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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2021-BT-STD-0003]

RIN 1904–AF13

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

AGENCY: Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (“DOE” or the “Department”) proposes to revise the Department’s “Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment” (“Process Rule”), revising the process the Department follows to develop energy conservation standards and test procedures for covered products and equipment. The proposed revisions are consistent with longstanding DOE practice and would remove unnecessary obstacles to DOE’s ability to meet its statutory obligations under the Energy Policy and Conservation Act (“EPCA”).

DATES: *Comments:* DOE will accept comments, data, and information regarding all aspects of this notice of proposed rulemaking on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. DOE will hold a webinar on Friday, April

23, 2021, from 10:00 a.m. to 3:00 p.m. See section V, “Public Participation,” for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. If no participants register for the webinar, it will be cancelled.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov/docket/EERE-2021-BT-STD-0003>. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments by email to the following address: processrule2021STD0003@ee.doe.gov. Include “2021 Process Rule NOPR” and docket number EERE-2021-BTD-STD-0003 and/or RIN number 1904-AF13 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Appliance Standards Program staff at (202) 586-1445 to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V (Public Participation) of this document.

Docket: The docket for this rulemaking, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket webpage can be found at:

<http://www.regulations.gov/docket/EERE-2021-BT-STD-0003>. The docket webpage contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Email: ApplianceStandardsQuestions@ee.doe.gov.

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I. Summary of Proposal

On February 14, 2020, the United States Department of Energy (“DOE” or “the Department”) published a final rule (“February 2020 Final Rule”) in the *Federal Register* that made significant revisions to its “Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products” found in 10 CFR part 430, subpart C, appendix A. 85 FR 8626. DOE also published a companion final rule on August 19, 2020 (“August 2020 Final Rule”), that clarified how DOE would conduct a comparative analysis across all trial standard levels when determining whether a particular trial standard level was economically justified. *See* 85 FR 50937. These rules collectively modified the Process Rule that DOE had originally issued on July 15, 1996¹ into its current form. *See* 10 CFR part 430, subpart C, appendix A (2021). While the 1996 Process Rule acknowledged that the guidance would not be applicable to every rulemaking and that the circumstances of a particular rulemaking should dictate application of these generally applicable practices,² the revisions made in the February 2020 Final Rule sought to create a standardized rulemaking process that was binding on the Department. 85 FR 8626, 8634. In creating this one-size-fits-all approach, the

¹ “Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products,” 61 FR 36974 (July 15, 1996) (“1996 Process Rule”).

² *Id.* at 36979.

February 2020 Final Rule and the August 2020 Final Rule also added additional steps to the rulemaking process that are not required by any applicable statute.

Subsequent events have caused DOE to reconsider the merits of a one-size-fits-all rulemaking approach to establishing and amending energy conservation standards and test procedures. Two of these events are particularly salient. First, on October 30, 2020, a coalition of non-governmental organizations filed suit under EPCA alleging that DOE has failed to meet rulemaking deadlines for 25 different consumer products and commercial equipment.³ On November 9, 2020, a coalition of States filed a virtually identical lawsuit.⁴ In response to these lawsuits, DOE has had to reconsider whether the benefits of a one-size-fits-all rulemaking approach outweigh the increased difficulty such an approach poses in meeting DOE's statutory deadlines and obligations under EPCA. As mentioned previously, the 1996 Process Rule allowed for "case-specific deviations and modifications of the generally applicable rule."⁵ This allowed DOE to tailor rulemaking procedures to fit the specific circumstances of a particular rulemaking. For example, under the 1996 Process Rule, minor modifications to a test procedure would not automatically result in a 180-day delay before DOE could issue a notice of proposed energy conservation standards. Eliminating these unnecessary delays would better enable DOE to meet its obligations and deadlines under EPCA. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the greater the resulting energy savings and environmental benefits.

Second, on January 20, 2021, the White House issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 FR 7037 (Jan. 25, 2021). Section 1 of that Order lists a number of policies related to

³ *Natural Resources Defense Council v. DOE*, Case No. 20-cv-9127 (S.D.N.Y. 2020).

⁴ *State of New York v. DOE*, Case No. 20-cv-9362 (S.D.N.Y. 2020).

⁵ 61 FR 36974, 36979.

the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation's resilience to climate change. *Id.* at 86 FR 7037, 7041. Section 2 of the Order instructs all agencies to review "existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies]." *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.* Under that same section, for certain explicitly enumerated agency actions, including the February 2020 and the August 2020 Final Rules, the Order directs agencies to consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action within a specific time frame. Under this mandate, DOE is directed to propose any major revisions to these two rules by March 2021, with any remaining revisions to be proposed by June 2021. *Id.* at 7038. DOE believes today's proposed revisions will help the United States meet the goals in section 1 of Executive Order 13990 by allowing DOE to fulfill its responsibilities under EPCA to issue energy conservation standards that result in significant conservation of energy and are technologically feasible and economically justified in a more timely and effective manner, thereby allowing for more rapid realization of energy savings and reductions in greenhouse gas emissions through future energy conservation standards.

In light of these events, DOE has identified several aspects of the February 2020 and the August 2020 Final Rules (together, representing the current Process Rule) that present obstacles to DOE's ability to meet its obligations under EPCA, and thus appear to merit revision. Revision of the Process Rule would also support the goals in section 1 of Executive Order 13990. In accordance with the time frame specified in that Executive Order, DOE proposes major revisions

to the current Process Rule in this document and may propose additional revisions in a subsequent NOPR.

In this document, DOE proposes to: (1) restore DOE’s discretion to depart from the Process Rule’s general guidance; (2) remove the recently-added threshold for determining when the significant energy savings criterion is met; (3) remove the recently-added requirement to conduct a comparative analysis in addition to DOE’s analysis of economic justification under the factors listed in 42 U.S.C. 6295(o)(2)(B)(i); (4) revert to DOE’s 1996 guidance regarding completion of test procedure rulemakings prior to issuance of a NOPR for an energy conservation standards rulemaking; (5) clarify that DOE may make modifications to industry test procedure standards to comply with the requirements of EPCA, as well as for certification, compliance, and enforcement purposes; (6) revert to DOE’s prior practice on direct final rules; and (7) clarify that DOE will conduct negotiated rulemakings in accordance with the Negotiated Rulemaking Act. These revisions are summarized in the following table.

List of Proposed Revisions in this Document

Section	Proposed Revisions
1. Objectives	Revise language to be consistent with the newly proposed Section 3.
2. Scope	No revisions proposed in this document.
3. Mandatory Application of the Process Rule	Replace with new Section 3, “Application of the Process Rule.”
4. Setting Priorities for Rulemaking Activity	No revisions proposed in this document.
5. Coverage Determination Rulemakings	Eliminate the 180-day period in paragraph (c) between finalization of DOE test procedures and issuance of a NOPR proposing new or amended energy conservation standards.
6. Process for Developing Energy Conservation Standards	Eliminate paragraph (b), “Significant Savings of Energy.”
7. Policies on Selection of Standards	Eliminate text in paragraph (e)(2)(i) requiring DOE to conduct a comparative analysis when determining whether a proposed standard level is economically justified.
8. Test Procedures	Clarify in paragraph (c) that DOE may revise consensus industry test procedure standards for compliance, certification, and enforcement purposes; eliminate the 180-day period in

Section	Proposed Revisions
	paragraph (d) between finalization of DOE test procedures and issuance of a NOPR proposing new or amended energy conservation standards.
9. ASHRAE Equipment	No revisions proposed in this document.
10. Direct Final Rules	Revise section to clarify that DOE will implement its direct final rule authority on a case-by-case basis.
11. Negotiated Rulemaking Process	Eliminate section.
12. Principles for Distinguishing Between Effective and Compliance Dates	No revisions proposed in this document.
13. Principles for the Conduct of the Engineering Analysis	No revisions proposed in this document.
14. Principles for the Analysis of Impacts on Manufacturers	Eliminate incorrect cross reference.
15. Principles for the Analysis of Impacts on Consumers	No revisions proposed in this document.
16. Consideration of Non-Regulatory Approaches	No revisions proposed in this document.
17. Cross-Cutting Analytical Assumptions	No revisions proposed in this document.

* As part of the proposed revisions, DOE will renumber sections and subsections as required.

II. Authority and Background

A. Authority

Title III, Parts B⁶ and C⁷ of the Energy Policy and Conservation Act, as amended, (“EPCA” or “the Act”), Pub. L. 94-163 (42 U.S.C. 6291-6317, as codified), established the Energy Conservation Program for Consumer Products and Certain Industrial Equipment.⁸ Under EPCA, DOE’s energy conservation program for covered products consists essentially of four parts: (1) testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product and covered equipment during a representative average use cycle or period of use. (42 U.S.C. 6293; 42 U.S.C. 6314) Manufacturers of covered

⁶ For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

⁷ Part C was added by Pub. L. 95-619, Title IV, §441(a). For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A-1.

⁸ All references to EPCA in this document refer to the statute as amended through Energy Act of 2020, Pub. L. 116-260 (Dec. 27, 2020).

products and covered equipment must use the prescribed DOE test procedure when certifying to DOE that their products and equipment comply with the applicable energy conservation standards adopted under EPCA and when making any other representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s); 42 U.S.C. 6314(a); and 42 U.S.C. 6316(a)) Similarly, DOE must use these test procedures to determine whether the products comply with energy conservation standards adopted pursuant to EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316(a))

In addition, pursuant to EPCA, any new or amended energy conservation standard for covered products (and at least certain types of equipment) must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a)) In determining whether a standard is economically justified, EPCA requires DOE, to the greatest extent practicable, to consider the following seven factors: (1) the economic impact of the standard on the manufacturers and consumers; (2) the savings in operating costs, throughout the estimated average life of the products (*i.e.*, life-cycle costs), compared with any increase in the price of, or in the initial charges for, or operating and maintaining expenses of, the products which are likely to result from the imposition of the standard; (3) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard; (4) any lessening of the utility or the performance of the products likely to result from the imposition of the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (6) the need for national energy and water conservation; and (7) other factors DOE finds relevant. (42 U.S.C. 6295(o)(2)(B)(i)) Furthermore, the new or amended standard must result in a significant conservation of energy (42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6313(a)(6); and 42 U.S.C. 6316(a)) and comply with any other applicable statutory provisions.

B. Background

DOE conducted an effort between 1995 and 1996 to improve the process it follows to develop energy conservation standards for covered appliance products. This effort involved reaching out to many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties for input. The result was the publication of a final rule in the *Federal Register* on July 15, 1996, titled, “Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products” (“1996 Process Rule”). 61 FR 36974. This document was codified at 10 CFR part 430, subpart C, appendix A, and it became known colloquially as the “Process Rule.” The goal of the Process Rule was to elaborate on the procedures, interpretations, and policies that would guide the Department in establishing new or revised energy conservation standards for consumer products. The rule was issued without notice and comment under the Administrative Procedure Act’s (“APA”) exception for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” (5 U.S.C. 553(b)(A))

On December 18, 2017, DOE issued a request for information (“RFI”) on potential revisions to the Process Rule. 82 FR 59992. DOE subsequently published a NOPR regarding the Process Rule in the *Federal Register* on February 13, 2019. 84 FR 3910. After considering the comments it received DOE then published a final rule in the *Federal Register* on February 14, 2020, which significantly revised the Process Rule. 85 FR 8626.

While DOE issued the 1996 Process Rule without notice and comment as an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice, the February 2020 Final Rule was issued as a legislative rule subject to notice and

comment. For several reasons, as stated throughout this document, DOE believes the Process Rule is best described and utilized as generally applicable guidance that may guide, but not bind, the Department's rulemaking process. The revisions proposed in this document are intended to clarify this point. In accordance with Executive Order 13990, DOE is using a notice and comment process to propose revisions to the Process Rule. 86 FR 7037.

III. Discussion of Proposed Revisions to the Process Rule

The following sections discuss the proposed revisions to the Process Rule and request comment on those proposals. In addition to those specific requests for comment, DOE requests comment, data, and information regarding all aspects of this notice of proposed rulemaking.

