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EPA Issues Enforcement Policy on Use of 2010 and 2011 Biomass-Based Diesel Renewable Fuel Credits

The U.S. Environmental Protection Agency (EPA) has issued an Interim Enforcement Response Policy to Resolve Violations Arising from the Use of Invalid 2010 and 2011 Biomass-Based Diesel Renewable Identification Numbers (RINs).¹ The Policy follows in the wake of EPA's enforcement actions related to RINs generated by Clean Green Fuel LLC and Absolute Fuels LLC.² EPA's Policy addresses invalid 2010 and 2011 RINs only, and is modeled upon EPA's settlement posture set forth to the Obligated Parties who used Clean Green and/or Absolute Fuels RINs on their 2010 compliance reports. As stated in the Policy, EPA intends to take a "more aggressive approach to violations arising from the use of [invalid] 2012 and later RINs."

EPA's Policy continues the focus on Obligated Parties who use invalid RINs for compliance purposes and, additionally, on any shortfalls on their compliance reports that may ensue. EPA will require that invalid RINs be removed from reports and be replaced with valid RINs, as well as require the payment of penalties. There is no reference to penalties or enforcement for buying or selling invalid RINs.

The policy outlines the following approach. EPA will post information on its website when it has developed "sufficient proof" to warrant a public allegation of invalid RINs. EPA states, importantly, that the fact that EPA has not made such a public statement does not mean RINs are valid, and notes that EPA's decision process involves "fundamentally different issues" than the decision to purchase or use RINs. Once a company is aware that the RINs are alleged to be invalid by EPA, it will have 30 days to resubmit any reports on which the RINs are used for compliance purposes (a "use violation"). A separate and additional violation will occur if the company is not able to acquire sufficient RINs to meet its Renewable Volume Obligation (RVO) (i.e., a "shortfall violation"), which will most likely occur if a company runs afoul of the deficit provisions. The Policy allows for 120 days to retire enough RINs to make up for any such shortfall, and allows the RINs to be 2011 or 2012 biomass-based diesel RINs.

Penalties for each use violation will be \$0.10 per RIN, and penalties for each shortfall violation will be \$0.20 per RIN. Both types of violations will be separately capped at \$250,000. Additionally, the maximum penalties that any party will have to pay for any and all 2010 and 2011 RINs use violations will be capped at \$350,000; shortfall violations will be similarly capped. In conjunction with the penalties, a company will need to submit to EPA a "RIN Integrity Report" within one year that details efforts it is taking to ensure the RINs it uses are valid. Finally, EPA states that final resolution of any future 2010 and 2011 invalid RIN enforcement proceedings will be through an Administrative Settlement Agreement, and will most likely be finalized in early 2013.

¹ <http://www.epa.gov/compliance/civil/caa/fuel-novs.html>

² For further discussion on these enforcement actions, please see Sutherland's previous legal alerts: <http://www.sutherland.com/files/News/81049111-e3f6-4249-acfa-a1ee64986b82/Presentation/NewsAttachment/eda5ebd2-8f40-4aa3-a3d8-a2b5faa752b0/EPAIssuesNoticesofViolationoftheRFStoTwenty-FourParties.pdf>; and <http://www.sutherland.com/files/upload/EPAIssuesNoticeofViolationoftheRenewableFuelStandardforGenerationof48Million.pdf>.

The Energy and Environmental Practice Group at Sutherland has significant experience in representing parties regarding compliance with the Renewable Fuel Standard and before EPA's fuels division in enforcement proceedings.



If you have any questions regarding this issue, please feel free to contact any of the attorneys listed below.

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