authority to waive a portion of the BBD standard if there is a significant renewable feedstock disruption or other

<sup>1</sup> 82 FR 34206.

<sup>2</sup> 82 FR 34206.

<sup>3</sup> Advanced biodiesel and renewable diesel with a D code of 4.

<sup>4</sup> We note the possibility that in light of our consideration of comments received on this

document and the NPRM that the final rule could implement volume requirements that deviate further from the volume targets in the statute than the proposed levels. We believe the statutory provisions embody multiple Congressional objectives, including both increasing renewable

fuels and limiting in certain circumstances the additional cost or economic impact associated with such increases. We invite comment on how to balance these objectives in exercising our waiver authorities.

<sup>5</sup> 81 FR 89746, December 12, 2016.

market circumstance that would make the price of biomass-based diesel fuel increase significantly, and to make related reductions in the advanced biofuel and total renewable fuel volume requirements.<sup>6</sup> In light of recent developments, described below, we seek comment on whether it would be appropriate to use this waiver authority in the final rule.

### III. Cost and Supply of Advanced Biofuel

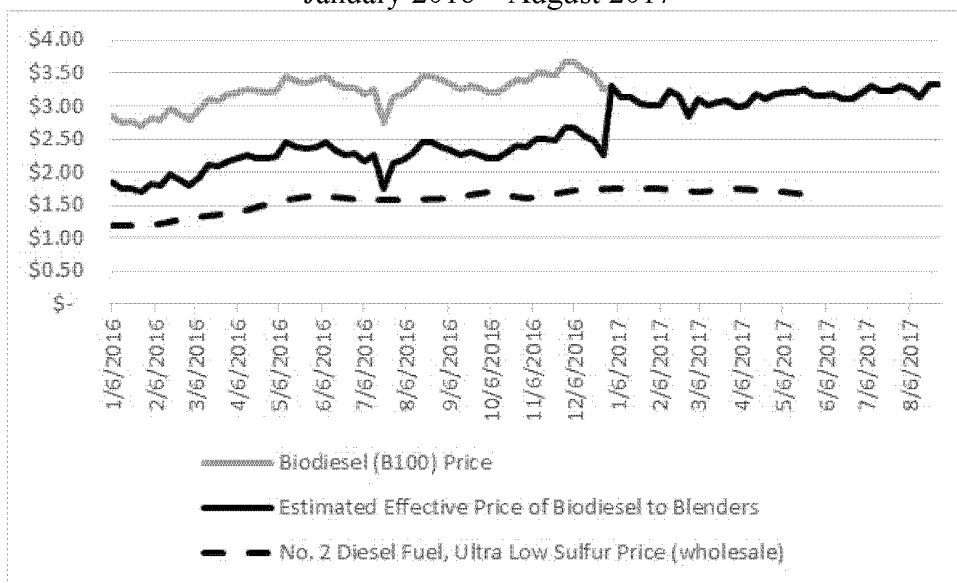
As EPA indicated in the July proposal, the cost of advanced biofuels is high on a per gallon basis compared to the petroleum fuels they replace. The expiration of the biodiesel tax credit in the U.S. at the end of 2016 has already impacted the effective price of biodiesel

to blenders, as well as the price of biodiesel blends to consumers. While it does not appear that the expiration of the tax credit has had a direct impact on the price of unblended biodiesel (B100) in 2017, we expect that the expiration of the tax credit has had a significant impact on the effective price of biodiesel sold to blenders. This is because the biodiesel tax credit that expired at the end of 2016 was received by biodiesel blenders, rather than biodiesel producers. The price of biodiesel and EPA's estimated effective price of biodiesel to blenders (net the \$1/gallon tax credit when applicable) from January 2016 through August 2017 are shown in Figure III-1 below.<sup>7</sup> We also expect the price of biodiesel used in the U.S. could increase further

following a recent preliminary determination by the Department of Commerce that it would be appropriate to place countervailing duties of 41% to 68% on imports of biodiesel from Argentina and Indonesia.<sup>8</sup> Cash deposits against preliminary duties are currently being collected, potentially impacting prices prior to a final determination. Such duties could also affect import volumes as pointed out in a recent letter from the American Fuel and Petrochemical Manufacturers (AFPM).<sup>9</sup> A final decision from the Department of Commerce and the International Trade Commission, which could include final countervailing duty orders, is scheduled for December 29, 2017.

