DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2021–BT–STD–0003]

RIN 1904–AF13

Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (''DOE'' or the ''Department'') is revising the Department's ''Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment.'' The revisions are consistent with longstanding DOE practice and would remove unnecessary obstacles to DOE's ability to meet its statutory obligations under the Energy Policy and Conservation Act (''EPCA'').

DATES: This rule is effective January 12, 2022.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The docket web page can be found at: *www.regulations.gov/docket/EERE-2021-BT-STD-0003.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

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SUPPLEMENTARY INFORMATION:

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I. Summary of the Final Rule

In July of 1996, the United States Department of Energy (''DOE'' or ''the Department'') issued a final rule that codified DOE's ''Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products'' at 10 CFR part 430, subpart C, appendix A (''appendix A''). 61 FR 36974 (July 15, 1996) (''July 1996 Final Rule''). The July 1996 Final Rule acknowledged that the guidance contained in appendix A would not be applicable to every rulemaking and that the circumstances of a particular rulemaking should dictate application of these generally applicable practices. 61 FR 36979.

On February 14, 2020, DOE published a final rule (''February 2020 Final Rule'') in the **Federal Register** that made significant revisions to appendix A. 85 FR 8626. DOE also published a companion final rule on August 19, 2020 (''August 2020 Final Rule''), that clarified how DOE would conduct a comparative analysis across all trial standard levels when determining whether a particular trial standard level was economically justified. *See* 85 FR 50937. Contrary to the July 1996 Final Rule, the revisions made in the February 2020 Final Rule sought to create a standardized rulemaking process that was binding on the Department. 85 FR 8626, 8634. In creating this one-size-fits-all approach, the February 2020 Final Rule and the August 2020 Final Rule also added additional steps to the rulemaking process that are not required by any applicable statute.

Subsequent events have caused DOE to reconsider the merits of a one-size-fits-all rulemaking approach to establishing and amending energy conservations standards and test procedures. Two of these events are particularly salient. First, on October 30, 2020, a coalition of non-governmental organizations filed suit under EPCA alleging that DOE has failed to meet rulemaking deadlines for 25 different consumer products and commercial equipment.[1] On November 9, 2020, a coalition of States filed a virtually identical lawsuit.[2] In response to these lawsuits, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach outweigh the increased difficulty such an approach poses in meeting DOE's statutory deadlines and obligations under EPCA. As mentioned previously, the July 1996 Final Rule allowed for ''case-specific deviations and modifications of the generally applicable rule.'' [3] This allowed DOE to tailor rulemaking procedures to fit the specific circumstances of a particular rulemaking. For example, under the July 1996 Final Rule, minor modifications to a test procedure would not automatically result in a 180-day delay before DOE could issue a notice of proposed energy conservation standards. Eliminating these unnecessary delays would better enable DOE to clear this backlog of missed rulemaking deadlines in a timely manner and meet future obligations and deadlines under EPCA while not affecting the ability of any interested person, including small entities, to participate in DOE's rulemaking process. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the

[1] *Natural Resources Defense Council* v. *DOE,* Case No. 20–cv–9127 (S.D.N.Y. 2020).

[2] *State of New York* v. *DOE,* Case No. 20–cv–9362 (S.D.N.Y. 2020).

[3] 61 FR 36974, 36979.

greater the resulting energy savings and environmental benefits.

Second, on January 20, 2021, the White House issued Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' 86 FR 7037 (Jan. 25, 2021). Section 1 of that Order lists a number of policies related to the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation's resilience to climate change. *Id.* at 86 FR 7037, 7041. Section 2 of the Order instructs all agencies to review ''existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies].'' *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.* Under that same section, for certain explicitly enumerated agency actions, including the February 2020 and the August 2020 Final Rules, the Order directs agencies to consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action within a specific time frame. Under this mandate, DOE is directed to propose any major revisions to these two rules by March 2021, with any remaining revisions to be proposed by June 2021. *Id.* at 86 FR 7038.

In light of these events, DOE has identified several aspects of the February 2020 and the August 2020 Final Rules that present obstacles to DOE's ability to expeditiously clear the backlog of missed rulemaking deadlines while meeting future obligations under EPCA. In accordance with E.O. 13990, DOE proposed major revisions to appendix A in a notice of proposed rulemaking (NOPR) that was published on April 12, 2021 (''April 2021 NOPR''). 86 FR 18901. DOE proposed additional revisions to appendix A in a second NOPR that was published on July 7, 2021 (''July 2021 NOPR''). 86 FR 35668. DOE is addressing the proposed revisions from the April 2021 NOPR in this document. DOE will address the additional revisions proposed in the July 2021 NOPR in a separate final rule.

In this document, DOE is: (1) Restoring DOE's discretion to depart from the general guidance in appendix A; (2) removing the recently-added threshold for determining when the significant energy savings criterion is met; (3) removing the recently-added requirement to conduct a comparative analysis as part of DOE's analysis of economic justification under the factors listed in 42 U.S.C. 6295(o)(2)(B)(i); (4) reverting to DOE's 1996 guidance regarding completion of test procedure rulemakings prior to issuance of a NOPR for an energy conservation standards rulemaking; (5) clarifying that DOE may make modifications to industry test procedure standards to comply with the requirements of EPCA, as well as for certification, compliance, and enforcement purposes; (6) reverting to DOE's prior practice on direct final rules; and (7) clarifying that DOE will conduct negotiated rulemakings in accordance with the Negotiated Rulemaking Act (''NRA''), Public Law 104–320 (5 U.S.C. 561, *et seq.*). These revisions are summarized in the following table.

