RFA RENEWABLE FUELS ASSOCIATION

May 18, 2010

VIA ELECTRONIC FILING

Mr. Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: # 335; FTC File No. R811005; 16 C.F.R. Part 306:
The Federal Trade Commission Rule For Automotive Fuel Ratings, Certification and Posting: Notice of Proposed Rulemaking and Request for Comments, 75 Fed. Reg. 12,470 (Mar. 16, 2010).

Dear Secretary Clark:

The Renewable Fuels Association ("RFA") respectfully submits the following comments on the Federal Trade Commission's ("FTC") notice of proposed rulemaking and request for comments on Automotive Fuel Ratings, Certification and Posting, which was published at 75 Fed. Reg. 12,470 (Mar. 16, 2010) (hereinafter referred to as the "Fuel Rating Proposed Rule"). RFA is the national trade association for the domestic ethanol industry. Our membership includes ethanol producers and suppliers, gasoline marketers, agricultural organizations and state agencies dedicated to the continued expansion and promotion of fuel ethanol.

Fuel ratings are intended to provide consumers with recognizable information in order to make informed decisions on fuel selection for their automobiles, as well as nonroad engines and vehicles. Comments on the FTC's notice on its plan to review the fuel rating regulations recognized that labeling at the pump has acted to prevent misfueling by consumers.[1] RFA agrees and believes this is true for both motor vehicles and non-road engines and vehicles.

However, the Fuel Rating Proposed Rule goes beyond the FTC's authority, and is inconsistent with the FTC's prior regulations and findings in which the FTC rejected a

[1] *See, e.g.*, Comments of Alliance of Automobile Manufacturers on the FTC Fuel Rating Rule, Matter No. R811005, at 1 (May 14, 2009); Comments of Petroleum Marketers Association of America on the FTC Fuel Rating Rule, Matter No. R811005, at 1 (May 14, 2009). Comments are available at http://www.ftc.gov/os/comments/fuelratingreview/index.shtm.

similar approach it has proposed for mid-level ethanol blends and now E85 for other fuels. In particular, RFA strongly opposes inclusion of any statements regarding fuel quality and performance in the labeling requirements for mid-level ethanol blends and E85. RFA believes that these statements are misleading, confusing to the consumers, and, moreover, inaccurate. Thus, they undermine the purpose of the fuel rating requirements. Indeed, the requirements may create disincentives to consumers to use higher ethanol blends for their flexible fuel vehicles, undermining the country's energy policy to move toward increased use of renewable fuels. As such, the FTC should not, and cannot, finalize the Fuel Ratings Proposed Rule, as proposed for mid-level ethanol blends and E85.

To the extent that the FTC revises its fuel ratings, RFA believes the information required should be along the lines of that required for blends of biodiesel and biomass-based diesel, *i.e.*, labeling requirements based on the content of the alternative fuel, and that such requirements should be generalized to provide retailers flexibility to include new types of renewable fuels and blends that may be developed.

I. The Proposed Labeling Requirements for Mid-Level Ethanol Blends and Revisions for E85 Go Beyond FTC Authority.

The Fuel Rating Proposed Rule defines "mid-level ethanol blends" and would require labels for such blends to state "may harm some vehicles" and "check owner's manual" for such blends and also for E85. These statements, however, relate to fuel quality and performance, and go beyond the FTC's authority to establish a fuel rating to inform consumers. Moreover, the FTC provides no support for its decision to treat all blends of ethanol above 10 percent as an "alternative" fuel.

