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DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2014–BT–STD–0049]

RIN 1904–AD38

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

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

ACTION: Request for information (RFI).

SUMMARY: Through this RFI, the U.S. Department of Energy (DOE) is commencing a notice-and-comment rulemaking to consider amending its ''Process Improvement Rule,'' with specific focus to clarify its process related to the promulgation of direct final rules (DFRs). The issues for discussion and public comment in this RFI include those raised in recent litigation concerning energy conservation standards for gas furnaces, central air conditioners and heat pumps, which has since been settled.

DATES: DOE will accept comments, data, and information responding to this RFI submitted no later than December 30, 2014.

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–2014–BT–STD–0049 or regulatory information number (RIN) 1904–AD38, by any of the following methods.

1. *Email: ConsumerProducts2014STD0049@ee.doe.gov.* Include the RIN (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.

2. *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disk (CD), in which case it is not necessary to include printed copies.

3. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Phone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: All submissions received must include the agency name and docket number and/or RIN for this rulemaking. No facsimiles (faxes) will be accepted.

Docket: A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;D=EERE-2014-BT-STD-0049.* This Web page contains a link to the docket for this rulemaking on the *www.regulations.gov* site. The *www.regulations.gov* Web page will contain instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT:

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

Ms. Johanna Hariharan, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6307. Email: *Johanna.Hariharan@hq.doe.gov.*

For further information on how to submit a comment and review other public comments, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Authority and Background

The Department of Energy's appliance standard program is conducted pursuant to Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (Pub. L. 94–163, 42 U.S.C. 6291, *et seq.* ''EPCA''). Under EPCA,[2] the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. In 1987, EPCA was amended to establish by law national efficiency standards for certain appliances and a schedule for DOE to conduct rulemakings to periodically review and update these standards. National Appliance Energy Conservation Act, Pub. L. 100–12 (1987). The standards must be designed to ''achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.'' (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must ''result in significant conservation of energy.'' (42 U.S.C. 6295(o)(3)(B))

DOE typically prescribes energy conservation standards by informal, notice-and-comment, rulemaking proceedings, consistent with the Administrative Procedure Act (APA) and EPCA. DOE has codified this process in its regulations at 10 CFR part 430, subpart C, appendix A through a final rule promulgated on July 15, 1996, titled ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' (''Process Improvement Rule''). 61 FR 36974.

The Energy Independence and Security Act of 2007 (Pub. L. 110–140) amended EPCA, in relevant part, to grant DOE authority to issue a direct final rule (DFR) to establish energy conservation standards. A DFR is a rulemaking proceeding in which an agency issues a final rule without an opportunity for prior public comment. DOE may issue a DFR 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).[3] (42 U.S.C. 6295(p)(4)(A)) Simultaneous with the issuance of a DFR, DOE must also issue a notice of proposed rulemaking (NOPR) containing the same energy conservation standards in the DFR. Following publication of the DFR, DOE must solicit public comment for a

[1] This part was originally titled Part B. It was redesignated Part A in the United States Code for editorial reasons.

[2] All references to EPCA in this document refer to the statute, as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210 (Dec. 18, 2012).

[3] DOE must issue simultaneously a notice of proposed rulemaking (NOPR) identical to the DFR. (42 U.S.C. 6295(p))

period of at least 110 days; then, not later than 120 days after issuance of the DFR, the Secretary must determine whether any adverse comments ''may provide a reasonable basis for withdrawing the DFR,'' based on the rulemaking record and specified statutory provisions. (42 U.S.C. 6295(p)(4)(B), (C)(i)) Upon withdrawal, the Secretary must proceed with the rulemaking process under the NOPR that was issued simultaneously with the DFR and publish the reasons the DFR was withdrawn. (42 U.S.C. 6295(C)(ii)) If the Secretary determines not to withdraw the DFR, it becomes effective as specified in the original issuance of the DFR.

DOE exercised this authority by publishing a DFR on June 27, 2011 (''2011 DFR'') that established energy conservation standards for residential furnaces, central air conditioners, and heat pumps (collectively referred to as heating, ventilating, and air conditioning (HVAC) products), including regional standards for particular types of products in specified States. 76 FR 37408.[4] In response, American Public Gas Association filed a petition for review in the D.C. Circuit on December 23, 2011, challenging the validity of the rule. Various environmental and commercial interest groups joined each side of the case, reflecting various viewpoints.

On March 11, 2014, all parties filed a joint motion presenting final terms of settlement in the case (''Joint Motion''). Among other things, the Joint Motion tasked DOE with initiating a notice-and-comment rulemaking proceeding to clarify its process related to the promulgation of DFRs by amending the DOE Process Improvement Rule.[5] The D.C. Circuit granted the Joint Motion on April 24, 2014. *American Public Gas Ass'n* v. *U.S. Dep't of Energy*, No. 11–1485 (D.C. Cir.).

To fulfill its responsibilities under the Joint Motion, DOE is initiating a notice-and-comment rulemaking proceeding to clarify its process related to DFRs by publishing this RFI. As per the Joint Motion, this RFI includes, *verbatim*, material submitted by letter from certain entities participating in the litigation, including Heating, Air-Conditioning & Refrigeration Distributors International (HARDI), Air-Conditioning, Heating, and Refrigeration Institute (AHRI), and Air Conditioning Contractors of America (ACCA), which is appended to this RFI. DOE will evaluate the comments received and undertake a further notice-and-comment process to consider amending the Process Improvement Rule to explicitly address DFRs.

