



VIA FTC COMMENTWORKS

**Comments of Energy-Efficiency, Environmental and Consumer Advocacy Organizations
Re: Energy Label Ranges, Matter No. R611004
March 1, 2013**

Introduction

The below-listed organizations (“Commenters”) submit the following comments on the Federal Trade Commission’s proposed revisions to the Appliance Labeling Rule. *See* 16 C.F.R. Part 305. In general, our organizations support the proposal to require more specific disclosures on room air conditioner and clothes washer labels, though we believe the wording of the proposed room air conditioner disclosure is deficient. We reiterate previous calls for FTC to establish a more frequent schedule for updating energy label range information and to consolidate ranges for refrigerator labels. For reasons explained in more detail below, FTC is acting unlawfully and arbitrarily in providing for label updates only once every five years and failing to provide broader comparison information for refrigerator labels.

In addition, we petition FTC to initiate a rulemaking to require Energy Guide labels on clothes dryers.

1. Room air conditioner labels need to more clearly disclose usage assumptions.

Commenters support FTC’s proposal to require disclosure of the 750 hours of usage assumption underlying the estimated annual energy cost displayed on room air conditioner labels. 78 Fed. Reg. 1780/3. We agree with FTC that disclosure of the room air conditioner usage assumption can help consumers better judge the costs of their own usage. This in turn can help consumers determine both the relative importance of a product’s efficiency and any changes in usage they may want to consider.

But these benefits will be undermined by the proposed phrasing of the disclosure, which refers to “750 hours of operation per year.” *see* 78 Fed. Reg. 1788/1). As indicated in previous comments, consumers would be better able to understand an assumption expressed in weekly or daily terms, such as “eight hours of use per day for three months.” Joint Comments from Energy-Efficiency and Consumer Organizations (May 16, 2012) (#560957-00015), 13. The agency’s proposed language, ‘750 hours per year’, covers too large an amount and too long a time horizon to assist consumers in determining their own costs. It is also inconsistent with other energy labels that contain usage assumptions, such as dishwashers (four loads per week), clothes washers (eight loads per week), televisions (five hours per day) and light bulbs (three hours per day). And FTC has not offered any reason room air conditioners merit different treatment in this respect.

2. Clothes washer labels need to specify capacity.

Commenters continue to support FTC's proposal to require specific capacity rather than just "standard" or "compact." Because capacity is directly proportional to estimated annual operating costs, it may be helpful to consumers comparing the operating costs of different models.

3. Keep range information on television labels.

Commenters oppose the Consumer Electronics Association's suggestion that FTC eliminate range information from televisions labels. The Commission does not have the statutory authority to eliminate this information from the label. Section 324(a)(1) of EPCA requires FTC to promulgate labeling rules meeting specific requirements spelled out in the rest of Section 324. 42 U.S.C. § 6294(a)(1). Those requirements include Section 324(c)(1)'s mandate that any rule "under this section" require labels that disclose both (1) "estimated annual operating costs" and (2) "information respecting the range of estimated annual operating costs for covered products to which the rule applies." *Id.* § 6294(c)(1).

Section 324 includes two specific exceptions to this mandate, and neither allows FTC to eliminate range information. The first exception allows FTC to use a "different useful measure of energy consumption" if disclosure of estimated annual operating costs is not technologically feasible, not likely to assist consumers, or not economically feasible. *Id.* § 6294(c)(1)(A). This exception applies only to the disclosure of estimated annual operating costs, and not to the disclosure of range information. The second exception only applies in cases where FTC does use a "different useful measure of energy consumption." In such cases, FTC may delay the effective date of the rule for up to 12 months if it determines that range information will not be available before then. *Id.* § 6294(c)(6).

Disclosure of estimated annual operating costs is neither technologically or economically infeasible, as television manufacturers already disclose those costs on the label. Nor can FTC claim that range information is unavailable, as the Consumer Electronics Association's comments point to many sources that carry it. CEA Comments (May 16, 2012) (#560957-0012), 3.

Moreover, the narrow range of differences between models in the same size classes hardly renders disclosure of estimated annual operating costs "not likely to assist consumers." This information is useful apart from how it compares to other new models. For example, it allows consumers to compare the energy costs of a new television model to an older one, or to none at all. It also allows consumers to know how their usage affects their energy costs. These considerations apply with particular force to televisions, which are often discretionary purchases, have benefitted from significant recent advances in efficiency, and vary their energy use according to consumer behavior.