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Figure III-1  
Price of Biodiesel,<sup>a</sup> Estimated Effective Price of Biodiesel to Blenders,<sup>b</sup> and Price of Petroleum Diesel<sup>c</sup>  
January 2016 – August 2017



<sup>a</sup> Biodiesel (B100) prices from USDA National Weekly Ag Energy Round-Up (Iowa prices)

<sup>b</sup> Estimated Effective Price of Biodiesel to Blenders calculated by subtracting \$1 from the biodiesel (B100) prices in 2016, and equal to the biodiesel (B100) prices in 2017

<sup>c</sup> Diesel (No. 2 Diesel Fuel, Ultra Low Sulfur) prices from EIA; Refiner Petroleum Product Prices by Sales Type, Sales to End Users (Available online: [https://www.eia.gov/dnav/pet/pet\\_pri\\_refoth\\_dcu\\_nus\\_m.htm](https://www.eia.gov/dnav/pet/pet_pri_refoth_dcu_nus_m.htm))

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The level of imports and exports can also affect the price of renewable fuel used in the U.S., and both imports and

export volumes have varied considerably over the last several years. Based on data collected on RIN generation and retirement from the EPA-

Moderated Transaction System (EMTS), we have determined gross domestic production and import and export volumes for advanced biofuels and

<sup>6</sup> Under CAA section 211(o)(7)(E)(ii).

<sup>7</sup> After January 1, 2017 the price of biodiesel and the estimated effective price of biodiesel to blenders

are identical, as the tax credit expired at the end of 2016.

<sup>8</sup> "Commerce Preliminary Finds Countervailable Subsidization of Imports of Biodiesel from

Argentina and Indonesia," available in EPA docket number EPA-HQ-OAR-2017-0091.

<sup>9</sup> "AFPM letter on biodiesel supply in 2017," available in docket EPA-HQ-OAR-2017-0091.

biomass-based diesel for the years 2013 through 2016.<sup>10</sup> Further details can be found in a memorandum to the docket.<sup>11</sup>

TABLE III-1—SUPPLY OF ADVANCED BIOFUEL  
[million RINs]

	2013	2014	2015	2016
Gross domestic production .....	2,278	2,308	2,327	3,023
Imports .....	911	479	710	1,177
Exports .....	128	134	143	202

TABLE III-2—SUPPLY OF BIOMASS-BASED DIESEL  
[million RINs]

	2013	2014	2015	2016
Gross domestic production .....	2,162	2,196	2,155	2,791
Imports .....	476	415	596	1,121
Exports .....	125	134	143	202

Commenters raised concerns that along with affecting prices of renewable fuels in the U.S., imports may also have an impact on the energy independence and security status of the U.S.<sup>12</sup> Increasing the energy independence and security of the U.S. is one of the stated goals in the Energy Security and Independence Act of 2007, and the RFS program's standards affect the volumes of both domestic production and imports. EPA requests comment on whether it is appropriate to consider possible impacts of these volumes on U.S. energy independence and security in setting the applicable standards under the RFS program, insofar as they impact those factors that we are permitted to consider and evaluate under the available waiver authorities, and/or the standard-setting authority for BBD.

EPA remains concerned about the high cost of advanced biofuels. As a result, and in light of the pending action on countervailing duties on imported biodiesel from Argentina and Indonesia which we believe could, if finalized, further increase the cost and/or decrease the supply of advanced biofuel in the U.S., we believe it is appropriate to request further comment on appropriate ways to determine the applicable volume requirements for 2018, and the BBD volume requirement for 2019.

#### IV. Possible Further Reductions of 2018 Volume Requirements

##### A. General Waiver Authority

Section 211(o)(7)(A) of the CAA provides that EPA, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the applicable volumes specified in the Act in whole or in part based on a petition by one or more States, by any person subject to the requirements of the Act, or by the EPA Administrator on his own motion. Such a waiver must be based on a determination by the Administrator, after public notice and opportunity for comment that: (1) Implementation of the requirement would severely harm the economy or the environment of a State, a region or the United States, or (2) there is an inadequate domestic supply. We sought comment on the possible use of the general waiver authority in the proposal, and here are once again seeking comment in light of the data provided in Section III of this document and a possible revised interpretation of the inadequate domestic supply waiver authority, as discussed below. We also solicit further comment on our use of the general waiver authority under a determination of either inadequate domestic supply or severe economic harm to reduce volumes of renewable fuel.