II. Issues on Which DOE Seeks Comment and Information

In this RFI, DOE intends to gather the information necessary to undertake a further notice-and-comment process to consider DFR-related amendments to the Process Improvement Rule. DOE specifically invites public comment on three issues: (1) When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by ''interested persons that are fairly representative of relevant points of view,'' thereby permitting use of the DFR mechanism; (2) the nature and extent of ''adverse comments'' that may provide the Secretary a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR; and (3) what constitutes the ''recommended standard contained in the statement,'' and the scope of any resulting DFR. Each area of public comment is explained in more detail below.

A. Interested Persons

Under EPCA, DOE may use the DFR mechanism ''[o]n receipt of a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, and contains recommendations with respect to an energy or water conservation standard.'' (42 U.S.C. 6295(p)(4)(A)) In the 2011 DFR, DOE determined that a consensus agreement submitted by a broad cross-section of manufacturers who produced the subject HVAC products, their trade associations, and environmental and energy-efficiency advocacy organizations (''Consensus Agreement'') constituted the joint statement required by EPCA.[6] 76 FR 37408, 37422 (June 27, 2011). DOE did not read EPCA as requiring absolute agreement by all interested parties, since the Secretary has discretionary authority to determine if a joint agreement meets the requirement for representativeness. *Id.* DOE also reasoned that no single party should be deemed to have a veto power over use of the DFR mechanism. *Id.* Consequently, DOE considers consensus agreements on a case-by-case basis to determine if they meet the statutory requirements.

In this RFI, DOE specifically requests comments on its DFR process, as reflected in the 2011 DFR determination. DOE also requests general comments on factors supporting a determination that DOE has received a ''joint statement'' submitted by ''interested persons that are fairly representative of relevant points of view.''

B. Adverse Comments

Under EPCA, the Secretary shall withdraw a DFR no later than 120 days after publication (110 days for comment submittal, 10 days for comment review period) if (1) ''the Secretary receives 1 or more adverse public comments relating to the direct final rule;'' and (2) ''based on the rulemaking record . . . the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule.'' (42 U.S.C. 6295(p)(4)(C)(i))[7]

To meet this requirement in the 2011 DFR, DOE created a balancing test. DOE considered the substance of all adverse comments received (rather than quantity) and weighed them against the anticipated benefits of the Consensus Agreement and the likelihood that further consideration of the comments would change the results of the rulemaking. 76 FR 37408, 37422 (June 27, 2011). DOE did not consider adverse comments that had been previously raised and addressed at an earlier stage in the rulemaking proceeding. *Id.*

DOE requests comments on the balancing test approach to managing adverse comments, as articulated in the 2011 DFR. DOE also requests comments on the nature and extent of such ''adverse comments'' that may provide the Secretary a reasonable basis for withdrawing the DFR.

C. Recommended Standard

Under EPCA, the Secretary must determine that a ''recommended standard contained in the statement'' satisfies the statutory requirements of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)(A)(i)) This determination requires the same type of analysis that DOE conducts whenever it considers energy conservation standards.

[4] This rule became effective on October 25, 2011, following a determination issued by DOE on October 24, 2011. 76 FR 67037 (Oct. 31, 2011).

[5] Under the terms of the joint motion, DOE must initiate this notice-and-comment rulemaking within 180 days of a D.C. Circuit judgment implementing the agreement.

[6] Although States were not signatories to the Consensus Agreement, they did not express any opposition to it. 76 FR 37408, 37422 (June 27, 2011).

[7] If the DFR is withdrawn, the Secretary will proceed with the rulemaking process under the NOPR that was issued simultaneously with the DFR. (42 U.S.C. 6295(p)(4)(C)(ii)).

Accordingly, in the 2011 DFR, DOE certified that the energy conservation standard adopted achieved the ''maximum improvement in energy efficiency that is technologically feasible and economically justified and will result in significant conservation of energy.'' 42 U.S.C. 6295(o); 76 FR 37408, 37422 (June 27, 2011). Accordingly, DOE adopted the amended energy conservation standards for residential central air conditioners, heat pumps, and furnaces. 76 FR 37408, 37422 (June 27, 2011).

DOE requests comments on what constitutes the ''recommended standard contained in the statement,'' as well as the scope of any resulting DFR.

Although comment is particularly welcome on the issues discussed above, DOE also requests comments on any other topics pertaining to the DFR process.

III. Public Participation

DOE invites all interested parties to submit, in writing by December 30, 2014, comments and information on matters addressed in this rulemaking and on other matters relevant to the DFR process. As per the Joint Motion, this RFI includes, *verbatim*, material submitted by letter from certain entities participating in the litigation, including HARDI, AHRI, and ACCA, which is appended to this RFI. After the close of the comment period, DOE will begin collecting data and reviewing the public comments. These actions will be taken to aid in the potential development of a Process Improvement Rule NOPR.

DOE considers public participation to be a very important part of the process for developing rules. DOE actively encourages the participation and interaction of the public during the comment period at each stage of the rulemaking process. Interactions with and between the members of the public provide a balanced discussion of the issues and assist DOE in the rulemaking process.

Confidential Business Information

Pursuant to 10 CFR 1004.11, any person submitting information 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 which 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).