If FTC were to find disclosure of estimated annual operating costs is not likely to assist consumers, the statute would still not allow the agency to eliminate range information. Rather, the statute directs FTC to use a different useful measure of energy consumption, such as lifetime energy costs or resulting greenhouse gas emissions. In that case, FTC still must publish range information.

Even if FTC were to interpret Section 324(c)(9) as giving it the necessary authority, it would be arbitrary for FTC to eliminate the range information.¹ The agency has previously acknowledged the value of range information in requiring online retailers to include it among their disclosures. 76 Fed. Reg. 1046/3; 77 Fed. Reg. 15,301. To the extent FTC believes the concentration of models at or below the low end of the comparison ranges reduces the utility of range information, other steps are available to address the problem. As described below in the context of refrigerators, comparison ranges would show greater differences between products if FTC consolidated or scrapped altogether the number of subcategories for televisions. Likewise, as described below, more frequent updates to the ranges would largely solve the problem of models appearing below the low end of the range.

4. Range information must be updated more frequently than every five years.

Commenters reiterate their earlier call for FTC to establish more frequent updates to range and cost information on Energy Guide labels. The statute requires that labels include “information respecting the range of estimated annual operating costs for covered products to which the rule applies.” 42 U.S.C. § 6294(c)(1)(B). While the statute does not set a specific schedule for updating this information, it does specifically allow FTC to update the ranges annually. 42 U.S.C. § 6296(c).

FTC’s interpretation of the statute—that it can wait five years or more to update this information even when doing so means the ranges will include products that are no longer made and to which the rule does not apply—violates the statute’s plain language and is unreasonable. This is especially true given that FTC collects “information respecting the range of estimated annual operating costs for covered products to which the rule applies” annually. *See* 16 C.F.R. § 305.8. Including outdated range information on labels also violates the statutory requirement that the labels be “likely to assist consumers in making purchasing decisions.” *See* 42 U.S.C. § 6294(c)(3).

To comply with the statute and better assist consumers with their purchasing decisions, FTC should update ranges (1) whenever multiple new products enter the market in a product subcategory for which FTC has not published range information, (2) whenever new products too efficient to be captured by the low end of the range enter the market, and (3) whenever efficiency standards or ENERGY STAR specifications change. Should FTC insist on sticking to a regular schedule for updating range information, Commenters suggest a three-year schedule for most products and a two-year schedule for those with rapidly changing efficiencies and quicker sell-through periods. These shorter time frames should help mitigate many of the

¹ The effect of section 324(c)(9), which says FTC “may apply” paragraphs (1), (2), (3), (5) and (6) of subsection (c) to televisions and other products, is at best unclear. *See* 42 U.S.C. § 6294(c)(9). Rather than giving FTC discretion to ignore the specified paragraphs entirely for those products, it may simply authorize FTC to apply the substantive portions of those paragraphs without first making the triggering determinations they contemplate. Or it may merely specify that FTC may not apply the unlisted paragraphs (4), (7) and (8) to the listed products.

² FTC does not suggest more frequent updates would increase burdens on manufacturers, nor

problems created by the five-year schedule.

As noted in previous comments, the five-year schedule results in labels that depict a false picture of the market. The schedule also means the Rule mandates claims that would otherwise constitute deceptive advertising in violation of Section 5 of the FTC Act. In seeking comment on whether to eliminate range information on television labels, FTC has implied it agrees ranges can become outdated well before five years have passed. In such cases, the five-year update schedule violates the statutory requirement for the labels to contain “information respecting the range of estimated annual operating costs for covered products to which the rule applies.”

In any case, FTC has failed to follow even the five-year schedule it has set for itself. It is now six years since FTC last published ranges, and FTC is only now just proposing to update average energy cost and range figures, and only for some products at that. In order to coincide with new DOE test procedures, FTC proposes to wait at least seven years between updates for refrigerators, clothes washers and furnaces. 78 Fed. Reg. 1780/1. Furthermore, FTC fails to explain why a new test procedure can justify delaying a range update but not accelerating one.

FTC’s stated concern about “inconsistent cost and range information ... leading to consumer confusion and lack of confidence in the label” rings hollow. *See* 78 Fed. Reg. 1781/1. Cost and labeling information that is now six years old and counting is far more likely to lead to “consumer confusion and lack of confidence.” *Id.* The statute itself limits contemplated annual updates to the ranges. 42 U.S.C. § 6296(c). In any case, consistency does not justify waiting five or more years to update range information.

