



VIA FTC COMMENT WORKS

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
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Washington, D.C. 20580

**Re: Supplementary Notice of Proposed Rulemaking on Energy Labeling Rule
Regulatory Review (16 CFR Part 305) (Project No. R611004)**

August 18, 2014

Introduction

The Alliance to Save Energy, American Council for an Energy Efficient Economy, Appliance Standards Awareness Project, Consumer Federation of America, Consumers Union, Earthjustice, and Natural Resources Defense Council (“Joint Commenters”) submit the following comments on the Federal Trade Commission’s (“FTC’s”) supplemental notice of proposed rulemaking (“Supplemental Notice”) proposing revisions to the Energy Labeling Rule.¹ In general, the Joint Commenters support many of the changes in the proposal. For example, the proposal to require Lighting Facts labels on additional classes of lamps, the consolidation of range information for refrigerators, the inclusion of EnergyGuide labels on room air-conditioner boxes, and the proposed improvements to hang tag labels will all have a positive impact on the public’s access to energy efficiency information. However, we reiterate

¹ See 79 Fed. Reg. 34,642 (June 18, 2014) (to be codified at 16 C.F.R. Part 305).

below our previous calls for FTC to make additional changes to the Labeling Rule, including extending liability under the rule to retailers and marketplace websites, requiring labels on clothes dryers, and updating label content more frequently. In addition, we offer specific comments below on several of the issues as to which the Supplemental Notice sought stakeholder input.

I. Extending labeling requirements to additional types of lamps is needed to provide crucial information to consumers.

For the reasons explained in our prior comments, the Joint Commenters support a requirement to apply the full Lighting Facts label to all screw-base lamps, as well as GU-10 and GU-24 base lamps.² Consumers' need for standardized, accurate information on brightness, operating costs, power use, color temperature, lifetime, and mercury content is not limited to the most common bulb shapes or socket fittings. Indeed, consumers face an array of choices for just about every lighting application, and the availability of the Lighting Facts label on all competing products would help to ensure those decisions are well informed.

Although the Commission has proposed a narrower scope of coverage and more limited label content in the Supplemental Notice, extending brightness, operating cost, and lifetime labeling requirements to the proposed additional types of lamps will enable consumers to quickly compare those specialty consumer lamps both with each other and with the general service lamps with which they compete in the marketplace. Moreover, the significant and growing sales volume for many of these alternative lamps means many consumers across the country will benefit from the easy access to important information that FTC's proposal will offer. For example, the Department of Energy's ("DOE's") tracking of the shipments of some of the lamp types that are among the most common substitutes for general service incandescent lamps has revealed that the combined shipments of rough service, vibration service, shatter-resistant, and 2601-3300 lumen incandescent lamps have increased from 16.6 million units in 2010 to more than 18 million units in 2013.³

Access to Lighting Facts labels for specialty consumer lamps is also becoming increasingly important because of the spread of more efficient lighting technologies into niche applications. There are now significant variations in efficacy within all or nearly all lamp categories. For example, LED lamps are now available with intermediate and candelabra bases, with flame and bent tips, and in G, S, and other specialty shapes where traditional incandescent

² See Comments of Natural Resources Defense Council (Sept. 16, 2011) (FTC Doc. No. P084206-00006-80665); Comments of Appliance Standards Awareness Project, et al. (Sept. 22, 2011) (FTC Doc. No. P084206-00008-80686).

³ Compare 79 Fed. Reg. 15,058 (Mar. 18, 2014), with 77 Fed. Reg. 16,183 (Mar. 20, 2012).

lamps still constitute the baseline performance.⁴ The availability of high efficiency lighting technology should be a clear indicator that a label is needed for any lamp type, because even if the market for the particular lamp type is small, there will be consumers who would benefit significantly from access to the information the Lighting Facts label provides.

The Joint Commenters support the proposed lower wattage limit of 30 watts, because that level will ensure consumers receive accurate information about the many lamps that fall just outside the scope of federal lighting efficiency standards. For example, several manufacturers offer 39 watt incandescent reflector lamps,⁵ which are exempt from the DOE's reflector lamp standards because those standards only apply to lamps greater than or equal to 40 watts.⁶ These lamps also appear to be exempt from FTC's current labeling requirements, because they do not meet the Labeling Rule's definition of an "incandescent lamp."⁷ Similarly, many manufacturers offer 30 watt R-20 reflector lamps that enjoy a similar exclusion from DOE and FTC requirements.⁸ Even though brightness, energy cost, and lifetime information may be disclosed on the existing packaging for such lamps, consumers would still benefit from having a uniform approach to calculating those numbers (*e.g.*, using the same electricity cost values and expressing lifetime in years rather than hours).⁹

⁴ See, *e.g.*, SuperBrightLEDs.com listings under product category LED Household Lighting, at <http://www.superbrightleds.com/cat/led-household-bulbs/> (offering LEDs with C, G, and other specialty bulb shapes).

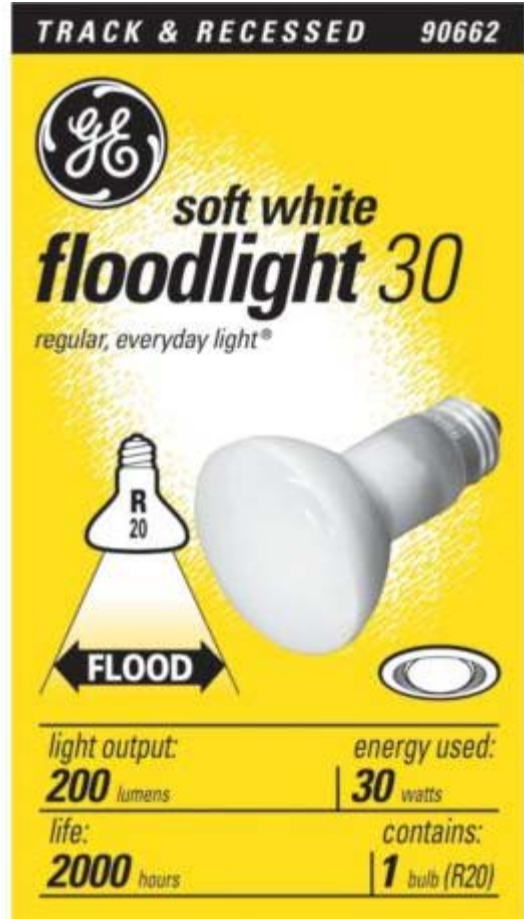
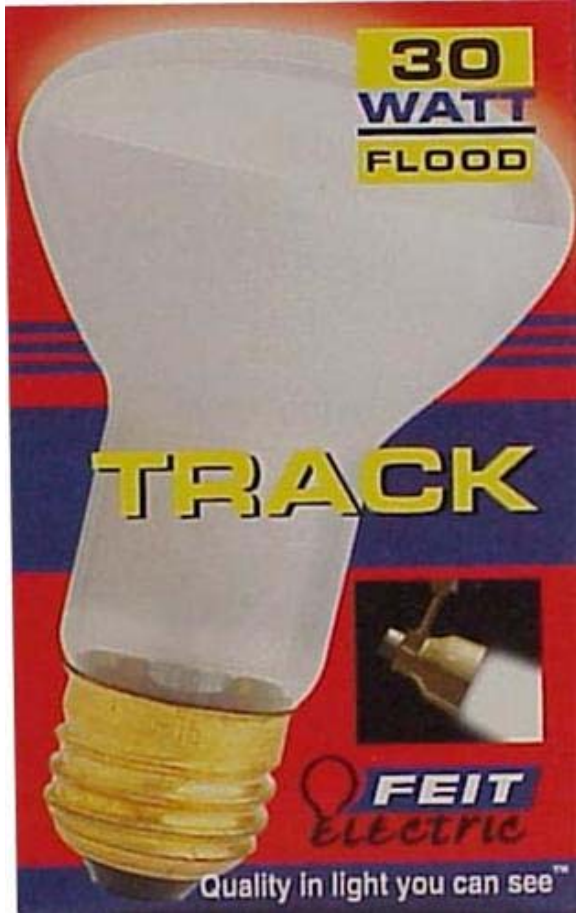
⁵ See, *e.g.*, Lowes.com listing for Sylvania 2-Pack 39-Watt PAR38 Medium Base Warm White Dimmable Outdoor Halogen Flood Light Bulbs, at http://www.lowes.com/pd_403301-3-16634_0_?productId=3745673.