The FTC has limited authority to require labeling of fuels to give consumers sufficient information to compare against the fuel recommendations for their vehicles. The Petroleum Marketing Practices Act ("PMPA") first sought to give consumers information regarding octane ratings for gasoline to ensure that purchasers have the information they need to choose the correct type or grade of fuel for their vehicles "with sufficient octane to prevent engine knocking while avoiding wasteful octane overbuying." 58 Fed. Reg. 41,356, 41,356 (Aug. 3, 1993). Congress amended the PMPA to provide similar information regarding alternative fuel content in automotive fuels:

> The purpose of the EPA 92 amendments to PMPA is to extend the Octane Rule's certification and posting requirements to alternative liquid automotive fuels to allow purchasers to compare posted octane or other fuel ratings with their engines' requirements. Thus, the amendments attempt to increase consumer confidence in and information about motor fuels. The amendments recognize "that motorists have a right to know what they pay for, and that dealers have a right to know that their competitors are

> not cheating." Simply stated, the purpose is to give purchasers information they need to choose the correct type or grade of fuel for their vehicles.

Id. (quoting H. Rept. No. 102-474 (I), at 153 (1992)). The FTC does not have authority, data or expertise to make representations as to the quality of the fuel or potential impacts on vehicle performance, and it has previously recognized it could not require information be placed on labels that go beyond its statutory mandate.[2] *Id.* at 41,360. In particular, the FTC does not have authority to assess the use of a fuel or to make fuel recommendations or influence consumer decisions.

The PMPA makes clear that Congress did not intend for the FTC to make any determinations as to the performance of any particular fuel. Congress provided that the fuel automotive ratings not create any express or implied warranty that the fuel may be used in all vehicles without knocking. *See* 15 U.S.C. § 2822(h). This evidences that Congress did not intend for the FTC to include any statements in the labeling that could confuse or mislead consumers as to the performance of any particular fuel. Moreover, EPA and state governments regulate fuel quality and the performance benefits of any fuel, not the FTC.

The FTC has found that using the commonly used name of alternative fuels with a disclosure of the amount of renewable fuel, expressed as a minimum percentage by volume, of the principal component of the fuel provides sufficient information for consumers. Unlike gasoline choices, many vehicles will not have the capability to operate on more than one type of fuel, and consumers will be aware of the fuel requirements for their vehicles. The label in conjunction with a vehicle manufacturers fuel recommendations in an owners manual provides consumers with the information necessary to select the fuel on which their vehicle had been designed to run. The FTC has found that this provides a rating measure consistent with the purpose of the statute. 58 Fed. Reg. at 41,366. The alternative fuel content of the fuel has been sufficient information to allow consumers to comply with manufacturer recommendations and warranty requirements. Comments to the FTC have shown that consumers need only have information regarding the gasoline versus alternative fuel components of the fuel: "pump labeling of E85 dispensers appears to have been successful as well [as the octane rating], reports about unintentional misfueling of conventional vehicles have been virtually nonexistent to date." 75 Fed. Reg. at 12,471 (quoting Comments of Alliance of Automobile Manufacturers on the FTC Fuel Rating Rule, Matter No. R811005, at 1 (May 14, 2009)). Indeed, the Alliance of Automobile Manufacturers has indicated "[f]or any vehicle, the owner's manual is the key source of information on the type of fuel to use."

---

[2] *See In re Sealed Case 00-5116*, 254 F.3d 233, 237 (D.C. Cir. 2001) ("Indeed, the Commission seemed to have completely overlooked the bedrock principle that '[a]gencies are not empowered to carve out exceptions to statutory limits on their authority,' an authority that flows directly from explicit congressional delegations.") (quoting *In re Sealed Case*, 237 F.3d 657, 669-70 (D.C. Cir. 2001)) (alteration in original).

Comments of Alliance of Automobile Manufacturers on the FTC Fuel Rating Rule, Matter No. R811005, at 1 (May 14, 2009).

In addition, the FTC should not attempt to define what types of fuel blends constitute "alternative" fuels. While the definition of alternative fuels already includes "denatured ethanol," the FTC has now distinguished "mid-level ethanol blends" as an "alternative liquid automotive fuel." It has defined such blends as "a mixture of gasoline and ethanol containing more than 10 but less than 70 percent ethanol." 75 Fed. Reg. at 12,479 (proposed 16 U.S.C. §306.0(o)). The FTC, however, does not have authority to either define "mid-level ethanol blends" or to list them as alternative fuels. The Energy Policy Act of 1992, which authorized the FTC to establish labeling for alternative fuels,[3] specifically lists types of "alternative fuels" and gives the Secretary of Energy, not the FTC, authority to identify other "alternative fuels."[4] 42 U.S.C. §§13201, 13211.

