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**Part VI**

## **Federal Trade Commission**

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**16 CFR Part 306  
Automotive Fuel Ratings, Certification and  
Posting; Final Rule**

## FEDERAL TRADE COMMISSION

### 16 CFR Part 306

RIN 3084-AA45

### Automotive Fuel Ratings, Certification and Posting

**AGENCY:** Federal Trade Commission (“FTC” or “Commission”).

**ACTION:** Final rule.

**SUMMARY:** Section 205 of the Energy Independence and Security Act of 2007 requires the Commission to promulgate biodiesel and biomass-based diesel labeling requirements. In accordance with this directive, the Commission has completed the required rulemaking and is publishing final amendments to its rule for “Automotive Fuel Ratings, Certification and Posting” (“Fuel Rating Rule” or “Rule”) (16 CFR Part 306).

**DATES:** The amendments published in this final rule will become effective December 16, 2008. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 16, 2008.

**ADDRESSES:** Requests for copies of this document should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including this document, are available at <http://www.ftc.gov>.

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**SUPPLEMENTARY INFORMATION:** Section 205 of the Energy Independence and Security Act of 2007 (“EISA” or the “Act”) (Pub. L. 110-140) requires the Commission to promulgate biodiesel and biomass-based diesel labeling requirements within 180 days of the law’s passage. The Act addresses three categories of biodiesel and biomass-based diesel blends and specifies labeling requirements for two of them. The Act also contains definitions for the terms “biomass-based diesel,” “biodiesel,” and “biomass-based diesel and biodiesel blends” (hereinafter referred to collectively as “biodiesel fuels”). Following enactment on December 19, 2007, the Commission published a Notice of Proposed Rulemaking (“NPRM”) on March 11, 2008.

Based on comments received in response to the NPRM, the Commission now publishes final amendments to the Fuel Rating Rule (16 CFR Part 306) that incorporate EISA’s labeling requirements. Under the final amendments, the rating and certification requirements of the existing Rule apply to fuels containing more than five percent biodiesel or more than five percent biomass-based diesel. This notice provides background on the Fuel Rating Rule, a short description of biodiesel and biomass-based diesel fuels, information about the new statutory labeling requirements for biodiesel fuels, a discussion of the comments submitted along with an explanation of the changes made in response to those comments, and a detailed description of the Commission’s final amendments.

#### I. The Fuel Rating Rule

The Commission first promulgated the Fuel Rating Rule (then titled the “Octane Certification and Posting Rule”) in 1979 in accordance with the Petroleum Marketing Practices Act (“PMPA”) (15 U.S.C. 2821 *et seq.*). In response to amendments to the PMPA, the Commission expanded the scope of the Rule in 1993 to cover liquid alternative fuels (58 FR 41356 (Aug. 3, 1993)). The Fuel Rating Rule, therefore, covers any alternative liquid fuel distributed for use in any motor vehicle including, but “not limited to,” methanol, denatured ethanol, liquefied natural gas, and coal-derived liquid fuels.<sup>1</sup> PMPA gives the Commission authority to designate methods for fuel rating, fuel certification, and posting for these fuels at the point of sale. *See* 15 U.S.C. 2822.

#### II. Biodiesel Fuels

EISA contains labeling requirements for “biomass-based diesel” and “biodiesel.” It defines biomass-based diesel as any fuel substitute that is produced from certain renewable resources and that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency (“EPA”) under 42 U.S.C. 7545,<sup>2</sup> but not necessarily the requirements of the ASTM

<sup>1</sup> In 1993, the Commission explained that “[t]he Fuel Rating Rule . . . applies to all present and future alternative liquid automotive fuels.” 58 FR 41355, 41358 (Aug. 3, 1993).

<sup>2</sup> The EPA has issued registration requirements for fuels and fuel additives (40 CFR Part 79 “Registration of Fuels and Fuel Additives”) pursuant to 42 U.S.C. 7545. Those requirements constitute EPA’s regulatory program for the registration of motor vehicle diesel fuel (including biomass-based diesel and biodiesel), motor vehicle gasoline, and their additives.

International<sup>3</sup> (“ASTM”) standard D6751.<sup>4</sup>

“Biodiesel,” as defined by EISA, is a diesel fuel produced using alcohol to transform animal fat or vegetable oil. Specifically, EISA (Sec. 205(c)) defines “biodiesel” to mean “the monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet: (A) the registration requirements for fuels and fuel additives under this section [42 U.S.C. 7545];<sup>5</sup> and (B) the requirements of ASTM standard D6751.”<sup>6</sup> Biodiesel serves as a substitute for diesel fuel for some diesel vehicles and is usually blended with diesel for sale at retail pumps. According to the Department of Energy, biodiesel in the United States is usually made from soybean oil or recycled restaurant grease. Some estimates suggest that biodiesel sales increased from 15 million gallons in 2002 to 250 million gallons in 2006.<sup>7</sup>

Finally, EISA (Sec. 205(c)(4)) defines “biomass-based diesel and biodiesel blends” as fuels consisting of “biomass-based diesel” or “biodiesel” . . . blended with petroleum-based diesel fuel.”

Although the FTC has never specifically addressed fuel labeling requirements for biodiesel fuels, the broad authority under PMPA allows the Commission to include these fuels

<sup>3</sup> ASTM International was formerly known as, and is referred to in the Fuel Rating Rule as, the American Society for Testing and Materials.

<sup>4</sup> ASTM D6751 is titled: “Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels.” EISA defines “biomass-based diesel” by referencing the definition of the term “biodiesel” provided in Section 312(f) of the Energy Policy Act of 1992 (42 U.S.C. 13220(f)). The definition reads: “a diesel fuel substitute produced from nonpetroleum renewable resources that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under [42 U.S.C. 7545],” and includes fuel derived from “(i) animal wastes, including poultry fats and poultry wastes, and other waste materials; or (ii) municipal solid waste and sludges and oils derived from wastewater and the treatment of wastewater.” 42 U.S.C. 13220(f)(1)(A) and (B).

<sup>5</sup> EISA’s definition of “biodiesel” specifically refers to the registration requirements for fuels and fuel additives under “this section.” However, there are no such registration requirements in Section 205 of EISA nor are there any in the FTC’s Fuel Rating Rule (16 CFR Part 306). Accordingly, we assume the phrase “this section” refers to the EPA’s registration requirements for fuels and fuel additives (40 CFR Part 79 “Registration of Fuels and Fuel Additives”) issued pursuant to 42 U.S.C. 7545. Therefore, the definition of “biodiesel” in the final amendments references the requirements of 40 CFR Part 79.

<sup>6</sup> Because biodiesel, as defined by EISA, meets EPA’s fuel registration requirements and is derived from renewable resources, biodiesel also meets the definition of biomass-based diesel, effectively making biodiesel a subset of biomass-based diesel.

<sup>7</sup> *See* ([http://www1.eere.energy.gov/biomass/renewable\\_diesel.html](http://www1.eere.energy.gov/biomass/renewable_diesel.html)) (2002 estimate) and ([http://www.biodiesel.org/pdf\\_files/fuelfactsheets/Biodiesel\\_Sales\\_Graph.pdf](http://www.biodiesel.org/pdf_files/fuelfactsheets/Biodiesel_Sales_Graph.pdf)) (2006 estimate).

under the rating, certification, and posting requirements of the Fuel Rating Rule. In light of Congress's specific directive in EISA to promulgate biodiesel fuel labeling requirements, the Commission now amends the Fuel Rating Rule to include biodiesel fuels in accordance with that directive.<sup>8</sup>

### III. EISA's Directive

Section 205(a) of EISA provides that "[e]ach retail diesel fuel pump shall be labeled in a manner that informs consumers of the percent of biomass-based diesel or biodiesel that is contained in the biomass-based diesel blend or biodiesel blend that is offered for sale, as determined by the Federal Trade Commission." EISA also specifically addresses three categories of biodiesel fuel blends, requiring labels with precise wording for two. First, fuel blends containing no more than five percent biodiesel and no more than five percent biomass-based diesel, and that meet ASTM D975 ("Standard Specification for Diesel Fuel Oils"), need not be labeled.<sup>9</sup> Second, fuel blends containing more than five but no more than twenty percent biomass-based diesel or biodiesel "shall be labeled" contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent." EISA, Sec. 205(b)(2) (emphasis added). Finally, blends containing more than twenty percent biodiesel or biomass-based diesel "shall be labeled" contains more than 20 percent biomass-based diesel or biodiesel." EISA, Sec. 205(b)(3) (emphasis added). Significantly, although Section 205 of EISA furnishes precise, mandatory label language, the Act leaves the FTC with discretion to determine the specific size, layout, and color of the required label, as well as to require any additional wording necessary to "inform[] consumers of the percent of biomass-based diesel or biodiesel that is contained in the biomass-based diesel blend or biodiesel blend that is offered for sale." EISA, Sec. 205(a).