⁶ See 10 C.F.R. § 430.2 (definition of "incandescent reflector lamp").

⁷ See 16 C.F.R. § 305.3(n)(1)(ii) (limiting reflector lamps to 40 watts or higher).

⁸ See, *e.g.*, PlumberSurplus.com listing for Feit Electric 30R20 Track Reflector Flood Light Bulb, at http://www.plumbersurplus.com/Prod/Feit-Electric-30R20-Track-Reflector-Flood-Light-Bulb/108247/Cat/1037?utm_medium=referral&utm_source=shareasale&SSAID=198698 (listing discloses no lumen information).

⁹ See, *e.g.*, LampsPlus.com listing for GE 30-Watt R-20 Reflector Light Bulb, at http://www.lampsplus.com/products/GE-30-Watt-R-20-Reflector-Light-Bulb_90662.html?cm_mmc=LS-AF--DataFeed--Light+Bulbs--90662&lpAffilSiteID=Tmgf2_WUJkA-0HgtrkagxgQjokQtxCkEJA (showing 200 lumens and 2000 hours of life, but no operating cost information).



Images of lamp packaging shown in online retailers' listings for specialty consumer lamps (See notes 8 and 9).

FTC has proposed no specific testing or reporting requirements to certify the claims made for the otherwise unregulated specialty consumer lamps. Instead, manufacturers will need to have a “reasonable basis consisting of competent and reliable scientific tests and procedures substantiating” the values shown on the label for these products.¹⁰ This absence of clear testing and reporting requirements raises concerns about the accuracy of label content. Therefore, the Joint Commenters recommend two measures to help ensure consumers’ access to high quality information. First, because the lighting test procedures referenced in 16 C.F.R. § 305.5(b) may apply to many of the specialty consumer lamps proposed for coverage in the Supplemental Notice, the Joint Commenters recommend that, where appropriate, FTC amend that provision to clarify that the tests referenced therein apply both to general service lamps and their specialty consumer lamp analogues.

Second, even if the Commission does not otherwise subject specialty consumer lamps to reporting requirements, the Joint Commenters urge FTC to consider working with DOE to

¹⁰ See 79 Fed. Reg. at 34,646 (citing 16 C.F.R. § 305.5(b)).

provide access to the current labels for specialty consumer lamps through DOE's Compliance Certification and Management System ("CCMS") website. As we discuss below, the Commission's proposal to use CCMS as a clearinghouse for EnergyGuide and Lighting Facts labels will provide a valuable resource for consumers and retailers by making it easy to locate the current label for general service lamps and the other products covered by labeling requirements.¹¹ Including links to labels for specialty consumer lamps in the database would help to ensure access to the label information for these competing lamps, particularly by facilitating online retailers' compliance with the Rule.

The Joint Commenters recommend delaying the application of Lighting Facts labels to newly covered lamps for no more than one year. Because lamp manufacturers typically publish catalogs with lumen output and lifetime ratings (and, in many cases, energy cost information) for specialty consumer lamps, significant testing likely would not be needed to develop label content.¹² Instead, manufacturers would only need time to redesign packaging. But even this task is likely a more limited undertaking than it might at first seem, because, as FTC notes in the Supplemental Notice, manufacturers have already applied the Lighting Facts label to many lamps for which it is not yet required.¹³

In 2011, FTC suggested allowing 2.5 years to begin labeling previously exempt lamps,¹⁴ but such a lengthy delay would be contrary to the Energy Policy and Conservation Act's ("EPCA's") more demanding approach to compliance. The statute allowed only one year of lead time for the implementation of FTC's labels for general service fluorescent lamps, medium base compact fluorescent lamps, and general service incandescent lamps.¹⁵ And EPCA provided only 6 months for manufacturers of other lighting products to comply with labeling requirements.¹⁶

An extended lead time would also be inconsistent with past FTC practice. For example, in 2010, the Commission allowed only 1 year of lead time for updates to the Lighting Facts Label.¹⁷ However, to the extent FTC determines that manufacturers need additional time, the Joint Commenters urge the Commission to consider a phased approach that gives priority to

¹¹ See pages 17-18, *infra*.

¹² See, e.g., Philips Lighting Company, *Lighting Catalog: Lamp Specification Guide 2013* (2013) at 98-130, available at http://www.usa.lighting.philips.com/pwc_li/us_en/connect/tools_literature/downloads/sg100-2013.pdf; Satco Products, Inc., *Lamp Specification Catalog* (2010) at 9-72, available at https://www.satco.com/flipbook/lamp_spec_catalog/files/assets/common/downloads/publication.pdf.

¹³ See 79 Fed. Reg. at 34,646 n.38.

¹⁴ See 76 Fed. Reg. 45,715 (Aug. 1, 2011).

¹⁵ 42 U.S.C. § 6294(a)(2)(D)(i).

¹⁶ See *id.* §§ 6294(a)(2)(B) (fluorescent lamp ballasts), 6294(a)(2)(C)(ii) (metal halide lamp fixtures).

