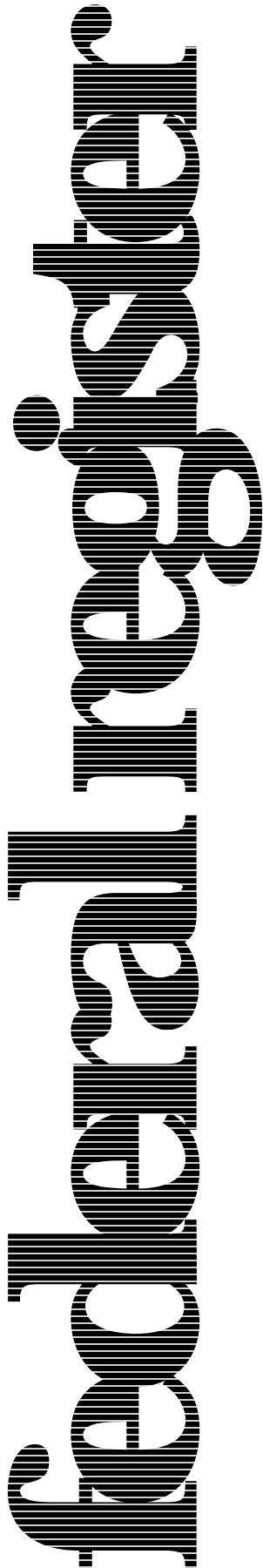

Monday
August 28, 1995



Part X

Federal Trade Commission

16 CFR Part 311

**Test Procedures and Labeling Standards
for Recycled Oil; Proposed Rule**

FEDERAL TRADE COMMISSION

16 CFR Part 311

Test Procedures and Labeling Standards for Recycled Oil

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 383 of the Energy Policy and Conservation Act of 1975 ("EPCA") directs the Federal Trade Commission ("FTC" or "Commission") to promulgate a rule prescribing test procedures and labeling standards applicable to recycled oil. The Commission is required to prescribe the rule within 90 days after the National Institute of Standards and Technology ("NIST") reports to the Commission the test procedures to determine the substantial equivalency of processed used oil with new oil distributed for a particular end use. Because NIST has reported the relevant test procedures to the Commission, this notice announces the Commission's proposed rule implementing the statutory directive. The Commission invites interested persons to submit written comments addressing any issue they believe may bear upon the proposed rule. After reviewing comments received in response to this notice, the Commission will publish a final rule.

DATES: Written comments must be submitted on or before September 27, 1995. Due to the time constraints of this rulemaking proceeding, the Commission does not contemplate any extensions to this comment period.

ADDRESSES: Written comments should be submitted to Office of the Secretary, Federal Trade Commission, room 159, Sixth and Pennsylvania Avenue, NW., Washington, DC 20580, telephone number 202-326-2506. Comments should be identified as "16 CFR Part 311 Comment-Recycled Oil." If possible, submit comments both in writing and on a personal computer diskette in Word Perfect or other word processing format (to assist in processing, please identify the format used). Written comments should be submitted, when feasible and not burdensome, in six copies.

FOR FURTHER INFORMATION CONTACT: Neil J. Blickman, Attorney, or Laura Koss, Attorney, Federal Trade Commission, Bureau of Consumer Protection, Division of Enforcement, Room S-4631, Sixth and Pennsylvania Ave., NW., Washington, DC 20580, telephone numbers 202/326-3038, or 202/326-2890.

SUPPLEMENTARY INFORMATION:

I. Background

A. EPCA's Requirements

The purposes of the recycled oil section of EPCA are to encourage the recycling of used oil, to promote the use of recycled oil, to reduce consumption of new oil by promoting increased utilization of recycled oil, and to reduce environmental hazards and wasteful practices associated with the disposal of used oil.¹ To achieve these goals, section 383 of EPCA directs NIST to develop test procedures for the determination of the substantial equivalency of re-refined or otherwise processed used oil or blend of oil (consisting of such re-refined or otherwise processed used oil and new oil or additives) with new oil distributed for a particular end use and to report such test procedures to the Commission.² Within 90 days after receiving such report from NIST, the Commission is required to prescribe, by rule, the substantial equivalency test procedures, as well as labeling standards applicable to containers of recycled oil.³ EPCA further requires that the Commission's rule permit any container of processed used oil to bear a label indicating any particular end use, such as for use as engine lubricating oil, so long as a determination of "substantial equivalency" with new oil has been made in accordance with the test procedures prescribed by the Commission.⁴

