

Statement of

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Before the

U.S. House Committee on Energy and Commerce,

Subcommittee on Environment

December 11, 2018

Hearing on

“Discussion Draft: The 21st Century Transportation Fuels Act.”

I. SUMMARY OF TESTIMONY

- With respect to the comments provided on the discussion draft, I emphasize that NACS and SIGMA (hereinafter the “Associations”) currently have no position on the legislation.
- The Associations appreciate that the drafters have incorporated many of the concerns that they have shared with lawmakers over the course of the past year into the draft text. Today, however, I am here to share comments on the discussion draft related to provisions that the Associations believe are unclear, or about which there remain concerns and a potential need for further modification.
- The Committee has specified that any technological solution to prevent misfueling must be “technically and economically feasible.”¹ However, the text does not clarify for whom the solution must be feasible. Given the likelihood that misfueling will involve interactions between the vehicle and the dispenser, the choice of technology that is implemented to prevent misfueling must take into account the feasibility for both auto manufacturers and retailers. Specifically, the Associations wish to reiterate the importance of ensuring that such a solution is technically and economically feasible for retailers as well as auto manufacturers.
- In addition, the Associations are concerned that the text is too specific regarding the size of nozzles to be used to dispense fuels with a research octane number of 95 or higher. The bill states that a nozzle must be no more than 0.77 inches in diameter.² It is the Associations’ understanding that such a nozzle specification would impose significant costs on automobile manufacturers that would undoubtedly be passed down to consumers.
- NACS and SIGMA commend the drafters for including misfueling liability protections in the discussion draft. The bill text, however, must clarify that a retailer who complies with all applicable signage and other misfueling prevention requirements is protected from liability under state, federal, and common law with regard to damages resulting from any misfueling activity of a consumer. This protection is necessary to ensure that retailers who comply with all necessary labeling requirements are not susceptible to penalties for behavior over which they have no control.
- The Associations appreciate that the bill’s requirements for dispenser systems are *prospective* and do not require retailers to automatically upgrade infrastructure to handle fuel blends they do not plan to sell. NACS and SIGMA urge the Committee to maintain this posture. Many existing dispenser systems are not certified to handle more than E10 and installing new dispensers is extremely burdensome and costly for retailers. Upon enactment of this bill, not all retailers will immediately switch to selling fuel blends over E10, thus, it is important that retailers continue to be able to use their existing equipment

¹ The 21st Century Transportation Fuels Act, Discussion Draft, 115th Cong. § 101.

² *Id.*

until such time as they decide to change their fuel offerings (and upgrade their equipment accordingly).

- With regard to fuel labeling, NACS and SIGMA urge the Committee to clarify two points in the legislation: (1) the Environmental Protection Agency (EPA) and the Federal Trade Commission (FTC) ought to be required to harmonize their labeling regimes, particularly as more ethanol blends have the potential to be added into the fuel supply; and (2) labels must be clear on the octane content and ethanol range³ of fuels to ensure consumers with legacy vehicles can make appropriate fueling decisions.
- Finally, the Associations note that in the discussion draft, the Committee has laid out a section specifying requirements for the posting of 95 RON fuel prices. While the Associations do not oppose the posting of prices,⁴ any legislation must ensure that federal price sign requirements are consistent with the existing state and local requirements to the greatest extent possible and that retailers are not subject to multiple penalties (both federal and state/local) for non-compliance with price sign requirements. And, federal regulation must not preclude the ability of fuel retailers to also use the signs to inform consumers of deals that may alter the final price of fuel. Such deals may include joining a rewards program, paying in cash, purchasing an add-on service such as a car wash, etc.
- Thank you for the opportunity to testify before you today. NACS and SIGMA appreciate the opportunity to continue the dialogue on RFS reform and look forward to working further with the Committee on this issue

³ Disclosure of the ethanol range does not mean a specific accounting of the precise volume of ethanol in any particular gallon. Rather, it means retailers must inform consumers that a certain fuel may contain, for example, “up to 10 percent ethanol” or “up to 15 percent ethanol.”

