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May 21, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Submitted via: https://public.commentworks.com/ftc/fuelratingreview/

Re: Fuel Rating Review, Matter No. R811005

To Whom It May Concern:

The American Petroleum Institute (API) respectfully submits the following comments on the notice of proposed rulemaking to the Federal Trade Commission's (FTC) Fuel Rating Rule. API represents more than 400 companies involved in all aspects of the oil and natural gas industry. API member companies may also be submitting comments containing additional information.

API and our member companies recognize the benefits of appropriately labeling dispensers of mid-level ethanol blends and to appropriately distinguish them from gasoline. With increasing mandated levels of biofuels in the nation's fuel supply, intentional and unintentional misfueling are significant concerns for API member companies and other interested stakeholders. This NPRM is a positive step in addressing unintentional misfueling, but we have some concerns as outlined in this letter.

API urges the FTC to communicate and coordinate with the Environmental Protection Agency (EPA) to develop a common dispenser labeling scheme. EPA stated in November 2009 that a working group was being pulled together to address pump labeling of ethanol blends between 10 and 15 percent by volume[1]. This FTC labeling format and methodology should be consistent with EPA labels to prevent customer confusion. There is great potential for conflicting FTC and EPA labeling, particularly on blends between 10 and 15 percent by volume should EPA grant a partial waiver for E15 to be used as gasoline in only certain model year non-flexible-fuel vehicles. This issue should be resolved prior to a final rulemaking from either agency.

FTC has proposed adding the following definition to 16 CFR 306: Mid-Level Ethanol blend - *A mixture of gasoline and ethanol containing more than 10 but less than 70 percent ethanol*. This

[1] http://www.epa.gov/otaq/regs/fuels/additive/lettertogrowthenergy11-30-09.pdf

definition should specify that the blend percentages are by volume (vol%). The Environmental Protection Agency (EPA) currently limits the amount of ethanol in gasoline to 10 vol% (for use in non-flexible-fuel vehicles and other equipment). However, EPA has indicated that 15 vol% blends may be approved by mid-2010 for 2001 and newer vehicles[2]. API has concerns that FTC is setting de facto limits for the ethanol content of E85 (ASTM D5798) and gasoline.

Should EPA decide to permit the use of 11 vol% to 15 vol% ethanol blends in all or some of the vehicle fleet prior to completion of no-harm testing of all model year 2001 and newer vehicle technology groups, and if FTC can work with EPA on a common label and avoid duplicate labeling on 11 vol% to 15 vol% by volume blends, API suggests that FTC's rulemaking address labeling requirements for 11 vol% to 15 vol% ethanol blends. The labeling language suggested below should be consistent with labeling format and language for gasoline containing a waivered amount of ethanol and clearly warn that "Federal law PROHIBITS use in model year 2000 [or other designation of waivered vehicles chosen by EPA] and older vehicles and all non-road engines and equipment (Except Flexible-Fuel Vehicles)". This label would also advise that the vehicle owner should "Check Vehicle, Engine & Equipment Manufacturers' Recommendations."

If FTC and EPA do not develop a common labeling scheme to prevent duplicate labels, EPA should have the sole authority on labeling of fuel blends up to the waivered volume level, presumably 15 vol% ethanol. In this case, the midlevel ethanol blend definition in this rulemaking should state that it covers gasoline and ethanol blends at a blend ratio not already covered by EPA waiver (i.e. greater than 15 vol%). In the event EPA does not grant a waiver above 10 vol% ethanol blends to be considered gasoline, any blend above 10 volume percent would be covered in the mid-level ethanol blend definition.