##### 1. Inadequate Domestic Supply

In the annual rule establishing the 2014–2016 renewable fuel standards, we determined that there would be an

“inadequate domestic supply” of renewable fuel to consumers in 2016, and so exercised the general waiver authority to reduce volumes to levels we believed could be supplied.<sup>13</sup> The United States Court of Appeals for the District of Columbia Circuit recently ruled in a lawsuit challenging that rule that EPA improperly focused on supply of renewable fuel to consumers, and that the statute instead requires a “supply-side” assessment of the volumes of renewable fuel that can be supplied to refiners, importers and blenders. *Americans for Clean Energy (“ACE”) v. EPA*, 864 F.3d 691 (2017). Other components of EPA’s interpretation of “inadequate domestic supply” were either upheld by the court in *ACE* (e.g., EPA’s interpretation that carryover RINs are not part of the “supply” for purposes of this waiver authority) or were not challenged (e.g., EPA’s consideration of biofuel imports as part of the domestic supply). In response to the proposed 2018 standards, we received comments suggesting that EPA should interpret the undefined term “domestic” in “inadequate domestic supply” to account for only volumes of renewable fuel that are produced domestically.<sup>14</sup> As we understand this suggestion, in determining the adequacy of supply, EPA would consider only whether there was an adequate supply of domestically produced volumes to satisfy the statutory volume targets. If there were not, EPA would be authorized to reduce the statutory

<sup>10</sup> The use of RIN data necessarily excludes renewable fuel import or export volumes for which no RINs were generated. RINs may not be generated, for instance, if ethanol has not been denatured or if a producer is exporting the renewable fuel. However, for advanced biofuels, RINless volumes (which would not be reflected in Tables III-1 or III-

2) are expected to be an extremely small portion of all volumes.

<sup>11</sup> “Imports and exports of renewable fuel in 2013 through 2016,” memorandum from David Korotney to docket EPA-HQ-OAR-2017-0091.

<sup>12</sup> See e.g., comments from AFPM/API, EPA-HQ-OAR-2017-0091-3645.

<sup>13</sup> See 80 FR 77420 (December 14, 2015).

<sup>14</sup> See, e.g., comments from American Fuels and Petrochemical Manufacturers/American Petroleum Institute (AFPM/API) (Docket Item No. EPA-HQ-OAR-2017-0091-3645) and Valero (Docket Item No. EPA-HQ-OAR-2017-0091-3677).

applicable volumes. Having made the threshold finding that there was an inadequate domestic supply, EPA could consider the availability of imports as one factor among others in determining whether to exercise its discretion to use the waiver authority.

Some commenters suggested that this interpretation would rely on common dictionary definitions of “domestic,” as meaning “of, or relating to, or originating within a country and especially one’s own country,”<sup>15</sup> or “[o]f or pertaining to one’s own country or nation; not foreign, internal, inland, ‘home.’”<sup>16</sup> Commenters suggested that this interpretation could lead to volume requirements providing greater stability and certainty for obligated parties; they noted the increasing uncertainty in international trade markets for biofuels, including the potential for disruptions in supply and duties being placed on these biofuels. These commenters suggested that by basing the volume requirements on the projected domestic supply of biofuels, EPA could set volume requirements that would better ensure the availability of renewable fuel for compliance.<sup>17</sup>

We note that this interpretation of the statutory phrase “inadequate domestic supply,” would not in any way limit the use of qualifying imported biofuel by obligated parties to ultimately comply with the annual percentage standards. Imported and domestically produced biofuels would still have the same opportunities to compete in the U.S. market as they do now. The interpretation would only affect the way in which EPA calculates the volumes used to set the percentage standards with which obligated parties must comply, by allowing EPA to consider the supply of domestically produced biofuels in deciding whether to use the general waiver authority. Once the standards were established, however, qualifying imported renewable fuel could still be used to comply with the established standards, exactly as it is currently.