Issued in Washington, DC, on October 24, 2014.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Appendix A: Material Submitted by Entities Participating in Litigation

As per the Joint Motion, this RFI includes, *verbatim*, material submitted by letter from certain entities participating in the litigation, including HARDI, (AHRI, and ACCA. DOE received the materials directly from the entities listed above. These materials represent the views of those entities. DOE has not altered or edited these letters in any way other than formatting necessary for publication in the **Federal Register**.

A. HARDI Letter (October 9, 2014)

October 9, 2014.

Mr. Daniel Cohen, U.S. Department of Energy Building Technologies Program, 1000 Independence Avenue SW., Washington, DC 20585

Re: U.S. Department of Energy (DOE) Request for Information Regarding Direct Final Rule (DFR) Process Pursuant to 42 U.S.C. 6295 (p)(4)

Mr. Cohen, Thank you for the opportunity to provide the U.S. Department of Energy (''DOE''), all stakeholders, and the general public with the views of the Heating, Air-Conditioning & Refrigeration Distributors International (''HARDI'') regarding DOE's direct final rulemaking (''DFR'') authority under the Energy Policy and Conservation Act, 42 U.S.C. 6201–6422, as amended (''EPCA'') and, specifically, EPCA's DFR provision, codified at 42 U.S.C. 6295(p)(4).

Experience has shown that EPCA's DFR process can be both a boon and a bane to not only stakeholders but also DOE. On the one hand, there are circumstances where use of the DFR process benefits all involved, not only allowing DOE to set energy-efficiency standards on an expedited basis using a less resource-intensive alternative to normal notice and comment rulemaking, but also allowing affected stakeholders to work together to craft a proposal for energy-efficiency standards that not only meet EPCA's statutory requirements but accommodate the needs of all involved. Indeed, used appropriately, the DFR process can serve as a vehicle through which industry can work with efficiency and environmental advocates to craft and propose standards that are both technically and economically feasible and result in tremendous energy savings. By the same token, EPCA's DFR process is susceptible to overuse and could be mistakenly employed to establish highly controversial and impracticable energy-conservation standards over substantial stakeholder objection based on an agreement among a narrow subset of interested parties, which excludes input from a broad array of affected stakeholders. DOE's Plan for Clarification of DOE Direct Final Rule Process provides an opportunity to achieve a constructive balance between under- and overuse of the DFR process, reflecting EPCA's DFR provision's statutory text, purpose, and legislative history.

We look forward to working with DOE to clarify the DFR process through common-sense, practical regulations reconciling the due process-based procedural safeguards of normal notice and comment rulemaking with the worthy goal of expediting the process if, but only if, there is a genuine consensus agreement among all affected stakeholders. To this end, HARDI respectfully submits its views, and the reasons for those views, on the following issues:

(1) When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by ''interested persons that are fairly representative of relevant points of view,'' thereby permitting use of the DFR mechanism;

(2) the nature and extent of ''adverse comments'' that may provide the Secretary a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying notice of proposed rulemaking (''NOPR''); and

(3) what constitutes the ''recommended standard contained in the statement,'' and the scope of any resulting DFR.

I. Importance of Clarification of DOE's Direct Final Rule Process to General Public, Consumers, and Industry Stakeholders

By way of background, DOE's Plan for Clarification of DOE Direct Final Rule Process arose from the settlement of a lawsuit, American Public Gas Association (APGA) v. DOE, No. 11–1485 (D.C. Cir.). In brief, DOE received a joint comment from a narrow subset of interested parties and used this as the basis for issuing a DFR setting highly controversial energy-efficiency standards for furnaces, air conditioners, and heat pumps in June 2011. HARDI and other

''interested persons'' were not part of the negotiations leading to the joint comment and did not agree to the energy-efficiency standards it proposed. DOE subsequently received over thirty adverse comments, including comments from HARDI and other stakeholders, pointing out substantial issues of concern. Ultimately, this led to protracted litigation involving eleven participants representing an incredibly diverse cross-section of interests: HVAC distributors, contractors, and manufacturers; natural gas distributors; consumer, energy-efficiency, and environmental advocates; and DOE. In early 2014, a settlement agreement was reached in which all eleven participants agreed to a notice and comment process to clarify the circumstances under which DOE could use the DFR process to set standards. The circumstances surrounding the lawsuit and settlement, while expensive and potentially avoidable, illustrate the pressing need for clarification of DOE's DFR authority under EPCA moving forward in the interest of ensuring that the same situation does not arise again.

The pressing need for clarification is underscored by the fact that DOE's DFR authority under EPCA affects myriad industries: manufacturers of a wide range of consumer products, including furnaces, air conditioners, boilers, refrigerators, freezers, heat pumps, water heaters, pool heaters, direct heating equipment, dishwashers, clothes washers and dryers, various lamps, kitchen ranges and ovens, faucets, showerheads, urinals, microwaves, and other consumer products falling within the ambit of the statute; distributors of the foregoing consumer products, as well as contractors and installers—tens of thousands of small businesses; energy suppliers, such as natural gas distributors; and utilities. In addition, consumers are affected by energy-conservation standards that DOE establishes under EPCA, which may, among other things, substantially increase the up-front cost of products that are necessities of modem life, such as furnaces, air conditioners, and refrigerators.

