

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.

**(g) Repetitive Inspections**

Before the accumulation of 7,400 total flight hours or within 6 months after the effective date of this AD, whichever occurs later, perform a radiographic (x-ray) inspection or a borescope inspection for cracking of the horizontal stabilizer rib assemblies, in accordance with a method approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA. Repeat the inspection thereafter at intervals not to exceed 2,400 flight hours. For an inspection method to be approved by the Manager, Wichita ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

**(h) Replacement**

If any cracking is found during any inspection required by paragraph (g) of this AD: Before further flight, replace the horizontal rib assemblies with new horizontal rib assemblies, in accordance with method to be approved by the Manager, Wichita ACO. For a replacement method to be approved by the Manager, Wichita ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD. This replacement does not terminate the repetitive inspection requirements of paragraph (g) of this AD.

**(i) Special Flight Permit**

Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the airplane can be repaired (if the operator elects to do so), provided the restrictions specified in paragraphs (i)(1) through (i)(4) of this AD are followed.

(1) Do not exceed 10 flight hours of operation.

(2) Only operations under daylight conditions and under visual flight rules are allowed.

(3) Only operations with the minimum flightcrew and with no passengers are allowed.

(4) Do not exceed maneuver speed as specified in the applicable airplane flight manual.

**(j) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Airframe Branch, ACE-118W, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

**(k) Related Information**

For more information about this AD, contact Paul Chapman, Aerospace Engineer, Airframe Branch, ACE-118W, FAA, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946-4152; fax (316) 946-4107.

Issued in Renton, Washington, on March 28, 2014.

**Jeffrey E. Duven,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

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**BILLING CODE 4910-13-P**

**FEDERAL TRADE COMMISSION****16 CFR Part 306****Automotive Fuel Ratings, Certification and Posting**

**AGENCY:** Federal Trade Commission ("FTC" or "Commission").

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission proposes amendments to its Rule for Automotive Fuel Ratings, Certification and Posting ("Fuel Rating Rule" or "Rule") that would adopt and revise rating, certification, and labeling requirements for ethanol-gasoline blends and would allow an alternative octane rating method. The proposed amendments further the Rule's goal of helping purchasers identify the correct fuel for their vehicles.

**DATES:** Comments on the proposed information requests must be received on or before June 2, 2014.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Fuel Rating Rule Review, 16 CFR Part 306, Project No. R811005" on your comment, and file your comment online at <https://ftcpublic.commentworks.com/ftc/autofuelratingscertnprm> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Miriam Lederer, (202) 326-2975, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Federal Trade Commission proposes amending its Fuel Rating Rule, 16 CFR part 306, to provide: (1) Revised rating, certification, and labeling requirements for blends of gasoline and more than 10 percent ethanol ("ethanol blends"); and 2) an additional octane rating method for gasoline. The Commission previously proposed amendments governing ethanol blends in a 2010 Notice of Proposed Rulemaking ("2010 NPRM").<sup>1</sup> After reviewing the comments, the Commission responded in April 2011 by publishing final amendments addressing other issues. Specifically, the Commission approved a new octane rating method and declined to amend the biodiesel and biomass-based diesel provisions.<sup>2</sup> The Commission deferred consideration of ethanol blend labeling to consider an Environmental Protection Agency ("EPA") decision permitting the use of ethanol blends between 10 to 15 percent concentration ("E15") in 2001 and newer conventional vehicles.<sup>3</sup> The Commission now proposes ethanol-labeling amendments in response to comments received on the 2010 NPRM proposals, EPA's action, and changes in an ASTM International specification regarding ethanol.

The amendments proposed today retain the 2010 NPRM's proposal that entities rate and certify all ethanol blends, but alter the proposed ethanol label's disclosures, to provide consumers with more precise concentration and suitability information. The new proposed amendments also exempt EPA-approved E15 from the Commission's labeling requirements.

The Commission also proposes an additional octane rating method that

<sup>1</sup> *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Notice of Proposed Rulemaking ("2010 NPRM")*, 75 FR 12470 (Mar. 16, 2010).

<sup>2</sup> *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule Amendments ("2011 Final Amendments")*, 76 FR 19684 (Apr. 8, 2011).

<sup>3</sup> EPA made this decision through a two-step process. First, the agency approved E15 for 2007 and newer vehicles. *Environmental Protection Agency: Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator ("EPA Waiver Decision I")*, 75 FR 68094 (Nov. 4, 2010). Then, it expanded its approval to 2001 and newer vehicles, based on additional test data. *Environmental Protection Agency: Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator ("EPA Waiver Decision II")*, 76 FR 4662 (Jan. 26, 2011). For ease of discussion, this document refers to them together as the EPA "waiver decision."

uses infrared sensor technology (the “infrared method”) to measure gasoline octane levels. Although the Commission did not propose this rating method in the 2010 NPRM, several commenters, including state regulatory agencies, supported its use.

To accomplish these goals, this document first provides background on the Fuel Rating Rule, ethanol blends, and this rulemaking’s procedural history. Then, it discusses the additions to the record since the 2010 NPRM.<sup>4</sup> Finally, it responds to the new record evidence and describes the new proposed amendments in detail.

## II. Background

### A. The Fuel Rating Rule

The Commission first promulgated the Fuel Rating Rule, 16 CFR Part 306 (then titled the “Octane Certification and Posting Rule”), in 1979, in accordance with the Petroleum Marketing Practices Act (“PMPA”), 15 U.S.C. 2801 *et seq.*<sup>5</sup> The Rule originally applied only to gasoline. In 1993, pursuant to PMPA amendments, the Commission expanded the Rule to cover all alternative liquid fuels.<sup>6</sup> Currently, the Rule identifies a non-exhaustive list of “alternative liquid automotive fuels.” That list does not include ethanol blends below 70 percent concentration.<sup>7</sup>

PMPA authorizes the Commission to require octane ratings, cetane ratings (for diesel fuel), or “another form of rating” that it determines is more appropriate to carry out the Act’s purposes. For alternative fuels, the 1993 amendments require a rating that is “the commonly used name of the fuel with a disclosure of the amount, expressed as a minimum percentage by volume, of the principal component of the fuel.”<sup>8</sup> In promulgating those amendments, the Commission determined that this rating was appropriate because octane ratings might mislead consumers to believe that gasoline and alternative fuels are interchangeable and that alternative fuels’ high octane ratings “signif[y] higher quality and better performance.”<sup>9</sup>

<sup>4</sup> For a discussion of comments regarding other issues, see *2011 Final Amendments*, 76 FR at 19686–87.

<sup>5</sup> *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule*, 44 FR 19160 (Mar. 30, 1979).

<sup>6</sup> *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule (“1993 Final Rule”)*, 58 FR 41356 (Aug. 3, 1993).

<sup>7</sup> 16 CFR 306.0(i)(2).

<sup>8</sup> 16 CFR 306.0(j)(2). For blends with more than 5 percent biodiesel or biomass-based diesel, the rating is a “disclosure of the biomass-based diesel or biodiesel component, expressed as a percentage by volume.” 16 CFR 306.0(j)(3).

<sup>9</sup> 58 FR at 41361.

The Fuel Rating Rule designates methods for rating and certifying fuels, as well as posting the ratings at the point of sale. The Rule also requires refiners, importers, and producers of any liquid automotive fuel to determine a fuel’s “automotive fuel rating” before transferring it to a distributor or retailer. Any covered entity, including a distributor, that transfers a fuel must certify the fuel’s rating to the transferee either by including it in papers accompanying the transfer or by letter.<sup>10</sup> The Rule also requires retailers to post the fuel rating by adhering a label to the retail fuel pump; the Rule provides precise specifications regarding the content, size, color, and font of the labels.<sup>11</sup>

### B. Ethanol

Ethanol is a renewable fuel made from corn or other plant materials.<sup>12</sup> Fuel producers and retailers can blend ethanol with gasoline in various concentrations. Almost all gasoline in the United States contains ethanol in a low-level blend composed of up to 10 percent ethanol and 90 percent gasoline.<sup>13</sup> EPA recently approved the use of E15 in conventional vehicles model year (“MY”) 2001 and newer, subject to certain conditions.<sup>14</sup>

### C. Procedural History

This rulemaking began in 2009 when the Commission solicited general comments on the Fuel Rating Rule.<sup>15</sup> After reviewing those comments, the Commission published the 2010 NPRM proposing, among other things, three changes to the Fuel Rating Rule’s ethanol fuel provisions. First, the proposed amendments required rating ethanol-gasoline blends by the percentage of ethanol, rather than the currently required “principal component,” in order to accurately label ethanol blends below 50 percent concentration. Second, the proposed amendments defined a new class of ethanol blends containing more than 10 but less than 70 percent ethanol as “mid-level ethanol blends.” Third, the proposed amendments added new labeling requirements for ethanol blends. For mid-level ethanol blends, the labels would disclose the ethanol content as a broad range of “10 to 70 percent ethanol,” a narrower range, or a

specific percentage. For all ethanol blends, the proposed labels contained the additional disclosures “may harm some vehicles” and “check owner’s manual.” The Commission explained that the labels’ “additional information should assist consumers in identifying the proper fuel for their vehicles.”<sup>16</sup>

As described in detail below, commenters responding to the 2010 NPRM objected to several aspects of the proposed ethanol labeling requirements and suggested various revisions. Generally, they favored a more precise disclosure of the fuel’s ethanol concentration and a more specific disclosure concerning the fuel’s proper use. They also encouraged the FTC to coordinate its labeling requirements with EPA’s developing labeling requirements for E15. In addition, many commenters urged the Commission to allow the infrared method as an additional octane rating method.<sup>17</sup>

On April 8, 2011, in light of the commenters’ feedback and EPA’s pending E15 rulemaking, the Commission published final amendments addressing the 2010 NPRM’s non-ethanol provisions but announced that it would consider issuing ethanol-labeling amendments and the infrared method at a later date.<sup>18</sup>

## III. The Record

The Commission received 54 comments in response to the 2010 NPRM that addressed ethanol labeling.<sup>19</sup> In addition, EPA issued final rules governing use of E15 in conventional cars, including a pump label for E15 dispensers. Furthermore, ASTM International (“ASTM”) substantially revised its ethanol fuel specification for ethanol percentages in higher concentration ethanol blends. Finally, the Commission received many comments, including from industry, state regulatory agencies, and a consumer advocacy group supporting the use of the infrared method in testing octane.

### A. Comments Received in Response to the 2010 NPRM’s Proposed Ethanol Labeling

Commenters generally objected to the 2010 ethanol-labeling proposal, but

<sup>16</sup> *2010 NPRM*, 75 FR at 12474.

<sup>17</sup> Commenters had not previously mentioned the infrared method, and the Commission did not propose it in the 2010 NPM. Therefore, the Commission declined to issue final amendments including the infrared method without providing notice and opportunity for comment on it. *2011 Final Amendments*, 76 FR at 19689.

<sup>18</sup> *Id.*

<sup>19</sup> These comments are located at: [www.ftc.gov/oc/comments/fuelratingnprm](http://www.ftc.gov/oc/comments/fuelratingnprm).

<sup>10</sup> 16 CFR 306.6.

<sup>11</sup> 16 CFR 306.10; 306.12.

<sup>12</sup> See [www.afdc.energy.gov/fuels/ethanol.html](http://www.afdc.energy.gov/fuels/ethanol.html).

<sup>13</sup> See [www.afdc.energy.gov/fuels/ethanol\\_blends.html](http://www.afdc.energy.gov/fuels/ethanol_blends.html).

<sup>14</sup> *EPA Waiver Decision II*, 76 FR 4662.

<sup>15</sup> *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Request for Public Comments*, 74 FR 9054 (Mar. 2, 2009).

their reasons differed. The Renewable Fuels Association (“RFA”) and Growth Energy, an association of ethanol producers, argued that the FTC lacks legal authority to promulgate the proposed labeling requirements. In addition, these commenters, along with other individuals and businesses, asserted that the proposed labels’ suitability disclosures, “May harm some vehicles” and “Check owner’s manual,” unfairly conveyed a negative message about the fuel.<sup>20</sup> In contrast, other commenters, including consumer groups, petroleum industry members and organizations, engine manufacturer organizations, and state regulators, argued that the risks from ethanol misfueling necessitated stronger suitability language and a more precise disclosure regarding the percentage of ethanol in the fuel.<sup>21</sup>

#### 1. Objections to the Proposed Labeling Requirements as Beyond the FTC’s Authority

RFA and Growth Energy argued that PMPA did not authorize the FTC to require the ethanol labels proposed in the 2010 NPRM. They asserted that PMPA permitted the FTC to require that retailers display only “automotive fuel rating[s].”<sup>22</sup> RFA asserted that, under PMPA, the term “automotive fuel rating” does not include

<sup>20</sup> The following commenters specifically supported Growth Energy’s comment: Bob Haskins Racing; “Eichstadt”; Kurt Felker; Donna Funk; “Gill”; David Gloer; “Kelleher”; Kelley Manning; and Jonathan Overly. In addition to commenters supporting Growth Energy, the following individuals and entities submitted brief comments voicing support for ethanol fuels and/or criticisms of the proposed labels as unfair to those fuels: Dale Calendine; James Foley; Michael Green; Kelly Hansen; “Jarman”; Steve Murphy; William Nankervis; Philbro; POET Biorefining; Patrick Reid; and Dan Sanders. Growth Energy, RFA, ICM, Inc., and the American Coalition for Ethanol (“ACE”), along with the other commenters identified in this footnote are hereinafter referred to collectively as “ethanol-industry commenters.” The Commission recognizes that some of these commenters may not be ethanol industry members or employees, and is using the term only as shorthand for the purposes of this document.

