



January 24, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Alexander Hoehn-Saric
Chair
Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Re: Docket No. CPSC–2019–0020; Safety Standard for Residential Gas Furnaces and Boilers.

Dear Chair Hoehn-Saric:

On October 25, 2023, the Consumer Product Safety Commission (CPSC) published a proposed rule titled “Safety Standard for Residential Gas Furnaces and Boilers.”¹ The proposed rule would require all residential gas furnaces and boilers to, either directly or indirectly, continuously monitor the concentration of carbon monoxide (CO) produced during the combustion process. The gas furnace or boiler would also be required to incorporate a shutdown or modulation mechanism that would respond to specified CO concentration conditions.² This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy commends CPSC’s efforts to protect consumers from the hazards associated with CO exposure. Consumer safety is a top priority for small product manufacturers. Nonetheless, Advocacy is concerned that the benefits of CPSC’s proposed rule may be outweighed by its costs. Small business representatives have told Advocacy that the initial regulatory flexibility analysis (IRFA) contained in the proposed rule underestimates the costs small firms will incur to redesign and reengineer these products. Further, the IRFA does not adequately consider significant alternatives which could accomplish CPSC’s stated objectives while minimizing the significant economic impact of the proposal on small entities, as required by the Regulatory Flexibility Act (RFA).³ Advocacy also believes it is not clear whether CPSC’s estimated benefits would justify the costs imposed on small entities. For these reasons, CPSC must prepare and

¹ 88 Fed. Reg. 73272 (proposed Oct. 25, 2023).

² *Id.* at 73,283.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

make available for public comment a supplemental IRFA. Advocacy also recommends that CPSC provide a supplemental presentation of the rule's cost and benefit analysis.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under 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) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act,⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁵ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁶ The agency must provide a statement of factual basis that adequately supports its certification.⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁹

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."¹⁰

B. The Proposed Rule

The Consumer Product Safety Act (CPSA)¹¹ authorizes CPSC to promulgate mandatory product safety standards that set performance requirements for consumer products, such as residential gas furnaces and boilers, and/or requirements that a product be marked or accompanied by clear and adequate warnings.¹² The standard must be reasonably necessary to prevent or reduce an

⁴ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁵ 5 U.S.C. § 603.

⁶ *Id.* § 605(b).

⁷ *Id.*

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

¹⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹¹ 15 U.S.C. §§ 2051-89.

¹² 15 U.S.C. § 2056(a).

unreasonable risk or injury.¹³ According to section (9)(f)(1) of the CPSA, before promulgating a consumer safety rule, CPSC must consider and make findings on the following:

- (1) the degree and nature of the risk of injury that the rule is designed to eliminate or reduce;
- (2) the approximate number of consumer products subject to the rule;
- (3) the public need for the products subject to the rule and the probable effect the rule will have on utility, cost, or availability of such products; and
- (4) the means to achieve the objective of the rule while minimizing adverse effects on competition, manufacturing, and commercial practices.¹⁴

CPSC discusses each of these factors in its proposed rulemaking.¹⁵

Section 9 of the CPSA also specifies the procedure CPSC must follow to issue a safety standard. CPSC may commence a rulemaking by issuing an Advanced Notice of Proposed Rulemaking (ANPRM). On August 19, 2019, CPSC published an ANPRM to develop a rule to address the risk of injury associated with residential gas furnaces and boilers from CO production and leakage.¹⁶ CPSC received 15 comments on the ANPRM.¹⁷

On October 25, 2023, CPSC issued this proposed rule, which sets forth a mandatory safety standard and responds to the public comments submitted on the ANPRM. The proposed rule establishes performance requirements for residential gas furnaces, boilers, and wall and floor furnaces.¹⁸ The proposed rule would require that these consumer products have a means to, either directly or indirectly, monitor the concentration of CO emitted during combustion.¹⁹ It would also require each product to incorporate a means to shut down or modulate combustion to reduce average CO concentrations to specified levels for a minimum duration of time.²⁰

The proposed rule includes an initial regulatory flexibility analysis.²¹ In its IRFA, CPSC identified two small manufacturers of gas furnaces, three small manufactures of residential gas boilers, and one small importer of gas furnaces that may fall within the scope of the rule.²² CPSC found a maximum conversion cost of \$13.80 million for each of these five small firms.²³ In addition, CPSC estimates that small firms will incur variable costs of \$66.47 per unit associated with installing CO sensors and shutoff capabilities. This equates to an annual total of \$7.95 million in variable costs for each small firm.²⁴

¹³ *Id.*

¹⁴ *See* 15 U.S.C. § 2058(f)(1).