Once this proposed rule becomes final, no Commission order or rule, and no law, regulation, or order of any State (or political subdivision thereof), may remain in effect if it has labeling requirements with respect to the comparative characteristics of recycled oil with new oil that are not identical to the labels permitted by this rule.⁵ Also, no rule or order of the Commission may require any container of recycled oil to also bear a label containing any term,

phrase, or description connoting less than substantial equivalency of such recycled oil with new oil.⁶

Section 383 of EPCA does not specify any particular rulemaking procedures that must be followed. The Commission, therefore, is using the notice and comment rulemaking procedures of the Administrative Procedure Act ("APA") to obtain the views of interested parties. 5 U.S.C. 553(b) and (c). Pursuant to section 553(b)(3) of the APA, the Commission has elected to publish the specific terms of its proposed rule. 5 U.S.C. 553(b)(3).

B. The FTC Used Oil Rule and the Used Oil Recycling Act

In 1964, prior to the enactment of EPCA, the Commission had promulgated a trade regulation rule relating to the advertising and labeling of previously used lubricating oil ("Used Oil Rule").⁷ The Rule was based on the Commission's finding that whether a lubricant has been made from crude oil or from used oil is material to consumers, and it was promulgated to prevent deception of those consumers who prefer new and unused lubricating oil. Specifically, the Rule requires that advertising, promotional material, and labels on containers of lubricant made from used oil disclose that such used lubricating oil has been previously used. The Rule further states that it is an unfair method of competition and an unfair and deceptive act or practice to represent in any manner that used lubricating oil is new or unused and to use the term "re-refined," or any other term of similar import, to describe previously used lubricating oil unless the physical and chemical contaminants acquired through previous use have been removed by a refining process.⁸

On October 15, 1980, the Used Oil Recycling Act, which reiterated Congress' policy favoring the recycling of used oil, suspended the provision of the Used Oil Rule, as well as any similar provision in a Commission order, requiring labels to disclose the origin of lubricants made from used oil.⁹ The

¹ 42 U.S.C. 6363(a).

² 42 U.S.C. 6363(c). Although EPCA does not explicitly define the term "processed used oil," it is defined herein to mean re-refined or otherwise processed used oil or any blend of such oil, consistent with the definition of "recycled oil" at 42 U.S.C. 6363(b)(2)(A) and (B).

³ 42 U.S.C. 6363(d). Recycled oil, as defined in section 6363(b)(2) of EPCA is either (a) used oil from which physical and chemical contaminants acquired through prior use of the oil have been removed by refining or other processing, or (b) any blend of re-refined or otherwise processed used oil and new oil or additives, that, for either (a) or (b), the manufacturer has determined, pursuant to the Commission's rule, is substantially equivalent to new oil for a particular end use.

⁴ 42 U.S.C. 6363(d)(1)(B).

⁵ 42 U.S.C. 6363(e)(1).

⁶ 42 U.S.C. 6363(e)(2).

⁷ 16 CFR 406.

⁸ 16 CFR 406.5.

⁹ Used Oil Recycling Act of 1980, Pub. L. 96-463, 94 Stat. 2055 (codified as amended in scattered sections of 42 U.S.C.). Section 4(c) of the Used Oil Recycling Act provides that before the effective date of the FTC rule prescribed under section 383 of EPCA, no requirement of any rule or order of the FTC could remain applicable if it required that a container of recycled oil bear any label referring to the fact that its contents were derived from previously used oil. However, section 4(c) does not restrict the ability of the FTC to regulate the labeling of oil on the basis of performance characteristics or fitness for its intended use. See 42 U.S.C. 6363 note.

legislative history of the Used Oil Recycling Act indicates that Congress was concerned that the requirement in the FTC's Rule that previously used oil be labeled as such was having an adverse impact on consumer acceptance of recycled oil, provided no useful information to consumers concerning the performance of the oil, and was inhibiting recycling. The re-refining industry and environmental community contended that such labeling gave consumers the incorrect impression that the product is inferior, while providing no information relating to its quality. According to Congress, the intent of section 383 of EPCA was clear. "Oil should be labeled on the basis of performance characteristics and fitness for intended use, and not on the basis of the origin of the oil."¹⁰ The legislative history also states that the Commission, in response to a petition of the Association of Petroleum Refiners, published a proposed Statement of Enforcement Policy on August 19, 1980 announcing its intention to replace the term "used" with "recycled" on the belief that the term "recycled" connotes more accurately the origin and processing of the product.¹¹ However, the Association of Petroleum Refiners expressed its concern to Congress that even the term "recycled" was likely to inhibit sales of re-refined oil because the label might suggest that the product is in some way inferior. The Commission's proposed Statement of Enforcement Policy would become effective on October 18, 1980. However, the Used Oil Recycling Act, which was enacted just days before, suspended any Commission labeling requirements until a final Commission rule is issued under EPCA.