Moreover, the FTC does not provide adequate support for its definition of mid-level ethanol blends. Congress required the FTC to expand the fuel rating system to automotive fuels to account for alternative fuels and fuel blends with alternative fuels. Because "alternative liquid automotive fuels" is already defined to include denatured ethanol, it is not clear why the FTC is treating "mid-level ethanol blends" as a separate "alternative fuel." Indeed, the FTC provides no support for its arbitrary range of 10 percent to 70 percent to be "mid-level" blends. As noted above, the DOE identifies "intermediate" blends, such as E15 and E20, but does not consider them alternative fuels. RFA is concerned that this definition and the inclusion of mid-level blends under the definition of "alternative liquid automotive fuels" will serve to confuse consumers given that certain of these blends are mostly petroleum. Thus, RFA does not believe the FTC should attempt to define "mid-level ethanol blends" or to include "mid-level ethanol blends" under the definition of "alternative liquid automotive fuels."

---

[3] 42 U.S.C. § 13232. Section 205 of the Energy Independence and Security Act ("EISA") required labeling for biodiesel and biomass-based diesel.

[4] The Energy Policy Act defines alternative fuels to include "any other fuel the Secretary [of Energy] determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits." 42 U.S.C. §§ 13201, 13211. While RFA agrees that mid-level ethanol blends provide substantial energy security and environmental benefits, the FTC does not explain why the entire range of ethanol blends in its definition of "mid-level ethanol blends" are "substantially not petroleum." *Cf.* 58 Fed. Reg. at 41,357 n.28 (finding certain fuels did not constitute "alternative fuels" because they "are substantially gasoline"). The Department of Energy ("DOE") recognizes that "[f]ueling large numbers of vehicles with intermediate blends could provide similar benefits as fueling with low-level blends while increasing gasoline displacement and utilizing the nation's rapidly increasing ethanol production," but notes that they do not currently qualify as "alternative fuels." DOE, Energy Efficiency and Renewable Energy, E15-E20: Intermediate Ethanol Blends, http://www.afdc.energy.gov/afdc/ethanol/blends_e15_e20.html.

II. The Fuel Rating Proposed Rule's Provisions for Mid-Level Ethanol Blends and E85 are Inconsistent with FTC's Requirements for Other Fuels.

The Fuel Rating Proposed Rule inappropriately includes separate requirements for mid-level ethanol blends and E85 along the lines of those it has previously rejected as being misleading and confusing to the consumer. The statements "may harm some vehicles" and "check owner's manual" for mid-level ethanol blends and E85 similarly should be rejected.

In the past, the FTC has declined to include statements on labels that may reflect on a fuel's quality because the statements may give consumers an incorrect impression of the fuel's performance. For example, in declining to require octane posting and certification for alternative liquid automotive fuels, the FTC found such disclosures may mislead consumers about the significance of the high octane ratings of alternative liquid automotive fuels, "all of which far exceed the minimum octane requirements of vehicles that can use such fuels." 58 Fed. Reg. at 41,361. In particular, the FTC determined that requiring disclosure of these higher octane ratings "may foster consumer misperceptions that higher octane necessarily signifies higher quality and better performance." *Id.* The FTC also determined that posting information regarding heat values of fuels would be confusing and misleading to consumers as to fuel performance. *Id.* at 41,364. As commenters noted with respect to posting of information on heat values, such information would encourage consumers to purchase gasoline, because the information makes these other fuels appear less efficient. *Id.*

