FEDERAL REGISTER

Vol. 81 Thursday,
No. 9 January 14, 2016

Part III

Federal Trade Commission

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

FEDERAL TRADE COMMISSION

16 CFR Part 306

RIN 3084–AB39

Automotive Fuel Ratings, Certification and Posting

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Final rule.

SUMMARY: The Commission issues final amendments to its Rule for Automotive Fuel Ratings, Certification and Posting (''Fuel Rating Rule'' or ''Rule'') by adopting rating, certification, and labeling requirements for certain ethanol-gasoline blends. The amendments further the Rule's goal of helping purchasers identify the correct fuel for their vehicles.

DATES: The amendments published in this document will become effective July 14, 2016. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 14, 2016.

ADDRESSES: Relevant portions of the proceeding, including this document, are available at *www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: R. Michael Waller, (202) 326–2902, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

On April 4, 2014, the Commission published a Notice of Proposed Rulemaking (''2014 NPRM'') requesting comments on: (1) New rating, certification, and labeling requirements for gasoline blends with more than 10 percent ethanol (''Ethanol Blends''); and (2) an alternative method to determine the fuel rating of gasoline (''octane rating'').[1] After considering the comments received in response as well as Environmental Protection Agency (''EPA'') decisions related to ethanol blends, the Commission now issues final ethanol fuel amendments.[2]

As explained below, the final amendments require that entities rate and certify all ethanol fuels to provide useful information to consumers about ethanol concentration and suitability for their cars and engines. Responding to the comments, the final amendments provide greater flexibility for businesses to comply with the ethanol labeling requirements, and do not adopt the alternative octane rating method proposed in the 2014 NPRM.

This document first provides background on the Fuel Rating Rule. It then summarizes comments in response to the 2014 NPRM regarding ethanol blend ratings and labeling as well as octane rating testing. Finally, it provides the Commission's analysis and final rule.

II. Background

A. The Fuel Rating Rule

The Commission first promulgated the Fuel Rating Rule, 16 CFR part 306 (then titled the ''Octane Certification and Posting Rule''), in 1979 pursuant to the Petroleum Marketing Practices Act (''PMPA''), 15 U.S.C. 2801 *et seq.*[3] The Rule originally applied only to gasoline. The Energy Policy Act of 1992 amended Title II of the PMPA to extend the Commission's authority, requiring it to determine automotive fuel certification and posting requirements for all liquid automotive fuels, including ethanol-gasoline blends.[4] Pursuant to these amendments, the Commission expanded the Rule to cover ''alternative liquid fuels'' in 1993, including ethanol blends below 70 percent concentration.[5] However, the current Rule's non-exhaustive list of alternative liquid fuels does not expressly include these ethanol blends.[6]

For covered fuels, the Rule mandates methods for rating and certifying, as well as posting the ratings at the point of sale. For most alternative fuels,[7] the rating is ''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'' (*e.g.,* ''Methanol/Minimum 80% Methanol'').[8] Any covered entity, including a distributor, that transfers a fuel must certify the fuel's rating to the transferee either by including it in papers accompanying the transfer or by letter.[9] The Rule further requires retailers to post this fuel rating by adhering a label to the retail fuel pump and provides precise specifications (*e.g.,* content, size, color, and font) for these labels.[10]

B. Procedural History

In March 2009, as part of a systematic review of the FTC's rules and guides, the Commission solicited general comments on the Fuel Rating Rule.[11] After reviewing those comments, the Commission published a Notice of Proposed Rulemaking in March 2010 (''2010 NPRM'') proposing three amendments addressing ethanol fuels.[12] First, the proposed amendments would have required ratings disclosing an ethanol blend's ethanol concentration (*e.g.,* 40 percent ethanol), rather than the ''principal component'' concentration. Second, the proposed amendments would have required retailers to post labels disclosing a blend's ethanol content by displaying a broad range of 10 to 70 percent ethanol, a narrower range (*e.g.,* 30–40 percent ethanol), or a specific percentage. Finally, the proposed amendments would have required all ethanol fuel labels to disclose ''may harm some vehicles'' and ''check owner's manual.'' In the 2010 NPRM, the Commission explained that ''[t]his additional information should assist consumers in identifying the proper fuel for their vehicles.'' [13] In April 2011, the Commission published

[1] *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Notice of Proposed Rulemaking,* 79 FR 18850 (Apr. 4, 2014).

[2] EPA's decisions permitted the use of ethanol blends between 10 to 15 percent concentration (''E15'') for 2001 and newer conventional vehicles. In 2010, the EPA approved E15 for 2007 and newer conventional vehicles. *Environmental Protection Agency: Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of Administrator (''EPA Waiver Decision I''),* 75 FR 68094 (Nov. 4, 2010). Then, it expanded its approval to 2001 and newer vehicles based on additional test data. *Environmental Protection Agency, Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator (''EPA Waiver Decision II''), 76 FR 4662* (Jan. 26, 2011). EPA soon thereafter promulgated complementary regulations providing ''labeling requirements for fuel pumps that dispense E15 to alert consumers to the appropriate and lawful use of the fuel.'' *Environmental Protection Agency: Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs; Final Rule (''EPA Final Rule to Mitigate Misfueling''),* 76 FR 44406 (July 25, 2011).

[3] *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule,* 44 FR 19160 (Mar. 30, 1979).

[4] Section 1501(b) of Public Law 102–486, 106 Stat. 2776, 2996 (codified at 15 U.S.C. 2821(6), (17)–(18)). The statute defines the term ''automotive fuel'' to mean liquid fuel of a type distributed for use in any motor vehicle. Section 1501(b) of Public Law 102–486, 106 Stat. 2776, 2996–7 (codified at 15 U.S.C. 2821(6)).

[5] *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule* (''1993 Final Rule''), 58 FR 41356, 41358 (Aug. 3, 1993).

[6] 16 CFR 306.0(i)(2).

[7] The Rule requires rating biodiesel fuels by the percentage of biodiesel or biomass-based diesel in the fuel.

[8] 16 CFR 306.0(j)(2).

[9] 16 CFR 306.6.

[10] 16 CFR 306.10, 306.12.

[11] *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Request for Public Comments,* 74 FR 9054 (Mar. 2, 2009).

[12] *Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Notice of Proposed Rulemaking,* 75 FR 12470 (Mar. 16, 2010).

[13] 2010 NPRM, 75 FR at 12474.

final amendments providing an alternative method of rating gasoline octane and making other minor changes to the Rule.[14] At that time, the Commission declined to adopt final ethanol amendments, noting that it needed additional time to consider ethanol labeling in light of comments received in response to the 2010 NPRM and a recent EPA decision permitting the use of certain ethanol blends between 10 and 15 percent concentration (''E15'') in newer conventional vehicles.[15]

In April 2014, the Commission published a second NPRM proposing that ethanol blend labels disclose the exact percentage of ethanol, or a percentage rounded to the nearest multiple of ten.[16] The proposal also required that the label state ''Use Only in Flex-Fuel Vehicles/May Harm Other Engines.'' [17] In addition, 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. Finally, the 2014 NPRM proposed allowing octane ratings determined by infrared spectrophotometry.[18]

III. Comments in Response to the 2014 NPRM

Many comments received in response to the 2014 NPRM supported the need for new labeling and testing methods.[19] However, commenters suggested several modifications, including defining gasoline to include E15, an octane label for Ethanol Blends, an alternative label for Ethanol Blends of 51 to 83 percent, and referee testing methods for octane ratings determined through infrared spectrophotometry.