A. Restoring the Department's Discretion to Depart from the Process Rule's General Guidance

One of the most significant changes made to the Process Rule in the February 2020 Final Rule was to turn what had been guidance on usual practices for issuing new or amended energy conservation standards and test procedures into binding requirements. The July 1996 Final Rule contained procedures, interpretations, and policies that DOE believed would be appropriate for general use in conducting energy conservation standard and test procedure rulemakings. 61 FR 36974, 36979. DOE also acknowledged the possibility that the usual practices would not be appropriate for every rulemaking and that the circumstances of a particular rulemaking should dictate application of these generally applicable practices, subject to public notice explaining any such deviations. *Id.*

In making the Process Rule binding, DOE determined at the time it issued the February 2020 final rule that "promoting a rulemaking environment that is both predictable and consistent" outweighed the need for "flexibility to fit the appropriate process to the appliance

standard or test procedure at issue.” February 2020 Final Rule, 85 FR 8626, 8633-8634.

Additionally, in response to comments that mandatory application of the Process Rule could conflict with DOE’s statutory obligations under EPCA (*e.g.*, rulemaking deadlines), DOE stated that the Process Rule had been drafted to closely follow and implement EPCA. *Id.* at 8634.

As discussed earlier in this document, DOE is reconsidering whether mandatory application of the Process Rule would have a negative effect on DOE’s ability to meet the statutory deadlines established under EPCA and other applicable requirements. DOE acknowledges it has often been unable to meet its rulemaking deadlines. The Process Rule, however, mandates procedural steps that make the rulemaking process lengthier than EPCA requires. Under EPCA, DOE is required to review energy conservation standards for covered products and equipment at least once every six years to determine if a more-stringent standard would result in significant conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6295(m)(1); 42 U.S.C. 6313(a)(6)(C); 42 U.S.C. 6316(a)) Similarly, DOE is also required to review test procedures for covered products and equipment at least once every seven years to determine if improvements can be made. (42 U.S.C. 6293(b)(1); 42 U.S.C. 6314(a)(1)(A)) DOE currently has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and is typically working on anywhere from 50 to 100 rulemakings (for both energy conservation standards and test procedures) at any one time. As a result, any modifications or additions to the procedural requirements laid out in EPCA may affect DOE’s ability to meet the rulemaking deadlines in EPCA.

For instance, EPCA does not require DOE to issue any rulemaking documents in advance of a NOPR. The February 2020 Final Rule, on the other hand, mandates use of an early assessment RFI and either an advanced notice of proposed rulemaking (“ANOPR”) or a

framework document with a preliminary analysis. DOE recognizes the importance of gathering early stakeholder input and has used RFIs and ANOPRs in the past. But an RFI followed by a ANOPR may not be the most efficient method for gathering early stakeholder input in all rulemakings. For instance, EPCA requires DOE to revisit a determination that standards do not need to be amended within three years. (42 U.S.C. 6295(m)(3)(B)) In such cases, particularly with respect to covered products and equipment that have gone through multiple rounds of rulemakings, a notice of data availability (“NODA”) that updates the analysis from the previous determination, as opposed to an early assessment RFI and an ANOPR, may be best suited for gathering early stakeholder input and establishing an adequate rulemaking record. As a result, mandatory application of the Process Rule requirement for early assessment RFIs and ANOPRs could in some circumstances make it more difficult for DOE to meet its statutory deadlines, while adding little to no value to the rulemaking process.

The February 2020 Final Rule also required that DOE identify any necessary modifications to established test procedures prior to initiating the standards development process and finalize those modifications, if any, 180 days prior to publication of a NOPR proposing new or amended energy conservation standards. DOE stated that this requirement would allow stakeholders to provide more effective comments on the proposed energy conservation standards. 85 FR 8626, 8676. That being said, this requirement is not found in EPCA, where energy conservation standards and test procedures are under different review cycles (*i.e.*, six and seven years, respectively). By requiring test procedure modifications to be identified and finalized 180 days prior to proposing new or amended energy conservation standards, the Process Rule has effectively mandated a six-year review cycle for test procedures. Further, this requirement would apply regardless of the complexity of the modifications made to the test procedure. Application of this provision could restrict DOE’s ability to meet its statutory obligations while

offering little benefit in situations where DOE makes minor modifications or adjustments to a test procedure. This proposed change is discussed in greater detail in section III.E.

These examples illustrate what was clearly understood in the July 1996 Final Rule. While the procedures, interpretations, and policies laid out in the Process Rule are generally applicable to DOE's rulemaking program, application of these guidelines to a specific rulemaking should be determined on a case-by-case basis. 61 FR 36974, 36979. Accordingly, DOE proposes to revert the Process Rule back to its original, non-binding status. DOE requests comments, information, and data on whether the Process Rule should be non-binding or, alternatively, whether the rule should remain binding but with revised provisions.

In addition, consistent with this proposal to revert the Process Rule back to its original form as non-binding guidance, DOE also proposes to clarify that the Process Rule does not create legally enforceable rights. DOE does not intend for departures from the generally applicable guidance contained in the Process Rule to serve as the basis for potential procedural legal challenges. It is noted, however, that this proposed clarification, which is similar to the general approach contained in the 1996 Process Rule, would not impact the ability of a party to raise a challenge regarding the substantive merits of a given rulemaking or the procedural steps delineated under EPCA or the APA. *See* 42 U.S.C. 6306 (applying judicial review to EPCA's consumer product provisions) and 42 U.S.C. 6316(a)-(b) (extending the application of 42 U.S.C. 6306 to commercial and industrial equipment). DOE seeks comment on this proposed clarification.

B. Significant Energy Savings Threshold

EPCA provides that the Secretary of Energy may not prescribe an amended or new energy conservation standard if the Secretary determines that such standard will not result in

significant conservation of energy. (42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6313(a)(6)(A)(ii)(II); and 42 U.S.C. 6316(a)) Congress did not define the statutory term “significant conservation of energy,” and, for several decades prior to the February 2020 Process Rule, DOE also did not provide specific guidance or a numerical threshold for determining what constitutes significant conservation of energy. Instead, DOE determined on a case-by-case basis whether a particular rulemaking would result in significant conservation of energy.

In a departure from this practice, DOE adopted a numerical threshold for significant conservation of energy in the February 2020 Process Rule, which presently applies to all energy conservation standards rulemakings for both covered products and equipment. Specifically, the new threshold requires that an energy conservation standard result in a 0.30 quad reduction in site energy use over a 30-year analysis period or a 10-percent reduction in site energy use over that same period. In explaining the benefits of the new threshold, DOE stated that it would ensure that economically-justified standards would be developed, while also making the rulemaking process more predictable. 85 FR 8626, 8670.

DOE is reconsidering whether the numerical threshold established in the February 2020 Final Rule allows DOE to fully consider whether an energy conservation standard would result in significant conservation of energy. In particular, DOE is reevaluating whether the significance of energy savings offered by a new or amended energy conservation standard can be determined without knowledge of the specific circumstances surrounding a given rulemaking. For example, the United States has now rejoined the Paris Agreement and will exert leadership in confronting the climate crisis.⁹ These actions have placed an increased emphasis on the importance of energy savings that reduce greenhouse gas emissions, but the threshold established in the February 2020 Final Rule does not allow DOE to account for the increased significance of

⁹ See Executive Order 14008, 86 FR 7619 (Feb. 1, 2021) (“Tackling the Climate Crisis at Home and Abroad”).

energy savings that may help mitigate the climate crisis. Additionally, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. For example, consumer refrigerators operate 24 hours per day, 365 days per year. Residential air conditioners, on the other hand, typically operate during peak demand, e.g., during hot summer days. Reducing energy use during periods of peak demand helps reduce stress on energy infrastructure. As a result, a 0.3 quad reduction in energy use for residential air conditioners will have a greater impact on reducing the stress on U.S. energy infrastructure than a 0.3 quad reduction in energy use for consumer refrigerators. These differences can also be exacerbated by geographical and population differences. Lastly, establishing a set, numerical site energy threshold for all covered products and equipment does not allow DOE to account for differences in primary energy and full-fuel-cycle (“FFC”) effects for different covered products and equipment when determining whether energy savings are significant. Primary energy and FFC effects include the energy consumed in electricity production (depending on load shape), in distribution and transmission, and in extracting, processing, and transporting primary fuels (*i.e.*, coal, natural gas, petroleum fuels), and thus present a more complete picture of the impacts of energy conservation standards. For example, according to *Annual Energy Outlook 2021*, 1 quad of site electricity energy consumption in 2022 corresponds to approximately 3.05 quads of FFC energy consumption (for a generic end-use load shape).¹⁰ By contrast, 1 quad of site natural gas or oil energy consumption in 2022 corresponds to 1.11 and 1.17 quads of FFC energy consumption, respectively. These are just some examples of any number of factors that cannot be fully accounted for when using DOE’s current, static threshold for significant conservation of energy.

¹⁰ Available at: <https://www.eia.gov/outlooks/aeo/>.

Accordingly, DOE proposes to eliminate the current threshold for determining significant conservation of energy and to revert to its prior practice of making such determinations on a case-by-case basis. DOE requests comments, information, and data on whether its proposed approach is appropriate for determining significant conservation of energy or on any suggested alternatives.

C. Determinations of Economic Justification

Under EPCA, any new or amended standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) To ensure that DOE meets this statutory mandate, DOE employs a walk-down process to select energy conservation standard levels. As a first step in the process, DOE screens out technologies for improving energy efficiency that are not feasible. DOE then uses the remaining technologies to create a range of trial standard levels (“TSLs”). These TSLs typically include: (1) the most-stringent TSL that is technologically feasible (*i.e.*, the “max-tech” standard); (2) the TSL with the lowest life-cycle cost; (3) a TSL with a payback period of not more than three years; and (4) any TSLs that incorporate noteworthy technologies or fill in large gaps between efficiency levels of other TSLs. Beginning with the max-tech TSL, DOE then determines whether a specific TSL is economically justified. In making that determination, DOE determines, after reviewing public comments and data, whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven factors described in 42 U.S.C. 6295(o)(2)(B)(i). If DOE determines that the max-tech TSL is economically justified, the analysis ends, and DOE adopts the max-tech TSL as the new or amended standard. However, if DOE determines that the max-tech TSL is not economically justified, DOE walks down to consider the next-most-stringent TSL. This walk-down process continues until DOE determines that a TSL is economically justified or that none of the TSLs are economically justified.

In the August 2020 Final Rule, DOE modified this process to require that determinations of economic justification include a comparison of the benefits and burdens of the selected TSL against the benefits and burdens of the baseline case and all other TSLs. 85 FR 50937, 50944. DOE stated its belief that such approach would allow for more reliable determinations that a specific TSL is economically justified. *Id.* at 50939. While the requirement to conduct a comparative analysis affected DOE's process for determining whether a TSL is economically justified, it did not dictate any particular outcome or require DOE to modify its general approach of walking down from the max-tech TSL.

DOE's decision to add a comparative analysis to the process for determining whether a TSL is economically justified generated considerable confusion amongst DOE's stakeholders. Perhaps the greatest confusion stemmed from whether the requirement to conduct a comparative analysis would conflict with DOE's statutory mandate to select the TSL that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified. Several stakeholders were concerned that DOE would use the comparative analysis to select a TSL that maximizes net benefits, as opposed to the TSL that maximizes energy savings and is technologically feasible and economically justified. *Id.* While DOE reiterated its commitment to follow the requirements in EPCA in the August 2020 Final Rule, the Department also stated that "the purpose of EPCA's seven factors is not to select the standard that achieves the maximum improvement in energy efficiency, *no matter how minute an estimated cost savings.*" 85 FR 50937, 50939 (emphasis added). In retrospect, DOE has come to understand that these statements are somewhat contradictory and generate uncertainty regarding how DOE would use a comparative analysis to determine whether a specific TSL is economically justified.

In light of this uncertainty, DOE proposes to eliminate the requirement to conduct a comparative analysis when determining whether a specific TSL is economically justified. DOE has tentatively concluded that the process and criteria laid out in 42 U.S.C. 6295(o)(2)(B)(i) for determining economic justification is already sufficiently robust. And, any improvement to that process that may result from the use of a comparative analysis is outweighed by the uncertainty it casts over DOE's statutory obligation to select a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified and the additional burden the comparative analysis imposes on DOE. DOE requests comments, information, and data on whether this proposal offers an appropriate approach for determining whether a TSL is economically justified.

