



May 25, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Jennifer Granholm
Secretary, U.S. Department Energy
U.S. Department of Energy
1000 Independence Ave., SW
Washington, D.C. 20585

Re: Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (86 Fed. Reg. 18901; April 12, 2021).

Dear Secretary Granholm:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration respectfully submits the following comments on the U.S. Department of Energy (DOE)'s proposed rule to update policies for consideration in new or revised energy conservation standards and test procedures for consumer products and commercial and industrial equipment. Advocacy encourages DOE to reconsider eliminating large portions of the 2020 rule, as this creates regulatory uncertainty and burdens for small business.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

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impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁵

Background

Under the Energy Policy Conservation Act (EPCA), DOE is required to develop energy conservation standards and test procedures for covered products.⁶ Manufacturers use the test procedures to test their products and certify compliance to DOE. EPCA requires that any new or updated standard that DOE implements be designed to achieve maximum improvement in energy efficiency that is technologically feasible and economically justified.⁷ The process by which DOE implements provisions of EPCA was updated in 1996 and came to be known as the "Process Rule".⁸

On December 18, 2017 DOE issued a request for information (RFI) on potential revisions to the process rule.⁹ In response to comments received on the RFI the agency issued a proposed rule updating its policies and procedures.¹⁰ After considering public comments, DOE finalized the rule on February 14, 2020.¹¹ On April 12, 2021, DOE proposed a new process rule that attempts to modify or remove portions of the 2020 final rule.¹²

³ Small Business Jobs Act of 2010 (Pub. L. No. 111-240) § 1601.

⁴ *Id.*

⁵ 5 U.S.C. Sec. 601 note.

⁶ 42 U.S.C. § 6293. *Also* 42 U.S.C. § 6314.

⁷ 42 U.S.C. §6295 (o) (2) (A).

⁸ Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. 39674 (July 15, 1996).

⁹ Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 82 Fed Reg. 59992 (December 18, 2017).

¹⁰ Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 84 Fed. Reg. 3910 (February 13, 2019).

¹¹ Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8626 (February 14, 2020).

¹² Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 Fed. Reg. 18901.

Key features of the proposed rule that are relevant to Advocacy's comments include the following:

- a) The proposed rule removes the binding nature of the 2020 final process rule. DOE would instead implement procedures on a case-by-case basis as was the practice under the 1996 rule.¹³
- b) The proposal eliminates the requirement for early engagement through a request for information (RFI) or advance notice of proposed rulemaking (ANPRM). Instead of early engagement being the default procedure for proposed rulemakings, the agency would return to discretionary use of these tools.¹⁴
- c) The proposed rule removes the significant energy savings threshold set forth in the 2020 final rule. This portion of the rule creates a numerical threshold requiring that an energy conservation standard result in a specified reduction in energy use.¹⁵
- d) The 2020 final rule required that DOE establish and finalize test procedures for a particular product at least 180 days prior to publication of a proposed energy conservation standard. The proposed rule would eliminate this requirement.¹⁶
- e) The proposal eliminates the requirement to conduct a comparative analysis when determining whether a specific conservation threshold is economically justified.¹⁷

I. Small Businesses are concerned that eliminating portions of the 2020 rule will create significant regulatory uncertainty, greatly impacting their ability to succeed.

On April 27, 2021 Advocacy hosted a small business teleconference to hear directly from small businesses about the proposed rule.¹⁸ Advocacy also spoke with small business representatives who previously commented on the 2020 process rule. During the teleconference, and in speaking with small businesses about the rule, many cited regulatory uncertainties. These small businesses spoke about how a lack of predictability in agency actions can gravely impact their operations. Other participants spoke about how small businesses have limited time, resources, and staff and therefore do not have the ability to focus solely on DOE rulemakings to try to anticipate what the agency in its broad discretion may do with respect to a particular product. Furthermore, many small businesses stated that the 2020 process rule was finalized after significant input from the regulated community. Many of the now required portions of the 2020 final rule were already in the 1996 rule; however, because the 1996 rule was non-binding on the agency, DOE did not adhere to practices that had been put in place to make the process efficient and transparent. The 2020 rule ensures that those processes are followed by the agency. Regulatory uncertainty leads to a loss of revenue and in some instances losing their businesses by hindering their ability to plan for business strategy and growth and creating significant and unnecessary hurdles to

¹³ *Id.* at 18904.

¹⁴ *Id.*

¹⁵ *Id.* at 18905.

¹⁶ *Id.* at 18908.

