

(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, Airframe Branch, ACE-118W, FAA, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209

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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

¹ 75 FR 12470 (Mar. 16, 2010).

² 76 FR 19684 (Apr. 8, 2011).

³ EPA made this decision through a two-step process. First, the agency approved E15 for 2007 and newer vehicles.

⁴ 75 FR 68094 (Nov. 4, 2010). Then, it expanded its approval to 2001 and newer vehicles, based on additional test data.

⁵ 76 FR 4662 (Jan. 26, 2011). For ease of discussion, this document refers to them together as the EPA "waiver decision."

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.²⁰ 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.²¹

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].”²² RFA asserted that, under

²⁰ The following commenters specifically supported Growth Energy’s comment: Bob Haskins Racing; “Eichstadt”; Kuff-Ferker; 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.

²¹ 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.

²² 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).

²³ RFA comment at 3.

²⁴ .

²⁵ RFA comment at 3.

²⁶ 15 U.S.C. 2821(17) (emphasis added).

²⁷ Growth Energy comment at 11.

²⁸ . at 11–12.

²⁹ 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.

³⁰ Growth Energy comment at 8.

³¹ RFA comment at 2–3 (internal quotation marks omitted).

³² . 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. . at 14.

³³ 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.

³⁴ . . . 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.³⁵

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.”³⁶ ACE likewise argued that the need for “may harm some vehicles” is “unsupported by any of the data” in the March 2009 record.³⁷

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.³⁸ 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.”³⁹

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.⁴⁰ 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.⁴¹ 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.^{42,43}

³⁵ RFA comment at 6–7.

³⁶ Growth Energy comment at 15.

³⁷ ACE comment at 2.

³⁸ . . . 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.” *75 FR* at 12471 for further discussion. As discussed below, evidence submitted in response to the NPRM contradicts AAM’s comment.

³⁹ RFA comment at 3.

⁴⁰ . . . 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.

⁴¹ Growth Energy comment at 15.

⁴² ICM, Inc. comment at 1.

⁴³ ACE comment at 2.

⁴⁴ . . .

⁴⁵ . . . , David Gloer comment; Kurt Felker comment; Patrick Reid comment.

⁴⁶ 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.

⁴⁷ . . . , ACE comment at 2; Growth Energy comment at 18; ICM, Inc. comment at 2.

⁴⁸ . . . , 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.

⁴⁹ ICM, Inc. comment at 2.

⁵⁰ Tennessee Department of Agriculture comment at 2.

⁵¹ New York Department of Environmental Conservation comment at 2.

⁵² Growth Energy comment at 18; . . . , Patrick Reid comment; David Gloer comment.

⁵³ Marathon comment at 1.

⁵⁴ API comment at 3.

⁵⁵ 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 emissions, malfunction of the engine, degradation of the catalyst or engine, and invalidation of the manufacturer warranty on the vehicle emissions control systems[.]⁵⁶

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."⁵⁷ 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."⁵⁸

Moreover, Petroleum Marketers and Convenience Stores of Iowa ("PMCI"), an Iowa fuel retailer group, reported that ethanol misfueling occurs in the absence of labeling.⁵⁹ 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 commenters⁶⁰ criticized the proposed labels for inadequately warning non-automotive engine owners of ethanol misfueling risks.⁶¹ 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.⁶² NMMA noted

that ethanol blends can adversely impact boat engines.⁶³

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.⁶⁴ API supported the disclosure along with legal prohibition language, an advisement that the fuel "may damage" non flex-fuel vehicles, and the word "WARNING."⁶⁵ Commenters CVEF, Marathon, AIAM, and PMCI also favored "For Flex-Fuel Vehicles Only" (or something very similar).⁶⁶ 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."⁶⁷

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.⁶⁸

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.⁶⁹

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."⁷⁰

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.⁷¹ MDA supported a disclosure of the exact ethanol percentage.⁷² Others suggested allowing some flexibility. For example,

⁶⁸ 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.

⁶⁹ James Hyde comment at 1.

⁷⁰ 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. . . . at 2.

⁷¹ 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 (i.e., a label disclosing the BTU per gallon of fuel sold). AllSAFE comment at 10-11.

⁷² MDA comment at 1. MDA favored an exact disclosure for only blends below 70 percent concentration. . . .

⁵⁶ CAS comment at 2 (citations omitted).

⁵⁷ CVEF comment at 1.

⁵⁸ PMAA comment at 1-2. 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.").

⁵⁹ 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. PMAA comment at 1 (stating that "misfueling would increase" in the absence of labeling).

⁶⁰ Louis Ehlers comment (supporting an ethanol disclosure so consumers can select proper fuel for use in airplanes).

⁶¹ Several petroleum companies and associations agreed that ethanol fuels pose risks to non-road engines. Marathon comment at 1.

⁶² AllSAFE comment at 4.