D. Adoption of Industry Test Standards

The February 2020 Final Rule amended the Process Rule to require adoption, without modification, of industry standards as test procedures for covered products and equipment, unless such standards do not meet the EPCA statutory criteria for test procedures. 85 FR 8626, 8678-8682, 8708. In essence, DOE sought to explain and codify its established practice, which is to analyze the appropriate consensus standard, with the input of stakeholders and the interested public, to: (1) determine that the EPCA statutory criteria are met and use it as the Federal test procedure; (2) modify it so that it complies with the statutory criteria, or (3) reject it and develop an entirely new test procedure.

On further review, DOE has come to see that its attempt at clarification may have had the opposite effect, creating the false impression that DOE had put in place a new presumption for an "as-is" adoption of industry consensus standards without meaningful review. The resulting confusion led to complaints that DOE was being overly deferential to industry and abdicating its responsibilities under the statute to ensure that any industry consensus standards adopted as

Federal test procedures comport with the relevant requirements of EPCA. Such outcome was never DOE's intention, and accordingly, the Department proposes to clarify that while DOE will first consider applicable industry consensus standards, such standards must first undergo a thorough agency review to ensure that they meet the requirements of the statute, either with or without modification. The following discussion explains DOE's process for consideration of industry consensus standards as Federal test procedures. *See* 85 FR 8676-8682.

As an initial matter, the requirement at section 8(c) of the Process Rule applies to covered products and equipment where use of a specific consensus standard is not otherwise mandated by EPCA. In all other cases, it has been DOE's established practice to routinely adopt consensus standards as Federal test procedures, which is consistent with both EPCA and other relevant statutory provisions. However, in order to adopt any such test procedure, the Department must apply certain statutory criteria contained in two provisions of EPCA -- 42 U.S.C. 6293(b)(3)-(4) or 42 U.S.C. 6314(a)(2)-(3), depending upon the specific covered product or covered equipment to which the test procedure would apply. Both of these sections contain similar language describing two statutory criteria for the promulgation of a test procedure: (1) That the test procedure shall be reasonably designed to produce test results which measure energy efficiency, energy use, water use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary, and (2) that the test procedure shall not be unduly burdensome to conduct.¹¹

¹¹ The language in 42 U.S.C. 6314(a)(2)-(3) differs slightly from its parallel sections in 42 U.S.C. 6293(b)(3)-(4). 42 U.S.C. 6314(a)(2) reads as follows: "(2) Test procedures prescribed in accordance with this section shall be reasonably designed to produce test results which reflect energy efficiency, energy use, and estimated operating costs of a type of industrial equipment (or class thereof) during a representative average use cycle (as determined by the Secretary), and shall not be unduly burdensome to conduct." Subparagraphs (3) for each of these two statutory provisions referenced above address test procedures for determining estimated annual operating costs have similar language but are not identical in order to reflect differences in criteria for covered products and covered commercial equipment.

Furthermore, the National Technology Transfer and Advancement Act (“NTTAA”) and OMB Circular A–119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” together direct Federal agencies to adopt voluntary, private sector, consensus standards to meet agency needs during standards development activities, thereby supporting the use of technical standards that are developed or adopted by voluntary, private sector, consensus standards bodies (rather than government-unique standards), unless such standards are inconsistent with applicable law or otherwise impractical. (National Technology Transfer and Advancement Act of 1995, Pub. L. 104–113, Section 12 (March 7, 1996) and revised Circular A–119, 81 FR 4673 (January 27, 2016)) The NTTAA codified the policies in OMB Circular A–119. The 2016 revised version of OMB Circular A–119 is available and can be accessed via PDF download at <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>. These provisions seek to promote a number of public policy objectives, including the intention to enhance technological innovation for commercial public purposes, to promote the adoption of technological innovations, to encourage long-term growth for U.S. enterprises, to promote efficiency and economic competition through harmonization of standards, and to eliminate the cost to the Federal government of developing its own standards and decrease the burden of complying with agency regulation. DOE agrees that consideration of industry consensus standards furthers these objectives and also facilitates compliance and reduces burdens, because the regulated industry is already familiar with these procedures.

While it is true that EPCA does not require the use of consensus standards for test procedures for certain equipment, neither does it prohibit such use, and again, the NTTAA and OMB Circular A–119 favor the use of consensus standards by agencies, unless there is a conflict with applicable law, or it is otherwise impractical. Clearly, nothing in EPCA prevents DOE from using consensus standards in test procedure rulemakings as long as DOE can demonstrate that these consensus standards meet the EPCA statutory criteria. Consensus standards are a logical

foundation from which to begin the Federal test procedure process. Accordingly, DOE finds that the current Process Rule implements both the underlying purpose of EPCA with respect to test procedures, as well as the NTTAA and OMB Circular A-119 with respect to consensus standards, and ultimately, it is a reasonable exercise of the agency's discretion in its test procedure rulemaking activity. As such, DOE is not proposing to change this aspect of the Process Rule.

Turning from DOE's authority to consider industry consensus standards to the Department's process for considering such standards as a Federal test procedure, DOE notes that because industry consensus test procedures are not generally developed for regulatory purposes, a careful review by the agency is necessary and appropriate to ensure that the relevant statutory criteria are met, with modifications as necessary. Accordingly, when DOE considers promulgating either a new or amended test procedure, DOE will evaluate the applicable consensus standard to determine whether such consensus standard meets the applicable above-referenced EPCA requirements. DOE will also assess whether an industry consensus standard would generate consistent and repeatable results that are compatible with the Department's compliance, certification, and enforcement ("CC&E") regulations. Failure to generate such results would render such test procedure impractical for regulatory purposes, a key consideration under both the NTTAA and OMB Circular A-119.

If the consensus standard does not meet both relevant statutory criteria (as detailed earlier) and CC&E requirements, DOE will not adopt the consensus standard without modification. It will then be necessary for DOE and stakeholders, during the notice and comment rulemaking process, to determine what specific modifications, if any, will bring the consensus standard into compliance with the statutory criteria and CC&E requirements. If the consensus standard cannot be modified to meet the statutory criteria and CC&E requirements,

DOE will not use it and will need to craft its own test procedure. As with all test procedure rules, all of these issues, including whether the consensus standard meets the EPCA statutory criteria, will be discussed and decided in the regular notice and comment rulemaking process. To the extent that modifications to these industry consensus standards impose costs on industry (*i.e.*, DOE modifications require different testing equipment or facilities), DOE must weigh whether such costs present an undue burden on manufacturers. (42 U.S.C. 6293(b)(3); 42 U.S.C. 6314(a)(2))

While DOE believes that the above discussion should dispel any lingering confusion regarding the application of the Process Rule to DOE's consideration of industry consensus standards in setting Federal test procedures and that no modifications to the current text are necessary, DOE remains open to providing further clarification. In that vein, DOE proposes to include additional language at paragraph 8(c) of the Process Rule, stating that DOE may also make further modifications as necessary to ensure industry test standards are compatible with the relevant statutory requirements, as well as DOE's compliance, certification, and enforcement requirements.

DOE invites comment and suggestions on this aspect of its proposal.

E. Finalization of Test Procedures Prior to Issuance of a Standards Proposal

In the February 14, 2020 Final Rule, DOE adopted at section 8(d) of the Process Rule, a requirement that Federal test procedures establishing methodologies used to evaluate new or amended standards will be finalized at least 180 days before publication of a NOPR proposing new or amended energy conservation standards. 85 FR 8626, 8678, 8708. DOE explained that this approach would allow interested parties to gain some experience with such test procedure, thereby allowing additional insight into and effective comments on proposed standards. One

commenter (Zero Zone) also cautioned that, due to EPCA's anti-backsliding provision, energy conservation standards improperly set due to an incomplete understanding of test procedure amendments cannot be adjusted downwards. DOE also acknowledged past deviations from this preferred, sequential approach in which it conducted test procedure and standards rulemakings concurrently. 85 FR 8626, 8676.

After further reflection, DOE has determined that while sequencing of test procedure and energy conservation standards rulemakings may be sensible, competing considerations call into doubt the agency's decision to require an inflexible 180-day pause between those rulemaking activities. Accordingly, for the reasons that follow, DOE proposes to remove the requirement for a 180-day pause between completion of a test procedure final rule and proposal of an energy conservation standard and revert to the guidance used in the 1996 Process Rule, *i.e.*, that test procedure rulemakings "will be finalized prior to publication of a NOPR proposing new or amended energy conservation standards," thereby providing the agency flexibility in individual rulemaking proceedings. DOE seeks comment on whether there are situations where it may be beneficial to maintain a 180-day period, or some other timeframe, between finalization of a test procedure and issuance of a proposed energy conservation standard.

Further reflection regarding the implications of following the approach set out in the February 2020 Final Rule has led DOE to tentatively conclude that the rule inadvertently painted with too broad a brush in addressing certain stakeholders' concerns about appropriate spacing of test procedure and energy conservation standards rulemakings. Not every test procedure rulemaking would be expected to involve the same level of complexity. For example, on September 21, 2018, DOE amended the test procedure for integrated light-emitting diode lamps to allow manufacturers to conduct "time to failure" testing at elevated temperatures. 83 FR 47806. The prior DOE test procedure specified that such testing had to be conducted at 25

degrees Celsius with a 5 degree tolerance, while the amended test procedure stated that manufacturers could continue to test under those conditions or use a higher temperature with the same 5 degree tolerance. *Id.* at 47809. This was a simple modification to one test condition in the entire test procedure. Further, the change in the test procedure did not require manufacturers to make any adjustments as they were allowed to continue to use the original temperature condition specified in the test procedure. In contrast to this simple test procedure modification, on December 29, 2016, DOE amended the test procedures for consumer and commercial water heaters to translate multiple performance metrics into a single uniform efficiency metric, as required by EPCA. 81 FR 96204. This test procedure amendment required DOE to develop a mathematical conversion, based on test data, that would convert existing energy efficiency metrics to the uniform efficiency metric for a wide variety of consumer and commercial water heater models. Further, manufacturers had to either use this mathematical conversion to recertify their water heaters by converting existing efficiency and performance ratings or retest their models. *Id.* at 96227. The February 2020 Final Rule removed DOE's ability to effectively distinguish between these two different situations, by imposing the same 180-day pause upon a minor technical modification as it does on a wholesale test procedure revision. It also created new uncertainty surrounding the impact that a later-discovered error in the test procedure would have on a related standards rulemaking (*i.e.*, must the standards rulemaking be paused until or entirely restarted after the requisite test procedure change is made?). Once again, DOE has tentatively concluded that it should have flexibility to address such situations on a case-by-case basis as they arise. DOE's proposed revisions are designed to remove the rigidity of a one-size-fits-all approach to the sequencing of test procedure and energy conservation standards rulemakings, in favor of an approach that allows the agency to move more nimbly as circumstances warrant, while still recognizing the importance of resolving test procedure issues in advance of a notice of proposed rulemaking for energy conservation standards.

Finally, DOE proposes making these changes regarding the sequencing of test procedure and standards rulemakings after reevaluating the potential delays that may ensue from the mandatory 180-day spacing requirement. DOE currently has a number of outstanding energy conservation standards rulemakings subject to statutory or judicial deadlines. DOE is sensitive to the negative impact that the rigid application of a mandatory 180-day spacing requirement could have in certain circumstances, not only upon the Department's ability to expeditiously satisfy these legal deadlines, but also in terms of EPCA's mandate to pursue significant energy and cost savings for the benefit of individual consumers and the Nation, which in those circumstances may outweigh the informational and public notice benefits the 180-day period offers. As noted previously, there may also be circumstances where such data and input may materially inform the rulemaking process and in those instances, a longer rulemaking timeline may be justified.

DOE seeks further comment on its proposal to eliminate the required 180-day period between finalization of a test procedure rulemaking and issuance of a standards NOPR. DOE also seeks comments on any alternatives that it might consider to balance the interests identified in this discussion, including whether DOE should consider retaining a set period between the finalization of a test procedure and the issuance of a standards NOPR.