Accordingly, on April 8, 1981, the Commission published a notice announcing the statutory suspension of the origin labeling requirements of the Used Oil Rule and relevant orders. In the same notice, the Commission announced a Statement of Enforcement Policy suspending enforcement of those portions of the Used Oil Rule and Commission orders requiring that advertising and promotional material disclose the origin of lubricants made from used oil.¹²

¹⁰ See Legislative History Pub. L. 96-463, U.S. Code Cong. and Adm. News, pp. 4354-4356 (1980).

¹¹ Id.

¹² 46 FR 20979. There are 12 Commission orders requiring oil processors/manufacturers to cease advertising and selling their products without disclosing that such products are refined, reclaimed, or reprocessed. *Dabrol Products Corp.*, 70 F.T.C. 1099 (1949); *Pennsylvania Oil Terminal, Inc.*, 48 F.T.C. 356 (1951); *High Penn Oil Co., Inc.*, 53 F.T.C. 256 (1956); *Supreme Petroleum Products Inc.*, 54 F.T.C. 1129 (1956); *Royal Oil Corp.*, 70

C. Basis for this Proceeding

On July 27, 1995, NIST reported to the Commission the test procedures for the determination of the substantial equivalency of processed used engine oils with new engine oils.¹³ The test procedures and performance standards reported by NIST for such processed used engine lubricating oils are the same as those adopted by the American Petroleum Institute ("API") for engine lubricating oils generally, irrespective of the origin of the oil. As required by EPCA, the Commission is proposing in this notice a rule regarding the labeling of containers of recycled engine oil.

D. The Used and Re-refined Oil Markets

According to the Environmental Protection Agency, approximately 1.5 billion gallons of used oil are made available for collection or disposal each year. Of this 1.5 billion, some 900 million gallons are collected; the remaining 600 million gallons are disposed of improperly. Of the 900 million gallons that are collected, approximately 100 million gallons are used as feedstock for re-refineries. The primary use for used oil is as fuel for industrial boilers and marine engines. Re-refined oil is used oil from which all contaminants have been removed. Re-refiners use a sophisticated process, including hydrotreating,¹⁴ to produce re-refined base oils that pass the API tests and meet the International Lubricant Standardization and Approval Committee requirements for motor oils.

The volume of re-refined base oil sold or used in the United States is approximately 65 million gallons per year. This represents a relatively small, but still significant, portion of the total U.S. lubricating oil market of some 1.2 billion gallons per year. The principal products made from re-refined based oils are: gear lubricants, hydraulic oils, power transmission fluids, passenger car motor oils, diesel engine oils, and railroad diesel engine oils. Virgin oils

F.T.C. 629 (1957); *Acme Refining Corp.*, 54 F.T.C. 1126 (1958); *Allied Petroleum Corp.*, 54 F.T.C. 1132 (1958); *Deep Rock Refining Co.*, 54 F.T.C. 1123 (1958); *Double Eagle Refining Co.*, 54 F.T.C. 1035 (1958); *Mohawk Refining Corp.*, 54 F.T.C. 1071 (1958); *Seaboard Oil Co.*, 54 F.T.C. 1135 (1958); *Salyer Refining Co.*, 54 F.T.C. 1026 (1958).

¹³ NIST recently has been involved with the subject of re-refined oil pursuant to a 1993 Executive Order, which, in part, requires federal agencies to implement procurement guidelines for re-refined lubricating oil, and requires NIST to establish a program for testing the performance of products containing recovered materials. See Exec. Order No. 12,873, 58 FR 54911 (1993).

¹⁴ Hydrotreating is a re-refining process in which oil is first distilled and then reacted with hydrogen to eliminate contaminants (such as chlorine and polynuclear aromatics) that an ordinary distillation process would not eliminate.

are also used to produce all of these products.

The principal customers for re-refined base oils are lubricant manufacturers who produce the various products mentioned above. These products are sold in the same markets as lubricants made from virgin base oil. For example, some re-refiners sell base oil to other manufacturers for use in producing finished lubricant products, and some directly produce finished products that may then be sold to distributors, mass merchandisers, and large private end-users.