### IV. Procedural History

On March 11, 2008, the Commission published an NPRM requesting

<sup>8</sup> The Fuel Rating Rule currently does not specify labeling requirements for petroleum-based diesel. See 58 FR 41356, 41368 (Aug. 3, 1993). The Commission, therefore, is not amending the Rule to include such requirements for diesel fuel as part of this proceeding.

<sup>9</sup> Specifically, EISA states that these fuels "shall not require any additional labels." EISA, Sec. 205(b)(1). We understand this language to mean that although EISA does not require labeling of biodiesel and biomass-based diesel blends at concentrations of five percent or less, any label requirements otherwise applicable to such diesel fuel will continue to apply.

comment on proposed amendments to the Rule. (73 FR 12916). The Commission designed the proposed amendments to: (1) explicitly include fuels containing more than five percent biodiesel or more than five percent biomass-based diesel as alternative fuels subject to the rating, certification, and posting requirements of the Fuel Rating Rule; and (2) promulgate labeling requirements for those fuels consistent with EISA's requirements. The NPRM also raised specific questions for comment.

### V. Comments Received and the Commission's Response

The Commission received twelve comments.<sup>10</sup> Generally, the comments supported the FTC's proposed amendments. However, several commenters raised issues. This section addresses these issues in the following order: separate labeling for fuels containing biodiesel and for fuels containing biomass-based diesel; the appropriateness of the labeling scheme generally; the appropriate background color for the labels; modifications to the labels proposed by the commenters to benefit consumers; and whether to require specific percentage designations only for biodiesel fuel blends over twenty percent.

#### A. Separate Labeling for Fuels Containing Biodiesel and Biomass-Based Diesel

##### COMMENTS:

Several commenters noted that biomass-based diesel and biodiesel have significantly different qualities and, therefore, urged their separate treatment for the purposes of rating, certification, and labeling. Commenters further asserted that labeling both of them as "biodiesel blends," as proposed in the NPRM, would lead to consumer confusion. They therefore proposed various revisions to eliminate that confusion.

#### *Biomass-Based Diesel as Distinct from Biodiesel*

Almost all of the comments expressed the view that biodiesel differs significantly from biomass-based diesel. For example, the Illinois Soybean Association ("ISA") stated that there is a significant difference between biodiesel and biomass-based diesel fuel; consequently they should be labeled separately. Biodiesel is a defined fuel with a specific ASTM standard—D6751. . . . Biomass-based diesel fuel is a category of fuels, and could contain a number of different

feedstocks and products, none of which currently have an ASTM specification.

In addition, the National Biodiesel Board ("NBB") noted that several types of fuels conceivably could qualify as biomass-based diesel. Most significantly, ConocoPhillips, a producer of a type of biomass-based diesel known as renewable diesel, explained that, unlike biodiesel blends, its fuel is "essentially indistinguishable from ASTM D 975 defined diesel fuel." ConocoPhillips noted that biodiesel blends contain methyl ester and that engine manufacturers generally recommend using fuels containing no more than a certain amount of methyl ester. By contrast, ConocoPhillip's renewable diesel blends do not currently contain methyl ester.

In addition, the American Trucking Associations, Inc. ("ATA") agreed with ConocoPhillips' assertion that manufacturer warranties generally require a consumer to use fuels containing no more than a specific percentage of biodiesel. ATA stated that heavy duty diesel engines sold in America "are designed and warranted to operate on diesel fuel formulated to meet [the ASTM] D-975 fuel standard." Thus, use of any fuel, including renewable diesel, that meets ASTM D975 will satisfy engine warranty standards for heavy duty diesel engines.

Archer Daniels Midland Company ("ADM"), however, asserted that "biomass-based diesel and Biodiesel [sic] mean the same thing" for purposes of labeling because EISA defines biomass-based diesel to mean "biodiesel" as defined in Section 312(f) of the Energy Policy Act of 1992.

#### *Possible Consumer Harm from Confusion of Biodiesel and Biomass-Based Diesel*

Because biomass-based diesel and biodiesel may have different properties, commenters expressed concerns that treating them as the same fuel for purposes of rating, certification, and labeling would cause consumer harm. NBB explained that some vehicle manufacturers' warranties require use of only biodiesel that meets the requirements of ASTM D6751 or diesel fuel that meets ASTM D975, and that different types of biomass-based diesel fuels would not necessarily meet this standard. NBB further asserted that using the designation "B-XX" for both fuels, as proposed in the NPRM, would confuse consumers regarding what fuel they are purchasing because consumers associate that designation solely with biodiesel blends. ADM and ISA likewise asserted that the proposed labels would

<sup>10</sup> Comments are available at: (<http://www.ftc.gov/os/comments/biodiesel/index.shtml>).

cause consumer confusion regarding the content and properties of the biodiesel and biomass-based diesel blends. Finally, ConocoPhillips observed that, under the proposed amendments, fuel blends containing five percent or less renewable diesel and five percent or less biodiesel, but with a combined concentration of biodiesel and biomass-based diesel of over five percent, would be labeled “contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent.” Those blends, however, would not differ in terms of suitability for various engines from diesel fuel containing five percent or less combined biodiesel and biomass-based diesel, for which there is no label requirement.

#### *Proposed Solutions*

Commenters suggested several changes to distinguish biodiesel from biomass-based diesel. NBB proposed that “a separate designation be required for a ‘biodiesel blend’” and that the FTC “create a system that allows each type of fuel within the biomass-based diesel pool to have its own label.” NBB further urged reserving the designation “B-XX” for only biodiesel blends. Similarly, ConocoPhillips recommended that “[r]ather than having headers read ‘B-100 Biodiesel’ and ‘B-20 Biodiesel Blend,’ [the headers should] be changed to ‘B-100 Biomass Diesel’ and ‘B-20 Biomass Diesel Blend.’” ISA suggested prohibiting the use of the term “biodiesel” altogether on a label unless the fuel actually contains biodiesel. Finally, as an alternative to changing the label, the Alliance of Automobile Manufacturers (“AAM”) recommended altering the definition of “biomass-based diesel” in the Fuel Rating Rule to define it explicitly as “biodiesel as defined in section 312(f) of the Energy Policy Act of 1992.”

#### **DISCUSSION:**

Based on the comments, it appears that fuel containing biomass-based diesel can differ significantly from fuel containing biodiesel and that these differences are significant for purposes of engine warranties. As the commenters explained, consumers may lose warranty coverage if they use fuels containing biodiesel in too high a concentration, whereas the use of the only biomass-based diesel currently on the market would not affect warranty coverage at any concentration. Furthermore, as the Commission noted in the NPRM, many original equipment manufacturers and customer service departments set biodiesel warranty

thresholds at five or twenty percent.<sup>11</sup> In order to make these thresholds meaningful, it is critical that consumers understand whether a fuel contains biodiesel or biomass-based diesel. However, the label proposed in the NPRM makes no distinction between fuels containing biodiesel and biomass-based diesel. Therefore, it might lead consumers to mistake a biodiesel blend for a biomass-based diesel blend and, thus, wrongly conclude that they can properly use a biodiesel blend without voiding their warranty.

The Commission’s proposed label also could cause a related problem. If a fuel contained both biodiesel and biomass-based diesel, the proposed amendments would require retailers to combine the percentage of biodiesel and biomass-based diesel present in the fuel for labeling purposes, thereby potentially confusing consumers regarding whether the fuel is suitable for their engines.<sup>12</sup>

Accordingly, as described in detail below, the Commission is altering the proposed amendments in four ways. First, the final amendments revise the definition of biomass-based diesel to make clear that biodiesel does not fall within the definition of biomass-based diesel for the purposes of the Fuel Rating Rule. Clarifying that the two fuels are distinct allows the Commission to require different labels for each.

