

Supporting Statement
Automotive Fuel Ratings, Certification and Posting
16 C.F.R. Part 306
(Control Number: 3084-0068)

Section 205 of the Energy Independence and Security Act of 2007 (“EISA” or the “Act”) requires the Federal Trade Commission (“FTC” or “Commission”) to promulgate labeling requirements for fuels containing biodiesel or biomass-based diesel (collectively, “biodiesel fuels”). Accordingly, the FTC has published proposed amendments to its rule for “Automotive Fuel Ratings, Certification, and Posting” (“the Fuel Rating Rule” or “Rule”). In accordance with the Paperwork Reduction Act (“PRA”) 44 U.S.C. 3501-3521, FTC staff seeks approval from the Office of Management and Budget (“OMB”) for the proposed Rule amendments.

(1) Necessity for Collecting the Information

The Commission first promulgated the Fuel Rating Rule, formerly known as the Octane Posting and Certification Rule (“Octane Rule”), 16 C.F.R. Part 306, pursuant to the Petroleum Marketing Practices Act (“PMPA”), 15 U.S.C. 2821. This Rule became effective on June 1, 1979, and initially applied only to gasoline. The Energy Policy Act of 1992 (“EPA 92”), Pub. L. 102-486, amended the PMPA and required the Commission to amend the Rule to establish automotive fuel rating determination, certification, and posting requirements for liquid alternative automotive fuels. Accordingly, on July 21, 1993, the Commission amended the Octane Rule, effective October 25, 1993, to include alternative liquid automotive fuels. The 1993 amendment did not explicitly name biodiesel fuels as covered alternative fuels.

In 2007, Congress passed EISA, which addresses three different categories of biodiesel fuel blends and mandates that the Commission promulgate labeling requirements for two of them. For fuel at blends containing less than or equal to five percent biodiesel or biomass-based diesel, no specific label is required. For fuel blends between five and no more than twenty percent, EISA requires that the label must state that the fuel blend “contains biomass-based diesel or biodiesel in quantities between 5 and 20 percent.” For fuel blends that contain more than twenty percent biodiesel or biomass-based diesel, the label must state that the fuel blend “contains more than 20 percent biomass-based diesel or biodiesel.” The Act further gives the FTC 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 or biodiesel blend that is offered for sale”

Consistent with the directive in Section 205 of EISA, the Commission is proposing to amend the Fuel Rating Rule to clarify that biodiesel fuels are subject to the rating and certification requirements of the Fuel Rating Rule and to include labeling requirements for biodiesel fuels containing at least five percent biomass-based diesel or biodiesel. Under the proposed amendments, producers, importers, and distributors of biodiesel fuels containing more than 5 percent biodiesel or biomass-based diesel must certify the percentage by volume of biodiesel or biomass-based diesel in the fuel. In addition, retailers of such fuels must post a label

containing the appropriate congressionally mandated language and, for blends containing more than 20 percent biodiesel or biomass-based diesel, the percentage of biodiesel or biomass-based diesel contained in the fuel. For example, a blend containing 6 percent biodiesel must be labeled “Biodiesel Blend” and include the words “contains biomass-based diesel or biodiesel in quantities between 5 and 20 percent,”¹ while a blend containing 30 percent biodiesel must be labeled “B-30 Biodiesel Blend” and include the words “contains more than 20 percent biomass-based diesel or biodiesel.”

As noted above, the proposed amendments make clear that retailers of biodiesel fuels are subject to the Fuel Rating Rule’s rating and certification procedures for other alternative fuels. Under those procedures, industry members “must possess a reasonable basis, consisting of competent and reliable evidence, for the percentage by volume of the principal component [in this case, biodiesel] of the alternative liquid automotive fuel that [they] must disclose.” 16 C.F.R. § 306.5(b). Producers, importers, and distributors must also certify the automotive fuel rating of the fuel that they transfer for resale. They may make this certification by either including it on a delivery ticket with each transfer or by a one-time letter or other written statement. Finally, retailers must post the required fuel label on each face of each fuel dispenser.