A. Proposed Definition of ''Ethanol Blend'' and Exemption for EPA E15

The 2014 NPRM proposed including E15 in the definition of ''Ethanol Blend,'' but not requiring retailers to post a separate FTC fuel rating label for EPA E15.[20] The Commission intended its proposal to facilitate coverage of all concentrations of ethanol blends above 10 percent and to help consumers quickly identify ethanol blends at pumps.[21]

Several commenters, including fuel manufacturers, a state regulator, and an ethanol industry group, urged the FTC to exclude E15 from the definition of Ethanol Blends altogether.[22] For example, Tesoro suggested that ''Ethanol Blend'' be defined as ''a mixture of gasoline and ethanol containing more than 15 percent ethanol'' and that the definition of ''gasoline'' include concentrations below 15 percent, *i.e.,* E10 and E15.[23] According to Tesoro, these changes would subject E15 to the Rule's octane labeling and certification requirements for gasoline.[24] Moreover, defining E15 as gasoline would exempt E15 from the ethanol blend labeling requirements and prevent an overlap with EPA's E15 regulations.[25] According to Tesoro, ''all E15 is subject to the EPA Misfueling Mitigation rule.'' [26] Phillips66 agreed and added that all Ethanol Blends below 16 percent are subject to EPA regulations on blendstock and finished gasoline, including ''vapor pressure, sulfur, benzene, etc.'' [27] It argued that defining gasoline to include E15 would avoid ''confusion and conflict with EPA regulations and requirements.'' [28] API worried that the 2014 NPRM exemption for EPA E15 ''may allow a supplier to differentiate 'EPA-approved E15' from 'non-EPA-approved E15' and, for the latter, avoid'' the EPA's requirements.[29] Thus, it concluded that the FTC Rule should exclude E15 from the definition of Ethanol Blends.[30]

Finally, the Tennessee Department of Agriculture (''TN Dept. Ag.'') and the National Conference of Weights and Measures (''NCWM'') urged the Commission to refer to Ethanol Blends as ''Ethanol Flex Fuel Blends'' or ''Ethanol Flex Fuel.'' [31] TN Dept. Ag. explained that the relevant ASTM International (''ASTM'') standard for ethanol fuel blends, ASTM D5798, recognizes ''Ethanol Flex-Fuel'' as the most standardized term for ''higher level'' ethanol blends (*i.e.,* blends from 51 to 83 percent volume ethanol).[32] Additionally, TN Dept. Ag. explained that the term ''Ethanol Flex Fuel'' is consistent with NCWM's definition of ethanol blends.[33]

B. Octane Rating for Ethanol Blends

Although the 2014 NPRM did not propose an octane rating for Ethanol Blends, eight commenters suggested that the Commission require one to prevent misfueling, ensure fuel quality, or bolster ethanol's competitiveness.[34] Two state regulators and ethanol industry groups asserted that, without such a rating, consumers could not choose the EPA E15 appropriate for their vehicle.[35] The California Department of Food and Agriculture (''CA Dept. Ag.'') explained that ''[v]ehicles manufactured after 2001 also have varying octane requirements, and requiring use of the US EPA label alone does not ensure that consumers will purchase a fuel that meets their vehicle's needs.'' [36]

Automotive manufacturing groups argued for an octane rating for Ethanol Flex Fuels of less than 51 percent ethanol: ''Consumers have come to expect and have a right to know the octane rating of the fuel offered for sale . . . . The correct octane rating for the vehicle is provided in the vehicle owner's manual and therefore the correlating octane information should be available from the rating on the retail pump.'' [37] These commenters added, however, that ''at this point an octane AKI posting for Ethanol Flex Fuel (E51–83%) as defined by ASTM International is not yet practically feasible given variable composition.'' [38] The NADA, an automobile dealers group, suggested that retailers display octane ratings for

[14] *Federal Trade Commission: Automotive Fuel Ratings Certification and Posting: Final Rule,* 76 FR 19684 (Apr. 8, 2011).

[15] *Id.* at 19689.

[16] 2014 NPRM, 79 FR 18850, 18859.

[17] *Id.* at 18857.

[18] *Id.* at 18861.

[19] The Commission received 357 comments in response to the 2014 NPRM. These comments are located at: *http://www.ftc.gov/policy/public-comments/initiative-555.*

[20] *See* 40 CFR 80.1501; *see also* 2014 NPRM, 79 FR at 18865.

[21] 79 FR at 18857.

[22] *See* Phillips66 comment at 1; Renewable Fuels Association (''RFA'') comment at 1–2; Tesoro comment Att. 1 at 1–2; American Fuel & Petrochemical Manufacturers (''AFPM'') comment at 2–3; American Petroleum Institute (''API'') comment at 2; BP Products North America (''BP Products'') comment at 1; Chevron comment at 2; Marathon Petroleum Corporation (''Marathon'') comment at 1–2; Tennessee Department of Agriculture (''TN Dept. Ag.'') comment at 2–3.

[23] Tesoro comment Att. 1 at 1–2; *see* AFPM comment at 2–3; API comment at 2; BP Products comment at 1; Chevron comment at 2; TN Dept. Ag. comment at 2–3.

[24] Tesoro comment Att. 1 at 2.

[25] *Id.*

[26] *Id.*

[27] Phillips66 comment at 1.

[28] *Id.*

[29] API comment at 2; *see also* Marathon comment at 2.

[30] API comment at 2.

[31] TN Dept. Ag. comment at 1–3; NCWM comment at 6.

[32] TN Dept. Ag. comment at 1–2 (referring to ASTM International D5798 Standard Specification for Ethanol Fuel Blends for Flexible-Fuel Automotive Spark-Ignition Engines).

[33] *Id.* at 2.

[34] Tesoro comment at 1, Att. 1 at 5–6; Alliance of Automobile Manufacturers and Association of Global Automakers (''AAM/AGA'') comment at 4–5; National Automobile Dealers Association (''NADA'') comment at 3; American Coalition for Ethanol (''ACE'') comment at 2; TN Dept. Ag. comment at 1; California Department of Food and Agriculture (CA Dept. Ag.) comment; Growth Energy comment at 2; Davis comment.

[35] ACE comment at 2; Growth Energy comment at 2; TN Dept. Ag. comment at 1; CA Dept. Ag. comment.

[36] CA Dept. Ag. comment.

[37] AAM/AGA comment at 4.

[38] *Id.* at 4–5.

all automotive fuels: ''[c]onsumers often and wisely consider a fuel's octane rating when making appropriate vehicle fueling decisions, whether or not an ethanol blend is involved.'' [39]

Other commenters argued that an octane rating is important for communicating ethanol's benefits. Ethanol proponents Growth Energy and ACE noted that ethanol's high octane rating represents an important advantage for ethanol.[40] ACE explained that ''[c]lean and high octane is one of ethanol's greatest competitive advantages in the marketplace, and while nothing in the rule would preclude a marketer from posting the octane rating of E15, ACE believes this proposal gives oil companies the power to prevent their branded marketers from displaying the higher octane rating of E15.'' [41] The TN Dept. Ag. added that ''[r]equiring the [octane rating] as the legal Automotive Fuel Rating for E15 will benefit the consumer and both the ethanol and petroleum industries by maintaining a level playing field for marketing the various grades of gasoline and gasoline-ethanol blends.'' [42]

Tesoro and automaker groups argued for certification and display of octane rating to ensure the quality of the gasoline used for Ethanol Flex Fuels.[43] AAM/AGA explained that, ''[an] octane rating label will also support compliance/enforcement to be sure the correct octane tracks with the blend [Ethanol Flex Fuel], and is not inappropriately low due to lower octane BOB ([Gasoline] Blendstock for Oxygenate Blending) used'' in the blending.[44]

C. Proposed Ethanol Blend Pump Labeling

Commenters disagreed about the proposed fuel pump label for Ethanol Blends. Some supported the Commission's proposal and others urged more detail and precision in the label disclosure, while still others sought less detail and precision. Finally, many commenters argued that there is no label that would be sufficient to prevent misfueling and, therefore, opposed the Commission's proposal.

