April 7, 2008

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex F)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Via: ***http://secure.commentworks.com/ftc-biodiesel***

Re: Biodiesel Labeling -- Fuel Ratings, Certification and Posting (RIN #3084-AA45)

To Whom It May Concern:

The American Trucking Associations, Inc.[1] ("ATA") is writing to provide comments on the Federal Trade Commission's ("FTC") notice of proposed rulemaking concerning biodiesel labeling (hereinafter the "Proposed Rule").[2] As the national representative of the trucking industry, ATA is interested in matters affecting the sale of diesel fuel, including the manner in which biodiesel is dispensed at retail refueling stations.

Diesel fuel is the lifeblood of the trucking industry. Last year, the trucking industry required 39 billion gallons of diesel fuel to deliver virtually all of the nation's consumer goods. As the largest consumer of diesel fuel, the trucking industry is impacted by the distribution of diesel fuel alternatives, such as biodiesel. While low percentage blends of high quality biodiesel are an acceptable means to extend the nation's supply of diesel fuel, poor quality biodiesel or biodiesel blends exceeding five percent create operational challenges for motor carriers.

For this reason, ATA worked hard to ensure that Congress included biodiesel labeling provisions in the Energy Independence and Security Act of 2007 (the "Act"). We are pleased that the FTC has moved quickly to implement the biodiesel labeling provisions contained in the Act and offer the following supportive comments on the Proposed Rule.

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[1] ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

[2] *See* Automotive Fuel Ratings, Certification and Posting, 73 *Federal Register* 12916 (March 11, 2008).

A. The Impact of Various Biodiesel Blends on the Trucking Industry

Biodiesel use raises concerns over engine warranties, fuel economy, cold weather performance, and increased maintenance requirements. These important operating factors are affected by different biodiesel blend percentages. We discuss each of these factors below:

(1) Engine Warranties. All heavy duty diesel engines sold in the United States are designed and warranted to operate on diesel fuel formulated to meet the American Society of Testing Materials ("ASTM") D-975 fuel standard. Pure biodiesel that meets the ASTM 6751 quality standards may be blended into on-road diesel fuel in amounts up to five percent and still meet the ASTM D-975 fuel parameters.[3] While some heavy duty diesel engine manufacturers have stated that certain engines may use biodiesel in blends exceeding five percent, most heavy duty diesel engines in use today are not designed to operate on higher concentrations of biodiesel. As such, the owner of a heavy duty diesel engine has a very real need to know the percentage of biodiesel being dispensed at a retail pump and may choose various biodiesel blends based on the manufacturer's recommendations for the equipment being operated. A trucking company that has invested over $100,000 in a power unit is unlikely to jeopardize that investment by using fuel that is not recommended by the manufacturer. In the absence of a biodiesel labeling system that informs the consumer as to the concentration of biodiesel, consumers cannot ensure that they are selecting fuel that is appropriate for their particular vehicle.

(2) Fuel Economy. Pure biodiesel has about 10% less energy per gallon compared to petroleum-based ultra low sulfur diesel ("ULSD"). The higher the concentration of biodiesel, the more fuel that must be consumed to perform an equivalent amount of work.[4] For most trucking companies, diesel fuel is the second highest expense (after labor). Using fuel that has lower energy content has a direct impact on fuel economy and affects a motor carrier's profitability. For this reason, a fuel dispenser label indicating the percent of biodiesel being dispensed is critical to enabling consumers to make an educated decision on their fuel purchases. From an economic standpoint, biodiesel blends should sell at a discount to ULSD, since consumers will need to purchase an additional amount of biodiesel to perform an equivalent amount of work. Biodiesel pump labeling will enable consumers to make an informed decision and compare prices at various fueling locations.

[3] Pure biodiesel may be represented by the symbol "B100." Biodiesel blends are usually represented by the letter "B" with the percentage of biodiesel contained in the blend listed in a numerical representation. For example, a five percent biodiesel blend is represented by the B5 symbol and a twenty percent biodiesel blend is represented by the B20 symbol.

[4] A B5 blend is likely to reduce fuel economy by ½ a percent, while a B20 blend is likely to reduce fuel economy by 2 percent.

(3) Cold Weather Performance. Biodiesel has reduced cold weather performance compared to ULSD. While the cloud point and pour point of diesel fuel varies greatly, generally ULSD will gel at 16ºF. B100 derived from soy bean oil will typically gel at 32ºF. B20 will raise the cloud point of the base fuel by 3ºF - 10ºF. Low percentage blends (< B5) should perform comparably to petroleum based diesel. Because trucking companies route trucks to various parts of the country, knowing the cold weather capability of diesel fuel is critically important to ensuring that a truck will not become stranded. Heavy duty diesel trucks typically have a range of more than 1,500 miles and there is no guarantee that the ambient temperature where refueling occurs will be equivalent to the ambient temperature along the route. While various biodiesel blends may be appropriate for some routes, a truck destined to travel north during the winter must consider the temperature along the entire route and determine whether a biodiesel blend, with reduced cold weather performance, is appropriate for the particular trip contemplated. For this reason, biodiesel blend labels are critically important and will facilitate informed purchasing decisions for trucks destined for colder climates.

