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As [illegible] n f America
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Fax

To: John Morrall **From:** Laura Tague

Fax: 202/395-6974

Phone: 202/395-7316

RE: Comments of Draft Report

cc:

☒ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

13 PAGES

PETROLEUM MARKETERS ASSOCIATION OF AMERICA

1901 N. Fort Myer Drive • Suite 1200 • Arlington, Virginia • 22209-1604 • 703-351-8000 • Fax 703-351-9160

May 24,2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget, NEOB
Room 10235
725 17th Street, NW
Washington, DC 20503

RE: PMAA Comments on Draft Report to Congress on the Costs and Benefits of Federal Regulations

Dear Mr. Morrall:

The Petroleum Marketers Association of America (PMAA) appreciates the opportunity to comment on The Office of Management and Budget's (OMB) Draft Report to Congress on the Costs and Benefits of Federal Regulations. Specifically, PMAA appreciates the opportunity to recommend regulations for review that we believe either the costs significantly outweigh the benefits, or are duplicative and confusing.

PMAA is a federation of 42 state and regional trade associations representing 8,000 small, independent petroleum marketers. These marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in this country annually. Our members are regulated by numerous agencies, including the Department of Transportation (DOT), The Department of Labor (DOL), The Environmental Protection Agency (EPA), and The Internal Revenue Service (IRS). We are asking OMB to review regulations under these agencies.

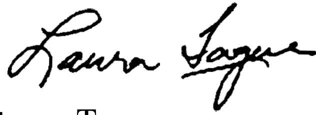
PMAA believes there are three federal rules that significantly impact our member that need to be reformed. Our three requests for review are:

1. Internal Revenue Service, 26 CFR 48.6427-9, Notice 89-29 (1989-1 C.B. 669), Letter Rulings 200130047, 2001 16023,1999-28018, 95-05001
II. Environmental Protection Agency, 20 CFR 80.500
III. Department of Transportation Research and Special Programs, 49 CFR 172 Subpart H and the Department of Labor Occupational Safety and Health, 29 CFR 1910 Subpart H.

Attached are 'supporting materials and documentation for each of these regulations which state why PMAA believes they need to be reviewed.

Thank you for your consideration of our request. If you have any questions on the above, or would like to speak with us further about our concerns, please do not hesitate to contact me at 703-351-8000, ext. 30.

Sincerely,



Laura Tague
Director of Regulatory Policy

I. Request for Review: Government Fleet Fueling Cards

Regulating Agency:
Internal Revenue Service

Citations:
26 CFR 48,6427-9, Notice 89-29 (1989-1 C.B. 669),
Letter Rulings 200130047,200116023,1999-28018
95-05001

Description of Problem:
Government vehicle fleet managers (state and federal) have been steadily changing their purchasing practices to having their drivers procure fuel at retail locations on fleet fueling cards, which are essentially a type of credit card. Under the long established doctrine of intergovernmental immunity (*McCulloch v. Maryland,* 4 Wheat. 316, 1819) neither the federal government nor the states should be taxing the essential governmental functions of the other. In the case of highway fleets, the tax at issue is the federal excise tax on motor fuels (26 USC 4081, et. seq.) and the corresponding state motor fuel excise taxes.

The current situation is one of confusion and resentment. The federal *tax* on gasoline and diesel fuel is applied when the fuel leaves a bulk terminal. The retailer purchases the fuel from a supplier who passes the federal *tax* on to him as an addition to the price of the fuel. When a consumer purchases the fuel, the federal tax (and the *state tax)* is included in the pump price. When a state government employee, for instance a police officer, uses a fleet fueling card at a retail station, his purchase price includes the federal tax (3.184 per gallon for gasoline and $.244 for diesel). At that point someone must obtain a refund of the federal tax to avoid the situation of having the federal government taxing the essential state operations.

The refund process is the heart of the problem. If the fuel purchased was gasoline, there are potentially three different refund claimants: the wholesaler, the supplier (taxpayer at the terminal) or the government agency itself. If the fuel purchased was diesel, there is only one: the retailer and only if he was registered with the IRS as an ultimate vendor prior to the sale. Due to the confusion arising under the regulations and guidance documents, many times the refunds are not forthcoming. Last year the State of Colorado, in desperation, contracted with a recovery firm to try to convince retailers to *make* income tax refund requests for fuel tax sold to the state. If they succeeded they were to give the refunds to the State. If, however, any questions arose, they stood alone before the IRS. If they did not make the refund requests, the recovery firm hinted that the State would cease doing business with their stations.

