



# Regulatory Advisory

December 2010



## Low Carbon Fuel Standard (LCFS) Regulatory Advisory 10-04

### Compliance Obligations for 2011 and Related Items

#### SCOPE

*The Air Resources Board (ARB) is issuing a Regulatory Advisory today, 10-04 (Advisory 10-04), which goes into effect January 1, 2011. This Advisory 10-04 replaces, in their entirety, the provisions of LCFS Regulatory Advisory 10-03 (Advisory 10-03) that apply in 2011. The remaining provisions of Advisory 10-03 that apply only to 2010 will remain in effect through December 31, 2010, as discussed in this Advisory 10-04. This Advisory 10-04 will remain in effect through December 31, 2011, unless superseded by a subsequent ARB advisory or notice.*

#### BACKGROUND

On April 23, 2009, the California Air Resources Board (ARB or Board) approved for adoption the LCFS regulation pursuant to the California Global Warming Solutions Act of 2006. The regulation became effective on January 12, 2010, and was codified at title 17, California Code of Regulations, sections 95480-95490. Additional provisions became effective on April 15, 2010, and were codified in the same sections. The combined final regulation order can be found at: <http://www.arb.ca.gov/regact/2009/lcfs09/lcfscombofinal.pdf>. The LCFS will reduce greenhouse gas (GHG) emissions by reducing the carbon intensity of transportation fuels used in California by an average of 10 percent by the year 2020. Carbon intensity is a measure of the GHG emissions associated with the combination of all of the steps in the "lifecycle" of a transportation fuel. While carbon intensity (CI) standards are not applicable in 2010 (the first year of the regulation), compliance with the reporting and recordkeeping requirements is required for all years, including 2010.

On November 18, 2010, staff presented to the Board an update on LCFS implementation activities, including the development of the LCFS Reporting Tool, the proposed path forward on addressing land use change after receiving recommendations from the Expert Workgroup subgroups, the development of a screening tool for high-carbon-intensity crude oils, and several others. Through Resolution 10-49, the Board directed staff to issue guidelines regarding the implementation of the LCFS for 2011. This Regulatory Advisory represents those guidelines.

#### DEFINITIONS

For purposes of this Regulatory Advisory, "we" means ARB, the Board, or ARB staff, and "Executive Officer" refers to the ARB Executive Officer or his or her designee. Also, "this advisory period" means the period during which this Regulatory Advisory will remain in effect, which is January 1, 2011, through December 31, 2011, unless superseded by a subsequent ARB advisory or notice. Unless otherwise stated, all references to "section" are to the LCFS regulation, and references to the "Lookup Table" are to one or both of the carbon intensity lookup tables in section 95486(b)(1) of the LCFS regulation.

#### OVERVIEW

As noted by the Board in Resolution 10-49, the compliance obligation for regulated parties in 2011 to meet the carbon intensity standard for gasoline and diesel is necessary to ensure that continuous progress is maintained in implementing the LCFS regulation. However, there is a need for discretionary enforcement of the LCFS during the initial implementation year of 2011. Accordingly, ARB staff will implement in 2011 the 0.25% carbon-intensity (CI) reduction requirement with recognition of the need to recognize reasonable, good-faith compliance efforts while focusing enforcement actions on willful, intentional, egregious, or other substantial and material violations of the LCFS regulation.

## **ELECTRONIC REPORTING REQUIREMENTS**

### **Current Action: Retention of Advisory 10-03 Timeliness Guidance for 2010 Q4 Report and 2010 Annual Compliance Report**

As noted in Advisory 10-03, the 2010 fourth quarter (Q4) report and 2010 annual compliance report remain due February 28, 2011, and April 30, 2011, respectively. However, like the 2010 Q1, Q2, and Q3 reports, the 2010 Q4 report and the 2010 annual compliance report will not be subject to enforcement actions for lack of accuracy or completeness. Also, as noted in Advisory 10-03, ARB will not enforce the 2010 quarterly and annual compliance reports retroactively for lack of accuracy or completeness.

