



Energy Marketers of America (EMA) Priorities Report January 2021

**For all COVID-19 updates including EMA Regulatory Alerts, information on the Paycheck Protection Program, etc, please click [here](#).

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Top Issues

- **COVID-19 Relief**

Over the holidays, President Trump signed a \$2.3 trillion funding package into law, which includes \$1.4 trillion in government funding and \$900 billion in COVID relief. The legislation extends the Small Business Administration's (SBA) Paycheck Protection Program (PPP) and clarifies PPP expenses as tax deductible. The bill also provides \$600 stimulus checks for adults and dependents, restores \$300/week in additional unemployment assistance, increases SNAP benefits by 15 percent for six months (but does not expand eligibility), and allocates \$20 billion in new targeted economic injury disaster loans (EIDL) for low-income communities. Please note that the bill does not include an extension of the Paid Sick and Family Leave Mandate which expires on December 31st. However, the legislation does provide a refundable tax credit that allows businesses the option to offer paid leave, but it is no longer mandatory, and the provision expires in March 2021. Congressional leaders, however, could not reach an agreement to include Democratic priorities for additional state and local government aid and Republican's liability protections.

The COVID relief/government spending passage marks the end of an eventful month in Washington, DC.

Click [here](#) for a detailed summary of the COVID-19 relief package and click [here](#) for a summary of the paid sick leave refundable tax credit.

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

The Federal Motor Carrier Safety Administration's (FMCSA) long awaited CDL hours of service (HOS) amendments for short-haul drivers went into effect on September 29, 2020. The FMCSA issued an HOS final rule earlier this year that adopted several provisions requested by EMA provides regulatory relief for short haul drivers. The final rule adopted the following EMA reforms:

- Expands the short haul driver exception from recording driver hours of service from 100 air-miles to 150 air-miles.
- Increases the maximum daily on duty time for short haul drivers from 12 hours to 14 hours.
- Extends the maximum daily 11 hour driving window by two hours during adverse weather conditions and allows drivers (in addition to dispatchers) to determine if the weather conditions exist to trigger the extension.

These reforms are important for motor fuels and heating fuels marketers because the majority of drivers they employ are short-haul drivers. The reforms provide short haul drivers additional on duty time and expanded operating range without losing their current exception from having to record daily hours of service. In addition, many long-haul drivers may now be reclassified as short-haul drivers so long as they stay within the newly expanded 150-mile air radius limitation. As a result, these former long-haul drivers are no longer required to use electronic on-board HOS recorders mandated by the FMCSA several years ago. Instead, their HOS can now be demonstrated the same way as all short-haul drivers - by timecards and/or other business records if requested by the DOT during an audit. This will reduce the recordkeeping burden on both motor and heating fuels marketers and provide them with more flexibility to schedule drivers while adding a significant number of on-duty hours per company across all drivers.

- **Surface Transportation Reauthorization/Electrification**

House Democrats are expected to reintroduce their comprehensive infrastructure bill known as "The Moving Forward Act" (H.R. 2) in 2021. Click [here](#) for a complete breakdown of provisions important to energy marketers that was passed along party lines in the House last year. The Senate did not consider H.R. 2, however, Senate democrats, now in the majority, may turn to budget reconciliation (needing only 51 Senate votes) to approve it in the new Congress. Using budget reconciliation tactics still faces a tough hill to climb given that Senator Manchin (D-WV) and other Senate moderates are unlikely to give incoming Senate Majority Leader Chuck Schumer (D-NY) a free ride to pass an aggressive green infrastructure package. The Senate Environment and Public Works Committee passed its own surface transportation bill last year, S. 2302. Incoming EPW Chair Tom Carper plans to rewrite the bill with additional climate

measures this year. Before the end of 2020, Congress passed a short-term reauthorization of surface transportation programs into the fall 2021 to give it time to develop an infrastructure that can pass both chambers of Congress.

