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Submitted by E-Mail

Hampton Newsome  
Attorney, Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
Room M-8102B  
600 Pennsylvania Ave., NW  
Washington, DC 20580

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Re: AHAM Supplemental Comments;  
Appliance Labeling Amendments; Matter No. R611004

Dear Mr. Newsome:

The Association of Home Appliance Manufacturers (AHAM) respectfully submits the following comments to the Federal Trade Commission (FTC or Commission) on its Notice of Proposed Rulemaking on Appliance Labeling Amendments, Matter No. R611004, 77 Fed. Reg. 15298 (March 15, 2012). In our comments on this matter dated May 16, 2012, AHAM noted that it would provide the FTC with a more detailed proposal regarding transition labeling for refrigerator/freezers and clothes washers. These comments provide that additional detail and respond to a proposal made by another commenter regarding labeling of refrigerator/freezers. To the extent possible, we respectfully request that the Commission issue guidance to address our proposals for early compliance representations and transitional labeling. Should rulemaking be required to implement any of our proposals, while we recognize that the official comment period has closed, we respectfully request that the FTC exercise its discretion to place these comments on the public record as part of the rulemaking in Matter No. R611004 so that they can be addressed as expeditiously as possible.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances

often represent the most effective choice a consumer can make to reduce home energy use and costs.

## **I. Transition Labeling Refrigerator/Freezers and Clothes Washers**

As we commented on May 16, DOE has recently revised the test procedures for refrigerator/freezers and residential clothes washers as well as the energy efficiency standards for those products. Compliance with the revised test procedures and standards for refrigerator/freezers will be required on September 15, 2014. So long as the pending direct final rule regarding clothes washer standards becomes final, compliance with the clothes washer standards will be required starting on March 7, 2015, and with a second tier for top-loading products on January 1, 2018.

AHAM requested that DOE permit early compliance with the refrigerator/freezer standards and test procedure beginning on January 1, 2014, and with the clothes washer standards and test procedure beginning on June 1, 2014.<sup>1</sup> On June 29, 2012, DOE issued final guidance permitting early compliance with new or amended test procedures and standards. That guidance, which is attached to these comments at Attachment A, states:

DOE does not object to the use of a new or amended test procedure prior to the compliance date to (1) certify compliance with energy conservation standards and (2) make representations of energy efficiency or energy use so long as those representations fairly disclose the results of that testing. *See* 42 U.S.C. § 6293(c)(1). Manufacturers who choose this early adoption path should ensure that their products or equipment satisfy the applicable new or amended standards. (If a new or amended standard has not yet been established, manufacturers should ensure that their products or equipment satisfy the existing standard.) DOE will make available certification templates for products certified using any new or amended test procedure.

DOE did not provide a date on which early compliance can begin and the guidance applies across various product categories, not just to refrigerator/freezers and clothes washers.

AHAM requested in its comments to the FTC dated May 16, 2012, that the Commission also allow for early compliance by allowing for the option of displaying on the EnergyGuide label the rating and estimated yearly operating cost based on the new test procedures. Now that DOE has issued guidance permitting early compliance, it is especially critical that the FTC provide guidance to manufacturers regarding labeling if a manufacturer chooses DOE's early adoption path. In fact, DOE's guidance recognizes the necessity of such guidance: "DOE notes that manufacturers of some covered products must comply with FTC labeling rules . . . which generally require manufacturers to base label disclosures on mandatory test procedures and

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<sup>1</sup> In addition, AHAM requested early compliance with the revised clothes dryer standards and test procedure, which become mandatory on January 1, 2015. Because clothes dryers do not have an EnergyGuide label, we do not address that product in these comments except to state that should manufacturers elect early compliance per DOE's June 29 guidance, annual reports for clothes dryers will reflect that decision per DOE's statement that it will make available certification templates for products certified using any new or amended test procedure.

related provisions in the Code of Federal Regulations. . . . To do otherwise could subject the manufacturer to civil penalties. Manufacturers of labeled products should contact FTC for guidance about label disclosures during these test procedure transitions.”