F. Direct Final Rules

The Energy Independence Security Act of 2007, Pub. L. 110–140 (Dec. 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a “direct final rule” (“DFR”) to establish energy conservation standards in appropriate cases. Under this authority, DOE may issue a DFR adopting energy conservation standards for a covered product or equipment upon receipt of a joint proposal from a group of “interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States,

and efficiency advocates),” provided DOE determines the energy conservation standards recommended in the joint proposal conform with the requirements of 42 U.S.C. 6295(o) or 6313(a)(6)(B), as applicable. (42 U.S.C. 6295(p)(4)(A)) While these two provisions contain many of the requirements DOE typically must satisfy in issuing an energy conservation standard, such as the prohibition against setting less-stringent standards (anti-backsliding requirement), they do not adopt all the requirements of a typical energy conservation standard rulemaking. For example, 42 U.S.C. 6295(o) does not specify a mandatory time period between promulgation of an energy conservation standard and the compliance date for that standard (*i.e.*, lead time). DOE has looked to the joint proposals to fill in these necessary details. This process had been well-received by manufacturers, trade organizations, and energy efficiency advocates, as it allowed more room for negotiation, which in turn made it easier for stakeholders to reach a consensus agreement. February 2020 Final Rule, 85 FR 8626, 8682-8683.

In a departure from this practice, DOE clarified in the February 2020 Final Rule that 42 U.S.C. 6295(p)(4) is a procedure for issuing a DFR and not an independent grant of rulemaking authority. As such, under the current Process Rule, any joint proposal submitted to DOE under the DFR provision must identify a separate rulemaking authority such as 42 U.S.C. 6295(m) (amendment of standards) or 42 U.S.C. 6295(n) (petition for amended standard) and comply with the requirements (*e.g.*, compliance periods) listed in that provision. *Id.* DOE also provided additional guidance on the Department’s interpretation of “fairly representative” and obligations upon receipt of an adverse comment. *Id.* at 85 FR 8683-8685.

DOE is reconsidering whether these clarifications regarding the DFR process are appropriate or necessary. This reconsideration begins with the language of the statute. The language in 42 U.S.C. 6295(p)(4) is clear on when DOE may issue standards recommended by interested persons that are fairly representative of relative points of view as a DFR, and that is

when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. There are no other requirements listed, which is unsurprising considering the unique circumstances of rules issued under the DFR provision. DOE's overarching statutory mandate in issuing energy conservation standards is to choose a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified – a requirement found in 42 U.S.C. 6295(o).

Many of the other requirements found in EPCA constrain DOE's discretion in setting standards for the benefit of stakeholders. For example, mandatory compliance periods give manufacturers enough time to design new products and shift manufacturing capacity as necessary. Similarly, EPCA provides that manufacturers shall not be required to apply new standards to a product with respect to which other new standards have been required during the prior 6-year period. (42 U.S.C. 6295(m)(4)(B)) But, if manufacturers agree to a shorter compliance period or two tiers of standards as part of a consensus agreement submitted under the DFR provision, it would be odd if DOE were then forced to deny such a proposal based upon requirements designed to protect the interests of those same manufacturers. That being said, DOE will still deny such a proposal if it is not fairly representative of manufacturers' points of view. (42 U.S.C. 6295(p)(4)(A)) Similarly, DOE will also deny such a proposal if it does not meet applicable criteria in 42 U.S.C. 6295(o), which, among other things, require DOE to consider the economic impact on manufacturers (including small manufacturers) and any possible lessening of competition that may result from imposition of the proposed standard. As to this latter point, DOE receives a written determination from the Attorney General as to the anti-competitive effects from a proposed standard. See 42 U.S.C. 6295(o)(2)(B)(i)(V) and (ii).

Issuing standards through a consensus agreement among stakeholders is different from DOE's normal rulemaking process. And, there is a corresponding difference in the statutory

criteria that DOE must apply to each process, one that is made clear by the language in 42 U.S.C. 6295(p)(4). Accordingly, DOE proposes to eliminate the requirement that DFR submittals identify a separate rulemaking authority and revert to the Department's prior practice of evaluating DFR submittals based on the criteria laid out in 42 U.S.C. 6295(p)(4). DOE requests comments, information, and data on whether its proposed approach for evaluating DFR submittals is appropriate.

As discussed previously, DOE also provided additional guidance on the Department's interpretation of "fairly representative" and obligations upon receipt of an adverse comment. Upon reconsideration, DOE believes that the additional guidance may be overly prescriptive in some circumstances. For instance, the February 2020 Final Rule required a group submitting a DFR proposal to include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities (as appropriate for the given covered product or equipment), consumers, and States. 85 FR 8626, 8683. While this list may be appropriate for some DFR proposals, it is not universally applicable. For instance, some of DOE's regulated industries do not have small business manufacturers (*e.g.*, external power supplies).¹² DOE also stated it would publish in the *Federal Register* any DFR proposal to obtain feedback as to whether the proposal was submitted by a group that is fairly representative of relevant points of view. *Id.* Once again, this may be good practice for some DFR proposals (*e.g.*, those concerning newly covered products or equipment), but it may be unnecessary for most DFR proposals. The bulk of DOE's covered products and equipment have gone through multiple rounds of rulemakings, and DOE has become very familiar with the relevant points of view for these covered products and equipment.

¹² See 85 FR 30636, 30648 (May 20, 2020).

With respect to DOE's discussion of adverse comments in the February 2020 Final Rule, DOE largely repeated the requirements listed in 42 U.S.C. 6295(p)(4)(C). Namely, DOE will withdraw a DFR if one or more adverse comments may provide a reasonable basis for withdrawing the rule under 42 U.S.C. 6295(o), 42 U.S.C. 6313(a)(6)(B), or any other applicable law. The one clarification DOE offered was that the Department may consider comments as adverse, even if the issue was brought up previously during the rulemaking process. *Id.* at 85 FR 8685. However, this clarification does not offer any insight into how DOE will determine whether an adverse comment provides a reasonable basis for withdrawing the rule.

DOE is considering whether the guidance contained in the February 2020 Final Rule concerning DFRs is unnecessary or redundant to the statutory language in 42 U.S.C. 6295(p)(4) and is proposing to add "where appropriate" to clarify that DOE retains the ability to determine what "fairly representative" means for a given DFR submission on a case-by-case basis. DOE requests comments on the merits of its proposed revisions to the DFR section, as well as any alternative approaches, such as deletion of or amendments to the section or retention of aspects of this section. Regardless of whether the DFR section in the Process Rule is retained, deleted, or revised, DOE will continue to evaluate DFR proposals in accordance with 42 U.S.C. 6295(p)(4). Additionally, DOE seeks comment regarding small business perspectives and related impacts as to the proposed application of the DFR provision of EPCA.

G. Negotiated Rulemaking

As part of the February 2020 Final Rule amending DOE's Process Rule, the Department adopted a new section 11, *Negotiated Rulemaking Process*, to set forth the procedures that DOE would follow when using negotiated rulemaking under the Appliance Standards Program. 85 FR 8626, 8708-8709. These provisions discussed DOE's historical use of negotiated rulemaking, along with a few modifications to the agency's past approach. 85 FR 8626, 8685-8686. As the

final rule explained, negotiated rulemaking is a process by which an agency attempts to develop a consensus proposal for regulation in consultation with interested parties, thereby addressing salient comments from stakeholders before issuing a proposed rule. This process is conducted in accordance with the requirements of the Negotiated Rulemaking Act (“NRA”), Pub. L. 104–320 (5 U.S.C. 561–570). To facilitate potential negotiated rulemakings, DOE established the Appliance Standards and Rulemaking Federal Advisory Committee (“ASRAC”) to comply with the Federal Advisory Committee Act, Pub. L. 92–463 (1972) (codified at 5 U.S.C. App. 2). As part of the DOE process, working groups have been established as subcommittees of ASRAC, from time to time, for specific products, with one member from the ASRAC committee attending and participating in the meetings of the specific working group. Ultimately, the working group reports to ASRAC, and ASRAC itself votes on whether to make a recommendation to DOE to adopt a consensus agreement. The negotiated rulemaking process allows real-time adjustments to the analyses as the working group is considering them. Furthermore, it allows parties with differing viewpoints and objectives to negotiate face-to-face regarding the terms of a potential standard. Additionally, it encourages manufacturers to provide data for the analyses in a more direct manner, thereby helping to better account for manufacturer concerns. DOE has recognized the value of this process and encouraged submission of joint stakeholder recommendations. *Id.*

The February 2020 Final Rule also discussed the following key points related to negotiated rulemaking at 85 FR 8626, 8685 (Feb. 14, 2020):

- Negotiated rulemakings will go through the ASRAC process outlined above, and the appropriateness of a negotiated rulemaking for any given rulemaking will be determined on a case-by-case basis.

- In making this determination, DOE will use a convener to ascertain, in consultation with relevant stakeholders, whether review for a given product or equipment type would be conducive to negotiated rulemaking, with the agency evaluating the convener's recommendation before reaching a decision on such matter.
- The following five factors militate in favor of a negotiated rulemaking: (1) Stakeholders have commented in favor of negotiated rulemaking in response to the initial rulemaking notice; (2) the rulemaking analysis or underlying technologies in question are complex, and DOE can benefit from external expertise and/or real-time changes to the analysis based on stakeholder feedback, information, and data; (3) the current standards have already been amended one or more times; (4) stakeholders from differing points of view are willing to participate; and (5) DOE determines that the parties may be able to reach an agreement.
- If a negotiated rulemaking is initiated, a neutral and independent facilitator, who is not a DOE employee or consultant, shall be present at all ASRAC working group meetings.
- DOE will set aside a portion of each ASRAC working group meeting to receive input and data from non-members of the ASRAC working group.
- Finally, a negotiated rulemaking in which DOE participates under the ASRAC process will not result in the issuance of a DFR, and further, any potential term sheet upon which an ASRAC working group reaches consensus must comply with all of the provisions of EPCA under which the rule is authorized.

After further consideration, DOE has tentatively determined that further changes to its approach to negotiated rulemaking are necessary and appropriate. Although section 11 of the Process Rule largely mirrors the process DOE has followed when the Department has

determined, on a case-by-case basis, that such alternative rulemaking procedures would be useful to supplement the normal notice-and-comment rulemaking process, DOE proposes to make certain modifications to the process articulated in that section. On a number of points, DOE seeks to revert to the approach it employed prior to promulgation of the February 2020 Final Rule. The following paragraphs outline these proposed changes.

First, DOE would clarify that although the Department has frequently used facilitators and considered whether to use convenors in past negotiated rulemakings, the use of such individuals is not required under the Negotiated Rulemaking Act (*see* 5 U.S.C. 563(b)). A “convenor” performs the task of canvassing various interested parties regarding the potential and feasibility of achieving consensus in a particular matter. In contrast, a “facilitator” helps guide the discussion among the participants to a negotiated rulemaking. While DOE recognizes the value of using a convenor and/or a facilitator in certain cases, there are also instances where DOE can adequately assess whether a given situation is ripe for a consensus-based approach through negotiated rulemaking. These instances may occur where DOE has accumulated years or decades of experience with setting standards with a particular product or equipment, or where DOE is approached by concerned stakeholders. In those instances, it may not be necessary to expend the time and/or resources associated with the use of a convenor. Consequently, DOE proposes to eliminate the requirement for use of a convenor and a facilitator and to instead retain discretion to utilize the services of such individuals in appropriate cases. This change in approach would allow the agency to conserve resources and avoid delay where such services are not necessary.

Second, DOE proposes that the list of factors militating in favor of a negotiated rulemaking, as currently articulated at section 11(a)(3) of the Process Rule, are neither mandatory nor exclusive. The NRA already sets forth factors for consideration at 5 U.S.C. 563(a). Because the factors set forth in section 11(a)(3) of the Process Rule may not be

appropriate in all cases, DOE proposes to no longer be bound by this list when determining whether it is appropriate to convene a negotiated rulemaking. Instead, the Department proposes to consider the factors articulated under 5 U.S.C. 563(a), as well as any other considerations relevant to the specific product/equipment proceeding in question.

