

BEFORE THE  
FEDERAL TRADE COMMISSION

16 CFR PART 460 – R-VALUE RULE REVIEW, FILE NO. R811001

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In Re:

FTC'S ADVANCE NOTICE OF PROPOSED RULEMAKING – 16 CFR PART 460 –  
R-VALUE RULE REVIEW, FILE NO. R811001, 81 FEDERAL REGISTER 19,936 (April 6,  
2016)

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COMMENTS OF THE  
NORTH AMERICAN INSULATION  
MANUFACTURERS ASSOCIATION

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NORTH AMERICAN INSULATION MANUFACTURERS ASSOCIATION'S ("NAIMA")  
COMMENTS ON THE FEDERAL TRADE COMMISSION'S  
ADVANCE NOTICE OF PROPOSED RULEMAKING –  
**16 CFR PART 460 – R-VALUE RULE REVIEW, FILE NO. R811001**  
81 Federal Register 19,936 (April 6, 2016)

## INTRODUCTION

The North American Insulation Manufacturers Association ("NAIMA") greatly appreciates the opportunity to submit comments on the Federal Trade Commission's ("FTC") Advance Notice of Proposed Rulemaking ("ANPR") to review the cost, benefits, necessity, and regulatory and economic impact of the Commission's Labeling and Advertising of Home Insulation Rule, 16 C.F.R. Part 460. 81 Fed. Reg. 19,936 (April 6, 2016).

NAIMA is the trade association of North American manufacturers of fiber glass and mineral wool (rock wool and slag wool) insulation products. NAIMA promotes the energy efficiency and energy savings found through the use of insulation products. NAIMA also frequently represents its members in regulatory matters. NAIMA and most of its members are subject to the requirements of the R-value Rule. Therefore, NAIMA and its members have particular interest in the FTC's reauthorization of the R-value Rule.

NAIMA's members include the following fiber glass insulation manufacturers: CertainTeed Corporation, Hollingsworth & Vose, Johns Manville, Knauf Insulation, and Owens Corning; and the following mineral wool insulation manufacturers: Aislantes Minerales; Armstrong; Industrial Insulation Group ("IIG"); Rock Wool Manufacturing; Roxul, Incorporated; Thermafiber Owens Corning; and USG Interiors, Inc.

As demonstrated throughout these comments, NAIMA strongly supports the retention of the R-value Rule and provides specific responses to the FTC's "Issues for Comments."

## FTC'S BACKGROUND

NAIMA appreciates the FTC's consistent acknowledgement that "[t]hermal insulation is an important energy-savings product that reduces consumers' heating and cooling costs and increases their home energy efficiency."<sup>1</sup> NAIMA also supports the FTC's background description on the R-value Rule as accurate, including its summary of: 1) products covered; 2) covered parties; 3) the Rule's basis; and 4) the Rule's requirements.

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<sup>1</sup> 81 Fed. Reg. at 19,937.

## ISSUES FOR COMMENTS

*Need: Is there a continuing need for the Rule? Why or why not?*

### R-value Rule Is Needed To Protect Consumers

NAIMA and its members regard the R-value Rule as vitally relevant today as when the Commission first promulgated the Rule in 1979. The safeguards offered by the Rule to consumers seem even more indispensable today as individual consumers' selection and installation of insulation products has reached record levels as there is a growing emphasis on environmental responsibility, saving energy, and contributing to the reduction of air pollutants.

This increased consumer interest in insulation is effectively documented by the increased presence of insulation products in retail establishments. Further documentation of increased consumer interest in insulation is found in the expansion of insulation products available on the market and the concerted efforts by the insulation manufacturers to address their advertisement and promotional materials towards the consumers.

In fact, this heightened availability of insulation products and the discernibly more intense efforts to persuade the consumer of the merits of one competing insulation product over another insulation product is the most compelling reason for reauthorization of the R-value Rule. Indeed, consumers now need, more than ever, the FTC as a protector against false and misleading advertising claims that are proffered by new, inexperienced, or irresponsible advertisers.

### R-value Rule Is Needed Because There Is a Proliferation of False and Misleading Advertisements

Yet another compelling reason for the reauthorization of the R-value Rule is that there remains in the insulation industry advertisers who promote insulation and compare insulation products using unfair, inaccurate, and deceptive statements and claims. For example, these violations include failure to follow such simple requirements as including the "Savings Vary" disclosure language. There are also more egregious claims such as astronomical increased savings claims of 50 percent.