⁴ The Associations do not oppose posting fuel prices on a store’s main price sign and on fuel dispensers where 95 RON product is dispensed. For more information, see *infra* Section IV.F.

II. INTRODUCTION

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, thank you for the opportunity to testify today regarding reform of the Renewable Fuel Standard (RFS) and the proposed discussion draft of the 21st Century Transportation Fuels Act. My name is Tim Columbus of the law firm Steptoe & Johnson LLP, and I appear today on behalf of our clients the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”) (collectively the “Associations”). Together, the Associations represent approximately 80 percent of retail motor fuels sales in the United States.

III. OVERVIEW OF THE ASSOCIATIONS

NACS is an international trade association representing the convenience store industry with more than 2,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

In 2017, the fuel retailing and convenience industry employed approximately 2.5 million workers and generated \$601.1 billion in total sales. Of those sales, approximately \$364 billion came from fuel sales alone. The industry is a highly competitive, consumer-facing industry. If fuel retailers don’t constantly respond to consumer demand, they will go out of business. In short, convenience stores sell what customers want to buy—be it food or fuel.

IV. COMMENTS ON THE DISCUSSION DRAFT

Currently, NACS and SIGMA have **no position** on the draft legislation. Thus, any and all comments that are shared indicate the Associations’ thoughts about particular provisions, but do

not constitute support for, or opposition to, the discussion draft. In general, the Associations are in favor of setting performance specifications for fuel that the market can meet in the most practical and affordable way for both retailers and consumers.

With regard to the specific legislation being discussed here today, the Associations appreciate that many concerns they have shared with lawmakers have been incorporated into the text. Today, however, I am here to share comments on the discussion draft related to provisions that the Associations believe are unclear, or about which there remain concerns and a potential need for further modification. Specifically, I will discuss concerns regarding the misfueling liability section, equipment upgrades, labeling, and the posting of fuel prices.

A. Misfueling Technology Must Be Cost-Effective for Retailers

The discussion draft specifies that any technological solution to prevent misfueling must be “technically and economically feasible.”⁵ However, the text does not clarify *for whom* the solution must be feasible or whether the cost-effectiveness for one sector outweighs or supersedes that for another. Automobile manufacturers will undoubtedly have a part to play in ensuring that any solution implemented at the pump works with new and existing vehicles, but the Associations wish to reiterate the importance of ensuring that such a solution is technically and economically feasible **for retailers** as well as auto manufacturers.

The fuel retailing and convenience industry is a small business industry. About 80 percent of convenience stores/fuel outlets are owned by someone with 10 stores or fewer, and approximately 63 percent of convenience store owners operate just a single store. The retail fuel market is also one of the most competitive and transparent markets in the world. Fuel retailers

⁵ The 21st Century Transportation Fuels Act, Discussion Draft, 115th Cong. § 101.

operate on narrow margins and are unable to absorb incremental cost increases without passing them on to consumers. And in the retail fueling business, every cent matters; consumers will often change where they buy gas to save just a few cents per gallon.⁶

Given the competitive realities of the fuel market, it is critical that the costs borne by retailers in any RFS reform solution remain as low as possible to ensure that the connected customer costs remain as low as possible.

B. The Associations Are Concerned with the Proposed Nozzle Size

The Associations are concerned that the text is too specific regarding the size of nozzles to be used to dispense fuels with a research octane number of 95 or higher. The bill states that a nozzle must be no more than 0.77 inches in diameter,⁷ which is smaller than existing nozzles.⁸ NACS and SIGMA appreciate that the intent of such a provision would be to help prevent consumers from misfueling new cars that are designed to run on higher octane fuels with lower octane fuels. Specifying a 0.77-inch diameter standard for nozzles, however, would impose significant costs for automobile manufacturers. It is the Associations' understanding that given the potential effects of a smaller nozzle on flow rate and associated flow characteristics of the fuel, significant changes may have to be made in newer vehicles to allow them to be properly fueled by a smaller nozzle. While these changes *could* likely be made, the Associations understand they would result in an excessive cost burden on manufacturers that would be passed

⁶ According to a 2017 NACS survey, 67% of consumers say they would drive five minutes out of their way to save 5 cents per gallon and 61% say that price is the most important factor in determining where they buy gas. See *How Consumers Behave at the Pump*, NACS, <http://www.convenience.org/YourBusiness/FuelsCenter/Pages/How-Consumers-Behave-at-the-Pump.aspx#.Ws4QQS7wbb0>.