<sup>21</sup> Specifically, these commenters were: The Center for Auto Safety; the American Petroleum Institute; Marathon Petroleum Company, LLC; the Alliance of Automobile Manufacturers; the Association of International Automobile Manufacturers; the Clean Vehicle Education Foundation; the Alliance for a Sane Alternative Fuels Environment; the National Marine Manufacturers Association; the Tennessee, New York, and Missouri Departments of Agriculture; and the New York Department of Environmental Conservation.

<sup>22</sup> PMPA’s definition of “automotive fuel ratings” includes: Octane ratings; cetane ratings; or “another form of rating determined by the Federal Trade Commission, after consultation with [ASTM], to be more appropriate to carry out the purposes of this subchapter with respect to the automotive fuel concerned. 15 U.S.C. 2821(17)(C).

“representations as to the quality of the fuel or potential impacts on vehicle performance.”<sup>23</sup> They therefore argued that the proposed disclosure “May harm some vehicles/Check owner’s manual” did not fall within the definition of “automotive fuel rating.”<sup>24</sup> Moreover, RFA viewed the proposed disclosures as denigrating to the ethanol blends’ performance and quality and, therefore, beyond PMPA’s authority.<sup>25</sup>

Growth Energy likewise focused on the definition of “automotive fuel rating,” arguing that the statute’s intent was only to require octane, cetane, or similar ratings. The Act states: “The term ‘automotive fuel rating’ means (A) the octane rating of an automotive spark-ignition engine fuel; and (B) if provided for by the Federal Trade Commission by rule, the cetane rating of diesel fuel oils; or (C) another form of rating. . . .”<sup>26</sup> Growth Energy argued that the use of “and” and “or” evidences an intent that the FTC require either octane and cetane ratings or another, similar rating in their place.<sup>27</sup>

Growth Energy further asserted that principles of statutory construction require the Commission to read “another form of rating” in light of the other listed ratings. Thus, according to Growth Energy, the statutory language “makes it unambiguous that Congress wanted to require any other rating forms that the FTC might attempt to promulgate to be similar in purpose to octane or cetane ratings.”<sup>28</sup>

In further support of their reading of PMPA, Growth Energy and RFA cited statements in the Congressional Record regarding the 1992 amendments to the statute.<sup>29</sup> In particular, Growth Energy cited statements describing the amendments as extending the statute’s octane rating requirements to other fuels, thereby allowing consumers to compare different fuels’ octane ratings.<sup>30</sup> RFA noted that in its 1993 rulemaking, the Commission relied upon legislative history describing an intent to ensure that consumers “have a right to know what they pay for, and . . . dealers have a right to know that their competitors are not cheating.”<sup>31</sup> Growth Energy and RFA maintained

<sup>23</sup> RFA comment at 3.

<sup>24</sup> *Id.*

<sup>25</sup> RFA comment at 3.

<sup>26</sup> 15 U.S.C. 2821(17) (emphasis added).

<sup>27</sup> Growth Energy comment at 11.

<sup>28</sup> *Id.* at 11–12.

<sup>29</sup> Growth Energy also cited the original PMPA’s legislative history as indicating intent to require retailers to post only octane ratings. Growth Energy comment at 7.

<sup>30</sup> Growth Energy comment at 8.

<sup>31</sup> RFA comment at 2–3 (internal quotation marks omitted).

that these statements foreclosed interpreting “automotive fuel rating” to include the proposed disclosures.<sup>32</sup>

#### 2. Objections to the Proposed Labels

Commenters disagreed about the form and content of the proposed ethanol disclosures. Ethanol-industry commenters viewed the disclosures as excessive and urged what they characterized as more neutral content. In contrast, consumer groups, petroleum industry groups, auto and other engine manufacturing groups, as well as individual commenters, criticized the disclosures as inadequate given the risks of using ethanol blends in conventional vehicles.

##### a. Criticism of Proposed Labels as Unnecessary and Unfair

Ethanol-industry commenters presented several arguments that the proposed ethanol labels were unnecessary and unfair. As discussed below, three of these commenters disputed evidence that ethanol blends harm conventional engines, and all asserted that the proposed labels denigrated ethanol blends. In addition, several argued that the amended Rule would unfairly require the proposed disclosures only for ethanol blends rather than all alternative fuels. To address these issues, almost all of these commenters<sup>33</sup> suggested, among other things, replacing the proposed language with “flex-fuel vehicles only,” or substantially similar language.<sup>34</sup>

As a threshold issue, three commenters disagreed that the evidence established that there is a significant risk to consumers’ vehicles from ethanol fuel use. RFA stated that earlier comments noting potential risks from ethanol “provide no evidence that mid-level ethanol blends or E85 will damage conventional vehicles,” explaining:

There are many ongoing projects researching the effects of E15 and E20 on vehicle engine, catalysts, Powertrain systems, fuel system damper, level sensors, and general material compatibility. This research

<sup>32</sup> *Id.* at 3; Growth Energy Comment at 8. Growth Energy made two additional arguments related to process. First, it argued that the Commission has not fulfilled its obligation under PMPA to consult with ASTM. Growth Energy comment at 13. Second, it argued that the Commission must assess how the proposed disclosures further the “objectives of an octane rating” before requiring an alternative rating. *Id.* at 14.

<sup>33</sup> RFA opposed any narrative disclosure, arguing that “[t]he ethanol content of the fuel is sufficient to inform consumers” of misfueling risk. RFA comment at 8.

<sup>34</sup> See, e.g., ACE comment at 2; ICM, Inc. comment at 2. Growth Energy favored voluntary labeling guidelines that would include “Flex Fuel Vehicles Only” on the labels. Growth Energy comment at 18–19.

is not complete, and it is incorrect to state confirmatively that blends above 10 percent ethanol by volume are not appropriate for certain vehicles . . . . [E]vidence to date . . . indicates that mid-level ethanol blends do not harm motor vehicles.<sup>35</sup>

Growth Energy concurred, asserting “[t]he statement that midlevel blends ‘MAY HARM SOME VEHICLES’ has no apparent basis in the record, other than two comment letters unaccompanied by any technical or market-research analysis.”<sup>36</sup> ACE likewise argued that the need for “may harm some vehicles” is “unsupported by any of the data” in the March 2009 record.<sup>37</sup>

ACE and RFA asserted that the Rule’s current requirements already prevent misfueling, relying on a 2009 comment asserting that ethanol misfueling is virtually nonexistent.<sup>38</sup> Thus, RFA concluded, “using the commonly used name of alternative fuels with a disclosure of the amount . . . of the principal component of the fuel provides sufficient information for consumers.”<sup>39</sup>

Growth Energy, ACE, RFA, and the other ethanol-industry commenters also argued that the proposed labels’ “negative statements” would mislead consumers by suggesting that they should not use ethanol blends in any type of vehicle.<sup>40</sup> In particular, Growth Energy expressed concern that the term “some” would confuse consumers, leaving them “wondering if [their] vehicle fits within the ‘some’ category” and, thereby, deterring flex-fuel vehicle owners from purchasing ethanol blends.<sup>41</sup> ICM, Inc., an agricultural and renewable energy company, concurred, stating that consumers could perceive the labels as a warning, thereby improperly influencing their purchasing

decisions.<sup>42</sup> ACE asserted that “any fuel ‘MAY HARM SOME VEHICLES,’” so the proposed labels would unfairly discourage use of ethanol blends by suggesting to a consumer that “his/her vehicle may be [one] that would be harmed.”<sup>43</sup> According to ACE, the proposed labels would likely “lead a flex fuel vehicle owner to question whether a mid-level blend or E85 is suitable for the very type of vehicle that was designed to use that fuel.”<sup>44</sup> In addition, many other individual and business commenters described the labels as a “gross misrepresentation of the fuel,”<sup>45</sup> and argued that requiring suitability language only for ethanol blends treats like fuels inconsistently.<sup>46</sup>

Finally, Growth Energy, ACE, and all other ethanol-industry commenters that addressed the issue criticized the proposed labels’ orange background. Specifically, they argued that orange was an inappropriate color because the transportation sector traditionally has used that color to signal caution.<sup>47</sup>

To remedy the perceived content and format flaws, Growth Energy, ACE, and other ethanol-industry commenters, as well as some state regulators, suggested a “For Flex-Fuel Vehicles Only” disclosure (or substantially similar language), and an octane disclosure.<sup>48</sup> Commenter ICM, Inc. explained:

This clear warning statement will protect consumers against improper fueling of their vehicles while not discouraging the market access and use of alternative fuels containing ethanol. . . . In addition, we strongly recommend including an octane rating requirement for alternative fuels containing ethanol. The FTC’s proposed label for alternative fuels does not have the critical octane rating which ensures that consumers can choose the appropriate octane level for their engine.<sup>49</sup>

The Tennessee Department of Agriculture supported replacing “May harm some vehicles” with “For flexible

fuel vehicles only,” but favored retaining “Check owner’s manual.”<sup>50</sup> The New York Department of Environmental Conservation supported an octane disclosure on ethanol labels, but only in conjunction with a disclosure of ethanol content and “any appropriate limitation on use of the fuel in order to prevent misfueling.”<sup>51</sup> In addition, Growth Energy and other ethanol-industry commenters proposed changing the required background to blue, asserting that a dark blue background for ethanol blends would “distinguish[] these fuels from the other alternative fuels.”<sup>52</sup>

#### b. Criticism of Proposed Labels as Insufficient To Warn Against Risks

In contrast, some commenters supported revising the proposed labels to include stronger misfueling disclosures. In addition, some of these commenters criticized the proposed labels’ failure to address non-automotive devices, such as lawn equipment. Notably, all of these commenters proposed adding a “For Flex-Fuel Vehicles Only” disclosure, and most supported additional disclosure language.

Many commenters voiced concerns that the proposed labels would not prevent misfueling. For example, Marathon Petroleum Company, LLC (“Marathon”) stated that it “does not believe that [the] FTC’s current proposal to label mid-level ethanol blends . . . is enough of a consumer warning to prevent mis-fueling and advise the consumer of the potential dangers.”<sup>53</sup> The American Petroleum Institute (“API”) agreed, explaining:

[The proposed] language is inadequate because it fails to warn consumers that mid-level ethanol blends may cause damage to, and may not be used in, any equipment other than Flexible-Fuel Vehicles (“FFVs”). . . . [O]nly FFVs are currently permitted by EPA to use blends containing greater than 10 vol% ethanol. Use in non-FFVs is a violation of federal law. . . . Therefore, strong language is necessary to clarify that only specialty vehicles can use these fuels.<sup>54</sup>

Similarly, the Association of International Automobile Manufacturers (“AIAM”) supported stronger language because EPA does not allow distribution of ethanol fuel for use in conventional vehicles.<sup>55</sup>

<sup>35</sup> RFA comment at 6–7.

<sup>36</sup> Growth Energy comment at 15.

<sup>37</sup> ACE comment at 2.

<sup>38</sup> *Id.* at 1; RFA comment at 3. The Alliance of Automobile Manufacturers (“AAM”) submitted the referenced comment, which observed that “pump labeling of E85 dispensers appears to have been successful” because reports of misfueling have been “virtually nonexistent.” See 2010 NPRM, 75 FR at 12471 for further discussion. As discussed below, evidence submitted in response to the NPRM contradicts AAM’s comment.

<sup>39</sup> RFA comment at 3.

<sup>40</sup> See, e.g., *id.* at 5. Other commenters voiced similar concerns. The Petroleum Marketers Association of America (“PMAA”) asserted that the proposed language would “confuse consumers and raise an unwarranted suspicion” that ethanol blends could damage cars regardless of concentration. PMAA comment at 2. In addition, the Tennessee Department of Agriculture, while not characterizing the suitability language as distorting or disparaging, expressed concern that the labels would lead flex-fuel vehicle owners to avoid ethanol fuel. Tennessee Department of Agriculture comment at 2.

<sup>41</sup> Growth Energy comment at 15.

<sup>42</sup> ICM, Inc. comment at 1.

<sup>43</sup> ACE comment at 2.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., David Gloer comment; Kurt Felker comment; Patrick Reid comment.

<sup>46</sup> RFA comment at 6. AAM also acknowledged the inconsistency of requiring suitability language for some but not all fuels, but proposed addressing it by requiring the same advisory language for blends of gasoline and methanol, an alcohol-based fuel, as well as for biodiesel fuels. AAM comment at 2.

<sup>47</sup> See, e.g., ACE comment at 2; Growth Energy comment at 18; ICM, Inc. comment at 2.

<sup>48</sup> See, e.g., Growth Energy comment at 18–19; ACE comment at 2 (“The simple addition of the phrase ‘For Flex-Fuel Vehicles Only’ would be a change that we would support.”); ICM, Inc. comment at 2; Patrick Reid comment; David Gloer comment. Growth Energy, consistent with its interpretation of PMPA, supported this type of disclosure only on a voluntary basis.

<sup>49</sup> ICM, Inc. comment at 2.

<sup>50</sup> Tennessee Department of Agriculture comment at 2.

<sup>51</sup> New York Department of Environmental Conservation comment at 2.

