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## Citizen Petition Requesting Amendments to the Federal Trade Commission's Appliance Labeling Rule

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### I. INTRODUCTION

Pursuant to 16 C.F.R. § 1.25, the below-listed consumer and environmental organizations hereby petition the Federal Trade Commission to amend the provisions of the Appliance Labeling Rule, 16 C.F.R. Part 305 (“the Rule”), governing the listing of covered products in online catalogs. Among other things, we ask that the Commission extend portions of the recently promulgated online labeling requirements for televisions, 16 C.F.R. § 305.20(g), to all products that require Energy Guide labels. Specifically, we ask that the Commission require qualifying internet catalogs to visibly and prominently display the appropriate Energy Guide label on each page where the corresponding covered product is available for sale. In addition, we ask that the Commission require that manufacturers make copies of labels for their products available on their websites.

The proposed amendments will promote energy efficiency and simplify compliance and enforcement of the Rule. In addition, they are required by FTC’s duty under the Energy Policy and Conservation Act (EPCA) to ensure that consumers have access to useful information about the relative energy use and operating costs of covered products.

### II. PARTIES

**The American Council for an Energy-Efficient Economy** is a nonprofit organization dedicated to advancing energy efficiency as a means of promoting both economic prosperity and environmental protection. ACEEE fulfills this mission by conducting in-depth technical and policy assessments; advising policymakers and program managers; working collaboratively with businesses, public interest groups, and other organizations; publishing books, conference proceedings, and reports; organizing conferences and workshops; and educating consumers and businesses. ACEEE believes energy efficiency labeling is an important tool for informing consumers about the energy consumption of products on the market and is a valuable guide to effective decision-making. The organization was involved in the legislation establishing federal efficiency standards, and has been an active participant in rulemakings relating to the Appliance Labeling Rule. It filed substantive comments as part of the 2007 rulemaking that redesigned the Energy Guide label and made clear that the Rule applied to online retailers, and filed comments during the 2010 consumer electronics rulemaking that extended new requirements to televisions sold online.

**Consumers Union of United States, Inc.**, publisher of Consumer Reports ®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union is a long-time advocate of energy efficiency. Through Consumer Reports magazine and Consumer Reports online, it encourages consumers to take steps to decrease their energy consumption and save money on their utility bills. In addition, the organization advocates for accurate energy labels that are helpful to consumers. Improving Energy Star and Energy Guide labels have long been a priority for Consumers Union.

**Public Citizen** is a national nonprofit consumer advocacy organization. Public Citizen works to strengthen laws and rules designed to promote energy efficiency, and works to ensure that consumers are provided with product information required by law so they can make informed choices in the marketplace. The organization believes that more prominent labeling will help consumers save energy and reduce pollution by encouraging the purchase of energy-efficient products. To that end, it has filed comments in recent energy efficiency labeling rulemakings and has been working directly with online retailers to improve their compliance with the Rule.

### **III. LEGAL FRAMEWORK**

In pursuit of its goal of “providing for improved energy efficiency of … major appliances[] and certain other consumer products,” 42 U.S.C. § 6201(5), EPCA directs FTC to issue labeling rules that enable and encourage consumers to comparison shop for energy-efficient appliances. *See* 42 U.S.C. § 6294; *see also* 44 Fed. Reg. 66466 (Nov. 19, 1979). To comply with the statute, these rules must require that labels 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 similar products. 42 U.S.C. § 6294(c). Accordingly, FTC’s Appliance Labeling Rule requires that covered products sold in retail stores display the black-and-yellow Energy Guide label, which contains, among other information, a product’s estimated annual operating cost and a scale showing how it compares to similar products. 16 C.F.R. § 305.11(f)(5–6).

While establishing criteria for the content of the label is important, Congress anticipated that relying on manufacturers and retailers to voluntarily affix Energy Guide labels to prominent locations on covered products would not suffice to guarantee shoppers access to crucial efficiency information. Therefore, EPCA further commands FTC to ensure that Energy Guide labels are “displayed in a manner that the Commission determines is likely to assist consumers in making purchasing decisions.” 42 U.S.C. § 6294(c)(3). To fulfill this obligation, FTC has issued regulations that require manufacturers to affix to their products labels that display, among other information, estimated annual operating costs, a scale comparing those costs to costs of operating similar models, and a statement that explains how the costs were calculated and the comparison was done. 16 C.F.R. § 305.11(f).

Congress also recognized that many purchases are made remotely and that even in-store purchases are often made on the basis of information obtained prior to entering the store. Therefore, EPCA provides that catalogs containing product listings “shall contain all information required to be displayed on the label, except as otherwise provided by rule of the Commission.” 42 U.S.C. § 6296(a). However, with respect to this requirement, FTC’s implementation has been uneven.

