TESTIMONY OF

JOHN EICHBERGER,
VICE PRESIDENT OF GOVERNMENT RELATIONS,
NATIONAL ASSOCIATION OF CONVENIENCE STORES

BEFORE THE

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

APRIL 19, 2012

LEGISLATIVE HEARING:

H.R. 4345,
"THE DOMESTIC FUELS PROTECTION ACT OF 2012"

SUMMARY OF TESTIMONY OF JOHN EICHBERGER, NACS

- NACS members make decisions each day regarding what products to sell and which services to offer their customers. But taking a chance by offering a new candy bar is very different from switching their fueling infrastructure to accommodate a new fuel. For this reason, and many others, they are guarded about adopting new fuel products until they are certain sufficient consumer demand exists to provide a reasonable return on their investment – an investment which in many cases can be significant.

- 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 as they arise. NACS members are not beholden to any specific product – they simply desire to sell what the customer wants to buy provided it is lawful and, hopefully, profitable to do so. As new fuels come onto the market, our members want to have the legal option to sell these fuels if their customers wish to buy them.

- Retailers face many challenges when considering whether to sell a new fuel and these challenges must be overcome if the goals of the Renewable Fuels Standard (RFS) are to be realized. Among these issues are the compatibility of retail storage and dispensing equipment; associated risks of a customer fueling a non-authorized engine with a new fuel; and associated risks of retroactive liability if today's laws governing the sale of such fuels change in the future.

- H.R. 4345, the Domestic Fuels Protection Act of 2012, addresses each of these challenges directly and NACS urges enactment of this legislation.

- H.R. 4345 provides a way for existing retail equipment that is technically compatible with new fuels to be legally recognized as such, thereby eliminating some of the costs associated with unnecessary equipment replacement; it protects market participants from liability in the event self-service consumers circumvent federally required misfueling measures; and, it protects market participants from retroactive liability should today's laws governing fuel sales change in the future.

- America's fuel retailers want to provide consumers with the choices they demand and the fuels that are not only approved by the federal government, but effectively encouraged and even required by the government. Enacting H.R. 4345 will remove key legal impediments that make it difficult and impractical, or even impossible, to bring these fuels to market. H.R. 4345 will promote innovation in the motor fuels marketplace.

INTRODUCTION

Chairman Shimkus, Ranking Member Green, members of the Subcommittee, thank you for the opportunity to speak with you today. My name is John Eichberger and I am Vice President of Government Relations for the National Association of Convenience Stores (NACS).

NACS is an international trade association representing the convenience and fuel retailing industry. Our membership consists of nearly 2,200 retail member companies and nearly 1,800 supplier companies. In 2011, the industry operated 148,000 stores in the United States, generated $681.9 billion in sales (representing $1 of every $22 spent in the U.S.), of which $486.9 billion was in motor fuels. The industry sells more than 80% of the fuel consumed in the country and employs more than 1.8 million workers.

Our industry is dominated by small businesses. In fact, of the 121,000 convenience stores that sell fuel, 58.2% of them are single-store companies – true mom and pop operations. Despite common misperceptions, the large integrated oil companies are leaving the retail market place and today own and operate fewer than 1% of the retail locations. Although a store may sell a particular brand of fuel associated with a refiner, the vast majority are independently owned and operated and the relationship to the fuel brand they sell ends there. The rest have sought to establish their own brand in the market.

NACS members make decisions each day regarding what products to sell and which services to offer their customers. But taking a chance by offering a new candy bar is very different from switching their fueling infrastructure to accommodate a new fuel. For this reason, and many others, they are guarded about adopting new fuel products until they are certain sufficient consumer demand exists to provide a reasonable return on their investment – an investment which in many cases can be significant.

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 as they arise. NACS members are not beholden to any specific product – they simply desire to sell what the customer wants to buy provided it is lawful and, hopefully, profitable to do so. As new fuels come onto the market, our members want to have the legal option to sell these fuels if their customers wish to buy them.

It is with this background that NACS strongly endorses H.R. 4345, the Domestic Fuels Protection Act of 2012, which addresses some of the legal challenges facing retailers and begins to create a market in which retailers can make lawful business decisions concerning which fuels they will sell to their customers.