<sup>52</sup> Growth Energy comment at 18; see also, e.g., Patrick Reid comment; David Gloer comment.

<sup>53</sup> Marathon comment at 1.

<sup>54</sup> API comment at 3.

<sup>55</sup> AIAM comment at 2.

In addition, several commenters noted that misfueling can cause significant engine damage. For example, the Center for Auto Safety (“CAS”), a nonprofit consumer group, noted EPA’s prohibition and explained:

Depending upon the percentage of ethanol in the fuel blend and the number of misfueling events, misfueling a non-FFV with mid-level or higher ethanol and gasoline blends can cause: An increase in HC and NO<sub>x</sub> emissions, malfunction of the engine, degradation of the catalyst or engine, and invalidation of the manufacturer warranty on the vehicle emissions control systems[.]<sup>56</sup>

The Clean Vehicle Education Foundation (“CVEF”) similarly noted that misfueling potentially causes “failure of the fuel system on the vehicle due to degradation of the elastomers and galvanic corrosion.”<sup>57</sup> PMAA likewise argued that the proposed labels are “not sufficient” because ethanol misfueling “could void automobile warranties, damage catalytic converters, increase tailpipe emissions and expose petroleum retailers to increased risk of liability.”<sup>58</sup>

Moreover, Petroleum Marketers and Convenience Stores of Iowa (“PMCI”), an Iowa fuel retailer group, reported that ethanol misfueling occurs in the absence of labeling.<sup>59</sup> Notably, this contradicts AAM’s comment in the March 2009 record that ethanol misfueling is virtually nonexistent.

In addition, commenters AllSAFE, the National Marine Manufacturers Association (“NMMA”), and several individual commenters<sup>60</sup> criticized the proposed labels for inadequately warning non-automotive engine owners of ethanol misfueling risks.<sup>61</sup> AllSAFE explained that use of ethanol blends in non-automotive engines can cause “emissions control device failures, operability issues, and equipment failures,” which can present safety risks for those devices’ users.<sup>62</sup> NMMA noted

that ethanol blends can adversely impact boat engines.<sup>63</sup>

Despite disagreeing with ethanol-industry commenters about the need to alert consumers of misfueling risks, commenters favoring stronger labels recommended a “For Flex-Fuel Vehicles Only” disclosure, albeit generally as part of a longer advisory. For example, commenters AllSAFE, NMMA, and API supported adding a “Flex-Fuel Vehicles Only” disclosure. AllSAFE and NMMA supported this additional disclosure in conjunction with an advisement that the law prohibits use of ethanol blends in an exhaustive list of non-automotive engines and equipment.<sup>64</sup> API supported the disclosure along with legal prohibition language, an advisement that the fuel “may damage” non flex-fuel vehicles, and the word “WARNING.”<sup>65</sup> Commenters CVEF, Marathon, AIAM, and PMCI also favored “For Flex-Fuel Vehicles Only” (or something very similar).<sup>66</sup> Similarly, CAS supported a “Flexible-Fuel Vehicles Only” labeling scheme, along with requiring “conspicuous signs indicating that [ethanol] fuels are for FFVs only” and pump nozzle labels stating “For FFV use only.”<sup>67</sup>

### 3. Objections to Proposed Ethanol Concentration Disclosures

In the 2010 NPRM, the Commission proposed continuing to allow labels for ethanol blends above 70 percent concentration to disclose the minimum amount in the blend, while requiring “mid-level ethanol blend” labels to disclose a range of 10 to 70 percent, a narrower range, or the exact percentage of ethanol in the blend. Of the fourteen commenters that addressed this issue, all but one favored a more specific fuel-concentration disclosure. Several argued that consumers needed more specificity because fuel economy decreases as ethanol concentration increases, affecting consumers’ overall fuel costs. CVEF explained:

Ethanol has a lower volumetric energy density than gasoline. A blend of ethanol in gasoline will have a lower energy density than the base gasoline by an amount proportional to the volume -% ethanol in the blended fuel. Ethanol . . . has an energy density of approximately 76,000 BTU/gallon. . . . Gasoline . . . [has] an energy density generally measured in the range of 109,000 to 119,000 BTU/gallon. . . . [Thus,] for every 1% addition of ethanol in gasoline, the energy density of the fuel blend will drop by about 0.33%. . . . As the volumetric energy density of the fuel goes down, so does the vehicle’s fuel economy.<sup>68</sup>

Individual commenter James Hyde submitted a similar analysis, and observed that the disparity in energy densities between gasoline and ethanol can affect consumers’ overall fuel costs:

[S]ince ethanol contains considerably less energy [than] does petroleum-derived gasoline, the consumer must purchase more gallons of mixtures to drive the same distance[.] . . . and so reducing the value to a consumer while also reducing the supplier’s cost. . . . The consumer who is unaware of these differences may be [led] to believe that a fuel with a lower cost per gallon and a higher posted octane is a better value.<sup>69</sup>

In addition, AAM noted that vehicle ethanol tolerances will likely vary in the future, and consumers will need a more specific disclosure “to protect their vehicles and related warranties when selecting fuel.”<sup>70</sup>

Thus, CVEF and AAM, as well as the Tennessee, New York, and Missouri Departments of Agriculture, and the New York Department of Environmental Conservation, supported more precise concentration disclosures.<sup>71</sup> MDA supported a disclosure of the exact ethanol percentage.<sup>72</sup> Others suggested allowing some flexibility. For example,

<sup>68</sup> CVEF comment at 2 (citations omitted). CVEF’s comment cited two studies of ethanol fuel economy supporting its observations. No commenter presented data contradicting those studies.

<sup>69</sup> James Hyde comment at 1.

<sup>70</sup> AAM comment at 1. AAM also suggested changing the disclosure thresholds from 10 and 70 percent to 11 and 69 to further mitigate the risk of consumer confusion about selecting the proper fuel. *Id.* at 2.

<sup>71</sup> CVEF comment at 1; AAM comment at 1; Tennessee Department of Agriculture comment at 2; New York Department of Agriculture and Markets comment at 1; MDA comment at 1; New York Department of Environmental Conservation comment at 2; AllSAFE comment at 8–9. As an alternative means of addressing the problem, Hyde suggested adopting unit pricing based on gasoline-gallon equivalents rather than an ethanol content disclosure. James Hyde comment at 2. AllSAFE similarly requested that the Commission use its authority under the FTC Act to require fuel labeling according to energy content (*e.g.*, a label disclosing the BTU per gallon of fuel sold). AllSAFE comment at 10–11.

<sup>72</sup> MDA comment at 1. MDA favored an exact disclosure for only blends below 70 percent concentration. *Id.*

<sup>56</sup> CAS comment at 2 (citations omitted).

<sup>57</sup> CVEF comment at 1.

<sup>58</sup> PMAA comment at 1–2. *See also* The Alliance for a Safe Alternative Fuels Environment (“AllSAFE”) comment at 4 (“[Conventional vehicles] may experience emissions control device failures, operability issues, and equipment failures when operated on fuels greater than E-10.”).

<sup>59</sup> Specifically, PMCI related that “[i]n Iowa where Mid-Level Ethanol blends and E85 are widely available and heavily promoted by interested groups, instances of misfueling occur frequently enough to be a cause for concern among retailers.” PMCI comment at 1. *See also* PMAA comment at 1 (stating that “misfueling would increase” in the absence of labeling).

<sup>60</sup> *See, e.g.*, Louis Ehlers comment (supporting an ethanol disclosure so consumers can select proper fuel for use in airplanes).

<sup>61</sup> Several petroleum companies and associations agreed that ethanol fuels pose risks to non-road engines. *See, e.g.*, Marathon comment at 1.

<sup>62</sup> AllSAFE comment at 4.

<sup>63</sup> NMMA comment at 4. *See also* EPA Waiver Decision I, 75 FR at 68129–37 (discussing non-suitability of E15 for non-road engines, vehicles, and equipment).

<sup>64</sup> AllSAFE comment at 12; NMMA comment at 5. In addition, AllSAFE proposed going beyond labeling and requiring a “visible gap” between gasoline and ethanol fuel pumps. AllSAFE comment at 5.

<sup>65</sup> API comment at 4.

<sup>66</sup> CVEF comment at 1; Marathon comment at 2; AIAM comment at 2; PMCI comment at 2. In addition, the Missouri Department of Agriculture (“MDA”) noted that the National Conference on Weights and Measures (“NCWM”) has adopted model regulations requiring ethanol fuel labels reading: “For Use in Flexible Fuels Vehicles (FFV) Only.” MDA comment at 2.

<sup>67</sup> CAS comment at 2.

the Tennessee Department of Agriculture supported rounding to the nearest interval of 10 (e.g., disclose 62 percent ethanol as 60 percent) because such rounding would “provide[] reasonable flexibility, and also provide[] sufficient information for the consumer to make an informed choice.”<sup>73</sup>

Significantly, ethanol-industry commenters also recommended a more precise content disclosure. Growth Energy, for example, favored an exact percentage disclosure because “ethanol concentration has an impact on the economics of the purchase, and the consumer needs to know more precisely the concentration of the ethanol in the fuel to make an informed decision regarding the purchase.”<sup>74</sup> Comments submitted by individual ethanol supporters suggested a disclosure grouped in intervals of 10, allowing the actual fuel concentration to vary from as much as 10 percent more than the disclosed amount to 10 percent less than that amount (e.g., a blend disclosed as 20 percent could vary between 18 and 22 percent, while a blend disclosed as 30 percent could vary between 27 and 33 percent).<sup>75</sup>

One commenter, PMCI, did not support a more precise disclosure. Instead, it praised the Commission’s proposal as giving “retailers the flexibility to account for relative changes in the prices of gasoline and ethanol.”<sup>76</sup>

### B. EPA E15 Waiver

When the Commission issued the 2010 NPRM, EPA was considering an application to allow E15 in conventional vehicles, pursuant to its authority under the Clean Air Act, Section 211(f)(4), to grant “waivers” to non-gasoline fuels for use in conventional cars.<sup>77</sup> Several

<sup>73</sup> Tennessee Department of Agriculture comment at 2.

<sup>74</sup> Growth Energy comment at 17–18.

<sup>75</sup> See, e.g., ICM, Inc. comment at 2; David Gloer comment.

<sup>76</sup> PMCI comment at 1. In addition to comments regarding precise disclosure, API urged that the Commission ensure consistency with EPA regulations by defining mid-level ethanol blends and E85 according to their percentages of pure, rather than denatured, ethanol. API comment at 1–2. As part of the ethanol production process, manufacturers add a small amount of denaturant, usually gasoline, to the ethanol before distributing it. The proposed amendments define ethanol fuels according to their ethanol volume, exclusive of denaturant, to remain consistent with EPA regulations.

<sup>77</sup> See *EPA Waiver Decision I*, 75 FR at 68099. Section 211(f) of the Clean Air Act bans alternative fuels, including ethanol blends, from being introduced into commerce unless EPA affirmatively permits them for certain vehicles. See 42 U.S.C. 7545(f).

commenters urged the FTC to coordinate with EPA to avoid conflicts in the labeling requirements.<sup>78</sup>

After the 2010 NPRM comment period closed, EPA granted a waiver that permitted light-duty<sup>79</sup> conventional vehicles, MY2001 and later, to use EPA-approved E15 blends. The waiver requires that this fuel meet certain fuel quality standards.<sup>80</sup> Moreover, EPA soon thereafter promulgated complementary regulations to help prevent misfueling.<sup>81</sup> The regulations include: (1) A prohibition on misfueling by “gasoline and ethanol producers, distributors, retailers, and consumers” and (2) “labeling requirements for fuel pumps that dispense E15 to alert consumers to the appropriate and lawful use of the fuel.”<sup>82</sup>

### 1. EPA’s Prohibition Against Misfueling

Relying on its technical and engineering expertise, EPA prohibited the use of E15 and higher blends in certain vehicles and engines because it found that ethanol has properties that can damage older conventional cars, heavy-duty gasoline engines and vehicles, motorcycles, and nonroad products.<sup>83</sup> Specifically, ethanol

<sup>78</sup> For example, Growth Energy argued that if EPA approved the waiver request, the FTC’s proposed Fuel Rating Rule amendments would require a label for E15 advising consumers of potential vehicle harm, even though EPA had approved the fuel for all vehicles. Growth Energy comment at 17. API and other commenters urged the Commission to “communicate and coordinate with [EPA] to develop a common dispenser labeling scheme.” API comment at 1. See also AAM comment at 2; AIAM comment at 2; ALLSAFE comment at 6–7; NMMA comment at 2; National Petrochemical & Refiners Association (“NPR”) comment at 2; New York Department of Environmental Conservation comment at 1; New York State Department of Agriculture and Markets comment at 2–3. Marathon, PMAA, and Valero recommended delaying any rulemaking until EPA issued a decision on the waiver petition. Marathon comment at 1–2; PMAA comment at 2; Valero comment at 1.

<sup>79</sup> “Light-duty” vehicles include passenger cars, light-duty trucks, and medium-duty passenger vehicles. See *EPA Waiver Decision I*, 75 FR at 68095.

<sup>80</sup> *EPA Waiver Decision I*, 75 FR at 68149–50.

<sup>81</sup> *Regulation to Mitigate the Misfueling of Vehicles and Engines With Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs; Final Rule* (“*Final Rule to Mitigate Misfueling*”), 40 CFR Part 80, 76 FR 44406, 44407 (July 25, 2011).

