**Joint Economic Committee**
**United States Senate**
**United States House of Representatives**

**Hearing on**
**Is Market Concentration in the U.S. Petroleum Industry Harming Consumers?**
**Testimony of**

**Samantha Slater**
**Director, Congressional and Regulatory Affairs**
**Renewable Fuels Association**

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Good morning Chairman Schumer and Members of the Committee. My name is Samantha Slater and I am Director of Congressional and Regulatory Affairs for the Renewable Fuels Association (RFA), the national trade association representing the U.S. ethanol industry.

This is an important and timely hearing, and I am pleased to be here to discuss the ethanol industry's perspective of the effects that increased concentration of the petroleum industry has had on availability of E-85 at the pump. When consumers drive into service stations, they should have the option of choosing renewable fuels. The increased availability of E-85 at service stations nationwide would give consumers the opportunity to choose a high-octane fuel that provides superior engine performance, reduces harmful tailpipe and greenhouse gas emissions that contribute to global warming, reduces our dependence on foreign oil, and enhances our energy and economic security.

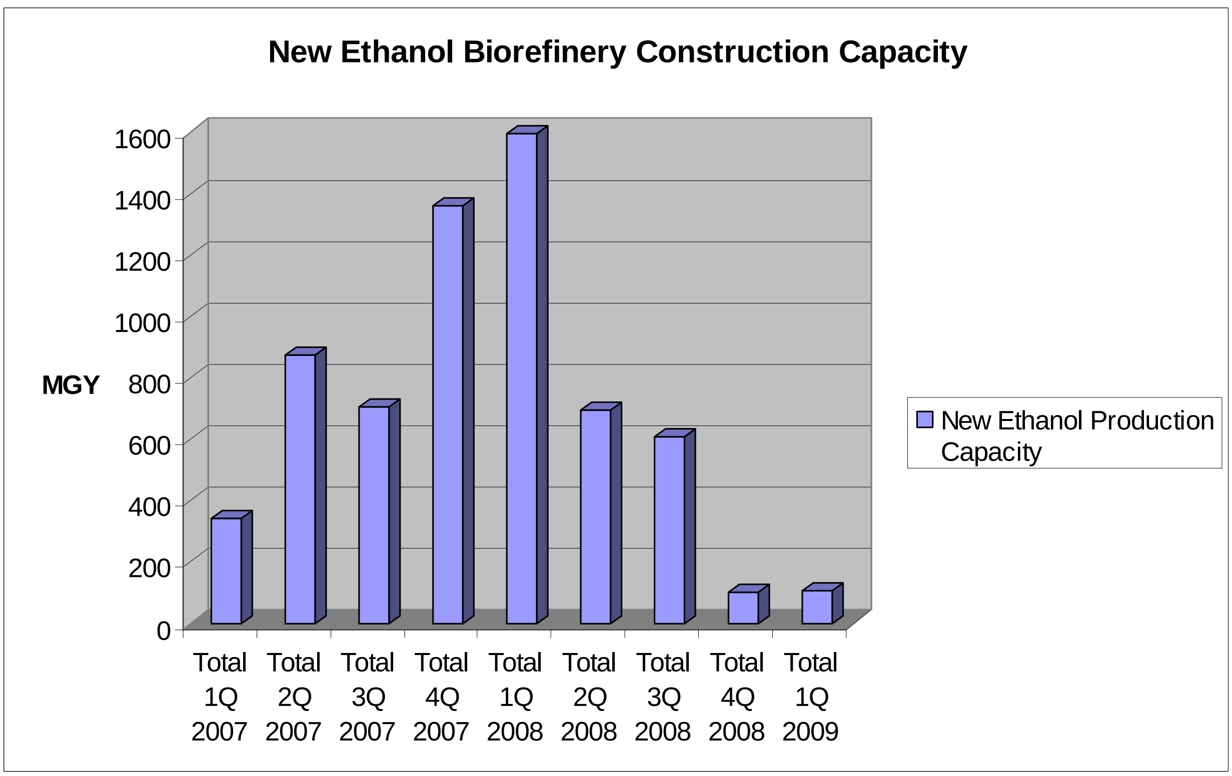
## Background

Today's ethanol industry consists of 119 biorefineries located in 19 different states with the capacity to process more than 2 billion bushels of grain into 6.1 billion gallons of high octane, low carbon, clean burning motor fuel, and more than 12 million metric tons of livestock and poultry feed. It is a dynamic and growing industry that is revitalizing rural America, reducing emissions in our nation's cities, and lowering our dependence on imported petroleum.

