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FEDERAL TRADE COMMISSION
16 CFR Part 311

Test Procedures and Labeling Standards for Recycled Oil

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") has completed its regulatory review of the Test Procedures and Labeling Standards for Recycled Oil ("Recycled Oil Rule" or "Rule"), as part of the Commission's systematic review of all current Commission regulations and guides. The Commission, with the exception of incorporating by reference American Petroleum Institute Publication 1509, Fifteenth Edition, and updating incorporation by reference approval language, has determined to retain the Recycled Oil Rule in its current form.

DATES: This action is effective as of [insert date of publication in the Federal Register]. The incorporation by reference of the American Petroleum Institute Publication 1509, Fifteenth Edition, listed in this Rule, is approved by the Director of the Federal Register as of [insert date of publication in the Federal Register].

ADDRESSES: Requests for copies of this notice should be sent to the Consumer Response Center, Room 130, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, DC 20580. The notice also is available on the Internet at the Commission's website, http://www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Janice Podoll Frankle, (202) 326-3022, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580. E-mail: jfrankle@ftc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission has determined, as part of its oversight responsibilities, to review its rules and guides periodically to seek information about their costs and benefits, as well as their regulatory and economic impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission.

II. Background

Section 383 of the Energy Policy and Conservation Act of 1975 ("EPCA"), 42 U.S.C. 6363, mandated that the FTC promulgate a rule prescribing testing procedures and labeling standards for recycled oil. This section of EPCA is intended to encourage the recycling of used oil, promote the use of recycled oil, reduce consumption of new oil by promoting increased utilization of recycled oil, and reduce environmental hazards and wasteful practices associated with the disposal of used oil. 42 U.S.C. 6363(a).

EPCA also mandated that the National Institute of Standards and Technology ("NIST") develop (and report to the FTC) test procedures to determine whether processed used oil is substantially equivalent to new oil for a particular end use. 42 U.S.C. 6363(c). Within 90 days after receiving NIST's test procedures, EPCA required that the FTC prescribe, by rule, substantial equivalency test procedures, as well as labeling standards for recycled oil. 42 U.S.C. 6363(d)(1) (A). EPCA also required that the Commission's rule permit any container of recycled oil to bear a label indicating any particular end use (e.g., engine lubricating oil), for which a determination of "substantial equivalency" with new oil has been made in accordance with the NIST test procedures. 42 U.S.C. 6363(d)(1)(B).

On July 27, 1995, NIST reported to the FTC test procedures for determining the substantial equivalence of processed used engine oil with new engine oil. The NIST test procedures and performance standards are the same as those adopted by the American Petroleum Institute ("API") for engine lubricating oils generally, regardless of origin. The Rule, 16 CFR part 311, which was issued on October 31, 1995 (60 FR 55421), implements EPCA's requirements by permitting a manufacturer or other seller to "represent, . . . on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil only if the manufacturer has determined that the oil is substantially equivalent to new oil for use as engine oil" in accordance with the test procedures entitled "Engine Oil Licensing and Certification System," American Petroleum Institute Publication 1509, Thirteenth Edition, January 1995.[1]

As part of the Commission's ongoing project to review periodically its rules and guides to determine their current effectiveness and impact, on July 6, 2006, the Commission published a Federal Register notice ("FRN") seeking comment on the Recycled Oil Rule.[2] The Commission sought comment on: 1) the continuing need for the Rule as currently promulgated; 2) the benefits the Rule has provided to purchasers; 3) whether the Rule has imposed costs on purchasers; 4) what changes, if any, should be made to the Rule to increase purchasers' benefits

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[1] The Commission's 1995 Federal Register notice explained that the Rule "does not require manufacturers to . . . explicitly state that their engine oil is substantially equivalent to new oil" and does not mandate any qualifiers or specific disclosures. (60 FR 55418-55419). Until NIST develops test procedures for other end uses, the Recycled Oil Rule is limited to recycled oil used as engine oil. Moreover, because NIST's test procedures and performance standards are the same as those adopted by API for engine oils, the Commission must limit the Rule's scope to categories of engine oil that are covered by the API Engine Oil Licensing and Certification System, as prescribed in API Publication 1509.