AHAM requests that the Commission quickly issue clear guidance on early compliance labeling, per AHAM’s below proposal, in order to reduce regulatory uncertainty, avoid consumer confusion, and harmonize with DOE’s guidance. As we have previously stated, early compliance labeling will be important to help minimize consumer confusion as new models are introduced to comply with the new standards. Without an option for early compliance and labeling, manufacturers may need to introduce new models designed to meet the new standards before the mandatory compliance dates and label those products based on the old test procedures, and then, on the compliance dates, they would need to provide new labels based on the new test procedures. This would mean that consumers would see the same units with different energy and cost representations. That is a situation manufacturers wish to avoid to the extent possible. An option for early labeling will also minimize duplicative testing (i.e., testing a newly introduced model under both the old and the new test procedure) and help curtail cumbersome and costly retail floor model changes. Lastly, early compliance provides an incentive for manufacturers to introduce models that meet the more stringent energy standards sooner, saving more energy and helping the environment.

Without the transitional label AHAM proposes below, there will also be consumer confusion during the transition to the new standards and test procedures because, with regard to refrigerator/freezers, if a consumer tries to compare an older, less efficient model to a newer, more efficient model using the labels as they currently exist, the older model could appear (incorrectly) more efficient and less costly to operate because the old test procedure results in less measured energy on average. The test procedure’s impact on measured energy for clothes washers will vary, but the same result could occur. In addition, for models of both products that comply with the current standard and that will also comply with the new standard using the new test procedure, consumers will see different energy use and cost information on the EnergyGuide label for the same units depending on how long it takes for the older models to sell through. (Importantly, in that situation the actual cost to operate the unit for the consumer will not even change, thus compounding the complexity and confusion.)

Thus, as a complement to the early compliance DOE is permitting, AHAM urges the Commission to allow for the option of reporting on the EnergyGuide labels the rating and estimated yearly operating cost that corresponds to the test procedure and standard the manufacturer uses to certify the product to DOE. For example, if a manufacturer were to certify to DOE on February 3, 2013, that a refrigerator/freezer meets the September 2014 standard as measured by the new test procedure, AHAM requests that that manufacturer be permitted to report on the EnergyGuide label the rating and estimated yearly operating cost obtained per the new test procedure.

Specifically, to address potential consumer confusion, as mentioned in our May 16, 2012, comments, AHAM requests that the Commission authorize a transitional label for refrigerator/freezers and clothes washers to aid consumers during the transition time. In order to make it clear to consumers that there is a difference between existing products that meet existing

standards and are measured under the old test procedure and products designed to meet the revised standards and tested under revised test procedures, AHAM proposes that the text for all products that comply with the new standards under the new test procedures (whether they comply early or on/after the compliance date) be printed in blue (cyan) ink on the yellow label and bear the statement: “Compare only to other [refrigerator/freezers or clothes washers] with blue text.” We are requesting that the color blue be specified as cyan in order to match the color of the ENERGY STAR logo and minimize printing costs when that logo is present on the EnergyGuide label.

Because DOE has not tied its early compliance guidance to a starting date, we request that the Commission also not limit permissible early compliance labeling to a start date. If, however, the FTC decides that in order to permit early compliance labeling a limited timeframe is necessary, we request that the FTC permit early compliance labeling no later than January 1, 2014, for refrigerator/freezers and June 1, 2014, for clothes washers. It is unlikely manufacturers would choose early compliance much before these dates anyway because of the time required to design products that comply with the new standards. In addition, manufacturers have a vested interest in limiting the timeframe during which two labels could appear in order to minimize consumer confusion. Accordingly, if the FTC does not provide a start date, the market will likely limit the start date naturally. Thus, we do not believe that the Commission should be concerned that if it does not provide for a specific start date, blue labels will start appearing significantly before the 2014 dates, making the transitional period too long.

Regarding an end date, the transitional “blue” label should remain until the next standards transition. This is the best way to reduce consumer confusion after the transition is complete because once all of the old units sell through (with labels printed in black showing test results under the old test procedure), all units will bear labels printed in “blue” and the statement “compare only to other [refrigerator/freezers or clothes washers] with blue text” will simply result in consumers being able to compare all models to each other.