We request comment on whether this interpretation would comply with the Court’s direction in *ACE* that we only consider “supply-side factors” in determining whether there is an

inadequate domestic supply. Although the Court in *ACE* explained that EPA “may” or is “authorized” to consider renewable fuel imports as part of a supply-side assessment under this waiver authority,<sup>18</sup> we note that these statements were made in the context of comparing supply-side considerations to demand-side considerations, and finding EPA’s demand-side consideration to be impermissible. Thus, the court’s statements may indicate the scope of permissible, but not required, interpretations, and not foreclose further consideration by EPA of the scope of appropriate supply-side considerations in light of the statute and the court’s decision.<sup>19</sup>

We believe there are a number of reasons why this interpretation of the phrase “inadequate domestic supply” may be appropriate. First, as noted by commenters, this interpretation may be consistent with a straightforward reading of the term “domestic supply” as referring to volumes of domestically-produced renewable fuels. Second, as also noted by commenters, basing EPA’s use of the general waiver authority on domestic supply only may better meet the energy independence and security purposes of EISA. Third, as EPA has noted in past rulemakings,<sup>20</sup> it is extremely difficult to project volumes that can be made available in the U.S. through imports, and we believe that in light of this substantial uncertainty, that EPA could reasonably interpret the statute as allowing it the discretion to waive statutory applicable volumes on the basis of a more certain assessment of the likely supply of domestically-produced fuels.

We invite comment on this possible interpretation of the term “inadequate domestic supply,” and the possibility of applying this interpretation to reduce the final 2018 advanced biofuel volume requirement beyond the level proposed. In Section III of this document we provide data on the domestic production of advanced biofuels for 2013 through 2016. We solicit comment on data and methodologies we should use for estimating the 2018 supply of domestically-produced BBD and other advanced biofuels if we adopt this interpretation. We also invite comment on the potential impact on imports and

the domestic production of advanced biofuel if EPA were to further reduce the proposed applicable volume of advanced biofuel on the basis of an interpretation of the term “inadequate domestic supply” as discussed in this section. We also request comment on whether and how EPA should consider the potential level of imports in determining whether to use its discretionary general waiver authority to reduce the required volume requirements should this interpretation be adopted.

Considering the nested nature of the standards, we also seek comment on the appropriateness of (and possible basis for) providing a reduction in the total renewable fuel applicable volume requirement commensurate with any reduction in the advanced biofuel volume requirement that may be finalized based on a reinterpretation of the inadequate domestic supply waiver authority as discussed in this section. We note that absent a commensurate reduction, the implied volume for conventional biofuels (*i.e.*, the difference between advanced and total volumes), would exceed the 15 billion gallon implied cap that can be discerned from the statutory tables. We note that both the cellulosic waiver authority in CAA section 211(o)(7)(D) and the BBD waiver authority in section 211(o)(7)(E) stipulate that when nested cellulosic or BBD volumes, respectively, are waived under these authorities, that reductions in the advanced and total renewable fuel volume requirements are authorized. Similarly, due to the nested nature of the standards, advanced biofuel can be used to meet the total renewable fuel requirement. This program structure, established in EISA, suggests that, in general, a reduction in a nested renewable fuel type can justify a corresponding reduction in the other renewable fuel standard or standards that the fuel can also be used to meet. We seek comment on the extent to which EPA should interpret the inadequate domestic supply waiver authority in CAA section 211(o)(7)(A) as also authorizing EPA to make a commensurate reduction in total renewable fuel volumes when waiving advanced biofuel volumes on the basis of inadequate domestic supply.

## 2. Severe Economic Harm

Section 211(o)(7)(A)(1) of the CAA provides that EPA may waive the applicable volume based on a determination that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States. We received comments from several

<sup>15</sup> AFPM/API comments (citing Merriam-Webster Dictionary).

<sup>16</sup> *Id.* (citing Oxford English Dictionary).

