



BRAZILIAN SUGARCANE INDUSTRY ASSOCIATION

ETHANOL • SUGAR • ELECTRICITY

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February 16th, 2017

RE: UNICA's Comments on "Renewables Enhancement and Growth Support Rule," (November 16, 2016)

Docket No. EPA-HQ- OAR- 2016-0041

To Whom It May Concern:

The Brazilian Sugarcane Industry Association ("UNICA") appreciates the opportunity to provide these comments on the proposed rule, entitled the "Renewables Enhancement and Growth Support Rule", published by the U.S. Environmental Protection Agency ("EPA") on November 16, 2016 ("Proposed Rule"). UNICA has generally supported efforts by EPA to increase the consumption of advanced biofuels in the U.S. under the Renewable Fuel Standard ("RFS") program, and Brazilian sugarcane has played a modest but important role in the success of that program. However, as described below, EPA's definition of "biointermediate" and the special provisions proposed for biointermediate producers in the Proposed Rule will have significantly adverse, unjustified and discriminatory impacts on Brazilian producers of sugarcane ethanol, effectively preventing the import and use of Brazilian sugarcane ethanol for compliance with the RFS in the future. UNICA respectfully requests that the EPA modify these provisions to reflect the manner in which sugarcane ethanol is produced in Brazil and imported into the United States for compliance with the RFS, and so allow Brazilian sugarcane ethanol to continue its key role in the RFS program.

UNICA is the largest representative of Brazil's sugar, ethanol and bioelectricity producers. Its members were responsible for about 50 percent of Brazil's ethanol production and 55 percent of Brazil's sugar production in 2015/2016 harvest season. UNICA's priorities include serving as a source for credible scientific and economic data about the competitiveness of sugarcane biofuels. UNICA also works to encourage the continuous advancement of sustainability throughout the sugarcane industry and to promote ethanol as a clean, reliable alternative to fossil fuels.

Brazil is the world's largest sugarcane producer and the second largest producer and exporter of ethanol with 26 percent of global production and 23 percent of world exports in 2015.¹ Despite these volumes, sugarcane ethanol production uses only 2 percent of Brazil's arable land² and reduces lifecycle greenhouse gas ("GHG") emissions by more than 100 percent³ compared to conventional gasoline. Also, thanks to our innovative use of ethanol in transportation and biomass for power cogeneration, sugarcane is now a leading source of renewable energy in Brazil, representing 15.7 percent of the country's total energy needs⁴. More than 40 percent of the country's gasoline needs were replaced by sugarcane ethanol last year.⁵ The industry also continues to expand existing production of other renewable products and, with the help of innovative companies here in the United States and elsewhere, is already offering bio-based hydrocarbons that can replace carbon-intensive fossil fuels and chemicals.

In the past, UNICA has supported many of EPA's decisions implementing the RFS program, and its members have provided significant volumes of sugarcane ethanol, an extremely low carbon advanced biofuel, to help obligated parties in the United States meet their RFS requirements. Hence, UNICA and its members play an important role in the ongoing success of the RFS program. UNICA recognizes the continued difficult position in which EPA finds itself with regard to the RFS program, given the lower than expected volumes of cellulosic and other advanced biofuels in the last few years, well below statutorily set volumes, and EPA's need to ensure enhancement and growth of the market for advanced biofuels. Indeed, UNICA has no issue with most of the Proposed Rule, including EPA's efforts to assist the few renewable fuel producers who may actually process their renewable fuel over multiple facilities by creating a new category of "biointermediates." However, those operations differ significantly from Brazilian sugarcane ethanol producers.

UNICA's main concern is with EPA's proposal to characterize undenatured imported ethanol, like sugarcane ethanol from Brazil, as a biointermediate product. We believe that such characterization does not fit the nature or production of Brazilian sugarcane ethanol fuel from which Renewable Identification Numbers ("RINs") have been generated, without any reported fraud, for the past decade. We also believe that if this rule were to be finalized as proposed, the goal of the RFS program of reducing GHG emissions by increasing the production of advanced fuels would be in jeopardy. The Proposed Rule will impose not only significant and costly obligations on UNICA's members but will also make compliance with the RFS's biointermediate requirements by UNICA's members practically infeasible. As a

¹ Percentages calculated by UNICA, based on LMC Report Data - Second Quarter 2016.

² Brazilian Institute of Geography and Statistics (PAM 2010, Censo Agropecuário 2006). Environment Ministry. National Institute for Space Research. Model Ag-LUE-BR (Gerd Sparovek. Esalq/USP).