¹⁷ See 75 Fed. Reg. 41,696 (July 19, 2010). In response to a petition from the lighting industry, the Commission later extended this deadline by just over 5 months. See 76 Fed. Reg. 20,233 (Apr. 12, 2011). But the resulting lead time was still only 18 months.

labeling specialty consumer lamp types with the highest sales volume and the greatest aggregate energy consumption.

Finally, a few issues related to the implementation of labeling requirements for specialty consumer lamps merit clarification in the final rule. First, FTC needs to clarify that paper catalogs and websites must treat specialty consumer lamps the same as general service lamps. Currently, websites advertising general service lamps must either display an image of the Lighting Facts label for each model offered, or a Lighting Facts icon that links to such an image.¹⁸ Similarly, paper catalogs advertising general service lamps must either display an image of the Lighting Facts label for each model, or disclose the label's content in text.¹⁹ Because FTC has found that specialty consumer lamps compete in the marketplace with general service lamps, the same advertising disclosure requirements should apply.²⁰

The Joint Commenters also note that there appears to be an inconsistency in the proposed regulatory text, which FTC may need to address in the final rule. The proposed text for 16 C.F.R. § 305.15 is missing a paragraph (c)(3), though it is referenced in paragraph (c)(4): "Information specified in paragraph (c)(3) of this section shall be presented"

And lastly, although the Supplemental Notice does not discuss these issues, the Joint Commenters offer recommendations on two ways to improve the information lamp packaging provides to consumers. First, the Joint Commenters renew their request to FTC to clarify appropriate limits for wattage equivalency claims.²¹ Our prior comments have called attention to problematic wattage equivalency claims, and because such claims are persisting on lamp packaging, the potential for abuse remains. Therefore, we urge FTC to set clear guidelines for claims that are acceptable.

Second, adding color ink to the light appearance section of the lighting facts label would help consumers select a bulb with the color temperature that suits their needs. Selecting color temperature is high on the list of consumer concerns when buying new efficient light bulbs. However, in a recent Consumer Reports nationally representative poll, only 23 percent of respondents found the warm to cool scale helpful.²² A very likely reason is that the scale is in black and white. Most consumers do not understand what 2700 degrees Kelvin (or even "warm") means and need to see the actual colors to make a meaningful selection. In addition, a scant 11% of respondents found a description of color compared to an incandescent bulb

¹⁸ See 16 C.F.R. § 305.20(a)(1).

¹⁹ See *id.* § 305.20(b)(1).

²⁰ See 79 Fed. Reg. at 34,645 (explaining that the proposed requirements "cover[] common product types likely to appear side-by-side on store shelves with general service bulbs").

²¹ See Comments of Natural Resources Defense Council, *supra* note 2, at 4-5; Comments of Appliance Standards Awareness Project, et al., *supra* note 2, at 1.

²² This survey information was gathered for an upcoming issue of *Consumer Reports*, and can be made available to the Commission upon publication.

helpful, meaning that consumers have little to go on when selecting a bulb that matches their color preferences.

To provide meaningful light appearance information to consumers, FTC should require the light appearance bar to be printed in color. For the dozen light bulbs Consumer Reports recently tested, even though most Lighting Facts labels were printed in black and white, the remainder of the packaging used numerous color inks, indicating that including color ink on the Lighting Facts label would not be unreasonably expensive. In fact, two models Consumer Reports recently tested added color graphs to their labels to show color temperature separate from the black and white Lighting Facts label, similar to the example shown below.²³



Example of use of color to convey light appearance information (See note 23).

²³ See, e.g., LED Lighting Facts website, at <http://www.lightingfacts.com/Library/Content/Label>.

II. Consolidating range info for automatic defrost refrigerator-freezers and for manual and partial automatic defrost refrigerator-freezers is necessary for range information to be useful to the consumer.

FTC's proposal to consolidate the annual operating cost range information for refrigerator-freezers will help to eliminate a source of frustration for consumers who currently must make sense of EnergyGuide labels with range information that, when it communicates any information at all, often seems in conflict with the operating cost and electricity consumption figures shown for adjacent models on the showroom floor. Currently, automatic defrost refrigerator-freezers may fall into one of 55 separate range categories, while manual and partial automatic defrost models are scattered across 26 categories.²⁴ Many of these categories encompass only models at a single level of energy consumption, meaning that labels provide no meaningful comparison information at all.²⁵

But even if the current approach adequately informed consumers of their options, the impending increase in the number of potential categories will make the EnergyGuide label's range information useless for a much larger share of models. For example, the DOE standards that will take effect next month will increase the number of categories of refrigerator-freezers with automatic defrost from 5 to 17.²⁶ Should FTC maintain its current practice of further subdividing DOE's product classes by capacity in increments of 2 cubic feet from 10.5 to 28.5 cubic feet, the number of potential classes would grow to 187. As is the case today, many of these classes would encompass only a single level of efficiency, resulting, in some cases, from there being only a single basic model within the class.²⁷ Subdividing product categories to the extent that models are without competition renders range information useless to the consumer.

In contrast, consolidating refrigerator categories will provide range information that is relevant to most U.S. consumers. As the Joint Commenters have noted in prior comments, available data shows that many consumers already do consider refrigerators with different configurations (and likely different features) when making purchasing decisions.²⁸ Moreover, ready access to range information that compares models with different configurations and features would assist consumers by facilitating such considerations.

The new DOE standards that take effect this year also increase consumers' need for range information that cuts across configurations and features for another reason: the new standards reduce the maximum allowable energy consumption by 20 to 25 percent for most

²⁴ See 16 C.F.R. Part 305 Apps. A2-A8.

²⁵ See *id.* (for example, 8 of the 31 automatic defrost refrigerator freezer product classes for which range information was generated in 2007 show only a single level of energy use within the class).

²⁶ See 10 C.F.R. § 430.32(a).

²⁷ See *supra* note 25.

²⁸ See Comments of Earthjustice, et al. (Mar. 1, 2013) at 5-6 (FTC Doc. No. 563707-00005).

product classes.²⁹ Therefore, the new DOE standards will likely shrink the ranges of energy consumption within each current FTC class. The recently updated Energy Star specification for refrigerators reflects this convergence, as the percentage by which a model must be below DOE standards to qualify for the Energy Star label has shrunk from 20% to 10%.³⁰ The diminishing differences between the high and low ends of the current ranges reflect that the more informative comparison between refrigerator models is a comparison across FTC's current classes, rather than one between models within a class.