<sup>17</sup> See, *e.g.*, Comments from Valero (Docket Item No. EPA-HQ-OAR-2017-0091-3677). EPA notes that we also received comments from the biodiesel industry that reducing volumes based on imports could actually harm domestic producers, see, *e.g.*, comments from the National Renderers Association (Docket Item No. EPA-HQ-OAR-2017-0091-3959), National Biodiesel Board (Docket Item No. EPA-HQ-OAR-2017-0091-3880).

<sup>18</sup> See *e.g.*, *ACE*, 864 F.3d at 709.

<sup>19</sup> Moreover, EPA’s interpretation of the term “domestic” in the phrase “inadequate domestic supply” and the relevance of imports to EPA’s assessment was not challenged in the litigation or necessary for the court’s decision, so we believe that the court’s statements in this regard are dicta.

<sup>20</sup> See, *e.g.*, Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 FR 89746, 89764–65 (December 12, 2016).

stakeholders suggesting that EPA should reduce volumes on the basis of severe economic harm.<sup>21</sup> We note that EPA has previously expressed an interpretation of the severe economic harm waiver in denying petitions to exercise the waiver.<sup>22</sup> We solicit comment on the appropriateness of this interpretation, as well as rationales and data to support approaches for identifying volumes that would be associated with severe economic harm, or other means of implementing this waiver authority consistent with the statutory provision. In particular, we seek input on whether there is information indicating that severe economic harm is occurring under current standards or would occur for any volume requirement that could be established in the current rulemaking<sup>23</sup> and, if so, whether and how volumes should be adjusted to address such harm.

#### *B. Biomass-Based Diesel Waiver Authority*

CAA section 211(o)(7)(E)(ii) provides that if EPA determines that there is a significant renewable feedstock disruption or other market circumstance that would make the price of BBD increase significantly, EPA shall, in consultation with the Secretary of Energy, and the Secretary of Agriculture, issue an order to reduce, for up to a 60-day period, the annual volume requirement for BBD by an appropriate quantity that does not exceed 15 percent. The statute also stipulates that EPA is authorized to reduce applicable volumes of advanced biofuel and total renewable fuel by the same or a lesser volume than the reduction in BBD. Also, the statute provides that EPA may provide additional 60-day waivers, with an appropriate additional reduction in the annual requirement of up to 15%, if EPA determines that the feedstock disruptions or circumstances warranting the initial waiver are continuing.

We note that the renewable fuels standards apply on an annual basis and compliance is determined three months after the end of the year. Waiving the standard for 60 days without adjusting the annual standard would provide no relief. We thus solicit comment on

whether it would be appropriate to implement the provision by waiving the annual standard (in circumstances where use of the provision is authorized) by a volume that does not exceed 15%. Alternatively, it may be possible to implement the provision by allowing each refiner or importer to subtract from its compliance obligation calculations an amount of gasoline and diesel produced or imported during a specific 60-day period, subject to a 15% limitation on the reduction in their annual RVO. We note that the statute also allows for an extension of any initial waiver for additional 60-day periods if the feedstock disruption or other market circumstance persists. We invite comment on how to interpret and implement the BBD waiver provision consistent with the text and goals of the Act.

As described in Section III of this action, the price of biodiesel, particularly advanced biodiesel, has been impacted by the expiration of the federal tax credit at the end of 2016 and may be expected to be impacted further by the imposition of new duties on imports of biodiesel from Argentina and Indonesia.<sup>24</sup> We seek comment on the likely result of these and any other factors on biodiesel prices, and the extent to which any expected price increases should be considered “significant” for purposes of the waiver authority in CAA section 211(o)(7)(E)(ii). We also seek comment on whether the relevant biodiesel prices are those paid by refiners, importers and blenders,<sup>25</sup> and if so whether it is appropriate to consider the increase in the “effective price” of biomass-based diesel (net of any tax credit) to blenders for these purposes. We note that the 2018 BBD volume requirement was established by rule in 2016 at 2.1 billion gallons.<sup>26</sup> Therefore, if EPA were to make the appropriate findings under the statute, CAA section 211(o)(7)(E)(ii) would authorize an initial waiver of up to 315 million gallons (15% as specified in the statute) of the 2018 applicable volume requirement of 2.1 billion gallon (resulting in an applicable volume as low as 1.79 billion gallons), with additional incremental reductions possible in 60 day intervals if the circumstances warranted.<sup>27</sup>