II. Scope of the Proposed Rule

As discussed above, EPCA directs the Commission to issue a rule prescribing: (1) test procedures for determining the substantial equivalency of processed used oil with new oil for a particular end use; and (2) labeling standards applicable to containers of such recycled oil.¹⁵ NIST has reported test procedures and performance standards for determining the substantial equivalency of processed used engine oils with new engine oils. Until NIST develops test procedures for other end uses, the scope of the rule is limited to engine oil.

III. Section-by-Section Discussion of Proposed Rule

EPCA gives the Commission broad latitude to prescribe labeling standards to effectuate the statute's purposes. EPCA, however, requires that the Commission's rules permit any container of processed used oil to bear a label indicating any particular end use for which a determination of "substantial equivalency" with new oil has been made in accordance with the test procedures prescribed by the Commission.¹⁶ EPCA further states that the Commission's rule may not require any container of recycled oil to also bear a label containing any term, phrase, or description connoting less than substantial equivalency of such recycled oil with new oil.¹⁷

Section 311.1

Section 311.1 of the proposed rule defines the following terms, which are used in the proposed regulation: "manufacturer," "new oil," "recycled oil," and "used oil." These are the principal terms defined in section 383(b) of EPCA.¹⁸ The proposed rule, however, also adds definitions for "re-refined oil" and "processed used oil,"

¹⁵ 42 U.S.C. 6363(d)(1)(A).

¹⁶ 42 U.S.C. 6363(d)(1)(B).

¹⁷ 42 U.S.C. 6363(e)(2).

¹⁸ 42 U.S.C. 6363(b).

and includes a revised, shorter definition for "recycled oil." The Commission seeks comment on whether additional terms should be included and defined in section 311.1 of the final rule.

Section 311.2

Section 311.2 of the proposed rule is a general provision that states if any part of the Commission's rule is stayed or held invalid, the rest of the rule will remain in force.

Section 311.3

Section 311.3 of the proposed rule is a preemption provision that tracks the preemption language contained in section 383(e)(1) of EPCA.¹⁹ Section 383(e)(1) states that "no rule or order of the Commission, other than the rule required to be prescribed pursuant to section 383(d) of EPCA, and no law, regulation, or order of any State or political subdivision thereof may remain applicable to any container of recycled oil, if the law, regulation, rule, or order requires that containers of recycled oil, which bear a label in accordance with the terms of the Commission's rule prescribed under section 383(d) of EPCA, bear any label with respect to the comparative characteristics of recycled oil with new oil that is not identical to that permitted by the Commission's rule respecting labeling standards prescribed under section 383(d) of EPCA."²⁰ The statute's preemptive effect is limited to recycled oil that meets the definition of recycled oil in EPCA (i.e., oil that is substantially equivalent to new oil pursuant to FTC-specified test procedures).

Section 383(e)(1) appears to intend that there be one uniform labeling requirement regarding the comparative characteristics of recycled oil (for a particular end use). If a container of recycled oil is labeled in accordance with the FTC's EPCA rule, neither the FTC nor any state or political subdivision can require any additional or different disclosure. By preventing multiple labeling requirements, this section furthers the Congressional purpose "to promote the use of recycled oil."

The proposed rule permits manufacturers to choose how they convey substantial equivalency (if they meet the specified test procedures for substantial equivalency). State laws that require specific disclosures (e.g., that the product is recycled) or have specific format requirements (e.g., specific print size requirements for their disclosures)

would be preempted because they would require a label that is not "identical to that permitted by the (FTC's) rule. . . ." States, however, may adopt labeling requirements identical to those required by the FTC, if they wish, and prosecute violations under state law.

Section 383(e)(2) of EPCA also restricts Commission rules and orders, stating "the Commission may [not] require any container of recycled oil to also bear a label containing any term, phrase, or description which connotes less than substantial equivalency. . . ." To some extent this section overlaps with section 383(e)(1) of EPCA. But, whereas section (e)(1) expresses Congressional intent that there be a national uniform labeling standard, preempting non-identical state laws, section (e)(2) is specifically aimed at prohibiting Commission label requirements in addition to what the Commission prescribes under section 383(d)(1) of EPCA if the additional requirements would create the impression that the recycled oil is not substantially equivalent to recycled oil.

For example, the Commission's Used Oil Rule requires disclosures in advertising and on labeling that recycled oil is used.²¹ When the Commission issues its final rule based on the equivalency determination for engine oil, the Used Oil Rule's requirements for origin labeling with respect to engine oil will be preempted pursuant to section 383(e) of EPCA.²² Accordingly, the Commission need not take further action to repeal those portions of the Used Oil Rule. Further, the relevant labeling origin provisions of the Used Oil Rule and the twelve Commission orders concerning recycled oil²³ continue to be subject to

²¹ Specifically, the Used Oil Rule, in part, requires manufacturers to disclose "clearly and conspicuously that such used lubricating oil has been previously used, in all advertising, promotional material and on each front or face panel of the container." 16 CFR 406.5(b)(2).

