PETROLEUM MARKETERS ASSOCIATION OF AMERICA
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PMAA Priorities Report December 2019

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***** Bold means the issue has been updated.**

Top Issues

- **CDL Driver Shortage: Focus on Expanding the HOS Short Haul Exemption**

The Federal Motor Carrier Safety Administration (FMCSA) is set to issue important hours of service reform regulations in early 2020.

PMAA has been actively involved with the FMCSA over the past few years on this issue including highlighting its support during the annual DC Conference and Day on the Hill. The FMCSA proposed changes are designed to provide regulatory relief to motor carriers and CDL drivers. PMAA met with top FMCSA regulators, submitted written comments on the rulemaking and successfully had several key changes important to petroleum marketers added to the proposed rule. The four changes in the proposed rule that are important to petroleum marketers include:

- **Expand the current 100 air-mile radius limitation in the short-haul driver exception to recording daily to 150 air-mile radius.**
- **Extend the 12-hour daily maximum on-duty period for CDL drivers operating under the short haul exception to a maximum 14 hours on-duty.**
- **Add two hours onto the 14- hour daily maximum on-duty status for CDL drivers operating under the adverse weather exception. The adverse weather exception currently extends the 11-hour maximum daily driving limit by 2 hours due to bad weather but does add 2 hours onto the 14-hour maximum daily on-duty time to accommodate for the longer driving time.**
- **Allow CDL drivers to interrupt the clock on their 14-hour maximum daily on-duty time for up to 3 hours, for loading and unloading activities, provided the driver goes off-duty for the length of the interruption and takes 10 consecutive hours off at the end of the work shift.**

PMAA told the FMCSA that it supports the proposed changes and requested that the break in on-duty time for up to three hours apply to CDL drivers who are required to remain on-duty during waiting periods at petroleum terminals. The changes are expected to add flexibility to driver scheduling and provide some relief to the chronic shortage of qualified CDL drivers. The final rule is expected to be published early next year.

Meanwhile, the Federal Motor Carrier Safety Administration (FMCSA) is set to announce a two-year delay to its Entry Level Driver Training (ELDT) Rule scheduled to go into effect February 7, 2020. The ELDT rule is controversial in the petroleum marketing industry because it requires rigorous new training requirements for both CDL license applicants and current CDL holders seeking a license upgrade. The new requirements will make it more difficult to obtain and renew a CDL, discourage new applicants from applying for a CDL and, as a result, contribute to the shortage of CDL drivers already occurring nationwide. Click here to view the full PMAA Regulatory Alert.

- **Unfair EV Charging Infrastructure Initiatives/EV Tax Credit**

In a major victory for PMAA, the tax extenders package that passed in December did not include an extension of the $7,500 electric vehicle tax credit. PMAA adamantly opposed the EV tax credit extension during its "DC Conference/Day on the Hill" and also wrote in opposition earlier this year. According to a recent study, the EV tax credit alone would cost taxpayers as much as $15.7 billion, and it would only benefit a few companies who have already hit their EV targets as well as individuals making over $100,000 per year. The Trump Administration warned lawmakers if they tried to include the EV credit in the extenders package, it could kill the whole deal.

PMAA also signed onto letters from AFPM and API to Senate tax writing Committee leadership opposing any extension or expansion of the electric vehicle (EV) tax credit. PMAA's strong and urgent messaging to Congress and the media includes:

- **Allowing utilities to use their rate base to pay for EV infrastructure expansion gives utilities a huge and unfair competitive advantage over marketers and others who must economically justify at risk investments in new equipment such as EV charging stations.**
- **Granting a de facto monopoly to utilities unfairly competing in the marketplace could ultimately put small business petroleum marketers out of business.**
- **Not only do poor and middle-class ratepayers subsidize the wealthy's luxury buying power to purchase expensive EVs, they pay again with the tax credits subsidies.**

Additionally, the Fuels Institute recently released a literature review of the environmental impact of electric vehicles as compared to an internal combustion engine titled "Supercharged: The Environment Impact of Electric Vehicles" in the context of the life-cycle of electric vehicles (EVs) including manufacture, distribution, use, longevity, and disposal. It summarizes results of studies on emissions reduction by EVs over internal combustion engines (ICEs). The report notes that while an EV does not have tailpipe emissions, its production and operation still produce significant global climate change emissions due to such factors as the source of electricity charging the battery, energy usage and the efficiency of the vehicle, and manufacturing and production. Overall the report concludes that there are numerous variables that drive the environmental impacts and that "there is no consensus break-even set of conditions that need to occur in order to realize the environmental benefits that the public attributes to the adoption of EVs." Click here to download and access the review.

Finally, in a New York Times op-ed, Senate Minority Leader Chuck Schumer (D-NY) said that if the Democrats win the Presidency and the Senate in 2020, he will introduce a $400 billion cash-for-clunkers style program to end the existence of the internal combustion engine (ICE) and switch to an all-electric future. Vouchers would start at $3,000 to trade in HCEs for EVs, plug-in hybrids and hydrogen fuel cell vehicles. Lower income households could expect a larger trade-in amount. He also said that the legislation would spend $45 billion in new grants to encourage the use of EV charging infrastructure and $17 billion to transform the U.S. manufacturing sector to produce EVs. By 2040, all ICEs would be off the road. The total cost would be $454 billion over ten years, according to his office.