The Rule further requires producers, importers, distributors, and retailers of alternative fuels to keep for one year records of any delivery tickets, letters of certification, or tests upon which they based the automotive fuel ratings that they certified or posted. These records must be available for inspection by Commission and Environmental Protection Agency (“EPA”) staff members or by persons authorized by the Commission or EPA.

(2) Use of the Information

The Fuel Rating Rule’s certification and posting requirements for liquid alternative automotive fuels provide consumers with information necessary to make informed fuel-purchasing decisions based on, among other things, the suitability of a fuel for use in their vehicle and the environmental impact of that fuel. This approach allows fuel producers and marketers the flexibility to develop and blend fuels appropriate for location and climate, and is consistent with EPA and original equipment manufacturer requirements.

The information that must be kept under the Rule’s recordkeeping requirements is used by Commission or EPA staff, or by persons authorized by the FTC or EPA. Authorized persons check the records for enforcement purposes to ensure the accuracy of automotive fuel rating representations. The information is sought on a case-by-case or spot check basis.

The primary purpose of the recordkeeping requirement is to preserve evidence of automotive fuel rating certification from refiners through the chain of distribution. Without

¹ The proposed amendment allows, but does not require, retailers of blends containing more than 5 but not more than 20 percent to also post the precise percentage of biodiesel or biomass-based diesel.

records of how the rating of the automotive fuel was represented when the transfer was made, it would be impossible to trace cases of a rating overstatement from the point of detection at the retail level back upstream to an offending distributor or refiner.

(3) Consideration of the Use of Improved Information Technology to Reduce Burden

The Rule permits the use of any technologies that industry members may wish to employ and that may reduce the burden of information collection. The Rule's certification and posting requirements are tailored to take advantage of existing industry practices in order to minimize the compliance burden. Certifications can be made on computer-generated delivery documents, resulting in savings of considerable time and labor. As noted above, certification can be accomplished in either of two ways: on a delivery ticket with each transfer of fuel or by a certification letter or other written statement, which may be sent and stored electronically.

Although nothing in the Rule requires that these certifications contain any signature (see § 306.6), to the extent such a certification may typically involve a signature, the Rule leaves certifying parties free to use whatever technology they deem appropriate to identify and authenticate such signatures, consistent with the Government Paperwork Elimination Act, P.L. 105-277, Title XVII, 112 Stat. 2681-749 (GPEA). Likewise, the Rule complies with GPEA by permitting certain disclosures to be made (see § 306.5) and necessary records to be kept (see §§ 306.7, 306.9, 306.11) without regard to format, so that a regulated entity, if it chooses, may conduct these activities electronically.

Under GPEA, however, it would be impracticable and incompatible with the purpose of the Rule to permit the use of electronic mail or other electronic option to substitute for the automotive fuel rating labels (see § 306.12) that retailers must post on the face of each fuel pump, because these disclosures must be made to the consumer at the pump, although nothing in this labeling requirement expressly prohibits the label itself from being electronically displayed if it otherwise satisfies the typeface, color, size, and durability requirements of the Rule.

(4) Efforts to Identify Duplication

Under Sec. 205 of EISA, the Commission does not have discretion to forgo this rulemaking proceeding. Nonetheless, Commission staff has not identified any other federal statutes, rules, or policies that would duplicate the Rule.

(5) Efforts to Minimize Burden on Small Organizations

The Rule's certification and posting requirements for alternative fuels were designed to impose the minimum possible burden on industry members. The proposed 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 certification of an automotive fuel rating by a refiner to a distributor or by a distributor to a retailer may be made on any document that is

used as written proof of transfer or a letter or any other written statement. These fuel transfer documents were already retained by refiners, distributors, and retailers in the ordinary course of business. To further minimize the certification and recordkeeping burdens, the Rule permits an automotive fuel rating certification to be provided by means of a one-time letter of certification, obviating the need for individual certifications on each delivery ticket. This one-time letter could remain effective for a number of years, and its retention would constitute compliance with the Rule's recordkeeping requirements.