We also request that the Commission issue guidance stating that it will not require model number changes for older models that also comply with the new standards under the new test procedure.<sup>2</sup> Instead, the Commission should allow this to be noted in DOE certification reports and FTC annual submissions. For example, the reporting template could ask which test procedure is the basis for the certification or could allow the same model number to be listed twice on the report—once with the old test procedure values and once with the new test procedure values. This will minimize consumer confusion and mitigate the burden on manufacturers. In addition, this approach is consistent with DOE’s regulations, which require a model number change only when a manufacturer modifies a noncompliant model. *See* Department of Energy, Guidance, “When does the Department of Energy (“DOE”) require changes to model numbers?” (June 4, 2012) (attached as Attachment B). We understand that the Commission may be concerned that this would cause confusion for consumers who purchase a product online and get a product with

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<sup>2</sup> This request does not apply to a situation in which a manufacturer modifies an existing model that would not otherwise meet the amended standards in such a way as to make that model more efficient and meet the new standards. In that case, we expect that manufacturers would change the model number on the now-compliant model in order to avoid consumer confusion.

a different label delivered to their home. But prescribing model number changes will not resolve that concern because retailers and manufacturers are unlikely to show two separate listings for the same product even if the model numbers differ. Similarly, if the same product with different model numbers is available, there is no assurance that a consumer who orders model “A” (old) will not have model “B” (model A tested under the new test procedure) delivered to their home because manufacturers and retailers would likely view them as identical. And, to the extent there would be consumer confusion, under AHAM’s proposal, consumers would have access to certification data to determine why there is a perceived difference.

## **II. Revision of Ranges of Comparability**

Every five years the Commission revises the ranges of estimated annual operating costs for covered products. This year, the FTC is scheduled to revise the ranges of comparability for refrigerator/freezers. That change would also mean that DOE’s revised representative average unit costs of energy would need to be incorporated on the EnergyGuide label.<sup>3</sup> In order to reduce the already numerous, complex, and burdensome regulatory requirements on refrigerator/freezer manufacturers (as outlined more fully below in Section III), AHAM believes that the best approach would be for the Commission to wait to revise that range until the transitional label AHAM proposes in Section I is implemented. Because data on which to determine the range of comparability will not yet be available for refrigerator/freezers that comply with the 2014 standards, AHAM proposes that the FTC set a generic range rather than base the range on data manufacturers submit in the annual report. Determining what the upper and lower bounds should be will require consultation with individual manufacturers and input through notice and comment rulemaking.

## **III. The Commission Should not Collapse Refrigerator/Freezer Product Classes.**

Joint comments from ACEEE, NRDC, EarthJustice, Consumers Union and others (the Joint Commenters) argued that the Commission should “reduce the number of comparison ranges for refrigerators and refrigerator-freezers to include all products within a particular range of volumes.” AHAM strongly opposes that proposed approach. It would have the effect of putting larger and certain more fully featured products in an unfavorable light as compared to less fully featured products. We believe the Commission would agree that social engineering is not the role of government. Nor should the government give preferential treatment for some product models and features over others. Simply put, the Commission should not attempt to influence what size of refrigerator/freezer a consumer purchases, whether the product has through-the-door ice, or where the freezer is located on a refrigerator-freezer. Instead, the Commission should focus on providing the consumer with a fair comparison of a product’s energy costs as compared to products with similar energy and design and utility characteristics. Consumers who wish to compare energy costs between classes and sizes can easily do so with the annual energy costs and the current format of the label.

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<sup>3</sup> See Energy Conservation Program for Consumer Products: Representative Average Unit Costs of Energy, 77 Fed. Reg. 24940 (April 26, 2012).