- **RFS Reform, E15 Description/Labeling**

PMAA continues highlighting the need to reduce the RFS corn ethanol mandate since it has led to an unlevel playing field in the retail marketplace and placed petroleum marketers in a precarious situation. **In late November, PMAA sent comments into the EPA on its RFS supplemental notice of proposed rulemaking. PMAA urged EPA to take no action in the rulemaking that would increase corn-based ethanol mandate beyond 9.7 percent projected gasoline demand. Specifically, PMAA told the EPA that it has no position on the small refinery exemptions (SREs). However, PMAA opposes any reallocation of displaced gasoline volumes lost to SREs if it would result in a total corn ethanol RVO greater than 9.7 percent of projected customer demand as determined by the Energy Information Administration (EIA). Reallocating displaced ethanol volumes would likely create undue speculation and disruption to retail motor fuels markets. Click here to read the comments.**

PMAA also took the following actions:

- **PMAA worked with Reps. Flores (R-TX) and Welch (D-VT) in introducing bipartisan legislation known as "The Food and Fuel Consumer Protection Act," (H.R. 2540) which would cap the ethanol mandate at 9.7 percent of projected gasoline demand.**
- **PMAA continued to remind the EPA about serious UST system compatibility issues with ethanol blends over E10 relating to pipe dope and sealants. At PMAA's request, the EPA's Office of Underground Storage Tanks issued a statement indicating that much of the existing pipe dope on the market is not compatible with E15.**
- **PMAA submitted a proposal to the National Conference on Weights and Measures (NCWM) that asks the ethanol industry to be transparent about the fuel being advertised and sold and not let price alone drive a consumer's decision by adding the term E15 to any brand name such as "unleaded 88 E15."**

- **CAFE Standards -- Rolling Back Obama-era Fuel Efficiency Rules**

In December, the Trump Administration announced that it will be finalizing its new Corporate Average Fuel Economy (CAFE) Standards rule sometime next year. The rule is expected to require a 1.5 percent annual increase in the fleet-wide efficiency of new automobiles starting in the 2021. Current regulations set by the Obama Administration require a mile-per-gallon average of roughly 50 miles per gallon by 2025. However, last year, the Trump Administration proposed capping that requirement at a 37-miles-per-gallon average after 2020.

PMAA has submitted numerous reasons why current MPG standards could harm petroleum marketers and how important it is that the Trump Administration's proposed rule is adopted. Click here to read the comments.

- **Reducing UST Compliance Costs**

PMAA member states are advised that the October 13, 2018 deadline is in effect for complying with the remaining underground storage tank (UST) requirements in the 2015 revised UST regulation *for non-SPA states.*

PMAA Regulatory Counsel has drafted a **regulatory report** on what that means for the states with program approval and the states without program approval. While the EPA won't extend the compliance deadline, they have agreed to delay its enforcement in the event there is a shortage of contractors or equipment. The EPA said enforcement discretion would be given to those tank owners showing a "good faith effort" to comply by the deadline but are unable due to equipment or contractor shortage. Click **here** to read EPA's response to lawmakers. Evidence of a good faith effort would be having a contract for compliance work in place by the October 13, 2018 deadline. It is important to understand that the October 13, 2018 deadline only applies in some states. Several states also have adopted a compliance deadline after October 13, 2018. Click **here** for more information on EPA's state UST program webpage. The EPA's UST regulations allow states with UST program authority to adopt the October 13, 2018 federal compliance deadline or establish their own deadline any time thereafter, but no later than October 13, 2021. The remaining states must enforce the October 13, 2018 deadline.

PMAA continues to work with the EPA and industry standard groups to develop guidance that offers additional compliance flexibility to states that choose to adopt them. PMAA is working on the development of a new ASTM industry standard that relies solely on visual inspection of sumps. The visual test method is less expensive and more effective than existing hydrostatic and pneumatic sump test methods. Visual inspections would be carried out annually by third-party certified inspectors. Once the visual sump test standard is approved by ASTM, it would qualify as an approved test method under the EPA's 2015 UST amendments.

Meanwhile, EPA's Office of Underground Storage Tanks (OUST) issued guidance for PMAA's alternative low-level liquid hydrostatic testing for UST containment sumps used as secondary containment. The new guidance puts EPA's stamp of approval on the PMAA low liquid level alternative testing method that will encourage states to adopt it as well. PMAA developed this test as an inexpensive alternative to the EPA's hydrostatic test method for containment sumps which requires costly high-level liquid testing. Publication of the EPA guidance is important because it clears the way for PMAA's alternative test method to be approved for use by state UST program regulators.

Click **here** for EPA Low Liquid Level Containment Sump Test Procedures
Click **here** for EPA Low Liquid Level Containment Sump Test Compliance Form.

PEI issued their 2019 updated recommended practice RP1200: Testing of UST Spill, Overfill, Leak Detection and Secondary Containment. The updated RP includes the PMAA alternative methods for testing containment sumps; however, PEI made significant modifications to the procedure. PMAA submitted comments on this revision and held a conference call to review and make recommendations in November.

- **Diesel Fuel Quality**

PMAA's ULSD Corrosion Task Force and Motor Fuels Committee has been participating in diesel fuel quality surveys spearheaded by the Fuels Institute's Diesel Fuel Quality Council which is studying the relationship between diesel fuel quality and modern high-pressure common rail diesel engines, identifying possible issues with that relationship, and evaluating the viability of potential solutions.

The Diesel Fuel Quality Council met at Detroit Diesel's offices and manufacturing facility on October 29th. The council is working on several diesel fuel quality related projects. The diesel engine survey was initiated early this year to collect information about engine failures and the potential causes with a specific focus on fuel related failures. Data collection by the survey has been limited and the data collected so far is insufficient to determine any trends or draw any conclusions. The group decided to leave the survey open for the time being and pursue a more qualitative approach by contacting organizations directly and conducting phone interviews.

The second project is the development of best practices for the handling of diesel fuel. Draft best practices have been developed for loading at a terminal and unloading at a dispensing site and storage at a dispensing site. These draft best practices were sent out to the council for review and comment. Comments have been forwarded to the authors of the two best practices for review and revisions to the draft best practices.

The final project is a fuel sampling study. A preliminary scope has been developed and was discussed by the group. The approach will be to take samples of diesel from dispenser nozzles and tanks representative of diversity of sites, geography and climate. Diesel fuel samples will be analyzed for a series of parameters considered to impact the quality of the fuel and engine operation. The hope is to work with companies that already take periodic samples to obtain samples for the study. Initial estimates of the cost for the sample collection were reviewed and discussed. A task group is working on finalizing recommendations for scope to include the number, location and frequency of samples and the analytical parameters.