²² For example, the legislative history of the Used Oil Recycling Act reveals Congress' concern that the requirement in the FTC's rule was having an adverse impact on consumer acceptance of recycled oil. The re-refining industry expressed dissatisfaction with the Commission's proposal to substitute the term "recycled" for the term "used" in the Used Oil Rule, since it too might suggest that the product is in some way inferior. Similarly, EPCA's history indicates that Congress believed that disclosures conveying the origin of oil (words like used, recycled, re-refined) did not provide information that would be useful or relevant to consumers. Congress made clear that disclosures should instead pertain to performance characteristics and fitness for intended use.

²³ These orders will be eliminated if the Commission adopts as final its proposed rule for sunsetting administrative consumer protection orders over twenty years old. Duration of Existing

Congressional stay of enforcement as to non-engine oils.²⁴ (The Used Oil covers other lubricating oils as to which the EPCA preemption does not apply.) The Commission also is continuing its 1981 stay of the origin advertising provisions of the Used Oil Rule as to all oils.²⁵

Section 311.4

In accordance with section 383(d)(1)(A)(i) of EPCA,²⁶ section 311.4 of the proposed rule prescribes test procedures for determining the substantial equivalency of processed used oil with new oil distributed for use as engine oil. The test procedures, as reported to the Commission by NIST, are found in American Petroleum Institute Publication 1509, Thirteenth Edition, January 1995, entitled "Engine Oil Licensing and Certification System."²⁷ In its letter transmitting the test procedures to the Commission, NIST stated that the engine test procedures described in API Publication 1509 combined with the API Engine Oil Licensing and Certification System are accepted for use with automotive engine oils by the Society of Automotive Engineers, the American Society of Testing and Materials, and all major automotive engine manufacturers.

The American Petroleum Institute operates a voluntary licensing and certification system that is designed to provide consumers with the technical information needed to understand the performance, viscosity, and accepted use of engine oils. Under this system, API licenses two types of "Marks" which may appear on the labeling of qualified engine oils: The API Service Symbol and the API Certification Mark. The Service Symbol identifies the type of engine in which the oil should be used, explains the oil's characteristics, and describes the oil's ability to protect against wear, sludge, and corrosion. The symbol also contains a rating of the oil's viscosity that is based on specifications established by the Society of Automotive Engineers. Finally, the symbol indicates whether the oil has any energy conserving properties when compared to a standard reference oil.

The API Certification Mark identifies engine oils recommended for a specified use. An engine oil is eligible to receive

Competition and Consumer Protection Orders, 60 FR 42,481 (1995).

²⁴ 42 U.S.C. 6363 note.

²⁵ 46 FR 20,979.

²⁶ 42 U.S.C. 6363(d)(1)(A)(i).

²⁷ The Commission will be seeking approval from the Director of the Federal Register to incorporate this document by reference into section 311.4 of the final rule, as required by section 552(a) of the APA, 5 U.S.C. 552(a), and by regulations issued by the Office of the Federal Register, 1 CFR 51.

¹⁹ 42 U.S.C. 6363(e)(1).

²⁰ *Id.*

the API Certification Mark only if it satisfies the minimum performance standards established by the International Lubricant Standardization and Approval Committee ("ILSAC"). To receive ILSAC approval and, in turn, API certification, motor oils must pass a series of tests designed to evaluate the following factors: (1) The oil's performance and its effect on the engine at zero degrees Fahrenheit or lower; (2) the extent to which the oil prevents engine rust and corrosion; (3) the oil's fuel efficiency; (4) the capability of the oil to reduce friction and to protect moving parts within the engine from fusing together; (5) the oil's resistance to thickening under high temperatures up to three hundred degrees Fahrenheit; (6) the level of detergents and dispersants in the oil; and (7) the content of phosphorus in the oil. The current standards for these factors, as well as the applicable test procedures, are found in Appendices D, E, F, G, I, J, K, L, M, and N of API Publication 1509.

Section 311.5

In accordance with section 383(d)(1)(A)(ii) of EPCA,²⁸ section 311.5 of the proposed rule prescribes labeling standards applicable to containers of recycled oil. Section 311.5 states that a manufacturer may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for engine use, but only if the manufacturer has determined the substantial equivalency of the oil to new oil for that particular end use in accordance with the test procedures prescribed by the Commission, and has based the representation on that determination. For example, a manufacturer could represent that its oil is substantially equivalent to new oil by displaying the API Mark on its container. A manufacturer would not be required to add any qualifiers to its label such as "used" or "re-refined."

