



Priorities Report January 2022

Top Issues

- Surface Transportation Reauthorization & Infrastructure /Electrification
- Build Back Better Act (Please note several EMA issues included: EV credit, taxes, USDA grant program, biodiesel tax credit etc.)
- CDL Driver Shortage
- Disaster Response
- Tobacco Issues
- RFS Reform/E15 Compatibility Proposal
- OSHA ETS/Test Rule
- Strengthening enforcement of the Robinson-Patman Act (“RPA”)
- Swipe Fees and Litigation
- CAFE Standards

Secondary Issues

- Diesel Fuel Quality
- IRS Excise Tax Delays
- Placarding
- NORA Reauthorization
- State Climate Change Challenges against Marketers
- LIHEAP Funding
- Consumer Data Privacy Principles

Surface Transportation Reauthorization & Infrastructure/Electrification

This fall, Congress approved, and the President signed into law (on November 15th) the \$1.2 trillion bipartisan infrastructure bill, the Infrastructure Investment and Jobs Act (IIJA). Passage came after months of negotiations, with most progressive Democrats agreeing to vote for the bill on the condition that Democratic moderates agreed to move forward with the separate \$1.75 trillion domestic spending package (the Build Back Better Act) if the overall price-tag was consistent with the narrative pushed by Democratic leadership and the White House.

The IIJA provides \$7.5 billion in funding for states to deploy EV charging infrastructure with a \$2.5 billion set aside for a competitive grant program to build out EV charging, hydrogen, natural gas and propane infrastructure along alternative fuel corridors. The bill also provides \$7.5 billion for clean energy transportation and \$3.5 billion for the Weatherization Assistance Program. In total, the \$15 billion for clean energy transportation is significantly less than President Biden’s request, which included \$174 billion specifically for EV infrastructure.

Importantly, the IIJA **does not**:

- Increase the federal motor fuels tax
- Permit the installation of EV chargers at rest areas.
- Mandate retrofit requirements for automatic emergency braking systems
- Require rear underride protection.

Unfortunately, the legislation omits EV user fees. The legislation provides a five-year extension of surface transportation authorization, mostly paid for by repurposing unspent pandemic relief funds and unspent unemployment benefits.

The White House and relevant agencies are now turning to implementation of IIA. The Federal Highway Administration (FHWA) issued a Notice of Request for Information seeking public input on implementation of two new federally funded EV infrastructure programs created under the Infrastructure Investment and Jobs act of 2021. FHWA is requesting comment on how the program should be administered, including criteria for locating EV infrastructure projects. EMA plans to submit comments to FHWA and is seeking input from the Motor Fuels Committee and Alternative Energy Task Force on the EV infrastructure related questions. Comments of the FHWA are due by January 28, 2022.

Build Back Better Act

Congressional Democrats and the White House spent a majority of 2021 working through multiple versions of a budget reconciliation measure that would advance President Biden's social infrastructure priorities. Upon release of the Build Back Better (BBB) Act in the summer, EMA quickly recognized that the proposed policies would harm marketers throughout the U.S. As a result, EMA voiced opposition to the overall bill while also working with state associations to advocate for changes to several BBB provisions.

On December 19, in a move that surprised many in the Democratic party, Senator Joe Manchin (D-WV) said he could not support the current form of the Build Back Better Act (BBB) – President Biden's partisan \$1.75 trillion climate change, healthcare, and education package. The House passed the BBB in November on partisan lines, while the legislation has been the subject of extensive debate in the Senate. Senator Manchin's comments effectively eliminate passage of the current version of the BBB, as his vote is critical for Senate Democrats to secure the needed 50-vote threshold to pass a budget reconciliation measure. Despite Senator Manchin's objections, House progressives are pushing Congressional leadership and the White House to hold a vote on the measure. Senate Majority Leader Chuck Schumer (D-NY) has reportedly said the Senate will still vote on the legislation in January. Should Sen. Manchin maintain his objections, which is likely, additional Senate Democrats may also oppose the bill for political reasons. Should the current BBB move for a vote in the Senate, many Senators – knowing the bill will not pass – might also oppose for political reasons. These Senators could include Senators Sinema (D-AZ), Kelly (D-AZ), Tester (D-MT), as well as members in contested 2022 elections like Sen. Hassan (D-NH).