Alternative Energy Grant Programs

The issue of alternative transportation technologies is being debated on surface transportation reauthorization bills in both chambers of Congress. A provision H.R. 2 that could harm fuel marketers is the creation of a grant program for states to deploy electric vehicle (EV) charging and other alternative energy stations along designated alternative fuel corridors. EMA is concerned that the grant program could permit electric utilities to double dip – meaning they could charge their rate paying consumers to pay to expand EV infrastructure, while also taking grant money to subsidize the same projects. In fact, utility companies have been requesting permission from state public utility commissions (PUCs) and bills are being introduced, to raise rates on all customers in some states. The purpose of these rate increases is, in part, to offset costs for installing EV infrastructure and charging networks that very few people will use.

Hardworking Americans should not pay more in their utility bills just so that a few who can afford EVs are able to charge their vehicles, in some cases for free. Even small utility rate hikes to pay for EV charging can have an outsized impact on households. Nearly 1 in 3 American households reported difficulty paying their energy bill, according to a 2018 Energy Information Administration report. If a PUC permits a rate hike, those unfairly paying for EV charging will include (1) low-income families, (2) the elderly and fixed-income families, (3) those who do not own EVs and will not use EV chargers and (4) small businesses. Furthermore, an electricity monopoly installing EV infrastructure hurts consumers by effectively blocking out competition. Competition will ensure consumers pay a competitive price for EV charging and are ultimately serviced by the companies that provide the best customer experience. In other words, utilities and non-utilities, including private businesses, should be on a level playing field when it comes to building out EV charging infrastructure.

EMA is also concerned that the grant program could 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 convenience stores will be placed at a competitive disadvantage. EMA has urged both Transportation Committees to ensure that 50 percent of the grant program funding be dedicated to small, independent fuel marketing businesses with less than 500 employees who can diversify and ensure consumers pay a competitive price for EV charging.

***Meanwhile, EMA commissioned a study recently finding that a rapid buildout of an EV charging infrastructure, looking just at new distribution and transmission investments to support EVs making up only 10 percent of the vehicles on the road in the U.S., could cost as much as \$146 billion. Further, if this buildout is funded by the utilities, these costs would be passed along to their customers through rate increases, regardless of whether they own EVs.

The study examined three separate scenarios based on varying EV adoption projections:

- 8.4 million light-duty EVs on the road by 2030;
- 18 million EVs on the road by 2030; and
- 30 million EVs on the road by 2030 (**represents approximately 10 percent of the U.S. vehicle fleet).
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These scenarios are based on the Annual Energy Outlook 2020, 100 percent EV sales by 2050, and 100 percent EV sales by 2035, respectively. Costs associated with each scenario range from \$35.4 billion to \$146.2 billion, all borne by utility ratepayers. [Click here](#) for the report.

Interstate Rest Area Commercialization

Unfortunately, the House democratic surface transportation reauthorization bill included a provision to allow EV charging options at rest areas. This provision is certain to undermine the significant investments fuel marketers have made in communities and real estate directly off the U.S. Interstate System. Allowing EV chargers at rest areas will also discourage fuel marketers located off highway exits from investing in charging infrastructure because they cannot compete with an on-highway option. When Congress created the Interstate Highway System in 1956, Congress and

community leaders feared that local businesses, jobs, and tax bases would shrink as motorists and truck drivers bypassed their cities and towns. For this reason, Congress prohibited new Interstate rest areas from offering commercial services, such as food and convenience items that are offered at businesses along the highway exits. The prohibition on rest area commercialization ultimately has led to a thriving and competitive business environment along the Interstate exits as these businesses continue to make investments to provide consumers the best available products.

EV Tax Credit

Included in H.R. 2 was the controversial expansion of the 7,500 federal EV tax credit. The current \$7,500 EV tax credit allows taxpayers to deduct part of the cost of buying an EV and phases out once an automaker hits 200,000 cumulative EV sales which both Tesla and GM have hit. The bill would expand the 200,000 cumulative EV sales to 600,000 and reduce the credit by \$500 to \$7,000.

A coalition of farm and fuel groups including EMA sent a letter to Congress addressing concerns in H.R. 2. The letter specifically asked members of Congress to not further expand the federal electric vehicle tax credit, which disproportionately benefits a small group of Americans. Additionally, the letter asked that infrastructure investment dollars be spent on projects that will benefit all Americans, not just EV owners. And finally, it asked that Congress protect utility ratepayers from shouldering the cost burden of increased investment in EV charging infrastructure. Please go to <https://transportationfairness.org/> for the latest updates.

