Joint Comments on Proposed Changes to FTC's Appliance Labeling Rule
Re: Appliance Labeling Amendments, Matter No. R611004

May 16, 2012

INTRODUCTION

The below-listed organizations ("Commenters") submit the following comments on the Federal Trade Commission's proposed revisions to the Appliance Labeling Rule. 16 C.F.R. Part 305. In general, our organizations support the proposed changes in the Notice of Proposed Rulemaking. In addition, because the proposed rule presents an opportunity to correct deficiencies in the existing framework and more effectively communicate crucial energy and cost information to consumers, we call upon FTC to enact further changes to fulfill its statutory mandate of ensuring that "each covered product in the type or class of covered products to which the rule applies bear a label which discloses" the estimated annual operating cost of the product and "that the label be displayed in a manner that the Commission determines is likely to assist consumers in making purchasing decisions…" 42 U.S.C. § 6294(c)(1) & (3).

1. Reporting and testing

Commenters support FTC's proposal to synchronize reporting and testing requirements with similar requirements from the Department of Energy.

2. Physical labels: type and location

Commenters support the proposed prohibition on hang tags as well as the proposed requirement that boxes for room air conditioners display labels. In addition, Commenters call on FTC to require labels on boxes for water heaters, compact refrigerators, compact freezers and compact refrigerator-freezers.

a. Prohibition on hang tags

Commenters support FTC's proposal to require manufacturers to affix labels via adhesive rather than by hanging. Over the last year, commenters visited 48 appliance showrooms around the country, recording compliance-related information on more than 3,000 covered products. We are submitting a redacted version of our inspection data as Attachment A. Photos from these inspections are included in Attachment B.

Among other things, these inspections confirmed FTC's finding that "hang tag" style labels become detached much more frequently than adhesive labels. This was particularly true of tags hung by string, plastic bobby pins, or directly onto a prong in the front of a dishwasher's top rack. *See, e.g.,* Attachment B-1–2. Labels hung with zip ties, or by string with reinforced

punched holes, were more likely to remain attached than other types of hang tags. *See, e.g.,* Attachment B-3.

We encourage FTC to specify what qualifies as an adhesive label. In our inspections, we have encountered many labels that were hanging from a strip of tape attached to the inside of a product, and others that were hanging from a string that was itself taped to the inside of a product. *See, e.g.,* Attachment B-4. Manufacturers that affixed labels in this way appeared to have higher rates of missing and loose labels. *See, e.g.,* Attachment B-5. To ensure that labels remain attached, we recommend that FTC specify the label must be either (1) printed on adhesive-backed paper and attached to the product directly via use of the adhesive backing, or (2) attached to the product directly with multiple strips of tape. We would encourage manufacturers to use a label that can be removed by the consumer without damaging the product, but do not believe that FTC needs to specify removability requirements at this time.

b. Labeling of room a/c boxes

We support FTC's proposal to require that room air conditioner boxes display labels. This requirement is necessary to comply with the statutory requirement that FTC ensure labels are "displayed in a manner … likely to assist consumers with purchasing decisions." 42 U.S.C. § 6294(c)(3).

Our own inspection results confirm FTC's observation that room air conditioner models for sale in retail showrooms are frequently displayed only in boxes without an accompanying display model. *See, e.g.,* Attachment B-6. However, because some stores display only unpacked room air conditioners and do not keep the boxes visible nearby, we urge FTC to maintain the requirement that the models themselves carry labels. *See* 75 Fed. Reg. 11483, 11486 ("Labels on packages, another possible option, would only provide information to consumers where retailers display boxes on the showroom floor.").

Table 1 below captures the results of these inspections. It shows the different practices we observed major retail chains using in their display of room air conditioners. Many chains tend not to display room air conditioner units outside of the box. Others display both models and boxes. Still others display models out of the box but do not display the boxes themselves.

TABLE 1: Displays of room air conditioners

Store[1]	# of models for sale	# in box only	# out of box only	# both in and out of box
Store 1	35	1	34	0
Store 2	34	19[2]	12	3
Store 3	25	3	14	8
Store 4	16	11	5	0
Store 5	8	8	0	0

[1] Stores identifiers do not correspond to those in other tables or those in Attachment A

[2] In two cases, boxed units of the same model were displayed out of the box in one area of the store but only in boxes in another area of the store.

Store 6	20	1	4	15
Store 7	15	15	0	0
Store 8	3	3	0	0
Totals	**159**	**64**	**69**	**26**

Consumers who purchase an air conditioner from a store that displays units only in boxes will not see the EnergyGuide until after they have made their purchase. Conversely, those consumers unable to see the box before purchase will not benefit from a label unless it is also on the display model. To address both of these common situations, FTC rules must require that both the box and the product display the label.

Although manufacturers resisted calls to label boxes for televisions, the reasons for their opposition do not apply to room air conditioners. Television manufacturers asserted that the energy consumption of TVs changes frequently, as running changes are made to software during production of a model. *See* Comments of Adam Goldberg, Mitsubishi, Official Transcript, Consumer Electronic Labeling, FTC Matter P094201, p. 124-25; Comments of Jon Fairhurst, Sharp Labs, *id*. at 125-26. Manufacturers have made no such assertion for room air conditioners, and FTC has no reason to think they can or will.[3]

c. Labeling of compact refrigerator, compact freezer and water heater boxes

For similar reasons to those expressed above, FTC must also require labeling of boxes—in addition to models themselves—for compact refrigerators, compact refrigerator-freezers, compact freezers, and water heaters. As documented in Tables 2 and 3 below, many stores display these products in boxes without showing a model out of the box. Others show these products only out of the box, without making the box visible to consumers.

TABLE 2: Displays of covered compact refrigeration products

Store	**# models for sale**	**# in box only**	**# out of box only**	**# both in and out of box**
Store 1	22	8	14	0
Store 2	24	1	21	2
Store 3	12	0	12	0
Store 4	26	3	21	2
Store 5	14	1	9	4
Store 6	15	15	0	0
Others	17	4	9	4
TOTALS	**130**	**32**	**86**	**12**

[3] In the unlikely event that a change would affect energy consumption and render the EnergyGuide label printed on a box inaccurate, manufacturers could place an adhesive label over the printed label.