EMA voiced its outright opposition to the overall BBB bill while also working with state associations to advocate for changes to several BBB provisions. Those include:

EV Tax Credit

EMA's advocacy on the BBB included efforts to limit tax credit eligibility for Americans making over \$100,000/year to purchase an EV that costs over \$40,000. Under the current BBB draft, this income threshold is \$400,000 for an individual and \$800,000 for joint tax filers. As stated in a EMA's West Virginia Oil Marketers and Grocers Association (OMEGA) letter to Senator Manchin, the BBB's proposed tax credit is a wealth-credit in disguise. [CLICK HERE](#) to read letter.

Tobacco/Nicotine Tax Increase

EMA opposed a potential tobacco/nicotine tax. The BBB no longer includes the proposed tax increases. (More information under tobacco issue brief).

Multiple, Onerous Tax Increases in BBB

EMA opposed potential increases in individual income, capital gains tax and changes to the very important 20% qualified business income deduction under 199A for pass-through entities. These potential tax increases are no longer in the House BBB bill. Additionally, EMA also sent a letter outlining opposition to any proposal that would require financial institutions to report to the IRS on transactions in business and personal accounts. [CLICK HERE](#) to read the joint association letter. The unnecessary proposal would require financial services providers to track and submit to the IRS information on the inflows and outflows of every account above a de minimis threshold of \$10,000 during the year. Intended to help the IRS target wealthy tax dodgers, the unintended consequence is the overly broad proposal would

directly affect many Americans and small businesses with an account at a financial institution. The good news is the provision was stripped from the House BBB.

USDA Cost-Sharing Program to Install E10/B20 Plus Blend Infrastructure

EMA also voiced concerns with a \$960 million USDA cost-sharing grant program for marketers to install, retrofit or upgrade UST system infrastructure and pumps to sell higher biofuel blends as well as to build and retrofit traditional and pipeline biodiesel terminal operations and home heating oil distribution centers. The provision had no safeguards to ensure access to funding by small business marketers. The lack of limiting language based on business size would have allowed the largest multistate retailers to access the entire \$960 million in funding. The latest Senate version has made some improvements but more work still needs to be done.

Electrification-Only Programs

EMA also opposed electrification-only programs that would affect small business heating fuel dealers. EMA worked with the Maine Energy Marketers Association in a letter to Senator King (I-ME) to ensure heating fuel appliances that are compatible with B20 plus blends be part of the rebate programs offered to electric HVAC systems. Requiring rebate equity on the federal level supports ongoing efforts in individual heating oil states opposing electric utility electrification rebate programs.

Special Carve Out for Renewable Jet Fuel

EMA opposed a special carveout for aviation fuel. The House BBB would give renewable jet fuel preferential tax treatment compared to on and off-road renewable diesel, even though they both use the same feedstocks. The proposal would undermine the market for biodiesel in transportation and heating fuels.

Biodiesel Blenders Tax Credit

The House BBB would convert the biodiesel blender's tax credit to a producer credit within five years which would effectively eliminate biodiesel blender credits for energy marketers below the terminal rack and undermine the market for biodiesel in transportation and heating fuels.