⁶³ NMMA comment at 4. 75 FR at 68129-37 (discussing non-suitability of E15 for non-road engines, vehicles, and equipment).

⁶⁴ 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.

⁶⁵ API comment at 4.

⁶⁶ 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.

⁶⁷ CAS comment at 2.

⁷⁸ 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. AAM comment at 2; AIAM comment at 2; AIISAFE comment at 6-7; NMMA comment at 2; National Petrochemical & Refiners Association ("NPRA") 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.

⁷⁹ "Light-duty" vehicles include passenger cars, light-duty trucks, and medium-duty passenger vehicles. 75 FR at 68095.

⁸⁰ 75 FR at 68149-50.

⁸¹ Valero comment at 2; V. Tromsubmit omby individu)Tjend Agri01, 40 CFR Part 80, 76 FR 44406, 44407 (July 25, 2011).

⁸² 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.

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⁷³ Tennessee Department of Agriculture comment at 2.

⁷⁴ Growth Energy comment at 17-18.

⁷⁵ ICM, Inc. comment at 2; David Gloer comment.

⁷⁶ 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.

⁷⁷ 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. 42 U.S.C. 7545(f).

⁹⁰ , 76 FR at 44437 (emphasis in original). This misfueling prohibition does not extend to ethanol-blend use in newer conventional vehicles.

⁹¹ 40 CFR 80.1506 (amendment as codified); ⁹² , 76 FR at 44449 .

⁹² , 76 FR at 44408.

⁹³
⁹⁴ at 44418.

⁹⁵ at 44414.

⁹⁶ at 44415.

⁹⁷ Growth Energy comment at 4–5; API comment at 2.

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

Level Ethanol blends” as “alternative fuels,” pointing to a definition of that term in the Energy Policy Act of 1992 authorizing DOE to determine

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].¹⁰¹

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.”¹⁰²

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.”¹⁰³

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.¹⁰⁴ In addition, Tesoro submitted specific language to effect its proposed change.¹⁰⁵

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.”¹⁰⁶ 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.

¹⁰¹ . at 2.

¹⁰² . at 4.

¹⁰³ . at 6.

¹⁰⁴ . at 7.

¹⁰⁵ . 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.

¹⁰⁶ Washington State Department of Agriculture comment; 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.¹⁰⁷

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.¹⁰⁸

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.

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 described 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.¹⁰⁹ This will facilitate uniform labeling requirements for ethanol blends, which should assist consumers in quickly identifying ethanol blends at pumps.¹¹⁰

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.¹¹¹ 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.¹¹²

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

¹⁰⁹ 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.

¹¹⁰ 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. 15 U.S.C. 2821(6).

¹¹¹ 15 U.S.C. 2821(17); 1993 . . . , 58 FR 41361.

¹¹² 1993 . . . , 58 FR at 41361.

¹⁰⁷ NCWM comment at 3–4.

¹⁰⁸ 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,¹¹³ 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.¹¹⁴ 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.

¹¹³ PMAA comment at 1; Tennessee Department of Agriculture comment at 1.

¹¹⁴ 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 comments¹¹⁵ 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.”¹¹⁶ 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

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

¹¹⁶ MDA comment at 2. NCWM’s comment did not address this issue.

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

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.¹¹⁸ The record, however, shows a risk that misfueling may harm conventional vehicles and non-road engines.¹¹⁹ 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.”¹²⁰

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

¹¹⁷ 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.

¹¹⁸ 2010 P. 75 FR at 12471. On November 15th, EPA proposed reducing the 2014 renewable mandate due to a limited market and production capacity for renewables. 2014 P. 40 P. 80, 78 FR 71732 (Nov. 29, 2013). However, EPA indicated that it remained committed to increasing the amount of renewable fuel in the market. 2014 P. 80 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.”).

¹¹⁹ 2010 section III.A.2.b,

¹²⁰ 2010 P. 75 FR at 68103.

¹³¹ 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.

¹³² 15 U.S.C. 2823(c)(1)(B).

¹³³ 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.”

¹³⁴ 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).

¹³⁵ 1993 *et al.*, 58 FR at 41356.

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."¹⁴³ 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."¹⁴⁴ 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."¹⁴⁵ 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 3339 Tm (143)Tj* (a44 Tw -13.285 -0nm (eartheutomotith j 0 T4 9 0 0 9 361.5643 725 T29 instaattide consumwwitsp1 TD uensuri spceg. iF oi ir 3339 Tm befpropJune 2, 2014. Wrcla "F2 R

¹⁴⁵ 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* 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).

¹⁴⁶ 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.

¹⁴⁷ 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).

¹⁴³ *Id.*, v. *Id.*, 499 U.S. 117, 129 (1991).

¹⁴⁴ RFA comment at 2.

already employed by industry members, namely, administrative.

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.

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, 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) (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 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:

* * * * *

(i) 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) 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



(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 IN." It is in 16 point font,

except for the word "ONLY," which is in 26 point font. The word "ONLY"

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