Years of DOE analysis for appliance efficiency standards have determined what those similar energy characteristics are—DOE’s lengthy, thorough, and long-existing rulemaking process for appliance efficiency standards has established separate product classes and standards for refrigerator/freezers for good reasons. And DOE’s test procedures and regulations are the foundation for the EnergyGuide label. Thus, the Commission should not adopt a labeling approach that would vary from DOE’s approach to regulating refrigerator/freezers. To do so ignores the extensive analysis that DOE has done to formulate standards for those products which includes a careful balancing of energy savings, consumer choice, product functionality, and manufacturer burden per the National Appliance Energy Conservation Act of 1987 (NAECA).

Furthermore, the Joint Commenters’ proposal is not consistent with the Commission’s statutory mandate, which is to prescribe labeling requirements for covered products when the Commission determines that those labels will assist purchasers in making purchasing decisions where DOE has prescribed test procedures and labeling is economically and technologically feasible. *See* 42 U.S.C. § 6294(a)(3). Currently, the EnergyGuide label provides information to consumers within certain product subcategories consistent with DOE product classes. This helps consumers who want to purchase a specific type of refrigerator/freezer compare annual operating cost and energy usage across other similar models. The current product class approach is consistent with marketplace and consumer purchase drivers, and is therefore the best way to “assist purchasers in making purchasing decisions.” The Joint Commenters stated that they are not aware of data suggesting that consumers arrive at a store or website having made up their minds as to the product configuration they wish to purchase. They also state that the Commission has never shown that consumers generally decide in advance whether or not they want through-the-door ice service. AHAM does not have data that speaks exactly to these points; however, as AHAM previously commented, 66% of consumers who purchased an appliance in the past 12 months researched their purchase before going to the store or purchasing it on a website, and 72% say they will do some form of research before their next major appliance purchase.<sup>4</sup> Furthermore, AHAM data (from a separate study) show that 46% of side by side refrigerator-freezer owners and 85% of top mount refrigerator-freezer owners replaced their units with the same configuration. More consumer research would need to be done to know definitively if consumers arrive at the store or website knowing which configuration they plan to purchase or whether or not they want through-the-door ice. But, in the interim, it could be inferred from AHAM’s existing data that many consumers do arrive at the store or website knowing which configuration they plan to buy given that the majority of consumers are doing research before making a purchase and a high percentage are replacing units with the same type of configuration they previously owned.

The Joint Commenters’ proposal also would add significant and unnecessary complexity to an already complex regulatory agenda for refrigerator/freezers. As AHAM explained in our previous comments, the magnitude of the change to the standards and test procedures in 2014 for refrigerator/freezers is the largest since energy labeling began. The refrigerator test procedure will increase measured energy by approximately 14% (though this varies across product classes, manufacturers, and even individual models). It will include a constant adder to account for

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<sup>4</sup> Bellomy Research Inc. April 2012 for AHAM.

icemaker energy (84 kWh/year) as well as changes in the way adjusted volume is measured. The stringency of the standards has also been significantly increased. And the FTC likely will be changing the cost figures for the label based on its review schedule. In addition, the ENERGY STAR qualification criteria are set to increase in stringency in 2013, and almost certainly again in 2014 when the standards levels change, adding further complexity. Add to that, yet another upcoming change to the test procedure (and standard) to measure ice maker energy use (as opposed to accounting for that energy through a constant adder). And under the Environmental Protection Agency's mandatory greenhouse gas reporting rule, beginning in Fall 2012, importers and exporters of fluorinated greenhouse gases contained in pre-charged equipment or closed-cell foams must report the quantity of each fluorinated greenhouse gases imported or exported. Such reporting also requires extensive data collection. Accordingly, this is not the time for a drastic and unwarranted change to the EnergyGuide label.

AHAM appreciates the opportunity to submit these supplemental comments on the FTC's Notice of Proposed Rulemaking on Appliance Labeling Amendments, and we would be glad to further discuss this matter should you request. We respectfully request that the FTC place these comments on the public record and address them in the current rulemaking as time is of the essence regarding AHAM's proposal for early compliance labeling.

Respectfully Submitted,



Jennifer Cleary  
Director, Regulatory Affairs

## **ATTACHMENT A**



This final document represents the definitive view of the agency on the questions addressed and may be relied upon by the regulated industry and members of the public.

