

April 20, 2018

Rana McReynolds  
Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

**Re: LCFS18 – Proposed Amendments to the Low Carbon Fuel Standard Regulation**

Dear Ms. McReynolds:

Eversheds Sutherland (US) LLP appreciates the opportunity to submit comments to the California Air Resources Board (“CARB”) regarding the 2018 proposed amendments to the Low Carbon Fuel Standard (“LCFS”) Program. In particular, we wish to comment on the following: (1) the potential ambiguity associated with the proposed definition of “rack,”<sup>1</sup> and encourage CARB to use a different definition to allow the transfer of the compliance obligation through to the point in the distribution chain that is traditionally considered the rack; and (2) clarification that a “fuel reporting entity” would be a “regulated entity” and that, accordingly, fuel reporting entities can trade LCFS credits under the proposed amendments.

**1. Definition of Rack**

As written, the proposed amendments would prohibit transfers of credit and deficit generator status to an entity acquiring title to fuel below the rack. The proposed amendments then define the rack as a “mechanism for delivering motor vehicle fuel or diesel from a refinery or terminal into a truck, trailer, railroad car, or other means of non-bulk transfer.” This proposed definition is sufficiently broad such that it could be interpreted to cover transfers of fuel that are typically thought of as being “above the rack.” The rack is commercially understood by fuel producers, refiners and retailers to be facilities used to transfer gasoline, diesel and other products for delivery to retail fuel dispensers like gasoline stations, convenience stores and truck stops.<sup>2</sup> In most instances, the rack is located at a terminal where ethanol is added to gasoline and where the final diesel blend is sold to “jobbers” who then truck the gasoline and diesel to retail locations.

The proposed definition, however, is broader than the industry concept of the rack such that it could capture terminals that are actually in the middle of the distribution chain. For instance, rail has become a common way to ship refined product from refineries and import locations to terminals where it is stored for significant periods before being blended with ethanol and shipped to retail fuel dispensers or instead being transshipped, unblended, to another terminal by pipe or rail. Under CARB’s proposed definition of the rack, there could be confusion that parties are prohibited from transferring the compliance obligation beyond the initial point where it is added to the railroad car. Similarly, the proposed definition could be construed so as to include any point where unblended denatured ethanol (*i.e.*, e98) is transferred from a terminal to a truck for shipment to an actual blending terminal. Therefore, under the proposed definition of “rack,”

---

<sup>1</sup> Section 95481(108) of the Proposed Regulation Order amending the LCFS regulation includes language defining “Rack” as, “a mechanism for delivering motor vehicle fuel or diesel from a refinery or terminal into a truck, trailer, railroad car, or other means of non-bulk transfer”. See CARB, Appendix A: Proposed Regulation Order, Low Carbon Fuel Standard (Mar. 6, 2018), <https://www.arb.ca.gov/regact/2018/lcfs18/appa.pdf> (“Proposed Amendments”).

<sup>2</sup> See Fuels Institute, *Assessment of the U.S. Fuel Distribution Network*.

distributors and marketers may believe they are unnecessarily constrained from contracting with counterparties who are better suited to retain the LCFS compliance obligation.<sup>3</sup>

Given the potential for the proposed definition of “rack” to preclude wholesale fuel distributors from transferring their credit or deficit generator status downstream, we propose CARB consider and adopt a definition of “rack” that better aligns with the expectations and custom of commercial market participants. For LCFS purposes, CARB’s definition of “rack” should comport with the common understanding of that term among companies engaged in the fuel distribution business<sup>4</sup> and be consistent with the economics and structure of the market.<sup>5</sup> In our view, such a definition would focus on the identity of an intended recipient of a transfer of fuel. Accordingly, we recommend that CARB adopt a definition of “rack” that is a variation of *“the last point of sale before retail distribution.”*

## 2. Fuel Reporting Entities’ Ability to Trade LCFS Credits

Under the proposed amendments, a “fuel reporting entity” is any entity who acquires reporting entity status for any fuel even if that fuel is sold to another party with such status and the seller does not retain the ability to generate credits or deficits.<sup>6</sup> Also, under the proposed amendments, a regulated entity may buy and sell LCFS credits.<sup>7</sup> A “regulated entity” is defined as “an entity subject to any requirement pursuant to this subarticle,” which implies that the definition covers fuel reporting entities as such entities are subject to the requirements of the LCFS.<sup>8</sup> Therefore, it follows that fuel reporting entities are entitled to trade LCFS credits even if they do not retain credit or deficit generator status for fuel that they buy and sell and do not retain reporting entity status. We request that CARB clarify this point in the amended LCFS regulations as it is important for a functioning and liquid market for parties participating in the LCFS Program to clearly understand their ability to trade LCFS credits.

Thank you for your time and consideration in these issues.

Sincerely,

Eversheds Sutherland (US) LLP

David M. McCullough

<sup>3</sup> See Proposed Amendments at EX-2, I-3, III-33-35, IV-2, V-10.

<sup>4</sup> “Rack Sales” are commonly understood to be wholesale truckload sales or smaller sales of gasoline where title transfers at a terminal. See EIA, Definitions, Sources and Explanatory Notes, [https://www.eia.gov/dnav/pet/TblDefs/pet\\_cons\\_refmg\\_tbldef2.asp](https://www.eia.gov/dnav/pet/TblDefs/pet_cons_refmg_tbldef2.asp).

<sup>5</sup> Market prices for refiner gasoline is segmented by EIA in terms of wholesale markets (*i.e.*, sales for resale) and retail markets (*i.e.*, sales to end users). See EIA, Refiner Gasoline Prices by Grade and Sales Type (Mar. 1, 2018), [https://www.eia.gov/dnav/pet/pet\\_pri\\_refmg\\_dcu\\_nus\\_m.htm](https://www.eia.gov/dnav/pet/pet_pri_refmg_dcu_nus_m.htm).

<sup>6</sup> See Section 95481(a)(59) of the Proposed Amendments.

<sup>7</sup> See Section 95487(a)(1)(B) of the Proposed Amendments.

<sup>8</sup> See Section 95481(a)(110) of the Proposed Amendments.