API is also concerned that FTC did not adequately consider ongoing work at ASTM to allow for a minimum percentage of ethanol other than 70 vol% in the E85 specification D5798 to improve cold weather starting operation. FTC declined to recognize the potential change "because there is no current ASTM or DOE standard allowing E85 to contain 68% ethanol". ASTM has approved a change in D5798 that will set 68 vol% ethanol minimum (70 vol% denatured fuel ethanol) for all three volatility classes. The regulations are not always clear whether the volumetric limits apply to pure ethanol or to denatured fuel ethanol. For cold-start drivability, ASTM is discussing allowing an even lower minimum limit for ethanol. By neglecting to address this concern, FTC is creating a barrier to this change in the marketplace. In the event ASTM does alter the standard to allow for concentrations as low as 50 vol% ethanol, the FTC required label would be in direct conflict with the standard. FTC should draft the rule to allow for such changes at ASTM without creating obstacles that will only confuse consumers and restrict availability of improved products. This can be accomplished by defining E85, which can vary in ethanol content, and referencing the most recent version of ASTM D5798 as displayed on ASTM's website (www.ASTM.org).

[2] ibid

FTC proposes the following language on labels for mid-level ethanol blends:

- MAY HARM SOME VEHICLES
- CHECK OWNER'S MANUAL

This warning language is inadequate because it fails to warn consumers that mid-level ethanol blends may cause damage to, and may not be used in, any equipment other than Flexible-Fuel Vehicles ("FFVs"). Current research and available data indicates that mid-level blends may not be suitable for use in a large percentage of the current fleet of vehicles and non-road equipment. Ongoing testing of E15 and E20 blends has raised concerns that mid-level ethanol blends may cause damage to engines and fuel system components in non-FFVs (including motorcycles), in gasoline powered non-road vehicles (e.g. certain powerboats, snowmobiles, ATVs, ultralight aircraft) and in gasoline powered non-road/non-vehicle equipment (e.g. lawnmowers, chainsaws, yard equipment and other small engines).

Moreover, only FFVs are currently permitted by EPA to use blends containing greater than 10 vol% ethanol. Use in non-FFVs is a violation of federal law. The Department of Energy (DOE) estimates that in 2010, FFVs will make up only 4% of the light duty vehicle fleet[3]. DOE also estimates flexible-fuel vehicles will make up less than 20% of the light duty vehicle fleet in 2035[4]. These projections of vehicle market penetration show that FFV's should be considered specialty vehicles for the foreseeable future. Therefore, strong language is necessary to clarify that only specialty vehicles can use these fuels. The FTC should protect consumers by providing all relevant information in a concise manner. The language proposed fails to adequately inform consumers about the risks to their vehicles and non-road equipment.

[3] http://www.eia.doe.gov/oiaf/aeo/supplement/supref.html Table 58
[4] ibid

If EPA grants a waiver allowing ethanol blends in gasoline up to 15 vol%, API proposes label language provided in the following label examples:

Mid-Level Ethanol Blend 16-69% by Volume Ethanol

WARNING

- ONLY for use in Flexible-Fuel Vehicles.
- Federal law PROHIBITS use in other vehicles and all non-road engines and equipment. Its use may damage these vehicles, engines & equipment.

Check Vehicle, Engine & Equipment Manufacturers' Recommendations

E-85 Maximum 85% by Volume Ethanol

WARNING

- ONLY for use in Flexible-Fuel Vehicles.
- Federal law PROHIBITS use in other vehicles and all non-road engines and equipment. Its use may damage these vehicles, engines & equipment.

Check Vehicle, Engine & Equipment Manufacturers' Recommendations

Contains 11-15% by Volume Ethanol

WARNING

- Federal law PROHIBITS use in model year 2000 and older vehicles and all non-road engines & equipment (Except Flexible Fuel Vehicles).
- Its use may damage vehicles, engines & equipment.

Check Vehicle, Engine & Equipment Manufacturers' Recommendations

If EPA does not grant a waiver allowing ethanol blends in gasoline to exceed 10 volume percent, API proposes label language provided in the following label examples:

Mid-Level Ethanol Blend 11-69% by Volume Ethanol	E-85 Maximum 85% by Volume Ethanol
WARNING	WARNING
• ONLY for use in Flexible-Fuel Vehicles. • Federal law PROHIBITS use in other vehicles and all non-road engines and equipment. Its use may damage these vehicles, engines & equipment.	• ONLY for use in Flexible-Fuel Vehicles. • Federal law PROHIBITS use in other vehicles and all non-road engines and equipment. Its use may damage these vehicles, engines & equipment.
Check Vehicle, Engine & Equipment Manufacturers' Recommendations	*Check Vehicle, Engine & Equipment Manufacturers' Recommendations*