It further strains credulity to think that a temporary marginal increase in differences between ranges resulting from more frequent updates would undermine the label’s usefulness when the labels for refrigerator-freezers alone use 41 different ranges, with more on the way. Such a wide array of ranges for very similar products belies FTC’s claim that “the need for consistent label information is paramount.” *See* 78 Fed. Reg. 1781/1.

To the extent this concern is legitimate, FTC has already designed a way to address it. While more frequent label updates might lead to differences in range and cost information between labels, the transitional labels FTC has proposed for clothes washers and refrigerators will also create differences in the way estimated annual energy consumption figures are calculated, making them unsuitable for comparison to current labels. The proposed design for the transitional labels includes yellow text framed by black boxes and contains a statement explaining the distinction between labels with that design and labels with black text on a yellow background. Similar design requirements could easily be used to clarify differences between labels with updated ranges and those without, should FTC determine it is necessary.²

If FTC refuses to establish a more frequent schedule for updating ranges, FTC should at least (1) provide the year in which range information was collected so that consumers will know how old it is, and (2) use a dotted line or other mechanism to extend the low (efficient) end of

² FTC does not suggest more frequent updates would increase burdens on manufacturers, nor does the statute authorize FTC to consider that as a factor. However, the transitional approach could also help alleviate any potential increase in burdens on manufacturers.

the range while still marking the most efficient model available at the time was range was published. Although these alternatives would not fully correct the illegality and arbitrariness of delayed updating, they would render the labels less misleading.

5. Refrigerator labels must compare models with different configurations and features.

As explained in previous comments, FTC's current approach of comparing refrigerator models only to those with the same configurations and features (1) focuses consumer attention on small differences in energy efficiency and operating costs while misleadingly obscuring large differences,³ (2) is arbitrarily and capriciously based on classifications devised for other purposes, rather than on any evidence that labels that use these classifications are "likely to assist consumers with their purchasing decisions," and (3) leads to labels for many models having no comparison information at all.⁴

In order to assist consumers with their purchasing decisions, the label must help consumers compare the energy consumption between models they are considering when making those decisions. See 76 Fed. Reg. 1041/3 ("The Commission agrees that the comparison categories should facilitate consumers' easy comparison of similar products, which reflects how they shop in practice."). And the available data show that many consumers do consider refrigerators with different configurations (and likely different features) when making purchasing decisions:

- Forty percent of the time Consumer Reports subscribers visited the publication's online refrigerator ratings in 2012, those subscribers looked at ratings for multiple refrigerator-freezer configurations. And those who looked only at one configuration likely looked at models both with and without through-the-door ice dispensers, and may have looked at an additional configuration on a subsequent visit.
- According to the Association of Home Appliance Manufacturers, more than half of side-by-side refrigerator-freezer owners buy replacement units with a different configuration. Again, that number is very likely even larger when including owners who bought replacement units with the same configuration but with different features.
- In an e-mail survey of Earthjustice energy efficiency activists, more than two thirds of respondents indicated that a label that compared across subcategories would be more likely to assist them in making their purchasing decision than a label that presented comparison information only for products with the same configuration and features.

AHAM nonetheless asserts that many consumers know which configuration (if not which features) they plan to buy before their ultimate visit to a store or website. This argument

³ As AHAM notes in its comments, the test procedure taking effect in 2014 will include automatic icemaker energy for the first time, making the hidden cost of a through-the-door ice dispenser even larger.

⁴ FTC was unable to identify any models on the market in 2007 for approximately half the 100 refrigerator and freezers subcategories, including the now-common design of bottom-mounted freezers with through-the-door ice dispensers. When new models in those subcategories have entered the market, their labels have contained no comparison information at all.

finds no support in the data. It also misses the point. Even if some consumers do limit themselves to a certain subcategory of products beforehand, the relevant question is whether they would still do so after *they examine an Energy Guide label that shows differences between subcategories*. AHAM's protestations about some products being put "in an unfavorable light" indicate it believes the answer is no. In other words, some consumers who are not already considering models with different configurations or features may decide to do so after seeing the impact those configurations and features have on energy use. AHAM's other complaint, that a consolidated range would represent a "drastic" change of "significant ... complexity," neglects that manufacturers will already have to change their refrigerator labels when FTC publishes updated ranges. Whether or not those updated ranges are consolidated should have no effect on the number of changes manufacturers have to make to their labels or the number of different labels they will have to print going forward.