LIST OF REVISIONS IN THIS DOCUMENT

Section	Proposed revisions in April 2021 NOPR	Final revisions
1. Objectives	Revise language to be consistent with the newly proposed Section 3.	Revise language to be consistent with new Section 3; revise paragraph (g) to specifically reference consensus recommendations developed through negotiated rulemakings.
2. Scope	No revisions proposed in this document	No revisions in this document.
3. Mandatory Application of the Process Rule	Replace with new Section 3, ''Application''	Replace with new Section 3, ''Application.''
4. Setting Priorities for Rulemaking Activity	No revisions proposed in this document	No revisions in this document.
5. Coverage Determination Rulemakings	Eliminate the 180-day period in paragraph (c) between finalization of DOE test procedures and issuance of a NOPR proposing new or amended energy conservation standards.	Eliminate the 180-day period in paragraph (c) between finalization of DOE test procedures and issuance of a NOPR proposing new or amended energy conservation standards.
6. Process for Developing Energy Conservation Standards.	Eliminate paragraph (b), ''Significant Savings of Energy''.	Eliminate paragraph (b), ''Significant Savings of Energy.''
7. Policies on Selection of Standards	Eliminate text in paragraph (e)(2)(i) requiring DOE to conduct a comparative analysis when determining whether a proposed standard level is economically justified.	Eliminate text in paragraph (e)(2)(i) requiring DOE to conduct a comparative analysis when determining whether a proposed standard level is economically justified.
8. Test Procedures	Clarify in paragraph (c) that DOE may revise consensus industry test procedure standards for compliance, certification, and enforcement purposes; eliminate the 180-day period in paragraph (d) between finalization of DOE test procedures and issuance of a NOPR proposing new or amended energy conservation standards.	Clarify in paragraph (c) that DOE may revise consensus industry test procedure standards for compliance, certification, and enforcement purposes; revise application of the 180-day period in paragraph (d).
9. ASHRAE Equipment	No revisions proposed in this document	No revisions in this document.
10. Direct Final Rules	Revise section to clarify that DOE will implement its direct final rule authority on a case-by-case basis.	Revise section to clarify that DOE will implement its direct final rule authority on a case-by-case basis.
11. Negotiated Rulemaking Process	Eliminate section	Eliminate section.
12. Principles for Distinguishing Between Effective and Compliance Dates.	No revisions proposed in this document	No revisions in this document.
13. Principles for the Conduct of the Engineering Analysis.	No revisions proposed in this document	No revisions in this document.

LIST OF REVISIONS IN THIS DOCUMENT—Continued

Section	Proposed revisions in April 2021 NOPR	Final revisions
14. Principles for the Analysis of Impacts on Manufacturers.	Eliminate incorrect cross reference	Eliminate incorrect cross reference.
15. Principles for the Analysis of Impacts on Consumers.	No revisions proposed in this document	No revisions in this document.
16. Consideration of Non-Regulatory Approaches.	No revisions proposed in this document	No revisions in this document.
17. Cross-Cutting Analytical Assumptions	No revisions proposed in this document	No revisions in this document.

* As part of the revisions, sections and subsections have been renumbered as required.

II. Authority and Background

A. Authority

Title III, Parts B [4] and C [5] of the Energy Policy and Conservation Act, as amended, (''EPCA'' or ''the Act''), Public Law 94–163 (42 U.S.C. 6291–6317, as codified), established the Energy Conservation Program for Consumer Products and Certain Industrial Equipment.[6] Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product and covered equipment during a representative average use cycle or period of use. (42 U.S.C. 6293; 42 U.S.C. 6314) Manufacturers of covered products and covered equipment must use the prescribed DOE test procedure when certifying to DOE that their products and equipment comply with the applicable energy conservation standards adopted under EPCA and when making any other representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s); 42 U.S.C. 6314(a); and 42 U.S.C. 6316(a)) Similarly, DOE must use these test procedures to determine whether the products comply with energy conservation standards adopted pursuant to EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316(a))

In addition, pursuant to EPCA, any new or amended energy conservation standard for covered products (and at least certain types of equipment) must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a)) In determining whether a standard is economically justified, EPCA requires DOE, to the greatest extent practicable, to consider the following seven factors: (1) The economic impact of the standard on the manufacturers and consumers; (2) the savings in operating costs, throughout the estimated average life of the products (*i.e.,* life-cycle costs), compared with any increase in the price of, or in the initial charges for, or operating and maintaining expenses of, the products which are likely to result from the imposition of the standard; (3) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard; (4) any lessening of the utility or the performance of the products likely to result from the imposition of the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (6) the need for national energy and water conservation; and (7) other factors DOE finds relevant. (42 U.S.C. 6295(o)(2)(B)(i)) Furthermore, the new or amended standard must result in a significant conservation of energy (42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6313(a)(6); and 42 U.S.C. 6316(a)) and comply with any other applicable statutory provisions.

B. Background

DOE conducted an effort between 1995 and 1996 to improve the process it follows to develop energy conservation standards for covered appliance products. As part of this effort, DOE reached out to many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties for input on the procedures, interpretations, and policies used by DOE in considering whether to issue new or amended energy conservation standards. This process resulted in publication of the July 1996 Final Rule which codified these procedures, interpretations, and policies in appendix A. The goal of the July 1996 Final Rule was to elaborate on the procedures, interpretations, and policies that would guide the Department in establishing new or revised energy conservation standards for consumer products. The rule was issued without notice and comment under the Administrative Procedure Act's (''APA'') exception for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' (5 U.S.C. 553(b)(A))

On December 18, 2017, DOE issued a request for information (''RFI'') on potential revisions to appendix A. 82 FR 59992. DOE subsequently published a NOPR regarding appendix A in the **Federal Register** on February 13, 2019. 84 FR 3910. On July 26, 2019, DOE subsequently issued a notice of data availability (''NODA'') in the **Federal Register**. 84 FR 36037 (''July 2019 NODA''). After considering the comments it received DOE then published a final rule in the **Federal Register** on February 14, 2020, which significantly revised appendix A. 85 FR 8626.

While DOE issued the July 1996 Final Rule without notice and comment as an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice, the February 2020 Final Rule was issued with notice and comment. For several reasons, as stated throughout the April 2021 NOPR and this document, DOE believes appendix A is best described and utilized not as a legislative rule but instead as generally applicable guidance that may guide, but not bind, the Department's rulemaking process. The revisions finalized in this document are intended to clarify this point. In accordance with Executive Order 13990, DOE used a notice and comment process to revise appendix A. 86 FR 7037. DOE held a public webinar for the April 2021 NOPR on April 23, 2021.