All Label properties:

Size:	3.5" x 4 to 4.5"
Banner:	Bronze with 18 point font (Color unnecessary on 11-15% label)
Warning:	Red lettering with 20 point font
Statements:	Bulleted with 12 point font
Advisory:	Red lettering with italicized 11 point font

- The statement "ONLY For Use in Flexible-Fuel Vehicles" is clear for consumers to understand that they need a specialty vehicle to use mid-level blends or E85.

- All capital letters are not necessary and make the label more difficult to read because multiple statements are necessary.

- The red "WARNING" statement alerts the consumer and makes the label more difficult to ignore. It is also consistent with EPA diesel labeling.

- The statement "Federal law PROHIBITS use in other vehicles and all non-road engines and equipment" clearly states the fact that unauthorized use is a violation of federal law. This language is also consistent with EPA diesel labeling.

- The statement "Federal law PROHIBITS use in model year 2000 and older vehicles and all non-road engines & equipment (Except Flexible-Fuel Vehicles)" on the 11 vol% to 15 vol% label would only be appropriate if EPA granted such a waiver. The model year

stated and blend percentage in the banner would need to match the designation of waivered vehicles as chosen by EPA.

- The statement "Its use may damage these vehicles, engines & equipment" recognizes that unpermitted use of the fuel has the potential to require repair. The statement "Its use may damage vehicles, engines & equipment" on the 11 vol% to 15 vol% label recognizes that some permitted use of the fuel has the potential to require repair. The word "damage" more appropriately conveys the message that physical damage may result from using the fuel, most notably on expensive catalytic convertors. The term "harm" implies a lesser degree of concern to consumers, such as decreased performance or decreased fuel economy. The word "damage" is also consistent with EPA diesel labeling.

- The advisory "Check Vehicle, Engine & Equipment Manufacturers' Recommendations" conveys the same message as the FTC proposed "CHECK OWNER'S MANUAL", but is more appropriate in the event EPA grants a waiver for blends above 10 vol% for some vehicles. The vehicle, engine and equipment manufacturers' recommendations have the potential to change in the event a waiver is granted by EPA. Owner's manuals may not account for a change in recommendations.

- It is not necessary to establish Helvetica Black as the only acceptable font. Any block type font should be allowed, as long as it is clear to read. FTC states in the proposal that the font name may vary in different desk-top and phototype setting systems. Helvetica Black is not an option in the latest version of Microsoft Word, which causes confusion as to what substitute font name is acceptable. Specifying block type font is also consistent with EPA diesel labeling.

- The top banner color should be bronze. This is the color used by the petroleum industry to identify alcohol based fuels as established in API Recommended Practice 1637 *Using the API Color-Symbol System to Mark Equipment and Vehicles for Product Identification at Gasoline Dispensing Facilities and Distribution Terminals*. This standard was developed to prevent mixing incompatible products at wholesale and retail distribution facilities. It is appropriate to use this same color for labeling these fuels on the dispenser. If 11 vol% to 15 vol% ethanol blends are approved by EPA, the banner is unnecessary on the 11 vol% to 15 vol% label because EPA will define the fuel as gasoline.

- The upper limit of ethanol specified that delineates between mid-level ethanol blends and E85 (i.e. 69 vol%) should reference the allowable limit in the latest version of ASTM D5798 located on ASTM's website.

The labels that API supports are consistent with EPA methodology in labeling diesel fuels. EPA has indicated that the label that will potentially be developed to distinguish E15 blends will follow a format similar to diesel labels. It is crucial in preventing unintentional misfueling that

labels be clear, easy to read and consistent for all waivered gasoline blends, mid-level blends and E85.