PMAA Environmental and Technical consultant, Jim Rocco, provided the marketer's perspective on diesel fuel quality noting that marketers are limited by the quality of the diesel fuel that is provided by their supplier and that they expect the diesel fuel provided to meet all applicable specifications. He also provided an overview of practices used at marketing facilities to monitor diesel fuel quality. It was clear from the presentations that each segment has its concerns and issues with diesel fuel quality as it moves through the supply chain. It was also recognized that there is no simple solution or one segment of the supply chain that is solely responsible for diesel fuel quality.

- **Infrastructure and Funding Issues**

It is possible that Congress could consider an infrastructure package in 2020, especially if they can get past the "pay-fors" that have been a huge stumbling point. In December, Senate Finance Chairman Chuck Grassley (R-IA) said that a five-year surface transportation could be on the Senate floor next year since his staff are finalizing a set of transportation pay-fors that could enable Senate Majority Leader Mitch McConnell (R-KY) to bring a highway program to the Senate floor soon after the Trump impeachment trial ends. Grassley is considering putting together a tax package that will raise $113 billion.

Senate Republican Conference Chairman John Barrasso (R-WY), who chairs the Environment and Public Works Committee, said his committee's highway bill, (S. 2302) could come to the floor soon. In all, $287 billion would be authorized as the $113 billion in extra pay-fors would augment taxes that already support surface transportation programs.

Of particular concern for PMAA, Section 1401 of Barrasso's *America's Transportation Infrastructure Act (ATIA)* would create a $1 billion grant program for states to deploy electric vehicle, hydrogen and natural gas vehicle charging stations along designated alternative fuel corridors. PMAA is concerned that the grant program does not provide for the equitable distribution of funds or account for other investment required for infrastructure changes that may be needed to accommodate EV and alternative fueling equipment such as upgrades to site utilities, adding land, and

expanding paved areas and operating costs. In addition, the focus on alternative fuel corridors will result in a preference for grants to companies that have multiple sites distributed along major transportation routes. As with other grants for alternative fuels, small to medium c-stores will be placed at a competitive disadvantage.

On the House side, Transportation and Infrastructure Committee Chairman Peter DeFazio (D-OR) said this week that progress on the highway bill shouldn't be delayed by the January Senate impeachment trial. DeFazio supports a short-term gas tax increase as a bridge to solve the nation's infrastructure funding woes given that a national shift to a vehicle miles traveled (VMT) is unlikely to be feasible for another decade. A VMT is a user fee based on miles traveled that can possibly be tracked by phone apps, in-car diagnostic systems or by other means. DeFazio also re-iterated that he supports "de-fossilization" and will have "a major electrification title" in the House package and "resilient infrastructure provisions to protect roads, bridges, and other transportation infrastructure from increasingly severe weather events."

Meanwhile, a carbon tax campaign being pushed by a coalition of strange bedfellows that include major oil companies (ExxonMobil, Shell, BP Total), environmental groups, big corporations and former GOP lawmakers and economists is gaining traction. ConocoPhillips recently announced that it is joining the group known as the Climate Leadership Council which advocates for an escalating carbon tax on CO2 emissions starting at $40 a ton and increasing every year at 5 percent above inflation. The carbon tax would then be returned to American consumers through quarterly checks. The carbon tax would replace all current and future federal stationary source carbon regulations. The group argues that if it is implemented by 2021, the carbon tax will cut U.S. CO2 emissions in half by 2035 (as compared to 2005). Click here for more information.

- **Tax Extenders/Biodiesel Tax Credit**

Just before the holidays, the President signed a $1.4 trillion government spending bill along with a tax extender's package which included a retroactive extension of the $1 per gallon biodiesel blender's tax credit through December 31, 2022. A retroactive multiyear extension of the biodiesel blender's tax credit was a significant win for PMAA.

Also included in the tax package were:

- **The Oil Spill Liability Tax (OSLT) would be renewed on a prospective basis that will be effective starting January 1, 2020. The nine cents per barrel OSLT tax is imposed on crude oil at the refinery gate. Proceeds from the OSLT go into a trust fund used by the Coast Guard to pay for clean-up after accidents like oil spills. The effective date of the OSLT would apply on and after the first day of the first calendar month beginning after the enactment date of the tax extenders package. This represents a victory for PMAA after it urged Congress earlier this year to renew the OSLT on a prospective basis rather than making it retroactive.**

- **The Alternative Fuel Infrastructure tax credit would be retroactively renewed through December 31, 2020. Specifically, fueling equipment for natural gas, propane, liquefied hydrogen, electricity, E85, or diesel fuel blends containing a minimum of 20% biodiesel installed from December 31, 2017 through December 31, 2020, is eligible for a tax credit of 30% of the cost, not to exceed $30,000. The credit is available for on-highway use only. The IRS is preparing a one-time, 180-day claim period for retroactive claims back to January 1, 2018.**

- **The residential energy efficiency tax credit would be retroactively renewed through December 31, 2020 for water heaters, furnaces, boilers, heat pumps, building insulation, windows and roofs.**

- **The "Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019" is also included which is comprised of a number of relatively small improvements which taken together should improve the qualified retirement plan system. The Small Business Legislative Council will have a full report later.**

- **Permanent repeal of Obamacare's "Cadillac tax" on high-cost employer health plans, as well as the health insurance tax and medical device tax which were originally approved as part of the healthcare law to fund its coverage expansion.**

- **Placarding**

PMAA filed comments asking the Pipeline Hazardous Material and Safety Administration (PHMSA) to restore a cargo tank placarding provision important to petroleum marketers. Specifically, the provision allowed marketers to permanently attach a UN 1203 placard to cargo tanks for alternating loads of diesel fuel and gasoline rather than having to continually change placards between runs. The 1203 placarding provision stood for 35 years until PHMSA issued an interpretive letter in 2015 that limited permanent 1203 placards to straight loads of gasoline or split loads of gasoline and diesel fuel stored in separate compartments of the same load. In November 2015, PMAA petitioned the agency to undertake a rulemaking to restore the ability to placard to the 1203 provision.