[4] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[5] Part C was added by Public Law 95–619, Title IV, section 441(a). For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[6] All references to EPCA in this document refer to the statute as amended through Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

In response to the April 2021 NOPR and public webinar, DOE received comments from the following parties:

TABLE OF COMMENTERS

Commenter(s)	Affiliation	Acronym, identifier
A.O. Smith	Manufacturer	A.O. Smith.
Air-Conditioning, Heating, and Refrigeration Institute	Manufacturer Trade Group	AHRI.
Air-Conditioning, Heating, and Refrigeration Institute (AHRI), AMCA International (AMCA), American Lighting Association (ALA), Association of Home Appliance Manufacturers (AHAM), Consumer Technology Association (CTA), Hearth, Patio & Barbecue Association (HPBA), Heating, Air-conditioning & Refrigeration Distributors International (HARDI), Information Technology Industry Council (ITI), International Sign Association (ISA), Manufactured Housing Institute (MHI), National Association of Manufacturers (NAM), National Electrical Manufacturers Association (NEMA), North American Association of Food Equipment Manufacturers (NAFEM), Power Tool institute, Inc. (PTI), and Plumbing Manufacturers International (PMI).	Manufacturer Trade Groups	Joint Industry Commenters.
American Gas Association, American Public Gas Association, Spire, Inc., and Spire Missouri, Inc.	Utility Trade Group	AGA.
American Lighting Association	Manufacturer Trade Group	ALA.
Americans for Prosperity	Advocacy Group	AFP.
Anonymous	Individual.	
Anonymous	Individual.	
Appliance Standards Awareness Project (Joint Comments filed with the American Council for an Energy-Efficient Economy, Consumer Federation of America, and National Consumer Law Center).	Advocacy Group	Joint Advocacy Commenters.
Attorneys General of California, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York.	State, Local Governments	State Commenters.
Bradford White Corporation	Manufacturer	BWC.
California Energy Commission	State	CEC.
California Investor-Owned Utilities	Utilities	Cal-IOUs.
John Cannon	Individual.	
Carrier Corporation	Manufacturer	Carrier.
Crown Boiler Company	Manufacturer	Crown Boiler.
Edison Electric Institute	Utility Trade Group	EEI.
GE Appliances	Manufacturer	GEA.
Goodman Manufacturing Company, L.P	Manufacturer	Goodman.
Grundfos Americas Corporation	Manufacturer	Grundfos.
Ahmed Ahmed Hamdi	Individual.	
Hoshizaki America, Inc	Manufacturer	Hoshizaki.
Hussmann Corporation	Manufacturer	Hussmann.
Hydraulic Institute	Manufacturer Trade Group	HI.
Hydronic Industry Alliance—Commercial	Manufacturer Trade Group	HIA.
Institute for Policy Integrity—New York University School of Law	Academic Institution	IPR.
Lennox International	Manufacturer	Lennox.
Lutron	Manufacturer	Lutron.
Manufactured Housing Institute	Manufacturer Trade Group	MHI.
New Yorker Boiler Company, Inc	Manufacturer	New Yorker Boiler.
North American Association of Food Equipment Manufacturers	Manufacturer Trade Group	NAFEM.
National Propane Gas Association	Utility Trade Group	NPGA.
Natural Resources Defense Council, Earthjustice & Sierra Club	Advocacy Groups	Joint Environmentalist Commenters.
Nortek Global HVAC, LLC	Manufacturer	Nortek.
Northwest Power and Conservation Council	Advocacy Group	NPCC.
Northwest Energy Efficiency Alliance	Advocacy Group	NEEA.
Signify	Manufacturer	Signify.
Small Business Administration (SBA) Office of Advocacy	Federal Government Agency	SBA Office of Advocacy.
Southern Company	Utility	Southern.
Sullivan-Palatek, Inc	Manufacturer	Sullivan-Palatek.
Sara Taylor	Individual.	
Trane Technologies	Manufacturer	Trane.
Unico, Inc	Manufacturer	Unico.
U.S. Boiler Company	Manufacturer	U.S. Boiler.
Weil-McLain Company	Manufacturer	Weil-McLain.
Westinghouse Lighting Corporation	Manufacturer	Westinghouse.
Whirlpool Corporation	Manufacturer	Whirlpool.
Zero Zone, Inc	Manufacturer	Zero Zone.

III. Discussion of Specific Revisions to Appendix A

A. Restoring the Department's Discretion To Depart From the General Guidance in Appendix A

One of the most significant changes made to appendix A in the February 2020 Final Rule was to turn what had been guidance on usual practices for issuing new or amended energy conservation standards and test procedures into binding requirements. In contrast, the July 1996 Final Rule contained procedures, interpretations, and policies that DOE believed would be appropriate for general use in conducting energy conservation standard and test procedure rulemakings. However, in the July 1996 Final Rule, DOE also acknowledged the possibility that the usual practices would not be appropriate for every rulemaking and that the circumstances of a particular rulemaking should dictate application of these generally applicable practices, subject to public notice explaining any such deviations. 61 FR 36974, 36979.

In making appendix A binding, DOE made a policy determination at the time it issued the February 2020 Final Rule that ''promot[ing] a rulemaking environment that is both predictable and consistent'' outweighed the need for ''flexibility to fit the appropriate process to the appliance standard or test procedure at issue.'' February 2020 Final Rule, 85 FR 8626, 8633–8634. Additionally, in response to comments that mandatory application of appendix A could conflict with DOE's statutory obligations under EPCA (*e.g.,* rulemaking deadlines), DOE stated its policy view that the February 2020 Final Rule had been drafted to closely follow and implement EPCA. *Id.* at 85 FR 8634.

