



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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July 30, 2001

Norman Yoerg, Esq.
Associate Corporate Counsel
Masco Corporation
21001 Van Born Road
Taylor, Michigan 48180

Dear Mr. Yoerg:

This letter responds to your July 12, 2001 inquiry regarding the coverage of spas under the Federal Trade Commission's (FTC's of Commission's) Appliance Labeling Rule (16 C.F.R. Part 305). In particular, you have asked for guidance on the following three questions:

- Does the FTC's Appliance Labeling Rule on EnergyGuide labels apply to spas?
- Have either the FTC or [the Department of Energy (DOE)] promulgated any U.S. government standards to test a spa's energy use or efficiency?
- Does the FTC or the DOE endorse companies using the EnergyGuide label to promote their spa's use or efficiency and does the FTC have any prior substantiation or deception requirements that would apply in using that label?

Spas and the Appliance Labeling Rule

The EnergyGuide labeling requirements in the Appliance Labeling Rule apply to appliances that are designated as "covered products" under the Rule. One such covered product is the pool heater, which is defined by the Rule at 16 C.F.R. § 305.4(r) as:

... an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications. The requirements of this part are limited to those pool heaters for which the Department of Energy has adopted and published test procedures for measuring energy usage (see 10 CFR part 430, subpart B, appendix P).

As indicated in the definition, certain heaters for spas are covered products under the Rule. DOE regulations contain test procedures for gas-fired and oil-fired pool heaters (10 C.F.R. Part 430, Subpart B, Appendix P) and thus, these products are within the definition. The DOE regulations currently do not, however, contain test procedures for electric pool heaters. It is our understanding that most spas on the market use electric pool heaters. Accordingly, electric pool heaters used in spas are not currently considered covered products under the FTC Rule and thus are not required to have an EnergyGuide label. If DOE promulgates test procedures for these products in the future, the labeling requirements of FTC's Rule would apply.

No Endorsement of Companies or Products Using EnergyGuide Labels

The Appliance Labeling Rule is a mandatory program administered by the Commission. The FTC staff does not "endorse" particular companies or products that use or display mandatory EnergyGuide labels.¹ If a spa manufacturer produces a gas-fired pool heater (*i.e.*, a covered product under the Rule), the FTC's Rule imposes specific labeling, reporting, and substantiation requirements on that manufacturer (*see, e.g.*, 16 C.F.R. §§ 305.5, 305.8, and 305.11). The use of mandatory EnergyGuide labels provides consumers with energy use or efficiency information in a uniform way based on government mandated test procedures.

Similarly, the FTC does not "endorse" the use of EnergyGuide labels for pool heaters that fall outside of the definition of "covered product" under the Rule. In fact, such a practice raises several concerns. The use of the FTC's EnergyGuide label (with its commonly recognized features) for non-covered products, such as electric pool heaters for spas, may be misleading to consumers because it may imply that the information on the label is required by the government and is based on government mandated tests.² Such a label may also confuse consumers, particularly where the information provided is not consistent in format and content with that

¹The FTC's EnergyGuide labeling program is sometimes confused with the Energy Star program, which is administered by DOE and the Environmental Protection Agency (EPA), and is a voluntary labeling program designed to identify and promote energy-efficient products. *See* <http://www.energystar.gov/> for additional information. In addition, the views in this letter are limited to the views of the FTC staff and do not necessarily reflect those of DOE, EPA, or any other federal agency.

²A manufacturer who included inaccurate information on the EnergyGuide labels for products not covered by the Rule (*e.g.*, a statement that the energy information was derived from government required test procedures where in fact no such test procedures exist) would be making an express misrepresentation in violation of the FTC Act..

found on a mandatory label for a covered product. In lieu of the EnergyGuide format, manufacturers of products not covered by the Rule can use alternative methods to convey energy use or efficiency information to consumers. Manufacturers of these products can provide accurate, substantiated information about the energy use or efficiency of their products whether on a label of their own design or in other forms of advertising. Such information can be very useful to consumers.

FTC Substantiation and Deception Policy Statements

Even where a manufacturer produces a product that is not covered under the specific requirements of the Appliance Labeling Rule, all of the FTC's general truth-in-advertising principles will apply to ad claims, including claims made about energy use. Companies must tell the truth in their advertising and not mislead consumers. Under FTC's Policy Statement on Deception, deception occurs "if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material."³ Companies also must provide relevant information that, if left out, might mislead consumers or imply something that is not true. The Commission has stated that it is deceptive to omit "material information, the disclosure of which is necessary to prevent [a] claim, practice, or sale from being misleading."⁴ Express claims, or deliberately made implied claims, used to induce the purchase of or payment for a particular product or service, are presumed to be material.⁵

Finally, companies must have evidence to back up the claims made or implied in their advertising. The FTC, in enforcing the statutory prohibition on unfair or deceptive acts or practices,⁶ requires that advertisers possess a reasonable basis for all objective claims about their products, express or implied. What constitutes a reasonable basis can vary, depending on several factors: the type of product, the type of claim, the benefits if the claim is true, the consequences if the claim is false, the ease and expense of developing substantiation, and the level of substantiation experts in the field would agree is reasonable.⁷ We would expect the advertiser to have scientific evidence to support any claims about the energy use or efficiency of spas.

³Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Assocs., 103 F.T.C. 110, 165, appeal dismissed sub nom. Koven v. FTC, No. 84-5337 (11th Cir. 1984) (Deception Statement).

⁴Id. at 177.

⁵Thompson Medical Co., 104 F.T.C. 648, 816 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). Information concerning the cost of a product or service also has been found to be material. Deception Statement, 103 F.T.C. at 174.

⁶See Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

⁷ See Pfizer, Inc., 81 F.T.C. 23, 64 (1972); FTC Policy Statement Regarding Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. at 839.

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The views expressed in this letter are those of the staff assigned to enforce the Commission's Appliance Labeling Rule. This letter has not been reviewed or approved by the Commission, and the views expressed in the letter are not binding on the Commission. In conformance with Section 1.4 of the Commission's Rules of Practice, 16 C.F.R. § 1.4, this letter and your request along with related submissions are being placed on the public record.

If you have any further questions, please contact me at (202) 326-2889.

Sincerely,

A handwritten signature in black ink, appearing to read "Hampton Newsome", written in a cursive style.

Hampton Newsome
Attorney