¹⁵ 88 Fed. Reg. 73272 at 73,292.

¹⁶ Performance Requirements for Residential Gas Furnaces and Boilers; Advance Notice of Proposed Rulemaking, 84 Fed. Reg. 42847 (Aug. 19, 2019).

¹⁷ 88 Fed. Reg. 73272 at 73,273.

¹⁸ *Id.* at 73,290.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 73,286-87.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

The IRFA includes a brief description of the regulatory alternatives generally considered by CPSC.²⁵ It does not, however, provide any economic analysis of the costs and benefits of those alternatives to small entities. It also does not examine specific alternatives that would minimize the cost burden to small entities.²⁶

II. Advocacy's Small Business Concerns

Advocacy has two chief concerns with the proposed rule. First, the IRFA found in the proposed rule is deficient because it underestimates the economic impact to small entities and does not adequately examine regulatory alternatives that would minimize the impact to those entities. Second, Advocacy believes that CPSC's estimated benefits may not justify the costs of the proposed rule.

A. The IRFA Found in the Proposed Rule is Deficient

Under the RFA, an IRFA must contain:

- 1) A description of why the regulatory action is being taken.
- 2) The objectives and legal basis for the proposed regulation.
- 3) A description and estimated number of regulated small entities.
- 4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
- 5) Identification of duplication, overlap, and conflict with other rules and regulations.
- 6) A description of significant alternatives to the rule.²⁷

First, Advocacy is concerned that the IRFA underestimates the economic impact to regulated small entities. Second, Advocacy believes the IRFA does not adequately discuss specific alternatives that might reduce the impacts on small entities.

1. The Proposed Rule Underestimates the Economic Impact to Small Entities

The IRFA found in the proposed rule does not adequately estimate the economic impact to small entities. As noted in the IRFA, the proposed rule would be extremely costly to small furnace and boiler manufacturers. CPSC states that small manufacturers would face one-time conversion costs of redesigning their products and modifying factory operations, as well as ongoing, per-unit variable costs associated with producing, testing, and certifying products with CO sensors and shutoff capabilities.²⁸

Small business representatives have told Advocacy, however, that the high costs conceded by CPSC still significantly underestimate the actual impact of the rule to small firms. This underestimation appears to have occurred, in part, because CPSC does not analyze the impact of costs to small entities relative to those of larger entities. Small firms face disproportionate impacts from regulation because they lack the resources and operational scale necessary to

²⁵ *Id.*

²⁶ *See id.*

²⁷ 5 U.S.C. § 603.

²⁸ 88 Fed. Reg. at 73,286.

absorb the costs associated with reengineering their products, facilities, and operations. For this reason, small manufacturers will be put at an extreme disadvantage when attempting to comply with the safety standard within an 18-month time window. Analysis of impacts by firm size will allow CPSC to assess whether small firms can realistically meet the requirements of the proposed safety standard with the resources they have or through flexibilities where appropriate. Small firms have told Advocacy that CPSC's cost estimates are also too low because they rely on the commercial availability of European and Japanese technology. These technologies are not sold in the United States and do not fit into the systems in American homes.

For these reasons, CPSC must revise its IRFA to better assess the costs to small entities. CPSC should also provide detailed analysis addressing the heightened cost burden faced by those entities in relation to larger firms. This would help CPSC better understand the cost burden faced by small, regulated entities.