Electrification of Heating Fuels

Similar to the electrification of the motor fuels industry, there are efforts in many states to convert heating fuel consumers to heat pumps. The Democratic infrastructure proposal, H.R. 2, also includes language that favors this approach which will likely be an issue in 2021. Essentially, the goal is to eliminate the combustion of fossil fuels, natural gas, propane and heating oil from home and business use. Many states are now pushing huge subsidies to encourage those conversions. This is a dire threat to the heating fuels industry.

The heating fuels sector has been working to develop biofuels as an alternative to electrification. Essentially, replacing one form of liquid energy with another (BioHeat®), thus allowing the industry a pathway to survival. These will be critical and difficult issues to deal with, and EMA will be relying on its good relationships with members of Congress to reduce the threat of electrification.

- **IRS Excise Tax Delays**

The IRS assured EMA recently that the claim payment processing backlog for motor fuel excise tax refunds, and biodiesel blender, alternative fuel mixture and alternative fuel use credits will be resolved by the end of January and/or February at the latest. EMA has received numerous complaints from marketers over the past six months concerning the accumulation of unpaid IRS claims owed, often reaching into the hundreds of thousands of dollars. Continuing to float the unpaid claims is creating unnecessary financial hardship for many marketers. As a result, clearing up the claim backlog has been a top priority for EMA. EMA has been pressuring the IRS to clear up the backlog since it began last April. Unfortunately, the IRS has not been forthcoming about the extent of the backlog or plans to eliminate it.

To get definitive answers, EMA enlisted the help of the Senate Finance Committee to pressure the IRS to address the growing backlog. As a result, the IRS finally responded recently with a plan to quickly clear up the processing backlog. According to the IRS, the backlog is due to the disruption in normal work hours and loss of personnel caused by COVID-19. The IRS said that motor fuel excise tax and renewable fuel credit claims filed electronically have been processed in a timely manner throughout the COVID-19 period. However, paper filings requiring hand processing remain backlogged. To clear up the backlog the IRS said it will introduce an electronic means of processing paper claims sometime in January or early February. Once electronic processing of paper claims is initiated, the IRS expects overdue payments to be processed quickly and the backlog eliminated. EMA will continue to work with the Senate Finance Committee to ensure that IRS follows through with expedited processing of paper claims and that marketers receive payment for overdue claims as quickly and efficiently as possible.

In the meantime, marketers are advised to file all new refund and credit claims electronically to ensure timely processing. Electronic filing directions are found in the instruction sections of all IRS claim forms. Also, the IRS is required to pay interest on all electronic claims not processed within 20 days of receipt and on paper claims after 45 days. The rate paid is the federal short-term rate (set quarterly) plus three percent compounded daily. The IRS told EMA that checks for payment of backlogged claims will not include interest payments covering the processing delay period. Instead, those payments will follow in a separate check once the claim backlog is cleared.

- **Liability Protection from COVID-19 Lawsuits**

In March 2020, the Department of Homeland Security's Cybersecurity, and Infrastructure Security Agency (CISA) issued guidance designating certain businesses and industries as essential critical infrastructure. These industries include motor and heating fuels marketers that are committed to staying open during this time of crisis when Americans need them most to provide food, fuel, beverages and other necessities.

While these businesses are committed to serving their communities during these tough times, they have legitimate concerns about unsubstantiated lawsuits that may arise from continuing to stay open during the COVID-19 health crisis. Unfortunately, many of these essential businesses, who are taking every precaution necessary to ensure its employees and customers are protected, could face civil lawsuits from employees or customers claiming they were exposed to COVID-19 at those business locations.

Unfortunately, the final COVID-19 relief legislation that was signed into law over the holidays did not include liability protections for businesses. EMA will continue to work with NACS, SIGMA and NATSO to include reasonable liability protections in the next Congress.