TABLE 3: Displays of covered water heaters

Store	# models for sale	# in box only	# out of box only	# both in and out of box
Store 1	55	38	N/A	N/A
Store 2	26	10	N/A	N/A
Store 3	14	3	N/A	N/A
TOTALS	**95**	**51**	N/A	N/A

As with labels for room air conditioners, the Rule fails to ensure that labels for these products will be "displayed in a manner … likely to assist consumers in making purchasing decisions." Nor is there any reason to think that manufacturers cannot determine the energy consumption characteristics of these products before printing the boxes. FTC must therefore require that boxes for these products also carry labels.

Commenters again note that FTC must continue to require labeling of the products themselves. Not only do some stores display these product types without boxes. But consumers often leave the EnergyGuide attached to their water heaters, which helps energy auditors, prospective home buyers and others who may want to assess installed equipment.

3. Online requirements

Commenters support FTC's efforts to improve the catalog provisions of the Rule to ensure that the Rule remains useful as consumer purchasing and consumer research increasingly migrate online. Though commenters largely support FTC's proposed changes to the Rule's catalog requirements, additional changes are necessary to ensure that catalogs "contain all information required to be displayed on the label," 42 U.S.C. § 6296(a), and that such information "be displayed in a manner .... likely to assist consumers in making purchasing decisions.…" *Id.* § 6294(c)(3). Our support for these proposed changes is based on our experience over the past year using informal and formal mechanisms to get online retailers to improve their compliance with the Rule.[4]

a. FTC must require online retailers to display the full EnergyGuide on catalog listings of covered products

We strongly support FTC's proposal to extend the basic requirements of the TV labeling rule and require retailers, manufacturers and private labelers to post the full EnergyGuide or Lighting Facts label online. 77 Fed. Reg. 15,300-01. Commenters refer to the points made in the petition submitted by the American Council for an Energy Efficient Economy, Consumers Union and Public Citizen as the basis of this support. *See* Attachment C, Citizen Petition Requesting Amendments to the Federal Trade Commission's Appliance Labeling Rule

[4] We have thus far reviewed many thousands of covered product listings on dozens of retailers' websites, sent letters to 28 online retailers notifying them of compliance problems we observed on their websites, and referred 3 retailers who failed to take corrective action to FTC.

("Petition"). As noted in that petition, by allowing online retailers to make energy efficiency information difficult for consumers to find, the Rule fails to ensure that such information is "displayed in a manner ... likely to assist consumers in making purchasing decisions…." *See* 42 U.S.C. § 6294(c)(3).

The Notice of Proposed Rulemaking proposes to allow retailers to continue to use links to the EnergyGuide or Lighting Facts label provided those links are in the form of an EnergyGuide icon with specific text incorporated. While we agree with FTC that this likely represents an improvement over EnergyGuide icons with no explanatory text or potentially misleading explanatory text, *see* Petition at 10, we have similar concerns about this approach. Some consumers may still not realize that the icon is a link. Others may realize that it is a link but not understand what it leads to, and thus could choose not to click on it. Others may click on it but could decide not to view it if it requires them to download a PDF or other file to their computer.

Time is precious. Many consumers do not use external links for making a product selection, focusing attention instead on the information on the website from which they intend to buy. Most comparison shopping is done based on price, not energy consumption, so retailers need to make the label conspicuous, easily accessible and an intrinsic part of the description of the product in order for it to be useful to and used by consumers. The EnergyGuide icon is not useful in and of itself and most consumers will not know the type of information that will be revealed by clicking on the link.

For these reasons, the full label is preferable to a link in the form of an EnergyGuide icon with explanatory text. If retailers do not wish to take up valuable screen space with the label, they could easily provide it through a hover or mouseover feature that does not send a consumer away from the website. If FTC were to allow a link with explanatory text, it should require that the explanatory text incorporate the particular product's estimated annual operating cost.[5] While this would not give consumers the same comparison or contextual information that the label provides, it would give some valuable information and clue consumers in as to the content of the link.

b. FTC must require that manufacturer sites make the label available

Commenters fully support FTC's proposal to extend the TV labeling requirement that manufacturers make a copy of the label available on their websites. 77 Fed. Reg. 15,300-01. Commenters again refer to the points made in the petition submitted by the American Council for an Energy Efficient Economy, Consumers Union, and Public Citizen as the basis of this support.

c. FTC must make marketplace sites responsible for compliance

As noted above, commenters believe FTC must make additional changes to the catalog provision of the Rule to ensure its effectiveness in an online environment. First among these,

[5] We suggest something along the lines of "Using this product costs $__ per year in addition to the purchase price. Click for more information and to compare this product to others."

FTC must amend the Rule to make clear marketplace websites like Amazon.com, Buy.com, eBay.com and Walmart.com, which feature listings from third-party retailers selling new covered products directly to consumers, are responsible for the compliance of listings of covered products sold on their sites.

As described more fully below, the severe noncompliance of marketplace listings demonstrates the Rule's failure to meet the statutory commands of ensuring that catalogs "contain all information required to be displayed on the label," 42 U.S.C. § 6296(a), and that such information "be displayed in a manner ... likely to assist consumers in making purchasing decisions…." Id. § 6294(c)(3). Though the statute does not explicitly address marketplace sites, it is arbitrary and capricious to exempt them from liability.

Despite EPCA's clear requirements, the Rule's catalog provisions—as currently written—apply only to manufacturers, private labelers, retailers and distributors. 16 C.F.R. §§ 305.4(b)(5), 305.20(a); *but see* proposed § 305.20(a)(i) ("All Web sites advertising [certain covered products] must display, for each model, an image of the label required for that product by this Part."). Because marketplace sites usually do not take possession of covered products sold by third parties, they do not fit the regulatory or statutory definition of a retailer. *See* 42 U.S.C. § 6291(13) (defining "retailer" as "a person to whom a consumer 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) (same). As the Rule is currently written, legal responsibility for ensuring compliance therefore rests with third-party retailers.[6]

However, marketplace websites typically have far more control over whether their listings comply with labeling requirements than do the third-party retailers who use these services. In order to sell their products on marketplace sites, retailers generally must agree that the sites have the right to make any modifications to or remove the listings if they wish. For example, a retailer putting a product for sale on Amazon.com will automatically have the existing listing (if one exists) displayed for that product. The retailer can set the price and select condition and shipping information. But if the existing listing is noncompliant, the retailer can