Unfortunately, PHMSA failed to act on the petition for over a year until PMAA successfully lobbied Congress for legislation requiring the agency to initiate a rulemaking within 90 days. PHMSA expressed concerns in its 2015 interpretive letter for the safety of emergency responders because gasoline with ethanol blends over 10 percent required a different placard and emergency response procedures than E10 blends. PMAA told PHMSA in written comments that placarding alternating straight loads of diesel fuel and gasoline with the UN 1203 placard does not pose any danger to public safety because emergency response methods for both are identical under Emergency Response Guide 128. PMAA also explained that mid-level ethanol grades are blended at the pump and not typically transported in cargo tank trucks so there was no need to remove the 1203 placarding provision based on concerns over alcohol content. PMAA told PHMSA it supports limiting the 1203 placarding provision to a maximum E10 blend to neutralize concerns over mid-level ethanol blends**.**

PMAA and the Minnesota Petroleum Marketers Association recently met with PHMSA to urge them to fix the placarding issue and will continue to do so until it is fixed.

- **PACT ACT, Tobacco21, FDA Regulation of Tobacco**

The government funding package that passed at the end of 2019 also included a provision that raises the federal legal age to purchase tobacco products to 21. Specifically, within 180 days of the bill's enactment, the Department of Health and Human Services must issue a final rule that changes all references to the minimum age to purchase tobacco products in the Federal Code from 18 to 21. A final rule must go into effect within 90 days from when it is published.

However, less than a week after the law was passed, FDA announced that the T21 law is effective immediately, meaning it is now illegal for stores to sell tobacco products, including cigarettes and e-cigarettes, to anyone under the age of 21. The announcement created confusion among retailers who have been given no formal notice or direction from the FDA or a reasonable time frame to transition stores and employees. As a result, PMAA joined NACS and SIGMA, as well as other trade groups, in sending a letter to the FDA and HHS asking them to announce that they will not enforce T21 until the implementing regulations are written and finalized. Click here to view the letter.

Meanwhile, the FDA issued a Final Guidance yesterday titled "Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization." The Final Guidance document describes the enforcement policy that the FDA will take relative to certain flavored e-cigarettes, flavored cigars and flavored hookah tobacco.

The final guidance document does not appear to single out convenience stores, but rather focuses on specific kinds of electronic nicotine products (i.e., certain flavored cartridge-based electronic nicotine products). In a statement from FDA, it said that "this Final Guidance prioritizes enforcement with respect to any flavored, cartridge-based ENDS products (other than a tobacco and menthol-flavored ENDS product) without regard to the location or method of sale." After the FDA's Draft Guidance was released in March, PMAA and other like-minded associations opposed the

FDA provision allowing sales of flavored e-cigarettes in stores that are considered adult-only, such as vape shops, while prohibiting them from being sold in convenience stores.

Below is a summary of the additional provisions in the Final Guidance document courtesy of the National Association of Tobacco Outlets:

- **The Final Guidance would take effect thirty days after the Final Guidance document is published in the Federal Register. The Final Guidance document should be published in the Federal Register in the next day or two.**
- **The FDA will prioritize enforcement against those companies that manufacture, distribute or sell flavored cartridge-based electronic nicotine delivery products (except tobacco-flavored, menthol-flavored and non-flavored cartridge-based electronic nicotine delivery products) that have not received a premarket authorization order from the FDA.**
- **Flavored cartridge-based electronic nicotine delivery products (except tobacco-flavored, menthol flavored, and non-flavored cartridge-based products) would need to be removed from the market, including from retail stores, within 30 days after the Final Guidance document is published in the Federal Register. The FDA states in the Final Guidance document that these products are not being completely banned from the market but could come back on the market if manufacturers file premarket authorization applications by May 12, 2020 and the FDA subsequently approves the application.**
- **The FDA also intends to prioritize enforcement against those cartridge-based products for tobacco-flavored, menthol-flavored, or non-flavored electronic nicotine products and any non-cartridge flavored electronic nicotine products if they lack a premarket authorization order from the FDA and the manufacturer has not taken or is not taking adequate measures to prevent minors' access to these products.**
- **The FDA also intends to prioritize enforcement against any electronic nicotine products targeted to, or whose marketing is likely to promote use by, underage persons. Examples include electronic nicotine products with labeling or advertising that resembles kid-friendly foods and drinks (e.g., juice boxes, candy or kid-friendly cereal), or with youth-appealing cartoon or animated character advertising or marketed on popular children's YouTube channels and television shows.**
- **The FDA also intends to prioritize enforcement of any electronic nicotine product (either cartridge-based or non-cartridge based product) that is offered for sale after May 12, 2020, and for which the manufacturer has not submitted a premarket authorization application (or after a negative action by FDA on a timely submitted application).**
- **The FDA will not at this time take enforcement action against "open system" electronic nicotine products nor small manufacturers such as vape shops that mix e-liquids on-site and primarily sell non-cartridge-based electronic nicotine products, unless they market to youth, fail to take adequate measures to prevent youth access, or do not file a premarket authorization.**
- **The FDA has decided not to prioritize enforcement against flavored cigars and flavored hookah tobacco products before May 12, 2020 because underage use of these tobacco products is significantly lower than cartridge-based electronic nicotine products. However, the FDA reiterates in the Final Guidance document that flavored cigars and flavored hookah tobacco are required to submit premarket authorization applications to the agency for those products by May 12, 2020. The FDA acknowledges that there are a number of "grandfathered" flavored cigars that are lawfully marketed and would remain available to consumers regardless of FDA's enforcement of premarket authorization requirements.**

Click here to view the full FDA Final Guidance document.

Finally, the House passed H.R. 3942, known as the "Preventing Online Sales of E-Cigarettes to Children Act." The bipartisan bill was sponsored by Reps. Rosa DeLauro (D-CT) and Kelly Armstrong (R-ND), and would prohibit online sales of e-cigarettes to minors by applying the same safeguards already in place for regular cigarettes and smokeless tobacco products.