³ Seabra, J. E. A., Macedo, I. C., Chum, H. L., Faroni, C. E. and Sarto, C. A. (2011). Life cycle assessment of Brazilian sugarcane products: GHG emissions and energy use. *Biofuels, Bioprod. Bioref.*, 5: 519–532. doi:10.1002/bbb.289

⁴ National Energy Balance (2015), published by Energy Research Company (EPE) - government agency linked to Brazilian Ministry of Mines and Energy.

⁵ National Agency of Petroleum, Natural Gas and Biofuels (ANP).

result, UNICA's members and other producers may be left with no choice but to decline to supply Brazilian sugarcane ethanol under the RFS program and look to other domestic and global markets instead. This will adversely impact the ability of importers and refiners to meet their RFS obligations as well as EPA to meet statutorily-set volumetric goals for advanced biofuels and total renewable fuels.

Given the potentially devastating impacts of this Proposed Rule to Brazilian mills, UNICA regrettably objects to and opposes these proposed changes to the RFS program as they pertain to Brazilian undenatured sugarcane ethanol. We urge EPA to provide in the final rule that the provisions on biointermediates do not apply to foreign produced undenatured ethanol, like Brazilian sugarcane ethanol, which is shipped to the United States for commercial purposes. The biointermediate provisions should only apply to truly "proto-renewable fuels," *e.g.* bio-oil,⁶ feedstocks specifically produced by an entity for further processing into renewable fuels at another specified facility. Indeed, the decision of EPA to define undenatured ethanol as biointermediate, after admitting that this type of product is mainly supplied by foreign producers, not by domestic producers, raise concerns that these proposed changes are not consistent with World Trade Organization ("WTO") disciplines.

I. EPA's Definition of "Biointermediate" Does Not Fit Undenatured Brazilian Sugarcane Ethanol

Ethanol derived from sugarcane has a well-established pathway under the RFS program. As a matter of fact, Table 1 to 40 CFR 80.1426, lists sugarcane as an approved *feedstock*, with ethanol as the *fuel type* and fermentation as the fuel process, and assigns a RIN D-Code 5 for the fuel. For the past decade, this approved and well-established pathway has been used to allow more than 2 billion gallons⁷ of sugarcane ethanol to enter the United States and to help EPA achieve the goals of the program. EPA has already ensured that foreign producers of renewable fuels, including Brazilian sugarcane ethanol producers, follow strict registration and recordkeeping procedures designed to ensure the integrity of the RINs generated through import of this fuel. Thus, EPA already enjoys significant oversight and enforcement roles to ensure that the RINs derived from Brazilian sugarcane ethanol are valid to fulfill the requirements of the RFS.

To understand the impact of EPA's proposals, it is important to clarify how Brazilian sugarcane ethanol is produced. Ethanol is produced from sugarcane juice through a fermentation and distilling process. The juice is first purified by various filtering processes until it is ready to be fermented and mixed with yeast. At this stage, the liquid is called fermented wine. The alcohol contained in the wine is recovered in distillation and rectification columns. Hydrous ethanol, the type used in flex-fuel vehicles in Brazil, is produced at this point. To obtain anhydrous ethanol, the type that is mixed with gasoline or used for flex-fuel vehicles in the United

⁶ 81 Fed. Reg., 81,828, 80,830 (Nov. 16, 2016).

⁷ EPA data from table and texts (EMST)

States, the liquid undergoes an additional water removal, or dehydration stage. Significantly, this entire process, from sugarcane to renewable fuel, takes place within a *single* mill. Brazilian sugarcane ethanol producers do not separate different parts of the process over several geographically distinct facilities. The entire procedure, from the arrival of the cane at the mill to the finished product, takes 15 hours. One ton of sugarcane yields about 22.5 gallons of ethanol. Ethanol produced in Brazil follows strict technical specifications and international standards.⁸ Significantly, ethanol production in Brazil is not dominated by a few large producers. Rather, most of the production is derived from many smaller independent operations.

Unlike practices in the United States, it is extremely rare for ethanol producers to immediately add denaturants to ethanol produced in Brazil. Instead, for Brazilian tax purposes, a coloring agent may be added to anhydrous ethanol to distinguish it from hydrous ethanol products. But there is no requirement to add denaturants during production. Hydrous ethanol from the mills is immediately available as transportation fuel and is used as such in Brazil. Clearly, the ethanol is a fuel and not a feedstock requiring further processing.

