



May 14, 2010

Federal Trade Commission
Office of the Secretary, Room H-135 (Annex N)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Proposed labeling requirements for televisions and other consumer electronics, 75
Fed. Reg. 11483 (March 11, 2010)

We have the following comments on the above-referenced proposal.

1. Size of proposed television labels: The proposed television label designs are too small for the average consumer to read at distances likely to be encountered in retail stores. Some major retailers display the large TVs (e.g., larger than 32 inches diagonal) in banks stacked two TVs high, with the higher TV well above eye level (and sometimes above head level). Some display TVs stacked high on palettes or boxes, or in locations set back from the aisle, such that small print on the screen or bezel would be very hard to read. Some place the display models behind boxes so they are well-removed from the aisle. An Addendum at the of this letter provides links to photographs (also attached to these comments in pdf form) showing examples of some of the above-described display practices. In such situations, an average consumer will often not be able to read the cost range information on the higher stacked or more distant models if the label is as small as allowed under the proposal. The ability of a consumer to read the cost range information (not just the particular model's annual operating cost) is crucial to assisting the consumer in comparing the relative efficiency of the different models. For all the foregoing reasons, the proposal does not comply with the statutory requirement that the label be displayed in a manner that "is likely to assist consumers in making purchasing decisions." 42 U.S.C. §6294(c)(3). To address this problem, the Commission needs to revise the minimum size and layout requirements for the label by making the slider bar larger and more prominent, akin in size to the slider bar on the EnergyGuide labels for other large appliances such as refrigerators, dishwashers, and washing machines.

2. Labeling of boxes: In addition to requiring the labeling of display models, the rule needs to require EnergyGuide labels on each box containing a television because such labeling is likely to assist consumers in making purchasing decisions. The rule must further require retailers to display boxes with the EnergyGuide label facing outward. Retail stores can display televisions packed in their factory sealed boxes, rather than, or in addition to unpacked floor models. Links to photos of boxes as displayed in stores are provided in the Addendum and corresponding pdf attachments. The consumer viewing a boxed product without having seen a properly labeled floor model will therefore have no range of cost information on the energy efficiency of the product. A 2007 GAO report cited a growing number of warehouse retailers that sell appliances still in the manufacturer's shipping boxes (with the EnergyGuide labels not visible) as opposed to displaying unboxed appliances in a showroom, and found that this trend could prevent the EnergyGuide label from being easily accessible. United States Government Accountability Office, *Energy Efficiency – Opportunities Exist for Federal Agencies to Better*

Inform Household Consumers, GAO-07-1162, September 2007, at 6 (“GAO Report”). The GAO report also found many instances when unboxed appliances lacked any EnergyGuide label at all, or had labels that were not visible or easily accessible. *Id.* (As shown in some of the photos cited in the Addendum, the boxes are sometimes closer to and more accessible to the customer than the display models.) Requiring the box to be labeled is essential to ensure that consumers have the requisite efficiency information in such situations. And even where the consumer has access to a properly labeled floor model, requiring the box to be labeled will assist the consumer in verifying that the product he or she receives does in fact have the same labeled efficiency as the display model viewed.

Some parties have suggested that a requirement for labeling of boxes would be onerous because of the allegedly long lead time involved in printing the boxes. The claim is implausible, as it would suggest that the lead time for printing the boxes is longer than the time required to design, test, and manufacture the particular TV model to be shipped in the box. Manufacturers already print the ENERGY STAR label on TV boxes, so there is enough lead time to determine the efficiency of a given model and appropriately label the box. See photos cited in Addendum. Even if there were a problem with lead time in printing boxes, there is no apparent reason that a manufacturer could not stick an adhesive EnergyGuide label on the box at the time the product is packaged for shipment.