The bill now goes to the Senate where its companion legislation, S. 1253, could be voted on sometime next year. The Senate companion bill was introduced earlier this year by Sens. Dianne Feinstein (D-CA), John Cornyn (R-TX), and Chris Van Hollen (D-MD).

The bill amends the "Prevent All Cigarette Trafficking Act (PACT Act)" to also include e-cigarettes in the definition that already includes cigarettes. Specifically, the bill would require online retailers of e-cigarettes to:

- **Verify the age of customers for all purchases.**
- **Require an adult with ID to be present for delivery.**
- **Label shipping packages to show they contain tobacco products.**
- **Comply with all state and local tobacco tax requirements.**

PMAA fully supports this bill. PMAA asks that you remind your Senators to cosponsor this important legislation. Click here to do so.

- **Swipe Fees and Litigation**

Recently, the United States District Court for the Eastern District of New York gave final approval to the multi-billion-dollar settlement of the Visa/Mastercard antitrust litigation. A copy of the Court's approval order is attached hereto. All class members who did not opt out of the class by the July 23, 2019 deadline comprise a settlement class of all merchants that accepted Visa and Mastercard transaction cards during the relevant period. By remaining in the class, all such class members have released Visa and Mastercard for all antitrust liability for the period, and their only recourse now is to file for reimbursement from the settlement fund. Click here to view a copy of the court's approval order.

At the November 7, 2019 hearing at which the Court considered the objections to the settlement filed by class members, the Court indicated an intent to appoint a special master to determine whether franchisors (major branded suppliers) or franchisees (like branded wholesalers and retailers) or both, will be the recipients of settlement funds based on branded transactions at wholesaler and retailer locations. Many objectors urged the Court to make this decision before (and not after) final approval. It is likely that the Court's final approval will be appealed to the Second Circuit Court of Appeals on, among other things, the ground that the above referenced decision should have been made before final approval, before class members had to decide whether to stay in or opt out of the class, and before those who stayed in the class were required to release their claims against Visa and Mastercard.

It is anticipated that there will be various appeals from the final approval, on a number of different grounds, and that no distribution will take place until the appeals are resolved. PMAA will keep its members apprised of the progress of these appeals. In the meantime (as stated above) a special master will hear claims from branded refiners, and from branded wholesalers and retailers, and decide whether wholesalers and retailers will be eligible to receive settlement money.

Meanwhile, there appears to be significant confusion among Valero marketers (branded wholesalers and retailers) about their exclusion from the Visa/Mastercard settlement class. Valero marketers (and certain other franchisees) received exclusion notices from the Settlement Administrator advising them that they are ineligible to file a claim against the multi-billion dollar settlement fund because they were part of a separate settlement, and had released all their claims against Visa and Mastercard. When Valero reached a settlement with Visa and Mastercard, it released Visa and Mastercard from any further liability and it included all its branded wholesalers and retailers in the release. Branded wholesalers and retailers did not receive any of the money from the Valero settlement (it all went to Valero) but Valero included them in the settlement agreement for the sole purpose of releasing Visa and Mastercard from any liability. Now Judge Brodie, the Judge overseeing the Visa Mastercard antitrust settlement, ordered the class counsel to notify Valero marketers (and other franchisees excluded on the same basis) that they are back in the class and are now eligible to file claims. As a result of Judge Brodie's action, Valero marketers are now in the same boat as all other branded marketers. They are now part of the settlement class, but they are NOT assured of receiving any of the settlement money. All branded marketers will have to convince a special master appointed by the Judge that

they, and not their branded suppliers, are entitled to receive compensation from the fund for credit card transactions that occurred in the branded channel of trade. The special master will decide whether the branded suppliers, or their branded wholesalers and retailers, are the appropriate parties to receive reimbursements. PMAA will advise you further after a special master is appointed and a process is established for making claims.

Secondary Issues

- **Cougar Den of the Yakama Native American Tribe**

Last year, the Supreme Court ruled 5-4 that fuel taxes are not owed by a business owner (Cougar Den) of the Yakama Native American Tribe to Washington state.

The legal case that began in 2013 ended with the determination that the Cougar Den business owner did not owe the state more than three million dollars in fuel taxes. Specifically, an 1855 treaty between the Yakamas and the U.S. exempted the tribe from paying state fuel taxes, even for fuel imported from elsewhere to be sold on the reservation. The case was founded on gas that the Cougar Den brought in from Oregon. The case was based on the interpretation of a "right to travel" clause in the Yakama Treaty of 1855, and the justices interpreted the clause to mean Cougar Den is free to move its fuel in and out of the reservation.

According to its website (https://cougardeninc.com/why-us.html), Cougar Den does not collect or remit from tribal governments any state fuel excise tax which lowers Cougar Den's fuel costs and puts small business petroleum marketers at a competitive disadvantage. They are now delivering fuel without the state tax in Oklahoma.

PMAA General Counsel is now reviewing this issue.

- **Proposed Legislation Would Require Retrofit of Cargo Tanks with Side Underride Protection**

A bill introduced earlier this year, S. 665, sponsored by Sen. Gillibrand (D-NY), that would require new side underride protection for trailers and straight trucks with a gross vehicle weight over 10,000 pounds is important to petroleum marketers because it would require a costly retrofit of transport cargo tank trailers and single unit cargo tank trucks. Specifically, the bill would require the DOT to adopt regulations that would require: the installation of side underride rails on new and existing commercial motor vehicles (CMV) cargo tank trucks and trailers; and new performance standards, inspection and maintenance requirements for front, rear and side underride protection equipment. The bill is problematic for marketers because it would require virtually all CMVs and CMV trailers to be removed from service, brought to a certified cargo tank inspection and maintenance facility, cleaned and purged of residue and vapors and installation of new side underride rails and possibly replacement of existing rear underride rails that do not meet new equipment performance standards. The bill is particularly troubling because there is no practical or safe way to install side rail underride protection on bottom loading cargo tank vehicles and transport trailers.