The reason for this extreme action can be found in the regulations and guidance documents and *the* practices which result from their implementation. In Notice 89-29 the IRS established a set of rules *for* refund claims if the gasoline was sold on a "oil company credit card," a term which was not defined. Many of the fleet fueling cards assumed they qualified for that procedure, but as letter ruling 2001 16023 demonstrated, they were wrong and who, if anyone, could make the refund claim on these cards was unclear. In the case of the diesel sales, many retailers *are* not registered as ultimate vendors. When a state government uses a fleet fueling card, the retailer

does not even know that he is selling to a government agency and does not ever bill the customer directly. The agency has a contractual relationship with the card issuer, who extended them credit and bills them for the fuel. The card issuer reimburses the station owner. Yet it is the station owner who needs to make the refund claim. Even if he is registered, he is lacking the information to make a claim since he did not bill the customer. Thus Colorado's attempt to have a firm retroactively document purchases and try to force the retailers into seeking refunds they did not know they were entitled to at the time of the transaction.

The states have rightfully chafed at this situation for several years. Now that the General Services Administration has issued fleet fueling cards for the federal fleet, many are refusing to exempt the federal government fiom the state motor fuel tax on credit card purchases.

Proposed Solution:
The IRS has recently asked for public comments regarding this situation (Notice of Proposed rule Making REG-143219-01). We have submitted comments (see attached letter dated January 18,2002). As you can see from our letter, one of our major concerns is the scope of the IRS project. It is currently aimed at gasoline only. Any new regulatory system which fails to consolidate the rules for gasoline and diesel fuel refunds resulting fiom purchases on the same fleet fueling card will perpetuate the current confused situation.

We proposed to the IRS, and reitcrate here, that a new regulatory interpretation is needed. The person issuing the credit to the government agency (and receiving the payment from them) needs to be treated as the "seller of gasoline" and the "ultimate vendor of diesel fuel". This is the person who needs to be the refund claimant. Such simplification would allow the states to get their refunds fiom the party that has the information to make the claims. It would assure both the states and the federal government that there is one party who is entitled to the refund, thus increasing the likelihood of obtaining them and decreasing the likelihood of fraud from multiple Claimants.

Estimate of Economic Impacts:
Three times in the past six years our members have faced chargebacks from their branded suppliers when the IRS deemed certain sales to state agencies which were made on oil company credit cards but the supplier was the incorrect claimant. These chargebacks to our members cost them over $2,000,000in lost refunds. While the card issuers keep the level of refunds private as confidential information, we believe the true loss to state governments is considerably higher each year. Only at these elevated levels does the actions of the State of Colorado make sense.

In the bigger picture, the cost is much higher. Retailers who try to help the government agencies to recover these refunds face confusing and contradictory requirements for different types of fuels - which as small business owners, they are not properly staffed or easily prepared to handle. The federal government is Iosing as much in refunds fiom the state retaliatory action and this friction is straining the intergovernmental tax immunity.

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January 18, 2002

Internal Revenue Service
Attn: CC:ITA:RU (REG-143210-01)
Room 5226
P. O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

We are responding to your request for comments on a proposed regulatory project related to claims for credits or refunds of excise tax on sales of gasoline to tax exempt users.

PMAA is a federation of 42 state and regional trade associations representing 8,000 small, independent petroleum marketers. Thcsc marketers sell nearly half the gasoline, over 60 percent of the diesel fuel, and approximately 85 percent of the home heating oil consumed in this country annually. Our members have a very strong marketing presence in the rural areas, thus positioning them to provide a large portion of the fuel to state and local government fleets.

Our members provide these exempt consumers with fuel by three delivery methods: bulk deliveries into government owned tanks, retail station sales on fleet fueling cards and automated card-lock deliveries. We deliver both diesel fuel and gasoline to the customers under all three methods.

