



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 430

EERE-2020-BT-STD-0015

RIN 1904-AE87

Energy Conservation Program: Clarifying Amendments to the Error Correction Rule

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

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Department of Energy (“DOE” or “the Department”) proposes amending its procedures for providing public input on possible corrections to pre-publication drafts of energy conservation standard documents, as informed by a decision by the United States Court of Appeals for the Ninth Circuit regarding the implementation and scope of the existing procedures. This proposal seeks to modify certain aspects of these procedures and to clarify and reflect the Department’s intent with regard to the procedures. In particular, the proposal would clarify that although DOE has elected to utilize a distinct error correction process to receive public input on certain pre-publication draft documents, this process does not in any way restrict, limit, diminish, or eliminate the Secretary’s discretion to determine whether to establish or amend an energy conservation standard, or to determine the appropriate level at which to amend or establish any energy conservation standard.

DATES: DOE will accept comments, data, and information regarding this proposal no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. See section IV, “Public Participation,” for details.

ADDRESSES:

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments.

Alternatively, interested persons may submit comments, identified by docket number EERE-2020-BT-STD-0015, by any of the following methods:

- 1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- 2) *E-mail:* ErrorCorrection2020STD0015@ee.doe.gov. Include the docket number EERE-2020-BT-STD-0015 or regulatory information number (RIN) 1904-AE87 in the subject line of the message.
- 3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 287-1445. If possible, please submit all items on a compact disc (“CD”), in which case it is not necessary to include printed copies.
- 4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza, SW., Suite

600, Washington, DC, 20024. Telephone: (202) 287-1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

Docket: The docket, which includes *Federal Register* notices, public meeting attendee lists and transcripts (if a public meeting is held), 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 web page can be found at <http://www.regulations.gov/docket?D=EERE-2020-BT-STD-0015>. The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE-5B, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 287-1692 or John.Cymbalsky@ee.doe.gov.

For further information on how to submit a comment or to review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287-1445 or by e-mail: *ApplianceStandardsQuestions@ee.doe.gov*.

SUPPLEMENTARY INFORMATION:

- I. Authority & Background
 - A. *Legal Authority*
 - B. *Background*
- II. Summary of Rule Amendments
 - A. *Breakdown of Proposed Amendments*
- III. Procedural Issues and Regulatory Review
- IV. Public Participation
- V. Approval of the Office of the Secretary

I. Authority & Background

A. Legal Authority

Title III of the Energy Policy and Conservation Act, as amended (“EPCA” or in context, “the Act”), establishes a program within DOE designed to improve the energy efficiency of consumer products (other than automobiles) and of certain industrial equipment. Under this authority and subject to the requirements of EPCA and the Administrative Procedure Act (“APA”), DOE may establish and/or amend energy conservation standards for a variety of covered consumer products and industrial equipment.

To achieve a primary purpose of EPCA, that of improving the energy efficiency of a variety of consumer products and industrial equipment, the Department undertakes certain

rulemakings to establish or revise energy conservation standards and to consider amending such standards on a periodic basis. 42 U.S.C. 6295(m)(1). The Act requires DOE to conduct such rulemakings or periodic reviews and provides that DOE may not establish a new or amend an existing standard if the Department determines that such a standard will not be technologically feasible or economically justified, or that the standard will not result in significant conservation of energy or water. *See* 42 U.S.C. 6295(o)(2)(A), (3). The Act additionally prevents DOE from “prescrib[ing] any amended standard which increases the maximum allowable energy use [or, for certain products, water use] . . . or decreases the minimum required energy efficiency” of a covered product (referred to as the “anti-backsliding” provision). 42 U.S.C. 6295(o)(1).

When considering whether to establish or to amend existing energy conservation standards, DOE conducts extensive technological analyses and uses considerable amounts of data. Given the complexity of this review process, DOE recognizes the reality that a potential standards regulation may go through the entire rulemaking process and may still contain an error of fact that would result in the Department’s prescribing a standard in regulation that is inconsistent with the analysis conducted by the Department and conflicts with the Secretary’s intent for the rulemaking. If such an error remains uncorrected and the standard takes legal effect, it is at least arguable that EPCA’s anti-backsliding provision could prevent the Department from correcting the error.

