

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20530

In the Matter of the)
Trade Regulation Rule Concerning Deceptive) 16 C.F.R. Part 410
Advertising as to Sizes of Viewable Pictures) Picture Tube Rule Review
Shown by Television Receiving Sets) File No. P174200

**COMMENTS OF THE
CONSUMER TECHNOLOGY ASSOCIATION**

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The Consumer Technology Association¹ (“CTA”) respectfully submits these comments on the Federal Trade Commission’s (“FTC’s” or “Commission’s”) Notice of Proposed Rulemaking (“NPRM”) on Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (the “Picture Tube Rule” or “Rule”).²

¹ Consumer Technology Association (CTA)TM is the trade association representing the \$351 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES[®] – the world’s gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA’s industry services.

² See Picture Tube Rule, 16 C.F.R. Part 410; Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 83 Fed. Reg. 17,117, 17,119 (Apr. 18, 2018) [hereinafter NPRM] (stating that “the Commission preliminarily concludes that the Rule is outdated and no longer necessary to protect consumers”). Although the NPRM does not ask – as the Advance Notice of Proposed Rulemaking did – about expanding the scope of the Picture Tube Rule to cover devices other than televisions, CTA reiterates its opposition to any such expansion of the Rule.

I. INTRODUCTION.

The Picture Tube Rule is an “unnecessary relic”³ of the bygone era of cathode ray tube-based television screens and furniture-like screen enclosures. The deceptive practices that the Commission sought to address when it adopted the Picture Tube Rule in 1966 have long since disappeared, along with CRT-based television screens.⁴ Specifically, as CTA stated in its comments on the Commission’s ANPR, television “manufacturers clearly and conspicuously disclose that the advertised dimension is the diagonal screen size,” and their “current practices satisfy the FTC’s goal of providing consumers with a uniform method of measurement that does not convey misleading claims about picture size.”⁵ Moreover, the Rule has not been the basis of an enforcement action in the more than 50 years since it was adopted.⁶ These reasons alone are sufficient to warrant repealing the Rule.

In addition, market conditions and current television technology strongly suggest that deceptive picture size marketing practices are unlikely to return. In the more than half-century since the FTC adopted the Picture Tube Rule, televisions have gone from one of the most expensive purchases that consumers made to highly affordable household items. The market for televisions is vigorously competitive, and the forces of competition have led to constant improvements in quality, innovation in features, and decreases in prices over the past several

³ NPRM at 17,118 (characterizing comments on the Advance Notice of Proposed Rulemaking [hereinafter ANPR]: Trade Regulation Rule Concerning Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 82 Fed. Reg. 29,256 (June 28, 2017) [hereinafter Advance NPRM]).

⁴ See NPRM at 17,118-19 (stating that “[t]he record lacks evidence of deception supporting retaining the Rule”).

⁵ Comments of CTA, FTC File No. P174200, at 5 (Aug. 31, 2017) [hereinafter CTA ANPR Comments].

⁶ NPRM at 17,118.

decades. The benefits to consumers are evident in the even the most casual comparison along any dimension between the state of the art in 1966 and today –including picture size, price, resolution, and other characteristics. Maintaining consumers’ trust is one critical element of companies’ ability to survive in such a competitive marketplace. Television manufacturers must be able to deliver on their promises to consumers, whether those promises are about picture size or any other aspect of a television’s performance. If they do not, consumers can easily turn to other manufacturers that can and do meet their commitments.

This need to satisfy customers, combined with changes in television technology, have created a marketplace norm in which manufacturers use a consistent, accurate, and informative method to measure viewable picture size. This norm likely to continue on a voluntary basis in the absence of the Picture Tube Rule. Moreover, robust consumer protections will remain in place if the Commission decides to repeal the Rule. Television manufacturers take seriously their obligations to provide consumers with truthful, non-misleading information about any aspect of their products that is important to consumers’ purchasing decisions – regardless of whether they are related to picture size. The FTC would retain its full authority under Section 5 of the FTC to take action, on a case-by-case basis, against any instances in which manufacturers fail to meet this standard. Fully protecting consumers on a consistent, nationwide basis⁷ while eliminating an unnecessary regulation is a winning proposition. Accordingly, CTA fully supports the Commission’s proposal to repeal the Picture Tube Rule.

⁷ See Part IV, *infra* (discussing preemption of state and local laws and regulations concerning specific requirements for measuring television picture size).