(4) Maintenance Requirements. Biodiesel acts like a solvent and will clean out the sediment that naturally accumulates in diesel fuel systems. This sediment becomes trapped by the fuel filter and eventually will clog the fuel filter and shut down the engine. For this reason, use of biodiesel requires motor carriers to closely monitor their fuel filters and likely will require a fuel filter change that coincides with the initial introduction of biodiesel. Subsequent fuel filter changes may need to occur ahead of regularly scheduled maintenance until the fuel system is free from accumulated sediment. This is not an insurmountable challenge for most motor carriers, providing they are aware of the need to change the fuel filter ahead of their regularly scheduled maintenance plan when using biodiesel. For this reason, biodiesel blend labels are important to the trucking industry. Biodiesel labeling will help facilitate the development of proper maintenance schedules to prevent unexpected clogging of a fuel filter, which could result in the loss of power or could even strand the truck on the side of the road.

B. Quality Concerns.

Quality control is one of the most significant challenges facing biodiesel distribution in the United States. It is relatively easy to make biodiesel; however, it is rather difficult to consistently manufacture high quality biodiesel. Biodiesel producers are a diverse group. Some facilities look like modern petroleum refineries and have deployed quality controls including on-site testing laboratories. Other producers utilize small batch systems where quality may vary significantly from batch-to-batch. In 2006, the National Renewable Energy Laboratory conducted a random survey of biodiesel producers and found that more than 50% of the samples taken failed to meet the applicable ASTM quality specifications. In 2007, the survey was repeated and 10% of

the biodiesel produced in the United States failed to meet ASTM 6751.[5] While the improvement is obvious and we applaud the National Biodiesel Board for their efforts in addressing this critical problem, a 10% failure rate still is unacceptable.

The Proposed Rule requires pumps to be labeled in a manner that indicates the quantity of biodiesel present. Fuel that does not meet the ASTM 6751 specifications cannot legally be called biodiesel. We trust that the FTC will consider this quality issue and devise a label enforcement program that holds retailers strictly liable for dispensing biodiesel blends that do not meet the ASTM specifications.

C. Blending Concerns and the Need for Enforcement

Biodiesel quality at the production site is not the only concern for end-users. Section A to these comments describes the challenges that higher percentage blends of biodiesel create for motor carriers. For this reason, the percentage of biodiesel contained in a blended fuel must be accurately labeled to ensure that the motor carrier can make an educated decision on whether filling up with biodiesel at a certain blend level is advantageous or should be avoided based upon the type of vehicle, load carried, route traveled and distance from the motor carrier's terminal where routine maintenance can be performed.

Earlier this year, researches at the Woods Hole Oceanographic Institution found that many of the biodiesel blends they sampled did not contain the advertised amount of biodiesel.[6] When testing fuels listed as B20, they found that the actual percentage of biodiesel ranged from as little as 10 percent to as much as 74 percent. Given the impact upon maintenance schedules, cold weather performance, potential warranty claims and the economics of using higher percentage blends, accurate labeling of biodiesel blend limits is important to the end user. For this reason, the FTC must not only require fuel dispensers to list the percentage of biodiesel, but also must aggressively inspect and enforce these regulatory requirements.

D. Responses to Specific Questions Raised in the Proposed Rule

Considering the operating challenges presented by the use of various biodiesel blends it is easy to understand why biodiesel pump labeling is a high priority for the trucking industry. The remainder of these comments focus upon the specific questions raised by the FTC in the notice of proposed rulemaking.

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[5] *See* National Renewable Energy Laboratory, *Results of the 2007 B100 Quality Survey* (March 2008); *http://www.biodiesel.org/resources/reportsdatabase/reports/gen/20080301-gen383.pdf*

[6] *See* Woods Hole Oceanic Institute, *New Research Suggests Biofuel Blending is Often Inaccurate* (February 2008) http://www.whoi.edu/page.do?pid=7545&tid=282&cid=38226&ct=162

(1) *What costs or burdens, or any other impacts, do the proposed requirements impose, and on whom?*

The FTC should make clear that the pump labeling requirement applies only to the retail sale of diesel fuel. Centrally fueled fleets should not be subject to the labeling requirements, as they do not sell fuel to the public. We assume this is not intended under the Proposed Rule, so we do not offer any comment on the potential costs of extending the labeling requirement to such facilities.

