The Wild West of the RIN Market: An Environmental Law Exploited as a Financial Tool

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INTRODUCTION

“Absent RINs, we’re competitive with anyone in the world,” remarked Greg Gatta, the CEO of Philadelphia Energy Solutions (PES), as PES filed for bankruptcy in 2018.1 PES once owned and operated the largest oil refinery on the East Coast, accounting for one-fourth of the East Coast’s crude refining capacity.2 Crude refining is directly linked to the price consumers pay for gas at the pump, accounting for roughly 25% of that cost.3 PES cited the “skyrocketing costs” of Renewable Identification Numbers, or RINs, which serve as credits to measure compliance with the Renewable Fuels Standards (RFS), for its bankruptcy.4 Blaming RINs and the RFS—an Environmental Protection Agency (EPA)-run program aimed at lowering pollution by blending renewable fuels into gasoline—was certainly met with criticism.5 That said, United States Senator Ted Cruz, in a 2018 Town Hall at the PES refinery, pointed to PES’s 2017 balance sheet, which showed that PES spent approximately $218 million on RINs to meet RFS compliance—more than double the company’s payroll.6 Between the years 2011 and 2013, the amount PES spent on RINs

2. Id.
rose from $19 million to $116.3 million. \(^7\) “How many of you think the refinery should be wasting money on government license that don’t create a damn thing, rather than creating jobs and paying your salaries?” declared Cruz, arguing that Texas refineries and Texas jobs were just as at risk. \(^8\)

Senator Cruz is far from the only person in D.C. to speak out on the issues occurring in the RIN market. Not four months prior, United States Senator Tom Carper, a Democrat leading the 2017 Environment and Public Works Committee, sent a letter to the Federal Trade Commission (FTC) asking the FTC to open an investigation into RIN market manipulation. \(^9\) The letter, containing bipartisan and bicameral signatures, \(^10\) cited wildly fluctuating RIN prices from the prior four years, with 2017 having a price spike of over 200\%. \(^11\) Eight months after PES filed for bankruptcy, then-President Donald Trump issued a White House statement calling for the EPA to increase transparency in the RIN market to prevent market manipulation. \(^12\)

To say RIN prices have ‘fluctuated wildly’ almost does not do it justice. For many years, the primary RIN type (D6 ethanol) was below

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\(^8\) Gillman, supra note 6.


\(^10\) The list of congressional members that signed the letter includes Senators Carper, Chris Coons, and Congresswoman Lisa Blunt Rochester (all D-Del.), as well as Senators Bob Casey (D-Pa.), Cory Booker (D-N.J.), and Congressman Patrick Meehan (R-Pa.). Id.

\(^11\) Id.

$0.01.\textsuperscript{13} In 2012, D6 RIN prices skyrocketed to $1.18,\textsuperscript{14} and around July 2013, a RIN pricing data vendor reported D6 RIN prices over $1.40.\textsuperscript{15} The 2012 spike represented a 2,100\% increase, and the price of D6 RINs represented $0.11 of every gallon of gasoline or diesel produced in that year.\textsuperscript{16} The $1.00 per D6 RIN mark was reached again in 2017 and 2021, according to Oil Price Information Service (OPIS)—another RIN pricing data vendor.\textsuperscript{17} The EPA, through the EPA Moderated Transaction System (EMTS), reported that D6 RIN prices in 2021 fell as low as $0.69 and peaked at $1.59, a 130\% swing.\textsuperscript{18} Since 2022, D6 RIN prices reported on the EMTS have not dropped below $1.00, and in 2023 alone, the price fluctuated $0.40, peaking at $1.66.\textsuperscript{19} For context, the 2022 RIN trading volume included 194,870 transactions accounting for 25 billion RINs, an approximate market value of $38 billion.\textsuperscript{20}

The burden of the RIN market is not unique to PES; instead, it is shared with all of the refineries obligated under the RFS to blend renewable fuels or buy RINs. To illustrate the impact, a publicly traded independent refiner will be used, calling it Company A. In the years 2020, 2021, and 2022, Company A spent $767 million, $2.1 billion, and $1.5 billion, respectively, on purchasing RINs.\textsuperscript{21} Company A states in its 2022 Annual Report (Form 10-K) (Feb. 23, 2023) at 137.


\textsuperscript{14} Id.


\textsuperscript{16} Legal Alert: Renewable Fuel Standard Costs Reach Record Levels: Corn-Ethanol RINs at $1.18 per RIN, supra note 13.


\textsuperscript{19} Id.


\textsuperscript{21} Valero Energy Corp., Annual Report (Form 10-K) (Feb. 23, 2023) at 137.
10-K that, to manage the risk of RIN price volatility, it would enter into “derivative instruments,” which include futures and options. This issue is magnified for smaller, “mom and pop” style merchant refiners.

The Fueling American Jobs Coalition has frequently contended, even as recently as 2022, that such high RIN prices will cause independent refiners to spend more on RINs than on payroll, benefits, utilities, and maintenance combined. The American Fuel & Petrochemical Manufacturers laid claim to the same issues. In 2023, the Biden Administration had the EPA engage the Commodity Futures Trading Commission (CFTC) and the FTC to address potential market manipulation in the RIN market, a White House action that was also done back in 2016.

22. Id. at 136.

23. For derivative investments, futures refer to financial contracts obligating the buyer to purchase (in the case of a "long" position) or the seller to sell (in the case of a "short" position) a specified asset at a predetermined price (the "futures price") at a future date, as agreed upon when the contract is initiated. These assets can include commodities such as oil, gold, or agricultural products, financial instruments like stock indexes, currencies, or interest rates, and even specific securities, such as RIN’s. For more information, see Jason Fernando, What is Futures Trading, INVESTOPEDIA, https://www.investopedia.com/terms/f/futures.asp [https://perma.cc/46ZX-M4BM] (last updated Mar. 20, 2024).

24. Similar to futures, options are agreements to purchase assets at a predetermined price and time with the main difference from futures being that options do not obligate buyer make the purchase. They are just that, an option. For more information, see Fernando, supra note 23.


28. Id.

The RIN price fluctuations signal market inefficiencies, the causes of which are unclear in the opaque RIN market. Pricing data is available from three sources: the EMTS, Argus, and OPIS. The latter two collect data from voluntary submissions—likely from different sources—while the EMTS requires only limited reporting, which does not include derivative contracts. This creates siloed information that provides an inadequate and fractured representation of RIN prices and RIN trading at any given time.

Some of the concerns about market manipulation derive from this lack of transparency in the RIN trading market. RIN trading has no centralized trading platform and may occur on public exchanges, via private contracts, or through other means. Bloomberg, in a 2016 article on a criminal proceeding for fraudulent RINs, commented that “[s]waps [of RINs] are usually agreed upon between companies, traders, and brokers via e-mail, phone, texts, and chat-room messages.” RIN trading remains opaque despite the existence of the EMTS, a system designed for tracking and reporting RIN transactions, but nonetheless tracks far less information than is tracked in other regulated markets.

Other concerns for market manipulation derive from the extensive involvement in the RIN market by non-obligated parties—parties not obligated to obtain RINs for compliance but are still able to buy and sell RINs for profit. The EPA reported in 2014 that, of the 50 billion RIN sales transacted in that year, 30 billion of those transactions involved non-obligated parties. In 2022, of the 2,400 parties registered to trade RINs...

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31. Id.; 40 C.F.R. § 80.1452(c) (“The reportable event for a RIN purchase or sale occurs on the date of transfer.”).
32. DAVIS ET AL., supra note 20.
with the EPA, 2,000 were non-obligated parties. Indeed, a non-obligated party, herein referred to as Company B, made $92.9 million and $117 million selling RINs in 2014 and 2015, respectively. These profits interestingly accounted for 85% and 87% of Company B’s annual profits for those years. Company B reported RIN profits on its 2022 10-K as being $265.3 million in 2021 and $305.8 million in 2022. RIN profits account for 56% of Company B’s total net revenue in 2021 and 41% in 2022. All the while, obligated parties like PES are going bankrupt. As recently as December 28, 2023, U.S. refiners petitioned the EPA for rulemaking to eliminate the participation of non-obligated parties, which they claim “has led to gross market manipulation.” This petition by Coffeyville Resources Refining and Marketing and Wynnewood Refining Company made clear that the current RIN system is “inflicting disproportionate economic harm on small refineries, crippling many merchant refineries, contributing to the closure of several refineries, and


36. DAVIS ET AL., supra note 20.
37. Weinstein, Ph.D., supra note 35.
38. Id.
40. Id. at 36 (total net revenue from operations in 2021 was $472.8 million and $740.9 million in 2022).
by EPA’s own admission, increasing fuel costs for the American consumer.”

Laxed restrictions likewise invite the involvement of brokers in the RIN market. As of December 12, 2023, the EPA’s published list of registered Companies and Facilities encompassed 907 companies or individuals registered as “RIN Owner Only.” Wall Street traders and Financial Institutions such as JP Morgan Chase, Morgan Stanley, Citigroup, and Barclays are all registered with the EPA via subsidiaries to trade RINs. And yes, the EPA has said that individual citizens may own RINs since “[t]here is no restriction on who may own RINs.”