II. DEVELOPMENTS IN THE TELEVISION MARKETPLACE COMPEL THE CONCLUSION THAT THE RULE IS UNNECESSARY.

The Picture Tube Rule sets two main requirements for the advertisement of television picture sizes. First, measurements must convey “the actual size of the viewable picture area measured on a single plane basis.”⁸ Second, a size measurement must be either (1) the horizontal dimension of the viewable picture area or (2) a measurement that is described in a statement made clearly, conspicuously, and in close connection with the measurement.⁹ It is the universal practice of television manufacturers to use the diagonal measurement of screen size and to appropriately disclose that this is the case. FTC staff’s market research confirms this assertion.¹⁰

A. *TECHNICAL CONSIDERATIONS – RATHER THAN THE PICTURE TUBE RULE – MAKE IT HIGHLY UNLIKELY THAT MANUFACTURERS WILL SHIFT AWAY FROM DIAGONAL, SINGLE-PLANE MEASUREMENTS.*

The state of the technical art in television sets provides no reason for manufacturers to use anything other than a diagonal, single-plane measurement of picture size. Widescreen flat-panel displays have overtaken the television market. In contrast to when the Rule was adopted in 1966 – and even when the Commission concluded its previous review of the Rule in 2006 – all televisions sold today have flat screens.¹¹ The viewable area of flat screens extends virtually to the edge of any casing that surrounds the display. Therefore, the only size or area that it makes

⁸ Picture Tube Rule, 16 C.F.R. § 410.1.

⁹ *See id.*

¹⁰ *See NPRM* at 17,118 (“Commission staff visited retail stores, reviewed newspaper circulars, and surfed websites offering televisions for sale. Staff observed that virtually every television had a flat screen and that the entire screen was visible.”).

¹¹ A small fraction of current television models has *concave* screens. A measurement that ignores concave screen curvature understates the viewable picture size. *See CTA ANPR Comments* at 9.

sense to discuss in connection with a flat-screen television is the viewable area. Moreover, it is unnecessary to require a “single-plane” measurement, because the flat screens that predominate in today’s television marketplace lack the convex curvature that may have led to overstated picture size dimensions in the cathode ray tube-based televisions of the past.¹² Finally, the diagonal measurement is as convenient and informative as any other single measurement of picture size. Televisions are built to accommodate the aspect ratio in standards for television broadcasts.¹³ Given an aspect ratio, a diagonal measurement provides no more or less information than a horizontal measurement, for example. Television manufacturers have used diagonal viewable picture size measurements despite changes in standard aspect ratios (from the 4:3 aspect ratio that governed analog television broadcasts to the 16:9 aspect ratio that is the current standard for high-definition television broadcasts), and there is simply no reason to use a different measurement.

B. CONSUMERS EXPECT DIAGONAL, SINGLE-PLANE MEASUREMENTS.

The expectation of diagonal, single-plane picture size measurements has become ingrained with consumers, not only because of the consistent use of this measurement for televisions but also for myriad other devices, including monitors, smartphones, and tablets. Manufacturers use diagonal screen size measurements for all of these non-television devices. As such devices become more widely used for viewing video content, the expectation that their picture sizes are measured in the same manner is likely to become stronger. A manufacturer that attempts to use a different measurement would find itself needing to explain this decision and

¹² *See id.*; Picture Tube Rule, 16 C.F.R. § 410.1, Note 1 (stating that “single plane basis refers to a measurement of the distance between the outer extremities (sides) of the picture area which does not take into account the curvature of the tube”).

¹³ *See* CTA ANPR Comments at 9-10.

would struggle to present the measurement in a way that allows consumers to use it for comparison shopping. Nothing in the current marketplace provides a rationale for taking such action.

III. REPEALING THE RULE WILL NOT HARM CONSUMERS OR IMPOSE SIGNIFICANT ADDITIONAL COSTS ON TELEVISION MANUFACTURERS.

A. CONSUMERS HAVE LITTLE, IF ANYTHING, TO GAIN FROM MAINTAINING THE RULE.

Television manufacturers' current practices fulfill the Rule's dual goals of preventing deceptive claims about picture and facilitating comparison shopping.¹⁴ Consumers benefit from receiving truthful, non-misleading information about television picture sizes based on an industry-wide practice of stating the diagonal measurement. The widespread use of single-plane, diagonal viewable picture size measurements allows consumers easily to compare different television models – whether they are from the same manufacturer or different manufacturers – without accounting for different measurement methods. This consistency, in turn, allows consumers to focus on other aspects of comparison shopping, such as price.

The Picture Tube Rule adds little, if anything, to the market forces and technological consideration that already secure these benefits. Tellingly, the Commission has not brought an enforcement action under the Rule in the more than 50 years since its adoption.¹⁵ This fact, in conjunction with the factors discussed above that weigh against the emergence of deceptive

¹⁴ See ANPR, 82 Fed. Reg. at 29,257; see also Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 71 Fed. Reg. 34,247 (June 14, 2006).