The Department initially adopted the error correction rule in 2016 with these considerations in mind, and now seeks to clarify that the procedure is designed to prevent avoidable erroneous outcomes while maintaining in full the Secretary’s authority and discretion

to conduct energy conservation standard rulemakings. The proposed amendments set forth in this rulemaking are designed to ensure that the error correction review process does not supplant or limit in any way the Secretary's authority to determine how any rulemaking should proceed or the ultimate outcome of a rulemaking proceeding.

B. Background

DOE is proposing to amend its procedures for addressing errors in pre-publication draft documents that would, if finalized, set new or amended energy conservation standards for the various products and equipment that DOE regulates. *See* 10 CFR 430.5. DOE is taking this action as informed by a 2019 decision from the United States Court of Appeals for the Ninth Circuit that held that DOE's existing error correction rule ("ECR"), as written, imposes a non-discretionary duty upon the Secretary to publish rules within 30 days of completing the error correction process. *See Natural Resources Defense Council v. Perry*, 940 F.3d 1072 (9th Cir. 2019). The court of appeals held that 10 CFR 430.5(f) created a non-discretionary duty to submit draft rules (i.e. a pre-publication draft) for publication in the *Federal Register* within 30 days of the close of the error correction submission period. 940 F.3d at 1079-1080. In response, this proposed rule would amend 10 CFR 430.5 to provide clearly that the rule creates no non-discretionary duty to publish a pre-publication draft that has been posted in accordance with the error correction process. DOE has determined that it is necessary to revise the ECR so that the rule may more accurately meet the very limited purpose originally intended -- the Department's need to prevent energy conservation standards from containing errors or mistakes -- while also clarifying that the error correction process does not limit the Secretary's rulemaking discretion in any way.

To address this issue, DOE's proposal would clarify that the error correction process provides the public with an additional opportunity to review documents for errors, but without limiting the Secretary's rulemaking authority. Through this rulemaking, DOE has sought to restructure how the ECR process can identify errors in documents, that if finalized, might be difficult to remedy due to EPCA's anti-backsliding provision (42 U.S.C. 6295(o)(1)), while maintaining the Secretary's discretion to determine whether to establish or amend an energy conservation standard. These proposed revisions to the ECR will not impair DOE's ability to meet its statutorily prescribed deadlines for either establishing or amending energy conservation standards for covered products and equipment. DOE also emphasizes that these proposed revisions to the error correction rule focus solely on DOE's intent to allow the public to identify possible technical and objective errors in certain pre-publication draft documents and that these proposed revisions would not limit DOE's discretion in determining how to address the receipt of any new information received that falls outside of the error correction context that DOE is seeking to address. Any new information, regardless of how DOE receives it (i.e. whether submitted from an outside party or discovered by DOE on its own) that would affect the policy-making aspects of a given standards rulemaking will be considered within the context of that rulemaking. DOE will evaluate that information as appropriate and determine how best to proceed.

II. Summary of Rule Amendments

The following proposed revisions to the ECR would clarify the rule's original limited purpose by maintaining the Secretary's discretion in establishing or amending energy conservation standards, eliminating any possible interpretation that the rule introduces a

mandatory obligation or timeline for the Secretary to publish an energy conservation standard at the completion of the error correction review process, and ensuring the availability of a mechanism to further the specific and limited purpose of avoiding promulgating energy conservation standards that contain errors.

Breakdown of Proposed Amendments

§430.5(a): Purpose and Scope

This proposal renames this section (currently named “Scope and purpose”) as “Purpose and Scope” and separates it into two subsections that address the purpose, (a)(1), and the scope, (a)(2), of the regulations in this section.

The general purpose of subsection (1) is to describe the procedures through which the Department may accept and consider public input for the review of a pre-publication draft document’s regulatory text. As envisioned in this proposed rule, neither the governing statutes nor the regulations described here place an affirmative obligation on the Secretary to provide an opportunity to seek error correction requests on any document or to act or respond in light of any submissions properly submitted by the public. The error correction process described herein is strictly a voluntary activity on the part of DOE. Under the proposed rule, the Department would be under no legal obligation to offer the public an additional review period for energy conservation standards beyond that which is already provided under EPCA or other applicable provisions of the APA. The Department intends this opportunity to facilitate greater public involvement in the rulemaking process and to ensure accuracy of its documents.