The Commission's proposal focuses on the performance of oil and its fitness for an intended use rather than its origin, and thus should encourage the recycling of used oil, encourage the use of recycled oil, and reduce consumption of new oil by promoting increased utilization of recycled oil. Because the proposed rule does not mandate the use of specific disclosures, recycled oil manufacturers have flexibility to promote the performance of their products and their "substantial equivalency" with new oil and develop marketing strategies for various markets. For example, the proposed rule does not restrain manufacturers from voluntarily

labeling recycled oil containers with terms or phrases such as "recycled" to assist in the marketing of their products.²⁹

Section 311.6

Section 311.6 of the proposed rule tracks the language relating to prohibited acts and enforcement of the Commission's rule contained in sections 524 and 525 of EPCA.³⁰ Pursuant to section 524 of EPCA, it is a prohibited act to violate the Commission's final rule issued pursuant to section 383 of EPCA.³¹ The proposed rule declares that it is unlawful for any manufacturer to represent, on a label on a container of processed used oil, that the processed used oil is substantially equivalent to new oil for engine use unless the manufacturer has based such representation on the manufacturer's determination of the substantial equivalency of the processed used oil to new oil for use as engine oil in accordance with the test procedures prescribed under section 311.4 of the proposed rule.

The proposed rule also provides that violations will be subject to enforcement in accordance with section 525 of EPCA. Section 525 of EPCA provides that whoever violates the Commission's final rule is subject to a civil penalty of not more than \$5,000 for each violation.³² Whoever willfully violates the Commission's rule shall be fined not more than \$10,000 for each violation.³³ Any person who knowingly and willfully violates the Commission's rule after having been subjected to a civil penalty for a prior violation of the rule, shall be fined not more than \$50,000, or imprisoned not more than six months, or both.³⁴ Further, pursuant to section 525 of EPCA, whenever it appears to any officer or agency of the United States (in whom is vested, or to whom is delegated, authority under EPCA) that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of the Commission's rule, such officer or agency may request the Attorney General to bring an action in an appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing, a temporary restraining order or a preliminary or permanent injunction

²⁹ Manufacturers should, of course, consider the Commission's Guides For The Use Of Environmental Marketing Claims. See e.g., 16 CFR 260.7(e).

³⁰ 42 U.S.C. 6394(2) and 42 U.S.C. 6395.

³¹ 42 U.S.C. 6394(2).

³² 42 U.S.C. 6395(a).

³³ 42 U.S.C. 6395(b).

³⁴ 42 U.S.C. 6395(c).

shall be granted without bond. Any such court also may issue mandatory injunctions commanding any person to comply with the Commission's rule.³⁵

Because section 525 of EPCA does not explicitly authorize the Commission to bring enforcement actions, this rule will be enforced by the Department of Justice under 28 U.S.C. 516, a provision that authorizes the Department of Justice to enforce statutes that are not specifically assigned to other agencies for enforcement. The Commission, however, has the authority to investigate violations, and make referrals to the Department of Justice pursuant to section 525(d) of EPCA.³⁶

IV. Effective Date

EPCA directs the Commission to "prescribe" the relevant test procedures and pertinent labeling standards within 90 days after the date on which NIST reports such test procedures to the Commission. It does not, however, specify an effective date for the rule. The Commission proposes that the rule become effective 30 days after publication of a final rule in the **Federal Register**. The Commission seeks comment on whether the proposed effective date will allow affected interests sufficient time to comply with the proposed labeling standards.

V. Invitation To Comment

The Commission invites interested persons to address any questions of fact, law, or policy that they believe may bear upon the proposed rule. The Commission particularly desires comment, however, on the questions listed below. All comments should reference the aspect of the proposed rule or question being discussed. Comments opposing the proposed rule or specific provisions should, if possible, suggest a specific alternative. Proposals for alternative regulations should include reasons and data explaining why the alternative would better serve the purposes of section 383 of EPCA.

Before adopting a final rule, consideration will be given to any written comments timely submitted to the Commission. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act³⁷ and the Commission's Rule of Practice,³⁸ during normal business days from 8:30 a.m. to 5 p.m., at the Public Reference Room, Room 130, Federal Trade Commission,

³⁵ 42 U.S.C. 6395(d).

³⁶ 42 U.S.C. 6395(d).

³⁷ 5 U.S.C. 552.

³⁸ 16 CFR 4.11.