Although the Energy Star program may continue to use criteria that vary with features and configurations, FTC's use of consolidated product groupings need not create confusion. A clear explanation of FTC's approach can avoid any confusion stemming from the possibility that a model could place near the high cost end of the range for its capacity class while still earning an Energy Star designation. For example, in place of the current illustrative language stating, "Cost range based only on models of similar capacity with automatic defrost, side-mounted freezer, and through-the-door ice,"³¹ the revised label could state "Cost range based on models of similar capacity with automatic defrost, with or without the same door configuration or method of ice service." In addition, to the extent that additional clarification that the Energy Star designation reflects a comparison with similarly-equipped and configured models might be needed, it would be more straightforward to add that explanation below the Energy Star logo permitted on the EnergyGuide label for qualified products. Energy Star designations are typically earned by a small minority of refrigerator models, so the extra text would not be necessary on the labels for most products.

Nor would refrigerators be unique in featuring range information that may conflict with consumer expectations regarding Energy Star. For example, FTC treats heat pump storage water heaters as a separate class distinct from electric storage water heaters, while Energy Star has no separate criteria for heat pump models.³² Similarly, because the current EnergyGuide label for ceiling fans provides information on high speed performance exclusively, it may seem to conflict with the Energy Star status of a model, which is based on performance at 3 different

²⁹ See 76 Fed. Reg. 57,516, 57,563 Tbl. VI.1 (Sept. 15, 2011) (showing percentage reductions for Trial Standard Level ("TSL") 3); *id.* at 57,596 (adopting TSL 3 levels).

³⁰ Compare Energy Star, *Energy Star Program Requirements Product Specification for Residential Refrigerators and Freezers: Eligibility Criteria Version 5.0* (May 31, 2013), at 3, available at <https://www.energystar.gov/products/specs/sites/products/files/ENERGY%20STAR%20Final%20Version%205.0%20Residential%20Refrigerators%20and%20Freezers%20Specification.pdf>, with Energy Star, *Energy Star Program Eligibility Criteria for Residential Refrigerators and/or Freezers (Version 4.0)* (Aug. 3, 2007) at 4, available at https://www.energystar.gov/ia/partners/prod_development/revisions/downloads/refrig/REF_ProgramRequirements_2008.pdf?034d-b8d4.

³¹ 16 C.F.R. Part 305 App. L Sample Label 1.

³² Compare 16 C.F.R. Part 305 Apps. D2, D5 (FTC electric water heater categories), with Energy Star, *Energy Star, Residential Water Heaters Key Product Criteria*, at https://www.energystar.gov/index.cfm?c=water_heat.pr_crit_water_heaters.

speed settings.³³ Other stakeholders have not suggested that these discrepancies are creating confusion in the marketplace.

Moreover, to the extent that the EnergyGuide label ranges would no longer reflect the product classes DOE uses to group refrigerators for purposes of the standards program, this distinction merely reflects the differing purposes of the labeling and standards programs, as reflected in the language of EPCA. The statute directs that DOE's mandatory minimum standards must require manufacturers to "achieve the maximum improvement in energy efficiency" that is "technologically feasible and economically justified."³⁴ Congress recognized that such standards have the potential to directly eliminate certain product attributes from the marketplace, if those features are incompatible with increased energy efficiency. Therefore, EPCA contains language authorizing DOE to group covered products into different classes with unique standards to shield from elimination certain product attributes that deliver some unique utility to the end-user.³⁵

In contrast, FTC's mission in administering EPCA's labeling program is merely to provide consumers with access to information that will assist them in making purchasing decisions.³⁶ It is only those decisions of the public, and not the information which FTC requires to be disclosed, which can eliminate products from the market. Thus, nothing in EPCA suggests that the Commission must adhere to DOE's feature-protecting approach. Put another way, what DOE needs to take into account when adopting standards is whether some consumers value a feature, but what FTC needs to determine when prescribing labeling requirements is whether most consumers consider a feature essential, and whether the importance they place on that feature justifies presenting information reinforcing the importance of the feature.

The EnergyGuide labels for clothes washers reflect this unique function of the FTC labeling requirements. Although DOE has established separate product classes for top-loading and front-loading clothes washers, the EnergyGuide label ranges group these machines together, offering separate ranges only for standard and compact models.³⁷ As FTC determined in its 2000 final rule eliminating separate top-loading and front-loading categories for clothes washer ranges, the Commission "is not constrained by any statutory provisions from establishing the product classes in the Appendices for purposes of the ranges of comparability in whatever form it believes to be most appropriate."³⁸ FTC explained that it "has chosen to

³³ Compare 16 C.F.R. § 305.13(a)(1) (ceiling fan label content), with Energy Star, *Ceiling Fans Key Product Criteria*, at https://www.energystar.gov/index.cfm?c=ceiling_fans.pr_crit_ceiling_fans.

³⁴ 42 U.S.C. § 6295(o)(2)(A).

³⁵ See 42 U.S.C. §§ 6295(o)(4), 6295(q)(1).

³⁶ See, e.g., *id.* § 6294(c)(3).

³⁷ Compare 10 C.F.R. § 430.32(g)(1) (DOE standards for clothes washers), with 16 C.F.R. Part 305 Apps. F1 & F2 (FTC range information for clothes washers).

³⁸ 65 Fed. Reg. 16,132, 16,139 n.91 (Mar. 27, 2000).

align its product classes with those in the DOE energy conservation standards program whenever it has concluded that doing so is helpful to consumers and competition.”³⁹

Finally, even if FTC concludes that certain refrigerator-freezer configurations or features continue to warrant separate range information, the Commission should consider displaying two ranges on the label: one broken out by the information FTC believes is dispositive, and a second range that allows consumers to compare models by capacity only, regardless of configuration and features.

III. EPCA requires EnergyGuide labels for clothes dryers.

The Commission has proposed not to require labels for clothes dryers. The Supplemental Notice suggests that because there currently is not “meaningful variation” in clothes dryer energy use, “the Commission doubts that “labeling would significantly aid consumer choices,” and therefore “labeling costs are likely to outweigh benefits to consumers.”⁴⁰

FTC’s justification for inaction on clothes dryer labels is not authorized by EPCA. The plain language of the statute reflects that Congress has made the determination that labels for clothes dryers will assist consumers. The statute provides that FTC “shall prescribe labeling rules applicable to [clothes dryers], except to the extent that ... labeling in accordance with this section is not technologically or economically feasible.”⁴¹ For other products, FTC is also permitted not to require labeling if labels would be “not likely to assist consumers in making purchasing decisions,” but EPCA does not grant FTC the discretion to reject clothes dryer labels on this basis.⁴² Thus, so long as labeling clothes dryers is technologically and economically feasible, FTC must require labels on clothes dryers. Because FTC has not found that labeling clothes dryers would not be technologically or economically feasible, labels are required.