While these companies’ holdings are not published, the New York Times in 2013 reported from industry executives familiar with JP Morgan’s activities that JP Morgan owned “hundreds of millions” of RIN credits to which it was actively trying to sell. JP Morgan denied these reports, citing the fact that it must maintain involvement in the RIN market since some of its subsidiaries are required to participate in the RFS.

Non-obligated parties are able to make windfall profits on RINs by trading with obligated parties, like refiners and importers, since obligated parties are “captive buyers.” Obligated parties have a certain number of RINs they must individually retire per year, and a RIN’s shelf life only lasts two years. Companies like Company B and JP Morgan solely own RINs to eventually sell them to obligated parties. These non-obligated parties know who is required to buy RINs to satisfy RFS compliance—the EPA publishes a yearly spreadsheet of registered participants and their roles—and when they must have those RINs by. This makes the obligated parties “captive buyers” to whatever RINs are available at any given time, while non-obligated parties have no incentive to sell RINs until demand is where they desire.

42. Neeley, supra note 41.
43. Excel spreadsheet (on file with author) (downloaded from EPA’s website) [https://perma.cc/5RLL-DHX7].
46. Morgenson & Gebeloff, supra note 44.
47. Id.
Despite extensive pleas for RIN market reform, the EPA continues to state that no evidence of market manipulation exists. The renewed call for change coming from the Biden Administration is welcomed but unexempted. Small refiners continue to be adversely affected by RIN prices over the past decade with federal agencies showing minimal consideration for substantive change. While price manipulation is a heavy accusation, such unlawful activity carries heavy consequences, particularly when refiners like PES are declaring bankruptcy. Even greater, any exacerbated costs of RINs will be reflected in the gas prices at the pump, adversely affecting the everyday consumer. As Margo Oge, the former director of the EPA’s Office of Transportation and Air Quality, stated, “[t]he last thing we wanted in implementing [the RFS] is to get price increases for the customer.”

This Article considers whether this sort of obscure dealing of a government-mandated fiction—a RIN—is violative of EPA regulations and skirts broader financial regulation under the Commodities Exchange Act (CEA). This Article then highlights potential legal avenues through which different parties may pursue judicial intervention within the RIN market. The ultimate resolution of these issues, however, derives from regulatory or legislative intervention where the EPA and CFTC create a more transparent and competitive RIN market. Creating such a market will unveil any nefarious manipulation in the market that could be costing, and possibly bankrupting, small refiners. Changes to the regulatory scheme promoting greater transparency will finally align the RIN credits program under the RFS with the actual purpose of the RFS—to increase the use of renewable fuels in transportation. The judiciary can be a catalyst for these changes, as the United States Fifth Circuit Court of Appeals has already shown.

I. OVERVIEW OF THE RFS AND THE RIN MARKET

The United States Congress passed, and then-President George W. Bush signed into law, the Energy Policy Act of 2005, which amended the

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49. Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 FR 26980 (June 10, 2019) (codified at 40 CFR 80).
50. Some small refiners are allowed exemption under the RFS. See 42 U.S.C. § 7545(o)(9).
51. Morgenson & Gebeloff, supra note 44.
Clean Air Act (CAA). A part of this amendment was the creation of the Renewable Fuel Standard (RFS) Program. The RFS was later amended by the Energy Independence and Security Act of 2007 (the amended version hereinafter referred to as RFS2). The intended purpose of the RFS2 is to have a certain volume of renewable fuels used for transportation fuel.

The RFS2 involves four categories of renewable fuel: (1) biomass-based diesel; (2) cellulosic biofuel; (3) advanced biofuel; and (4) total renewable fuel. The RFS2 requires a certain volume of each renewable fuel category to be utilized in the US as transportation fuel within a calendar year. The EPA enforces compliance with these volumes through mandates placed upon refiners producing gasoline or diesel fuel and importers importing gasoline or diesel fuel, which are identified as “obligated parties.” Obligated parties must comply with a Renewable Volume Obligation, or an RVO.

Established by the EPA, an RVO is a volume requirement unique to each obligated party that dictates how much renewable fuel the obligated party must utilize in a given compliance period measured in years. The EPA generally bases RVOs on an estimate of what the United States fuel demand will be and a target for use of renewables as a share of demand.

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55. Id.
56. Id.
59. Id.; Overview for Renewable Fuel Standard, supra note 54.
61. Id. § 7545(o)(2)(A)(iii); 40 C.F.R. § 80.2. The full definition of “obligated party” is “any refiner that produces gasoline or diesel fuel within the covered location, or any importer that imports gasoline or diesel fuel into the covered location, during a compliance period.”
62. 40 C.F.R. § 80.1406(b) (2023).
Each renewable fuel category has its own RVO for which the obligated party must comply. To track compliance with RVOs, each gallon of renewable fuel created or imported is assigned a serial number called a Renewable Identification Number (RIN). Within five days of generation, the RINs must be recorded in the EMTS. When someone purchases renewable fuel, it receives the RINs that are assigned to those gallons of fuel.

Obligated parties demonstrate compliance with their RVOs by retiring RINs within a compliance period, which essentially means reporting the RINs it obtained to the EPA, taking those RINs out of commerce. Obligated parties may nevertheless carry over unused RINs. An obligated party may carry a compliance deficit into a subsequent period, so long as the deficit is made up the following year. RINs may only be used for compliance in the year that they are generated or within the following year, with a maximum of 20% being RINs from the previous year. If an obligated party does not utilize enough renewable fuel to obtain enough RINs to satisfy its RVO, it can purchase RINs from others to satisfy its RVO.

Each renewable fuel category is assigned a “D-code” connected to the RIN for purposes of identifying the renewable fuel type. D6 RINs are the most relevant to this Article as they include conventional biofuel, primarily corn ethanol. To utilize renewable fuels in transportation, a party will blend the renewable fuels with fossil fuels. For example, at the pump, consumers might recognize the “E10” designation, which stands for gasoline made up of up to 10% ethanol—a renewable fuel. The gallons of ethanol mixed into the gasoline generate RINs. Regular vehicle engines can utilize E10 fuel without issue. Some gas stations also offer

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66. Id. § 80.2.
67. This rule only applies to RINs generated after July 1, 2010.
68. Id. § 80.1425.
69. Id. § 80.1428(a)(3).
70. Id. § 80.1427, 80.1434(a)(1).
71. Overview for Renewable Fuel Standard, supra note 54. See also 40 C.F.R. § 1427(b)(1).
72. 40 C.F.R. § 80.1427(a)(6)(i).
73. Overview for Renewable Fuel Standard, supra note 54.
74. Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 FR 26980 (June 10, 2019) (codified at 40 CFR 80).
E85—gasoline mixed with much more renewable fuel: up to 85% ethanol. But only newer cars optioned as flexible fuel vehicles (FFVs) have combustion engines capable of running on E85.\(^{76}\) And E85 demand is lagging.

Upon blending the renewable fuel, the blender “separates” the RINs from the underlying gallons of blended renewable fuel.\(^{77}\) Separated RINs can then be retired to satisfy an RVO or be sold to another party “for the purpose of complying with [its RVO].”\(^{78}\) If an obligated party exceeds its RVO, it can sell its extra RINs. If an obligated party does not have enough RINs to meet its annual RVO, it can purchase RINs to satisfy its RVO. This “credit program” was created by Congress to establish compliance with the RFS2.\(^{79}\) In practice and as allowed by the EPA’s regulations, parties without any obligation to satisfy an RVO can generate and sell separated RINs.\(^{80}\)

**A. The Parties Participating in the RIN Market**

As provided by the EPA, RIN market participants who may buy and sell RINs include obligated parties, renewable fuel producers, renewable fuel exporters, and registered RIN market participants.\(^{81}\) The parties involved can be broken down into two broad categories: obligated parties and non-obligated parties. Obligated parties must comply with an RVO, while non-obligated parties can buy, sell, and hold RINs with no impending compliance requirement. Ownership of separated RINs is ‘limited’ to parties that have registered with the EPA.\(^{82}\) As to who may register, the EPA says it can be anyone who “intends to own RINs.”\(^{83}\) An entity that registers to participate in the RIN market, despite not having an


\(^{77}\) 40 C.F.R. § 80.1429(b)(2).


\(^{79}\) Id.

\(^{80}\) See 40 C.F.R. § 80.1428 (b), 80.1429.


\(^{82}\) 40 C.F.R. § 80.1428(b)(1).

\(^{83}\) Id. § 80.1450(e).
RVO, is the aforementioned “non-obligated party.” Non-obligated parties range from private investors, market brokers, and blenders—companies like JP Morgan and Company B.

Large retail gas station chains that do not refine or import fossil fuel, and therefore have no RVO, have the infrastructure to easily blend renewable fuel into transportation fuel. They can take advantage of their unique position (infrastructure positive and RVO neutral) to blend renewable fuels into gasoline and generate separated RINs. They can then sell those separated RINs to obligated parties—usually small refineries unable to meet their RVO—for a profit.