[2] 71 FR 38321 (July 6, 2006).

and how the changes would affect the costs to firms; 5) what significant burdens or costs the Rule has imposed on firms; 6) what changes, if any, should be made to the Rule to reduce burdens or costs to firms; 7) whether the Rule overlaps or conflicts with other federal, state, or local laws or regulations; 8) what effects, if any, have changes in relevant technology or economic conditions had on the Rule; and 9) whether the updated version of American Petroleum Institute Publication 1509 (Fifteenth Edition) should be incorporated by reference into the Rule.

III. Regulatory Review Comments

The Commission received comments[3] from four trade associations[4] and three companies.[5] These comments are discussed below.

1. Is there a continuing need for the Rule as currently promulgated?

All of the comments stated that the Recycled Oil Rule should remain in effect. The Automotive Oil Change Association ("AOCA"), which stated that it is the national representative for over 3,000 small business fast-lube facilities that both generate significant quantities of used oil and collect "do-it-yourselfer" used oil from the public, commented that the Rule furthers the success of the used oil recycling chain. AOCA also commented that consumers

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[3] The comments are cited in this notice by reference to the name of the commenter. The comments are on the public record and are available for public inspection in the Consumer Response Center, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays. The comments also are available on the Internet at the Commission's website, http://www.ftc.gov.

[4] The trade associations are: American Petroleum Institute, Automotive Oil Change Association, National Automobile Dealers Association, and National Petrochemical & Refiners Association (comment received after comment period closed).

[5] The companies are: ExxonMobil Lubricants & Specialities Company, Safety-Kleen Systems, Inc., and Pennzoil-Quaker State Company.

and the automotive service industry need uniformity in motor oil container labeling and that without the Rule some states might require recycled oil content labeling "that differs from other states thereby causing confusion and placing a burden on commerce."

The National Automobile Dealers Association ("NADA"), which stated that it represents 20,000 franchised automobile and truck dealers who sell new and used vehicles and service, provide auto repair, and sell auto parts, commented that the Rule indirectly impacts car and truck dealerships that purchase motor oil for vehicle use and collect used oil from the vehicles they service. NADA commented that since car and truck dealerships use only API certified motor oils, "the Rule's requirement that used oil processors take appropriate steps when manufacturing 'substantially equivalent' motor oils helps make those oils potentially marketable to dealerships." NADA further stated that by not requiring that "substantially equivalent" recycled oils be labeled "recycled" or "re-refined," used oil processors are able to market their products effectively. NADA also advised that the Rule has facilitated the growth of consumer acceptance of recycled oil.

Safety-Kleen Systems, Inc. ("Safety-Kleen"), which stated that it re-refines about 160 million gallons of used oil each year, commented that the Department of Energy, in conjunction with the Environmental Protection Agency, recently completed a study that, in part, concluded that re-refining used oil is beneficial to the environment and noted the need to encourage the use of recycled oil.[6] Similarly, ExxonMobil Lubricants & Specialties Company ("ExxonMobil") commented that the Rule "contributes to the goal of encouraging responsible used oil management practices to protect the public and the environment."

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[6] The study is entitled "Used Oil Re-refining Study to Address Energy Policy Act of 2005 Section 1838."

2. What benefits has the Rule provided to purchasers of the products or services affected by the Rule?

Safety-Kleen stated that because the Rule sets forth the criteria that re-refined oil must meet to be "substantially equivalent" to new oil, end users are assured that the oil will perform as intended in their vehicles. Pennzoil-Quaker State Company, a wholly owned subsidiary of Shell Oil Company ("Shell"), which is the manufacturer, marketer, and seller of a number of engine oils, including Pennzoil, Quaker State, Q, ROTELLA, and Formula Shell, and the owner of Jiffy Lube stores, commented that the Rule has eliminated the requirement that engine oils made with recycled base oils be labeled as such; thus, consumers can shop for engine oils with the assurance that engine oil that meets API's standards will be sufficient for their vehicles, whether the base oil used is virgin or recycled.