⁷ See *supra* note 5.

⁸ The applicable SAE International standard currently says nozzles should be 0.807/0.840 in. in diameter. See "Dispenser Nozzle Spouts for Liquid Fuels Intended for Use with Spark Ignition and Compression Ignition Engines (STABILIZED May 2012)," SAE Standard J285, Stab. May, 2012.

down to consumers.⁹ While the Associations appreciate that there will likely need to be a physical change of some sort made to nozzles and/or fill pipes to help ensure that consumers cannot accidentally put lower octane fuels into new vehicles that are made to run on higher octane fuels, NACS and SIGMA remain unconvinced that 0.77 inches is the correct specification.¹⁰

C. Misfueling Liability Protection Is Essential for a Successful Fuel Transition

NACS and SIGMA were pleased to see the inclusion of misfueling liability protection in the discussion draft. The bill text, however, must clarify that a retailer who complies with all applicable signage and other misfueling prevention requirements is protected from all liability under state, federal, and common law with regard to any damages resulting from the misfueling activity of a consumer. That liability protection should include all types of misfueling whether a consumer uses fuel that has less than 95 RON in a new vehicle that requires it or whether a consumer uses E15 or E20 gasoline in an older vehicle that cannot handle those levels of ethanol in fuel. This will ensure that retailers that follow the law cannot be penalized for misfueling actions over which they have no effective control. This protection for retailers is not insignificant.

⁹ Additional information on this topic may be provided by the auto manufacturers.

¹⁰ For example, it may be possible to use a “notch” in newer cars that would prevent customers from being able to put a nozzle dispensing older fuel into a new car. Such a notch may be easier for auto manufacturers to accommodate. In providing this example, however, the Associations do not intend to imply that this may be the only or even the preferred solution of all stakeholders. It is simply offered to point out that there may be alternatives to mandating a nozzle size.

For example, today—despite a retailer following labeling requirements outlined in EPA’s rule authorizing the sale of E15¹¹—there is still liability exposure if customers choose to put the wrong fuel in their vehicles. Thus, retailers find themselves in a precarious situation. If a fuel retailer properly offers E15 and a consumer uses that fuel in a non-approved engine, the retailer can be held responsible for violating the Clean Air Act and be subject to fines of up to \$37,500 per violation. In addition, a retailer may be subject to civil litigation under the Act’s private right of action provision.¹²

Ultimately, if retailers are in compliance with labeling and other applicable misfueling prevention requirements, they should not face enforcement actions from EPA regarding actions they cannot control. Liability should fall on the person who engages in the misfueling activity.

D. Dispenser Upgrade Requirements Must Remain Prospective

Another concern of the Associations is related to the fueling infrastructure owned and operated by retailers. Specifically, it is vital that requirements in the bill related to new dispenser systems and related infrastructure remain prospective and do not require retailers to automatically upgrade infrastructure.

Occupational Safety and Health Administration (“OSHA”) regulations require retailers to use equipment that has been listed by a nationally recognized testing laboratory as compatible with the fuel the equipment is storing and dispensing.¹³ The primary testing laboratory is

¹¹ See 40 C.F.R. 80.1504; *see also* EPA, Final Rule, 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, 76 Fed. Reg. 44406 (July 25, 2011).

¹³ 29 C.F.R. 1926.152(a)(1) (“Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids.”) “Approved” is defined at 29 C.F.R. 1910.106(35) (“Approved unless

Underwriters Laboratories (“UL”). However, the first year UL listed a single dispenser as compatible with any ethanol concentration greater than 10 percent was 2010. Further, under UL’s policy, no device listing can be revised. Consequently, retailers who wish to sell any gasoline containing more than 10 percent ethanol (such as E15 or E85) must acquire a new dispenser that has been listed as compatible with the product if they have not purchased new dispensers since 2010.¹⁴ Dispensers can cost upwards of \$20,000, a big expense for a small business.