Subsection (2) describes the scope of the procedure that would be available under this section. The error correction rule would be limited to pre-publication draft documents that could, if finalized, establish or amend energy conservation standards for which the Secretary determines that additional public review for errors is warranted. Under the approach set forth in this proposed rule, it would remain solely within the Secretary's discretion to subject an energy conservation standard pre-publication draft document to the error correction process; under this approach, not all documents potentially within the scope of the error correction rule must be selected by the Secretary for this review.

DOE proposes to maintain the limitation on the scope of its existing error correction rule that excludes from the error correction review process those documents pertaining to test procedures, requirements for labeling or certification, and procedures for enforcement. While DOE recognizes the importance of correcting errors in all of its documents, the error-correction process is unnecessary in these other cases because any errors in such cases would clearly not be subject to the anti-backsliding provision and can be addressed in subsequent rulemaking proceedings. The Department maintains its intention to be responsive to input from the public that identifies errors through traditional notice and comment practices for these excluded documents. Here, the Department is sensitive to the particular complexities of energy conservation standards and the potential impacts of the Act's anti-backsliding provision. Accordingly, DOE proposes to continue to limit application of the error correction rule to those pre-publication drafts that could establish or amend energy conservation standards for the various products and equipment that DOE has the authority to regulate under EPCA.

Under this proposed rule, DOE would also continue to exclude energy conservation standards set through the issuance of a direct final rule pursuant to section 325(p)(4) of EPCA. (42 U.S.C. 6295(p)(4)) As noted in the original rule establishing the error correction process, as a practical matter, the mechanisms of the direct final rule process provide an opportunity for correcting errors that is at least as effective as what the error correction rule achieves. If a direct final rule contains an error, the public has an opportunity to identify that error through the comment process provided by statute, and any error that a person would have identified during the error correction process could also be identified in the 110-day comment period required by EPCA for a direct final rule. See 42 U.S.C. 6295(p)(4)(B).

§ 430.5(b): Definitions

This paragraph would continue to set forth several definitions that clarify the meaning of this section and the application of the error correction process. Below, DOE describes changes to the existing definitions in the error correction rule.

The term “*Error*” for the purposes of this section would be redefined to include the revised definition of *Pre-publication draft*. This update would clarify the type of document that the public will encounter online in those instances in which a document is subject to the error correction review process. The phrase “regulatory text” would continue to mean the material that is to be placed in the Code of Federal Regulations (“CFR”), together with the amendatory instructions by which the rule communicates what should go in the CFR 81 FR 26998, 27000.

The Department is proposing to replace the term “*Rule*” with the term “*Pre-publication draft*” to better describe the type of document that the public will review during the error

correction process. This publicly available document will contain the regulatory text and, where appropriate, an accompanying preamble to a draft rule.

§ 430.5(c): Posting of pre-publication drafts

The Department is proposing to revise the title of this section to pair with revised definitions included in section 430.5(b). This section would continue to describe the beginning of the error correction process.

§ 430.5(c)(1): Decision to post pre-publication drafts is discretionary

In subsection (1), the Department is proposing to revise the current regulatory text to clarify that the Secretary's decision to post pre-publication drafts online is discretionary and voluntary, not the result of a mandatory duty. If the Secretary chooses to post the draft for error correction review, the draft would be available for a maximum of 45 days.

§ 430.5(c)(2): Pre-publication draft availability

Subsection (2) would be revised to remove any suggestion of an implied timeline for the Secretary's decision to publish a potential rule that has undergone error correction review. This proposed change would further clarify that the error correction rule does not impose a deadline by which the Secretary must submit the document for publication. Subsection (2) would be clarified to emphasize that the public's review of pre-publication draft documents is available at the sole discretion of the Secretary. The error correction rule does not establish an obligation for the Secretary to post pre-publication draft documents online for every rulemaking that could, if finalized, amend or establish an energy conservation standard. The Secretary is free to determine which energy conservation standard rulemakings are appropriate subjects for this process.

Finally, the Secretary would retain the discretion to determine the degree to which these documents may be amended, if at all, after the review process is complete.