Similarly, some insulation manufacturers are claiming that they are tested, approved, and endorsed by various government agencies, including the Consumer Product Safety Commission and the Occupational Safety and Health Administration. There is an evident confusion between being regulated by these agencies and being somehow approved or endorsed by them. Nonetheless, the consumer will likely not know the difference. The gravitas of a government endorsement or approval is weighty and a persuasive marketing tool that can sway consumers.

There is a plethora of comparative advertising claims with one product being compared to another, but consistently missing from these comparisons is the basis for the comparison. Such comparisons result in confusion and an unfair advantage to those making the careless claims. There is also frequent use of R-value per inch claims which lead consumers to the false conclusion that R-value is always linear in nature.

The most abundant of all violations is the lack of substantiation. There is a common practice in certain segments of the industry to rely upon outdated studies. Each company claims this same study supports their energy savings claim, but, in reality, the individual companies have not conducted any studies of their own.

While these examples are just a sampling of non-compliance existing in today's marketplace, the presence of such violations document the need for the R-value Rule.

### The R-value Rule Is An Effective Tool For the Industry To Police Itself

If the credibility of insulation products and promotion of insulation benefits is questioned and doubted because of irresponsible advertising claims, the public will likely lose trust and confidence in the insulation industry and the benefits derived from installation of insulation. Moreover, this mistrust could diminish a consumers' willingness to invest in increased savings from energy efficiency products. NAIMA recognized this fact, and it has undertaken an effort to police the industry in order to foster full but fair competition. NAIMA frequently challenges claims that violate the R-value Rule through letters to competitors and other third parties promoting insulation.

These letters have been effective in bringing many website and advertising claims into compliance. Obviously not all recipients of the letters are quick to make changes, but the experience has taught NAIMA that informing competitors and others about the Rule and its requirements is likely to increase awareness and compliance. The letters NAIMA sends would likely be meaningless if there were not an R-value Rule in place with enforcement provisions behind it.

Therefore, NAIMA believes yet another reason to reauthorize the R-value Rule is because it creates a standard for industry conduct and allows the industry to police itself. And that self-policing fosters full and fair competition, which benefits consumers.

Given the ongoing consumer consumption of insulation products, the continued violation of certain R-value Rule provisions, and the desire of the industry to have a legal standard by which to judge it, NAIMA strongly urges the FTC to reauthorize the R-value Rule.

*Benefits and Costs to Consumers: What benefits has the Rule provided to consumers, and does the Rule impose any significant costs on consumers?*

NAIMA believes that any time there is a standard of conduct for advertising, the consumer benefits from it. For example, if an advertiser claims that its insulation will increase savings by 50 percent, a competitor can, with confidence, counter that claim, demand substantiation and challenge the outrageous claim as false and misleading. Therefore, the consumer is made aware that certain claims may be deceptive. That counterclaim or challenge can be made because a Federal law exists that establishes a standard of conduct.

NAIMA believes that consumers greatly benefit from the R-value Rule. NAIMA cannot imagine the R-value Rule imposing a cost on the consumer.

*Benefits and Costs to Industry Members: What benefits, if any, has the Rule provided to businesses, and does the Rule impose any significant costs, including costs of compliance, on businesses, including small businesses?*

The R-value Rule greatly benefits the industry because it provides a uniform set of Rules with which all insulation manufacturers must comply. The uniform standard is an effective tool for leveling the playing field. As noted above, the R-value Rule also provides an effective tool for the industry to police itself. The Rule defines the standard of conduct without debate or uncertainty. These factors are significant benefits to NAIMA and its members.

The cost of compliance with the R-value Rule typically entails legal review of advertising to assure compliance. This should be deemed as the cost of doing business because it is a preventative measure and saves costs associated with a violation of the Rule or litigation costs connected with false and misleading advertising. Therefore, NAIMA does not believe that the R-value Rule imposes significant costs on businesses, unless the business violates the Rule and is fined. NAIMA's small businesses are informed of the R-value Rule and its requirements through NAIMA's letter writing efforts.