2. The Proposed Rule Does Not Adequately Consider Regulatory Alternatives that Will Lower the Burden to Small Entities

The RFA requires that an IRFA discuss significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact on small entities. The IRFA briefly refers to four regulatory alternatives considered in the proposed rule's regulatory impact analysis (RIA):

- 1) continue to work and advocate for change through the voluntary standards process;
- 2) rely on the use of residential CO alarms;
- 3) rely on education and information campaigns; and
- 4) rely on recalls.²⁹

However, the analysis of alternatives considered in the RIA is limited. The RIA does not provide a quantitative evaluation of alternatives to show their effects on the costs and benefits of the rule. Further, the RIA does not provide information on how each alternative impacts small businesses specifically. CPSC should perform a cost analysis for every alternative in the IRFA to fully understand how this proposed rule can be altered to provide relief to small businesses. CPSC should also include an analysis of any additional feasible alternatives that would help minimize the impacts of the rule to small businesses. For example, CPSC should analyze the effects of delaying the effective date of the rule specifically for small firms.

To comply with the RFA, CPSC must revise its IRFA to include additional significant regulatory alternatives which accomplish its objectives for the rulemaking. Advocacy encourages CPSC to provide a detailed analysis of each potential alternative and discuss how that alternative may reduce the economic burden on small entities.

B. CPSC's Estimated Benefits May Not Justify the Costs

Advocacy is also concerned that CPSC's estimated benefits may not justify the costs of the proposed rule. By CPSC's own estimation, the benefits of this regulation are less than its costs.

²⁹ *Id.* at 73,286-87.

For every \$1 spent improving residential furnaces and boilers, CPSC expects only \$0.59 in benefits from mitigated deaths and injuries.³⁰ However, Advocacy believes that the estimated benefits of the rule may not achieve the intended outcomes for the following reasons:

- CPSC assumes that the death and injury prevention will be consistent every year once the new regulation is in place. However, it also assumes that the benefits should slowly increase over time as new furnaces are installed.
- The 21 deaths per year average for the nation used to justify the rule features a mix of new and old furnaces.³¹ The difference in benefits might be much smaller for new furnaces than the average furnace in use, further reducing future benefits.
- Because the rule increases cost to replace old furnaces and boilers, consumers may delay purchasing new products. Older furnaces and boilers near the end of their lifespans are the most likely to fail. The associated increase in risk to consumers would offset some of the benefits of the rule.
- Most sensors will fail within the normal lifetime of a boiler or furnace; CPSC found that sensors had a lifespan of 6.4 to 10 years.³² Assuming that most failures occur towards the end of the lifecycle of a product, the rule may not prevent the number of deaths and injuries anticipated if consumers do not replace the sensors when they fail.

For these reasons, CPSC should perform further analysis to determine whether the regulation imposes costs to small entities that are not justified by its benefits.

C. Advocacy's Recommendations

Advocacy is concerned that, because of deficiencies in the rule's cost-benefit analysis and IRFA, the public has not been adequately informed about the possible impact of the proposed rule on small entities. Additionally, small entities have not been given sufficient information regarding less burdensome significant alternatives to the proposed rule that would meet CPSC's objectives.

For these reasons, CPSC should prepare and make available for public comment a supplemental cost-benefit analysis and a supplemental IRFA. The supplemental IRFA should adequately estimate potential impacts to small entities. CPSC should provide detailed information that will allow it to analyze the relative impact of costs based on entity size. Further, the supplemental IRFA must examine specific regulatory alternatives that would minimize the cost burden to small entities, as required by the RFA.

III. Conclusion

Consumer safety is a top priority for small furnace and boiler manufacturers. However, CPSC's proposed rule imposes cost-prohibitive requirements that would likely cause small firms to exit the market. Advocacy is concerned that these costs may not be justified by the benefits of the rule. Advocacy is also concerned that the IRFA lacks essential information required by the RFA.

³⁰ *Id.* at 73,293.

³¹ *Id.* at 73,278.

³² *Id.*

CPSC must provide a detailed analysis of the impact of the proposed rule to small entities before proceeding to a final rule. CPSC must also explore specific regulatory alternatives that might reduce the significant economic impact to small entities. This analysis should be published in a supplemental IRFA to provide small entities an opportunity to comment. Advocacy also recommends that CPSC provide a supplemental presentation of the rule's cost and benefit analysis.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Meagan Singer
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator
 Office of Information and Regulatory Affairs
 Office of Management and Budget