²⁸ 42 U.S.C. 6363(d)(1)(A)(ii).

6th and Pennsylvania Ave., NW., Washington, DC 20580.

A. Proposed Labeling Rule

The Commission is proposing labeling standards applicable to containers of recycled engine oil. The proposed rule also prescribes test procedures, as reported to the Commission by NIST, for determining the substantial equivalency of processed used engine oil to new oil, and includes definition, preemption and prohibited acts sections that track the language contained in sections 383, 524, and 525 of EPCA. The Commission seeks comment on all aspects of its proposal. The questions below also include those that are routinely asked in conducting FTC regulatory reviews.³⁹

(1) Is the Commission's proposal consistent with, and does it promote, the purposes of section 383 of EPCA? If yes, why; if no, why not?

(2) Should the Commission issue its proposal relating to the labeling of recycled engine oil containers as a final rule? If yes, why; if no, why not?

(3) What are the advantages of the Commission's proposal?

(4) What changes, if any, should be made to the proposed rule to increase the benefits of the rule?

(a) How would these changes affect the costs the proposed rule would impose on firms subject to its requirements?

(5) What significant burdens or costs, including costs of compliance, will the proposed rule impose on firms subject to its requirements?

(a) Will the proposed rule provide benefits to such firms?

(b) To what extent will consumers of recycled engine oils benefit or be harmed by the Commission's proposal?

(c) How will the Commission's proposal affect the consumption of recycled engine oil relative to new engine oil?

(6) What changes, if any, should be made to the proposed rule to reduce the burdens or costs that would be imposed on firms subject to its requirements?

(a) How would these changes affect the benefits provided by the proposed rule?

(7) Should the Commission require or permit any additional or alternative disclosures, or variations on the proposed labeling standards? If yes, how should the Commission's proposal be modified, and why; if no, why not?

(8) To what extent would any recycled oil container labeling

requirements specified by law (either federal, state, or local) be affected by the Commission's proposal?

(9) Are there additional appropriate and meaningful definitions that the Commission should include in section 311.1 of the final rule? If yes, what should they be, and why; if no, why not?

B. Effective Date

The Commission proposes that its rule become effective 30 days after publication of a final rule in the **Federal Register**.

(1) Does the proposed effective date allow affected interests sufficient time to comply with the proposed rule? If yes, why; if no, why not? How much extra time would be necessary to comply with the proposed rule? Why is that extra time necessary?

C. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")⁴⁰ requires agencies to prepare regulatory flexibility analyses when publishing proposed rules⁴¹ unless the proposed rule, if promulgated, would not have a "significant economic impact on a substantial number of small entities."⁴² Here, the economic impact of the proposed labeling standards appears to be *de minimis*. The Commission's proposed rule permits, rather than requires, any container of recycled oil to bear a label indicating that it is substantially equivalent to new engine oil, if such determination has been made in accordance with the test procedures prescribed in the proposed rule. Any economic costs incurred by entities that choose to make a determination of substantial equivalency are neither statutorily imposed nor imposed by the proposed regulations. The Commission proposes no reporting or recordkeeping requirements, and the proposed rule permits recycled oil containers to be labeled with information that is basic and easily ascertainable.

The Commission also tentatively concludes that the proposed rule also will not affect a substantial number of small entities because information the Commission currently possesses indicates that relatively few companies currently manufacture and sell recycled oil as engine oil. Of those that do, most are not "small entit[ies]" as that term is defined either in section 601 of RFA⁴³ or applicable regulations of the Small Business Administration.⁴⁴

In light of the above, the Commission certifies, pursuant to section 605 of RFA, 5 U.S.C. 605, that the proposed rule would not, if promulgated, have a significant impact on a substantial number of small entities and, therefore, that a regulatory analysis is not necessary. The Commission requests comment on this certification, and whether the proposed rule will have a significant impact on a substantial number of small entities. After reviewing any comments received on this subject, the Commission will decide whether the preparation of a final regulatory-flexibility analysis is appropriate.

D. Paperwork Reduction Act

If promulgated, the Commission's proposed rule would not involve the "collection of information" as defined by the regulations of the Office of Management and Budget ("OMB")⁴⁵ implementing the Paperwork Reduction Act ("PRA").⁴⁶ The Commission's proposed rule contains no reporting, recordkeeping, labeling or other third-party disclosure requirements, so there is no "information collection" in this proceeding to submit to OMB for clearance. However, to ensure the accuracy of its conclusion, the Commission solicits comment on any paperwork burden that the public believes the proposed requirements may impose.