OSHA COVID-19 ETS

OSHA released a final emergency temporary standard (ETS) in November requiring employee COVID-19 vaccination or weekly testing at all employers with 100 or more employees. The ETS was stayed by a federal court last month which delayed the original December 5, 2021 compliance deadline. On Dec. 17, the 6th U.S. Circuit Court of Appeals lifted the stay and OSHA is now requiring employers with 100 or more employees to have their covid-19 workplace testing program in place by January 10, 2022. Employee testing must begin by February 9, 2022. However, compliance may be stayed once again as a number of state attorney generals opposed to ETS have appealed the lifting of the stay to the U.S. Supreme Court (SCOTUS). SCOTUS is expected to hear arguments regarding the mandate on Friday, January 7. In the meantime, covered employers should assume the ETS is going forward as planned and prepare to come into compliance by the January 10th and February 9th compliance deadlines.

[CLICK HERE FOR THE FULL EMA COMPLIANCE BULLETIN](#)

[CLICK HERE \(links to downloadable .DOCX file\) FOR OSHA'S COVID-19 Vaccination, Testing and Face Covering Policy Template](#)

CDL Driver Shortage

The driver shortage remains a huge national problem. EMA sent a letter to the Department of Transportation to extend the compliance deadline for the Federal Motor Carrier Safety Administration's (FMCSA) Entry Level Driver Training (ELDT) rule. EMA believes a deadline extension is warranted due to the ongoing shortage of qualified CDL drivers nationwide combined with unprecedented supply chain disruptions caused by the COVID-19 pandemic.

The original compliance date for the ELDT rule was set for February 7, 2021 but was pushed back to February 7, 2022. The ELDT rule establishes new knowledge and behind the wheel skills testing for new applicants who wish to obtain a

CDL license for the first time or upgrade their current CDL from Class A to Class B or obtain a hazardous material endorsement. Only trainers certified by the FMCSA may provide the new training. [CLICK HERE](#) to read the letter.

EMA is working with the U.S. Department of Energy (DOE) on a study that the Department is preparing regarding the driver shortage and potential solutions. EMA frequently raises the shortage with the U.S. Department of Transportation (DOT), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA) and sent a letter in November outlining ways to minimize the driver shortage and improve disaster response. [CLICK HERE](#) to read the letter and below is a quick summary.

EMA recommendations include:

- Expand the availability of EB3 Visas or offer short term emergency Visas to qualified foreign drivers.
- Amend the hazardous materials training requirements under 49 CFR 172 to allow for training modules for the packaging and transportation of industry specific hazardous materials. For example, a training module that focuses on the petroleum transportation industry and the specific liquid petroleum hazardous materials drivers in that industry are likely to handle. Many hazardous material endorsement applicants are deterred by the breadth of general awareness training required under 49 CFR 172.704.1. Driver applicants often question why they must study and be tested on general hazardous material curricula that is unrelated to their job hauling petroleum products. EMA believes far more applicants would pass their hazardous material training and be qualified to drive if general awareness training is limited to industry specific hazardous materials. EMA believes the function specific training required under 49 CFR 172.704.2 is sufficient when industry specific curricula is included.
- Allow for a hazardous materials endorsement (HME) exemption for Bobtail (up to 5,000 gallons) trucks during severe disaster situations which would increase the pool of drivers to deliver fuel into the communities and to hospitals.
- Create a system of communication from the ports to petroleum marketers regarding the availability of TWIC escorts at water borne terminals to lessen wait times at terminals during disasters.
- Support “The Drive Safe Act” which would allow drivers 18 and older to operate across state lines if they meet rigorous training requirements — at least 400 hours of on-duty time with 240 hours of driving time, with an experienced driver training them. Although drivers of petroleum would not be covered under the Drive-Safe Act since drivers must be 21 to qualify for a hazardous materials endorsement (HME), EMA supports the bill because it would expand the number of CDL drivers overall, some of whom may choose to obtain an HME in the future.

