Consumer Technology Association™

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Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of	)	
	)	
Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products	)	RIN 3084–AB62

PETITION FOR RULE CLARIFICATION OR, IN THE ALTERNATIVE, AMENDMENT

The Consumer Technology Association ("CTA") respectfully requests that the Federal Trade Commission ("FTC" or "Commission") clarify its application of the amended Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products (the "Amplifier Rule" or "Rule")[1] to products designed, tested, and manufactured before the amended Rule's August 12, 2024 effective date. Specifically, CTA asks that the FTC confirm that the amended Amplifier Rule is not intended to have retroactive effect and thus applies only to those products designed, tested, and manufactured on or after August 12, 2024. Alternatively, CTA requests that the FTC amend the Amplifier Rule to apply only prospectively to products designed, tested, and manufactured on or after the August 12, 2024 effective date.[2] In the interim, CTA requests a stay of enforcement until the Commission has addressed the issues raised by this petition.

Applying the amended Rule prospectively is consistent with both the plain text of the amended Rule and the conclusion of the Commission in its order adopting the amendments that compliance would not lead to additional compliance expenses. It would also be consistent with the general presumption that retroactive effect is strongly disfavored in the law. Applying the Rule retroactively to existing designs, on the other hand, would require overcoming this presumption by applying a balancing analysis that the FTC did not conduct, would impose significant costs to re-test, repackage, and alter the disclosures for existing designs, and could lead to consumer confusion stemming from re-rating existing products.

CTA is North America's largest technology trade association and represents the $505 billion U.S. consumer technology industry. CTA's members include the world's leading manufacturers and innovators—from startups to global brands—helping support more than 18 million jobs. CTA audio and video members are committed to moving technology forward and

[1] 16 C.F.R. §§ 432.1–432.6; *see Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 89 Fed. Reg. 49797 (rel. June 12, 2024) ("Final Notice").
[2] *See* Appendix A for proposed text of the amended Rule.

creating a world in which consumers can benefit from the ultimate home entertainment experience, including through sound amplifier equipment that CTA members design, test, manufacture, and distribute.

I. CTA Seeks Clarification on Conflicting Interpretations, or Alternatively Amendment, of the Amplifier Rule.

CTA seeks necessary clarification from the FTC regarding how the amended Amplifier Rule impacts its members, namely those that designed, tested, and manufactured products before the amended Rule became effective on August 12, 2024. In the absence of a clarification, the Commission should amend the Amplifier Rule to account for the concerns expressed by manufacturers of products designed, tested, and manufactured before the effective date.

The revisions to the Amplifier Rule change the way that manufacturers are permitted to make claims related to the power output of home sound amplification equipment.[3] Specifically, "[w]henever any direct or indirect representation is made of the power output, power band or power frequency response, or distortion characteristics of sound power amplification equipment,"[4] manufacturers must now disclose "minimum sine wave continuous average power output, in watts, per channel (if the equipment is designed to amplify two or more channels simultaneously), measured with all associated channels fully driven to rated per channel power," and must be measured "at an impedance of 8 ohms after input signals at said frequencies have been continuously applied at full rated power for not less than five (5) minutes."[5] Previously, the rule required disclosure of "rated minimum sine wave continuous average power output, in watts, per channel (if the equipment is designed to amplify two or more channels simultaneously) at an impedance of 8 ohms, *or, if the amplifier is not designed for an 8-ohm impedance, at the impedance for which the amplifier is primarily designed, measured with all associated channels fully driven to rated per channel power*."[6] The amendments to the Rule thus adopt a new uniform set of testing criteria, specified in the text of the Rule,[7] and eliminate the option previously available to manufacturers to specify different criteria for testing so long as those criteria were disclosed. For equipment tested under the old Rule to previous, manufacturer-defined standards, new testing will be required.

The Rule also allows, in specific circumstances, manufacturers to disclose "[o]ther operating characteristics and technical specifications not required" under the mandatory disclosures, though these exceptions do not impact the mandatory disclosures that must be made whenever representations are made about power levels, and must be "less conspicuously and prominently made than any rated power output disclosure required in § 432.2."[8] A violation of the Amplifier Rule constitutes "an unfair method of competition and an unfair or deceptive act or practice."[9]

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[3] 16 C.F.R. § 432.2.
[4] *Id.*
[5] *Id.* §§ 432.3(g), (e).
[6] 16 C.F.R. § 432.2(a) (emphasis added; superseded June 12, 2024).
[7] 16 C.F.R. § 432.3.
[8] *Id.* § 432.4.
[9] *Id.* § 432.1(c).