A footnote in the proposed rule suggests consumers might be confused if a label carries the ENERGY STAR logo while a consolidated range shows that other products use less energy. *See* 78 Fed. Reg. 1785 n.38. The mere fact that ENERGY STAR labels refrigerators in a way that obscures the impacts of configurations and features does not justify the practice. In any case, if FTC's concern turns out to be valid, the label still can and should include information that compares energy costs across configurations and features.⁵ The new fuel economy labels for cars and trucks use a version of this approach. Each label discloses, among other things, the fuel economy of the particular vehicle model, the fuel economy of the most efficient new vehicle models, the range of fuel economies of new models in the same class, and a comparison to the average new model.⁶

For all of these reasons, FTC should consolidate the comparison ranges for refrigerators when it publishes updated ranges in 2014.

⁵ To prevent any potential confusion, FTC could add language to the label clarifying the difference between the information conveyed by the ENERGY STAR logo and the information conveyed by the consolidated range. For example, the caption beneath the range could change from "Cost range of similar models" to "Cost range of all models with similar capacity." The information currently found in the top left of the label could instead accompany the ENERGY STAR logo. For example, "[C]ompared to other models with automatic defrost, side-mounted freezers and through-the-door icemakers."

⁶ As pointed out in prior comments, EPA and the National Highway Traffic Safety Administration decided on this approach after finding that some consumers consider purchasing vehicles from more than one class before making their purchasing decisions. *See* Environmental Protection Agency, "Fuel Economy Label: Pre-Focus Groups Online Survey Report," Aug. 2010, p. 5, available at <http://www.epa.gov/fueleconomy/label/420r10907.pdf> (detailing results of internet survey in which more than 60 percent of respondents reported considering more than one vehicle type in making purchasing decisions). And as the available data shows, it is irrational for FTC to assume that consumers are more particular about refrigerator configurations and features than they are about cars.

6. FTC should allow for transitional labels for refrigerators and clothes washers.

Commenters support the general approach put forward in the NOPR.

7. FTC must establish a labeling rule for clothes dryers.

Commenters additionally call on FTC to establish a labeling rule applicable to clothes dryers. All three requirements for a labeling rule are clearly present with respect to clothes dryers. The Department of Energy has already prescribed a test procedure for clothes dryers. Labeling clothes dryers is just as economically and technically feasible as labeling other white goods, such as clothes washers, dishwashers and refrigerators. And labels for clothes dryers will assist consumers in making purchasing decisions in several ways.

Labels will assist consumers through disclosure of the absolute energy use of clothes dryers. Clothes dryers use significantly more energy than do the majority of products in the labeling program, and use roughly two to three times what clothes washers (often displayed and sold as matching units) use. Yet washers have labels while dryers do not, giving the misimpression that dryer energy use is less significant. A dryer label would benefit consumers simply by making clear to them that dryer energy use is significant. This information may lead some consumers to forgo or delay purchasing a dryer (or washer and dryer) and instead hang their clothes or use a laundromat, to choose a less expensive unit so as to be able to afford the energy costs, or to look for ways to use the dryer they purchase more efficiently.

In addition, labels will assist consumers through disclosure of comparative energy use information among various models of clothes dryers. Disclosure of the significant differences in operating costs between gas and electric dryers would be useful to consumers with a gas connection available. The differences between models with the same heat source are smaller but still real, which is more than can be said of many subcategories of refrigerators. And two developments are likely to increase those differences. First, proposed amendments to the DOE test procedure for clothes dryers reveal a greater range of energy use in the clothes dryer models on the market than was previously thought. *See* 78 Fed. Reg. 152. Those test procedures should become final by the end of this year, and mandatory by January 1, 2015. Second, ENERGY STAR predicts imminent U.S. adoption of heat-pump dryer models, which use approximately one-third less energy than standard electric models. ENERGY STAR, "What about clothes dryers," available at http://www.energystar.gov/index.cfm?c=clotheswash.pr_clothes_dryers, last visited March 1, 2013; *see also* ENERGY STAR Market & Industry Scoping Report, Residential Clothes Dryers (Nov. 2011), available at http://www.energystar.gov/ia/products/downloads/ENERGY_STAR_Scoping_Report_Residential_Clothes_Dryers.pdf, last visited March 1, 2013. In both absolute and relative terms, it is likely that efficiency differences among clothes dryer models will be significantly greater than efficiency differences among existing subcategories for televisions and refrigerators. Disclosure of this information will help consumers who wish to consider energy use and operating cost in selecting a clothes dryer model.

Because a labeling rule for clothes dryers will be helpful to consumers, FTC needs to establish one now.

Respectfully submitted,

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