The first comment that needs to be made is related to the scope of your project. In the request for comments you only mention gasoline. We believe that scope is too narrow. As much as possible, you need to harmonize the rules on gasoline and diesel refunds. Imagine the common situation where a police bus is transporting prisoners from one location to another. A policc car escorts the bus. During the journey they need to stop and fuel both vehicles: diesel for the bus and gasoline for the car. Two employees of the Same agency two fuel the vehicles on the same fleet fueling card at the same station. Under the current rules it is most likely that there will be two different refund claimants. It is also likely that neither claimant will bill the agency for thc fuel purchased on the fleet fueling card. The resulting situation is one in which the consumer does not know who to question if the refunds were not received. Furthermore they claimants are

confused as to who should submit each claim. Many eligible claims are never submitted, yet it is possible that multiple claimants can make a claim to the Same transaction and obtain unauthorized refunds.

We recognize that the problem stems from the different code sections governing the refund procedure for each fuel (6416(a)(4) and 6427(l)(5)). However, we believe you could make progress in harmonizing the rules by looking at a key concept. In 6416 (a)(4) a critical condition to the right to claim a refund reads, " . . .sells the gasoline to its ultimate purchaser. .." In 6427(l)(5)(C) the critical condition as to who has the right to the refund reads, "...the ultimate vendor of such fuel..." The key concept here is how to define the seller. Our members will often issue fleet fueling cards or card-lock access cards to a governmental agency. When the agency fuels their vehicles, it may well be at one of the wholesaler's dealer locations. Even though the wholesaler will bill the agency, the dealer may have to obtain the refunds, despite the fact that they might not have any contractual relationship. This often leads to the confusion set out above and lost refunds. (See letter ruling 95-05001 for an example of these facts).

We would suggest an expansion on Regulation 48.0-2 related to sales. We would suggest that the seller will be the person who makes the sale under the relevant Uniform Commercial Code of the jurisdiction with particular emphasis given to three elements: which party sets the price the user ultimately pays; which party extends the credit to the user, and which party bears the economic risk of loss on the transaction. Ultimately the party who "sells to the ultimate purchaser" should be the same party as the "ultimate vendor" of the fuel. Presently the determination is largely controlled by the party's position in the distribution chain, not by the criteria we are suggesting.

A second issue is the definition of an "oil company credit card" under Notice 89-29. Our members accept credit cards issued by branding refiners, some of which are co-branded with general purpose credit cards. In addition our member accept several "universal" fleet fueling credit cards. In all of these cases, our members have no relationship with the cardholder except when they withdraw fuel from our retail station pumps. Whether the concept of an "oil company credit card" continues in new regulations deserves some thought If it is to survive, the definition needs to be much fuller and the application of the rule as to which party is the proper refund claimant needs to be spelled out in detail. A new regulation should harmonize both gasoline and diesel refunds on sales made with these cards. (See letter rulings 1999-28018 and 2001 16023 for examples of facts under which this confusion arises). Twice in the past five years our members have faced major "charge-backs" from refiners after the Service had disallowed refunds on "oil company credit cards".

Our members need clear rules which will allow them to contract with state and local governments on a basis of certain results. The government agencies expect to receive their refunds. Our members expect that there will be a fair process in place to see that these refunds are obtained at a minimal cost and in a timely manner. There are several ways to achieve these goals. We would like to suggest that you convene a

hearing to explore how fueling cards are used by state and local governments and how those refunds could be processed. We would pledge to bring members with experience in these transactions to participate in finding a solution.

We appreciate the opportunity to comment prior to the formation of new regulations. Please feel free to call me (703-351-8000, ext. 24) or Ron Raven, our excise tax counsel (404-329-6312) if we can provide any information during your deliberations.

Sincerely,

Holly Tuminello
Vice President, PMAA

II. Request For Review: Final Rule on Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements

Regulating Agencies:
The Environmental Protection Agency (EPA)

Citations:
40 CFR 80.500

Description of Problem:
On January 18,2001, EPA published its final rule on Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements. The final rule, among other things, requires that the sulfur content in all highway diesel fuel being sold by retailers be reduced from 500 parts per million (ppm) to 15 ppm by December 1,2010. The regulation staggers the implementation date by requiring retailers to begin offering both fuels by September 1,2006.