FTC’s suggestion in the Supplemental Notice that a labeling requirement’s costs would outweigh its benefits is not the determination that EPCA requires FTC to make. This cost-benefit test does not assess economic feasibility, because “economically feasible” and “economically advantageous” are not the same thing. The word “feasible” means “capable of being done, executed, or effected.”⁴³ As the Supreme Court has explained, the term’s use in a statute shows that “Congress itself defined the basic relationship between costs and benefits, by placing the ‘benefit’ ... above all other considerations save those making attainment of this

³⁹ *Id.*

⁴⁰ 79 Fed. Reg. at 34,659-60.

⁴¹ 42 U.S.C. § 6294(a)(1).

⁴² *E.g., id.* § 6294(a)(2)(A).

⁴³ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981).

'benefit' unachievable."⁴⁴ Here, FTC has not even suggested that manufacturers are not economically capable of labeling clothes dryers.

However, even if the Commission's cost-benefit approach were lawful, the reasons FTC suggests for why the benefits of clothes dryer labels would be minimal do not withstand scrutiny. FTC contends that there is little spread in the operating costs among currently available dryers and that although higher efficiency heat pump electric dryers may be significantly more efficient, they are not currently available in the U.S. market.⁴⁵ However, at least one manufacturer has unveiled plans to introduce a heat pump dryer in 2014,⁴⁶ while another manufacturer has introduced new models using an alternative approach to reducing energy consumption.⁴⁷ Reflecting this trend, Energy Star recently finalized its first specification for clothes dryers, which requires, on average, approximately 20% less energy use than allowed under DOE's 2015 minimum efficiency standards – a larger spread in energy use than the new Energy Star specs for refrigerators.⁴⁸ And there are already dryers on the market that are certified as meeting the new Energy Star level.⁴⁹

FTC also suggests that a label is not needed because heat pump and more efficient conventional dryer designs "are significantly more expensive to manufacture and install," and the savings in operating costs from these dryers would likely be insufficient to cover their higher purchase price.⁵⁰ However, even if true, this does not suggest that labels would not be helpful to consumers, who have a right under EPCA to be provided with information on product operating costs, whether or not that information supports purchasing a more energy-efficient product.

Labels for clothes dryers that present operating cost information would also be helpful to consumers who have gas service in their home, but who currently use an electric clothes dryer. The Supplemental Notice acknowledges that labeling for clothes dryers would disclose the significant difference in operating costs of electric and gas dryers, but maintains that "there

⁴⁴ *Id.* at 509.

⁴⁵ 79 Fed. Reg. at 34,659.

⁴⁶ See Ed Perratore, *LG's New Dryer Saves Energy and Money: Uses a Hybrid Heat Pump to Recycle Wasted Heat*, CONSUMER REPORTS (Jan. 14, 2014), at <http://www.consumerreports.org/cro/news/2014/01/lg-s-new-dryer-saves-energy-and-money/index.htm>.

⁴⁷ See *New Dryer Technology Available to Consumers*, APPLIANCE MAGAZINE (Aug. 11, 2014), at <http://www.appliancemagazine.com/news.php?article=1757114&zzone=0&first=1>. This manufacturer has reported the highest Energy Factor currently certified in DOE's CCMS: 3.95.

⁴⁸ See Energy Star, *Energy Star Program Requirements Product Specification for Clothes Dryers: Eligibility Criteria Version 1.0* (May 19, 2014) at 2-3, available at http://www.energystar.gov/products/specs/clothes_dryers_specification_version_1_0_pd.

⁴⁹ See, e.g., Kimberly Janeway, *First Energy Star Dryer Saves Energy and Money: Innovative Whirlpool Duet Dryer First to Earn Energy-Saving Badge*, CONSUMER REPORTS (June 19, 2014), at <http://www.consumerreports.org/cro/news/2014/06/first-energy-star-dryer-saves-energy-and-money/index.htm>.

⁵⁰ 79 Fed. Reg. at 34,659 n.136.

is no evidence that such information would impact consumer decisions to purchase a model using a particular fuel type.”⁵¹ However, according to the Energy Information Administration’s (“EIA’s”) 2009 Residential Energy Consumption Survey (“RECS”), there is significant potential for households to switch clothes dryer fuel types. RECS estimates that while 55.6 million households use natural gas as their main heating fuel, 58.3 million households use natural gas storage water heaters, and natural gas is the most-used cooking fuel in 38.3 million households, only 17.4 million households currently use natural gas for clothes drying, while 71.8 million households use electric dryers.⁵² The millions of households with natural gas service who currently use an electric dryer represent a significant population of consumers who may benefit from access to information on dryer operating costs.

Finally, although DOE is allowing two alternative test procedures to take effect for clothes dryers in 2015,⁵³ a requirement that label information must be based exclusively on testing in accordance with the new clothes dryer test procedure codified at Appendix D2 to 10 C.F.R. Part 430 Subpart B would better assist consumers in making purchasing decisions. Indeed, the new Energy Star spec for dryers already requires its use, as the program determined that the new D2 procedure provides a more accurate method of measuring the effectiveness of automatic termination controls.⁵⁴ In contrast, although it also recognized the improved accuracy of the Appendix D2 method, DOE was unwilling to require the use of the new automatic termination procedure due to the varied impacts on rated energy consumption it would have for models that manufacturers had believed would be compliant with the impending 2015 efficiency standards for dryers.⁵⁵ Here, although an FTC requirement that EnergyGuide label information must reflect the results of testing under Appendix D2 would not force manufacturers to use that test method to demonstrate compliance with DOE’s standards, it would ensure that consumers have access to the most accurate information available on clothes dryer energy use and operating costs.

⁵¹ 79 Fed. Reg. at 34,660.

⁵² See EIA, *2009 RECS Survey Data* (2013) at Table HC3.1 Appliances in U.S. Homes, by Housing Unit Type; *id.* at Table HC6.1: Space Heating in U.S. Homes, by Housing Unit Type; *id.* at Table HC8.1: Water Heating in U.S. Homes, by Housing Unit Type, available at <http://www.eia.gov/consumption/residential/data/2009/>.

⁵³ See 78 Fed. Reg. 49,608, 49,641 (Aug. 14, 2013) (stating that “manufacturers may elect to use Appendix D2 early to show compliance with the January 1, 2015 energy conservation standards”).

⁵⁴ See Energy Star, *Summary and Response to Stakeholder Comments Received on the ENERGY STAR Program Final Draft Version 1.0 Clothes Dryer Specification* (May 2014) at 5 (explaining that Appendix D2 “provides more accurate energy use and relative energy-efficiency comparisons”), available at http://www.energystar.gov/products/specs/clothes_dryers_specification_version_1_0_pd.