We offer no opinion on the costs involved in assuring biodiesel quality, blend limit accuracy and the costs associated with proper labeling to comply with the Proposed Rule. Avoiding the costs associated with malfunctioning trucks (the benefits of the Proposed Rule) outweigh the minimal costs of complying with the Proposed Rule. We note that the typical cost of towing a truck to a maintenance shop to change a fuel filter often exceeds $600 per incident. This estimate does not include the downtime of the truck or the cost of refunding the freight charges for failure to deliver freight on schedule. Unfortunately, there is only anecdotal evidence of truck malfunctions as a result of biodiesel concentration or quality. This is because truck operators do not report malfunctions caused by uninformed biodiesel use, since such malfunctions are beyond the scope of manufacturers' warranties. Finally, we note that Congress has mandated the regulations contemplated by this Proposed Rule.

(2) *What modifications, if any, should be made to the proposed requirements to increase their benefits to consumers?*

ATA, working with the National Biodiesel Board, was the driving force behind the Congressionally-mandated requirement that is the subject of this Proposed Rule. The tiered labeling system that was ultimately enacted into law strikes a careful balance between the consumer's need to know varying biodiesel blend percentages and the fuel retailers need to accurately report biodiesel blend percentages in a manner that does not unreasonably increase costs for those in the biodiesel supply chain and enables compliance with the labeling regulations.

When ATA first considered the issue, we concluded that knowing the *specific percentage* of biodiesel used in the blend would be advantageous. Upon discussing the issue with representatives of the fuel retailing industry, we recognized that compliance with such a labeling requirement would be impracticable. Retailers would find it virtually impossible to determine the resulting percentage as new batches were delivered and mixed into existing product stored in underground tanks. For this reason, ATA believes that a tiered labeling system reflecting operational differences caused by various blends strikes the appropriate balance between a consumer's need to know and a retailers obligation to label.

The three tiers reflect the trucking industry and biodiesel industry current understanding of differences between varying biodiesel blend levels in heavy duty diesel engines and various trucking applications.

- Tier 1 includes biodiesel blends less than or equal to 5 percent, providing the finished blend complies with the ASTM D975 standard, and would require no additional label. This tier reflects the fact that these low percentage biodiesel blends perform comparably to ULSD. Since engine manufacturers design engines to operate on fuel that meets ASTM D975, there is no reason to require an additional label for these blends. The critical aspect of this tier relates to continued compliance with the ASTM D975 standard. If a low percentage biodiesel blend – even a blend less than five percent biodiesel – fails to meet this standard, then fuel retailers must be required to inform consumers as to that fact.

- Tier 2 includes biodiesel blends between B5 and B20. This label reflects the fact that a few heavy-duty engine manufacturers have stated that certain engines may burn biodiesel in blends up to twenty percent and that additional operational challenges are created by using these higher biodiesel percentages.

- Tier 3 includes biodiesel blends greater than B20. This tier is created to accommodate high percentage biodiesel blends that currently are not recommended for use in heavy duty diesel engines. These blends of biodiesel may require the use of fuel additives and present end-users with a noticeable degradation in fuel economy.

ATA supports the use of the tiered labeling system required by the Act, as a starting point for ensuring that consumers have the ability to make informed fuel purchasing decisions. On the issue of modifications that could increase benefits to consumers, we believe that the FTC should consider adding additional tiers to provide consumers with a more specific indication of the amount of biodiesel contained in the blend. Ideally label categories that are based on biodiesel blend increments of 5 percentage points should be used:

- Contains biodiesel in amounts up to B5 – blend meets ASTM D-975;
- contains biodiesel in amounts between B5 and B10;
- contains biodiesel in amounts between B10 and B15;
- contains biodiesel in amounts between B15 and B20; and
- additional label categories that specify the percentage of biodiesel in increments of 5%, combined with a warning for blends greater than 20% biodiesel, advising the consumer to check with the engine manufacturer.

The addition of these tiers would facilitate more informed purchasing decisions at the point of sale, while avoiding the use of an unworkable requirement for specific blend concentrations.

(3) What modifications, if any, should be made to the proposed requirements to decrease their burdens on businesses?

We believe that the FTC has structured this rule in compliance with the Act and has not imposed any additional burdens on businesses aside from what is required by the statute.