#### *Recommended Changes*

NAIMA supports retention of all provisions in the current R-value Rule. NAIMA requests the following additions or clarifications:

#### Twitter and Mobile Sources

As Twitter and mobile sources become primary advertising venues, NAIMA and its members are concerned about the mandatory disclosure requirements set forth in the Home Insulation Rule, 16 C.F.R. Part 460. Specifically, regarding claims that insulation can cut fuel bills or fuel use, the advertiser must make the following statement: "Savings vary. Find out why in the seller's fact sheet on R-values. Higher R-values mean greater insulating power."

This disclosure statement likely exceeds the maximum characters that would be contained in a Twitter or mobile communication, yet this disclosure statement is required by law. This proves troublesome to those insulation manufacturers committed to comply with the law. Interestingly, the R-value Rule historically has exempted radio and television ads from these disclosure requirements. Twitter and mobile source advertising bear similarities to radio and television in that all mediums seem to demand pithy and concise messages – clever enough to catch the audience's attention in a very short amount of time. Interruption of a radio or television ad was deemed intrusive. Indeed, the FTC eliminated disclosure requirements for both radio and television.

NAIMA believes a very similar scenario exists with the growing use of Twitter, text messaging, and other mobile media. Therefore, NAIMA urges the FTC to address this issue and permit an exemption from the disclosure language requirements for Twitter and small mobile sources.

#### Real Estate Advertisements

NAIMA encourages the FTC to protect the consumer in another area involving home insulation. Home sellers promote and advertise homes for sale as “energy efficient.” NAIMA urges the FTC to require the advertiser or seller to disclose the basis for the claim. The advertisement should state the products used (appliances, insulation, windows), the R-value of the products used, and the location in the home in which they were used. This amendment is offered to prevent home sellers from misleading buyers with an unsubstantiated claim that the home for sale is energy efficient. All such claims should have a reasonable basis and should be connected to current model energy codes for that jurisdiction.

#### Acoustic Performance Claims

The Rule already requires that manufacturers have adequate data per the cited ASTM methods to substantiate R-value thermal performance. Since the Rule was last reviewed, NAIMA has noted an increasing number of performance claims (both monadic and comparative) concerning acoustic performance of home insulation.

Acoustic performance was one of the issues in the National Advertising Division (“NAD”) challenge action against Applegate Cellulose Insulation.<sup>2</sup> In its decision, the NAD stated:

NAD recommended that Applegate discontinue the unsupported claim that ‘Applegate Insulation quiets a home better than fiberglass by reducing air infiltration through wall cavities. Applegate Cellulose completely fills the intended space making it difficult for sound to pass,’ and the graph depicting the superior acoustic performance of cellulose over fiberglass batts. NAD determined that Applegate had not demonstrated any real world consumer relevance for its sound bucket demonstration and, therefore, recommended that it be discontinued.<sup>3</sup>

NAIMA urges the FTC to add to the Rule a provision that requires manufacturers to have competent and reliable test data per appropriate ASTM methods to support all claims related to the acoustic performance of home insulation.

#### FTC Should Confirm That Traditional Commercial and Industrial Insulation Products Are Subject To the R-Value Rule If They Are Used In Residential Applications

NAIMA urges the FTC to recognize that commercial and industrial insulation products are now being installed in residential buildings. This is particularly true of rigid board products. NAIMA’s own members report an increase in the use of rigid board products in residential

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<sup>2</sup> Applegate Insulation (Cellulose Insulation Products), Case #5961, NAD/CARY Case reports (June 2016).

<sup>3</sup> Applegate Insulation (Cellulose Insulation Products), Case #5961, NAD/CARY Case reports (June 2016), p. 38.

construction that previously were thought to be exclusively reserved for commercial and industrial applications.

This fact seems true for other types of board products, too. GreenBuilding Advisor (<http://www.greenbuildingadvisor.com/green-basics/rigid-foam-insulation>) features recommendations directed at homeowners on a variety of foam board products. The online questions and comments are from homeowners using rigid foam board in their garages and homes (<http://www.greenbuildingadvisor.com/green-basics/rigid-foam-insulation>).<sup>4</sup> The fact that these products are recognized and, in some cases, promoted as potential materials for home use, indicates the consumer will search for more information on websites that may be directed at commercial and industrial markets.