§ 430.5(c)(3): Pre-publication draft disclaimer

Subsection (3) would be updated to replace “rule” with the new term “pre-publication draft,” consistent with changes throughout the rule. The Department is proposing to revise the disclaimer notice that will continue to be posted along with any pre-publication draft document that is made available for public review. The proposed text would explain that, through engaging in the error correction process, the Department may conduct additional review of the regulatory text prior to finalizing a potential energy conservation standard to ensure that the text is consistent with the Secretary’s intent and with data and analysis available at the time of posting. It would remain within the Secretary’s discretion to determine the appropriate remedy for any error that may be identified during this process.

§ 430.5(d): Request for error-correction review.

This section explains how the public would be able to submit a request to the Department, seeking consideration of a potential error identified in the regulatory text of the pre-publication draft document. This section also identifies what evidence would be accepted in support of the request. The title of the section and references to the current term “rule” used throughout this section would be revised to reflect the updated definitions.

Subsection (1) would be updated to include the revised definition of *Pre-publication draft*. As in the original rule, the public would be able to submit a request for the Secretary to review and correct an error properly identified. The Secretary would not be obligated to take an

action, and would have the discretion to choose whether to correct an error properly identified and determined to be consequential. If the error were deemed to be inconsequential, the Secretary would be under no obligation to review and correct the regulatory text.

Subsection (2) would continue to set out the requirements for a properly submitted request. Under these proposed requirements, a request must identify an error, as defined within this section, with particularity by stating what text is erroneous and providing a corrected substitute if possible. If no substitute can be articulated, the request must include an explanation as to why the requester cannot do so.

The Department emphasizes that the review conducted by the public would be limited to identifying errors existing in the regulatory text of the pre-publication draft document. Disagreements on discretionary questions of policy reflected in a pre-publication draft document would be outside of the scope of the error correction process. The proposed rule seeks to clarify that all policy decisions reflected in the pre-publication draft document would be within the sole discretion of the Secretary both before and after the posting of a pre-publication draft document for error correction review.

As proposed, subsection (3) would make clear that evidence in the record can relate to the accompanying preamble of the pre-publication draft, but that the error itself must originate from the regulatory text. DOE would not consider a request that does not conform to the requirements of this section.

§ 430.5(e): Correction of pre-publication draft documents.

This section would continue to describe the course of action that the Department may take in the event that a request for correction has appropriately identified an error. Under the proposed rule, the error correction rule would impose no requirement for publication and would not establish any obligation on the Secretary to publish a pre-publication draft document as a final rule upon the completion of the error correction process.

The new text introduced here would clarify the Secretary's authority to determine the appropriate remedy for an error identified and would ensure that the Secretary retains the discretion to initiate additional review of the regulatory text so that the text mirrors the Secretary's intent, based on the Secretary's exercise of discretion.

§ 430.5(f): Available outcomes and publication.

To avoid confusion regarding whether and when the Department may publish a pre-publication draft document as a final rule, this section would be revised to prevent the inference that publication in the *Federal Register* is the only outcome available at the conclusion of the error correction process. Under this proposed rule, application of the error correction rule would be a voluntary activity by the Department, and the Secretary would not be obligated to consider or respond to any request for correction submitted. At the conclusion of the review period, the Secretary would be under no obligation to submit any document for publication.

§ 430.5(g): Alteration of Standards.

This section of the regulations is proposed for removal. The current version of this provision states that until such time as a standard has been published in the Federal Register,

DOE may correct that standard consistent with the APA. DOE is proposing to remove this provision as unnecessary in light of the clarifications being proposed for the remaining sections of 10 CFR 430.5.

§ 430.5(g): Relationship between pre-publication draft documents and prescribed rules; finality of agency's decision.

This section would be renumbered from (h) to (g). The section would include new text to reaffirm that pre-publication draft documents are not final rules or prescribed rules within the meaning of the Act. The Department's posting of these drafts online for error correction review would not finalize the substance of a document under error correction review or end the rulemaking process for that document, including the Department's consideration of any policy decisions pertaining to the rulemaking. The section thus seeks to provide clarity regarding the finality of the agency's decisions.

III. Procedural Issues and Regulatory Review

A. Administrative Procedure Act

Agency rules of procedure and practice, such as the one described in this document, are not subject to the requirement to provide prior notice and an opportunity for public comment pursuant to authority at 5 U.S.C. 553(b)(A). DOE notes that a rule of this nature is also not a substantive rule subject to a 30-day delay in effective date pursuant to 5 U.S.C. 553(d).