(6) Consequences of Conducting Collection Less Frequently

The fundamental element of information collection the Rule requires consists of placing a label on the face of each biodiesel fuel dispenser at every biodiesel fuel outlet. To do less than this would fail to fulfill the statutory mandate of EISA.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in this Rule is consistent with the guidelines stated in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

Pursuant to OMB regulations implementing the PRA, the Commission is seeking public comment on PRA aspects of the Rule, as required by 5 C.F.R. 1320.8(d). See 70 Fed. Reg. 49,925.

(9) Payments or Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

The Rule requirements for which the Commission seeks OMB approval do not involve collection or disclosure of confidential or otherwise sensitive information.

(12) Hours Burden and Associated Labor Costs

Estimated annual hours burden:

Recordkeeping: Staff has previously estimated the burden of complying with the recordkeeping burden of the Fuel Rating Rule to be five minutes per industry member. Applying that burden to the 3,700 producers, distributors, and retailers of biodiesel fuels results in a total annual burden of 308 hours.

Disclosure: Staff has previously estimated that retailers of automotive fuels incur an average burden of approximately one hour to produce, distribute, and post fuel rating labels. Because the labels are durable, staff has concluded that only about one of every eight retailers incur this burden each year. Applying these estimates to the approximately 1,500 retailers of biodiesel fuels results in a total annual burden of 188 hours (1,500 retailers x 1/8 x 1hr).

Labor costs associated with hours burden:

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. Staff estimates the mean hourly wage for employees of producers, importers, and distributors of biodiesel fuels to be \$21.39,² and the mean hourly wage for employees of biodiesel retailers to be \$14.35.³

Applying these rates to the relevant affected populations, this would total \$3,922 for recordkeeping for producers and distributors of biodiesel fuel (2,200 x \$21.39/hour x 5 minutes each) and \$1,794 for retailers (1,500 x \$14.35/hour x 5 minutes each) and \$2,698 (188 hours x \$14.35) for retailer labeling requirements. Thus, cumulatively, \$8,414 in labor costs.

(13) Estimated Annual Capital and/or Other Non-labor Related Costs

Staff believes that the Rule does not impose any capital costs for producers, importers, or distributors of biodiesel fuels. Retailers, however, incur the cost of procuring and replacing fuel dispenser labels to comply with the Rule. Staff has previously estimated that the price per automotive fuel label is about 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 \$4,500 (1,500 retailers x 6 pumps x .50). In addition, staff has previously estimated the useful life of dispenser labels to range from 6 to 10 years. Applying 8 hours, the mean of that range, and distributing the costs on a per-year basis, staff estimates the total annual replacement labeling cost to be \$93.75 (1,500 x 1/8 x .50). Thus, the cumulative approximate costs would be \$4,600.

(14) Estimate of Cost to Federal Government

Because staff anticipates that the cost to the FTC of administering the proposed amendments will be *de minimis*, it retains its prior estimate of \$22,000 as the cost per year to implement the Fuel Rating Rule. This represents .15 of an attorney/economist work year, and includes employee benefits.

² Bureau of Labor Statistics, 2006 Employment Statistics Survey, Annual Average Hourly Earnings for Oil and Gas Extraction Production workers.

³ Bureau of Labor Statistics, May 2006 Occupational Employment Statistics Survey, "Correspondence Clerks," Table 1.

(15) Changes in Burden

As detailed above, Commission staff estimates that the Rule amendments will result in a 497 hour increase in total annual burden.

(16) Statistical Use of Information

There are no plans to publish for statistical use any information the Rule requires.

(17) Display of the Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to the Certification for Paperwork Reduction Act Submissions

Not applicable.