NAIMA recently challenged a website that compared polyiso board with mineral wool board. The comparison and statements did not conform to the FTC's R-value Rule. The response from the promoter of polyiso board to NAIMA's challenge was that these are commercial and industrial products and therefore are not subject to the FTC Rule. While they are indeed typically commercial and industrial products, polyiso board is being used in residential applications (see footnote 4). Such a tenuous distinction should not be allowed as an escape from compliance with the FTC's requirements governing promotion of home insulation. NAIMA believes that there was once a clearly demarcated line for products that were used in commercial and industrial applications vs. home applications. But these lines have become blurred. NAIMA urges the FTC to address this blurred line in the reauthorization of the Rule and make more clear and certain that if a product is used in residential insulation applications, there must be compliance with the Rule, even if the lion share of the product's use is in the commercial and industrial market. No harm will be done if the advertisements for the commercial and industrial market are more carefully crafted.

#### "Effective R-Value" and Air Infiltration Claims Are Misleading

NAIMA urges the FTC to retain R-value as the measure of thermal performance. Air infiltration and stopping air infiltration with insulation is frequently used in advertising by various insulation manufacturers as what really matters. This is frequently labeled as "effective R-value" or "real world R-value," which is purportedly some ad hoc and unscientific method that somehow combines insulation and air sealing in a single value. The suggestion is that stopping air infiltration is what really counts, not R-value, and that some insulation products are better at limiting air infiltration and hence, better performing than competing products. These advertisements dismiss R-value as a reliable indicator of thermal performance and advocate reliance upon stopping air leakage or air infiltration. While insulation can fill gaps and voids,

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<sup>4</sup> For example, the following question was posted on the GreenBuilding Advisor webpage: My husband is preparing to drywall our garage. He wants to put polyiso rigid foam insulation between the wall studs. He is cutting the foam 15" wide by 8' high and pressing it into the stud wall cavity. He has two layers, one is 2" thick, with the foil side facing toward the inside of the house, and then he is putting a second layer of 1" thick polyiso board on top of this, with the foil facing the garage. Then, he was going to drywall over that. Is this ok? I'm just wondering if the warmer, moist air from inside the house will get into the walls and condense as it moves closer to the colder drywall. The garage will not be heated. If this is not a good approach, could you advise the best way to insulate the garage walls? Read more: <http://www.greenbuildingadvisor.com/green-basics/rigid-foam-insulation#ixzz48ByhyM6R>.

insulation is never applied to all areas of possible air leakage. Hence, insulation does not and cannot solve all air leakage problems.

A building – residential or commercial – operates as a system. This system includes the thermal envelope that embodies the outside walls, attic, foundation, and insulation. The thermal envelope is part of a larger system that encompasses the mechanical subsystems such as heating and cooling, hot water, kitchen and bathroom ventilation, and appliances. All of these components combine together to achieve optimal energy performance. For the building occupants, active elements like the heating and cooling systems and passive elements such as insulation are analogous to the driver, the car and the engine. Without one, the others would be useless. Similarly, none of those components can deliver the desired thermal performance on its own, yet that is what many advertisements and claims suggest. Indeed, insulation plays no major role in blocking total air infiltration in a home. Resistance to air flow is accomplished largely with gypsum board, sheathing, house wrap, and sealing of joints and holes.<sup>5</sup>

This fact is embraced by the FTC’s R-value Rule which supports measuring thermal performance with R-value. Specifically, the FTC declined to incorporate air infiltration or air leakage into the R-value Rule because air leakage could not be uniformly measured in a reliable and consistent manner so as to make it a reliable tool for consumers.<sup>6</sup> In addition, environmental factors made the measurement of air infiltration unpredictable and therefore unreliable.<sup>7</sup> More importantly, the FTC has previously rejected the notion that thermal performance could be measured by air leakage alone.<sup>8</sup> In a recent Thermal Metric Study<sup>9</sup> in which most insulation types were tested, it was found that sealed walls of the same R-value perform equally well regardless of the type of insulation used. The test results showed that all wall assemblies experienced a loss in thermal performance due to air movement through the assembly. None of the assemblies tested, regardless of the type of insulation material used, including cellulose, fiber glass, open cell spray foam, closed cell spray foam or extruded polystyrene, acted as a complete air barrier.