3. Has the Rule imposed costs on purchasers?

Both Safety-Kleen and Shell stated that they were not aware of any additional costs to purchasers due to the Rule. No other comments addressed this question.

4. What changes, if any, should be made to the Rule to increase the benefits of the Rule to purchasers? How would these changes affect the costs the Rule imposes on firms subject to its requirements? How would these changes affect the benefits to purchasers?

The National Petrochemical & Refiners Association ("NPRA"), Shell, and Safety-Kleen, while supporting the Rule, suggested certain modifications. NPRA, which stated that it is a national trade association with 450 members, including those who own or operate virtually all U.S. refining capacity, in addition to most of the nation's petrochemical manufacturers,

commented that the Rule's definition of "recycled oil"[7] "is too broad and could result in sub-standard products in the marketplace." NPRA attached to its comment three proposed definitions for recycled oil ("re-refining,"[8] "re-conditioning,"[9] and "re-processing."[10]), which it said "reflect today's current manufacturing procedures and would help ensure uniform, reliable products."

NPRA, however, did not explain how the manufacturing processes underlying its proposed new definitions impact the performance characteristics of recycled oil. Significantly, Congress was primarily concerned with the performance characteristics of recycled oil, not the recycling process used to manufacture the oil.[11] The current definition of recycled oil, requiring that the oil perform substantially equivalently to new oil, meets this goal. Furthermore, the

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[7] Part 311.1(d) of the Rule defines "recycled oil" as "processed used oil" that the manufacturer has determined, pursuant to the Rule's required test procedures is "substantially equivalent to new oil for use as engine oil."

[8] NPRA stated that "re-refined stock shall be substantially free from materials introduced through additization and use. Re-refining produces a base oil comparable to virgin base oils. It is capable of meeting current guidelines required to produce most current engine oil categories and licensing requirements as defined by API. (API Base Oil Interchangeability Guidelines, E.1.2.1 and API 1509 requirements.)"

[9] NPRA defined "re-conditioning" as "[u]se of a filtration system to remove insoluble impurities, combines with replenishment of key additives, to extend the lubricant's life."

[10] NPRA defined "re-processing" as "chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products. Processing includes, but is not limited to: blending used oil with virgin petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation."

[11] H.R. Rep. No. 96-1415, 96th Cong. 2d Sess. 6 (1980), reproduced at 1980 U.S. Code Cong. & Ad. News 4354, 4356. ("Oil should be labeled on the basis of performance characteristics and fitness for its intended use, and not on the basis of the origin of the oil.")

Commission has not received any complaints or any other comments regarding the current definition of "recycled oil."

Shell commented that the "'substantially equivalent' criterion is solely performance-based and does not include a consideration of the possible health effects of engine oils and other products manufactured with recycled base oils, rather than virgin petroleum base oils."[12] Thus, Shell recommended that the FTC "require 'substantial equivalency' to include health-based criteria in addition to the performance-based criteria."[13]

The Commission observes that Exxon Company, U.S.A., in connection with the 1995 Recycled Oil rulemaking, also proposed that the Recycled Oil Rule establish health-based "substantial equivalency" standards. In addressing Exxon's concerns, the Commission found that consideration of the potential health effect of recycled oil was beyond its statutory mandate and that "it is clear from the legislative history of EPA that Congress was concerned only with the performance characteristics of recycled oil, not potential health consequences. . . . Although Exxon's concerns may be important, they cannot be addressed in this proceeding. The Commission has no factual or legal basis to address the health effects, or any other nonperformance qualities, of recycled oil in this rulemaking."[14] Accordingly, the Commission

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[12] Shell contends that recycled oils vary in how well the impurities are removed during their manufacture. Shell further asserts that these impurities "present" a skin cancer hazard. However, Shell did not present any studies that showed a link between recycled oil and any health ailments. Rather, Shell stated that limited health data on re-refined base oils is available as compared to studies of virgin base oils. Shell also did not propose a specific study protocol for evaluating the health effects of recycled oil.