The Rule defines catalogs to include “printed material, *including material disseminated over the Internet*, which contains the terms of sale, retail price, and instructions for ordering, from which a retail consumer can order a covered product.” 16 C.F.R. § 305.2(h) (emphasis added). For most products, FTC allows online retailers<sup>1</sup> and other catalog sellers to convey required energy efficiency information in one of three ways: (1) by displaying the Energy Guide label; (2) by including a link that will take the viewer to a display of the Energy Guide label; or (3) by dispensing with the Energy Guide label entirely and instead providing only the estimated annual operating cost of the specific product being advertised and some related information. 16 C.F.R. § 305.20.

In a 2007 rulemaking, FTC offered several justifications for allowing catalog sellers to avoid showing the Energy Guide label. 72 Fed. Reg. 49948, 49961 (Aug. 29, 2007). FTC first stated that online and other 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.” *Id.* FTC further claimed that range information in paper catalogs “may cause confusion or fail to provide significant benefit to consumers,” because it cannot always be presented in the same form as it appears on the label. *Id.* Finally, FTC determined that the burdens of providing range information “can be significant” and “often fall on retailers who are not producing and labeling the products themselves.” *Id.*

However, in the recent television labeling rulemaking, 76 Fed. Reg. 1038 (January 6, 2011), FTC reversed its position. That rulemaking required that the full Energy Guide label—or a black-and-yellow Energy Guide logo linking to the label—“appear clearly and conspicuously, and in close proximity to the television’s price, on each webpage that contains a detailed description of the television and its price.” 76 Fed. Reg. at 1051 (to be codified at 16 C.F.R. 305.20(g)(2)). FTC justified this change on the grounds that consumers should not “have to scroll down unreasonably or click on a tab or other link to view the label or icon” to compare the operating costs of televisions, and that “[o]nline catalogs have fewer space constraints than paper catalogs and can more easily include the full Energy Guide label.” *Id.* at 1046.

The television labeling rulemaking also required that television manufacturers make their Energy Guide labels available online. *Id.* at 1046, 1050 (codified at 16 C.F.R. § 315.17(g)). This requirement was based on EPCA’s requirement that manufacturers provide a label, and aimed to alleviate any burden online retailers might have in finding a

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<sup>1</sup> The Rule defines “retailer” as “a person to whom a consumer appliance product is delivered or sold, if such delivery or sale is for purposes of sale or distribution in commerce to purchasers who buy such product for purposes other than resale.” 16 C.F.R. § 305.2(ff).

copy of the appropriate Energy Guide label to link to or download and repost. *Id.* at 1046; *see also* 42 U.S.C. § 6296(a).

## IV. FACTUAL BACKGROUND

### A. Online retailers' implementation of the current catalog requirements denies consumers effective access to energy efficiency information.

While the television labeling rule's catalog provisions took effect July 11, absent further action by the Commission, online listings for other products will continue to be governed by the older, laxer standard. And many listings that purport to comply do so in ways that make it difficult to find what little information they do post. Listings that provide a link to—rather than display—the Energy Guide label often bury that link at the bottom of a long page of text and other information,<sup>2</sup> or behind another link<sup>3</sup> or tab.<sup>4</sup> The links often carry no accompanying information indicating what they signify. Instead, they may have such unhelpful labels as “more info,”<sup>5</sup> “take a product tour,”<sup>6</sup> “manual,”<sup>7</sup> or “larger photo.”<sup>8</sup> Often, these links don't lead to the label itself, but to a list of links or tabs that may not be any more clearly labeled than the initial link.<sup>9</sup> Likewise, retailers who choose to display the estimated annual operating cost rather than the full Energy Guide label often bury that information behind another tab, and rarely provide the required prominently displayed statement that estimated costs are based on specific assumed utility rates and—where applicable—usage patterns, both of which may vary with individual consumers.<sup>10</sup>

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<sup>2</sup> See, e.g., Attachment 1, Brandsmart USA, Frigidaire - 27.8 CuFt Bottom Freezer Refrigerator, available at <http://www.brandsmartusa.com/Product/144448-Frigidaire-Fphb2899lf-Ss-27-8-Cuft-Bottom-Freezer-Refrigerator>, last visited July 20, 2011.

<sup>3</sup> See, e.g., Attachments 2–4, *infra* notes 3–5.

<sup>4</sup> See, e.g., Attachment 2, Home Depot, LG Electronics 15,000 BTU Window Air Conditioner with Remote, available at [http://www.homedepot.com/Appliances-Heating-Cooling-Air-Quality-Air-Conditioners-Window-Air-Conditioners/h\\_d1/N-5yc1vZbv6l/R-202073148/h\\_d2/ProductDisplay?langId=1&storeId=10051&catalogId=10053](http://www.homedepot.com/Appliances-Heating-Cooling-Air-Quality-Air-Conditioners-Window-Air-Conditioners/h_d1/N-5yc1vZbv6l/R-202073148/h_d2/ProductDisplay?langId=1&storeId=10051&catalogId=10053), last visited July 20, 2011.

<sup>5</sup> See, e.g., *id.*

<sup>6</sup> See, e.g., Attachment 3, hhgregg, LG 4.5 Cu. Ft. Graphite Steel High-Efficiency Top-Load Washer, available at <http://hhgregg.com/ProductDetail.asp?SID=n&ProductID=37460>, last visited July 11, 2001.