### R-Value Per Inch Claims

NAIMA finds the prohibitions and restrictions on R-value per inch claims set forth in § 460.20 of the R-value Rule to be very important and greatly needed. NAIMA’s experience with the provision of the Rule suggests that many do not understand the word “linear” or the implication of the word in the context of R-value per inch claims. When NAIMA has challenged R-value per inch claims, a common response is that the overall R-value increases with additional inches. NAIMA’s counter to this response is always that the increase is typically not linear or, stated another way, it is not typically proportional to the inches added. NAIMA requests that the FTC provide further explanation for the reason behind the R-value per inch prohibitions. NAIMA’s understanding is that most light density fibrous insulation does not increase proportionally in

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<sup>5</sup> Joseph Lstiburek, “Air Barriers” Building Science.com Research Report – 0403, p.1 (2004).

<sup>6</sup> 70 Fed. Reg. 31,257, 31,262 (May 31, 2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Thermal Metric Summary Report*, Building Science Corporation (September 23, 2013) ([http://www.buildingscience.com/documents/special/content/thermal-metric/BSCThermalMetricSummaryReport\\_20131021.pdf](http://www.buildingscience.com/documents/special/content/thermal-metric/BSCThermalMetricSummaryReport_20131021.pdf)).

R-value as inches are added. While adding thickness may increase the total R-value of fibrous insulation, each added inch will not add the same “amount” of R-value. In other words, contrary to the mistaken assumption of some advertisers, each inch of insulation does not account for the same amount of the insulation’s total R-value. Thus, for example, if a person installed six inches of insulation and then installed another six inches, the second layer would likely not double the insulation’s R-value. The fact that R-value does not increase proportionally with inches or thickness is, from NAIMA perspective, exactly why the FTC regulates and restricts R-value per inch claims.

NAIMA requests that language similar to that set forth above be included so that the concept is not entirely dependent on the word “linear.”

The importance of such clarification is further illustrated in a recent decision from the Better Business Bureau’s National Advertising Division (“NAD”). NAIMA challenged Applegate Insulation’s frequent use of R-value per inch claims and ranges of R-value. NAIMA pointed out that the assertion of R-value per inch is acceptable if you have actual test data that “prove that the R-values per inch of your product does not drop as its gets thicker.” Instead of actual data, Applegate provided only a coverage chart for its cellulose insulation (which states the number of “settled inches” of its insulation that are supposedly required to achieve specific R-values), and Applegate argued that doing a “little math” (dividing the desired R-value by the corresponding number of inches specified in the coverage chart) reveals that its products do not drop in R-value as they get thicker.<sup>10</sup>

NAIMA does not believe that the coverage chart constitutes “actual test data.” NAIMA seeks additional clarification from the FTC as to what constitutes actual test data.

In addition, the NAD concluded that because NAIMA had not provided any consumer perception evidence in support of its position that consumers would think R-values are linear, Applegate’s claims were not misleading.<sup>11</sup> The FTC based its R-value per inch rule on the fact that consumers would think that R-values are linear. The FTC plainly stated that R-value per inch claims are “clearly leading consumers to believe that insulation R-values are linear.”<sup>12</sup> If the FTC has made this finding, NAIMA or others should not have to possess consumer perception evidence in order to challenge such claims. NAIMA also found that explaining the misleading nature of R-value per inch claims would have been easier had there been a more fulsome articulation of the reasoning behind this particular provision of the Rule incorporated into the codified language itself. NAIMA requests the FTC to incorporate further clarity into the Rule itself.

### *Impact on Information*

As indicated above, NAIMA has an active letter writing campaign that challenges advertising claims that are in violation of the R-value Rule or the FTC’s Green Guides. In some instances,

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<sup>10</sup> Applegate Insulation (Cellulose Insulation Products), Case #5961, NAD/CARY Case reports (June 2016).

<sup>11</sup> Applegate Insulation (Cellulose Insulation Products), Case #5961, NAD/CARY Case reports (June 2016), p. 34.