¹⁷ *Id.* at 18906.

¹⁸ Small Business Energy Teleconference – April 27, agenda available at: <https://advocacy.sba.gov/2021/04/14/small-business-energy-teleconference-april-27/>.

business success.

II. The Process Rule should remain binding on DOE while allowing for exceptions in certain instances.

Advocacy heard numerous comments from small businesses regarding uncertainty in agency rulemaking when DOE uses a case-by-case approach to promulgating efficiency standards. In the proposed rule, DOE cites its inability to meet statutory obligations if it were required to comply with portions of the 2020 Process Rule, citing as examples the requirement that test procedures be finalized 180 days prior to proposed energy conservation standards, as well as the requirement to use early assessment tools such as RFIs and ANPRMs in advance of a proposed rule.¹⁹ DOE states that these requirements will delay its ability to promulgate rules and that having full agency discretion to decide when and whether to comply with these and other requirements on a case-by-case basis will be more efficient.

Advocacy disagrees. Without clear-cut processes for how the agency will promulgate standards, small businesses are not able to participate meaningfully in commenting and are not able to provide the types of substantive technical comments necessary to determine whether a particular test procedure is feasible. This leads to standards being proposed with limited small business input; even if DOE were later to abandon or reverse course on an infeasible standard, small businesses could already have suffered harm. Given their limited resources small businesses rely on consistent agency process and predictability.

Advocacy requests that DOE not remove the binding nature of the requirement to use early engagement tools prior to proposed rules. Early engagement in rulemaking is highly beneficial for small businesses who may otherwise be left out of the rulemaking process. Advocacy is concerned that DOE is proposing to use these tools only on a case-by-case basis, rather than as the norm.

Rules that are based on early input from affected small businesses that have time and resources to provide that input will lead to better decision-making; ensuring that small, regulated entities have a realistic opportunity for comment ahead of a proposed rulemaking ensures transparency in the process, and levels the playing field in allowing all parties to engage, while also increasing efficiency in instances where DOE receives information suggesting a new standard is not necessary.

Rather than revert entirely to a case-by-case approach to rulemaking, DOE should instead endeavor to meet the requirements of the 2020 process rule while allowing for flexibilities or exceptions in instances where it is simply not feasible to do so, or where the requirements would result in unnecessary delays.

¹⁹ *Id* at 18904-18905.

III. DOE should retain the significant energy savings threshold as it provides certainty to small business and meets the agency's statutory objectives.

DOE should not eliminate the significant energy savings threshold from the Process Rule. Rather, DOE should re-evaluate the thresholds put forth in the 2020 Final Rule and if it finds justification for doing so, publish for comment new thresholds. DOE cites various concerns as justification for eliminating the threshold including its inability to account for increased significance of energy savings that may mitigate the climate crisis, and accounting for products that have most of their energy consumption during peak energy demand.²⁰ Advocacy fails to see how setting a threshold prohibits DOE from including such factors in its accounting, as DOE does not provide further explanation. If the concern is that the threshold is too high, DOE could propose a new fact and data-based threshold that will accommodate more variables. Simply eliminating the threshold altogether in favor of a case-by-case approach, however, does not seem to benefit the agency or the regulated community and contributes even more to uncertainty in the rulemaking process.

Advocacy encourages DOE to consider comments received from small businesses on this issue. Having a threshold allows DOE to prioritize those rules that will result in maximum energy efficiency savings thereby meeting the agency's own stated objective of efficiently issuing energy conservation standards.²¹ Furthermore, having a threshold ensures a level of certainty for small businesses who are better able to predict agency priorities and anticipate which products may have upcoming regulatory action, and what standards the agency may propose.

IV. The requirement to finalize a test procedure 180 days before a proposed conservation standard should not be eliminated.

In the 2020 final rule, DOE is required to finalize a test procedure 180 days prior to issuing a proposed conservation standard.²² DOE is now proposing to remove this requirement, to the detriment of small businesses. As stated above, small businesses have limited resources, and staff and in many instances do not have the ability to test their products on-site. They must instead hire an outside laboratory to test the products and report back or must pull employees from other tasks to conduct the testing. Small businesses therefore need time to conduct this testing without having to pay for expedited results or lose additional revenue by redirecting staff to complete the testing in an unreasonably expedited manner. It is therefore prudent for DOE to allow for time between test procedure finalization and a proposed standard. Should DOE feel strongly that the 180-day requirement cannot be met, Advocacy encourages DOE to work with stakeholders to develop a timeline that is more appropriate for both industry and the agency, rather than simply removing the requirement entirely.