This model is embodied by companies like Company B, which has no RVO but utilizes its infrastructure to generate RINs. Company B will simply purchase large supplies of renewable fuels that come with RINs, mix the renewable fuels with gasoline at a ratio consumers will tolerate (e.g., the ubiquitous E10), sell the blended fuel to the consumer, and then sell the RINs to a refiner with an RVO. Company B’s 2013 SEC filing recognized the windfall profits it reaped from its unique position in the RIN market: “Net income for the first half of 2013 increased $29.3 million over the same period in 2012. The primary reason for this increase was a significant increase in the value received from sale of RINs in the most recent period.” In 2014, Murphy sold $92.9 million worth of RINs, and in 2015 it sold $117.5 million worth of RINs, which made up 85% and 87% of its yearly net revenue, respectively. In 2022, Murphy’s RIN revenue represented $305.8 million.

Wall Street financial brokers also participate as non-obligated parties in the RIN market. Though the roles of certain Wall Street banks in the RIN market are unclear due to a lack of transparency in the market coupled with the bank’s use of subsidiaries, numerous Wall Street banks are

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87. Id. at 3.
89. Murphy USA, Inc., Annual Report (Form 10-K) (Dec. 31, 2015) at 34.
90. Id. at 37.
involved in the RIN market—presumably as market brokers. In 2013, a bio-fuels manager at Hart Energy told the New York Times (NYT), “There is a RINs trading desk at any major brokerage now,” and “There are people who are not refiners that are buying and selling RINs like a commodity. They treat it like something to be traded, to be day-traded.” As the NYT article points out, the opaque reporting requirements under the RFS make it impossible to know how much involvement brokers actually have in the market, an issue still quite prominent in 2023. An analyst from OPIS told the New York Times, “You could conceivably have a company in the middle holding millions of RINs.” “Any entity could have a 1, 2, or 5 [%] market share in RINs and is waiting to sell them at some explosive gain.” While JP Morgan denied the claims, the New York Times shared rumors that JP Morgan held “hundreds of millions” of RINs with the intent to sell them for windfall profits. These remain only rumors since JP Morgan denied these claims.

Unlike other credit markets in the United States and in comparable markets in Canada, non-obligated parties participate in the RIN market as both buyers and sellers. The involvement of non-obligated parties places obligated parties at a disadvantage. While non-obligated parties can buy and sell RINs with the intent to make a profit, obligated parties are “captive buyers,” buying the ever-fluctuating and highly-priced RINs with the intent to satisfy a time-sensitive compliance requirement imposed by the EPA. Non-obligated parties have the luxury of speculating on RINs without the requirement of buying RINs by certain deadlines.

The EPA, in a recent case in front of the United States Court of Appeals for the Fifth Circuit over the denial of small refiner exceptions to the RFS, argued that obligated parties are able to recoup the cost of compliance by raising the price of their fuel products and, thus, passing the cost of compliance onto the customer. The Fifth Circuit expressly

91. Morgenson & Gebeloff, supra note 44.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 FR 26980 (June 10, 2019) (codified at 40 CFR 80).
rejected this argument, finding that a RIN-passthrough theory only exists in an efficient fuels market. The Fifth Circuit determined that the RIN market is an inefficient RIN market in certain “micro-markets,” meaning that obligated parties in certain pockets of the United States are stuck paying the high price of RINs while being unable to pass on the costs of RINs to the consumers. In PES’s case, that appears to be a dispositive reality.

Having third parties involved in this intended-to-be credit market also posits the potential for market influence from non-traditional notions of supply and demand. A 2018 report from NERA Economic Consulting—which was funded by Valero, an obligated party—found that non-obligated parties historically held between 5 and 10% of available, RVO-eligible RINs. In 2018, however, non-obligated parties held 80% of the total supply—an amount that would likely engage the CFTC to determine the intentions of such positions. Couple this fact with the wildly fluctuating prices of RINs since around 2013, and eyebrows raise.

The potential for parties, particularly non-obligated parties, to manipulate the market comes under new light with the continual proposal and push for eRINs. An eRIN is a RIN credit generated when “qualifying biogas is used to generate renewable electricity for the charging of light-duty electric vehicles.” Proposed in 2022, the EPA elected not to move forward with the eRIN program at that time. The eRIN market, when implemented, will certainly be lucrative as Waste Management (WM) predicted in April 2023 it could generate more than $70 million through the eRIN market without any added capital expenditures.

100. Id. at 1141.
101. Id.
103. Id.
104. Id.
Implementation of the eRIN program seems imminent and when it arrives, will give another credit market for which non-obligated parties may be able to participate.

B. Reporting and Transparency under the RFS2

Reporting and transparency help determine whether non-traditional notions of supply and demand are occurring within a market. Currently, the RFS2 contains reporting requirements to track compliance. An obligated party must submit annual compliance reports to the EPA, which provide whether the obligated party has satisfied its RVO within the compliance period. Likewise, RIN generators must submit reports to the EPA on a quarterly basis showing the produced batches of renewable fuel during that period accompanied by the RINs generated. Parties owning RINs must submit RIN transaction reports and RIN activity reports to the EPA on a quarterly basis.

Both RIN transaction and activity reports include, amongst other things: (1) current-year and prior-year RINs owned at the beginning of the quarter; (2) current-year and prior-year total RINs purchased; (3) current-year and prior-year total RINs sold; (4) current-year and prior-year total RINs retired; (5) current-year and prior-year RINs owned at the end of the quarter; (6) the number of RINs generated; and (7) the volume of renewable fuel owned at the end of the quarter. The RIN activity reports also require: (1) the owner’s registration designation, i.e., “RIN owner only” or “Renewable Fuel Producer;” (2) an indication of whether the non-obligated submitting party and its affiliates exceeded three percent of a holdings-to-market percentage any day within that quarter; and (3) an indication of whether the submitting party or its affiliates, no matter the designation, exceeded 130% of the holdings-to-obligation percentage any day within the quarter. Holdings-to-market percentage is calculated by dividing the number of separated D6 RINs each individual corporate affiliate holds at the end of a calendar day by the total expected volume in...
gallons of conventional renewable fuels for the compliance period, which is then multiplied by 100.115 Holdings-to-obligation percentage is calculated by dividing the sum of D6 RINs each corporate affiliate holds at the end of a calendar day by the sum of conventional RVOs of each corporate affiliate plus any RIN deficits carried over, which is then multiplied by 100.116 If a submitting party’s holdings-to-market or its holdings-to-obligation exceeds the threshold percentage, the EPA may publish the party’s name and identification number.117

Once a RIN is generated and assigned to a batch of renewable fuel, the party assigning RINs to the batch must report the assignment to the EPA.118 For every sale, separation, or retirement of RINs,119 the affected party must submit a report to the EPA within five days of the event.120 Parties purchasing RINs must submit a report to the EPA within 10 days of the transfer of ownership.121 These reports require, among other things: (1) the RIN’s vintage year; (2) the RIN status, i.e., assigned or separated; (3) the RIN code; (4) the transaction type, e.g., buy, sell, separation; (5) the date of transfer; (6) the trading partner’s name; (7) amount of RINs involved; (8) the reason for the action; (9) the mechanism used to buy or sell the RINs; and (10) the per-gallon RIN price, or if an assigned RIN, the per-gallon price of renewable fuel.122

These reporting requirements are certainly positive steps toward a healthy market, but they are not enough. The EPA’s Office of Inspector General (OIG) recently concluded that the EPA’s reporting system under the EMTS was insufficient and required improvements to better prevent potential fraud in the RIN market.123 In the September 2023 audit, the OIG pointed out specific deficiencies within the RFS2 reporting program.124 Those deficiencies included not requiring timely submissions of RIN transactions despite the RFS2 providing specific timing parameters, not

115.  *Id.* § 80.1435(b)(1); If the day falls within January 1 and March 31, then the total expected annual volume is multiplied by 1.25 before division occurs; *See id.* § 80.1435(b)(1)(i).
116.  *Id.* § 80.1435(b)(2); If the day falls within January 1 and March 31, then the sum of RVOs plus the RIN deficit is multiplied by 1.25 before division occurs; *See id.* § 80.1435(b)(1)(i).
117.  *Id.* § 80.1451(c)(2)(i), (ii).
118.  *Id.* § 80.1452(b); *Id.* § 80.1425.
119.  This rule only applies to RINs generated after July 1, 2010.
120.  *Id.* § 80.1452(c).
121.  *Id.*
122.  *Id.*
124.  *Id.*
preventing companies from generating RINs in excess of their registered renewable fuel production capacity, and not verifying EMTS reported RIN transactions with the documents supporting the transaction.125 These reporting and transparency issues are further exacerbated by the RFS2’s general nature of imposing a “buyer beware” type liability on obligated parties to not purchase invalid RINs.126

C. 2018 Proposed Reporting Amendments

Recognizing that the 2023 version of the RFS2 contains deficiencies that render the RIN market susceptible to manipulative activities makes the EPA’s 2018 proposed-but-not-passed amendments to the RFS2 all the more important. 2018 was a pivotal year for the EPA and the RFS2 as then-President Donald Trump, through a White House statement, directed the EPA to address RIN price manipulation claims and increase transparency in the RIN market.127 In the statement, President Trump proposed four reforms: (1) “[p]rohibiting entities other than obligated parties from purchasing separated RINs;” (2) “[r]equiring public disclosure when RIN holdings held by an individual actor exceed specified limits;” (3) “[l]imiting the length of time a non-obligated party can hold RINs;” and (4) “[r]equiring the retirement of RINs for the purpose of compliance be made in real time.”128 The EPA responded in 2019 by proposing all four reforms to the RIN market and the RFS2.129 Ultimately, the EPA only implemented Reform (2) above “Requiring public disclosure when RIN holdings exceed specified thresholds.” The EPA also committed to “[c]ollecting additional data to improve market transparency and enhance EPA oversight.”130 The EPA stated it would employ a third-party market monitor to screen the RIN market for potential anti-competitive behavior and would take non-regulatory steps to update its EMTS business rules to ensure that both parties to a RIN transaction enter the same RIN price.131

125. Id.
128. Id.
129. Id.
130. Id.
131. Id.
The EPA elected not to implement President Trump’s Reforms (1), (3), and (4).

