



Statement of

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On behalf of the

National Association of Convenience Stores (NACS)

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INTRODUCTION

Chairman Whitfield, Ranking Member Rush, members of the Subcommittee. My name is Jeff Miller. I am President of Miller Oil Company headquartered in Norfolk, VA. My company operates 34 stores in Virginia and 2 in Florida. In addition, we supply fuel to 65 independent retail operators in Virginia and 40 in Florida. I also currently serve as Chairman of the National Association of Convenience Stores (NACS).

NACS is an international trade association comprised of more than 2,200 retail member companies and more than 1,800 supplier companies doing business in nearly 50 countries. As of December 31, 2010, the U.S. convenience and fuel retailing industry operated 146,341 stores of which 117,297 (80.2%) sold motor fuels. In 2009, our industry generated \$511 billion in sales (one of every 28 dollars spent in the United States), employed more than 1.5 million workers and sold approximately 80% of the nation's motor fuel.

Thank you for the opportunity to testify today on the topic of renewable and alternative fuels.

Our industry is committed to complying with today's laws and regulations, to provide our customers with the best products and services we can offer and to adapt to new technologies and market opportunities. My company is constantly striving to identify the best new products and services we can bring to our stores. Consequently, we are not beholden to any specific product – we simply want to sell what our customers want to buy and, as new fuels come onto the market, we want to have the legal option to sell them. To accomplish this, we will need Congressional assistance to remove existing barriers to new market opportunities.

I would like to focus my comments today on the current situation facing the retail marketplace and then present some recommendations for Congress as you consider options for increasing the use of alternative and renewable fuels.

COMPOSITION OF THE RETAIL FUELS MARKET

To fully understand how fuels enter the market and are sold to consumers, it is important to know who is making the decision at the retail level of trade.

Our industry is dominated by small businesses. In fact, of the 117,297 convenience stores that sell fuel, 57.5% of them are single-store companies – true mom and pop operations. Overall, nearly 75% of all stores are owned and operated by companies my size or smaller – and we all started with just a couple of stores.

Many of these companies – mine included – sell fuel under the brand name of their fuel supplier. This has created a common misperception in the minds of many policymakers and consumers that the large integrated oil companies own these stations. The reality is that the majors are leaving the retail market place and today own and operate fewer than 2% of the retail locations. Although a store may sell a particular brand of fuel associated with a refiner – I operate under the Shell, BP and Exxon brands - the vast majority are independently owned and operated like mine. Our relationship to the brand we sell ends there – it is a brand.

We are in the customer service business. We have to make decisions each day regarding what products to sell and which services to offer our customers, and we often take some risks – you cannot be successful without doing so. But taking a chance by offering a new candy bar is very different from switching my fueling infrastructure to accommodate a new fuel. So when a new fuel product becomes available, our decision to offer it to our customers takes more time. We need to know that our customers want to buy it, that we can generate enough return to justify the investment, and that we can sell the fuel legally. These are the fundamental issues that face the introduction of new renewable and alternative fuels.

CURRENT RENEWABLE AND ALTERNATIVE FUEL OPTIONS

Today, most of the fuel sold in the United States is blended with 10% ethanol. The transition to this fuel mix was not complicated, but it was not without challenges. When ethanol became more prevalent in my market, we realized what a powerful solvent it is. Ethanol forced us to clean our storage tanks and change our filters frequently to avoid introducing contaminants into the fuel tanks of our customers' vehicles. Despite our best efforts, however, there were times when the fuel a customer purchased caused problems with their vehicles. In those situations, it was our responsibility to correct the damage. And while the transition to E10 required no significant changes to equipment or systems, it taught us some lessons that influence our decisions concerning new fuels.

Retailers are now hearing reports from Washington that the use of fuel containing 15% ethanol is authorized. Some of our equipment manufacturers are telling us that our equipment can accommodate these fuels and that some dispenser warranties have been extended to cover 25% ethanol blends. Ethanol advocacy groups are marketing a Blend Your Own Ethanol program to encourage retailers to use blender pumps to sell higher ethanol blended fuels. There is a lot of encouraging news and reports – but this is really only confusing the situation.

We know there are several challenges we must overcome to sell new fuels and we need your help to do so. Unfortunately, some think that discussing such challenges is undermining the value of the new fuel under consideration. That is simply not the case. Rather, how can credible challenges be overcome if they are not discussed and made part of the strategy to implement new fuel programs? So, I would like to highlight some of the issues retailers face when considering whether to sell a new fuel. To illustrate my points, I will use E15 as the fuel under consideration – but these issues can be applied to almost any other fuel that is being developed.

COMPATIBILITY

By law, all equipment used to store and dispense flammable and combustible liquids must be certified by a nationally recognized testing laboratory¹ as compatible with that liquid.