[13] Attachment 1 to Shell's comment contains a detailed discussion of this matter and the basis for Shell's recommendation.

[14] 60 FR 55418 (October 31, 1995).

reiterates that it is beyond the Commission's legislative mandate to amend the Rule to incorporate health-based criteria.

Additionally, Safety-Kleen suggested that the Commission consider labeling changes that emphasize that "re-refined motor oil is 'recycled' and environmentally preferable to other end uses of used motor oil."[15] As the Commission stated in the 1995 Recycled Oil rulemaking: "Because the rule does not mandate the use of specific disclosures, recycled oil manufacturers or other sellers have flexibility to promote the performance of their products and their 'substantial equivalency' with new oil. . . . Manufacturers can voluntarily label recycled oil with terms such as 'recycled' to assist in the marketing of their products."[16] In the present Rule review, the Commission continues to adhere to that position because the Rule already provides manufacturers and sellers the discretion to label and market their processed used engine oil as "recycled."

5. What significant burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements? Has the Rule provided benefits to such firms? If so, what benefits?

Safety-Kleen commented that by referencing the API certification, the Rule has minimized duplication of costs in obtaining engine oil approval. Safety-Kleen commented that it would oppose any requirements beyond those specified by the API because any additional

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[15] Specifically, Safety-Kleen commented that re-refined motor oil requires less energy to produce than motor oil derived from crude oil and results in fewer emissions.

[16] 60 FR 55419. The Commission, however, explained that manufacturers using such terms need to consider the Commission's Guides for the Use of Environmental Marketing Claims. See, e.g., 16 CFR 260.7(e).

testing or requirements would be a burden.[17] Shell commented that it did not have any data regarding the compliance costs for manufacturers of refined oil.

6. What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on firms subject to its requirements? How would these changes affect the benefits provided by the Rule?[18]

Shell recommended that the Commission make no changes to the performance-based criteria but reiterated its recommendation that the Commission include health-based criteria.

7. Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

Safety-Kleen commented that the Rule is consistent with federal efforts to encourage re-refining used oil and that there is no significant overlap between the Rule and other government initiatives.[19] Shell commented that it is not aware of any conflict or overlap with other federal, state, or local laws or regulations.

8. Since the Rule was issued, what effects, if any, have changes in relevant technology or economic conditions had on the Rule?

Safety-Kleen commented that "[t]he rising price of crude oil and the political instability in many crude-producing regions has made re-refining more attractive both economically and

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[17] Safety-Kleen also noted that any requirements that only apply to recycled oil, and not to new oil, would be counter to the Rule's purpose.

[18] Safety-Kleen's response to this question referred back to its response to question 4.

[19] Safety-Kleen responded that the Rule is consistent with Executive Orders 13101 (1998) and 13149 (2000) that direct the federal government to buy re-refined oil when it is available at the same quality and price as new oil.

strategically." Safety-Kleen observed that advances in re-refining have "led re-refined oil to be warranty approved by all major US manufacturers as long as the oil is API approved."

9. Since the Rule was issued, the API has published the Fifteenth Edition of Publication 1509.[20] Should this updated version of Publication 1509 be incorporated by reference into the Rule?

All of the comments recommended that the Commission incorporate by reference the Fifteenth Edition of Publication 1509 into the Rule and that the Commission amend the Rule's reference to Publication 1509 to accommodate edition updates. API observed that the Sixteenth Edition of API 1509 is "expected to be issued shortly" and thus recommended that the reference to API Publication 1509 in Section 311.4 of the Rule be amended to read "latest edition." API stated that adopting the "latest edition" language will prevent confusion as new editions are issued.

Although this suggestion has considerable merit, each statement of incorporation by reference in regulatory text must specifically identify the material to be incorporated, including the title, date, edition, author, publisher, and identification number of the publication.[21] Therefore, the Commission does not have discretion to refer generally to the "latest" or "current" edition of API Publication 1509 in the Rule.[22] Because Publication 1509 is in its Fifteenth

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[20] The current Rule references the Thirteenth Edition.