This statutory provision also indicates that EPA may reduce the applicable volume of renewable fuel and advanced biofuels requirement by the same or a lesser volume as the reduction in the BBD volume requirement. Were we to exercise this BBD waiver authority, we believe it would be appropriate to lower the advanced biofuel and total renewable fuel volumes by the same amount, since the predominant form of advanced biofuel is BBD and a reduction in the BBD volume requirement may have little or no impact on BBD prices if there is no commensurate reduction in advanced biofuel and total renewable fuel volumes. If the BBD volume requirement were to be reduced by 315 million gallons, an equivalent reduction in advanced biofuel and total renewable fuel would be 473 million ethanol equivalent RINs.<sup>28</sup> This would bring the 2018 advanced biofuel volume requirement down from the proposed level of 4.24 billion gallons to 3.77 billion gallons and the 2018 total renewable fuel volume requirement from the proposed level of 19.24 billion gallons to 18.77 billion gallons.<sup>29</sup>

We request comment on the possible use of the waiver authority provided in CAA section 211(o)(7)(E)(ii) to reduce the 2018 volume requirement for BBD by as much as 315 million gallons, and to concurrently reduce the advanced biofuel and total renewable fuel volume requirements by as much as 473 million gallons. In particular, we seek data on recent BBD price increases and expectations for additional price increases, and we seek comment on the extent to which these price increases should be considered “significant” for purposes of the CAA section 211(o)(7)(E)(ii) waiver authority and the extent of a waiver (up to 15%) that would be necessary to address or avoid a significant price increase.

#### **V. Consideration of Possible Reductions in the Biomass-Based Diesel Volume Requirement for 2019**

The statute establishes applicable volume targets for BBD only through 2012. For years after those for which

<sup>21</sup> See, e.g., comments from American Fuels and Petrochemical Manufacturers/American Petroleum Institute (AFPM/API) (Docket Item No. EPA-HQ-OAR-2017-0091-3645) and Valero (Docket Item No. EPA-HQ-OAR-2017-0091-3677).

<sup>22</sup> See, e.g., 73 FR 47168 (August 13, 2008) (Notice of Decision Regarding the State of Texas Request for a Waiver of a Portion of the Renewable Fuel Standard); 77 FR 70752 (November 27, 2012) (Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard).

<sup>23</sup> 82 FR 34206 (July 21, 2017).

<sup>24</sup> Both advanced and conventional biodiesel are imported from these two countries.

<sup>25</sup> This approach would arguably be consistent with the focus of the *ACE* Court on the ability of these parties to blend the statutorily required volumes of renewable fuel.

<sup>26</sup> 81 FR 89746, December 12, 2016.

<sup>27</sup> 2.10 billion gallon BBD volume requirement  $\times$  15% = 315 mill gal.

<sup>28</sup> In the context of calculating the applicable percentage standards from the volume requirements, one gallon of BBD is equivalent to 1.5 gallons of ethanol. The advanced biofuel and total renewable fuel applicable volumes are expressed as ethanol-equivalent volumes, whereas the BBD applicable volume requirement is expressed in terms of biodiesel equivalence.

<sup>29</sup> The statute does not specifically require notice and opportunity for comment prior to EPA issuance of a waiver under CAA section 211(o)(7)(E)(ii); that EPA is providing an opportunity for comment regarding EPA's possible first use of this authority at this time should not be viewed as suggesting that EPA would always do so in the future.

volumes are specified in the statute, EPA is required under CAA section 211(o)(2)(B)(ii) to determine the applicable volume of BBD, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of implementation of the program during calendar years for which the statute specifies the volumes and an analysis of the following factors:

1. The impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;
2. The impact of renewable fuels on the energy security of the United States;
3. The expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and BBD);
4. The impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;
5. The impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and
6. The impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The statute also specifies that the volume requirement for BBD cannot be less than the applicable volume specified in the statute for calendar year 2012, which is 1.0 billion gallons. The statute does not, however, establish any other numeric criteria, or specify how EPA should weigh the importance of the often competing factors, and the overarching goals of the statute when EPA sets the applicable volumes of BBD in years after those for which the statute specifies such volumes. In the period 2013–2022, the statute specifies increasing applicable volumes of cellulosic biofuel, advanced biofuel, and total renewable fuel, but does not do so for BBD, instead specifying only a 1.0 billion gallon minimum and factors that EPA must evaluate in determining the volume requirement that EPA is to set.

