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DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE-2017-BT-STD-0062]

RIN 1904–AD38

Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment

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

ACTION: Notice of proposed rulemaking (NOPR) and request for comment.

SUMMARY: The U.S. Department of Energy ("DOE" or "the Department") proposes to update and modernize the Department's current rulemaking methodology titled, "Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products" ("Process Rule"). In overview, in this document, DOE is proposing to clarify that the Process Rule applies to the establishment of new or revised energy conservation standards and test procedures for both consumer products and commercial/industrial equipment. This proposed rule would make the specified rulemaking procedures binding on DOE, and it would also revise language in certain provisions to make it consistent with the Energy Policy and Conservation Act of 1975 ("EPCA"), as amended, and

other applicable law. It also proposes to expand early opportunities for public input on the Appliance Program's priority setting and rulemaking activities, to define a significant energy savings threshold for updating energy conservation standards, to commit to publishing final test procedures at least 180 days in advance of a standards proposal, and to delineate procedures for rulemaking under the separate direct final rule and negotiated rulemaking authorities, among other issues. DOE may consider additional changes to the Process Rule in a future proceeding. In addition to requesting written comments on its proposal, DOE will also hold a public meeting at DOE Headquarters to discuss this proposal and obtain additional input.

DATES: *Comments*: DOE will accept comments, data, and information regarding this notice of proposed rulemaking before and after the public meeting, but no later than [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***]. See section V, "Public Participation," for details.

Meeting: DOE will hold a public meeting on Thursday, March 21, 2019, from 9 a.m. to 4:30 p.m. The meeting will also be broadcast as a webinar. See section V, "Public Participation," for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

ADDRESSES: The public meeting will be held 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 NOPR" and docket number EERE-2017-BT-STD-0062 and/or the regulatory information number (RIN) 1904-AD38. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.

- *E-mail*: *Process.Rule@ee.doe.gov*. Include "Process Rule NOPR" and docket number EERE-2017-BT-STD-0062 and/or RIN number 1904-AD38 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.

- *Postal Mail*: Sofie Miller, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Washington, DC 20585, Room 6A-013, Washington, DC, 20585. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

- *Hand Delivery/Courier*: Sofie Miller, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586-5000. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

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

The docket webpage can be found at: *https://www.regulations.gov/docket?D=EERE-2017-BT-STD-0062*. The docket webpage contains instructions on how to access all documents, including public comments, in the docket. See section V, "Public Participation," for further information on how to submit comments through *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Sofie Miller, Senior Advisor, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue, SW, Washington, DC 20585. Telephone: (202) 586-5000. E-mail: *Process.Rule@ee.doe.gov*.

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I. Summary of Proposal

DOE generally uses the procedures set forth in its Process Rule (found in 10 CFR part 430, subpart C, appendix A) when prescribing energy conservation standards for both consumer products and commercial equipment pursuant to the Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, codified at 42 U.S.C. 6291, *et seq.*). In this document, DOE is proposing to update and modernize its Process Rule by addressing the following major topics: (1) emphasizing that the procedures outlined in the Process Rule are binding on the agency; (2) formalizing DOE's past practice of applying the Process Rule to both consumer products and commercial equipment; (3) clarifying the Process Rule's application with regard to equipment covered by ASHRAE Standard 90.1; (4) expanding the Process Rule to test procedure rulemakings, as well as energy conservation standards rulemakings; (5) committing to both an "early look" process and other robust methods for early stakeholder input; (6) defining a significant energy savings threshold that must be met before DOE will update an energy conservation standard; (7) clarifying DOE's commitment to publish a test procedure six months before a related standards NOPR; (8) articulating DOE's authority under the Negotiated Rulemaking Act and EPCA's direct final rule ("DFR") provision, while clarifying that negotiated rulemakings and DFRs are two separate processes with their own sets of requirements; and (9) addressing other miscellaneous issues. DOE welcomes written comments from the public on any subject within the scope of this proposal (including related topics not specifically raised in this NOPR).

DOE continues to contemplate additional topics regarding its process for undertaking appliance standards rulemakings that may lead to additional rulemaking proceedings to update the Process Rule. In particular, DOE continues to think about potential changes to its analytical methodologies and models for assessing the costs and benefits of appliance standards rulemakings.

II. Introduction

A. Authority

In overview, the Department of Energy's Process Rule was developed to guide implementation of the Appliance Standards Program, which is conducted pursuant to Title III, Parts B[1] of the Energy Policy and Conservation Act of 1975 ("EPCA" or "the Act"), Pub. L. 94-163 (42 U.S.C. 6291-6309, as codified), for consumer products, and Part C[2] for certain industrial equipment (42 U.S.C. 6311-6317, as codified), added by Pub. L. 95-619, Title IV, §441(a).[3]

Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. The Federal Trade Commission ("FTC") is primarily responsible for labeling, and DOE implements the remainder of the program. 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. (42 U.S.C. 6293 and 6314) Manufacturers of

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.
[2] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A-1.
[3] All references to EPCA in this document refer to the statute as amended through the EPS Improvement Act of 2017, Public Law 115–115 (January 12, 2018).

covered products and covered equipment must use the prescribed DOE test procedure as the basis for 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), 6295(s) 6314(a), and 6316(a)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. *Id.*

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) and 6316(a)) Furthermore, the new or amended standard must result in a significant conservation of energy (42 U.S.C. 6295(o)(3)(B), 6313(a)(6), and 6316(a)), and comply with any other applicable statutory provisions.

B. Background on the Process Rule

DOE conducted a formal effort between 1995 and 1996 to improve the process it follows to develop energy conservation standards for covered appliance products. This effort involved many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties. The result was the publication of a final rule on July 15, 1996, titled, "Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products." 61 FR 36974. This document was codified at 10 CFR part 430, subpart C, appendix A.[4]

[4] As explained in the final rule for the Process Rule, this rule came within the scope of the Administrative Procedure Act's exemption from notice-and-comment rulemaking for procedural rules at 5 U.S.C. 553(b)(A). 61 FR 36974,

The Process Rule was designed to provide guidance to stakeholders as to how DOE would implement its rulemaking responsibilities under EPCA for the Appliance Program. As part of this enhanced process, supplementing the traditional notice-and-comment rulemaking process under the Administrative Procedure Act (APA), DOE has invited and promoted extensive stakeholder involvement in its energy conservation standards and test procedure rulemakings. An important legacy of the Process Rule has been both to educate and learn from the many stakeholders who participate in DOE's appliance rulemaking efforts. Some of the successes that have resulted from the Process Rule include: (1) more involvement of a wider variety of stakeholders in DOE's appliance rulemaking process; (2) improved technical analyses in support of the appliance rules due to enhanced input from stakeholders at an early stage of the rulemaking process; (3) improved solutions to issues and problems because of increased stakeholder involvement; and (4) more open dialogue and improved relationships between stakeholders and also between stakeholders and DOE.

While there have been many positive results from the Process Rule, DOE proposes to further improve the Process Rule in this document. These proposals would address: (1) processes that may no longer track the current legal requirements of EPCA; (2) processes that do not take into account the maturation of DOE's appliance program to the point that modernization is necessary; (3) that DOE has not rigorously followed the Process Rule in many instances; (4) the need for regulatory reform to reduce the costs and burdens of rulemaking; and (5) the need to clarify that the Process Rule applies to commercial/industrial equipment. In evaluating and

36980 (July 15, 1996). Although DOE's current rulemaking to consider potential revisions to the Process Rule might similarly warrant exemption from notice-and-comment requirements, DOE nonetheless seeks input from the interested public regarding potential avenues to improve DOE's procedures.

seeking to expand the positive impacts of the Process Rule, as well as remedying the above-described negative developments, this proposal will address the changed landscape of the rulemaking process under EPCA, and endeavor to modernize the Process Rule.[5]

On December 18, 2017, DOE issued an RFI (December 2017 RFI) to address potential improvements to DOE's Process Rule so that it could to achieve meaningful burden reduction while continuing to achieve the Department's statutory obligations in the development of appliance energy conservation standards and test procedures. 82 FR 59992. Originally, the comment period for this RFI was scheduled to end on February 16, 2018. However, several stakeholders requested a 30-day extension to file comments. (Letter dated January 29, 2018 from Air-Conditioning, Heating, and Refrigeration Institute ("AHRI"), the Association of Home Appliance Manufacturers ("AHAM"), and the National Electrical Manufacturers Association ("NEMA"), to John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Buildings Technologies Program). Consequently, DOE extended the comment period until March 2, 2018. 83 FR 5374 (Feb. 7, 2018). Subsequently, DOE posted a notice on its website on March 2, 2018, which stated that the comment period was further extended until March 5, 2018, due to a brief closure of the Federal government in the Washington D.C. area.

[5] In November 2010, DOE also issued a statement intended to expedite its rulemaking process. The statement is currently available at *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/changes_standards_process.pdf*. In this proposal, DOE is undertaking a thorough review of its Process Rule to determine the procedures it will follow in considering new or amended energy conservation standard and test procedures. As a result, if adopted, this proposed rule would supersede those portions of the November 2010 statement pertaining to the elimination of these early rulemaking steps.

To explore the issues in the December 2017 RFI, DOE convened a public meeting on January 9, 2018, which was attended by a wide range of stakeholders. The Department also simultaneously hosted a webinar, which was attended by approximately 150 additional persons. At this all-day public meeting, a wide variety of topics were addressed, including, but not limited to: (1) direct final rules; (2) negotiated rulemaking; (3) elimination of the statutory requirement for an advance notice of proposed rulemaking and alternate means to gather additional information early in the process; (4) application of the process rule to commercial equipment; (5) use of industry standards in DOE test procedures; (6) timing of the issuance of DOE test procedures; (7) certification, compliance and enforcement; (8) improvements to DOE's analyses; and (9) any other issues or topics raised by stakeholders.

Overall, DOE experienced a high level of engagement from stakeholders and the interested public regarding potential changes to the Process Rule.[6] Such comments provided

[6] The following organizations or individuals provided comments in response to the December 18, 2017 RFI (82 FR 59992): ABB; Acuity Brands, Inc. ("Acuity Brands"); American Boiler Manufacturers Association ("ABMA"); American Public Power Association ("APPA"); American Public Gas Association ("APGA"); Joint Commenters of the Appliance Standards Awareness Project (ASAP), Alliance to Save Energy, American Council for an Energy-Efficient Economy (ACEEE), Consumer Federation of America (CFA), National Consumer Law Center (NCLC), Natural Resources Defense Council (NRDC) , Northeast Energy Efficiency Partnerships (NEEP), and the Northwest Energy Efficiency Alliance (NEEA) (filing joint and collectively identified as, "the ASAP Joint Comment"); Atlas Copco North America ("Atlas Copco"); Big Ass Solutions ("BAF"); Bradford White Corporation ("Bradford White"); California Investor Owned Utilities (comprised of Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas and Electric, and Southern California Edison) (collectively referred to as "CA IOUs"); California Energy Commission ("CEC"); CSA America, Inc. ("CSA"); Daikin U.S. Corp. ("Daikin"); Edison Electric Institute ("EEI"); Energy Solutions; George Washington University ("GW"); Mile High Equipment, LLC. ("Ice-O-Matic"); joint comments filed by the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI"), Air Movement and Control Association International Inc. ("AMCA"), American Lighting Association ("ALA"), Association of Home Appliance Manufacturers ("AHAM"), Hearth, Patio & Barbecue Association ("HPBA"), Heating Air-Conditioning & Refrigeration Distributors International ("HARDI"), National Association of Manufacturers ("NAM"), National Electrical Manufacturers Association ("NEMA"), and Plumbing Manufacturers International ("PMI") (collectively, "the Joint Commenters"); Lennox International Inc. ("Lennox"); Lochinvar; Lutron Electronics Co., Inc. ("Lutron"); Manufactured Housing Institute ("MHI"); Miles & Stockbridge P.C. ("Miles & Stockbridge"); North American Association of Food Equipment Manufacturers ("NAFEM"); National Consumer Law Center ("NCLA") and the Consumer Federation of America ("CFA"); National Conference of State Legislatures ("NCSL"); Northeast Energy Efficiency Partnerships ("NEEP"); Nor-Lake, Inc. ("Nor-Lake"); Northwest Power and Conservation Council ("NPCC"); National Propane Gas Association ("NPGA");Office of

important input to DOE's current proposal to modernize the Process Rule, and the issues raised in those public comments are addressed subsequently in this document. Once finalized, DOE envisions promulgation of a Process Rule that increases transparency and public engagement and achieves meaningful burden reduction, while at the same time continuing to meet the Department's statutory obligations under EPCA.

III. Discussion of Specific Revisions to the Process Rule

A. The Process Rule Will Be Binding on the Department of Energy

In the December 2017 RFI, DOE asked stakeholders whether DOE should make compliance with the Process Rule mandatory. 82 FR 59992, 59997. At the January 9, 2018, Process Rule public meeting, most stakeholders agreed that the Process Rule should be binding on the Department. (AHRI, January 9, 2018 Public Meeting Transcript at pp. 24, 169, 265; AHAM, January 9, 2018 Public Meeting Transcript at pp. 31, 168; Spire, January 9, 2018 Public Meeting Transcript at pp. 54-55; Southern Company, January 9, 2018 Public Meeting Transcript at p. 268; NEMA, January 9, 2018 Public Meeting Transcript at p. 265; AGA, January 9, 2018 Public Meeting Transcript, at p. 37)

One commenter at the January 9, 2018, public meeting recommended that any amended Process Rule retain flexibility for DOE. (ASAP, January 9, 2018 Public Meeting Transcript, at pp. 266-268) Two commenters, Spire and Southern Company, suggested a savings or escape

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Information and Regulatory Affairs ("OIRA"); Plumbing Heating Cooling Contractors Association ("PHCC"); Regal Beloit Corporation ("Regal"); Sierra Club and Earth Justice; Rheem; Southern Company Services Inc. ("Southern Company"); Spire Inc. ("Spire"); Sub Zero Group, Inc. ("Sub Zero"); Schneider Electric; ITW-Food Equipment Group ("Traulsen/Kairak"); United Technologies ("UT-Carrier"); Whirlpool Corporation ("Whirlpool"); Daikin; Westinghouse Lighting; and Chris Soares.

clause, respectively, to address this problem. According to Spire, this would mean that DOE must follow the Process Rule unless there is a conflict with EPCA. (Spire, January 9, 2018, Public Meeting Transcript, at p. 266) Southern Company stated that if it is difficult to follow the Process Rule, the matter can be sent to negotiated rulemaking and the group can decide whether to change the procedure. (Southern Company, January 9, 2018 Public Meeting Transcript, at p. 268)

Commenters who took the position that the Process Rule should be binding on the Department generally argued that the Department should be held accountable for complying with its own procedures so that the public will have confidence in the transparency and fairness of DOE's regulatory process, including the certainty that mandatory application would bring. (Joint Commenters, No. 51 at pp. 2, 19, 32; EEI, No. 72 at p. 2; Atlas Copco North America, No. 54 at p. 7; ALA, No. 55 at p. 2; Lennox, No. 62 at p. 1; PHCC, No. 63 at p. 3; Southern Company, No. 70 at p. 2; Public Power Association, No. 36 at p. 4; NPCC, No. 35 at p. 22; Ice-O-Matic, No. 29 at p. 1; Spire, No. 57 at p. 2; Sub-Zero, No. 43 at p. 4)

Conversely, several commenters expressed that it would be potentially harmful to the Department's Appliance Program if DOE were to eliminate all flexibility in the Process Rule. These commenters supported application of the Process Rule, including its goal, among others, of promoting transparency and early stakeholder engagement, as long as DOE also meets its statutory obligations. (Sierra Club and Earth Justice, No. 66 at p. 2) The California Energy Commission ("CEC") and Natural Resources Defense Council ("NRDC") stated that DOE should not be subject to prescriptive requirements that limit its flexibility and restrict its ability to

respond to the circumstances of each rulemaking. Such an approach, in CEC's view, would increase DOE's litigation risk. (CEC, No. 53, at p. 8) At the same time, NRDC, along with others, expressed openness to revisions to the Process Rule that would make it clearer or provide greater predictability with respect to how DOE will act in the standards-setting process. (NRDC, No. 74 at p. 3) Other commenters also supported maintaining flexibility in the Process Rule and maintaining it as guidance. (CA IOUs, No. 65 at pp. 3, 5; NEEP, No. 77 at pp. 1, 5; ASAP Joint Comment, No. 75 at p. 9)

DOE acknowledges the important points made by commenters on this issue. In the December 2017 RFI, DOE stated that it has declined to follow the procedures in the Process Rule in a number of cases in the recent past. 82 FR 59992, 59993. And, DOE agrees that substantive improvements must be made in the Process Rule to promote greater transparency, consistency, and meaningful participation in DOE rulemakings.

DOE has carefully considered all the comments on this matter and has determined that requiring mandatory compliance on the part of DOE with its own Process Rule would clearly promote a rulemaking environment that is both predictable and consistent (*i.e.*, one where all stakeholders know what to expect during the rulemaking process). Accordingly, DOE is proposing language for the amended Process Rule to make clear that its provisions are binding on the agency. This approach would promote DOE's efforts to achieve meaningful burden reduction in the context of standards setting and compliance, as well as testing requirements, while continuing to achieve the Department's statutory obligations in the development of appliance standards.

DOE hopes that this approach will promote a rulemaking environment that is open, consistent, and predictable for all stakeholders. Furthermore, DOE anticipates that going forward, the rulemaking process with its binding application on the Department, will result in reduced burden to stakeholders through a more consistent set of procedures.

B. The Process Rule Will Apply to Both Consumer Products and Commercial Equipment

By its terms (and specifically by its title), the current Process Rule is applicable only to consumer products. However, in practice, DOE has routinely followed the procedures set forth in the Process Rule when establishing standards for commercial equipment. In its December 2017 RFI, DOE requested comment as to whether the agency should amend the Process Rule to clarify that it is equally applicable to the consideration of standards for commercial equipment. 82 FR 59992, 59996. At the January 9, 2018, Process Rule public meeting, DOE also asked stakeholders how the agency should treat equipment covered by the American National Standards Institute ("ANSI")/American Society of Heating, Refrigerating, and Air-Conditioning Engineers ("ASHRAE")/Illuminating Engineering Society of North America ("IESNA") Standard 90.1 ("ASHRAE Standard 90.1"), if DOE were to amend the Process Rule to include commercial equipment. DOE pointed out that EPCA provides a separate set of procedural requirements and timelines for ASHRAE equipment that are different than those in the Process Rule. (DOE, January 9, 2018 Public Meeting Transcript at pp. 183-184)

Commenters generally supported the principle that the Process Rule procedures should explicitly apply to both new and amended energy conservation standards for both covered

consumer products and industrial and commercial covered equipment, but with modified provisions specific to ASHRAE equipment. (AHRI, January 9, 2018 Public Meeting Transcript, at p. 25; Spire, January 9, 2018 Public Meeting Transcript, at p. 184; EEI January 9, 2018 Public Meeting Transcript, at p. 184; AHAM, January 9, 2018 Public Meeting Transcript, at p. 184; AHRI, January 9, 2018 Public Meeting Transcript, at pp. 184-185; Joint Comment, No. 51 at pp. 2, 32-33; NPCC, No. 35 at pp. 7, 16; Spire, No. 57 at p. 15; PHCC, No. 63 at p. 2; Southern Company, No. 70 at p. 2; APPA, No. 36 at p. 3; Ice-O-Matic, No. 29 at p. 1; Nor-Lake, No. 68 at pp. 1-2; Acuity Brands, No. 46 at p. 4; CA IOUs, No. 65 at p. 5; NAFEM, No. 47 at p. 3; CEC, No. 53 at p. 5; NEEP, No. 77 at p. 3; ASAP Joint Comment, No. 75 at p. 7; Lennox , No. 62 at p. 2, 8)

Some of the commenters expressed the reasons for their support of this principle. For instance, Acuity Brands stated that a consistent approach would ease compliance burdens by applying the same set of rules across the board. (Acuity Brands, No. 46 at p. 4) The North American Association of Food Equipment Manufacturers ("NAFEM") agreed that a consistent approach reduces administrative burdens and costs. NAFEM also stated that the Process Rule need not be identical as it relates to consumer products and commercial equipment given that there could be differences in the two markets that necessitate differences in the standard-setting process. (NAFEM, No. 47 at p. 3) The Joint Commenters stated that since the procedures for developing energy efficiency standards for both consumer products and commercial equipment are largely the same, with the exception of ASHRAE equipment, it makes sense to have one set of expectations regardless of whether the regulated product/equipment has residential or commercial applications. (Joint Commenters, No. 51 at p. 33) Spire stated that it sees no legal

impediment to extending the requirements of the Process Rule to commercial equipment. (Spire, No. 57 at p. 15)

One commenter, the American Boiler Manufacturers Association ("ABMA"), did not agree that a Process Rule developed for consumer products can be equally applied to commercial equipment. It states that in many sectors, including the boiler industry that it represents, consumer products do not resemble their commercial counterparts in terms of size, complexity, and application, to name just a few distinctions. ABMA stated that this is particularly true for the largest commercial equipment engineered for a specific application that have sales in the single digits annually in some instances. ABMA advocated that there needs to be a way to differentiate between the equipment with a similar name but possessing significant differences in terms of processes and features, including capacity. (ABMA, No. 71 at pp. 2-3)

Overall, DOE agrees with commenters that a modernized and amended Process Rule should apply to both consumer products and industrial and commercial equipment, and that the Process Rule must contain language that clarifies this coverage. Historically, DOE has applied the Process Rule to both consumer and industrial and commercial rules. This proposal would make clear that such practice will continue. To promote a consistent process that reduces the regulatory burden of the rulemaking, DOE proposes to apply the same procedures in the Process Rule to both consumer products and industrial and commercial equipment rulemakings, except as discussed in section III.C for ASHRAE equipment. In response to ABMA, DOE does not see the procedural safeguards of the Process Rule in any way negatively impacting the detailed consideration to be accorded a given type of product or equipment in the context of an individual

standards or test procedure rulemaking. On the contrary, DOE has tentatively concluded that formally applying the Process Rule to commercial and industrial equipment will enhance the consideration of such equipment by ensuring that there is proper time and information before the agency prior to promulgation of new or amended regulations.