API agrees with the concept of identifying a range of ethanol content for mid-level blends. The top banner should also state the fuel is a mid-level ethanol blend. Consumers need to be able to readily identify if a fuel is incompatible with their vehicle. By stating clearly that a fuel is a mid-level blend, it relieves the consumer for needing to know what percentage their vehicle can handle. Existing labels that state "up to 10% ethanol" may leave consumers to think their vehicle can tolerate some amount of ethanol, but they may not know 10% is the limit for their vehicle (or 15% if deemed acceptable by EPA). The term "mid-level ethanol blend" in the top banner helps to group these blends together and clarify for the consumer if the fuel is permissible in their vehicle.

API is concerned about liability in the event of intentional and unintentional misfueling by motorists. The FTC's proposal does not prohibit the act of misfueling, and API would oppose the inclusion of such a provision. EPA already prohibits the act of misfueling and FTC should not duplicate this activity in a final rule. Retailers who appropriately inform consumers and comply with labeling rules should not be held liable for the act of misfueling.

Octane Rating Using the On-Line Method

API is supportive of the change to allow ASTM D2885 *Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique*. However, FTC should state that the "most recent version of ASTM D2885 located on ASTM's Website," applies. The proposed rule specifically names D2885-08. ASTM has revised the standard, and the most recent is D2885-10. FTC should not specify historical, outdated standards. FTC also cites the outdated ASTM D2699-08 and ASTM D2700-08 standards. These test methods were both revised and renumbered. Prescribing outdated, historical standards creates an obstacle in using the most up to date technology and methodology in determining octane, and is a detriment to providing accurate information to consumers.

Biodiesel and Biomass-Based Diesel

FTC disagreed with API's recommendation to require the disclosure of the presence of biodiesel in blends containing less than 5 vol%. API urges the FTC to reconsider. FTC concludes that disclosure would benefit retailers at the expense to fuel producers and distributors. Disclosure would also benefit producers and distributors by helping to prevent unintentional misfueling, which is a great concern to API member companies. While API does not support specifically identifying the precise biodiesel percentage, a general disclosure of the presence of biodiesel will benefit the whole industry and consumers. FTC outlines a scenario where a retailer ensures compliance by blending more than 6 vol% but less than 15 vol% and subsequently labels the dispenser B20. While this scheme would ensure correct labeling, most retailers do not wish to offer blends above 5 vol%. Most light duty diesel vehicles and equipment are not recommended

for use with biodiesel concentrations above 5 vol%. Additionally, fuel distributors are reluctant to offer higher blends in cold climates due to fuel gelling. Therefore, it is unrealistic to assume this scenario of blending between 6 vol% and 15 vol% and labeling the dispenser as B20 will actually take place. The lack of regulation in this area is likely to result in over blending of biodiesel and unintentional misrepresentation on the dispenser.

API supports the same flexibility for the labeling of biodiesel blends containing more than 20 vol% biodiesel as the FTC provided for mid-level ethanol blends. EISA Section 205 required labeling based on ranges rather than single values. Including the option of using the term "Biodiesel Blend" in the top band, while requiring the lower portion of the decal to state the *range* of the volume percentages the fuel will contain, effectively alerts the consumer to the presence of biodiesel and helps alleviate the potential consumer confusion when both a specific volume percentage and a range of volume percentages are required on the same label.

Exempting Renewable Diesel from the Rule

API believes that it is not necessary to disclose the presence of renewable diesel; however it is necessary to disclose the presence of FAME biodiesel. FTC asserts that the Energy Independence and Security Act of 2007 (EISA) directs the FTC to establish a label for renewable diesel. FTC fails to take into account, however, that the law is in fact ambiguous on this point, and that it is therefore within FTC's discretion to appropriately resolve this ambiguity.