<sup>7</sup> See, e.g., Attachment 4, CSN Stores, Haier 2.7 cu.ft. Refrigerator / Freezer - Black - HSB03BB, available at <http://www.csnstores.com/Haier-2.7-cu.ft.-Refrigerator-Freezer-Black-HSB03BB-HER1055.html>, last visited July 13, 2011.

<sup>8</sup> See, e.g., Attachment 5, Quality Matters, DANBY 4.3 cu. ft. Compact Refrigerator/Freezer - Black DCR412BL, available at <http://www.qualitymatters.com/ProductDetails.asp?ProductCode=QMDCR412BL>, last visited July 11, 2011.

<sup>9</sup> After clicking on “take a product tour” on the hhgregg website, a customer is redirected to a page with seven different tabs. The Energy Guide label is behind the tab labeled “Documents.” See, e.g., Attachment 3, *supra* note 6.

<sup>10</sup> See, e.g., Attachment 6, Best Buy, Frigidaire - 12,000 BTU Window Air Conditioner – White, <http://www.bestbuy.com/site/Frigidaire++12%2C000+BTU+Window+Air+Conditioner+-+White/9776258.p?id=1218171773409&skuId=9776258>, last visited July 7, 2011; *See also* Attachment 11, *infra* note 15.

On many sites, consumers who want to assess and compare operating costs must look for information in multiple places in each listing. For example, on the AJ Madison website, the information, if it appears at all,<sup>11</sup> may be hidden behind a tab labeled “energy info,”<sup>12</sup> or in the form of a link to the Energy Guide found behind a tab labeled “info and guides.”<sup>13</sup> Occasionally, tabs labeled “specifications” and “features” will contain estimated annual energy usage in kilowatt-hours, but no cost information.<sup>14</sup> On the website of Howard’s Appliance & Big Screen Superstores, the information may be at the bottom of a long list of information under the “features & specifications” tab,<sup>15</sup> in a link to the Energy Guide label under the “documentation” tab,<sup>16</sup> or missing entirely.<sup>17</sup>

Nor can consumers rely on manufacturer or private labeler websites to find energy efficiency information, as most manufacturers and private labelers of covered products do not sell products via their websites.<sup>18</sup> As a result, they do not have an obligation to display Energy Guide labels on their sites, and many do not display them.<sup>19</sup> When

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<sup>11</sup> See, e.g., Attachment 7, Amana AH123E35AXAA, available at <http://www.ajmadison.com/cgi-bin/ajmadison/AH123E35AXAA.html>, last visited July 20, 2011.

<sup>12</sup> See, e.g., Attachment 8, Avanti RA751WT, available at <http://www.ajmadison.com/cgi-bin/ajmadison/RA751WT.html>, last visited July 20, 2011.

<sup>13</sup> See, e.g., Attachment 9, Summit FF1251W, available at <http://www.ajmadison.com/cgi-bin/ajmadison/FF1251W.html>, last visited July 20, 2011.

<sup>14</sup> See, e.g., Attachment 10, Bosch Vision 500 Series DLX WFVC6450UC, available at <http://www.ajmadison.com/cgi-bin/ajmadison/WFVC6450UC.html>, last visited July 20, 2011.

<sup>15</sup> See, e.g., Attachment 11, LG 22.4 Cu. Ft. Bottom-Mount Refrigerator, available at <http://www.howards.com/details.cfm?c=10&b=18&s=13&id=kb15n0202hmmak>, last visited July 20, 2011.

<sup>16</sup> See, e.g., Attachment 12, GE ENERGY STAR 22.0 Cu. Ft. Bottom-Freezer French Door Refrigerator, available at <http://www.howards.com/details.cfm?c=10&b=5&s=18&id=if17e1016cnzbx>, last visited July 20, 2011.

<sup>17</sup> See, e.g., Attachment 13, LG 27.5 cu. ft. French Door Refrigerator, available at <http://www.howards.com/details.cfm?c=10&b=18&s=18&id=kb12l0316dahzz>, last visited July 20, 2011.

<sup>18</sup> But see, e.g., Attachment 14, Living Direct, CRF320SS - EdgeStar Stainless Steel Energy Star 3.2 Cu. Ft. Fridge / Freezer, available at <http://www.compactappliance.com/CRF320SS-EdgeStar-Midsize-Compact-Refrigerator-Freezer-Stainless-Steel/CRF320SS,default,pd.html>, last visited July 12, 2011; Attachment 15, Sears, Kenmore 17.5 cu. ft. Top Freezer Refrigerator, available at [http://www.sears.com/shc/s/p\\_10153\\_12605\\_04660939000P?vName=Appliances&keyword=04660939000p%7C04633170000p%7C04671033000p%7C04616342000p%7C04628262000p%7C04689803000p&resultsLabelText=FeaturedItems](http://www.sears.com/shc/s/p_10153_12605_04660939000P?vName=Appliances&keyword=04660939000p%7C04633170000p%7C04671033000p%7C04616342000p%7C04628262000p%7C04689803000p&resultsLabelText=FeaturedItems), last visited July 20, 2011; Attachment 16, Sunpentown, RF-171W: 1.7 cu.ft. Compact Refrigerator in White, available at <http://www.sunpentown.com/rf17cucorein1.html>, last visited July 12, 2011.