C. The Application of the Process Rule to ASHRAE Equipment

As noted previously, at the January 9, 2018, Process Rule public meeting, DOE requested comment as to how the agency should treat ASHRAE equipment subject to ASHRAE Standard 90.1, in the event DOE were to amend the Process Rule to formally apply to commercial equipment. In relevant part, EPCA provides that ASHRAE equipment is subject to unique statutory requirements and its 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 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 such equipment. (42 U.S.C. 6313(a)(6)(A)) For each type of equipment, EPCA directs that if ASHRAE Standard 90.1 is amended, 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, unless 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. (42 U.S.C. 6313(a)(6)(A)(ii)(I)-(II))

Several stakeholders expressed their views as to how DOE should handle ASHRAE equipment. The Joint Commenters stated that ASHRAE equipment occupies a unique place under EPCA. They asserted that the language and intent of EPCA reflects the underlying policy that the stakeholder-driven process of ASHRAE Standard 90.1 is working and that DOE should defer to that process. The Joint Commenters argued that amendments to the Process Rule should set apart ASHRAE equipment and acknowledge the expectation that DOE will normally codify the industry consensus standards adopted in Standard 90.1 as the uniform national standard. Furthermore, they stated that DOE should undertake some form of early stakeholder engagement for ASHRAE equipment. They stated that if ASHRAE Standard 90.1 is amended to increase minimum efficiency requirements for covered equipment, DOE should act promptly to publish a NOPR with the expectation that the applicable ASHRAE Standard 90.1 levels will be adopted as a final rule within 18 months. (Joint Commenters, No. 51 at p. 33)

Lennox stated that the Process Rule should be applied to commercial equipment except when it would conflict with special statutory provisions specific to commercial equipment rulemakings, such as provisions for adopting ASHRAE 90.1 industry standards. For commercial equipment covered by ASHRAE Standard 90.1, Lennox pointed out that DOE must adopt the industry standard unless "clear and convincing evidence" dictates otherwise. (42 U.S.C. 6313(a)(6)(A)(ii)) It stated that if DOE simply adopts ASHRAE Standard 90.1 standards, the additional provisions in the Process Rule are not necessary. However, if DOE considers promulgating regulations more stringent than ASHRAE 90.1 standards, Lennox argued that DOE should follow the Process Rule. Moreover, according to Lennox, the Process Rule should clarify the high bar for what constitutes "clear and convincing evidence" for promulgating a standard

more stringent than ASHRAE Standard 90.1. (Lennox, No. 62 at p. 8) The Joint Commenters agreed with Lennox that an amended Process Rule should develop an interpretation of what the higher bar of "clear and convincing" evidence means for the establishment of energy conservation standards. The Joint Commenters stated that in recent years, DOE has published rules that adopt more stringent standards than the national uniform consensus ASHRAE 90.1 energy efficiency standards and has not taken steps to demonstrate that their findings meet a higher threshold of evidentiary proof. They stated that EPCA provides a statutory presumption that standards more stringent than those required by ASHRAE Standard 90.1 are not necessary, and that presumption can be rebutted only on the basis of "clear and convincing evidence." (Joint Commenters, No. 51 at p. 34) (Also see, AHRI, January 9, 2018 Public Meeting Transcript at p. 188, for the proposition that DOE should codify the clear and convincing burden of proof standard for when DOE seeks to go beyond the ASHRAE levels.)

The Joint Commenters also stated that DOE needs evidence to support its assumptions in every case, and it needs even more evidence when the "clear and convincing" standard applies. The commenter argued that the "clear and convincing" standard is more demanding than the "reasonable" standard required for non-ASHRAE rulemakings. The Joint Commenters added that an assumption is not even "reasonable" in the absence of any evidence of its validity (*i.e.*, unless it is supported by "substantial evidence," which EPCA requires in the case of standards for consumer products under 42 U.S.C. 6306(b)(2)). The Joint Commenters gave as an example the single package, vertical unit rulemaking in which DOE raised the standard level over the ASHRAE minimums, arguing that if DOE had developed the required evidence, the agency would have reached a different and better result. (Joint Commenters, No. 51 at pp. 34-35)

One commenter (AHRI) stated that to the extent DOE plans on conducting an ASHRAE rulemaking that goes above the ASHRAE Standard 90.1 standards level, the full Process Rule should apply. Also, if DOE is doing a six-year review of ASHRAE standards and DOE is initiating that review, AHRI argued that the full Process Rule should apply. However, if a rule is being conducted based upon and consistent with an ASHRAE change, AHRI suggested that the process should be the same as it is now. (AHRI, January 9, 2018 Public Meeting Transcript at pp. 185-186)

In this proposal, DOE has tentatively determined that the amended Process Rule will contain a new section that clearly delineates the procedure DOE will follow for evaluating amendments to ASHRAE Standard 90.1 and conducting related rulemakings. First, DOE's statutory obligations for ASHRAE equipment will be reiterated in this new section. Through its amended Process Rule, DOE is also announcing its tentative decision that, going forward, DOE anticipates adopting the revised ASHRAE levels as contemplated by EPCA, except in very limited circumstances as discussed below. (42 U.S.C. 6313(a)(6)(A)(ii)(II)) DOE's commitment to adopting the amended ASHRAE Standard 90.1 level(s) as its regular practice will result in reducing the regulatory burden on stakeholders and will promote consistency and simplicity when DOE is addressing ASHRAE equipment.

With respect to DOE's consideration of more-stringent standards than the ASHRAE levels, DOE tentatively takes the position that for DOE to utilize its statutory authority to establish more-stringent standards than the amendments to ASHRAE Standard 90.1 pursuant to

42 U.S.C. 6313(a)(6)(A)(ii)(II), DOE will be required to meet a very high bar to demonstrate the "clear and convincing evidence" threshold that is articulated in this latter subsection. When evaluating whether it can proceed with a rulemaking to potentially establish more-stringent standards than those adopted by ASHRAE, 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. Moreover, DOE proposes that clear and convincing evidence would exist only if:

<u>Given the circumstances, facts, and data that exists for a particular ASHRAE amendment, DOE determines there is no substantial doubt that the more stringent standard would result in a significant additional conservation of energy, is technologically feasible and economically justified.</u>

This high bar would mean that only in extraordinary circumstances would DOE conduct a rulemaking to establish more-stringent standards for covered ASHRAE equipment. In the event that DOE determines that such a rule is possible, all of the Process Rule requirements would apply. However, for the typical situation wherein DOE is adopting the ASHRAE Standard 90.1 level(s), DOE would follow the EPCA statutory requirements and not be required to follow additional Process Rule requirements.

Making clear that DOE will adopt the action taken by ASHRAE except in rare circumstances raises the question as to how broadly DOE is triggered by ASHRAE action in amending Standard 90.1. For example, if ASHRAE acts to amend its standard at the equipment

class level for air-cooled variable refrigerant flow (VRF) multi-split air conditioners greater than or equal to 65,000 Btu/h and less than 135,000 Btu/h, is DOE triggered to consider amended standards: (1) only for that specific equipment class that was actually amended in ASHRAE 90.1; (2) for the entire equipment category of VRF equipment, or (3) for the entire covered equipment type of small commercial package air conditioning and heating equipment? EPCA does not specifically define the term "amended" in the context of ASHRAE Standard 90.1. Although the statute is not entirely clear on this matter, DOE has maintained a consistent position for over a decade, at least since it interpreted what would constitute an "amended standard" in a final rule published in the *Federal Register* on March 7, 2007. 72 FR 10038. In that rule, DOE stated that the statutory triggering event requiring DOE to adopt uniform national standards based on ASHRAE action is for ASHRAE to change a standard for any of the equipment listed in EPCA section 342(a)(6)(A)(i) (42 U.S.C. 6313(a)(6)(A)(i)) by increasing the energy efficiency level for that equipment. Id. at 10042. In other words, if the revised ASHRAE Standard 90.1 leaves the standard level unchanged or lowers the standard, as compared to the level specified by the national standard adopted pursuant to EPCA, DOE does not have the authority to conduct a rulemaking to consider a higher standard for that equipment pursuant to 42 U.S.C. 6313(a)(6)(A). DOE subsequently reiterated this position in final rules published in the *Federal Register* on July 22, 2009 (74 FR 36312, 36313), May 16, 2012 (77 FR 28928, 28937), and July 17, 2015 (80 FR 42614, 42617).

In the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112-210 (Dec. 18, 2012), Congress modified several provisions related to ASHRAE Standard 90.1 equipment. In relevant part, DOE must act whenever ASHRAE Standard 90.1's "standard

level or design requirements under that standard" are amended. (42 U.S.C. 6313(a)(6)(A)(i)) Furthermore, that statutory amendment required that DOE must conduct an evaluation of each class of covered equipment in ASHRAE Standard 90.1 "every 6 years." (42 U.S.C. 6313(a)(6)(C)(i))

In practice, DOE's review in making this assessment has been strictly limited to the specific standards for the specific equipment for which ASHRAE has made a change (*i.e.*, determined down to the equipment class level). DOE believes that this is the best reading of the statutory provisions discussed previously, because if ASHRAE were to change the standard for a single equipment class, but DOE then considered itself triggered at the equipment category level or equipment type level, the process would arguably no longer comport with the statutory scheme. More specifically, in such cases, DOE would be addressing certain classes of ASHRAE equipment for which standards had not changed, so it would be impossible for DOE to adopt the ASHRAE level as the statute envisions (as it would already be the same as the existing Federal standard). Instead, DOE could only consider adoption of more-stringent standard levels. Such interpretation would arguably run counter to the "follow ASHRAE" statutory structure set in place by Congress. Furthermore, Congress specifically and recently added a 6-year-lookback provision for covered ASHRAE equipment at 42 U.S.C. 6313(a)(6)(C)(i), a provision which arguably instructs DOE in terms of how and when to address covered equipment upon which ASHRAE has not acted in a timely manner. However, DOE believes that ASHRAE not acting to amend Standard 90.1 is tantamount to a decision that the existing standard remain in place. Thus, as required by 42 U.S.C. 6313(a)(6)(C), DOE would need to find clear and convincing

evidence, as defined above, to issue a standard more stringent than the existing standard for the product. DOE welcomes comments, data, and information on this topic.

D. Priority Setting

The current Process Rule at 10 CFR part 430, subpart C, Appendix A, section 3(d) outlines DOE's priority-setting analysis, which considers ten factors: (1) potential energy savings; (2) potential economic benefits; (3) potential environmental or energy security benefits; (4) applicable deadlines for rulemakings; (5) incremental DOE resources required to complete the rulemaking process; (6) other relevant regulatory actions affecting products; (7) stakeholder recommendations; (8) evidence of energy efficiency gains in the market absent new or revised standards; (9) status of required changes to test procedures; and (10) other relevant factors. The current Process Rule requires that the results of this analysis will be used to develop rulemaking priorities and proposed schedules for the development and issuance of all rulemakings which will then be documented and distributed for review and comment. 10 CFR part 430, subpart C, Appendix A, section 3(a). The Process Rule also states that each fall, DOE will issue, simultaneously with the Administration's Regulatory Agenda, a final set of rulemaking priorities, the accompanying analysis, and the schedules for all priority rulemakings that it anticipates within the next two years. Id. at section 3(c).

In this document, while DOE intends to continue considering the 10 factors in its priority-setting, DOE proposes to revise the process discussed above. In the past, DOE has not successfully fulfilled its prioritization objectives as outlined in the Process Rule, perhaps in part because DOE determined that the analysis described in the current Process Rule is reflected in

the Regulatory Agenda, which is available to the public. In any event, DOE sees value in streamlining and clarifying the reporting of its priority-setting activities in the revised Process Rule. Going forward, DOE is proposing that stakeholders would have the opportunity to provide input on prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring. In particular, DOE would point interested parties to the Regulatory Agenda posted to *www.reginfo.gov* the previous fall and would request input concerning which rulemaking proceedings should be in particular action categories in the spring Regulatory Agenda and the timing of such rulemakings. If stakeholders believe that the Department is pursuing a rule that should not be prioritized, they would have the opportunity to use this mechanism to so inform DOE. If stakeholders believe DOE should act more quickly on another rulemaking they could make that point as well. Through this revised process, DOE has tentatively concluded that increased stakeholder input early in the rulemaking process, combined with the public availability of the Regulatory Agenda, would meet the same objectives as DOE's previous priority-setting analysis.

E. Coverage Determinations

In addition to specifying a list of covered residential and commercial products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products and industrial/commercial equipment as "covered" within the meaning of EPCA. (42 U.S.C. 6292(b); *see also* 42 U.S.C. 6295(l) for consumer products; 42 U.S.C. 6312 for commercial and industrial equipment) This authority allows DOE to consider regulating additional products/equipment that further the goals of EPCA; that is, to conserve energy for the Nation as long as the statutory threshold requirements are met.

If DOE determines to initiate the coverage determination process, it will first publish a notice of proposed determination, limited to the issue of coverage, 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. (42 U.S.C. 6292(b)(1)) In the case of commercial/industrial equipment, DOE follows the same process, except that the Department need only show the coverage determination is "necessary" to carry out the purposes of EPCA. (42 U.S.C. 6312) DOE's authority to add commercial equipment is more limited than its authority to add consumer products because Congress specified the particular types of equipment that could be added. (42 U.S.C. 6311(2)(B)) Stakeholders would then be given 60 days to submit written comments to DOE on the proposed determination notice. Subsequently (and in a change from DOE's past practice), DOE would assess the written comments and then publish its final decision on coverage as a separate notice, an action which would be completed prior to the initiation of any rulemaking for related test procedures or energy conservation standards. If the final decision determines that coverage is warranted, DOE will proceed with its typical rulemaking process for both test procedures and standards, applying the requirements of the Process Rule, as amended. Specifically, DOE would not issue any 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 prior to finalization of the coverage determination. DOE will also finalize coverage for a product at least six months prior to publication of a proposed rule to establish a test procedure. And, DOE will complete the test procedure rulemaking at least six months prior to publication of a proposed

energy conservation standard. This timing does not present any legal issue because adding coverage for a product and establishing test procedures and standards is a purely discretionary act without legal deadline.

The Joint Commenters, citing to 42 U.S.C. 6292(b)(1)(A), argued that DOE should exercise its authority to identify new "covered products" in a limited fashion, extending only to those products for which EPCA regulation is "necessary or appropriate" to the achievement of EPCA's purposes. They further argued that DOE's authority to identify new "covered products" is limited to products that consume at least enough energy to satisfy a stated minimum energy consumption criterion. The Joint Commenters urged that coverage determinations be made on a product-specific basis with each new covered product being defined separately with sufficient clarity to ensure that products serving different purposes are not treated as a single covered product. They added that each product should individually satisfy the minimum energy consumption requirement and qualify as a "necessary or appropriate" target for regulation. The Joint Commenters advocated that the Process Rule should be amended to require that proposed and final coverage determinations under 42 U.S.C. 6292(b) specifically identify each of the products at issue and provide a separate justification for the coverage of each. They further added that DOE has failed to satisfy these requirements in the past. Moreover, the Joint Commenters recommended that a final coverage determination be in place before substantive rulemaking on test procedures or energy conservation standards commences so that the public clearly understands which products are covered, thus avoiding unnecessary confusion, wasted resources, and the failure to address critical issues. Lastly, the Joint Commenters suggested that the current Process Rule requires a reopening of comment on the justification for a coverage

determination during the first rulemaking in which substantive regulation is imposed and if broader coverage is required, a new coverage determination must be proposed and finalized before initiating a rulemaking to regulate the broader range of products. (Joint Comment, No. 51 at pp. 9-10) Whirlpool and Lutron expressed support for these views. (*See* Whirlpool, No. 76 at p. 1; Lutron, No. 50 at p. 2)

DOE agrees with the points raised by the Joint Commenters, discussed above, that DOE should exercise its authority to identify new "covered products" in a limited fashion. To this end, DOE proposes to extend coverage only to: (1) those consumer products for which EPCA regulation is "necessary or appropriate" to the achievement of EPCA's purposes and which meet statutory consumption criterion, and (2) to that commercial/industrial equipment for which EPCA regulation is "necessary" to the achievement of EPCA's purposes. DOE agrees that any proposed new covered products/equipment should be narrowly defined with sufficient clarity so that the proposed coverage corresponds to that which is intended.

DOE does not agree with the Joint Commenter's suggestion that all coverage determinations must be reopened as a matter of course in the first substantive rulemaking on the newly covered product/equipment. After completing notice and comment on a proposed coverage determination and issuing a final determination, DOE believes it is appropriate to accord such process finality. However, if during the substantive rulemaking proceeding DOE finds it necessary and appropriate to expand or reduce the scope of coverage, the Department agrees with the Joint Commenter's that a new coverage determination process at that point

should be initiated and finalized prior to moving forward with the test procedure or standards rulemaking.

F. Early Stakeholder Input to Determine the Need for Rulemaking

1. Standards

In the December 2017 RFI, DOE sought comment on whether the Process Rule should be revised to eliminate its current provisions related to the publication of an advanced notice of proposed rulemaking ("ANOPR") because of statutory amendments that eliminated the ANOPR requirement and/or to include additional preliminary rulemaking steps. 82 FR 59992, 59995. DOE received a number of comments regarding both the elimination of the ANOPR and the inclusion of other avenues for early stakeholder input, which are discussed in further detail, along with DOE's response, in the subsections immediately following.

a. Avenues for Early Stakeholder Input: Early Assessment Review

In response to comments discussed below, DOE proposes adding a process for an early assessment review of a potential rule. For example, the Joint Commenters recommended that DOE should adopt "a quick hard look process" for use at an early juncture in the rulemaking to determine whether a standard needs to be amended. The Joint Commenters stated that this type of preliminary evaluation procedure would allow DOE to focus its resources on rulemakings offering the potential for significant energy savings. In those instances where opportunities for energy savings are not significant or an amended standard is not technologically feasible or economically justified, DOE could make a determination to not amend standards. The Joint Commenters argued that such an approach would continue to allow DOE to meet its statutory

obligations, while focusing the regulatory process on those areas where the most benefit can be obtained and at the same time reducing the burden on stakeholders. As part of this "quick hard look," the Joint Commenters recommended that DOE should publish an RFI seeking information that would assist the Department in determining whether anything has changed (technologically, economically, or otherwise) since the last final rule as would necessitate amended standards. Under this preliminary assessment procedure, the Joint Commenters presume that standards would not need amendment unless DOE or stakeholders identify significant changes since the last rulemaking. (Joint Commenters, No. 51 at pp. 4-6)

In contrast to the Joint Commenters, the Appliance Standards Awareness Project ("ASAP") Joint Commenters did not support a separate "quick look" process to determine whether a full rulemaking is necessary. The ASAP Joint Commenters argued that existing law already provides the necessary framework for DOE to quickly determine, after notice and comment, that no change is warranted for a particular standard. (ASAP Joint Comment, No. 75 at p. 6)

In response to the Joint Comment, DOE agrees generally with the need for an early assessment review at the beginning of the rulemaking process to allow DOE to focus its resources appropriately, and an understanding of any changed circumstances since the last final rule would certainly be relevant to that inquiry. DOE notes that it discusses significant energy savings in detail later in this proposal (see section III.G). An assessment of the potential energy savings at issue would also be an important consideration when evaluating the need for further rulemaking. Thus, DOE is proposing to adopt provisions in the revised Process Rule that would

provide for an early assessment review of the suitability of further rulemaking, thereby allowing both the agency and interested stakeholders to conserve and target limited resources so as to achieve the greatest benefit. Therefore, as the first step in any proceeding to consider establishing or amending any energy conservation standard, DOE proposes to publish a notice in the *Federal Register* announcing that DOE is considering initiation of a proceeding, and as part of that notice, DOE would request submission of related comments, including data and information showing whether any new or amended standard is economically justified, technologically feasible or would result in a significant savings of energy. If DOE receives sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, DOE would engage in notice and comment rulemaking to make that determination. If DOE does not receive sufficient information 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. Beginning such a rulemaking, however, would not preclude DOE from later making a determination that a new or amended energy conservation standard is not economically justified, technologically feasible or would not result in a significant savings of energy.

b. Other Avenues for Early Stakeholder Input

In response to comments discussed below, DOE will continue to seek early stakeholder input after the early assessment review. A number of commenters stressed the importance of early stakeholder input during the rulemaking process. (UT-Carrier, No. 41 at p.4; Sub Zero, No. 43 at p. 4; Ice-O-Matic, No. 29 at p.1; NAFEM, No. 47 at p. 2) The California Investor-Owned Utilities ("CA IOUs") urged that as part of such engagement, DOE should perform

testing and research so as to generate publicly-available information to inform the process. (CA IOUs, No. 65 at p. 5) Other commenters touted early stakeholder input as a means of understanding the industry's own efforts to advance energy efficiency. (*See e.g.,* Schneider Electric, No. 69 at p. 2) CEC stated that for newly covered products, a Framework Document is likely appropriate, whereas for previously covered products, a Request for Information would probably be adequate. CEC added that depending on the product, a Preliminary Technical Support Document or Notice of Data Availability should typically precede a NOPR. (CEC, No. 53 at p. 4)

In response to these comments, DOE agrees that early stakeholder input is an important part of the rulemaking process, particularly when it comes to information exchange. In the November 6, 2010, policy statement (*https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/changes_standards_process.pdf*), DOE stated that "the energy conservation standards rulemaking process typically began with a framework document, followed by a preliminary analysis. Only after these two steps were completed did the Department issue a proposed rule for public comment. While the framework document and preliminary analysis provide useful information, there are more efficient ways of gathering data. Accordingly, in appropriate cases, the Department will gather the needed preliminary data informally and begin the public rulemaking process with the issuance of a proposed rule for public comment." DOE now proposes, however, that after conducting the early assessment review process described above, if the Department does not receive sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, or the information received is

inconclusive with regard to the statutory criteria, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE would undertake would be the framework document and preliminary analysis or an ANOPR. These documents, as opposed to "informal" data gathering, would provide the necessary robust analysis to determine whether to move forward with a proposed standard. RFIs and NODAs could be issued, as appropriate, in addition to these analytical documents, and the Department will continue to rely on a variety of notices (including those mentioned by the commenters) to ensure opportunities for public input in the rulemaking process.

c. Elimination of ANOPRs from the Process Rule

A number of commenters spoke specifically about the use of ANOPRs during the rulemaking process, including whether DOE should follow through on removal of that step in the rulemaking process, given the statute's rescission of such requirements. Several commenters did not support the elimination of the ANOPR from the Process Rule, stating that it helps to ensure early stakeholder input in the process. (Bradford White, No. 42 at pp. 1-2; Atlas Copco, No. 54 pp. 7-8; Ice-O-Matic, No. 29 at p. 2; Spire, No. 57 at p. 14; ABMA, No. 71 at p. 2; Lennox, No. 62 at p. 7) Acuity Brands added that ANOPRs can improve the quality of proposed rules/standards, in part by obtaining prompt input on topics such as defining terms and scope and setting criteria for data modeling. Without stakeholder involvement at the front end of the process, the commenter argued that there is a higher risk of proceeding with erroneous assumptions, which could negatively impact the NOPR. As part of the ANOPR (or at a similar preliminary stage), Acuity Brands recommended that DOE should undertake consideration of the effect of any current standards, in order to assess the usefulness, scope, and parameters of a new

rulemaking. (Acuity Brands, No. 46 at pp. 3-4) The National Propane Gas Association ("NPGA") did not favor the elimination of ANOPRs because early stakeholder engagement encourages the exchange of valuable information and transparency. (NPGA, No. 59 at p. 2) In contrast, two commenters supported the elimination of the ANOPR in order to reflect the Congress's change to the statute, reminding that DOE has alternative ways to achieve the same objectives. (Sierra Club and Earth Justice, No. 66 at p. 5; NPCC, No. 35 at p.7, 15; CEC, No. 53 at p. 4)

Others expressed support for either an ANOPR or a similar method for early stakeholder involvement. (Southern Company, No. 70 at p. 4; APPA, No. 36 at p. 3; EEI, No. 72 at p. 3; ASAP Joint Comment, No. 75 at p. 7; PHCC, No. 63 at p. 2) The Northeast Energy Efficiency Partnerships ("NEEP") commented that data collection early in the rulemaking process helps to ensure a successful rule in the end. It further stated that DOE has several available options for obtaining advanced information: ANOPRs, Framework Documents, Preliminary Analyses, NODAs, and/or RFIs. Because of the wide breadth of consumer appliances and commercial equipment that DOE regulates, NEEP commented that DOE should select the tool that is most appropriate for a given products/equipment rulemaking. (NEEP, No. 77 at p. 3)

In response to these comments, DOE has tentatively concluded that there are multiple procedures the agency could adopt as part of the revised Process Rule that achieve the aims of early information gathering in the rulemaking process. The ANOPR might be preferable in a given proceeding. Alternatively, an RFI or Notice of Data Availability would allow for early stakeholder input through a request for comments in circumstances where DOE may not have

sufficient information to develop an ANOPR. DOE might issue a Framework Document and Preliminary Analysis where DOE received information in response to the early look that might have been inconclusive with regard to the need for a new or amended standard, and DOE seeks additional input to help make that determination. These alternate tools should equally promote transparency in DOE's process and allow for early information exchange. In all cases, however, contrary to DOE's November 2010 policy statement, DOE will provide for some form of preliminary data gathering and public comment process, including either an ANOPR or Framework Document and Preliminary Analysis, prior to issuing a proposed rule.

d. Decision-making Process for Issuing a Determination Not to Amend Current Standards

DOE received a number of comments regarding the potential for DOE's issuance of a determination not to amend a current energy conservation standard. These comments fell within two groups – those that supported the potential for such a determination and those that did not.