⁵⁵ “DOE determined that the amended automatic cycle termination test procedure for clothes dryers represents a significantly different testing methodology that may impact the energy consumption of some clothes dryers more than others and would potentially require additional product re-design to meet the January 1, 2015 standards. As a result, to maintain the same basic test procedure that is required for use to determine compliance with the January 1, 2015 clothes dryer standards, DOE is not amending appendix D1 in today’s final rule to include provisions for more accurately measuring the effects of automatic cycle termination.” 78 Fed. Reg. at 49,610.

Moreover, nothing in EPCA compels the Commission to accept operating cost information derived from testing under the less accurate dryer test method codified at Appendix D1 to 10 C.F.R. Part 430 Subpart B. The statute requires only that EnergyGuide operating cost information must be “determined in accordance with test procedures prescribed under [section 323 of the statute.]” – a criterion which the new Appendix D2 test procedure meets.⁵⁶

IV. Retention of a 5-year review schedule for updating labels will mislead consumers about the efficiency and operating costs of products.

FTC has proposed not to adopt a schedule that would review the range and operating cost information on EnergyGuide labels more frequently than the current 5-year timetable provides. In prior comments (incorporated herein by reference) the Joint Commenters have argued that FTC’s current schedule violates EPCA’s plain language and unreasonably misleads consumers as to the costs and available efficiency of covered products.⁵⁷ In response, FTC suggests in the Supplemental Notice that the transition periods created by label updates can inhibit comparisons with older labeled products and that 5 years strikes a reasonable balance between this concern and the need to keep label information up to date.⁵⁸

However, to the extent that label update transition periods prevent an effective comparison of competing products manufactured at different times, other changes proposed in the Supplemental Notice can solve this problem. The Commission has proposed to use DOE’s CCMS database as a clearinghouse for links to the current EnergyGuide labels. Having easy access to updated labels would enable retailers to print out and provide updated labels to consumers, or simply provide links for consumers to access this information themselves.

Although more frequent updates are required, even if FTC maintains 5 years as a general guideline, the Commission needs to take steps to prevent repetition of the current delays in updating the labels for refrigerators and clothes washers. In light of pending changes to the DOE test procedures and standard levels applicable to these products, FTC has delayed updating their range and energy cost information.⁵⁹ Thus, manufacturers continue to apply 2007 energy cost and range information to the labels for these products.

This outcome was avoidable and must be avoided in the future. FTC needs to take account of DOE’s rulemaking schedule and coordinate updates to the EnergyGuide labels so that their information does not become stale. When deadlines for DOE action that is likely to

⁵⁶ 42 U.S.C. § 6294(c)(1)(A).

⁵⁷ See Comments of Earthjustice, et al. (Dec. 3, 2012) at 15-16 (FTC Doc. No. 560957-00028); Comments of Earthjustice, et al. (Mar. 1, 2013) at 3-5 (FTC Doc. No. 563707-00005).

⁵⁸ See 79 Fed. Reg. at 34,657.

⁵⁹ See 78 Fed. Reg. 43,974, 43,975 (July 23, 2013).

impact label data fall shortly after FTC's planned 5-year review for a product, FTC should respond by conducting two cycles of reviews for the product, rather than waiting until the conclusion of DOE's work to update a label that may by then be 8 or more years out of date. For example, DOE must begin a review to update the current refrigerator standards in 2017 and must complete this review by 2019, with amendments taking effect 3 years later (i.e., in the 2020-2022 timeframe).⁶⁰ If FTC finishes updating the current refrigerator labels in 2015, the next 5-year review will likely conflict with the compliance date for amended DOE standards. Under these circumstances, conducting a review of the label information in 2018 would minimize the potential for an extended interval between label updates.

FTC also sought comments on any products for which labels are currently in need of updating.⁶¹ Among the products for which labels were updated in 2013, there is at least one product type for which the available efficiency of current models far exceeds the range information presented on the label. Specifically, Stiebel Eltron, Inc. now offers a heat pump electric storage water heater with an annual operating cost nearly \$60 less than the only cost level shown in the range bar for its capacity class.⁶² To avoid confusing consumers viewing the labels for highly efficient new products, FTC should coordinate with Energy Star to be notified when the performance of new products extends beyond the current ranges. Even if, as FTC argues, label updates are not warranted when a "slightly more efficient product arrives on the market,"⁶³ products, like the Stiebel Eltron model, which significantly exceed the performance of existing models, should necessitate an update to the label.

V. FTC needs to consider options other than eliminating capacity information from the labels for certain central air conditioners and heat pumps and needs to ensure consumers' access to information for those products.

FTC has proposed to eliminate the capacity information on EnergyGuide labels for split system central air conditioners and heat pumps, noting that industry commenters raised the concern that the capacity of these products depends on the actual condenser-coil combination installed on site.⁶⁴ However, the SNOPR does not discuss whether presenting a range of capacities on the label would be a more informative approach. Including capacity information as a range of values would be consistent with how energy efficiency information is represented on the labels of these units, and would harmonize with FTC's approach to oil furnaces, which also present multiple capacity levels on the label.

⁶⁰ See 42 U.S.C. § 6295(m).

⁶¹ 79 Fed. Reg. at 34,657.

⁶² See Stiebel Eltron, Inc., Accelerera 300 EnergyGuide label, at <http://www.stiebel-eltron-usa.com/pdf/energy-guide-accelerera.pdf>.

⁶³ 79 Fed. Reg. at 34,657.

⁶⁴ 79 Fed. Reg. at 34,652-53.

The Commission suggests that maintaining model numbers on the label will enable consumers to access cost information online that is specific to their condenser-coil combination.⁶⁵ Although the Joint Commenters believe such a program can work well, we note that DOE's CCMS does not yet provide the information that FTC discussed in the 2013 final rule.⁶⁶ The DOE website referenced on the labels for residential heating and cooling equipment (productinfo.energy.gov) does not yet include an online calculator tool to enable consumers to calculate the annual energy cost of this equipment. Moreover, as regards the elimination of capacity information, we note that DOE's certification regulations for split system heat pumps do not currently require manufacturers to report heating capacity, and this information is not displayed in DOE's CCMS listings.⁶⁷ Updates to DOE's certification requirements and the CCMS interface will be needed to enable consumers to use these tools as the Supplemental Notice envisions.

VI. Labels are needed both on room air conditioner boxes and on the units themselves.

The Commission has proposed to require EnergyGuide labels on room air conditioner boxes.⁶⁸ The Supplemental Notice reveals that 79 percent of the room air conditioner models that FTC observed in visits to retailers were displayed either only in their box or both in and out of their box.⁶⁹ These findings are generally consistent with Earthjustice's own investigations of retailer practices.⁷⁰ Because labeling boxes will therefore improve access to energy efficiency information for many consumers, the Joint Commenters support the proposed requirement.