The bill would impose huge compliance costs on all petroleum marketers operating cargo tank vehicles and trailers. The DOT attempted to impose similar requirements specifically targeting bottom loading vehicles and trailers back in 1998, but eventually withdrew the proposed rule after fierce opposition by PMAA and other trucking interests. That rulemaking was withdrawn in part because of the findings in a study partially funded by PMAA which found that more people would die during retrofit installation of side rails than those killed in cargo tank underride traffic accidents. PMAA opposes efforts to mandate costly underride equipment retrofits.

PMAA has been meeting with members of Congress to highlight our concerns with the bill.

- **NORA Reauthorization**

In December 2018, Congress passed the Farm Bill which includes a 10-year reauthorization of the National Oilheat Research Alliance (NORA) in which 25% of the funding will be escrowed each year that can be accessed on year 11.

Passage of the bill is a huge victory for heating fuels dealers. PMAA would like to thank all of our state/regional associations that reached out to their lawmakers to get us to this point, but most especially, NEFI, all of the Northeast state associations, Wisconsin, Kansas, Ohio, Michigan, North Carolina, South Carolina, Kentucky, Illinois, Washington state and Oregon.

Senators who played a key role in the process included Senator Jeanne Shaheen (D-NH), Senator Patrick Leahy (D-NH), Senator Susan Collins (R-ME), Senate Majority Leader Mitch McConnell (R-KY), Senator Richard Burr (R-NC), Senator Rob Portman (R-OH) and Senator Jack Reed (D-RI). In the House, key lawmakers included: Paul Tonko (D-NY), Jeff Duncan (R-SC), Frank Pallone (D-NJ), Peter Welch (D-VT), John Faso (R-NY), Ann Kuster (D-NH), Cathy McMorris Rodgers (R-WA), and David Rouzer (R-NC).

NORA was first authorized in 2000 to provide funding that would allow the oilheat industry to provide more efficient and reliable heat and hot water to American consumers. As a "check-off" program, NORA receives $0.002 at the wholesale level on every gallon of heating oil sold. NORA provides critical training opportunities and supports the necessary research and development for the industry. Oilheat is currently used in 6.3 million homes, serving more than 16 million Americans across the country.

- **Meal and Rest Breaks for Motor Carriers**

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") recently released its determination in response to a preemption application by the National Tank Truck Carriers, Inc. (NTTC) that California's meal and rest break requirements are preempted with respect to all drivers of motor vehicles transporting hazardous materials (whether interstate or intrastate). This means the state meal and rest break provisions no longer apply to interstate and intrastate hazardous materials motor carriers in California.

In its determination, PHMSA found that California's meal and rest break laws create unnecessary delay in the transportation of hazardous materials in conflict with provisions of the federal Hazardous Materials Transportation Act. PHMSA also found the California's laws preempted on additional grounds as to specific subsets of hazmat drivers. The determination recognizes the impact meal and rest break laws have on delaying motor carrier service.

Standing alone, the decision should be beneficial in mitigating the explosion of class action claims centered on violations of California's meal and rest break laws and likely similar laws in other states.

- **LIHEAP Funding**

PMAA has urged Congress not to eliminate LIHEAP because it is vital in serving low income consumers of home heating fuel. PMAA is a participant in the National Energy and Utility Affordability Coalition (NEUAC) which sent an "all organizations" letter to save LIHEAP. Click **here** to view the letter.

Fortunately, the government spending bill that passed at the end of 2019 included $3.7 billion in funding for LIHEAP, which was an increase of $50 million from the previous year.

Meanwhile, this Fall, the U.S. Department of Health and Human Services (HHS), Office of Community Services (OCS), and Division of Energy Assistance (DEA) announced the release of approximately $3.32 billion of Federal Fiscal Year FY20 regular block grant funding to LIHEAP grantees. State grantees will receive 90% of the funds available. A table detailing the allocations to state and territory grantees can be found here. The funding is provided under the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, (Continuing Resolution), signed into law on September 27 (Public Law 116-59).

The funding came at a critical time with the winter heating season set to start for many programs on November 1.

- **Overtime Rule**

The Department of Labor (DOL) issued its long-awaited final rulemaking on employee overtime pay. The final rule updates earnings thresholds that must be reached to exempt executive, administrative, or professional employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements.

The new DOL rule raises the annual earnings threshold that triggers overtime pay (time and a half) for an employee working beyond 40 hours per week from $23,660 to $35,568. The annual earnings threshold increase will expand overtime pay eligibility to 1.3 million workers for the first time. The new, higher threshold accounts for growth in employee earnings since the currently enforced thresholds were set in 2004. Moreover, the final rule does not adjust the annual earnings threshold to inflation. Instead, any increase would require a new DOL rulemaking based on a determination of economic need.

The final rule replaces an Obama Administration rulemaking that raised the annual earnings threshold for overtime eligibility to $47,476. The Obama rule would have expanded overtime eligibility to 4.2 million workers. However, a federal court enjoined the rule from going into effect. The new overtime rule was written in response to the federal court action.

The final rule would also:

- **allow employers to count a portion of certain bonuses and commissions towards meeting the annual salary level;**
- **raise the "standard salary level" from $455 to $684 per week (equivalent to $35,568 per year for a full-year worker);**
- **raise the total annual compensation level for "highly compensated employees" from $100,000 to $107,432 per year; and**
- **allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.**

Meanwhile, the Small Business Legislative Council (SBLC) held a webinar regarding the new final overtime regulations. The webinar provided an overview of the DOL's newly released overtime rules and recommendations for businesses on what steps they need to take before the rules go into effect on January 1, 2020. PMAA is a board member of the SBLC.

If you would like to share this webinar with any of your members who weren't able to make the Overtime webinar, but would still like to view it, the webinar is now available on SBLC's website by clicking http://sblc.org/member-reports/newest-final-overtime-regulations-2019-webinar/

For your members (link is labeled "For Members' Guests") – the username and password will be as follows:

Username: 2019
Password: FinalRegulations

Additionally, in December, DOL issued a final rule that it says will allow employers to more easily offer benefits and perks to their employees. The 'regular rate' rule is used to calculate overtime premiums under the Fair Labor Standards Act (FLSA). The SBLC will have more information on the final rule soon and PMAA will report on the specifics.