These energy-conservation standards impact the day-to-day lives of millions of people. For this reason, they are often classified as ''major rules,'' which means that they have been deemed ''likely to result in . . . an annual effect on the economy of $100,000,000 or more'' or ''a major increase in costs'' or ''significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of'' American companies ''to compete with foreign-based enterprises.'' [8] In other words, the stakes are often high when DOE promulgates regulations implementing EPCA, whether via the DFR process or through normal notice and comment rulemaking. Given that EPCA requires DOE to establish energy-conservation standards at regular intervals, it is expected that DOE frequently will use the DFR process to promulgate ''major rules'' establishing energy-conservation standards for consumer products, notwithstanding adverse comments on those rules.[9]

II. History of DOE's DFR Authority Under EPCA

HARDI believes that DOE's communications to Congress requesting legislation authorizing DOE to issue and confirm DFRs setting energy-efficiency standards under EPCA outline the proper framework for regulations clarifying the scope of this authority, the circumstances in which DOE may issue a DFR, and, perhaps more importantly, the circumstances requiring withdrawal of a DFR. In this regard, in 2006, then-Secretary of Energy Samuel W. Bodman wrote to the Speaker of the U.S. House of Representatives ''to transmit legislation to authorize the Secretary of Energy to use expedited procedures to promulgate rules establishing energy conservation standards,'' which included proposed legislation granting DOE authority to set standards through the DFR process: [10]

''The proposed legislation would provide expedited procedures for rulemaking in a defined set of circumstances. It would authorize special rulemaking procedures that would allow the Secretary to prescribe energy conservation standards by direct final rule. Use of this authority would be limited to circumstances in which, in response to an advance notice of proposed rulemaking, representatives of *all relevant interests* (including manufacturers of covered products, efficiency advocates and State officials) *negotiate on their own initiative and submit a joint comment to the Department of Energy* (DOE) proposing an energy conservation standard for a product. If the Secretary determines that the jointly proposed standard meets the substantive requirements of the law for that product, the Secretary would be authorized to publish a notice of direct final rulemaking incorporating the recommended standard. The Secretary simultaneously would publish a notice of proposed rulemaking, incorporating the regulatory language of the direct final rule and providing a public comment deadline before the effective date of the direct final rule. If there is no objection to the jointly proposed standard, the direct final rule would become effective 120 days after the notice is published. *If any person files a significant adverse comment* on the notice of proposed rulemaking, the Secretary would *be required to withdraw the direct final rule* and move forward under the procedures of existing law to consider the comments and publish a standard notice of final rulemaking.

This proposed legislation would permit DOE, *in the absence of apparent stakeholder objection, to expedite a rulemaking* by going directly from an advance notice of proposed rulemaking to a notice of final rulemaking with a summary statement of basis and purpose, even though there is no emergency that would justify waiver of notice and comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553. Since the rational basis test under the APA (5 U.S.C. 706) would apply to judicial review of a direct final rule in the event that an interested person filed a petition for review, *DOE would have to be cautious in determining that the stakeholder agreement represents the views of all relevant stakeholder interests.''* [11]

DOE's testimony before Congress on the scope of its requested DFR authority provides another important touchstone for regulations clarifying DOE's DFR process. For example, Assistant Secretary Alexander Karsner told Congress that DOE's DFR ''legislative proposal would allow the Department to move directly to a final rule for certain *products when a clear consensus for standards* exist among the manufacturers, efficiency advocates and *other stakeholders*.'' [12] Principal Deputy Assistant Secretary John Mizroch echoed that message to Congress:

''To shorten the time for a completed standard by nearly one-third, Secretary Bodman recently requested authorization from Congress to streamline the rulemaking process and allow the Department to go to a direct final rule for certain products when a clear consensus for a standard exists among manufacturers, efficiency advocates, the Government and other stakeholders.'' [13]

Congress accepted then-Secretary Bodman's proposal in 2007 through Section 308 of the Energy Independence and Security Act of 2007, codified at 42 U.S.C. 6295(p)(4), which reflects DOE's, and Congress's, intent to limit use of the expedited DFR process to circumstances where genuine consensus exists among all affected stakeholders. HARDI agrees with DOE that ''Congress adopted almost exactly the language DOE had . . . proposed'' in draft legislation attached to Secretary Bodman's letter to Congress.[14] In part for this reason, regulations clarifying DOE's DFR authority under EPCA should be consistent with Secretary Bodman's proposal.

In addition, regulations clarifying DOE's DFR authority should be consistent with 42 U.S.C. 6295(p)(4)'s plain language. That provision authorizes DOE to set standards through DRFs only under limited circumstances. To do so, DOE must first receive ''a statement . . . submitted jointly

[8] 15 U.S.C. 804(2).

[9] See, e.g., Notice of Effective Date and Compliance Dates for Direct Final Rule, Energy Conservation Program: Energy Conservation Standards for Dishwashers, 77 FR 59,712 (Oct. 1, 2012).

[10] Letter from Samuel J. Bodman, Secretary of Energy, to The Honorable J. Dennis Hastert, at 1 (March 23, 2006).

[11] *Id.* at 1–2 (emphasis added).

[12] Achieving—At Long Last—Appliance Efficiency Standards, Hearing Before H. Subcomm. On Energy and Air Quality, 110th Cong., 8, 16 (2007) (Alexander Karsner, Asst. Sec., DOE), *available at http://www.gpo.gov/fdsys/pkg/CHRG-l10hhrg39512/html/CHRG-l10hhrg39512.htm* (last visited July 17, 2014).