Disaster Response

EMA’s ongoing efforts in this area have significantly improved the efficiency of the federal regulatory waiver process by establishing for the first time, interagency communication and coordination during declared emergencies. EMA initiated these efforts due to chronic delay and confusion among federal regulatory agencies during emergencies that often cause interruptions in the petroleum distribution chain below the terminal rack. As a result of EMA’s work in this area, drivers are available to move fuel where it is needed without delay. During a national government-wide call during Hurricane Ida response, Louisiana EOC representative reported that EMA and LOMCSA did phenomenal work to provide fuel to Louisiana.

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 a sstone@emamerica.org.

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.commroute1.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. 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 addressed a problem where some replacement drivers had not been allowed to receive on-site training to be carded for specific terminal facilities (which is usually allowed during disasters). **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.

RFS Reform

The EPA issued proposed RFS annual blending mandates in December that significantly lowered renewable fuel (ethanol) volumes for 2021. The EPA is proposing to set the 2021 renewable fuel blending mandate at 13.3 billion gallons. Also, in an unprecedented move, the agency is proposing to retroactively reduce the 2020 renewable fuel (ethanol) blending mandate previously set at 15 billion gallons to 12.5 billion gallons. According to the EPA, the retroactive reduction is due to lower demand for transportation fuels during the COVID-19 pandemic. The EPA already set the 2021 biomass-based diesel (biodiesel) blending mandate at 2.43 billion gallons in a previous rulemaking. The EPA delayed decisions on 2021 blending obligations by more than a year and recently missed the November 30th deadline to finalize 2022 blending mandates.

EMA has for many years called for lower annual corn ethanol blending volumes that would allow marketers to determine for themselves whether to sell E15 rather than be required to do so through a de facto mandate. EMA sent multiple letters to the EPA and the National Economic Council this year requesting urgent action to reduce the corn ethanol mandate to address the current E15 crisis. Click [here](#) and [here](#) to read EMA's letters.

EMA fully believes in renewable fuels and their importance in the liquid fuels market and plans to ask the Biden Administration to ensure that future federal grant funds be available for small business energy marketers to upgrade their underground storage tank system equipment to safely and legally sell E10 plus blends.

PROPOSED RFS VOLUME REQUIREMENTS (IN BILLION GALLONS)

	2020	2021	2022
Cellulosic Biofuel	.051	.062	.077
Biomass-based Diesel (biodiesel)	2.43	2.43	2.76
Advanced Biofuel	4.63	5.2	5.77
Renewable Fuel (Ethanol)	12.5	13.3	15.0
Supplemental Standard	n/a	n/a	0.25

The agency's proposal also includes a call to add a 250 million gallon "supplemental obligation" to the volumes proposed for 2022 and another 250 million gallons in 2023, in response to a 2017 court ruling that invalidated EPA small refinery waivers totaling 500 million gallons of renewable fuel. In addition, the proposal would deny the 65 petitions pending refinery exemption requests before the agency and opens comment on its outlook on future waivers.

Meanwhile, Rep. Cheri Bustos (D-IL), along with five other Democrats and Republicans, recently introduced a bill known as the "Next Generation Fuels Act" that seeks to establish a minimum 95 Research Octane Number (RON) standard for gasoline. The bill is supported by the National Corn Growers Association. Cosponsors of the bill are Reps. Emanuel

Cleaver (D-MO), Cindy Axne (D-IA), Darin LaHood (R-IL), Jason Smith (R-MO), and James Comer (R-KY)). The bill would require automakers to use a test fuel that contains 20 percent ethanol with a minimum 95 RON octane value for new vehicle emissions and fuel economy standards starting with model year 2026 cars that would rise to 98 RON after 2031. The ethanol blend requirement creates a major issue with respect to infrastructure because it mandates sites with annual sales over 200,000 gallons per year to sell this product which in turn would require upgrades to the facilities. Equipment that is not E15 compatible will have to be replaced before 2026 and equipment that is E15 compatible up to E20 compatible would need to be replaced by 2031. Essentially, marketers would need to upgrade to E30 or greater compatibility. Underground storage tanks may not be an issue, although it raises the age issue and mandatory replacement. In tank equipment and piping would likely need to be replaced and possibly dispensers depending on their age and UL listing. It requires EPA to require UST systems and dispenser to be compatible with up to 40 percent ethanol that are brought into service after 1/1/2024. This will include new and replaced system and be costly.