V. DOE should not remove the comparative analysis requirement from the rulemaking.

Under EPCA, DOE is required to select energy conservation standards that achieve the

²⁰ *Id.* at 18905.

²¹ *See id.* at 18902 stating that DOE wants to allow for more rapid realization of energy savings and reductions of greenhouse gas emissions through future energy conservation standards.

²² *Id.* at 18908.

maximum improvement in energy efficiency that is technologically feasible and economically justified.²³ Historically, DOE determined this through a range of trial standard levels (TSLs). If DOE determined that the maximum TSL was justified, then the process ended. If, however, the maximum TSL was not justified, DOE engaged in a walk-down process until the agency determined that a particular TSL or in some instances no proposed TSL was economically justified.²⁴

The 2020 process rule instead requires DOE to include a comparison of the benefits and burdens of the selected TSL against the baseline and the other TSLs. This comparative analysis is meant to ensure that the selected TSL is indeed economically justified.²⁵ DOE is now proposing to remove the comparative analysis requirement in favor of returning to the walk-down method, stating that the analysis creates more uncertainty and that stakeholders were concerned that DOE would use the analysis to select the TSL that maximizes net benefits rather than energy savings.²⁶

Advocacy disagrees with DOE's proposal to remove the comparative analysis requirement. Under EPCA DOE is required to consider both factors (technologically feasible and economically justified) for the standard that is selected. EPCA does not expressly prohibit an analysis of net benefits. Economically justified under EPCA includes among other things the economic impact of the standard on the manufacturer, as well as the impact of any lessening of competition.²⁷ Thus conducting a comparative analysis of the selected TSL would ensure that DOE is indeed choosing a standard that is economically justified and would offer more transparency as to how the agency arrived at this decision. Furthermore, in this proposed rulemaking, DOE does not provide additional justification as to why a net benefits approach is inaccurate or otherwise prohibited, and instead merely states that the elimination of the comparative analysis is to reduce uncertainty.²⁸

DOE should also use the comparative analysis to ensure compliance with the RFA. In the past, Advocacy has commented on several proposed conservation standards where DOE failed to adequately consider the economic impacts of the selected TSL on small businesses, and as a result failed to comply with the requirements of the RFA.²⁹ In many of those same instances, DOE selected TSLs that were neither technologically feasible, nor economically justified.

²³ 42 U.S.C. § 6295 (o)(2)(A).

²⁴ 86 Fed. Reg. 18901, 18905-18906.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 42 U.S.C. § 6295 (o) (2) (B)(i).

²⁸ *Id.*

²⁹ *See e.g.*, Comments from Office of Advocacy on Proposed Energy Conservation Standards for Manufactured Housing, filed on June 17, 2016, available at <https://webarchive.loc.gov/all/20170105214836/https://www.sba.gov/advocacy/08-16-2016-comments-proposed-energy-conservation-standards-manufactured-housing-81-fed-reg>; Comments from Office of Advocacy on Proposed Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machine filed on November 23, 2015, available at <https://webarchive.loc.gov/all/20170305093158/https://www.sba.gov/advocacy/11-23-2015-comments-proposed-energy-conservation-standards-refrigerated-bottled-or-canned>; Comments from Office of Advocacy Proposed Energy Conservation Standards for Hearth Products, filed on May 8, 2015 available at <https://webarchive.loc.gov/all/20170305115505/https://www.sba.gov/advocacy/5815-comments-department-energy-proposed-energy-conservation-standards-hearth-products>.

Furthermore, one of the requirements of the RFA is to discuss significant alternatives which minimize the economic impacts on small entities.³⁰ DOE on multiple occasions fails to discuss such alternatives, instead pointing to its regulatory impact analysis that includes the range of TSLs for which no discussion is made. Engaging in a comparative analysis would ensure that DOE is considering the full scope of impacts of a particular standard and would help DOE in moving towards better compliance with the RFA.

Conclusions and Recommendations

Advocacy strongly encourages DOE to consider the above recommendations. Eliminating large portions of the 2020 process rule in favor of returning to discretionary, case-by-case approaches to rulemakings will not create increased efficiency in the process for small businesses and will only create more burdensome regulatory uncertainty for them. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

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/s/

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Copy to: Sharon Block, Acting Administrator
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Office of Management and Budget

³⁰ 5 U.S.C. 603 (c).