The amendments to the Rule were adopted following an FTC rulemaking, starting with an Advanced Notice of Proposed Rulemaking in 2020.[10] In 2022, the Commission issued a Notice of Proposed Rulemaking.[11] CTA actively engaged in this proceeding, submitting comments in response to this Notice.[12] In 2023, the FTC issued a Supplemental Notice of Proposed Rulemaking, which forms the basis for the amended Amplifier Rule.[13] CTA submitted further comments in response to the Supplemental Notice,[14] and the FTC issued the amended Rule in June 2024,[15] with an effective date of August 12, 2024.

CTA has always understood the FTC's intent to be prospective and, throughout the rulemaking process, believed that the amended Rule, if adopted, would apply to products designed, tested, and manufactured after the effective date of the Rule. The reason for this is simple: the amended Rule changes the testing requirements for consumer products, and these tests are ordinarily conducted during the design and validation phase of product development. Moreover, because the amended Rule reaches any and all "representations" related to power output, it impacts not just advertising claims but also spec sheets, product information, and packaging—all of which are difficult or impossible to change after a product has been designed, tested, and set up for manufacturing. Applying the amended Rule retroactively to existing products would mean having to re-test all existing equipment, redesign existing product materials and packaging, and pull hundreds of thousands of units out of production and out of the supply chain for modification, all of which would result in tremendous costs to manufacturers, retailers, and the public. Indeed, for some closed systems where the speaker and amplifier are integrated (such as subwoofers, active loudspeakers, and soundbars) and where the integrated speaker does not operate at an 8 ohm resistance, compliance with the new rule's disclosure conditions results in false or misleading representations to the consumer. Providing power levels at 8 ohms for these systems would result in power level disclosures that could never be achieved and thus are irrelevant to the system; for these devices, *all* representations related to power level must now just be removed entirely. The FTC's conclusion in the Final Notice that the Rule amendments would not increase costs[16] thus confirms that the Rule would apply only prospectively, to design, testing, and packaging decisions made *after* the Rule's effective date.

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[10] *Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, Advanced Notice of Proposed Rulemaking, 85 Fed. Reg. 82391 (rel. Dec. 18, 2020).
[11] *Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, Notice of Proposed Rulemaking, 87 Fed. Reg. 45047 (rel. July 27, 2022).
[12] Comments of Consumer Technology Association, Docket No. FTC-2022-0048 (filed Sept. 26, 2022), https://www.regulations.gov/comment/FTC-2022-0048-0008.
[13] *Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, Supplemental Notice of Proposed Rulemaking, 88 Fed. Reg. 56780 (rel. Aug. 21, 2023).
[14] Comments of Consumer Technology Association, Docket No. 2023-16792 (filed Oct. 20, 2023), https://cdn.cta.tech/cta/media/media/pdfs/cta-comments-on-ftc-supplemental-nprm-on-amplifier-rule-final.pdf ("CTA Supplemental Notice of Proposed Rulemaking Comments").
[15] *Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 89 Fed. Reg. 49797 (rel. Jun. 12, 2024) ("Final Notice"); *see also* Press Release, FTC, *FTC Issues Final Amendments to Amplifier Rule to Make Testing Methods More Useful to Consumers* (June 5, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/06/ftc-issues-final-amendments-amplifier-rule-make-testing-methods-more-useful-consumers.
[16] *See, e.g.*, Final Notice, 89 Fed. Reg. at 49799. The FTC's conclusions about costs are discussed in more detail in Section II.B, *infra.*

The text of the Rule reflects this common-sense understanding. For example, the Amplifier Rule applies "whenever any power output (in watts or otherwise), power band or power frequency response, or distortion capability or characteristic is represented, either expressly or by implication, in connection with the advertising, sale, or offering for sale, in commerce as 'commerce' is defined in the Federal Trade Commission Act, of sound power amplification equipment manufactured or sold for home entertainment purposes."[17] As the amended Amplifier Rule language describes disclosures and uniform test conditions in the future tense, and as the FTC never raised the issue of retroactivity in the rulemaking, CTA reasonably assumed that the amendments were not intended to apply retroactively to products designed, tested, and manufactured before August 12.

However, CTA has received indications from FTC staff of a contrary interpretation: that the disclosure and uniform test conditions apply to *all* existing products—regardless of when they were designed, tested, and manufactured. In correspondence with the Commission, an FTC staff attorney noted that the amendments do not exclude "covered products that were manufactured prior to that date or are already on the shelves by that date."[18] If applied retroactively, as this correspondence suggests, the new testing and disclosure requirements would apply to all existing equipment designs on the August 12, 2024 effective date. And while Commission staff noted that manufacturers and retailers of products in other FTC rule contexts have placed modified disclosure labels on packages to comply with requirements,[19] this solution is neither straightforward nor simple here, particularly given the new testing that each impacted product would need to undergo to first determine the required disclosure.