<sup>82</sup> *Id.* EPA promulgated these anti-misfueling measures under Section 211(c) of the Clean Air Act, which authorizes that agency to “control or prohibit the manufacture, introduction into commerce, offering for sale, or sale” of a fuel if it determines that use of the fuel will impair emission control systems or have other environmental impacts. 42 U.S.C. 7545(c).

<sup>83</sup> EPA prohibited the use of E15 in MY2000 and older vehicles, heavy-duty gasoline engines and vehicles, motorcycles, and all nonroad products (which includes marine applications), “based on potential effects of E15 in four areas: (1) Exhaust

increases the air-fuel ratio, causing the fuel to burn hotter.<sup>84</sup> Hotter burning fuel can damage catalytic converters over time and lead to other component failure.<sup>85</sup> In motorcycles and nonroad products, EPA raised engine-failure concerns from overheating. Therefore, EPA declined to approve ethanol blends above 10 percent for use in older conventional vehicles, heavy-duty gasoline engines and vehicles, motorcycles, or nonroad products, unless it had reliable<sup>86</sup> test data showing a lack of harm.<sup>87</sup>

As part of EPA’s waiver, the agency promulgated complementary regulations that, among other things, prohibit misfueling in older conventional cars, heavy-duty gasoline engines, motorcycles, and non-road engines.<sup>88</sup> This prohibition “establishes a legal barrier against production, distribution, sale or use of gasoline containing more than 10 vol% ethanol in vehicles, engines and equipment not covered by the partial waiver decisions . . . . The prohibition is broadly applicable, including to consumers.”<sup>89</sup> In response to a question regarding to whom the prohibition applied, EPA responded:

[T]he proposed regulations would prohibit consumer misfueling, whether intentional or not, and we are retaining that provision in today’s final rule. Thus, today’s final rule prohibits *any* person from introducing or causing the introduction of gasoline containing greater than 10 vol% ethanol into vehicles, engines, and products not covered by the E15 partial waivers, and prohibits causing or allowing the introduction of gasoline containing greater than 10 vol%

emissions—immediate and long-term (known as durability); (2) evaporative emissions—immediate and long-term; (3) the impact of materials compatibility on emissions; and (4) the impact of driveability and operability on emissions.” *EPA Waiver Decision II*, 76 FR at 4663. Later, in EPA’s *Final Rule to Mitigate Misfueling*, EPA explained that its “engineering assessment for these vehicles, engines, and products identifies a number of emission-related concerns with the use of E15.” 76 FR at 44439.

<sup>84</sup> *EPA Waiver Decision I*, 75 FR at 68103.

<sup>85</sup> *Id.*

<sup>86</sup> EPA found that tests cited by Growth Energy in its waiver application were not sufficient to show a lack of potential harm to older vehicles. *Id.* at 68104.

<sup>87</sup> *Id.* at 68095. Currently, it is illegal to distribute ethanol blends above 15 percent concentration for use in conventional vehicles. 42 U.S.C. 7545(f).

<sup>88</sup> EPA did not address the emissions impacts of blends above E15 for newer, light-duty conventional vehicles. See *Final Rule to Mitigate Misfueling*, 76 FR at 44417. However, it is currently illegal to distribute those blends for use in conventional vehicles because EPA has not granted a waiver allowing ethanol blends in those vehicles. See 42 U.S.C. 7545(f).

<sup>89</sup> *Final Rule to Mitigate Misfueling*, 76 FR at 44411; see also 40 CFR 80.1504(a) (amendment as codified).

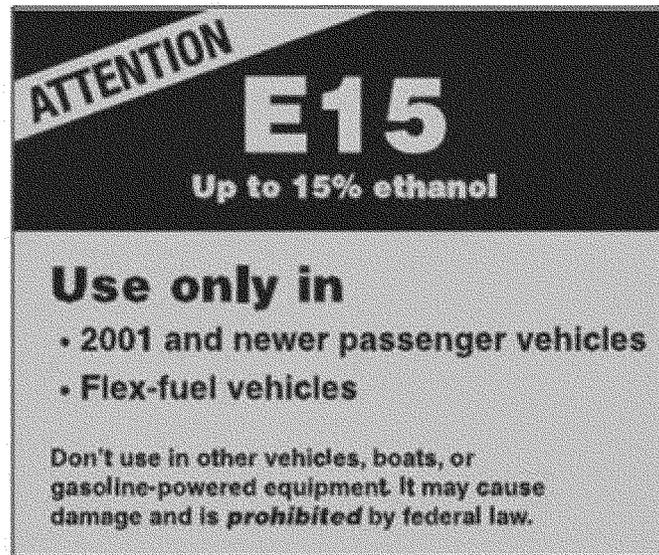
ethanol into such vehicles, engines, and products.<sup>90</sup>

Section 80.1506 of the final rule provides that any person who misfuels “is subject to an administrative or civil penalty, as specified in sections 205 and 211(d) of the Clean Air Act, for every day of each violation and the amount of economic benefit or savings resulting from the violation.”<sup>91</sup>

## 2. EPA’s Labeling Requirements

EPA also promulgated labeling requirements to prevent misfueling of E15 in non-approved engines. In formulating its E15 label, EPA “consulted with FTC consumer labeling experts and other staff about effective label design and potential coordination with FTC labels.”<sup>92</sup> As a result, EPA’s

final E15 label, shown below, “adopts FTC’s color scheme for alternative fuel labels and other aspects of the design of FTC’s proposed gasoline-ethanol blend labels, such as size, shape, and font . . . .”<sup>93</sup> In addition, EPA’s label included the warning: “Don’t use in other vehicles, boats, or gasoline-powered equipment. It may cause damage and is prohibited by federal law.”<sup>94</sup>



EPA explained that this “damage statement” was “necessary and appropriate for the E15 label . . . because (1) [a]vailable data is insufficient to show that E15 would not cause or contribute to a failure by these products to meet emission standards, and (2) [EPA’s] engineering judgment is that E15 may adversely affect the emissions control performance of these products, particularly over time.”<sup>95</sup> EPA continued:

A statement that E15 use in those products ‘may cause damage’ is consistent with and supported by EPA’s technical analysis for its decision to deny the waiver request for introduction of E15 into commerce for use in these products. Including the damage statement is also critical to the effectiveness of the E15 label, since consumers are more likely to comply with the label’s direction if they understand that harm might otherwise occur.<sup>96</sup>

### C. ASTM Ethanol Specification

In proposing labeling requirements, the 2010 NPRM relied in part on ASTM’s specification for high concentration ethanol blends, ASTM D5798. At that time, ASTM D5798 characterized ethanol blends of at least 70 percent concentration as “E85.” Therefore, the Commission proposed amendments differentiating E85 and lower concentration ethanol blends.

Two commenters objected. Growth Energy and API both noted that, subsequent to publication of the NPRM, ASTM had lowered the E85 blend threshold, making the “85” number less useful to consumers.<sup>97</sup> API noted that ASTM was considering lowering the blend threshold even further, and urged the Commission to “draft the rule to allow for such changes.”<sup>98</sup> In addition, Growth Energy noted that “E85 is problematic” because it “does not represent[] the true ethanol

concentration of all fuels” labeled as such and, therefore, recommended a “new name” for the fuel.<sup>99</sup>

After the comment period closed, ASTM further lowered D5798’s concentration threshold and ceased using the term “E85.” The standard now applies to fuels of at least 51 percent concentration and replaces the term “E85” with “Ethanol Flex-Fuel.”

### D. Comments Supporting the Infrared Method

Several commenters supported amending the Fuel Rating Rule to allow use of the Infrared Method as an additional octane rating method. Tesoro, a manufacturer and marketer of petroleum products, explained that the Infrared Method provides more precise and accurate results, an ability to sample gasoline more efficiently, and reduced costs to industry.<sup>100</sup> Specifically, Tesoro reported:

Level Ethanol blends” as “alternative fuels,” pointing to a definition of that term in the Energy Policy Act of 1992 authorizing DOE to determine which fuels qualify as alternative fuels. RFA comment at 4.

<sup>99</sup> Growth Energy comment 4, 5.

<sup>100</sup> Tesoro comment at 1–2. Tesoro also submitted additional material to Commission staff during the

<sup>90</sup> Final Rule to Mitigate Misfueling, 76 FR at 44437 (emphasis in original). This misfueling prohibition does not extend to ethanol-blend use in newer conventional vehicles.

<sup>91</sup> 40 CFR 80.1506 (amendment as codified); see also 76 FR at 44449.

<sup>92</sup> Final Rule to Mitigate Misfueling, 76 FR at 44408.

<sup>93</sup> Id.

<sup>94</sup> Id. at 44418.

<sup>95</sup> Id. at 44414.

<sup>96</sup> Id. at 44415.

<sup>97</sup> Growth Energy comment at 4–5; API comment at 2.

<sup>98</sup> API comment at 2. RFA argued that the FTC lacked authority to define new fuels such as “Mid-

A recent interlaboratory study was conducted to demonstrate the accuracy and precision of infrared analyzers for octane. Based on the results of that study involving six laboratories, near infrared analyzers showed significantly better precision over ASTM D2699 and D2700 octane [methods].<sup>101</sup>

Tesoro further reported that, due in part to greater reliability, “[o]ver 25 states use infrared analyzers for screening fuel samples [to test octane levels] in the field as well as in the laboratory.”<sup>102</sup>

Tesoro further suggested that the Commission could ensure the accuracy of infrared method ratings by providing that, in the case of a discrepancy between infrared results and results derived through the traditional ASTM D2699 and D2700 methods, the D2699/2700 methods would be the “referee test.”<sup>103</sup>

Tesoro recommended amending the Rule to allow the method only insofar as the method conforms to ASTM D6122, “Standard Practice for Validation of the Performance of Multivariate Infrared Spectrophotometers,” and as set out in that protocol to correlate with the ASTM D2699 and D2700 methods.<sup>104</sup> In addition, Tesoro submitted specific language to effect its proposed change.<sup>105</sup>

Several state regulators also supported approving the infrared method. For example, the Washington State Department of Agriculture reported that it “has used portable infrared octane analyzers successfully in the field to test octane levels on gasoline motor fuels for over 10 years” and that it has “found portable infrared analyzers to be an accurate and low cost tool in determining octane level compliance.”<sup>106</sup> Additionally, the National Conference on Weights and Measures (“NCWM”) provided a survey showing that 17 of 24 regulatory agencies surveyed use the Infrared

comment period, which is included in the record and available on the same Web page as the comments.

<sup>101</sup> *Id.* at 2.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.* at 6.

<sup>104</sup> *Id.* at 7.

<sup>105</sup> *Id.* at 8. Petroleum industry members and representatives ConocoPhillips, Flint Hills Resources LP, Marathon, Suncor Energy USA, NPRA, and Valero Energy Corporation (“Valero”) also supported the Infrared Method. ConocoPhillips comment at 2; Flint Hills Resources comment; Marathon comment at 2; Suncor Energy USA comment; NPRA comment at 3; Valero comment at 1.

<sup>106</sup> Washington State Department of Agriculture comment; *see also* Massachusetts Division of Standards comment (supporting the Infrared Method); Nevada Department of Agriculture comment (same); North Carolina Department of Agriculture and Consumer Services comment (same).

Method to determine if fuel dispensed at a pump has the same octane rating as posted on the label.<sup>107</sup>

Significantly, the CAS supported the method. CAS explained that allowing the method would ease enforcement and, therefore, benefit consumers:

Many states now use infrared analyzers to determine octane because they are cheaper, more accurate and permit greater number[s] of dispensing pump inspections per day than using octane engines. . . . Approving infrared analyzers calibrated to measure octane would allow greater levels of enforcement and increased quality control by refiners at lower cost.<sup>108</sup>

#### IV. Proposed Rule Amendments

In light of the comments, EPA’s waiver decision, and the revision to ASTM D5798, the Commission now proposes: (1) New requirements for rating, certification, and labeling of ethanol blends; and (2) amendments allowing use of the Infrared Method.

##### A. Ethanol Fuel Amendments

The following proposed amendments require labels for ethanol blends, excluding EPA-approved E15, to state “USE ONLY IN FLEX-FUEL VEHICLES/MAY HARM OTHER ENGINES” and to disclose the percentage ethanol content rounded to the nearest interval of 10. These amendments differ from those proposed in the 2010 NPRM in four ways. First, the new amendments do not distinguish between “mid-level ethanol blends” and “E85.” As noted by API and Growth Energy, the term “E85” no longer accurately describes higher concentration ethanol blends and, therefore, could confuse consumers about such fuel’s ethanol concentration. Second, the new proposed amendments revise the disclosures in light of views from both ethanol-industry commenters and those arguing for a stronger label using “flex-fuel vehicle only” and a more precise concentration disclosure. Third, the amendments address the request for additional language to prevent misfueling harm to non flex-fuel vehicles and engines. Finally, the amendments exempt fuel that meets EPA’s E15 waiver.

The discussion below first describes the amendments and then explains the Commission’s legal authority to promulgate them.

##### 1. Definitions

In order to establish requirements for rating, certifying, and labeling ethanol blends, the 2010 NPRM proposed using the term “mid-level ethanol blend” to describe blends of over 10, but not more

than 70, percent ethanol and adding that term to the Rule’s list of alternative fuels. Although the 2010 NPRM did not propose defining ethanol blends at greater concentrations, it did propose a separate label for such fuels that would describe the fuel as “E85.”

