NACS NATSO SIGMA

May 7, 2021

Ms. Kathleen Theoharides
Chair, Transportation and Climate Initiative
Secretary, Massachusetts Executive Office of Energy and Environmental Affairs
100 Cambridge St., Suite 900
Boston, MA 02114

Dear Chair Theoharides:

The National Association of Convenience Stores[1] ("NACS"), the National Association of Truckstop Operators[2] ("NATSO"), and the Society of Independent Gasoline Marketers of America[3] ("SIGMA") (collectively the "Associations"), representing more than 90% of retail fuel sales in the United States, write to reiterate our concern regarding the efforts to implement the Transportation and Climate Initiative program ("TCI" or the "Program"). The proposed Program contains inherent structural flaws that will exacerbate foreseeably adverse economic consequences. Those costs will be felt most acutely by the northeast region's low-income communities. The Draft Model Rule[4] ("Rule") released by TCI only spells out the deficiencies of this Program. There are more efficient and effective ways to commercialize alternative fuel technologies.

In comments submitted last year, the Associations expressed a desire to work with policymakers and stakeholders who are evaluating the adoption of the TCI program. Our members are highly attuned to consumer preference and often serve as a surrogate for the consumer to policymakers. Our members are fuel-agnostic, governed by a loyalty not to a particular type of fuel, but to low and stable priced energy for their customers. This combination of attributes has allowed our Associations to support many sound environmental policies that have been designed to improve the emissions characteristics of transportation fuel while harnessing the retail fuel industry's ingenuity and willingness to embrace alternative fuel types, provided their customers want to purchase such fuels. Such programs ultimately transform the environmental profile of transportation fuels while providing cleaner and more desirable fuels to the consumer at a lower cost. TCI, as proposed, fails to harness these lessons and instead creates a confusing and deficient

[1] NACS is an international trade association representing the convenience store industry with more than 2,200 retail and 1,600 supplier companies as members, the majority of whom are based in the United States.
[2] NATSO currently represents more than 4,000 travel plazas and truck stops nationwide, comprised of both national chains and small, independent locations.
[3] SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.
[4] TCI, Draft Model Rule (Mar. 1, 2021), https://www.transportationandclimate.org/sites/default/files/TCI-P-Draft-Model-Rule-March-2021.pdf.

program that will rob struggling Americans of hard-earned money without achieving the program's desired goals.

I. TCI's Misunderstanding of Fuel Markets Will Limit the Program's Effectiveness

TCI creates a very complex regulatory regime that does not consider the way in which the downstream fuel distribution system works. As a result, TCI would lead to widespread evasion and enforcement difficulties. The Draft Model Rule, as proposed, potentially subjects all fuel marketers that operate within TCI jurisdictions to compliance obligations.[5] Yet the Rule also allows participating states to implement very different programs – which can lead to diverging burdens and results. Depending on how a state adopts and implements the rules relating to TCI, a business attempting to operate in one or more TCI states will be governed by multiple regimes even within the same program. Businesses unable to discern which state's rules take precedence may unwittingly exceed the emissions limit of a particular jurisdiction and then be vulnerable to the Draft Model Rule's punitive proposal to deduct allowances equal to three times the number of the business's excess emissions.[6]

TCI proposes to require that entities that sell affected fuels must obtain and surrender credits to a particular TCI jurisdiction to demonstrate compliance with the Program. Affected fuels enter commerce in a particular state from bulk storage facilities located at a refinery or a terminal remote from a refinery. Thus, the relevant point of inquiry is, as recognized by the Draft Model Rule, the loading rack of bulk product terminals. Fuel is first delivered from terminal racks into trucks. From there, the fuel may be delivered directly to a retail outlet for sale to a motorist, but it could also go through several intermediaries within the supply chain before arriving at a retailer. Thus, it is common for the title to fuel to pass through multiple entities before the fuel is finally sold to the consumer. The ultimate destination of a particular gallon of fuel being transported is often not known by its title-holder and/or transporter while the fuel is in transit. In fact, fuel could move to a different state (or multiple different states) and have multiple different interim owners prior to reaching the destination where it will be sold to an individual consumer. This presents a problem not only for an entity operating among multiple TCI states but provides additional challenges for entities operating in TCI and non-TCI neighboring states. The Rule ignores entirely these complexities by requiring entities to provide information they cannot possibly know, such as the various title-holders of the transported fuel, destination jurisdictions, and even reasons for why a destination may have been changed.[7] The compliance burden is made heavier on fuel marketers by requiring them to provide monthly CO_2 emissions data reports and having these reports be made public.[8]

In addition to the structural challenges relating to how regulated entities achieve compliance, the Program injects substantial pricing and administrative complexities into the retail fuels market, without necessarily making alternative fuels (including electricity) more desirable for consumers than other fuels. TCI would not effectively "reward" fuel retailers who invest in