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[6] An increasing number of marketplace sites also offer third-party sellers the option of listing their products on the site, shipping them to the site's warehouse, and paying the site to store their inventory and ship it to customers once it has been ordered. Fulfillment by Amazon, *available at* http://www.amazonservices.com/content/fulfillment-by-amazon.htm?ld=AZFSSOAAS#features-and-benefits last visited May 16, 2012; About Marketplace: Sell Through Sears, *available at* https://seller.marketplace.sears.com/SellerPortal/d/help/about_marketplace.jsp#sellthroughsears, last visited May 16, 2012; Internet Retailer, "eBay to buy GSI Commerce," p. 2, March 28, 2011, *available at* http://www.internetretailer.com/2011/03/28/ebay-buy-gsi-commerce?p=2, last visited May 16, 2012; Commerce Interface, "Channel Overview: Overstock.com," *available at* http://www.commerceinterface.com/channel-services/overstock-com, last visited May 16, 2012. If a retailer elects to use such a fulfillment program, the marketplace site becomes a retailer or distributor and thus liable under the Rule. But whether or not a product is located in the warehouse of the marketplace site has no bearing on whether the marketplace site can comply with the Rule, or whether a label for that listing would be likely to assist consumers.

only submit suggested changes to its appearance—such as by uploading an image of the EnergyGuide label—and wait for Amazon's approval. *See* Amazon.com Help: Listing Your Item FAQ, *available at* http://www.amazon.com/gp/help/customer/display.html?nodeId=1161276&#correction, last visited May 16, 2012.

But that approval may never come. Amazon's user agreement makes clear that "[t]here is no guarantee that the product information you provide will appear on Amazon.com."[7] And several third-party retailers report that it often does not. For example, Attachment D contains a letter from an online retailer (redacted to remove identifying information) in response to a prior letter alerting the retailer to the presence of noncompliant listings on its own website and on its Amazon channel. The retailer had brought its own listings into compliance but, for some listings, was unable to get Amazon to display the required information. Other retailers also report having trouble fixing the appearance, and compliance, of their marketplace listings. *See*, *e.g.*, Internet Retailer, "The Risky Rumba with Amazon," January 2011, p. 4, *available at* http://www.internetretailer.com/2011/12/31/risky-rumba-amazon?p=1, last visited May 16, 2012.

It is not surprising that noncompliance is rampant on these sites. Table 4 below summarizes the results of searches recently conducted on several marketplace sites' listings of covered products.

TABLE 4: Compliance by product type on marketplace websites

Date of search	Site	Product type	Compliant	Partially compliant[8]	Noncompliant
April 2012	Amazon.com	Clothes washers	7	0	225
April 2012	Buy.com	Dishwashers	2	0	318
April 2011	Amazon.com	Room air conditioners	2	6	87

FTC is well aware of this problem, having sent letters in 2009 warning both Amazon.com and Buy.com about noncompliance on their sites, which we have included as Attachment E. Yet the Commission has never brought an enforcement action to address these violations. Even in the case of Abt Electronics, a retailer that FTC warned and later fined for failing to display EnergyGuide labels in the listings on its own website, FTC took no public action to address the company's many noncompliant listings of covered products for sale

[7] Getting Started Guide: How to Get Set Up Selling on Amazon, *available at* http://g-ecx.images-amazon.com/images/G/01/rainier/help/pdf/Getting_Started_Guide.pdf, p. 9, last visited May 16, 2012; Buy.com licenses its marketplace listings to other online retailers, meaning that both Buy.com and the owner of the second site could exercise control over the listings of products without being liable for their compliance with the rule. *See* Internet Retailer, "Buy.com plans to roll out a white-label marketplace," July 28, 2010, *available at* http://www.internetretailer.com/2010/07/28/buycom-plans-roll-out-white-label-marketplace, last visited May 16, 2012.

[8] This category consists of listings that disclose the estimated annual operating cost of the product but do not explain that figure as required by 16 C.F.R. § 305.20(a)(3)(ii).

through Amazon.com's marketplace. *See In the Matter of Abt Electronics, Inc.*, Complaint, FTC File No. 1023038, Docket No. C-4302, *available at* http://www.ftc.gov/os/caselist/1023038/101101abtcmpt.pdf, last visited May 16, 2012; *See also* Attachment F, FTC letter to Abt (warning company about potential consequences of noncompliance); *Cf.* Internet Retailer, "Online retailers face stricter energy use labeling requirements for TVs," July 25, 2011 (quoting company co-president as claiming FTC had not warned company) *available at* http://www.internetretailer.com/2011/07/25/online-retailers-face-stricter-energy-use-labeling-rules-tvs, last visited May 16, 2012.

Marketplace sites play an increasingly large role in online retailing generally and in sales of covered products in particular. Attachment G, This Week in Consumer Electronics, "Top 100 Major Appliance Retailers," June 20, 2011. They are perfectly capable of ensuring that the products they sell are properly labeled, as they often do in other contexts. For example, eBay requires that all listings for pesticides carry the same information that EPA requires the product label itself to carry. eBay Pesticides Policy, *available at* http://pages.ebay.com/help/policies/pesticides.html#what, last visited May 16, 2012. Seed listings on eBay must include dates of packaging and germination testing if that information appears on the packaging. eBay Plants and Seeds Policy, *available at* http://pages.ebay.com/help/policies/plantsandseeds.html, last visited May 16, 2012. Amazon requires subscribers to apply for approval before listing a host of products, including shoes, watches and certain video games. Amazon.com, Categories Requiring Approval, *available at* http://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=14113001, last visited May 16, 2012.

Exempting marketplace sites from liability for labeling violations guts the Appliance Labeling Rule by stymieing its enforcement. As written, the Rule requires the Commission to expend its limited resources bringing numerous cases against third-party retailers when FTC could otherwise much more easily address the lack of compliance on these sites by bringing enforcement actions against a small number of marketplace sites.

In addition, exempting marketplace sites from liability lacks any rational basis. FTC cannot argue that it makes sense to scatter compliance obligations among third-party retailers when the marketplace sites determine in significant part whether listings comply. Nor can the Commission supply a reasoned justification that a marketplace site's responsibility for a given listing should depend on whether the product listed is located in the warehouse of the marketplace site or whether it will instead ship directly from a third-party retailer. Such a distinction is wholly unrelated to EPCA's requirement that catalogs contain energy efficiency information and does not affect the marketplace site's ability to convey the required information. It has no relationship to the statutory purpose of assisting consumers in making purchasing decisions.

