

# ENERGY EFFICIENCY ADVISORY

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## DOE Amends Efficiency Rulemaking Procedures; Proposes Amended Standards Selection

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In a major departure from its prior approach, the Department of Energy (DOE) has rewritten its Process Rule—its procedures for energy efficiency rulemaking.<sup>1</sup> The old rule had been in place since 1996. The new Process Rule will take effect April 14, 2020. At the same time, DOE published a proposal to change its decision-making process for selecting energy efficiency standards.<sup>2</sup> Comments on this proposal are due by March 16, 2020.

### DOE's amended Process Rule

In 1996, DOE issued a rule (1996 Process Rule)<sup>3</sup> setting forth its appliance efficiency rulemaking procedures to implement the Energy Policy and Conservation Act (EPCA).<sup>4</sup> In 2017, DOE began proceedings to improve the 1996 Process Rule. DOE said its intent was to increase transparency and public engagement and achieve meaningful burden reduction, while at the same time continuing to meet DOE's statutory obligations under EPCA. The rulemaking garnered heavy participation by industry, advocacy groups, and governmental entities.

Key features of the amended Process Rule include the following:

**The amended Process Rule is binding on DOE.** DOE had said that the 1996 Process Rule was not binding on the agency, and, indeed, the agency had deviated from it on a case-by-case basis. The agency has now determined that requiring mandatory compliance on

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<sup>1</sup> Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final Rule, 85 Fed. Reg. 8626 (Feb. 14, 2020) (to be codified at 10 C.F.R. pts. 430 & 431).

<sup>2</sup> Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, Supplemental Notice of Proposed Rulemaking, 85 Fed. Reg. 8483 (Feb. 14, 2020) (to be codified at 10 C.F.R. pt. 430).

<sup>3</sup> Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, Rule, 61 Fed. Reg. 36974 (July 15, 1996). These procedures appear at 10 C.F.R. Pt. 430, subpt. C, app. A.

<sup>4</sup> 42 U.S.C. § 6291 *et seq.*

its part would clearly promote a rulemaking environment that is predictable and consistent.

**The amended Process Rule applies to both consumer products and commercial equipment.** The 1996 Process Rule by its terms applied only to consumer products, but DOE in practice also applied it to commercial equipment. The amended Process Rule makes this practice official.

**The amended Process Rule has special provisions for ASHRAE 90.1.** Under EPCA, if ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings*, is amended for a type of equipment, DOE must adopt amended standards at the 90.1 level. That is unless DOE determines, supported by “clear and convincing evidence,” that a more stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified.<sup>5</sup> The amended Process Rule uses procedures tailored to whether DOE is adopting the 90.1 levels or more stringent levels.

**The amended Process Rule revises the process for rulemaking prioritizing rulemaking.** This includes increased stakeholder input early in the process on which rules should be prioritized. DOE will now issue a request for comment as it begins preparation of its Regulatory Agenda each spring.

**The amended Process Rule tightens procedures for designating additional products as “covered.”** DOE intends to exercise its authority to designate new “covered” products in a more limited fashion than before. Coverage would be extended only to: (i) those consumer products for which EPCA regulation is “necessary or appropriate” to the achievement of EPCA’s purposes and which meet statutory consumption criterion; and (ii) to that commercial/industrial equipment for which EPCA regulation is “necessary” to the achievement of EPCA’s purposes. DOE would publish its decision on coverage before initiating any rulemaking for related test procedures or energy conservation standards.

**The amended Process Rule provides opportunities for earlier stakeholder input to determine the need for rulemaking.** This includes adding a process for an early assessment review of the suitability of a potential rule and for continuing to seek early stakeholder input after the early assessment review. It also includes procedures for faster decisions about whether to amend a rule.

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<sup>5</sup> *Id.* § 6313(a)(6)(A)(ii)(I)–(II).

**The amended Process Rule applies a threshold approach to whether projected energy savings would be “significant” within the meaning of EPCA.** DOE will now determine the significance of energy savings using either 0.3 quad of aggregate site energy savings or a 10-percent decrease in energy use (measured in quads)—both over a 30-year period.

