Supporting Statement
Proposed Amendments to the Automotive Fuel Ratings, Certification and Posting Rule
16 C.F.R. Part 306
OMB Control No. 3084-0068

In response to comments solicited by the Federal Trade Commission ("FTC" or "Commission") as part of a systematic review of its rules and guides, the Commission proposes amendments to its Automotive Fuel Ratings, Certification and Posting Rule ("Fuel Rating Rule" or "Rule"). Specifically, the Commission proposes to adopt rating, certification, and labeling requirements for gasoline-ethanol mixtures having more than 10, and less than 70, percent ethanol. In accordance with the Paperwork Reduction Act ("PRA") 44 U.S.C. §§ 3501-3521, the FTC seeks approval from the Office of Management and Budget ("OMB") for the proposed Rule amendments.[1]

(1) Necessity for Collecting the Information

The Commission first promulgated the Fuel Rating Rule, pursuant to section 2821 of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2841. This Rule became effective on June 1, 1979, and initially applied only to gasoline. The Energy Policy Act of 1992, 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 all liquid automotive fuels, including alternative liquid fuels. On July 21, 1993, the Commission amended the Rule to include alternative liquid fuels accordingly.

As amended in 1993, the Rule provides specific rating, certification, and labeling requirements for ethanol fuels of at least 70 percent concentration, including E85, a fuel that generally contains 85 percent ethanol mixed with 15 percent gasoline. 16 C.F.R. § 306.0(i)(2)(ii).[2] In addition, the Rule defines ethanol-gasoline blends containing up to 10 percent ethanol as gasoline. 16 C.F.R. § 306.0(i)(1). The Rule does not provide specific rating, certification, and posting requirements for gasoline-ethanol mixtures containing between 10 and 70 percent ethanol ("Mid-Level Ethanol blends").[3]

In response to the Commission's request for comments, several commenters noted the increasing availability of Mid-Level Ethanol Blends and recommended that the Rule provide

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[1] The proposed amendments also require new, specific language on the Commission's currently required label for ethanol fuels above 70 percent concentration. This new required disclosure, however, does not invoke the PRA because it comprises a disclosure supplied by the Federal Government. See 5 C.F.R. § 1320.3(c)(2) ("The public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not included within [the definition of a PRA 'collection of information']".).

[2] The U.S. Department of Energy, however, allows retailers to reduce the ethanol component to as little as 70 percent to allow for proper starting and performance in colder climates.

[3] Mid-Level Ethanol blends, however, still qualify as alternative fuels generally subject to the Rule. See 16 C.F.R. § 306.0(i)(2) (providing that alternative fuels are "not limited to" those explicitly listed in the Rule).

specific requirements for those blends. Specifically, several commenters noted that, though generally not available when the Commission first promulgated alternative fuel requirements in 1993, Mid-Level Ethanol blends have subsequently entered the marketplace. For example, one commenter noted that retailers now blend ethanol into gasoline at retail fuel pumps, allowing them to create blends such as E20, E30, and E40. The commenter submitted a list of more than 100 retail establishments with the capacity to sell Mid-Level Ethanol blends. Moreover, several commenters stated that the market for ethanol blends of all types will grow as part of a general move toward renewable fuels.

Commenters cautioned, however, that ethanol blends above 10 percent concentration are not appropriate for conventional vehicles. The Alliance of Automobile Manufacturers noted that conventional vehicles are validated for gasoline containing only up to 10 percent ethanol. Consistent with that comment, the United States Department of Energy has explained that "[a]lthough nearly all gasoline-fueled passenger cars and light-duty trucks sold in the last 20 years have been designed to operate on E10, substantial modifications are made to [certain vehicles] so they can use higher concentrations of ethanol . . . without adverse effects on fuel system materials, components, on-board diagnostics systems, or driveability."[4] Given the misfueling risk, commenters suggested providing specific labeling requirements for Mid-Level Ethanol blends.

Given these comments, the Commission proposes specific requirements for rating, certifying, and labeling Mid-Level Ethanol blends. Specifically, the proposed amendments would require refiners, producers, importers, and distributors of Mid-Level Ethanol blends to rate the fuel by the percentage of ethanol contained in the blend and to certify that rating to any transferee. The proposed amendments would further require retailers to post a label on the fuel pump consistent with the fuel's rating. The proposed amendments would also require, consistent with the recordkeeping requirements for other liquid automotive fuels,[5] that covered entities producing or selling Mid-Level Ethanol blends 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. These records would have to be made 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 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. This approach allows fuel producers and

[4] *See* Department of Energy, "Handbook for Handling, Storing, and Dispensing E85," p.17, available at: http://www.afdc.energy.gov/afdc/pdfs/41853.pdf.