¹⁵ See NPRM at 17,119 (stating that the record developed in response to the ANPR contained no “indicat[ion] that manufacturers are making deceptive screen size claims” and that “in the over 50 years since its adoption, the Commission has never brought an enforcement action against marketers making such claims”).

practices in the absence of the Rule, strongly suggests that consumers will receive no benefits from maintaining the Rule.

B. REPEALING THE RULE WOULD NOT IMPOSE SIGNIFICANT COSTS ON MANUFACTURERS.

Television manufacturers take seriously compliance with applicable laws. Their need to provide truthful, non-misleading information about television picture sizes – and other material characteristics of their products – will not change if the Rule is repealed. Since manufacturers have already developed practices to obtain accurate diagonal measurements and to communicate this method of measurement to consumers through the appropriately placed, clear, and conspicuous disclosures that the Rule requires,¹⁶ it is unlikely that they will need to adjust their practices if the Rule is repealed. In particular, CTA is not aware of any manufacturers that rely on the Rule to advertise unqualified horizontal measurements and might incur costs in changing their practices in response to repeal of the Rule.

C. THE CIRCUMSTANCES SURROUNDING THE PICTURE TUBE RULE ARE CONSISTENT WITH OTHER INSTANCES IN WHICH THE COMMISSION REPEALED TRADE REGULATION RULES.

Finally, repealing the Rule is consistent with the Commission’s practice of eliminating trade regulation rules that are “no longer necessary to protect consumers.”¹⁷ As detailed above, the Picture Tube Rule is obsolete because it addresses an issue with measuring the viewable picture size of CRT-based televisions that have essentially disappeared from the marketplace, and there is no evidence of deceptive picture size measurements in the marketplace.

In analogous circumstances surrounding other trade regulation rules, the FTC has eliminated the relevant rules. For example, in 1996, the Commission eliminated the rule

¹⁶ See Picture Tube Rule, 16 C.F.R. § 410.1.

¹⁷ NPRM at 17,118.

concerning games of chance in the food retailing and gasoline industries after finding, among other things, that the rule was outdated and that there were no enforcement actions in the 27 years of its existence.¹⁸ Rule obsolescence due to changes in technology and the disappearance of products from the market have also been the basis of rule repeal in the past. For example, the Commission decided to eliminate a trade regulation rule governing labels for binoculars after determining that the potential for confusion about different types of binoculars had disappeared because of the predominance of one type of lens technology in the marketplace and clear labeling of niche products that used different types of lenses.¹⁹ Even when the record contains a mixture of support for a rule, the Commission has in at least one instance eliminated a trade regulation rule after determining that case-by-case enforcement under Section 5 adequately protects consumers, while eliminating an unnecessary rule serves the public interest and advances government-wide initiatives to reduce regulatory burdens.²⁰

The Picture Tube Rule fits squarely among these past rule repeals. The passage of more than a half-century without an enforcement action, combined with changes in technology and the absence of any evidence of deceptive practices, all underscore that the Rule is unnecessary and should be eliminated.

¹⁸ Trade Regulation Rule Concerning Games of Chance in the Food Retailing and Gasoline Industries, 61 Fed. Reg. 68,143, 68,144 (Dec. 27, 1996) (repealing 16 C.F.R. Part 419).

¹⁹ See Trade Regulation Rule Concerning Deception as to Non-Prismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 60 Fed. Reg. 65,529, 65,530 (Dec. 20, 1995) (repealing 16 C.F.R. Part 402).

²⁰ See Trade Regulation Rule on Misbranding and Deception as to Leather Content of Waist Belts, 61 Fed. Reg. 25,560, 25,560-61 (May 22, 1996) (repealing 16 C.F.R. Part 405).

IV. THE FTC SHOULD INDICATE THAT REPEAL OF THE RULE ESTABLISHES A FEDERAL POLICY IN FAVOR OF DEREGULATION THAT PREEMPTS STATE LAWS.

To ensure that the federal policy rationales for repealing the Rule are not frustrated, the Commission should make clear that it is preempting any state or local efforts to resuscitate similar mandates. The Commission possesses legal authority to preempt such mandates, and only by exercising that authority can it ensure that consumers are not harmed by a complicated patchwork quilt of inconsistent mandates.