VI. Additional Information for Interested Persons

A. Motions or Petitions

Any motions or petitions in connection with this proceeding must be filed with the Secretary of the Commission.

B. Communications by Outside Parties to Commissioners or Their Advisors

Pursuant to Commission Rule of Practice 1.18(c),⁴⁷ communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor during the course of this rulemaking shall be subject to the following treatment: Written communications, including written communications from members of Congress, shall be forwarded promptly to the Secretary for placement on the public record. Oral communications, not including oral communications from members of Congress, are permitted only when such oral communications are transcribed verbatim or summarized at the

³⁹The Commission has implemented a program to review all of its current and proposed rules and guides. One purpose of the review is to minimize the economic impact of new regulatory actions by seeking comment on, for example, regulatory options.

⁴⁰ 5 U.S.C. 601-612.

⁴¹ 5 U.S.C. 603(a).

⁴² 5 U.S.C. 605(b).

⁴³ 5 U.S.C. 601(6).

⁴⁴ 13 CFR 121.

⁴⁵ 5 CFR 1320.7(c).

⁴⁶ 44 U.S.C. 3501-3520.

⁴⁷ 16 CFR 1.18(c).

discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications. Oral communications from members of Congress shall be transcribed or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and promptly placed on the public record, together with any written communication and summaries of any oral communications relating to such oral communications.

List of Subjects in 16 CFR Part 311

Energy conservation, Incorporation by reference, Labeling, Recycled oil, Trade practices.

Text of Proposed Rule

Accordingly, it is proposed that Chapter I of 16 CFR be amended by adding a new part 311 to Subchapter C to read as follows:

PART 311—LABELING STANDARDS FOR RECYCLED OIL CONTAINERS

Sec.

311.1 Definitions.

311.2 Stayed or invalid parts.

311.3 Preemption.

311.4 Testing.

311.5 Labeling.

311.6 Prohibited acts.

Authority: 42 U.S.C. 6363(d)

§ 311.1 Definitions.

As used in this Part:

(a) *Manufacturer* means any person who re-refines or otherwise processes used oil to remove physical or chemical impurities acquired through use or who blends such re-refined or otherwise processed used oil with new oil or additives.

(b) *New oil* means any oil which has been refined from crude oil and has not been used, and which may or may not contain additives. Such term does not include used oil or recycled oil.

(c) *Processed used oil* means re-refined or otherwise processed used oil or blend of oil, consisting of such re-refined or otherwise processed used oil and new oil or additives.

(d) *Recycled oil* means processed used oil with respect to which the manufacturer has determined, pursuant to § 311.4 of this part, is substantially equivalent to new oil for use as engine oil.

(e) *Used oil* means any oil which has been refined from crude oil, has been used, and as a result of such use has been contaminated by physical or chemical impurities.

(f) *Re-refined oil* means used oil from which physical and chemical contaminants acquired through use have been removed.

§ 311.2 Stayed or invalid parts.

If any part of this rule is stayed or held invalid, the rest of it will remain in force.

§ 311.3 Preemption.

No law, regulation, or order of any State or political subdivision thereof may apply, or remain applicable, to any container of recycled oil, if such law, regulation, or order requires any container of recycled oil, which container bears a label in accordance with the terms of § 311.5 of this Part, to bear any label with respect to the comparative characteristics of such recycled oil with new oil that is not identical to that permitted by § 311.5 of this Part.

§ 311.4 Testing.

To determine the substantial equivalency of processed used oil with new oil for use as engine oil,

manufacturers must use the test procedures that were reported to the Commission by the National Institute of Standards and Technology ("NIST") on July 27, 1995, entitled "Engine Oil Licensing and Certification System," and found in Publication 1509 of the American Petroleum Institute ("API"), Thirteenth Edition, January, 1995.

§ 311.5 Labeling.

A manufacturer may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil only if the manufacturer has determined that the oil is substantially equivalent to new oil for use as engine oil in accordance with the NIST test procedures prescribed under § 311.4 of this Part, and has based the representation on that determination.

§ 311.6 Prohibited acts.

It is unlawful for any manufacturer to represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil unless the manufacturer has based such representation on the manufacturer's determination that the processed used oil is substantially equivalent to new oil for use as engine oil in accordance with the NIST test procedures prescribed under § 311.4 of this Part. Violations will be subject to enforcement through civil penalties, imprisonment, and/or injunctive relief in accordance with the enforcement provisions of Section 6395 of the Energy Policy and Conservation Act (42 U.S.C. 6395).

By direction of the Commission.

Donald S. Clark,

Secretary.

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