1. Required Label Statement

Commenters, including petroleum retailers and industry groups, auto manufacturing groups, ethanol producer groups, and a state regulator, all supported inclusion of ''Use Only in Flex-Fuel Vehicles'' on the label.[45] Few commenters, however, supported the ''May Harm Other Engines'' language without change.[46]

Ethanol producer groups argued ''May Harm Other Engines'' is scientifically unsubstantiated and unduly harmful to the ethanol industry.[47] For example, RFA stated that it is ''not aware of any credible evidence showing that misfueling has been a problem at flex fuel dispensers that simply advise the consumer'' that the fuel is for flex-fuel vehicles only.[48] IRFA reported that there have been no reports of misfueling, and ACE stated ''that there has been little, if any, harm or damage reported'' from misfueling.[49] According to RFA, ''the proposed language . . . does not appear to be based on scientific evidence and would undoubtedly deter some [flex-fuel vehicle] drivers from purchasing the fuel[.]'' [50] IRFA added, ''[n]o scientific evidence exists to prove that any vehicles may be harmed [by flex-fuel blends].'' [51] Ethanol groups also described the phrase as unfair because labels for other fuels (*e.g.,* diesel) do not include this language.[52] Growth Energy added that the phrase is vague, does nothing to prevent misfueling, and ''further confuses the consumer.'' [53] It suggested an alternative phrase: ''Attention . . . Not Approved for Other Engines.'' [54]

Conversely, some commenters viewed ''May Harm Other Engines'' as too weak. Citing concerns such as misfueling, automobile performance, warranty coverage, damage to small engines, and consistency with NCWM's label, the NCWM, gasoline manufacturers and retailers, automobile manufacturers, a regulator, and two individual commenters suggested adding ''Check Owner's Manual'' or ''Consult Vehicle Owner's Manual for Fuel Recommendations.'' [55] AFPM and other commenters explained that NCWM's suggested label for ethanol blends includes the phrase ''Check Owner's Manual.'' [56] Retailers expressed concern about liability under laws that prohibit misfueling and suggested that the label contain an ''advisory word'' such as ''Attention.'' [57] Similarly, other commenters proposed adding ''Warning'' or ''Caution'' to the label.[58] Commenters also highlighted harm to engines from misfueling and advocated for: ''Do Not Use in Other Engines May Cause Harm;'' [59] and ''Don't Use in other Vehicles, Boats, or Gasoline Powered Engine. It May Cause Damages;'' [60] among others.[61]

AAM/AGA added that '' 'May Harm . . .' does not convey the intended absolute prohibition on its use for non-flex-fuel equipment, whereas 'Do Not Use . . .' is a clear, simple instruction.'' [62] AAM/AGA further expressed ''strong concerns about the risks for consumers from misfueling vehicles with ethanol blends,'' including mechanical damage on engine parts and the fuel pump as well as improper illumination of the malfunction indicator light (''MIL'') that will reduce consumer confidence in this

[39] NADA comment at 3.

[40] Growth Energy comment at 2; ACE comment at 2.

[41] ACE comment at 2.

[42] TN Dept. Ag. comment at 2.

[43] Tesoro comment at 1, Att. 1 at 5–6; AAM/AGA comment at 4–5.

[44] AAM/AGA comment at 4–5.

[45] RFA comment at 5; AAM/AGA comment at 2; Iowa Renewable Fuels Association (''IRFA'') comment at 2; AAM/AGA comment at 2; ACE comment Att. (May 20, 2010 comment at 3); Petroleum Marketers and Convenience Stores of Iowa (''PMCSI'') comment; Outdoor Power and Equipment Institute/National Marine Manufacturers Association (''OPEI/NMMA'') comment at 14; CA Dept. Ag. comment; Growth Energy comment at 1; Marathon comment at 3; Davis comment. Phillips66, Tesoro, AFPM, API, and NCWM suggest ''For Use in Flexible Fuel Vehicles (FFV) Only.'' Phillips66 comment at 2; Tesoro comment Att. 1 at 3; AFPM comment at 4; API comment at 3; NCWM comment at 4; BP Products comment at 1; Chevron comment at 1.

[46] *See* Center for Auto Safety (''CAS'') comment at 1; CA Dept. Ag. comment at ¶ 2.

[47] RFA comment at 5; *see also* IRFA comment at 2; ACE comment at 1; Growth Energy comment at 1. These groups reiterated concerns raised in their comments to the March 16, 2010 NPRM, available at *https://www.ftc.gov/policy/public-comments/initiative-335.*

[48] RFA comment at 5.

[49] IRFA comment at 1; ACE comment at 2.

[50] RFA comment at 5.

[51] IRFA comment at 2.

[52] RFA comment at 5–6; IRFA comment at 2; ACE comment at 1.

[53] Growth Energy comment at 1.

[54] *Id.*

[55] Phillips66 comment at 2; Tesoro comment Att. 1; AFPM comment at 3; Chevron comment at 1; BP Products at 1; API comment at 3; AAM/AGA comment at 3; PMCSI comment; NCWM comment at 6; OPEI/NMMA comment at 19; TN Dept. Ag. comment at 2; McComas comment; Lori Jacobson comment.

[56] AFPM comment at 4; Tesoro comment Att. 1; Phillips66 comment at 2; NCWM comment at 4, 6.

[57] National Association of Convenience Stores/Society of Independent Gasoline Marketers of America (''NACS/SIGMA'') comment at 3–4.

[58] AAM/AGA comment at 3; OPEI/NMMA comment at 19.

[59] OPEI/NMMA comment at 14; AAM/AGA comment at 2–3; *see* NADA comment at 2 (suggests replacing ''May Harm Other Engines'' with ''Do Not Use in Other Engines'').

[60] Mississippi State Chemical Laboratory (''MSU Chem. Lab.'') comment.

[61] Pipkorn comment (''I think the label should include a large print warning on the ethanol fuel pumps that ethanol fuels will cause harm, damage and possibly destroy your engine and fuel systems!''); Scally comment (''Since ethanol is known to damage engines, why don't you just say that at the pumps? That would be much more understandable for the general public.''); Seldon comment (''Any labels for gasoline containing E–15 can only honestly say 'POISON for gasoline engines'—DO NOT USE!''); Haines comment (''Do Not Use—May Cause Engine Damage.'').

[62] AAM/AGA comment at 3.

diagnostic tool.[63] AAM/AGA included letters from 12 automakers about the potential for damage to automobiles from ethanol blends above 10 percent ethanol. In these letters, the automakers expressed concern about vehicle damage not covered by vehicle warranties and reduced fuel efficiency.[64] Marathon argued for the word ''damage'' in lieu of ''harm,'' which it considers an insufficient warning to owners of small engines, motorcycles, and other non-flex fuel vehicles.[65] Groups representing motorcycle, marine, and other small engine manufacturers and users also cited evidence of engine damage from ethanol blends.[66]

Finally, some commenters proposed changes to the color of the labels and size of the fonts. For example, AAM/AGA recommended increasing the font sizes of the language on the labels to ''ease reading them.'' [67] API and supporting commenters recommended a larger label, matching the size of the EPA's E15 label.[68] NCWM proposed larger type than the 2014 NPRM and greater flexibility for retailers in the placement of particular components of the label on fuel pumps as well as colors and font styles.[69]

2. Ethanol Percentage Disclosure

Three commenters supported the FTC's proposed ethanol percentage label disclosures.[70] Seven called for more precise disclosures.[71] Thirteen urged the FTC to permit less precise disclosures, such as a single label for 51 to 83 percent ethanol blends.[72]

Commenters supporting more precise disclosures argued for 5 percent increments, instead of the 10 percent increments in the proposal. They claimed that the narrower range would allow retailers to use commercially available ethanol blend dispensers without confusing or deceiving consumers.[73] AAM/AGA added that ''[u]sing units of 5 avoids the potential perception that FTC's proposed units of 10 somehow inhibit the ability to market an E25 fuel [albeit the proposed regulatory language in the NPRM allows the option for labeling the exact % ethanol content in proposed Sec. 306(12)(a)(4)(A)].'' [74]

Most commenters who proposed less precise disclosures [75] generally supported the National Conference for Weights and Measures (''NCWM'') proposal to allow businesses to round the ethanol content to the nearest ten percent for ethanol blends below 51 percent ethanol (''Mid-level Blends'') and post a single label for blends from 51 to 83 percent (''High-level Blends'').[76] These commenters explained that engines will not cold-start during winter months if the ethanol concentration is too high. As a result, High-level Blends contain a changing ratio of ethanol to gasoline during colder months to ensure performance and compliance with ASTM International (''ASTM'') specifications.[77] Commenters worried that manufacturers and sellers of High-level Blends would, therefore, incur high costs resulting from constantly changing labels and that these changes would cause customer confusion. For example, the Renewable Fuels Association (''RFA'') stated that ''[a] requirement to change the label every time the ethanol content fluctuates would be burdensome, costly, and confusing;'' moreover, simultaneously posting ''multiple labels for every possible variant of ethanol content in the 'ethanol flex fuel' offered at the pump . . . would only confuse consumers about the actual ethanol content of the fuel.'' [78] TN Dept. Ag., which supported rounding ethanol content to the nearest 10 percent for Mid-level Blends, argued that some retailers will choose not to sell ethanol or blend lower amounts of ethanol to avoid the burden of re-labeling High-level Blends seasonally.[79] They further explained that selling only lower blends would be counter to the intent of the Energy Independence and Security Act of 2007 [80] to increase the availability of alternative fuels.

