July 21, 2017

Mr. John Cymbalsky
U.S. Department of Energy
1000 Independence Ave.
Washington, DC

Subject: Ex Parte Communication Report of discussion with DOE concerning the history and value of federal regulation as a way to avoid greater burdens under state-by-state regulation. Meeting occurred at DOE headquarters on July 12, 2017

Dear Mr. Cymbalsky:

This memo memorializes the July 12 discussion

The meeting on July 12, 2017 with some senior staff at DOE (see below) chiefly concerned a review of prior experiences of the home appliance and residential ceiling fan sectors with state-by-state regulation of products that subsequently became the subject of federal regulations, preempting the states.

In addition, the Department was briefed concerning outstanding issues associated with the test procedure on the already final rule for residential ceiling fans. Draft proposed legislation is being developed by some AMCA members and non-AMCA members that manufacture products subject to the residential ceiling fan rule. Furthermore, AMCA's FEI metric is an important component of the legislation. The Department was encouraged to initiate round robin testing to supplement efforts already underway within the industry to ensure the test procedure as it currently stands does not have unintended consequences, or lead to an overly burdensome test procedure that is insufficiently valid or repeatable. The proposed legislation is believed to address regulatory procedural issues that might otherwise delay improvement of this test procedure.

On the general subject of the importance of federal preemption in achieving an overall objective of reducing the national burden of government regulation, the simple message was that, certainly with regard to the regulation of testing and labeling of commercial and industrial fans, that the consensus positon of the AMCA membership was that state-by-state regulation in this area was not in the national interest. It was explained that this would raise the regulatory and compliance burden for industry and its customers, risk inconsistent application of inconsistent metrics and processes for testing and labeling these products; and ultimately, slow national progress on improving the efficiency of these products and lowering the energy cost of operating commercial and industrial buildings.

It was further explained that AMCA members were not eager to see the multiple years of effort expended to develop a federal test procedure, metric and labeling system go to waste; and therefore, offered DOE staff (meeting included: Deputy Assistant Secretary, Kathleen Hogan,

Buildings and Technologies office Director, David Nemtzow, John Cymbalsky, Program Manager Appliance and Equipment Standards Program, as well as two senior advisors to Assistant Secretary Simmons, Kevin Jayne and Alex Fitzsimmons) a menu of options that would preserve the value of the prior efforts. (The author of this memo, Tom Catania, Executive in Residence at the University of Michigan's Erb Institute for Global Sustainable Enterprise, and advisor to both AMCA and Hunter Fan was the only non-DOE attendee.)

The options were described as being arrayed along a spectrum of choices extending from what is perceived as the least effective to the most effective in avoiding the problems associated with state-by-state regulation of commercial and industrial fans.

1) Beginning on the least effective end, was the suggestion that DOE release to the public record in the California regulatory proceeding the most recent draft version of the NOPR for the testing and labeling of commercial and industrial fans that incorporates the ASRAC term sheet elements and the Department's proposed resolution of outstanding issues required for issuance of a NOPR. It is believed that this document would substantially advance and inform the California proceeding, but it has the infirmity of failing to preempt state regulation.
2) Further along the spectrum would be for the Department to actually complete the issuance of the testing and labeling NOPR. This would allow for economy of regulatory policy by creating a strong incentive for the State of California to put its own proceeding into abeyance while the Department followed the statutory normal notice and comment proceedings and processes required to move to a final rule.
3) Third, in addition to issuance of the NOPR, would be a clear expression of the intention of the Department to move to a final rule regarding testing and labeling commercial and industrial fans. Industry is concerned that in the absence of a clear expression that the Department intends to complete a final rule that there is a risk of parallel proceedings at the state and federal level, which would be especially burdensome for small and medium sized enterprises that would feel compelled to protect themselves in multiple jurisdictions.

I appreciated the opportunity to meet with DOE staff on these subjects. I have not included copies of the handout materials related to proposed residential ceiling fan legislation, since it did not concern a pending rule making, but involved an already final rule. We do not object to the posting of those documents if you believe it is required under the ex parte communications guidelines.

Sincerely yours,

Tom Catania
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University of Michigan