Currently, there is essentially only one organization that certifies our equipment – Underwriters Laboratories (UL). UL establishes specifications for safety and compatibility and runs tests on equipment submitted by manufacturers for UL listing. Once satisfied, UL lists the equipment as meeting a certain standard for a certain fuel.

¹ 29CFR1926.152(a)(1) “Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids.” “Approved” is defined at 29CFR1910.106 (35) “Approved unless otherwise indicated, approved, or listed by a nationally recognized testing laboratory.”

Prior to last spring, however, UL had not listed a single motor fuel dispenser (a.k.a, pump) as compatible with any fuel containing more than 10% ethanol. This means that any dispenser in the market prior to last spring – which would represent the vast majority of my dispensers - is not legally permitted to sell E15, E85 or anything above 10% ethanol – even if it is technically able to do so safely.

If I use non-listed equipment, I am in violation of OSHA regulations and may be violating my tank insurance policies, state tank fund program requirements, bank loan covenants, and potentially other local regulations. Furthermore, if my store has a petroleum release from that equipment, I could be sued on the grounds of negligence for using non-listed equipment, which would cost me significantly more than the expense of cleaning up the spill.

So, if none of my dispensers are UL-listed for E15, what are my options?

Unfortunately, UL will not re-certify any equipment. Only those units manufactured after UL certification is issued are so certified – all previously manufactured devices, even if they are the same model, are subject only to the UL listing available at the time of manufacture. This means that no retail dispensers, except those produced after UL issued a listing last spring, are legally approved for E10+ fuels.

In other words, the only legal option for me to sell E15 is to replace my dispensers with the specific models listed by UL. On average, a retail motor fuel dispenser costs approximately \$20,000.

It is less clear how many of my underground storage tanks and associated pipes and lines would require replacement. Many of these units are manufactured to be compatible with high concentrations of ethanol, but they may not be listed as such. In addition, the gaskets and seals may need to be replaced to ensure the system does not pose a threat to the environment. If I have to crack open concrete to replace seals, gaskets or tanks, my costs can escalate rapidly and can easily exceed \$100,000 per location.

MISFUELING

The second major issue I must consider is the effect of the fuel on customer engines and vehicles. Having dealt with engine problems associated with fuel contamination following the introduction of E10, I am very concerned about the potential effect a fuel like E15 would have on vehicles. The EPA decision concerning E15 is very challenging. Under EPA's partial waiver, only vehicles manufactured in model year 2001 or more recently are authorized to fuel with E15. Older vehicles, motorcycles, boats, and small engines are not authorized to use E15.

How am I supposed to prevent the consumer from buying the wrong fuel? I can deal with the responsibility for fuel quality and contamination control, but self-service customer misfueling is a much more difficult challenge to control.

In the past, when we have introduced new fuels – like unleaded gasoline or ultra-low sulfur diesel - they were backwards compatible; i.e. older vehicles could use the new fuel. In addition, newer vehicles were required to use the new fuel, creating a guaranteed market demand.

Such is not the case with E15 – legacy vehicles are not permitted to use the new fuel. Doing so will violate Clean Air Act standards and could cause engine performance or safety issues. Yet, there are no viable options to retroactively install physical countermeasures to prevent misfueling. Consequently, my risk of liability if a customer uses E15 in the wrong engine – whether accidentally or intentionally - is significant.

First of all, I could be fined under the Clean Air Act for misuse of the fuel – this has happened before. When lead was phased out of gasoline, unleaded fuel was more expensive than leaded fuel. To save a few cents per gallon, some consumers physically altered their vehicle fill pipes to accommodate the larger leaded nozzles either by using can openers or by using a funnel while fueling. Retailers had no ability to prevent such behavior, but the EPA often levied fines against retailers for not physically preventing the consumer from bypassing the misfueling countermeasures.

My understanding is EPA has told NACS that the agency would not be targeting retailers for consumer misfueling. But that provides me with little comfort – EPA policy can change in the absence of specific legal safeguards. Further, the Clean Air Act includes a private right of action and any citizen can file a lawsuit against a retailer who does not prevent misfueling. Whether the retailer is found guilty does not change the fact that defending against such claims can be very expensive.

Finally, I am very concerned about the effect of E15 in the wrong engine. Using the wrong fuel could void an engine's warranty, cause engine performance problems or even compromise the safety of some equipment. A consumer may seek to hold me liable for these situations even if my company was not responsible for the misfueling. Defending my company against such claims is financially expensive, but also expensive from a customer-relations perspective.

GENERAL LIABILITY EXPOSURE

Retailers are also concerned about long-term liability exposure. Our industry has experience with being sued for selling fuels that were approved at the time but later ruled defective. What assurances are there that such a situation will not repeat itself with new fuels being approved for commerce?