Convenience store groups and fuel marketers also urged less precision, advocating for a single label for Mid-level Blends.[81] According to them, many retailers cannot know the ethanol content within 10 percent because they do not blend their own fuels and mix fuel deliveries with preexisting fuel in their storage tanks. They explained, ''[e]ven if retailers *are* in a position to make this determination, requiring them to constantly shift the labels on their blender pumps (E20 one day, E40 another day, etc.) would be exceedingly burdensome and have little offsetting benefit to the consumer.'' [82]

3. Opposition to Additional Labeling

The American Motorcyclist Association (''AMA'') and 72 individual commenters argued that the proposed label would be ineffective. According to AMA, ''another label on a blender pump that already has many labels will not be sufficient to avoid misfueling and could be easily overlooked.'' [83] Instead, AMA recommends ''physical barriers in the fueling nozzle/receptacle, as was provided when the nation went from leaded to unleaded fuel.'' [84]

D. Infrared Testing Method for Octane Rating

Commenters generally supported allowing infrared spectrophotometry (''IR Testing'') to establish an octane rating, citing reduced production and enforcement costs.[85] Specifically, the Commission's proposal would have allowed octane ratings from infrared spectrophotometers that are correlated with ASTM D2699 and D2700 and

[63] *Id.* at 5.

[64] *Id.* at 6–7 and attachments.

[65] Marathon comment at 3.

[66] OPEI/NMMA comment at 3–7; American Motorcyclist Association (''AMA'') comment at 1–2. Individual commenters also expressed support for AMA's comment.

[67] AAM/AGA comment at 3.

[68] API comment at 4; *see also* Phillips66 comment at 1; Chevron comment at 1; BP Products comment at 1.

[69] NCWM comment at 6.

[70] CAS comment at 1; PMCSI comment; Davis comment.

[71] AAM/AGA comment at 2; NADA comment at 2; OPEI/NMMA comment at 21; Berendts comment; Brink comment; Miller comment; Theisen comment.

[72] Phillips66 comment at 2; RFA comment at 4; Tesoro comment Att. 1 at 3–4; API comment at 3; ACE comment at 2; NCWM comment at 3–4; TN Dept. Ag. comment at 3; CA Dept. Ag. comment; NACS/SIGMA comment at 1–3; BP Products comment at 1; Chevron comment at 2; Marathon comment at 2.

[73] AAM/AGA comment at 2; OPEI/NMMA comment at 21. Other commenters argue that more precise disclosures would be ''safer for consumer use'' or provided no explanation. *See* Theissen comment; Berendts comment; Brink comment; Miller comment.

[74] AAM/AGA comment at 2 (brackets included in original text).

[75] Phillips66 comment at 2; RFA comment at 4; Tesoro comment Att. 1 at 3–4; API comment at 3; ACE comment at 2; NCWM comment at 3–4; TN Dept. Ag. comment at 3; CA Dept. Ag. comment; NACS/SIGMA comment at 1–3; BP Products comment at 1; Chevron comment at 2; Marathon comment at 2.

[76] Citing the high cost of changing labels, NACS/SIGMA argued for a single label for ethanol blends below 51 percent and another label for blends between 51 and 83 percent. NACS/SIGMA comment at 1–3.

[77] According to Phillips66, ''[t]he ASTM specification varies seasonally to ensure continued vehicle performance with changing ambient temperatures. In order to meet the seasonal specification changes, the ethanol volume is varied.'' Phillips66 comment at 2.

[78] RFA comment at 4; *see also* AFPM comment at 3; Tesoro comment Att. 1 at 2–3.

[79] TN Dept. Ag. comment at 3.

[80] Pub. L. 110–140, 121 Stat. 1492 (2007).

[81] NACS/SIGMA comment at 2–3.

[82] *Id.*

[83] AMA comment at 3.

[84] *Id.*

[85] Phillips66 comment at 1; Lima comment at 1; Tesoro comment Att. 1 at 4–5; CAS comment at 2; AFPM comment at 5; AAM/AGA comment at 9; API comment at 4–5; Chevron comment at 1; MSU Chem. Lab. comment; Marathon comment at 4; Davis comment.

conform to ASTM D6122 (''Standard Practice for the Validation of the Performance of Multivariate Infrared Spectrophotometers'').[86] In support, some commenters noted that gasoline producers and regulators already use such spectrophotometric testing.[87] Others suggested that the Rule permit additional techniques, including Raman spectrophotometry.[88]

However, even these commenters argued that should the Rule provide for IR Testing, it must identify ASTM D2699 and D2700 as ''referee'' tests in case of a dispute over the reliability of testing results.[89] Some of these commenters questioned the reliability of IR Testing and noted that, unlike D2699 and D2700, IR Testing identifies the components of fuel, not its actual performance. AFPM, a petrochemical manufacturers group, explained: ''All correlative test methods such as infrared and others must relate the results obtained (*i.e.,* spectra inferred octane) to the engine test methods as required in ASTM D4814 for gasoline certification.'' [90] AFPM concludes that the purpose of correlative methods ''is only to predict the standard method results [from ASTM D2699 and D2700],'' which have been used to classify gasoline for ''over 60 years.'' [91] It adds that ''[r]eplacing this combustion-based technology testing with a chemical make-up test technology [such as infrared spectrophotometry] may or may not be fully functional or directly applicable to today's fuels or automobile needs.'' [92] BP Products and an individual commenter urged the FTC not to include these methods until ASTM endorses correlative methods specifically for octane rating.[93]

IV. Final Rule Amendments

After considering the record, the Commission now issues final Rule amendments regarding the rating, certification, and labeling of ethanol fuels. These amendments include modifications in response to the comments. Specifically, the final amendments: (1) establish specific rating and certification requirements for Ethanol Blends with ethanol content *above* 10 percent to a *maximum* of 83 percent (''Ethanol Flex Fuels''); (2) modify the ethanol fuel labeling to permit a single pump label for High-level Blends; and (3) do *not* adopt infrared spectrophotometry as a method to determine octane rating for gasoline.

A. Definitions and Exemption for EPA E15

To establish requirements for rating, certifying, and labeling gasoline-ethanol blends, the 2014 NPRM proposed defining ''Ethanol Blends'' as ''a mixture of gasoline and ethanol containing more than 10 percent ethanol.'' [94] The NPRM, however, exempted EPA E15 from the Rule's labeling requirements, because it is subject to EPA labeling requirements. The final amendments retain this definition and exemption, but replace the proposed term ''Ethanol Blends'' with ''Ethanol Flex Fuels.''

Though some commenters agreed that E15 should be exempt from the Rule's ethanol labeling, they urged the Commission to require an octane rating label for E15. Specifically, they suggested that the Commission include E15 in the Rule's definition of gasoline, which currently includes gasoline-ethanol blends of up to 10 percent ethanol. Doing so would require E15 pumps to have octane rating labels. These ratings, according to automotive manufacturer and dealer groups, state regulators, and ethanol industry groups, would help consumers choose fuels appropriate for their vehicles, bolster ethanol's competitiveness as a high-octane fuel, and ensure that Ethanol Flex Fuels are composed of appropriate quality gasoline.

The Commission has not adopted these suggestions. First, as discussed in the 2010 NPRM and the Commission's 1993 rulemaking, an octane rating likely would not provide useful information to consumers and may deceive them about the suitability of Ethanol Flex Fuels for their vehicles.[95] Ethanol naturally boosts the octane rating in Ethanol Flex Fuels, and consumers may mistakenly equate octane with fuel quality.[96] Thus, this higher octane rating may mislead consumers to believe that such fuels are better for conventional gasoline engines. Second, according to automakers, using E15 may void vehicle warranties regardless of model year, except for certain vehicles manufactured since MY2012 as ''E15 capable.'' [97] Third, by exempting EPA E15 from the labeling requirements, but not from the other Rule requirements, *e.g.,* the certification provisions, the Rule ensures distributors and retailers have accurate ethanol concentration information, but does not burden retailers or confuse consumers with two separate E15 pump labels.