Based on ASTM amendments, providing different labels for “mid-level” blends and “E85” is no longer appropriate. The revised D5798 does not use the term “E85,” and there is no other basis in the record to distinguish between blends above and below that concentration. Moreover, as Growth Energy noted, allowing labels to use “E85” to describe fuels meeting the revised D5798’s concentration level of 51 percent could mislead consumers.

Thus, the Commission now proposes adding to the Fuel Rating Rule’s non-exhaustive alternative fuel list a single, new defined term, “ethanol blend,” that covers all concentrations of ethanol blends above 10 percent.<sup>109</sup> This will facilitate uniform labeling requirements for ethanol blends, which should assist consumers in quickly identifying ethanol blends at pumps.<sup>110</sup>

##### 2. Rating and Certification

The Commission reaffirms its 1993 determination that “another form of rating” is more appropriate for ethanol blends than an octane rating.<sup>111</sup> Requiring octane ratings for ethanol blends might incorrectly suggest that those blends are interchangeable with gasoline. As discussed in the 1993 rulemaking, not only would an octane rating not provide useful information to consumers, it might deceive them about the suitability of the fuel for their vehicles. Ethanol blends have naturally occurring high octane levels. Conventional vehicle owners might misinterpret those blends’ higher octane content as signifying that they are better for conventional gasoline engines.<sup>112</sup>

Consistent with this finding, the 2010 NPRM proposed new rating and certification provisions to clarify that

<sup>109</sup> As explained below, the new proposed amendments would exempt EPA-approved E15 from the Rule’s labeling requirements, provided that retailers use EPA’s required label.

<sup>110</sup> The new term would be codified at § 306.0(i)(2)(iii). RFA argued that this section should not include ethanol blends as alternative fuels because the Energy Policy Act of 1992 specifies DOE as the agency that determines whether fuels are “alternative” for certain purposes. RFA’s argument is inapposite because the Commission’s rulemaking is under PMPA, which authorizes the FTC to provide labeling for all liquid automotive fuels, regardless of whether they are also designated as alternative by DOE. *See* 15 U.S.C. 2821(6).

<sup>111</sup> *See* 15 U.S.C. 2821(17); 1993 *Final Rule*, 58 FR 41361.

<sup>112</sup> 1993 *Final Rule*, 58 FR at 41361.

<sup>107</sup> NCWM comment at 3–4.

<sup>108</sup> CAS comment at 2.

covered entities must rate ethanol blends by “the percentage of ethanol contained in the fuel,” and not by the percentage of the principal component of the fuel. This change is necessary to require ethanol-content labeling for blends below 50 percent concentration. Two commenters supported this change,<sup>113</sup> and no commenters took issue with the proposal. Accordingly, the amendments proposed today require rating ethanol blends by ethanol content.

The 2010 NPRM also proposed an amendment providing that a certification of ethanol content letter remains valid only as long as the fuel transferred contains the same percentage of ethanol as previous fuel transfers covered by the letter.<sup>114</sup> For most alternative fuels, a certification letter remains valid if a transferred fuel has the same or a higher concentration than certified because an increase in concentration will not trigger different labeling requirements. An increase or decrease in concentration for ethanol blends, however, may trigger different concentration disclosures. For example, if a fuel’s ethanol concentration increases from 26 percent to 38 percent, the label, as discussed below, must disclose a higher concentration level. No commenter objected to the 2010 proposal; therefore, the Commission proposes it again here.

### 3. Labeling

The 2010 NPRM proposed adding new labeling requirements for ethanol blends. The proposed amendments required labels disclosing the fuel’s suitability for different vehicles by stating:

MAY HARM SOME VEHICLES  
CHECK OWNER’S MANUAL

The proposed amendments also would have required ethanol blends below 70 percent concentration to disclose that the fuels contained between 10 to 70 percent ethanol, a narrower range, or the precise amount of ethanol in the blend.

Commenters generally objected to both the disclosures and the 10–70 content range. They also urged the Commission to coordinate with EPA to prevent duplicative or inconsistent labeling requirements. The new proposed amendments address both issues.

<sup>113</sup> PMAA comment at 1; Tennessee Department of Agriculture comment at 1.

<sup>114</sup> Section 306.6(b) allows fuel transferors to provide certifications through a letter to the transferee rather than through a document accompanying each fuel shipment.

#### a. Text

Some commenters objected that the 2010 NPRM advisory disclosure was excessive, and others objected that it was insufficient. Ethanol-industry commenters asserted that: (1) The record did not establish that ethanol blends would harm conventional vehicles; (2) the disclosure was unnecessary; (3) the disclosure would discourage proper use of ethanol blends; and (4) requiring the additional disclosure would be unfair. Conversely, some commenters argued for stronger and more precise language, noting the EPA prohibition on use in conventional vehicles, risk of engine damage, damage to the vehicle’s emissions system, and other problems.

Nevertheless, all but one of the comments<sup>115</sup> supported a “use only in flex-fuel vehicles” disclosure. In addition, NCWM has adopted model state regulations requiring ethanol fuel labels that state “For Use in Flexible Fuel Vehicles (FFV) Only.”<sup>116</sup> Many commenters also stressed the need for additional disclosures to prevent misfueling.

In light of these comments, the new proposed amendments replace the 2010 NPRM’s proposed disclosure with “USE ONLY IN FLEX-FUEL VEHICLES/MAY HARM OTHER ENGINES.” These two disclosures should explain the significance of the ethanol-concentration rating without misleading flex-fuel vehicle owners about the fuel’s suitability for their cars. Specifically, “USE ONLY IN FLEX-FUEL VEHICLES” provides a simple, unambiguous direction to consumers that they can use ethanol blends in their flex-fuel vehicles. This direction eliminates the need for consumers to consult their owner’s manuals. And, “MAY HARM OTHER ENGINES” alerts consumers that use in other engines may have serious consequences.

Given consumers’ unfamiliarity with ethanol blends, a bare ethanol-concentration disclosure will not provide sufficient information for many consumers to understand whether the fuel is appropriate for their engines. Accordingly, the proposed text conveys the significance of the ethanol concentration and the potential risk of damage to consumers’ cars, which are often among their most expensive purchases. Additionally, this disclosure should alert consumers not to use the

<sup>115</sup> RFA comment at 8 (arguing that ethanol-content disclosure is sufficient).

<sup>116</sup> MDA comment at 2. NCWM’s comment did not address this issue.

fuel in their non-vehicular engines (e.g., lawn mowers, motor boats).<sup>117</sup>

Ethanol-industry commenters’ criticism of the 2010 NPRM’s labels is either inapplicable to the revised disclosures or unpersuasive. The Energy Independence and Security Act’s renewable fuel mandate will likely ensure that ethanol blends are an increasing part of the fuel market, thereby exposing many more consumers to pumps dispensing those blends.<sup>118</sup> The record, however, shows a risk that misfueling may harm conventional vehicles and non-road engines.<sup>119</sup> As EPA explained, “[e]thanol impacts motor vehicles in two primary ways. First, . . . ethanol enleans the [air/fuel] ratio (increases the proportion of oxygen relative to hydrocarbons) which can lead to increased exhaust gas temperatures and potentially increase incremental deterioration of emission control hardware and performance over time, possibly causing catalyst failure. Second, ethanol can cause materials compatibility issues, which may lead to other component failures.”<sup>120</sup>

EPA ultimately held that these general concerns were allayed only with regard to the use of E15 in light-duty conventional vehicles MY2001 and newer. However, that agency also found, based on its technical and engineering experience, that ethanol potentially damages older conventional cars, heavy-duty engines, motorcycles, and non-road engines, explaining:

Older motor vehicles, heavy-duty gasoline engines and vehicles, motorcycles, and especially nonroad products cannot fully compensate for the change in the stoichiometric air-to-fuel ratio as ethanol concentration increases. Over time, this enleanment caused by ethanol may lead to thermal degradation of the emissions control hardware and ultimately catalyst failure. Higher ethanol concentration will exacerbate the enleanment effect in these vehicles, engines, and equipment and therefore

<sup>117</sup> The Commission declines to require additional language suggested by commenters. The specificity of the proposed disclosure should sufficiently apprise owners of conventional vehicles and non-automotive devices that ethanol fuels are not appropriate for their engines. Furthermore, additional language may dilute the disclosures’ message and lessen their effectiveness.

<sup>118</sup> See 2010 NPRM, 75 FR at 12471. On November 15th, EPA proposed reducing the 2014 renewable mandate due to a limited market and production capacity for renewables. See *Proposed 2014 Standards for the Renewable Fuel Standard Program*, 40 CFR Part 80, 78 FR 71732 (Nov. 29, 2013). However, EPA indicated that it remained committed to increasing the amount of renewable fuel in the market. See *id.* at 71738 (“[O]ur intent is to develop an approach that puts the [Renewable Fuel Standard] program on a manageable trajectory while supporting continued growth in renewable fuels over time.”).

<sup>119</sup> See section III.A.2.b, *supra*.

<sup>120</sup> EPA Waiver Decision I, 75 FR at 68103.

increase the potential of thermal degradation and risk of catalyst failure. In addition to enleanment, ethanol can cause materials compatibility issues which may lead to other component failure and ultimately exhaust and/or evaporative emission increases. . . . For older motor vehicles, heavy-duty gasoline engines and vehicles, motorcycles, and nonroad products, the potential for materials compatibility issues increases with higher ethanol concentration.<sup>121</sup> The Commission seeks evidence regarding the harm or benefits of ethanol blends to non flex-fuel engines, including newer conventional vehicles.<sup>122</sup>

The lack of EPA approval for ethanol blends, other than E15, in non flex-fuel engines further supports a label with the two-prong notice. Specifically, distribution of such blends to non flex-fuel vehicles is prohibited by the Clean Air Act.<sup>123</sup> In addition, EPA regulations expose consumers and retailers to liability for misfueling MY 2000 and older light-duty vehicles, as well as all motorcycles, heavy-duty vehicles, and non-road engines.<sup>124</sup> Therefore, consumers need clear guidance regarding the engines for which those blends are appropriate, so that they can make an informed choice.

The commenters' other concerns are also not persuasive. The concern that the 2010 NPRM's "MAY HARM SOME VEHICLES" disclosure would lead flex-fuel vehicle owners to wrongly conclude that their vehicles fit into the "some" category does not apply to the revised disclosure. Although "MAY HARM OTHER ENGINES" is similar, it does not raise the same concern because it emphasizes that the fuel potentially harms only "other" (*i.e.*, non flex-fuel) engines. In addition, the new disclosures advise, more prominently and in larger text, that the fuel is indeed suitable for flex-fuel vehicles. This disclosure would also appear appropriate even if, at this rulemaking's conclusion, the record is unsettled about whether ethanol blends are suitable for some newer model conventional vehicles. The proposed disclosure states only that the fuel "may" harm other engines, not that it would necessarily harm all such engines.

The Commission also disagrees with the claim that any disclosures are unfair because they apply only to ethanol blends. EPA has promulgated extensive

rules to mitigate potential misfueling of EPA-approved E15. The Commission has no evidence indicating that other alternative fuels carry a similar risk. If the Commission obtains evidence demonstrating that another fuel poses similar misfueling and consumer confusion risks, the Commission will consider similar suitability ratings for those fuels.<sup>125</sup> In promulgating regulations, agencies need not take an all-or-nothing approach but may proceed incrementally.<sup>126</sup>

#### b. Percentage Disclosure

The 2010 NPRM proposed requiring that ethanol blends below 70 percent concentration have a label disclosing that the fuel contained between 10 and 70 percent ethanol. Retailers would have had the option of disclosing a narrower range or an exact percentage. Commenters generally favored requiring a more precise content disclosure because fuels with higher concentrations of ethanol have worse fuel economy. In addition, commenters noted that future vehicle fleets might have varying ethanol tolerances, which will require more precise content disclosures. Significantly, both ethanol-industry and other commenters supported such disclosures.

In light of these comments, the Commission proposes requiring ethanol percentage disclosures rounded to the nearest factor of 10 (*e.g.*, retailers can label fuels at 26 and 34 percent concentrations as 30% Ethanol).<sup>127</sup> Requiring this more precise disclosure would help flex-fuel vehicle owners make informed choices about ethanol blends, while presenting consumers with numbers that are easy to use.<sup>128</sup> Rounding also benefits retailers by allowing them to alter their blends by small percentages without the expense of changing labels. However, the Commission notes that consumers purchasing ethanol blends with rounded-down disclosures may receive

<sup>125</sup> The proposed amendments do not adopt CAS' proposal to require separate signs and pump nozzle disclosures or AllSAFE's proposal to require a visible gap between ethanol pumps and other fuel pumps. There is no evidence that such additional steps are necessary to prevent misfueling.

<sup>126</sup> *Investment Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 187 (D.D.C. 2012) ("[A]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.") (quotation omitted); *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) ("[A]gencies have great discretion to treat a problem partially.").

<sup>127</sup> This approach will address concerns of commenters supporting energy-content labeling.

<sup>128</sup> The Commission proposes adopting the Tennessee Department of Agriculture's rounding approach rather than the ethanol-industry commenters' 10 percent tolerance approach because it is simpler.

less than expected fuel efficiency. Thus, the Commission invites comment on the costs and benefits of this approach for retailers and consumers.