THE NEED FOR H.R. 4345

Since enactment of the Energy Independence and Security Act (EISA) of 2007, Washington has been discussing the pending arrival of the so-called "blend wall" – that point beyond which the market cannot absorb any additional renewable fuels. We can now say unequivocally that we are there.

The 2012 statutory mandate for the RFS is 15.2 billion gallons. If 10% ethanol were blended into every gallon of gasoline sold in the nation in 2011 (133.9 billion gallons), the market would reach a maximum of 13.39 billion gallons. Meanwhile the market for higher blends of ethanol (E85) for flexible fuel vehicles (FFVs) has not developed as rapidly as some had hoped and there are few indications for a rapid expansion. So clearly we have a problem.

The decision by EPA to authorize the use of E15 in certain vehicles and engines does very little to expand the use of renewable fuels. This is primarily because, although registrations have been issued for the fuel as an additive, there remain many legal barriers to the introduction of E15 and other fuels and fuel additives that Congress must address.

H.R. 4345 will address some of the legal issues that are preventing retailers from even considering whether to sell new fuels like E15. It is important to note that this legislation is not an E15 bill – it applies to any new fuel formulations or additives approved and registered by the EPA. E15 is often used as the primary example to demonstrate how this legislation would affect the market because it is a fuel with which we are now very familiar. However, H.R. 4345 is fuel-neutral; it is designed to facilitate the introduction of innovative new fuels.

H.R. 4345 addresses three areas of legal concern limiting the introduction of new fuels – infrastructure incompatibility, liability for consumer misuse of fuels, and retroactive liability if the rules governing a fuel change in the future.

COMPATIBILITY

The reason the retail market is unable to accommodate additional volumes of renewable fuels begins with the equipment found at retail stations. By law, all equipment used to store and dispense flammable and combustible liquids must be certified by a nationally recognized testing laboratory. These requirements are found in regulations of the Occupational Safety and Health Administration.[1]

Currently, there is essentially only one organization that certifies such 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. Prior to 2010, UL had not listed a single motor fuel dispenser (a.k.a, a pump) as compatible with any fuel containing more than 10% ethanol. This means that any dispenser in the market prior to early 2010 is not legally permitted to sell E15, E85 or anything above 10% ethanol – even if it is technically able to do so safely.

If a retailer fails to use listed equipment, that retailer is violating OSHA regulations and may be violating tank insurance policies, state tank fund program requirements, bank loan covenants, and potentially other local regulations. In addition, the retailer could be found negligent per se based on the sole fact that his fuel dispensing system is not listed by UL.

[1] 29 CFR 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 CFR 1910.106 (35) ("Approved unless otherwise indicated, approved, or listed by a nationally recognized testing laboratory.")

This brings us to the primary challenge: If no dispenser prior to early 2010 was listed as compatible with fuels containing greater than ten percent ethanol, what options are available to retailers to sell these fuels?

In February 2009,[2] UL issued a letter announcing that dispensers listed under a certain UL standard as compatible with E10 were in fact safe to handle fuels containing up to 15% ethanol. UL said that it would support "local authorities having jurisdiction" to provide waivers to retailers who wished to increase their ethanol blends through these dispensers. UL did not, however, change the official certification of those dispensers. Consequently, retailers who relied upon local authority waivers would still be in violation of all laws and regulations requiring listed equipment.

However, in December 2010[3] UL rescinded that notice based upon new research that indicated issues with gaskets, seals and hoses when exposed to E15. UL now recommends that only equipment specifically listed by UL as compatible with E10+ fuels be used for such fuels.

Unfortunately, this places a significant economic burden on the retail market. UL policy prevents retroactive certification of equipment. In other words, only those units produced after UL certification is issued are so certified – all previously manufactured devices, even if they are the exact same model using the exact same materials, are subject only to the UL listing available at the time of manufacture. This means that no retail dispensers, except those specific units produced after UL issued a listing in 2010, are legally approved for E10+ fuels.

In other words, under current requirements the vast majority of retailers wishing to sell E10+ fuels must replace their dispensers. On average, a retail motor fuel dispenser costs approximately $20,000.

It is less clear how many 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. Further, if there are concerns with gaskets and seals in dispensers, care must be given to ensure the underground gaskets and seals do not pose a threat to the environment. Once a retailer begins to replace underground equipment, the cost can escalate rapidly and can easily exceed $100,000 per location.