[5] *See* 16 C.F.R. §§ 306.7; 306.9; and 306.11.

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 may check the records for enforcement purposes to ensure the accuracy of automotive fuel rating representations.

The primary purpose of the recordkeeping requirement is to preserve evidence of automotive fuel rating certification from refiners through the chain of distribution. Without 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, 44 U.S.C. 3504 note (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.

Notwithstanding the GPEA, 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. These disclosures must be made to the consumer at the pump. Nothing in this labeling requirement, however, 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

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 are designed to impose the minimum possible burden on industry members. The proposed amendments require refiners, producers, importers, distributors, and retailers of Mid-Level Ethanol blends 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 requirements, 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 Mid-Level Ethanol blend dispenser. To do less than this would fail to fulfill the PMPA's statutory mandate.

(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) Public Comments/Consultation Outside the Agency

Pursuant to PRA implementing regulations under 5 C.F.R. Part 1320, the FTC is providing an opportunity for public comment on its burden analysis, contemporaneous with this submission. In addition, as noted above, the Commission sought comment on the Fuel Rating Rule as part of its periodic review of its rules and guides. *See* 874 Fed. Reg. 9,054 (Mar. 2, 2009). Moreover, Commission staff consulted with EPA staff about the status of alternative liquid fuels, generally, and ethanol fuels, in particular.

(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:[6]

Based on a comment submitted to the Commission as part of its periodic review of its rules and guides, staff estimates that there are approximately 130 retailers of Mid-Level Ethanol blends. Furthermore, the Commission understands from those comments that Mid-Level Ethanol blends are created through blender pumps and, therefore, there are no producers or distributors of such blends. Because the procedures for distributing and selling Mid-Level Ethanol blends are no different from those for other automotive fuels, the Commission expects that, consistent with practices in the fuel industry generally, the covered parties will record the fuel rating certification on documents (e.g., shipping receipts) already in use, or will use a letter of certification. Furthermore, the Commission expects that labeling of Mid-Level Ethanol blend pumps will be consistent, generally, with practices in the fuel industry.

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 approximately 130 retailers of Mid-Level Ethanol blends results in a total annual burden of 10.83 hours.

Disclosure: Consistent with past assumptions regarding other required fuel industry disclosures, staff estimates that each retailer will spend 1/8th of an hour per year complying with the proposed disclosure requirements. Thus, incremental disclosure burden for 130 Mid-Level Ethanol blend retailers totals 16.25 hours.

Labor costs associated with hours burden:

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. Applying a mean hourly wage for retailer employees of $15.04[7] to the estimated affected population, labor costs total $407.28 ($15.04 x 27.08 hours) for recordkeeping and disclosure burden.

(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, do 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 approximately fifty cents and that the average automotive fuel retailer

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[6] This analysis concerns strictly the incremental PRA effects of the proposed amendments to the Fuel Rating Rule. The existing burden hour total for the Rule under OMB Control No. 3084-0068 is 40,496 hours.

[7] Bureau of Labor Statistics, May 2008 Occupational Employment Statistics Survey, "Correspondence Clerks," Table 1, at http://www.bls.gov/news.release/pdf/ocwage.pdf.

has six dispensers. One commenter,[8] however, stated that the cost of labels ranges from one to two dollars. Conservatively applying the upper end of that range results in an initial cost to retailers of $12.00 (6 pumps x $2). Regarding label replacement, however, staff has previously estimated the useful life of dispenser labels to range from 6 to 10 years. Assuming a useful life of 8 years, the mean of that range, replacement labeling will not be necessary for well beyond the relevant time frame, i.e., the immediate 3-year PRA clearance sought. Accordingly, averaging solely the $12 labeling cost at inception per retailer over that period, annualized labeling cost per retailer will be $4. Cumulative labeling cost would thus be $520 (130 retailers x $4 each, annualized).[9]

(14) Estimate of Cost to Federal Government

Because staff anticipates that the incremental 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 as a whole. This represents .15 of an attorney/economist work year, and includes employee benefits.

(15) Adjustments/Changes in Burden

This is a new rule rulemaking. As detailed above, Commission staff estimates the incremental burden regarding the proposed recordkeeping and disclosure requirements will total 27+ hours, cumulatively.

(16) Statistical Use of Information

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

(17) Requested Permission Not to Display the Expiration Date for OMB Approval

Not applicable.

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

Not applicable.

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[8] The Petroleum Marketers Association of America.

[9] This reflects strictly the incremental (and annualized) PRA costs of the proposed amendments. Cumulative capital/non-labor costs for the current Rule under existing OMB clearance is $88,600.