The bill would require new dispenser labeling warnings to address misfuelling but does not address the problem of fueling older vehicles with higher blend ethanol fuels. This could be a problem with some vehicles that are rated to E15, but not higher. It requires that the price of the 95/98 octane be displayed any place that the price of the “most-sold” fuel is displayed. It provides a Clean Octane standard driven by a requirement for reduce aromatics and a prohibition on lifetime greenhouse gas emissions that are not 40% less than current fuels. It also provides a waiver from the RVP with a presumption that it meets all requirements. It also adds 20% and greater blends to the alternative fuel vehicle refueling property credit.

The good news is that the bill is not moving anywhere, however, it is important that EMA engage with NCGA, American Fuel & Petrochemical Manufacturers (AFPM) who represent the refiners, as well as the auto industry to find common ground. In 2018, AFPM argued that a fuel-neutral, 95-RON octane performance standard could address the needs of all stakeholders: the auto industry, marketers, biofuel producers, refiners, and, most importantly, consumers. 95 RON is similar to today’s premium fuel that would lower emissions and preserve the liquid fuels distribution network. Given ethanol’s octane boost, a minimum of E10 would likely be used to meet the 95 RON standard. The legislation aims to establish a 95 research octane number (RON) octane standard for new light duty vehicles, modernize the RFS, and streamline other fuels regulations. AFPM hopes that members of Congress will introduce a version of this plan in the coming months.

The complexities involved in the transition to a single high-octane gasoline would require federal legislation, since EPA lacks the authority to implement the transition nationwide, at least quickly enough to take full advantage of a new fuel. Even with a federal mandate in place, the transition to a high-octane fuel would likely take time to achieve given the need for both Congressional and EPA action to make it happen.

E15 Compatibility

The EPA issued a notice of proposed rulemaking (NPRM) on January 19, 2021 designed to broaden E15 retail market share and availability. The NPRM weakens both EPA’s E15 misfuelling mitigation requirements and the EPA Office of Underground Storage Tanks’ (OUST) E15 compatibility requirements designed to prevent UST system releases. The NPRM is proposing changes that would have a major impact on energy marketers regardless of whether or not they sell or intend to sell E15 gasoline.

The proposed rule would:

- Weaken or eliminate E15 dispenser label language
- Require that all newly installed UST systems and all replacement parts for existing systems be compatible with ethanol blends up to E100
- Allow tank owners who cannot demonstrate E15 compatibility to forgo proof of compatibility provided their UST systems are equipped with secondary containment and interstitial monitoring for tanks and piping (including safe suction piping)
- Eliminates proof of compatibility for *categories* of equipment already known to be compatible with E15 and no proof of compatibility required for certain *models* of equipment already known to be compatible.

The proposed rule would increase the risk of release from UST systems, result in higher insurance costs, policy cancelations, and jeopardize the financial solvency of State Tank Funds. EMA submitted comments opposing the proposed rule after consultation with the EMA Motor Fuels Committee and EMA UST Task Force.

Tobacco Issues

After heavy pressure from EMA and other organizations, Senate democrats eliminated a potential tax increase on nicotine products that was included in the House-passed Build Back Better (BBB). EMA used a targeted grassroots approach through its state associations to ensure that a tobacco/nicotine tax increase did not make it into the partisan Build Back Better Act (BBB). EMA President Rob Underwood was quoted in a Politico article stating, “The Energy Marketers of America is opposed to the massive tobacco tax increase in the current House reconciliation bill because the proposed tax increase will shift tobacco sales into the illicit market and undermine small business retailers who legally offer tobacco products to adult users. Additionally, the proposed increase contradicts President Biden’s promise not to raise taxes on individuals making less than \$400,000 a year.” [Click here](#) to read the article.