[13] Energy Efficiency Promotion Act of 2007: Hearing on S. 1115 Before S. Comm. On Energy and Nat'l Resources, 110th Cong. 4, 6 (2007) (John Mizroch, Principal Deputy Ass. Sec., DOE), *available at http://www.gpo.gov/fdsys/pkg/CHRG-l10shrg36640/html/CHRG-l10shrg36640.htm* (last visited July 17, 2014).

[14] Brief for the Respondent, *APGA v. DOE,* Case No. 11–1485, Doc. #1386024, at 13 (D.C. Cir. July 26, 2012).

by interested persons that are fairly representative of relevant points of view (including representatives of covered products, States, and efficiency advocates) . . . [that] contains recommendations with respect to an energy . . . conservation standard[.]'' [15] Then DOE must ''determine[] that the recommended standard contained in the [joint] statement'' complies with EPCA's other requirements for new or amended energy-conservation standards.[16] If DOE determines that a joint statement recommending energy-conservation standards satisfies these requirements, then it may issue a DFR setting a standard [17] and must solicit public comment for at least 110 days with respect thereto.[18] If DOE ''receives 1 or more adverse public comments . . . that the Secretary determines . . . may provide a reasonable basis for withdrawing the direct final rule under subsection (o) [of EPCA] . . . or any other applicable law,'' DOE must withdraw the DFR.[19] DOE must make this determination within 10 days or less of the close of the comment period,[20] which, as a practical matter, does not provide DOE sufficient time to evaluate the merits of adverse comments or conduct a complex cost-benefit analysis.

HARDI agrees with DOE that the statute requires the agency to consider adverse comments cumulatively.[21] HARDI also agrees with DOE [22] that the statute requires the agency to either confirm the DFR or withdraw the DFR in its entirety.[23] The statutory text also makes clear that DOE must withdraw a DFR if it receives adverse comments that could possibly provide a reasonable basis for withdrawal. Congress's deliberate decision to use ''may'' language, coupled with the 10-day-or-less withdrawal period, confirms that Congress chose to give DOE narrow authority to set uncontroversial standards through DFRs based on genuine, broad-based consensus agreements among stakeholders.

III. Recommendations for Definitions Clarifying DOE's DFR Authority

In light of the above, HARDI believes that defining key statutory language in EPCA's DFR provision, as outlined below, would have various long-term benefits for DOE, all stakeholders, and the general public:

- Reduce the potential for litigation and thereby reduce the likelihood of delayed implementation of energy-conservation standards.
- Ensure that regulated parties and others who will incur compliance- and enforcement-related and other monetary costs as a result of energy-conservation standards will have a seat at the table and a meaningful opportunity to participate in the process.
- Prevent a narrow subset of interested parties (advocating either unduly stringent or unduly lax standards) from forcing those standards on the regulated community (and/or other interested parties, including efficiency advocates) without their consent.
- Provide a framework that will allow the expedited DFR process to be used as intended in circumstances where a clear consensus exists among all relevant interests, including manufacturers, efficiency advocates, and other stakeholders (which may include distributors, contractors, energy suppliers, utilities, consumers, and other market participants, depending on the substance of the proposed DFR).
- Enable DOE to work with stakeholders to develop DFR standards that will, on the one hand, ensure that relevant stakeholders will always have a seat at the table, but, on the other hand, prevent a single individual from derailing a DFR through submission of a frivolous comment on Regulations.gov.

Accordingly, HARDI respectfully suggests the following definitions of key statutory language in EPCA's DFR provision, 42 U.S.C. 6295(p)(4):

(1) ''Interested Parties That Are Fairly Representative of Relevant Points of View''

In his or her determination, the Secretary shall consider whether the petitioners fairly represent the spectrum of opinions that have been presented to the Department as being interested in the products or efficiency standard at issue. There is no requirement that all possible commenters join in a petition, and all such persons will have an opportunity to comment on the DFR and potentially submit an ''adverse comment'' that will require withdrawal of a DFR. However, a petition must represent the views of all relevant stakeholder interests (which may include distributors, contractors, energy suppliers, utilities, consumers, and other market participants, depending on the substance of the proposed DFR).

(a) Representatives of manufacturers of covered products, States, and efficiency advocates are necessary parties to any joint statement forming the basis of a direct final rule. No presumption shall arise that a joint statement submitted solely by representatives of manufacturers of covered products, States, and efficiency advocates has been submitted by interested parties that are fairly representative of relevant points of view.

(b) A joint statement recommending that the Secretary exercise his or her optional authority under 42 U.S.C. 6295(O)(6) to set regional standards for furnaces, central air conditioners, or heat pumps cannot form the basis of a direct final rule unless representatives of the market participants listed in 42 U.S.C. 6295(O)(6)(D)(ii) are signatories to that joint statement (consumers, manufacturers, product distributors, contractors, and installers).

Rationale for Proposed Definition 1: Proposed Definition 1 is designed to clarify language in 42 U.S.C. 6295(p)(4)(A) authorizing DOE to issue a DFR if, and only if, it receives ''a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates)[.]'' [24] Particularly against the backdrop of then-Secretary Bodman's proposal, Congress's use of the word ''including'' makes clear that the list of necessary parties to the joint statement is nonexhaustive, as the stakeholders ''that are fairly representative of relevant points of view'' will vary based on the content of the DFR. For example, EPCA itself lists additional stakeholders who necessarily have relevant points of view for DFRs setting regional energy conservation standards, as it requires DOE to ''consider the impact of the additional regional standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers.'' [25] Elsewhere, DOE has recognized that energy suppliers may be relevant parties.[26] The same holds true with respect to utilities.[27]

Rationale for Proposed Definition (l)(a): Proposed Definition (l)(a) is designed to clarify Congress's intent that while manufacturers of covered products, States, and energy-efficiency advocates are necessary parties to any joint statement forming the basis of a DFR, those parties may not be sufficient, depending on the substance of the proposed standard.