Commenters at the January 9, 2018, public meeting supported DOE's review of the suitability of pursuing amended standards for a given type of product or equipment at the start of a rulemaking. In cases where covered products have undergone multiple amended standards rulemakings to date, these commenters asserted that DOE's analyses have demonstrated diminishing returns that either left little room for technical improvement to move energy efficiency beyond the current minimum efficiency standard or indicated that the highest efficiency models have already achieved a significant share of the market. These commenters added that, in their view, DOE and stakeholders understand that amending the standards for

certain products/equipment would be unlikely to result in significant energy savings and present either serious economic or technological obstacles to further improve efficiency. For such products/equipment, these commenters suggested that DOE should exercise the opportunity to issue a determination pursuant to EPCA that the applicable standards will remain unchanged without going through the usual costly suite of analyses (*i.e.*, market, manufacturer impact teardown, and LCC analyses) and multiple rounds of amendment proposals and comment periods. In their collective view, the continued application of this approach, is neither required by statute, nor a good use of DOE's resources. AHRI in particular recommended that the Process Rule should specify that the opportunity to issue a notice determining that no new standard is needed will occur early in the rulemaking process so that DOE, industry, and other stakeholders can allocate time and resources to focus on those products/equipment that are the best candidates for improvement based on technological feasibility and economic opportunity. It added that such an approach would need to be designed to meet all statutory timelines and requirements. (AHRI, January 9, 2018, Public Meeting Transcript at pp. 25-27, 182-183, 250; AHAM, January 9, 2018, Public Meeting Transcript at pp. 30-32, 177-179)

Other industry commenters held similar views. The American Public Power Association ("APPA") supported the inclusion of guidelines regarding the issuance of determinations that no amended standards are warranted, particularly in cases where it would apply to products for which little energy savings would result due to declining shipments. (APPA, No. 36 at p. 4) Ice-O-Matic supported the inclusion of such guidelines and argued in favor of formalizing a process for the immediate assessment of whether an amended standard is required. It argued that many covered products and equipment have undergone multiple rulemakings, and the pace of normal

technological development shows a diminishing rate of return with each rulemaking. The company stressed that DOE has the ability under EPCA to allow a standard to remain static after first determining from available data that there will be little return from a future rulemaking. In its view, the current approach of fully reviewing a given standard creates high levels of "non-valued added work" for the Department of Energy and stakeholders. (Ice-O-Matic, No. 29 at p. 1)

NEMA commented that the Process Rule must fit within the statutory parameters and take into account DOE's experience with EPCA over the past several decades. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 45-48) In NEMA's view, DOE's Energy Conservation Program has reached in some cases, or is reaching in other cases, a point of maturity for many covered products. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 48-49) The energy savings to date stemming from these standards are very large, and the program, by that metric, has achieved a measure of success. NEMA argued that for a number of regulated products, DOE's rulemaking experience indicates that the limit of efficiency improvements through further rulemaking has occurred or is fast approaching. In NEMA's view, DOE should re-examine its approach used to-date for undertaking rulemakings to amend a given standard for a covered product. (NEMA, January 9, 2018, Public Meeting Transcript at p. 46) According to NEMA, this approach of continuing the pursuit of a full-blown multi-year regulatory process under the Administrative Procedure Act in the face of likely diminishing returns on energy savings is costly for both the government and the stakeholders who participate in DOE's rulemakings. In NEMA's view, if the public is going to continue to invest in this regulatory process, where products have been subject to multiple rulemakings over time, it should be on the

basis that there are very significant economic benefits to be realized at a reasonable cost. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 46-47) Accordingly, NEMA suggested that when reviewing whether a covered product is a suitable candidate for amended standards, DOE should inquire whether further efforts at amending the standards are really needed. (*Id*.)

NEMA also commented that when the current Process Rule was first adopted in 1996, DOE had little experience with rulemakings, and part of the intent behind the Process Rule was to find an efficient means forward for gaining that experience. It stated that the Process Rule was aimed at prioritizing regulatory activity in a manner consistent with the statute as written at that point in time, and it relied on scarce appropriated funds that Congress had provided for the program. A modern Process Rule, NEMA argued, needs to fit with both DOE's experience and the statute as it is now written. (NEMA, January 9, 2018, Public Meeting Transcript at p. 48) With a modernized version of the Process Rule, NEMA asserted that DOE should be able to determine very quickly in the next rulemaking cycle for any given covered product or equipment, whether the current situation has changed so significantly as to warrant a different conclusion. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 48-49)

AHRI added that it did not believe that a determination not to amend the current standards for a given product or equipment would require the development of additional criteria beyond those already used by DOE in its analyses. It argued that this assessment should be made pursuant to EPCA and suggested developing a process for doing so. (AHRI, January 9, 2018 Public Meeting Transcript, at p. 250)

Lennox argued that DOE should more actively consider "no amended standard" scenarios, and to this end, DOE should apply presumptions against over-regulation as part of this consideration. By having robust presumptions against new or more stringent regulations – for instance, by applying an approach that avoids new efficiency standards where 20 percent or more of consumers would be "economically harmed"—these presumptions would, in Lennox's view, protect manufacturers from over-regulation. Lennox argued that applying this type of approach would be better than trying to develop a one-size-fits-all approach definition of significant energy savings. (*See* Lennox, No. 17 at pp. 14-15)

Spire argued that the Process Rule should specify appropriate decision criteria to preclude the adoption of standards that impose net costs on too many purchasers or that are overly regressive for which average payback periods are unreasonably long and that would have excessive adverse impacts on manufacturers. (Spire, No. 57 at p. 22) Spire added that DOE should be required to provide more than "'substantial evidence" in support of a proposed standard, particularly in those instances where a "clear and convincing" standard "is required by anyone attempting to refute EERE's findings." *Id*. In its opinion, DOE and interested parties with a dissenting view of a proposed standard should share the same evidentiary burden. (*Id*.)

NAFEM also argued in favor of applying a "no amended standards" determination. It asserted that because certain products have gone through multiple rounds of standards rulemaking, improvements in energy savings are becoming harder to obtain at costs the market is able to bear. In its view, regulations are outpacing product and equipment design and life-cycles,

and the data about the real world outcomes of the last round of rulemaking are not available by the time the next rulemaking starts. NAFEM stated that EPCA allows for a determination that no new standards are needed and that DOE needs to consider taking this route in appropriate cases. (NAFEM, No. 47 at pp. 4-5)

EEI and Southern Company indicated that with some products there is little margin for improvement, so for these products, it makes no sense to invest resources for only limited further gain in energy savings. (EEI, January 9, 2018, Public Meeting Transcript at pp. 251-252; Southern Company, January 9, 2018 Public Meeting Transcript at p. 253)

With respect to the contours of a possible approach that DOE could follow, NEMA referred to the Direct Heating Equipment final rule as an instance providing lessons for other future rulemaking proceedings. In that case, DOE determined early on not to amend the energy conservation standard by comparing the current market for the covered product against the market that it evaluated six years earlier. NEMA argued that section 325(m) (42 U.S.C. 6295(m)) provides the opportunity to quickly look and determine early on whether standards need further amending. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 49-50) In NEMA's view, a modernized version of the Process Rule should invite public comment at the outset of every rulemaking proceeding examining a given energy conservation standard as to whether DOE should: (1) amend that standard after accounting for what has been accomplished with that particular product/equipment since the previous rulemaking and (2) discuss any changes (technological or otherwise) that have occurred since that time. It further asserted that DOE's modernized Process Rule could also inquire as to whether the prior rulemaking contained

any erroneous conclusions or assumptions. Additionally, NEMA stated that DOE should focus on asking whether there are opportunities for increasing deployment by customers and users of energy-consuming products of the most efficient set of already efficient products that remain in the marketplace (instead of establishing new minimum energy conservation standards for a given covered product where the regulatory limit has effectively been reached). NEMA mentioned that both the current Process Rule and Executive Orders encourage consideration of non-regulatory approaches to achieving statutory goals – and where the EPCA program has reached maturity, other approaches may offer better ways of achieving incremental, permanent energy savings over time. (NEMA, January 9, 2018, Public Meeting Transcript at pp. 50-52)

Acuity Brands also suggested that DOE should develop a "quick look" process before engaging in "serial" rulemakings for covered products in order to assess early on whether new, higher energy conservation standards are warranted. In its view, such early determinations will save time and resources by avoiding standards updates that would not produce significant energy savings. It added that adopting such an approach would focus DOE's process on ensuring that proposed standards offer actual utility and value to consumers and towards DOE's energy efficiency goals, in part by accounting for technological advancements, changes in marketplace demand, and other real-world dynamics. (Acuity Brands, No. 46 at p. 8)

In contrast, the Northwest Power and Conservation Council ("NPCC") expressed the view that EPCA already provides DOE with more than sufficient guidance and flexibility to make a "no new standards" determinations without needing to add criteria to the Process Rule. (NPCC, No. 35 at p. 21) NEEP articulated a similar view, asserting that there would be no

benefit to adding criteria to the Process Rule for reaching no amended standards determinations. (NEEP, No. 77 at p. 5) The CEC also stated that the statutory criteria in EPCA are already adequate and allow for a determination of "no amended standards." It did not, however, object to DOE revising the Process Rule to conform to EPCA. (CEC, No. 53 at p. 7) The CA IOUs acknowledged that EPCA allows for a "no new standards" determination, but they asserted that DOE would need to go through the complete rulemaking process to determine the impact of updated standards. Consequently, they opposed the suggestion that a no new standards determination could be made through a truncated (*i.e.*, abbreviated or quick) process. (CA IOUs, No. 65 at p. 9)

While DOE considers four factors in screening energy conservation standard design options, Nor-Lake pointed out that DOE does not consider the economic impact to manufacturers from revising a standard until after a proposed standard has been selected. In its view, the Process Rule should also gauge the economic impact to manufacturers during the "screening" phase; otherwise, DOE may only be left with options that all have economically detrimental impacts on manufacturers, often with only minimal energy conservation results. Accordingly, Nor-Lake argued that the inclusion of this evaluation at the earliest stage of the rulemaking process (*i.e.*, screening analysis) may save many unnecessary steps in the protracted regulatory process. (Nor-Lake, No. 68 at pp. 2-3)

After careful consideration, DOE responds to these comments as follows. In those instances where the early hard look either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, DOE has

tentatively decided to develop a process by which it will examine the potential costs and benefits of a new standard that will enable it to more expeditiously review and determine whether to amend a given energy conservation standard. The process would apply both to instances where DOE is establishing a new standard and in cases where DOE is weighing whether to amend an already-existing standard. Performing this task in an expeditious manner – *i.e.*, something short of initiating the usual three-year process involved in proposing and finalizing a new standard – is consistent with the statute (*see* 42 U.S.C. 6295(m) (providing that the Secretary shall publish either a notice of determination that standards for a product do not need to be amended or a proposal with new standards). In determining whether to move forward with a given standards rulemaking, DOE intends to address a series of issues that, while more expeditious than a complete rulemaking analysis, will nonetheless be supported by a thorough analysis to ensure that DOE proceeds with only those rulemakings that are likely to yield a significant conservation of energy and be technologically feasible and economically justified. That process would consider a variety of factors, such as whether there are sufficiently developed, cost-effective technological improvements that would allow a given product to achieve an enhanced level of efficiency. The level of improvement under consideration would need to be consistent with the threshold for significant energy conservation, as discussed elsewhere in this document. In evaluating the prospects of proposing a new standard—or in determining that no new standard is needed—DOE would first look to the projected energy savings that are likely to result using available information solicited from the public through an ANOPR, preliminary analysis, RFI or NODA, as appropriate. DOE would then compare these projected savings against the technological feasibility of, and likely costs necessary to meet, the amended standards needed to achieve these energy savings. DOE disagrees with commenters who insist DOE must always go

through the full analysis, because if potential amended standards can be shown to be lacking in terms of significant energy savings, technological feasibility, or economic justification, DOE cannot adopt them regardless of whether DOE makes such determination at an early stage or upon completion of its full suite of analyses.

In the Department's view, applying this new approach would enable DOE to more readily ascertain whether the expenditure on a rulemaking of its limited resources and those of interested parties is merited for a given regulated product or equipment. DOE believes that this proposed approach, if adopted, would enable it to focus its efforts in the most efficient manner possible, while satisfying its legal obligations.

DOE seeks comment on its initial decision-making process for determining whether to proceed with a standard rulemaking, including what specific criteria, factors, or circumstances it should apply when conducting this proposed approach.

2. Test Procedures

As with the early stakeholder input process for energy conservation standards, DOE believes that early stakeholder input is also very important during test procedure rulemakings. Consequently, DOE proposes to publish a notice in the *Federal Register* announcing whenever DOE is considering initiation of a rulemaking for new or revised test procedures. Particularly when considering amended test procedures, DOE would follow an early assessment process similar to that described in the preceding sections discussing DOE's consideration of new or amended energy conservation standards. As part of such notice, DOE would request submission

of related comments, including data and information substantively showing that an amended test procedure rule is not necessary at that time and that DOE should not proceed with the rulemaking. DOE would review these comments and, subject to its statutory obligations, determine whether it agrees with the submitted information. If DOE agrees that the test procedure is not justified at that time, it would not pursue the rulemaking and would publish a notice to that effect.

However, these documents would offer stakeholders the chance to provide DOE with feedback on such test procedures, including information about industry-based test procedures that may meet the same need as those proposed by DOE.

G. Significant Savings of Energy Threshold

DOE received numerous comments regarding whether it should determine or otherwise apply a threshold with respect to whether the projected energy savings for a given standard would be significant for purposes of satisfying the statutory requirements under EPCA. (*See* 42 U.S.C. 6295(o)(3)(B) (providing, among other things, that the Secretary may not prescribe an amended or new standard that "will not result in significant conservation of energy")) Applying such a threshold would determine whether DOE proceeds forward with a rulemaking to amend or establish energy conservation standards for a given covered product or covered equipment. Comments are discussed immediately below, followed by DOE's response.

A number of industry commenters suggested during the January 9, 2018, public meeting that DOE should determine an appropriate threshold of what constitutes significant energy

savings. AHRI, for example, indicated that using a reasonable threshold for energy savings would permit DOE and industry to allocate resources to improve technologies that will have the greatest impact. (AHRI, January 9, 2018 Public Meeting Transcript at pp. 28-29, 264; AHAM, January 9, 2018 Public Meeting Transcript at p. 32; Spire, January 9, 2018 Public Meeting Transcript at 261)

Interested parties who submitted written comments also indicated that DOE should focus on standards rulemakings that produce significant energy savings. In that vein, they suggested that DOE should take steps to define a threshold level for significant energy savings, which some argued would help avoid producing regulations yielding a small reduction in energy usage but requiring a significant expenditure of resources to meet and resulting in higher product and equipment prices for consumers. (*See* Ice-O-Matic, No. 29 at p. 2; Nor-Lake, No. 68 at p. 2; Lutron, No. 50 at p. 2; ABMA, No. 71 at p. 4; and Whirlpool, No. 76 at p. 1) Ice-O-Matic argued that DOE has conducted rulemakings in the past producing "a very small total energy reduction" while requiring manufacturers and stakeholders to expend many months and years of work for a very small total payback, thereby "resulting in negative impacts on consumers due to higher product and equipment prices." (Ice-O-Matic, No. 29 at p. 2) ABMA, which focused its attention on issues related to boilers, supported the use of a baseline for significant energy savings, particularly since, in its view, current boiler designs may be close to the point of diminishing returns with respect to improved efficiency for this product. (ABMA, No. 71 at p. 4)

In ascertaining what constitutes "significant" energy savings, Nor-Lake urged DOE to solicit comments from stakeholders and suggested that DOE should follow a number of steps. (Nor-Lake, No. 68 at p. 2) First, it suggested that DOE should only promulgate an amended energy conservation standard if it will result in "significant" energy savings. Nor-Lake criticized DOE's approach to date, arguing that the agency has rarely determined that incremental energy savings were not significant – including cases where the projected incremental savings amounted to less than a 1 percent gain in efficiency. It also stated that there is currently no definition for the term "significant" as it relates to energy savings. Second, it suggested that DOE should more rigorously examine whether an existing (or proposed) standard imposes "significant" costs on manufacturers and solicit comments on how to define "significant" manufacturer costs and other impacts. The company pointed to DOE rulemakings and Office of Hearings and Appeals orders that appear to endorse, or at least accept, that a 10-percent to 20-percent impact on earnings is not significant to a manufacturer, a stance with which the commenter appeared to disagree. Third, it suggested that DOE should evaluate the economic impact of proposed energy conservation standards on manufacturers earlier in the process than it currently does under the Process Rule. Nor-Lake also suggested that DOE should articulate criteria, whether by rule or through guidance, for issuing a "no amended standard determination," which would be justified when the energy savings from an incremental increase in the energy conservation standard for a given product would not result in significant energy savings and/or when the economic impact on manufacturers from a revised standard would be significant, in isolation or relative to the energy savings to be gained. (Nor-Lake, No. 68 at pp. 2-3)

Lutron asserted that setting a threshold for "significant conservation of energy" in the Process Rule is needed to plan for future rulemakings and to add clarity to those rulemakings. By establishing a threshold for this term, it argued that DOE can limit the variability in how this term has been applied, which would reduce the overall burden on regulated industries. The company, citing to a recommendation from the Joint Commenters, suggested a threshold of "one quad (or equivalent amount of energy savings in kWh) saved over 30 years" be used. (Lutron, No. 50 at p. 2)[7] (*See also* APPA, No. 36 at p. 4 (suggesting that DOE should apply criteria for energy savings such as a threshold difference of under 2-4 percent between the standard under consideration and max-tech or savings over a 30-year period of less than 0.2 quads) *and* Sullivan-Palatek, No. 64 at p. 1 (criticizing DOE's recent rulemaking efforts on compressors, commercial packaged boilers, and pumps, which it asserted provided energy savings of 0.6 percent, 0.6 percent, and 1.0 percent, respectively))

Other commenters, however, asserted that such an approach was unnecessary or flat-out opposed it. (NPCC, No. 22, at p. 9; CEC, No. 53 at p. 8; NRDC, No. 74 at p. 3; NEEP, No. 77 at p. 5) In Joint Comments filed by ASAP, those groups stated that DOE must comply with the meaning provided by the U.S. Court of Appeals for the District of Columbia in NRDC v. Herrington for "significant" energy savings. (ASAP Joint Comment, No. 75 at pp. 6, 8) This position was also supported by NRDC. (*See* NRDC, No. 74, at p. 1) The CEC added that if DOE were to decide that a baseline for significant energy savings was necessary, the determination of that baseline would need to be done on a case-by-case basis and require updating to reflect market changes for the product at issue, as well as studies of the existing

[7] Although Lutron referenced the submission from the Joint Commenters with respect to the one quad threshold, that comment contained no reference to, or discussion on, that particular issue.

product stock and specific sales data. (CEC, No. 53 at p. 8) NEEP asserted that there is no benefit in adding criteria for considering the establishment of a baseline for energy savings with respect to qualifying for a "not significant" determination. It emphasized that DOE should adhere to the definition of "significant" laid out in NRDC v. Herrington. (NEEP, No. 77 at p. 5)

Separately, the CA IOUs suggested that DOE should continue reviewing standards, even in cases where several rounds of rulemaking have already been conducted, because the potential savings from an updated standard which were determined not to be significant in one round of rulemaking may become significant in a later round of rulemaking due to technological innovation. (CA IOUs, No. 65 at p. 8) They also urged DOE not to adopt a no-standard standard since such an approach would prevent individual States from adopting their own levels. In their view, such an approach can prevent significant, cost-effective energy savings from being realized. (*Id.* at p. 9)

In response to these comments, DOE has undertaken a review of how it applies the concept of "significant conservation of energy" in its rulemaking process, including how it has interpreted the court's mandate in Natural Resources Defense Council v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985) (hereinafter, "*NRDC v. Herrington*", the "*Herrington* case" or "*Herrington*"). The following discussion reflects DOE's understanding of that term in light of the court case, a response to comments on this issue, and DOE's proposed approach moving forward.