EMA also joined FMI (the Food Industry Association), NACS, NATSO and SIGMA in a [letter](#) to Janet Woodcock, M.D. Acting Commissioner of Food and Drugs, U.S. Food & Drug Administration (FDA), and Mitchell Zeller, JD, Director of the Center for Tobacco Products (CTP), FDA, urging swift announcement of the list of electronic nicotine delivery system (ENDS) products for which the Agency has issued marketing denial orders (MDOs). Without the list, retail members, who make every effort to comply with the law, do not know which products must be removed from shelves.

Retail members who sell ENDS products take the responsibility of compliance and operating in accordance with the law seriously. Publicly available information noting the status of individual products is the only way retailers can ensure compliance.

Strengthening Enforcement of the Robinson-Patman Act (“RPA”)

The National Grocers Association (NGA) along with EMA, NACS and other associations formed the Main Street Competition Coalition (MSCC) to promote competition by strengthening enforcement of the Robinson-Patman Act (“RPA”), the only federal price discrimination law to ensure a level playing field for the benefit of both businesses and consumers. Members of the MSCC include the Energy Marketers of America as well as the National Community Pharmacists Association, American Beverage Licensees, Protect Our Restaurants, Organic Farmers Association, Western Growers Association, National Beer Wholesalers Association and the National Association of Truck Stop Operators.

The RPA prohibits price discrimination when the effect of the discrimination is to lessen or destroy competition. EMA’s Convenience Store Committee has had multiple discussions centered on the discrimination practiced by suppliers of beverages and other grocery items in their sales to convenience stores, discrimination that favors, among others, super stores and big box retailers who are regarded by suppliers as being in a different class of trade from their smaller to medium-sized competitors. While the RPA authorizes private enforcement by retailers, the obstacles to successful enforcement (many of which were fashioned by the federal courts) make private enforcement too difficult and time-consuming, and ultimately too risky from a success standpoint to justify the enormous costs of such litigation. The only viable means of enforcing the law, therefore, is to encourage enforcement of the RPA by the Federal Trade Commission (FTC).

Unfortunately, the FTC has not brought a case under the Robinson-Patman Act in more than 20 years. Nor has the FTC brought an enforcement action against economic discrimination using the other antitrust laws. The objective of MSCC is to breathe life back into the RPA law. Please go to www.mainstreetcompetition.com for more information.

CAFE Standards

The Biden Administration released its final Corporate Average Fuel Economy Standards (CAFE) to significantly tighten light truck and car fuel efficiency in December. The new efficiency standards will result in a 40-mpg requirement for light trucks and cars by 2026. By comparison, the Trump era CAFE standards required a 32-mpg efficiency requirement by

2026. Under the EPA's projections, CAFE standards are expected to begin a shift to electric vehicles over the next decade pushing sales of EVs and plug-in hybrids to about 17 percent in model year 2026 from an expected 7 percent in model year 2023, still far from President Biden's goal for half of U.S. car sales to be EVs by 2030. However, that goal is widely seen as overly optimistic given that EVs sales represented only 3 percent of all passenger cars sales in 2020.

Automakers are also concerned with Biden's fuel economy plan as it represents a dramatic shift from the current U.S. auto market and can only happen with policies that include incentives for EV purchases, adequate government funding for charging stations and money to expand EV manufacturing and the parts supply chain. Senator Manchin's announcement on Fox News Sunday that he can no longer support Build Back Better (BBB) complicates Biden's goal as it included tax credits and rebates to entice people into buying EVs.