<sup>12</sup> 44 Fed. Reg. at 50,225 (August 27, 1979). This conclusion has been restated in subsequent reauthorizations of the R-value Rule.

the company writes back stating that changes are being made. Others write back stating that there is nothing wrong with their advertising, but quietly make corrections and modifications to their advertisement consistent with the R-value Rule. Still others do not write back, but NAIMA finds corrections and modifications to their advertising claims. Of course, there are those who completely ignore the letter and suggestions for changes. What is evident from this ongoing practice is that the R-value Rule is a powerful tool for changing, correcting, and improving advertisements throughout the industry. NAIMA has had responses that plainly stated a lack of awareness of this particular Rule. Based on the Rule and its authority, corrections are being made. These experiences play a large role in NAIMA's strong advocacy for retention of the R-value Rule.

### *Compliance*

NAIMA's letter writing campaign remains active, which indicates that there are violations and non-compliance throughout the insulation industry. That NAIMA's letters frequently elicit changes and amendments to advertisements suggests that the Rule helps maintain some semblance of order in the insulation industry.

However, there are some forms of insulation where noncompliance with the Rule – as well as false and deceptive claims – are endemic and which the FTC should consider for additional scrutiny. For example, makers of cellulose insulation routinely violate the Rule's requirements concerning insulation ads (Section 460.18) and savings claims (Section 460.19). As stated in the NAD's decision in the challenge action against Applegate Cellulose Insulation:<sup>13</sup>

NAD recommended that Applegate discontinue its unsupported comparative performance claims that cellulose insulation provides superior energy savings over fiberglass insulation, resulting in consumers having reduced heating and cooling bills, including:

“[I]f one type of insulation is more effective than another, it can help save even more money (and energy). Studies at universities, national laboratories, private research facilities and hundreds of homes and buildings have shown that cellulose is from 20% to 50% more effective than fiberglass.”

“A study by the Leominster Housing Authority demonstrates how using Applegate can reduce the load on your heating bills by as much as 32%! We're so confident that you'll save money using Applegate insulation that we're even willing to guarantee it.”

A set of two side-by-side charts appearing under the heading “Applegate Cellulose helps keep your home warmer in the winter, cooler in the summer, blocks air infiltration, and saves you money!”

“Extensive and expensive air sealing measures must be used for fiber glass buildings to approach the tightness of buildings insulated with cellulose. The

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<sup>13</sup> Applegate Insulation (Cellulose Insulation Products), Case #5961, NAD/CARY Case reports (June 2016), p. 37.

extra expense may yield few benefits. In a Massachusetts survey the cellulose insulated building still consumed 32% less energy for heating than buildings insulated with fiberglass, even after extensive air sealing of all the buildings was done.”

“Applegate Cellulose insulation can reduce your utility bill by up to 40%.”

Applegate Cellulose “is more effective at reducing energy costs than [fiber] glass.”

“Pound for Pound Applegate Cellulose Insulation is more effective at reducing energy costs than glass . . .”

These specific claims found to be deceptive by the NAD are shared with FTC because they are representative of the claims frequently employed by the cellulose industry. NAIMA will systematically continue its efforts to correct such claims. The proliferation of these claims dramatically substantiates the need for the R-value Rule.

#### *Unnecessary Provisions*

As indicated above, NAIMA supports all existing provisions of the Rule.

#### *Additional Unfair or Deceptive Practices*

Please see NAIMA’s response on the Recommended Changes section.

#### *Product Coverage*

NAIMA supports the FTC’s interpretation of the R-value Rule. Home insulation includes insulation used in all types of residential structures. NAIMA supports the FTC’s interpretation that the R-value Rule covers new types or forms of insulation marketed for use in the residential market. NAIMA supports the exemption of pipe insulation or any type of duct insulation, except for duct wrap. NAIMA supports the Rule’s exclusive jurisdiction on residential insulation and supports the exclusion of commercial and industrial insulation but includes these products if used in a residential setting. NAIMA supports the Rule’s non-applicability to storm windows and storm doors. NAIMA supports the Rule’s applicability to mass insulations and reflective insulations used in the residential market.

#### *Technological or Economic Changes*

NAIMA does not have any specific comments at this time on technological or economic changes.

## GENERAL REGULATORY REVIEW QUESTIONS

### *Conflicts With Other Requirements*

The preemption clause in the R-value Rule,<sup>14</sup> from NAIMA's perspective, is one of the most important features in the Rule. It is absolutely essential to maintain national consistency. NAIMA strongly urges the FTC to retain this provision and bolster it if possible.

