Federal Trade Commission
Supplemental Supporting Statement
Final 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 amends its Automotive Fuel Ratings, Certification and Posting Rule ("Fuel Rating Rule" or "Rule"). Specifically, the Commission adopts rating, certification, and labeling requirements for gasoline-ethanol mixtures having more than 10 percent but not greater than 83 percent ethanol ("Ethanol Flex Fuels"). 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 these Rule amendments.

(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 contains up to 85 percent ethanol. 16 C.F.R. § 306.0(i)(2)(ii). 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 current Rule does not provide specific rating, certification, and posting requirements for gasoline-ethanol mixtures containing between 10 and 70 percent ethanol.[1]

In response to the Commission's request for comments as part of its systematic review of its rules and guides, several commenters noted the increasing availability of Ethanol Flex Fuels and recommended that the Rule provide specific requirements for those blends. Commenters cautioned that ethanol blends above 10 percent concentration may not be appropriate for conventional vehicles. Given the misfueling risk, commenters suggested providing specific labeling requirements for these blends.

After reviewing those comments, the Commission published a Notice of Proposed Rulemaking in March 2010 ("2010 NPRM") proposing amendments addressing ethanol fuels.[2]

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

[2] *See* 75 Fed. Reg. 12470 (Mar. 16, 2010). The Commission submitted the related Information Collection Request to OMB on the same date the NPRM published (ICR Reference No: 201002-3084-002).

In April 2011, the Commission published final amendments making minor changes to the Rule unrelated to ethanol.[3] At that time, the Commission noted that it needed additional time to consider ethanol labeling in light of comments received in response to the 2010 NPRM and a recent Environmental Protection Agency ("EPA") decision permitting the use of certain ethanol blends between 10 and 15 percent concentration ("E15") in newer conventional vehicles.[4]

On April 4, 2014, the Commission published a second NPRM ("2014 NPRM") proposing that ethanol blend labels disclose the exact percentage of ethanol, or a percentage rounded to the nearest multiple of ten.[5] The proposal also required that the label state "Use Only in Flex-Fuel Vehicles/May Harm Other Engines."[6] In addition, the proposal required producers and distributors to certify a fuel's ethanol concentration to downstream parties. Finally, to prevent consumer confusion and avoid unnecessary burden on industry, the proposed Rule exempted EPA-approved E15 ("EPA E15") from the Rule's labeling requirements.[7]

Many comments received in response to the 2014 NPRM supported the need for new rating, certification, and labeling requirements for Ethanol Flex Fuels. After reviewing the comments as well as EPA decisions relating to ethanol blends, the Commission adopts the proposed "Use Only in Flex-Fuel Vehicles/May Harm Other Engines" language for Ethanol Flex Fuel labels. In light of the comments, however, the Commission modifies the ethanol percentage disclosures proposed in the 2014 NPRM to provide retailers greater flexibility for rating certain Ethanol Flex Fuels. Specifically, retailers must post labels with exact ethanol concentrations or round to the nearest multiple of 10 for blends containing more than 10 percent and no greater than 50 percent ethanol. For blends containing more than 50 percent ethanol, retailers may post the exact concentration, round to the nearest multiple of 10, or label the fuel as "51% to 83% Ethanol." In addition, the Commission adopts the proposed exemption of EPA E15 from the Rule's labeling requirements.

The Rule amendments require refiners, producers, importers, distributors, and retailers of Ethanol Flex 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.

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[3] See 76 Fed. Reg. 19684 (Apr. 8, 2011) (ICR Reference No: 201103-3084-003).

[4] Id. at 19689.

[5] 79 Fed. Reg. 18850, 18859 (ICR Reference No: 201403-3084-002).

[6] *Id.* at 18857.

[7] The EPA permits E15 use only in MY2001 or newer automobiles because it determined that Ethanol Flex Fuels may damage emissions systems and engine components of other engines. *See* 75 Fed. Reg. 68094, 68097-68098, 68103 (Nov. 4, 2010); *see also* 76 Fed. Reg. 44406, 44414-15, 44439 (July 25, 2011).

(2) Use of the Information

The Rule's rating, 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 marketers the flexibility to develop and blend fuels appropriate for location and climate, and is consistent with EPA and original equipment manufacturer requirements.

The Rule requires information to be kept and made available for inspection by FTC or EPA staff, or by persons authorized by the FTC or EPA. Authorized persons, or EPA or FTC staff, 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 an inaccurate rating 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 labeling 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. The Rule exempts EPA-approved E15 from FTC labeling requirements because that fuel is already subject to EPA labeling requirements.

(5) Efforts to Minimize Burden on Small Organizations

The Rule's certification, posting, and recordkeeping requirements are designed to impose the minimum possible burden on industry members. 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 are 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 Ethanol Flex Fuel 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

On April 4, 2014, the Commission published the 2014 NPRM requesting comments on the then-proposed amendments. As noted in item (1) above, many comments received in response to the 2014 NPRM supported the need for new rating, certification, and labeling requirements for Ethanol Flex Fuels. The Commission made modifications to the proposal in light of the comments. In addition, Commission staff consulted with EPA staff regarding the proposal and status of Ethanol Flex Fuels.