[21] See, National Archives and Records Administration, Office of the Federal Register, "Federal Register Document Drafting Handbook," ch. 6 (1998). This handbook contains the rules federal agencies must follow to incorporate materials by reference into regulatory text. This handbook is issued under the Federal Register Act (44 U.S.C. 1501-1511) and the regulations of the Administrative Committee of the Federal Register (1 CFR 15.10).

[22] Comments made in connection with the Recycled Oil rulemaking in 1995 (continued...)

Edition, the Commission is incorporating it by reference by publishing an amendment to the Code of Federal Regulations in the current rulemaking.

IV. Conclusion

The comments provide evidence that the Rule serves a useful purpose, while imposing minimal costs on the industry; and the Commission has no evidence to the contrary. Accordingly, with the exception of incorporating by reference API Publication 1509, Fifteenth Edition, and adding an updated explanation of incorporation by reference in Section 311.4, the Commission has determined to retain the Recycled Oil Rule in its current form.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 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. See 5 U.S.C. 603-605. The Rule permits rather than requires any container of recycled oil to bear a label indicating that it is substantially equivalent to new engine oil, if such determination has been made in accordance with the prescribed test procedures. The Rule imposes no reporting or recordkeeping requirements, and it permits recycled oil to be labeled with information that is basic and easily ascertainable. In addition, the Rule does not require recycled oil manufacturers to conduct substantial equivalency tests themselves and maintain their own testing equipment. Rather, they may use third parties to minimize testing costs. In

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[22] (...continued)
similarly suggested that the final rule require use of test procedures found in the "latest" or "current" version of API Publication 1509. In addressing comments made in connection with the 1995 rulemaking, the Commission's Federal Register notice detailed why such proposals were not feasible. (60 FRN 55417-55418).

any event, the Commission believes the Rule, as amended, does not affect a substantial number of small entities because relatively few companies currently manufacture and sell recycled oil as engine oil, and that most would not be "small entities" under applicable regulations, 13 CFR part 121. Although there may be some "small entities" among private-label retail sellers or distributors of recycled engine oil, the Rule's labeling standards should continue to have only a minimal impact on such entities, because the Rule is limited to voluntary labeling disclosures beyond the labeling costs that such entities already incur. Accordingly, for the reasons above, the Commission certifies that the Rule, as amended, will not have a significant economic impact on a substantial number of small entities. This document serves as notice of that determination to the Small Business Administration.

VI. Paperwork Reduction Act

Under the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501-3520, federal agencies must obtain approval from the Office of Management and Budget ("OMB") for each collection of information they conduct or sponsor. "Collection of information" means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The amended Rule does not involve the "collection of information" under the PRA and, therefore, OMB approval is not required.

List of Subjects in 16 CFR Part 311

Energy conservation, Incorporation by reference, Labeling, Recycled oil, Trade practices.

Text of Amendments

For the reason set forth in the preamble, 16 CFR part 311 is amended as follows:

Part 311 – TEST PROCEDURES AND LABELING STANDARDS FOR RECYCLED OIL

1. The authority for this part remains:

AUTHORITY: 42 U.S.C. 6363(d).

2. Revise § 311.4 to read as follows:

§ 311.4 Testing.

To determine the substantial equivalency of processed used oil with new oil for use as engine oil, manufacturers or their designees must use the test procedures that were reported to the Commission by the National Institutes of Standards and Technology ("NIST") on July 27, 1995, entitled "Engine Oil Licensing and Certification System," American Petroleum Institute ("API"), Publication 1509, Thirteenth Edition, January 1995. API Publication 1509, Thirteenth Edition has been updated to API Publication 1509, Fifteenth Edition, April 2002. API Publication 1509, Fifteenth Edition, April 2002, is incorporated by reference. This incorporation by reference is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the materials incorporated by reference may be obtained from: API, 1220 L Street, NW, Washington, DC 20005. Copies may be inspected at the Federal Trade Commission, Consumer Response Center, Room 130, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or 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/code_of_federal_regulations/ibr_locations.html.

By direction of the Commission.

Donald S. Clark
Secretary