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

On December 20, the Advisory Committee on Immunization Practices (ACIP) updated interim vaccine allocation recommendations:

- 1a (current) healthcare workers and LTC facilities
- 1b people age 75 and older AND frontline essential workers (c-store operators and employees)
- 1c people aged 65-74, people aged 16-64 with high-risk medical conditions, and essential workers not included in Phase 1b (drivers)

Essential workers were broken into the frontline/non-frontline categories because there is not yet enough vaccine available to include all in the 1b category as was first envisioned. Although states generally follow the CDC's guidelines, each creates its own plan to deal with situations unique to each state.

EMA was deeply involved in the development of the original ***Essential Critical Infrastructure Workers Guidance***, as well as all the iterations that have followed, that laid the foundation for vaccination prioritization. Further, for the past six months EMA has worked with government officials to express the need for energy marketers, drivers, home heating fuel deliverers and repair technicians, and convenience store essential employees to be among the essential workers who should receive vaccines early, due to the critical nature of their work. EMA also joined multiple letters of support for including energy essential workers in what would have been part of 1b. For more information, click [here](#).

EMA was also informed by owners and employees of c-stores who were being put in a bad position by states delegating mask enforcement responsibility to the stores. EMA requested CDC guidance that could be used by essential workers so that they can stay safe and to minimize potential liability charges for non-enforcement. The CDC issued updated guidance recommending that retail workers should not "argue with a customer if they make threats or become violent," in reference to "anti-mask" customers. Furthermore, the agency says that employees should not "attempt to force anyone who appears upset or violent to follow COVID-19 prevention policies or other policies or practices related to COVID-19." The guidance adds that should employees be confronted with threats or violence; they should remove themselves and find a safe area.

Early into the pandemic, EMA VP Sherri Stone coordinated with DOE, DHS and FEMA and delivered over 200,000 free reusable masks for our essential marketing, c-store and heating fuel workers. EMA also worked with the All-Hazards Consortium (AHC), DHS and Idaho Labs and released a Commercial Routing App (CRA) that can be accessed through the AHC/EMA private URL at <http://www.commroutel.org>. This is reported to be the best routing tool available and includes data on weight limits, CDL medical grace periods and drug testing requirements, CDL expiration extensions, HOS and other federal waivers, as well as rest stop closures. EMA also has asked for a fuel specific section which will include the multitude of fuel specific waivers and declarations is being developed. Additionally, an extensive real-time PPE directory was made available to all EMA members.

Importantly, CRA may provide an opportunity for resolving inefficiencies when 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.

EMA has been working to address a problem where some replacement drivers have not been allowed to receive on-site training to be carded for specific terminal facilities (which is usually allowed during disasters). **In order to obtain terminal on-site training, it is especially important to do these things:**

- Notify the terminal in advance so the request can be run up the chain for approval.
- Justify why this is needed, for example, the driver who normally pulls from the terminal is sick.
- Make certain the facility knows the replacement driver is an experienced driver who has loaded fuel at multiple other terminals or xx number of years.

Click here for a downloaded template for the EMA document for owners and managers to use in creating company protocols regarding COVID-19 to use internally and with business partners. In particular, the template can also be used with terminal operators who require such documentation in support of their own expanded protocols to protect their employees.

EMA and the National Tank Truck Carriers (NTTC) also created a [document](#) that has overlap with much of the company template document for company owners and managers. However, this document is for a different audience, it is for truck drivers specifically. Based on feedback from EMA members and from FEMA, drivers are in need of clear guidance on how they should operate.

Finally, EMA established the EMA Disaster Fuel Response Program, a critically necessary link between marketers available to provide fuel to disaster areas and those in need of fuel or drivers. Please contact EMA VP Sherri Stone for further details at ssstone@emamerica.org

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

EMA continues to support limiting the ethanol mandate under the RFS to a volume no greater than 9.7 percent of projected customer demand as determined by the Energy Information Administration (EIA). Limiting the RFS volumetric mandate to 9.7 percent of consumer demand will maintain the per gallon ethanol content at the current E10 level (10 percent ethanol).