Finally, using the term ''Ethanol Flex Fuels'' is consistent with NCWM's and ASTM's use of ''Ethanol Flex Fuels'' for ethanol blends up to 83 percent.[98] Harmonizing these terms should alleviate consumer confusion. Including concentrations above 83 percent, however, would be inappropriate because automakers have not certified such blends for flex fuel vehicles or conventional automobiles, and Section 211(f) of the Clean Air Act prohibits their use as an automotive fuel.[99] If this changes, the Commission will consider appropriate amendments.

B. Rating and Certification

The final rule contains amendments related to rating and certification. First, consistent with the 2014 NPRM, the final amendments require an ethanol content rating for all Ethanol Flex Fuels. Previously, the Rule rated ethanol blends with the common name of the fuel and the percentage of the principal component of the fuel (*e.g.,* E85/''Minimum 70% Ethanol''). As a result, the Rule required rating ethanol blends below 50 percent ethanol concentration with the fuel's gasoline concentration, not its ethanol concentration (*e.g.,* E45/''Minimum 55% Gasoline''). Generally, ethanol contains less energy per gallon than petroleum-derived gasoline.[100] Consequently, the higher the ethanol concentration, the lower the fuel

[86] 2014 NPRM, 79 FR at 18865. The Commission received 22 comments on this issue.

[87] TN Dept. Ag. comment at 2; *see also* Gibbs comment.

[88] Lima comment at 2; Tesoro comment Att. 1 at 4–5; AFPM comment at 5; Chevron comment at 1; Travers comment; Botelho comment; Demsey comment; Parsley comment; McDaniel comment; Smith comment.

[89] Phillips66 comment at 1; Tesoro comment Att. 1 at 4–5; AFPM comment at 5; AAM/AGA comment at 9; API comment at 4–5; Chevron comment at 1–2; TN Dept. Ag. comment at 2; Marathon comment at 4; Davis comment. Many commenters pointed out that the 2014 NPRM cited outdated ASTM standards and urged the FTC to adopt the most recent standards. RFA comment at 1; API comment at 5; BP Products comment at 1; NCWM comment at 4; Chevron comment at 1; TN Dept. Ag. comment at 2; Gibbs comment.

[90] AFPM comment at 6; *see also* Gibbs comment.

[91] AFPM comment at 6.

[92] *Id.; see* Tesoro comment Att.1 at 4–5; Gibbs comment.

[93] BP Products comment at 1; Gibbs comment.

[94] 2014 NPRM, 79 FR at 18865.

[95] 2010 NPRM, 79 FR at 18857; 1993 Final Rule, 58 FR at 41361.

[96] 1993 Final Rule, 58 FR at 41361.

[97] *See AAM/AGA* comment at 5, 7. If EPA E15 and E15 capable vehicles become prevalent, the Commission may consider whether retailers must post an octane label for EPA E15.

[98] TN Dept. Ag. comment at 2–3; NCWM comment at 5; *see also* ASTM D5798.

[99] 42 U.S.C. 7545(f).

[100] *See* Hyde comment to 2010 NPRM; AMA comment at 7 & atts. Honda Letter at 2, Chrysler Letter at 2, BMW Letter at 2, & GM Letter at 2; Department of Energy, National Renewable Energy Laboratory, Effects of Intermediate Ethanol Blends on Legacy Vehicles and Small Non-Road Engines, Report 1—Updated study, at xvii. Golden, Colorado. February 2009. Available at *http://energy.gov/eere/bioenergy/downloads/effects-intermediate-ethanol-blends-legacy-vehicles-and-small-non-road.*

economy. Therefore, by disclosing the ethanol concentration, the label does not incorrectly convey that the fuel has the same fuel economy as gasoline. No commenter opposed this change.

Second, the Commission adopts the 2014 NPRM proposal to allow transferors to certify fuel content through a letter to the transferee. For most other alternative fuels, a certification letter remains valid if a transferred fuel has the same or a higher concentration of the principal fuel component because an increase in concentration will not trigger label changes. In contrast, an increase or decrease in the concentration for Ethanol Flex Fuels may trigger new disclosures by changing the ethanol concentration of the fuel. For example, if a fuel's ethanol concentration increased from 26 percent to 38 percent, the label, as discussed below, must disclose a higher concentration level. Therefore, a certification letter will only remain valid as long as the transferred fuel contains the same percentage of ethanol as previous fuel transfers covered by the letter. No commenter objected to this proposal.[101]

C. Labeling

As explained below, the final amendments adopt the proposed ''Use Only in Flex-Fuel Vehicles/May Harm Other Engines'' language, but modify the ethanol percentage disclosures proposed in the 2014 NPRM. Specifically, retailers must post labels with exact ethanol concentrations or round to the nearest multiple of 10 for Mid-level Blends. For High-level Blends, however, they may post the exact concentration, round to the nearest multiple of 10, or label the fuel as ''51% to 83% Ethanol.''

1. Required Label Statement

As proposed in the 2014 NPRM, the final rule requires that ethanol labels disclose ''Use Only in Flex-Fuel Vehicles/May Harm Other Engines,'' despite objections both that ''May Harm Other Engines'' is too narrow and that it is overbroad. No commenters opposed the proposed ''Use Only in Flex-Fuel Vehicles.'' [102]

The Commission reaches the same conclusion as in the 2014 NPRM—objections to the proposed text are unconvincing and not supported by the record.[103] First, there are significant risks, including engine damage and legal liability, associated with misfueling. The record demonstrates that Ethanol Flex Fuels may cause engine malfunction, engine damage, damage to the vehicle's emissions system, or other problems in conventional automobiles Model Year (''MY'') 2000 or older, motorcycles, small engines, and non-road engines, including marine engines.[104] The EPA permits E15 use only in MY2001 or newer automobiles [105] because it determined that Ethanol Flex Fuels may damage emissions systems and engine components of other engines.[106] Moreover, AAM/AGA submitted letters from 12 automakers stating that E15 may also harm MY2001 or newer automobiles.[107] These automakers also expressed concern that damage from ethanol may not be covered by warranty.[108]

Second, ''May Harm Other Engines'' is not confusing. By stating ''Use Only In Flex-Fuel Vehicles'' and ''May Harm Other Engines,'' the label clearly and accurately explains: (1) The fuel's suitability for consumers' cars and (2) that misfueling risks harm to non-flex-fuel engines, but not that it will necessarily harm all such engines. Moreover, because the disclosure clearly distinguishes between flex-fuel vehicles and ''other'' (*i.e.,* non-flex fuel) engines, it should not cause flex-fuel vehicle owners to fear that use of ethanol blends would harm their engines.

Third, the Commission disagrees that the disclosures are unfair because they apply only to ethanol blends. Ethanol blends present a different challenge than other automotive fuels. Specifically, most fuels present consumers with a binary choice (*e.g.,* engines either operate on diesel fuel or not). In contrast, when choosing a gasoline-ethanol blend, consumers must determine the appropriate ethanol concentration because different makes and models of gasoline-powered engines operate on differing ranges of ethanol concentration. For example, ethanol blends up to 10% ethanol concentration (*i.e.,* E10) are appropriate for almost all gasoline-powered automotive engines, but E15 may only be appropriate for MY2001 or newer automobiles and Flex-Fuel Vehicles. Furthermore, higher blends (*e.g.,* E20, E30, or E85) are only appropriate for Flex-Fuel Vehicles. Accordingly, the challenge of choosing the appropriate ethanol concentration is more likely to lead to misfueling than the binary choice between a gasoline-ethanol blend and another automotive fuel, such as diesel. A label, therefore, that delineates between different blends (*e.g.,* E20, E30, or E85) is appropriate for ethanol, but unnecessary for other fuels.

As courts have repeatedly held, agencies may limit rules to those areas where they have observed a problem.[109] Similarly, agencies need not take an all-or-nothing approach to regulation but may proceed incrementally.[110]

Fourth, the Commission disagrees with the argument that the disclosures need additional or different language, such as ''Warning,'' ''Check Owner's Manual,'' or more information about potential harm from misfueling. The label's orange color and placement on the fuel pump should sufficiently attract consumer's attention, making ''Warning'' or similar language unnecessary. Moreover, when displayed together, the phrases ''Use Only in Flex-Fuel Vehicles'' and ''May Harm Other Engines'' simply and unambiguously inform consumers that they can use ethanol blends in their flex-fuel vehicles and does not require the extra step of consulting an owner's manual.

