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DEPARTMENT OF ENERGY

Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Request for information and notice of public meeting.

SUMMARY: As part of its implementation of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” (January 30, 2017) and Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” (Feb. 24, 2017), the Department of Energy (DOE) is seeking comments and information from interested parties to assist DOE in identifying potential modifications to its “Process Rule” for the development of appliance standards to achieve meaningful burden reduction while continuing to achieve the Department’s statutory obligations in the development of appliance standards. DOE will also hold a public meeting to receive input from interested parties on potential improvements to the “Process Rule”.

DATES: Written comments and information are requested on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. A public meeting will be held on January 9, 2017.

ADDRESSES: The public meeting will begin at 9:30 a.m., at the U.S. Department of Energy, Forrestal Building, Room 8E-089, 1000 Independence Avenue, SW., Washington, DC 20585.

Interested persons are encouraged to submit comments, identified by “Process Rule RFI,” by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* Regulatory.Review@hq.doe.gov. Include “Process Rule RFI” in the subject line of the message.
- *Mail:* U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW, Room 6A245, Washington, DC 20585.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Caitlin Davis, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue, SW., Washington, DC 20585. E-mail: Regulatory.Review@hq.doe.gov, Phone: 202-586-6803.

SUPPLEMENTARY INFORMATION: On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Additionally, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The Order required the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory

task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

To implement these Executive Orders, the Department, among other actions, issued a Request for Information (RFI) seeking public comment on how best to achieve meaningful burden reduction while continuing to achieve the Department's regulatory objectives. 82 FR 24582 (May, 30, 2017). In response to this RFI, the Department received a number of comments pertaining to DOE's Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, codified at 10 CFR part 430, subpart C, appendix A. DOE generally uses the procedures set forth in the Process Rule to prescribe energy conservation standards for both consumer products and commercial equipment pursuant to the Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, 42 U.S.C. 6291, et seq. "EPCA") (EPCA). These procedures are commonly referred to as the "Process Rule". DOE's objectives in establishing these procedures include: 1) providing for early input from stakeholders; 2) increasing predictability of the rulemaking timetable; 3) increasing the use of outside technical expertise; 4) eliminating problematic design options early in the process; 5) fully consider non-regulatory approaches; 6) conducting a thorough analysis of impacts; (7) using transparent and robust analytical methods; (8) articulating policies to guide selection of standards; and (9) supporting efforts to build consensus on standards.

In this RFI, and through the public meeting announced in the **DATES** section, DOE seeks additional comments and information on potential improvements to the Process Rule. DOE welcomes comment on all aspects of the Process Rule that interested parties believe could

be improved, including specific changes to the existing text of appendix A to subpart C of part 430 or other suggestions on how to accomplish the suggested improvements. In the paragraphs that follow, DOE also provides a list of several issue areas on which it is particularly interested in receiving comments. DOE developed these issue areas based on feedback received in response to previous regulatory reform efforts related to the Process Rule. These efforts include DOE's recent regulatory reform RFI. DOE also developed issue areas based on changes in the law since the original promulgation of the Process Rule, and on DOE's experience in promulgating standards using the procedures set out in the rule.

Issue Areas.

A. Direct Final Rules

The Energy Independence and Security Act of 2007 (EISA) (Pub. L. 110-140) amended EPCA, in relevant part, to grant DOE authority to issue a "direct final rule" (DFR) to establish energy conservation standards. (Direct final rule is a term used generically to describe a type of rulemaking proceeding.) As amended, EPCA establishes the requirements for DOE to use this type of rulemaking proceeding for the issuance of certain actions. Specifically, DOE may issue a DFR adopting energy conservation standards for a covered product upon receipt of a joint proposal from a group of "interested persons that are fairly representative of relevant points of view," provided DOE determines the energy conservation standards recommended in the joint proposal conform with the requirements of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(A)) Simultaneous with the issuance of a DFR, DOE must also issue a notice of proposed rulemaking (NOPR) containing the same energy conservation standards in the DFR. Following publication of the DFR, DOE must solicit public comment for a period of at least 110 days; then, not later

than 120 days after issuance of the DFR, the Secretary must determine whether any adverse comments “may provide a reasonable basis for withdrawing the DFR,” based on the rulemaking record and specified statutory provisions. (42 U.S.C. 6295(p)(4)(B), (C)(i)) Upon withdrawal, the Secretary must proceed with the rulemaking process under the NOPR that was issued simultaneously with the DFR and publish the reasons the DFR was withdrawn. (42 U.S.C. 6295(C)(ii)) If the Secretary determines not to withdraw the DFR, it becomes effective as specified in the original issuance of the DFR.