(4) *Should the Rule allow a non-specific percentage designation ("biodiesel blend") for biodiesel blends over five and no more than twenty percent? Or should the Rule require specific percentages on the label for all blends over five percent?*

As stated in Section D.2, *supra*, the requirement to list a specific blend percentage imposes a significant burden on fuel retailers, as it would be very difficult to ensure compliance with such a rigid requirement. For example, a retailer that has been selling petroleum-based ULSD and then takes a delivery of 8,000 gallons of B20, must now calculate the percentage of biodiesel being dispensed at the pump. This calculation would require the retailer to know how much ULSD was left in the storage tank prior to the delivery of B20 and perform a calculation to figure out the biodiesel content of the blended fuels. Since determining the amount of fuel remaining in the tank prior to delivery is imprecise, the requirement to list the specific percentage on the pump label may lead to unintended non-compliance with the labeling requirement. In addition, such a rigid, specific requirement could require retailers to change pump labels often, thereby increasing the costs of complying with the Proposed Rule. Labels indicating biodiesel blend percentages in 5 point increments eliminates this problem, while ensuring that consumers receive the information necessary to make an informed purchasing decision.

(5) *Should the Rule require a specific designation (e.g., "B-80") for biodiesel blends over twenty percent? Or should the Rule allow generic designation for such blend?*

For the reasons set forth in the response to questions (2) and (4), we believe that the FTC should avoid a specific percentage designation, but rather should consider incremental designations based on biodiesel blend content variances of 5 percentage points.

(6) *Of fuels containing biodiesel sold in the United States, approximately what percentage contains no more than five percent biodiesel? What percentage contains more than five and no more than twenty percent biodiesel? What percentage contains more than twenty percent biodiesel?*

We are not aware of data indicating the percentage of biodiesel sold at retail establishments around the country. Indeed, as shown in section C, *supra*, it appears that there is a significant amount of misrepresentation in biodiesel content at the retail level. While not directly answering the question posed, we note that the following five states have enacted biodiesel mandates: Louisiana, Minnesota, New Mexico, Oregon, and Washington. Of these five states, only Minnesota's biodiesel mandate is fully implemented. Minnesota requires all diesel fuel sold within the state to contain at least 2% biodiesel by volume. Oregon's requirement is patterned after Minnesota's and based on various feedstock production triggers will require each gallon of fuel sold to have 2% (and eventually 5%) biodiesel. Louisiana and Washington will require that on average 2% of the diesel fuel sold must be biodiesel, but do not require each gallon of fuel sold to contain biodiesel. Finally, New Mexico will require all diesel fuel sold have a minimum of five percent biodiesel content for each gallon sold. It is also worth noting that Illinois provides a state tax exemption for diesel fuel that contains more than 10% biodiesel. As a result, we believe that a significant amount of diesel fuel sold in Illinois is B11, further bolstering the need for a labeling requirement indicating a blend level between B10 and B15.

(7) *Of fuels containing biomass-based diesel sold in the United States, approximately what percentage contains no more than five percent biomass-based diesel? What percentage contains more than five and no more than twenty percent biomass-based diesel? What percentage contains more than twenty percent biomass-based diesel?*

We are unaware of efforts to determine the amount of biomass-based diesel consumed in the United States.

(8) *Is purple (PMS 2562) an appropriate background color for the biodiesel blend and biodiesel label? If not, what color would be appropriate?*

ATA supports the use of a distinct uniform label color, but offers no opinion as to the color that should be chosen.

(9) *Would the Commission's proposed biodiesel label cause confusion with regard to any label currently used for diesel (or any other fuel) at retail pumps?*

We believe that the proposed labels are distinctive and not likely to confuse consumers. We further believe that the use of a distinct uniform label color will further help distinguish fuel containing biodiesel or biomass-based diesel. We note that the Environmental Protection Agency mandates specific text for labels indicating the sulfur content of on-road diesel fuel, but does not require a specific color to distinguish

ULSD from low sulfur diesel. We believe that the diesel fuel labeling system would benefit from the development of standardized colors to differentiate sulfur content.

As with the introduction of any new fuel, we believe it important to educate consumers. Considering the Act requires the substantial increase in biodiesel and biomass-based diesel, we believe that FTC should organize a consumer education campaign concerning the new labels that will appear on diesel fuel. ATA stands ready to work with the FTC, EPA, the petroleum distribution industry and the biodiesel industry to make sure that consumers and retailers are properly educated on the new renewable fuels entering the marketplace and the appropriate labels for those fuels.

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For the reasons set forth above, we support FTC's initiative to promptly implement a uniform pump labeling system that requires retailers to inform consumers as to the varying percentages of biodiesel that will be dispensed at their facilities. We further believe that the labeling system could be improved by requiring labels to indicate the amount of biodiesel dispensed based upon increments of five percentage points. We believe that the FTC must simultaneously implement a robust enforcement program to ensure retail compliance and that the purposes of the Act are fully realized. Finally, we recommend that the FTC devise an educational program to inform consumers and retailers of the new labeling requirement.

If you have questions concerning the trucking industry's recommendations for implementing biodiesel labeling requirements, please contact me at (703) 838-1910.

Respectfully submitted,

Richard Moskowitz
Vice President & Regulatory Affairs Counsel