3. Retailers must have compliance obligations: The proposed rule lacks adequate provisions to hold retailers accountable for ensuring that the products they display and sell are properly labeled. A GAO inspection of appliances in retail showrooms found that 26% lacked required EnergyGuide labels, and another 24% of labels were no longer affixed in a prominent and easily accessible location. GAO Report at 6. Thus, fully half of the products viewed in retail stores were not properly labeled. According to the report, FTC staff told GAO that they lacked specific statutory authority to ensure that retailers display the EnergyGuide in showrooms. The report states that according to these staff, the current statute does not require retailers to ensure the EnergyGuide label is available to consumers in showrooms; it only prohibits them from removing it, a violation that is difficult to prove. *Id.*

To the extent FTC staff take the position that FTC lacks authority to hold retailers responsible for compliance with labeling requirements, that position is in error. The statute not only allows FTC to impose responsibility on retailers, but requires FTC to do so. Failure to require retailers to ensure compliance with labeling requirement violates an express statutory mandate that each FTC labeling rule “shall require that each covered product in the type or class of covered products to which the rule applies **bear a label** which discloses” the information of the sort provided on an EnergyGuide label. 42 U.S.C. § 6294(c)(1) (emphasis added). It also violates statutory requirements that FTC rules specify “directions for displaying [the] label” and require “that the label **be displayed** in a manner that the Commission determines is likely to assist consumers in making purchasing decisions...” *Id.* § 6294(c)(3). These provisions direct FTC to adopt rules requiring each product to bear a label and requiring actual display of the label in a manner likely to assist consumers -- without limitation as to where the products are in the sales process. See also 42 U.S.C. §6294(a)(1) (FTC “shall prescribe labeling rules....applicable to all covered products” of various types, including televisions). FTC cannot satisfy these

mandates without requiring that covered products bear the required labels when they are in retail stores. A regulatory approach that does not require products to be adequately labeled at the very point they are viewed by consumers plainly does not satisfy the above-cited statutory mandates, or the directive that FTC’s rules require the label to “be displayed in a manner that is likely to assist consumers in making purchasing decisions.”

The notion that FTC lacks authority to hold retailers accountable for label compliance is wholly unfounded. The above-cited statutory mandates require the labeling of products and the display of such labels, without limiting responsibility to manufacturers. See also 42 U.S.C. §6294(a)(2)(I) (authorizing the Commission to, by regulation, “prescribe labeling or other disclosure requirements” for televisions and other listed consumer electronic products – authority that is not limited to setting requirements for manufacturers); id § 6294(a)(2)(I)(iii)(stating that such rules “may include specific requirements for each electronic product to be labeled” – without limiting the applicability of such requirements to manufacturers). Moreover, the statute expressly authorizes FTC to seek injunctive relief “to restrain . . .any person from distributing in commerce any covered product which does not comply with an applicable rule under section 6294.” This authority plainly extends to injunctive relief against retailers. See 42 U.S.C. §62291(16)(“‘distribute in commerce’ and ‘distribution in commerce’ mean to sell in commerce . . .or to hold for sale or distribution after introduction into commerce.”).

Failure of FTC’s rules to require retailers to ensure that each product they sell bears a properly displayed label would also be arbitrary and capricious. FTC cannot rationally find its rules require labels to be displayed “in a manner . . . likely to assist consumers in making purchasing decisions” when those rules in fact allow the person selling the product to the consumer to display no label at all, or a label that is illegible or located where it cannot be viewed by the consumer. The GAO report’s finding that fully half of the products viewed in retail stores lacked adequate labels shows that such a result is not merely possible, but likely. A regulatory approach that results in half of the covered products being inadequately labeled at the very point they are first viewed by consumers plainly cannot rationally be found to be “likely to assist consumers in making purchasing decisions.” It is not sufficient to simply require manufacturers to attach labels more securely. In its visits to retail stores, GAO found products in stores that were missing even adhesive labels. Moreover, even a legible and properly affixed label is of no use to the consumer if it is obscured behind shelving or other objects in the retail store.

Of course, manufacturers must remain liable for ensuring that they properly label each television, including affixing each label in a secure manner. The retailer responsibilities outlined above must be in addition to, and not in lieu of, manufacturer responsibilities.