Last year, EPA issued guidelines for determining the compatibility of underground storage tank equipment with new fuels. Those guidelines, which are now being incorporated into regulations, stipulate that compatibility can be demonstrated either with a listing from a nationally recognized testing laboratory, written documentation by the equipment manufacturer or another standard to be adopted by the states. NACS is supportive of these regulations, but they offer retailers very limited certainty.

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[2] Underwriters Laboratories at . (http://www.ul.com/global/eng/pages/corporate/newsroom/newsitem.jsp?cpath=%2Fglobal%2Feng%2Fcontent%2Fcorporate%2Fnewsroom%2Fpressreleases%2Fdata%2Funderwriterslaboratoriesannouncessupportforauthoritieshavingjurisdiction20090219140900_20090219140900.xml)

[3] Underwriters Laboratories at (http://www.ul.com/global/eng/pages/offerings/industries/energy/alternative/flammableandcombustiblefluids/updates/)

First, the regulations do not establish a minimum standard of care to govern the self-certification procedures of the equipment manufacturer.

Second, the regulations apply only to underground storage tank systems – they do not cover the fuel dispenser itself.

Finally, these regulations do not protect a retailer from his legal obligations for using compatible equipment enforced by other jurisdictions. It is unclear whether the regulations will satisfy OSHA regulations, tank insurance, or other requirements.

H.R. 4345 seeks to fix these problems, in our view. The legislation directs the EPA to revise these regulations to establish a minimum standard of care for manufacturer self-certification to ensure there is no backsliding in protecting the environment; it establishes that the compatibility regulations will apply to the fuel dispenser; and it provides the equipment owner with regulatory and legal certainty by stipulating that equipment which satisfies the EPA compatibility requirements will be considered to satisfy all compatibility-related requirements that may be applied to the retailer.

It is important to note that H.R. 4345 does not in any way relieve a tank owner from any responsibilities regarding a fuel release. The retailer will remain responsible for preventing a fuel release and for cleaning up any contamination that may occur as a result of a release. However, the retailer will not be per se negligent provided that his equipment satisfies the requirements established by the EPA.

NACS finds it interesting that some believe retailers are supporting H.R. 4345 because they want a license to pollute. I would like to remind the committee that during consideration of the Energy Policy Act of 2005, NACS members were among the most vocal advocates for additional resources and authority for underground storage tank officials to enforce the regulations and shut-down non-compliant tank systems.

NACS members take very seriously their responsibility to protect the environment and prevent releases from their systems. Their support for this legislation is based upon the realization that some of the equipment at their stations is technically compatible and can safely store and dispense new fuels. If their equipment is compatible, they see no reason why they should be required to incur significant expense to replace it.

MISFUELING

The second major issue facing retailers is the potential liability associated with improperly fueling an engine with a non-approved fuel. The EPA decision concerning E15 puts this issue into sharp focus for retailers. 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.

For the retailer, bifurcating the market in this way presents serious challenges. For instance, how does the retailer prevent the consumer from buying the wrong fuel? Typically, when new fuels

are authorized they are backwards compatible so this is not a problem. In other words, older vehicles can use the new fuel. Here are some examples:

> **Example 1:** When EPA phased lead out of gasoline in the late 1970s and early 1980s, older vehicles were capable of running on unleaded fuel – newer vehicles, however, were required to run only on unleaded. These newer vehicle gasoline tanks were equipped with smaller fill pipes into which a leaded nozzle could not fit – likewise, unleaded dispensers were equipped with smaller nozzles.
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> **Example 2:** When EPA mandated a 97% reduction in the sulfur content of on-road diesel fuel, trucks manufactured beginning with model year 2007 were required to use only ultra-low sulfur diesel (ULSD) fuel – earlier model trucks were able to run on this new fuel. Misfueling was limited by a combination of a mandated oversupply of ULSD (which limited the supply of the restricted fuel and therefore limited the potential for misfueling) and enforced labeling and inventory management requirements.

E15 is very different: legacy engines 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. Further, the risk to retailers of a customer using E15 in the wrong engine – whether accidentally or intentionally - are significant.

First of all, retailers could be subject to penalties under the Clean Air Act for not preventing a customer from misfueling with E15. This concern is not without justification. In the past, retailers have been held accountable for the actions of their customers. For example, because unleaded fuel was more expensive than leaded fuel, 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. We may see similar behavior in the future given the high price of gasoline relative to ethanol. As in the past, the retailer will have no ability to prevent such practices, but in the case of leaded gasoline the EPA levied fines against the retailer for not physically preventing the consumer from bypassing the misfueling countermeasures.