Second, the final amendments require separate labels to disclose the presence of biodiesel and biomass-based diesel in a fuel blend.<sup>13</sup> The proposed amendments contained certain font, formatting, and heading requirements for biodiesel fuel labels. The final amendments retain these provisions. However, to distinguish between the two fuels, they also require biomass-based diesel labels to display headers that differ from those for biodiesel. Specifically, headers for biomass-based diesel labels will read “Biomass-Based Diesel Blend,” instead of “Biodiesel Blend.” In addition, while the headers for biomass-based diesel blends, like

those for biodiesel blends, must contain a specific disclosure of the exact percentage of biomass-based diesel in blends over twenty percent (and may contain such a disclosure for blends below that level), the labels will not use the “B-XX” designation. Instead, they will display the numerical representation of the volume followed by the percentage sign (e.g., “25%”). The final amendments limit the use of the “B-XX” designation to fuels containing biodiesel because, according to the commenters, consumers associate that designation solely with biodiesel blends.

Similarly, the final amendments provide separate labels for 100 percent (or “neat”) biodiesel and biomass-based diesel. Neat biomass-based diesel labels will have a header reading “100% Biomass-Based Diesel,” with language underneath the header reading “contains 100 percent biomass-based diesel.” The label for neat biodiesel will remain the same as proposed in the NPRM (i.e., “B-100 Biodiesel”), except that the language underneath the header will read: “contains 100 percent biodiesel.” The Commission is changing the text beneath the header to assist consumers in distinguishing neat biodiesel and neat biomass-based diesel.<sup>14</sup>

Third, to distinguish the fuels further, the final amendments change the background color for fuels containing biomass-based diesel to orange, rather than the blue required for biodiesel labels.<sup>15</sup> The Commission institutes this change for two reasons. First, the orange biomass-based diesel label will contrast with the blue biodiesel label, making it easier for consumers to distinguish between the two fuels. Second, biomass-based diesel, at least as it is currently sold, does not appear to pose engine warranty problems, or other unique concerns, for consumers. It is, therefore, appropriate to use the same background color as that used for all other previously covered alternative fuels.

Finally, the Commission is revising the amendments to make clear that, for purposes of determining whether and how to disclose the presence of

<sup>11</sup> See, e.g., “OEM Warranty Statements and Use of Biodiesel Blends over 5% (B5),” National Biodiesel Board, available at: ([http://www.biodiesel.org/pdf\\_files/B5\\_warranty\\_statement\\_32206.pdf](http://www.biodiesel.org/pdf_files/B5_warranty_statement_32206.pdf)).

<sup>12</sup> For example, the proposed label for fuel containing eighteen percent biodiesel and three percent biomass-based diesel would be “B-21 Biodiesel Blend,” wrongly implying that the amount of biodiesel in the fuel exceeds the significant threshold of twenty percent.

<sup>13</sup> As required by EISA, the Commission does not require retailers to disclose the presence of five percent or less biomass-based diesel in a fuel blend. However, if a blend contains more than five percent of biomass-based diesel and more than five percent biodiesel, the final amendments require both a biodiesel label and a biomass-based diesel label on the pump.

<sup>14</sup> As discussed below, the Commission is not altering the text below the header for biodiesel and biomass-based diesel blends. However, because EISA only provides specific labeling requirements for biodiesel and biomass-based diesel blends—and neat biodiesel and biomass-based diesel are not blends—the Commission has discretion to omit the term “biomass-based diesel” from neat biodiesel labels and vice versa.

<sup>15</sup> In the NPRM, the Commission proposed biodiesel fuel labels with a background color of purple. For reasons explained in Section V.C below, the Commission is now changing the required color for biodiesel to blue.

biodiesel or biomass-based diesel in fuels, their concentrations should be counted separately. Thus, the final amendments define the term "biodiesel blend" as a blend containing more than five percent biodiesel, and it defines a new term, "biomass-based diesel blend," as a blend containing more than five percent biomass-based diesel. The final amendments also explicitly do not cover blends that "contain less than or equal to 5 percent biodiesel by volume and less than or equal to 5 percent biomass-based diesel by volume." These changes are consistent with EISA's provision that retailers need not disclose biodiesel and biomass-based diesel in concentrations of five percent or less.

Furthermore, the Commission is incorporating these new terms into the rating and certification requirements. Therefore, covered entities must rate and certify the percentage of biodiesel and/or biomass-based diesel in a fuel blend independently. As noted above, because biodiesel and biomass-based diesel must be separately rated and disclosed on separate labels, it is theoretically possible that a single fuel blend could contain more than five percent of each and, therefore, would require two separate labels. However, the Commission has no evidence that there is any substantial market for such dual blends at this time. If this requirement becomes unwieldy at some future date, any affected party may petition for revisions to the Rule.

Although the final amendments require separate labeling of biodiesel and biomass-based diesel fuels, they do not change the text below the label's black band for either biodiesel or biomass-based diesel blends, notwithstanding several commenters' views that the text could confuse consumers. As explained above, EISA requires that this specific language appear on the label. Section 205(b) explicitly states that blends at concentrations of more than five percent and no more than twenty percent "shall be labeled 'contains biomass-based diesel or biodiesel in quantities between 5 and 20 percent'" and that blends at concentrations above twenty percent "shall be labeled 'contains more than 20 percent biomass-based diesel or biodiesel.'" EISA, Sec. 205(b) (emphasis added). The Commission, therefore, does not have discretion to allow different language.

#### Examples

To illustrate the application of the revised labeling requirements, the Commission provides the following examples:

1) A fuel blend containing five percent biomass-based diesel and five percent biodiesel does not require any additional labeling because the Rule only applies to diesel blends containing more than five percent biodiesel and/or more than five percent biomass-based diesel.

2) A blend containing six percent biodiesel and five percent biomass-based diesel requires a blue label with either "B-6 Biodiesel Blend" or "Biodiesel Blend" in the header and with the text "contains biomass-based diesel or biodiesel in quantities between 5 and 20 percent" below the header. The header of the label does not disclose the presence of biomass-based diesel because it comprises only five percent of the fuel.

3) A blend containing twenty-one percent biodiesel and five percent biomass-based diesel requires a blue label with "B-21 Biodiesel Blend" in the header and with the text "contains more than 20 percent biomass-based diesel or biodiesel" below the header. The header of the label does not disclose the presence of biomass-based diesel because it comprises only five percent of the fuel by volume. Furthermore, because the fuel contains only five percent biomass-based diesel, retailers should not include it for the purposes of determining the specific blend designation.

#### B. General Appropriateness of Label

##### COMMENTS:

None of the commenters objected to the Commission's explicit inclusion of fuels containing more than five percent biodiesel or biomass-based diesel within the scope of the Fuel Rating Rule, nor did commenters object to the size or format of the labels. For example, ATA supported the labels as "distinctive and not likely to confuse consumers." The commenters also concurred with the general categories of information disclosed on the labels. For example, the American Petroleum Institute ("API") expressed the view that the labels "provide[] the consumer with the information necessary to fuel properly his/her vehicle."

##### DISCUSSION:

Because the size, format, and general layout requirements of the biodiesel and biomass-based diesel blend labels are consistent with requirements for other fuels, and because none of the commenters objected to those requirements, the Commission retains those aspects of the proposed labels.

#### C. Appropriateness of Background Color

The NPRM proposed a background color of purple, PMS 2562, for biodiesel and biomass-based diesel labels. The Commission requested comment on whether purple, blue, or another color was most appropriate.

##### COMMENTS:

API supported purple as the background color, noting that it "provides an appropriate contrast between regular diesel labels (often green), gasoline-octane labels (yellow) and E85 labels (orange)." Most commenters, however, believed a different color would be more appropriate for biodiesel. Significantly, both ISA and ADM favored a blue background because it would be consistent with state biodiesel labeling requirements already in place.

##### DISCUSSION:

The Commission agrees with ISA and ADM that biodiesel labels should have a blue background. A blue label is consistent with pre-existing state requirements, and blue will sufficiently contrast with colors used for other fuel labels, reducing the risk of consumers mistaking biodiesel for biomass-based diesel.<sup>16</sup>

The final amendments, however, require biomass-based diesel labels to have an orange background. As explained above, the use of currently available biomass-based diesel blends does not raise the same engine warranty concerns as biodiesel, and, therefore, it is appropriate to use the same orange background as that used for all other previously covered alternative fuels.