Similarly, the negative statements the FTC has proposed to place on labels for mid-level ethanol blends will foster consumer misperceptions that higher ethanol content results in lower quality and worse vehicle performance. This may lead consumers, including those that drive flexible fuel vehicles, to make fuel choices, not based on the manufacturer's recommendations, but on the fact that only pumps containing fuels with higher ethanol blends state that the fuel "may harm some vehicles." While the FTC asserts that the statement is also needed on E85 pumps because "consumers might conclude wrongly that E85 cannot harm conventional vehicles," 75 Fed. Reg. at 12,474, RFA believes the opposite will occur. Including such a warning now on E85 is more likely to confuse customers who are aware that such fuel may only be used in flexible fuel vehicles. Consumers would be more likely to purchase gasoline or E10, even though their vehicles can run on fuels with higher ethanol blends. This goes beyond the authority of the FTC, and undermines the purpose of the fuel rating requirements. Moreover, it undermines the energy and environmental policy of the United States to promote increased use of renewable fuels. No where on the label does it indicate the numerous economic, energy and environmental benefits that are provided by these mid-level ethanol blends and E85 over gasoline.

Further, there is no evidence that "ethanol" in a general reference will harm any engine, no more than the term "gasoline" may cause harm to any engine. All fuels not meeting industry accepted fuel characteristic specifications have the potential to cause engine

damage. There are a million different actions that can cause the nullification of an automobile warranty. The FTC rules should not single out fuel choice on the label, giving it the appearance that it is the most significant factor affecting vehicle performance.

In addition, in finalizing the labeling requirements for biodiesel and biomass-based diesel, FTC expressly declined to include a "consult manufacturer fuel recommendations" warning, finding such warning "inconsistent with the Fuel Rating Rule's treatment of other alternative fuels." 73 Fed. Reg. 40,154, 40,158 (July 11, 2008). RFA agrees that such a warning is not necessary or warranted for *any* alternative fuel. The FTC provides no support for why it chose to require such a statement for mid-level ethanol blends and now E85 blends. Indeed, it has been well-recognized that misfueling has not occurred regarding E85, and the information provided on ethanol content of the fuel has been more than sufficient. As such, the statements "may harm some vehicles" and "check owner's manual" should not be included in any labeling requirements for ethanol blends in the final rule.

III. There is No Evidence that Mid-Level Blends will "Harm Some Vehicles."

The FTC provides no support for its proposal to require the statement "may harm some vehicles" but instead seeks comments on the issue. This turns the public notice and comment requirement on its head, as it provides the public with no information as to the FTC's basis for its proposal. In any event, FTC's request for comments on whether ethanol blends above 10 percent will damage conventional vehicles is wholly outside its authority. FTC's sole authority is to ensure that the label on fuel pumps provides sufficient information for a consumer to compare the fuel content against its owner manual to make an informed choice of fuel. The FTC does not have the authority or expertise to make any judgments regarding the potential effects of mid-level ethanol blends or E85 on vehicles.

Although the FTC has previously (and appropriately) declined to include statements regarding fuel quality or fuel performance as beyond its authority to provide fuel ratings, the Fuel Rating Proposed Rule refers to a comment on its notice of review of the fuel rating rules that "raises a question concerning whether ethanol blends above 10 percent concentration will damage conventional vehicles" to support this requirement. 75 Fed. Reg. at 12,474. The referenced comments, however, provide no evidence that mid-level ethanol blends or E85 will damage conventional vehicles. Moreover, the comments merely state that "*unlabeled* dispensers would cause consumers to unwittingly put their vehicle warranties at risk." Comments of Alliance of Automobile Manufacturers on the FTC Fuel Rating Rule, Matter No. R811005, at 2 (May 14, 2009) (emphasis added), *cited in* 75 Fed. Reg. at 12,474 n.61. These comments do not warrant requiring the statements on fuel quality as is proposed in the Fuel Rating Proposed Rule.