Denaturants are not added to Brazilian-produced ethanol, if at all, until long after the producer has relinquished custody of the ethanol to third parties, usually by importers at the U.S. port of entry. Brazilian export data corroborates this, showing that of the nearly 2 billion gallons of ethanol Brazil exported to the US in the last decade, none of the anhydrous ethanol was denatured.⁹ In fact, mills in Brazil have technical and infrastructural impediments to add gasoline as denaturant to ethanol in the agricultural/industrial setting. Mills lack the infrastructure to handle and add denaturant to ethanol, which would require segregated tanks specifically to store the product containing the denaturant. Other special infrastructure would also be needed to satisfy the Ministry of Labor requirement that workers will not handle or be exposed to hazardous materials like benzene. Hence, Brazilian sugarcane ethanol producers generally lack both the experience and infrastructure to handle denaturants for their products and are impeded from adding gasoline as a denaturant. In view of these circumstances, Brazilian sugarcane mills do not engage and have not engaged in the process of adding denaturants and generating RINs at the facility.

This process, with Brazilian ethanol producers shipping undenatured ethanol to the U.S., has been followed consistently since the RFS program was implemented. It is unlikely to change in the foreseeable future because it avoids costly complications for the mills and does not require new legislation to allow denaturing with gasoline nor does it require the expensive segregated infrastructure related to the production and handling of denatured ethanol in Brazil, as discussed above. The existing process also helps ensure RFS program integrity. Delaying generation of

⁸ Please see virtual mill video at: <http://english.unica.com.br/virtual-mill/>

⁹ Brazilian Ministry of Trade Aliceweb (requires free subscription)

RINs until the ethanol is imported results in fewer RINs transactions and, accordingly, fewer opportunities for potentially fraudulent transfers through the separation of RINs from the underlying ethanol or other means. Furthermore, through contractual arrangements, Brazilian sugarcane ethanol producers and the importers/RINs generators have developed mutually acceptable and well-established means of allocating the risks associated with invalid RINs and other potential losses, were they ever to occur. Thus, the current practices already give EPA the control and assurances over foreign production that it seeks with this proposed rule.

Therefore, Brazilian ethanol manufacturers, their products and technologies differ substantially from those cited in the rule as a reason for including biointermediate provisions. The Brazilian ethanol producing process does not involve “sequential” production of pre-processing feedstock at one facility and transportation to another nearby facility for the ultimate conversion to renewable fuel. Rather, the export to the United States is a finished product, not a feedstock. It is a liquid fuel that can be used, without further processing, for transportation. It is denatured before it is considered a renewable fuel for *U.S. purposes*, according to the Alcohol and Tobacco Tax and Trade Bureau of the U.S. Treasury Department.¹⁰ UNICA and its member companies believe that the addition of a denaturant does not constitute a new processing or a new product nor render the ethanol a feedstock. It is done only to ensure that the alcohol is not used for human consumption and clearly “marked” for use in automobile fuel tanks in the United States.

Denaturing doesn’t change the nature or structure of the ethanol or require further processing to make that fuel suitable for use. Rather, denaturing is only a transformation in regulatory terms – the imported anhydrous ethanol cannot be considered a renewable fuel *for purposes of the RFS* until it is denatured. But for the U.S. regulatory requirement for denaturing, the fuel would be suitable for commercial use. Hence, denaturing essentially results in a “mere ‘form change’” which does not constitute a biointermediate.¹¹

Further, unlike the two domestic companies cited in the Proposed Rule, Brazilian sugarcane ethanol production requires no sequential operations or co-processing over multiple facilities. UNICA members are companies who produce the renewable fuel at a single facility in Brazil, without any intermediate production. Buyers/importers at the port of entry simply add gasoline, the usual denaturant to the alcohol, to characterize it as a renewable fuel in order to comply with domestic laws.

There is also no reason to change or impose further regulation on Brazilian

¹⁰ 27 CFR parts 19-21.

¹¹ 81 Fed. Reg. at 80,834. Notably, EPA refers to domestic renewable fuel production that takes place at a single facility, including the purchasing and crushing of corn in a mill, and fermentation into alcohol. *Id.* at 80,833. This is precisely what occurs at Brazilian mills with sugarcane and fermentation.

sugarcane ethanol producers. While *domestic* producers of undenatured ethanol may not be currently subject to RFS requirements, the same cannot be said for foreign producers of sugarcane ethanol.¹² Of the 380 Brazilian ethanol mills, spread out all over the Brazilian territory, 208 are already registered with EPA¹³, following all the procedures established by EPA for foreign ethanol producers to register and provide the proper documentation to ensure that D5 RINs generated from the import of Brazilian ethanol are produced in accordance to the strict guidelines of the program.¹⁴ We have worked with EPA to ensure that the documents provided by Brazilian mills are in full accordance with the rules and we have no knowledge of any problem with the validity of RINs generated by importers of this fuel or the Brazilian producer's procedural compliance. The requirements in place are working and need not and should not be changed. Unlike the two domestic producers mentioned by EPA, there are no new production factors requiring amendment of the rules as they apply to Brazilian ethanol production and exports to the U.S.