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); 42 U.S.C. 6316(a)) A determination of significant energy savings is made for each type of covered product or covered equipment when conducting an energy conservation standards rulemaking. Congress did not define the statutory term "significant conservation of energy" (nor has DOE done so in regulation), but the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") added a judicial gloss to the understanding of that term in *NRDC v. Herrington*. In *Herrington*, the court held that it was unlikely that Congress intended for DOE to pass up a "cost-free chance to save energy unless the amount of energy saved was genuinely trivial," but stressed that it was not dictating any specific definition of significance to DOE with respect to the application of this term. Id. at 1373. With this decision in mind, DOE conducted numerous rulemakings for a variety of covered products and equipment that yielded a range of energy savings (typically quantified in terms of the number of quadrillion British thermal units or "quads" of energy saved) projected over a 30-year period.

In further examining the *Herrington* decision, however, DOE has tentatively concluded that the court's opinion affords DOE a degree of latitude with respect to determining whether a given level of energy savings constitutes "significant" energy savings for purposes of satisfying the requirements under EPCA. Specifically, in DOE's view, the agency may, consistent with the *Herrington* decision, apply a specific numeric and/or percentage threshold rather than the more general conceptual approach it has applied in years past when considering potential new or amended energy conservation standards authorized under EPCA. Such threshold may be

determined in absolute terms (*i.e.*, setting a uniform level of significance for each product or equipment type – a total quads saved threshold), in relative terms (*i.e.*, setting a level of significance based on a percentage of energy use), or a combination of both. DOE is considering applying such a threshold to ensure that limited agency resources are devoted to the analysis of those standards rulemakings that are most likely to yield substantial benefits to consumers and the Nation. DOE is concerned with the direct economic impacts that are likely to flow from imposing standards that are projected to yield relatively lower energy savings – standards that may produce little in overall benefits in energy and cost savings for consumers when compared to the costs related to the manufacture and purchase of products and equipment meeting these kinds of standards. This approach gives effect to the *Herrington* court's reference to not forego energy savings that are "cost-free." However, this approach would also limit the first-cost impacts to consumers to those instances where a given rulemaking is expected to generate significant energy savings and other substantial benefits.

In the aftermath of *Herrington*, DOE largely focused on the court's "genuinely trivial" language, without accounting for the fact that this language was in reference to "cost-free" standards when determining the significance of potential energy savings. This approach resulted in a low bar for setting standards.[8] However, in examining DOE's regulatory history post-

[8] The language contained in DOE's 1989 final rule establishing energy conservation standards for refrigerators and small gas furnaces is illustrative of the agency's understanding of how it was to determine "significant energy savings" in the post-*Herrington* environment. Specifically, that rule's preamble stated:

Under section 325(l)(3)(B) of the Act, the Department is prohibited from adopting a standard for a product if that standard would not result in "significant" energy savings. While the term 'significant' has never been defined in the Act, the Department believes that a standard level option need not meet a threshold level of energy savings to be considered a "significant" saver of energy. The U.S. Court of Appeals, *NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985), concluded that Congressional intent in using the word "significant" was to mean "non-trivial." *Id.* at 1373. Thus, for this rulemaking, DOE believes that each candidate standard considered results in significant energy savings.

Herrington through July 10, 2017 (*i.e.*, publication of the final rule for walk-in coolers and freezers – see 82 FR 31808), DOE set standards for covered products and equipment a total of 57 times (excluding instances where DOE set no-standard standards or adopted the standard levels from ASHRAE Standard 90.1). This figure also reflects, in certain cases, the same products or equipment being regulated more than once. Of that total, 23 of those rulemakings adopted standards that DOE projected would achieve less than 0.50 quad of energy savings over the standard 30-year period that DOE uses when analyzing the impacts of its standards (which yielded a total of 4.24 quads in energy savings); in contrast, the remaining 34 rulemakings each resulted in over 0.50 quad of energy savings over the same period (for a total of 109 quads in energy savings).[9] These figures suggest that instituting an appropriate threshold for energy savings may significantly reduce the burdens of regulation without significantly reducing energy savings.

In this proceeding, DOE is seeking a middle ground with regard to what constitutes a significant savings of energy to help improve both the predictability and transparency of its rulemaking process when setting standards for the various products and equipment it regulates. Looking to the statute, the *Herrington* court discussed DOE's authority to prescribe a discretionary standard for an appliance if, among other criteria, the national energy consumption of the appliance exceeds 0.014335 quads per year, which corresponds to 1.449 quads of source energy over 30 years. *Herrington* at 1374. The court suggested that a threshold that exceeded

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54 FR 47916, 47920 (Nov. 17, 1989).

[9] These totals were drawn from DOE's analysis of rulemakings done since the inception of the Appliance Standards Program. It is noted that these values reflect: (1) the lower end of any range of energy savings reported in a final rule, and (2) the reported values for analytical periods less than 30 years (*i.e.*, without extrapolation of those values to 30 years). Nonetheless, in DOE's view, these totals should be sufficient to represent the trends under discussion vis-à-vis DOE's energy conservation standards rulemakings.

this value "is inconsistent with the congressional decision to authorize discretionary standards for [these] appliances." *Id.* at 1375-76. However, the court acknowledged that DOE may set energy savings thresholds so long as the levels "show some awareness of the range of energy savings congress thought worth pursuing." *Id.* at 1372. Thus, DOE has some latitude when determining significant energy savings. In this regard, one factor of particular relevance is the fact that DOE has completed multiple cycles of standards rulemakings for those products and equipment for which Congress has mandated standards since the *Herrington* decision. With now decades of completed rulemakings that have steadily increased the stringency of the energy conservation standards for a wide variety of products and equipment, evaluating the significance of the energy savings produced by a given standard—along with the likelihood of additional energy efficiency improvements (*i.e.*, the prospect for diminishing returns) and the likely increasing cost of additional efficiency gains—must be viewed against that backdrop.

After careful consideration, DOE has tentatively decided to apply a threshold-based analysis that, in DOE's view, is both comprehensive and workable while remaining cognizant of the goals and requirements of EPCA. This "hybrid" approach would examine energy savings through the twin lenses of the total amount of projected energy savings and the relative percentage increase in efficiency/decrease in energy usage that could be obtained from setting or amending standards for a given product/equipment.

Under the first step of this approach, the projected energy savings from a potential maximum technologically feasible ("max-tech") standard would be evaluated against a given numerical threshold. This initial step would be performed to ascertain whether a potential

standard satisfies 42 U.S.C. 6295(o)(3)(B) to ensure that DOE avoids setting a standard that "will not result in significant conservation of energy." If the projected max-tech energy savings does not meet or exceed this numerical threshold (with any lower level expected to achieve even less energy savings), those max-tech savings would then be compared to the total energy usage of the product/equipment to calculate a potential percentage improvement in energy efficiency/reduction in energy usage. If this comparison does not yield an energy savings improvement of a given percentage, the analysis would end, and DOE would determine that no significant energy savings would likely result from setting new or amended standards. This step would ensure promulgation of those standards most likely to confer substantial benefits to consumers and the Nation by eliminating from further consideration those potential standards that are projected to result in low energy savings.

If either one of these thresholds is reached, DOE would then conduct analyses to ascertain whether a standard can be prescribed that produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified (and still constitutes significant energy savings at the level determined to be economically justified). *See* 42 U.S.C. 6295(o)(2)(A). Because technological feasibility is already determined through the max-tech analysis, DOE would then focus on performing an economic justification analysis under 42 U.S.C. 6295(o)(2)(B)(i).

In performing this analysis, DOE would consider the total amount of energy savings at issue at each trial standard level ("TSL"). Assuming that DOE uses a minimum numerical threshold and a separate percentage threshold, the projected savings for any given TSL would be

measured against these two thresholds. DOE would perform its economic analysis to determine whether an economically justified level (producing the maximum amount of energy savings possible) can be reached that meets or exceeds either of these thresholds. The analysis would proceed to compare that projected savings against the amount that the examined product/equipment consumes at each TSL.

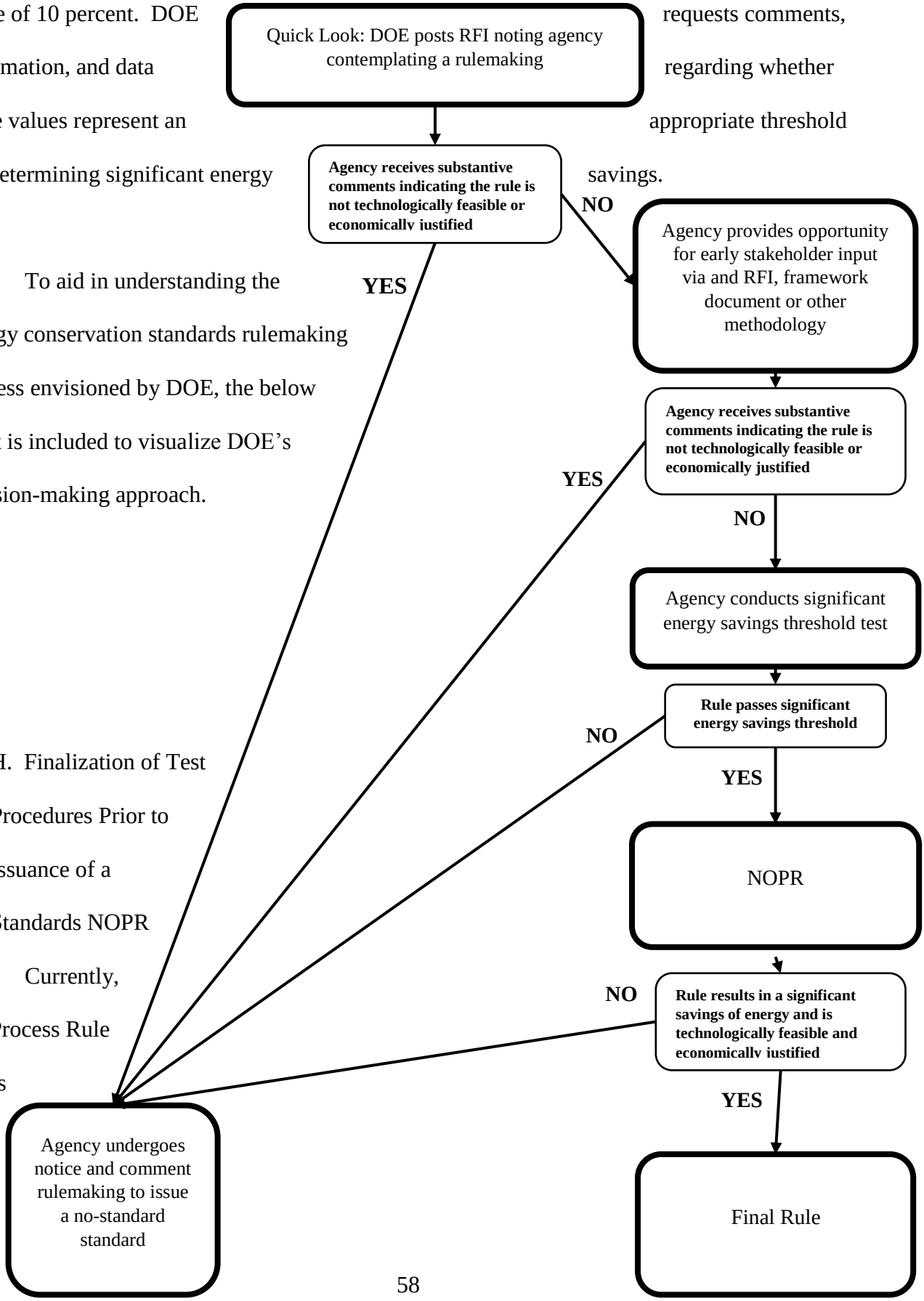
In DOE's view, this approach would enable the agency to more readily ascertain whether pursuing a standards rulemaking for a given product/equipment would yield energy savings that the Secretary would consider significant under EPCA. It would also provide the public with greater transparency and predictability regarding how DOE's analytical process would work with respect to the setting of standards through the use of these minimum energy savings thresholds and potentially allow industry to improve its product planning. Further, DOE believes that following this approach would encourage the development of gradual efficiency improvements independent of mandatory regulatory requirements and help focus utility and energy efficiency advocacy efforts on development of standards that generate greater energy savings and that yield more meaningful impacts through fewer regulatory actions.[10]

Based on an examination of all past DOE standards rulemakings, DOE is considering using a quad threshold value (over a 30-year period) of 0.5 quad and a percentage threshold

[10] While this discussion does not delve into the details of how the max-tech and economic justification analyses are performed, there are a number of variables that may come into play depending on the product/equipment at issue that may not be readily apparent during the max-tech analysis but appear in the more comprehensive economic justification analysis. For example, fuel-switching (*e.g.*, in the context of furnaces) may affect the projected energy savings from a standard and result in lower than expected savings when performing the relevant economic analysis. Similarly, there may be cases where technology-switching may occur that could impact the analysis. Also, depending on the pricing impacts of adopting more stringent efficiency standards, the projected savings may be less if potential purchasers of the more efficient product opt to repair their current product, rather than replace it.

value of 10 percent. DOE requests comments, information, and data regarding whether these values represent an appropriate threshold for determining significant energy savings.

To aid in understanding the energy conservation standards rulemaking process envisioned by DOE, the below chart is included to visualize DOE's decision-making approach.



H. Finalization of Test Procedures Prior to Issuance of a Standards NOPR

Currently, the Process Rule states

that DOE will propose any modifications to a test procedure prior to issuing an ANOPR for energy conservation standards and finalize those modifications prior to issuing a NOPR for energy conservation standards. However, DOE has deviated from this schedule in the past and conducted test procedure and standards rulemakings concurrently. DOE recognizes that a finalized test procedure allows interested parties to provide more effective comments on proposed standards. Further, if the test procedure is finalized sufficiently in advance of the issuance of proposed standards, manufacturers will have experience using the new test procedure, which may provide additional insights into the proposed standards. As a result, DOE proposes to require that test procedures used to evaluate new or amended standards will be finalized at least 180 days before publication of a NOPR proposing new or amended standards.

Commenters were in general agreement that test procedures should be finalized before DOE proposes new or amended standards. For example, Acuity Brands stated that manufacturers need time to develop baseline data using the finalized test procedure before evaluating the proposed efficiency levels. (Acuity Brands, No. 46 at pp. 4-5) Similarly, the ASAP Joint Commenters expressed support for finalizing test procedures prior to DOE proposing new or amended standards "because it allows manufacturers and other stakeholders to better assess the effects of proposed standard levels." (ASAP Joint Commenters, No. 75 at p. 5)

Commenters also provided more specific suggestions regarding the timing of test procedure and standards rulemakings. For instance, UT-Carrier stated that an "[e]nergy conservation standard rulemaking should only be initiated 3-6 months after the related test procedure is finalized and is published in the Federal Register." (UT-Carrier, No. 41 at p. 2) Big

Ass Fans ("BAF") recommended that new test procedures be finalized 6 to 18 months before DOE proposes a new energy conservation standard. (BAF, No. 73 at p. 2) The Joint Commenters recommended that test procedure amendments be finalized 6 months before initiating a standards rulemaking and that test procedures for newly covered products be finalized 1 year before initiating a standards rulemaking. (Joint Commenters, No. 51 at p. 19) Several other commenters simply stated that test procedures should be finalized prior to DOE initiating a rulemaking to propose new or amended standards. (*See, e.g.*, Bradford White, No.42 at p. 2; ABMA, No. 71 at p. 3)

As stated previously, DOE is proposing that test procedures used to evaluate proposed standards be finalized at least 180 days prior to publication of a NOPR proposing new or amended standards. DOE believes that 180 days provides interested parties with sufficient time to evaluate the new or amended test procedure. DOE seeks comment on the appropriateness of this 180-day period.

I. Adoption of Industry Standards

The current Process Rule does not discuss the verbatim adoption of industry standards as DOE test procedures. That being said, DOE is obligated to adopt industry standards in certain cases. For example, under EPCA, DOE is required to use industry standards developed or recognized by ASHRAE for several categories of covered equipment. (42 U.S.C. 6314(a)(4)(A)) Additionally, if these industry standards are amended, EPCA requires that DOE amend its test procedures as necessary to be consistent with the amended industry standard unless it determines, by rule published in the *Federal Register* and supported by clear and convincing

evidence, that the amended test procedure would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, and estimated operating costs of that equipment during a representative average use cycle. (42 U.S.C. 6314(a)(2), (3) and (4)(B)) As for covered products and equipment where use of an industry standard is not mandated by EPCA, DOE still routinely adopts industry standards as DOE test procedures. In many cases, aspects of these industry standards are modified by DOE upon incorporation into the DOE test procedure. DOE recognizes that modifications to these standards impose a burden on industry. For instance, manufacturers will face increased costs if the DOE modifications require different testing equipment or facilities.

Some commenters urged DOE to adopt industry standards without modification. For example, Sub Zero stated that industry is best positioned to develop tests that accurately, fairly, and consistently measure energy, and modifications to industry test procedures are costly, unnecessary, and duplicative. (Sub Zero, No. 43 at p. 3) Similarly, the Joint Commenters stated that DOE modifications to industry standards frequently have little impact on test results, but significantly increase the testing burden on manufacturers. (Joint Commenters, No. 51 at p. 21) The Joint Commenters also stated that DOE should only modify industry standards in narrow circumstances, supported by clear and convincing evidence. (*Id.*)

Other commenters supported the adoption of industry standards under certain conditions. For instance, Nor-Lake stated that industry standards should only be adopted without modification if there is unanimous agreement among DOE, manufacturers, and other stakeholders. (Nor-Lake, No. 68 at p. 3)

Finally, some commenters opposed adding language to the Process Rule that would require DOE to adopt industry standards without modification. For example, the CA IOUs stated that industry standards may serve as a useful starting point for a DOE test procedure, but they are not typically developed with DOE's energy efficiency metrics and CCE requirements in mind. And, as such, DOE should not amend the Process rule to specify the use of industry standards without modification. (CA IOUs, No. 65 at p. 5) Similarly, NPCC stated that adopting industry standards without modifications would rarely satisfy EPCA requirements. Correspondingly, NPCC stated that DOE should not amend the Process Rule to specify the use of industry standards without modification. (NPCC, No. 35 at pp. 8, 16)

In recognition of the costs discussed by commenters that are imposed by DOE's adoption of changes to industry test methods, DOE proposes to amend the Process Rule to require adoption, without modification, of industry standards as test procedures for covered products and equipment unless such standards would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, and estimated operating costs of that equipment during a representative average use cycle. DOE seeks comment on this proposal Further, given DOE's past adoption of test procedures that did vary from the industry test, DOE seeks comment on whether, if DOE were to adopt this proposal, there are existing test procedures that should be modified to conform to the existing industry test method.

J. Direct Final Rules

The Energy Independence Security Act of 2007 ("EISA 2007") (Pub. L. 110-140) amended EPCA, in relevant part, to grant DOE authority to issue a "direct final rule" (i.e. DFR) to establish energy conservation standards. As amended, EPCA establishes requirements for when DOE uses 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 or equipment 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) or section 342(a)(6)(B) as applicable. (42 U.S.C. 6295(p)(4)(A))

In the December 2017 RFI, DOE requested feedback as to whether it should amend the Process Rule to include provisions related to the use of DFRs. 82 FR 59992, 59993 (Dec. 18, 2017). Most responders supported both the use of the DFR process in developing rules and addressing the DFR provision in the Process Rule. A more detailed discussion of these DFR-related comments follows, along with DOE's response.

Some commenters supported DFRs as an alternative to negotiated rulemaking, while others stated conversely that DFRs should only be issued in the context of negotiated rulemaking, led by an Appliance Standards and Rulemaking Federal Advisory Committee ("ASRAC") subcommittee. The CEC stated that DFRs should remain available as an option for finalizing standards developed in either ASRAC negotiations or in non-ASRAC negotiations. (CEC, No. 53 at p. 2) Lennox supported the use of DFRs and suggested that identifying DFRs as

an alternative to consensus rulemaking outlined in the current Process Rule would be helpful. (Lennox, No. 62 at p. 3) EEI stated that DFRs that have not been the result of negotiated rulemakings should be part of the final Process Rule. However, EEI stressed that DOE should have a preference for conducting notice and comment rulemaking, and the use of DFR's should be limited in practice. (EEI, No. 72 at p. 2). The National Consumer Law Center ("NCLC") supported the DFR process when it can be used to speed up the rulemaking process, reduce unnecessary time and expense for all parties, reduce the likelihood of contentious hearings and litigation, and lead to results that maximize the satisfaction of all parties. (National Consumer Law Center, January 9, 2018 Public Meeting Transcript at pp. 22)

The APPA expressed its opinion that DOE should not issue DFRs outside of negotiated rulemakings. (APPA, No. 36 at p. 2) The NPCC supports the continued use of DFRs coupled with the ASRAC negotiated rulemaking process. (NPCC, No. 35 at pp. 7, 10) Southern Company stated that it is unrealistic to expect that an energy or water standard which is not part of a negotiated rulemaking would be adopted using this process. (Southern Company, No. 70 at p. 3). NEMA suggested that the DFR and the negotiated rulemaking process should be treated as two separate processes. (NEMA, January 9, 2018 Public Meeting Transcript at pp. 78-79)

In response to these comments, DOE notes that DFRs are intended to be a process that is distinct from that outlined under the Negotiated Rulemaking Act, although in the recent past, the Department has sometimes conflated the two. The Negotiated Rulemaking Act clearly contemplates that the outcome of the negotiation process will be a proposed rule. *See* 5 U.S.C. 563. In contrast, the purpose of the DFR provision in EPCA is to allow the Secretary to adopt a

final rule without first utilizing the normal notice and comment process. Thus, although negotiated rules and direct final rules are both valuable tools, they represent two distinct administrative processes. Going forward, DOE intends to treat them as the two separate processes that they are, and consequently, DOE proposes to codify this distinction in the revised Process Rule.