Nor can FTC argue that the statute prevents the Commission from assigning liability to marketplace sites. The statutory command to ensure that labels are present carries with it an implicit authority to carry out the duty. *See, e.g.*, *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011) ("It does not follow, however, that just because Congress required mandatory minimum regulations for some technologies, it intended to exclude other technologies from regulation."). In addition, EPCA's catalog requirement refers specifically to

catalogs rather than retailers. 42 U.S.C. § 6296(a). ("If such manufacturer or any distributor, retailer, or private labeler of such product advertises such product in a catalog from which it may be purchased, *such catalog* shall contain all information required to be displayed on the label, except as otherwise provided by rule of the Commission.") (emphasis added). Finally, the statute's "prohibited acts" section clearly contemplates the possibility that compliance with catalog requirements may extend beyond manufacturers, private labelers, retailers and distributors. *Id*. § 6302(a)(4) (making it unlawful for "*any person* to fail to comply with an applicable requirement of section 6296(a)….")(emphasis added). Therefore, marketplace websites may clearly be held liable under EPCA for any failure to display labeling information.

Finally, the control marketplace sites exert over listings nullifies any argument that the Communications Decency Act, 47 U.S.C. § 230 (CDA), provides blanket immunity from enforcement of these listings. The CDA prohibits civil liability for the "provider of an interactive computer service," when such liability would treat the service provider as a "publisher" of "information provided by another information content provider," 47 U.S.C. § 230(c)(1), in turn defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

Courts have construed the statute's reference to "information provided by another" to provide immunity only where the unlawful information at the base of the complaint originates entirely with the user and is not further developed by the defendant. *Fair Housing Council of San Fernando Valley v. Roommates.com,* 521 F.3d 1157, 1162, 1171 (9th Cir. 2008) (en banc) (*citing Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003). Immunity is not available where, as here, a service provider "materially contribut[es]" to content's "alleged unlawfulness," *id*. at 1168, such as by creating and posting listings itself, *see Anthony v. Yahoo! Inc.*, 421 F. Supp.2 d 1257, 1262–63 (N.D. Cal. 2006), or by making it impossible for third-party retailers to upload content in a way that complies with the law. *Roommates.com*, 521 F.3d at 1166. That is precisely what happens in many cases involving noncompliant listings on marketplace sites. In addition to creating their own listings, marketplace sites exercise control over the appearance of listings in a way that makes it impossible for third-party retailers to ensure where, if at all, EnergyGuide labels will appear on their listings.[9]

[9] To the extent FTC believes this issue is in doubt, commenters note that the CDA is an affirmative defense: If FTC ever were to enforce the Rule against a marketplace site, the Commission would have the right to take discovery relating to the marketplace site's level of control over the development of the listing's noncompliance. *See Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004); *Curran v. Amazon.com, Inc.*, No. 2:07–0354, 2008 WL 472433, *12 (S.D.W.Va. 2008); *Doctor's Associates, Inc. v. QIP Holders, LLC*, 2007 WL 1186026 (D. Conn. 2007). While some courts have nonetheless granted 12(b)(6) motions to dismiss complaints under the CDA, they have done so only when plaintiffs have not requested discovery, *e.g. Doe,* 347 F.3d at 657 (7th Cir. 2003); *Novak*, 309 F. Supp. 2d at 452, or have not pled allegations sufficient to support the need for it. *E.g. Gibson v.*

d. FTC must amend the Rule to cover those sellers that do not take possession of products

Similarly, FTC should amend the Rule to make clear that it applies to those sellers who, despite listing covered products for sale in qualifying catalogs online, never take physical possession of those products on their way from a third party's warehouse to the buyer. These sellers tend to be smaller companies and often scrape information directly from other product listings. It can be difficult to determine whether listed products are in, or will be in, possession of the companies who list them. But because of the large number of listings on these sellers' sites and on their marketplace channels, allowing them to escape liability creates a potentially large loophole that could prevent consumers from seeing labels when searching for products online.

As noted with respect to marketplace sites, FTC has both the authority and the duty to assign liability to these parties as necessary to ensure energy efficiency information will be available to catalog shoppers.

e. FTC should clarify the definition of catalog

Commenters also request certain clarifications of the types of web pages that qualify as a catalog. Though the statute does not define "catalog," the Rule describes it as "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). This definition should be read to encompass each of the three types of listings described below.

The first such type of listings hides the retail price behind a link, often leading to a pop-up window or virtual "shopping cart." *See, e.g.,* Attachment H-1, Buy.com, Bosch Ascenta Series SHE3AR55UC Full Console Dishwasher ("Click here for price"), *available at* http://www.buy.com/prod/bosch-ascenta-series-she3ar55uc-full-console-dishwasher/224775949.html, last visited May 16, 2012; Attachment H-2, Amazon.com, LG WM3455HS 24 Front Load Compact Washer/Dryer Combo ("See price in cart"), *available at* http://www.amazon.com/LG-WM3455HS-Compact-Washer-Capacity/dp/B003JN379G/ref=sr_du_3_map?m=AT7DFJHK0UJS4&s=appliances&ie=UTF8&qid=1333579687&sr=1-3, last visited May 16, 2012; Attachment H-3, TigerDirect.com, Samsung UN60EH6000 60" Class 1080p ("Price: to see details, proceed to the checkout page."), *available at* http://www.tigerdirect.com/applications/SearchTools/item-details.asp?EdpNo=2062575&Sku=S222-6001, last visited May 16, 2012. The purpose of hiding the price in this way is to comply with minimum advertised prices set by manufacturers. In every other respect, these listings are identical to those that FTC has previously cited. Commenters believe that such listings still "contain[] the … retail price" even if they require consumers to click on or mouse over a link to see it. *See* 16 C.F.R. § 305.2(h). These listings thus

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Craigslist, Inc., 2009 WL 1704355, (S.D.N.Y. 2009); *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523, 537 (D. Md. 2006).

fit within the definition of catalog, and it would unreasonable to read that definition as excluding them from having to comply.

FTC should likewise clarify that the definition of catalog includes pages that contain the information described in the definition but allow consumers to select different energy-neutral features—such as color, or a refrigerator door that opens to the left rather than the right—before completing the purchase. *See, e.g.*, Attachment I, AJMadison.com, Summit FFBF28, *available at* http://www.ajmadison.com/cgi-bin/ajmadison/FFBF28.html, last visited May 16, 2012. As with listings that hide the retail price, these listings fit within the definition of "catalog" even though they require consumers to select a feature before they become listings "from which a retail consumer can order a covered product." 16 C.F.R. § 305.2(h). Because consumers may make their purchasing decisions before selecting the feature, it would be similarly unreasonable for FTC to exclude these listings from having to comply.