132. *Id.* The first proposal—limiting purchasing authority of D6 RINs to obligated parties and limited non-obligated parties—derived in part from Canada’s RFS-equivalent regulations and the EPA’s gasoline sulfur and benzene programs. Canada limits its RFS equivalent to only permitting primary suppliers—Canada’s equivalence of obligated parties—to acquire compliance units, the same structure which is found in the EPA’s gasoline sulfur and benzene programs. The EPA noted, however, that, unlike the RFS, the obligated parties in the gasoline, sulfur, and benzene programs are both the generators and users who are not dependent on non-obligated blenders. The EPA also highlighted comments to Proposed Reform (1) that spoke to the implications this reform would have to the RIN market, including: (1) a decline in the RIN market’s liquidity; (2) eliminating brokers who alleviate a RIN seller’s burden of finding a counterpart willing to buy an exact amount of RINs at an exact time; and (3) creating greater volatility in a market susceptible to policy shocks. These comments made clear that the impact would adversely affect non-obligated parties’ abilities to deliver on term contracts with obligated parties for delivery of a specific quantity of RINs. By eliminating non-obligated parties from the purchasing market, non-obligated parties would be unable to purchase RINs from other parties to then provide to the obligated parties they contracted with, particularly under the circumstances of when the RIN market falls on hard times. The EPA also noted that, since the requirements are relatively easy to become an obligated party, a non-obligated party could simply become an obligated party with a low RVO and then be able to purchase separated RINs. Nevertheless, the EPA assured the readers that simply using the RIN market to make a profit was not manipulative or anti-competitive behavior.

133. *Id.* Proposed Reform (3) intended to restrict the holding time that non-obligated parties could hold separated RINs acquired at blending. This reform would have promoted liquidity in the RIN market as non-obligated RIN generators would now be obligated to inject RINs into the market almost immediately upon generation. This reform would simultaneously deter anti-competitive behavior by disallowing non-obligated generators from: (1) accumulating enough RINs to gain market power and (2) delaying the sale of RINs to time the market; tactics that could be used to manipulate RIN prices. Rest assured, though, the EPA confidently stated that this type of manipulation was not currently occurring and that these reforms were only precautionary. Harmful effects this reform may have on the RIN market, as expressed by the EPA, included squeezing non-obligated parties into short selling windows that they may not be able to satisfy and making it difficult for them to participate in the market. The EPA again noted that such non-obligated parties could avoid this holding limitation by becoming an obligated party.

134. Responses by the EPA to comments regarding modifications to the RIN market also suggested that the EPA considered a prohibitive limit on the number of RINs a party may hold at one time. The EPA did not advance such a limit since public disclosure reforms would, in the EPA’s view, provide enough deterrence.
Proposed Reforms (1) and (3), a prohibition on non-obligated parties as buyers in the RIN market and a time limit imposed on non-obligated parties holding RINs, primarily did not pass because the EPA had no “data-based evidence” showing market manipulation occurring.\footnote{135} Without definitive evidence, the EPA wanted to proceed carefully to not disrupt or harm the existing RIN market.\footnote{136}

In support, the EPA’s Response to Comments, citing Valero’s NERA reports,\footnote{137} provided that all non-obligated parties, combined, owned between 5 to 10\% of the market between 2013 and 2017 with 5\% accounting for around 780 million RINs.\footnote{138} No particular non-obligated party held more than 450 million separated D6 RINs at one time.\footnote{139} With obligated parties holding around 90\% of the open D6 RIN market, the EPA concluded that most of the RIN market is held for compliance, as opposed to trading.\footnote{140}

The EPA, in a section in the 2019 Final Rule dedicated to price and market manipulation, cited the formal steps it had taken to investigate such manipulation.\footnote{141} These steps included the 2016 investigation conducted in conjunction with the CFTC via a Memorandum of Understanding (MOU) before the proposed reforms, an individual-level RIN holding data analysis

\footnote{135}{40 C.F.R. § 80; Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 FR 26980 (June 10, 2019) (codified at 40 CFR 80). The EPA specifically stated: For example, the RIN spot price can rise naturally, consistent with market fundamentals, and a party purchasing RINs at an increased price does not indicate market manipulation. As another example, the phantom offers that one commentor complained about does not appear to be false or misleading but rather normal business practices, as explained by a different commentor. Furthermore, we have conducted and reviewed analyses using non-public, individual-level data and have found no data-based evidence such anti-competitive behavior occurring between market participants.}

\footnote{136}{40 C.F.R. § 80.}

\footnote{137}{BROWN-HRUSKA, PH.D. ET AL., supra note 15.}

\footnote{138}{Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 FR 26980 (June 10, 2019) (codified at 40 CFR 80).}

\footnote{139}{Id.}

\footnote{140}{Id.}

\footnote{141}{Id. at III.B.}
evaluating historical market shares during the development of the proposed reforms, and additional analysis of D6 RIN holdings distribution upon publishing the proposed reforms.\footnote{142} The screening analysis conducted during the proposals produced evidence that any one party only held a maximum of 10\% to 14\% of all D6 RINs in the market at one time, which aligned with the “gasoline and diesel production market share of the largest refiners.”\footnote{143} Other results from this same analysis concluded that only three obligated parties exceeded 130\% of its RVO, suggesting no manipulative behavior.\footnote{144} As to the analysis conducted after the publication of the proposals, the EPA looked at the market distributions on three separate dates and found that D6 RINs in excess of individual RVOs were available from 114 to 145 parties, with no parties holding more than 14\% of the ‘excess’ RINs.\footnote{145} This suggested to the EPA that excess RINs are spread across numerous parties and no parties maintained an excessive share of the RIN market.\footnote{146} These results were further supported by “many commenters” suggesting that they never experienced manipulation in the RIN market.\footnote{147} The EPA concluded that this information did not warrant restructuring the RIN market, but it would continue to collect data from the market.\footnote{148} Importantly, none of the EPA’s findings appear to be based on an investigation of the underlying RIN-derivatives market that also affects RIN pricing.

RIN market transparency was a major issue in 2018 and remains an issue in 2023. In addition to the OIG’s letter acknowledging deficiencies in RIN transparency, the Biden Administration recently directed the EPA to engage the CFTC “to discuss potential monitoring of daily credit trades and possibly recruiting more help from the Federal Trade Commission.”\footnote{149} Not long after, the CFTC Division of Enforcement Director announced the addition of two task forces, one of which is the Environmental Fraud Task Force.\footnote{150} This task force’s objective is to address fraud and manipulation.

\footnote{143} Id.
\footnote{144} Id.
\footnote{145} Id.
\footnote{146} Id.
\footnote{147} Id.
\footnote{148} Id.
\footnote{149} Dlouhy & Jacobs, supra note 29.
\footnote{150} Paul M. Tyrrell et al., Cybersecurity and Environmental Fraud Top Priorities of U.S. Commodity Futures Trading Commission Division of Enforcement, SIDLEY (July 14, 2023), https://datamatters.sidley.com/2023/07/14
in derivative and spot markets “relating to purported efforts to address climate change and other environmental risks” with a particular eye towards carbon credits and Environmental, Social, and Governmental (ESG) investment strategies.\textsuperscript{151} Whether the Environmental Fraud Task Force will investigate the RIN market is yet to be seen.

Even presuming that the CFTC acts following President Biden’s call for engagement, major gaps in RIN market transparency remain while most of the wildly fluctuating swings in RIN prices cannot be easily written-off as traditional notions of supply and demand. With that, the following Section explores what actions, if any, are available to ensure more stability in the RIN market moving forward.

II. WHETHER RFS2 VIOLATIONS ARE OCCURRING IS UNCLEAR WITHOUT MORE TRANSPARENCY IN THE RIN MARKET

Reporting and transparency provide opportunities for identifying and rectifying issues within a market. The RFS2 provides avenues for both the EPA and market participants to seek judicial intervention against parties violating provisions of the RFS2. The judicial actions provided by the RFS2 are essentially inconsequential so long as the RFS2 lacks the needed transparency to unveil RFS2 violations.

A. RFS2 Enforcement Actions

The RFS2 outlines enforcement actions that may be brought by the EPA as well as by states or corporations. The EPA may file actions for civil penalties as well as for injunctions against parties for violating the RFS, generating and selling invalid RINs, and failing to meet its RVO.\textsuperscript{152} EPA regulations also prohibit any party from causing an obligated party to not meet its RVO.\textsuperscript{153} If a third party is manipulating the RIN market in such a way that RINs become unaffordable to an obligated party, that would violate this prohibition.