A number of commenters stated that DOE should clarify the DFR provision in the Process Rule. (*See e.g.*, Rheem, January 9, 2018 Public Meeting Transcript at pp. 76-77) The ALA recommended that DOE set forth the specific conditions DOE would need in order to consider a joint proposal under the DFR authority in EPCA. (ALA, No. 55 at p. 2) The CEC stated that in its amended Process Rule, DOE should provide additional guidance – but not strict prescriptive criteria -- describing the minimum parameters a consensus proposal must meet in order to be a candidate for a DFR. (CEC, No. 53 at p. 2) In response, DOE agrees with these comments and is providing clarification in this proposed rule about its DFR authority and the conditions a submitted joint proposal must meet in order for DOE to consider publication, as explained in further detail subsequently.

Two commenters expressed concerns about potential negative outcomes that might result from potential changes to the current DFR process. NEEP stated that adding unnecessary provisions to the Process Rule could result in a more cumbersome procedure and a less effective DFR outcome. (NEEP, No. 77 at p. 2) NPCC conceded that the DFR procedures can always be improved, but it urged caution so as not to lose any of the value that is gained from the DFR process. NPCC stated that the procedures as developed are generally effective, efficient, and

transparent; they also offer great opportunity for involvement by, and generally have the support of, industry, States, efficiency advocates, and others. (NPCC, No. 35 at pp. 7, 10) In response, DOE notes that in providing clarification as to its expectations for DFR submittals, it aims to improve, rather than hinder, the DFR process.

Some commenters offered their concerns about the use of DFRs. For example, Spire argued that DFRs should only be utilized in non-controversial efficiency rules where prior notice and comment procedures serve no useful purpose. (Spire, January 9, 2018 Public Meeting Transcript at pp. 70-72) The NPGA stated that DOE should not rely on DFRs because they fail to uphold the spirit of open dialogue with the public called for under EPCA and the APA. (NPGA, No. 59 at p. 2) In response, DOE notes that the purpose of addressing the DFR provision in this proposed rule is to, in part, ensure open dialogue with stakeholders and to limit controversy. The Department does not agree that the DFR mechanism is somehow unsuitable for complex or controversial cases; on the contrary, the DFR may be beneficial in those instances due to early and broad stakeholder involvement.

In light of the comments described above, as part of this proposed rule, DOE is: (1) clarifying its authority under the DFR provision found at 42 U.S.C. 6295(p)(4); (2) providing guidance as to DOE's interpretation of "fairly representative," and (3) explaining DOE's obligations upon receipt of an adverse comment. In this way, DOE hopes to improve the transparency, consistency, and inclusiveness of its existing DFR process.

1. DOE's Authority Under the DFR Provision

The DFR provision is found in EPCA at 42 U.S.C. 6295(p), the heading and introduction of which state: "Procedure for prescribing new or amended standards. Any new or amended energy conservation standard shall be prescribed in accordance with the following procedure." Given this description, DOE believes that 42 U.S.C. 6295(p)(4) must be understood as procedural; that is, the provision is not a substantive grant of rulemaking authority but rather outlines a process DOE must follow when issuing a DFR. Supporting this view is the fact that subparagraphs (p)(1) and (p)(2) are merely procedural provisions. That is, subparagraphs (p)(1) and (p)(2) outline the process the Secretary must follow to propose and finalize a standard using the "normal" rulemaking approach. However, neither of those subparagraphs is an independent grant of rulemaking authority. Both are meaningless unless a separate provision of EPCA authorizes issuance of a rule to establish a new or amend an existing energy conservation standard. Thus, subparagraphs (p)(1) and (p)(2) could not be interpreted as granting DOE separate and independent standard issuing authority. When read in context with the rest of the subsection, 42 U.S.C. 6295(p)(4) likewise must be read as procedural, i.e., not a separate and independent grant of rulemaking authority. Under this interpretation, DOE must rely on authority provided by other sections of EPCA.

As the DFR provision is not a separate grant of authority, any standard issued must comply with the provisions of the EPCA subsection under which the rule was authorized. For example, if the DFR were a recommendation that DOE amend the standards for metal halide lamp fixtures under 42 U.S.C. 6295(hh)(3)(A), which requires that not later than January 1, 2019, the Secretary shall publish a final rule to determine whether the standards then in effect for metal halide lamp fixtures should be amended, the standards must comply with 42 U.S.C.

6295(hh)(3)(B), which requires that any amended standards apply to products manufactured after January 1, 2022, along with all other applicable parts of EPCA. DOE will not accept or issue as a DFR a submitted joint proposal that does not comply with all pertinent parts of EPCA, including those product specific requirements included in the provision that authorizes issuance of the standard.

2. Interested Persons Fairly Representative of Relevant Points of View

In the December 2017 RFI, DOE requested comment on 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. 82 FR 59992, 59993-59994. A number of commenters provided feedback on this issue.

Several commenters recommended that DOE should do its best to be as inclusive as possible in identifying fairly representative points of view, but they recognized that fairly representative does not mean "all." For example, the Joint Commenters stated that "fairly" cannot practically mean "every point of view;" otherwise, there would be no need to seek public comment on the proposed standard as required by EPCA in 42 U.S.C. 6295(p)(4)(B). According to the Joint Commenters, the Secretary can make an initial determination of how "fairly" the group represents the relevant points of view based on the identity of the persons submitting the Joint Statement, and can reassess that initial determination after the public comment period has expired. (Joint Commenters, No. 51 at pp. 17-18)

The ALA stated that the DOE should develop a more substantive definition of "fairly representative" in the Process Rule, but the ALA also suggested that because each product and market is unique, the definition should be flexible. The ALA further stated that any joint proposal should include, at a minimum, representative stakeholders from industry/manufacturers, along with energy-efficiency advocates and States. (ALA, No. 55 at p. 2) Southern Company commented that the group should also include, distributors, utilities, consumer groups, and any other groups that might be relevant for that specific rulemaking. (Southern Company, No. 70 at p. 3) The CEC stated that it may be appropriate to identify constituents whose points of view should always be included in order for a proposal to be considered representative but that an extreme definition of "fairly representative," such as consideration of "all" relevant points of view would create an insurmountable hurdle. (CEC, No. 53 at p. 3) In contrast, Spire asserted that the term should be interpreted to mean "all known relevant points of view." (Spire, No. 57 at pp. 9-10) Spire, NEEP and EEI argued that the outcome of the residential furnaces DFR rulemaking made clear that there must be an intentionally inclusive group negotiating a DFR. (NEEP, No. 77 at p. 2; Spire, No. 57 at pp. 9-10; EEI, January 9, 2018 Public Meeting Transcript at p. 64) EEI added its concern about how stakeholders who are not included in the DFR process do not see the rule until it is published in the *Federal Register*, and as a result, they are excluded from any preliminary input. EEI suggested that a possible solution would be for DOE to announce the negotiations and welcome other parties to join in the process. (EEI, January 9, 2018 Public Meeting Transcript at p. 64) The American Gas Association ("AGA") stated that the DFR should only be used where a consensus has been developed among all affected parties. (AGA, January 9, 2018 Public Meeting Transcript, at pp. 36)

A few commenters argued against changing the existing definition of "fairly representative." (*See e.g.*, Lennox, No. 35 at p. 3) The NPCC asserted that any joint proposal developed under the Negotiated Rulemaking Act meets the definition of "fairly representative." NPCC further stated that if a DFR is not developed under the Negotiated Rulemaking Act, then DOE should consult with ASRAC to determine if a recommendation was submitted by interested persons that are fairly representative of relevant points of view. (NPCC, No. 35 at p. 12)

The NPGA stated its opposition to DFRs and asserted that it would not be beneficial for DOE to define "fairly representative." NPGA further stated that in trying to define this term, DOE would either intentionally or inadvertently exclude certain stakeholders from the DFR rulemaking process. (NPGA, No. 59 at p. 2)

In response to these comments, DOE agrees that the rulemaking process must be as inclusive as possible, even though it cannot reasonably be expected to encompass every possible viewpoint. DOE notes that at a minimum, "fairly representative of relevant points of view" must include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, as appropriate, consumers, and States. However, DOE also believes that 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 additional parties that must be part of a joint statement in order to be "fairly representative of relevant points of view." DOE notes that it cannot be a member of a group that submits a joint statement to be issued as a DFR.

In order to assist DOE in making this case-by-case determination, upon receipt of a joint statement recommending energy conservation standards, DOE will publish in the *Federal Register* that statement, as submitted to DOE, in order to obtain feedback as to whether the joint statement was submitted by a group that is fairly representative of relevant points of view. The comment period would occur during the time DOE analyzes the submission for other legal and analytical issues and considers preparation of a rulemaking document. (DOE notes that such preliminary comment period would not diminish or eliminate the statutory comment period(s) associated with publication of a subsequent DFR and/or NOPR.) Therefore, if any substantive concerns are raised about parties not included during the negotiation of the consensus agreement, DOE can make the appropriate decision as to whether the rule can move forward as a DFR. If DOE determines that the rule does not meet the requirements for publication as a direct final rule, DOE will consider whether any further rulemaking activity is appropriate, consistent with the procedures for the regular rulemaking process.

DOE appreciates the comments received in response to the RFI and considered in the development of this proposal. DOE continues to seek comment on what it means for a statement to be submitted by interested persons that are "fairly representative of relevant points of view." DOE continues to seek comment on what constitutes a relevant point of view for purposes of using the EPCA authority in 42 U.S.C. 6295(p)(4) to issue a DFR. More generally, DOE seeks further comment on the strengths and weaknesses of using the DFR process to promulgate energy conservation standards.

3. Adverse Comments

Simultaneous with the issuance of a DFR, DOE must also issue a notice of proposed rulemaking ("NOPR") containing the same energy conservation standards as in the DFR. Following publication of the DFR, DOE must solicit public comment for a period of at least 110 days; then, not later than120 days after issuance of the DFR, the Secretary must determine whether any adverse comments "may provide a reasonable basis for withdrawing the direct final rule," based on the rulemaking record. (42 U.S.C. 6295(p)(4)(B),(C)(i)) In the December 2017 RFI, DOE solicited comment on the nature and extent of "adverse comments" that may provide the Secretary with a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR. 82 FR 59992, 59994.

Currently, to determine whether a comment is sufficiently "adverse" so as to provide a reasonable basis for withdrawal of the direct final rule, DOE weighs the substance of any adverse comment received against the anticipated benefits of the consensus agreement and the likelihood that further consideration of the comment would change the result of the rulemaking (referred to as the "balancing test"). This approach was outlined in recent DOE rulemakings, such as DOE's final rule for energy conservation standards for dishwashers. 77 FR 59712, 59714 (Oct. 1, 2012).

A number of commenters supported DOE's current balancing test. (*See e.g.*, Southern Company, No. 70 at 3; NPCC, No. 35 at 11; CA IOUs, No. 65 at p. 4) Some of these commenters further noted that in order to result in the withdrawal of a DFR, adverse comments should be substantive, accompanied by supporting data, and further consideration of the issues

raised through the normal notice and comment process could materially affect the outcome of the particular DFR. (Lennox No. 35 at p. 4) The Joint Commenters agreed that the determination to withdraw a DFR should be based on substance and quality, not the quantity of the adverse comments. (Joint Commenters, No. 51 at pp. 16-17) The CA IOUs stated that DOE should maintain the flexibility to modify its analysis or decision so that such comments do not become a tactic to delay the rulemaking. Both Lennox and the CA IOUs argued that if the negative commenters had the opportunity to provide such comments earlier in the rulemaking process, DOE should not be required to modify the analysis or decision. (CA IOUs, No. 65 at p. 4; Lennox No. 35 at p. 4)

While the Joint Commenters supported the concept of the balancing test, they noted that the determining factor is not the anticipated benefits of the consensus agreement against which these adverse comments must be measured, but whether the adverse comments merit concluding that the Joint Statement is not in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B) of EPCA. (Joint Commenters, No. 51 at p. 17)

Both Spire and GW expressed concern that the balancing test excludes the opinions of some stakeholders directly affected by a DFR because DOE does not sufficiently take into account adverse comments. (GW, No. 48 at p. 4; Spire, No. 57 at pp. 9-10) GW pointed out that DOE has rarely, if ever, deviated from a DFR, even when it received adverse comments. (GW, No. 48 at p. 5) Spire further raised specific criticisms in the context of prior rulemakings with respect to the treatment of adverse comments. (Spire, No. 57 at pp. 9-10) EEI stated that the DFR process is worrisome because parties that were not involved in negotiation do not know

what issues were raised or addressed during negotiations, and can only supply input once the DFR has been submitted. EEI further argued that quantity, as well as quality and substance of comments, should be taken into account. (EEI, January 9, 2018 Public Meeting Transcript at p. 87)

ABMA suggested that DOE should mirror EPA's treatment of adverse comments to a DFR, whereby a single adverse comment is sufficient to send the rule to notice and comment rulemaking. (ABMA, No. 71 at p. 2) Spire stated that if an interested party goes through the trouble of commenting, then that comment should be considered relevant, and the rule should undergo notice and comment. (Spire, January 9, 2018 Public Meeting Transcript at p. 117)

In response, given the concerns expressed regarding DFRs, DOE plans to move away from the previously announced balancing test. As suggested by commenters, DOE will look not at the quantity of comments received but rather at the substance of the adverse comment, though one comment may present an argument that could lead DOE to conclude that it is an adverse comment providing a basis for withdrawal of the DFR. Moreover, in contrast to previous policy, DOE may take into account, as adverse, comments even if the issue was brought up previously during DOE-initiated discussions (e.g. publication of a framework or RFI document) that preceded submission of a joint statement, if the Department concludes that the comment merits further consideration. In short, if DOE determines that one or more substantive comments objecting to the final rule provides a sufficient reason to withdraw the DFR, DOE will do so, and instead proceed with the published NOPR (which could include withdrawal of that NOPR, as appropriate).

K. Negotiated Rulemaking

1. Utilizing the Negotiated Rulemaking Process, Including the Establishment of the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC)

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.[11] Consequently, when done properly, negotiated rulemaking can yield better decisions, while conserving time and resources of both the agency and interested parties. Negotiated rulemaking is a topic not directly addressed by the current Process Rule. However, the Process Rule does recognize the value and encourage submission of joint stakeholder recommendations.

To facilitate potential negotiated rulemakings, DOE established the Appliance Standards and Rulemaking Federal Advisory Committee (i.e. ASRAC) so as to comply with the Federal Advisory Committee Act ("FACA"), Pub. L. No. 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, and one member from the ASRAC committee attends and participates in the meetings of a 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.

[11] 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).

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 in a more direct manner to provide data for the analyses, thereby helping to better account for manufacturer concerns.

In the December 2017 RFI, DOE asked a number of questions related to negotiated rulemaking, including whether the Process Rule should be amended to provide for the use of negotiated rulemaking in appropriate cases. DOE opened up the issue broadly to seek comments on matters related to negotiated rulemaking, including how DOE can improve its current process in a manner consistent with the Negotiated Rulemaking Act ("NRA"). (5 U.S.C. 561-570a) Specifically, DOE asked whether the Process Rule should provide for the use of a convener or facilitator for each negotiated rulemaking. DOE also asked about measures to ensure that a negotiated rulemaking consider all reasonable alternatives, including the option of not amending/issuing standards or alternatives that would affect different stakeholders differently. Finally, DOE requested comments on the use of a direct final rule mechanism at the conclusion to a negotiated rulemaking. 82 FR 59992, 59995.

DOE received a number of comments from interested stakeholders regarding DOE's use of negotiated rulemaking, most of whom supported inclusion of such mechanism in the Process Rule (either explicitly or implicitly through positive statements regarding negotiated rulemaking). Commenters addressed negotiated rulemaking generally and also specifically regarding its implementation in the DOE context.

2. Inclusion of Negotiated Rulemaking in the Process Rule

As noted above, the majority of commenters supported DOE's use of negotiated rulemakings in appropriate cases and either explicitly called for, or voiced no objection to, its inclusion in the Process Rule. (Bradford White, No. 42 at p. 1; HARDI, No. 56 at p. 3; Lennox, No. 62 at p. 5; NPCC, No. 35 at pp. 7, 12- 13; Nor-Lake, No. 68 at p. 4; Spire, No. 57 at p. 13; Acuity Brands, No. 46 at p. 3; EEI, No. 72 at p. 3; ABMA, No. 71 at p. 2; NEMA, January 9, 2018 Public Meeting Transcript, at pp. 78-79; AGA, January 9, 2018 Public Meeting Transcript, at p. 36; NPCC, January 9, 2018 Public Meeting Transcript, at pp. 57-58; Southern Company, January 9, 2018 Public Meeting Transcript, at p. 123; Lennox, January 9, 2018 Public Meeting Transcript, at pp. 124, 133-134; Daikin, January 9, 2018 Public Meeting Transcript, at p. 124; AHRI, January 9, 2018 Public Meeting Transcript, at p. 125; AHAM, January 9, 2018 Public Meeting Transcript, at p. 126; NEMA, January 9, 2018 Public Meeting Transcript, at p. 127) A number of commenters stated that negotiated rulemaking should be the preferred option. (Lennox, No. 62 at p. 5; NPCC, No. 35 at pp. 7, 12- 13; ABMA, No. 71 at p. 2; Daikin, January 9, 2018 Public Meeting Transcript, at 124; AHRI, January 9, 2018 Public Meeting Transcript, at p. 125; AHAM, January 9, 2018 Public Meeting Transcript, at p. 126; NEMA, January 9, 2018 Public Meeting Transcript, at p. 127) However, commenters generally recognized that negotiated rulemaking may not be appropriate in each and every case, suggesting that its use should be encouraged, but not required. (NPCC, No. 35 at pp. 7, 12- 13; CA IOUs, No. 65 at p. 5; AHRI, January 9, 2018 Public Meeting Transcript, at p. 125) Some commenters clarified that negotiated rulemaking should not become the norm or be used in every case. (Southern Company, January 9, 2018 Public Meeting Transcript, at p. 123; Lennox, January 9, 2018 Public

Meeting Transcript, at p. 124) Echoing this sentiment, Spire cautioned that not all rules can be negotiated, given that it is a very labor-intensive process which requires the right representation. (Spire, January 9, 2018 Public Meeting Transcript, at pp. 128-130)

After carefully considering the comments, DOE has tentatively decided that negotiated rulemaking can be beneficial in the context of the Appliance Standards Program in appropriate circumstances, and accordingly, the Department proposes to include a section on negotiated rulemaking in the updated Process Rule. DOE agrees that the appropriateness of a negotiated rulemaking for any given rulemaking should be determined on a case-by-case basis. When approached by one or more stakeholders or on its own initiative, 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.

A number of commenters expressed general support for continuing the current negotiated rulemaking process through the ASRAC. (HARDI, No. 56 at p. 3; Lennox, No. 62 at p. 5; NPCC, No. 35 at pp. 7, 12- 13; NEMA, January 9, 2018 Public Meeting Transcript, at pp. 78-79) According to the NPCC, the ASRAC process has generally resulted in successful and relatively uncontested rules because the appropriate parties have participated, there is transparency, and the parties have had a chance to interact with both DOE and its technical consultants who are performing the necessary supporting analytical work. (NPCC, January 9, 2018 Public Meeting Transcript, at pp. 57-58) Lennox suggested that DOE should explore the feasibility of negotiated rulemaking for all major rulemakings (especially ones with some degree of complexity),

including DOE outreach to determine whether there is a reasonable likelihood that the requisite consensus can be reached among core stakeholders (including manufacturers of the product subject to regulation, States, and efficiency advocates). (Lennox, No. 62 at p. 5; Lennox, January 9, 2018 Public Meeting Transcript, at p. 124) NEMA added that consideration should be given to amending the Process Rule so as to incorporate the potential for a statutorily-compliant DFR proposal emerging from the ASRAC negotiated rulemaking process. (NEMA, January 9, 2018 Public Meeting Transcript, at p. 80) The Plumbing Heating Cooling Contractors Association ("PHCC") and the CEC also stated that DFRs could be the natural outcome of a successful negotiated rulemaking, thereby allowing DOE to proceed expeditiously to a final rule. (PHCC, No. 63 at pp. 1-2; CEC, No. 53 at p. 4) The Joint Commenters similarly pointed to DFRs as an important aspect of negotiated rulemaking, and it stated that if the Process Rule is amended to address DFRs, it should acknowledge DFRs in the context of both ASRAC working groups and other parties engaged in informal negotiations. (Joint Commenters, No. 51 at p. 14; Whirlpool, No. 76, was a signatory to the Joint Commenters submission and indicated its support on these issues.)

DOE agrees with the commenters that the ASRAC has provided a workable and effective forum for conducting negotiated rulemakings, with working groups making a recommendation to ASRAC and ASRAC in turn making a recommendation to DOE for its ultimate decision. As stated previously, DOE plans to consider the use of negotiated rulemaking in appropriate cases. However, in a break from its previous practice, DOE intends to separate DFRs and negotiated rulemakings, with the latter leading to a notice of proposed rulemaking in all cases. The NRA contemplates that the committee will transmit to the agency a report containing a proposed rule

(or more applicable in DOE's use of the process, a term sheet specifying the potential standard levels to be incorporated into a proposed rule). Accordingly, DOE is modifying its process for negotiated rulemaking so as to be more fully consistent with the statute. (See the DFR section of this proposal for a more complete discussion of direct final rules.)