Finally, FTC should also clarify that the definition of catalog encompasses marketplace site listings that contain terms of sale, price and instructions for ordering, but require that the consumer click on a link to an external site before ordering. *See, e.g.*, Attachment J, Amazon.com, Viking Custom Colors Side-by-Side Built In Refrigerator VISB548DBR, *available at* http://www.amazon.com/Viking-Custom-Colors-Refrigerator-VISB548DBR/dp/B003CV1QK2/ref=sr_1_1?s=appliances&ie=UTF8&qid=1334858032&sr=1-1, last visited May 16, 2012; *see also* Internet Retailer, "The Risky Rumba with Amazon," December 31, 2011, p. 4, *available at* http://www.internetretailer.com/2011/12/31/risky-rumba-amazon, last visited May 16, 2012. These listings are virtually identical to listings for products available for purchase through the marketplace site, and consumers may make their purchasing decisions on the basis of the information these listings contain. As they become more common, it will be increasingly important for FTC to ensure that they are providing consumers with the required information.

Though each of these types of listing differs slightly from those over which FTC has previously fined online retailers, they function in identical ways. Moreover, they are no different than a traditional paper catalog, in which consumers usually must flip to a different page in order to fill out an order form—and often specify preferences such as color—for a product listed elsewhere in the catalog. In each case, it would be unreasonable for FTC to interpret the definition to exclude such listings from having to comply with the Rule.

f. FTC should develop an online database of labels

Commenters' final comment with respect to the online provisions of the Rule calls on FTC to develop an online database of labels to make them more accessible to retailers and consumers.

Many online retailers, including both small companies and marketplace sites, have responded to our enforcement efforts (described above) by citing the need for a centralized database from which they can obtain the information they are required to display. Retailers report that a centralized database maintained by FTC (or DOE, in conjunction with FTC) would better enable them to automatically update their listings and easily fix any mistakes. It would additionally make it easier for consumers to compare products directly.

Neither FTC's appliance energy data web page nor the Department of Energy's compliance certification database are currently adequate tools for those purposes, as the product information available there does not contain even the limited cost information that online retailers are required to display for most appliances, let alone copies of the EnergyGuide label. However, it would not be difficult to add additional fields (e.g., estimated annual operating cost; usage and rate assumptions) to either database, or to create a wiki that would automatically generate EnergyGuide labels based on the information currently in the database. *See* Attachment K, Letter from Earthjustice and Consumers Union to DOE, Jan. 27, 2012 (suggesting changes to certification compliance database). If FTC does not believe it has the resources to do this itself, we encourage FTC to work with nongovernmental organizations to develop an official such site that consumers and retailers will be able to rely on.

4. Label content

Commenters support FTC's proposed content changes to EnergyGuide label, including the requirement that labels have QR codes,[10] and that labels for clothes washers disclose models' specific capacity, and that labels for ceiling fans feature operating costs as their central component. With regard to ceiling fan labels, commenters believe that the label's "excluding lights" caveat should be larger, as should the airflow efficiency. Commenters believe that FTC should explore the appropriateness of comparison ranges, and that the proposed one year implementation period should provide manufacturers with plenty of time to comply.

In addition, Commenters call on FTC to make the following content changes to EnergyGuide labels.

a. FTC should require that EnergyGuide labels for room air conditioners disclose usage assumptions

EnergyGuide labels for room air conditioners should disclose the usage assumption that forms the basis of the estimated annual operating cost figure that appears on the label. Usage assumptions provide valuable information to consumers, and room air conditioners are the only products with labels that fail to disclose the usage assumption underlying the estimated annual operating costs on the label. Labels for dishwashers disclose that the estimated annual operating cost figure is based on assumed usage of four washloads per week. 16 C.F.R. § 305.11(f)(9)(vi). Labels for clothes washers disclose that the figure is based on an assumption of eight loads per week. *Id.* And labels for televisions disclose that the figure is based on an assumption of five hours of use per day. *Id.* § 305.17(f)(1). Room air conditioners are based on

[10] Although QR codes are increasingly popular in retail showrooms, see Internet Retailer, "Retailers stuff their stores with QR codes," January 2004, *available at* http://www.internetretailer.com/2012/01/04/retailers-stuff-their-stores-qr-codes, last visited May 16, 2012, many consumers do not have smartphones with QR code readers installed. Additionally, many consumers will view labels online via personal computers or mobile devices, potentially complicating their ability to read the QR code. Accordingly, FTC should ensure that the URL of the website to which the QR code links is also printed on the label so that these consumers can access the information the website provides.

an assumed usage of 750 hours per year. But, for reasons that appear to be wholly unexplained, labels and listings for room air conditioners are not required to disclose that information.

This information can contextualize the annual operating cost figure and help consumers determine the effect of their actions on energy consumption. The failure to require that information on labels and listings for room air conditioners is arbitrary and unsupportable. This is especially true in light of the greater operating costs of room air conditioners in comparison to these other products.

In order to assist consumers with their purchasing decisions, FTC must require room air conditioner labels to disclose this assumption. We also suggest FTC require the assumption to be expressed in weekly or daily terms accessible to most consumers, for example, eight hours of use per day for approximately three months.[11]

b. FTC must create ranges that enable consumers to compare products across classes.

Commenters call on FTC to reduce the number of comparison ranges for refrigerators and refrigerator-freezers to include all products within a particular range of volumes.

By statute, labels must disclose "information respecting the range of estimated annual operating costs for covered products.…" 42 U.S.C. § 6294(c)(1)(B). FTC must publish these ranges as part of the Rule. *Id*. § 6294(c)(2)(B). As a necessary part of the label, these ranges must be "likely to assist consumers in making purchasing decisions and [be] appropriate to carry out" EPCA's goals. *Id.* § 6294(c)(3).

Yet it is neither helpful to consumers nor appropriate to create ranges for fifty (and counting)[12] different subcategories of refrigerators and refrigerator-freezers, each grouped according to volume, configuration, defrost mechanism, and the presence or absence of a through-the-door ice dispenser. Rather, it undermines the label's usefulness by obscuring relevant energy efficiency differences between models with different configurations and features.

For example, a consumer viewing a label that compares similarly sized refrigerator-freezers that all have through-the door ice, side-mounted freezers and automatic defrost mechanisms is highly unlikely to be able to determine the efficiency penalty she would have to pay for each of those features. FTC should combine ranges or require labels to display a second range that compares all similarly sized units, allowing consumers to determine the effect of various configurations and features.