\textsuperscript{151} Tyrrell et al., supra note 150; CFTC Division of Enforcement Creates Two New Task Forces, supra note 150.
\textsuperscript{152} 42 U.S.C. § 7545(d)(1), (2); 40 CFR § 80.1428.
\textsuperscript{153} 40 C.F.R. § 80.1460(c), (e); § 80.1461.
For example, “spoofing” is one way nefarious traders manipulate a commodity’s price. Spoofing occurs when a trader places bids or offers on a futures contract with the intention of canceling the bids or offers whenever the commodity’s price has shifted based upon the impression of market interest. This causes an artificial inflation or deflation of prices. If RIN prices are artificially high, e.g., from spoofing, and it causes an obligated party to not afford enough RINS to meet its RVO, then that is arguably a violation by the third party for ultimately causing the failure. The concerns and the potential for price manipulation, whether through spoofing or otherwise, are exacerbated by the fact that non-obligated sellers know that obligated parties are “captive buyers” required to buy a certain number of RINs by a certain date or they will otherwise face fines.

The EPA has never brought an enforcement action for market manipulation that resulted in the impairment of an obligated party’s ability to meet its RVO. Of the 16 enforcement actions it has brought under the RFS since 2013, 13 of them were for the generation or sale of fraudulent RINs. The remaining three actions were against obligated parties for failing to meet their RVO. The lack of enforcement actions for RIN-market manipulation is not surprising, given that more transparency in the market would be needed to develop the evidence to support such an action.

States and corporations may file suit against the EPA or the United States for an alleged violation of an RFS2 limitation or emission standard, or an alleged violation of an EPA or state order relating to a limitation. A state or corporation may also sue the EPA’s administrator for failure to perform any non-discretionary act or duty. Before commencing one of

156. Id.
157. DAVIS ET AL., supra note 20.
159. 42 U.S.C. § 7604(a)(1). The term “limitation” is qualified by 42 U.S.C. § 7604(f). Based on this definition, there would not be any applicable use for 42 U.S.C. § 7604(a)(1) within the scope of this Article.
160. Id. § 7604(a)(2).
these actions, notice must be given to the EPA’s administrator.\textsuperscript{161} Arguments potentially exist that the EPA has violated the CAA through its RFS2 credit program, but such arguments are outside the scope of this paper.\textsuperscript{162} More pertinent is the limited scope provided to states and corporations to challenge the EPA’s limited transparency requirements within the RIN market.

\begin{itemize}
\item \textsuperscript{161} Id. § 7604(b).
\item \textsuperscript{162} Under 42 U.S.C. § 7545(o)(5)(A)(i), the EPA is required to establish a credit program under the RFS “for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under [the applicable volumes provided for in the RFS].” The RFS continues, “[a] person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with [the applicable volumes provided for in the RFS].” Id. § 7547(o)(5)(B). In the EPA’s final rule in 2006, the EPA stated, “The [CAA] requires the [EPA] to promulgate a credit trading program for the RFS whereby an obligated party may generate credits for overcomplying with their annual obligation.” 40 C.F.R. § 80.
\end{itemize}

The Department of Energy similarly stated in a 2011 “Small Refinery Exemption Study” that the RFS “allow[s] trading between the obligated parties from those who over-comply to those who find it less advantageous to blend renewable fuels into the transportation fuel mix.” Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship, OFF. OF POL’Y AND INT’L AFF., U.S. DEPT. OF ENERGY (Mar. 2011), https://www.epa.gov/sites/default/files/2016-12/documents/small-refinery-exempt-study.pdf [https://perma.cc/WY7F-GEGX]. The conflict with these statutory provisions exists in the EPA’s implemented regulations that allow any party, obligated or not, to generate RINs and allow non-obligated parties to purchase RINs. See, e.g., Can Anyone Own RINs and Participate in the RIN Market?, supra note 45. For non-obligated RIN generators, these parties do not have an annual RVO to abide by, which would make generating gasoline containing “a quantity of renewable fuel that is greater than” its annual obligation impossible. Likewise, a non-obligated party’s ability to purchase RINs does not further the RIN credit program’s purpose, which is for complying with applicable renewable fuel volumes provided for under the RFS. Overview for Renewable Fuel Standard, supra note 54. A non-obligated party in no way can purchase RINs to satisfy its own RVO since a non-obligated party will not have an annual RVO to abide by. Instead, a non-obligated party would be buying RINs only to turn around and sell to an obligated party, essentially functioning as a broker within the RIN market. This issue was recently brought to the forefront by a December 28, 2023, petition from Coffeyville Resources Refining and Wynnewood Refining Company to the EPA claiming that the RFS2 was improperly functioning based on the statutory text of 42 U.S.C. § 7545(o)(5). Kelly, supra note 41.
Without enough transparency in the RIN market, it is impossible to determine whether the actions of the non-obligated parties are inappropriately, or worse, illegally, manipulating the RIN market. The EPA’s responses to allegations of RIN-market manipulation made clear that lack of evidence is the reason for lack of reform. But lack of evidence in the hands of the EPA does not mean the RIN market is free of manipulation. It serves to highlight the need for more transparency to generate evidence that either there is manipulation or there is not manipulation.

B. The RFS2 does not provide enough transparency while the EPA simultaneously lacks an understanding of the RIN Market.

The EPA’s determination that no market manipulation existed in the RIN market is questionable in light of concerns around the lack of RFS2 reporting and disclosure requirements. Additionally, the conclusions by the EPA in support of the argument that no data supported market manipulation might not be reliable. Did the EPA analyze an adequate amount of data points over a long enough period of time to conclude that price manipulation had not occurred? The EPA only looked at three dates during the 2017 compliance period, which they selected based upon seasonal RIN market activity.\textsuperscript{163} Using data from only three dates within the same compliance period, the EPA concluded that “no single party controls an excessive share of the market.”\textsuperscript{164} That important of a determination should be made with data spanning more than just five months. Second, the data acquired by the EPA is stagnant; it is information gathered in the form of a snapshot in time. It does not account for any one party’s transactions over a given period of time. This stagnant data fails to account for changes that occur in the interim between the gathering dates. Third and lastly, the EPA fixated upon the RIN holdings as being the standard that determined whether hoarding was occurring and, thus, whether market manipulation was present. The EPA, however, focused on “excess” D6 RIN holdings, which contemplates RINs held in excess of an individual RVO.\textsuperscript{165} This intrinsically eliminates data from any non-obligated parties as non-obligated parties cannot hold in “excess” of its own RVO since it does not have an RVO.

The data collected and analyzed by the EPA also sidesteps greater issues with the RIN market that influence RIN pricing, such as the fact that

\begin{footnotesize}
\begin{itemize}
    \item[\textsuperscript{163}] 40 C.F.R. § 80.
    \item[\textsuperscript{164}] Id.
    \item[\textsuperscript{165}] Id.
\end{itemize}
\end{footnotesize}
non-obligated parties can create separated RINs while knowing that obligated parties must have a certain amount of RINs by a certain date. For example, the EPA compared the RIN ownership of obligated and non-obligated parties. The EPA should have analyzed the percentage of traded RINs originally held by non-obligated parties. If a significant percentage of traded RINs originate from non-obligated parties, then non-obligated parties very-well may have the market power to control the price of RINs. Additionally, the EPA’s focus left out the investigation of derivative contracts, which can be used to manipulate markets through numerous methods outside of hoarding excessive shares (e.g., spoofing).

NERA did its own market analysis for Valero, utilizing data collected from the EPA, OPIS, and Argus. NERA conducted tests relating to RIN price volatility, RIN market liquidity, bid-ask spreads, time value of RINs, and price convergences between D4 and D6 RINs. It concluded that the RIN market was inefficient and fragmented, lacked integrity, and incentivized hoarding.

In response, the American Petroleum Institute (API) commissioned Covington & Burling to analyze the RIN market. Covington & Burling found that there are no issues with the RIN market as it existed in 2018, pointing to prices being directly affected by political events and the “blendwall” amongst other things. Making these conclusions, the Covington & Burling Report only uses data from OPIS—one of the three places RIN prices are readily available—to support its conclusion. The competing conclusions and competing datasets only highlight the lack of transparency in RIN pricing data, which is the heart of the issue. With more transparency, which exists in comparable markets, price manipulation can either be ruled out as a factor affecting RIN prices, or it can be unveiled.

Additionally, the Covington & Burling Report suggests that unhappy obligated parties can actively change their position, and thus, address their complaints, by either establishing their own RIN-generating blending infrastructure and/or passing on RIN pricing to consumers downstream to recover RIN costs.

The report suggests that going from a merchant refiner, who focuses on purchasing RINs, to an integrated refiner, who blends to generate its

166. BROWN-HRUSKA, PH.D. ET AL., supra note 15.
167. Id.
169. Id.
own RINs, will solve the obligated parties’ issues. But the report does not address whether companies like PES lack the infrastructure to blend or whether they simply cannot afford the amount of blending necessary to meet their RVO.