Swipe Fees and Litigation

The Justice Department's Antitrust Division and the Federal Trade Commission (FTC) endorsed a May 2021 proposal by the Federal Reserve to strengthen the 2011 debit card interchange fee rules (Regulation II) to reign in the rapidly growing "card-not-present" (CNP) transactions such as online shopping, automatic bill payments and new payment methods such as Apple Pay. The Merchants Payments Coalition (MPC), in which EMA is a contributing member, submitted comments urging the Fed to update Regulation II to ensure that two unaffiliated networks must be available for all debit transactions including CNP transactions. MPC also requested that the Fed further clarify that access to competitive debit networks must be enabled regardless of what kind of authentication – such as signature, PIN, PINless or biometrics – is used.

Furthermore, MPC urged the Fed to reduce the current regulated debit card fee rate that sits at \$.21 plus .05 percent of the transaction, plus 1 cent for fraud. MPC's comments builds upon the North Dakota Retail Association and the North Dakota Petroleum Marketers Association's lawsuit filed in April arguing that the Fed failed to follow the Dodd-Frank law which called for the fees to be "reasonable and proportional" to the cost incurred by the issuer.

Swipe Fee Settlement

EMA advised marketers 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.

Judge Brodie of the US District Court for the Eastern District of New York 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 U.S. 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 has now been informed that the Second Circuit Court of Appeals has scheduled a hearing to hear oral arguments on EMA's appeal on March 16, 2022. The Court will then render a decision on the appeal some months after oral argument. EMA will alert its members to any developments that may arise out of the arguments before a three-judge panel of the Court on March 16 and, of course, EMA will update its members immediately upon a decision by the Court following oral argument. There is no reliable estimate at this time as to how long the Court will take after March 16 to render a decision.

Secondary Issues

Diesel Fuel Quality/Diesel Fuel Best Practices

The Fuels Institute's Diesel Fuel Quality Council (DFQC) released its second-best practices document related to the handling of diesel fuel. The "Diesel Fuel Loading and Delivery: Industry Practices to Minimize Degradation and Improve Fuel Quality" is a seventeen-page document that provides recommended practices for the loading of diesel fuel on to a tanker at a terminal and unloading into a diesel fuel storage tank. Information is presented to ensure the delivery of quality diesel fuel and avoid potential fuel contamination problems while loading and unloading diesel fuel. EMA provided extensive comments on this document during its development. EMA believes any solution to the diesel fuel quality issue must include testing above the terminal rack. Thus far, no study has focused on above the rack diesel fuel quality. You can download the document for free by clicking [here](#).

Placarding

EMA filed a request with the Pipelines & Hazardous Materials Safety Administration (PHMSA) for a Special Permit that would allow 1203 placarding for straight loads of diesel fuel and gasoline. The special permit would be issued to a single energy marketer but would allow any other marketer to operate under it. PHMSA granted the Special Permit (DOT-SP 21104) allowing the 1203 placard for straight loads of diesel fuel and gasoline so long as the alternating loads were not separated by more than one business day. EMA filed for a modification to the Special Permit expanding the length of time between loads to a maximum 30 days. PHMSA rejected the 30-day modification as well as EMA's recent appeal of that decision. However, the Special Permit remains in effect and may be used by any marketer who applies to operate under its conditions, provided the period between a straight load of diesel fuel and gasoline occur within one business day.

IRS Excise Tax Delays

The IRS experienced significant delays processing claims during COVID19 workplace restrictions that left energy marketers waiting sometimes more than a year to receive refund checks for the tax including sales of diesel fuel to state and local government entities. Claims for the biodiesel blender tax credit and alternative fuel mixture credits were similarly delayed. Continuing to float unpaid refund claims created unnecessary financial hardship for many marketers. EMA pressed the IRS to clear up the backlog. As a result, clearing up the claim backlog became a top priority.