### **Current Action: Timely, Complete, and Accurate Submittal Is Required for 2011 Quarterly and Annual Reports**

Because the LCFS Reporting Tool (LRT) is currently operational, regulated parties should use the LRT to submit their 2011 annual and quarterly reports. This Advisory 10-04 does not affect any of the submittal deadlines in 2011, and all 2011 quarterly and annual compliance reports will be subject to enforcement action for their timeliness, completeness, accuracy, and any other applicable requirements specified in the regulation and discussed in this Advisory 10-04.

### **Current Action: 2011 Enforcement Actions to Be Focused on Substantial Non-Compliance**

In accordance with the Board's directives in Resolution 10-49, we are administratively taking the actions described in this section and elsewhere in this Advisory 10-04 with regard to enforcement actions. We will only take enforcement action for substantial noncompliance with the reporting requirements in 2011. This means that the failure of a regulated party to completely meet all reporting requirements in 2011, despite its reasonable, good-faith efforts to compile the required records and submit quarterly and annual compliance reports in accordance with the provisions of the LCFS regulation, will not trigger enforcement actions. Instead, ARB will focus its enforcement actions on regulated parties that fail to make reasonable, good-faith efforts to meet the reporting requirements in 2011. Put another way, ARB will pursue enforcement actions and penalties only for materially egregious violations, such as willful or persistent disregard of material reporting requirements or material non-compliance with the other provisions of the LCFS regulation, taking into account reasonable, good-faith efforts a regulated party takes to comply.

Examples of substantial non-compliance include, but are not limited to:

- Completely or substantially ignoring the requirement, or otherwise failing, to electronically report the information specified in the regulation by the applicable due date without a demonstration to the written satisfaction of the Executive Officer that the failure was beyond the regulated party's reasonable control (e.g., failure to report was due to the LRT system being non-operational or inaccessible for more than a week);
- Repeated failures to submit the required reports or to submit them in a timely fashion;
- Reporting patently false or misleading information (e.g., reporting another regulated party's name as your own, reporting credits as having been generated based on the purchase of low carbon intensity fuel/blendstock when no such purchase occurred); and
- Omitting substantial and material information in the electronic reporting, including omitting CI values (i.e., because this Advisory 10-04 provides default "catch-all" CI values for ethanol and high-carbon intensity crude oils, there will be no reasonable basis for omitting a CI value in a submitted report).

Examples of substantial compliance include, but are not limited to:

- Submitting in good faith all or most of the material information specified in the reporting provisions of the LCFS regulation, but the submittal contains errors that are of a typographical, transpositional, spelling, or similar nature and determined by the Executive Officer to be inadvertent and reasonable under the circumstances; and
- Submitting in good faith a complete electronic report late, but the date of actual submittal is within 5 business days of the deadline specified in the regulation; the regulated party notified ARB staff in writing (e.g., email) before the deadline that it would be late with its submittal; and the lateness is due to an inadvertent and reasonable failure (e.g., the party's computer system that holds the information required by the LCFS regulation failed just before the deadline, the person(s) who is registered with the LRT system as that party's designated contact person(s) was unavailable to electronically submit the report due to sickness or death, etc.); and
- Submitting in good faith based on the written LCFS regulation, regulatory advisories, and guidance documents as of the time of the reported transactions. Subsequent regulatory advisories, rule changes, and guidance documents will not be enforced retroactively, except as otherwise noted in those subsequent documents.

In determining whether a regulated party failed to make reasonable, good-faith efforts to comply with the LCFS requirements or, conversely, whether a regulated party committed a willful, intentional, or materially egregious violation, ARB will consider the totality of the circumstances based on information provided by the regulated party and any other available information.

#### **Current Action: Use of Generic CI Value for Ethanol**

Typically, a regulated party that purchases ethanol for fuel blending would be provided with documentation on the carbon intensity of that ethanol. However, there may be situations in 2011 where a regulated party is in a position to purchase ethanol for which the CI is indeterminate and incapable of being reasonably determined. In such cases, we will administratively allow the regulated party for that ethanol to use the CI value of 99.40 g CO<sub>2</sub>e per megajoule (MJ), which is the default CI value for ethanol in the Lookup Table in section 95486(b). For purposes of this Advisory 10-04, the ethanol's CI is "incapable of being reasonably determined" when the production facility for the ethanol cannot reasonably be identified with certainty through CARB's list of registered biofuel facilities, product transfer documents, invoices, or other available documentation or information.