<sup>19</sup> See, e.g., Attachment 17, Danby, Window Air Conditioner | DAC10010E, available at <http://www.danby.com/product/DAC10010E/4>, last visited July 14, 2011; Attachment 18, Electrolux, Front Load Washer with Wave-Touch® Controls Featuring Perfect Steam™, available at <http://www.electroluxappliances.com/laundry-appliances/washers/ewfls70jrr>, last visited July 14, 2011; Attachment 19, Fisher & Paykel, French Door Refrigerator, RF195ADUX1, available at <http://fisherpaykel.com/product/refrigeration/refrigerators/index.cfm?productuid=A11C44C2-EAF3-81BC-9B6A6087173AA8A9>, last visited July 14, 2011; Attachment 20, Northland Kitchen Appliances, 18" Top Mount Freezer with White Interior available at <http://www.northlandnka.com/refrigeration/top-freezer/top-freezer-18TF-W.asp>, last visited July 14, 2011; Attachment 21, LG, WM2140CW, available at <http://www.lg.com/us/appliances/washers/LG-front-load-washer-WM2140CW.jsp>, last visited July 14, 2011; Attachment 21, Soleus Air, SG-WAC-06SE, available at [http://soleusair.com/soleusair\\_sg\\_wac\\_06se.html](http://soleusair.com/soleusair_sg_wac_06se.html), last visited July 14, 2011; Attachment 23, Sharp, AF-Q120RX, available at <http://www.sharpusa.com/ForHome/HomeEnvironment/AirConditioners/AFO120RX.aspx>, last visited July 14, 2011.

manufacturers and private labelers do display or link to labels on their websites, they often make them difficult for a consumer to find.<sup>20</sup>

**B. Online retail sales account for a significant share of sales of covered products, and the effectiveness of the current online labeling rules needs to be examined.**

Online retail sales of covered products are growing quickly. In 2009, the last year for which there is official data available, online-only U.S. retailers like Amazon.com and eBay.com sold more than \$14 billion worth of electronics and appliances.<sup>21</sup> Storefront retailers sold another \$1.1 billion online.<sup>22</sup> While overall sales of this product category fell by 9.6 percent, online sales continued to grow.<sup>23</sup> Since 2002, e-commerce has steadily grown in both absolute terms and as a portion of all retail sales.<sup>24</sup> It continues to grow at a fast pace, and now makes up a significant portion of all retail sales.<sup>25</sup> Online-only retailers, led by marketplace sites like Amazon.com and eBay.com, are enjoying

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<sup>20</sup> See, e.g., Attachment 24, Amana, 25 cu. ft. Side-by-Side Refrigerator, available at [http://amana.com/refrigeration/side\\_by\\_side\\_refrigerators/refrigeration/25\\_cu\\_ft\\_side\\_by\\_side\\_refrigerator\\_asd2522wrb.pro](http://amana.com/refrigeration/side_by_side_refrigerators/refrigeration/25_cu_ft_side_by_side_refrigerator_asd2522wrb.pro) (link buried behind “Literature” tab), last visited July 14, 2011; Attachment 25, Dacor, 36" Freestanding French Door Refrigerator with Ice and Water Dispenser, available at <http://www.dacor.com/Our-Products/Refrigeration/Epicure-36-Inch-French-Door-Bottom-Freezer-Refrigerator-with-Ice-Dispenser.aspx> (“Manuals & Guides”), last visited July 20, 2011; Attachment 26, Bosch, SHX98M09UC, available at <http://www.bosch-home.com/us/SHX98M09UC.html> (“Additional documents”), last visited July 20, 2011; Attachment 27, Jenn-Air, TriFecta™ Dishwasher, available at <http://www.jennair.com/flash.cmd?#/product/JDB3600AWS/> (“guides and manuals”), last visited July 20, 2011; Attachment 28, KitchenAid, Superba® Series EQ, available at <http://www.kitchenaid.com/flash.cmd?#/product/KUDE70FXSS/> (“Features & Specs”), last visited July 20, 2011; Attachment 29, Maytag, MDB7749AWW Jetclean® Plus Dishwasher with SteamClean, available at [http://www.maytag.com/-\[MDB7749AWW\]-110101/MDB7749AWW/](http://www.maytag.com/-[MDB7749AWW]-110101/MDB7749AWW/) (“Manuals & Literature”), last visited July 14, 2011; Attachment 30, Miele, G 287 2 SCSF, available at [http://www.mieleusa.com/usa/dishwashers/product.asp?cat=2&model=462&series=116&nav=&snav=&tnav=&oT=125&menu\\_id=1&active=Our%20Products&subm=Home%20Appliances&thirdL=Dishwashers&fourthL=Products&](http://www.mieleusa.com/usa/dishwashers/product.asp?cat=2&model=462&series=116&nav=&snav=&tnav=&oT=125&menu_id=1&active=Our%20Products&subm=Home%20Appliances&thirdL=Dishwashers&fourthL=Products&) (“Energy Guide” tab at bottom of page), last visited July 14, 2011; Attachment 31, Summit, FFBF240W, available at <http://www.summitappliance.com/catalog/model/FFBF240W> (Downloads), last visited July 13, 2011; Attachment 32, Whirlpool, Duet® Steam Front Load Washer, available at [http://www.whirlpool.com/laundry-1/laundry-2/washers-3-\[WFW9550WW\]-1001658/WFW9550WW/](http://www.whirlpool.com/laundry-1/laundry-2/washers-3-[WFW9550WW]-1001658/WFW9550WW/) (“Manuals & Literature”), last visited July 12, 2011.