To get definitive answers, EMA enlisted the help of the Senate Finance Committee member Pat Toomey (R-PA) as well as Senator Roger Wicker (R-MS) and House Republican Chief Deputy Whip Ferguson (R-GA) to pressure the IRS to address the growing backlog. This resulted with the IRS finally responding with a plan to clear up the processing backlog. According to the IRS, the backlog was due to a combination of factors; the disruption in normal work hours and loss of personnel caused by COVID-19; and the volume of paper claims filed by marketers. According to the IRS, electronically filed claims were processed quickly while paper claims were delayed due to the labor-intensive processing requirements for such claims and the lack of personnel to handle them. Due to the continual pressure brought to bear on the IRS, the mountain of unpaid paper claims was processed, and refunds sent to marketers just 2 months after EMA got involved. EMA is continuing to pressure the IRS to process interest payments for marketers with claims delayed more than 40 days. EMA is also working on programs to educate marketers on the importance of electronic filing so that future processing delays are avoided.

State Climate Change Challenges against Marketers

This fall, EMA filed an opposition to a Rhode Island (RI) federal court's remand of a state climate challenge against major oil companies. Citing a May decision of the U.S. Supreme court finding in *BP v. Mayor and City Council of Baltimore*, a climate change case in which EMA submitted an amicus brief in support of BP and the other major oil company defendants, EMA argued that the case should be tried in federal court. Although the case involved a procedural issue related to whether the case would proceed in a federal or state court, it is significant in determining whether cities, like Baltimore, can ultimately prevail. State courts, applying traditional state law causes of action, have allowed the cases to proceed to where they will ultimately be tried by a jury. Federal courts, on the other hand, are considerably more likely to decide the cases under federal common law, which would warrant a dismissal of the cases before the huge potential liability and enormous costs of litigation leave the defendants with no alternative but to settle. As one federal court of appeals recently stated in affirming the dismissal of a climate change case brought by the City of New York, the responsibility for global warming cannot be shifted to energy producers when “every single person who uses gas and electricity contributes to global warming.”

EMA got involved in the Baltimore case as well as other cases including RI after local marketers were added to the list of (mostly major oil company) defendants as part of a strategy to defeat federal jurisdiction and keep the cases in local state courts. The Supreme Court’s opinion could dampen the enthusiasm of coastal cities, like Baltimore, to continue to bring these cases against energy producers and marketers. Although it dealt only with a procedural issue, the decision could also hasten the day when one of the cases proceeds to the U.S. Supreme Court for a substantive review and, very likely, a decision that the effects of global climate change are not the responsibility of the petroleum industry.

In May 2021, the U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the Fourth Circuit, which affirmed a lower court ruling that the case could proceed in a State court. The Supreme Court held that the Fourth Circuit’s review of the case was too narrowly based and that a broader review is required. The Fourth Circuit has not yet ruled on the question following the Supreme Court’s reversal, and its decision, one way or the other, is likely to be appealed to the Supreme Court for a decision that would be binding on all the federal courts.

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 used in 6.3 million homes, serving more than 16 million Americans across the country. NORA was reauthorized in 2018 for ten years. EMA will be looking for opportunities to permanently authorize NORA.

LIHEAP Funding

LIHEAP helps low-income households and seniors with their energy bills, providing vital assistance during the cold winter months. According to the National Energy Assistance Director’s Association (NEADA), nearly 90 percent of LIHEAP recipients have at least one household member who is a child, elderly or disabled. For these vulnerable households, LIHEAP funding has been a lifeline during challenging economic times.

EMA is a member of the National Energy and Utility Affordability Coalition (NEUAC) that is urging Congress to maximize funding for LIHEAP. In addition to the \$3.75 billion in appropriations for FY 2021, the American Rescue Plan Act of 2021 provided \$4.5 billion in additional LIHEAP funds through September 2022, for a total of \$8.25 billion. Recently, Senator Jeanne Shaheen (D-NH) sent a letter to the Department of Health and Human Services requesting information and timeline updates regarding implementation and eligibility for low-income families and funding needs for the Department to fulfill its obligations. EMA continues to urge all lawmakers to maximize LIHEAP funding.

Consumer Data Privacy Principles

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.