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[5] Rule, *supra* note 4 at XX-1.2.
[6] Rule, *supra* note 4 at XX-6.5(d).
[7] Rule, *supra* note 4 at XX-8.3(c), XX-8.4.
[8] Rule, *supra* note 4 at XX-8.2, XX-8.5.

bringing alternative fuels to market; instead, it would simply "punish them less" and potentially divert revenue raised in the name of improving the environment toward other, unrelated state priorities. The difficulty of tracking and loopholes created by the proposal will be exploited by bad actors who will not only rob TCI of the revenue it anticipates generating but ultimately will rob it of anticipated revenue from responsible actors. Because each state will implement the program differently and because fuel flows through multiple states, TCI will not function as a simple tax assessed on all fuel at the rack, similar to the gasoline excise tax. Given that not all fuel will be subject to the economic impact of TCI, there will inevitably be an effort to evade this cost. For responsible businesses, there is the challenge of pricing their product to recover the cost of the added compliance burden within the Rule's three-year compliance term.[9] Other entities may even decide to reduce or end operations in TCI jurisdictions altogether. Furthermore, consumers (and businesses) that need fuel will instead head to the nearest non-TCI jurisdiction to avoid the Program's costs, siphoning revenue from both the fuel retailers at the borders of the TCI state and the state itself.

The Rule's impact on diesel markets exemplifies this threat. Before 1983, diesel fuel excise taxes were allocated based on where the fuel was purchased, not where the trucks traveled. But with the passage of the International Fuel Tax Agreement (IFTA) in 1996, all 48 contiguous states, along with all ten Canadian provinces, were by then required to pool and proportionally allocate excise tax revenues based on truck miles traveled in each state. Thus, most states and the Canadian provinces now receive their fair share of excise tax revenue for fixing roads and bridges based on where trucks travel, not where the fuel was purchased.

The Rule would require all diesel sales be reported and charged an allowance fee for the emissions the fuel will create when combusted. By designing it as a "fee" rather than a "tax," it circumvents IFTA. Both the trucking industry and the retail diesel industry are highly competitive businesses operating under razor-thin margins. Trucking firms employ sophisticated logistics technology to find the best daily fuel prices for their trucks. TCI will not affect excise tax revenues, but it will alter the regional diesel fuel supply and distribution locations in states that opt-in. Diesel fuel sales in those states will undoubtedly, precipitously plummet as trucking firms seek to avoid TCI states due to the extra per gallon "fee" on diesel fuel.

Contrary to its goal of generating revenue for complimentary policies to lessen emissions, TCI will become a self-defeating policy as it relates to diesel fuel. It will be unable to capitalize on diesel fuel allowances because most diesel fuel purchases will migrate toward non-participating states.

The Rule also does not account for the mechanics of diesel excise tax collection. On-road diesel is subject to the motor fuel excise tax whereas off-road diesel is not. As diesel leaves the rack the fuel remains clear if the excise tax has been paid. If the tax has not been paid, and the fuel is determined to be for off-road use, the fuel is dyed red. That this tracking regimen was put in place underscores the pervasive desire for bad actors to avoid costs associated with their product. If the enticement is present for individuals to evade the diesel excise tax system, it stands to reason that a similar incentive to evade the TCI cost burden will exist as well.

[9] Rule, *supra* note 4 at XX-1.2.

It may be tempting, therefore, to take the diesel model, apply it to TCI, and dye fuel not being sold in the TCI states. The problem with that solution returns to the structural challenges of the program at large. Because TCI impacts fuel based on where the fuel is sold and not for what purpose, and the final destination of fuel is not known when it leaves the rack, dyeing non-TCI state fuel is not an option. The multiple state jurisdictions will make enforcement and compliance an added challenge. Fuel may travel in and out of TCI states (more than once) before reaching its final destination. Tracking this across multiple states will not be possible. Businesses that make every attempt to follow the law and the Program will be required to price product higher than those evading compliance. Because consumers are extremely price conscious, the bad actor, offering lower priced product, will generate more business than the responsible actor. In doing so, the responsible actor will generate less income, sell less product, pay fewer taxes and retire fewer TCI compliance credits. Again, because the system is structured to punish instead of incentivize good behavior, market forces are not likely to assist the TCI states to achieve the stated goals of the Program. For these reasons, members of the downstream fuel industry have expressed serious concerns about the effectiveness of the program.