Finally, the Proposal Rule itself does not characterize sugarcane ethanol as a biointermediate. EPA clearly states in the Proposed Rule that any feedstock listed in Table 1 to 40 CFR 80.1426 or in an approved pathway pursuant to 40 CFR 80.1416 is not a biointermediate.¹⁵ Sugarcane feedstock is listed in Table 1 to 40CFR 80.1426 and sugarcane ethanol has an approved pathway pursuant to 80 CFR 80.1416. Thus, EPA's characterization of foreign undenatured ethanol from sugarcane as a biointermediate conflicts with its own regulatory statements.

To address this issue, EPA should simply provide that the definition of biointermediate does not include undenatured sugarcane ethanol fuel that is subsequently imported into the U.S. and denatured. This exception will not alter the current status of foreign ethanol producers who remain obligated to register with EPA and do not generate RINs through their production. It would also allow EPA to provide the biointermediate provisions to the few domestic producers to which they should logically apply.

II. EPA's Proposed Regulation of Numbers of Parties Allowed to Make a Biointermediates is Not Compatible with Brazilian Ethanol Production Practices Which Involve Multiple Producers

If this rule were to be finalized as proposed, Brazilian sugarcane ethanol would most likely not be able to be supplied to the U.S. market. EPA's paradigm of one facility producing biointermediate feedstocks for a single renewable fuel

¹² *Id.* at 80,834.

¹³ Part 80: Fuels Program List: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/registered-companies-and-facilities-fuel-programs>

¹⁴ EPA recognizes that foreign ethanol producers must register with the EPA in a manner similar to renewable fuel producers. 81 Fed. Reg. at 80,834.

¹⁵ *Id.*

producer may be true for some domestic entities, but it does not fit the customary Brazilian practice where an importer may secure undenatured sugarcane ethanol from multiple producers in Brazil. Hence, the provisions proposed by EPA to ensure oversight over biointermediate producers only results in unjustifiably limited and harmful barriers to Brazilian ethanol producers.

First, the rule would require that the processing of a feedstock into a biointermediate could only occur in a single facility before being transported to a renewable fuel production facility; only two parties would be involved in the transformation of the feedstock.¹⁶ By imposing such requirement, EPA would essentially require each Brazilian mill and importer to segregate a given product until it reaches the U.S. port of entry. As UNICA explained in comments to a similar proposal in 2013, this is not the established commercial practice. Brazilian ethanol export volumes are composed of ethanol from a large number of different smaller mills. For logistical reasons and to increase efficiency, ethanol from multiple mills is typically comingled at intermediary storage facilities for transport to the United States. The volumes are combined and not segregated or separately tracked.¹⁷ Notably, this practice has gone on since the beginning of the RFS program and has not led to any problems with RIN fraud, given the stringent controls placed upon foreign ethanol producers and EPA's ability to track and enforce compliance.

Limiting a transaction to only two parties for the provision of ethanol to the United States as a renewable fuel under the RFS will simply not be feasible in Brazil. It would require the exclusive use of trucks to transport the ethanol from each of the many mills directly to the port of exit, in either Santos or Paranagua, because other transportation options all involve the comingling of ethanol from different facilities. Such a requirement would also force the use of segregated storage at the ports of exit which would be extremely costly, currently impractical, and may prove technically infeasible.

In order to ensure efficient transportation from Brazil to the United States, sugarcane ethanol is always stored in tanks at the port of exit until there is sufficient capacity to fill a transport vessel. However, the tankage capacity in ports of exit is limited and it is highly unlikely that there are sufficient segregated storage tanks available to separately accommodate the many mills that currently produce ethanol that is exported to the United States. It would also be economically unfeasible to transport partially filled ships from Brazil to the United States. Because many of the transportation costs are fixed, ethanol producers are likely to be charged a much higher per-unit price for transportation, which could reduce or even altogether eliminate any relatively narrow margins that are associated with exporting the ethanol to the United States. In the same manner, the GHG emissions associated with transporting ethanol from Brazil to the United States are largely fixed, and

¹⁶ *Id.* at 80,837.