For example, E15 is approved only for certain engines and its use in other engines is prohibited by the EPA due to associated emissions and performance issues. What if E15 does indeed cause problems in non-approved engines or even in approved engines? What if in the future the product is determined defective, the rules are changed and E15 is no longer approved for use in commerce? There is significant concern that such a change in the law would be retroactively applied to any who manufactured, distributed, blended or sold the product in question.

Retailers are hesitant to enter new fuel markets without some assurance that our compliance with the law today will protect us from retroactive liability should the law change in the future. It

seems reasonable that law abiding citizens should not be held accountable if the law changes in the future. Congress could help overcome significant resistance to new fuels by providing assurances that market participants will only be held to account for the laws as they exist at the time and not subject to liability for violating a future law or regulation.

MARKET ACCEPTANCE

The final challenge we face is the rate at which consumers will adopt the new fuels. Assume all the other issues are resolved, I have to ask myself: Will my customers purchase the fuel? It is important to note that this is the first fuel transition in which no person is required to purchase the fuel, unlike prior transitions to unleaded gasoline and ultra-low sulfur diesel fuel.

In the situation facing E15, only a subset of the population (about 65% of vehicles) is authorized to buy it. Yet the auto industry is not fully supportive of its use in anything except flexible fuel vehicles (about 3% of vehicles). This situation could dramatically reduce consumer acceptance. The risk of misfueling and potentially alienating customers if E15 causes performance issues also is a serious concern.

With these unknowns, how can I calculate an accurate return on my investment to install E15 compatible equipment? Again, this is not like offering a new candy bar – to sell E15 I will likely have to spend significant resources.

As new fuels enter the market, their compatibility with vehicles and their performance characteristics compared to traditional gasoline will be critically important to determining consumer acceptance. In addition, the cost of entry for retailers will influence the return on investment calculations required to determine whether to invest in the new fuel.

OPTIONS

NACS believes there are options available to Congress to help the market overcome these challenges. I have referenced E15 in this testimony because it is a fuel with which we are all familiar due to its current considerations at EPA. However, E15 alone will not satisfy the renewable fuel objectives of the country. Other products must be brought to market and how they interact with the refueling infrastructure and the consumer's vehicles should be critical considerations to Congress when deciding whether to support their development and introduction.

Regardless which fuels are introduced in the future, the following recommendations can help lower the cost of entry and provide retailers with greater regulatory and legal certainty necessary for them to offer these new fuels to consumers:

- First, because UL will not retroactively certify any equipment, Congress should authorize an alternative method for certifying legacy equipment. Such a method would preserve the protections for environmental health and safety, but eliminate the need to replace all equipment simply because the certification policy of the primary testing laboratory will not re-evaluate legacy equipment. NACS was supportive of legislation introduced in the House last Congress Reps. Mike Ross (D-AR) and John Shimkus (R-IL) as H.R. 5778. This bill directed the EPA to develop guidelines for determining the compatibility of

equipment with new fuels and stipulates equipment that satisfied such guidelines would thereby satisfy all laws and regulations concerning compatibility.

- Second, Congress can require EPA to issue labeling regulations for fuels that are authorized for only a subset of vehicles and ensure that retailers who comply with such requirements satisfy their requirements under the Clean Air Act and protect them from violations or engine warranty claims in the event a self-service customer ignores the notifications and misfuels a non-authorized engine. H.R. 5778 also included provisions to achieve these objectives.
- Third, Congress can provide market participants with regulatory and legal certainty that compliance with current applicable laws and regulations concerning the manufacture, distribution, storage and sale of new fuels will protect them from retroactive liability should the laws and regulations change at some time in the future.
- Finally, Congress should evaluate the prospects for the marketing of infrastructure-compatible fuels and support the development of such fuels. These could aid compliance with the renewable fuels standard and save retailers, engine makers and consumers billions of dollars. Policymakers might consider establishing characteristics that new fuels must possess so that equipment and engines can be manufactured or retrofitted to accommodate whichever new fuel provides the greatest benefit to consumers and the economy.

If Congress takes action to lower the cost of entry and to remove the threat of unreasonable liability, more retailers may be willing to take a chance and offer a new renewable fuel. By lowering the barriers to entry, Congress will give the market an opportunity to express its will and allow retailers to offer consumers more choice. If consumers reject the new fuel, the retailer can reverse the decision without sacrificing a significant investment, but new fuels will be given a better opportunity to successfully penetrate the market.

The nation's convenience and fuel retailers are ready to assist Congress in its consideration of policies that will promote a stable and efficient market for transportation fuels. There are many factors to consider and we hope that policymakers will proceed cautiously and avoid imposing unnecessary and costly burdens on the system.

I hope my comments on the current status of the fuels market and the prospects for future use of alternative and renewable fuels have been constructive.

I thank you for the opportunity to testify today and look forward to answering any questions you might have.