Research is currently being done to investigate the suitability of ethanol content above 10 percent in varying engine types. There are many ongoing projects researching the effects

of E15 and E20 on vehicle engine, catalysts, Powertrain systems, fuel system damper, level sensors, and general material compatibility. This research is not complete, and it is incorrect to state confirmatively that blends above 10 percent ethanol by volume are not appropriate for certain vehicles. Moreover, EPA has indicated that it is working on a labeling and certification rulemaking to address ethanol blends above 10 percent. EPA Action Initiation List, Feb. 2010, RIN 2060-AQ17. The announced EPA rulemaking on labeling requirements relates to its pending consideration of a request for a waiver under Section 211(f) of the Clean Air Act to approve use of ethanol blends up to E15 in motor vehicles. The FTC must defer to EPA's pending rulemaking, and the FTC's labeling requirements should not include any statements that may contradict EPA's findings that E15 is approved for use in conventional vehicles.[5] While RFA believes the proposed required statements and FTC's request for comments is beyond its authority and inappropriate in the context of a fuel ratings system, evidence to date in fact indicates that mid-level ethanol blends do not harm motor vehicles. For example, blends as high as E20 have not been found to have significant durability or driveability issues.[6] Thus, the proposed statement that these fuels may "harm" vehicles is inaccurate and provides insufficient information such that it is misleading and confusing to consumer, providing no valuable information whatsoever.

In sum, the FTC should not include any statements regarding the potential impacts of mid-level ethanol blends or E85 on vehicles. In particular, the statements proposed in the

---

[5] EPA has required specific labeling for certain diesel fuels. In these cases, however, EPA has expressly prohibited use of fuels with higher sulfur content in certain vehicles because the sulfur, not the fuel, had been found to damage the required emission control requirements for certain vehicles and engines. 66 Fed. Reg. 5002, 5002, 5005, 5057-5058, 5119 (Jan. 18, 2001); 69 Fed. Reg. 38,958, 38,958, 39,084-39,086 (June 29, 2004).

[6] *See, e.g.*, Oak Ridge National Laboratory, Effects of Intermediate Ethanol Blends on Legacy Vehicles and Small Non-Road Engines, Report 1, at xviii (Feb. 2009, updated), *available at* http://www.ornl.gov/sci/bioenergy/pdfs/EffectsIntermediateEthanolBlends.pdf ("Although formal driveability testing was not conducted during the testing reported here, no operability or driveability issues were identified when any of the ethanol blends were used during the limited time of the project."); David Kittelson, *et al.*, University of Minnesota, Department of Mechanical Engineering, Demonstration and Driveability Project to Determine the Feasibility of Using E20 as a Motor Fuel, Final Report submitted to Minnesota Department of Agriculture, at i (Nov. 4, 2008), *available at* http://www.mda.state.mn.us/news/publications/renewable/ethanol/e20drivability.pdf (finding "no significant differences between paired E0 and E20 vehicles were observed in driveability, reliability, or fuel economy"); Coordinating Research Council ("CRC"), 2008 CRC Cold-Start and Warmup E85 and E15/E20 Driveability Program, Final Report (CRC Report No. 652), at 3 (Oct. 2008), *available at* http://www.crcao.org/reports/recentstudies2008/652/CRC%20652.pdf (finding, for E15/E20, that "[t]here was no significant effect of vapor pressure or fuel type on driveability"); Stockholm University, *et al.*, Blending of Ethanol in Gasoline for Spark Ignition Engines: Problem Inventory and Evaporative Measurements, at 4 (2004-2005), *available at* http://growthenergy.org/images/reports/avl_ethanol_sparkignition.pdf ("The main conclusion from using ethanol-gasoline blends in practice is that blends with up to 15 percent ethanol will not have any significant negative effects on the wear of the engine or vehicle performance."); CRC Report No. 648, 2006 Hot-Fuel-Handling Program, at iii (Jan. 2007), *available at* http://www.crcao.com/reports/recentstudies2007/CRC%20648/CRC_648_HFH_Final_Report%20adobe.pdf (finding performance was similar, regardless of the ethanol content for E0, E5, E10 and E20).