¹⁷ UNICA's comments on "Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards," Docket EPA-HQ-OAR-2012-0401 (July 15, 2013).

transporting at less than full capacity will increase the per-gallon GHG emissions for the shipment. Again, this inefficient transport directly contravenes the primary GHG reduction goals of the RFS2 program and was not taken into account in EPA's assumption that GHG implications of the rule would be minimal.¹⁸

Finally, the segregation requirements would also impose higher costs on importers, who would have to supply the equipment at port, contract with many individual entities, and bear the costs, obligations and liabilities for the performance of those multiple mills. Faced with these burdens, an importer may no longer find it cost effective to import Brazilian sugarcane ethanol, especially since the market operates on such narrow margins.

Ultimately, there is no reason to establish such a draconian limitation on Brazilian exports of sugarcane ethanol. While the two-party limitation may make sense for the few domestic entities involved in biointermediate feedstock production and make it easier for EPA to track transactions, it would severely harm Brazilian producers for no justifiable reason. We therefore request that EPA not apply this limitation to Brazilian undenatured sugarcane ethanol, which it could simply accomplish by not defining this product as a biointermediate in the first place.

III. Additional Registration, Recordkeeping and Reporting Requirements for Biointermediate Producers are Unnecessary, Cost Prohibitive for Brazilian Sugarcane Ethanol and a Create a Barrier to Trade

Brazilian sugarcane ethanol producers are already registered with EPA¹⁹ and verify and provide records to their clients/importers and EPA, assuring that the fuel delivered to the U.S. port is made from a feedstock that meets the definition of renewable biomass. The registration information EPA is requesting for biointermediates already exists in the EPA system and Brazilian mills update it every three years, as required by law. EPA recognizes this and simply assumes that it can place the same types of requirements on foreign producers of (what it considers) biointermediates that it imposes on foreign ethanol producers.²⁰

However, assuming undenatured ethanol can even be a biointermediate, there are aspects of the proposed requirements on biointermediate producers that could cause special problems to Brazilian ethanol producers. First, EPA would require intermediate producers to identify in their registration the renewable fuel producers that intend to use their product. This is very problematic for Brazilian producers, since at time of registration, a mill may not necessarily know who will be the buyer/importer of its product.

¹⁸ 81 Fed. Reg. 80,835.

¹⁹ Part 80: Fuels Program List: <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/registered-companies-and-facilities-fuel-programs>

²⁰ 81 Fed. Reg. at 80,834.

Similarly, since ethanol supplies from multiple mills are generally added together for export, it is unclear how Brazilian mills would be able to specify to EPA the renewable fuel facility where denaturant will be added to their batches of ethanol. By providing this requirement, EPA is assuming that a mill would know in advance who in the market place is going to buy/import its product and add denaturant. This is not how the market is structured in Brazil, and imposing this requirement would fundamentally alter existing commercial practices and relationships without adequate justification.

The new reporting and recordkeeping requirements proposed in this rule for biointermediates would also be cost prohibitive for Brazilian mills. By requiring quarterly reports to be submitted to EPA by every purported producer of a biointermediate, the agency is only increasing the amount of work and cost for Brazilian mills -- and for the Agency itself. Currently, while a mill must send documentation to a buyer attesting that the biomass is renewable, it only needs to send registration reports to EPA every three years. Thus, EPA significantly increases the reporting burden on hundreds of mills. Moreover, the reports that the mills file already include the information EPA is requesting. Increasing the frequency of the reports does not necessarily guarantee a more precise monitoring by the EPA, just burdensome paperwork.

The Proposed Rule would also require the ultimate customers of the sugarcane ethanol, the renewable fuel producers, to specify the party from whom the biointermediate was purchased. This could create significant burdens to the renewable fuel producer since it may be purchasing ethanol collected from multiple producers in Brazil, and it may lack information as to each product included in the import. Every additional burden on the ultimate customer creates a cost to the transaction and can make the export of sugarcane ethanol economically prohibitive.

There is simply no reason that EPA needs to change the current compliance obligations for foreign ethanol producers without some proof that these obligations are not working or that there is a need to protect program integrity. EPA simply assumes it can impose the same requirements on companies as either producers of biointermediates or ethanol fuel producers, but these requirements are not identical, given the different nature of Brazilian ethanol production and export. The limitations added for biointermediate producers make it cost prohibitive for Brazilian ethanol producers.