The Constitution’s Supremacy Clause provides that federal laws “shall be the supreme Law of the Land.”²¹ This clause “provides Congress with the power to pre-empt state law.”²² As the Supreme Court has made clear, this power extends to federal agencies: “Federal regulations have no less preemptive effect than federal statutes.”²³ Under the “conflict preemption” doctrine, state or local law is void when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁴

Here, the Commission’s authority to issue trade regulation rules entails implied authority to preempt state regulations that, in its view, conflict with how such rules address specific unfair or deceptive practices.²⁵ In the Supreme Court’s words, federal administrative agencies “have a

²¹ U.S. Const. art. VI, cl. 2. Because municipalities and localities are creations of, and derive their powers from, the states, federal law also preempts their requirements. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

²² *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986).

²³ *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). *See also La. Pub. Serv. Comm’n*, 476 U.S. at 374; *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008)).

²⁴ *Fidelity Federal Sav. & Loan Ass’n*, 458 U.S. at 153.

²⁵ *See, e.g., Katherine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979); *Am. Fin’l Svcs. Ass’n v. FTC*, 767 F.2d 957, 989-91 (D.C. Cir. 1985).

unique understanding of the statutes that they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁶ This holds true for the Commission’s rulemaking authority under Section 18 of the FTC Act: “Although the Magnuson-Moss Act contains no explicit preemption provision, 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.”²⁷

Moreover, federal policies of *nonregulation* deserve the same preemptive effect as regulatory policies. Specifically, “a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*.”²⁸ And “[b]ecause what must be implied is of no less force than that which is expressed, federal law may preempt state law even if the conflict between the two is not facially apparent.”²⁹ There is no reason to treat the Commission’s expressly granted authority to repeal trade regulation rules any differently.³⁰ Thus, the Commission is empowered to determine that state or local requirements

²⁶ *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (internal quotation and citation omitted).

²⁷ *Am. Fin’l Svcs. Ass’n*, 767 F.2d at 989. Although the Picture Tube Rule was adopted before the trade regulation rulemaking procedures were enacted through Title II of the Magnuson-Moss Warranty – FTC Improvements Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, 2193-203 (codified as amended in scattered sections of Title 15), the Act provides the Commission’s authority to amend or repeal such rules and governs the procedures for doing so.

²⁸ *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (internal quotation and citation omitted). See also *Minn. PUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“Competition and deregulation are valid federal interests [a federal agency] may protect through preemption of state regulation.”).

²⁹ *Comm’ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 326 (D.C. Cir. 2014) (internal quotations and citations omitted).

³⁰ See 15 U.S.C. § 57a(d)(1) (setting forth procedures that apply to the substantive amendment or repeal of trade regulation rules).

reviving the Rule or similar mandates would conflict with federal policy favoring removal of such requirements, and therefore are preempted.

Such a determination is entirely warranted here. The Commission’s preliminary findings indicate that (1) consumers expect single-plane diagonal picture size measurements,³¹ (2) deception through other picture size representations is non-existent,³² and therefore (3) a rule that specifically addresses picture size representations is unnecessary.³³ The net result of these findings is that only picture size measurements that are actually deceptive should be limited or prohibited. While a federal finding to that effect is necessary, its benefits – and federal policy goals – would be undercut by the adoption of equivalent (or similar) state or local requirements. Thus, CTA respectfully requests that the Commission declare that state regulations akin to the Rule – including interpretations of state laws prohibiting unfair or deceptive acts or practices – are in conflict with federal policy and therefore are preempted.

V. CONCLUSION.

The practices that led the Commission to adopt the Picture Tube Rule more than 50 years ago have disappeared from the marketplace. The industry norm of advertising diagonal picture size measurements provides consumers with accurate information that they can use to compare different television sets, meets consumers’ expectations for screen size measurements of devices

³¹ NPRM at 17,119 (“The ubiquity of the diagonal dimension and the comments suggest that consumers expect to compare diagonal dimensions.”).

³² *See id.* (“In the over 50 years since the Rule’s promulgation, the record demonstrates that the industry standard for representing television screen size has been the screen’s diagonal dimension. All of the televisions for sale that staff recently observed listed the screen’s diagonal dimension.”) (citation omitted); *id.* (“The record lacks evidence of deception supporting retaining the Rule.”).

³³ *See* NPRM at 17,119 (“[T]he record provides no basis for concluding that maintaining the Rule is necessary to prevent deception.”).

more generally, and is unlikely to change in the absence of the Rule. The Commission's proposal to repeal the Rule is appropriate given the absence of deception regarding television picture size measurements and consistent with the Commission's practice of eliminating obsolete rules. Therefore, CTA strongly encourages the Commission to repeal the Picture Tube Rule.

Respectfully submitted,

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