PMAA applauds the EPA for taking steps to reduce emissions from diesel engines. However, PMAA believes the EPA has made a significant error by allowing the phase-in of an ultra-clean diesel into the market at the same time: today's diesel is still available for use.

The EPA "phase-in" is premised on the belief that fewer refineries will be required to upgrade their facilities and thus significant costs will be avoided. Unfortunately, this effort to minimize the impact on small refiners may jeopardize the nation's fuel supply, lead to price spikes and may destroy the environmental benefits intended by implementation of the rule. Currently, refiners estimate that the new rule will add up to 15 cents per gallon to the price of diesel fuel. Should the existing phase-in component of the rule remain, downstream marketers would have to install new tanks to store two types of diesel, thus adding further to the per gallon cost.

With this phase-in marketers of petroleum products will be faced with making investments to distribute two fuels that are competing with each other in the market. More tanks will need to be installed and more trucks will be necessary to distribute the two different types of diesel fuel, increasing demands on an already stressed distribution system and threatening supply availability. These significant and unrecoverable investments will not improve the environment, as the new ultra-low sulfur fuel becomes the dominant fuel over a four-year period, the extra tanks will be rendered unnecessary. This is a wasted capital investment that petroleum marketers cannot afford to make.

In addition, the demand for the new fuel will be extremely uncertain and small, while the investments in refineries will be tremendous. Thus, there is the red possibility that users of diesel fuel in America will find that insufficient investments were made by refineries to produce the new fuel, and that America has less fuel than it needs. This "demand-supply" imbalance, combined with new distribution difficulties, will almost certainly lead to higher and unstable prices, and the American public will suffer the consequences of this flawed decision.

There also is a very real possibility that the phase-in will jeopardize the environmental objective of the rule. According to EPA, the current diesel fuel will destroy the new catalytic exhaust emission control devices in new trucks; thus new trucks will need to use the new fuel. However, if the new fuel is more expensive than that currently available, or if its geographical distribution is inconsistent because of regional credits or underproduction, truckers and other operators of diesel equipment are likely to defer and delay purchasing new vehicles. When that happens, the older dirtier vehicles will stay on the road longer, while the newer cleaner vehicles stay on the showroom floor, providing no environmental benefit.

The phase-in of the new diesel sulfur requirements will impede the environmental objectives of the rule and will cost consumers money. If the phase-in is allowed to stand, EPA will have essentially created an entirely new underground storage tank universe by forcing petroleum marketers to put in new tanks to store an additional fuel. Any anticipated savings for refiners will be offset by distribution and marketing costs. In addition, consumers may experience supply disruptions because of the rule. Environmentalists, state regulators, petroleum refiners, distributors and auto & engine manufacturers agree that a phase-in is bad environmental and bad energy policy.

Finally, on October 20, 1999, EPA itself argues against a proposed phase-in period. According to their own document "Comparison of Single Grade of Diesel vs. Phase-in Approaches," EPA states numerous reasons why the phase-in approach is not preferable. (EPA Air Docket A-99-06) According to EPA's own document., a single fuel approach is preferable because it is the least costly and strongest environmental approach; avoids unfunded mandates and impact on tribal governments; minimizes the number of small businesses impacted; provides certainty that the fuel will be available everywhere for the vehicles that need it; and avoids any concern of misfueling which could cause in-use emissions increases and vehicle breakdowns. PMAA questions why EPA stated so many reasons against the phase-in approach but eventually did not listen to their own arguments. It is essential that EPA take another look at their initial findings.

Proposed Solution:

PMAA believes an appropriate solution to the problem is to reopen for comment the specific part of the rule which addresses the phase-in period. Please note that PMAA is <u>not</u> asking that the entire rule be re-opened for comment, just one specific portion. PMAA believes that by asking for additional comments regarding the phase-in, EPA will again reach their original determination that the phasein period is not required and will actually have a negative impact on the environment and fuel supply.