By way of illustration, GE's discontinued 21.9–cubic-foot GSH22JFZ refrigerator-freezer model uses an estimated 540 kilowatt-hours per year, for an estimated annual operating cost of $57. Compared to other similarly sized models that also have side-mounted freezers, automatic defrost mechanism and through-the door ice dispensers, it appears to be very efficient, one dollar away from the low end of the range. *See* Attachment L, GSH22JFZ Energy Guide, *available at*

[11] 94 days x 8 hours/day = 752 hours.

[12] Though nearly 100 subcategories exist, FTC has only published range information for half of them. FTC did not know of any products in the other subcategories when it published ranges in 2007.

http://products.geappliances.com/MarketingObjectRetrieval/Dispatcher?RequestType=PDF&Name=197D7891P026_22Estar_540kWh_Rev001_07062010.pdf, last visited May 16, 2012.

The same estimated annual operating cost figure would be at the low end of the range for similarly sized models with side-mounted freezers and through-the-door ice service, in the middle of the range for similarly sized units with side-mounted freezers and no through-the-door ice, 16 C.F.R. Part 305 App. A5, near the right (high) end of the range for similarly sized models with bottom-mounted freezers and no through-the-door ice, *id*. App. A6, and past the right end of the corresponding ranges for similarly sized models with top-mounted freezers with or without through-the-door ice, *id*. App. A4, A7. A consumer viewing the EnergyGuide label for this model would be hard-pressed to realize the model is less efficient than every other similarly sized refrigerator with a top-freezer and no through-the-door ice dispenser, and likely no better than average compared to all similarly sized refrigerators.

The subcategories were chosen to match product classes established by the National Appliance Energy Conservation Act. 58 Fed. Reg. at 12824-25. Yet FTC never demonstrated that product classes developed for the purpose of efficiency standards necessarily reflect consumer information needs.

The criterion DOE uses in determining whether to establish a new product class with a relaxed efficiency standard is whether a product type provides a unique feature with sufficient utility to consumers. The criterion FTC must use to determine how to classify products for purposes of comparison ranges is whether the information will be likely to assist consumers with their purchasing decisions. These two criteria differ in important ways, and it is arbitrary and capricious for FTC to rely on the standard-setting criterion rather than the criterion specifically established for labeling rules.

For example, whether a refrigerator with a through-the-door ice dispenser provides some consumers sufficient utility to justify a relaxed efficiency standard does not mean that consumers have no need to compare units that use different ice service methods. Similarly, though different configurations may provide different utilities, consumers may still benefit from comparing the operating costs of products with different configurations.

For similar reasons, the Environmental Protection Agency and National Highway Traffic Safety Administration decided that new automotive fuel economy stickers should compare individual models to vehicles in all classes. Those agencies explained their decision by pointing to evidence that some consumers consider purchasing vehicles from more than one class before making their purchasing decisions.[13] The agencies explained:

> "For these consumers to be able to compare vehicles in different classes, the information must necessarily span those classes, or it will be of little use or, worse, misleading: A vehicle that is ''best'' in one class, in terms of the metrics presented on the label, may be less so when compared to other classes. For those consumers shopping across classes

[13] EPA and NHTSA reached this conclusion after holding 32 focus groups, convening an expert panel, conducting an Internet survey, and receiving around 6000 comments. FTC does not appear to have done a similar level of consumer research into the question of whether consumers shop for refrigerators or room air conditioners across classes. If the Commission believes it necessary, we encourage FTC to issue a supplemental notice to take comment on this issue.

who wish to know the relative performance of those choices, a single all-vehicles rating system will enable them to make accurate comparisons across whichever vehicles they choose to shop. Such an approach would still be useful within a class, since each metric will differentiate vehicles regardless of their class." Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39478, 39487-88.

That rationale applies equally to appliance labels. Commenters are not aware of any data suggesting, for example, that consumers arrive at a store (or website) having already made up their minds that they want a unit with a bottom-mounted freezer rather than one that is side- or top-mounted. Nor has FTC ever shown that consumers generally decide in advance—without reference to price, operating costs or other features—whether or not they want through-the-door ice service.

Even if the numerous subcategories created for these products were justified when FTC created them in 1993, subsequent improvements in refrigerator efficiency have rendered the within-class comparison significantly less helpful than they might have been previously. In most of the fifty subcategories with published ranges, the difference in operating costs between the most efficient and least efficient models is less than $10. In fact, more subcategories have zero difference between than have differences of even $10. And, as described in Subsection C below, these ranges can already overstate potential efficiency differences by continuing to include discontinued low-efficiency products as if they are still for sale. It is therefore even more important for consumers to be able to compare the effect different features and configurations have on operating costs.

c. FTC must update national average energy cost, estimated annual cost figures and comparison scales more frequently than every five years

FTC should require that national average energy costs and ranges of comparability used on labels are updated more frequently than every five years.

The Rule requires FTC to publish revised ranges of comparability every five years, starting in 2012. 16 C.F.R. § 305.10.[14] Yet changes during that five-year period can be very substantial. First, improvements in the efficiency of products since 2007 mean that the ranges of comparability, based on products available in 2007, are now so outdated as to be misleading. Federal minimum standards for many products covered by the Rule have become more stringent since 2007. Yet the ranges have not. Rather, the ranges include many models that are no longer even available for purchase, given that they are so inefficient as to be illegal to manufacture. Ranges also fail to capture highly efficient products introduced in the five years between updates. By comparing models to less efficient older ones, and by not comparing models to more efficient newer ones, the comparison ranges can mislead consumers into thinking a product they are viewing is more efficient—relative to the market—than it really is.

[14] The NOPR does not propose any changes to the Rule's requirement that FTC this year update or expand the comparison ranges and national average energy costs. Commenters encourage FTC to address these issues as soon as possible, whether through a new rulemaking or a supplemental notice of proposed rulemaking.

EnergyGuide labels for dishwashers help illustrate this problem. The range of comparability displayed on current labels for standard-sized dishwasher models runs from $20 to $50. As all scales are based on the 2007 estimated national average energy cost of 10.65¢/kwh, this translates to a range of dishwashers that use between 187 kwh per year at the low end and 469 kwh per year at the high end.

But no dishwasher made in the last two years can legally use more than the 355 kilowatt-hours per year allowed by the relevant federal minimum standards for dishwashers. 10 C.F.R. §430.32(f)(2)(i). The EnergyGuide's use of an outdated range and electricity prices means that the lowest-performing dishwashers on the market, those that barely meet the federal minimum standard, appear to cost about $37.80 per year to operate—just slightly worse than the median operating cost of all dishwashers on the market. But that claim is so misleading that it would likely constitute an unlawful deceptive practice if it were not mandated by FTC.