Meanwhile, the EPA missed the statutory deadline by which the 2021 renewable volume obligations (RVOs) under the RFS must be set. The EPA is required by statute to finalize annual RFS blending requirements for each upcoming compliance year by November 30 of the preceding year. The delay means that the incoming Biden Administration, widely considered a friend of the ethanol industry, will determine blending volumes for 2021. It is unlikely the new administration would impose a radical increase in blending volumes, at least for 2021. Blending volumes beyond 2021 are likely to see an increase due to Biden's commitment to aggressively address climate change. However, the outgoing Trump Administration is likely to exempt refineries from biofuel-blending requirements for the 2019 compliance year.

Additionally, the U.S. Department of Agriculture (USDA) announced it is reopening the application process for the Higher Blend Infrastructure Incentive Program (HBIIP) for marketers seeking grants to install or upgrade higher blend ethanol and/or biodiesel fueling infrastructure. For more information, click on this link [HBIIP Application](#).

For additional information on the RFS including EMA's concerns, click [here](#).

- **Reducing UST Compliance Costs**

The National Leak Prevention Association-Ken Wilcox Associates, Inc. (NLPA/KWA) recently completed the development of a standard for the repair of UST system containment sumps. Under EPA UST regulations (40 CFR 280.33(a)), all UST system repairs must be conducted according to a code of practice developed by a nationally recognized association or an independent testing laboratory to ensure that repairs will prevent releases once the sump is returned to service. Without proper repairs, sumps may fail to prevent releases when piping or pumping equipment leaks. The EPA has authorized Standard 823 as compliant for the proper repair of UST system sumps. [EPA's Office of Underground Storage Tanks \(OUST\) technical online compendium](#) reflects this code of practice meets the regulatory requirements as an acceptable standard for containment sump repairs and more information about the standard can be found [here](#).

EMA Regulatory Counsel also drafted a [regulatory report](#) on what that means for the states with program approval and the states without program approval. It is important to understand that the October 13, 2018 deadline only applied 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.

EPA's Office of Underground Storage Tanks (OUST) issued guidance for EM'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 EMA low liquid level alternative testing method that will encourage states to adopt it as well. EMA 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 EMA'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 EMA alternative methods for testing containment sumps; however, PEI made significant modifications to the procedure.

EMA 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. EMA 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.

- **Diesel Fuel Quality/Diesel Fuel Best Practices**

The Fuels Institute's Diesel Fuel Quality Council (DFQC) (which EMA's ULSD Corrosion Task Force and Motor Fuels Committee has been participating) is conducting a diesel fuel quality study to evaluate fuel properties that affect engine performance. The study collected diesel fuel samples from 190 nozzles and 262 tank samples (131 middle layer samples and 131 bottom layer samples) from a mix of retail and commercial facilities throughout the US. Samples were collected from sites within each PADD based on the share of distillate fuel sales by Tankology in conjunction with their annual compliance testing and monthly inspection for their clients with their permission. Sample collection was randomized

within each PADD and not tied to information on diesel fuel quality or specific locations. Samples were analyzed at the Iowa Central Laboratory for a variety of parameters considered important to engine performance including flash point, water & sediment, biodiesel content, and metals. Information such as the terminal that supplies the diesel fuel, monthly throughput, biodiesel content, biodiesel blending on-site or at terminal, and routine preventative maintenance was documented for each sample. All results were provided to a third party for evaluation and results provided to the DFQC in a draft report for review. A draft report was developed and presented to the DFQC. Nine tests were conducted on nozzle samples with the majority of the samples meeting the corresponding industry standards. Oxidation Stability, Flash Point and Appearance did not meet industry standards in at least one PADD for each of these tests. Seven tests were conducted on the tank samples. Of note, for tank samples in all PADD regions some samples reported concentrations of ethanol (Note: middle layer samples only were analyzed for ethanol). In addition, microbe counts (bacteria count and mycological count) above the industry maximum limitation (4000 CFU/L) were identified in some samples from each PADD for both microbial count tests except for the West Coast (PADD 5). Generally, nozzle samples had better quality than tank samples and the middle layer tank samples had better quality than bottom layer samples. Based on a review of the draft report and discussions with the contractor, the DFQC identified a number of areas to research further and include in the report. The report is currently being revised to address the results of the additional research and comments provided by the DFQC.

