

Dissenting Statement of Commissioner Christine S. Wilson
Notice of Amendments to the Energy Labeling Rule
May 24, 2021

Today the Commission announces required changes to the Energy Labeling Rule but makes no other changes to the Rule. Since 2015, the Commission has sought comment on provisions of this Rule at least three times, and has made numerous amendments.¹ 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. For the reasons described below, I dissent.

I have repeatedly urged the Commission² to seek comment on the more prescriptive aspects of this Rule. As I have noted in prior statements, the Rule includes highly prescriptive requirements detailing 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.³ For example, the label example attached to the Rule specifies not only the categories of information to be displayed, but also the precise font and size in which that information is to be printed. For example, the cooling efficiency number must appear in 38 pt Arial Narrow Bold. And while the phrase “US Government” at the top must be printed in 10 pt Arial Narrow, the text next to it that reads “Federal law prohibits removal of this label before consumer purchase” must be printed in 9 pt Arial Narrow. *See* Attachment 1 (Labeling Requirements).

The Energy Labeling Rule exemplifies the era in which it was created. The FTC promulgated the Rule in the 1970s, an era when the agency was engaged in prolific and highly prescriptive rulemaking.⁴ As I have noted previously,⁵ no area of commerce was too straightforward or mundane to escape the Commission’s notice:

¹ *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).

² *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/public-statements/2018/12/dissenting-statement-commissioner-christine-s-wilson-notice-proposed>; *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/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf.

³ *See* 16 C.F.R §§ 305.13 and 305.20

⁴ *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

- The Trade Regulation Rule concerning Deception as to Non-Prismatic and Partially Prismatic Instruments Being Prismatic Binoculars⁶ addressed failures to disclose that “instruments having bulges on the tubes which simulate prismatic instruments are not prismatic instruments or do not contain complete prism systems” and provided detailed definitions of six types of binoculars and field glasses.
- The Trade Regulation Rule concerning Failure to Disclose that Skin Irritation May Result from Washing or Handling Glass Fiber Curtains and Draperies included a Commission conclusion that “the failure to disclose that skin irritation may result from body contact with glass fiber drapery and curtain fabrics, and clothing or other articles which have been washed with such glass fiber products or in containers previously used for washing such products when that container has not been cleansed of glass particles, has the capacity and tendency to mislead and deceive purchasers and prospective purchasers and to divert business from competitors whose products may be washed or handled without the resulting irritation.”⁷
- The Guides for the Ladies’ Handbag Industry addressed the use of the terms “scuffproof,” “scratchproof,” “scuff resistant,” and “scratch resistant,” representations that a product is colored, finished or dyed with aniline dye or otherwise dyed, embossed, grained, processed, finished or stitched in a certain manner; and required disclosures to be made with respect to a product’s composition.⁸

In March 2020, we sought comment on some of the more prescriptive provisions of the Energy Labeling Rule⁹ and received many interesting and thoughtful comments.¹⁰ Rather than act on these comments or proposals, though, the Commission chose to finalize only proposals necessary

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/>.

⁵ 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;

Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), <https://www.ftc.gov/public-statements/2018/12/dissenting-statement-commissioner-christine-s-wilson-notice-proposed>.

⁶ 16 C.F.R. 402, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-concerning-deception-non-prismatic-and-partially-prismatic-instruments-being/950523non-prismatic.pdf.

⁷ 16 C.F.R. 413.3(c), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-deceptive-advertising-and-labeling-size-tablecloths-and-related-products-16/950523advertisingandlabelingasto.pdf.

⁸ 16 C.F.R. 247, 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.

⁹ See Concurring Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Mar. 20, 2020),

https://www.ftc.gov/system/files/documents/public_statements/1569815/r611004_wilson_statement_energy_labeling.pdf.

¹⁰ See, e.g., Air-Conditioning, Heating and Refrigeration Institute (AHRI) Comment (#33-09), available at:

<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>.

to conform to Department of Energy changes.¹¹ Again today, the Commission chooses to make minor changes necessary for conformity but fails to conduct a full review of the Rule to consider removing all dated and prescriptive provisions, and to consider the recent comments suggesting changes.

The Commission last conducted a full review of the Energy Labeling Rule in 2015. Under our 10-year regulatory review schedule, the next review is scheduled for 2025. Nothing, however, prevents the Commission from conducting this review now. I again urge the Commission to act on the comments we received last year, 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.

¹¹ See Dissenting Statement of Commissioner Christine S. Wilson on Notice of Proposed Rulemaking: Energy Label Rule (Dec. 22, 2020), https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf.

Attachment 1