To EPA's credit, they have asserted that they would not be targeting retailers for consumer misfueling. But that provides little comfort to retailers – 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 that does not prevent misfueling. Whether the retailer is found guilty does not change the fact that defending against such claims can be very expensive.

Further, the consumer may seek to hold the retailer liable for their own actions. Using the wrong fuel could void an engine's warranty, cause engine performance problems or even compromise the safety of some equipment. In all situations, some consumers may seek to hold the retailer accountable even when the retailer was not responsible for the improper use of the fuel. Once again, the defense to such claims can be expensive.

H.R. 4345 addresses this challenge directly. It requires the EPA to issue misfueling regulations whenever the agency approves a fuel for only a subset of engines. EPA has already taken such steps with regards to E15 and has issued regulations requiring E15 retailers to affix a specific label to their dispensers to inform consumers of the authorized and prohibited uses of the fuel. In addition, certain inventory management procedures are required.

H.R. 4345 provides that neither a retailer, nor a retailer's supplier, can be held responsible for violating the Clean Air Act in the event a self-service customer introduces a registered fuel into an engine for which that fuel has not been approved. However, if the retailer fails to comply with the misfueling regulations issued by the agency then that retailer can be held responsible.

H.R. 4345 also addresses another potential liability associated with an engine warranty. The EPA decision to approve E15 for 2001 and newer vehicles is not consistent with the terms of most warranty policies issued with these affected vehicles. Consequently, while using E15 in a 2009 vehicle might be lawful under the Clean Air Act, it may in fact void the warranty of the consumer's vehicle. Retailers have no mechanism for ensuring that consumers abide by their vehicle warranties – it is the consumer's responsibility to comply with the terms of their contract with their vehicle manufacturer. Therefore, H.R. 4345 stipulates that no person shall be held liable in the event a self-service customer introduces a fuel into their vehicle that is not covered by their vehicle warranty. The notable exception also applies here – the retailer can be held liable if they fail to comply with the misfueling regulations issued by the EPA.

H.R. 4345 does not stipulate what constitutes an appropriate misfueling regulation, and NACS members are prepared to comply with whatever is mandated. The current regulations affecting E15 include labeling and inventory management provisions. If EPA requires a certain fuel be sold from a locked cage, retailers who wish to sell that fuel will do so. NACS is supporting H.R. 4345's misfueling provisions because retailers need to be given some legal certainty with respect to their business operations. If they abide by the rules, they should be protected from liability.

GENERAL LIABILITY EXPOSURE

Finally, there are widespread concerns throughout the retail community and with our product suppliers that the rules of the game may change and we could be left exposed to significant liability. 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 their compliance with the law today will protect them 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. And that is what H.R. 4345 does. It helps 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. If the rules change, retailers will adjust and comply, but they cannot be expected to comply with laws that do not yet exist.

CONCLUSION

The current debate has been centering on the effects of E15 in the marketplace. H.R. 4345 is not fuel specific, however. Rather, it seeks to set a path through which the market has a better chance of complying with the mandates of the RFS. Successful implementation of the RFS, especially in light of the proposed corporate average fuel economy revisions, will require an average blend ratio of 30 – 40% renewable fuel in every single gallon.

H.R. 4345 is the necessary first step to reduce the cost of introduction of new fuels and to provide long-term regulatory and legal certainty to the market.

When considering this legislation, Congress must take into consideration that it was not long ago (1988-1998) that federal law required that all USTs in the country be removed from the ground and retrofitted with leak detection, spill prevention, and anti-corrosion systems. The wholesale retrofit requirements led to the closure of thousands of facilities due to the costs required to comply with the new law. Since then, many states have enacted additional requirements that have forced retailers to retrofit or replace the systems that were installed to comply with the federal law. Another round of mandatory replacements will be difficult for all retailers, and impossible for many, to endure.

H.R. 4345 is a reasonable and responsible approach to preventing a motor fuels crisis in this country.

On behalf of the members of NACS, I appreciate the opportunity to share our perspective with you today and I urge this committee to proceed to markup on the Domestic Fuels Protection Act of 2012 at the earliest possible time.