Finally, as explained in the 2014 NPRM, the disclosures fall squarely within the Commission's statutory authority under the PMPA to prescribe labels disclosing fuel ratings.[111]

2. Ethanol Disclosure

The final rule adopts tiered labeling for Ethanol Flex Fuels because this

[101] Tesoro suggested that the FTC consider requiring certification of the octane rating for gasoline blendstock intended for blending with oxygenates, such as ethanol. Tesoro comment Att. 1 at 5–6. The Rule, however, does not require an octane rating for ethanol blends above 10 percent, and therefore will not require a certification for the gasoline used in Ethanol Flex Fuels.

[102] As discussed in Section III.C.3. *supra,* some commenters recommended physical barriers between gasoline and Ethanol Flex Fuel nozzles or pumps to prevent misfueling. However, the PMPA does not authorize the FTC to mandate such barriers. Thus, the Commission does not analyze this recommendation further.

[103] 2014 NPRM, 79 FR at 18858–59.

[104] *Id.; see* discussion of comments from gasoline manufacturers and retailers, automobile manufacturers, and other similar comments in Section III.C.1. *supra.*

[105] *EPA Waiver Decision II,* 76 FR at 4662.

[106] *EPA Waiver Decision I,* 75 FR at 68097–98, 68103; *see also EPA Final Rule to Mitigate Misfueling,* 76 FR at 44414–15, 44439.

[107] AAM/AGA comment at 7 and Atts. The automakers included Chrysler, Ford, GM, Mercedes-Benz, Honda, Mazda, Toyota, Nissan, Volkswagen, Volvo, BMW, Hyundai, and Kia Motors.

[108] *Id.*

[109] *See, e.g., Pharm. Research and Mfrs. of Am.* v. *FTC,* 790 F.3d 198, 206 (D.C. Cir. 2015); *Illinois Commercial Fishing Ass'n* v. *Salazar,* 867 F.Supp.2d 108, 118–19 (D.D.C. 2012) (upholding rule banning commercial fishing but allowing recreational fishing, where commercial fishing posed the greater risk to endangered fish.).

[110] *Investment Co. Inst.* v. *CFTC,* 891 F. Supp. 2d 162, 187 (D.D.C. 2012) (''[A]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.'') (quotation omitted); *City of Las Vegas* v. *Lujan,* 891 F.2d 927 (D.C. Cir. 1989) (''[A]gencies have great discretion to treat a problem partially.'').

[111] 2014 NPRM, 79 FR at 18860–61.

approach provides consumers with the information needed to choose appropriate fuels without placing an undue burden on retailers. First, for Mid-level Blends (ethanol concentrations above 10 percent, but no greater than 50 percent), retailers may post the exact percentage or round to the nearest multiple of 10 (*e.g.,* ''40% Ethanol'').[112] Second, for High-level Blends (concentrations above 50 percent, but no greater than 83 percent), retailers may post the exact percentage of ethanol concentration, round to the nearest multiple of 10, or indicate that the fuel contains ''51% to 83% Ethanol.'' [113]

For Mid-level Blends, the consumer benefits from more precise labels outweigh the burden on retailers. Requiring more precise disclosures provides flexible-fuel vehicle owners with meaningful information about the fuel's suitability for their vehicles without the risk of incorrectly conveying that the fuel has the same fuel economy as gasoline.[114] Thus, the precision helps them make informed choices about Ethanol Flex Fuels. The Rule, furthermore, mitigates the burden of labeling by permitting rounding of ethanol concentration, which allows retailers to alter their blends by small percentages without changing labels.

In contrast, the consumer benefits from more precise labeling of High-level Blends do not outweigh the increased burden to retailers. Unlike Mid-level Blends, High-level Blends' performance depends on weather conditions. As a result, retailers and producers must change the ethanol concentration in High-level Blends to maintain performance in changing weather conditions and comply with ASTM D5798's standards for vapor pressure.[115] To do so, producers may frequently change blends with varying ethanol concentrations.[116] When retailers place a newer blend in their tanks, it mixes with fuel of different ethanol concentration from prior deliveries. As a result, retailers may be unable to determine a concentration range more precise than 51 to 83 percent.[117] More precise labeling, therefore, would require retailers to acquire testing technology, regularly test for ethanol concentration, and re-label when necessary.

More precise labeling for High-level Blends, moreover, would have less benefit for consumers because it is unlikely that retailers could market High-Level Blends differentiated by ethanol concentration. According to the TN Dept. of Ag., retailers and producers will market ''comparable concentrations of [High-Level Blends] at [their] competing fuel sites in a given market,'' in order to comply with ASTM D5798 and their obligations under the Energy Independence and Security Act of 2007 to blend increasing amounts of renewable fuels.[118] Thus, these reduced benefits do not outweigh the retailers' increased burden from precise labels.

3. Label Specifications

The final amendments generally adopt the size, font, format, and color requirements proposed in the 2014 NPRM, with minor alterations to accommodate the additional characters needed for High-level Blend labels.[119] To help effectuate these amendments, 306.12(f) now provides sample illustrations of labels for Mid-level Blends and High-level Blends.

Some commenters argued for changes to the proposed label's size, font size, placement on the pump, or color. The proposed label formatting and placement specifications, however, are consistent with those in place for most of the alternative liquid fuels covered by the Rule, and the record does not support inconsistent treatment for ethanol labels. For example, the ethanol industry commented that orange is ''associated with danger'' and would put the industry at a competitive disadvantage.[120] However, as explained in the 2014 NPRM, orange is the color for all alternative fuels except biodiesel and will enable retail consumers to distinguish Ethanol Flex Fuels from gasoline. Furthermore, orange's brightness will help ensure that consumers notice the label and, therefore, avoid misfueling. Finally, EPA's E15 label uses the same orange background. Thus, using orange creates a uniform color scheme for all Ethanol Flex Fuels, making the label easier for consumers to identify.

D. Octane Rating by Infrared Spectrophotometry

Contrary to the 2014 proposal, the Commission does not adopt infrared spectrophotometry as an approved method to test octane rating.[121] According to the record, infrared testing is an indirect method of determining octane rating that is not endorsed by ASTM, nor is it as reliable as the methods currently specified by the Rule, namely ASTM D2699 and D2700. Furthermore, in the case of a dispute involving infrared testing, ASTM D2699 and D2700 must verify the results. Therefore, to avoid potential conflict and uncertainty from such indirect testing methods, the Commission does not amend its list of octane rating testing methods.

V. Paperwork Reduction Act

The certification and labeling requirements announced in the final amendments for Ethanol Flex Fuels constitute a ''collection of information'' under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (''PRA'').

Consistent with the Rule's requirements for other alternative fuels, under the final amendments, refiners, producers, importers, distributors, and retailers of Ethanol Flex Fuels must 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.[122] The covered entities also must make these records available for inspection by staff of the Commission and EPA or by persons authorized by those agencies. Finally, retailers must produce, distribute, and post fuel rating labels on fuel pumps.

In 2014, the Commission discussed the 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. The Commission has updated those estimates to incorporate more recent data for the number of retailers nationwide and labor costs. Below, the Commission discusses those estimates.

The Commission has previously estimated the burden associated with the Rule's recordkeeping requirements for the sale of automotive fuels to be no more than 5 minutes per year (or 1/12th of an hour) per industry member, and no more than 1/8th of an hour per year per industry member for the Rule's

[112] For example, retailers can label fuels at 25 and 34 percent concentrations as 30% Ethanol.

[113] The label states ''51% to 83% Ethanol,'' even though High-level Blends include concentrations about 50 percent. An ''Over 50% to 83% Ethanol'' label or similar alternative might be more specific, but would present consumers with a more complicated message in a smaller font, impeding comprehension.

[114] *See supra* Section IV.B.

[115] *See supra* notes 75–79; *see also* ASTM D5798 X1.3.

[116] NCWM comment at 2.

[117] NACS/SIGMA comment at 3.

[118] TN Dept. Ag. comment at 3.

[119] The final amendments also delete the Rule's sample label for ''E–100'' (*i.e.,* ethanol not mixed with gasoline) because the record does not show any retail sales of such fuels.

[120] ACE comment Att. (May 20, 2010 comment at 2).

[121] The amendments do adopt, however, the most current versions of the ASTM D4814, D2699, D2700, and D2885.

