

and 305.11(a)(5)(i)(E)). Because the new (J1) test for clothes washers will not become effective until January 1, 2004, the current rule does not authorize the use of that test for energy consumption information on EnergyGuide labels until that date. By granting the requested exemption, the Commission would allow manufacturers to begin using the new test results on EnergyGuide labels before 2004. In addition, the rule does not allow any marks or identification other than those specified in the rule to appear on the label except for some limited exceptions not applicable here (see 16 CFR 305.11(a)(5)(i)(K)). Accordingly, absent an exemption, the rule does not allow the kind of explanatory information proposed by AHAM.

B. Proposed Rule Change for EnergyGuide Labels for 2004 and Beyond

In the April 3, 2003, document, the Commission indicated that, by granting the exemption, it is probable that many new clothes washers distributed for sale in the United States for the remainder of 2003 would have labels containing the proposed advisory language that: "This Model has been Tested to the 2004 Test Procedure. Compare only with Models with this Notice." Once this change is made to EnergyGuide labels on units distributed in 2003, a return to the conventional label in the future may cause consumer confusion because the units with the modified label will stay on showroom floors into 2004 and beyond. Given these considerations, AHAM asked the Commission to make its proposed label changes permanent. The Commission proposed that the advisory language required by the rule after January 1, 2004, should be identical to that on the label during the exemption period. The Commission sought public comment on a proposed rule change that would incorporate AHAM's suggested label changes and require these changes for all clothes washers distributed for sale in the United States beginning January 1, 2004.

IV. Comment Analysis

The Commission received four comments in response to the April 3, 2003, document.⁶ The three industry comments (from Alliance, Whirlpool, and AHAM) supported the proposed conditional exemption and rule change. AHAM stated that, "early compliance

with J1 labeling requirements in 2003 is critical to the efficiency of testing and production as the industry transitions to new washer standards by the end of 2003."⁷ Whirlpool echoed AHAM's comment, adding that, without the conditional exemption, it would be not be able "to meet existing commitments to trade partners."⁸ These three commenters also supported the proposal to make the changes to the EnergyGuide label permanent. The fourth commenter, NRCAN (the agency responsible for appliance labeling in Canada), raised concerns about the impact of the proposal on adjoining labels bearing both the U.S. EnergyGuide and the Canadian "EnerGuide" label (as allowed by the Commission's rule). An analysis of specific issues raised by the comments follows:

A. Differences Between the J and J1 Tests

Comments

The Commission requested comments on whether the differences between the results yielded by the new (J1) and old (J) tests are significant enough to warrant special advisory language on the EnergyGuide labels. The Commission also asked whether one test yields significantly higher or lower results than the other. The three industry comments indicated that the differences were significant enough to warrant the change. Alliance stated that the tests yielded a 25% difference for one of its models.⁹ Whirlpool and AHAM commented that the new (J1) test results are generally lower than the older (J) test results and the differences could be as much as 40%.¹⁰

Discussion

According to the commenters, the differences in energy use results yielded by the two tests can be significant. Given this information, we believe the explanatory text on the labels is appropriate to aid consumers in distinguishing models tested under the two procedures. The Commission notes that DOE periodically modifies the test procedure for covered products and such changes can yield different test results for the same model. In the past, the Commission has not required additional information on the EnergyGuide label in response to test procedure changes. In this case, however, there are special circumstances that, in the Commission's view, warrant the explanatory language

as requested by AHAM. First, because the new conservation standard will become effective on the same date as the new test procedure, a large number of new models will appear on the market over a short period of time in response to the more stringent efficiency standards. In addition, the differences between the results of the old and new test procedures could be quite substantial in this case, up to 40% as indicated by the industry comments. Finally, because the exemption will allow manufacturers to begin using the new (J1) test results for labeling early, manufacturers will distribute new products with labels based on the new test while they will continue to distribute older products with labels reflecting the old test. Accordingly, the transition between the old and new labels in showrooms will likely be longer than is usually the case when DOE amends a test procedure. Considering all these factors, the Commission believes that explanatory language as suggested by AHAM is appropriate.

B. Content, Size, and Placement of the Modified Language

Comments

The Commission solicited comments on the proposed changes to the label, such as the content, size, and placement of the modified language on the EnergyGuide. The Commission asked whether the proposed language on the EnergyGuide label will help consumers in their purchasing decisions, or cause undue confusion. In addition, commenters were asked whether the reference to the year "2004" on the label will create confusion in subsequent years if the proposed change becomes a permanent fixture on the label and whether the explanatory language should be required on both the top and the bottom of the label. The Commission sought comment on alternatives to the proposed advisory language, such as using the term "J1" or "Modified Energy Factor" in lieu of "2004" in describing the test.

The three industry comments stated that the proposed changes are appropriate and that the changes to the EnergyGuide label will help consumers. Whirlpool stated that there will be less need for dealers to "refloor" model units and less confusion for "energy conscientious consumers when selecting new appliances."¹¹ The industry commenters also preferred the reference to "the 2004 procedure" over other descriptors such as "J1" or

⁶ The Commission received comments from Alliance Laundry Systems ("Alliance") (1), Whirlpool Corporation ("Whirlpool") (2), AHAM (3), and Natural Resources Canada ("NRCAN") (4).

⁷ AHAM (3) p. 1.

⁸ Whirlpool (2) p. 3.

⁹ Alliance (1) p. 1 (attachment).

¹⁰ AHAM (3) p. 2; Whirlpool (2) p. 4.

¹¹ Whirlpool (2) p. 4.