As noted in its April 2021 proposal, DOE is reconsidering its policy judgment in weighing the predictability of a one-size-fits-all approach against the negative effects that a mandatory application of appendix A would have on DOE's ability to meet the statutory deadlines established under EPCA and other applicable requirements. Under EPCA, DOE is required to review energy conservation standards for covered products and equipment at least once every six years to determine whether a more-stringent standard would result in significant conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6295(m)(1); 42 U.S.C. 6313(a)(6)(C); 42 U.S.C. 6316(a)) Similarly, DOE is also required to review test procedures for covered products and equipment at least once every seven years to determine whether improvements can be made. (42 U.S.C. 6293(b)(1); 42 U.S.C. 6314(a)(1)(A)) DOE currently has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and is typically working on anywhere from 50 to 100 rulemakings (for both energy conservation standards and test procedures) at any one time. Consequently, DOE has often been unable to meet its rulemaking deadlines, and with the February 2020 Final Rule mandating procedural steps that make the rulemaking process lengthier than EPCA requires, implementation of this binding process would make it even more difficult to clear the existing backlog of missed rulemaking deadlines in a timely manner and meet future rulemaking deadlines.

Among the steps that EPCA does not require—but the February 2020 Final Rule does—is for DOE to issue rulemaking documents in advance of a NOPR. The February 2020 Final Rule mandates use of an early assessment RFI and either an advanced notice of proposed rulemaking (''ANOPR'') or a framework document with a preliminary analysis. While DOE recognizes the importance of gathering early stakeholder input and has proposed to maintain opportunities for pre-NOPR input in the July 2021 NOPR,[7] such input may not be necessary or useful in all cases. For instance, EPCA requires DOE to revisit a determination that standards do not need to be amended within three years. (42 U.S.C. 6295(m)(3)(B)) In such cases, particularly with respect to covered products and equipment that have gone through multiple rounds of rulemakings and for which there has been negligible change to the market and relevant technology, a pre-NOPR publication may provide limited value. Thus, DOE may be able to directly issue a notice of proposed determination that standards do not need to be amended. Stakeholders would still have the opportunity to comment on the proposed determination. And, in the event that DOE receives new information in response to the notice of proposed determination, DOE can issue supplemental rulemaking documents before proceeding to a final rule or determination.

The February 2020 Final Rule also required that DOE finalize test procedure rulemakings establishing methodologies used to evaluate proposed energy conservation standards at least 180 days prior to publication of a NOPR proposing new or amended energy conservation standards. DOE stated that this requirement would allow stakeholders to provide more effective comments on the proposed energy conservation standards. 85 FR 8626, 8676. DOE acknowledges the importance of established methodologies for measuring energy use and energy efficiency when evaluating potential amendments to the energy conservation standards. Whether a potential energy conservation standard is technologically feasible and economically justified will be dependent, in part, on how the energy use of a product is measured. As discussed in section III.E of this document, DOE is requiring that new test procedures and amended test procedures that impact measured energy use or efficiency be finalized at least 180 days prior to the close of the comment period for: (i) A NOPR proposing new or amended energy conservation standards; or (ii) a notice of proposed determination that standards do not need to be amended. However, this 180-day period may not always be necessary. For example, DOE will typically use an industry test procedure as the basis for a new DOE test procedure. If DOE adopts the industry test procedure without modification, stakeholders should already be familiar with the test procedure. In such cases, requiring the new test procedure to be finalized 180 days prior to the close of the comment period for a NOPR proposing new energy conservation standards would offer little benefit to stakeholders while delaying DOE's promulgation of new energy conservation standards.

These examples illustrate what was clearly understood in the July 1996 Final Rule—that the procedures, interpretations, and policies laid out in appendix A that are generally applicable to DOE's rulemaking program should be determined on a case-by-case basis based on the individual circumstances of a given rulemaking. 61 FR 36974, 36979. Accordingly, in the April 2021 NOPR, the Department proposed reverting back to the original, non-binding status of appendix A. DOE requested comments, information, and data on whether appendix A should be non-binding or, alternatively, whether the rule should remain binding but with revised provisions.

In addition, consistent with its proposal to revert appendix A back to non-binding guidance, DOE's April 2021 NOPR also proposed clarifying that appendix A does not create legally enforceable rights. DOE does not intend for departures from the generally

[7] 86 FR 35668, 35669.

applicable guidance contained in appendix A to serve as the basis for potential procedural legal challenges. DOE's proposed clarification, like the general approach contained in the July 1996 Final Rule, would not impact the ability of a party to raise a challenge regarding the substantive merits of a given rulemaking or the procedural steps delineated under EPCA or the APA. (*See* 42 U.S.C. 6306 (applying judicial review to EPCA's consumer product provisions) and 42 U.S.C. 6316(a)–(b) (extending the application of 42 U.S.C. 6306 to commercial and industrial equipment)) DOE sought comment on this proposed clarification as well. 86 FR 18901, 18905.

Comments in Favor of DOE's Proposal To Restore the Non-Binding Nature of Appendix A

A number of commenters favored DOE's proposed approach. For example, the Joint Environmentalist Commenters reasoned that it is impossible for DOE to create a binding, one-size-fits-all procedure that would adequately address all the unique situations and requirements of DOE's myriad rulemakings. In their view, neither the Administrative Procedure Act (APA) nor EPCA compel such a rigid approach. They argued that the rulemaking process created by the February 2020 Final Rule is more onerous and more time consuming than the one enacted by Congress or adopted in the July 1996 Final Rule. These commenters argued that DOE cannot afford to waste time in addressing its statutory mandate and rulemaking backlog, and they supported DOE's attempt to restore flexibility to appendix A by returning it to non-binding guidance, thereby allowing DOE to respond appropriately to the unique circumstances of a particular rulemaking. (Joint Environmentalist Commenters, No. 31 at p. 2) [8]

Similarly, the CA IOUs urged DOE to return appendix A to its previous status as non-binding guidance, which they argued would restore predictability and certainty to the rulemaking process. These commenters argued that each DOE rulemaking is unique, making the inflexible blanket approach followed in the February 2020 Final Rule one that could result in missed opportunities for increased energy and water efficiency and delay DOE's timely completion of its statutory obligations (including elimination of the current backlog of rulemakings). Furthermore, the CA IOUs argued that a binding appendix A opened DOE up to additional avenues of legal challenge, first on the basis of appendix A itself and then on the potentially conflicting requirements of appendix A and EPCA. They suggested that a binding appendix A increases uncertainty and reduces the ability for all parties to plan for the future, so they encouraged DOE to expand its reasoning for this rulemaking action to clarify DOE's position for future Administrations. However, in the interest of transparency, the CA IOUs also recommended that DOE should alert stakeholders and document when the agency finds it necessary to deviate from the guidance embodied in appendix A; however, the commenters stated that even this provision should be non-binding. (CA IOUs, No. 34 at pp. 1, 2, 6)