Because retroactive application of laws is disfavored, and because the Commission has not attempted to justify retroactive application of the amended Rule, the agency should confirm that the Amplifier Rule applies only to those products designed, tested, and manufactured after the effective date. In the alternative, the FTC should amend the Amplifier Rule to make clear that it applies prospectively only to those products designed, tested, and manufactured after August 12, 2024.

II. Applying the Amplifier Rule Retroactively Would Conflict with Judicial Precedent.

A. Retroactive Application of Laws and Regulations Is Strongly Disfavored.

As Supreme Court precedent emphasizes, "retroactivity is not favored in the law."[20] In fact, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[21] The presumption against retroactivity is "sacred," as "laws by which human conduct is to be regulated look forward, not

[17] 16 C.F.R. § 432.1(a).
[18] Email from Hong Park, Attorney, Bureau of Consumer Protection, FTC, to David Grossman, Vice President, Policy & Regulatory Affairs, CTA (July 16, 2024).
[19] Email from Hong Park, Attorney, Bureau of Consumer Protection, FTC, to David Grossman, Vice President Policy & Regulatory Affairs, CTA (Aug. 8, 2024)
[20] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[21] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–66 (1994) (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842–844, 855–856 (1990) (Scalia, J., concurring) (other citations omitted)).

backward, and are never to be construed retroactively, unless the language of the act should render that indispensable."[22] For a statute or agency regulation to apply retroactively, the relevant language must expressly state that it is intended to have retroactive effect.[23]

Retroactive application of agency rules "can cause great mischief."[24] Retroactive rules "upset[] expectations" and "impose[] new sanctions on past conduct."[25] Fundamentally, "retroactive rules 'alter[] the past legal consequences of past actions.'"[26] As such, to overcome the presumption against retroactivity, an agency must "explain why it has decided to take this rather extraordinary step" and provide insight into "how it determined that the balancing of the harms and benefits favors giving a change in policy retroactive application."[27]

Moreover, even where regulations do not directly apply retroactively, rules can have a prohibited "secondary" retroactive effect. For example, "[i]mpermissible secondary retroactivity can arise when a regulation 'impair[s] the future value of a past bargain.'"[28] Under secondary retroactivity, "an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation."[29] Courts "require that agencies balance the harmful 'secondary retroactivity' of upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests."[30] Rules that have a secondary retroactive effect are thus held to a higher standard than rules that have only forward-looking impacts, and are upheld only if their balancing of retroactivity considerations is reasonable.[31]

B. The Amended Rule Cannot Be Applied Retroactively.

Applying the Amplifier Rule as "an unfair method of competition and an unfair or deceptive act or practice" would, if applied to products designed, tested, and manufactured before the effective date, "alter[] the past legal consequences of past actions."[32] That alone would render the amended Rule retroactive. The Amplifier Rule would also deem impermissible the same practices and standards allowed before the amendments—without meaningful opportunity to bring into compliance products that were designed, tested, and manufactured before August 12. At a minimum, this would constitute "secondary retroactivity," by upsetting the expectations and investments made in products prior to the amended Rule's effective date.

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[22] *U.S. v. Target Rock Corp.*, No. CV-90-4414, 1992 WL 157677, at *3 (E.D.N.Y. June 30, 1992) (quoting *Ladiga v. Howland*, 2 How. 581, 589, 11 L.Ed. 387, 390 (1844)) (citations omitted).
[23] *See e.g.*, *Bowen*, 488 U.S. at 208-209 (citations omitted); *see also Target Rock Corp.*, 1992 WL 157677, 4 at *5 (explaining that "Congress has been ever mindful of its historical obligation to provide a clear expression of intent to apply a statute retroactively").
[24] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745–746 (D.C. Cir. 1986).
[25] *Nat'l Petrochem. & Refiners Ass'n v. EPA*, 630 F.3d 145, 158–159 (D.C. Cir. 2010) (citations omitted).
[26] *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (alteration in original) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)).
[27] *Yakima Valley Cablevision, Inc.*, 794 F.2d at 746.
[28] *Ass'n of Private Colls. & Univs v. Duncan*, 870 F. Supp. 2d 133, 152 (D.D.C. 2012) (alteration in original) (citing *Nat'l Cable and Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009)).
[29] *Mobile Relay Assocs.*, 457 F.3d at 11 (citations omitted).
[30] *Nat'l Cable and Telecomm. Ass'n*, 567 F.3d at 670 (citations omitted).
[31] *Id.* at 670-671 (citations omitted).
[32] *See* 16 C.F.R. § 432.1(c); *Mobile Relay Assocs.*, 457 F.3d at 11 (alteration in original) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)).