Second, national average energy costs—which form the basis of estimated annual operating costs—may increase substantially. Labels currently use the Department of Energy's Energy Information Administration 2007 estimated national average cost of 10.65¢ per kilowatt-hour. But the Energy Information Administration recently determined that the national average cost of a kilowatt-hour is now 11.84¢. 77 Fed. Reg. 24940. As a result, EnergyGuide labels understate the cost of operating many appliances by approximately eleven percent.

Dishwasher labels again provide a useful example. An accurate label (i.e. one likely to assist consumers) for the least efficient product manufactured in the last two years would show that operating such a unit costs approximately $42.03 per year, as much as or more than every other single model available.

Commenters suggest that, for most products, FTC update both the national average energy cost figure and the comparison range every three years, a time period chosen because it would help address this problem without unnecessarily burdening manufacturers. We recommend a two-year time period for categories with rapidly changing efficiencies and quicker sell-through periods, such as televisions.

Commenters also suggest FTC reserve its discretion to publish or update comparison ranges whenever a significant number of products enter the market in a subcategory without a previously published range, or whenever a significant percentage of the market for a subcategory is too efficient to be reflected in the range. *See, e.g.,* Attachment B-7–9. Both situations can leave consumers without a useful way of comparing the operating costs of a product to others on the market.

d. FTC should take steps to ensure that EnergyGuide labels do not display inaccurate Energy Star claims

Commenters have found a number of EnergyGuide labels online and in stores that have undeserved Energy Star logos on them. In most cases, these products once qualified for Energy Star but now no longer do given updates to the qualifying criteria.

For example, one online listing for a dishwasher model that uses 334 kilowatt-hours per year links to a label with the Energy Star logo. *See* Attachment M-1, PC Richard & Son, Amana ADB2500AWS Dishwasher, *available at* http://www.pcrichard.com/catalog/product.jsp?productId=51&parentCategoryId=7&categoryId

=1017&subCategoryId=1017010120, last visited May 16, 2012. Another listing on a different site, for a model that uses 318 kilowatt-hours per year, also links to an Energy Guide label displaying the Energy Star logo. *See* Attachment M-2, Orville's Home Appliances, FFBD2409 Frigidaire 24in Built-in Dishwasher, *available at* http://www.orvilles.com/mm5/merchant.mvc?Screen=PROD&Store_Code=OHA&Product_Code=FFBD2409, last visited May 16, 2012.

In the first case, the label's claim is echoed by the listing. In the second, the listing does not mention Energy Star other than via the label. But in both cases, the claims are inaccurate. The current criterion for dishwashers is 295 kilowatt-hours per year. Models using 334 kilowatt-hours per year have not qualified for Energy Star since August of 2009. In other instances, products that were disqualified from the program because they failed verification testing continue to display Energy Star logos on their EnergyGuide label.

Similar issues arise in stores. *See, e.g.,* Attachment B-10. But once mislabeled products are sold, they tend to be replaced with properly labeled ones. Consumer Reports, "What the Energy Guide Label Doesn't Tell You," March 2011, *available at* http://www.consumerreports.org/cro/magazine-archive/2011/march/appliances/washers-dryers/energyguide-label/index.htm, last visited May 16, 2012. Online, however, this problem may persist indefinitely, as few retailers are likely to update Energy Guide labels for the products they list.

Consumers pay attention to the Energy Star logo when it appears on the EnergyGuide label. Allowing labels to carry inaccurate logos both misleads individual consumers and weakens the Energy Star and EnergyGuide brands.

Commenters generally favor allowing manufacturers to display the Energy Star logo on EnergyGuide labels when it is deserved. Accordingly, commenters encourage FTC to work with EPA and the Energy Star program to address this problem and ensure that EnergyGuide labels are not displaying outdated, false, or otherwise inaccurate Energy Star claims.[15] We encourage FTC to take additional public comment on this issue if necessary.

e. FTC should enlarge the size of the pointer indicating where a television's operating costs fall along the range of comparability

Commenters also suggest FTC amend the Rule to ensure that television labels more clearly indicate where a television's operating costs falls along the appropriate range of comparability, by increasing the size and prominence of the arrow. The television label, as illustrated in Appendix L, currently requires a small arrow indicating that placement and shading of the range below or to the left of that arrow. *See* 16 C.F.R. § 305.17(f)(6).

Given the relatively small size of the television label, proportionate placement on the range of comparability is the easiest way for consumers to quickly gauge if a model is efficient or not. But the arrow on television labels is much smaller than it is for other products. FTC

[15] Among other options, commenters suggest FTC and Energy Star consider requiring a vintage indicating the year of the specification under which a product was certified, as well as any necessary amendments to Energy Star partner agreements to cover EnergyGuide labels or specification changes.

should enlarge and embolden it to ensure that consumers are able to compare television models.

5. Enforcement provisions

Commenters support FTC's proposed amendment to the enforcement section of the Rule clarifying that the Commission may assess separate penalties for each offending web page. We further call on FTC to hold brick-and-mortar retailers accountable for ensuring the products they sell bear labels.

a. Commenters support FTC's proposal to clarify that noncompliant web listings are individually subject to penalties

The Rule's definition of "catalog" encompasses individual web pages (and, as noted in section 3.e. *supra*, individual collections of web pages listing an individual product). Without separate liability for each listing, the Rule would set the same limited maximum penalty for an online retailer with 500 noncompliant listings on its site as it would for an online retailer with a single noncompliant listing. The statute does not require FTC to reach that absurd result. *Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006). ("Certainly, if the result reached is 'illogical on its own terms,' the Authority's order is arbitrary and capricious.")

The differences between retail websites and paper catalogs further justify the FTC's proposal. Retailers print many copies of the same paper catalog. In the event those copies are noncompliant, each copy may be individually subject to penalties.[16] Except in cases where more than one URL leads to the same site, retailers do not publish more than one website. Were the Rule to treat a retailer's entire website as a single catalog, increasingly popular online catalogs would be subject to far fewer penalties than paper catalogs. Once again, the law should not be interpreted to require such an absurd result.

b. FTC must make retailers responsible for compliance

In addition, FTC must also amend the enforcement provisions so that brick-and-mortar retailers have responsibility for the products sold in their stores.