Third, DOE proposes to revert to its prior approach, which would allow for a negotiated rulemaking to result in a term sheet recommending promulgation of a DFR under 42 U.S.C. 6295(p)(4). (*See* section III.F. of this document for a more complete discussion of DFRs.) DOE has tentatively concluded that the approach adopted in the February 2020 Final Rule (*i.e.*, that a negotiated rulemaking must result in a proposed rule followed by a final rule) was an overly restrictive reading of the NRA. While 5 U.S.C. 563(a) discusses issuance of a proposed rule and a final rule, 42 U.S.C. 6295(p)(4) (under EPCA) already mandates publication of a proposed rule simultaneously with a DFR -- and in the event of an adverse comment that may provide a reasonable basis for withdrawal, DOE is required to conduct further rulemaking under the proposed rule, proceeding to a final rule, if appropriate. (42 U.S.C. 6295(p)(4)(C)(i)(II)) Furthermore, at 5 U.S.C. 561, *Purpose*, the NRA states, “Nothing in this subchapter shall be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.” In light of the above, DOE has tentatively concluded that these relevant legal authorities can be read in harmony and do not preclude the possibility of a negotiated rulemaking that results in a recommendation to implement the body’s consensus through a DFR. Accordingly, DOE proposes to revert to its prior position on this topic.

In light of these proposed modifications, DOE has tentatively concluded that section 11 of the revised Process Rule would become largely redundant of the NRA requirements to which the agency is already subject, and therefore, the Department finds section 11 to be unnecessary and proposes its removal. DOE notes, however, that its proposal to remove this section from the

Process Rule in no way reflects a change in the Department's perception of the value of negotiated rulemaking or its intention to use negotiated rulemaking in appropriate cases. Similarly, this proposal is not expected to affect DOE's practice of providing opportunities for public comment and access to working group documents and meetings/webinars throughout the negotiated rulemaking process. DOE requests comments on the merits of this proposed approach including comments regarding the proposed complete removal of section 11, as well as any alternatives to this proposal, such as amendments or revisions to the section or retention of aspects of section 11.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This regulatory action is a significant regulatory action under section 3(f)(4) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993). Accordingly, this proposed regulatory action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

The revisions contained in this proposed regulatory action are procedural changes designed to improve DOE's ability to meet its rulemaking obligations and deadlines under EPCA. These proposed revisions would not impose any regulatory costs or burdens on stakeholders, nor would they limit public participation in DOE's rulemaking process. Instead, these proposed revisions would allow DOE to tailor its rulemaking processes to fit the facts and circumstances of a particular rulemaking for a covered product or equipment.

DOE currently has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and is typically working on anywhere from 50 to 100 rulemakings (for both energy conservation standards and test procedures) at any

one time. Further, these rulemakings are all subject to deadlines. Typically, review cycles for energy conservation standards and test procedures for covered products are 6 and 7 years, respectively. (42 U.S.C. 6295(m)(1); 42 U.S.C 6293(b)(1)) Additionally, if DOE decides not to amend an energy conservation standard for a covered product, the subsequent review cycle is shortened to 3 years. (42 U.S.C. 6295(m)(3)(B)) It is challenging to meet these cyclical deadlines for more than 60 categories of covered products and equipment. In fact, as previously discussed, DOE is currently facing two lawsuits that allege DOE has failed to meet rulemaking deadlines for 25 different consumer products and commercial equipment. In order to meet these rulemaking deadlines, DOE cannot afford the inefficiencies that come with a one-size-fits-all rulemaking approach. For example, having to issue an early assessment RFI followed by an ANOPR to collect early stakeholder input when a NODA would accomplish the same purpose unnecessarily lengthens the rulemaking process and wastes limited DOE resources. Similarly, having to delay issuance of a proposed energy conservation standard for 180 days because of a minor modification to a test procedure makes it more difficult for DOE to meet rulemaking deadlines, while offering no benefit to stakeholders. The revisions proposed in this document would allow DOE to eliminate these types of inefficiencies that lengthen the rulemaking process and waste DOE resources, while not affecting the ability of the public to participate in the rulemaking process. Eliminating inefficiencies that lengthen the rulemaking process allows DOE to more quickly develop energy conservation standards that deliver the environmental benefits, including reductions in greenhouse gas emissions, that DOE is directed to implement under E.O. 13990. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the greater the resulting energy savings and environmental benefits.

Further, the revisions proposed in this document would not dictate any particular rulemaking outcome in an energy conservation standard or test procedure rulemaking. DOE will

continue to calculate the regulatory costs and benefits of new and amended energy conservation standards and test procedures issued under EPCA in future, individual rulemakings.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website at: <http://energy.gov/gc/office-general-counsel>.

This proposed rule details generally applicable guidance that may guide, but not bind, the Department’s rulemaking process. The proposed revisions are intended to improve DOE’s ability to meet the obligations and deadlines outlined in EPCA by allowing DOE to tailor its rulemaking procedures to fit the specific facts and circumstances of a particular covered product or equipment, while not affecting the ability of any interested person, including small entities, to participate in DOE’s rulemaking process. Because this proposed rule imposes no regulatory obligations on the public, including small entities, and does not affect the ability of any interested person, including small entities, to participate in DOE’s rulemaking process, DOE

certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no initial regulatory flexibility analysis is required. Mid-Tex Elec. Co-Op, Inc. v. F.E.R.C., 773 F.2d 327 (1985).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Specifically, this proposed rule, addressing clarifications to the Process Rule itself, does not contain any collection of information requirement that would trigger the PRA.

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A5. DOE's regulations include a categorical exclusion for rulemakings that are strictly procedural. 10 CFR part 1021, subpart D, appendix A6. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 and A6 because it is amending a rule and because it is a procedural rulemaking, it does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it will not have a substantial direct effect on the States, on the relationship between the national government and

the States, or on the distribution of power and responsibilities among the various levels of government. It will primarily affect the procedure by which DOE develops proposed rules to revise energy conservation standards and test procedures. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at <http://www.energy.gov/gc/office-general-counsel> under “Guidance & Opinions” (Rulemaking)) DOE examined the proposed rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy

or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy

action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that the regulatory action in this document, which makes clarifications to the Process Rule that guides the Department in proposing energy conservation standards is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this proposed rule.

L. Review Consistent with OMB's Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation

of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The “Energy Conservation Standards Rulemaking Peer Review Report,” dated February 2007, has been disseminated and is available at the following website: http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE’s analytical methodologies to ascertain whether modifications are needed to improve the Department’s analyses. The results from that review are expected later in 2021.

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar, it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website:

<https://www.energy.gov/eere/buildings/process-rule>. Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this proposed rulemaking, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the webinar. Such persons may submit requests to speak by email to the Appliance and Equipment Standards Program,

ApplianceStandardsQuestions@ee.doe.gov. Persons who wish to speak should include with their request a computer file in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

Persons requesting to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. DOE requests persons selected to make an oral presentation to submit an advance copy of their statements at least two weeks before the webinar. At its discretion, DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the

Building Technologies Office. As necessary, requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of the Webinar

DOE will designate a DOE official to preside at the webinar and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the webinar. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the webinar and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The webinar will be conducted in an informal, conference style. DOE will present summaries of comments received before the webinar, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the webinar will accept additional comments or questions

from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the webinar.

A transcript of the webinar will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this NOPR. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> webpage will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached

to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not contain special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household Appliances, Imports, Incorporation by Reference, Intergovernmental relations, Small businesses, Test procedures.

Signing Authority

This document of the Department of Energy was signed on March 30, 2021, by Kelly Speakes-Backman, Principal Deputy Assistant Secretary and Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on March 30, 2021

Treana V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons stated in the preamble, DOE proposes to amend part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291-6309; 28 U.S.C. 2461 note.

2. Appendix A to subpart C of part 430 is revised to read as follows:

**APPENDIX A TO SUBPART C OF PART 430 -- PROCEDURES, INTERPRETATIONS,
AND POLICIES FOR CONSIDERATION OF NEW OR REVISED ENERGY
CONSERVATION STANDARDS AND TEST PROCEDURES FOR CONSUMER
PRODUCTS AND CERTAIN COMMERCIAL/INDUSTRIAL EQUIPMENT**

1. Objectives
2. Scope
3. Application of the Process Rule
4. Setting Priorities for Rulemaking Activity
5. Coverage Determination Rulemakings
6. Process for Developing Energy Conservation Standards
7. Policies on Selection of Standards
8. Test Procedures
9. ASHRAE Equipment
10. Direct Final Rules
11. Principles for Distinguishing Between Effective and Compliance Dates

12. Principles for the Conduct of the Engineering Analysis
13. Principles for the Analysis of Impacts on Manufacturers
14. Principles for the Analysis of Impacts on Consumers
15. Consideration of Non-Regulatory Approaches
16. Cross-cutting Analytical Assumptions

1. Objectives

This appendix establishes procedures, interpretations, and policies to guide the Department of Energy (“DOE” or the “Department”) in the consideration and promulgation of new or revised appliance energy conservation standards and test procedures under the Energy Policy and Conservation Act (EPCA). This appendix applies to both covered consumer products and covered commercial/industrial equipment. The Department’s objectives in establishing these procedures include:

(a) *Provide for early input from stakeholders.* The Department seeks to provide opportunities for public input early in the rulemaking process so that the initiation and direction of rulemakings is informed by comment from interested parties. DOE will be able to seek early input from interested parties in determining whether establishing new or amending existing energy conservation standards will result in significant savings of energy and is economically justified and technologically feasible. In the context of test procedure rulemakings, DOE will be able to seek early input from interested parties in determining whether—

(1) Establishing a new or amending an existing test procedure will better measure the energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product/equipment during a representative average use cycle or period of use (for consumer products); and

(2) Will not be unduly burdensome to conduct.

(b) *Increase predictability of the rulemaking timetable.* The Department seeks to make informed, strategic decisions about how to deploy its resources on the range of possible standards and test procedure development activities, and to announce these prioritization decisions so that all interested parties have a common expectation about the timing of different rulemaking activities. Further, DOE will offer the opportunity to provide input on the prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring.

(c) *Eliminate problematic design options early in the process.* The Department seeks to eliminate from consideration, early in the process, any design options that present unacceptable problems with respect to manufacturability, consumer utility, or safety, so that the detailed analysis can focus only on viable design options. DOE will be able to eliminate from consideration design options if it concludes that manufacture, installation or service of the design will be impractical, or that the design option will have a material adverse impact on the utility of the product, or if the design option will have a material adverse impact on safety or health. DOE will also be able to eliminate from consideration proprietary design options that represent a unique pathway to achieving a given efficiency level. This screening will be done at the outset of a rulemaking.

(d) *Fully consider non-regulatory approaches.* The Department seeks to understand the effects of market forces and voluntary programs on encouraging the purchase of energy efficient products so that the incremental impacts of a new or revised standard can be accurately assessed and the Department can make informed decisions about where standards and voluntary programs can be used most effectively. DOE will continue to be able to support voluntary efforts by manufacturers, retailers, utilities, and others to increase product/equipment efficiency.

(e) *Conduct thorough analysis of impacts.* In addition to understanding the aggregate social and private costs and benefits of standards, the Department seeks to understand the

distribution of those costs and benefits among consumers, manufacturers, and others, as well as the uncertainty associated with these analyses of costs and benefits, so that any adverse impacts on subgroups and uncertainty concerning any adverse impacts can be fully considered in selecting a standard. DOE will be able to consider the variability of impacts on significant groups of manufacturers and consumers in addition to aggregate social and private costs and benefits, report the range of uncertainty associated with these impacts, and take into account cumulative impacts of regulation on manufacturers. The Department will also be able to conduct appropriate analyses to assess the impact that new or amended test procedures will have on manufacturers and consumers.

(f) *Use transparent and robust analytical methods.* The Department seeks to use qualitative and quantitative analytical methods that are fully documented for the public and that produce results that can be explained and reproduced, so that the analytical underpinnings for policy decisions on standards are as sound and well-accepted as possible.

(g) *Support efforts to build consensus on standards.* The Department seeks to encourage development of consensus proposals for new or revised standards because standards with such broad-based support are likely to balance effectively the various interests affected by such standards.

2. *Scope*

The procedures, interpretations, and policies described in this appendix apply to rulemakings concerning new or revised Federal energy conservation standards and test procedures, and related rule documents (*i.e.*, coverage determinations) for consumer products in Part A and commercial and industrial equipment under Part A–1 of the Energy Policy and Conservation Act (EPCA), as amended, except covered ASHRAE equipment in Part A–1 are governed separately under section 9 in this appendix.

3. Application of the Process Rule

(a) This appendix contains procedures, interpretations, and policies that are generally applicable to the development of energy conservation standards and test procedures. The Department may, as necessary, deviate from this appendix to account for the specific circumstances of a particular rulemaking.