Nonetheless, DOE is voluntarily offering an opportunity for the public to make comments on the changes set forth in this proposed rule.

B. Review Under Executive Orders 12866

This proposed regulatory action is a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Because this proposed rule is not subject to the requirement to provide prior notice and an opportunity for public comment, it is not subject to the analytical requirements of the Regulatory Flexibility Act.

D. Review Under the Paperwork Reduction Act

This proposed rule does not contain a collection of information for purposes of the Paperwork Reduction Act.

E. Review Under the National Environmental Policy Act of 1969

DOE has determined that this proposed 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

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 (Aug. 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 that it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products and equipment that would be subject to this proposed rule. 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)) No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 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; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). 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 section 3(a) and section 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 determined that, to the extent permitted by law, this 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 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting 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 small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at <http://energy.gov/gc/office-general-counsel>. DOE examined this proposed rule according to UMRA and its statement of policy and determined that the proposed rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule will 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

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (Mar. 18, 1988), that this proposed regulation 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 guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with 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 significant energy action. A “significant energy action” is defined as any action by an agency that promulgated 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 significant energy action, the

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

This proposed rule is not a significant energy action because the ability to correct regulations will not, in itself, have a significant adverse effect on the supply, distribution, or use of energy. Moreover, 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. Accordingly, DOE has not prepared a Statement of Energy Effects.

IV. Public Participation

Submission of Comments

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

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

read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

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

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

Submitting comments via email, hand delivery, or postal mail. Comments and documents submitted via email, hand delivery, 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 on 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 mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

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

Campaign Form Letters.

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

Confidential Business Information.

According 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 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.

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).

V. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on September 29, 2020, by Alexander N. Fitzsimmons, Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on September 30, 2020

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

For the reasons stated in the preamble, DOE is proposing to amend part 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 430 – ENERGY CONSERVATION STANDARDS 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. Section 430.5 is revised to read as follows:

§430.5 Error correction procedures for energy conservation standards rules.

(a) *Purpose and scope.*

(1) The regulations in this section describe the procedures through which the Department of Energy may receive voluntary submissions from the public regarding the identification of possible Errors (as defined in this section) found in the regulatory text of a pre-publication draft of a document that may result in the establishment or amendment of an energy conservation standard issued under the Energy Policy and Conservation Act, as amended (42 U.S.C. 6291-6317). The Secretary may take the submissions received under advisement, but is not required to take any action in response to the receipt of a submission.

(2) This section applies only to pre-publication draft documents that may result in establishing or amending energy conservation standards under the Act, as identified by the Secretary. This section does not apply to direct final rules issued pursuant to section 325(p)(4) of the Act (42 U.S.C. 6295(p)(4)). Nothing in the procedure set forth in this section in any way restricts, limits, diminishes, or eliminates the Secretary's discretion to

determine whether to establish or amend an energy conservation standard, or to determine the appropriate level at which to amend or establish any energy conservation standard.

(b) *Definitions.*

Act means the Energy Policy and Conservation Act, as amended (42 U.S.C. 6291-6317).

Error means an objective mistake in the regulatory text of a pre-publication draft document that may result in the establishment or amendment of an energy conservation standard. Examples of possible mistakes that might give rise to Errors include:

- (1) A typographical mistake that causes the regulatory text to differ from how the preamble to the pre-publication draft document describes the potential standard;
- (2) A calculation mistake that causes the numerical value of a potential energy conservation standard to differ from what the draft technical support documents accompanying the relevant rulemaking docket would justify; or
- (3) A numbering mistake that causes a cross-reference to lead to the wrong text.

Pre-publication draft means a publicly available draft of a potential rule establishing or amending an energy conservation standard under the Act that the Secretary has not finalized and submitted to the Office of the Federal Register for publication.

Secretary means the Secretary of Energy or an official with delegated authority to perform a function of the Secretary of Energy under this section.

(c) *Posting of pre-publication drafts.* (1) The Secretary may cause a pre-publication draft document to be posted on a publicly accessible Web site. Once posted, the Secretary ordinarily

will keep the pre-publication draft document posted for a period of 45 calendar days, but the Secretary in his or her discretion may shorten or lengthen the time period during which the pre-publication draft document is posted.