Diesel Fuel Quality Council (DFQC) continues to work on the development of a diesel fuel storage tank best practices document and diesel fuel distribution best practices. The first draft of the storage tank best practices document underwent significant revisions, and the revised draft is currently out for comments by the DFQC. EMA has submitted extensive comments on this second draft. The first draft of the diesel fuel distribution best practices has been revised based on comments received. DFQC will be sending a second draft of the diesel fuel distribution best practices later in January.

- **Placarding**

EMA filed comments asking the Pipeline Hazardous Material and Safety Administration (PHMSA) to restore a cargo tank placarding provision important to fuel 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, EMA 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 EMA 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. EMA 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. EMA 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. EMA told PHMSA it supports limiting the 1203 placarding provision to a maximum E10 blend to neutralize concerns over mid-level ethanol blends.

PHMSA recently issued a special permit (DOT-SP 21104) to a Minnesota marketer which allows placarding to the lowest flashpoint for straight loads of gasoline and diesel fuel. DOT-SP 21104 is available for any marketer who applies. Unfortunately, there are a couple of conditions to the permit that make it difficult. The biggest hurdle is it requires gasoline to be transported in the cargo tank within the current or past business day. EMA and the Minnesota Petroleum Marketers Association are asking PHMSA to modify the petition by lengthening the period between gasoline and diesel fuel to 30 days.

Keep in mind that if a marketer runs one compartment empty that previously held gasoline, and the rest with diesel fuel then it qualifies as a mixed load and the UN1203 placard is permitted. The empty compartment works because PHMSA regulations treats it as a full compartment unless it has been purged of vapors and cleaned. PHMSA is expected to update the special permit before the end of the Trump Administration. EMA decided to go for a Special Permit that is suitable nationwide until a permanent regulatory fix is granted.

- **Tobacco Issues**

The COVID-19 relief/government spending bill that was signed into law in December 2020 included the “Preventing Online Sales of E-Cigarettes to Children” which prohibits online sales of e-cigarettes to minors by applying the same safeguards already in place for regular cigarettes and smokeless tobacco products.

On January 7, 2021, the FDA published in the Federal Register a policy prioritizing enforcement against e-cigarette products (other than tobacco- or menthol-flavored). However, open vaping systems that use flavored liquid or flavored single-use, disposable products are allowed. FDA’s final guidance will become effective on February 6th meaning that retailers will have until February 6th to sell their current stock of flavored cartridge-based products.

On Aug. 8, 2016, all e-cigarettes and other Electronic Nicotine Delivery Systems (ENDS) products became subject to the FDA’s tobacco authorities, including the premarket authorization requirements in the Federal Food, Drug, and Cosmetic Act (FD&C Act). All e-cigarettes and other ENDS products on the market at that time needed to have authorization from the FDA to be legally marketed. However, as an exercise of its enforcement discretion, the agency had deferred enforcement of the premarket authorization requirements. To date, no ENDS products have been authorized by the FDA — meaning that all ENDS products currently on the market are considered illegally marketed and are subject to enforcement, at any time, in the FDA’s discretion.

EMA, NACS, SIGMA and NATSO have urged the FDA to publish a public list of currently marketed e-cigarette products for which the Agency has received a premarket tobacco product application (PMTA). FDA has not responded.

Secondary Issues

- **Swipe Fees and Litigation**

In our last update on this matter, EMA advised you of the Court’s consideration of objections filed by members of the plaintiff class at a hearing in November of 2019. Several objections related to the issue of most concern to branded wholesalers and retailers of motor fuels. The issue is whether franchisors (major branded suppliers) or franchisees (branded wholesalers and retailers) will be entitled to proceeds from the multi-billion-dollar settlement fund with respect to card transactions at stations they operate or supply. The objectors argued that this issue should have been resolved before the July 2019 deadline for opting out of the class; they argued further that it should have been resolved in favor of the branded wholesaler and retailer class members, and that the settlement should not be approved until the matter is resolved.

EMA also reported that Judge Brodie approved the settlement notwithstanding the objections, and she stated her intent to appoint a special master to hear arguments on this issue. This action prompted several appeals to the United States Court of Appeals for the Second Circuit, which challenge the approval of the settlement on several grounds. One of those appeals was filed by EMA, along with several individual wholesaler and retailer companies and two other associations, SIGMA and NASM. A brief on behalf of these appellants has been filed with the Court of Appeals.