(b) This appendix is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity.

4. Setting Priorities for Rulemaking Activity

(a) In establishing its priorities for undertaking energy conservation standards and test procedure rulemakings, DOE will consider the following factors, consistent with applicable legal obligations:

- (1) Potential energy savings;
- (2) Potential social and private, including environmental or energy security, benefits;
- (3) Applicable deadlines for rulemakings;
- (4) Incremental DOE resources required to complete the rulemaking process;
- (5) Other relevant regulatory actions affecting the products/equipment;
- (6) Stakeholder recommendations;
- (7) Evidence of energy efficiency gains in the market absent new or revised standards;
- (8) Status of required changes to test procedures; and
- (9) Other relevant factors.

(b) DOE will offer the opportunity to provide input on prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring.

5. Coverage Determination Rulemakings

(a) DOE has discretion to conduct proceedings to determine whether additional consumer products and commercial/industrial equipment should be covered under EPCA if certain statutory criteria are met. (42 U.S.C. 6292 and 42 U.S.C. 6295(l) for consumer products; 42 U.S.C. 6312 for commercial/industrial equipment)

(b) If DOE determines to initiate the coverage determination process, it will first publish a notice of proposed determination, providing an opportunity for public comment of not less than 60 days, in which DOE will explain how such products/equipment that it seeks to designate as “covered” meet the statutory criteria for coverage and why such coverage is “necessary or appropriate” to carry out the purposes of EPCA. In the case of commercial equipment, DOE will follow the same process, except that the Department must demonstrate that coverage of the equipment type is “necessary” to carry out the purposes of EPCA.

(c) DOE will publish its final decision on coverage as a separate notice, an action that will be completed prior to the initiation of any test procedure or energy conservation standards rulemaking (*i.e.*, DOE will not issue any Requests for Information (RFIs), Notices of Data Availability (NODAs), or any other mechanism to gather information for the purpose of initiating a rulemaking to establish a test procedure or energy conservation standard for the proposed covered product/equipment prior to finalization of the coverage determination). If DOE determines that coverage is warranted, DOE will proceed with its typical rulemaking process for both test procedures and standards. Specifically, DOE will finalize coverage for a product/equipment at least 180 days prior to publication of a proposed rule to establish a test procedure.

(d) If, during the substantive rulemaking proceedings to establish test procedures or energy conservation standards after completing a coverage determination, DOE finds it necessary and appropriate to expand or reduce the scope of coverage, a new coverage determination process will be initiated and finalized prior to moving forward with the test procedure or standards rulemaking.

6. Process for Developing Energy Conservation Standards

This section describes the process to be used in developing energy conservation standards for covered products and equipment other than those covered equipment subject to ASHRAE/IES Standard 90.1.

(a) *Early Assessment.* (1) As the first step in any proceeding to consider establishing or amending any energy conservation standard, DOE will publish a document in the *Federal Register* announcing that DOE is considering initiating a rulemaking proceeding. As part of that document, DOE will solicit submission of related comments, including data and information on whether DOE should proceed with the rulemaking, including whether any new or amended rule would be cost effective, economically justified, technologically feasible, or would result in a significant savings of energy. Based on the information received in response to the notice and its own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended energy conservation standard or an amended test procedure. If DOE determines that a new or amended standard would not satisfy applicable statutory criteria, DOE would engage in notice and comment rulemaking to issue a determination that a new or amended standard is not warranted. If DOE receives sufficient information suggesting it could justify a new or amended standard or the information received is inconclusive with regard to the statutory criteria, DOE would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard, as discussed further in paragraph (a)(2) of this section.

(2) If the Department determines it is appropriate to proceed with a rulemaking, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a Framework Document and Preliminary Analysis, or an Advance Notice of Proposed Rulemaking (ANOPR). Requests for Information (RFI) and Notices of Data Availability (NODA) could be issued, as appropriate, in addition to these preliminary-stage documents.

(3) In those instances where the early assessment either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, and DOE undertakes the preliminary stages of a rulemaking to establish or amend an energy conservation standard, DOE may still ultimately determine that such a standard is not economically justified, technologically feasible or would not result in a significant savings of energy. Therefore, DOE will examine the potential costs and benefits and energy savings potential of a new or amended energy conservation standard at the preliminary stage of the rulemaking. DOE notes that it will, consistent with its statutory obligations, consider both cost effectiveness and economic justification when issuing a determination not to amend a standard.

(b) *Design options*—(1) *General*. Once the Department has initiated a rulemaking for a specific product/equipment but before publishing a proposed rule to establish or amend standards, DOE will typically identify the product/equipment categories and design options to be analyzed in detail, as well as those design options to be eliminated from further consideration. During the pre-proposal stages of the rulemaking, interested parties may be consulted to provide information on key issues through a variety of rulemaking documents. The preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a framework document and preliminary analysis, or an advance notice of proposed rulemaking (ANOPR). Requests for Information (RFI) and Notice of Data Availability (NODA) could also be issued, as appropriate.

(2) *Identification and screening of design options*. During the pre-NOPR phase of the rulemaking process, the Department will typically develop a list of design options for consideration. Initially, the candidate design options will encompass all those technologies considered to be technologically feasible. Following the development of this initial list of design options, DOE will review each design option based on the factors described in paragraph (b)(3) of this section and the policies stated in section 7 of this Appendix (*i.e.*, Policies on Selection of Standards). The reasons for eliminating or retaining any design option at this stage of the

process will be fully documented and published as part of the NOPR and as appropriate for a given rule, in the pre-NOPR documents. The technologically feasible design options that are not eliminated in this screening will be considered further in the Engineering Analysis described in paragraph (c) of this section.

(3) *Factors for screening of design options.* The factors for screening design options include:

(i) Technological feasibility. Technologies incorporated in commercial products or in working prototypes will be considered technologically feasible.

(ii) Practicability to manufacture, install and service. If mass production of a technology under consideration for use in commercially-available products (or equipment) and reliable installation and servicing of the technology could be achieved on the scale necessary to serve the relevant market at the time of the effective date of the standard, then that technology will be considered practicable to manufacture, install and service.

(iii) Adverse Impacts on Product Utility or Product Availability.

(iv) Adverse Impacts on Health or Safety.

(v) Unique-Pathway Proprietary Technologies. If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further.

(c) *Engineering analysis of design options and selection of candidate standard levels.*

After design options are identified and screened, DOE will perform the engineering analysis and the benefit/cost analysis and select the candidate standard levels based on these analyses. The results of the analyses will be published in a Technical Support Document (TSD) to accompany the appropriate rulemaking documents.

(1) *Identification of engineering analytical methods and tools.* DOE will select the specific engineering analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the design options identified as a result of the screening analysis.

(2) *Engineering and life-cycle cost analysis of design options.* DOE and its contractor will perform engineering and life-cycle cost analyses of the design options.

(3) *Review by stakeholders.* Interested parties will have the opportunity to review the results of the engineering and life-cycle cost analyses. If appropriate, a public workshop will be conducted to review these results. The analyses will be revised as appropriate on the basis of this input.

(4) *New information relating to the factors used for screening design options.* If further information or analysis leads to a determination that a design option, or a combination of design options, has unacceptable impacts, that design option or combination of design options will not be included in a candidate standard level.

(5) *Selection of candidate standard levels.* Based on the results of the engineering and life-cycle cost analysis of design options and the policies stated in paragraph (b) of this section, DOE will select the candidate standard levels for further analysis.

(d) *Pre-NOPR Stage—(1) Documentation of decisions on candidate standard selection.*

(i) If the early assessment and screening analysis indicates that continued development of a standard is appropriate, the Department will publish either:

(A) A notice accompanying a framework document and, subsequently, a preliminary analysis or;

(B) An ANOPR. The notice document will be published in the *Federal Register*, with accompanying documents referenced and posted in the appropriate docket.

(ii) If DOE determines at any point in the pre-NOPR stage that no candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified or constitute significant energy savings, that conclusion will be announced in the *Federal Register* with an opportunity for public comment provided to stakeholders. In such cases, the Department will proceed with a rulemaking that proposes not to adopt new or amended standards.

(2) *Public comment and hearing.* The length of the public comment period for pre-NOPR rulemaking documents will vary depending upon the circumstances of the particular rulemaking, but will not be less than 75 calendar days. For such documents, DOE will determine whether a public hearing is appropriate.

(3) *Revisions based on comments.* Based on consideration of the comments received, any necessary changes to the engineering analysis or the candidate standard levels will be made.

(e) *Analysis of impacts and selection of proposed standard level.* After the pre-NOPR stage, if DOE has determined preliminarily that a candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified or constitute significant energy savings, economic analyses of the impacts of the candidate standard levels will be conducted. The Department will propose new or amended standards based on the results of the impact analysis.

(1) *Identification of issues for analysis.* The Department, in consideration of comments received, will identify issues that will be examined in the impacts analysis.

(2) *Identification of analytical methods and tools.* DOE will select the specific economic analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the candidate standard levels.

(3) *Analysis of impacts.* DOE will conduct the analysis of the impacts of candidate standard levels.

(4) *Factors to be considered in selecting a proposed standard.* The factors to be considered in selection of a proposed standard include:

(i) *Impacts on manufacturers.* The analysis of private manufacturer impacts will include: Estimated impacts on cash flow; assessment of impacts on manufacturers of specific categories of products/equipment and small manufacturers; assessment of impacts on manufacturers of multiple product-specific Federal regulatory requirements, including efficiency standards for

other products and regulations of other agencies; and impacts on manufacturing capacity, plant closures, and loss of capital investment.

(ii) Private Impacts on consumers. The analysis of consumer impacts will include: Estimated private energy savings impacts on consumers based on national average energy prices and energy usage; assessments of impacts on subgroups of consumers based on major regional differences in usage or energy prices and significant variations in installation costs or performance; sensitivity analyses using high and low discount rates reflecting both private transactions and social discount rates and high and low energy price forecasts; consideration of changes to product utility, changes to purchase rate of products, and other impacts of likely concern to all or some consumers, based to the extent practicable on direct input from consumers; estimated life-cycle cost with sensitivity analysis; consideration of the increased first cost to consumers and the time required for energy cost savings to pay back these first costs; and loss of utility.

(iii) Impacts on competition, including industry concentration analysis.

(iv) Impacts on utilities. The analysis of utility impacts will include estimated marginal impacts on electric and gas utility costs and revenues.

(v) National energy, economic, and employment impacts. The analysis of national energy, economic, and employment impacts will include: Estimated energy savings by fuel type; estimated net present value of benefits to all consumers; and estimates of the direct and indirect impacts on employment by appliance manufacturers, relevant service industries, energy suppliers, suppliers of complementary and substitution products, and the economy in general.

(vi) Impacts on the environment. The analysis of environmental impacts will include estimated impacts on emissions of carbon and relevant criteria pollutants, and impacts on pollution control costs.

(vii) Impacts of non-regulatory approaches. The analysis of energy savings and consumer impacts will incorporate an assessment of the impacts of market forces and existing

voluntary programs in promoting product/equipment efficiency, usage, and related characteristics in the absence of updated efficiency standards.

(viii) New information relating to the factors used for screening design options.

(f) *Notice of Proposed Rulemaking—(1) Documentation of decisions on proposed standard selection.* The Department will publish a NOPR in the *Federal Register* that proposes standard levels and explains the basis for the selection of those proposed levels, and will post on its website a draft TSD documenting the analysis of impacts. The draft TSD will also be posted in the appropriate docket on <http://www.regulations.gov>. As required by 42 U.S.C. 6295(p)(1) of EPCA, the NOPR also will describe the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards.

(2) *Public comment and hearing.* There will be not less than 75 days for public comment on the NOPR, with at least one public hearing or workshop. (42 U.S.C. 6295(p)(2) and 42 U.S.C. 6306).

(3) *Revisions to impact analyses and selection of final standard.* Based on the public comments received, DOE will review the proposed standard and impact analyses, and make modifications as necessary. If major changes to the analyses are required at this stage, DOE will publish a Supplemental Notice of Proposed Rulemaking (SNOPR), when required. DOE may also publish a NODA or RFI, where appropriate.