In our yearlong investigation into appliance labeling in retail showrooms, 558 (22 percent) of the 2525 appliances we observed on display[17] (including refrigerators, refrigerator-freezers, freezers, clothes washers, dishwashers, room air conditioners and water heaters) lacked any visible EnergyGuide label on or near the exterior or interior of the product. Another 823 (33 percent) had labels that did not comply with the requirements of the Rule. These noncompliant labels typically were loose, were somehow hidden or obstructed from the consumer, hung from exterior of the product, or utilized an old design. *See, e.g.,* Attachment B-1, B-5, B-11–19. Table 5 below shows these results broken out by product type.

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[16] FTC has discretion to reduce penalties in the event a paper catalog has relatively few noncompliant listings.

[17] The figures cited in this section do not include those products displayed only in boxes. *See* Tables 1–3 *supra.*

TABLE 5: Retail showroom inspection results by product type

Product type	Total units	No label	Noncompliant label	Compliant
Clothes washers	665	243	254	168
Dishwashers	550	107	203	240
Freezers	109	27	39	43
Refrigerators	1092	143	302	617
Room air conditioners	95	29	10	56
Water heaters	44	9	15	20
Totals	**2525**	558	823	1144

These inspection results closely track the results of FTC's own observations, 77 Fed. Reg. 15300, as well as a similar inspection by the GAO in 2007. Government Accountability Office, "Energy Efficiency: Opportunities Exist for Federal Agencies to Better Inform Household Consumers," Report 07-1162, at 6. This continuing widespread noncompliance demonstrates that the Rule does not fulfill the statutory requirements to ensure that each product "bear a label" and "that the label be displayed in a manner that … is likely to assist consumers." That noncompliance rates remain roughly the same as they were six years ago indicates that banning hang tags on the exterior of products has failed to solve the problem, despite FTC's prediction that it would. 76 Fed. Reg. 1047.

Nor has banning all hang tags for televisions done much to improve compliance for those products. In the TV labeling rulemaking, FTC expressed confidence that a "network of measures"—consisting of the existing requirements for other appliances plus a ban on all hang tags—were "reasonably calculated to ensure" and in fact would "result in consumers receiving energy information." 76 Fed. Reg. 1047. It has not. Our inspection results indicate that the compliance among televisions is similar to that of other covered products sold in retail stores.[18]

This continued noncompliance cannot be blamed on consumers. During our many hours of inspections in appliance showrooms, we did not observe a single instance in which a consumer removed an EnergyGuide label or carried a detached EnergyGuide label.

[18] Between March 15, 2012 and April 8, 2012, we recorded information on 347 television units of models that appeared to be covered by the Rule. Of these, 173 units appeared to have labels and 174 appeared to be missing labels. We determined whether the Rule applied to a particular model by reviewing the manufacturer's website as well as online listings of the model, and looking for copies of the EnergyGuide label or other evidence that the model has been in production since the May 10, 2011 effective date of the TV labeling requirement. *See* 76 Fed Reg. 1038; 16 C.F.R. § 305.5(e)(4)(2). While it is still possible that the particular units we observed were manufactured before the effective date, it is unlikely that 50 percent of covered models observed in retail showrooms had been there for more than 10 months. *See* 76 Fed. Reg. 1047–48 (noting that most production cycles begin in summer).

FTC noted in the TV rulemaking that, "[i]f experience with implementing the final amendments suggests that improvements are necessary, the Commission can revisit the requirements at a later date." 76 Fed. Reg. 1047. We now call on FTC to take that step.

The obvious way for FTC to remedy this continuing noncompliance is to require retailers to ensure that the covered products they sell properly display labels.[19] Such an approach would likely result in substantial reductions in the number of products missing labels. *See, e.g.,* Comments of Lydia Aouani, Intercan, FTC Roundtable on Consumer Electronic Labeling, Matter No. P094201, p. 58-60 (April 16, 2010) ("TV Labeling Transcript") (stating that retailers can achieve 95 percent compliance with labeling rules).

FTC expressed concern in the television labeling rulemaking that retailers would be unable to attach labels to the correct products. 76 Fed. Reg. 1047. This concern is unfounded. In that same rulemaking, FTC acknowledged that retailers regularly ensure the accuracy of similar product information they display in their stores. 75 Fed. Reg. 11488 ("However, the Proposed Rule does not require information such as screen size, television type, multiple functions (e.g., integral DVD player), and screen resolution. Manufacturers and retailers routinely provide this information through marketing and point-of-sale materials, and, therefore, cluttering the label with this information would not substantially benefit consumers."). Retailers are also capable of advertising products as Energy Star, or posting price and rebate information. All of these actions require retail employees to cross-check the information they provided against separate materials. It is far less complicated to simply ensure that the correct label is present, especially when the product already carries a nameplate displaying the model number.

In fact, retailers already appear to be affixing EnergyGuide labels to products. Many of the compliant products we observed appeared to have had their labels attached, reattached, or reprinted by the retailer. In some cases, products appeared to have been sent to the retailer with the expectation that the retailer would attach the label. Retailers are of course much better-positioned than manufacturers to remedy situations in which labels have become detached or lost, as well as those in which labels do not comply with specific requirements of the Rule (e.g., labels utilizing an old design or hanging from the exterior of a product).

Moreover, a preliminary analysis of our inspection results suggests that the identity of the retailer selling a particular unit appears to significantly influence the probability of that unit's compliance. *See also* 76 Fed. Reg. 15300 n.22 ("The examination did not find specific models or brands consistently missing labels. Accordingly, the visits provided no clear evidence that specific manufacturers are routinely failing to label their products.")

In light of retailer influence over compliance with the Rule and the Rule's ongoing failure to ensure that covered products bear labels, it is arbitrary and capricious for FTC to refuse to amend the Rule to hold retailers responsible for compliance. We further note that

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[19] In addition to granting FTC implicit authority through the statutory commands to ensure products bear labels that will be helpful to consumers, EPCA grants FTC authority to hold retailers responsible in other sections. See, e.g. 42 U.S.C. § 6294(c)(4) ("A rule under this section applicable to a covered product may require disclosure, *in any printed matter displayed or distributed at the point of sale* of such product, of any information which may be required under this section to be disclosed on the label of such product.") (emphasis added).

making retailers responsible for labeling could make redundant prescriptive requirements designed to ensure labels are likely to stay attached during normal handling.

6. Product definitions

Commenters support FTC's proposed changes to the refrigerator and refrigerator-freezer definitions. We also encourage FTC to promptly make any further changes to the definitions that become necessary as a result of DOE's ongoing rulemaking regarding the potential coverage of wine chillers and other types of household refrigeration products.

Respectfully submitted,

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