**The amended Process Rule requires test procedures to be finalized before issuance of a proposal for a standard.** The 1996 Process Rule provides for developing test procedures before issuance of a notice of proposed rulemaking for a standard. But DOE has deviated on occasion. DOE has concluded that a finalized test procedure allows interested parties to provide more effective comments on proposed standards. Hence, the amended Process Rule requires that test procedures be finalized at least 180 days before publication of a Notice of Proposed Rulemaking for new or amended standards.

**The amended Process Rule generally requires adoption of industry test standards.** Industry test standards are to be adopted without modification unless they would be unduly burdensome to conduct or would not produce test results that reflect energy efficiency, energy use (as specified in EPCA), or estimated operating costs of equipment during a representative average use cycle.

**The amended Process Rule includes provisions on the use of direct final rules (DFRs) and negotiated rulemaking (NR).** DFRs and NR are rulemaking mechanisms already used by DOE. The amended Process Rule clarifies DOE’s DFR authority; the conditions a submitted joint proposal must meet for the agency to consider publication; and DOE’s obligations upon receipt of an adverse comment. It also contains provisions on the Negotiated Rulemaking Act, including those on an Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) transmitting to DOE a report containing a proposed rule or term sheet.

**The amended Process Rule commits to a new peer review of analytical methodologies.** In 2007, DOE issued a peer review report on its energy conservation standards rulemaking analysis. In the amended Process Rule, the agency commits to engaging in a new peer review of its analytical methodologies. It says that this is because available data, models, and technological understanding have changed since 2007.

**The amended Process Rule discusses assessment of cumulative regulatory burden.** DOE says that it will improve its assessment of the potential burdens faced by industry in implementing potential standards. The agency agrees that inquiry into this burden should begin as early in the rulemaking process as possible. It says that specific mechanisms for considering this burden will likely require more study, including through peer review.

**The amended Process Rule discusses conducting retrospective review of energy savings and costs of standards.** DOE says a review of current and past standards could provide valuable data for future standards rulemaking. The agency has decided to bifurcate its approach. Through its early assessment process, DOE believes it is possible to conduct a timely and useful assessment of developments since the last rulemaking for the product in question. The other, longer-term aspect of DOE’s approach will involve consideration under the peer review of DOE’s analytical methodologies.

**DOE will consider certification, compliance, and enforcement (CCE) separately.** DOE plans to deal with CCE in future rulemakings.

**The amended Process Rule distinguishes between effective and compliance dates.** DOE says that the effective date of a rule is when it is published in the *Federal Register*. For test procedures, the compliance date is when manufacturers are required to use the new or amended test procedure requirements to make representations. For energy conservation standards, the compliance date is the date on which manufacturers are required to meet the standards.

#### **DOE’s proposal to amend the process for selecting energy efficiency standards**

DOE is also proposing changes that would require the agency to conduct a comparative analysis of the relative costs and benefits of *all* of the proposed alternative levels for potential standards. It says this is to determine that the chosen alternative is economically justified.

DOE historically has used a so-called “walk-down” approach in selecting standards levels. DOE would create a range of trial standard levels (TSLs)—beginning with the most stringent TSL that is technologically feasible (the “max-tech” standard). It would then conduct a cost-benefit analysis of the max-tech TSL. If that assessment demonstrated that the benefits of max-tech TSL exceed its costs, DOE would adopt the max-tech TSL as the standard. Otherwise, DOE would “walk down” to consider the next most-stringent TSL. This “walk-down” process would continue until DOE determines that the benefits of a TSL exceed its costs, and, thus, the TSL is economically justified, or that none of the TSLs are economically justified.

DOE is rethinking this approach. The agency believes that the approach may not allow for a full consideration of the economic justification required by EPCA. “In only comparing the costs and benefits of the TSL under consideration against a baseline case and generally ceasing consideration at the highest TSL for which benefits exceed burdens, DOE may select a TSL that has significant, adverse economic impacts when compared to another TSL.” DOE now believes that it should compare the TSLs to each other to determine the relative benefits in light of the costs. Hence, the agency will conduct a comparative analysis of the relative costs and benefits of all of the proposed TSLs to make a reliable determination that a specific TSL is economically justified.

This change would be reflected in another modification to the amended Process Rule.

### **Conclusion**

The amended Process Rule will broadly affect consumer products and commercial/industrial equipment. And the further changes now proposed will impact standards levels. Stakeholders should familiarize themselves with the amended Process Rule and take advantage of the opportunity to weigh in on the standards-selection proposal.

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