#### **Current Action: Use of Draft CI Values for Pathways Reviewed and Posted by ARB Staff Prior to Formal Rulemaking Adoption**

Because time is a consideration when regulated parties contract for the purchase of fuels and blendstocks, we will administratively allow regulated parties to use, for reporting and credit generation purposes, a draft CI value for a pathway that has been evaluated by ARB staff and posted on ARB's web site for public review prior to the start of a 45-day comment period that initiates a formal rulemaking to adopt and incorporate the proposed CI value into the LCFS regulation. In the event a CI value is posted by ARB staff for public review and is subsequently modified in the course of the rulemaking, regulated parties must use for all purposes the final adopted CI value no later than six months after the effective date of adoption of the CI value. In the event a proposed CI value is posted by ARB staff and subsequently disapproved in the course of the rulemaking, regulated parties using that proposed CI value must cease using that CI value for all purposes no later than six months after the effective date of the disapproval. We will not require any retroactive adjustment of reports and credits that are based on the draft CI value posted by ARB staff that was either modified or disapproved in the course of the rulemaking.

#### **Current Action: Use of Interim CI Value for Fuels/Blendstocks Derived from Potentially High Carbon-Intensity Crude Oils**

A screening method is currently under development by ARB staff to assist regulated parties to better identify high carbon intensity crude oils (HCICO). In the interim, we will take the following administrative actions for HCICO or potentially HCICO feedstocks (for purposes of this Advisory 10-04, we will refer to these collectively as "HCICO"):

1. For any HCICO purchased under contract that is executed by June 30, 2011, the regulated party may continue to use the CI value for gasoline (95.86 g CO<sub>2</sub>e/MJ) or diesel fuel (94.71 g CO<sub>2</sub>e/MJ) in the Lookup Table, whichever applies provided the crude oil is delivered to California no later than September 30, 2011.
2. For any HCICO purchased under contract that is executed after July 1, 2011, or for any HCICO delivered to California after September 30, 2011, a regulated party must use whatever CI value is most applicable and established at that time for HCICO in the Lookup Table or, if no HCICO CI values are established in the Lookup Table, use a CI value that is determined as specified in section 95486(b)(2)(A)2. We will not require any retroactive adjustment of reports and calculations that are based on the interim CI values used during the interim period above; and
3. Pursuant to Resolution 10-49, ARB staff will continue to work with stakeholders to develop guidelines addressing the generation and banking of credits during 2011, as potentially affected by crude oil purchases that are not part of the 2006 baseline. These guidelines will be promulgated as an amendment to this Regulatory Advisory (10-4).

#### **Current Action: Miscellaneous**

As noted in prior advisories 10-02 and 10-03, we will not enforce the Renewable Identification Numbers (RIN) reporting requirement in section 95484(c)(3)(A)4., and staff will be proposing regulatory changes to codify this in a future rulemaking.

## FOR MORE INFORMATION

Currently, the LRT can be accessed at <https://ssl.arb.ca.gov/LCFSRT>, as specified in a listserv announcement on September 2, 2010. Other LRT-related materials can be accessed at: <http://www.arb.ca.gov/fuels/lcfs/workgroups/workgroups.htm>. The final regulation order and other rulemaking documents can be found in the LCFS rulemaking website at: <http://www.arb.ca.gov/regact/2009/lcfs09/lcfscombfinal.pdf>. For any questions regarding this advisory, please contact Mr. Floyd Vergara, Manager, Industrial Section at (916) 327-5986 or via email at [fvergara@arb.ca.gov](mailto:fvergara@arb.ca.gov), or Ms. Renee Littaua, Manager, Fuels Section at (916) 322-6019 or via email at [rlittaua@arb.ca.gov](mailto:rlittaua@arb.ca.gov). If this document is needed in an alternate format or language, please contact Ms. Michelle Buffington at (916) 324-0368 or [mbuffing@arb.ca.gov](mailto:mbuffing@arb.ca.gov). TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.