The discussion draft allows for the use of fuel blends up to E20, which the Associations support as it will allow fuel blend flexibility. However, not all retailers will choose to offer the same fuel blends in the first years of the transition and, under the draft bill, will not be required to install new infrastructure capable of handling fuel blends with higher ethanol content. The Associations are pleased the bill does not require retailers to immediately upgrade existing infrastructure when the bill goes into effect.¹⁵ Retailers should only be required to install E20 compatible dispensers when they choose to offer those fuels.

In sum, given the costs of infrastructure upgrades, it is critical that any infrastructure requirements prescribed by the bill be prospective and not require immediate upgrades across the board. This will allow retailers to make choices about which fuel blends they want to offer and

otherwise indicated, approved, or listed by a nationally recognized testing laboratory.”) *See also* 29 C.F.R. 1910.7 (definition and requirements for a nationally recognized testing laboratory).

¹⁴ The Associations appreciate that the bill text correctly recognizes that unlike dispensers, Underground Storage Tanks have already been regulated by EPA. *See* Environmental Protection Agency, Final Rule, Revising Underground Storage Tank Regulations – Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training, 80 Fed. Reg. 41566 (July 15, 2015), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-07-15/pdf/2015-15914.pdf>.

¹⁵ The Associations assume that this interpretation is correct. If the Committee believes that the bill does, in fact, require immediate upgrades, then the Associations urge the Committee to update the text to ensure that retailers only need to upgrade equipment at such time as they choose to offer fuel blends that are not compatible with their existing infrastructure.

when they plan to offer those blends, and upgrade infrastructure accordingly. The Associations appreciate that the bill's requirements for dispenser systems and related infrastructure are currently prospective and urge the Committee to maintain this posture.

E. Labeling Regimes Must Be Streamlined and Clear

Currently, both EPA and the FTC play an important role in the labeling of automotive fuels. EPA's regulations guide the labeling of fuel with ethanol content up to 15 percent,¹⁶ while the FTC's regulations guide the labeling of both higher-level ethanol blends¹⁷ and the octane content of a fuel.¹⁸ Given the potential of the fuel market to see both expanded octane options and expanded ethanol blends under the draft legislation, it will be important to clearly label fuels moving forward to avoid customer confusion.

Therefore, NACS and SIGMA urge the Committee to clarify two points in the legislation: (1) EPA and the FTC ought to be required to harmonize their labeling regimes, particularly as more ethanol blends have the potential to be added into the fuel mix; and (2) labels must be clear on both octane content and ethanol ranges¹⁹ to ensure consumers with legacy vehicles can make appropriate fueling decisions.

¹⁶ 40 C.F.R. §80.1501.

¹⁷ See 16 C.F.R. §306.10(f)(2) regarding percent of ethanol content and 16 C.F.R. §306.12 regarding the size and appearance of labels.

¹⁸ See 16 C.F.R. §306.10 regarding where to label and 16 C.F.R. §306.12 regarding the size and appearance of such labels.

¹⁹ As discussed in *supra* note 2, use of ethanol range here does not mean a specific accounting of the precise volume of ethanol in any particular gallon. Rather, it means retailers must inform consumers that a certain fuel may contain, for example, "up to 10 percent ethanol" or "up to 15 percent ethanol." This will allow consumers to make proper choices about which fuel to put in their vehicles.

1. Streamlining Labeling Regimes

NACS and SIGMA appreciate that the draft bill calls for the FTC to regulate labels so they are understandable to consumers and car owners, as well as affordable for fuel retailers.²⁰ This is an important first step in ensuring that a new labeling regime is clear and cost-effective. In considering the question of clarity, however, it is important to consider not just how the labels themselves appear, but also how *many* labels appear on a fuel dispenser. Between federal and state labeling regimes relating to fueling and other areas (e.g., the Americans with Disabilities Act), a fuel dispenser often has so many labels it looks like it has the chicken pox.