IV. Product Transfer Documents Requirements Would Adversely Impact Foreign Ethanol Producers

Brazilian sugarcane ethanol producers already transfer to importers with each shipment the same types of documents that EPA is proposing for producers of

intermediates.²¹ Requiring the mills to transfer documents to the parties denaturing their products, however, would be new and extremely burdensome. As previously mentioned, mills and importers have developed mutually acceptable and well-established means of allocating the risks associated with invalid RINs and other potential losses, were they ever to occur. EPA offers no justification why these relationships and practices should be changed, which would come at cost to both entities. EPA's proposal creates the same problems for Brazilian mills as noted above. These mills generally do not know who will ultimately be denaturing their products, which are commingled in overall shipments. It would be infeasible to require each Brazilian ethanol producer to ensure the party that ultimately denatures the product has its specific product transfer document.

EPA should continue to apply existing RFS requirements on foreign producers of denatured ethanol and not the proposed biointermediate provisions on transfer documents.

V. EPA Should Clarify Its Proposal On Prohibited Activities and Liabilities in Cases Where a Biointermediate is not a Valid Feedstock

UNICA is uncertain how EPA's proposal on prohibited activities may affect its members.²² To the extent EPA is prohibiting foreign ethanol producers from producing product for a renewable fuel producer that is not identified in the former's registration, UNICA would have the same concerns as set forth in section III – Brazilian mills may not know the identity of the ultimate importer when it produces its product. To the extent the requirement only prohibits the production of feedstock from a process not described in the registration, the provision is less problematic. EPA should clarify this issue. In any event, for the reasons stated above, UNICA does not believe such a prohibition is even necessary for its members because their products should not be classified as biointermediates.

VI. Attest Engagements for Biointermediate Producers May Be Problematic for Brazilian Ethanol Producers

EPA proposes attest engagements for biointermediate producers that it considers similar to those currently applicable to foreign ethanol producers. Under the latter requirements, Brazilian mills must re-register every three years, which requires hiring certified auditors who ensure that the procedures and documents of shipments are in accordance to EPA RFS requirements. UNICA and its member companies are concerned however, with the changes that EPA is proposing relating to independent auditors, including requiring certification every year. Contrary to EPA's assertions, there is currently a lack of qualified professionals and companies who can perform these audits in the Brazilian market. By making the requirements more frequent and more restrictive EPA is making it even more difficult, if not impossible, for Brazilian mills to comply with the requirements of the RFS program

²¹ *Id.* at 80,838.

²² *Id.* at 80,840

and sell its products. EPA is proposing the following changes for third party auditors: 1) Not having conducted research, development, design construction, or consulting services for the producer within the last three years; 2) Not providing business or consulting services for the producer for a period of at least three years following submission of the final QAP audit for the producer; 3) Ensuring that all personnel involved in audit activities for a specific producer do not accept future employment with that producer for a period of at least three years following submission of the final QAP audit for the producer. In many cases, since the number of companies that employ these professionals is so few in Brazil, they have necessarily provided some type of consultancy or service (i.e. triennial review) for the mills that export ethanol to the US market. We also find troublesome the requirement that such professional cannot accept employment from a party who may have hired their services in the past. We are certain that such discrimination would necessarily cause problems in the labor courts of Brazil.

EPA should continue to apply existing RFS requirements on foreign producers of denatured ethanol and not the proposed biointermediate provisions on attesting.

VII. Mandatory Quality Assurance Plans During an Uncertain Interim Period Makes Compliance Costs Prohibitive for Brazilian Ethanol Producers

EPA proposes that in order for a renewable fuel producer to generate a Q-RIN, both the biointermediate producer and the renewable fuel producer must have an EPA-approved pathway-specific Quality Assurance Plan (QAP) in place on an interim basis.²³ Such a requirement, if imposed on Brazilian producers of undenatured sugarcane ethanol, could be infeasible and cost prohibitive for many of the same reasons described above.

Brazilian mills today use approved pathway-specific QAPs when demanded by contract by a client. The cost of such compliance is worked out in the price under the contract. By requiring a mandatory EPA-approved QAP for each shipment of ethanol to the United States, EPA is forcing mills to add this cost of compliance to its operation. EPA also acknowledges that the interim period may extend beyond the January 1, 2018 date, so the obligation of a QAP would be extended as well. Given the constraints in resources at EPA, the interim period may be extended for years to come, which means UNICA members will have to bear the cost of compliance if they want to sell to the United States for the foreseeable future.