<sup>21</sup> See Attachment 33, U.S. Census Bureau, 2009 Annual Retail Trade Survey, “Table 6. U.S. Electronic Shopping and Mail-Order Houses - Total and E-commerce Sales by Merchandise Line: 2009 and 2008,” available at <http://www.census.gov/econ/estats/2009/table6.pdf>, last visited July 13, 2011.

<sup>22</sup> See Attachment 34, U.S. Census Bureau, 2009 Annual Retail Trade Survey, “Table 5. U.S. Retail Trade Sales - Total and E-commerce: 2009 and 2008,” available at <http://www.census.gov/econ/estats/2009/table5.pdf>, last visited July 13, 2011.

<sup>23</sup> Id.

<sup>24</sup> Attachment 35, U.S. Census Bureau, Quarterly Retail E-Commerce Sales 1<sup>st</sup> Quarter 2011, available at [http://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf), last visited July 13, 2011.

<sup>25</sup> Attachment 36, Internet Retailer, “E-commerce sales rise 14.8% in 2010,” Feb. 17, 2011, available at <http://www.internetretailer.com/2011/02/17/e-commerce-sales-rise-148-2010>, last visited July 13, 2011.

especially fast growth,<sup>26</sup> and have made an increasing portion of their revenue from appliances and electronics.<sup>27</sup>

Not only is the portion of appliances sold online increasing, but a much larger percentage of appliances are sold to consumers whose purchasing decisions may be influenced by what they see online.<sup>28</sup> It is no accident that the 10 largest appliance retailers and 18 of the top 20 now have websites from which consumers can directly order covered products.<sup>29</sup>

## V. PROPOSED AMENDMENTS TO THE CATALOG REQUIREMENTS

### A. FTC should extend the television labeling requirements to all covered products sold online.

To fully and rationally implement the statute, FTC needs to require online catalog listings for all covered products to prominently display the full Energy Guide label on each page containing a detailed description of a covered product and its price.

The current approach many retailers take of disclosing only the estimated annual operating cost may be legal, but it makes it impossible for an online consumer to compare the efficiency of the model being viewed with that of other models without visiting multiple web pages, 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. This task is further complicated by the common practices of burying such information and rendering it in partial form.

Even when retailers post a link to the Energy Guide label, consumers are likely to have difficulty finding the link. Shoppers should not be expected to pick their way through multiple nondescript tabs and links to find energy efficiency information, nor to guess that an icon labeled “larger photo” actually contains the Energy Guide label.<sup>30</sup> The fact

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<sup>26</sup> Attachment 37, Internet Retailer, “Top 500 web-only merchants hit the fast track,” March 29, 2011, available at <http://www.internetretailer.com/2011/03/29/top-500-web-only-merchants-hit-fast-track>, last visited July 13, 2011.

<sup>27</sup> Attachment 38, U.S. Census Bureau, Annual Retail Trade Survey, “Table 6/Historical. U.S. Electronic Shopping and Mail-Order Houses - Total and E-commerce Sales by Merchandise Line: 1999-2009,” available at <http://www.census.gov/econ/estats/2008/historical/2008ht5.pdf>, last visited July 13, 2011.

<sup>28</sup> Attachment 39, Internet Retailer, “E-retail will influence 53% of purchases by 2014, Forrester says,” March 8, 2010, available at <http://www.internetretailer.com/2010/03/08/e-retail-will-influence-53-of-purchases-by-2014-forrester-says>, last visited July 13, 2011.

<sup>29</sup> In 2009, the 20 retailers with the highest sales of major appliances were Sears, Lowe’s, The Home Depot, Best Buy, Walmart, hhgregg, P.C. Richard & Son, BrandsMart USA, Conn’s, Costco Wholesale, Pacific Sales Kitchen & Bath Centers, ABC Warehouse, Target, Abt Electronics and Appliances, Nebraska Furniture Mart, Menards, American TV & Appliances, Sam’s Club, R.C. Willey Home Furnishings, and Kmart. See Attachment 40, “The Top 100 Major Appliance Retailers,” THIS WEEK IN CONSUMER ELECTRONICS, June 21, 2010, p. 30. The only stores that do not sell covered products through their websites were Pacific Sales Kitchen & Bath Centers (#11) and Menards (#16).