The report also suggests that obligated parties can simply recover RIN costs by passing those costs on to consumers. But the United States Fifth Circuit Court of Appeals recently rejected such an argument.\textsuperscript{170} The Fifth Circuit in \textit{Calumet Shreveport Refining v. EPA} found that there are inefficient fuel markets in some parts of the US where RIN prices cannot be successfully passed on to consumers.\textsuperscript{171} Small market refiners functioning in inefficient fuel markets cannot pass RIN costs onto consumers,\textsuperscript{172} which disproportionately affects smaller refineries who likely have tighter financial margins.

The Fifth Circuit’s findings in \textit{Calumet Shreveport Refining} and the OIG’s letter underscore that the EPA does not have a good understanding of the RIN market. With a lack of understanding present, the EPA should strive to have a better understanding of the market, which can be accomplished by improving transparency. Improving transparency can be accomplished through amending the RFS2. A better solution, however, might be having the CFTC regulate the RIN market.

The Commodity Exchange Act and CFTC regulation require extensive transparency for all parties involved within a particular commodities market. The RIN market is ripe for regulation as a commodity under the CEA by the CFTC. In reality, the CFTC—-with the support of retail blenders—has avoided its duty of regulating the RIN market. But the need for an agency with financial expertise to take on the RIN market is apparent.

\section*{III. A RIN IS A COMMODITY SKIRTING REGULATION UNDER THE CEA; AND REGULATION UNDER THE CEA COULD RESOLVE RIN MARKET COMPLAINTS}

More transparency in the RIN market is necessary to uncover potential violations of the RFS2. Given the EPA’s traditional expertise in environmental sciences as opposed to financial markets, many participants and observers have called upon different agencies to intervene.\textsuperscript{173}

\textsuperscript{170} Calumet Shreveport Refin., L.L.C. v. EPA, 86 F.4th 1121 (5th Cir. 2023).
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} See, e.g., Carper Leads Letter Requesting FTC Investigate and End RIN Market Manipulation, \textit{supra} note 9; Commodity Futures Trading Commission Responses to Congressional Questions for the Record (QFR), 2017-2020, U.S.
Jurisdictionally, the Commodity Futures Trading Commission (CFTC), through the statutory framework of the Commodity Exchange Act (CEA), seems to be the proper agency for providing regulatory oversight to the RIN market.

The CEA is a statutory framework for the regulation of commodities and futures trading in the United States.174 The CEA designates the CFTC as the regulatory body that oversees and enforces the CEA’s requirements.175 For the CEA to have authority over a certain market, the ‘thing’ for which the market is built upon must be a “commodity.”176 The CEA defines a “commodity” as a slew of agricultural products as well as “all other goods and articles . . . and all services rights and interests . . . in which contracts for future delivery are presently or in the future dealt in.”177 The latter provision is so broad that United States District Courts have held natural gas and virtual currencies, like Bitcoin, to be a “commodity” for which the CFTC may regulate.178 A RIN fits the broad definition of a commodity. Realistically, it fits better than other virtual currencies, as U.S. renewable fuels are primarily made from corn, a classic commodity.179 Even the CFTC admits that a RIN fits the definition of a commodity under the CEA.180
Under the CEA, the CFTC may bring suit against parties manipulating prices. More pertinent, the CEA allows anyone, from private citizens to corporations to states, to bring actions against violating parties allegedly manipulating the price of commodities. While a RIN should fall well within the jurisdiction of the CEA, the greater issue of a lack of transparency in the RIN market means that the requisite evidentiary support to establish a prima facie price manipulation case is likely unavailable.

A. Prohibitions under the CEA

In 2010, the CEA was amended via the Dodd-Frank Act, which was intended to expand the CFTC’s jurisdiction and increase transparency in commodities trading. Among other things, the Dodd-Frank Act amended 7 U.S.C. § 9(c) of the CEA, also known as Section 6(c), to prohibit market manipulation and fraud relating to the sale of commodities in interstate commerce. The CFTC, to align with these amendments, enacted 17 C.F.R. §§ 180.1 and 180.2, which prohibit price manipulation along with manipulative and fraudulent activities. Specifically, the CEA prohibits:

any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

182. See id. § 25.
186. CFTC v. Kraft Foods Group, Inc., 153 F. Supp. 3d 996, 1006 (N.D. Ill. 2015); Anti-Manipulation and Anti-Fraud Final Rules, supra note 184; see 17 C.F.R. § 180.1, 180.2.
on or subject to the rules of any registered entity, any manipulative
or deceptive device or contrivance, in contravention of such rules
and regulations as the Commission shall promulgate.187

It is also unlawful under the CEA for “any person, directly or
indirectly, to manipulate or attempt to manipulate the price of any swap,
or of any commodity in interstate commerce, or for future delivery on or
subject to the rules of any registered entity.”188 The CEA also prohibits
certain transactions involving the purchase or sale of a commodity for
future delivery in interstate commerce.189 Specifically, the CEA prohibits
fictitious sales and transactions used to cause an untrue price to be
reported.190

In a similar vein, the regulations enacted by the CFTC, 17 C.F.R. §§
180.1 and 180.2, prohibit:

any person, directly or indirectly, in connection with any swap, or
contract of sale of any commodity in interstate commerce, or
contract for future delivery on or subject to the rules of any
registered entity, to intentionally or recklessly: (1) Use or employ,
or attempt to use or employ, any manipulative device, scheme, or
artifice to defraud; . . . (3) Engage, or attempt to engage, in any
act, practice, or course of business, which operates or would
operate as a fraud or deceit upon any person.191

Correspondingly, the CFTC prohibits “any person, directly or
indirectly, to manipulate or attempt to manipulate the price of any swap,
or of any commodity in interstate commerce, or for future delivery on or
subject to the rules of any registered entity.”192

Under the CEA and CFTC regulations, commodity market
manipulation is outright prohibited. And under the CEA and CFTC’s
regulations, the commodities market is transparent, allowing market
manipulations to be exposed.193 Since a RIN is a commodity, RIN market
manipulation is similarly prohibited. But because the same regulations and
reporting requirements (i.e., transparency) have not been enforced by the

188. Id. § 9(3).
189. Id. § 6c.
190. Id.
191. 17 C.F.R. § 180.1.
192. Id. § 180.2.
CFTC against the RIN market participants, RIN market manipulation cannot be exposed.

B. Enforcement Actions under the CEA

Presuming that enough evidence exists to bring an action for market manipulation, the CFTC may enjoin as well as seek civil penalties against a violating defendant in a federal district court.\textsuperscript{194} As to the states, a state attorney general, a state’s administrator of securities laws, or any other state official may file suit on behalf of the state’s citizens seeking injunctive relief to enforce any provision of the CEA or prohibit violations thereof along with monetary damages.\textsuperscript{195} The CEA also provides a cause of action to a person who made a contract of sale of a commodity for future delivery with the violating person or who purchased from or sold to the violating party a contract whenever the violation is a use or attempted use of a manipulative device or contrivance, or there is a manipulation of the price of the contract or the underlying commodity.\textsuperscript{196}

The Dodd-Frank Act amended the CEA to expressly prohibit “spoofing,” making it:

unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that is of the character of, or is commonly known to the trade as, “spoofing” (bidding or offering with the intent to cancel the bid or offer before execution).\textsuperscript{197}

The CFTC has recently sought to crack down on spoofing in other markets. On September 7, 2023, the CFTC filed a civil lawsuit against Logista Advisors LLC and Andrew Serotta for spoofing and other market manipulation schemes related to crude oil and natural gas futures contracts.\textsuperscript{198} In 2020, JP Morgan and its subsidiaries were ordered to pay $920 million for manipulative conduct and spoofing related to selling gold.

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\item[194.] 9 U.S.C. § 13a-1(a)–(b), (d). The civil penalties for an amount not more than $100,000 or triple the monetary gain made by the violating party as well as restitution and disgorgement.
\item[195.] 7 U.S.C. § 13a-2; see also 17 C.F.R. § 1.70.
\item[196.] \textit{Id.} § 25(a)(1)(B), (D).
\item[197.] \textit{See id.} § 6c(a)(5)(C).
\item[198.] Press Release No. 8773-23, Commodity Futures Trading Comm’n, CFTC Charges Texas Firm and Head Trader with Spoofing and Engaging in a Manipulative and Deceptive Scheme and Violating a Prior CFTC Order (Sept. 7, 2023), https://www.cftc.gov/PressRoom/PressReleases/8773-23 [https://perma.cc/ZTA3-VXBF].
\end{enumerate}
\end{footnotesize}
silver, platinum, palladium, Treasury notes, and Treasury bond futures contracts. Additionally, JP Morgan and its subsidiaries are non-obligated parties registered as RIN market participants.

It is not far-fetched for either the EPA, a state, or a corporation to bring an action against a party that manipulates the price of RINs, commits fraud or deception, or even “spoofs” another. The issue is that the CFTC has adamantly avoided involvement in the RIN market and has not required disclosures that might reveal evidence of such practices. The CEA does not provide for enforcement actions by private citizens against the CFTC to force regulation of the RIN market, as is found in the CAA and RFS2. If this remains, it is unclear how states or RIN participants might uncover evidence to support a direct action against an entity for RIN-market manipulation.