Ethanol has become an essential component of the U.S. motor fuel market. Today, ethanol is blended in 50 percent of the nation's fuel, and is sold virtually from coast to coast and border to border. The almost 5 billion gallons of ethanol produced and sold in the U.S. last year contributed significantly to the nation's economic, environmental and energy security. According to an analysis completed for the RFA[1], the approximately 5 billion gallons of ethanol produced in 2006 resulted in the following impacts:

- Added $41.1 billion to gross output;
- Created 160,231 jobs in all sectors of the economy;
- Increased economic activity and new jobs from ethanol increased household income by $6.7 billion, money that flows directly into consumers' pockets;
- Contributed $2.7 billion of tax revenue for the Federal government and $2.3 billion for State and Local governments; and,
- Reduced oil imports by 170 million barrels of oil, valued at $11.2 billion.

There are currently 79 biorefineries under construction. With eight existing biorefineries expanding, the industry expects more than 6.4 billion gallons of new production capacity to be in operation by the end of 2009. The following is our best estimate of when this new production will come online.




Ethanol today is largely a blend component with gasoline, adding octane, displacing toxics and helping refiners meet Clean Air Act specifications. Of the 5.4 billion gallons of ethanol blended in the U.S. last year, only about 50 million gallons were used for E-85. But the time when ethanol will saturate the blend market is on the horizon, and the industry is looking forward to

[1] *Contribution of the Ethanol Industry to the Economy of the United States*, Dr. John Urbanchuk, Director, LECG, LLC, December, 2006.

new market opportunities.  As rapidly as ethanol production is expanding, it is likely the industry will saturate the existing blend market before a meaningful E-85 market develops.

Today there are more than 230 million cars on American roads today capable of running on an up to 10 percent blend of ethanol.  Of these, only 6 million are flexible fuel vehicles (FFV), capable of using up to an 85 percent blend of ethanol.  America's automakers have realized the benefits of ethanol, particularly E-85, and have joined with the ethanol industry to aggressively develop the infrastructure and provide the vehicle fleet necessary to grow the E-85 market.  Ford, General Motors and DaimlerChrylser pledged to increase production of FFVs to half of all new vehicles by 2012, or about 4 million new FFVs a year.  General Motors has been a leader in promoting the use of ethanol.  Its campaign, "Live Green, Go Yellow," which focuses on the yellow gas caps that now come standard with all GM flex-fuel vehicles, has helped to raise public awareness of ethanol and especially E-85.

Enhancing incentives to gasoline marketers to install E-85 refueling pumps at service stations will continue to be essential.  There are now more than 1,200 E-85 pumps at service stations across the country, more than doubling in number since the passage of the Energy Policy Act of 2005.  However, that number remains insignificant considering the 170,000 service stations nationwide.  The majority of those service stations are not owned by the major oil companies, but franchised from those same companies, or independent.

**Barriers to the Increased Use of Renewable Fuel Use**

The greatest challenge the ethanol industry faces to increasing E-85 refueling pumps nationwide remains the resistance from the major oil companies to allow service stations to sell E-85.  In 1980, the U.S. Congress amended the Clayton Act through enactment of the Gasohol Competition Act, to make it unlawful for any person "to impose any condition [or] restriction … that …unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability …."  Congress decided to take this action when several major suppliers refused to permit their pumps and tanks to be used for the sale of gasohol, threatening to terminate their franchisees' contracts if they did so.  The Senate Report language on the legislation that became the Gasohol Competition Act noted that the statute was intended "to remove any potential obstacles that may be raised by the major oil companies to dealers who desire to market gasohol and other synthetic fuels …."

The Gasohol Competition Act put the days of discrimination against and unreasonable limitations on the sale of gasohol behind us; however, in recent years the efforts of many independent retailers to begin to sell E-85 at their stations have been thwarted by the major suppliers.  Since E-85 has certainly reached the same level of quality and acceptability as gasohol had in 1980, such actions are plainly illegal under the Gasohol Competition Act, and yet the interference still occurs.