#### D. Proposed Modifications to Increase Benefits to Consumers

##### COMMENTS:

Five commenters proposed modifications to the labels to increase the benefit to consumers. AAM proposed adding the text: "Consult manufacturer fuel recommendations." ATA suggested requiring a similar warning on labels for blends of more than twenty percent biodiesel. API suggested adding the word "MAXIMUM" in all capital letters to precede the specific blend disclosure for blends above B-20. Similarly, BP Products North America ("BP") urged altering proposed Part 306.5(b) to

<sup>16</sup> Some commenters suggested green as an appropriate background color for biodiesel. However, as noted by API, the color green is associated with diesel fuel, and biodiesel labels should present a significant contrast to 100 percent petroleum-based diesel to avoid the risk of confusion.

require that the labels display the maximum volume of biodiesel and/or biomass-based diesel in a blend. Finally, the Engine Manufacturers Association ("EMA") proposed requiring the label for neat biodiesel to state whether the fuel meets the standards of ASTM D6751.

#### DISCUSSION:

The final amendments do not incorporate these suggestions. Requiring a "consult manufacturer fuel recommendations" warning is inconsistent with the Fuel Rating Rule's treatment of other alternative fuels. The Commission notes, however, that nothing in the regulations prohibits a retailer from disclosing the warnings proposed by AMA and ATA. In addition, the Commission does not agree with API's and BP's suggestion that the term "maximum" appear on biodiesel fuel labels. The final amendments already require ratings and posting of a specific percentage designation for biodiesel fuels at concentrations of over twenty percent and, therefore, such a designation would be confusing. Finally, the Commission declines to adopt EMA's proposed language for neat biodiesel. In light of the final amendments, which now require different labels for neat biodiesel and neat biomass-based diesel, retailers may only label a fuel as "Biodiesel" if it meets the definition of "biodiesel" in Part 306.0, which specifically incorporates ASTM D6751 by reference.

#### *E. Allowing Nonspecific Percentage Designations ("Biodiesel Blend") for Blends at Concentrations of Up to Twenty Percent and Requiring Specific Designations ("B-XX") for Concentrations Exceeding Twenty Percent*

In the NPRM, the Commission sought comment on whether it should revise the Fuel Rating Rule to require a specific designation (e.g., "B-15") of the percentage of biodiesel and/or biomass-based diesel in a blend. As proposed in the NPRM, the amendments would have required specific designations for concentrations in excess of twenty percent, and allowed, but not required, the designations for concentrations up to twenty percent.

#### COMMENTS:

##### *Concentrations of Twenty Percent or Less*

All commenters agreed that the final amendments should not require a specific percentage disclosure at concentrations of twenty percent or less. Several noted that compliance with

such a requirement would be impractical. ATA, for example, asserted that retailers often mix different biodiesel fuels with concentration levels ranging from five to twenty percent at the point of sale, making it extremely difficult to know the exact concentration of a biodiesel fuel blend sold from a given dispenser. Similarly, the Petroleum Marketers Association of America ("PMAA") noted that "[a] label with a generic range would give retailers the flexibility to increase or decrease biodiesel blends to meet supply without changing the label." In addition, EMA explained that "many manufacturers approve the use of biodiesel blends up to 20%. Consequently, there is no quality reason or rationale to make a specific delineation among blends less than 20%. A single designation is sufficient to assure the quality of a blended fuel."

However, while not advocating for an exact percentage designation, ATA and individual commenter Johnas Carson suggested requiring disclosure of the percentage of biodiesel and biomass-based diesel in a fuel using blend increments of five percentage points (e.g., "contains biodiesel in amounts between B-10 and B-15").

##### *Concentrations of More than Twenty Percent*

Commenters generally supported the Commission's proposal to require a specific designation when disclosing the presence of more than twenty percent biodiesel and/or biomass-based diesel in a blend. NBB explained that for blends exceeding twenty percent,

performance varies based on climate, raw materials, and equipment, which means consumers need to be more aware of the specific blend level they are purchasing. Further, the impact on equipment of higher blends has not been thoroughly tested and there is a higher likelihood of known problems or issues with high blends that are not present or are of lesser importance when using blends of B20 or lower. Blends higher than 20% can not be considered a direct replacement for petroleum diesel fuel and may require significant additional precautions, handling and maintenance considerations as well as potential fuel system and engine modification.

Comments from AAM, EMA, ADM, and BP all concurred with NBB's position. The only objection to a specific designation came from ATA, which argued for disclosure of concentration levels using five percentage point increments for blends at all concentrations.

#### DISCUSSION:

The Commission agrees with the majority of commenters that it should retain the requirements of nonspecific designations of biodiesel or biomass-based diesel in concentrations of over five, but not over twenty, percent and continue to require specific designations for blends over twenty percent. The Commission understands that manufacturers' warranties generally allow use of biodiesel blends at concentrations of either no more than five or no more than twenty percent. Thus, there is less benefit to consumers from disclosure of a specific percentage in this range. Indeed, EISA implicitly recognizes this fact by prescribing the same labeling language for blends in the range. Furthermore, based on ATA's comment, retailers apparently would have difficulty determining the precise percentage of biodiesel or biomass-based diesel in blends up to twenty percent. Thus, requiring a specific designation for these blends would impose costs on industry members without significantly benefitting consumers. The seller, however, would have discretion to disclose the percentage of biodiesel or biomass-based diesel in blends up to twenty percent.<sup>17</sup>

By contrast, as noted in NBB's comment, the performance of blends containing more than twenty percent biodiesel is uncertain and can vary significantly. In addition, we understand that there are no biomass-based diesel fuels currently marketed at concentrations above twenty percent, and the properties of any such fuels that may be marketed in the future are unknown. Moreover, the commenters did not object to a specific designation for biomass-based diesel blends above twenty percent. Therefore, the Commission is retaining the specific percentage designation requirement for biodiesel and biomass-based diesel blends of more than twenty percent. The Commission further notes that this requirement will provide information of interest to those consumers who favor a fuel blend with a high percentage of nonpetroleum components.<sup>18</sup>

<sup>17</sup> See note 23, *infra*, and accompanying text.

<sup>18</sup> Commenters raised two additional topics that went beyond the scope of EISA or the Fuel Rating Rule. First, API asserted that biodiesel may not be compatible with "the existing retail-diesel infrastructure" and states that "[t]his is an area that we believe should be addressed." Second, individual commenter Jeff Cohan inquired about accuracy of media reports concerning the interaction of biodiesel fuels and fuel efficiency requirements. As these comments involve matters beyond the scope of this rulemaking, the Commission does not address them.

## VI. Final Amendments to the Fuel Rating Rule

In light of the comments described above, and pursuant to EISA's directive, the Commission is amending the Fuel Rating Rule to: 1) incorporate the definitions for the terms "biomass-based diesel," "biodiesel," and "biomass-based diesel and biodiesel blends" contained in Section 205 of EISA; 2) revise the definition of "automotive fuel" to make clear that those fuels are subject to the rating, certification, and posting requirements of the Fuel Rating Rule; and 3) require labeling of fuels containing more than five percent biomass-based diesel and/or more than five percent biodiesel, consistent with the language in Section 205 of EISA and state model rules proposed by the National Conference on Weights and Measures ("NCWM").

### A. Definitions

As noted above, Section 205 of EISA requires the Commission to promulgate labeling requirements for "biomass-based diesel," "biodiesel," and "biomass-based diesel and biodiesel blends," as those terms are defined in the Section 205(c) of the statute. The Commission, therefore, adds the statutorily required terms to Part 306.0 of the Fuel Rating Rule. Additionally, the Commission adds "biomass-based diesel blend" and "biodiesel blend" as separate terms to allow for separate rating, certification, and labeling requirements.