- **SNAP Program**

In December, the United States Department of Agriculture (USDA) announced that it had finalized a plan that would strengthen the work requirements for able-bodied adults with no dependents who receive Supplemental Nutrition Assistance Program (SNAP) benefits. The USDA said that as many as 688,000 people would be unable to receive the benefits if the rule were to go into effect.

Under current law, able-bodied adults with no dependents can receive SNAP benefits for up to three months during a three-year period, unless they are working or participating in an education or training program for 80 hours per month. Currently, states can waive the rule if work is not available, but the new rule will limit the state's ability to waive the rule unless unemployment reaches a certain percentage. It is estimated that seven percent of SNAP recipients are considered able-bodied adults with no dependents and Trump Administration officials have estimated that the rule will save the government around $5.5 billion over five years. The new rule is set to take effect on April 1, 2020.

Meanwhile, the Food and Nutrition Service (FNS) began implementing the restaurant (hot foods) provision of the final SNAP rule for all stores in October 2017.Retailers will be disqualified from the program if 50 percent or more of the store's total gross retail sales (including fuel and tobacco sales) come from items that are cooked or heated on site before or after purchase. Implementation of the stocking provision of the final rule began on January 17, 2018 for all stores. Click **here** for a summary of the stocking provision requirements.

The Farm Bill that passed late last year reauthorizes SNAP thru 2023. Most significantly for retailers, the bill prohibits electronic benefit transfer (EBT) processing fees through fiscal 2023. Specifically, it prohibits fees assessed by State benefit issuers related to the switching or routing of electronic benefit transfer transactions; requires a GAO study to examine EBT fees, outages and intermediaries providing services in-between redemption at retail food store and state-contracted EBT processors; requires USDA to review state EBT contract service agreements and compatibility of such systems with USDA fraud monitoring systems, and the use of third-party applications that access EBT systems; directs the Secretary to issue guidance and regulations as appropriate based on the findings of the GAO study and USDA review; requires the Secretary to issue guidance to retail food stores on selecting EBT equipment and service providers that are able to provide sufficient transaction information to minimize the risk of fraudulent transactions; it also allows the Secretary to require applicant retailers to provide certain EBT-related information to the Secretary during the retail authorization process.

In April, FNS released a proposal to expand what will qualify as variety as it relates to eligibility requirements for retailers participating in the SNAP Program. These proposed changes would provide retailers with more flexibility in meeting the enhanced stocking requirements under the 2016 final rule "Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)."

The Department is proposing a change with the "variety" rule that would allow any species of meat, poultry, or fish to be counted once as a discrete variety, if perishable, and once as a discrete variety, if shelf stable. It would also allow a store to stock four discrete varieties of cow milk-based cheese (fresh cheese, soft cheese, hard cheese, and cheese product). This change to the definition of "variety" would provide an additional two cheese varieties for each type of animal milk-based cheese in the dairy product's staple food category. Finally, the Department is proposing a change with this rule that would provide three additional staple food varieties in the bread or cereals products staple food category for each type of grain-based bread.

- **Method 27 -- Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure Vacuum Test**

The U.S. DOT regulations 49 CFR 180.407(h) allow for two methods to conduct a leak test on cargo tanks. The "K test" described under 190.407(h)(1) covers all cargo tanks and all products, including cargo tanks with vapor recovery and those hauling gasoline. The EPA Method 27 test (pneumatic not hydrostatic) included under 180.407(h)(2) can only be used for cargo tanks with vapor recovery systems dedicated to gasoline and E85 service only. Any cargo tank tested using EPA Method 27 is restricted to gasoline and E85 service (gasoline with an RVP of 7.8 to 9 RVP and E85 with an RVP of 7-12 RVP). Cargo tanks tested using the DOT K test may transport all petroleum products including diesel fuel.

Some marketers, cargo tank testers and roadside enforcement authorities have been under the mistaken impression that testing with EPA Method 27 would also certify cargo tanks to transport all petroleum products. As a result, marketers have been issued fines at roadside inspections for EPA Method 27 tested cargo tanks hauling diesel fuel. The confusion was likely due to the wording of EPA Method 27 which defines the phrase "petroleum distillate fuels" to include only gasoline and E85 with the RVP noted above. In the industry, petroleum distillates are used to describe

diesel fuel, kerosene and heating oil – not gasoline. PMAA met with EPA and DOT regulators to seek clarification. The DOT issued a compliance bulletin indicating that a K test is required to certify a cargo tank to transport all fuels while the Method 27 test restricts the cargo tank to gasoline and ethanol blends.

- **On-Demand Fueling**

PMAA has developed on-demand fueling state model legislation which includes two versions: one to ban the practice and one to allow it in a limited way. Click here for the template.

Provisions for On-Demand Mobile Fueling were added to both the 2018 International Fire Code (IFC) Chapter 57 (Flammable and Combustible Liquids) and the 2018 NFPA 30A (Code for Motor Fuel Dispensing Facilities and Repair Garages). On-Demand Motor Fueling is the retail practice of fueling motor vehicles of the general public while the owner's vehicle is parked and might be unattended. This practice is already occurring in many states as state and local fire officials are looking for direction on how to regulate this practice. The language in both codes is based on language developed by the California State Fire Marshall's Mobile Fueling Task Force.

The On-Demand Motor Fueling provisions in both the IFC and NFPA 30A are very similar. In general, the code provisions address the type of vehicle and associated tank or container capacity, locations where fueling can and cannot occur, vehicle/dispensing equipment, spill control and containment, operator requirements, and permitting requirements. They also have provisions for approval by the authority having jurisdiction (AHJ) for the operation, location, safety and emergency response, and vehicle operator training. In addition, fueling must be from an approved vehicle or metal safety can and is prohibited on roads, public right-of-way, in buildings, or covered parking areas and within 25 feet of buildings, property lines, or combustible storage. NFPA and IFC provides free access to view standards. The 2018 Edition of NFPA 30A can be accessed **here** and the 2018 Edition of the IFC can be accessed **here.**

Both codes are currently in the next edition revision cycle. In comments submitted to both organizations, on-demand model fueling companies are proposing revisions to expand the areas where on-demand mobile fueling can be conducted including on public streets and parking garages. Based on hearings addressing revisions to the IFC, these proposed revisions have been disapproved by the Committee. Similar proposed revisions are currently before the NFPA 30A Committee.