Commenters also saw a number of benefits associated with negotiated rulemaking. Daikin opined that negotiated rulemakings result in substantively better rules. (Daikin, January 9, 2018 Public Meeting Transcript, at pp. 124-125) Nor-Lake commented that negotiated rulemaking has the potential to streamline the rulemaking process. (Nor-Lake, No. 68 at p. 4) AHRI stated that negotiated rulemaking promotes greater transparency (in terms of both data and assumptions) and more stakeholder engagement. (AHRI, January 9, 2018 Public Meeting Transcript, at pp. 125-126; NEMA, January 9, 2018 Public Meeting Transcript, at p. 139) The CEC stated that negotiated rulemakings are a valuable process for appropriate products, because they allow for more direct engagement between interested parties, more rapid feedback from participants, and often proceed in a more expeditious manner than a notice and comment rulemaking. (CEC, No. 53 at p. 5) Acuity Brands suggested that like DFRs, negotiated rulemakings have the potential to reduce regulatory burdens, but they have the added benefit of including a broader set of stakeholders (including the DOE) from the start of the process. (Acuity Brands, No. 46 at p. 3) The CA IOUs and NCLC and the Consumer Federation of America ("CFA") stated that negotiated rulemakings can help streamline DOE rulemaking process in certain circumstances, thereby saving time and resources and allowing consumers to realize benefits sooner. (CA IOUs, No. 65 at p. 4; NCLC and CFA, No. 52 at p. 4) NCLC and CFA also commented that a successful negotiated rulemaking which reflects the interests of

relevant stakeholders can reduce the likelihood of contentious hearings and litigation. (NCLC and CFA, No. 52 at p. 4)

Even among those commenters who supported DOE's use of negotiated rulemaking and its inclusion in the Process Rule, there were some cautionary statements to ensure its proper application. ABMA and AGA cautioned that DOE must be certain that all stakeholders covering the full breadth of the marketplace are included in the process (ABMA, No. 71 at p. 2; AGA, January 9, 2018 Public Meeting Transcript, at p. 36), and Schneider Electric added that DOE should engage in a dialogue with industry before starting a rulemaking. (Schneider Electric, No. 69 at pp. 2-3) Spire emphasized the need for ensuring that negotiated rulemakings are conducted transparently and impartially and that "short shrift" is not given to any valid stakeholder – particularly those who provide "substantive and legitimate documentation to support their comments." It also urged that ASRAC "should remain an advisory committee to EERE only" and should be required to meet the Process Rule and any data quality and FACA requirements. (Spire, No. 57 at p. 13) EEI recommended that DOE allow extra time for stakeholders that are not part of the negotiation committee to provide input at committee meetings in order to allow for potentially adversely impacted parties to air concerns as part of the committee process. It also recommended that DOE create specific provisions allowing end-use consumers to participate in negotiated rulemakings for products being regulated for the first time, especially to get their perspective on which types of efficiency metrics can be most useful for actual end-users. (EEI, No. 72 at p. 3) Finally, EEI commented that first-time regulated products might be more amenable to traditional, notice-and-comment rulemaking, particularly given the resource-

intensive nature of negotiated rulemakings (*e.g.*, potential for significant travel). (EEI, January 9, 2018 Public Meeting Transcript, at p. 130)

Other commenters were more ambivalent about the use of negotiated rulemaking and/or the need to directly address it in the Process Rule. GW stated that although negotiated rulemaking can be an effective tool for expeditious rulemaking, it has procedural and analytical drawbacks the Department should consider before codifying it into the Process Rule. On this point, GW argued that negotiated rulemakings lead to decisions being made based on consensus rather than net welfare optimization. Second, interested parties may reach a policy conclusion well before a benefit-cost analysis can suggest an approach that would maximize net societal benefits. Third, there is a risk that comments submitted by parties not included in the negotiation may receive less than due consideration because the policy approach has already been decided. Fourth, the Department should be alert to circumstances in which jointly recommended standards harm competition or prefer one manufacturer at the expense of others—which ultimately harms consumers. (GW, No. 48 at pp. 5, 13)

Similarly, the Joint Commenters stated that they did not see the need to amend the Process Rule to clarify how negotiated rulemaking fits into the overall procedure, but it likewise did not oppose memorializing the *status quo*. The CA IOUs urged that if DOE decides to amend the Process Rule to address negotiated rulemakings, the agency should not make negotiated rulemaking mandatory, and it should retain flexibility within the negotiations. (CA IOUs, No. 65 at p. 5)

Finally, there were at least two commenters who opposed the inclusion of negotiated rulemaking in the Process Rule, the first for practical considerations and the second on more substantive grounds. NEEP stated its view that given the case-by-case nature of a negotiated rule (a tool that DOE has used when there is a high likelihood of reaching stakeholder consensus), NEEP sees no benefit in explicitly adding negotiated rulemaking guidance to the Process Rule. It stated that adding unnecessary provisions through addition to the Process Rule could result in a more cumbersome and less effective negotiated rulemaking outcome. (NEEP, No. 77 at p. 2) NPGA argued that negotiated rulemakings may limit the number of stakeholders who can participate, may constrain review and development to meet arbitrary deadlines, and may cause an antagonistic rather than cooperative nature among the groups involved. Thus, NPGA suggested that negotiated rulemakings do not provide for the same open dialogue and input available through the traditional rulemaking route. (NPGA, No. 59 at p. 2)

DOE agrees with those commenters who see potential benefits to the use of negotiated rulemaking in appropriate cases, and the Department has tentatively decided that it makes sense to clarify its approach to this procedural mechanism in the Process Rule. Negotiated rulemaking has the potential to increase transparency, to foster stakeholder/DOE engagement, and to streamline the rulemaking process, thereby conserving the time and resources of all interested parties. Thorough consideration of the underlying issues and recommending potential standards at a consensus level may also reduce litigation risk. DOE sees no reason why explicitly addressing negotiated rulemaking in the Process Rule should alter the manner in which that rulemaking will occur when such rulemaking approach is deemed appropriate or reduce any flexibility permissible under the statute.

In response to ABMA, AGA, and Schneider Electric, DOE seeks broad representation of interested stakeholders for negotiated rulemakings as part of the ASRAC working groups, including representatives of individual manufacturers and their trade associations. In addition, DOE makes meetings of the ASRAC working groups open to the public, so there are additional opportunities for input from other interested parties, including public comment during those sessions. However, DOE takes EEI's point as to the need, as a matter of fairness, to fully air the concerns of stakeholders who are not part of the committee or working group (including end-use consumers), so DOE is proposing to incorporate provisions in the Process Rule to ensure their opportunity for public comment and to bring their concerns before the committee for discussion. However, DOE would stress that any proposed rule emerging from a negotiated rulemaking would still provide an opportunity for public comment on the published document, and DOE would be required to respond to public comments, as appropriate, so all interested parties retain the ability to play an active role in the rulemaking process. In response to Spire, DOE is committed to thoroughly considering all views and data brought before it, as well as to comply with all applicable statutory requirements. As to Spire's comments about first-time regulated products being more amenable to traditional notice-and-comment rulemaking, rather than negotiated rulemaking, DOE reiterates that this is a determination best made on a case-by-case basis in the context of a given rulemaking. It is DOE's expectation that use of a convenor will help address each of these issues. That is, a neutral, independent convenor can identify issues that any negotiation would need to address, assess the full breadth of interested parties who should be included in any negotiated rulemaking to address those issues and make a judgment as

to whether there is the potential for a group of individuals negotiating in good faith to reach a consensus agreement given the issues presented.

DOE understands the concerns of GW that negotiated rulemaking should not lead to a rushed process where stakeholder opinions, public input, and analytical data are not fully considered and addressed. In part to mitigate such concerns, DOE is proposing to separate DFRs from the negotiated rulemaking process in the revised Process Rule. In this way, the outcome of any negotiated rulemaking would be a proposed rule, which would be subject to a comment period, as required under EPCA and the Administrative Procedure Act. DOE must then respond to comments received, including those regarding its data and analyses, in the final rule; in the event a comment raises a significant issue that previously had not been identified or properly considered, DOE may need to publish a supplemental notice of proposed rulemaking to modify its approach and seek further public comment. In this way, DOE endeavors to obtain the benefits of negotiated rulemaking, while making sure to maintain broad opportunity for participation among working group members and the interested public and full consideration of relevant data and information. DOE believes that this reasoning also addresses the similar concerns of NPGA. Finally, DOE notes that a proposed appliance standards rule's impacts on competition is one of the topics that must be specifically addressed by the U.S. Department of Justice ("DOJ") in any such rulemaking, as required under 42 U.S.C. 6295(o)(2)(B)(i)(VI) and (ii), and subsequently by DOE, regardless of whether the rule is developed through negotiated rulemaking, a joint proposal under DOE's DFR authority, or traditional notice-and-comment rulemaking.

3. Suggestions Regarding Implementation of Negotiated Rulemakings

Commenters seemed to generally agree that negotiated rulemaking may not be appropriate for all DOE rulemaking actions, and in some instances, traditional notice-and-comment rulemaking may remain the preferred approach. For example, the CA IOUs commented that negotiated rulemaking may not be useful where product categories cover a broad range of product classes and manufacturers and where it may not be feasible to identify all appropriate industry representatives, thereby making such process difficult. (CA IOUs, No. 65 at p. 4) Southern Company stated that because negotiated rulemakings require substantial time commitments from stakeholders, they should be reserved for larger, higher impact rulemakings where the Department and major stakeholders agree that a negotiated rulemaking is appropriate; in contrast, for most rulemakings, the commenter argued that the traditional process of notice and comment is more appropriate. (Southern Company Services, No. 70 at p. 4) The CEC stated that it does not object to a brief consideration of each product's potential for negotiated rulemaking but asserted that it is inappropriate to require the use, or even the evaluation, of a negotiated rulemaking for all products. (CEC, No. 53 at p.5)

DOE agrees with the commenters that negotiated rulemaking may not be appropriate in every case, particularly where there is not identification or participation of a significant number of interested stakeholders. DOE further acknowledges that negotiated rulemaking typically requires a significant input of time and resources on the part of both DOE and other interested parties, so it is important to initiate a negotiated rulemaking only where there is a reasonable likelihood of success. Consequently, as discussed previously, DOE plans to make a determination whether to conduct a negotiated rulemaking on a case-by-case basis in the context of a given rulemaking, based on a report produced by a third-party, neutral convenor.

According to the Joint Commenters, the following factors should militate in favor of a negotiated rulemaking: (1) Stakeholders 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 rulemaking involves standards that have already been amended one or more times; (4) Stakeholders from differing points of view are willing to participate; and (5) DOE believes that the parties may be able to reach an agreement. If DOE determines that a negotiated rulemaking is viable, DOE should make a recommendation to the ASRAC or support an interested party's recommendation to the ASRAC that the committee form a working group to negotiate a term sheet that will be submitted to DOE as a consensus recommendation. (Joint Commenters, No. 51 at p. 13)

DOE agrees with the Joint Commenters that it would be beneficial to include relevant criteria in the Process Rule to improve the transparency of DOE's decision-making process for determining when a negotiated rulemaking may be appropriate. The points raised by the Joint Commenters would likely be helpful in that regard and, accordingly, merit inclusion in a proposed list of criteria. DOE welcomes comment on the aforementioned criteria and any additional factors that may serve as appropriate criteria for determining when negotiated rulemaking may be appropriate.

In terms of how DOE should decide when a given rulemaking is conducive to negotiated rulemaking, a number of commenters urged DOE to consult with stakeholders, especially

industry. (Bradford White, No. 42 at p. 1; Schneider Electric, No. 69 at pp. 2-3) The CA IOUs suggested that DOE should work with stakeholders to outline the characteristics of standards and test procedures that would be appropriate for negotiated rulemaking. (CA IOUs, No. 65 at p. 4) AHRI also raised the possibility of using negotiated rulemaking when DOE makes modifications to its test procedures. (AHRI, January 9, 2018 Public Meeting Transcript, at p. 145) However, one commenter (Spire) recommended a more structured process, under which DOE would publish a notice in the *Federal Register* explaining that it is considering negotiated rulemaking and provide at least a 30-day comment period, prior to commencing such rulemaking; Spire added that the notice should also: (1) identify the range of boundaries of the covered products at issue, including competing technologies and energy sources (*e.g.*, gas and electricity); (2) request comments on whether DOE should or should not proceed with negotiated rulemaking; and (3) solicit comments concerning the range of interests to be represented in the negotiations and nominations of individuals to serve on the negotiating committee. (Spire, No. 57 at pp. 13-14)

In response to these comments, DOE is open to broad input from stakeholders, including affected industry as well as interested members of the public, regarding the appropriateness of negotiated rulemaking for any given type of consumer product or commercial equipment. Questions regarding the boundaries of coverage, competing technologies and energy sources, appropriateness of negotiated rulemaking, the range of interests to be represented, and nominations for serving on an ASRAC working group are all topics worthy of discussion prior to engaging in a negotiated rulemaking. In response to AHRI's comment on the use of negotiated rulemaking for test procedures, DOE agrees that such mechanism may be suitable in certain situations (determined on a case-by-case basis), but in those cases where DOE anticipates

adoption of an industry consensus standard with either no or limited modifications, the need for a negotiated rulemaking may not arise. For each of these reasons, DOE is proposing that it will engage the services of an independent, neutral convenor, as contemplated in the NRA, to assess these subjects through research and discussions with potentially interested parties. The convenor would then make a recommendation to the Department regarding the potential for use of negotiated rulemaking given the facts, issues and parties at interest.

When a negotiated rulemaking is determined to be appropriate, several commenters recommended that DOE continue to use its ASRAC process and procedures, which have generally provided a workable approach. (ALA, No. 55 at p. 2; HARDI, No. 56 at p. 3; Regal Beloit, No. 64 at p. 1) In addition to expressing support for conducting negotiated rulemaking through the ASRAC, the Joint Commenters urged DOE to incorporate the ASRAC process and procedures into the Process Rule. According to the Joint Commenters, even though the 1996 Process Rule was drafted prior to the ASRAC being convened, the underlying principles and policies from the original Process Rule are embodied in the ASRAC process including, a breadth of participation from interested parties, effective and efficient proceedings, and support from agency staff, all of which are intended to result in a balanced and informed recommendation to the Department. When updating the Process Rule, the Joint Commenters argued that DOE should acknowledge both the ASRAC negotiated rulemaking process, as well as informal negotiations that result in consensus recommendations. (Joint Commenters, No. 51 at pp. 11-12)

DOE agrees with the commenters who have found the ASRAC process to be a useful and workable approach, even in those instances where consensus could not ultimately be reached.

DOE is very appreciative of the work ASRAC has done to date and sees great benefit in continuing the ASRAC process. Given that the ASRAC has been used successfully for a number of years with refinements along the way, DOE has tentatively concluded that it may be appropriate to include reference to the ASRAC process in the Process Rule in the context of negotiated rulemaking. DOE believes that there may be benefits in terms of transparency and consistency associated with formalizing the negotiated rulemaking process as part of the Process Rule.

There were also various comments related to participation in the negotiated rulemaking process, some of which specifically referred to the ASRAC process. For example, the CA IOUs recommended that negotiated rulemaking participants should be fairly balanced, with a greater number of non-industry stakeholders drawn from consumer groups, utility companies, and energy efficiency advocacy organizations. (CA IOUs, No. 65 at p. 4) The Public Power Association commented that for products that have not previously been regulated, there should be a process to allow end-use consumers who purchase, operate, and maintain products to be part of the negotiation process, and to have direct input on the efficiency metric used to evaluate such products. (Public Power Association, No. 36 at p. 3) Acuity Brands stated that when weighing comments and data during a negotiated rulemaking, similar to its comments on DFRs, DOE should consider a commenter's specific qualifications and areas of expertise (or lack thereof), require sources of data or other validation of input, and trigger preemption at the start of the process. (Acuity Brands, No. 46 at p. 3) APPA added that stakeholders that are not part of the negotiation committee should be provided more time to provide input at committee meetings. (APPA, No. 36 at p. 3) NPCC stated that having the DOE contractors who do the analysis in the

room during a negotiated rulemaking is an advantage, and overall, the process builds trust and communication. (NPCC, January 9, 2018 Public Meeting Transcript, at p. 138)

In terms of forming an ASRAC working group for an individual rulemaking, DOE is routinely confronted with the task of striking an appropriate balance between inclusion of all relevant points of view and keeping the membership to a manageable size. As meetings of the ASRAC working groups are open to the public, there is always the opportunity for input from interested parties who are not members of the working group itself. DOE sees the most important objective to be a thorough airing of the issues surrounding the subject product/equipment, regardless of the source or status of that source (*i.e.*, member or non-member of the working group). Thus, DOE envisions the negotiated rulemaking process to be a collaborative one, as opposed to an adversarial one. Because the working group is intended not only to raise issues but also to resolve them, it is important to have representation from technical experts who have experience with the products/equipment under consideration. Moreover, given that a consensus recommendation requires unanimity (unless the working group itself votes to require something less than unanimity), DOE views parity of representation between industry groups and non-industry groups as unnecessary. Furthermore, DOE expects that non-members of the working group will caucus with like-minded members to make sure that their views are addressed by the committee. Absent that, non-members are free to raise issues themselves during opportunities for public comment at the ASRAC working group meetings. In response to APPA, DOE welcomes participation in the negotiated rulemaking process by end-users of the subject product or equipment; industry trade associations or manufacturers may be well positioned to identify end-users who may wish to offer input to the negotiated rulemaking.

In the spirit of fostering further public engagement, DOE is proposing to adopt APPA's suggestion to schedule a dedicated portion of each ASRAC working group meeting to receive input and data from non-members. Such period would not truncate the public's existing ability to provide relevant comments at appropriate points in the ongoing negotiations. However, by setting aside a scheduled block of time, DOE would hope to raise the level of detail and substantive input from interested stakeholders who are not voting members of the working group. While DOE strongly supports comments accompanied by data, it does not agree with Acuity Brands that there should be a litmus test for comment based upon academic credentials or professional/technical experience. In DOE's view, a non-expert is capable of providing meaningful insight or raising legitimate concerns, even if further inquiry is then required on the part of the agency. Likewise, DOE does not support nor can it necessarily legally impose preemption at the start of a negotiated rulemaking; instead, DOE will continue to consider preemption as expressed in EPCA. DOE agrees with NPCC that there is value in having DOE contractors present at the negotiated rulemaking sessions to answer questions regarding related technical analyses, a practice which DOE intends to continue. In a final thought on this topic, DOE notes that under its proposed revisions to the Process Rule, every successful negotiated rulemaking would result in a notice of proposed rulemaking, so at that point, all interested parties would have an equal opportunity to comment on DOE's proposal, and DOE would be required to address comments in proceeding to a final rule.

Commenters generally supported use of an experienced convener or facilitator for each negotiated rulemaking, an individual who can help guide the process by ensuring that all

procedures are followed and that all participants have an equal opportunity to contribute to the dialogue. (Bradford White, No. 42 at p. 1; Lennox, No. 62 at p. 7; PHCC, No. 63 at pp. 1-2; Spire, No. 57 at pp. 13-14; Acuity Brands, No. 46 at p. 3; CEC, No. 53 at p. 5; NEMA, January 9, 2018 Public Meeting Transcript, at p. 139) NEMA recommended that DOE should retain a professional facilitator, who is both neutral and independent, to meet with interested parties. (NEMA, January 9, 2018 Public Meeting Transcript, at p. 139) Spire stated that a neutral facilitator should be utilized at the option of the negotiating committee, but such person should not be a stakeholder representative or DOE staff member. (Spire, No. 57 at pp. 13-14) Acuity Brands added that while a facilitator possessing some level of familiarity with energy conservation standards may be helpful, a facilitator with a high level of technical expertise (*e.g.*, staff from national labs) may be an inappropriate choice, due to the potential to interject bias into the negotiations. (Acuity Brands, No. 46 at p. 3) Lennox commented that while it has generally found experienced facilitators to be helpful, the NRA already contains provisions regarding facilitators (*e.g.*, 5 U.S.C. 566(c),(d)). Accordingly, Lennox does not see a compelling need to amend the Process Rule in detail regarding the use of facilitators, although DOE could incorporate provisions along the lines of those statutory requirements. (Lennox, No. 62 at p. 7) The Joint Commenters expressed a similar sentiment, stating that while the use of a facilitator is generally helpful, the Joint Commenters have not identified the failure to assign a facilitator to be a problem that requires addressing in the amended Process Rule. (Joint Commenters, No. 51 at p. 13)

Other commenters (NPCC, ABB) suggested that use of a facilitator may not be essential in the context of a negotiated rulemaking. Instead, these commenters argued that while typically

useful, sometimes the facilitator can get in the way of making progress when faced with complex technical issues. (NPCC, January 9, 2018 Public Meeting Transcript, at p. 144; ABB, January 9, 2018 Public Meeting Transcript, at pp. 144-145) EEI stated that the Process Rule should provide for the use of a facilitator or convener as a discretionary matter. (EEI, January 9, 2018 Public Meeting Public Meeting Transcript, at pp. 149-150)

In contemplating potential revisions to its Process Rule, DOE has decided to incorporate new mechanisms and procedures that the agency has been using subsequent to the adoption of the original Process Rule – such as negotiated rulemaking. In evaluating its current approaches, DOE is also seeking to identify further improvements that can be made and included in an updated Process Rule. Along these lines, DOE is proposing to use a neutral, third-party convener to gauge the suitability of negotiated rulemaking in a given case, consistent with the NRA (5 U.S.C. 566(b)).

DOE envisions the convener providing an important evaluation and screening function, which can assist DOE in making its decision of how best to conduct a rulemaking. The convener would have early interaction with stakeholders, who could help shape how the rulemaking process unfolds.

DOE also plans to continue its current practice of having a neutral and independent facilitator present at all ASRAC working group meetings. In DOE's experience, facilitators have played a beneficial role in the overwhelming majority of the agency's past negotiated rulemakings. The Department agrees that the facilitator should not be a stakeholder

representative, a member of DOE's staff, a DOE consultant, or a technical expert in the subject matter (due to the potential to interject bias). DOE may elect to have the convener serve as facilitator, particularly given the knowledge acquired at the earlier stages of inquiry. Consistent with 5 U.S.C. 566(c), DOE will nominate a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. Given the useful role facilitators have played in past negotiated rulemakings and the similarly useful role that conveners could play in the future, DOE sees no reason not to explicitly include provisions for their use in the revised Process Rule.