Fuel Rating Proposed Rule provide no meaningful information to consumers and, indeed, provide misinformation. These statements will only serve to confuse the consumer, who should be able to rely on the vehicle's owner manual, not unsupported statements on fuel quality and performance.

V. To the Extent the FTC Revises the Fuel Ratings to Address Alternative Fuels, the Biodiesel Scheme Should Serve as the Model, and the FTC Should Provide Sufficient Flexibility to Cover Any New Fuel Blends Developed and Approved to Meet the Renewable Fuel Standard, Consistent with FTC's Authority.

As the FTC recognizes in the Fuel Rating Proposed Rule, EISA requires a significant expansion of use of renewable fuels in the United States. 75 Fed. Reg. at 12,474. For example, many retailers are now providing options for flexible fuel vehicles in the form of mid-level blends of ethanol. *Id.* at 12,471. RFA understands that consumers may need to know the renewable fuel content of the fuel they are purchasing to compare against the manufacturers' recommendations. To those ends, the biodiesel labeling requirements, which FTC determined did not require revising, should serve as the model for the revised labeling rules for other renewable fuels.

EISA required labeling at retail pumps "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." 73 Fed. Reg. at 40,155 (quoting EISA §205(a)). The labeling rules for biodiesel establish a fuel rating system based on the percentage of biodiesel and/or biomass-based diesel, not necessarily by the percentage of the principal component of the fuel. *Id.* at 40,159. Separate labels are required for biodiesel and biomass-based diesel that is not biodiesel. The labels required are for: (a) fuels containing between 5 and 20 percent biodiesel or biomass-based diesel; (b) fuel containing more than 20 percent biodiesel or biomass-based diesel; and (c) 100 percent biodiesel or biomass-based diesel. These labels provide for a heading that identifies whether the fuel is a biodiesel or biomass-based diesel blend and an identification of the amount of biodiesel or biomass-based diesel in the fuel (*e.g.*, between 5 and 20%, above 20%, and 100%). These guidelines provide sufficient information for the consumer to make an educated decision as to fuel selection.

Currently, the fuel rating rule for other alternative fuels is based on the minimum percentage of the principal component of the fuel. 75 Fed. Reg. at 12,470. The FTC could include a general requirement for fuel rating based on the alternative fuel component, as was done with biodiesel and biomass-based diesel. Further, FTC's requirements for other alternative fuels should be consistent with those labels. For example, the label should include a header with the percent of ethanol in the fuel or should reference "ethanol blend." The percent of ethanol included or the applicable range of percentages should be then provided on the label. The ethanol content of the fuel is sufficient to inform consumers, who would be aware of the fuel that is recommended for their vehicle. Retailers, however, need some flexibility in the labeling given that they may use different blends of ethanol for use in flexible fuel vehicles and,

thus, should be able to rely on a range (*e.g.*, contains 20 to 40 percent ethanol) rather than the specific ethanol content. These requirements, however, should not be dependent on whether the fuel is a so-called "mid-level ethanol blend," and the FTC should not define the arbitrary low and high end of these ranges.

The expansion of the renewable fuel standard program will likely lead to additional new fuels and new blends entering the market to meet these requirements. The FTC should keep these Congressional mandates in mind in any regulations it finalizes, and ensure the requirements take this possibility into account. To those ends, FTC should provide guidance on rating, certifying and labeling fuels on a general level, such as octane and/or primary alternative fuel component content. The primary alternative fuel component should apply to all types of renewable fuels that are currently being used and may be developed and blended with gasoline.[7]

* * *

RFA appreciates the opportunity to comment on this important matter. Please feel free to contact me at (202) 289-3835 with any questions or comments.

Sincerely,

Bob Dinneen

President & CEO
Renewable Fuels Association

[7] FTC previously recognized that "[i]f new types of alternative liquid automotive fuels are developed in the future, sellers can petition the Commission for further rulemaking if they believe that different or additional disclosures are necessary, or they can seek an exemption from specific certification and posting requirements if they believe those requirements are unnecessary for such new fuels." 58 Fed. Reg. at 41,358.