- **Disaster Planning/Establish Emergency Response Program**

Industry and government involvement in reforming disaster response, coordinating efforts and in providing far better service to anyone touched by a disaster began receiving far more attention following Hurricane Katrina in 2005. Then efforts catapulted following Super Storm Sandy. Since then, the federal government has taken many steps in streamlining the way it responds to a disaster. Now the Department of Energy (DOE) oversees coordinating all communication regarding the National Response Framework's Emergency Support Function 12 (Energy) particularly with regards to fuel delivery. Meanwhile, at PMAA we determined that big changes were coming in disaster planning and response and we needed to be at the table while the changes were being made. The enormity of the government entities that are involved ensured that many changes could occur and those could be positive if decisions were made based on full understanding of the industry.

Weak points in the past had to do with government to industry communication and coordination. That is where PMAA has seen a great deal of improvement. Communication and efficiencies across the government have improved tremendously, and the Trump Administration has taken these efficiencies even further with a willingness to establish waivers in advance, so the waivers are in place to fully supply tanks before the storm hits, and to re-supply as quickly as is safely possible.

PMAA works with federal agencies to clear regulatory hurdles in order to minimize delays, and government to speed implementation of waivers and particularly the use of regional waivers when appropriate. We are also active participants in developing the primary industry and government disaster response guidebooks, including serving on a subcommittee of the National Petroleum Council for development of their handbook. This helped to prevent new

government requirements and problems, while eliminating some barriers and enhancing efficiencies. Furthermore, PMAA is engaged in the government and industry planning exercises which are vital tools for determining where there are barriers and what can be changed to eliminate the barriers. In June 2019, PMAA participated in a national operational exercise hosted by DOE, DHS and DOD. PMAA was honored to be one of only a few non-government participants serving on the master cell of the multi-day "Shaken Fury" exercise. Further, PMAA worked alongside Florida's Executive Director at the Emergency Operations Center in Tallahassee during Hurricane Dorian.

We've made enormous headway in stopping delays at weigh stations and by police when drivers are passing through non-emergency states to deliver to a disaster area. Following our explanation of the cause for some delays in getting product where it is needed during and after disasters, Federal Motor Carrier Safety Administration (FMCSA) Administrator Ray Martinez decided to communicate with all state and local FMCSA directors on the necessity to communicate to the weigh stations and police so drivers will not be ticketed or delayed when passing through non-emergency states to get to an emergency area. This change will go a long way in increasing the response of distributors so that they can get fuel where it is needed as quickly as is safely possible. Furthermore, it will prevent drivers from being fined although they have appropriate waiver(s) from the receiving state.

Importantly, some drivers need to load their tanker trucks at water borne terminals and there are delays due to the need for Transportation Worker Identification Cards (TWIC) escorts for non-TWIC drivers. Drivers who are from areas of the country where they never load at water borne terminals but are delivering fuel to an emergency area and must load at water borne terminals do not have TWIC, so they are required to have a TWIC escort at the terminal. For planning purposes, however, it is often not clear which ports will have escorts available and during which hours. PMAA continues to work to establish systems so that drivers will know when TWIC escorts will be available. Furthermore, while meeting with DOE in 2018, policy staff realized that fuel terminals at the ports need to be on their list of priorities for electricity so that the terminals can remain open. This change has already resulted in far more efficient movement of fuel and elimination of long lines at the ports during emergencies.

Finally, PMAA established the PMAA Disaster Fuel Response Program, a critically necessary link between marketers available to provide fuel to disaster areas and those in need of such fuel.

- **Consumer Data Privacy Principles**

Recently, the House passed H.R. 2513, the "Corporate Transparency Act of 2019" (CTA). Prior to the vote, PMAA joined the NFIB Coalition of Associations that are opposed to H.R. 2513 in a letter of opposition to all House lawmakers.

PMAA and the Main Street Privacy Coalition (MSPC) also oppose the "True Incorporation Transparency for Law Enforcement (TITLE) Act" which is similar to the CTA. Both bills were created to shift the reporting requirements from large banks – those best equipped to handle reporting requirements – to millions of small businesses – those least equipped to handle reporting requirements.

Under the CTA, the reporting requirements would be duplicative and burdensome. Millions of small businesses would be required to register personally identifiable information with FinCEN upon incorporation and file annual reports with FinCEN for the life of the business. Failure to comply with these reporting requirements would be a federal crime with civil penalties up to $10,000, criminal penalties up to 3 years in prison, or both. Furthermore, the bill would impose a $5.7 billion regulatory burden on small businesses with 131.7 million new paperwork hours over 10 years.

The TITLE Act has two critical differences from the CTA. It would allow Congressional Chairman and Subcommittee Chairman the ability to access the information being filed (small business owners private beneficial ownership information) via a Congressional subpoena, and it would allow states to publicly post any and all of the information if they choose to do so.

Even though the bill passed, Republican opposition has grown significantly, from 40 percent Republicans supporting

the Committee passed bill earlier this year, and only 13 percent of Republicans supporting the bill during the full House vote. That is a big win for the coalition. This sends a clear message to the Senate that this bill and this concept is not inevitable, and there is real, serious opposition from the business community and others.

Any federal data privacy legislation should apply to all industry sectors and not contain loopholes that leave consumers unprotected when their personal data is handled by a business. All the companies involved in handling that chain of data should have legal obligations to properly guard it under privacy law and the law should not solely rely on private contracts to create those legal obligations. Protection of consumer data privacy is a priority issue for Congress and our associations collectively support federal privacy legislation that would establish a uniform, nationwide and consumer-centric data privacy law that does not pick regulatory winners and losers among differing business sectors.