NAIMA finds itself frequently reminding entities that the FTC has jurisdiction over the labeling and advertising of home insulation. "Green" advocacy groups have a tendency to create standards and "requirements" that impose labeling requirements on products. While these groups have no enforcement power, they have power in the marketplace. The FTC's preemption clause is effective in countering such requirements.

There also seems to be some confusion among governmental entities. A county-level local weights and measures office issued a citation against an insulation company for a product labeling violation. NAIMA corresponded with the weights and measures office essentially informing the official of the FTC's preemption.

The FTC's Rule for "Labeling and Advertising of Home Insulation" specifically preempts State and local laws from imposing conflicting rules or requirements on the labeling of home insulation: "State and local laws and regulations that are inconsistent with, or frustrate the purpose of, the provisions of this regulation are preempted."<sup>15</sup> The plain language of the FTC Rule is unambiguous and leaves no uncertainty that it preempts conflicting State and local laws.

The FTC does provide, however, that "a state or local government may petition the Commission, for good cause, to permit the enforcement of any part of a State or local law or regulations that would be preempted by this section."<sup>16</sup> NAIMA's research revealed no such petition that would permit State and local weights and measures requirements to override the plainly stated preemption clause in the FTC's Rule. If any such petition is ever filed, NAIMA urges the FTC to implement a requirement to give to the affected industry notice and opportunity to comment.

It is noted in training materials for the Weights and Measures Official: "There are over 750 State, county, and city weights and measures jurisdictions throughout the country."<sup>17</sup> This same document also acknowledges that "no federal agency has overall jurisdiction; while USDA, Food and Drug Administration (FDA), Federal Trade Commission (FTC), etc. play a role in issues and sometimes preempt the states . . ."<sup>18</sup> When it comes to home insulation, this is simply untrue and the FTC should clearly remind state and local governments that the FTC has "occupied the field" concerning home insulation.<sup>19</sup>

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<sup>14</sup> 16 C.F.R. § 460.23(b).

<sup>15</sup> 16 C.F.R. § 460.23(b).

<sup>16</sup> 16 C.F.R. § 460.23(b).

<sup>17</sup> Division of Measurement Standards, "Training Module: One, Introduction to Weights and Measures," 2002, p. 18.

<sup>18</sup> *Ibid.* at p. 18.

<sup>19</sup> See, e.g., *Gade v. National Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88 (1992).

With over 750 different jurisdictions, the enormous potential for conflicting labeling requirements for insulation products is not difficult to imagine. This would truly result in confusion and would impose upon manufacturers of insulation products a truly Herculean task to keep up with over 750 various requirements. In that fiber glass and mineral wool insulation is likely sold in all of these jurisdictions, the possibility of such confusion is very real.

It is worth noting that insulation products are exempt from the requirements of the Fair Packaging and Labeling Act (“FPLA”).<sup>20</sup> The FPLA focuses on “consumer commodities,” which is defined as follows:

(c) The term *consumer* or *commodity* means any article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use.<sup>21</sup>

Insulation products are considered durable products – hardware – where the weight of the product does not have the same relevance to a consumer as does the weight of a box of laundry detergent or any other consumer product that is used up within the household.

The power of the Federal agency, including the FTC, to preempt State and local provisions has been repeatedly upheld by the courts. In *American Financial Services Assoc. v. FTC*, the petitioners claimed that the FTC exceeded its rulemaking authority by preempting State consumer protection statutes. The D.C. Circuit Court of Appeals held that “it has long since been firmly established that state statutes and regulations may be superseded by validly enacted regulations of federal agencies such as the FTC.”<sup>22</sup>

NAIMA urges the FTC to retain its preemption over State and local laws, and, to the extent possible, provide additional clarity to the extent of the preemption.

## SPECIFIC QUESTIONS RELATED TO THE R-VALUE RULE

### *Aging of Cellular Plastics*

NAIMA advocates amending the Rule that requires cellular foam manufacturers to adopt aging methods already accepted by the majority of industry representatives and formally approved by the ASTM. NAIMA would support requirements to test pursuant to ASTM 1303. In addition, the FTC could consider other aging standards: ASTM C 1289 for polyisocyanurate; ASTM C 578 for polystyrene; and ASTM C 1029 for polyurethane insulation.

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<sup>20</sup> 16 C.F.R. Parts 500, 501, 502, 503.

<sup>21</sup> 16 C.F.R. § 500.2(c).