In response to a 2011 DFR in which DOE established energy conservation standards for residential furnaces, central air conditioners, and heat pumps, the American Public Gas Association filed a petition for review in the D.C. Circuit on December 23, 2011, challenging the validity of the rule. Various environmental and commercial interest groups joined each side of the case, reflecting various viewpoints. On March 11, 2014, all parties filed a joint motion presenting final terms of settlement in the case (“Joint Motion”).

Pursuant to the Joint Motion, DOE published an RFI on October 31, 2014 (“October RFI”) seeking public input on several aspects of the DFR process. 79 FR 64705. In the October RFI, DOE explained that it was conducting a notice-and-comment proceeding to clarify its interpretation and implementation of certain aspects of the DFR process and requested comment on three issues: (1) when a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by “interested persons that are fairly representative of relevant points of view,” thereby permitting use of the DFR mechanism; (2) the nature and extent of “adverse comments” that may provide the Secretary a reasonable

basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR; and (3) what constitutes the “recommended standard contained in the statement,” and the scope of any resulting DFR. *Id.* at 64706.

Request for comment: DOE seeks comment on whether to amend the process rule to include provisions related to the use of DFRs. The development of DFRs by a representative group of regulated entities and other stakeholders can achieve a number of the objectives set out in the Process Rule, such as providing for early input from stakeholders and supporting efforts to build consensus on standards. To assist DOE in the development of any appropriate revisions, DOE also seeks further comment on the three issues outlined above from the October RFI.

B. Negotiated Rulemaking.

Negotiated rulemaking is a process by which an agency attempts to develop a consensus proposal for regulation in consultation with all interested parties and before issuing a proposed rule.¹ The process allows an agency to address salient comments from interested parties prior to issuing a proposed rule. Consequently, negotiated rulemaking can yield better and more thoroughly vetted decisions. In its November 2010 announcement of process changes, DOE stated that it would use negotiated rulemakings as a means to engage the public, gather data and information, and attempt to reach consensus among interested parties to advance the rulemaking process.

¹ 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).

In pursuit of the Department's goal of promoting negotiated rulemakings in appropriate cases, DOE established the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) to comply with the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463 (1972) (codified at 5 U.S.C. App. 2). Generally speaking, FACA regulates the formation and operation of advisory committees by Federal agencies. The Department meets all of the FACA requirements for new advisory committees including public notice and a determination that the establishment will be in the public interest, a clearly defined purpose,² membership that is fairly balanced in terms of points of view represented and the functions to be performed, and meetings that are open to public observation, subject to the exceptions as provided in the Government in the Sunshine Act (5 U.S.C. 552(b)).

As part of the DOE process, working groups have been established for specific products and one member from the ASRAC committee attends the meetings of a specific working group. Ultimately, the working group reports to ASRAC, and ASRAC itself votes on whether to adopt a consensus agreement. DOE's role in the negotiated rulemaking process is to provide technical advice to the parties and provide legal input where needed.

In DOE's experience with using negotiated rulemaking, DOE has found that the process is inclusive and excels for several reasons. First, it allows real-time adjustments to the analyses

² ASRAC was created as a discretionary advisory committee to provide advice and recommendations related to: (1) the development of minimum efficiency standards for appliances and equipment, (2) the development of product test procedures; (3) the certification and enforcement of standards; (4) the labeling for various appliances and equipment; (5) specific issues of concern to DOE as requested by the Secretary of Energy, the Assistant Secretary for Energy Efficiency and Renewable Energy, and DOE's Building Technologies Office.

as the working group is considering them. Furthermore, it allows disparate parties to negotiate face-to-face regarding the terms of a potential standard. Additionally, it encourages manufacturers in a more direct manner to provide data to assist with the analysis which can help to better account for manufacturer concerns.

Request for comment: DOE seeks comment on whether to amend the Process Rule to include the use of negotiated rulemaking in appropriate cases. The use of negotiated rulemaking can also achieve many of the objectives of the Process Rule, such as providing for early input from stakeholders; increasing the use of outside technical expertise and eliminating problematic design options early in the process, when manufacturers and other interested parties can offer and debate expertise, data and information in real time as the rule is developed; conducting a thorough analysis of impacts and using transparent and robust analytical methods, for the same reasons; and supporting efforts to build consensus on standards.