(2) Pre-publication drafts may, in the sole discretion of the Secretary, be made available to the public to review for Errors in the document's draft regulatory text. The Secretary is not obligated to make pre-publication drafts available and will determine which documents will be posted on a publicly accessible website for public review. The posting of a document pursuant to this section does not change its status as a pre-publication draft. With respect to any document posted pursuant to this section, the Secretary retains full discretion both before and after posting to determine whether to establish or amend an energy conservation standard, and the appropriate level at which to amend or establish an energy conservation standard.

(3) Any pre-publication draft document posted pursuant to paragraph (c)(1) of this section shall bear the following disclaimer:

NOTICE: The text of this pre-publication draft document is not final and is subject to further review by the United States Department of Energy, including, but not limited to, review for correction based on the identification of errors as defined in 10 CFR 430.5. Readers are requested to notify the United States Department of Energy, by email at [EMAIL ADDRESS PROVIDED IN POSTED NOTICE], of any Errors, as defined in such regulations, by no later than midnight on [DATE 45 CALENDAR DAYS AFTER DATE OF POSTING OF THE DOCUMENT ON THE DEPARTMENT'S WEBSITE], in order that the United States Department of Energy may conduct additional review of the regulatory text and make any corrections it determines are appropriate.

(d) *Request for error-correction review.* (1) A person identifying an Error subject to this section may request that the Secretary review a potential Error. Such a request must ordinarily be submitted within 45 calendar days of the posting of the pre-publication draft pursuant to paragraph (c)(1) of this section. The Secretary in his or her discretion may shorten or lengthen the time period during which such requests may be submitted.

(2)(i) A request under this section must identify a potential Error with particularity. The request must specify the regulatory text claimed to be erroneous. The request must also provide text that the requester contends would be a correct substitute. If a requester is unable to identify a correct substitute, the requester may submit a request that states that the requester is unable to determine what text would be correct and explains why the requester is unable to do so. The request must also substantiate the claimed Error by citing evidence from the existing record of the rulemaking, demonstrating that the regulatory text of the pre-publication draft is inconsistent with what the Secretary intended the text to be.

(ii) A person's disagreement with any policy choices or discretionary decisions that are contained in the pre-publication draft will not constitute a valid basis for a request under this section. All policy and discretionary decisions with regard to whether to establish or amend any conservation standard and, if so, the appropriate level at which to amend or establish that standard, remain within the sole discretion of the Secretary without regard to the procedure established in this section.

(3) The evidence to substantiate a request (or evidence of the Error itself) must be in the record of the rulemaking at the time of posting the pre-publication draft, which may include an accompanying preamble. The Secretary will not consider new evidence submitted in connection with an error-correction request.

(4) A request under this section must be filed in electronic format by email to the address that the disclaimer to the pre-publication draft designates for error-correction requests. Should filing by email not be feasible, the requester should contact the program point of contact designated in the pre-publication draft in order to ascertain an appropriate alternative means of filing an Error-correction request.

(5) A request that does not comply with the requirements of this section will not be considered.

(e) *Correction of pre-publication draft documents.* The Secretary may respond to a request for error-correction review under paragraph (d) of this section, or address an Error discovered on the Secretary's own initiative, at any time the Secretary determines appropriate. The Secretary may determine the appropriate remedy, if any, for an identified Error, and may initiate further review if it is deemed necessary.

(f) *Available outcomes and publication.* (1) The Secretary has no obligation to consider or respond to any error-correction request.

(2) The Secretary is under no obligation to submit a document for publication to the Office of the Federal Register at any time, regardless of whether the time period for submitting an error-correction request has expired.

(g) *Relationship between pre-publication draft documents and prescribed rules; finality of agency's decision.* A rule is considered "prescribed" within the meaning of section 325 of the Act (42 U.S.C. 6295), and thus within the meaning of section 336(b) of the Act (42 U.S.C. 6306(b)), on the date the rule is published in the *Federal Register*. Any pre-publication draft document that the Secretary allows to be reviewed through the Error correction process of this

section is not a final agency action and is not a prescribed rule within the meaning of these provisions of the Act.

[FR Doc. 2020-21985 Filed: 10/8/2020 8:45 am; Publication Date: 10/9/2020]