Section 205 of EISA specifies that FTC is required to promulgate labeling requirements for biomass based diesel blends or biodiesel blends. Section 201 of EISA in turn defines the term "biomass based diesel." The definition of biomass based diesel generally includes "renewable diesel." However, section 201 expressly excludes from the definition of "biomass based diesel" renewable fuel derived from co-processing biomass with a petroleum feedstock. EPA's RFS2 regulations also make this clear in section 80.1401:

Biomass-based diesel means a renewable fuel that has lifecycle greenhouse gas emissions that are at least 50 percent less than baseline lifecycle greenhouse gas emissions and meets all of the requirements of paragraph (1) of this definition:
(1) (i) Is a transportation fuel, transportation fuel additive, heating oil, or jet fuel.
(ii) Meets the definition of either biodiesel or non-ester renewable diesel.
(iii) Is registered as a motor vehicle fuel or fuel additive under 40 CFR part 79, if the fuel or fuel additive is intended for use in a motor vehicle.
(2) Renewable fuel that is co-processed with petroleum is not biomass-based diesel.

EPA explained this further in the preamble to the RFS2 rules [page 107 of pre Fed Reg version]:

Biodiesel and renewable diesel are replacements for petroleum diesel that are made from plant or animal fats. Biodiesel consists of fatty acid methyl esters (FAME) and can be used in low-

concentration blends in most types of diesel engines and other combustion equipment with no modifications. The term renewable diesel covers fuels made by hydrotreating plant or animal fats in processes similar to those used in refining petroleum. Renewable diesel is chemically analogous to blendstocks already used in petroleum diesel, thus its use can be transparent and its blend level essentially unlimited. The goal of both biodiesel and renewable diesel conversion processes is to change the properties of a variety of feedstocks to more closely match those of petroleum diesel (such as its density, viscosity, and storage stability) for which the engines have been designed. The definition of biodiesel given in applicable regulations is sufficiently broad to be inclusive of both fuels.[106] **However, the EISA stipulates that renewable diesel that is coprocessed with petroleum diesel cannot be counted as biomass-based diesel for purposes of complying with the RFS2 volume requirements.**[107]

Thus, depending on whether renewable diesel is produced using a stand alone process or co-processed determines whether renewable diesel is considered "biomass based diesel" and therefore whether it falls within the scope of the labeling provision. This results in the absurd situation where on the one hand renewable diesel has to be labeled under FTC's regulations if it is produced in a stand alone process, while it does not have to be labeled if it is co-processed even though the physical properties would be the same in either case.

We urge FTC to resolve this ambiguity by clarifying that renewable diesel need not be labeled. Not only is the labeling requirement in the law ambiguous, but for the reasons set out below, labeling of renewable diesel is unnecessary:

1) Renewable diesel is indistinguishable in terms of its hydrocarbon structure from conventional petroleum diesel. The EPA describes renewable diesel as follows: "The term renewable diesel covers fuels made by hydrotreating plant or animal fats in processes similar to those used in refining petroleum. Renewable diesel is chemically analogous to blendstocks already used in petroleum diesel, thus its use can be transparent and its blend level essentially unlimited."[5] Currently, no standard test method referenced by ASTM D975 will reveal renewable diesel content. Unlike biodiesel which is a methyl ester, renewable diesel, like petroleum diesel, consists of hydrocarbon structures. Furthermore, renewable diesel is manufactured through conventional refining processes.

2) The current FTC requirement may increase the supplied cost or availability of fuel. Labeling renewable diesel at specific levels eliminates the supplier's ability to vary blend levels to minimize cost and reduces inventory alternatives. Renewable diesel is a start-up industry and cannot now be relied upon to consistently deliver specific volumes. Retail labeling cannot keep up with changing renewable diesel volumes, so renewable diesel may simply be excluded from the retail distribution system.

[5] See 58 Federal Register 14755, col 1,, EPA Final Rule, 40CFR Part 80, Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, March 26, 2010.

3) Current labeling requirements create enforcement challenges. Since there are no standard tests to determine renewable diesel blend levels, label requirements will be difficult or impossible to enforce.

Therefore, the current FTC labeling requirements for renewable diesel offer no benefits to the consumer. Since consumers are not required by OEM's to take any actions based on renewable diesel blend levels, this is an arbitrary labeling requirement that provides no actionable information to the consumer and retards the development of the renewable diesel industry.

API and our member companies appreciate the opportunity to comment on this proposed rule. If you have any questions or concerns, please contact me at 202-682-8192.

Sincerely,

Patrick Kelly
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cc: Paul Machiele, EPA