Rationale for Proposed Definition (l)(b): Proposed Definition (l)(b) reflects Congress's intent, as expressed by the plain text of 42 U.S.C. 6295(o)(6)(d)(ii), that if DOE wishes to exercise its option of setting regional energy-conservation standards, the agency ''shall . . . consider the impact of the additional regional standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers.'' This mandatory directive reflects Congress's recognition of the practical reality that regional energy-conservation standards are not only unprecedented in the industry but also impact a far wider array of stakeholders—including tens of thousands of small businesses (e.g., distributors, contractors) and consumers—than a national base standard. Regional standards effectively make a consumer product that would be legal in one part of the country illegal in another part of the country and impose substantial compliance-and enforcement-related costs on entire industries—from large manufacturers to independent contractors—which are fundamentally different from the costs imposed by a single national base standard. In light of the unique challenges posed by regional standards, this definition would ensure that any joint statement

[15] 42 U.S.C. 6295(p)(4)(A).

[16] 42 U.S.C. 6295(p)(4)(A)(i).

[17] *Id.*

[18] 42 U.S.C. 6295(p)(4)(B).

[19] 42 U.S.C. 6295(p)(4)(C)(i) (emphasis added).

[20] *Compare* 42 U.S.C. 6295(p)(4)(B) (requiring comment period of ''at least 110 days''), *with* 42 U.S.C. 6295(p)(4)(C)(i) (DOE must determine whether to withdraw DFR ''[n]ot later than 120 days'' after publication).

[21] Notice of Effective Date and Compliance Dates for Direct Final Rule, Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 FR 67,037, 67,050 (Oct. 31, 2011).

[22] *See id.* at 67,037.

[23] 42 U.S.C. 6295(p)(4)(C)(i).

[24] 42 U.S.C. 6295(p)(4)(A) (emphasis added).

[25] 42 U.S.C. 6295(o)(6)(D)(ii).

[26] Notice of Effective Date and Compliance Dates for Direct Final Rule, Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 FR 67,037, 67,050 (Oct. 31, 2011).

[27] 10 CFR pt. 430, Appendix A, Subpart C, § 8(b).

recommending that DOE set EPCA-optional regional standards reflects the views of relevant stakeholders who bear the brunt of the enforcement- and compliance-related costs associated with those standards.

(2) ''Adverse Public Comments'' That ''May Provide a Reasonable Basis for Withdrawing the Direct Final Rule''

Any one or more comments, considered as a whole, that provide a plausible basis for disputing material facts, analyses, or conclusions in the petition or DFR, even if not accepted by the Department as valid or dispositive, but which, if accepted, could possibly affect the proposed standard in stringency or structure, will require the Secretary to withdraw the DFR. In general, adverse comments should address technical, economic, energy, and legal arguments that are contained in the petition and in the DFR. In general, overly broad and general statements opposing regulations or questioning the motivation of petitioners will not be considered sufficient. The Secretary shall not make conclusive determinations on the merits of public comments. Comments will be considered cumulatively.

Rationale for Proposed Definition 2: Proposed Definition 2 attempts to strike the appropriate balance between establishing a standard for withdrawal that is so high that issuance of a DFR virtually ensures its confirmation, regardless of how controversial it may be and irrespective of the merits of substantive objections to it, and a standard so low that any individual can derail a DFR—and ruin productive negotiations—simply by submitting a frivolous comment on the Internet. We believe that this proposed definition reflects Congress's intent that DOE should not make conclusive determinations on the merits of public comments, which must be considered cumulatively, or engage in extrastatutory cost-benefit analysis based on those comments. We also believe that this proposed definition will prove beneficial by placing the emphasis on practical and legal arguments, as opposed to ideologically driven opposition that is more appropriately addressed through the political process. As a practical matter, this will ensure that DFRs that are the product of broad agreement among relevant stakeholders are confirmed, while those that prove to be controversial among those who will actually bear their costs are withdrawn.

(3) ''The Recommended Standard Contained in the Statement''

Any DFR issued pursuant to 42 U.S.C. 6295(p)(4)(A)(i) shall contain only the recommended standard contained in the joint statement authorizing the Secretary to issue the DFR. The Secretary shall not include in any DFR issued pursuant to 42 U.S.C. 6295(p)(4)(A)(i) any energy-conservation standards, including but not limited to standby and off-mode energy-conservation standards, that are not specifically recommended in the joint statement that authorizes issuance of that DFR.

Rationale for Proposed Definition 3: Proposed Definition 3 is intended to ensure that the broad array of stakeholders that negotiate and then submit consensus-based energy-conservation standards via a petition for a DFR get what they bargained for—no more, and no less. In the past, DOE has issued and confirmed DFRs containing energy-conservation standards (e.g., standby and off-mode standards for air conditioners) that are outside of the scope of standards proposed in a joint comment used as the basis for the DFR. Setting standards through the DFR process that are not recommended in the joint statement will needlessly disturb the settled expectations of the parties that submit it. This may have a chilling effect on the legitimate use of the DFR mechanism to set noncontroversial consensus standards. Proposed Definition 3 provides certainty to stakeholders that when they submit a joint statement asking DOE to issue a DFR setting particular standards, DOE will either issue a DFR establishing those, and only those, standards, or publish a notice of a determination explaining why a DFR cannot be issued based on the statement, as required by EPCA.