The CEC also agreed with DOE's proposal to return appendix A to a non-binding status as a means to enable DOE to retain the flexibility to adapt to the unique circumstances of each rulemaking. It argued generally that unless DOE adopted its proposed approach, following the February 2020 Final Rule would lead to worse air pollution, higher greenhouse gas emissions, unnecessary consumption of water, less-efficient products, and higher energy bills. It further argued that DOE's proposal would ensure necessary flexibility while providing the regulated community with sufficient certainty, encouraging innovation, saving consumers money, improving efficiency, making progress on the backlog of missed deadline rulemakings, and limiting unnecessary greenhouse gas emissions. (CEC, No. 35 at pp. 1–2, 11)

Furthermore, the CEC asserted that the self-imposed administrative barriers in the February 2020 Final Rule would lead to continued delays, market uncertainty, lost energy savings, and harm to consumers. Although the CEC encouraged DOE to be as transparent, consistent, and predictable as possible in its rulemakings, it cautioned that strict adherence to all of the February 2020 Final Rule's required elements will lead to further delay regarding already overdue energy conservation standards and test procedure rulemakings. It reasoned that a mandatory appendix A would provide additional opportunities for procedural challenges, which would create additional costs and unnecessary market uncertainties that would limit innovation and undermine achievable energy savings. In its view, EPCA's mandatory procedures regarding the setting of standards and test procedures control, and to the extent that any appendix A provisions conflict with EPCA, those regulatory requirements would be unlawful. For all these reasons, the CEC stated that appendix A should be returned to guidance status. (CEC, No. 35 at p. 3)

The Joint Advocacy Commenters also favored returning appendix A to general guidance and restoring DOE's discretion to depart from that guidance in appropriate cases. These commenters recognized the importance of having a predictable process for industry stakeholders and encouraged DOE to strive to adhere to the procedures set forth in appendix A, while stressing the need for DOE to have the flexibility to adjust the process to cover the range of issues which may arise in individual rulemakings. According to the Joint Advocacy Commenters, departing from appendix A's general practice may sometimes be necessary to avoid uncertainty for manufacturers and/or to avoid unnecessary delays. As an example, they noted how appendix A details the analytical practices DOE uses in rulemaking and argued that DOE should not need to go through rulemaking to change appendix A each time it wishes to modify its analytical processes to reflect best practices. They also expressed concern that the February 2020 Final Rule's binding provisions could conflict with statutory requirements and increase litigation solely on the issue of whether DOE has followed the prescribed procedures. For these reasons, the commenters argued that applying these guidelines to a specific rulemaking should be determined on a case-by-case basis and that appendix A should be returned to its original, non-binding status. (Joint Advocacy Commenters, No. 38 at pp. 1–2; Joint Advocacy Commenters (Appendix I), No. 38 at pp. 1, 2)

The State Commenters argued that application of appendix A should be determined on a case-by-case basis so that DOE is accorded the latitude and discretion to pursue the most appropriate approach to gathering, analyzing, and synthesizing stakeholder input for different standards. In their view, this procedural flexibility will help ensure that DOE is able to fulfill its statutory mandates as efficiently as possible and with minimal delay and litigation risk. (State Commenters, No. 29 at p. 8) The commenters also noted that making appendix A binding on all rulemakings—including where doing so conflicts with EPCA—exposes DOE to increased litigation that would further delay promulgation of final standards

[8] The parenthetical reference provides a reference for information located in the docket of this rulemaking. (Docket No. EERE–2021–BT–STD–0003, which is maintained at *www.regulations.gov*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

on statutorily mandated timelines. (State Commenters, No. 29 at p. 8)

NPCC and NEEA supported DOE's April 2021 proposal, noting that the current version of appendix A contains unnecessary obstacles to DOE's ability to meet its obligations under EPCA. (NPCC, No. 12 at pp. 1–2; NEEA, No. 43 at p. 2) NEEA also asserted that many of the changes in the 2020 Final Rule were unclear and confusing and that they handicapped DOE's ability to effectively and efficiently adopt standards and test procedures so as to achieve maximum economic and environmental benefits for the Nation—thereby making it more difficult for DOE to meet rulemaking deadlines, and resulting in less national energy savings. (NEEA, No. 43 at pp. 1–2) NPCC supported DOE's effort to revert back to non-binding guidance and to restore the flexibility that DOE once had under the 1996 version of appendix A. (NPCC, No. 12 at p. 3) Similarly, NEEA supported DOE's ability to address each rulemaking individually, but in furtherance of transparency, it urged DOE to clearly state in a particular rulemaking when it intended to depart from the procedures outlined in appendix A, along with the reasons for that departure. (NEEA, No. 43 at p. 2)

Comments Opposing DOE's Proposal

DOE also received a number of comments opposing its proposed removal of the mandatory application of appendix A. In AHRI's and BWC's views, appendix A should remain mandatory so as to provide certainty, transparency, and consistency in the rulemaking process DOE uses to implement its energy conservation standards program. (AHRI, No. 25 at p. 1–2; BWC, No. 24 at p. 1) AHRI also asserted that the Department's proposal fails to address or acknowledge DOE's stated reason for making the February 2020 Final Rule binding—namely that of promoting a predictable and consistent rulemaking environment where all stakeholders know what to expect during the rulemaking process—and DOE's proposal does not provide any explanation as to why the record before the agency no longer warrants ensuring that it provide a predictable and consistent rulemaking process. (AHRI, No. 25 at p. 7)