C. The CFTC’s relationship with the RIN Market

The CFTC has attempted to disclaim any regulatory responsibility for the RIN market. In 2016, the CFTC and the EPA entered into a Memorandum of Understanding (2016 MOU). The 2016 MOU allowed the EPA to share information with the CFTC for the CFTC to determine if trading violations and market abuse existed within the RIN market. While reports of the 2016 MOU was certainly good news to many, the CFTC only analyzed data for the period of May 1 to July 31, 2016, and it concluded that the provided data showed no evidence of market manipulation in the RIN market for that narrow window. As a result, in a response to a Congressional Question for the Record (QFR), the CFTC stated that it “has no ongoing further supervisory or oversight role in the

199. Id.
200. Excel spreadsheet, supra note 43; see also Morgenson & Gebeloff, supra note 44.
The CFTC simultaneously concluded that it did not have regulatory authority over the RIN market despite expressly stating that RINs are a commodity. It made this conclusion based on the fact that, from 2015 to 2018, a RIN futures market was “non-existent,” despite contradictorily highlighting the existence of a RIN futures market, albeit small. Since, the CFTC has been relatively hands off with the RIN market.

The CFTC’s actions following the 2016 MOU are problematic for two reasons. First, the CFTC relieves itself of any oversight duties utilizing discrete data covering only a three-month period. A true understanding of the RIN market cannot be made using only the type of data the EPA has collected, and certainly not over such a short period of time. Instead, the CFTC should analyze the same data it requires of the commodities it typically regulates, and it should analyze data over a period of time that would at least cover the longest possible life of a RIN.

Second, the CFTC summarily concluded that it had no further oversight role in the RIN market when the RIN market falls squarely within the typical jurisdiction of the CFTC, and the RIN market is in need of CFTC-type financial regulation. As the CFTC itself recognized, RINs are commodities. The CFTC tries to skirt regulation of this particular commodity by interpreting its jurisdiction as extending only to

204. Id.
205. Id. (“The CFTC does not have regulatory authority by statute over the RIN markets. The agency’s regulatory oversight is limited to the derivatives markets where RIN futures contracts are traded.”).

As Renewable Identification Numbers (“RIN”) meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

206. Id. What is interesting is that the full statement by the CFTC is “Activity in RIN futures is non-existent.” Currently, CME Group lists two vintage 2016 RIN futures with contract months through February 2018; however, since being listed at the end of December 2015, there was only one trading day with limited volume across three months in the biodiesel RIN future. Its maximum total open interest was 30 contracts and there has been no open interest in these futures since the September 2016 contract expired with an open interest of 10. Also, based on data submitted to the Commission, there were fewer than 300 open swaps based on the RIN market as of April 1, 2017. So, while the futures market may be small, it would be inaccurate to classify it as “non-existent.”

207. Id.
208. Id.
commodities with a futures market and describing the RIN-futures market as “non-existent.” But multiple sources indicate there is robust derivative trading (which would include futures) in the RIN market. As of the date of this paper, one can easily find websites offering derivative RIN contracts, including futures contracts.209

In April 2022, the Intercontinental Exchange (ICE), an American company that owns and operates financial and commodity marketplaces and exchanges, including the New York Stock Exchange,210 emphasized the “strong growth” in D6 RIN futures activities.211 ICE supplied RIN statistics to show that the number of RIN market participants and the number of RIN open interests increased drastically in 2021 from 2020.212 ICE again propped up the RIN futures market in 2023, reporting “strong demand” and record trading of RIN futures.213

Notably, prior to the Dodd-Frank Act, 7 U.S.C. § 2(g) existed to state that “[n]o provision of this Act . . . shall apply to or govern any agreement, contract, or transaction in a commodity other than an agricultural commodity if the agreement, contract, or transaction is—(2) subject to individual negotiation by the parties;” however, the Dodd-Frank Act repealed such a prohibition, and now no such prohibition exists.214 The existence of term contracts in the RIN market, as highlighted by both the EPA and the CFTC, and the existence of a RIN futures market, as


211. Wittner, supra note 64.

212. Id.

213. ICE Reports Strong Demand in U.S. Renewable Fuels Futures with Record Trading in Renewable Identification Numbers (RINs), supra note 209.

expressed by ICE, seem to establish that RIN “contracts for future delivery” are quite existent, which establishes a RIN futures market.\footnote{See 7 U.S.C. § 1a(9).}

Importantly, per McDonnell, My Big Coin Pay, and Brooks, for the CFTC to have jurisdiction, a violation does not need to occur within the futures market; a futures market must merely exist.\footnote{CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492 (D. Mass. 2018); CFTC v. McDonnell, 287 F. Supp. 3d 213 (E.D. N.Y. 2018); United States v. Brooks, 681 F.3d 678 (5th Cir. 2012).} In the same 2017 QFR answer that CFTC pronounced RINs as commodities, the CFTC awkwardly declared that RIN futures were “non-existent” despite highlighting the fact that two RIN futures contracts were being reported in February 2018 and the “maximum total open interest was 30 contracts.”\footnote{Hearing to consider the nomination of J. Christopher Giancarlo to be Chairman of the Commodity Futures Trading Commission Before the S. Comm. on Agric., Nutrition, & Forestry, 115th Cong. 591 (2017), https://www.govtattic.org/38docs/CFTCqfr_2017-2020.pdf [https://perma.cc/KQS7-UUJG].}

Similarly, the EPA, in its 2019 proposed modifications to the RFS, illustrated that prohibiting non-obligated parties from participating in the RIN market would adversely affect “term contracts,” which obligate one party to deliver “a specific quantity of RINs at the end of the contract period.”\footnote{Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications, 84 Fed. Reg. 55 (Mar. 21, 2019) (to be codified at 40 C.F.R. pt. 80).} Indeed, Valero Marketing & Supply (Valero) sued Sundive Commodity Group (Sundive) for failing to deliver future RINs pursuant to a term contract.\footnote{Brief of Petitioner, Valero Marketing & Supply Company v. Sundive Commodity Group, LLC, No. 2020-83945 (151st Dis. Ct. Harris Cty. dismissed Sept. 19, 2022).} Valero, in its complaint, asserted that “refineries like Company A buy future RINs to help with business planning while also conserving its cash.”\footnote{Id.}

Some commentators, particularly Covington & Burling, have suggested that a contract for future delivery is not a true derivative instrument that is meant to be regulated by financial agencies.\footnote{Poloncarz et al., supra note 168, at 20, n. 95. The White Paper cites 7 U.S.C. § 1a(26), now § 1a(27), which states, “the term ‘future delivery’ does not include any sale of any cash commodity for deferred shipment or delivery.”} In other words, futures contracts that are true derivative instruments never envision actual delivery of a product, only that the instrument’s worth obligates the parties to a financial transaction. Even presuming that a futures market does not exist for RINs, the definition of commodities under the CEA
encompasses “contracts of future delivery . . . in the future dealt in.”222 Indeed, the United States Fifth Circuit Court of Appeals in Brooks posed an open-ended question in a footnote, which was “whether the CEA requires a commodity to be the subject of a currently existing futures market, or merely that it be such a good for which a futures market could come into being.”223 While My Big Coin Pay provided somewhat of an answer,224 the question largely remains unanswered. No doubt, including merely conceivable futures markets within the jurisdiction of the CFTC renders any sale of a thing in interstate commerce within the control and oversight of the CFTC.225 But, the plain language of the statute is to be interpreted as written.226 Therefore, assuming arguendo that a futures market must have the potential to exist, it would be hard to fathom how a RIN futures market could not come into existence. Right now, on ICE, one can buy D6 RINs, which are described as “cash settled and future based,” which meets the definition set out by Covington & Burling.227

Thus, it would seem likely that RINs are subject to the CFTC and the CEA. And the CFTC can enforce its reporting requirements on the RIN market. The CFTC is precisely the type of financial agency capable of gathering the correct data to unveil manipulation and then prosecute such claims if they do exist. But the CEA does not provide an action against the CFTC to force its hand. RIN market participants’ hands are tied. They will have to either seek legislative amendments to the RFS2’s reporting requirements to align them with the CEA or find enough evidence in the limited reporting requirements to establish a prima facie case against a party potentially manipulating RIN prices.

222. 7 U.S.C. § 1a(9).
224. CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492 (D. Mass. 2018) (finding that the existence of a futures market for My Big Coin did not need to exist since the broader category of futures contracts of virtual currency existed).
226. Id.
IV. BRINGING AN ACTION UNDER THE CEA

To date, the CFTC has brought no enforcement actions against any parties involved in the RIN market.228 The CEA does provide causes of action against violating parties to two other groups: (1) the States and (2) private parties.229 With the CFTC refusing to take action, either a state or a private citizen should bring an enforcement action against violating defendants to place issues of fraud and market manipulation in the RIN market before the judiciary. This Section discusses jurisdiction, standing, and the general framework for a claim of RIN market manipulation.

A. Jurisdiction

For a court to have jurisdiction over a claim for RIN market manipulation under the CEA, a RIN must be a “commodity.”230 The CEA’s broad definition of commodities includes “all other goods and articles . . . all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”231 This definition posits two questions. First, a RIN must be a good, article, service, right, or interest. Second, a RINs futures market must, at a minimum, exist. Both questions can be answered affirmatively.