#### c. Label Specifications

The proposed amendments retain the size, font, and format requirements proposed in the 2010 NPRM.<sup>129</sup> These requirements are consistent with those in place for most of the alternative liquid fuels covered by the Rule. The new proposed amendments require Helvetica Black type, or equivalent type style, as the Rule requires for all other labels. They also propose a sample ethanol fuel label.<sup>130</sup>

The proposed ethanol fuel label requires an orange background (PMS 1495 or its equivalent). Orange is the color for all alternative fuels except biodiesel and will enable retail consumers to distinguish ethanol blends from gasoline. Several ethanol-industry commenters objected to orange, asserting that it is associated with caution and, thus, places the fuel at a competitive disadvantage. The Commission disagrees.

First, because the Rule currently requires an orange label for almost all alternative fuels (including ethanol blends), excepting ethanol blends would result in inconsistent treatment. Second, orange, a bright color, will help ensure that consumers notice the label and, therefore, prevent misfueling. Finally, EPA's E15 label uses the same orange background to coordinate with the FTC. Therefore, using orange will promote a consistent labeling scheme for all ethanol blends.

A proposed sample label is at the end of this document. The Commission invites comment on how consumers will perceive and understand the label's information about the rating, and whether the label will prevent misfueling.

#### d. E15 Exemption

To prevent consumer confusion and avoid unnecessary burden on industry, the new proposed amendments exempt fuel meeting EPA's E15 waiver from labeling requirements. The Commission provides this exemption for two reasons. First, EPA is better situated to tailor its labeling requirements to reflect

<sup>129</sup> The new amendments also propose deleting the Rule's sample label for "E-100" (*i.e.*, ethanol not mixed with gasoline) because the record does not show any retail sales of such fuels.

<sup>130</sup> The Rule's recordkeeping provisions (16 CFR 306.7, 306.9, and 306.11) without amendment will require covered entities to maintain records supporting the rating of any ethanol fuel they produce, transfer, or sell.

<sup>121</sup> *Final Rule to Mitigate Misfueling*, 40 CFR Part 80, 76 FR at 44439.

<sup>122</sup> The Commission is aware of all studies cited in EPA's waiver decision.

<sup>123</sup> 42 U.S.C. 7545(f).

<sup>124</sup> *Final Rule to Mitigate Misfueling*, 76 FR at 44437. See also 40 CFR 80.1504(a)(1) (codification of misfueling prohibition).

the waiver's evolving scope.<sup>131</sup> Second, exempting EPA-approved E15 from the FTC rule will avoid unduly burdening industry with redundant labels. Moreover, the proposed exemption is narrowly tailored to ensure that only E15 blends that obtain an EPA waiver, and therefore are labeled according to EPA rules, are exempt from the FTC's labeling requirements.

#### 4. PMPA Authorizes the Ethanol Amendments

Growth Energy and RFA argued that PMPA does not authorize the Commission to propose labels with disclosures about ethanol blends' suitability for consumers' vehicles. The Commission disagrees.

PMPA authorizes the Commission to require automotive fuel labels "displaying the automotive fuel rating of automotive fuel at the point of sale."<sup>132</sup> PMPA further defines "automotive fuel rating" to include octane ratings; cetane ratings; or "another form of rating determined by the Federal Trade Commission, after consultation with [ASTM],<sup>133</sup> to be more appropriate to carry out the purposes of this subchapter with respect to the automotive fuel concerned."<sup>134</sup>

As the Commission explained in 1993, one of PMPA's purposes is to give "purchasers the information they need to choose the correct type or grade of fuel for their vehicles."<sup>135</sup> For example, the legislative history reveals that Congress designed PMPA to "increase consumer confidence in and information about motor fuels" and ensure that "motorists have a right to know what they are getting and what they are paying for."<sup>136</sup> And it expresses specific concern about engine damage and stresses the need "to assist [motorists] in the purchase of suitable gasoline for their motor vehicles."<sup>137</sup>

<sup>131</sup> As noted above, the EPA waiver allows fuel with 15 percent ethanol in conventional vehicles. If EPA later determines that conventional vehicles can tolerate ethanol concentrations above 15 percent, the Commission can revise the Fuel Rating Rule to accommodate that determination.

<sup>132</sup> 15 U.S.C. 2823(c)(1)(B).

<sup>133</sup> Growth Energy relied on this language to argue that the Commission cannot promulgate alternative fuel ratings without ASTM consultation that is "subject to public review and comment." Growth Energy comment at 13. Growth Energy did not cite any authority for this interpretation. Nonetheless, Commission staff has consulted with ASTM throughout this rulemaking, and, as discussed below, is relying in part on an ASTM standard to justify abandoning a special label for "E85."

<sup>134</sup> 15 U.S.C. 2821(17). PMPA also empowers the Commission to define relevant terms used in the statute. 15 U.S.C. 2823(a).

<sup>135</sup> 1993 *Final Rule*, 58 FR at 41356.

<sup>136</sup> H. Rep. No. 102-474(I) (1992).

<sup>137</sup> S. Rep. No. 95-731 (1978).

Accordingly, the Commission determined that PMPA authorizes it to require fuel ratings that inform consumers about the content of alternative fuels to prevent misfueling. In evaluating options for rating alternative fuels, the Commission concluded, "automotive fuel rating" encompasses text necessary to "assure consumers that they are purchasing a product that satisfies automobile engine minimum content requirements, which may be specified in their owner's manuals."<sup>138</sup> Thus, since 1993 the Commission has interpreted automotive fuel ratings to include information necessary to prevent misfueling, such as fuel descriptors.<sup>139</sup>

Consistent with its 1993 determination, the Commission finds that the proposed ethanol-content disclosure accompanied by explanatory language regarding the suitability of the fuel is more appropriate than an octane rating for ethanol blends. The proposed disclosures further PMPA's purpose of helping consumers choose the correct fuel and preventing engine damage. Thus, the proposed label appears to fall squarely within the Commission's statutory authority to prescribe labels disclosing fuel ratings.

This interpretation comports with the plain meaning of "rating," which includes "[t]he value of a property or condition that is claimed to be *standard, optimal, or limiting for a device, engine, etc.*; a rated value."<sup>140</sup> Significantly, a "rating" does not encompass only numeric rankings of superiority or quality, but includes a "condition" that is standard or "limiting" for engines. Therefore, a rating can consist of a content description and suitability language communicating whether the rated item is proper, or improper, for certain devices, including engines.

One example is film ratings (G, PG, PG13, R, and NC17). Those ratings do not identify any quantity or embody any qualitative score. Instead, they provide guidance on the suitability of particular films for particular audiences, and include explanatory text, e.g., "PG-13; PARENTS STRONGLY CAUTIONED; SOME MATERIAL MAY BE INAPPROPRIATE FOR CHILDREN

<sup>138</sup> 1993 *Final Rule*, 58 FR at 41364-65.

<sup>139</sup> The Rule's current alternative fuel labels require a descriptor at the top of the label that identifies the fuel. For example, retailers must label liquefied petroleum gas as "LPG." 16 CFR 306.10(f)(5).

<sup>140</sup> *Oxford English Dictionary Online* (2013), <http://www.oed.com/view/Entry/158481?rskey=MGAeBQ&result=1&isAdvanced=false#eid> (last visited March 18, 2014) (emphasis added).

UNDER 13."<sup>141</sup> Similarly, the FTC's statutory authorization to adopt, for labeling purposes, "another form of rating" in lieu of octane measurements encompasses the authority to require labels alerting consumers to the suitability of particular fuel blends for particular engines.

Growth Energy and RFA made four arguments to support their position that the disclosures the Commission proposed in 2010 are inconsistent with the statute. The Commission is inclined to reject these arguments. First, RFA argued that language about a fuel's suitability for certain engines cannot be a rating because it is a "representation[]" as to the quality of the fuel or potential impacts on vehicle performance."<sup>142</sup> This is incorrect and inapposite. Neither the statute nor the plain meaning of the term "rating" excludes ratings based on fuel quality or performance; even an octane rating constitutes a representation about the fuel's "quality" and "performance" impact. In any event, the proposed disclosures do not include a generalized "quality" description of the fuel, but merely clarify the implication of the fuel's ethanol percentage and its suitability for certain engines in order to prevent misfueling and potential engine damage.

Second, Growth Energy noted PMPA's list of permissible ratings uses the conjunctive "and" between octane and cetane ratings, and the disjunctive "or" between those two ratings and "another form of rating." Growth Energy argued that this language demonstrates Congress' intent to authorize only octane and cetane ratings or, in their place, a rating that "would carry out the same purpose" as these ratings. This language, however, appears to have the opposite import. Specifically, the use of the disjunctive "or" after the conjunctive "and" signals that the phrase "another form of rating" could include types of rating distinct from those linked in the previous conjunctive list. Moreover, the statutory text authorizes the Commission to determine that another form of rating is "more appropriate to carry out the purposes of this subchapter." (Emphasis supplied). The reference to "the purposes of this subchapter" is a reference to PMPA as a whole, which broadly seeks to allow consumers to make informed decisions for all types of fuel, including alternative fuel blends. The Commission, therefore, provisionally concludes that the proposed label is no

<sup>141</sup> See Motion Picture Association of America, *How to Read a Rating*, [www.mpa.org/ratings/how-to-read-a-rating](http://www.mpa.org/ratings/how-to-read-a-rating).

<sup>142</sup> RFA comment at 3.

less appropriate or consistent with the PMPA's purposes than the ratings the Commission has required for the past 20 years.

Third, Growth Energy argued that the Commission must interpret "another form of rating" to be similar in purpose to octane or cetane ratings under the principle of *ejusdem generis*, a canon of statutory construction under which a general term following a specific one is often understood as a reference to subjects akin to the one with the specific enumeration. However, the Supreme Court has held that "[t]his canon does not control . . . when the whole context dictates a different conclusion."<sup>143</sup> That is the case here. Again, when Congress initially enacted PMPA, it pursued a general purpose of ensuring informed consumer choice at the pump, and it specifically directed the FTC to ensure accurate octane metrics because those are the main consumer concerns that arise in connection with the sale of ordinary gasoline. But because Congress understood that consumer-protection concerns will evolve with changes in fuel technology, it deliberately built flexibility into this statutory scheme by allowing the FTC to prescribe "another form of rating" that is "more appropriate" to carry out the consumer-protection purposes of PMPA. It would appear to defeat, not serve, that congressional policy choice to hamstring the FTC's consumer-protection authority as Growth Energy proposes here.

Finally, both Growth Energy and RFA argued that, notwithstanding the PMPA's plain language authorizing alternative forms of rating, legislative history precludes the Commission's interpretation of the term "rating" under PMPA. Specifically, Growth Energy cited statements describing the 1992 PMPA amendments as expanding the statute's octane rating requirements to other fuels. RFA noted that in its 1993 rulemaking, the Commission relied upon statements in the legislative history that consumers "have a right to know what they pay for."<sup>144</sup> However, the history cited by Growth Energy does not preclude the Commission's interpretation, and the history cited by RFA supports the Commission's interpretation. First, the statements cited by Growth Energy simply note the expansion of the statute's coverage to alternative fuels and do not refer specifically to the meaning of

"automotive fuel rating."<sup>145</sup> Moreover, to the extent this history could be read as requiring octane ratings for alternative fuels, it is directly contradicted by the statutory language, which explicitly allows ratings other than octane ratings. Finally, the statement cited by RFA declares an intent to ensure that fuel retailers provide consumers with the information they need to choose the correct fuel for their vehicles.<sup>146</sup>

#### B. Infrared Method

All commenters that addressed allowing automotive fuel rating through infrared spectrophotometers supported doing so. Significantly, these commenters included business, consumer groups, and state regulators. Their comments indicate that the infrared method is a more accurate and cost-effective means of measuring octane. Moreover, the record indicates widespread use of the method by state regulatory agencies.

In light of this strong support, the Commission proposes adding the infrared method to the Fuel Rating Rule's list of approved octane rating methods. Specifically, the amendment would allow use of octane measurement by infrared spectrophotometers that are correlated with ASTM D2699 and D2700, the octane rating methods specified in PMPA, and conform to ASTM D6122 ("Standard Practice for the Validation of the Performance of Multivariate Infrared Spectrophotometers"). For businesses, such an amendment should lower costs. For consumers, it should reduce the risk of inaccurate measurements.

The Commission does not propose adopting Tesoro's suggestion to designate D2699 and D2700 as "referee tests." Tesoro appears to be

<sup>145</sup> Significantly, the cited statements include the observation that one of the PMPA amendments' goals "is to improve the information available to consumers." Growth Energy comment at 8. See also H. Rep. No. 102-474(I) (1992) (explaining that "this legislation attempts to increase confidence in and information about motor fuels"); S. Rep. No. 95-731 (1978) (expressing concern about engine damage and noting the need "to assist [motorists] in the purchase of suitable gasoline for their motor vehicles").

<sup>146</sup> Growth Energy and RFA made two ancillary arguments for a narrow reading of "automotive fuel rating." First, RFA argued that the proposed language is misleading and, therefore, not a proper rating. For reasons explained above, the Commission does not agree that the proposed labels are misleading. Second, Growth Energy argued that before requiring a rating other than an octane or cetane rating, the Commission must consider how the alternative rating furthers the objectives of an octane rating. Growth Energy appears to base this argument on an assumption that PMPA's objective is to require octane ratings for all fuels. As explained above, that view of PMPA's purpose is contrary to its text.

recommending that the Rule provide that a fuel's rating derived through the infrared method is invalid if it differs from the rating derived through D2699 and D2700. However, the record does not show that D2699 and D2700 are superior to the infrared method. Thus, there is no reason to favor one approved rating method over another.