AFP also argued that appendix A should remain binding. It dismissed DOE's stated reasons for making appendix A non-binding—namely to aid in meeting deadlines and to allow it to meet unspecified ''statutory obligations''—noting that with over two decades of rulemakings, DOE has rarely met its statutory deadlines even when appendix A was non-binding. In AFP's view, DOE offered no justification in its proposal as to why this situation would change now. (AFP, No. 36 at p. 2) AFP asserted that the three examples offered by DOE in favor of making appendix A non-binding were flawed. It argued that with respect to DOE's ability to meet its statutory deadlines and ''other applicable requirements,'' DOE offered no explanation as to what comprised the latter. (AFP, No. 36 at pp. 2–3) It also argued that although DOE stated that changes or additions to EPCA's procedural requirements may affect DOE's ability to meet the relevant rulemaking deadlines, DOE failed to show how a non-binding appendix A will either help in meeting these statutory requirements or what will be different from DOE's historic practices. AFP offered similar criticisms with respect to DOE's statements regarding how the mandatory application of appendix A's requirements for early assessment RFIs and ANOPRs may affect DOE's ability to meet statutory deadlines and how having a binding appendix A would also make it more difficult to meet those statutory obligations. (AFP, No. 36 at pp. 2–3)

AFP also referenced DOE's statements to Congress regarding the Department's ability to satisfy the requisite statutory deadlines, in which DOE explained that the Appliance Standards Program has historically had difficulties in meeting its statutorily-required rulemaking obligations, including when appendix A was non-binding. (AFP, No. 36 at p. 3) The commenter asserted that the proposal did not explain how making appendix A non-binding will yield results different from the past, and that DOE should hold itself accountable for complying with its own procedures to ensure that the public will have confidence in the transparency and fairness of DOE's rulemaking process. (AFP, No. 36 at pp. 3, 5)

Commenters Favoring a Mandatory Appendix A Coupled With Well-Defined Exceptions

Additionally, there were also commenters who favored the use of limited, well-defined exceptions to appendix A while maintaining its overall mandatory approach. A number of manufacturers favored an approach that would retain the mandatory nature of appendix A (along with the certainty and predictability it offered), while building in additional flexibility for DOE, and objected to returning appendix A to its prior status as guidance. (Carrier, No. 26 at pp. 1–2; Nortek, No. 19 at p. 2; GEA, No. 20 at pp. 2–3; Lennox, No. 18 at p. 2; A.O. Smith, No. 27 at p. 2; Goodman, No. 22 at p. 2; Trane, No. 23 at p. 2) Nortek and GEA added that if Appendix A becomes non-binding, DOE should add both a mandatory public notice and comment provision that must be followed whenever the agency intends to deviate from appendix A and a rule-specific explanation for the deviation, followed by an opportunity for public comment before the agency proceeds with such deviation. (Nortek, No. 19 at p. 2; GEA, No. 20 at pp. 2–3; *see also* Goodman, No. 22 at p. 2 (asserting that DOE should explain its deviation)) Carrier, Lennox, A.O. Smith, and Trane offered that if DOE required more flexibility (such as making more expeditious, non-material, technical adjustments to test procedures), DOE should tailor those provisions of appendix A where that added flexibility is needed, rather than making Appendix A non-binding. (Carrier, No. 26 at p. 4; Lennox, No. 18 at p. 2; A.O. Smith, No. 27 at p. 3; Trane, No. 23 at p. 20). A.O. Smith suggested that DOE should propose to add a clear ''exception clause'' that would permit DOE to deviate from appendix A when certain criteria are met, namely: (1) Consensus agreements; (2) negotiated rulemakings; and (3) test procedure rulemakings that are addressing clarifications necessary to provide clarity to the market, reduce uncertainty, and provide a level playing field. (A.O. Smith, No. 27 at p. 2) In A.O. Smith's view, this limited exception would recognize those circumstances where deviations from appendix A are necessary and the expediting of the rulemaking process is reasonable. (A.O. Smith, No. 27 at pp. 2–3) Carrier suggested that DOE should retain its current early assessment requirement (*i.e.,* that an early assessment be conducted prior to the issuance of a standards NOPR) but that the current rule be modified to permit DOE the ability to use the most efficient early assessment method available. (Carrier, No. 26 at p. 1) The commenter offered a similar approach with respect to the current 180-day buffer period between the finalizing of a test procedure rule and the proposal for new or amended energy conservation standards. (Carrier, No. 26 at p. 2)

AGA objected to DOE's proposal to make appendix A non-binding and noted that because the 1996 version of appendix A had not been binding on DOE, it held little value. The commenter stated that in 2016, DOE frequently ignored appendix A, and its non-binding nature effectively conflicted with the need for an orderly and predictable regulatory process. (AGA,

No. 33 at pp. 3–4) Reversing the February 2020 Final Rule's mandatory nature would, in its view, be a serious mistake in light of AGA's past experience with having a non-binding version of appendix A in place. (AGA, No. 33 at p. 4) AGA argued that concerns over the rigidity of the February 2020 Final Rule—which AGA acknowledged to be the case with respect to some requirements—can be addressed through the revision of those requirements or by providing exceptions in appropriate circumstances, all without resorting to making appendix A non-binding. (AGA, No. 33 at pp. 4–5)

NPGA stated that while DOE's April 2021 NOPR has identified a number of rulemaking scenarios where different procedures may be beneficial, the agency's ability to make unilateral decisions about when and how to implement different rulemaking procedures lacks transparency. (NPGA, No. 15 at p. 2) It stressed the importance of getting stakeholder input regarding the potential feasibility and energy savings of rulemaking actions as soon in the process as possible. For that reason, NPGA supported the continued use of the ''early look'' provisions to solicit public comments on new regulatory actions. However, it agreed with DOE that different rulemaking approaches may be better suited in some cases for soliciting stakeholder input, so in the alternative, NPGA suggested that DOE should propose a new structure or minimum requirements that must be satisfied to justify an agency decision to deviate from appendix A and seek stakeholder information in response. (NPGA, No. 15 at pp. 2, 3) NPGA also argued that businesses need regulatory predictability and that DOE's proposal to largely operate on a case-by-case basis would make it difficult for manufacturers to have confidence in such rulemakings. It urged DOE to prepare and finalize regulations in an orderly fashion with a fair opportunity for all stakeholders to share information with the agency. (NPGA, No. 15 at p. 3)