<sup>30</sup> The widespread practice of burying energy efficiency information behind links and tabs may not comply with the Rule’s requirements that cost information appear on each page listing the product, *see, e.g.,* 16 C.F.R. §305.20(a)(1–2), (c)(1)(i–ii). This is especially true in light of FTC’s position in recent enforcement

that consumers may not find such information at all undermines the likelihood the information will “assist consumers in making purchasing decisions.”

FTC has concluded that the information on the Energy Guide label satisfies the statutory requirement that labeling be “likely to assist consumers in making purchasing decisions.” There is no basis for asserting that the Energy Guide label is somehow unlikely to assist consumers shopping online, and FTC has never made such a claim. And no lawful or rational basis exists for making online consumers go through such a laborious process simply to obtain the same information required on the label for in-store products.

FTC concluded as much in its recent television rulemaking. The rationales offered there—first, that consumers should not “have to scroll down unreasonably or click on a tab or other link to view the label or icon” to compare the operating costs of televisions, and second, that “[o]nline catalogs have fewer space constraints than paper catalogs and can more easily include the full Energy Guide label”—are equally true for all covered products sold online, not just televisions. It is therefore arbitrary and capricious to allow online retailers to eschew or bury the Energy Guide label for all covered products other than televisions.

In the preamble to the final television labeling rule, FTC noted that it “may consider extending the Web site disclosure requirements [for televisions] to all appliances covered under the Rule in the future.” 76 Fed. Reg. at 1046 n.66. We now call on the Commission to take that step, and specifically to require posting of the full Energy Guide label on each web site catalog page displaying detailed information about a covered product and its price.

As the Commission explicitly acknowledged in the final television labeling rule, there is no rational basis for continuing to rely on the justifications FTC offered in its 2007 rulemaking for allowing weaker disclosure requirements for web catalogs than for in-store products.

For example, the fact that online shoppers “are likely to see information for a much larger number of models than consumers in a showroom,” 72 Fed. Reg. 49948, 49961, is not relevant to determining the amount of labeling information that is likely to assist consumers. FTC has not suggested that Energy Guide 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. Even if it were relevant, the virtually limitless number of products one may encounter online makes it more, not less, difficult to compare energy usage and operating cost by memory. It is not rational to expect that the average consumer will have the time to surf through scores of web pages, navigate various tabs and links, copy down operating cost information on each model and assemble a comparative table.

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litigation that each page listing a covered product is a separate “catalog” subject to the requirements and enforcement provisions of the Rule. *See, e.g., Attachment 41, FTC Complaint, In the Matter of Pinnacle Marketing Group, Corp.*, FTC File No. 1023038, Docket No. C-4302, ¶ 5 (“[T]he webpages for each covered product are “catalogs” as defined in the Appliance Labeling Rule.”).

Nor is it relevant that range information in *paper* catalogs “may cause confusion or fail to provide significant benefit to consumers” because it cannot always be presented in the same form as it appears on the label. This rationale never purported to apply to *online* retailers, nor could it, as many online retailers in fact do display the full Energy Guide label for at least some listings.<sup>31</sup>

And, as FTC later acknowledged, space constraints are less of a concern for online catalogs. Web pages that advertise covered products typically contain substantial amounts of information and graphical displays (often including such peripheral matters as what others who viewed the product also viewed, links to unrelated products, promotions and Facebook).<sup>32</sup> Sellers cannot seriously claim they are incapable of including the actual image of the Energy Guide label on the same page as the product being advertised. In any case, many sellers do—at least sometimes—display the full Energy Guide label.<sup>33</sup> And even those that do not display the Energy Guide label often prominently display the Energy Star label for qualified appliances.<sup>34</sup>

To relieve the burden on retailers and facilitate compliance with the rule, FTC should also extend the television labeling rule’s requirement that manufacturers make the Energy Guide label available online so that retailers can download them and repost them on their own websites. This will have the additional benefit of enabling consumers to find Energy Guide labels that are missing from online retailers’ sites. And it will help limit the number of sites consumers have to search to find efficiency information on a particular model.

Finally, requiring product listings to conspicuously display the Energy Guide label will enhance the value of the Energy Guide program. Consumer research indicates that consumer trust in a label grows as the label becomes more prevalent and consumers become more familiar with the label. See Thogersen, J., “Promoting ‘green’ consumer behavior with eco-labels,” in Deitz T, Stern P, eds., NEW TOOLS FOR ENVIRONMENTAL

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<sup>31</sup> See e.g., Attachment 42, Walmart, Danby 8-Place Setting Energy Star Portable Dishwasher, available at <http://www.walmart.com/ip/Danby-Energy-Star-Portable-Dishwasher/12547917>, last visited July 13, 2011; Attachment 43, Amazon, Haier RWT350AW 3.1 Cubic Feet Top Load Agitator Washer, available at [http://www.amazon.com/Haier-RWT350AW-Cubic-Agitator-Washer/dp/B001QLAQGU/ref=sr\\_1\\_4?s=appliances&ie=UTF8&qid=1310573890&sr=1-4](http://www.amazon.com/Haier-RWT350AW-Cubic-Agitator-Washer/dp/B001QLAQGU/ref=sr_1_4?s=appliances&ie=UTF8&qid=1310573890&sr=1-4), last visited July 13, 2011. The landing pages for these products initially display large photos of the products themselves, with the labels visible only in thumbnail images beneath those larger photos. The large image of the Energy Guide, as shown in the attachment, appears when a consumer rolls the cursor over the thumbnail images.