#### V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before June 2, 2014. Write "Fuel Rating Rule Review, 16 CFR Part 306, Project No. 811005" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, don't include any "[t]rade secret or any commercial or financial information which is . . . privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names. If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>147</sup> Your comment will be kept confidential only if the FTC General Counsel grants your request in

<sup>147</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

<sup>143</sup> *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).

<sup>144</sup> RFA comment at 2.

accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublish.commentworks.com/ftc/autofuelratingscertnprm>, by following the instruction on the web-based form. If this Notice appears at <http://www.regulations.gov>, you also may file a comment through that Web site.

If you file your comment on paper, write "Fuel Rating Rule Review, 16 CFR Part 306, Project No. R811005" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at <http://www.ftc.gov> to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before June 2, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

The Commission invites members of the public to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of proposed amendments. The Commission requests that comments provide factual data upon which they are based. In addition to the issues raised above, the Commission solicits public comment on the following questions and the costs and benefits to industry members and consumers of each of the proposals. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

1. What evidence exists regarding whether ethanol blends can harm engines, including newer conventional vehicle engines? Is there evidence showing that harm is more likely at higher ethanol-concentration levels, and, if so, what levels?

2. What evidence exists regarding consumers misfueling with ethanol blends? If misfueling is occurring, is it happening with greater frequency in any

particular geographical region or with fuel containing any particular ethanol concentration? Do ethanol blend pumps currently contain any disclosures? If so, what do those disclosures say? Are they voluntary or required by state law? Do they effectively prevent misfueling?

3. How would consumers understand the disclosures on the proposed label? Would the "MAY HARM OTHER ENGINES" deter any lawful use of ethanol blends? Would "USE ONLY IN FLEX-FUEL VEHICLES" alone be sufficient to advise consumers not to use ethanol blends in other engines? Provide all evidence, including consumer surveys or copy tests, supporting your response.

4. What costs on businesses and consumers would the proposed requirement to disclose ethanol content rounded to the nearest tenth impose? What benefits to businesses and consumers would the proposed requirement provide? Provide all evidence supporting your response.

For purposes of the Paperwork Reduction Act, 44 U.S.C. 3501-3521 ("PRA"), the Commission also invites comments on (1) whether the proposed modifications to the current rating, certification, and labeling requirements are necessary and/or will be practically useful; (2) the accuracy of the associated burden estimates; (3) how to improve the quality, utility, and clarity of the labels; and (4) how to minimize further the burden of the collections of information.

Your responses to the points immediately above additionally should be sent to the Office of Management and Budget. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments should instead be sent by facsimile to (202) 395-5167.

## VI. Paperwork Reduction Act

The proposed amendments allowing the infrared method do not impose any burdens because they merely provide an alternative means of compliance. However, the proposed certification and labeling requirements for ethanol blends constitute a "collection of information" under the PRA.

Consistent with the Fuel Rating Rule's requirements for other alternative fuels, under the proposed amendments,

refiners, producers, importers, distributors, and retailers of ethanol blends must retain, for one year, records of any delivery tickets, letters of certification, or tests upon which they based the automotive fuel ratings that they certify or post.<sup>148</sup> The covered parties also must make these records available for inspection by staff of the Commission and EPA or by persons authorized by those agencies. Finally, retailers must produce, distribute, and post fuel-rating labels on pumps.

In the 2010 NPRM, the Commission provided estimated recordkeeping and disclosure burdens for entities covered under the Rule and sought comment on the accuracy of those estimates. The Commission believes that the changes made since the 2010 NPRM do not affect the previous burden estimates. Below, the Commission discusses those estimates.

The Commission estimated the burden associated with the Rule's recordkeeping requirements for the sale of automotive fuels to be no more than 5 minutes per year (or 1/12th of an hour) per industry member, and no more than 1/8th of an hour per year per industry member for the Rule's disclosure requirements.<sup>149</sup> Consistent with OMB regulations that implement the PRA, these estimates reflect solely the burden incremental to the usual and customary recordkeeping and disclosure activities performed by affected entities in the ordinary course of business. See 5 CFR 1320.3(b)(2).

Because the procedures for distributing and selling ethanol blends are not substantially different from those for other fuels, the Commission expects that, consistent with practices in the fuel industry generally, the covered parties will record the fuel rating certification on documents (e.g., shipping receipts) already in use, or will use a letter of certification. Furthermore, the Commission expects that labeling of ethanol-fuel pumps will be consistent, generally, with practices in the fuel industry. Accordingly, the PRA burden will be the same as that for other automotive fuels: 1/12th of an hour per

<sup>148</sup> See the Fuel Rating Rule's recordkeeping requirements, 16 CFR 306.7; 306.9; and 306.11.

<sup>149</sup> See, e.g., *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule on Biodiesel Labeling*, 73 FR at 40161. Staff has previously estimated that retailers of automotive fuels incur an average burden of approximately one hour to produce, distribute, and post fuel-rating labels. Because the labels are durable, staff has concluded that only about one of every eight retailers incur this burden each year. Hence, the Rule's disclosure requirement will impose an annual burden of 1/8th of an hour, on average, per retailer.

year for recordkeeping and 1/8th of an hour per year for disclosure.

The U.S. Department of Energy (“DOE”) indicates 2,667 ethanol retailers nationwide, and the U.S. Energy Information Administration indicates 193 ethanol fuel production plants.<sup>150</sup> Thus, assuming that each ethanol retailer and producer will spend 1/12th of an hour per year complying with the proposed recordkeeping requirements, and each ethanol retailer will spend 1/8th of an hour per year complying with the proposed disclosure requirements, the Commission estimates the incremental annual burden to be 238 hours, rounded, for recordkeeping (1/12th of an hour × 2,860 entities) and 333 hours, rounded, for disclosure (1/8th of an hour × 2,667), combined, 571 hours.

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. Applying an average hourly wage for producers of \$30.56, and an average hourly wage for retailers of \$10.54 to the estimated affected population, labor costs total \$6,338.66 ((\$30.56 × 16 hours) + (\$10.54 × 555 hours)) for recordkeeping and disclosure burden.<sup>151</sup>

The Rule does not impose any capital costs for producers, importers, or distributors of ethanol blends. Retailers, however, do incur the cost of procuring and replacing fuel dispenser labels to comply with the Rule. Staff has previously estimated that the price per automotive fuel label is fifty cents and that the average automotive fuel retailer has six dispensers. PMAA, however, stated that the cost of labels ranges from one to two dollars. Conservatively applying the upper end from PMAA’s estimate results in an initial cost to retailers of \$12 (6 pumps × \$2). Regarding label replacement, staff has previously estimated a dispenser useful life range of 6 to 10 years. Assuming a useful life of 8 years, the mean of that range, replacement labeling will not be necessary for well beyond the relevant time frame, *i.e.*, the immediate 3-year PRA clearance sought. Accordingly, averaging solely the \$12 labeling cost at inception per retailer over that period,

<sup>150</sup> See [http://www.afdc.energy.gov/fuels/ethanol\\_locations.html](http://www.afdc.energy.gov/fuels/ethanol_locations.html) (last visited Feb. 26, 2014); <http://www.eia.gov/petroleum/ethanolcapacity/> (last visited Feb. 26, 2014).

<sup>151</sup> See <http://www.bls.gov/iag/tgs/iag211.htm#earnings> (Bureau of Labor Statistics, December 2013 Current Employment Statistics, Average Hourly Earnings for Oil and Gas Extraction Production and Nonsupervisory Employees); <http://www.bls.gov/iag/tgs/iag447.htm> (Bureau of Labor Statistics, December 2013 Current Employment Statistics, Average Hourly Earnings for Gasoline Station Production and Nonsupervisory Employees).

annualized labeling cost per retailer will be \$4. Cumulative labeling cost would thus be \$10,668 (2,667 retailers × \$4 each, annualized).<sup>152</sup>

## VII. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis with a proposed rule unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603–605.

The FTC finds that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The amendment allowing alternative octane measurements does not impose any new costs on covered entities because it merely gives those entities the option of using a different octane rating method than what the Rule currently requires. As explained in Section VI above, the Commission expects each ethanol retailer and producer to spend, at most, 5 minutes per year complying with the recordkeeping requirements, and each ethanol retailer to spend 1/8th of an hour per year complying with the new ethanol disclosure requirements.<sup>153</sup> As also explained in Section VI, staff estimates an average hourly wage for producers of \$30.56, and for retailers of \$10.54. Even assuming that all ethanol producers and retailers are small entities, compliance with the recordkeeping requirements will cost producers an estimated \$2.55 (\$30.56 × 1/12th of an hour) and cost retailers an estimated \$0.88 (\$10.54 × 1/12th of an hour). In addition, under the same conservative assumptions, compliance with the disclosure requirements will cost retailers an estimated \$1.32 (\$10.54 × 1/8th of an hour). Finally, as discussed in Section VI, the Commission estimates annualized capital costs as \$4.

This document serves as notice to the Small Business Administration of the agency’s certification of no effect. Nonetheless, the Commission has prepared the following analysis.

### A. Reasons why the Commission is Proposing the Amendments

The Commission proposes these amendments in response to the

<sup>152</sup> This reflects strictly the incremental (and annualized) PRA costs of the ethanol amendments. Cumulative capital/non-labor costs for the current Rule under existing OMB clearance (Control No. 3084–0068) is \$88,600.

<sup>153</sup> The Commission assumes that ethanol-blend producers and distributors would determine the ethanol percentage in their blends and include it with the blends’ transfer documents.

emergence of ethanol blends as a retail fuel and the likely increased availability of such blends. As discussed above, the proposed amendments will further PMPA’s objective of giving consumers information necessary to choose the correct fuel for their vehicles.

### B. Statement of the Objectives and Legal Basis of the Amendments

These amendments provide requirements for rating and certifying ethanol blends and requirements for labeling blends of more than 10 percent ethanol, with an exemption for EPA-approved E15. Thus, they provide a mechanism for fuel pumps dispensing ethanol blends to post a rating that will alert consumers to the fuel’s ethanol content and the suitability of that fuel for their vehicles, pursuant to PMPA, 15 U.S.C. 2801 *et seq.*

### C. Estimate of the Number of Small Entities to Which the Proposed Amendments Will Apply

Retailers of ethanol blends will be classified as small businesses if they satisfy the Small Business Administration’s relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (“NAICS”). The closest NAICS size standard relevant to this rulemaking is for “Gasoline Stations with Convenience Stores.” That standard classifies retailers with a maximum \$27 million in annual receipts as small businesses.<sup>154</sup> As discussed above, DOE reports 2,667 ethanol fueling stations.<sup>155</sup> DOE does not provide information on those retailers’ revenue. Therefore, the Commission seeks comment on how many of those retailers qualify as small businesses.

### D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments make clear that the Fuel Rating Rule’s recordkeeping, certification, and labeling requirements apply to ethanol blends. Small entities potentially affected are producers, importers, distributors, and retailers of those blends. The Commission expects that the recordkeeping, certification, and labeling tasks are done by industry members in the normal course of their business. Accordingly, we do not expect the proposed amendments to require any professional skills beyond those

<sup>154</sup> See <http://www.sba.gov/content/small-business-size-standards>. (last visited Dec. 31, 2013).

<sup>155</sup> See [www.afdc.energy.gov/afdc/fuels/stations\\_counts.html](http://www.afdc.energy.gov/afdc/fuels/stations_counts.html) (last visited Dec. 31, 2013).

already employed by industry members, namely, administrative.

#### E. Identification of Overlapping Federal Rules

The Commission is not aware of any relevant Federal Rules that would duplicate, overlap, or conflict with the proposed amendments. The amendments specifically exempt EPA-approved E15 blends, which must be labeled under EPA rules.

#### F. Alternatives Considered

As explained above, PMPA requires retailers of liquid automotive fuels to post labels at the point of sale displaying those fuels' ratings. The posting requirements in the proposed amendments are minimal and, as noted above, do not require creating any separate documents because covered parties may use documents already in use, such as invoices, to certify a fuel's rating. Moreover, the Commission cannot exempt small businesses from the Rule and still communicate fuel rating information to consumers. Furthermore, the amendments minimize what, if any, economic impact there is from the labeling requirements. Finally, because PMPA requires point-of-sale labels, the Rule must require retailers to incur the costs of posting those labels. Therefore, the Commission concludes that there are no significant alternative measures that would accomplish the objectives of PMPA and further minimize the burden on small entities.

#### VIII. Public Hearings

Persons desiring a public hearing should notify the Commission no later than May 5, 2014. If there is interest in a public hearing, it will take place at a time and date to be announced in a subsequent notice. If a hearing is held, persons desiring an appointment to testify must submit to the Commission a complete statement in advance, which will be entered into the record in full. As a general rule, oral statements should not exceed 10 minutes. If there is a hearing, the Commission will provide further instructions in a notice announcing the hearing.

#### IX. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

#### X. Proposed Rule

##### List of Subjects in 16 CFR Part 306

Fuel ratings, Trade practices, Incorporation by reference.