Estimate of Economic Impacts:

A survey was conducted by The National Association of Truck Stop Owners to determine both the ability of the industry to carry two grades of highway diesel and the costs which would be required to do so. Forty-five percent of respondents stated it would cost over $100,000 per location to re-configure their site to an additional grade of fuel, fifteen percent of respondents stated it would cost over $75,000 per location, and sixteen percent stated it would cost over $50,000 per location. The remainder of respondents estimated costs at less than $50,000 per location.

The enormous expense required to re-configure a location would result from the need to purchase additional storage tanks to segregate the second grade of diesel, the need to tear up

concrete for additional tank installation and the requisite re-piping and re-manifolding of tank lines, and the purchase of new pumps and monitors. There will also be compliance costs and the increased cost to acquire product.

These burdensome costs would be extremely prohibitive, unrecoverable due to the *temporary* use of two fuels in the market, and would be expended by an industry which largely consists of small independent owners. The introduction of a second *grade* of highway *diesel* could therefore force many petroleum marketers *out* of business, and in turn, reduce overall diesel fuel supplies.

III. Request For Review: Duplication of Hazardous Materials Training Requirements

Regulating Agencies:
The Department of Transportation, Research and Special Programs Administration
The Department of Labor, Occupational Safety and Health Administration

Citations:
49 CFR 172.704, 29 CFR **1910.120**

Description of Problem:
The Department of Transportation's (DOT) Research and Special Programs Administration (RSPA) 49 CFR 172.704 and the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) 29 CFR 1910 should be reviewed by OMB because they are essentially duplicative in their requirements of hazardous materials training, but require the training at different intervals.

In 49 CFR 172.704, RSPA requires training for employees who handle hazardous materials to include general awareness/familiarization training, function-specific training, and safety training. This safety training includes emergency response information, measures to protect the employee from *hazards*, and how to avoid accidents. RSPA allows for *training* that is conducted to comply with the hazard communication training required by OSHA to be used to satisfy their training requirements if all of RSPA's requirements are met. Under RSPA, an employee who handles hazardous materials is required to receive refresher training at least once every three years.

In *29* CFR 1910.120, OSHA requires *training* for employees who handle hazardous materials to include names of personnel and alternates responsible for site safety and health; safety, health and other hazards present on the site; use of personal protective equipment; work practices by which the employee can minimize risks from hazards; safe use of engineering controls; and medical surveillance requirements. OSHA requires that employees receive refresher training annually.

PMAA believes that the training requirements required both by RSPA and OSHA are a necessity. However, what is required by both agencies is similar enough that there should only be one agency regulating hazardous materials training. PMAA members are currently faced with the dilemma of not knowing which agency's hazardous materials training regulations to comply with. For example, if a marketer chooses to follow the requirements set forth by RSPA, they are not in compliance with the requirements set forth by OSHA yet they are so substantially similar that a marketer may believe he is in compliance.

Proposed Solution:
PMAA would like to see just one agency regulate the hazardous materials regulations. PMAA **proposes** that **this** be RSPA because our small **business membership** finds *their* requirements to be less onerous for the reasons **described** below in the section titled "Estimate of Economic Impacts."

The procedure to reduce the number of agencies regulating hazardous materials training should be conducted through a rulemaking procedure. Following the Administrative Procedures Act, RSPA would publish a Notice of Proposed Rulemaking and solicit comments on the costs and benefits of having RSPA regulate employees who handle hazardous materials.

Estimate of Economic Impacts:
The benefits of such an action are two-fold. First, the economic impact of such an action would be beneficial to PMAA members. As stated in your request for comment, in the Small Business Regulatory Enforcement Act of 1996, Congress found that "small businesses bear a disproportionate share of regulatory costs and burdens." Our membership is comprised of small business owners who are currently required to pay for two sets of training every three years and one set of training every year. If only one agency regulated hazardous materials training, our members would only be required to pay for one set of training.

Secondly, the amount of paperwork would be reduced. PMAA believes that the paperwork requirements impose especially large burdens on our members and other small entities without an adequate benefit justification. Currently, our members are required to comply with two different federal regulations; therefore, the amount of paperwork is doubled. By combining the regulations into one with only one agency having jurisdiction, the amount of paperwork is cut in half.

In summary, OMB should consider the benefits in having one agency regulate employee hazardous materials training. The results would bc to eliminate confusion, lower costs for small businesses, and significantly reduce the paperwork burden.