### B. Alternative Fuels, Automotive Fuel Rating, and Certification

Part 306.0(i)(2) of the Rule currently lists examples of alternative fuels, but specifically states that alternative fuels are "not limited to" those listed. The final amendments expressly add biomass-based diesel and biodiesel, as well as blends containing more than five percent biodiesel and/or five percent biomass-based diesel, to this nonexclusive list. By specifically including these terms, the final amendments clarify that these fuels are covered by the rating and certification requirements of Part 306 of the Rule.<sup>19</sup>

Incorporating biodiesel fuels into the Fuel Rating Rule and subjecting them to these rating and certification requirements should help ensure the accuracy of the information on biodiesel

<sup>19</sup> Consistent with EISA (Sec. 205(b)(1)), the final amendments to Part 306.0 indicate that biodiesel blends and biomass-based diesel blends that contain less than or equal to five percent biomass-based diesel and less than or equal to five percent biodiesel by volume, and that meet ASTM D975, are not automotive fuels covered by the requirements of this Rule.

fuel labels. The current rating requirements in Part 306.5 and the certification procedures in Part 306.6 provide the means to substantiate fuel ratings throughout the chain of sale. Specifically, under the current Rule, refiners, importers, producers, and distributors of alternative liquid automotive fuels must have "competent and reliable evidence" supporting their advertised fuel rating (Sec. 306.5(b) and Sec. 306.8(b)). In addition, sellers must certify that percentage when they transfer the fuel to anyone other than a consumer (Sec. 306.6 and Sec. 306.8(c)).<sup>20</sup>

Finally, to comply with EISA's labeling requirements, the final amendments make minor changes to the rating and certification provisions of the Rule for biodiesel fuel blends. First, the final amendments modify language in the Rule's certification provision (306.5(b)) to clarify that biodiesel and biomass-based diesel blends should be rated by the percentage of biodiesel and/or biomass-based diesel fuel in the blend, not necessarily by the percentage of the principal component of the fuel like other alternative fuels.<sup>21</sup> Second, the certification requirements in Part 306.6(b) currently allow transferors of alternative automotive fuels to certify fuel ratings with a letter of certification, which remains valid so long as the fuel transferred contains the same or a greater rating of the principal component. However, a change in the concentration of biodiesel or biomass-based diesel in an automotive fuel may trigger different labeling requirements under EISA even if the concentration of the principal fuel increases (e.g., a change from B-25 to B-20). Therefore, the final amendment to Part 306.6(b) states that if transferors of biodiesel fuels choose to use a letter of certification, that letter will be valid only as long as the fuel transferred contains the same percentage of biodiesel or biomass-based diesel as previous fuel transfers covered by the letter.

### C. Labeling

The labeling requirements in the final amendments employ the language mandated by EISA. In accordance with

<sup>20</sup> As the Commission explained in the NPRM, an entity blending biodiesel fuels is responsible for determining the amount of biodiesel and/or biomass-based diesel in the fuel it sells. This includes the need to account for biodiesel and/or biomass-based diesel in any diesel fuel (e.g., diesel fuel containing biodiesel at five percent or less) it uses to create blends that must be rated, certified, or labeled under the Rule.

<sup>21</sup> For example, a twenty-five percent biodiesel/diesel blend should be rated as twenty-five percent biodiesel, not seventy-five percent diesel.

Section 205 of the Act, and consistent with the FTC's authority under PMPA, the final amendments address labeling for fuels containing biodiesel and/or biomass-based diesel at four different concentration levels.<sup>22</sup> First, retailers do not have to disclose the presence of five percent or less biodiesel and/or five percent or less biomass-based diesel in a fuel, provided that the fuel meets the specifications contained in ASTM D975. Second, for fuel blends containing more than five percent but no more than twenty percent biomass-based diesel or biodiesel, the label contains the language required by Section 205(b)(2) of EISA. Third, for fuels containing biodiesel or biomass-based diesel at concentrations of more than twenty percent but less than 100 percent, the label contains the language required by Section 205(b)(3) of EISA. Finally, pursuant to the Commission's authority under PMPA and consistent with EISA's direction, the final amendments require labels for neat (i.e., 100 percent) biodiesel and biomass-based diesel.

In addition to the specific disclosures required by EISA, the labels contain fuel terms on their headings that are consistent with both the draft model rules proposed by the NCWM and the Fuel Rating Rule's treatment of other alternative fuels. Specifically, as proposed in the NPRM, the heading in a label for a biodiesel blend containing more than five but no more than twenty percent biodiesel must display either: 1) the capital letter "B" followed first by a numeric representation of the percentage of biodiesel and then by the term "Biodiesel Blend," such as "B-20 Biodiesel Blend"; or 2) the term "Biodiesel Blend."<sup>23</sup> Similarly, as discussed above, the Commission has revised the proposed labels so that the heading for biomass-based diesel blends in the same more than five but no more than twenty percent concentration category must display either: 1) a numeric representation of the percentage of biomass-based diesel followed first by the percent symbol (%) and then by the term "Biomass-Based Diesel Blend," such as "20% Biomass-Based Diesel Blend"; or 2) the term "Biomass-Based Diesel Blend."

For biodiesel and biomass-based diesel blends containing more than

<sup>22</sup> Appendix ("App.") A summarizes the labeling requirements for biodiesel fuels at each of these concentrations.

<sup>23</sup> The choice of designation (e.g., "B-15 Biodiesel Blend" or "Biodiesel Blend") is at the discretion of the seller. Giving sellers this choice is consistent with the model rules under consideration by the NCWM and with Section 205 of EISA, which require disclosing only that the fuel contains between five and twenty percent biodiesel or biomass-based diesel, rather than a specific amount.

twenty percent, the final amendments require a specific blend designation (e.g., “B-80” for biodiesel and “80%” for biomass-based diesel) in the heading. The Commission has slightly revised the proposed requirements so that the designation is followed by either the term “Biodiesel Blend” or “Biomass-Based Diesel Blend,” as appropriate. Finally, as explained above, the final amendments provide for neat biodiesel and biomass-based diesel labels. The heading for these fuels must display either “B-100 Biodiesel” or “100% Biomass-Based Diesel,” along with the explanatory text of either “contains 100 percent biodiesel” or “contains 100 percent biomass-based diesel.” Inclusion of these terms on the label is consistent with draft model rules currently under consideration by the NCWM,<sup>24</sup> and with the Fuel Rating Rule’s labels for other alternative fuels, which must disclose the type of alternative fuel on the heading of the label (e.g., “E-85” for eighty-five percent ethanol blends).

The final amendments also specify the size, font, and format requirements for the draft labels. These requirements are consistent with those in place for other alternative liquid fuels in the Rule (see Sec. 306.12). The Rule requires a blue (PMS<sup>25</sup> 277 or its equivalent) background for labels disclosing the presence of biodiesel and an orange background (PMS 1495 or its equivalent) for biomass-based diesel. The blue background for biodiesel will allow retail consumers easily to distinguish biodiesel blends from biomass-based diesel, as well as other fuels sold at retail pumps (e.g., the yellow octane label), and will help minimize the likelihood that consumers will use the wrong fuel in their vehicle. In addition, the final amendments require, as for other alternative fuels, the text to be in Helvetica black type and centered on the label. The Commission is amending Part 306.12(f) to provide sample illustrations of biodiesel and biomass-based diesel labels.

## VII. Paperwork Reduction Act

The certification and labeling requirements announced in this notice constitute a “collection of information” under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (“PRA”).

<sup>24</sup> See “National Conference on Weights and Measures Laws and Regulations Committee & Petroleum Subcommittee Interim Meeting for the 93rd NCWM Annual Conference; Supplement to NCWM Publication 15” (Section 3.15).

<sup>25</sup> Pantone Matching System. We are also amending the Rule to allow the use of non-Pantone equivalents for all alternative fuels to prevent unnecessarily favoring the Pantone system over other suitable color schemes.

Consistent with the Fuel Rating Rule’s requirements for other alternative fuels, the final amendments require refiners, producers, importers, distributors, and retailers of biodiesel fuels to retain, for one year, records of any delivery tickets, letters of certification, or tests upon which they based the automotive fuel ratings that they certify or post. The covered parties also must make these records available for inspection by Commission and EPA staff as well as by persons authorized by the Commission or EPA. Finally, retailers must produce, distribute, and post fuel rating labels on fuel pumps.

In its NPRM, the Commission provided estimated recordkeeping and disclosure burdens for entities covered under the Rule and sought comment on the accuracy of those estimates. Commenters have not disputed those estimates, and the Office of Management and Budget (“OMB”) has approved the collections of information required by the amendments.

The Commission believes that the minor changes made since the NPRM do not affect the previous burden estimate. In the following sections, the Commission discusses comments regarding burden estimates in more detail, explains why it believes those estimates are not affected by the revisions, and restates those estimates.