II. TCI Will Disproportionately Harm Low-Income Communities

In addition to the structural problems inherent to TCI, the Program intentionally increases fuel prices and places a regressive tax upon low-income Americans, who spend a far greater percentage of their income on energy needs. Higher fuel prices not only impact individuals when they refuel their vehicles, but also translate into higher prices of most goods because the cost of transporting them to market by truck must be factored into the price. In a recent study[10] completed by Tufts University, the Center for State Policy Analysis found that TCI would almost "certainly" result in higher fuel prices, with various models showing an estimated increase of 13 to 24 cents-per-gallon but potentially reaching as high as 38 cents per gallon beginning in 2022. Those increases would change on an annual basis dependent upon the carbon reduction target agreed to by the participating states. The study acknowledges that residents in more rural areas dependent upon personal vehicles will pay a disproportionate amount of those increases. Those in rural areas will feel the impact due to the reliance on personal vehicles and increased fuel prices although all citizens of the participating states are likely to feel the economic impact of TCI due to the increased costs to transport goods in addition to the costs to fuel their own vehicles.

These consequences are not a mistake but, in fact, the intention of the Program. The study notes, "In the short term, higher gasoline prices will encourage people to seek ride-sharing options, consider public transit and rethink the expense of shipping goods by truck." While TCI may have that impact, these considerations are luxuries not available to every American. According to the Bureau of Labor and Statistics, the retail segment of the economy is responsible for more than 15.6 million jobs nationally[11] and direct-to-consumer and e-commerce retail is how many Americans interact with retail entities on a day to day basis. Threatening this industry would not only harm those who work in e-commerce, retail and the transportation and logistics that support that industry but also those who are dependent upon services and goods being delivered directly to home such as the elderly and disabled communities. Even the Rule's commitment that TCI jurisdictions will invest at least 35 percent of proceeds from allowance auctions in overburdened and underserved

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[10] https://tischcollege.tufts.edu/research/assessing-impact-tci.

[11] https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm.

communities still does too little to mitigate the economic damage that will be done to these groups.[12] Instead of punishing those Americans who are dependent upon this new way of life, a far better approach would be harnessing the levers available to policymakers to implement a system that would lower fuel prices for cleaner fuels.

III. <u>TCI's Undesirable Economic Consequences Will Jeopardize the Economic Recovery of Low-Income Americans From the COVID-19 Pandemic</u>

The economic burden created by TCI would add unnecessary stress to the livelihoods of low-income workers still rebounding from the severe economic crisis caused by the COVID-19 pandemic. While recent economic growth has been strong,[13] too many Americans – especially low-income workers and communities of color – still remain unemployed[14] and need assistance from their government.[15] This is not the time to impose a regulatory regime that would reintroduce economic hardship and uncertainty into their lives. The Tufts University study highlights the billions of dollars each year the Program would generate for participating states. What the study fails to do is connect the dots showing that the billions of dollars flowing into state coffers would be taken directly out of consumers' pockets in the increased prices they pay for fuel. Inflating household spending on an otherwise affordable, and necessary, good runs counter to most policymakers' stated goals. Our Associations serve many Americans that are just starting to see circumstances improve economically for themselves and their families. The government should not handicap their recovery in this precarious moment.

Furthermore, many of the behaviors TCI intends to change among the traveling population are limited, unavailable, or present health challenges for those with underlying conditions. As noted previously, if successful, TCI will direct more individuals to ride sharing, public transportation and more limited use of home delivery services for goods. Meanwhile, even with increased vaccine distribution, health and government officials still recommend that citizens limit time in communal spaces with individuals outside one's household and that results in less time using shared or public transportation and more time shipping goods directly to one's home, running counter to the goals of TCI.

IV. <u>Conclusion</u>

The Associations are encouraged by policymakers who take seriously the threat of climate change and craft policy designed to mitigate this threat for all Americans. We have been active, productive participants in these discussions. As proposed, however, TCI's Draft Model Rule suffers from multiple flaws that will limit its ability to achieve its environmental objectives while unintentionally punishing some of the region's most vulnerable communities. While the Associations support sound environmental policy to reduce greenhouse gas emissions and promote cleaner air, we do not support unnecessarily doing it on the backs of those least able to afford it.

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[12] Rule, *supra* note 4 at XX-3.1.

[13] Real Gross Domestic Product (GDP) was up 6.4 percent in Q1 of 2021 and 4.3 percent in Q4 of 2020. https://www.bea.gov/news/2021/gross-domestic-product-first-quarter-2021-advance-estimate.

[14] The Congressional Budget Office (CBO) predicts that the number of employed Americans will not return to pre-pandemic levels until 2024. *See* https://www.cbo.gov/system/files/2021-02/56965-Economic-Outlook.pdf.

[15] https://www.federalreserve.gov/newsevents/speech/powell20210503a.htm.

The Associations urge policymakers to work closely with our members to strengthen its Draft Model Rule so that it is more consumer-focused and thus better able to achieve what should be mutually compatible objectives.

Sincerely,

National Association of Convenience Stores (NACS)
National Association of Truck Stop Operators (NATSO)
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