

Dissenting Statement of Commissioner Christine S. Wilson
Notice of Proposed Rulemaking for the Energy Labeling Rule

December 22, 2020

Today's Commission action finalizes required changes to the Energy Labeling Rule, but fails to remove prescriptive aspects of the Rule that I believe are unnecessary and that could hinder important aspects of competition. For the reasons described below, I dissent.

The current amendments were proposed in March 2020. At that time, and at my urging, the Commission also sought comment on the more prescriptive aspects of the Rule. I was pleased to receive many interesting and thoughtful comments submitted by stakeholders. For example, industry members explained that changes in the market and consumer behavior indicate that affixed labels with detailed information may have ceased to provide benefits to consumers. Industry members also proposed providing the labeling information online or through QR codes at brick-and-mortar locations. Making this information easier to access in the digital era could foster greater competition among appliance manufacturers and more informed purchasing decisions by consumers.

Rather than act on these comments or proposals, though, the Commission has chosen to finalize only the air conditioning proposals necessary to conform to Department of Energy changes. The Federal Register Notice approved by a majority of the Commission explains that revising other aspects of the labeling obligations imposed by the Rule will require further exploration. I see no reason for the Commission to forego that exploration now. We can both finalize these changes *and* ask stakeholders for additional input on how to improve the rest of the Rule.

¹ See Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018) (expressing my view that the Commission should seek comment on the prescriptive labeling requirements),

https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf. See Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Oct. 22, 2019) (urging the Commission to seek comment on the labeling requirements),

https://www.ftc.gov/system/files/documents/public_statements/1569815/r611004_wilson_statement_energy_labeling.pdf. See Concurring Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Mar. 20, 2020),

<https://www.regulations.gov/document?D=FTC-2020-0033-0009>; Association of Home Appliance Manufacturers (AHAM) Comment (#33-04), available at: <https://www.regulations.gov/document?D=FTC-2020-0033-0004>; Goodman Manufacturing Comment (#33-08), available at: <https://www.regulations.gov/document?D=FTC-2020-0033-0008>.

Id.

The FTC promulgated the Energy Labeling Rule in the 1970s, an era when the agency was engaged in prolific rulemaking. As I have noted previously, no area of commerce was too straightforward or mundane to escape the Commission's notice:

- The Rule on Misbranding and Deception as to Leather Content of Waist Belts prescribed unlawful practices in connection with the sale of belts when not offered for sale as part of a garment. Among other things, the Rule prohibited the sale of belts that looked like leather, but that were made of split, ground, pulverized, or shredded leather or non-leather material, absent disclosures.
- The Guides for Shoe Content Labeling and Advertising required leather, split leather, and concealed insoles "containing . . . non-leather material which are concealed from view, but which also contain other visible parts of leather," to bear a label clearly disclosing the presence of the non-leather innersole.
- The Hosiery Guides established that the term "long staple cotton" used to describe hosiery "is understood to mean cotton fiber which is not less than 1 1/8" in length of staple" and that the term "lisle" represents hosiery "made of yarn composed of two or more ply of combed long staple cotton fiber."

A federal statute mandated that the FTC promulgate the Energy Labeling Rule. The FTC must implement the will of Congress, but it need not adopt a prescriptive approach while doing so. Here, the FTC itself has chosen to specify the trim size dimensions for labels, including the precise width (between 5 1/4" to 5 1/2") and length (between 7 3/8" and 7 5/8"); the number of picas for the copy set (between 27 and 29); the type style (Arial) and setting; the weight of the paper stock on which the labels are printed (not less than 58 pounds per 500 sheets or equivalent); and a suggested minimum peel adhesive capacity of 12 ounces per square inch. I urged the Commission take the opportunity to review these detailed labeling requirements in

⁵ See, e.g., Timothy J. Muris, Paper: Will the FTC's Success Continue?, George Mason Law & Economics No. 18 (Sept. 24, 2018) (discussing the successes and failures of the FTC's enforcement efforts including the aggressive rulemaking activities in the 1970s), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254294; Timothy J. Muris, Rules Without Reason, AEI J. on Gov't and Society (Sept/Oct. 1982) (describing failed FTC rulemaking proceedings), available at: <https://www.cato.org/sites/cato.org/files/serials/files/regulation/1982/9/v6n5-4.pdf>; Teresa Schwartz, Regulating Unfair Practices Under The FTC Act: The Need For a Legal Standard of Unfairness, 11 Akron Law Rev. 1 (1978) (explaining that the judicial reversals of FTC regulations resulted from a failure to establish an adequate legal basis for the regulations), available at: <https://ideaexchange.uakron.edu/akronlawreview/vol11/iss1/1/>.

See Concurring Statement of Commissioner Christine S. Wilson, Amplifier Rule (Dec. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1585038/csw_amplifier_rule_stmt_11192020.pdf.

16 C.F.R. § 405.4, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-misbranding-and-deception-leather-content-waist-belts-16-cfr-part-405/960522traderegulationruleonmisbranding.pdf.

16 C.F.R. § 231.3, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-luggage-and-related-products-industry-guides-shoe-content-labeling-and-advertising-and-guides/950918luggageandrelatedproducts.pdf.

16 C.F.R. § 22.3, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-hosiery-industry-16-cfr-part-22/960202hosieryindustry.pdf.

Energy Policy and Conservation Act, 42 U.S.C. 6295.

See 16 C.F.R. §§ 305.13 and 305.20

2018, and again in 2019, when the Commission sought comment and revised other sections of this Rule.

The Commission last conducted a full review of the Energy Labeling Rule in 2015; under our 10-year regulatory schedule, the next review is scheduled for 2025. However, since 2015, the Commission has sought comment on provisions of this Rule at least three times, including the current proceeding, and has made numerous amendments. This piecemeal approach has clarified the Rule's requirements – and I appreciate FTC staff's efforts to keep this Rule clear and current – but the Commission can and should do more.

Specifically, the Commission should conduct a full review of the Rule to consider removing all dated and prescriptive provisions, and to consider the recent comments suggesting changes. Nothing prevents the Commission from conducting this review now – we do not have to wait until the 10-year anniversary. I urge the Commission to act on these comments, eliminate the more prescriptive aspects of the Rule, and maximize the positive impact of this Rule for consumers. If we are statutorily mandated to maintain this Rule, we should endeavor to make it beneficial for consumers and competition.

¹² Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), [https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf](#).

[Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule \(Oct. 22, 2019\), \[https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf\]\(https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf\).](#)

See 81 Fed. Reg. 62861 (Sept. 12, 2016) (seeking comment on proposed amendments regarding portable air conditioners, ceiling fans, and electric water heaters); 84 Fed. Reg. 9261 (Mar. 14, 2019) (proposing amendments to organize the Rule's product descriptions); 85 Fed. Reg. 20218 (Apr. 10, 2020) (seeking comment on proposed amendments regarding central and portable air conditioners).