(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:

Consistent with OMB regulations that implement the PRA, these estimates reflect solely the burden incremental to the usual and customary recordkeeping and disclosure activities performed by affected entities in the ordinary course of business.[8]

Because the procedures for distributing and selling Ethanol Flex 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 will record the fuel rating certification on documents (*e.g.*, shipping receipts) already in use, or will use a letter of certification. The Commission expects that labeling of Ethanol Flex Fuel pumps will be consistent, generally, with practices in the fuel industry. Accordingly, the PRA burden will be the same as that for other automotive fuels: 5 minutes (or 1/12th of an hour) per year for recordkeeping and 1/8th of an hour per year (as explained below) for disclosure.

Recordkeeping: The U.S. Department of Energy (''DOE'') indicates 2,674 ethanol retailers nationwide, and the U.S. Energy Information Administration indicates 195 ethanol fuel production plants.[9] Assuming that each ethanol retailer and producer will spend 1/12th of an hour per year complying with the proposed recordkeeping requirements, the cumulative recordkeeping burden for retailers and producers is 223 hours and 16 hours, respectively. The total annual burden is 239 hours.

Disclosure: Commission staff previously has estimated that retailers of automotive fuels incur an average burden of approximately one hour to produce, distribute, and post fuel rating labels. However, because those labels are durable, staff had also concluded that in any given year only about one of every eight retailers incurs this burden (based on an averaging of an estimated dispenser useful life range of 6 to 10 years); hence, on average, 1/8th of an hour per retailer per year.[10]

Applying these past assumptions regarding other required fuel industry disclosures, staff estimates that ethanol retailers will also spend 1/8th of an hour per year complying with the disclosure requirements newly applicable to them with these final amendments. Thus, the disclosure burden for 2,674 ethanol retailers totals 334 hours (2,674 x 1/8th of an hour; or, alternatively, 334 x 1/8th x 1 hour).

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[8] *See* 5 C.F.R.§ 1320.3(b)(2).

[9] See http://www.afdc.energy.gov/fuels/ethanol_locations.html (last visited Oct. 28, 2015); http://www.eia.gov/petroleum/ethanolcapacity/ (last visited Oct. 28, 2015).

[10] *See, e.g.,* 73 Fed. Reg. 40154, 40160 - 40601 (July 11, 2008); 79 Fed. Reg. at 18862 – 18863.

Labor costs associated with hours burden:

Estimated labor costs are derived by applying appropriate hourly cost figures to the estimated burden hours described above. Applying an average hourly wage of $11.08 for ethanol retailers,[11] the aggregate recordkeeping and disclosure labor cost for all ethanol retailers combined would be $6,172 ((223 hours + 334 hours) x $11.08). Applying an average hourly wage of $29.67 for ethanol producers,[12] their cumulative labor costs (recordkeeping) would be $475 (16 hours x $29.67). Thus, cumulative labor costs for ethanol retailers and producers, combined, would be $6,647 ($6,172 + $475).

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

The Rule does not impose any capital costs for producers, importers, or distributors of ethanol blends. 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 fifty cents and that the average automotive fuel retailer has six dispensers. The Petroleum Marketers Association of American ("PMAA"), however, stated in its comment to the 2010 NPRM that the cost of labels ranges from one to two dollars. Conservatively applying the upper end from PMAA's estimate results in an initial cost to retailers of $12 (6 pumps × $2).

Regarding label replacement, staff has previously estimated, as noted above, a dispenser useful life range of 6 to 10 years and assumed a useful life of 8 years for labels, the mean of that range. Given that, replacement labeling will not be necessary for well beyond the relevant period at issue, *i.e.*, the immediate 3-year PRA clearance sought. However, conservatively annualizing the $12 labeling cost at inception per retailer over that shorter period rather than average useful life, annualized labeling cost per retailer will be $4. Cumulative labeling cost would thus be $10,696 (2,674 retailers × $4 each, annualized).

(14) Estimate of Cost to Federal Government

Because staff anticipates that the incremental cost to the FTC of administering the final 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 amendment. As detailed above, the incremental burden for the final amendments is an estimated 239 hours, cumulatively, for recordkeeping, 334 hours for labeling disclosures, an associated $6,647 in labor costs, and $10,696 in non-labor costs (labeling replacements). Slight variances from previously submitted estimates for the 2014 proposed

[11] *See http://www.bls.gov/iag/tgs/iag447.htm* (Bureau of Labor Statistics, July 2015 Current Employment Statistics, Average Hourly Earnings for Gasoline Station Production and Nonsupervisory Employees).

[12] *See http://www.bls.gov/iag/tgs/iag211.htm#earnings* (Bureau of Labor Statistics, July 2015 Current Employment Statistics, Average Hourly Earnings for Oil and Gas Extraction Production and Nonsupervisory Employees).

amendments (ICR Ref. No. 201403-3084-002) are attributable to updated data from the DOE for the number of ethanol producers and retailers and to updated hourly wage data from the Bureau of Labor Statistics.

(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.