However, the Commission has also proposed that the requirement to label the box would be in lieu of placing labels on the room air conditioners themselves.⁷¹ As FTC's visits to retailers reveal, a substantial portion of (21%) of observed room air conditioner models are displayed only outside of their boxes,⁷² and Earthjustice's observations from visits to retailers indicate the practice is even more common than FTC found.⁷³ The Commission has not disclosed which retailers it found to display the product without boxes present, or the share of overall room air conditioner sales for which these retailers may account. But the Supplemental Notice suggests that the "burden of requiring physical labels in multiple locations likely

⁶⁵ 79 Fed. Reg. at 34,653.

⁶⁶ FTC has not proposed to eliminate capacity information from the labels of single package equipment, nor is there any reason to do so.

⁶⁷ See 10 C.F.R. § 429.16(b)(2)(ii) (DOE's information requirements for certification reports for residential central air conditioning heat pumps).

⁶⁸ 79 Fed. Reg. at 34,649.

⁶⁹ 79 Fed. Reg. at 34,649-50.

⁷⁰ See Comments of Earthjustice, et al. (Dec. 3, 2012) at 2-3 (FTC Doc. No. 560957-00028).

⁷¹ 79 Fed. Reg. at 34,650.

⁷² See 79 Fed. Reg. at 34,650 n. 70.

⁷³ See Comments of Earthjustice, et al., *supra* note 70, at 2-3.

outweighs the benefits from such additional disclosures, particularly given new provisions increasing the labels' availability to consumers online."⁷⁴

FTC appears to have substantially underestimated the benefits of ensuring consumers' access to room air conditioner labels. Room air conditioners are unique among the products to which labeling requirements apply, in that the households that purchase room air conditioners are typically those most in need of the label's operating cost information. According to the 2009 RECS, most households that rely on one or more room air conditioners for space cooling have an annual household income below \$40,000.⁷⁵ The Commission should reconsider its evaluation of the costs and benefits of requiring a second label for room air conditioners in light of the market for this product.

Moreover, retaining a requirement to also label the room air conditioner itself can provide important information to households who pay to operate room air conditioners that they do not purchase themselves – for example, tenants in housing units where room air conditioners are installed. Approximately 32 percent of households in rental housing rely on one or more room air conditioners for space cooling;⁷⁶ for owner-occupied housing, the figure is less than 19 percent.⁷⁷ If the air conditioner itself is labeled, even if the label is removed from the unit upon installation, that label is less likely to be thrown away (and more likely to be provided to the tenant) than a label found only on the unit's packaging.

However, even if FTC is unwilling to require manufacturers to label both the room air conditioner and its packaging, EPCA grants the Commission authority to “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.”⁷⁸ Thus, FTC should require any retailers who display only unboxed room air conditioners to include in any printed display materials the information required on the EnergyGuide labels of those models.

VII. The benefits of providing a centralized location to access current labels greatly exceed any costs.

The Joint Commenters support the use of DOE's CCMS as a clearinghouse of links to the current EnergyGuide and Lighting Facts labels for all certified products that are subject to labeling requirements. As FTC notes, the burden imposed by this proposal would amount only

⁷⁴ 79 Fed. Reg. at 34,650.

⁷⁵ See EIA, *2009 RECS Survey Data* (2013) at Table HC7.5: Air Conditioning in U.S. Homes, by Household Income, 2009, available at <http://www.eia.gov/consumption/residential/data/2009/>.

⁷⁶ See *id.* at Table HC7.2: Air Conditioning in U.S. Homes, by Owner/Renter Status, 2009.

⁷⁷ See *id.*

⁷⁸ 42 U.S.C. § 6293(c)(4).

to including a URL link to an existing website when submitting a certification report to DOE.⁷⁹ On balance, use of the CCMS for this purpose is likely to reduce the time manufacturers and retailers spend providing labeling information. Establishing a central location for links to labels will reduce the time that manufacturers and retailers spend arranging for the display of accurate and up-to-date labels for online listings and reduce the time retailers spend searching for the correct label information when labels on showroom stock become dislodged or damaged.⁸⁰

We also agree with the Commission that improving access to labels online does not obviate the need to have physical labels on products. Though the Association of Home Appliance Manufacturers' comments indicate that the majority of consumers now conduct research online before purchasing an appliance, that fact merely supports the need to ensure accurate and accessible labeling information is available online. It does not suggest that online research has completely supplanted consumers' examination of multiple competing products in retail showrooms before making a final purchase decision.

VIII. Imposing liability on marketplace websites is the only practicable way to ensure the availability of labels for products sold there.

In proposing not to extend liability under the Labeling Rule to marketplace websites that do not take possession of the covered products they sell, FTC argues that the retailer or distributor who lists the product remains liable under the Rule, and this adequately ensures the enforceability needed to protect consumers' access to required labeling information. The Commission suggests that adding a "secondary layer of coverage" by requiring marketplace websites to comply would impose monitoring and compliance burdens that outweigh the "potential benefit to consumers."⁸¹

However, as the Joint Commenters have demonstrated in prior comments and reinforce below, holding marketplace websites liable for consumers' access to EnergyGuide labels is no mere secondary layer of coverage. It is the only practicable way to police the thousands of listings from a diverse group of sellers who often have little control over the final content that appears on marketplace website listings.

Prior comments on this issue discussed the findings of reviews of covered product listings on marketplace websites, which found that compliance with labeling requirements did not exceed 10 percent for any of the covered products and websites reviewed.⁸²

⁷⁹ 79 Fed. Reg. at 34,647.

⁸⁰ See Comments of Earthjustice, et al., *supra* note 70, at 20.

⁸¹ 79 Fed. Reg. at 34,659.

⁸² See Comments of Earthjustice, et al., *supra* note 70, at 7.

Table 1: Compliance by product type on marketplace websites (2012)⁸³

Date of search	Site	Product type	Compliant	Partially compliant ⁸⁴	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

A follow-up review of listings for the same three product types on the same two websites reveals some improvement among room air conditioner listings on Amazon.com, but no evidence of a broader increase in label availability. In this review, only the top 30 product listings were examined.⁸⁵

Table 2: Updated compliance review of marketplace websites (2014)⁸⁶

Date of search	Site	Product type	Compliant	Noncompliant
Aug. 2014	Amazon.com	Clothes washers	1	29
Aug. 2014	Rakuten.com ⁸⁷	Dishwashers	0	30
Aug. 2014	Amazon.com	Room air conditioners	22	8

Reflecting the frustration that consumers face when unable to access the information presented on the EnergyGuide label, many of the “Customer Questions & Answers” entries on Amazon.com for product listings without a label concerned the energy use and operating costs of the product. Some examples of actual questions from these noncompliant listings are below:

- For clothes washers:
 - Does this washer use up a lot of energy? Does it run up your electric bills?
 - What are the energy specs? How much water/energy does it use in a single load?