<sup>22</sup> *American Financial Services Assoc. v. FTC*, 767 F.2d 957, 989 (DC Cir. 1985), citing *Katharine Gibbs*, 612 F.2d at 667.

### *Affirmative Disclosures*

NAIMA repeats its argument from above regarding Twitter and mobile sources.

As Twitter and mobile sources become primary advertising venues, NAIMA and its members are concerned about the mandatory disclosure requirements set forth in the Home Insulation Rule, 16 C.F.R. Part 460. Specifically, regarding claims that insulation can cut fuel bills or fuel use, the advertiser must make the following statement: “Savings vary. Find out why in the seller’s fact sheet on R-values. Higher R-values mean greater insulating power.” The FTC could require a tweet to make reference to the advertiser’s website.

This disclosure statement likely exceeds the maximum characters that would be contained in a Twitter or mobile communication, yet this disclosure statement is required by law. This proves troublesome to those insulation manufacturers committed to comply with the law. Interestingly, the R-value Rule historically has exempted radio and television ads from these disclosure requirements. Twitter and mobile source advertising bear similarities to radio and television in that all mediums seem to demand pithy and concise messages – clever enough to catch the audience’s attention in a very short amount of time. Interruption of a radio or television ad was deemed intrusive. Indeed, the FTC eliminated disclosure requirements for both radio and television.

NAIMA believes a very similar scenario exists with the growing use of Twitter and mobile accounts. Therefore, NAIMA urges the FTC to address this issue and permit an exemption from the disclosure language requirements for Twitter and small mobile sources.

### *Foam Insulation*

NAIMA offers the following suggestions for addressing issues related to spray foam insulation advertising and testing. While NAIMA represents fiber glass and mineral wool insulation producers, some of NAIMA’s members also produce and sell spray foam insulation products. Therefore, the recommendations set forth herein have been carefully considered and found reasonable and needed to ensure persons using spray foam insulation products understand the limitations of the products and receive the expected benefits.

- **Gaps and Voids:** Spray foam insulation frequently claims that their product air seals and leaves no voids or gaps and completely fills the entire cavity space. Testing and field observations have revealed a number of potential problems: 1) When spraying a wall cavity intended to be completely filled with foam, there is a routine process called scarfing where the excess spray foam is removed so the insulation material is flush with the face of the cavity to facilitate installation of wall board. That scarfing process can leave a concave indentation in the insulated wall cavity. Thus, a gap has been created that likely impacts the thermal performance by reducing the thickness of the material in the cavity; 2) In testing of open cell spray foam insulation performance, it was noted that spray foam, in certain instances, did not attach to the exterior wall and a bubble or void was created – like the voids in a honeycomb – in the wall cavity. Again, this can compromise the thermal performance of the

insulation depending on the size of the void and the temperature conditions. This phenomenon is frequently called “cavity underfill.” NAIMA and its members believe this to be a common occurrence. Therefore, NAIMA makes no specific recommendation to FTC for action, but publicly states that, like other insulation products, improper installation can and does affect the thermal performance of spray foam insulation.

- Whole Building Sealing: Some spray foam producers are repeating the claims that spray foam will air seal the entire house or building. NAIMA recommends that the FTC prohibit such claims since it is impossible for any insulation product to completely air seal the house. Testing has shown air can move through the building envelope in areas where insulation is not installed such as the gap between wall top plates and where the bottom wall plate meets the subfloor.

### *Testing Requirements*

NAIMA requests that the FTC identify ASTM C 390 as optional testing for all insulation products. ASTM C 390 (2013) is the Standard Practice for Sampling and Acceptance of Thermal Insulation Lots. The sampling and inspection prescribed in this practice affords the purchaser a practical level of quality assurance on incoming material. They are based on cost/risk relationships considered typical for preformed thermal insulations offered for general use.

This procedure is intended primarily for the inspection of a continuing stream of lots, and there is not a high probability of rejecting occasional off lots. Consumer protection is based on economic pressure on the producer, through greater risk of lot rejection, to maintain the process average at 90 percent conformance or better.

### CONCLUSION

As these comments demonstrate, the reauthorization of the R-value Rule is essential for preserving standards of fairness and accuracy and has been and will continue to be used as an effective tool for the insulation industry to police itself.