C. Elimination of Advance Notice of Proposed Rulemaking; Inclusion of Alternate Means to Gather Additional Information Early in the Process

Throughout the Process Rule, there are many provisions that reference an Advance Notice of Proposed Rulemaking (ANOPR) as a step in the pre-NOPR process. Congress, however, eliminated the requirement that DOE publish an ANOPR in rulemakings to establish or amend energy conservation standards when it enacted EISA. Accordingly, DOE believes that it

would be appropriate to eliminate all references to the ANOPR requirement in the Process Rule to reflect EISA.³

DOE emphasizes, however, that it highly values public input early in the rulemaking process. So, even though DOE no longer has a legal obligation to issue an ANOPR, DOE has developed alternative mechanisms to receive early input and supplemental information from stakeholders. For example, DOE routinely provides early opportunities for public input through Framework and Preliminary Analysis documents, Notices of Data Availability, and RFIs. DOE welcomes as much participation from as many stakeholders as possible in the pre-NOPR stage of its rulemakings to raise issues, provide data, and critique DOE's technical analyses, when stakeholders determine that the need exists.

In November 2010, DOE announced certain changes on its website intended to improve its rulemaking process in appropriate circumstances. (See <https://energy.gov/gc/articles/doe-announces-changes-energy-conservation-standards-process>.) One of these potential changes was to, in appropriate circumstances, eliminate these preliminary steps in favor of issuing a proposed rule for public comment as the first phase of the rulemaking process. The 2010 announcement provided some examples where DOE might issue a NOPR directly including: (1) instances where the economic and technological data are well known and understood; (2) instances where the industry has experienced little change since the last rulemaking; and (3) instances where the

³ These Process Rule sections include: sections 1(j), 2, 5 (throughout), 6(c)(3), 6(d), and 12(c).

product being regulated has a long history of rulemaking so it is anticipated that there is little new data to collect.

DOE received comments in response to its regulatory reform RFI that DOE should not eliminate these early steps, and that the circumstances enumerated by DOE where it may be appropriate to directly issue a NOPR are, instead, indicators that insufficient time has elapsed since the promulgation of a prior standard to begin work on a new standard. In such cases, the impacts of the previous standard have not yet had sufficient time to materialize so that DOE could analyze them in determining whether to issue a new standard. These commenters cautioned that DOE should not rush to issue a proposed rule, but should instead allow more time to elapse so that the impacts of the previous standard can be properly evaluated in the pre-rule documents DOE typically issues at the start of the rulemaking process. DOE also received comment suggesting that DOE amend the Process Rule to require retrospective review of current standards prior to beginning work on a new standard, to determine if the prior standard has achieved the anticipated energy savings and costs. Commenters also suggested that DOE provide advanced notice of planned data collection activities to allow parties to contribute.

Request for comment: DOE seeks comment on whether the Process Rule should be revised to include any of the alternative pre-rule steps discussed above. These steps would achieve Process Rule objectives including the provision of early input from stakeholders; increasing predictability of the rulemaking timetable because regulated entities could count on these steps being taken; and eliminating problematic design options early in the process, conducting a thorough analysis of impacts, and using transparent and robust analytical methods,

because regulated entities and other stakeholders would have more opportunity early in the process to analyze and question DOE's data and analytical methods.

D. Application of the Process Rule to Commercial Equipment

When it was originally promulgated in 1975, EPCA established a Federal program consisting of test procedures, labeling, and energy conservation standards for covered consumer products. Subsequent amendments to EPCA included provisions for the establishment of energy conservation standards for certain types of commercial equipment. For example, the Energy Policy Act of 1992 (EPACT 1992) expanded the coverage of the standards program to include certain commercial and industrial equipment, including commercial heating and air-conditioning equipment, water heaters, certain incandescent and fluorescent lamps, and electric motors. (Energy Policy Act of 1992, Pub. L. 102-486 (1992)) EPACT 1992 also called for, among other things, determination analyses for small electric motors, high-intensity discharge lamps, and distribution transformers.

By its terms (and specifically by its title), the Process Rule is applicable only to consumer products. DOE has routinely followed the procedures set forth in the rule when establishing standards for commercial equipment, however, as there is no evident reason why DOE would want to use different procedures when establishing standards for such equipment.

Request for comment: Should DOE amend the Process Rule to clarify that it is equally applicable to the consideration of standards for commercial equipment and to recognize DOE's

current practice in applying the requirements of the process rule to commercial equipment? Such a revision would help to ensure that Process Rule objectives are also achieved in the consideration of whether to develop or amend standards for commercial equipment.

E. Use of industry standards in DOE test procedures.

In the development of DOE test procedures, DOE routinely considers the test methods established in industry standards and often adopts such standards as the DOE test method but has chosen in the past to alter these standards for a variety of products and equipment. DOE has asserted a number of reasons for the modifications, such as to increase repeatability and reproducibility of the test method or because an industry test method provides, in DOE's view, incomplete information required for testing.