That retroactivity would be unlawful. For one, the statute itself offers no express language authorizing retroactive rules.[33] And despite the long line of judicial precedent emphasizing the need for express language to overcome the presumption against retroactivity, the amended Amplifier Rule also does not explicitly state any intent to apply the Rule retroactively.[34] Consequently, the agency could not—and did not—balance any harmful effects of retroactive application against potential benefits.[35] This alone is enough to rule out any interpretation of the rule that would require retroactive effect.

Even if the agency had explicitly stated that it wished to apply the amended Rule retroactively and had attempted to balance the harmful effects of retroactive application to products designed, tested, and manufactured before the August 12, 2024 effective date, the Rule could not have sufficiently justified the need for retroactive application. Indeed, the Rule cannot pass ordinary arbitrary and capricious review.[36] But there is certainly no basis for imposing the Rule retroactively, given the substantial costs such an application would impose.

For example, one CTA member expressed concerns with the significant costs required to re-test and re-evaluate existing goods already on the market. These costs would markedly burden manufacturers, as the amended Amplifier Rule requires investment in new test procedures, equipment, and testing that was unavailable during the development of products currently on the market. Another manufacturer noted there will also be costs associated with attempting to re-create conditions that no longer exist. In some cases, retroactive application would render the rule applicable to products that may be years past their design/testing phase.

The impact of applying the amended Rule retroactively would not stop at these considerable cost increases. To apply the amended Rule to existing products, manufacturers would have to redo testing to the current specifications for existing products in order to ascertain the appropriate information to disclose. They would then have to spend substantial time and resources changing printed materials such as packaging, retail signage, and spec sheets—including packaging and spec sheets that have already been sealed and left the factory. As one member noted – from the time a manufacturer makes artwork changes to a product appearing on-shelf can take four to six months. Even changing disclosures for existing products on websites would lead to substantial costs. While changing web-based disclosures may seem straightforward, retroactive changes to existing specifications can lead to significant confusion both among customers and retail partners. And manufacturers must also rely on those retail

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[33] *See* 15 U.S.C. § 57a(a)(1)(B); Final Notice, 89 Fed. Reg. at 49797 n.1.

[34] *See Bowen*, 488 U.S. at 208-209 (citations omitted); *see also Target Rock Corp.*, 1992 WL 15767 at *5, *supra* n. 23.

[35] *See Nat'l Cable and Telecomm. Ass'n*, 567 F.3d at 670-671 (explaining agency balancing requirement).

[36] As CTA observed in its comments, the amended Rule ignores the realities of integrated audio system design. It makes no sense to require that amplifiers be tested with 8 ohm speakers if those amplifiers were designed and built to work with permanently affixed speakers that have a different impedance rating. This is the heartland of arbitrary and capricious decision-making. CTA Supplemental Notice of Proposed Rulemaking Comments at 1-2; *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that "an agency rule would be arbitrary and capricious if the agency… offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

partners to update their own websites, store packaging, and signage. Because retailers use different templates and web structures for product information, changing the specifications for existing products would be challenging and unpredictable.

None of these costs are addressed in the Final Notice adopting the Rule. In fact, the Final Notice specifically disclaims the idea that the amended Rule would lead to *any* increased compliance costs, holding flatly that "the amended Rule does not increase costs for affected manufacturers by requiring them to modify their products to meet the FTC standard, as suggested by CTA."[37] The Final Notice goes on to state that "[t]he amended Rule only requires compliance with the FTC standard when sellers make power related claims," and that "[i]f a manufacturer does not want to comply with the FTC standard, it need not make such a claim."[38] The necessary implication is that the Rule does not apply to those devices for which a claim is already being made in packaging and other advertising materials, i.e., those devices designed, tested, and manufactured before the effective date of the Rule.

Elsewhere in the Final Notice the FTC doubled down on this point, underlining that it did not foresee increased compliance costs from the Rule. It concluded "the change in the disclosure requirements should not significantly increase the costs of small entities that manufacture or import power amplification equipment for use in the home,"[39] and "FTC staff does not anticipate that this change will result in additional burden hours or higher costs for manufacturers who already test power output for their amplifiers, in many cases testing amplifiers under the conditions specified by the proposed amendments."[40] These conclusions cannot be squared with the substantial increases in costs that would come from re-testing and repackaging existing equipment designs.