HARDI appreciates the opportunity to contribute to this process. We hope that our comments and proposed DFR definitions are viewed as constructive and open the conversation about meaningful DFR reform on a positive note. We look forward to working with DOE to craft regulations that promote the public interest, codify and clarify Congress's intent, and provide meaningful long-term benefits to all stakeholders, as well as DOE.

Respectfully submitted,

Jonathan A. Melchi,

Director of Government Affairs, HARDI

B. AHRI Letter (October 10, 2014)

October 10, 2014.

Mr. Daniel Cohen, Assistant General Counsel for Legislation, Regulation and Energy Efficiency, Office of General Counsel, U.S. Department of Energy, 1000 Independence Avenue SW., Room 6A179 Washington, DC 20585.

Re: U.S. Department of Energy (DOE) Request for Information Regarding Direct Final Rule (DFR) Process Pursuant to 42 U.S.C. 6295 (p)(4)

Dear Mr. Cohen: These comments are submitted by the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) [28] in accordance with the settlement of the *American Public Gas Association (APGA) v. DOE* litigation [29] on April 24, 2014. The purpose of this letter is to provide DOE with information on the following issues, as set forth in the settlement agreement:

1. When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by ''interested persons that are fairly representative of relevant points of view,'' thereby permitting use of the DFR mechanism;

2. The nature and extent of ''adverse comments'' that may provide the Secretary a reasonable basis for withdrawing the direct final rule, leading to further rulemaking under the accompanying notice of proposed rulemaking (NOPR);

3. What constitutes the ''recommended standard contained in the statement,'' and the scope of any resulting direct final rule; and

4. Any other issues pertaining to the DFR process.

In general,[30] AHRI concurs with the definitions of key terms proposed by the Heating, Air-Conditioning and Refrigeration Distributors International (HARDI). Of particular concern to AHRI is issue number three (3), regarding the scope of the DFR. The DFR establishing energy efficiency standards for residential central air conditioning and furnaces [31] included non-consensus ''off-mode'' standards for residential air conditioners and heat pumps. AHRI has repeatedly objected to the inclusion of these standards, both because they were not part of the negotiated consensus agreement, and because they were promulgated without the statutorily required test procedure. Although the non-negotiated off-mode standards included in the DFR (which was first published over three years ago) will be effective January 1, 2015, DOE has yet to publish a final test procedure for those standards.

The non-consensus off-mode standards DOE included in the DFR are contrary to the statutory requirements and overall framework of the Energy Policy and Conservation Act (EPCA), which requires promulgated test procedures to be included in new or amended efficiency standards.[32] Under that framework, test procedures are included with the applicable standard, which is effective five years after the publication date.[33] This provides manufacturers with the necessary time to test products to ensure compliance with new or amended efficiency levels and make the appropriate certifications to DOE. Any lesser time frame for implementation results in test procedures that are unduly burdensome to conduct, as manufacturers will not have sufficient time to test products for certification and compliance purposes. As AHRI has repeatedly noted, it is arbitrary and capricious to set standards, or even to evaluate standards levels, until a test procedure has been established to determine

[28] The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) is the trade association representing manufacturers of air conditioning, heating, commercial refrigeration, and water heating equipment. An internationally recognized advocate for the industry, AHRI develops standards for and certifies the performance of many of these products. AHRI's 300+ member companies manufacture quality, efficient, and innovative residential and commercial air conditioning, space heating, water heating, and commercial refrigeration equipment and components for sale in North America and around the world.

[29] *American Public Gas Association (APGA) v. DOE,* No. 11–1485 (D.C. Cir.)

[30] Given the preemption provisions in EPCA, AHRI does not believe that States are required parties for all DFR statements, but that ''interested persons'' should be determined by the subject matter of the energy conservation standard at issue.

[31] 76 FR 37,408 (June 27, 2011)

[32] 42 U.S.C. 6295(r)

[33] *See, e.g.,* the process rule at 7(d).

actual performance and what is economically and technically feasible. Inclusion of the non- consensus off-mode standards in the DFR was thus entirely inappropriate.

The inclusion of the off-mode standards in the DFR despite the lack of a final test procedure, in violation of EPCA's statutory requirements, illustrates the importance of clarifying that any DFR issued pursuant to 42 U.S.C. 6295(p)(4)(A)(i) should contain only the recommended consensus standard contained in the joint statement authorizing the Secretary to issue the DFR. As HARDI notes in its proposed definition, the Secretary should be prohibited from including any energy conservation standards, including but not limited to standby and off-mode energy conservation standards that are not specifically recommended in the joint statement that authorizes the issuance of the DFR.