<sup>32</sup> See, e.g., Attachment 44, Walmart, GE 3.1 cu ft 2 Door Compact Refrigerator, Black, available at <http://www.walmart.com/ip/GE-ENERGY-STAR-3.1-cu-ft-Refrigerator/16672202>, last visited July 20, 2011.

<sup>33</sup> See *supra* note 27.

<sup>34</sup> See, e.g. Attachment 45, Amazon.com/Super DVD, Whirlpool 25.1 CuFt Side by Side Refrigerator Stainless Steel Electronic Ice & Water Dispenser ENERGY STAR Qualified, available at <http://www.amazon.com/Whirlpool-Refrigerator-Stainless-Electronic-Dispenser/dp/B004MR0EVC>, last visited July 20, 2011; Attachment 46, Target, Sunpentown Upright Freezer - 3.1 cu. ft., available at [http://www.target.com/Sunpentown-Upright-Freezer-3-1-cu/dp/B0025ZI07I/ref=br\\_1\\_4?ie=UTF8&id=Sunpentown%20Upright%20Freezer%203%20cu&node=319788011&searchSize=30&searchView=list&searchPage=3&sr=1-4&qid=1310670254&rh=&searchBinNameList=target\\_com\\_category-bin&searchRank=-price&frombrowse=1](http://www.target.com/Sunpentown-Upright-Freezer-3-1-cu/dp/B0025ZI07I/ref=br_1_4?ie=UTF8&id=Sunpentown%20Upright%20Freezer%203%20cu&node=319788011&searchSize=30&searchView=list&searchPage=3&sr=1-4&qid=1310670254&rh=&searchBinNameList=target_com_category-bin&searchRank=-price&frombrowse=1), last visited July 18, 2011.

PROTECTION: EDUCATION, INFORMATION AND VOLUNTARY MEASURES, Washington DC: National Academy Press, 2002, p. 92. Thus, energy efficiency information is more “likely to assist consumers” if they are familiar with the form of that information. And making the Energy Guide label more prevalent will improve consumers’ familiarity with the label, which will in turn lead to individual consumers paying closer attention to the label and the energy efficiency of the products they purchase.

With consumers increasingly turning to the web to buy or research covered products, ensuring the prominent display of the Energy Guide label in online listings will improve awareness of the program itself. Greater prevalence and visibility of the label will make the label easier for consumers to recognize and understand, and will further the statutory goal of improving energy efficiency of appliances by increasing the value consumers place on the information the label contains.

FTC’s continued failure to require the prominent display of the Energy Guide label undermines the labeling program and fails to ensure that labels are “likely to assist consumers.” This is especially true as online and online-influenced sales grow in importance. The percentage of consumers who benefit from and are influenced by the label may steadily decline unless FTC takes action.

To comply with the statute, to avoid arbitrariness, and to rectify widespread circumvention of the Rule, the online labeling requirements for televisions must be extended to all other covered products, and expressly mandate that the required Energy Guide label appear conspicuously, visibly, and in close proximity to the product’s price on each online catalog page that contains a detailed description of the product.

#### **B. FTC must require retailers to display the full Energy Guide label, and not simply a link in the form of a logo**

Merely requiring links in the form of the Energy Guide logo creates substantial risk for confusion. As FTC has noted in similar contexts, bare logos may be deceiving because consumers can interpret them as endorsements. “Guides for the Use of Environmental Marketing Claims; Proposed Rule,” 75 Fed. Reg. 635552, 63567 (Oct. 15, 2010) (finding that a product displaying the seal of an organization of which the manufacturers is a member “may cause consumers to mistakenly believe that the organization has evaluated and endorsed the product”). Or they may confuse the Energy Guide logo with the Energy Star logo, especially when the links are labeled in similar fashion or when manufacturers mischaracterize the meaning of the logos.<sup>35</sup> Due to such confusion, many consumers may