To make matters more difficult for UNICA's members, EPA is proposing to add more restrictive requirements for third party independent engineers and auditors, as mentioned above, making it almost impossible for Brazilian mills to find qualified professionals to perform these tasks. Given the current limited market of engineers and auditors qualified to attend to EPA's requirements, many engineers

²³ *Id.*

and auditors perform services for the same mills year around. By setting limits to restrict service performed or to be performed, it will be extremely hard to have qualified people to perform the task.

We do not believe there is sufficient justification or need to require Brazilian sugarcane ethanol producers to meet these obligations to ensure program integrity and prevent RIN fraud. Brazilian mills already are subject to strict requirements that help ensure the RINs derived from their fuel are valid. To the extent mills and buyers wish to further negotiate QAPs to qualify for Q-RINs, that is a matter best left to the commercial relationship. EPA's mandatory requirements will simply add costs that could make these transactions economically impractical. We urge EPA to reconsider these proposed changes, at least as to foreign producers of undenatured ethanol, as they will have a prohibitive effect on compliance especially for markets outside the United States.

VIII. Foreign Biointermediate Producer Requirements Will Dramatically Limit the Availability of Brazilian Sugarcane Ethanol that Can be Exported to the United States

Since the RFS program began, the EPA, through its regulations, has required a logical, reasonable, and workable approach where RINs associated with Brazilian sugarcane ethanol have been generated by importers at the port of entry to the United States, and not in Brazil by the producers themselves. As a result, while Brazilian sugarcane ethanol producers are subject to numerous requirements under the RFS program, for good reason they have not specifically been subject to the requirements of 40 C.F.R. § 80.1466, which currently applies only to "RIN-generating foreign producers and importers of renewable fuels." See 40 C.F.R. § 80.1466. One of the primary reasons that Brazilian sugarcane ethanol producers do not generate RINs is that only denatured ethanol is eligible to generate RINs under the RFS2 program. See 40 C.F.R. § 80.1101(d)(3) ("Ethanol covered by this definition [of renewable fuel] shall be denatured as required and defined in 27 C.F.R. parts 20 and 21. . . ."). Thus, until ethanol is denatured, it is not considered a renewable fuel under the RFS program and, consequently, cannot generate RINs.

As EPA states in the Proposed Rule, the Agency is "proposing that foreign biointermediate producers have similar requirements as foreign renewable fuel producers as described in 40 CFR 80.1866."²⁴ Thus, it is EPA's intent that all of the requirements that currently apply to the importers of Brazilian sugarcane ethanol who generate RINs would apply equally to the hundreds of Brazilian sugarcane ethanol mills that produce the ethanol. However, as discussed above, because of the many intermediate steps between ethanol production and RINs generation for Brazilian sugarcane ethanol, these requirements will prove extraordinarily challenging for ethanol producers and, in many instances, may prove infeasible as a practical matter. Among the most significant challenges that the requirements

²⁴ *Id.* at 80,840.

included in 40 C.F.R. § 80.1466 will pose for Brazilian sugarcane ethanol producers are the segregation of ethanol from mill to port and the bond requirement. We have explained in detail above that a segregation requirement for Brazilian mills is unfeasible from a logistical and economic stand point.

Applying this new bonding requirement to Brazilian sugarcane mills will also add a substantial new cost that many mills may not be able to bear. While some associate the Brazilian sugarcane industry with large integrated companies, much of the ethanol sent to the United States comes from small, independent producers. These bonding requirements will have the effect of pricing the small, independent producers out of the export market and will also create a significant barrier to entry for new mills. The new proposal of not allowing bonds to be paid directly to the U.S. Treasury Department may also cause difficulties for smaller parties that can not contract bonds from private banks. These disproportionate impacts on small businesses raise significant equity and social justice concerns that must be carefully considered by the Agency. Moreover, EPA fails to fully consider whether these substantial bonds are necessary to protect against RINs fraud from Brazil. Yet, as stated below, there is no evidence of RINs fraud related to Brazilian sugarcane ethanol, and, given the other RFS documentation and monitoring regulations applicable to sugarcane ethanol production in Brazil, there is no apparent need to increase the bonds for these feedstocks.

EPA's primary justification for expanding the scope of 40 C.F.R. § 80.1466 to all foreign biointermediate producers, regardless of whether they generate RINs, is an apparent but generalized concern that there is a heightened risk of RIN fraud among foreign producers. However, this purported justification demonstrates that the proposed rule is nothing more than a solution in search of a problem. There is no historical evidence of RINs fraud associated with Brazilian sugarcane ethanol or that EPA's proposed solution would address any hypothetical concerns. The best defense against RINs fraud is not to expand regulatory requirements further upstream to foreign producers, but to push RINs generation further downstream to limit the number of RINs transactions that could separate RINs from the underlying fuel and permit fraud to occur. In other words, continuing the current practices of generating RINs at the port of entry and transferring Brazilian sugarcane ethanol and the associated advanced biofuel RINs in the same transaction are the best defenses against RINs fraud, not proposing to unnecessarily regulate the industry in Brazil.