Whenever DOE conducts rulemaking, including negotiated rulemaking, the Department attempts to ensure broad stakeholder involvements and input, as well as ample opportunity for public comment. DOE provides notice in the *Federal Register* of its intent to form an ASRAC working group (including a request for nominations to serve on the committee), announcement of the selection of working group members (including their affiliation), and announcement of public meeting and the subject matter to be addressed. Such documents routinely note the products/equipment at issue and the responsible DOE contact. Consistent with 5 U.S.C. 565(b), DOE "shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership." DOE notes that in addition to formal membership on the ASRAC working group, the agency's negotiated rulemakings also provide the opportunity for substantial public comment and input, thereby helping to ensure that all relevant interests are represented. Again, it is DOE's expectation that use of a neutral,

independent convenor will help ensure that the negotiating committee will encompass the necessary parties in a balanced way that can reach an agreement addressing relevant issues.

If negotiations move forward and a consensus agreement is ultimately reached, Spire argued that DOE should publish a notice in the *Federal Register* (with a minimum 30-day comment period) explaining the consensus agreement, requesting public comments on additional issues to be addressed, and ascertaining whether DOE should move forward with the consensus agreement under its direct final rule authority or by issuing a notice of proposed rulemaking. Finally, Spire commented that all negotiated rules should undergo technological feasibility and economic justification analyses consistent with those applied to other covered products with similar market presence and potential, but for which the negotiated rulemaking path is not undertaken. Spire remarked that regardless of the use of negotiated rulemaking, EPCA requirements for meeting the test of technological feasibility and economic justification remain a requirement for minimum efficiency standards and need to receive full analytical consideration. (Spire, No. 57 at pp. 13-14)

In response, DOE notes that it has tentatively decided to modify its approach such that any negotiated rulemaking would result in a NOPR. Once the NOPR is published, interested parties will be presented with DOE's proposal and supporting analyses, and as part of the NOPR, DOE will explain and document why its negotiated rulemaking proposal meets the statutory requirements for a significant savings of energy, technological feasibility and economic justification, just the same as with any other notice-and-comment rulemaking. In addition, the

NOPR will provide a minimum comment period of 60 days, at which time commenters may raise any issue they have with DOE's proposal.

A number of commenters cautioned DOE to make sure to maintain the flexibility associated with its current negotiated rulemaking process, which many see as a valuable feature. Specifically, the CEC stated that key to the success of negotiated rulemakings is the flexibility to fit the process to each individual product being considered, so any revisions to the Process Rule to incorporate negotiated rulemaking should maintain this flexibility and not be prescriptive (*e.g.*, professional facilitation should be an option and composition of working groups should be a guideline). In contrast, the CEC stated that DOE could define "consensus" and apply that to all negotiated rulemakings instead of having the definition of consensus be determined in each negotiated rulemaking. (CEC, No. 53 at p. 5) EEI added that the Process Rule should be flexible as to the time allotted for completion of a negotiated rulemaking. (EEI, January 9, 2018 Public Meeting Transcript, at pp. 141-142) In terms of flexibility to consider and recommend reasonable alternatives in the context of a negotiated rulemaking, Daikin appeared to support that concept (Daikin, January 9, 2018 Public Meeting Transcript, at pp. 153-154), whereas the CEC disfavored a requirement for the Process Rule to specify which alternatives can be considered for fear of restricting or delaying the negotiated rulemaking process (CEC, January 9, 2018 Public Meeting Transcript, at pp. 158-159). The Joint Commenters disfavors updating the Process Rule to specify the need to consider all reasonable alternatives, because the current state of negotiated rulemaking already provides for that and nothing prevents the parties to a negotiation from raising all possible options during the course of discussions. (Joint Commenters, No. 51 at p. 14)

In response, DOE sees value in providing flexibility to interested and knowledgeable stakeholders to negotiate potential standard levels that take into account real world concerns regarding manufacturing processes, implementation challenges, and associated costs. The Department is open to allowing ASRAC working groups to tailor the negotiated rulemaking process to the specific product/equipment at issue. However, DOE emphasizes that any potential standard upon which an ASRAC working group reaches consensus must comply with all of the provisions of EPCA under which the rule was authorized. DOE will not accept recommended standard levels or issue a NOPR based upon negotiated rulemaking that does not comply with all pertinent parts of EPCA.

In response to the CEC's concern about the facilitator somehow diminishing the group's flexibility, DOE does not view this to be a problem, because it is not the role of the facilitator to drive any particular outcome; rather, the facilitator is there to assist the committee members in achieving their own consensus, if possible. Similarly with the composition of ASRAC working groups, DOE is maintaining its discretion to select members best suited to analyzing potential standards for the product/equipment in question. DOE agrees that sufficient time should be allocated to properly conduct the negotiated rulemaking and thoroughly address the underlying issues, while keeping in mind any applicable statutory or judicial deadlines. Regarding the term "consensus," section 562(2) of the NRA defines that term to mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless such committee agrees to another definition. Thus, defining consensus is committed to the discretion of the ASRAC committee by law, so DOE cannot establish a standardized measure of consensus for all negotiated rulemakings. Regarding the ability of the negotiated rulemaking committee to

consider all reasonable alternatives, DOE notes that consideration of available alternatives is a routine part of negotiated rulemakings and requires no special provisions in the Process Rule.

NPCC urged DOE, as part of the negotiated rulemaking process, to continue and enhance pre-rule access to DOE's technical staff, which NPCC finds improves the efficacy and validity of the data collection process, improves communications with manufacturers, builds confidence in the underlying data and analytics, and fosters greater understanding and acceptance of analytical results. (NPCC, No. 35 at pp. 5-6, 13) In a related comment on the technical aspects of a negotiated rulemaking, the CEC stated that to support that process, DOE should commit to: (1) ensuring that adequate product data and technical consultation are made available to the negotiated rulemaking working group, and (2) ensuring that negotiations are scheduled such that participants can fully engage. (CEC, No. 53 at p. 6)

DOE agrees that for a negotiated rulemaking to be successful, ASRAC working group members require access to relevant data and analyses, as well as support from DOE's technical staff. DOE has committed to providing technical support for consensus development in section 8 of the current Process Rule. The use of a convener should provide interested parties with further opportunity for engagement and to share relevant thoughts and information regarding the topic of the negotiated rulemaking prior to the beginning of such a proceeding. Furthermore, DOE understands that to achieve the optimal result, all committee members should be present and fully contributing to negotiating rulemaking sessions, so the agency strives to schedule meetings as to maximize participation (preferable through in-person attendance but through remote access

when necessary). DOE intends to continue these practices as part of its negotiated rulemaking process.

DOE continues to seek comment on any and all issues related to the use of negotiated rulemaking in the development of energy conservation standards, including how DOE can improve its current use of the process as envisioned by the NRA. DOE acknowledges the concern that relevant parties or points of view must be represented during the negotiations to ensure the most appropriate outcome and associated burden and distribution of costs. In particular, DOE seeks comment on its proposal to amend the Process Rule to provide for the use of a convenor or facilitator for each negotiated rulemaking. DOE also continues to request comment on amendments to the Process Rule that would ensure that all reasonable alternatives are explored in that process, including the option of not amending or issuing a standard and alternatives that will affect different stakeholders differently. DOE also requests further comment on the use of the DFR mechanism at the conclusion of a negotiated rulemaking.

L. Other Revisions and Issues

1. DOE's Analytical Methodologies, Generally

DOE received a variety of comments regarding its analytical methodologies. Some commenters offered detailed suggestions on how DOE might improve on specific aspects of its current set of methodologies. These issues generally fell into certain discrete areas – the peer review process, proprietary data, and DOE's analytical methodologies. The suggestions were both detailed and specific. However, the general consensus from the commenters suggested that there was room for DOE to improve its analytical methods.

In considering the numerous comments it received regarding its analyses, DOE believes it needs additional time to make a determination on proceeding and whether any changes to the Process Rule are necessary to address the methodological issues raised. In order to both assess what changes to the analytical methodologies are needed, and, potentially, what changes to the Process Rule might be appropriate, DOE is committing to conducting an expert independent peer review consistent with OMB's Information Quality Bulletin for Peer Review[12] of its assumptions, models, and methodologies to ensure that its approach is designed to provide projections that are sufficiently rigorous for their intended use. Additionally, in an effort to ensure that the analytical models and approaches that DOE regularly uses are as up-to-date and accurate as possible, DOE will undertake a recurring peer review of DOE's analytical methods at least once every 10 years.

While applying this approach may increase the overall commitment of time and resources both by DOE and interested parties wishing to participate as part of this peer review process, in DOE's view, making this investment should yield a number of potentially beneficial dividends with respect to each standards (or determination) rulemaking that DOE conducts when using this process – primarily in the form of more accurate economic forecasting and projections of energy savings. Because these benefits would apply across a wide variety of DOE's rulemakings and impact both consumer products and commercial equipment, in DOE's view, conducting a peer review in the immediate future and on a specified periodic basis thereafter would help improve the overall rulemaking process and ensure the credibility and validity of the results of that process. While DOE recognizes that the changes that the peer review process may bring could

[12] 70 FR 2664 (Jan. 14, 2005)

increase the amount of time that DOE must commit to any individual rulemaking activity, there may also be an opportunity for time and resource savings in those instances where it is readily apparent that a new standards rulemaking is unlikely to yield significant energy savings under EPCA. For those rulemakings which do move forward, there could be further savings of time and other resources to the extent that there is a diminished level of controversy surrounding DOE's rulemaking analyses.

DOE last peer reviewed its analytical approaches in 2005. At that time, DOE supplied seven reviewers with three rulemaking analyses concerning commercial unitary air conditioners and heat pumps, distribution transformers, and residential furnaces and boilers. These analyses were publicly available in the technical support documents at the time and had been posted in July 2004 as part of the ANOPR process for the respective product groups. Selected peer reviewers were energy experts whose backgrounds were primarily in engineering.[13]

DOE has identified 12 potential focus areas for the review to which it is currently committing, which are outlined in Table L1.1 below. DOE plans to task participants with reviewing the appropriate time horizon(s) for its analysis, estimation of baseline product efficiency, forecasting of future product prices, consumer choice models/modeling, emissions analysis, approaches to estimating indirect employment effects, fuel switching analysis, marginal manufacturer markup, effects on product performance, subgroup analysis, and how to undertake a welfare analysis as part of DOE's regulatory analysis. The charge to the peer reviewers will emphasize that, overall, DOE is interested in the sensitivity of the results to the assumptions made, thus the uncertainty inherent in the final model that it adopts. Procedurally, DOE is also interested in comments regarding the Department's handling and use of proprietary data.

[13] *https://www.energy.gov/sites/prod/files/2013/12/f5/peer_review_report021507.pdf*

Two peer review approaches that DOE is considering for this round of peer review are outlined in Table L1.1 below. The first approach, labeled "Analytical Overview", would differ from the peer review process in 2005 by drawing from portions of existing regulatory analyses to illustrate the analytical focus areas that DOE has identified. The second approach would more closely mirror the 2005 peer review by tasking reviewers with reviewing the entirety of 2–3 existing regulatory analyses. Both approaches would attempt to include analyses that include aspects of fuel switching, commercial products, and white goods.

Table L1.1—Proposed Peer Review Structure and Focus Areas

Peer Review Structure	Peer Review Materials	Analytical Focus Areas
Analytical Overview	DOE would illustrate the analytical focus areas using examples from specific product rulemakings. Product examples would include illustrations that touch on fuel switching, commercial products, and white goods.	• Analytical time horizon • Baseline efficiency estimates • Consumer choice model • Emissions analysis • Fuel switching analysis • Indirect employment effects • Marginal manufacturer markup • Product price forecasts • Product performance • Subgroup analysis • Use of proprietary data • Welfare analysis and deadweight loss
Rule Case Studies	DOE would assign 2–3 docketed technical support documents for existing standards to illustrate focus areas. Selected TSDs would be recent (2014–2016) and include fuel switching, commercial products, and white goods.	

This review is intended to evaluate analytical methods employed by DOE rather than to evaluate the efficacy of DOE's programs themselves. DOE further intends to make the peer review available to the public, including an opportunity for public commenters to raise concerns for the peer reviewers' consideration. Consistent with the requirements of OMB's Information

Quality Bulletin for Peer Review, DOE will make the results of the peer review and its responses available to the public. In addition, DOE may seek comment on its findings.

DOE seeks comment on these proposed approaches, including comment on the areas of focus that DOE has identified. DOE also seeks suggestions regarding what specific changes to its analytical methodologies would be needed to improve on its current approach. To the extent that certain specific changes are needed for particular product or equipment sectors, DOE seeks detailed information on those aspects as well. Any potential changes to the Process Rule that might be appropriate based on the results of the peer review and any methodological update would be addressed in a subsequent proceeding to amend the Process Rule.

One methodological issue upon which DOE seeks comment in this document is the "walk-down" approach to assessing different potential standards. Using this approach, DOE starts from the most stringent choice to determine both economic justification and technological feasibility by "walking-down" through the available choices by stringency until arriving at the first choice that meets all of the statutory criteria. Economic theory suggests that the most logical way to determine if a particular option is "economically justified" is to compare it to the full range of available choices, rather than just one baseline. Applying economic theory, DOE is proposing at 10 CFR part 430 Appendix A, sec. (7)(e)(2)(G) to require the Secretary to determine whether a candidate/trial standard level would be economically justified when compared to the full range of other feasible trial standard levels. In making this determination, the Secretary is to consider whether an economically rational consumer would choose a product meeting the candidate/trial standard level over products meeting the other feasible trial standard levels after considering all relevant factors, including but not limited to, energy savings, efficacy,

product features, and life-cycle costs. If an economically rational consumer would not choose the candidate trial standard level after considering these factors, it would be rejected as economically unjustified. This approach recognizes that the "economic justification" of any particular option depends on a broader comparison of economic attributes relative to other available options, rather than relative to just one baseline, particularly one that is likely to be of little relevance to a consumer when choosing which product(s) are economically justified for her purchase. Rather she is likely to be focused on the set of actually available products at the time of purchase rather than some hypothetical baseline representing the set of products that would have been available in the absence of the standard (including perhaps the model she is currently replacing). DOE seeks public comment on its proposal to refine the "walk-down" approach to require determinations of economic justification to consider comparisons of economically relevant factors across trial standard levels, consistent with both economic theory and the actual purchasing behavior of rational consumers.

2. Cumulative Regulatory Burden

DOE received a number of written comments related to the issue of addressing cumulative regulatory burden in conjunction with the agency's energy conservation standards rulemakings. Commenters generally suggested that the agency should account for this burden more comprehensively in light of the substantial burdens already faced by manufacturers from multiple regulatory requirements. For example, Sub-Zero stated that in light of the large number of regulatory requirements involving energy consumption and related environmental restrictions applying to a variety of different appliance types, it must still continue to introduce new products and features to stay in business. The cumulative burden presented by these requirements is, in its

view, almost insurmountable. Sub-Zero asserted that the timing of different regulations from various government agencies for different products is a significant factor that can increase the burden on manufacturers. While Sub-Zero acknowledged that DOE claims to take these factors into account when determining the economic and competitive impacts from a given rulemaking, the company asserted that the agency underestimates the overall impact -- particularly for smaller manufacturers such as Sub-Zero. (Sub-Zero, No. 43 at p. 2)

Other industry commenters held similar views. The Heating, Air-conditioning & Refrigeration Distributors International ("HARDI") stated that the Process Rule should account for cumulative regulatory burden. (HARDI, No. 56 at pp. 3-4) Lennox argued that DOE should develop transparent and more robust guidance on the process for including cumulative regulatory costs on manufacturers into its economic analysis, with supporting analysis made available to stakeholders, to ensure that the mandated cost-benefit analysis reasonably reflects real-world costs. (Lennox, No. 62 at p. 12) Within the context of its particular industry, MHI urged DOE to work with the Department of Housing and Urban Development ("HUD") to consider the cumulative regulatory impact of such regulations on producers of manufactured housing as a part of its cost-benefit analyses. (MHI, No. 67 at p. 2) Similarly, Nor-Lake stated that DOE should coordinate its efforts with other government agencies to avoid conflicting or overlapping mandates. (Nor-Lake, No. 68 at p. 3) Schneider Electric asserted that DOE should engage industry early enough in the process to ensure that standards under consideration are also reflective of its commitment to ENERGY STAR – a voluntary program geared towards encouraging the purchase of energy-efficient products and equipment that is overseen by the

Environmental Protection Agency but that relies on technical expertise and input from DOE. (Schneider Electric, No. 69 at p. 2)

The Joint Commenters similarly argued that a modernized Process Rule should meaningfully consider cumulative regulatory burden in DOE's rulemaking analyses. They asserted that the Process Rule should include cumulative regulatory burden analysis as a factor in DOE's decision on a proposed and final energy conservation standard, but it should not be a stand-alone analysis with no real impact. Instead, in their view, DOE should consider that burden as part of its analysis that manufacturers must comply with both a variety of domestic and international regulations. They added that a true cumulative regulatory burden analysis should not only consider the number of rulemakings to which appliance manufacturers are subject, but also the timing and technical and economic relationship of those rulemakings. The Joint Commenters urged DOE to consider manufacturers' relative and cumulative research and development, testing, and certification burdens, which can be significantly higher when regulations from different agencies take effect in close temporal proximity to each other. This burden, they argued, can be especially difficult for industries that have access to only a small number of accredited labs, creating a bottleneck problem as industry is forced to comply with several largely unrelated requirements at the same time. They stated further that both time and resources are needed to evaluate and respond to DOE's proposed test procedures and energy conservation standards, and when these rulemakings occur simultaneously, the cumulative burden on industry increases dramatically. They also argued that the same burden applies when compliance dates are clumped together for all of these products. The Joint Commenters suggested that DOE should consider voluntary, non-regulatory options in its analysis but

cautioned that the Department should not assume that labeling is a less burdensome approach; even without energy conservation requirements, labeling and other forms of providing information can require the same amount of testing and can have similar compliance risks. (Joint Commenters, No. 51 at pp. 2, 23-25) Lutron and Whirlpool signed on to the Joint Commenters' submission. (Lutron, No. 50 at p. 2 and Whirlpool, No. 76 at p. 1)

In contrast, the CEC supported DOE's consideration of cumulative regulatory burden in DOE's manufacturer impact analysis. It stated that this burden should be considered when determining the mandatory compliance date of an energy conservation standard and stressed that considering the cumulative regulatory burden faced by regulated entities should not be a factor in the life-cycle cost analysis. (CEC, No. 53 at p. 7) Within this context, the CEC also supported vetting manufacturer interview questions with the appropriate trade organization to improve the consistency and effectiveness of the interviews. (CEC, No. 53 at p. 7)

DOE acknowledges that its past treatment of the cumulative regulatory burdens faced by regulated entities may have lacked the comprehensiveness sought by some of the industry commenters. However, DOE has attempted to address these burdens in a consistent manner to ensure that it accounts for them in each of DOE's energy conservation standards rulemakings. To improve its assessments of the potential burdens (*i.e.*, costs) faced by industry in implementing potential standards, DOE commits to improving its analysis. As part of this effort, DOE will attempt to account for these potential costs through its modeling approaches. And as always, DOE remains open to constructive feedback on particular steps it should take (consistent

with its legal obligations) that would help improve its evaluation of the cumulative regulatory burdens faced by regulated entities within the energy conservation standards context.

3. Should DOE Conduct Retrospective Reviews of the Energy Savings and Costs of Energy Conservation Standards?

DOE solicited feedback during the public meeting regarding whether (and how) it should conduct a retrospective review of the energy savings and costs for its current standards and associated costs and benefits as part of any pre-rulemaking process that it ultimately adopts. A number of commenters weighed in with suggestions and varying viewpoints on this issue.