4. Catalog Disclosures: We strongly support requiring catalog (including website)¹ sellers to post energy efficiency information for each television product. Such posting is required by 42 U.S.C. § 6296(a). However, the proposed requirement for catalog information on televisions is not consistent with the statutory requirements for efficiency labeling of the

¹ FTC has defined “catalog” as “printed material, including material disseminated over the Internet...” 16 C.F.R. §305.2(h).

products themselves. Pursuant to 42 U.S.C. § 6294(c), FTC rules must require the label for a covered product to disclose **both** the estimated annual operating cost (or, in some circumstances a different useful measure of energy consumption), **and** information respecting the range of estimated annual operating costs of covered products to which the rule applies. The proposed EnergyGuide label would provide both kinds of information, allowing consumers to compare the operating cost of the model displayed with that of other models. The proposed catalog rule, however, allows catalogs to dispense with the EnergyGuide label entirely and instead provide only the estimated annual operating cost of the specific television set being advertised. 75 Fed. Reg. at 11496. Such an approach makes it impossible for the consumer to compare the efficiency of the model being viewed with that of other models without visiting multiple web pages (and probably multiple web sites), copying down the annual operating cost of each model viewed, and then trying to reconstruct the range of operating costs achieved by the different models.

There is no lawful or rational basis for requiring consumers to go through such a laborious process simply to obtain the same information required to be provided on the label for in-store products under 42 U.S.C. §6294(c). Pursuant to 42 U.S.C. § 6296(a), a catalog “shall contain all information required to be displayed on the label” mandated under §6294, “except as otherwise provided by rule of the Commission.” Here, FTC has provided no lawful or rational basis, and none exists, for allowing catalogs to contain less information than must be displayed on the EnergyGuide label. In a prior rulemaking governing other products, FTC justified such an approach on various grounds, none of which has a lawful or reasoned basis. 72 Fed. Reg. 49948, 49961 (2007). FTC first asserted that catalog shoppers “are likely to see information for a much larger number of models than consumers in a showroom,” and thus “do not have the same need for comparability ranges.” FTC provided no factual basis for these claims, which are both irrelevant and unfounded. The statute requires labeling in a manner “likely to assist consumers in making purchasing decisions,” and FTC has concluded that the information on the EnergyGuide label meets that test. There is no basis for asserting that the EnergyGuide label is somehow unlikely to assist consumers shopping on web sites, and indeed FTC makes no such claim.

Even assuming for the sake of argument that catalog shoppers are likely to see information on more models than consumers in showrooms, and that they do not have the same need for comparability ranges, the fact remains that the EnergyGuide label information is likely to assist them in making purchasing decisions. Moreover, the suggestion that the number of models that can be viewed in a given forum is somehow relevant to determining the amount of labeling information that is helpful is truly off base. FTC has not suggested that EnergyGuide labeling requirements for products sold in stores be variable based on the number of models displayed in the store, nor could it rationally do so. Aside from the irrelevance of this rationale, there is no factual basis for finding that catalog shoppers will be able to view and compare operating cost information on a large enough number of models to provide them the same comparability information as is provided on the EnergyGuide label. Indeed, it would be virtually impossible for an on-line consumer to do so, given the hundreds of television sets on the market. Nor is it rational to expect that the average consumer will have the time to surf through scores of web pages, copy down operating cost information on each model and then assemble a comparative table. See, e.g.,

http://www.bestbuy.com/site/olstemplatemapper.jsp?id=abcat0101000&type=category&qp=croo tcategoryid%23%23-1%23%23-1~~q70726f63657373696e6774696d653a3e313930302d30312d3031~~cabcat0100000%23%230%23%23wv~~cabcat0101000%23%230%23%236e~~f862%7C%7C*&sp=-bestsellingsort+skuid (indicating more than 200 television models on web site);
http://www.sears.com/shc/s/c_10153_12605_Computers+%26+Electronics_Televisions#viewItems=96&pageNum=1&sortOption=ORIGINAL_SORT_ORDER&&filter=Category|Flat+Panel&lastFilter=Category (indicating more than 800 flat panel models).

FTC further asserted that because the range information in paper catalogs cannot always be presented in the same form as they appear on the label, the display of range information in a catalog may cause confusion or fail to provide significant benefit. This rationale does not even purport to apply to web-based catalogs, and in any event is without factual support. Web sites can and do display EnergyGuide labels for individual products, so the practice is obviously feasible, as any label that can be reproduced in electronic form can necessarily be printed on paper as well. FTC asserted that the burdens of producing the EnergyGuide label in catalogs “can be significant”, but the Commission cited no factual basis for this claim, which is unsupported on its face. Manufacturers must supply the EnergyGuide label with each product, so the retailer need only duplicate that label for its catalog, a step that should not be inherently more difficult than producing images of the product itself, or other labels such as Energy Star.