With the shift to higher octane blends under this draft legislation, it will be important to consider whether it makes sense to have a separate octane rating label and ethanol range label, or whether there may be a way to combine these labels to provide greater simplicity and precision. Such combinations could be important as fuel retailers currently must comply with a variety of labeling requirements, but fuel pumps have limited “real estate” with which to post labels. Whether a new labeling regime ultimately determines that one label or several will be clearer and more cost-effective, it is clear that both the FTC and EPA will have a role to play. *As such, it is imperative that the Committee clarify that EPA and the FTC must work together to streamline their labeling requirements.* The legislation currently makes no such clarification, which will likely lead to a labeling regime that is excessively complicated and excessively burdensome for both retailers and consumers.

2. Labeling and Legacy Vehicles

It will be particularly important to provide labeling clarity for consumers with legacy vehicles that use today’s premium fuel (which would generally equate to a research octane

²⁰ The 21st Century Transportation Fuels Act, Discussion Draft, 115th Cong. § 102.

number (RON) of 95). Under the fuel regime proposed by the discussion draft, owners of these vehicles could see a preponderance of 95 RON options in the future, some of which may have an ethanol content that is greater than 10 percent. Legacy vehicles (pre-2001) may not be fueled with a product that is more than E10. It will therefore be critical that any labeling regime be simple, clear, and easy to follow. Customers must be able to understand what is in the fuel they are choosing to avoid damaging their engines.

F. Requirements Regarding the Posting of Fuel Prices Must Work with Current Regulations and Not Preclude “Consumer Savings Offers” on Signs

The discussion draft lays out a section specifying requirements for the posting of 95 RON fuel prices.²¹ In general, the Associations’ members have traditionally embraced exterior price signs, which inform consumers of the price for a certain grade of fuel, as a way to compete for business. In fact, these price signs are already highly regulated by states and localities across the country. Introducing federal requirements for price signs creates risks of inconsistent regimes or lack of clarity in how properly to comply with multiple sets of regulations. Given those potential risks, the Associations recommend that the discussion draft make clear that federal requirements should follow state and local regulations to the greatest extent feasible. And, legislation should prevent any possibility that federal regulation will result in duplicative penalties for retailers. For example, states and localities should not be allowed to impose penalties on a retailer for violations of their price sign regulations if the FTC has already imposed a penalty for the same sign(s). And, the opposite should be true as well: the FTC should not be able to penalize a retailer for a federal violation once that retailer has been penalized by its state or locality for the violation.

²¹ The 21st Century Transportation Fuels Act, Discussion Draft, 115th Cong. § 105.

In addition, any legislation and subsequent regulation must not preclude the ability of fuel retailers to also use the signs to inform consumers of deals that may alter the final price of fuel. For example, customers currently may be able to lower their fuel prices by joining a rewards program, paying in cash or with a debit card, purchasing an add-on service such as a car wash, bundling certain other purchases, and a host of other methods. Given the transparent and incredibly competitive nature of the fuel retailing industry, it is vital that retailers continue to be able to advertise these incentives to attract business.

In addition, the bill text states that the pricing of 95 RON product must be displayed on “*any sign* on which such person displays the price of the most-sold grade of automotive fuel...”(emphasis added).²² The Associations urge the Committee to clarify this text so that retailers are not required to post 95 RON pricing on dispensers that do not dispense 95 RON product. In other words, this price posting requirement should only apply to a retail fueling location’s main price sign, which is generally visible from the road, and on dispensers where 95 RON product is dispensed.

V. CONCLUSION

Thank you for the opportunity to testify before you today. To reiterate, while NACS and SIGMA currently have no position on the legislation, the Associations appreciate the opportunity to continue the dialogue on RFS reform. NACS and SIGMA look forward to working further with the Committee on this issue. I am happy to answer any questions this testimony may have raised.

²² *Id.*