



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
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Matt Sigler  
Technical Director  
Plumbing Manufacturers International  
1921 Rohlwing Road – Unit G  
Rolling Meadows, IL 60008

Dear Mr. Sigler:

Department of Energy (DOE) staff has informed Plumbing Manufacturers International's (PMI's) concerns about water use representations for dual-flush water closets. Specifically, you have raised questions about whether manufacturers may make dual-flush volume disclosures not specifically generated by DOE's test procedure. As discussed below, in the FTC staff's view, manufacturers may provide such information as long as the representations are not deceptive and otherwise comply with the provisions of the Energy Policy and Conservation Act (EPCA).

### Background

Dual-flush water closets have two water use settings: a "full-flush mode" and a "reduced flush mode." Like other plumbing products, these products must meet DOE's water conservations standards (10 CFR 430.32(q)) (*e.g.*, 1.6 gallons-per-flush in full-flush mode). To demonstrate compliance, manufacturers must test their models pursuant to DOE's test procedures (10 CFR Part 430, subpart B, appendix T). For dual-flush water closets, these procedures provide a method for manufacturers to measure both full-flush and reduced-flush volumes "in accordance with the test requirements specified in section 7.4, Water Consumption Test, of ASME A112.19.2-2008."

In the marketplace, manufacturers and other sellers routinely describe the performance of their dual-flush models using a weighted average (*i.e.*, one full and two reduced flushes). The DOE test procedure makes no mention of this weighted average disclosure. However, various state and federal agencies (*e.g.*, the Environmental Protection Agency's Water Sense Program and the State of California) use this formula as the primary tool for demonstrating compliance with their water efficiency programs. In addition, voluntary consensus standards adopted by the plumbing industry (*see* section 7.4 of ASME A112.19.2) use the same formula. For several years, manufacturers have disclosed the weighted average on specification sheets, packaging, installation guides, use and care manuals, packaging, tip sheets, websites, and other media for

dual-flush water closets.

### **Representations under EPCA**

Under EPCA (42 U.S.C. 6293(c)), manufacturers cannot make water use claims for a product covered by DOE's standards and test procedures "unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing." A violation of this restriction constitutes an "unfair or deceptive act or practice" under the Federal Trade Commission Act ("FTC Act").<sup>1</sup> In essence, this requirement promotes uniformity in water use claims and helps consumers make meaningful comparisons of competing plumbing products.<sup>2</sup> However, EPCA does not prohibit marketers from disseminating truthful, substantiated water information derived from sources other than the DOE tests if that information is not otherwise unfair or deceptive.

### **Representations for Dual-Flush Water Closets**

Although not established by the DOE test, truthful weighted dual-flush ratings can provide useful information for consumers and others. Indeed, as noted above, certain state and federal agencies use this information for their programs. Without evidence that weighted dual-flush ratings are categorically unfair or deceptive, FTC staff believes that there is no basis for a blanket prohibition against disclosing these averages.

Although the use of weighted dual-flush ratings generally is permissible, manufacturers and other marketers should exercise care in how they explain and disseminate these ratings to avoid deception. If marketers fail to adequately explain these ratings, they risk blurring the distinction between the dual-flush average rating (*e.g.*, "average 1.28 gpf") and the maximum flush volume generated by the DOE requirements (*e.g.*, "1.6 gpf"). In addition, in the absence of adequate explanation of the weighted dual-flush rating, consumers may not understand that the average is weighted toward lower flush volume. Accordingly, FTC staff recommends that, if marketers choose to disclose weighted average flush volumes, they should consider providing clear and conspicuous disclosures to avoid possible deception.<sup>3</sup> However, without information about how consumers interpret average flush volume claims, FTC staff cannot provide any more specific guidance on the content of such disclosures.

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<sup>1</sup> See 42 U.S.C. § 6293(c) (EPCA) and 15 U.S.C. § 45(a)(1) (Section 5 of the FTC Act). Section 5 of the FTC Act generally prohibits false and misleading statements made in advertising and other representations.

<sup>2</sup> The scope of representations covered by EPCA Section 6293(c) is broad. In the staff's view, the provision covers not only representations made in conventional advertising but also information provided in directories, reports, catalogs, and other publications not necessarily intended for end-use consumers. Because EPCA covers any water-related representations, the coverage of this section is not dependent on whether representations are made directly to "consumers."

<sup>3</sup> For ratings marked on the products themselves, manufacturers should also consider whether enough space exists to adequately explain average flush volume disclosures.

The views expressed in this letter are those of FTC staff assigned to enforce the Commission's Energy Labeling Rule (16 C.F.R. Part 305). In accordance with Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 CFR § 1.3(c), this is a staff opinion only and has not been reviewed or approved by the Commission or by any individual Commissioner. The advice provided in this letter is not binding upon the Commission and is given without prejudice to the right of the Commission later to rescind the advice and, when appropriate, to commence an enforcement proceeding. In conformance with Section 1.4 of the Commission's Rules of Practice, 16 CFR § 1.4, this letter is 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