### A. Comments on Burden to Covered Entities

Significantly, the commenters did not dispute the Commission’s estimates of burden, nor did they identify a burden that the Commission did not discuss in the NPRM. Indeed, individual commenter Johnas Carson affirmed that “the costs of the decals and installation quoted in this notice are accurate.” NBB described these costs as “minor.” Similarly, PMAA, an association of independent fuel retailers, stated that “[c]osts associated with the rulemaking are minimal so long as the requirements are written in a flexible manner that would not require dispenser owners to affix new labels every time there is a change in the biodiesel blend concentration.” The final amendments announced in this notice retain such flexibility by not requiring a specific percentage designation for fuel blends containing twenty percent or less biodiesel or biomass-based diesel.<sup>26</sup>

<sup>26</sup> While not commenting on the burden estimate, ATA urged that “[c]entrally fueled fleets should not be subject to the labeling requirements, as they do not sell fuel to the public. . . .” As amended, the labeling requirements of the Fuel Rating Rule apply only to retailers that sell to the “general public.” 16 CFR 306.0(f).

### B. Changes to the Proposed Labeling Requirements

As explained in detail above, the Commission has revised its labeling requirements to provide for separate labeling of biodiesel and biomass-based diesel. As amended, the label requirements make clear that retailers need not disclose the presence of five percent or less biodiesel or biomass-based diesel in a fuel blend. This final amendment reduces the burden on covered entities because it makes clear that retailers need not label fuels that cumulatively contain more than five percent biodiesel and biomass-based diesel, but less than five percent of each. However, the final amendments also could conceivably require a retailer to use two labels for a fuel blend that contained more than five percent biodiesel and more than five percent biomass-based diesel.

Notwithstanding this possibility, the Commission is not changing its burden estimates. Specifically, there is no evidence that retailers are selling any fuel blends containing more than five percent biomass-based diesel and, therefore, no evidence that any retailer will incur the burden of posting two labels on a fuel dispenser. In the NPRM, the Commission specifically sought comments on the market for biomass-based diesel. Other than ConocoPhillip’s acknowledgment that it markets renewable diesel blends at an unspecified concentration, the Commission received no comments in response to this request. Based on this record, and the lack of any objection to the Commission’s burden analysis in the NPRM, the Commission assumes that there is no significant burden impact from the revisions.<sup>27</sup>

### C. The Recordkeeping and Disclosure Burdens

The Commission previously estimated the burden associated with the Fuel Rating Rule’s recordkeeping requirements to be no more than five minutes per year per industry member, and it previously estimated the burden associated with the Rule’s disclosure requirements to affect no more than 1/8th of industry members in any given year at one hour per member affected—or, averaged across all industry members, 1/8th hour per year. These estimated burdens do not include recordkeeping in which covered

<sup>27</sup> The Commission has also revised its labeling requirements to substitute blue for purple as the background color and to require different headers for biomass-based diesel blends and pure biomass-based diesel fuel. These changes are cosmetic and do not impact the recordkeeping or disclosure burdens.



industry members already engage in their normal course of business.<sup>28</sup>

Because the procedures for distributing and selling biodiesel fuels are no different from those for other automotive fuels, the Commission expects that, consistent with practices in the fuel industry generally, the covered parties in the biodiesel fuel industry will record the fuel rating certification on documents (*e.g.*, shipping receipts) already in use, or will employ a one-time letter of certification. Furthermore, the Commission expects that labeling of biodiesel fuel pumps will be consistent with practices in the fuel industry generally. The information collection burden, therefore, will be the same as for other automotive fuels: five minutes per year for recordkeeping and 1/8th hour per year for disclosure.

Based on statistics provided by NBB, the Commission estimates that there are approximately 200 producers, 1500 retailers, and 2000 distributors of biodiesel.<sup>29</sup> Conservatively assuming that each producer, distributor, and retailer of biodiesel is a distinct entity, and that each seller of biodiesel will spend five minutes (or 1/12th hour) per year complying with the recordkeeping requirements, and assuming that each retailer will spend 1/8th hour per year complying with the disclosure requirements, the Commission estimates an incremental annual burden of 308 hours for recordkeeping (1/12th hour per year x 3700 entities) and 188 hours for disclosure (1/8th hour per year x 1,500 retailers).

#### D. Approval by OMB

Pursuant to the PRA, 44 U.S.C. 3501–3521, the FTC submitted to OMB for review and approval the collections of information contained in the Rule. On May 23, 2008, under OMB Control No. 3084–0068, OMB granted approval through May 31, 2011.

<sup>28</sup> For OMB purposes, “burden” does not include efforts to comply with a collection of information that a covered party would expend in any event. 5 CFR 1320.3(b)(2).

<sup>29</sup> Because the biodiesel industry is young, estimates of its size may not be as accurate as estimates of the size of more mature industries. Therefore, we have conservatively rounded up from the actual statistics provided by the NBB. In a document dated January 25, 2008, the NBB estimated a total of 171 producers of biodiesel and biodiesel blends. See ([http://www.biodiesel.org/pdf\\_files/fuelfactsheets/Production\\_Capacity.pdf](http://www.biodiesel.org/pdf_files/fuelfactsheets/Production_Capacity.pdf)). In addition, the NBB’s website lists all known distributors (<http://www.biodiesel.org/buyingbiodiesel/distributors/showall.asp>) and retailers (<http://www.biodiesel.org/buyingbiodiesel/retailfuelsites/showall.asp>) of biodiesel. As of February 4, 2008, the site listed approximately 1250 retailers and 1775 distributors of biodiesel and biodiesel blends.

### VIII. Regulatory Flexibility Act

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

In light of the comments submitted in response to the NPRM, the FTC reaffirms its belief that the final amendments will not have a significant economic impact on a substantial number of small entities. As explained in Section VII above, each entity in the biodiesel industry will spend, at most, five minutes per year complying with the recordkeeping requirements and 1/8th hour per year complying with the disclosure requirements. Staff estimates the mean hourly wage for employees of producers, importers, and distributors of biodiesel fuels to be \$21.39,<sup>30</sup> and the mean hourly wage for employees of biodiesel retailers to be \$14.35.<sup>31</sup> Conservatively assuming that all biodiesel producers, distributors, and retailers are small entities, compliance with the recordkeeping requirements will cost producers and distributors \$1.78 per year (\$21.39 x 1/12th hour) and retailers \$1.20 (\$14.35 x 1/12th hour). In addition, under the same conservative assumptions, compliance with the disclosure requirements will cost retailers \$1.79 (\$14.35 x 1/8th hour).

Retailers will also incur the cost of procuring and replacing fuel dispenser labels to comply with the disclosure requirements of the Rule. The Commission has previously estimated that the price per automotive fuel label is approximately fifty cents and that the average automotive fuel retailer has six dispensers. Applying those estimates to the biodiesel fuel industry results in an initial cost to retailers of \$3.00 (6 pumps x \$0.50). In addition, the Commission has previously estimated the useful life of dispenser labels to range from six to ten years. Assuming a useful life of eight years, the mean of that range, and distributing the costs on a per-year basis, staff estimates the total annual replacement labeling cost to be \$0.06 (1/8 x \$0.50).

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

<sup>30</sup> Bureau of Labor Statistics, 2006 Employment Statistics Survey, Annual Average Hourly Earnings for Oil and Gas Extraction Production workers.

<sup>31</sup> Bureau of Labor Statistics, May 2006 Occupational Employment Statistics Survey, “Correspondence Clerks,” Table 1.

providing a final analysis in order to inquire into the impact of the final amendments on small entities. Therefore, the Commission has prepared the following analysis.

#### A. Statement of the need for, and objectives of, the final amendments

Section 205 of EISA requires the Commission to promulgate biodiesel fuel labeling requirements that inform consumers of the percent of biomass-based diesel or biodiesel contained in a fuel sold at a retail pump. The Commission is publishing these final amendments in compliance with that congressional requirement.

#### B. Issues raised by comments in response to the initial regulatory flexibility analysis

Commenters did not raise any specific issues with respect to the regulatory flexibility analysis in the NPRM. As noted above, commenters, including an association of independent fuel retailers, supported adding biodiesel fuels to the coverage of the Fuel Rating Rule. Furthermore, the commenters agreed that the recordkeeping and disclosure burdens of the final amendments are “minimal.”