Oil companies today do not generally sell E-85, so they lose a sale when a driver pulls into a service station bearing their name and purchases E-85 instead of the gasoline the oil companies supply to the service station.  It is not in their best interest financially, then, to permit E-85 to be sold at these service stations.  ConocoPhillips, in a letter (attached) to Senators Tom Harkin and

Richard Lugar on February 14, 2006, plainly stated that E-85 "is not currently sold as a ConocoPhillips Branded product," and one of the key reasons is that "E-85 fuel predominately originates and is manufactured by other producers."

If an oil company, however, were to grant an exemption and allow a franchise service station to buy E-85 from an outside supplier, the service station would then be required to follow restrictive rules the oil companies say are in place to protect customers, as well as their brand. It is not unusual to find clauses in oil company contracts with franchisees that require service stations to dispense E-85 from its own unit, and not part of the existing multi-hose dispenser, necessitating service station owners to install new pumps and tanks at their own expense. It is common practice for oil companies to disallow the sale of E-85 on the primary island – under its canopy – and franchisees must therefore find another location on the property to install a new pump. And then, even if the franchisee is able to jump through all of those hoops, it is likely that the oil companies would prohibit the service station from advertising the availability and price of E-85 on their primary signs listing fuel prices.

The reason this interference continues is simple -- enforcement of the Gasohol Competition Act relies primarily on the willingness of marketers to face economic ruin. To bring a private action under the Gasohol Competition Act, the plaintiff must have suffered "antitrust injuries," according the United States Court of Appeals for the Seventh Circuit. For a marketer, that would mean that he could not sue unless his contract with the supplier has been terminated. Short of that, the marketer would be unable to demonstrate any antitrust injuries, and so there would be no remedy available for the wrongful conduct of the supplier. Faced with the possibility of termination of the contract with the supplier, and consequent economic ruin, the marketer will simply have to capitulate to the demands of the supplier to not sell E-85. An ethanol producer could bring an action against suppliers who interfere with the sale of E-85, but under current market conditions the producers are selling all the ethanol they can make already, and so they too would be unable to show any antitrust injuries. Further, any such litigation would be extremely costly, further discouraging the use of the Gasohol Competition Act.

In the faces of these barriers, many retailers are taking action to bring fuel choice to their customers. Recently, regional chains like Kroger and Meijer Inc. have taken the initiative to install E-85 pumps at their stores in Ohio and Texas, and Michigan and Indiana, respectively. National chains, like Wal-Mart, have also shown an interest in installing E-85 pumps at their 388 company-owned stations across the country. Even state legislatures are taking steps to end the restrictive policies put in place by the oil companies. In 2006, New York State enacted legislation that barred oil companies from requiring stations to buy all of their fuel from the companies, and the first E-85 pump is now in operation in Albany.

The goal of the Gasohol Competition Act was to integrate the sale of synthetic fuels into the existing distribution system, and Congress observed that the longer it takes to do so, "the longer we will be subjected to the vagaries of the international petroleum markets and the harshness of cartel price actions." That was true then, and it is just as true now. The need for opening up the gasoline supply infrastructure to E-85, to allow the millions of flex-fuel cars that the auto companies have manufactured over the last several years and will manufacture in increased numbers over the years to come, is critical to the achievement of the our national goal of reducing our dependence on imported oil. It is also critical to reducing our emissions of greenhouse gases, through the increased use of biofuels, like ethanol.

**Conclusion**

The RFA urges this Congress to consider augmenting the existing enforcement mechanisms under the Gasohol Competition Act through the creation of a regulatory enforcement regime. Assigning responsibility to an appropriate regulatory agency to ensure that marketers eager to give their customers the option of using home grown and American made fuels in place of imported oil have the realistic opportunity to do so would make a major contribution to opening up the market for E-85, and to helping alleviate our nation's addition to oil. The continued commitment of the 110th Congress and this Committee to further expand the rapidly growing domestic biofuels industry will contribute to ensuring America's future energy security. The RFA looks forward to working with you on these important issues.

Thank you.