We received comments on our July proposal requesting that EPA reduce the proposed applicable volume of BBD for 2019 due to the large volume of imported biodiesel and renewable diesel in recent years (See Table 2 for import

volumes of BBD),<sup>30</sup> which could affect our analysis of several of the factors listed above. Additionally, on August 28, 2017, the Department of Commerce published a preliminary determination that countervailing subsidies are being provided to producers and/or exporters of biodiesel from Argentina and Indonesia, and began requiring cash deposits equal to the subsidy rates.<sup>31</sup> These subsidies ranged from 50%–64% for biodiesel from Argentina and 41%–68% for biodiesel from Indonesia.<sup>32</sup> If finalized, the determination would have a direct impact on the cost of biodiesel imported from these countries, and could ultimately lead to increased cost to consumers of transportation fuel and the cost to transport goods, and/or could lead to reduced imports from these countries and potentially more limited supplies in the United States.

In our proposed assessment of the statutory factors listed above, we noted that the proposed BBD standard for 2019, if finalized, would not likely impact the advanced biodiesel and renewable diesel supply to the U.S. market. Instead, the higher advanced biofuel volume requirement would be the determinant, and the market would supply more advanced biodiesel and renewable diesel than the BBD standard would require. We further noted in the July proposal our expectation that the historic trend in establishing the advanced volume requirements (*i.e.*, annual increases) would continue into 2019, and the current production levels and costs for different types of advanced biofuel led us to believe that the same volume of BBD would likely be produced and imported to satisfy the anticipated 2019 advanced biofuel standard regardless of the applicable volume of BBD we ultimately required for purposes of the 2019 BBD standard. Any differences in the production and import of BBD were expected to be marginal and uncertain as BBD competes with other advanced biofuels in meeting the 2019 advanced biofuel volume. We proposed a level that we reasoned would provide a level of guaranteed support to the BBD industry, while also ensuring an opportunity under the advanced standard for the further development and marketing of non-BBD advanced biofuels that might have superior environmental characteristics or cost implications. As noted above, we are now also soliciting comment on options for reducing the

2018 advanced biofuel volume requirement. If we determine that it is appropriate to use one of the waiver authorities discussed above to reduce the required volume of advanced biofuel in 2018, it is possible that similar considerations would lead us to provide reductions of the 2019 advanced biofuel volume requirement for similar reasons. A lower required volume of advanced biofuel in 2019 could result in the proposed required volume of BBD for 2019 (2.1 billion gallons or 3.15 billion ethanol-equivalent RINs) driving demand for advanced biodiesel and renewable diesel, and could provide insufficient room under the advanced standard for non-BBD advanced biofuels to compete for market share within the advanced biofuel category and an inappropriate level of guaranteed support to the BBD industry.

In addition to these considerations, we seek comment on the extent to which the successful BBD industry requires the proposed level of guaranteed support, or if the advanced standard together with a significantly lower BBD standard would be sufficient for that purpose while advancing the goals of energy independence and security by providing additional encouragement for the growth of other types of advanced biofuels.

We request comment on how EPA should take into consideration the costs of biodiesel and the factors that influence those costs, together with other relevant factors discussed above or which commenters may wish to bring to our attention, in setting the appropriate required volume of BBD for 2019. We also request comment on what the volume requirement should be, noting that it could be equal to or greater than the statutory minimum of 1.0 billion gallons.

## **VI. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review**

This rulemaking is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review, as it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Any changes made in response to OMB recommendations have been documented in the docket.

Dated: September 26, 2017.

**E. Scott Pruitt,**  
Administrator.

[FR Doc. 2017–21128 Filed 10–3–17; 8:45 am]

**BILLING CODE 6560–50–P**

<sup>30</sup> See *e.g.*, comments from AFPM/API, EPA–HQ–OAR–2017–0091–3645.

<sup>31</sup> See 82 FR 40746 and 82 FR 40748 (July 21, 2017).

<sup>32</sup> *Ibid.*