#### C. Estimate of the number of small entities to which the final amendments will apply

As discussed above, the biodiesel fuel industry is young and still developing. Although the Commission has evidence of the size of the industry generally, it does not have any evidence regarding the number of small businesses within that industry. In the NPRM, the Commission assumed that all industry members are small businesses, and none of the commenters disagreed with that assumption. Accordingly, the Commission reaffirms its assumption for the purposes of this regulatory flexibility analysis that the 200 producers, 1500 retailers, and 2000 distributors of biodiesel are all small businesses.

#### D. Projected reporting, recordkeeping, and other compliance requirements

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

employed by industry members, namely, administrative.

#### E. Alternatives Considered

Section 205 of EISA requires that “[e]ach retail diesel fuel pump be labeled in a manner that informs consumers of the percent of biomass-based diesel or biodiesel that is contained in the biomass-based diesel or biodiesel blend that is offered for sale, as determined by the Federal Trade Commission.” The Commission, therefore, must require covered entities to accurately rate, certify, and label biodiesel fuels.

The Commission has amended the Fuel Rating Rule in a manner that minimizes the economic impact, if any, from Section 205’s labeling requirements. As explained above, the Commission has designed the rating, certification, and labeling requirements so that industry members may use documents already in use to certify a biodiesel fuel’s rating. Furthermore, the Commission is promulgating labeling provisions requiring only language specifically provided by Section 205 or necessary to inform consumers of the percentage of biodiesel or biomass-based diesel contained in a fuel. Moreover, the commenters have not identified any alternative requirements that would reduce this burden. Accordingly, the Commission concludes that there are no alternative requirements that would reduce the burden on industry members and satisfy EISA’s mandate.

### IX. Final Rule Language

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

Energy conservation, Gasoline, Incorporation by reference, Labeling, Reporting and recordkeeping requirements.

■ For the reasons set out above, the Commission amends 16 CFR Part 306 as follows:

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

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

**AUTHORITY:** 15 U.S.C. 2801 *et seq.*; Pub. L. 110-140.

■ 2. Section 306.0 is amended as follows:

- a. Paragraph (i)(2) is revised.
- b. Paragraph (i)(3) is added.
- c. Paragraph (j)(2) is revised.
- d. Paragraph (j)(3) is added.
- e. Paragraphs (k), (l), (m), and (n) are added.

#### § 306.0 Definitions.

\* \* \* \* \*

- (i) \* \* \* \* \*
- (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, denatured ethanol, and/or other alcohols (or such other percentage, but not less than 70 percent, as determined by the Secretary of the United States Department of Energy, by rule, to provide for requirements relating to cold start, safety, or vehicle functions), with gasoline or other fuels;
  - (iii) Liquefied natural gas;
  - (iv) Liquefied petroleum gas;
  - (v) Coal-derived liquid fuels;
  - (vi) Biodiesel;
  - (vii) Biomass-based diesel;
  - (viii) Biodiesel blends containing more than 5 percent biodiesel by volume; and
  - (ix) Biomass-based diesel blends containing more than 5 percent biomass-based diesel by volume.

(3) Biodiesel blends and biomass-based diesel blends that contain less than or equal to 5 percent biodiesel by volume and less than or equal to 5 percent biomass-based diesel by volume, and that meet American Society for Testing and Materials (“ASTM”) standard D975-07b (“Standard Specification for Diesel Fuel Oils”), are not automotive fuels covered by the requirements of this Part. The incorporation of ASTM D975-07b by reference was 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 D975-07b may be obtained from ASTM International, 1916 Race Street, Philadelphia, PA, 19103, or may be inspected at the Federal Trade Commission, Public Reference Room, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C., or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: ([http://www.archives.gov/federal\\_register/cfr/ibr\\_locations.html](http://www.archives.gov/federal_register/cfr/ibr_locations.html)).

(j) \* \* \*

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

(3) For biomass-based diesel, biodiesel, biomass-based diesel blends with more than five percent biomass-based diesel, and biodiesel blends with more than five percent biodiesel, a disclosure of the biomass-based diesel or biodiesel component, expressed as the percentage by volume.

(k) *Biomass-based diesel* means a diesel fuel substitute produced from nonpetroleum renewable resources that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under 42 U.S.C. 7545, and includes fuel derived from animal wastes, including poultry fats and poultry wastes, and other waste materials, or from municipal solid waste and sludges and oils derived from wastewater and the treatment of wastewater, except that the term does not include biodiesel as defined in this Part.

(l) *Biodiesel* means the monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet the registration requirements for fuels and fuel additives under 40 CFR Part 79; and the requirements of the American Society for Testing and Materials standard D6751-07b (“Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels”). The incorporation of ASTM D6751-07b by reference was 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 D6751-07b may be obtained from ASTM International, 1916 Race Street, Philadelphia, PA, 19103, or may be inspected at the Federal Trade Commission, Public Reference Room, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C., or at NARA. For information on the availability of this material at NARA, call 202-741-6030, or go to: ([http://www.archives.gov/federal\\_register/cfr/ibr\\_locations.html](http://www.archives.gov/federal_register/cfr/ibr_locations.html)).

(m) *Biodiesel blend* means a blend of petroleum-based diesel fuel with biodiesel.

(n) *Biomass-based diesel blend* means a blend of petroleum-based diesel fuel with biomass-based diesel.

■ 3. Section 306.5(b) is revised to read as follows:

#### § 306.5 Automotive fuel rating.

\* \* \* \* \*

(b) To determine automotive fuel ratings for alternative liquid automotive fuels other than biodiesel blends and biomass-based diesel blends, you must possess a reasonable basis, consisting of competent and reliable evidence, for the percentage by volume of the principal component of the alternative liquid automotive fuel that you must disclose.

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

■ 4. Section 306.6(b) is revised to read as follows:

**§ 306.6 Certification.**

\* \* \* \* \*

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

\* \* \* \* \*

■ 5. Section 306.10(f) is revised to read as follows:

**§ 306.10 Automotive fuel rating posting.**

\* \* \* \* \*

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

- (1) "Methanol/Minimum \_\_\_% Methanol"
- (2) "Ethanol/Minimum \_\_\_% Ethanol"
- (3) "M—85/Minimum \_\_\_% Methanol"
- (4) "E—85/Minimum \_\_\_% Ethanol"
- (5) "LPG/Minimum \_\_\_% Propane" or "LPG/Minimum \_\_\_% Propane and \_\_\_% Butane"

(6) "LNG/Minimum \_\_\_% Methane"

(7) "B—20 Biodiesel Blend/contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent"

(8) "20% Biomass-Based Diesel Blend/contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent"

(9) "B—100 Biodiesel/contains 100 percent biodiesel"

(10) "100% Biomass-Based Diesel/contains 100 percent biomass-based diesel"

■ 6. Section 306.12 is amended as follows:

■ a. Paragraph (a)(2) is revised.

■ b. Paragraphs (a)(4) through (a)(9) are added.

■ c. Paragraph (c)(2) is revised and paragraph (c)(3) is added.

■ d. Graphics are added at the end of the section.

**§ 306.12 Labels.**

\* \* \* \* \*

(a) \* \* \*

(2) *For alternative liquid automotive fuel labels (one principal component) other than biodiesel, biomass-based diesel, biodiesel blends, and biomass-based diesel blends.* The label is 3 inches (7.62 cm) wide × 2½ inches (6.35 cm) long. "Helvetica black" type is used throughout. All type is centered. The band at the top of the label contains the name of the fuel. This band should measure 1 inch (2.54 cm) deep. Spacing of the fuel name is 1/4 inch (.64 cm) from the top of the label and 3/16 inch (.48 cm) from the bottom of the black band, centered horizontally within the black band. The first line of type beneath the black band is 1/8 inch (.32 cm) from the bottom of the black band. All type below the black band is centered horizontally, with 1/8 inch (.32 cm) between each line. The bottom line of type is 3/16 inch (.48 cm) from the bottom of the label. All type should fall no closer than 3/16 inch (.48 cm) from the side edges of the label. If you wish to change the dimensions of this single component label to accommodate a fuel descriptor that is longer than shown in the sample labels, you must petition the Federal Trade Commission. You can do this by writing to the Secretary of the Federal Trade Commission, Washington, D.C. 20580. You must state the size and contents of the label that you wish to use, and the reasons that you want to use it.