The catalog rule also needs to be clarified to expressly state that the EnergyGuide label must appear on each page displaying the covered product, and adjacent to the first image of the product. The proposed rule states that catalog advertisers shall “include in such catalog” either the EnergyGuide label or estimated operating cost. 75 Fed. Reg. at 11496. Some catalog sellers might argue that they can comply with this language as long as they provide the required label information somewhere in their catalog or web site, even if not on the same page where the covered product is displayed (or even if not anywhere close thereto). This problem could be particularly acute on web sites, where a “catalog” can include scores of pages accessible only through links in fine print that the average consumer will not ordinarily see and would have difficulty finding even with a diligent search. A label or other energy efficiency information not readily viewable while reading the page advertising the product itself is not likely to assist the consumer in making purchasing decisions as required by the statute. To comply with the statute and avoid circumvention attempts, the rule needs to be changed to expressly mandate that the required EnergyGuide label must appear adjacent to the product image on each page displaying the covered product. FTC has mandated a similar “each page” requirement for other energy-related information. E.g., 16 C.F.R. §305.20(a)(1), (2), (c)(1)(i), (ii).

In the past, FTC has indicated that on web sites, the labeling requirement can be met by simply providing a hyperlink to an EnergyGuide label image generated by the manufacturer. Such an approach does not provide the requisite assistance to the consumer because the label information is not displayed in a location that is readily visible when viewing the product advertisement. The problem is exacerbated where, as is often the case, the hyperlink is shown merely as an EnergyGuide logo or a non-descriptive “more information” link without any accompanying information indicating what the logo or link signifies or any instructions to click

on the logo for energy efficiency information on the product.² Web pages that advertise televisions typically contain substantial amounts of information and graphical displays (including such peripheral matters as links to other products and chat rooms), so sellers cannot seriously claim they are incapable of including the actual image of the EnergyGuide label on the same page as the product being advertised. See, e.g.,

http://www.sears.com/shc/s/p_10153_12605_05775530000P?vName=Computers+%26+Electronics&cName=Televisions&sName=View+All&filter=Type%7CPlasma

5. Test Methods: FTC is justified in proposing to require manufacturers to use the IEC test procedures as adopted by the ENERGY STAR program, rather than waiting for a test method to be set by the Department of Energy. The statute authorizes FTC to prescribe labeling based on adequate non-DOE test procedures if FTC determines that labeling or other disclosures relating to the products are likely to assist consumers in making purchasing decisions. 42 U.S.C. §6294(a)(2)(I)(ii). As noted in the preamble to the proposed rule, both manufacturers and efficiency advocates view the ENERGY STAR test procedures to be adequate, and FTC also properly proposes to find that the results of such testing are likely to assist consumers in making purchasing decisions. There is no reasoned basis for delaying labeling requirements until a test method is set by DOE, given that ENERGY STAR test procedures are adequate, and given that labeling based on such testing would plainly assist consumers. There is no firm schedule for development of test procedures by DOE, so deferral of labeling to await DOE procedures would only undermine the statutory aim of assisting consumers in making purchasing decisions.

6. Effective Date: FTC appropriately proposes to make the labeling requirements for consumer electronics effective six months after promulgation. That approach is consistent with the statute, 42 U.S.C. 6294(a)(2)(I)(iii), and with EPCA's mandate that manufacturers test and re-label their products at least 180 days after DOE changes an applicable test procedure. 42 U.S.C. 6293(c). A six-month effective date also more effectively promotes the statute's purpose of assisting consumers than would a more protracted schedule.