This and other guidance documents are accessible on the U.S. Department of Energy, Energy Efficiency & Renewable Energy web site at: <http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1>.

**Guidance Type:** Certification and CCMS, Test Procedures, Conservation Standards

**Category:** All

**Product:** All

**Product Sub-type:** All

**Guidance Version:** FINAL

**Issued:** June 29, 2012

**Q: Should an amended test procedure be used to rate and certify products prior to the compliance date?**

**A: In response to numerous inquiries the Department of Energy (DOE)** is issuing this guidance to make clear that, while manufacturers need not comply with a new or amended test procedure prior to the compliance date established when that test procedure is issued, manufacturers may, as described in this guidance, voluntarily use newly amended test procedures to rate and certify their products prior to the compliance date requiring the use of that amended test procedure.

Compliance with the energy conservation standards must be based on the test procedure that DOE has prescribed pursuant to 42 U.S.C. § 6293. *See* 42 U.S.C. § 6295(s). In addition, under 42 U.S.C. §§ 6293(c) and 6314(d), a manufacturer may not make written representations or broadcast advertisements regarding the energy use or efficiency of a regulated product unless that product has been tested using the DOE test procedure and the results of that testing are fairly disclosed by those representations or advertisements. Once DOE promulgates a new or amended test procedure, manufacturers must use the new or amended procedure to certify compliance by no later than the date specified in the test procedure final rule notice. Manufacturers must use the new or amended test procedure for representations as set forth in 42 U.S.C. §§ 6293 and 6314.

Typically, when DOE amends an existing test procedure or develops a new test procedure and finds that the measured energy consumption or energy efficiency ratings would be altered, DOE also conducts an energy conservation standards rulemaking and specifies that use of the new or amended test procedure is required for certification on the compliance date of any final standards. For a variety of reasons, a lag time may exist between when an amended test procedure is adopted and the compliance date. During this interim period, manufacturers may wish to gain additional experience with the new or amended test procedure or voluntarily use it prior to the compliance date on which they are required to do so.

DOE does not object to the use of a new or amended test procedure prior to the compliance date to (1) certify compliance with energy conservation standards and (2) make representations of energy efficiency or energy use so long as those representations fairly disclose the results of that testing. *See*

42 U.S.C. § 6293(c)(1).<sup>1</sup> Manufacturers who choose this early adoption path should ensure that their products or equipment satisfy the applicable new or amended standards. (If a new or amended standard has not yet been established, manufacturers should ensure that their products or equipment satisfy the existing standard.) DOE will make available certification templates for products certified using any new or amended test procedure.

DOE notes that many basic models incorporating new features or designs may benefit from the use of the new or amended test procedure, as amended test procedures often address new technologies. In some instances, a manufacturer may not wish to use the new or amended test procedure until its use is required, but the existing test procedure may not adequately address the new technology. For example, a current test procedure may require certain changes in order for a manufacturer to apply it to a product but the manufacturer may prefer not to apply the new (and not yet required) procedure, even though the product could be readily tested under that new procedure. In that situation, a manufacturer should seek a waiver pursuant to 10 CFR 430.27 or 10 CFR 431.401, as appropriate to obtain permission to use an alternate test procedure.

DOE notes that manufacturers of some covered products must comply with FTC labeling rules (16 CFR Part 305), which generally require manufacturers to base label disclosures on mandatory test procedures and related provisions in the Code of Federal Regulations. *See, e.g.* 10 CFR Part 430, Appendices A through Z. To do otherwise could subject the manufacturer to civil penalties. Manufacturers of labeled products should contact the FTC for guidance about label disclosures during these test procedure transitions.

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<sup>1</sup> Manufacturers are required pursuant to 42 U.S.C. 6293(c)(2) to use the new or amended test procedure to make representations 180 days after it is prescribed or established. Use of the new or amended test procedure for certification would reduce testing burden by allowing manufacturers to test each new basic model using only the new or amended procedure.

## **ATTACHMENT B**

This final document represents the definitive view of the agency on the questions addressed and may be relied upon by the regulated industry and members of the public.