Crown Boiler (along with fellow boiler manufacturers U.S. Boiler and New Yorker Boiler who both filed nearly identical responses) opposed DOE's proposed change to make appendix A non-binding. Although Crown Boiler acknowledged that in some cases it may make sense for DOE to have flexibility in adapting the rulemaking process to different situations, the commenter asserted that when DOE did have such discretion in the past, the Department abused it. Crown Boiler argued that where deviation from appendix A is necessary, DOE should be required to justify such deviation in writing after soliciting stakeholder input. If DOE is deviating frequently from appendix A, Crown Boiler stated that further amendments to appendix A may be required, but the solution should not be to scrap the binding nature of the process. (Crown Boiler, No. 10 at pp. 2–3; U.S. Boiler, No. 11 at p. 3; and New Yorker Boiler, No. 13 at pp. 2–3)

ALA urged DOE to retain the binding aspects of appendix A but recognized that a one-size-fits-all approach may not always be practical. It argued that retaining the binding aspects of the February 2020 Final Rule will allow DOE to meet its statutory obligations and eliminate time-wasting negotiations on process and procedures. (ALA, No. 28 at p. 2) ALA suggested that if appendix A becomes non-binding, DOE should ensure consistency such as through applying at least a 180-day period between finalizing a test procedure and proposing standards when major changes affecting energy consumption measurements are at issue, although the commenter concluded that a shorter time frame may be warranted for changes that do not impact measured energy performance. In its view, this change will ensure the best outcome in setting appropriate standards and reduce undue burden—particularly on small business entities who have limited resources with which to fully participate in DOE's rulemakings. (ALA, No. 28 at 2)

Lutron stated that it understands DOE's desire to increase flexibility and improve efficiency by restoring DOE's discretion to depart from appendix A's general guidance. It did not oppose such changes as a general matter, but the company argued that certain aspects should remain mandatory, specifically: (1) Test procedures must be finalized before energy conservation standards are proposed; (2) New test procedures or test procedure amendments that impact measured energy must have an adequate lead time between finalization of that test procedure and a new or amended standards proposal; and (3) There should be some form of stakeholder engagement before issuance of a notice of proposed rulemaking for energy conservation standards. (Lutron, No. 16 at p. 2) Lutron suggested that DOE should revert to the language in section 14(a) of the July 1996 Final Rule, which required DOE to make a finding that it is necessary and appropriate to deviate from the procedure specified in appendix A, to explain why, and to provide interested parties an opportunity to comment. The commenter also argued that DOE should clarify that any such deviations will be rule-specific and done on a case-by-case basis, rather than being broadly applicable. (Lutron, No. 16 at p. 2)

Both Grundfos and HI disagreed with DOE's proposal to return appendix A to guidance and noted that manufacturers are held to the strict requirements of the regulations, so DOE should likewise be expected to define a clear and consistent method for how it intends to manage its process to create/update those regulations, thereby providing stakeholders with needed predictability and consistency—as well as a means of enforcing those provisions through legally enforceable rights. They did not favor a case-by-case approach and stressed that such an approach would be at odds with the need for consistency, predictability, and transparency in DOE's regulatory process. However, these commenters also offered a middle ground, suggesting that appendix A should be binding, but with clear, thoughtful, and well-constructed flexibility to ensure DOE can meet the applicable requirements of EPCA. (Grundfos, No. 37 at pp. 1, 2; HI, No. 42 at pp. 1, 2)

The SBA Office of Advocacy stated that appendix A should remain binding while allowing for exceptions in certain instances. (SBA Office of Advocacy, No. 14 at p. 4) It stated that, among other things, without clear-cut processes for how the agency will promulgate standards, small businesses are not able to participate meaningfully in commenting and are not able to provide the types of substantive technical comments necessary to determine whether a particular test procedure is feasible. (SBA Office of Advocacy, No. 14 at p. 4)

NAFEM opposed restoring DOE's discretion to depart from appendix A's general provisions and asserted that if DOE is concerned about unnecessary delays, the Department could amend the rule by including the option of using a NODA for early assessment instead of relegating the whole appendix A to being optional guidance. (NAFEM, No. 30 at p. 4) NAFEM added that the April 2021 NOPR makes clear that DOE is seeking additional insulation from having to follow any rule or having any provisions that would impinge on its unbridled discretion by removing any legal impediment to its actions. (NAFEM, No. 30 at p. 4) In NAFEM's view, removing accountability and allowing for unlimited discretion will not provide economic stability or efficiency in the EPCA rulemaking process. (NAFEM, No. 30 at p. 4)

The Joint Industry Commenters also strongly opposed DOE's proposal to eliminate the mandatory nature of the

February 2020 Final Rule. (Joint Industry Commenters, No. 40 at p. 4) They suggested instead that DOE should ensure the rule is tailored to its needs and provides the needed flexibility such that the agency can follow it regularly. (Joint Industry Commenters, No. 40 at p. 5). If DOE reverts back to a non-binding version of appendix A, the Joint Industry Commenters suggested DOE consider adding the following: (1) Provide parties with notice and explanation of why a deviation from appendix A is necessary and appropriate; (2) clarify that deviations can only be established on a case-by-case basis; (3) provide stakeholders with the opportunity to comment on the need for the deviation; and (4) maintain the mandatory nature of the rule for certain provisions, including: (a) A requirement to finalize test procedures before issuing proposed energy conservation standards with a 180-day lead-in period for new test procedures or amended test procedures that impact measured energy use or efficiency, and (b) an opportunity for early stakeholder input prior to issuance of proposed energy conservation standards. (Joint Industry Commenters, No. 40 at pp. 6–7)