Some commenters supported the use of a retrospective review. AHRI suggested that a retrospective review could be part of the initial assessment when DOE is deciding whether to proceed to another round of rulemaking and that it should be required every time. (AHRI, January 9, 2018 Public Meeting Transcript at pp. 175-176) NPCC supported the use of retrospective review, but it did not believe it would be useful or informative to carry out such an analysis on every standard or any current standard prior to commencing work on the development of revised standards. Looking back, the commenter asserted that prior retrospective reviews found that DOE overestimated the costs of meeting standards. Going forward, NPCC added that if DOE undertakes a retrospective review, it should determine the scope and submit that scope for public comment. (NPCC, No. 35 at p. 15)

GW expressed support for the use of retrospective review, and it recommended that DOE should follow GW's suggested framework, which was contained in a supplemental attachment to

its submission. GW argued that revisiting regulatory inputs is key to effective retrospective review. It asserted that these types of reviews could help DOE in verifying the accuracy of its forecasted assumptions on consumer behavior and energy prices, which both illustrate the costs and benefits of previous appliance standards and help improve future forecast analyses by providing more accurate inputs. (GW, No. 48 at pp. 8, 13-14)

Nor-Lake suggested that DOE should solicit feedback from stakeholders, either in the form of an RFI or otherwise, as to the retrospective impacts of the standard that is scheduled to be revised. In its view, this information would guide DOE in establishing its priorities and in determining whether it should promulgate an amended standard. (Nor-Lake, No. 68 at p. 2)

NAFEM stated that at the pre-rulemaking stage, DOE's first step should be to evaluate whether under the current standard, the anticipated energy efficiency gains have been achieved and assess what the actual associated costs to consumers and manufacturers were. NAFEM argued that this step would be one of the most important ways for DOE to reduce regulatory burdens. (NAFEM, No. 47 at pp. 2-3)

NPGA commented on the importance of DOE conducting a retrospective review and evaluation of current energy conservation standards prior to initiating a rulemaking for amended standards. It argued that the agency should refrain from amending its energy conservation standards on an arbitrary schedule (*e.g.*, every 5 years, every 8 years), but instead, DOE should assess the performance of the current standard, as well as the market penetration of more

efficient standards, to determine whether a new rulemaking is in fact necessary. (NPGA, No. 59 at p. 3)

While the Joint Commenters conceded that the actual impact and energy savings attributable to a current standard are highly relevant for future rulemakings, they did not support the creation of a separate process for performing retrospective review of current standards. They stated that such a review would essentially be another rulemaking and would significantly draw out the regulatory process by requiring the collection of data which would impose an additional burden on stakeholders. In their view, the imposition of a regular, mandatory retrospective review process would add burden, cost, and delay to the rulemaking process and would serve no real benefit. They added that commenters can always raise views on the impact of current standards, and DOE can respond to these issues without the need to dedicate its limited resources to obtaining the necessary data to support a retrospective review on its own. Instead, the Joint Commenters recommended the adoption of an inquiry at an early stage of a DOE regulatory action examining whether anything has changed since a previous DOE appliance efficiency standards final rule was adopted. (Joint Commenters, No. 51 at pp. 10-11) Lutron and Whirlpool supported the Joint Commenters' view by signing on to the Joint Comment. (*See* Lutron, No. 50 at p. 2 and Whirlpool, No. 76 at p. 1)

Other commenters flatly opposed the use of a separate retrospective analysis. The American Lighting Association ("ALA") opposed this approach and asserted that DOE should instead engage stakeholders by asking what, if any, new developments have occurred since the previous rulemaking proceeding. (ALA, No. 55 at p. 2) HARDI also opposed the creation of a

separate retrospective review process, suggesting instead that such a process could occur concurrently with the standards rulemaking process to help reduce both the regulatory timetable and associated product development costs. (HARDI, No. 56 at pp. 2-3) Lennox similarly asserted that requiring a retrospective review for all rulemakings would unnecessarily burden DOE and manufacturers alike. It argued that EPCA already requires an extensive economic justification test (*e.g.*, 42 U.S.C. 6295(o)), so a retrospective review of market impacts some six years or more before a rulemaking is not necessarily relevant to determining whether a standard under consideration is economically justified. As part of this economic justification analysis for a particular product, rather than leaping to a full and burdensome retrospective review, Lennox argued that DOE "should make common sense inquiries such as what, if anything, has changed since a previous DOE appliance efficiency standards final rule for that product was adopted." (Lennox, No. 62 at p. 8)

NEEP stated that it sees no benefit in performing a retrospective review of current standards and associated costs and benefits as part of a pre-rule process. It argued that the market analysis being conducted to inform a new standard will already include the impacts of earlier standards, as they have influenced the market. In its view, as DOE maps out any given market to inform a rule, the costs and benefits from current standards will become clear as will any other market influences (*e.g.*, utility programs, technological innovations, and economies of scale being reached). NEEP added that DOE's understanding of the real-world impact of appliance standards is important in understanding the success of the program, but it is not needed as an explicit goal of data collection before a rule begins. (NEEP, No. 77 at p. 3)

The CA IOUs stated that retrospective reviews should not be compulsory, because there is often not enough publicly available information to allow for a comprehensive review in time for DOE to meet its statutory obligations for completing updated rulemakings. (CA IOUs, No. 65 at p. 5) However, the CA IOUs did endorse the idea of DOE conducting some retrospective reviews to ensure that the predictions of its analytical models are accurate, and based upon these reviews, DOE should adjust the models accordingly where inaccuracies are found. (CA IOUs, No. 65 at pp. 7-8) Similarly, the CEC did not object to DOE performing a retrospective analysis of current standards, but it argued that it should not be a mandatory requirement for all rulemakings. CEC recommended that DOE should instead conduct a retrospective analysis outside of any specific rulemaking. It also noted that DOE must meet its statutory obligations to review standards and test procedures, regardless of any retrospective analysis. (CEC, No. 53 at p. 4)

A few commenters were undecided or expressed misgivings about the appropriateness of conducting a retrospective review. Given the statutory timelines, one commenter expressed the opinion that there may not be time for a retrospective review. (EEI, January 9, 2018 Public Meeting Transcript at pp. 174-175) Other commenters (Lennox, January 9, 2018 Public Meeting Transcript, at p. 176; Southern Company, January 9, 2018 Public Meeting Transcript at pp. 176-177) expressed reservations about investing the extensive time and effort in a retrospective review without first having a clear understanding of what to examine. Bradford White urged DOE to conduct an analysis of its current standards as part of the ANOPR process, but it did not suggest that a retrospective analysis should occur separately from this process. (Bradford White, No. 42 at p. 2)

In response, DOE acknowledges that a broad and comprehensive retrospective review of DOE's current and past energy conservation standards could provide significant data for DOE to consider as part of future standards rulemakings. While DOE recognizes the potential benefits of conducting this type of retrospective review on a periodic basis, it also recognizes that it faces limits on its own resources to conduct the broad and comprehensive analyses that would be needed to collect and analyze this information. As indicated by the variety of positions detailed in the comments submitted in response to the RFI, interested parties also recognize the considerable efforts and resources that would need to be committed to conducting these reviews on a regular basis. Accordingly, DOE is continuing to evaluate the prospect of conducting these types of reviews, including on a longer-term (*e.g.*, 10-year) basis but has not, as of yet, reached a final decision as to how to proceed. DOE does note that the early assessment processes proposed in this proceeding to amend the Process Rule do incorporate an element of retrospective review. That is, by beginning a potential proceeding to amend existing energy conservation standards or test procedures for a product by asking if anything has changed since issuance of the last standard or test procedure, DOE will be seeking input in what effectively amounts to a retrospective review of the impact and effectiveness of its most recent regulatory action for the product at issue.

4. Certification, Compliance, and Enforcement (CCE)-Related Issues

DOE received a variety of comments regarding its certification, compliance, and enforcement (CCE) process. In summary, these comments offered suggestions on how DOE

might improve the effectiveness of the agency's CCE-related efforts and steps that could be taken to streamline the rulemaking process involving CCE matters.

DOE has given serious consideration to the various CCE-related issues raised by the commenters. However, the comments raise issues with DOE regulations other than the Process Rule. In light of the nature of these issues and others that DOE is addressing in this proposal, DOE is opting to evaluate this topic further.

In 2010-2011 when DOE changed its certification, compliance, and enforcement requirements for all products in a single rulemaking, DOE learned that process was unwieldy, particularly given the level of interest from various parties and volume of comments received. 76 FR 38287 (June 30, 2011).[14] In light of that, DOE's plan is to address changes to the certification, compliance, and enforcement regulations, and related provisions in 10 CFR parts 430 and 431, in separate rulemakings with separate public meetings to help manage comments and to allow DOE to consider industry-specific issues in a more focused format. DOE may ultimately adopt different provisions for different products based on comments and would make appropriate changes to regulatory text to be more general or product-specific in a final rule.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This proposed regulatory action, if adopted, would be a significant regulatory action under section 3(f) 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

[14] Docket Number EERE-2010-BT-CE-0014, *https://www.regulations.gov/docket?D=EERE-2010-BT-CE-0014*.

Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Order 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, "Reducing Regulation and Controlling Regulatory Costs." 82 FR 9339 (Jan. 30, 2017). That Order states that the policy of the Executive Branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. More specifically, the Order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." 82 FR 12285 (March 1, 2017). The Order requires 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 individual 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 numerous and extensive comments pertaining to DOE's Process Rule.

C. 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*.

Because this proposed rule would not directly regulate small entities but instead only imposes procedural requirements on DOE itself, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. Mid-Tex Elec. Co-Op, Inc. v. F.E.R.C., 773 F.2d 327 (1985).

D. 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.

E. Review Under the National Environmental Policy Act of 1969

In this document, DOE proposes to revise its Process Rule, which outlines the procedures DOE will follow in conducting rulemakings for new or amended energy conservation standards and test procedures for covered consumer products and commercial/industrial equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*.) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule is strictly procedural and is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. 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 tentatively determined that it would 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.

G. 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 Executive agencies make every reasonable effort to ensure that 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 tentatively determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

H. 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. Public Law No. 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 tentatively 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.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 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.

J. 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.

K. 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 tentatively concluded that it is consistent with the applicable policies in those guidelines.

L. 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 proposes 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.

M. 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 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 is committing in this proceeding to engage in a new peer review of its analytical methodologies.

V. Public Participation

A. Attendance at the Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Regina Washington at (202) 586-1214 or by email: *Regina.Washington@ee.doe.gov*.

Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Regina Washington at (202) 586-1214 or *Regina.Washington@ee.doe.gov* so that the necessary procedures can be completed.

DOE requires visitors to have laptops and other devices, such as tablets, checked upon entry into the Forrestal Building. Any person wishing to bring these devices into the building will be required to obtain a property pass. Visitors should avoid bringing these devices, or allow an extra 45 minutes to check in. Please report to the visitor's desk to have devices checked before proceeding through security.

Due to the REAL ID Act implemented by the Department of Homeland Security (DHS), there have been recent changes regarding identification (ID) requirements for individuals wishing to enter Federal buildings from specific States and U.S. territories. As a result, driver's licenses from several States and one territory will not be accepted for building entry, and instead, one of the alternate forms of ID listed below will be required. DHS has determined that regular driver's licenses (and ID cards) from the following jurisdictions are not acceptable for entry into DOE facilities: Alaska, American Samoa, Arizona, Louisiana, Maine, Massachusetts, Minnesota, New York, Oklahoma, and Washington. Acceptable alternate forms of Photo-ID include: U.S. Passport or Passport Card; an Enhanced Driver's License or Enhanced ID-Card issued by the States of Minnesota, New York, or Washington (Enhanced licenses issued by these States are clearly marked Enhanced or Enhanced Driver's License); a military ID or other Federal government-issued Photo-ID card.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website at: *https://www.energy.gov/eere/buildings/regulatory-processes*, under the heading 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 plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit

requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this document. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make follow-up contact, if needed.

C. Conduct of the Public Meeting

DOE will designate a DOE official to preside at the public meeting 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 public meeting. 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 public meeting, interested parties may submit further comments on the proceedings, as well as on any aspect of the rulemaking, until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, 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 allow, 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 public meeting 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 public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this notice and will be accessible on the DOE website. 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 before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information 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 itself 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. Otherwise, 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 below.

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, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail 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. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. 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, that are written in English, and that are 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, postal mail, or hand delivery/courier 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. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when

such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

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 notice of proposed rulemaking.

List of Subjects

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.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Incorporation by reference, Reporting and recordkeeping requirements, Test procedures.

Signed in Washington, DC, on January 28, 2019

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Daniel R Simmons
Assistant Secretary
Energy Efficiency and Renewable Energy

For the reasons stated in the preamble, DOE is proposing to amend parts 430 and 431 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. Mandatory 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. Negotiated Rulemaking Process

   12. Principles for Distinguishing Between Effective and Compliance Dates

   13. Principles for the Conduct of the Engineering Analysis

14. Principles for the Analysis of Impacts on Manufacturers

15. Principles for the Analysis of Impacts on Consumers

16. Consideration of Non-Regulatory Approaches

17. Cross-cutting Analytical Assumptions

1. Objectives

This appendix establishes procedures, interpretations, and policies that DOE will follow 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. Under the procedures established by this appendix, DOE will 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 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. Under the procedures in this appendix, DOE will 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 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 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. Pursuant to this appendix, the analyses will 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 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 by section 9 in this appendix.

3. Mandatory Application of the Process Rule

The rulemaking procedures established in this appendix are binding on DOE.

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 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 RFIs, 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. And, DOE will complete the test procedure rulemaking at least 180 days prior to publication of a proposed energy conservation standard.

(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 notice in the *Federal Register* announcing that DOE is considering initiating a rulemaking proceeding. As part of that notice,

DOE will request 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 economically justified, technologically feasible, or would result in a significant savings of energy. If DOE receives sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, DOE would engage in notice and comment rulemaking to make that determination. 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.

(b) Significant Savings of Energy. (1) In evaluating the prospects of proposing a new or amended standard—or in determining that no new or amended standard is needed—DOE will first look to the projected energy savings that are likely to result. DOE will determine as a preliminary matter whether the rulemaking has the potential to result in "significant energy savings." If the rulemaking passes the significant energy savings threshold, DOE will then compare these projected savings against the technological feasibility of and likely costs necessary to meet the new or amended standards needed to achieve these energy savings.

(2) Under its significant energy savings analysis, DOE will examine both the total amount of projected energy savings and the relative percentage increase in efficiency or decrease in energy usage that could be obtained from establishing or amending energy conservation standards for a given covered product or equipment. Under the first step of this approach, the projected energy savings from a potential maximum technologically feasible ("max-tech") standard will be evaluated against a threshold of 0.5 quads of energy saved over a 30-year period.

(3) If the projected max-tech energy savings does not meet or exceed this threshold, those max-tech savings would then be compared to the total energy usage of the covered product or equipment to calculate a potential percentage improvement in energy efficiency or reduction in energy usage.

(4) If this comparison does not yield an energy savings improvement of at least 10 percent, the analysis will end, and DOE will propose to determine that no significant energy savings would likely result from setting new or amended standards.

(5) If either one of the thresholds described in paragraphs (b)(3) or (b)(4) of this section is reached, DOE will conduct analyses to ascertain whether a standard can be prescribed that produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and still constitutes significant energy savings (using the same criteria of either 0.5 quad of aggregate energy savings or a 10-percent improvement in energy efficiency or decrease in energy use) at the level determined to be economically justified.

(c) 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 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 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 (c)(3) of this section and the policies stated in section 7. 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 (d) 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.

(d) *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 (c) of this section, DOE will select the candidate standard levels for further analysis.

(e) *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.

(f) *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.

Other analyses of social and distributional effects include:

(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.

(g) *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 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.

(h) *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 5 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 of EPCA.

(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) *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 technologically feasible and economically justified.

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

(i) A candidate/trial standard level will not be proposed or promulgated if the Department determines that it is not technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and (o)(3)(B)) For a standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens. (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 a standard level 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 generally available in the U.S. at the time, 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))

(2) *Considerations in assessing economic justification.*

(i) The following considerations will guide the application of the economic justification criterion in selecting a proposed standard:

(A) The Department will determine whether a candidate/trial standard level would result in a negative return on investment for the industry, would significantly reduce the value of the industry, or would cause significant adverse impacts to a significant subgroup of manufacturers (including small manufacturing businesses).

(B) The Department will determine whether a candidate/trial standard level would be the direct cause of plant closures, significant losses in domestic manufacturer employment, or significant losses of capital investment by domestic manufacturers.

(C) The Department will determine whether a candidate/trial standard level would have a significant adverse impact on the environment or energy security.

(D) The Department will determine whether a candidate/trial standard level would not result in significant energy conservation relative to non-regulatory approaches.

(E) The Department will determine whether a candidate/trial standard level is not practicable to manufacture or has a negative impact on consumer utility or safety.

(F) The Department will determine whether a candidate/trial standard level is not consistent with the policies relating to consumer costs in paragraph (c)(1) of this section.

(G) The Department will determine whether a candidate/trial standard level would be economically justified when compared to the set of other feasible trial standard levels. In making this determination, the Department will consider whether an economically rational consumer would choose a product meeting the candidate/trial standard level over products meeting the other feasible trial standard levels after considering all relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs.

(H) The Department will determine whether a candidate/trial standard level will have significant adverse impacts on a significant subgroup of consumers (including low-income consumers).

(I) The Department of Energy and the Department of Justice will determine whether a candidate/trial standard level would have significant anticompetitive effects.

(ii) DOE will, consistent with paragraph (f) of this section, account for the views expressed by the Department of Justice regarding a given proposal's effects on competition.

(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 new or amended energy conservation standards. Consequently, DOE will publish a notice in the *Federal Register* whenever DOE is considering initiation of a rulemaking for new or revised test procedures. 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; and

(2) Not be unduly burdensome to conduct. DOE will review comments submitted and, subject to statutory obligations, determine whether it agrees with the submitted information. If DOE determines that a new or 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 a new or 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 or the information received is inconclusive with regard to these points, DOE would undertake the preliminary stages of a rulemaking to issue or 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 standards as DOE test procedures for covered products and equipment, unless such methodology would be unduly burdensome to conduct or would not 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.

(d) *Issuing final test procedure modification.* Test procedure rulemakings establishing methodologies used to evaluate proposed energy conservation standards will be finalized at least 180 days 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 the ASHRAE/IES Standard 90.1 for the product.

(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. Specifically, clear and convincing evidence would exist only where the facts and data made available to DOE regarding a particular ASHRAE amendment demonstrates that there is *no substantial doubt* that the more stringent standard would result in a significant additional amount of energy savings over the relevant ASHRAE level, 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 product.

10. Direct Final Rules

(a) A direct final rule (DFR), as contemplated in 42 U.S.C. 6295(p)(4), is a procedural mechanism separate from the negotiated rulemaking process outlined under the Negotiated Rulemaking Act (5 U.S.C. 563). DOE may issue a DFR adopting energy conservation standards for a covered product provided that:

(1) DOE receives a joint proposal from a group of "interested persons that are fairly representative of relevant points of view," which does not include DOE as a member of the group. At a minimum, to be "fairly representative of relevant points of view" the group submitting a joint statement must include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, as appropriate, 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 additional parties must be part of a joint statement in order to be "fairly representative of relevant points of view."

(2) This paragraph (a)(2) describes the steps DOE will follow with respect to a DFR.

(i) DOE must determine the energy conservation standard recommended in the joint proposal is in accordance with the requirements of 42 U.S.C. 6295(o) or section 342(a)(6)(B) as applicable. Because the DFR provision is procedural, and not a separate grant of rulemaking authority, any standard issued under the DFR process must comply fully with the provisions of the EPCA subsection under which the rule is authorized.

DOE will not accept or issue as a DFR a submitted joint proposal that does not comply with all applicable EPCA requirements.

(ii) Upon receipt of a joint statement recommending energy conservation standards, DOE will publish in the *Federal Register* that statement, as submitted to DOE, in order to obtain feedback as to whether the joint statement was submitted by a group that is fairly representative of relevant points of view. If DOE determines that the DFR was not submitted by a group that is fairly representative of relevant points of view, DOE will not move forward with a DFR and will consider whether any further rulemaking activity is appropriate. If the Secretary determines that a DFR cannot be issued based on the statement, the Secretary shall publish a notice of the determination, together with an explanation of the reasons for the determination.

(iii) Simultaneous with the issuance of a DFR, DOE must also publish a NOPR containing the same energy conservation standards as 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 direct final rule," based on the rulemaking record. If DOE determines that one or more substantive comments objecting to the DFR provides a sufficient reason to withdraw the DFR, DOE will do so, and will instead proceed with the published NOPR (unless the information provided suggests that withdrawal of that NOPR would likewise be appropriate). In making this determination, DOE may consider comments as adverse, even if the issue was brought up previously during DOE-initiated discussions (e.g. publication of a

framework or RFI document), if the Department concludes that the comments merit further consideration.

11. Negotiated Rulemaking Process

(a)(1) In those instances where negotiated rulemaking is determined to be appropriate, DOE will comply with the requirements of the Negotiated Rulemaking Act (NRA) (5 U.S.C. 561-570) and the requirements of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2). To facilitate potential negotiated rulemakings, and to comply with the requirements of the NRA and the FACA, DOE established the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC). Working groups can be established as subcommittees of ASRAC, from time to time, and for specific products/equipment, with one member representative from the ASRAC committee attending and participating in the meetings of a specific working group. (Consistent with 5 U.S.C. 565(b), committee membership is limited to 25 members, unless the agency determines that more members are necessary for the functioning of the committee or to achieve balanced membership.) Ultimately, the working group reports to ASRAC, and ASRAC itself votes on whether to make a recommendation to DOE to adopt a consensus agreement developed through the negotiated rulemaking.

(2) DOE will use the negotiated rulemaking process, on a case-by-case basis and, in appropriate circumstances, in an attempt to develop a consensus proposal before issuing a proposed rule. When approached by one or more stakeholders or on its own initiative, DOE will use a convener to ascertain, in consultation with relevant stakeholders, whether the development of the subject matter of a potential rulemaking proceeding would be conducive to negotiated rulemaking, with the agency evaluating the convener's recommendation before reaching a decision on such matter.

A neutral, independent convenor will identify issues that any negotiation would need to address, assess the full breadth of interested parties who should be included in any negotiated rulemaking to address those issues, and make a judgment as to whether there is the potential for a group of individuals negotiating in good faith to reach a consensus agreement given the issues presented. DOE will have a neutral and independent facilitator, who is not a DOE employee or consultant, present at all ASRAC working group meetings.

(3) DOE will base its decision to proceed with a potential negotiated rulemaking on the report of the convenor. The following additional factors militate in favor of a negotiated rulemaking:

(i) Stakeholders commented in favor of negotiated rulemaking in response to the initial rulemaking notice;

(ii) 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;

(iii) The current standards have already been amended one or more times;

(iv) Stakeholders from differing points of view are willing to participate; and

(v) DOE determines that the parties may be able to reach an agreement.

(4) DOE will provide notice in the *Federal Register* of its intent to form an ASRAC working group (including a request for nominations to serve on the committee), announcement of the selection of working group members (including their affiliation), and announcement of public meetings and the subject matter to be addressed.

(b) DOE's role in the negotiated rulemaking process is to participate as a member of a group attempting to develop a consensus proposal for energy conservation standards for a particular product/equipment and to provide technical/analytical advice to the negotiating parties and legal

input where needed to support the development of a potential consensus recommendation in the form of a term sheet.

(c) A negotiated rulemaking may be used to develop energy conservation standards, test procedures, product coverage, and other categories of rulemaking activities.

(d) A dedicated portion of each ASRAC working group meeting will be set aside to receive input and data from non-members of the ASRAC working group. This additional opportunity for input does nothing to diminish stakeholders' ability to provide comments and ask relevant questions during the course of the working group's ongoing deliberations at the public meeting.

(e) If DOE determines to proceed with a rulemaking at the conclusion of negotiations, DOE will publish a proposed rule. DOE will consider the approved term sheet in developing such proposed rule. A negotiated rulemaking in which DOE participates under the ASRAC process will not result in the issuance of a DFR. 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. DOE cannot accept recommendations or issue a NOPR based upon a negotiated rulemaking that does not comply with all applicable EPCA requirements, including those product- or equipment-specific requirements included in the provision that authorizes issuance of the standard.

12. Principles for Distinguishing Between Effective and Compliance Dates

(a) It is critical to recognize that for any given rule, the effective and compliance dates for either DOE test procedures or DOE energy conservation standards are typically not identical. 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.

13. 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 improvement in 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.

14. 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 (section 5(d)), 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*.

15. 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 (c) 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.

16. 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.

17. 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 time line 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 (h)(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 CO_2 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).

PART 431 – ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291-6317; 28 U.S.C. 2461 note.

4. Section 431.4 is added to subpart A to read as follows:

§431.4 Procedures, interpretations, and policies for consideration of new or revised energy conservation standards and test procedures for commercial/industrial equipment.

The procedures, interpretations, and policies for consideration of new or revised energy conservation standards and test procedures set forth in appendix A to subpart C of part 430 of this chapter shall apply to the consideration of new or revised energy conservation standards and test procedures considered for adoption under this part.

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