As the Renewable Fuel Standard (RFS) program continues to evolve and mature, so too does the manner in which the U.S. Environmental Protection Agency (EPA or the Agency) seeks to drive day-to-day compliance by the regulated community. From the program’s inception, EPA’s regulatory activities have been largely focused on creating a framework that fostered the orderly growth of the Renewable Identification Number (RIN) market mandated by Congress, providing guidance on how to gain access to and participate in those markets, and removing fraud from the emergent RFS ecosystem.

More recently, however, EPA has begun to shift its focus to establishing the boundaries and clarifying the rules of those markets through the most efficient means available to it—high-stakes civil enforcement. In addition, other agencies such as the U.S. Commodity Futures Trading Commission (CFTC) and the Federal Trade Commission (FTC) have begun to look into ways they might help ensure integrity in the RIN markets through enforcement actions either individually or in connection with EPA.

In the weeks leading up to election day, EPA and the U.S. Department of Justice (DOJ) announced two of the biggest civil enforcement cases in the history of the RFS program. These cases are particularly noteworthy for the same fundamental reason: despite the sheer volume of RINs involved and the record fines pursued, documents filed to date show no stated allegations of intentional misconduct. Up until this turning point, RFS enforcement was built upon the pursuit of overt fraudsters whose schemes robbed RFS markets of hundreds of millions of dollars of value. In contrast, the most recent cases reveal a trend in which EPA and DOJ are scrutinizing routine commercial transactions and then pursuing civil enforcement where regulatory interpretations adopted or industry norms followed in those transactions are deemed to conflict with the Agency’s view of its own regulations.

Though a degree of uncertainty will persist until the next leaders of EPA are identified by the incoming Trump Administration, these larger enforcement trends are expected to continue. In particular, while EPA will of course continue to pursue resolution of the backlog of criminal fraud cases involving the RFS, these criminal actions should not distract compliance managers at sophisticated refining, importing and trading companies from the more direct challenges posed by these most recent civil cases. It is this emerging trend of high-stakes civil enforcement that presents real risk to the day-to-day compliance efforts of even the most experienced RIN market participants. Far from the headlines depicting the opulent lifestyles of the early RIN fraudsters, EPA has quietly gone about the business of systematically putting into place the resources and inter-agency agreements necessary to, in its view, maintain market integrity and achieve the goals of the RFS program over the long term. These actions include:
• Helping to develop and train a team inside DOJ’s Environment and Natural Resources Division to work specifically on EPA mobile source issues, including the RFS;

• Releasing the first comprehensive penalty policy for petroleum-based fuels in twenty years, setting minimum penalties for violations at levels far in excess of many historical settlements (this penalty policy does not apply to RFS violations but is indicative of EPA’s thinking and could be used as leverage in enforcement actions);

• Negotiating and releasing a memorandum of understanding (MOU) between EPA and the CFTC earlier this year, intended to coordinate enforcement efforts and share information on potential manipulation of the RIN market; and

• Adding new attorney and investigator resources within EPA’s mobile source enforcement unit based in Denver.

Though each element appears routine and somewhat innocuous in isolation, when viewed as a whole it is apparent that the Agency is building a civil mobile source enforcement infrastructure that: (a) seeks to keep pace with a rapidly evolving market and range of approved pathways; (b) is equipped to respond to industry practices it deems to be unacceptable far more rapidly than through traditional rulemaking; and (c) will endure through changing administrations (although the Trump Administration brings added uncertainty). The availability of such a mechanism to drive compliance is increasingly important in an era when the Agency issues fewer guidance documents.

The recent cases illustrate vividly that the civil enforcement machine built over the last eight years is bearing fruit, and the momentum built is not expected to be halted immediately, particularly for those cases already added to EPA and DOJ’s pipeline. Much of that pipeline has already been built from some combination of classic enforcement tools like routine facility inspections or audits, probing information requests issued under Section 114 of the Clean Air Act, and tips provided to EPA by competitors. Moreover, the Agency will continue to use information collected in one case to build its next case, always seeking to connect the dots and complete the picture of similar commercial conduct it believes violates the rules.

Additionally, the growth in RFS markets has caught the attention of a host of other regulators, particularly the CFTC and FTC, that may ultimately seek to uncover a second, far more sophisticated wave of RIN market fraud. For example, while the CFTC has long been interested in RIN market issues, it is now taking concrete steps—including the data sharing MOU with EPA—to be better able to investigate issues in the RIN market. In addition, FTC Chairwoman Edith Ramirez recently told the U.S. Senate Committee on Commerce, Science and Transportation that the FTC was aware of the concerns many in the industry apparently have about RIN market manipulation and stated that the Commission
may have authority to investigate these issues. Enforcement by the CFTC or FTC would present new challenges for RFS program participants because these agencies would be expected to leverage their own statutory authorities to ensure fair competition and eliminate activity deemed to be deceptive acts or practices affecting commerce.

**Conclusion**

In the face of this mounting enforcement risk, a robust approach to compliance is of paramount importance, particularly given the uncertainty that will persist as the Trump Administration appointments are made, and EPA begins to make any new direction clear to the regulated community. Compliance and training programs should be developed and implemented and should be equipped to stay current as the RFS program and industry best practices evolve. Finally, inspections, audits and information requests from EPA should continue, and the responses should be coordinated carefully through in-house or outside counsel to provide companies with the most robust protection.

*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed under ‘Related People/Contributors’ or the Sutherland attorney with whom you regularly work.*