For the reasons discussed in the preamble, the Federal Trade Commission proposes to amend title 16, chapter I, subchapter C, of the Code of Federal Regulations, part 306, as follows:

##### PART 306—AUTOMOTIVE FUEL RATINGS, CERTIFICATION AND POSTING

■ 1. The authority citation for part 306 continues to read as follows:

**Authority:** 15 U.S.C. 2801 *et seq.*; 42 U.S.C. 17021.

■ 2. Amend § 306.0 by revising paragraphs (b), (i), and (j), and adding paragraph (o), to read as follows:

##### § 306.0 Definitions.

\* \* \* \* \*

(b) *Research octane number and motor octane number.* (1) These terms have the meanings given such terms in the specifications of ASTM International ("ASTM") entitled "Standard Specification for Automotive Spark-Ignition Engine Fuel (published November 2010)" designated D4814-10b and, with respect to any grade or type of gasoline, are determined in accordance with one of the following test methods or protocols:

(i) ASTM D2699-09, "Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel (published November 2009)" and ASTM D2700-09, "Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel (published November 2009)";

(ii) ASTM D2885-10, "Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique (published March 2010);" or

(iii) ASTM D6122-10, "Standard Practice for Validation of the Performance of Multivariate Infrared Spectrophotometers," which is correlated with ASTM D2699-09 and ASTM D2700-09.

(2) The incorporations by reference of ASTM D4814-10b, ASTM D6122-10, ASTM D2699-09, ASTM D2700-09, and ASTM D2885-10 in paragraph (b)(1) of this Section, and in § 306.5(a), were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of ASTM D4814-10b, ASTM D6122-10, ASTM D2699-09, ASTM D2700-09, and ASTM D2885-10, may be obtained from ASTM International, 100 Barr Harbor

Drive, West Conshohocken, PA 19428, or may be inspected at the Federal Trade Commission, Public Reference Room, Room 130, 600 Pennsylvania Avenue NW, Washington, DC, or at the National Archives and Records Administration ("NARA"). For information on the availability of this material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

\* \* \* \* \*

(i) *Automotive fuel.* This term means liquid fuel of a type distributed for use as a fuel in any motor vehicle, and the term includes, but is not limited to:

(1) Gasoline, an automotive spark-ignition engine fuel, which includes, but is not limited to, gasohol (generally a mixture of approximately 90 percent unleaded gasoline and 10 percent ethanol) and fuels developed to comply with the Clean Air Act, 42 U.S.C. 7401 *et seq.*, such as reformulated gasoline and oxygenated gasoline; and

(2) Alternative liquid automotive fuels, including, but not limited to:

(i) Methanol, denatured ethanol, and other alcohols;

(ii) Mixtures containing 85 percent or more by volume of methanol and/or other alcohols, excluding ethanol (or such other percentage, as provided by either the Secretary of the United States Department of Energy, by rule), with gasoline or other fuels;

(iii) Ethanol blends;

(iv) Liquefied natural gas;

(v) Liquefied petroleum gas;

(vi) Coal-derived liquid fuels;

(vii) Biodiesel;

(viii) Biomass-based diesel;

(ix) Biodiesel blends containing more than 5 percent biodiesel by volume; and

(x) Biomass-based diesel blends containing more than 5 percent biomass-based diesel by volume.

\* \* \* \* \*

(j) *Automotive fuel rating* means. (1) For gasoline, the octane rating.

(2) For an alternative liquid automotive fuel other than biodiesel, biomass-based diesel, biodiesel blends, biomass-based diesel blends, and ethanol blends, the commonly used name of the fuel with a disclosure of the amount, expressed as the minimum percentage by volume, of the principal component of the fuel. A disclosure of other components, expressed as the minimum percentage by volume, may be included, if desired.

(3) For biomass-based diesel, biodiesel, biomass-based diesel blends with more than 5 percent biomass-based diesel, and biodiesel blends with more than 5 percent biodiesel, a disclosure of the biomass-based diesel or biodiesel

component, expressed as the percentage by volume.

(4) For ethanol blends, a disclosure of the ethanol component, expressed as the percentage by volume and the text "USE ONLY IN FLEX-FUEL VEHICLES/MAY HARM OTHER ENGINES."

\* \* \* \* \*

(o) *Ethanol blend* means a mixture of gasoline and ethanol containing more than 10 percent ethanol;

■ 3. Revise § 306.5 to read as follows:

#### § 306.5 Automotive fuel rating.

If you are a refiner, importer, or producer, you must determine the automotive fuel rating of all automotive fuel before you transfer it. You can do that yourself or through a testing lab.

(a) To determine the automotive fuel rating of gasoline, add the research octane number and the motor octane number and divide by two, as explained by ASTM D4814–10b, "Standard Specifications for Automotive Spark-Ignition Engine Fuel," (incorporated by reference, see § 306.0(b)(2)). To determine the research octane and motor octane numbers you may do one of the following:

(1) Use ASTM standard test method ASTM D2699–09, "Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel" (incorporated by reference, see § 306.0(b)(2)), to determine the research octane number, and ASTM standard test method ASTM D2700–09, "Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel" (incorporated by reference, see § 306.0(b)(2)), to determine the motor octane number;

(2) Use the test method set forth in ASTM D2885–10, "Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique" (incorporated by reference, see § 306.0(b)(2)); or

(3) Use a multivariate infrared spectrophotometer, as described in Section 6.1.1 of ASTM D6122–10, "Standard Practice for Validation of the Performance of Multivariate Infrared Spectrophotometers," to determine the research octane number and the motor octane number following the procedures set forth in ASTM D6122–10 to correlate the measured research and motor octane numbers with the results of test methods ASTM D2699–09 and ASTM D2700–09 (incorporated by reference, see § 306.0(b)(2)).

(b) To determine automotive fuel ratings for alternative liquid automotive fuels other than ethanol blends, biodiesel blends, and biomass-based diesel blends, you must possess a

reasonable basis, consisting of competent and reliable evidence, for the percentage by volume of the principal component of the alternative liquid automotive fuel that you must disclose. In the case of biodiesel blends, you must possess a reasonable basis, consisting of competent and reliable evidence, for the percentage of biodiesel contained in the fuel. In the case of biomass-based diesel blends, you must possess a reasonable basis, consisting of competent and reliable evidence, for the percentage of ethanol contained in the fuel. You also must have a reasonable basis, consisting of competent and reliable evidence, for the minimum percentages by volume of other components that you choose to disclose.

■ 4. Revise § 306.6(b) to read as follows:

#### § 306.6 Certification.

\* \* \* \* \*

(b) Give the person a letter or other written statement. This letter must include the date, your name, the other person's name, and the automotive fuel rating of any automotive fuel you will transfer to that person from the date of the letter onwards. Octane rating numbers may be rounded to a whole or half number equal to or less than the number determined by you. This letter of certification will be good until you transfer automotive fuel with a lower automotive fuel rating, except that a letter certifying the fuel rating of biomass-based diesel, biodiesel, a biomass-based diesel blend, a biodiesel blend, or an ethanol blend will be good only until you transfer those fuels with a different automotive fuel rating, whether the rating is higher or lower. When this happens, you must certify the automotive fuel rating of the new automotive fuel either with a delivery ticket or by sending a new letter of certification.

\* \* \* \* \*

■ 5. Revise § 306.10(a) and (f) to read as follows:

#### § 306.10 Automotive fuel rating posting.

(a) If you are a retailer, you must post the automotive fuel rating of all automotive fuel you sell to consumers. You must do this by putting at least one label on each face of each dispenser through which you sell automotive fuel. If you are selling two or more kinds of automotive fuel with different automotive fuel ratings from a single dispenser, you must put separate labels for each kind of automotive fuel on each

face of the dispenser. Provided, however, that you do not need to post the automotive fuel rating of a mixture of gasoline and ethanol containing more than 10 but not more than 15 percent ethanol if the face of the dispenser is labelled in accordance with 40 CFR 80.1501.

\* \* \* \* \*

(f) The following examples of automotive fuel rating disclosures for some presently available alternative liquid automotive fuels are meant to serve as illustrations of compliance with this part, but do not limit the Rule's coverage to only the mentioned fuels:

- (1) "Methanol/Minimum \_\_\_ % Methanol"
- (2) "\_\_\_ % Ethanol/Use only in Flex-Fuel Vehicles/May harm other engines"
- (3) "M85/Minimum \_\_\_ % Methanol"
- (4) "LPG/Minimum \_\_\_ % Propane" or "LPG/Minimum \_\_\_ % Propane and \_\_\_ % Butane"
- (5) "LNG/Minimum \_\_\_ % Methane"
- (6) "B20 Biodiesel Blend/contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent"
- (7) "20% Biomass-Based Diesel Blend/contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent"
- (8) "B100 Biodiesel/contains 100 percent biodiesel"
- (9) "100% Biomass-Based Diesel/contains 100 percent biomass-based diesel"

\* \* \* \* \*

■ 6. Amend § 306.12 by re-designating existing paragraphs (a)(4) through (9) as paragraphs (a)(5) through (10), respectively; by adding new paragraph (a)(4); by removing the illustration of the "E-100" label in paragraph (f); and by adding a new illustration after the existing illustrations in paragraph (f), to read as follows:

#### § 306.12 Labels.

\* \* \* \* \*

(a) \* \* \*

(4) *For ethanol blends.* (i) The label is 3 inches (7.62 cm) wide h 2 1/2 inches (6.35 cm) long. "Helvetica Black" or equivalent type is used throughout. The type in the band is centered both horizontally and vertically. The band at the top of the label contains one of the following:

(A) The numerical value representing the volume percentage of ethanol in the fuel followed by the percentage sign and then by the term "ETHANOL"; or

(B) The numerical value representing the volume percentage of ethanol in the fuel, rounded to the nearest factor of 10, followed by the percentage sign and then the term "ETHANOL."

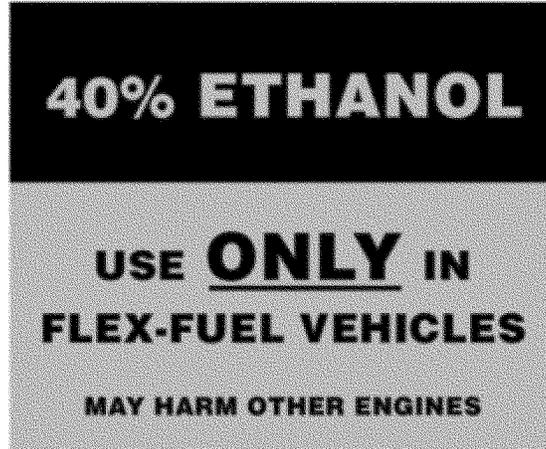
(ii) The band should measure 1 inch (2.54 cm) deep. The percentage disclosure and the word "ETHANOL" are in 24 point font. The type below the black band is centered vertically and horizontally. The first line is the text: "USE ONLY IN." It is in 16 point font,

except for the word "ONLY," which is in 26 point font. The word "ONLY" is underlined with a 2 point (or thick) underline. The second line is in 16 point font, at least 1/8 inch (.32 cm) below the first line, and is the text: "FLEX-FUEL VEHICLES." The third

line is in 10 point font, at least 1/8 inch (.32 cm) below the first line, and is the text "MAY HARM OTHER ENGINES."

\* \* \* \* \*

(f) \* \* \*



By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 2014-07423 Filed 4-3-14; 8:45 am]

BILLING CODE 6750-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 1

[Docket No. FDA-2011-D-0674]

#### Guidance for Industry: Food and Drug Administration Records Access Authority Under the Federal Food, Drug, and Cosmetic Act; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or we) is announcing the availability of a guidance for industry entitled "FDA Records Access Authority Under Sections 414 and 704 of the Federal Food, Drug, and Cosmetic Act." The guidance provides updated information pertaining to FDA's authority to access and copy records relating to food. It is a revision of FDA's November 2005 guidance entitled "Guidance for Industry and FDA Staff: Guidance for Records Access Authority Provided in Title III, Subtitle A, of the Public Health Security and Bioterrorism Preparedness

and Response Act of 2002; Final Guidance."

**DATES:** Submit either electronic or written comments on FDA guidances at any time.

**ADDRESSES:** Submit written requests for single copies of the guidance to the Outreach and Information Center, Center for Food Safety and Applied Nutrition (HFS-317), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance.

Submit electronic comments on the guidance to <http://www.regulations.gov>. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** William A. Correll, Jr., Center for Food Safety and Applied Nutrition (HFS-607), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240-402-1611.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

We are announcing the availability of a guidance for industry entitled "FDA Records Access Authority Under Sections 414 and 704 of the Federal Food, Drug, and Cosmetic Act." This guidance is being issued consistent with our good guidance practices regulation

(21 CFR 10.115). The guidance represents our current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

In the **Federal Register** of February 23, 2012 (77 FR 10753), we made available a draft guidance for industry entitled "FDA Records Access Authority Under Sections 414 and 704 of the Federal Food, Drug, and Cosmetic Act" and gave interested parties an opportunity to submit comments by May 23, 2012, for us to consider before beginning work on the final version of the guidance. We received several comments on the draft guidance. Other than providing further information on where to find guidance on the procedural steps for FDA staff to follow when accessing records under sections 414 and 704 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350c and 21 U.S.C. 374, respectively), we are issuing the guidance with a few minor changes. The guidance announced in this notice finalizes the draft guidance dated February 2012.

##### **II. Paperwork Reduction Act of 1995**

This guidance refers to information collection provisions found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). We