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<sup>35</sup> Compare Attachment 47, Sears, Kenmore 22.7 cu. ft. Bottom Freezer Refrigerator, available at [http://www.sears.com/shc/s/p\\_10153\\_12605\\_04671302000P?vName=Appliances&cName=Refrigerators&sName=View+All&filter=Brand%7CKenmore&subCatView=true](http://www.sears.com/shc/s/p_10153_12605_04671302000P?vName=Appliances&cName=Refrigerators&sName=View+All&filter=Brand%7CKenmore&subCatView=true) (describing a product as “Energy Star qualified” and “Energy Guide rated”), last visited July 13, 2011, with Attachment 48, AJ Madison, Frigidaire Professional Series FPUH19D7LF, available at <http://www.ajmadison.com/cgi-bin/ajmadison/FPUH19D7LF.html> (describing a product as “Energy Star rated”), last visited July 20, 2011 and Attachment 49, hhgregg, Samsung 4.3 Cu. Ft. Stainless Platinum Steam Washer, available at <http://hhgregg.com/ProductDetail.asp?SID=n&ProductID=72321> (same), last visited July 20, 2011; see also Attachment 50, Fry’s Electronics, Whirlpool ED5FVGXWS 25 Cu. Ft. Stainless Steel Side By Side

fail to click on the hyperlinked Energy Guide logo and thus fail to benefit from the type of comparative information the Rule must ensure they receive.

## VI. CONCLUSION

For the foregoing reasons, we ask that FTC strengthen the Appliance Labeling Rule by requiring online catalogs to visibly and prominently display the full Energy Guide label on each page containing a detailed description of a covered product and its price. We have included proposed regulatory language to this effect.

Respectfully Submitted

Jonathan Wiener\*  
Earthjustice  
1625 Massachusetts Ave., NW, Suite 702  
Washington, DC 20036  
Tel: (202) 667-4500 x211  
Fax: (202) 667-2356  
[www.earthjustice.org](http://www.earthjustice.org)

\* Admitted only in California; practice in this matter supervised directly by David Baron and Timothy Ballo.

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Refrigerator, available at <http://www.frys.com/product/6294860> (directing visitors to product's "Energy Star guide"), last visited July 13, 2011; Attachment 51, hhgregg, Maytag 4 Cu. Ft. Bravos® High-Efficiency Top-Load Washer, available at [http://hhgregg.com/ProductDetail.asp?SID=n&ProductID=7383\\_2](http://hhgregg.com/ProductDetail.asp?SID=n&ProductID=7383_2) (describing a clothes washer's Energy Star certification as indicating that the "application [sic] exceeds the federal minimum efficiency standards as set forth by the Environmental Protection Agency and the U.S. Department of Energy, helping to save money on utility bills"), last visited July 20, 2011.

## **PROPOSED REGULATORY LANGUAGE**

The undersigned propose the following amendments to the sections of the Appliance Labeling Rule. Proposed additions are in bold, deletions in bracketed italics.

### **16 C.F.R. § 305.20**

(a) Any manufacturer, distributor, retailer, or private labeler who advertises in a catalog, a covered product (except ceiling fan, fluorescent lamp ballasts, metal halide lamp fixtures, general service fluorescent lamps, medium base compact fluorescent lamps, general service incandescent lamps including incandescent reflector lamps, showerheads, faucets, water closets, or urinals) shall include in such catalog [*either*] the EnergyGuide labels prepared in accordance with §§ 305.11 and 305.12 for **such** products [*they offer or the following information:*]. **For online catalogs, the EnergyGuide label must appear clearly and conspicuously, and in close proximity to the product's price, on each webpage that contains a detailed description of the product and its price. The scale size of the label may be altered to accommodate the webpage's design, as long as the label remains clear and conspicuous to consumers viewing the page.**

*(1) The capacity of the model on each page that lists the covered product.*

*(2) The estimated annual operating costs for refrigerators, refrigerator-freezers, freezers, clothes washers, dishwashers, room air conditioners, and water heaters as determined in accordance with § 305.5 and appendix K of this part on each page that lists the covered product.*

*(3) A statement conspicuously placed in the catalog:*

*(i) For refrigerators, refrigerator-freezers, and freezers (fill in the blanks with the appropriate year and energy cost figures):*

*Your operating costs will depend on your utility rates and use. The estimated operating cost is based on a [Year] national average electricity cost of [\_\_ cents per kWh].*

*For more information, visit [www.ftc.gov/appliances](http://www.ftc.gov/appliances).*

*(ii) For room air conditioners and water heaters, (fill in the blanks with the appropriate year and energy cost figures):*

*Your operating costs will depend on your utility rates and use. The estimated operating cost is based on a [Year] national average [electricity, natural gas, propane, or oil] cost of [\$\_\_ per kWh, therm, or gallon].*

*For more information, visit [www.ftc.gov/appliances](http://www.ftc.gov/appliances).*

*(iii) For clothes washers and dishwashers, (fill in the blanks with the appropriate information such as the year, and the energy cost figures):*

*Your operating costs will depend on your utility rates and use. The estimated operating cost is based on [4 washloads a week for dishwashers, or 8 washloads a week for clothes washers] and a [Year] national average cost of \_\_ cents per kWh for electricity and \$\_\_ per therm for natural gas.*

*For more information, visit [www.ftc.gov/appliances](http://www.ftc.gov/appliances).*

*(4) The energy efficiency or thermal efficiency ratings for pool heaters, central air conditioners, heat pumps, and furnaces (including boilers) as determined in accordance with § 305.5 on each page that lists the covered product.]*