\* \* \* \* \*

(4) *For biodiesel blends containing more than 5 percent and no greater than 20 percent biodiesel by volume.* (i) The label is 3 inches (7.62 cm) wide × 2½

inches (6.35 cm) long. "Helvetica black" type is used throughout. All type is centered. The band at the top of the label contains either:

(A) The capital letter "B" followed immediately by the numerical value representing the volume percentage of biodiesel in the fuel (e. g., "B—20") and then by the term "Biodiesel Blend"; or

(B) The term "Biodiesel Blend."

(ii) The band should measure 1 inch (2.54 cm) deep. Spacing of the text in the band is 1/4 inch (.64 cm) from the top of the label and 3/16 inch (.48 cm) from the bottom of the black band, centered horizontally within the black band. Directly underneath the black band, the label shall read "contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent." The script underneath the black band must be centered horizontally, with 1/8 inch (.32 cm) between each line. The bottom line of type is 1/4 inch (.64 cm) from the bottom of the label. All type should fall no closer than 3/16 inch (.48 cm) from the side edges of the label.

(5) *For biomass-based diesel blends containing more than 5 percent and no greater than 20 percent biomass-based diesel by volume.* (i) The label is 3 inches (7.62 cm) wide × 2½ inches (6.35 cm) long. "Helvetica black" type is used throughout. All type is centered. The band at the top of the label contains either:

(A) The numerical value representing the volume percentage of biomass-based diesel in the fuel followed immediately by the percentage symbol (e.g., "20%") and then by the term "Biomass-Based Diesel Blend"; or

(B) The term "Biomass-Based Diesel Blend."

(ii) The band should measure 1 inch (2.54 cm) deep. Spacing of the text in the band is 1/4 inch (.64 cm) from the top of the label and 3/16 inch (.48 cm) from the bottom of the black band, centered horizontally within the black band. Directly underneath the black band, the label shall read "contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent." The script underneath the black band must be centered horizontally, with 1/8 inch (.32 cm) between each line. The bottom line of type is 1/4 inch (.64 cm) from the bottom of the label. All type should fall no closer than 3/16 inch (.48 cm) from the side edges of the label.

(6) *For biodiesel blends containing more than 20 percent biodiesel by volume.* The requirements are the same as in paragraph (a)(4) of this section, except that the black band at the top of the label shall contain the capital letter

“B” followed immediately by the numerical value representing the volume percentage of biodiesel in the fuel (e.g., “B-70”) and then the term “Biodiesel Blend.” In addition, the words directly underneath the black band shall read “contains more than 20 percent biomass-based diesel or biodiesel.”

(7) For biomass-based diesel blends containing more than 20 percent biomass-based diesel by volume. The requirements are the same as in paragraph (a)(5) of this section, except that the black band at the top of the label shall contain the numerical value representing the volume percentage of biomass-based diesel in the fuel followed immediately by the percentage symbol (e.g., “70%”) and then the term “Biomass-Based Diesel Blend.” In addition, the words directly underneath

the black band shall read “contains more than 20 percent biomass-based diesel or biodiesel.”

(8) For 100% biodiesel. The requirements are the same as in paragraph (a)(4) of this section, except that the black band at the top of the label shall contain the phrase “B-100 Biodiesel.” In addition, the words directly underneath the black band shall read “contains 100 percent biodiesel.”

(9) For 100% biomass-based diesel. The requirements are the same as in paragraph (a)(5) of this section, except that the black band at the top of the label shall contain the phrase “100% Biomass-Based Diesel.” In addition, the words directly underneath the black band shall read “contains 100 percent biomass-based diesel.”

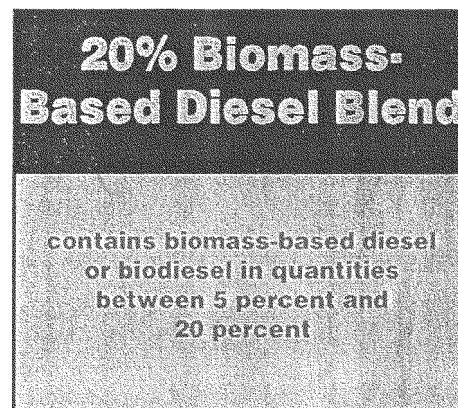
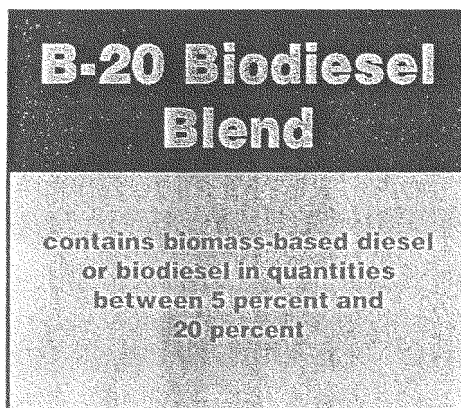
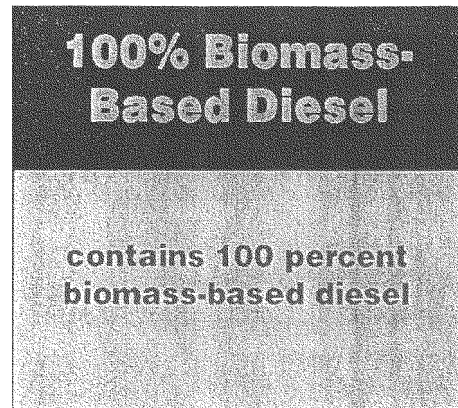
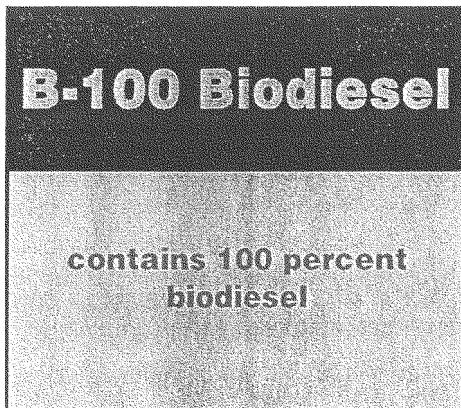
(c) \* \* \* \*

(2) For alternative liquid automotive fuel labels other than biodiesel and biodiesel blends. The background color on all the labels is Orange: PMS 1495 or its equivalent. The knock-out type within the black band is Orange: PMS 1495 or its equivalent. All other type is process black. All borders are process black. All colors must be non-fade.

(3) For biodiesel and biodiesel blends. The background color on all the labels is Blue: PMS 277 or its equivalent. The knock-out type within the black band is Blue: PMS 277 or its equivalent. All other type is process black. All borders are process black. All colors must be non-fade.

\* \* \* \* \*

(f) \* \* \*



■ 7. Appendix A to Part 306 is added to read as follows:

## APPENDIX A TO PART 306 - SUMMARY OF LABELING REQUIREMENTS FOR BIODIESEL FUELS

(Part 1 of 2)

Fuel type	Blends of 5 percent or less	Blends of more than 5 but not more than 20 percent		
		Header	Text	Color
<b>Biodiesel</b>	No label required	Either "B-XX Biodiesel Blend" or "Biodiesel Blend"	contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent	Blue
<b>Biomass-Based Diesel</b>	No label required	Either "XX% Biomass-Based Diesel Blend" or "Biomass-Based Diesel Blend"	contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent	Orange

## APPENDIX A TO PART 306 - SUMMARY OF LABELING REQUIREMENTS FOR BIODIESEL FUELS

(Part 2 of 2)

Fuel type	Blends of more than 20 percent			Pure (100%) Biodiesel or Biomass-Based diesel		
	Header	Text	Color	Header	Text	Color
<b>Biodiesel</b>	B-XX Biodiesel Blend	contains more than 20 percent biomass-based diesel or biodiesel	Blue	B-100 Biodiesel	contains 100 percent biodiesel	Blue
<b>Biomass-Based Diesel</b>	XX% Biomass-Based Diesel Blend	contains more than 20 percent biomass-based diesel or biodiesel	Orange	100% Biomass-Based Diesel	contains 100 percent biomass-based diesel	Orange

By direction of the Commission.

**Richard C. Donohue,**

*Acting Secretary.*

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