In its brief, EMA argued that branded wholesalers and retailers should be the recipients of settlement proceeds based on card transactions at their sites. The branded wholesalers and retailers, and not the branded suppliers, are the merchants that “accepted the cards,” and they are the merchants who paid the interchange fees that are the heart of Visa/Mastercard antitrust litigation. It was also argued that the issue should have been decided before the settlement was approved and before the various class members were compelled to decide whether to stay in the class or opt out. By staying in the class, each class member must release Visa and Mastercard from any antitrust liability. The class

members should not have been forced to make this decision until they were advised whether they will be recipients of the proceeds attributable to their sites. Other arguments include the conflict of interests that the lawyers representing the class had, which conflict contributed greatly to the delay in resolving the above-stated issue. The class lawyers tried to represent the branded suppliers (e.g., ExxonMobil, Shell, BP) and the branded wholesalers and retailers, despite the fact that the two groups have adverse interests on the issue of who will get the money.

EMA will keep you advised of developments in the appeal as they proceed.

- **CAFE Standards**

General Motors is abandoning a legal battle between the Trump Administration and California over the state's right to set its own standards for greenhouse gas emissions and fuel economy rules. The move signals a recognition by GM that its electrification and zero emissions strategy is more closely aligned with the priorities of the incoming Biden Administration.

In 2018, GM, Fiat Chrysler, Toyota and 10 other automakers sided with the Trump Administration in a lawsuit filed by environmental groups challenging the Administration's plans to roll back emissions and gas mileage standards and strip California's authority to set its own emission standards. Ford, Honda, BMW and Volkswagen sided with California and cut a separate deal with the state to meet a 50-mpg fleetwide standard by 2026 for all vehicles sold nationwide. In recent years, more than a dozen other states have signed on to California's emissions standards for vehicles.

During the campaign, candidate Biden pledged to make major investments in electric vehicles and EV fueling infrastructure through federal financial support to automakers and expanded tax credits for consumers. Now that Biden is president-elect, GM realized that continuing support for the Trump roll-back is no longer a viable way forward. There is no word on whether any of the remaining automakers in the lawsuit plan to follow GM's move.

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

In March 2019, 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 fuel marketers at a competitive disadvantage. They are now delivering fuel without the state tax in Oklahoma.

EMA General Counsel is reviewing this issue.

- **Retrofit of Cargo Tanks with Side Underride Protection**

The "The Moving Forward Act" (H.R. 2) that was approved along party lines in the House mandates Automatic Emergency Braking systems in newly manufactured commercial motor vehicles and mandates rear underride guard standards in newly manufactured trailers and semi-trailers capable of preventing passenger compartment underride at speeds up to 35 mph. The bill would require periodic inspection of rear underride equipment as well as daily pre-trip inspections by drivers. It also calls for a study on installing side underride guards on newly manufactured trailers and semitrailers and creates an Advisory Committee on Underride Protection. The House is likely to reintroduce similar legislation in 2021.

- **NORA Reauthorization**

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. NORA was recently reauthorized in 2018 for ten years. EMA will be looking for opportunities next Congress to make changes to NORA.

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

In February 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA) dismissed the California Labor Commissioner’s most recent attempt at overturning PHMSA’s previous ruling, which said 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).

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. The decision, as noted by PHMSA, will be subject to reconsideration pending the Ninth Circuit’s decision in *Intl Brotherhood of Teamsters, et al. v. FMCSA*, Court of Appeals Docket No.: 18-73488. Notably, briefing in the Ninth Circuit recently closed, also on February 21, 2020. However, in light of the COVID-19 pandemic, it is likely that such dates will be further delayed, and thus the MRB Rules and AB-5 will remain preempted in California. In the interim, motor carriers can operate as the rules intended and without interruption of the federal preemption.

- **LIHEAP Funding**

The latest \$2.4 trillion Government spending/COVID-19 package provides \$3.75 billion for the Low-Income Home Energy Assistance Program. Last year, President Trump signed the “Coronavirus Aid, Relief, and Economic Security (CARES) Act,” a \$2.2 trillion spending program to help mitigate the effects of the pandemic. The bill included \$900 million for LIHEAP to help low-income households pay their heating fuel bills during the crisis.