Again, the simplest way to address these concerns is to make it clear that foreign biointermediate producer requirements do not apply to foreign producers of undenatured ethanol that is shipped to the U.S. for denaturing. These cost prohibitive requirements will not adversely impact the numerous small Brazilian mills if they are not considered biointermediate producers, but rather are governed by the current regulations applying to foreign ethanol producers.

IX. EPA's Proposed Rule Imposes Obligations on Foreign Biointermediate

Producers That Are Inconsistent with US Obligations under the WTO

The United States is bound by its international legal obligations under WTO rules to ensure that it does not discriminate against imports and does not take measures that restrict trade more than is necessary. Under Article III:4 of the General Agreement on Tariffs and Trade (“GATT”) 1994 and Article 2.1 of the Agreement on Technical Barriers to Trade (“TBT”), the United States must accord foreign-produced renewable fuels with treatment no less favorable than that accorded to domestically-produced renewable fuels. Further, under Article 2.1 of the TBT Agreement, the United States must ensure that its technical regulations are not more trade-restrictive than necessary to fulfill legitimate objectives. In addition, under Article XI:1 of the GATT, the United States is prohibited from imposing measures that act as quantitative restrictions on imports.

A panel of the WTO would most likely find that the requirements of the Proposed Rule as they apply to foreign ethanol producers would violate these legal obligations. In particular, the following three provisions would be vulnerable to challenge under WTO rules: (i) the requirement that foreign producers of undenatured sugarcane ethanol meet obligations only reasonably applicable to true intermediate “proto-renewable fuels;” (ii) obligations that impose differential and unreasonable obligations on foreign ethanol producers, such as limits on facilities and requirements to specify before-hand renewable denaturant adders and fuel producers; (iii) applying stricter and more expensive foreign biointermediate producer requirements, such as bond provisions, than applied to domestic producers of biointermediates, without adequate justification. The Proposed Rule, if adopted and applied, would discriminate against Brazilian ethanol, be more restrictive of the ethanol trade than is necessary, and act as quantitative restrictions against Brazilian ethanol. Individually and cumulatively, they would also discourage the import of Brazilian ethanol by making the product more expensive, and thus less competitive against domestically produced advanced biofuels.

It would be difficult for the United States to defend these provision based on environmental objectives, as these provisions would apply arbitrarily to Brazilian ethanol imports, despite the environmental benefits that accrue from using Brazilian ethanol instead of non-renewable fuels. Since Brazilian sugarcane ethanol is already subject to existing EPA RFS controls, EPA has not demonstrated why additional obligations are necessary to ensure program and RIN integrity. EPA would have particularly difficulty justifying any of these changes on the basis that they are necessary to assist a limited number of true domestic biointermediate producers. EPA even acknowledges that it is not usual domestic practice to produce undenatured ethanol,²⁵ so its characterization of such a product as a biointermediate imposes obligations and costs that would have no domestic analogue. In essence, EPA is creating barriers to foreign trade in order to help two

²⁵ *Id.* at 80,834 (“Unlike domestic producers, foreign ethanol producers typically do not denature their ethanol product . . .”)

domestic producers. EPA can avoid these issues by not considering denatured sugarcane ethanol to be a biointermediate.

Conclusion

UNICA appreciates the efforts EPA has been making to ensure that the RFS reach its statutory goals. We have been actively involved and very committed to helping the United States reach these goals and wish to continue to do so. While the biointermediate approach may be an appropriate solution to ensure that some domestic companies provide advanced biofuel to the RFS, it is not an appropriate approach for undenatured sugarcane ethanol from Brazil for the many reasons we have set forth above. Sugarcane ethanol production and trade is a robust and well-established operation. We have been trading the fuel with the United States for decades and this trade has not only helped entities comply with RFS, but has allowed EPA to set increasing volumes for advanced and total biofuels, thus meeting Congressional goals.

EPA has identified no reason for this situation to change. We believe EPA can avoid this unintended result by simply excluding foreign undenatured ethanol as a biointermediate in its final rule, and we respectfully ask that it do so.

Respectfully Submitted,



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