The FTC cannot point to the brief period between the amended Rule's adoption in June 2024 and the effective date of the amendments in August 2024 to claim that there is no retroactive effect. This 60-day period is far too short to cover new research and development product cycles in the ordinary course. Any existing products would still need to be re-tested and have their packaging and disclosures modified under the staff's proposed reading. And while there may be some products designed, tested, and manufactured *after* June 2024 but *before* August 2024 for which manufacturers would have been on notice that changes in testing were required, there are still thousands of existing designs for which this is not the case.

CTA members are making best efforts to comply with the amended Amplifier Rule. However, it is difficult or impossible for retailers and manufacturers to ensure that all products designed, tested, and manufactured before August 12, 2024 are compliant with the new Rule, and it does not appear that the FTC intended to impose this substantially burdensome requirement. Therefore, CTA respectfully urges the FTC to clarify its interpretation of the amended Amplifier Rule as soon as possible. In the alternative, the Commission should further amend the Amplifier Rule to account for the concerns expressed by CTA and its members.

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[37] Final Notice, 89 Fed. Reg. at 49799.
[38] *Id.*
[39] *Id*. at 49801.
[40] *Id*.

III. Retroactive Application Would Depart from Analogous Agency Precedent.

Because retroactivity is so strongly disfavored in the law, giving retroactive effect to the amended Rule would also depart from similar agency precedent. For example, when the Consumer Product Safety Commission ("CPSC") implemented an analogous disclosure rule, it made clear in a Policy Statement that the rule was not intended to have retroactive effect.

Section 103(a) of the Consumer Product Safety Improvement Act required manufacturers of children's products to "place permanent, distinguishing marks on the product and its packaging" to allow parties to ascertain the source of the products.[41] In a Statement of Policy, the CPSC explained that the law "applies to children's products made on or after" the statute's enactment date and would "not apply retroactively to such products made before that date."[42] And during a preliminary education period, CPSC would "require compliance with this provision in the context of recalls of products" and, in the first instance, "not likely seek penalties if required information was inadvertently omitted" despite "good faith efforts by manufacturers to educate themselves on the requirements."[43]

Like CPSC in the "Tracking Labels for Children's Products" context, the FTC should clarify its expectations for manufacturer compliance. In particular, it should make clear that the amended Rule is not intended to apply retroactively, and only applies to the testing and disclosure for products designed, tested, and manufactured following the effective date of the Rule.

IV. Conclusion

CTA appreciates the Commission's continued attention to these issues and shared commitment to delivering the best home entertainment experience for consumers. CTA respectfully requests that the FTC clarify the amended Amplifier Rule—and confirm that the amendments apply prospectively to products designed, tested, and manufactured after the August 12, 2024 effective date. Alternatively, CTA asks that the Commission further amend the Amplifier Rule, based on judicial and agency precedent, in response to the significant concerns expressed by CTA and its members. In the interim, CTA requests a stay of enforcement until the Commission has addressed the issues raised by this petition.

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[41] 15 U.S.C. § 2063(a)(5)(A)(i); *Tracking Label Requirement for Children's Products*, CPSC, https://www.cpsc.gov/Business--Manufacturing/Business-Education/tracking-label (last visited Aug. 19, 2024).
[42] *Statement of Policy: Interpretation and Enforcement of Section 103(a) of the Consumer Product Safety Improvement Act* at 2–3, CPSC (July 20, 2009), https://www.cpsc.gov/s3fs-public/pdfs/blk_media_sect103policy.pdf.
[43] *Id.* at 2.

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APPENDIX A

PROPOSED AMENDMENT TO 16 C.F.R. § 432.1

CTA respectfully proposes the following amendment, noted in red underlined text, to the Scope of the Amplifier Rule, as expressed in 16 C.F.R. § 432.1:

(a) Except as provided in paragraph (b) of this section, this part shall apply whenever any power output (in watts or otherwise), power band or power frequency response, or distortion capability or characteristic is represented, either expressly or by implication, in connection with the advertising, sale, or offering for sale, in commerce as "commerce" is defined in the Federal Trade Commission Act, of sound power amplification equipment manufactured or sold for home entertainment purposes, such as for example, radios, record and tape players, radio-phonograph and/or tape combinations, component audio amplifiers, self-powered speakers for computers, multimedia systems and sound systems, and the like.

(b) Representations shall be exempt from this part if all representations of performance characteristics referred to in paragraph (a) of this section clearly and conspicuously disclose a manufacturer's rated power output and that rated output does not exceed two (2) watts (per channel or total).

(c) It is an unfair method of competition and an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part.

(d) All provisions in this part shall apply only to products designed, tested, and manufactured on or after the date that the individual provisions, including any amendments thereto, become effective.