DOE received comments in response to its regulatory reform RFI on the use of industry standards in DOE test procedures. Specifically, commenters requested that DOE consider using the industry standards, without modification, as the DOE test procedure. This approach could lead to process efficiencies and ease the test burden on manufacturers. DOE has also requested comment on this approach in recent RFIs for test procedures specific to a given product, such as small electric motors (82 FR 35468, July 31, 2017) and General Service Fluorescent Lamps, General Service Incandescent Lamps, Incandescent Reflector Lamps (82 FR 37031; Aug. 8, 2017).

Request for comment: DOE seeks comment on whether to modify the Process Rule to specify under what circumstances DOE would consider using the industry standard, without modification, as the DOE test procedure for a given product or equipment type. For example,

DOE could consider adopting the industry standard whenever the industry test method meets the EPCA requirements of being reasonably designed to produce test results that 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 of being not unduly burdensome to conduct, and whenever any benefits to using that test method are outweighed by the increased burden on manufacturers resulting from potential changes to the industry test method. Such a revision could achieve the Process Rule objective of increasing the use of outside technical expertise because DOE would focus primarily on the standard developed by industry, and any changes to that standard would occur only where the benefits outweighed the burdens on manufacturers.

F. Timing of the Issuance of DOE Test Procedures and Standards.

In response to DOE's regulatory reform RFI, commenters emphasized that DOE should follow the Process Rule, in particular with regard to the timing of the issuance of final test procedures and the commencement of a standards rulemaking. The Process Rule provides that final, modified test procedures will be issued prior to the notice of proposed rulemaking (NPR) on proposed standards. However, DOE has argued in some rulemakings that it was unable to meet this requirement because, for example, DOE has not had the resources to produce test procedures on a schedule to meet the Process Rule schedule requirement. In other instances, DOE has stated that it lacked the technical information and data it needs to complete a given test procedure on this timeline. There have also been some instances where a test procedure has been finalized, but new data emerge during the standards rulemaking showing the finalized test procedure to be insufficient. Commenters on DOE's regulatory reform RFI argue, however, that

these reasons counsel that DOE should, instead of rushing to complete a standards rulemaking, take the time and resources needed to gather the necessary technical information and develop the appropriate test procedure prior to commencing the standards rulemaking. Commenters have also asserted that it is necessary to finalize the test procedure before beginning work on a standards rulemaking to ensure that the effects of the test procedure on compliance with the standard can be analyzed, and to ensure that commenters can provide effective comments on both proposed test procedures and standards rules.

Request for comment: DOE seeks comment on whether the provisions of the Process Rule regarding the issuance of a final test procedure rule before issuing a proposed standards rule should be amended to further ensure that the Department follows this process in developing test procedures and standards. For example, provisions could be added regarding DOE's development of a schedule for considering whether to amend a particular standard, and that schedule could include consideration of any test procedure changes that would result in the finalization of any changes prior to issuance of the proposed standards rule. Such a revision could achieve the Process Rule objectives of providing for early input from stakeholders, because stakeholder input on the test procedure would be fully developed prior to issuance of any proposed standard. The objective of increasing predictability of the rulemaking timetable could also be achieved through such a revision.

G. Improvements to DOE's Analyses

Commenters on DOE's regulatory reform RFI suggested various ways to improve the analytical methods described in the Process Rule, such as enhancing the analysis of standards for employment impacts and the cumulative regulatory burden (e.g., providing for the development of guidance on including cumulative regulatory costs in analysis), the consideration of repair versus replacement dynamics, and improving discount rates. Other commenters suggested simplifying analytical processes and models to improve transparency.

Request for comment: DOE seeks more specificity in the ways in which the Process Rule could be amended to improve DOE's analyses and models, and to achieve burden reduction and increased transparency for regulated entities and the public. The proposals should be geared to achieving Process Rule objectives such as increasing the use of outside technical expertise; eliminating problematic design options early in the process; conducting a thorough analysis of impacts; and using transparent and robust analytical methods.

H. Other Issues

DOE also seek comment on topics not addressed in the current Process Rule and whether the Process Rule should be amended to address these topics.

Should DOE consider adding to the Process Rule criteria for "no amended standards" determinations when supported by data and when small energy savings require significant upfront cost to achieve?

Should DOE consider adding to the Process Rule criteria for consideration of voluntary, non-regulatory, and market-based alternatives to standards-setting?

Should DOE consider adding to the Process Rule criteria for consideration of establishing for each covered product and equipment a baseline for energy savings that qualify as not significant and thus rendering revised energy conservation standards not economically justified?

Should DOE make its compliance with the Process Rule mandatory?

DOE seeks comments and information concerning the issue areas identified above, as well as any other aspects of the Process Rule that commenters believe can be improved. The Department notes that this RFI is issued solely for information and program-planning purposes. While responses to this RFI do not bind DOE to any further actions related to the response, all submissions will be made publically available on www.regulations.gov.

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