(g) *Final Rule.* The Department will publish a Final Rule in the *Federal Register* that promulgates standard levels, responds to public comments received on the NOPR, and explains how the selection of those standards meets the statutory requirement that any new or amended energy conservation standard produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and constitutes significant energy savings, accompanied by a final TSD.

7. Policies on Selection of Standards

(a) *Purpose.* (1) Section 6 describes the process that will be used to consider new or revised energy efficiency standards and lists a number of factors and analyses that will be considered at specified points in the process. Department policies concerning the selection of new or revised standards, and decisions preliminary thereto, are described in this section. These policies are intended to elaborate on the statutory criteria provided in 42 U.S.C. 6295.

(2) The procedures described in this section are intended to assist the Department in making the determinations required by EPCA and do not preclude DOE's consideration of any other information consistent with the relevant statutory criteria. The Department will consider pertinent information in determining whether a new or revised standard is consistent with the statutory criteria.

(b) *Screening design options.* These factors will be considered as follows in determining whether a design option will receive any further consideration:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially-viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have significant adverse impact on the utility of the product/equipment to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology will have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

(c) *Identification of candidate standard levels.* Based on the results of the engineering and cost/benefit analyses of design options, DOE will identify the candidate standard levels for further analysis. Candidate standard levels will be selected as follows:

(1) *Costs and savings of design options.* Design options that have payback periods that exceed the median life of the product or which result in life-cycle cost increases relative to the base case, using typical fuel costs, usage, and private discount rates, will not be used as the basis for candidate standard levels.

(2) *Further information on factors used for screening design options.* If further information or analysis leads to a determination that a design option, or a combination of design options, has unacceptable impacts under the policies stated in this Appendix, that design option or combination of design options will not be included in a candidate standard level.

(3) *Selection of candidate standard levels.* Candidate standard levels, which will be identified in the pre-NOPR documents and on which impact analyses will be conducted, will be based on the remaining design options.

(i) The range of candidate standard levels will typically include:

(A) The most energy-efficient combination of design options;

(B) The combination of design options with the lowest life-cycle cost; and

(C) A combination of design options with a payback period of not more than three years.

(ii) Candidate standard levels that incorporate noteworthy technologies or fill in large gaps between efficiency levels of other candidate standard levels also may be selected.

(d) *Pre-NOPR Stage*. New information provided in public comments on any pre-NOPR documents will be considered to determine whether any changes to the candidate standard levels are needed before proceeding to the analysis of impacts.

(e)(1) *Selection of proposed standard*. Based on the results of the analysis of impacts, DOE will select a standard level to be proposed for public comment in the NOPR. As required under 42 U.S.C. 6295(o)(2)(A), any new or revised standard must be designed to achieve the maximum improvement in energy efficiency that is determined to be both technologically feasible and economically justified.

(2) *Statutory policies*. The fundamental policies concerning the selection of standards include:

(i) A trial standard level will not be proposed or promulgated if the Department determines that it is not both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) For a trial standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the factors listed in 42 U.S.C. 6295(o)(2)(B)(i). A standard level is subject to a rebuttable presumption that it is economically justified if the payback period is three years or less. (42 U.S.C. 6295(o)(2)(B)(iii))

(ii) If the Department determines that interested persons have established by a preponderance of the evidence that a standard level is likely to result in the unavailability in the United States of any covered product/equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time of the determination, then that standard level will not be proposed. (42 U.S.C. 6295(o)(4))

(iii) If the Department determines that a standard level would not result in significant conservation of energy, that standard level will not be proposed. (42 U.S.C. 6295(o)(3)(B))

(f) *Selection of a final standard.* New information provided in the public comments on the NOPR and any analysis by the Department of Justice concerning impacts on competition of the proposed standard will be considered to determine whether issuance of a new or amended energy conservation standard produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and still constitutes significant energy savings or whether any change to the proposed standard level is needed before proceeding to the final rule. The same policies used to select the proposed standard level, as described in this section, will be used to guide the selection of the final standard level or a determination that no new or amended standard is justified.

8. *Test Procedures*

(a) *General.* As with the early assessment process for energy conservation standards, DOE believes that early stakeholder input is also very important during test procedure rulemakings. DOE will follow an early assessment process similar to that described in the preceding sections discussing DOE's consideration of amended energy conservation standards. Consequently, DOE will publish a notice in the *Federal Register* whenever DOE is considering initiation of a rulemaking to amend a test procedure. In that notice, DOE will request submission of comments, including data and information on whether an amended test procedure rule would:

(1) More accurately measure energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product during a representative average use cycle or period of use without being unduly burdensome to conduct; or

(2) Reduce testing burden. DOE will review comments submitted and, subject to statutory obligations, determine whether it agrees with the submitted information. If DOE determines that an amended test procedure is not justified at that time, it will not pursue the rulemaking and will publish a notice in the *Federal Register* to that effect. If DOE receives

sufficient information suggesting an amended test procedure could more accurately measure energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct, reduce testing burden, or the information received is inconclusive with regard to these points, DOE would undertake the preliminary stages of a rulemaking to amend the test procedure, as discussed further in the paragraphs that follow in this section.

(b) *Identifying the need to modify test procedures.* DOE will identify any necessary modifications to established test procedures prior to initiating the standards development process. It will consider all stakeholder comments with respect to needed test procedure modifications. If DOE determines that it is appropriate to continue the test procedure rulemaking after the early assessment process, it would provide further opportunities for early public input through *Federal Register* documents, including NODAs and/or RFIs.

(c) *Adoption of Industry Test Methods.* DOE will adopt industry test procedure standards as DOE test procedures for covered products and equipment, but only if DOE determines that such procedures would not be unduly burdensome to conduct and would produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that equipment during a representative average use cycle. DOE may also adopt industry test procedure standards with modifications, or craft its own procedures as necessary to ensure compatibility with the relevant statutory requirements, as well as DOE's compliance, certification, and enforcement requirements.

(d) *Issuing final test procedure modification.* Test procedure rulemakings establishing methodologies used to evaluate proposed energy conservation standards will be finalized prior to publication of a NOPR proposing new or amended energy conservation standards.

(e) *Effective Date of Test Procedures.* If required only for the evaluation and issuance of updated efficiency standards, use of the modified test procedures typically will not be required until the implementation date of updated standards.

9. ASHRAE Equipment

(a) EPCA provides that ASHRAE equipment are subject to unique statutory requirements and their own set of timelines. More specifically, pursuant to EPCA's statutory scheme for covered ASHRAE equipment, DOE is required to consider amending the existing Federal energy conservation standards and test procedures for certain enumerated types of commercial and industrial equipment (generally, commercial water heaters, commercial packaged boilers, commercial air-conditioning and heating equipment, and packaged terminal air conditioners and heat pumps) when ASHRAE Standard 90.1 is amended with respect to standards and test procedures applicable to such equipment. Not later than 180 days after the amendment of the standard, the Secretary will publish in the *Federal Register* for public comment an analysis of the energy savings potential of amended energy efficiency standards. For each type of equipment, EPCA directs that if ASHRAE Standard 90.1 is amended, not later than 18 months after the date of publication of the amendment to ASHRAE Standard 90.1, DOE must adopt amended energy conservation standards at the new efficiency level in ASHRAE Standard 90.1 as the uniform national standard for such equipment, or amend the test procedure referenced in ASHRAE Standard 90.1 for the equipment at issue to be consistent with the applicable industry test procedure, respectively, unless—

(1) DOE determines by rule, and supported by clear and convincing evidence, that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified; or

(2) The test procedure would not meet the requirements for such test procedures specified in EPCA. In such case, DOE must adopt the more stringent standard not later than 30 months

after the date of publication of the amendment to ASHRAE/IES Standard 90.1 for the affected equipment.

(b) For ASHRAE equipment, DOE will adopt the revised ASHRAE levels or the industry test procedure, as contemplated by EPCA, except in very limited circumstances. With respect to DOE's consideration of standards more-stringent than the ASHRAE levels or changes to the industry test procedure, DOE will do so only if it can meet a very high bar to demonstrate the "clear and convincing evidence" threshold. Clear and convincing evidence would exist only where the specific facts and data made available to DOE regarding a particular ASHRAE amendment demonstrates that there is no substantial doubt that a standard more stringent than that contained in the ASHRAE Standard 90.1 amendment is permitted because it would result in a significant additional amount of energy savings, is technologically feasible and economically justified, or, in the case of test procedures, that the industry test procedure does not meet the EPCA requirements. DOE will make this determination only after seeking data and information from interested parties and the public to help inform the Agency's views. DOE will seek from interested stakeholders and the public data and information to assist in making this determination, prior to publishing a proposed rule to adopt more-stringent standards or a different test procedure.

(c) DOE's review in adopting amendments based on an action by ASHRAE to amend Standard 90.1 is strictly limited to the specific standards or test procedure amendment for the specific equipment for which ASHRAE has made a change (*i.e.*, determined down to the equipment class level). DOE believes that ASHRAE not acting to amend Standard 90.1 is tantamount to a decision that the existing standard remain in place. Thus, when undertaking a review as required by 42 U.S.C. 6313(a)(6)(C), DOE would need to find clear and convincing evidence, as defined in this section, to issue a standard more stringent than the existing standard for the equipment at issue.

10. Direct Final Rules

In accordance with 42 U.S.C. 6295(p)(4), on receipt of a joint proposal that is submitted by interested persons that are fairly representative of relevant points of view, DOE may issue a direct final rule (DFR) establishing energy conservation standards for a covered product or equipment if DOE determines the recommended standard is in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B) as applicable. To be “fairly representative of relevant points of view” the group submitting a joint statement must, where appropriate, include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, consumers, and States. However, it will be necessary to evaluate the meaning of “fairly representative” on a case-by-case basis, subject to the circumstances of a particular rulemaking, to determine whether fewer or additional parties must be part of a joint statement in order to be “fairly representative of relevant points of view.”

11. Principles for Distinguishing Between Effective and Compliance Dates

(a) *Dates, generally.* The effective and compliance dates for either DOE test procedures or DOE energy conservation standards are typically not identical, and these terms should not be used interchangeably.

(b) *Effective date.* The effective date is the date a rule is legally operative after being published in the *Federal Register*.

(c) *Compliance date.* (1) For test procedures, the compliance date is the specific date when manufacturers are required to use the new or amended test procedure requirements to make representations concerning the energy efficiency or use of a product, including certification that the covered product/equipment meets an applicable energy conservation standard.

(2) For energy conservation standards, the compliance date is the specific date upon which manufacturers are required to meet the new or amended standards for applicable covered products/equipment that are distributed in interstate commerce.

12. Principles for the Conduct of the Engineering Analysis

(a) The purpose of the engineering analysis is to develop the relationship between efficiency and cost of the subject product/equipment. The Department will use the most appropriate means available to determine the efficiency/cost relationship, including an overall system approach or engineering modeling to predict the reduction in energy use or improvement in energy efficiency that can be expected from individual design options as discussed in paragraphs (b) and (c) of this section. From this efficiency/cost relationship, measures such as payback, life-cycle cost, and energy savings can be developed. The Department will identify issues that will be examined in the engineering analysis and the types of specialized expertise that may be required. DOE will select appropriate contractors, subcontractors, and expert consultants, as necessary, to perform the engineering analysis and the impact analysis. Also, the Department will consider data, information, and analyses received from interested parties for use in the analysis wherever feasible.

(b) The engineering analysis begins with the list of design options developed in consultation with the interested parties as a result of the screening process. The Department will establish the likely cost and performance improvement of each design option. Ranges and uncertainties of cost and performance will be established, although efforts will be made to minimize uncertainties by using measures such as test data or component or material supplier information where available. Estimated uncertainties will be carried forward in subsequent analyses. The use of quantitative models will be supplemented by qualitative assessments as appropriate.

(c) The next step includes identifying, modifying, or developing any engineering models necessary to predict the efficiency impact of any one or combination of design options on the product/equipment. A base case configuration or starting point will be established, as well as the order and combination/blending of the design options to be evaluated. DOE will then perform

the engineering analysis and develop the cost-efficiency curve for the product/equipment. The cost efficiency curve and any necessary models will be available to stakeholders during the pre-NOPR stage of the rulemaking.