[122] *See* the Rule's recordkeeping requirements, 16 CFR 306.7; 306.9; and 306.11.

disclosure requirements.[123] 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.[124]

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 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: 1/12th of an hour per year for recordkeeping and 1/8th of an hour per year for disclosure.

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.[125] Assuming that each ethanol retailer and producer will spend 1/12th of an hour per year complying with the recordkeeping requirements, the cumulative recordkeeping burden for retailers and producers is 223 hours and 16 hours, respectively. Assuming each ethanol retailer will spend 1/8th of an hour per year complying with the disclosure requirements, the cumulative disclosure burden for retailers is 334 hours.

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,[126] the aggregate recordkeeping and disclosure labor cost for all ethanol retailers combined would be $6,172 ((223 hours + 334 hours) × $11.08). Applying an average hourly wage of $29.67 for ethanol producers,[127] their cumulative labor costs (recordkeeping) would be $475 (16 hours × $29.67). Thus, cumulative labor costs for ethanol retailers and producers, combined, would be $6,647 ($6,172 + $475).

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 a dispenser useful life range of 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. Averaging solely the $12 labeling cost at inception per retailer over that shorter period, however, annualized labeling cost per retailer will be $4. Cumulative labeling cost would thus be $10,696 (2,674 retailers × $4 each, annualized).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires an agency to provide a Final Regulatory Flexibility Analysis with the final rule unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[128]

The FTC reaffirms its conclusion that the final amendments will not have a significant economic impact on a substantial number of small entities. As explained in Section V above, the Commission expects Ethanol Flex Fuel retailers to spend, at most, 5 minutes per year complying with the recordkeeping requirements and 1/8th of an hour per year complying with the disclosure requirements. As also explained in Section V, staff estimates the mean hourly wage for producers of $29.67, and for retailers of $11.08. Even assuming that all ethanol retailers are small entities, compliance with the recordkeeping requirements will cost producers, individually, an estimated $2.47 ($29.67 × 1/12th of an hour) and cost retailers, individually, an estimated $.92 ($11.08 × 1/12th of an hour). In addition, under the same assumptions, compliance with the disclosure requirements will cost individual retailers an estimated $1.39 ($11.08 × 1/8th of an hour). Finally, as discussed in Section V, the Commission estimates annualized capital costs of $4 per retailer.

This document serves as notice to the Small Business Administration of the agency's certification of no effect. Nonetheless, the Commission has prepared the following analysis.

A. Statement of the Need for, and Objectives of, the Final Amendments

The Commission adopts these amendments to further the PMPA's objective of giving consumers information necessary to choose the correct fuel for their vehicles. The emergence of Ethanol Flex Fuels as a retail fuel and its likely increased availability necessitate the amendments. These amendments provide requirements for rating, certifying, and labeling Ethanol Flex Fuels (blends of gasoline and more than 10 percent but no greater than 83 percent ethanol) pursuant to PMPA, 15 U.S.C. 2801 *et seq.*

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.

C. Estimate of the Number of Small Entities to Which the Final Amendments Will Apply

Retailers of ethanol blends will be classified as small businesses if they satisfy the Small Business Administration's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (''NAICS''). The closest NAICS size standard relevant to this rulemaking is for ''Gasoline Stations with Convenience Stores.'' That standard classifies retailers with a maximum $29.5 million in annual receipts as small businesses.[129] As discussed above, DOE reports 2,674

[123] *See, e.g., Federal Trade Commission: Automotive Fuel Ratings, Certification and Posting: Final Rule on Biodiesel Labeling,* 73 FR 40154, 40161 (July 11, 2008). 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 incurs this burden each year, hence, 1/8th of an hour, on average, per retailer.

[124] *See* 5 CFR 1320.3(b)(2).

[125] *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).

[126] *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).

[127] *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).

[128] *See* 5 U.S.C. 603–605.

[129] *See http://www.sba.gov/content/small-business-size-standards* (last visited Jan. 15, 2015).

ethanol fueling stations.[130] DOE does not provide information on those retailers' revenue and no commenters submitted information about this issue. Therefore, the Commission is unable to determine how many of these retailers qualify as small businesses.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

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

E. Alternatives Considered

As explained above, PMPA requires retailers of liquid automotive fuels to post labels at the point of sale displaying those fuels' ratings. The posting requirements in the final amendments are minimal and, as noted above, do not require creating any separate documents because covered parties may use documents already in use to certify a fuel's rating. Moreover, the Commission cannot exempt small businesses from the Rule and still communicate fuel rating information to consumers. Furthermore, the amendments minimize what, if any, economic impact there is from the labeling requirements. Finally, because PMPA requires point-of-sale labels, the Rule must require retailers to incur the costs of posting those labels. Therefore, the Commission concludes that there are no alternative measures that would accomplish the purposes of PMPA and further minimize the burden on small entities.

VII. Incorporation by Reference

Consistent with 5 U.S.C. 552(a) and 1 CFR part 51, the Commission is incorporating the specifications of the following standards issued by ASTM International: D4814–15a ''Standard Specification for Automotive Spark-Ignition Engine Fuel (published August 2015)'' (''ASTM D4814–15a''); ASTM D2699–15a, ''Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel (published November 2015)''; ASTM D2700–14, ''Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel (published November 2014)''; and ASTM D2885–13, ''Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique (published July 2013).''

The terms *research octane number* and *motor octane number* have the meanings provided in ASTM Standard D4814–15a. Standards ASTM D2699–15a, ASTM D2700–14, and ASTM D2855–13 provide test methods or protocols for determining research octane number or motor octane number of specified grades or types of gasoline.

These ASTM standards are reasonably available to interested parties. Members of the public can obtain copies of ASTM D4814–15a, ASTM D2699–15a, ASTM D2700–14, and ASTM D2885–13 from ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428; telephone: 1–877–909–2786; internet address: *http://www.astm.org.* These ASTM standards are also available for inspection at the FTC Library, (202) 326–2395, Federal Trade Commission, Room H–630, 600 Pennsylvania Avenue NW., Washington, DC 20580.

List of Subjects in 16 CFR Part 306

Trade practices, Fuel ratings, Fuel, Gasoline, Incorporation by reference.

For the reasons discussed in the preamble, the Federal Trade Commission amends title 16, Chapter I, Subchapter C, of the Code of Federal Regulations, 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.;* 42 U.S.C. 17021.

■ 2. Amend § 306.0 by revising paragraphs (b), (i), (j), and (l) and adding paragraph (o) to read as follows:

§ 306.0 Definitions.

* * * * *

(b) *Research octane number and motor octane number.* These terms have the meanings given such terms in the specifications of ASTM D4814–15a, Standard Specification for Automotive Spark-Ignition Engine Fuel, (incorporated by reference, see § 306.13) and, with respect to any grade or type of gasoline, are determined in accordance with one of the following test methods or protocols:

(1) ASTM D2699–15a, Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel, and ASTM D2700–14, Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel, (both incorporated by reference, see § 306.13) or

(2) ASTM D2885–13, Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique, (incorporated by reference, see § 306.13).

* * * * *

(i) *Automotive fuel* means liquid fuel of a type distributed for use as a fuel in any motor vehicle, and the term includes, but is not limited to:

(1) Gasoline, an automotive spark-ignition engine fuel, which includes, but is not limited to, gasohol (generally a mixture of approximately 90 percent unleaded gasoline and 10 percent ethanol) and fuels developed to comply with the Clean Air Act, 42 U.S.C. 7401 *et seq.,* such as reformulated gasoline and oxygenated gasoline; and

(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 and/or other alcohols (or such other percentage, as provided by the Secretary of the United States Department of Energy, by rule), with gasoline or other fuels;

(iii) Ethanol flex fuels;

(iv) Liquefied natural gas;

(v) Liquefied petroleum gas;

(vi) Coal-derived liquid fuels;

(vii) Biodiesel;

(viii) Biomass-based diesel;

(ix) Biodiesel blends containing more than 5 percent biodiesel by volume; and

(x) 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 ASTM D975–07b, Standard Specification for Diesel Fuel Oils (incorporated by reference, see § 306.13), are not automotive fuels covered by the requirements of this part.

Note to paragraph (i): Provided, however, that 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 ASTM D975–09b, Standard Specification for Diesel Fuel Oils (incorporated by reference, see § 306.13), are not automotive fuels covered by the requirements of this Part.

