

H.R. 5778, “The Renewable Fuels Marketing Act of 2010”

The renewable fuels standard (RFS) established by Congress in the Energy Independence and Security Act of 2007 requires the use of 36 billion gallons of renewable fuels (such as ethanol) in motor fuels by 2022. EISA did not take into account, however, infrastructure impediments which limit the amount of renewable fuels that can be sold through existing motor fuel retail outlets:

- The current structure of the market (using E10 and E85, predominantly, with some biodiesel up to B20) is unable to satisfy the mandated volumes for the RFS. If every gallon of gasoline were blended with the legal maximum 10 percent ethanol, the market would be able to accommodate only approximately 14 billion of the 36 billion gallon mandate (the “blend wall”).
- To address this challenge, EPA is considering a petition to allow the sale of fuel blended with more than 10 percent ethanol. EPA and several stakeholders are conducting research to better understand the implications of higher ethanol blends on vehicles and non-road engines before making a decision. Currently, automaker warranties only cover fuels up to 10 percent ethanol (except for flex-fuel vehicles).
- It is illegal for retailers to store and sell any fuel with greater than 10 percent ethanol (including E85) or more than 5 percent biodiesel using existing infrastructure. Retailers must use equipment certified by a nationally recognized testing laboratory (like Underwriters Laboratories – UL) as compatible with the fuel they are selling. (As of July 15, 2010, there were only 2 certified dispensers to sell E85 and only 2 certified dispensers to sell up to E25). Failure to do so exposes the retailer to claims of gross negligence liability, violation of local fire codes and OSHA regulations, violation of tank insurance and state tank fund policy requirements, and provisions contained in many business loan agreements.
- On February 19, 2009, Underwriters Laboratories announced that most existing dispensers are suitable to sell up to 15 percent ethanol. This announcement does not apply to underground equipment and does not change the certification of these dispensers. In addition, UL will not recertify any equipment currently in use. As a result, any retailer selling E10+ fuels risks liability and is in violation of applicable regulations and policies.

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To ensure the RFS can accomplish the objectives established by Congress, Congress must act to overcome this limitation. The Renewable Fuels Marketing Act of 2010 will authorize a new pathway for retailers to ensure their equipment is safe and legally recognized as compatible to sell renewable fuels (E10+ fuels as well as biodiesel). This legislation will open the door to the marketing of additional renewable fuels consistent with the RFS, avoid imposing unsustainable costs on petroleum retailers, and remove the certainty of litigation from the market. This legislation does not in any way absolve a retailer from liability or obligations under federal and state environmental laws that arise from a “release” of motor fuels.

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Section 2. Fuel Compatibility with Infrastructure

- (a) **Compatibility with Renewable Fuels.** This subsection directs the Environmental Protection Agency (EPA) to issue guidelines to determine whether petroleum equipment at retail facilities (such as underground storage tanks, underground piping and fuel dispensers) are considered compatible and may be used to safely and lawfully sell motor fuels authorized by the Administrator. This will provide retailers a pathway to obtaining authorization to lawfully sell fuels like E85, B20 and E10+ gasolines through equipment currently in use at a majority of retail outlets. It will also expedite the certification of new devices as compatible with certain renewable fuel blends and increase the inventory of certified compatible equipment available to retailers for upgrades and conversions of outlets. Paragraph (3) ensures that current compatibility determinations (for fuels like gasoline, diesel, E10 and B5) will satisfy the requirements of the new guidelines.
- (b) **Liability.** This subsection specifies that a person who uses equipment that has been determined compatible under the guidelines established under (a) will be considered compliant with all applicable laws and regulations. Currently, due to the absence of compatible equipment in the marketplace, retailers who choose to sell renewable fuels face potential fines and litigation for non-compatibility. While subsection (a) expands the pathways for determining equipment compatibility, subsection (b) provides retailers with assurance that they can proceed to sell renewable fuels lawfully if they comply with subsection (a).
- (c) **Financial Responsibility.** This subsection specifies that equipment that meets the circumstances established by EPA in subsection (a) will satisfy the requirements for fuel compatibility contained in tank insurance policies and state tank trust fund programs. Consequently, a retailer who sells gasoline containing more than 10% ethanol through such approved equipment would be found compliant with such tank policies. The subsection in no way otherwise absolves a retailer of liability or obligations under federal and state environmental laws.

Sec. 3. Misfueling

- (a) This subsection directs the EPA to develop labeling requirements for retailers who choose to sell fuels that the Administrator has not determined are compatible with all engines. (i.e., E85 is suitable only for Flex Fuel Vehicles; in addition, EPA may approve E15 for use in only certain engines but not in others.) This requirement is necessary to ensure consumers are duly informed about the composition of the products they are purchasing and to ensure that consumers who may have engines that are not authorized to run on a particular fuel are able to make informed decisions.
- (b) This subsection specifies that any retailer who complies with the labeling requirements established by EPA in subsection (a) cannot be held responsible for the decision of another person to fuel an engine at a self service dispenser with a fuel blend that is not authorized for their particular engine. Under this section, a compliant retailer would not be found in violation of the Clean Air Act nor would that retailer be subject to litigation from the engine owner for claims associated with the act of misfueling.
- (c) This subsection ensures that the labeling requirements issued pursuant to subsection (a) do not apply to fuels currently in use in the market, such as gasoline, diesel, E10, B5 and E85.