13. Principles for the Analysis of Impacts on Manufacturers

(a) *Purpose.* The purpose of the manufacturer analysis is to identify the likely private impacts of efficiency standards on manufacturers. The Department will analyze the impact of standards on manufacturers with substantial input from manufacturers and other interested parties. This section describes the principles that will be used in conducting future manufacturing impact analyses.

(b) *Issue identification.* In the impact analysis stage, the Department will identify issues that will require greater consideration in the detailed manufacturer impact analysis. Possible issues may include identification of specific types or groups of manufacturers and concerns over access to technology. Specialized contractor expertise, empirical data requirements, and analytical tools required to perform the manufacturer impact analysis also would be identified at this stage.

(c) *Industry characterization.* Prior to initiating detailed impact studies, the Department will seek input on the present and past industry structure and market characteristics. Input on the following issues will be sought:

- (1) Manufacturers and their current and historical relative market shares;
- (2) Manufacturer characteristics, such as whether manufacturers make a full line of models or serve a niche market;
- (3) Trends in the number of manufacturers;
- (4) Financial situation of manufacturers;
- (5) Trends in product/equipment characteristics and retail markets including manufacturer market shares and market concentration; and

(6) Identification of other relevant regulatory actions and a description of the nature and timing of any likely impacts.

(d) *Cost impacts on manufacturers.* The costs of labor, material, engineering, tooling, and capital are difficult to estimate, manufacturer-specific, and usually proprietary. The Department will seek input from interested parties on the treatment of cost issues. Manufacturers will be encouraged to offer suggestions as to possible sources of data and appropriate data collection methodologies. Costing issues to be addressed include:

(1) Estimates of total private cost impacts, including product/equipment-specific costs (based on cost impacts estimated for the engineering analysis) and front-end investment/conversion costs for the full range of product/equipment models.

(2) Range of uncertainties in estimates of average cost, considering alternative designs and technologies which may vary cost impacts and changes in costs of material, labor, and other inputs which may vary costs.

(3) Variable cost impacts on particular types of manufacturers, considering factors such as atypical sunk costs or characteristics of specific models which may increase or decrease costs.

(e) *Impacts on product/equipment sales, features, prices, and cost recovery.* In order to make manufacturer cash-flow calculations, it is necessary to predict the number of products/equipment sold and their sale price. This requires an assessment of the likely impacts of price changes on the number of products/equipment sold and on typical features of models sold. Past analyses have relied on price and shipment data generated by economic models. The Department will develop additional estimates of prices and shipments by drawing on multiple sources of data and experience including: actual shipment and pricing experience; data from manufacturers, retailers, and other market experts; financial models, and sensitivity analyses. The possible impacts of candidate/trial standard levels on consumer choices among competing fuels will be explicitly considered where relevant.

(f) *Measures of impact.* The manufacturer impact analysis will estimate the impacts of candidate/trial standard levels on the net cash flow of manufacturers. Computations will be performed for the industry as a whole and for typical and atypical manufacturers. The exact nature and the process by which the analysis will be conducted will be determined by DOE, with input from interested parties, as appropriate. Impacts to be analyzed include:

(1) Industry net present value, with sensitivity analyses based on uncertainty of costs, sales prices, and sales volumes;

(2) Cash flows, by year; and

(3) Other measures of impact, such as revenue, net income, and return on equity, as appropriate. DOE also notes that the characteristics of a typical manufacturers worthy of special consideration will be determined in consultation with manufacturers and other interested parties and may include: manufacturers incurring higher or lower than average costs; and manufacturers experiencing greater or fewer adverse impacts on sales. Alternative scenarios based on other methods of estimating cost or sales impacts also will be performed, as needed.

(g) *Cumulative Impacts of Other Federal Regulatory Actions.* (1) The Department will recognize and seek to mitigate the overlapping effects on manufacturers of new or revised DOE standards and other regulatory actions affecting the same products or equipment. DOE will analyze and consider the impact on manufacturers of multiple product/equipment-specific regulatory actions. These factors will be considered in setting rulemaking priorities, conducting the early assessment as to whether DOE should proceed with a standards rulemaking, assessing manufacturer impacts of a particular standard, and establishing compliance dates for a new or revised standard that, consistent with any statutory requirements, are appropriately coordinated with other regulatory actions to mitigate any cumulative burden.

(2) If the Department determines that a proposed standard would impose a significant impact on product or equipment manufacturers within approximately three years of the compliance date of another DOE standard that imposes significant impacts on the same

manufacturers (or divisions thereof, as appropriate), the Department will, in addition to evaluating the impact on manufacturers of the proposed standard, assess the joint impacts of both standards on manufacturers.

(3) If the Department is directed to establish or revise standards for products/equipment that are components of other products/equipment subject to standards, the Department will consider the interaction between such standards in setting rulemaking priorities and assessing manufacturer impacts of a particular standard. The Department will assess, as part of the engineering and impact analyses, the cost of components subject to efficiency standards.

(h) *Summary of quantitative and qualitative assessments.* The summary of quantitative and qualitative assessments will contain a description and discussion of uncertainties.

Alternative estimates of impacts, resulting from the different potential scenarios developed throughout the analysis, will be explicitly presented in the final analysis results.

(1) Key modeling and analytical tools. In its assessment of the likely impacts of standards on manufacturers, the Department will use models that are clear and understandable, feature accessible calculations, and have clearly explained assumptions. As a starting point, the Department will use the Government Regulatory Impact Model (GRIM). The Department will also support the development of economic models for price and volume forecasting. Research required to update key economic data will be considered.

(2) [Reserved]

14. Principles for the Analysis of Impacts on Consumers

(a) *Early consideration of impacts on consumer utility.* The Department will consider at the earliest stages of the development of a standard whether particular design options will lessen the utility of the covered products/equipment to the consumer. See paragraph (b) of section 6.

(b) *Impacts on product/equipment availability.* The Department will determine, based on consideration of information submitted during the standard development process, whether a

proposed standard is likely to result in the unavailability of any covered product/equipment type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products/equipment generally available in the U.S. at the time. DOE will not promulgate a standard if it concludes that it would result in such unavailability.

(c) *Department of Justice review.* As required by law, the Department will solicit the views of the Department of Justice on any lessening of competition likely to result from the imposition of a proposed standard and will give the views provided full consideration in assessing economic justification of a proposed standard. In addition, DOE may consult with the Department of Justice at earlier stages in the standards development process to seek its preliminary views on competitive impacts.

(d) *Variation in consumer impacts.* The Department will use regional analysis and sensitivity analysis tools, as appropriate, to evaluate the potential distribution of impacts of candidate/trial standard levels among different subgroups of consumers. The Department will consider impacts on significant segments of consumers in determining standards levels. Where there are significant negative impacts on identifiable subgroups, DOE will consider the efficacy of voluntary approaches as a means to achieve potential energy savings.

(e) *Payback period and first cost.* (1) In the assessment of consumer impacts of standards, the Department will consider Life–Cycle Cost, Payback Period, and Cost of Conserved Energy to evaluate the savings in operating expenses relative to increases in purchase price. The Department also performs sensitivity and scenario analyses when appropriate. The results of these analyses will be carried throughout the analysis and the ensuing uncertainty described.

(2) If, in the analysis of consumer impacts, the Department determines that a candidate/trial standard level would result in a substantial increase in product/equipment first costs to consumers or would not pay back such additional first costs through energy cost savings

in less than three years, Department will assess the likely impacts of such a standard on low-income households, product/equipment sales and fuel switching, as appropriate.

15. Consideration of Non-Regulatory Approaches

The Department recognizes that non-regulatory efforts by manufacturers, utilities, and other interested parties can result in substantial efficiency improvements. The Department intends to consider the likely effects of non-regulatory initiatives on product/equipment energy use, consumer utility and life-cycle costs, manufacturers, competition, utilities, and the environment, as well as the distribution of these impacts among different regions, consumers, manufacturers, and utilities. DOE will attempt to base its assessment on the actual impacts of such initiatives to date, but also will consider information presented regarding the impacts that any existing initiative might have in the future. Such information is likely to include a demonstration of the strong commitment of manufacturers, distribution channels, utilities, or others to such non-regulatory efficiency improvements. This information will be used in assessing the likely incremental impacts of establishing or revising standards, in assessing—where possible—appropriate compliance dates for new or revised standards, and in considering DOE support of non-regulatory initiatives.

16. Cross-Cutting Analytical Assumptions

In selecting values for certain cross-cutting analytical assumptions, DOE expects to continue relying upon the following sources and general principles:

(a) *Underlying economic assumptions.* The appliance standards analyses will generally use the same economic growth and development assumptions that underlie the most current *Annual Energy Outlook (AEO)* published by the Energy Information Administration (EIA).

(b) *Analytic time length.* The appliance standards analyses will use two time lengths—30 years and another time length that is specific to the standard being considered such as the useful

lifetime of the product under consideration. As a sensitivity case, the analyses will also use a 9–year regulatory timeline in analyzing the effects of the standard.

(c) *Energy price and demand trends.* Analyses of the likely impact of appliance standards on typical users will generally adopt the mid-range energy price and demand scenario of the EIA’s most current *AEO*. The sensitivity of such estimated impacts to possible variations in future energy prices are likely to be examined using the EIA’s high and low energy price scenarios.

(d) *Product/equipment-specific energy-efficiency trends, without updated standards.* Product/equipment-specific energy-efficiency trends will be based on a combination of the efficiency trends forecast by the EIA’s residential and commercial demand model of the National Energy Modeling System (NEMS) and product-specific assessments by DOE and its contractors with input from interested parties.

(e) *Price forecasting.* DOE will endeavor to use robust price forecasting techniques in projecting future prices of products.

(f) *Private Discount rates.* For residential and commercial consumers, ranges of three different real discount rates will be used. For residential consumers, the mid-range discount rate will represent DOE’s approximation of the average financing cost (or opportunity costs of reduced savings) experienced by typical consumers. Sensitivity analyses will be performed using discount rates reflecting the costs more likely to be experienced by residential consumers with little or no savings and credit card financing and consumers with substantial savings. For commercial users, a mid-range discount rate reflecting DOE’s approximation of the average real rate of return on commercial investment will be used, with sensitivity analyses being performed using values indicative of the range of real rates of return likely to be experienced by typical commercial businesses. For national net present value calculations, DOE would use the Administration’s approximation of the average real rate of return on private investment in the U.S. economy. For manufacturer impacts, DOE typically uses a range of real discount rates

which are representative of the real rates of return experienced by typical U.S. manufacturers affected by the program.

(g) *Social Discount Rates.* Social discount rates as specified in OMB Circular A-4 will be used in assessing social effects such as costs and benefits.

(h) *Environmental impacts.* (1) DOE calculates emission reductions of carbon dioxide, sulfur dioxide, nitrogen oxides, methane, nitrous oxides, and mercury likely to be avoided by candidate/trial standard levels based on an emissions analysis that includes the two components described in paragraphs (h)(2) and (3) of this section.

(2) The first component estimates the effect of potential candidate/trial standard levels on power sector and site combustion emissions of carbon dioxide, nitrogen oxides, sulfur dioxide, mercury, methane, and nitrous oxide. DOE develops the power sector emissions analysis using a methodology based on DOE's latest *Annual Energy Outlook*. For site combustion of natural gas or petroleum fuels, the combustion emissions of carbon dioxide and nitrogen oxides are estimated using emission intensity factors from the Environmental Protection Agency.

(3) The second component of DOE's emissions analysis estimates the effect of potential candidate/trial standard levels on emissions of carbon dioxide, nitrogen oxides, sulfur dioxide, mercury, methane, and nitrous oxide due to "upstream activities" in the fuel production chain. These upstream activities include the emissions related to extracting, processing, and transporting fuels to the site of combustion as detailed in DOE's Fuel-Fuel-Cycle Statement of Policy (76 FR 51281 (August 18, 2011)). DOE will consider the effects of the candidate/trial standard levels on these emissions after assessing the seven factors required to demonstrate economic justification under EPCA. Consistent with Executive Order 13783, dated March 28, 2017, when monetizing the value of changes in reductions in CO₂ and nitrous oxides emissions resulting from its energy conservation standards regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, DOE ensures, to the extent permitted by law, that any such estimates are

consistent with the guidance contained in OMB Circular A-4 of September 17, 2003 (Regulatory Analysis).

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