Federal courts have opined that both virtual currencies and natural gas are within the “goods, articles, services, rights, and interests” portion of the “commodities” definition under the CEA.232 To make this conclusion, the courts determined that virtual currencies hold a “store of value.”233 RINs would similarly fall within the plain reading of the definition of commodities since RINs are more than just credits used to establish compliance with the RFS. RINs, particularly separated RINs, are goods that are traded, providing a “store of value” in the form of credits that are bartered in exchange for money. This is best exemplified by parties like Company B and JP Morgan, who buy and sell RINs, not to establish compliance with the RFS but to rake in profits. Just as the court in

228. See supra Part II.A.
229. 7 U.S.C. § 13a-2, § 25(a)(1)(B), (D); see also 17 C.F.R. § 1.70.
230. Id. § 2(a)(1)(A).
231. Id. § 1a(9).
McDonnell saw that virtual currency functions practically as a commodity, so too should a court determine that a RIN functions practically as a commodity.\textsuperscript{234}

Concluding RINs are a good-type commodity is supported by both statutory interpretation and practicality, but further support lies in the CFTC’s answer to 2017 Congressional Questions for the Record. The CFTC explicitly stated that “Renewable Identification Numbers (RIN) meet the definition of commodity.”\textsuperscript{235} While this statement does not carry the force of law,\textsuperscript{236} the CFTC’s expertise in this area, coupled with its signaling that it does not intend to regulate RINs, weighs heavily in favor of the interpretation that RINs are the type of good to be considered a commodity.

But the CFTC found that RINs do not meet the second part of the definition of a commodity: the existence of a futures market. RIN futures contracts exist, as pointed out above. Anyone can buy RIN futures right now on the open market. Companies like Valero have sued to enforce RIN futures contracts. And courts have alluded to the mere potential for a futures market to exist as enough to convey jurisdiction. With the low bar established by the courts, RIN futures contracts being used, and RIN futures being readily available on the open market, it seems easy to conclude that a RIN futures market exists. An existing RIN futures market coupled with RINs being a “good” indicates a court would have subject matter jurisdiction over a claim made under the CEA.

\textbf{B. Standing}

Standing, the next leg of bringing a claim under the CEA, is unique to each plaintiff—the States and private parties. A state’s standing derives from 7 U.S.C. § 13a-2. The statute provides that a particular state may bring an action against a violating party “in equity or an action at law on behalf of its residents” for injunctive relief, enforcement of the CEA, damages for its residents, or any other relief the court deems appropriate.\textsuperscript{237} Such action may be commenced whenever “it shall appear to the attorney general of [the] State . . . or such other official as a State

\begin{itemize}
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} \textit{Hearing to consider the nomination of J. Christopher Giancarlo to be Chairman of the Commodity Futures Trading Commission Before the S. Comm. on Agric., Nutrition, & Forestry, supra note 217.}
\item \textsuperscript{236} \textit{See Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944); see also W. Va. v. EPA, 142 S. Ct. 2587 (2022) (major questions doctrine).}
\item \textsuperscript{237} 7 U.S.C. § 13a-2(1).
\end{itemize}
may designate, that the interests of the residents of that State have been, are being or may be threatened or adversely affected” by any person’s violation of the CEA that person “has engaged in, is engaging in or is about to engage in.”238

For standing under the CEA for private parties, the court would need to look to 7 U.S.C. § 25 as that provision is the “exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter.” This provision explicitly outlines four types of persons for whom could have standing.239 The most pertinent to manipulation on the RIN market is subpart (D)(ii), which provides standing to any person “who purchased or sold a contract [futures contract] or swap if the violation constitutes . . . a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.”240 Subpart (D)(i) could also be highly relevant depending on the specific facts since such Subpart requires the use of a manipulative device.241 Additionally, the injured party must plead “actual damages” through showing an actual injury was caused by a violation.242 The violations would likely derive from 7 U.S.C. § 9, which covers manipulation through using manipulative or deceptive devices, manipulation through false reporting, and any manipulation, direct or indirect, of any commodity in interstate commerce.243

Upon establishing standing and jurisdiction, a court would move to the merits: the price manipulation. As stated previously, this point is likely only possible with more transparency within the market, which most easily comes from the CFTC asserting jurisdiction and enforcing its reporting requirements. Without the CFTC’s involvement, evidence would need to be uncovered by a private citizen or a state.

C. How Courts Address Market Manipulation under the CEA

Once jurisdiction over the RIN market is established and the requisite prima facie evidence exists to bring a claim, a cause of action by the states244 or private entities245 against the violating defendant may be

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238.  Id.
239.  Id. § 25(a)(1)(A)-(D).
240.  Id. § 25(D)(ii).
241.  Id. § 25(D)(i).
243.  7 U.S.C. § 9(1-3).
244.  Id. § 13a-2; see also 17 C.F.R. § 1.70.
245.  Id.§ 25(a)(1)(B), (D).
brought for market manipulation pursuant to pursuant to 7 U.S.C. § 9(3) and 17 C.F.R. § 180.2. Courts have taken these statutory provisions and established a four-part test for price manipulation. The test requires the injured plaintiff to allege: “(1) the defendants possessed the ability to influence prices; (2) an artificial price existed; (3) the defendants caused the artificial price; and (4) the defendants specifically intended to cause the artificial price.” A great example of how a court utilized this test to address price and market manipulation is CFTC v. Kraft Foods Group, Inc. In Kraft Foods, the District Court for the Northern District of Illinois addressed a motion to dismiss for failure to state a claim, one of which was for market manipulation under the CEA.

The court began by acknowledging that market manipulation is a fact specific analysis since such “methods and techniques of manipulation are limited only by the ingenuity of man.” Such a fluid standard requires a practical test—the four-part test—seeking “to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.” Addressing element (1), the CFTC claimed Kraft used its market position to increase the price of wheat by purchasing substantial amounts of one position. Based on its size, Kraft had the ability to purchase a $90 million future position that amassed to 87% of the wheat market. This was enough for the court to find that the CTFCC adequately alleged Kraft’s ability to influence wheat prices.

Element (2), the intent to cause an artificial price, was also adequately pled by the CFTC. The court noted that intent must be pled specifically and cannot allege that the defendant merely knew that certain actions may have an impact on the market. Instead, intent is established by proving that the defendant acted or failed to act “with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.” This means that pairing a legitimate transaction with an unlawful intent creates unlawful

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248. Id. at 1001.
249. Id. at 1017.
250. Id. (internal quotations omitted).
251. Id. at 1020.
252. Id.
253. Id. at 1021.
254. Id. at 1020.
255. Id.
market manipulation. To establish a prima facie case of intent, circumstantial evidence was used—in particular, emails from Kraft’s Senior Director discussing the change in wheat prices and futures. The emails, at least at the pleadings stage, were enough to show that Kraft intended to move the prices of wheat and wheat futures through its enormous market position.

The court then turned to element (3), the existence of an artificial price. An artificial price, the court defined, was one that did not reflect traditional notions of supply and demand. To establish this element, a court must identify extraneous and illegitimate factors to the commodity pricing market and determine if those prices are higher than they would be absent the defendant’s actions. In the context of Kraft Foods, the CFTC adequately alleged artificial prices by pleading the facts surrounding Kraft’s market position in the wheat market, which made clear that the wheat prices and future prices reacted differently than they would have had Kraft Foods not acquired 87% of the wheat futures market.

Causation, being that last element, merely required that Kraft’s actions cause an artificial price. Kraft argued that trading in a futures market does not directly cause changes in a cash market. The court found such an argument unpersuasive since, as alleged, the $90 million futures position caused artificial prices in both markets, as shown through circumstantial evidence, emails, and the specific prices around the time of Kraft’s actions. As a result, the court found that every element of market manipulation was adequately pled, which led to the court denying the defendants’ motion to dismiss.

CONCLUSION

As one can see, a market participant or a state seeking to establish a prima facie case of price manipulation under the CEA must work through

256. Id. at 1021.
257. Id.
258. Id.
259. Id.
260. Id. at 1021–22.
261. Id. at 1022.
262. Id.
263. Id. at 1023.
264. Id.
265. Id. The court first noted that the argument was waived because it was raised for the first time in the reply brief, but the court elected to address the argument regardless.
the four-part test courts use across the country. While such claims are available to market participants, like obligated parties, or even the states, the opaque nature of the RIN market makes it difficult to establish a prima facie case that an artificial RIN price exists at any given time. This proposed lawsuit can generate change to the transparency of the RIN market, but that transparency is also needed to have sufficient evidence to bring said lawsuit. This causes a conundrum that resembles the age-old question, “what came first, the chicken or the egg.” Not having enough data to determine whether there is a prima facie case of price manipulation is ultimately the Achilles heel of this Article.

While the judiciary can certainly state that the CFTC has jurisdiction over the RIN market, the CEA insulates the CFTC from actions that would otherwise force its hand. This deeply hinders propelling any change within the RIN market. Nonetheless, if a prima facie case is established, discovery will likely shed light on what many speculate to be an abusive financial market with small refiners and consumers on the bad end of the stick.