⁸³ Copy of Table 4 from Comments of Earthjustice, et al., *supra* note 70, at 7.

⁸⁴ This category consists of listings that disclosed the estimated annual operating cost of the product but did not explain that figure as required by 16 C.F.R. § 305.20(a)(3)(ii) (2011).

⁸⁵ The Amazon.com listings in the relevant subcategories (e.g., Appliances>Washers & Dryers>Washers) were sorted by the “New and Popular” criterion, while the Rakuten.com listings in the Home & Outdoor>Appliances>Kitchen Appliances>Major Kitchen Appliances>Dishwashers subcategory were sorted by “Most Popular.” Products that appeared in the search results but for which labels are not required (e.g., parts and accessories) were excluded.

⁸⁶ In addition to the one correctly labeled listing, two clothes washer listings displayed EnergyGuide labels for a model number that did not match the product listing. Further, although marked as compliant here, most room air conditioner labels predated FTC’s 2013 update to the EnergyGuide range and cost information for those products.

⁸⁷ Buy.com now redirects to Rakuten.com.

- For room air conditioners:
 - Is this product energy star rated?
 - [W]hat is the seer [sic] rating of this 6,000 ac unit??
 - What is the EER rating?
 - [H]as it raised your electric bill any[?]

Thus, in the absence of an enforceable EnergyGuide label requirement, consumers on marketplace websites are often left to crowd-source energy use and operating cost information from the anecdotal observations of previous customers. This outcome demonstrates the serious burden that consumers face in using some of the most popular online shopping websites. Even if the use of DOE’s CCMS as a clearinghouse for EnergyGuide labels comes to fruition, it will take years of concerted effort to make consumers aware of how to access this information. In the meantime, FTC needs to ensure that marketplace websites are held to the same standards as other online retailers.

IX. FTC must reconsider its failure to extend retailers’ liability to ensure products are labeled in accordance with the Rule.

FTC has proposed not to revise the Rule to hold retailers responsible for ensuring the EnergyGuide label’s presence on covered products sold in their stores, suggesting that “the burden on retailers of ensuring label presence may exceed the benefits.”⁸⁸ The burdens that FTC cites include monitoring product displays and, “[w]here labels are missing from display models, . . . find[ing] a properly-labeled replacement or obtain[ing] a substitute label.”⁸⁹ The Commission refers to a retailer association’s allegation that “requiring retailers to reaffix missing labels would cause ‘chaos,’ because retailers would be unable to quickly match labels with products, increasing the risk of inaccurate labeling,” and concludes that it is “premature to impose these costs and incur these risks when better label requirements and greater availability of online labels may alleviate the problem.”⁹⁰

Because the Supplemental Notice overstates the burdens that expanded retailer liability would impose, FTC must reevaluate the merits of this option. First, the Commission’s suggestion that monitoring product displays would constitute a significant burden fails to consider that retailers already monitor product displays on a near-constant basis – from cleaning display models to ensuring pricing and other product information remains in place. This level of engagement is confirmed by the many instances in which we observed what appeared to be replacement EnergyGuide labels printed by retailers to replace lost or damaged labels.⁹¹

⁸⁸ 79 Fed. Reg. at 34,658.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See Comments of Earthjustice, et al., *supra* note 70, at 20.

Moreover, the assumption that retailers' obligation to relabel products would create problems ignores FTC's proposal to work with DOE to ensure easy access to the current label through DOE's CCMS. When all it takes to locate a replacement label is to type the product's model number into a website's search function, the possibility of "chaos" seems remote. The availability of labels through links in the CCMS will greatly reduce both the burden on retailers and the risk of inaccurate labeling that FTC has cited, and therefore the Commission must reconsider its position on this issue.

X. More durable labels for clothes washers, dishwashers, and refrigerators will improve consumers' access to energy efficiency information, but further adjustments are needed.

Although the Joint Commenters generally support the Commission's proposal to amend the Rule to improve the durability of hang tags, we recommend that reinforced punch holes be required independent of the method of attaching a hang tag label. FTC has proposed that tags without reinforced punch holes can be used if attached using cable ties, but if double strings or a fastener with equivalent or greater strength is used, reinforced punch holes would be required.⁹² However, because the tensile strength of cable ties can vary by more than an order of magnitude,⁹³ and to avoid questions about whether a particular fastener is in fact a cable tie,⁹⁴ FTC should simply require reinforced punch holes on all hang tag labels. Doing so will also improve the uniformity of labels' appearance.

XI. The proposed revisions to ceiling fan labels will help to highlight the information most important to consumers.

The Joint Commenters support the Commission's proposed changes to the labels for ceiling fans. These changes will increase the effectiveness of the label by more closely aligning its appearance with the EnergyGuide labels for other products with which consumers are familiar. Furthermore, we note that, in contrast to certain industry stakeholders' recommendations to reduce usage rate assumptions for the label, in DOE's rulemaking to amend the efficiency standards for ceiling fans, multiple fan industry representatives pointed DOE to a study estimating national average daily ceiling fan use at 6.3 hours per day.⁹⁵

⁹² See 79 Fed. Reg. at 34,648.

⁹³ See, e.g., Cable Tie Express, *Cable Ties & Tie Wraps*, at <http://www.cabletieexpress.com/cable-ties> (offering cable ties rated from 18 to 250 pounds)

⁹⁴ See, e.g., Cable Tie Express, *Beaded Cable Ties*, at <http://www.cabletieexpress.com/beaded> (unlike traditional zip ties, beaded ties are releasable).

⁹⁵ See American Lighting Association, *The Ceiling Fan Industry Response To The Department of Energy: Energy Conservation Standards Rulemaking Framework Document For Ceiling Fans and Ceiling Fan Light Kits* (June 13, 2013) at 14 (Docket No. EERE-2012-BT-STD-0045-0039).

XII. Retaining ranges on labels for televisions provides valuable information.

The undersigned organizations support FTC's proposed retention of comparison ranges for televisions sets, and suggest that, to the extent that other stakeholders believe shrinking differences in operating costs within the current range categories have diminished the utility of the range information, consolidation into fewer size categories may be appropriate.

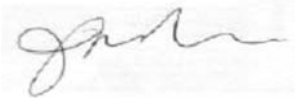
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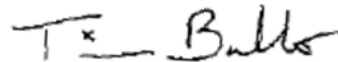
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