7. Other consumer electronic products: FTC should proceed forthwith to adopt energy efficiency labeling requirements for other consumer electronic products, as authorized by EISA. The Commission should start with computers and computer monitors. Computers and monitors use significant amounts of energy, and there are ranges of energy use among different models. 47 Fed. Reg. at 11490. ENERGY STAR test methods are available for both computers

² See, for example, the web posting at the following link: <http://www.bestbuy.com/site/LG++SteamDishwasher+24%22+Tall+Tub+Built-In+Dishwasher++White/9728277.p?id=1218161509640&skuId=9728277>. To access the EnergyGuide label for the product, the consumer has to click on the small link labeled "More Images," which then takes the viewer to a larger image of the product with a very small "Energy Guide" link in the top left corner of the screen, and no further indication of what information that link will provide. Needless to say, a link entitled "More Images" hardly alerts the viewer that the link will provide access to energy efficiency information, nor is the bare "Energy Guide" link informative to the consumer unschooled in the jargon of FTC's rules. Other similar examples appear on the same web site. See, e.g., <http://www.bestbuy.com/site/GE++25.1+Cu.+Ft.+Side-by-Side+Refrigerator+with+Thru-the-Door+Ice+and+Water++CleanSteel/8806624.p?id=1206142173126&skuId=8806624>.

and monitors, and the results of these tests will assist consumers in making purchasing decision by facilitating their comparison of energy usage in different models. FTC should then move promptly to set labeling requirements for cable/satellite set tops boxes, which depending on features and efficiency can consume 100 to 300 kWh/yr. ENERGY STAR test methods are available for these products as well. Contrary to claims by CEA, efficiency information on these products would assist consumers even when they are leasing the boxes as part of a cable or satellite subscription service. The labeling rule could require service providers to prominently display and disclose EnergyGuide-type information for their set-top boxes on the provider's web site, in promotion materials, and on each box itself. Such an approach would enable consumers to compare costs among different services when deciding on a provider. Such labeling requirements would also assist consumers already subscribing to a service in seeking more efficient boxes from their providers, and in deciding whether to switch to other providers.

Sincerely,

David S. Baron
Attorney

ADDENDUM LINKS TO PHOTOS

A. Photos of televisions displayed in ways that would make range of cost information difficult to read on proposed EnergyGuide labels:

1. http://laist.com/2007/11/28/happiness_iswor.php

Viewed on 05/14/2010; article dated 11/28/2007

2. <http://www.virginiamiracle.com/2008/01/12/how-costco-creates-fans/>

Viewed on 05/14/2010; article dated 01/12/2008

3. <http://www.societystylist.com/wp-content/uploads/2009/08/my-costco-tv-twinpack-1024x776.jpg> (from article at <http://www.societystylist.com/?p=814>)

Viewed on 05/14/2010; article dated 08/16/2009

4.

http://www.progressivegrocer.com/progressivegrocer/content_display/features/e3if74648e70af692b6be834a238acb1136

Viewed on 05/14/2010; article dated 04/08/2010

5. <http://www.geeksugar.com/Consumer-Confidence-Levels-Fall-US-Due-Recession-2442114>

Viewed on 05/14/2010; article dated 10/30/2008

6. <http://www.life.com/image/93193622>

Viewed on 05/14/2010; article dated 11/18/2009

7. <http://www.life.com/image/93193611>

Viewed on 05/14/2010; article dated 11/18/2009

8. <http://consumerist.com/2009/07/watch-out-for-best-buys-extended-warranties.html>

Viewed on 05/14/2010; article dated 07/30/2009

B. Photos of televisions packed in boxes as displayed in stores

* See photos A.1 and A.3 cited above

C. Photos showing substantial information on TV boxes, including model numbers and Energy Star labels in some cases.

1.

http://media.sacbee.com/smedia/2009/12/31/16/MC_FLATSCREEN.01.standalone.prod_affiliate.4.JPG

Viewed on 05/14/2010

2. <http://forums.redflagdeals.com/costco-sanyo-32-lcd-439-99-again-785822/>

Viewed on 05/14/2010; article dated 07/04/2009

3. TV in box - with adhesive label showing number:

http://www.phing.com/listing/31739-Brand-New-LG-22LG30R-LCD-TV-monitor-sony-vaio-iphone-i900-htc&usg=__BobKWn8w0MOCj4ZEviCdUvB9PoY=&h=480&w=640&sz=42&hl=vi&start=1&um=1

Viewed on 05/14/2010; article dated 01/12/2009

* See also photos A.1 and A.3 above.