(j) *Automotive fuel rating* means—

[130] *See www.afdc.energy.gov/afdc/fuels/stations_counts.html* (last visited Oct. 28, 2015).

(1) For gasoline, the octane rating.

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

(3) For biomass-based diesel, biodiesel, biomass-based diesel blends with more than 5 percent biomass-based diesel, and biodiesel blends with more than 5 percent biodiesel, a disclosure of the biomass-based diesel or biodiesel component, expressed as the percentage by volume.

(4) For ethanol flex fuels, a disclosure of the ethanol component, expressed as the percentage by volume and the text ''Use Only in Flex-Fuel Vehicles/May Harm Other Engines.''

* * * * *

(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 ASTM D6751–10, Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels, (incorporated by reference, see § 306.13).

* * * * *

(o) *Ethanol flex fuels* means a mixture of gasoline and ethanol containing more than 10 percent but not greater than 83 percent ethanol by volume.

■ 3. Revise § 306.5 to read as follows:

§ 306.5 Automotive fuel rating.

If you are a refiner, importer, or producer, you must determine the automotive fuel rating of all automotive fuel before you transfer it. You can do that yourself or through a testing lab.

(a) To determine the automotive fuel rating of gasoline, add the research octane number and the motor octane number and divide by two, as explained by ASTM D4814–15a, Standard Specifications for Automotive Spark-Ignition Engine Fuel, (incorporated by reference, see § 306.13). To determine the research octane and motor octane numbers, you may do one of the following:

(1) Use ASTM D2699–15a, Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel (incorporated by reference, see § 306.13), to determine the research octane number, and ASTM D2700–14, Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel (incorporated by reference, see § 306.13), to determine the motor octane number; or

(2) Use the test method set forth in ASTM D2885–13, Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique (incorporated by reference, see § 306.13).

(b) To determine automotive fuel ratings for alternative liquid automotive fuels other than ethanol flex fuels, 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. 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. In the case of ethanol flex fuels, you must possess a reasonable basis, consisting of competent and reliable evidence, for the percentage of ethanol 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. Amend § 306.6 by revising paragraph (b) 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, a biomass-based diesel blend, a biodiesel blend, or an ethanol flex fuel 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. Amend § 306.10 by revising paragraphs (a) and (f) to read as follows:

§ 306.10 Automotive fuel rating posting.

(a) If you are a retailer, you must post the automotive fuel rating of all automotive fuel you sell to consumers. You must do this by putting at least one label on each face of each dispenser through which you sell automotive fuel. If you are selling two or more kinds of automotive fuel with different automotive fuel ratings from a single dispenser, you must put separate labels for each kind of automotive fuel on each face of the dispenser. Provided, however, that you do not need to post the automotive fuel rating of a mixture of gasoline and ethanol containing more than 10 but not more than 15 percent ethanol if the face of the dispenser is labeled in accordance with 40 CFR 80.1501.

* * * * *

(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/Use Only in Flex-Fuel Vehicles/May Harm Other engines''

(3) ''M85/Minimum ____% Methanol''

(4) ''LPG/Minimum ____% Propane'' or ''LPG/Minimum ____% Propane and ____% Butane''

(5) ''LNG/Minimum ____% Methane''

(6) ''B20 Biodiesel Blend/contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent''

(7) ''20% Biomass-Based Diesel Blend/ contains biomass-based diesel or biodiesel in quantities between 5 percent and 20 percent''

(8) ''B100 Biodiesel/contains 100 percent biodiesel''

(9) ''100% Biomass-Based Diesel/ contains 100 percent biomass-based diesel''

* * * * *

■ 6. Amend § 306.12:

■ a. By redesignating paragraphs (a)(4) through (9) as paragraphs (a)(5) through (10), respectively;

■ b. By adding new paragraph (a)(4);

■ c. By removing the illustration of the ''E–100'' label in paragraph (f); and

■ d. By adding two illustrations after the existing illustrations in paragraph (f).

The additions read as follows:

§ 306.12 Labels.

* * * * *

(a) * * *

(4) *For ethanol flex fuels.* (i) The label is 3 inches (7.62 cm) wide x 2½ inches (6.35 cm) long. ''Helvetica Black'' or equivalent type is used throughout. The band at the top of the label contains one of the following:

(A) *For all ethanol flex* fuels. The numerical value representing the volume percentage of ethanol in the fuel followed by the percentage sign and then by the term ''ETHANOL''; or

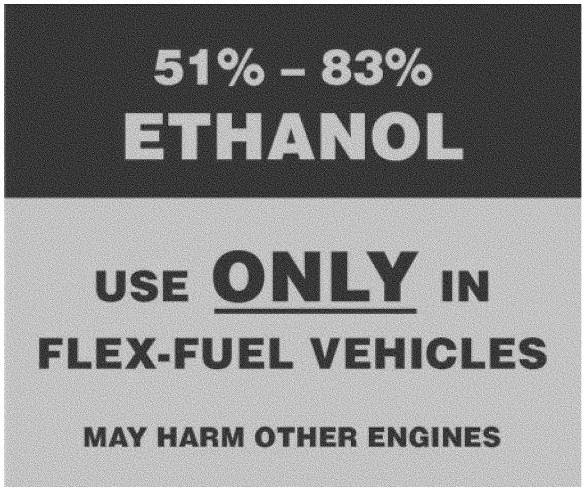
(B) *For ethanol flex fuels containing more than 10 percent and no greater than 50 percent ethanol by volume.* The numerical value representing the volume percentage of ethanol in the fuel, rounded to the nearest multiple of 10, followed by the percentage sign and then the term ''ETHANOL''; or

(C) *For ethanol flex fuels containing more than 50 percent and no greater than 83 percent ethanol by volume.* The numerical value representing the volume percentage of ethanol in the fuel, rounded to the nearest multiple of 10, followed by the percentage sign and then the term ''ETHANOL'' or the phrase, ''51%–83% ETHANOL.''

(ii) The band should measure 1 inch (2.54 cm) deep. The type in the band is centered both horizontally and vertically. The percentage disclosure and the word ''ETHANOL'' are in 24 point font. In the case of labels including the phrase, ''51%–83% ETHANOL,'' the percentage disclosure is in 18 point font, and the word ''ETHANOL'' is in 24 point font and at least ⅛ inch (.32 cm) below the percentage disclosure. The type below the black band is centered vertically and horizontally. The first line is the text: ''USE *ONLY* IN.'' It is in 16 point font, except for the word ''*ONLY,*'' which is in 26 point font. The word ''*ONLY*'' is underlined with a 2 point (or thicker) underline. The second line is in 16 point font, at least ⅛ inch (.32 cm) below the first line, and is the text: ''FLEX-FUEL VEHICLES.'' The third line is in 10 point font, at least ⅛ inch (.32 cm) below the first line, and is the text ''MAY HARM OTHER ENGINES.''

* * * * *

(f) * * *



■ 7. Add § 306.13 to read as follows:

§ 306.13 Incorporation by reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect all approved material at the FTC Library, (202) 326–2395, Federal Trade Commission, Room H–630, 600 Pennsylvania Avenue NW., Washington, DC 20580, and 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.*

(b) ASTM International (ASTM), 100 Barr Harbor Drive, West Conshohocken, PA 19428 telephone: 1–877–909–2786; Internet address: *http://www.astm.org.*

(1) ASTM D975–07b, Standard Specification for Diesel Fuel Oils,

published July 2007; IBR approved for § 306.0(i).

(2) ASTM D975–09b, Standard Specification for Diesel Fuel Oils, published August 2009; IBR approved for § 306.0(i).

(3) ASTM D2699–15a, Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel, published November 2015; IBR approved for §§ 306.0(b) and 306.5(a).

(4) ASTM D2700–14, Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel, published November 2014; IBR approved for §§ 306.0(b) and 306.5(a).

(5) ASTM D2885–13, Standard Test Method for Determination of Octane Number of Spark-Ignition Engine Fuels by On-Line Direct Comparison Technique, published July 2013; IBR approved for §§ 306.0(b) and 306.5(a).

(6) ASTM D4814–15a, Standard Specification for Automotive Spark-Ignition Engine Fuel, published August 2015; IBR approved for §§ 306.0(b) and 306.5(a).

(7) ASTM D6751–10, Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels, published October 2010; IBR approved for § 306.0(l).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2015–32972 Filed 1–13–16; 8:45 am]

BILLING CODE 6750–01–P