In the settlement agreement, DOE agreed to initiate a notice and comment rulemaking to clarify its process related to the promulgation of DFRs. The purpose of this rulemaking is to consider amending the DOE ''process rule'' promulgated July 15, 1996, titled ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products,'' and codified at Appendix A to Subpart C of Part 430, Title 10, Code of Federal Regulations.[34] AHRI believes that the process by which DOE will issue DFRs clearly pertains to, and in fact is inextricably linked with, its overall rulemaking process as set forth in the process rule, and that DOE must consider and solicit comment on other amendments to the process rule in connection with this notice and comment rulemaking. For example, the process rule addresses consideration of ''Joint Stakeholder Recommendations'' and states that DOE will identify any necessary modifications to established test procedures when initiating the standards development process, and that modifications will be proposed early in the standards development process. It also states that ''Final, modified test procedures will be issued prior to the NOPR on proposed standards.'' As noted above, this did not happen regarding the non-negotiated off-mode standards DOE included in the DFR for central air conditioners and heat pumps. There are also several other recent examples of DOE's publication of energy conservation standards when the related test procedures were final only after issuance of the related NOPR or final rule.[35]

It has been nearly 20 years since the process rule was promulgated, and the quantity of DOE rulemaking and complexity of DOE's analysis has changed significantly. The inclusion of guidance on the DFR process will be a substantial change to the process rule, one that should be considered as part and parcel of DOE's overall rulemaking. Both for that reason, and to ensure that the DFR process that DOE sets forth through the current proceedings are consistent with DOE's overall guidance on new or revised energy conservation standards for consumer products, DOE should solicit and consider comments on the DFR process and amendments and improvements to the process rule as a whole.

AHRI appreciates the opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely,

Amy Shepherd,

General Counsel.

C. ACCA Letter (October 10, 2014)

October 10, 2014

Mr. Daniel Cohen, Assistant General Counsel for Legislation, Regulation, & Energy Efficiency, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585.

RE: Intervener Letter in response to the Plan for Clarification of DOE Direct Final Rule Process

Dear Assistant General Counsel Cohen: ACCA submits this letter for inclusion in the notice of proposed rulemaking materials referenced in the Plan for Clarification of DOE Direct Final Rule Process (Plan for Clarification) appended to the Joint Motion of All Parties and lnterveners to Vacate in Part and Remand for Further Rulemaking filed as part of the *APGA v. US Department of Energy* litigation.

The Plan for Clarification indicates that DOE will invite public comment on issues related to the Direct Final Rule Process through a request for information (RFI), specifically:

(1) When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by ''interested persons that are fairly representative of relevant points of view,'' thereby permitting use of the DFR mechanism;

(2) The nature and extent of ''adverse comments'' that may provide the Secretary a reasonable basis for withdrawing the direct final rule, leading to further rulemaking under the accompanying notice of proposed rulemaking (NOPR);

(3) What constitutes the ''recommended standard contained in the statement,'' and the scope of any resulting direct final rule; and

(4) Any other issues pertaining to the DFR process.

The Plan for Clarification also states that DOE will ''undertake a further notice and comment process to consider amending the final rule promulgated on July 15, 1996, entitled 'Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products,' codified at Appendix A to Subpart C of Part 430, Title 10, Code of Federal Regulations.''

''Interested Persons That Are Fairly Representative of Relevant Points of View''

ACCA believes the meaning of the phrase ''interested persons that are fairly representative of relevant points of view'' with regard to the constituents or stakeholders to a joint statement filed for consideration under the DFR process is determined by the scope of the standard or rule. There are many analyses undertaken by DOE during the rulemaking process that look to various stakeholders for comment in developing the Technical Support Document (TSD), including the analysis of energy use, markup, life cycle costs, and payback period. If the purpose of the use of a DFR is to expedite a rulemaking process, stakeholders who would typically be interested in the results found in the TSO should be assumed to be ''interested persons.''

In addition, as part of any guidance, DOE should encourage any parties looking to develop a joint statement to consider all potential stakeholders listed in previous rulemakings on the same subject.

''Adverse Comments''

ACCA believes that more clearly defining ''adverse comments'' and the phrase ''reasonable basis ''are critical in improving the DFR development process and reducing the chances of a DFR being rejected for consideration or withdrawn by the Secretary. The factors in determining the nature of the adverse comments should be informed by the stakeholders filing those comments and the substantiation of the comments. ACCA agrees with the definition submitted by the Heating, Air-Conditioning, & Refrigeration Distributors International because it strikes the proper balance that ensures legitimate concerns will be reviewed and acknowledged.

''Recommended Standard Contained in the Statement and the Scope of Any Resulting Direct Final Rule''

ACCA believes this issue is relatively simple. DOE must consider the joint submission as a single proposal that cannot be cherry-picked. Should the joint submission include provisions that are outside the purview or jurisdiction of EPCA, or include elements that DOE prefers not to accept, then DOE must reject the joint submission with a public notice of it reasons.

Clarification of the DFR process and a follow up review of the Process Rule are necessary steps to improving the rulemaking process going forward. ACCA appreciates the opportunity to participate in the initiation of these efforts. Should you have further questions, please do not hesitate to contact me.

Respectfully,

Charlie McCrudden

Senior Vice President, Government Relations.

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[34] Joint Motion of all Parties and Intervenors to Vacate in Part and Remand for Further Rulemaking, *American Public Gas Association (APGA) v. DOE,* No. 11–1485 (D.C. Cir.) at 12.

[35] See, e.g., Energy Conservation Standards for Commercial Refrigeration Equipment, 79 FR 17,726 (Mar. 28, 2014); Energy Conservation Standards for Walk-In Coolers and Freezers, 79 FR 32,050 (June 3, 2014); and Energy Conservation Standards for Residential Furnace Fans, 79 FR 38,130 (July 3, 2014).