- **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 180.407(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. EMA 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**

EMA 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.

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.

Several modifications were made to On-Demand Mobil fueling provisions in NFPA 30A during the last revision cycle that are reflected in the 2021 version of that code. Of note is a revision to the prohibition on mobile fueling operations on public streets and public ways that allows mobile fueling on public streets and public ways if approved by the AHJ and the operation meets additional criteria. In addition, the AHJ can specify the time of day and day of the week when mobile fueling operations can be conducted on public streets and public ways. Other revisions include requirements for dispensing of fuels other than Class I and Class II liquids and a requirement for an approved vehicle inspection program and vehicle inspections prior to each shift. Modifications to the IFC that are reflected in the 2021 version of that code focus primarily on vehicle and operational requirements.

NFPA and IFC provides free access to view standards. The 2021 Edition of NFPA 30A can be accessed [here](#) and the 2021 Edition of the IFC can be accessed [here](#).

- **CFTC Finalizes Position Limits Rule**

In October, the Commodity Futures Trading Commission (CFTC) issued its long-delayed position limits rule mandated by the "Dodd-Frank Wall Street Reform Act" to curb excessive speculation in energy and other commodities futures contracts by a 3 – 2 vote.

The final position limits rule applies to 25 physically settled and linked cash-settled futures contracts, options on futures contracts, and "economically equivalent swaps." Important to energy marketers, federal spot month position limit levels are set at or below 25 percent of estimated deliverable supply on the NYMEX Light Sweet Crude Oil (CL), NYMEX New York Harbor ULSD Heating Oil (HO) and the NYMEX New York Harbor RBOB Gasoline (RB) contracts. RB and HO front-month contracts will have a position limit of 2,000 contracts. The federal spot month limit for the WTI contract features the following step-down limit: (1) 6,000 contracts as of the close of trading three business days prior to the last trading day of the contract; (2) 5,000 contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) 4,000 contracts as of the close of trading one business day prior to the last trading day of the contract.

In written comments earlier this year, EMA urged the CFTC to lower the stated spot-month limit for energy futures and "economically equivalent" energy futures, options on futures, and swaps to a level that is more consistent with existing federal spot month limits for legacy agriculture contracts to prevent excessive speculation. Additionally, EMA urged the Commission to impose position limits on non-spot months to energy futures contracts and "economically equivalent" contracts. EMA also urged the CFTC to impose separate limits on passive traders (i.e., index funds, exchange traded funds, and other similar vehicles that generally buy without regard to price), and require that positions of passive long speculators who follow the same trading strategy be aggregated for purposes of applying spot and non-spot month position limits. Unfortunately, the final rule fell short in addressing those concerns to reduce excessive oil speculation.

The final rule also expands the list of CFTC-defined bona fide hedge exemptions. It also creates a new process for bona fide hedges that are not on the CFTC's exemption list to be approved at the exchange level with a 10-day period for the CFTC to review those decisions. Democratic commissioners expressed concerns that the final rule is less sweeping than earlier versions and would impact trading on the soonest-expiring contracts, leaving intact traders' abilities to make big wagers on longer-term contracts. It is also likely to allow for bigger maximum positions than currently allowed in some physically settled futures contracts, and limits will likely be more permissive than those now allowed by exchanges. Exchanges would be free to maintain their current levels.

Excessive speculation helped contribute to the oil price run up in the mid-2000s only to see it dramatically plunge within a six-month period from approximately \$147 per barrel in July 2008 to a December 2008 low of \$32 per barrel. It can be argued that excessive speculation helped contribute to the dramatic drop in oil prices which sent the West Texas Intermediate (WTI) contract into negative territory (-\$37.63 in April 2020) for the first time.

- **Consumer Data Privacy Principles**

The Energy Marketers of America (EMA) is part of "The Main Street Privacy Coalition" which is comprised of a broad array of national trade associations representing businesses that line America's Main Streets. 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.

Click [here](#) for the latest.