This and other guidance documents are accessible on the U.S. Department of Energy, Energy Efficiency & Renewable Energy web site at: <http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1>.

**Guidance Type:** Certification and CCMS, Enforcement

**Category:** All

**Product:** All

**Guidance Version:** FINAL

**Issued:** June 4, 2012

**Q: When does the Department of Energy (“DOE”) require changes to model numbers?**

**Modifying a Noncompliant Basic Model**

A: When a manufacturer modifies a noncompliant basic model, it must assign a new model number to the basic model and all models within the basic model. See 10 C.F.R. § 429.114(d). The following examples demonstrate two possible scenarios in which a manufacturer would be required to change model numbers.

Scenario 1

*A manufacturer manufactures models ABC-1, ABC-2, and ABC-3, which are part of basic model ABC. After DOE determines that basic model ABC is noncompliant, the manufacturer makes physical changes to each model within the basic model. Basic model ABC is then compliant.*

Q: Has the manufacturer modified the basic model?

A: Yes. Making physical changes to each model within a basic model constitutes “modification” of the basic model.

Q: What model numbers must the manufacturer change?

A: The manufacturer must change the model numbers “ABC,” “ABC-1,” “ABC-2,” and “ABC-3.”

Scenario 2

*A foreign original equipment manufacturer (“OEM”) manufactures models ABC-1, ABC-2, and ABC-3, which are part of basic model ABC. A private labeler imports, privately labels, and sells these models as “123-A,” “123-B,” and “123-C,” and assigns the basic model the number “123.” After DOE determines that basic models ABC and 123 are noncompliant, the private labeler removes all models within basic model 123 from the market and replaces them with entirely different products.*

Q: Has the private labeler/importer modified the basic model?

A: Yes. Replacing models within a basic model with completely different models, even if the new models are from a different OEM, constitutes “modification” of the basic model.

Q: What model numbers must the private labeler change?

A: As in the first scenario, the private labeler must assign a new number to the basic model and all models within the basic model. Failure to do so constitutes a violation of DOE regulations. Furthermore, this practice may also be prohibited by the EPA when it involves a product that is part of the Energy Star program. (See <http://www.energystar.gov/>.) Finally, in certain circumstances, this practice may not be permitted under other federal laws. (See FTC Staff Opinion, Oct. 16, 2006, <http://www.regulations.gov/#!documentDetail;D=EERE-2010-BT-CE-0014-0078> (click pdf icon to view Whirlpool comment and attached opinion).)

### **Replacing a Model**

Q: May a private labeler use the same model number for a new, more efficient model that it decides to sell in place of an old, less efficient model?

A: Yes. If DOE has not determined that the old, less efficient model is noncompliant, DOE’s regulations do not prohibit a private labeler from reassigning an old model number to a new, more efficient model. Other federal laws and programs, however, may prohibit this practice. The following example demonstrates this scenario.

#### Example Scenario

*A foreign OEM manufactures models ABC-1, ABC-2, and ABC-3, which are part of basic model ABC. A private labeler imports, privately labels, and sells these models as models “123-A,” “123-B,” and “123-C,” and assigns the basic model number “123.” Basic models ABC and 123 are never deemed noncompliant, but the private labeler wishes to sell a more efficient product instead. Thus, the private labeler stops importing and private labeling the models within basic model ABC and starts importing an entirely different set of three products from the same OEM, which are part of the OEM’s basic model XYZ. The private labeler wishes to assign these models the model numbers “123-A,” “123-B,” and “123-C” and continuing using the basic model number “123.”*

Q: Will the private labeler be compliant with DOE regulations if it imports, privately labels, and sells models within basic model XYZ under the model numbers “123-A,” “123-B,” and “123-C”?

A: DOE regulations do not prohibit this practice; however, in certain circumstances, it may not be permitted under other federal laws. (See FTC Staff Opinion, Oct. 16, 2006, <http://www.regulations.gov/#!documentDetail;D=EERE-2010-BT-CE-0014-0078> (click pdf icon to view Whirlpool comment and attached opinion).)