DOE's Response to Comments

DOE first notes that the majority of commenters, both in support of and against restoring the Department's discretion to depart from the general guidance in Appendix A, have noted the merits of providing DOE with some measure of flexibility in its rulemaking processes. (*See, e.g.,* Carrier, No. 26 at pp. 1–2 (favoring a more flexible application of the procedures in appendix A); Nortek, No. 19 at p. 2 (suggesting DOE provide rule-specific explanations when deviations are needed); A.O. Smith, No. 27 at p. 3 (preferring a binding process with reasonable exceptions over the current rigid approach); AGA, No. 33 at pp. 4–5 (noting that the rigidity imposed by the current requirements can be mitigated by providing for exceptions in certain circumstances); State Commenters, No. 29 at p. 8 (noting that procedural flexibility will help ensure that DOE is able to fulfill its statutory mandates as efficiently as possible with minimal delay and litigation risk); Joint Environmentalist Commenters, No. 31 at p. 2 (discussing the importance of allowing DOE to respond appropriately to the unique circumstances of a particular rulemaking)) Where commenters differ is on how to implement this flexibility. Some commenters, such as the Joint Environmentalist Commenters, support making appendix A non-binding to allow DOE the necessary flexibility to respond to the unique circumstances of a particular rulemaking, while other commenters, such as the Joint Industry Commenters, support retaining the current, binding nature of appendix A with modifications to ensure procedures are tailored to DOE's needs and provide the needed flexibility such that DOE can follow it regularly. (Joint Environmentalist Commenters, No. 31 at p. 2; Joint Industry Commenters, No. 40 at p. 5)

After carefully considering these comments, DOE is finalizing the proposal from the April 2021 to revert appendix A back to its original status as non-binding guidance. That being said, DOE recognizes the merits in both approaches and believes the revisions to appendix A finalized in this document represent the best combination of these two approaches. Accordingly, DOE is also modifying appendix A to reduce the need for departures from the generally-applicable guidance by accounting for specific circumstances surrounding a rulemaking. For example, in section III.E of this document, DOE is implementing guidance on when a 180-day period between finalization of a test procedure and the end of the comment period for an associated standards proposal is warranted. These changes will result in fewer departures from the procedures laid out in appendix A. However, as noted previously, DOE currently has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and is typically working on anywhere from 50 to 100 rulemakings. Further these covered products and equipment encompass a wide variety of industries. For certain covered products and equipment, such as commercial package air conditioning and heat pumps, there are established trade organizations that represent a majority of manufacturers and that are able to compile comprehensive datasets. External power supplies, on the other hand, are used in a wide range of products and do not fall neatly into a single trade organization. As a result, DOE may need to tailor its rulemaking approach to account for the lack of consolidated information for a given covered product. This is just one example of how DOE has had to adapt its rulemaking process due to varying circumstances across covered products/equipment. Consequently, it is simply not feasible to anticipate every instance of when flexibility or an exception to the generally applicable procedures of appendix A would be warranted for the more than 60 categories of covered products and equipment that DOE regulates. As such, in addition to the specific instances where DOE is incorporating flexibility into appendix A, DOE believes it is imperative that the Department have the discretion to depart from the generally-applicable guidance in appendix A.

Several commenters expressed concern that reverting to the prior, longstanding use of appendix A as non-binding guidance would reduce certainty, transparency, and consistency in the rulemaking process DOE uses to implement its Appliance Standards Program. (*See, e.g.,* AHRI, No. 25 at p. 1–2; BWC, No. 24 at p. 1) NAFEM went so far as to state that a non-binding appendix A would allow for unbridled discretion in the rulemaking process by removing any legal impediment to DOE's actions. (NAFEM, No. 30 at p. 4) In response, DOE notes that reverting appendix A to non-binding guidance has no effect on the procedures that are already required under EPCA. DOE will continue to follow those statutory requirements and strive to continue to meet the related deadlines that EPCA prescribes. For example, EPCA requires that a test procedure or standards proposal be published for public comment, that comment periods be of specified minimum durations, and that notice of determinations be subject to notice and comment before DOE publishes a final determination not to amend a given set of standards for covered products and equipment. (*See* 42 U.S.C. 6293(b)(2) (prescribing minimum comment period for test procedure proposed rulemakings); 42 U.S.C. 6295(m)(2) (prescribing minimum comment period for proposed determinations); *and* 42 U.S.C. 6295(p)(2) (prescribing minimum comment period for standards proposed rulemakings)) Further, DOE will continue to ensure new or amended energy conservation standards and test procedures meet applicable statutory criteria in EPCA (*e.g.,* standards result in the maximum improvement in energy efficiency that is technologically feasible and economically justified). Taken together, all of these requirements establish a consistent, predictable rulemaking process. NAFEM's concerns about unbridled discretion and a lack of any legal impediment to DOE's actions are unfounded. As discussed above, EPCA restrains DOE's discretion in several areas and specifies a more detailed rulemaking process than that laid out in the Administrative Procedure Act.

As for comments regarding the transparency of DOE's rulemaking

process, DOE notes that appendix A is an agency construction—a provision that was developed not only to address how DOE will conduct energy conservation standards and test procedure rulemakings but also to provide transparency to DOE's rulemaking process. As stated throughout this rulemaking, DOE is making appendix A non-binding in recognition of the fact that DOE should be able to tailor its rulemaking process to best fit the unique circumstances of a particular rulemaking, not to reduce transparency in its rulemaking process. That being said, DOE recognizes that deviations from appendix A without notice or explanation are not conducive to a transparent rulemaking process. Accordingly, DOE is modifying its proposed approach from the April 2021 NOPR to more closely match the original appendix A by providing the public with notice and an explanation of any deviations to the generally applicable guidance of appendix A. These deviations will be narrowly tailored to the individual rulemaking at issue and will not be applied on an across-the-board basis.

In response to those commenters who criticized DOE's proposal and noted the Department's past inability to meet statutory deadlines even under a non-binding appendix A, DOE acknowledges the difficulties it has had in meeting these requirements in the past. DOE will continue to strive to meet these deadlines, and the removal of the mandatory provisions imposed by the 2020 February Final Rule (which tended to lengthen the rulemaking process) will provide DOE with a greater chance of success in doing so. Reserving this discretionary flexibility will aid in DOE's ability to focus its various resources in meeting the deadlines imposed under EPCA (or any other potential deadlines, such as those imposed pursuant to court order). Furthermore, DOE's past difficulty in meeting these deadlines when appendix A's provisions were not mandatory only further highlights the need for the agency to have more flexibility in carrying out a given rulemaking, not less, as the February 2020 Final Rule dictates.

Finally, DOE agrees with those commenters who suggested that the removal of the binding nature of appendix A would reduce the overall scope of DOE's litigation risk and avoid scenarios where appendix A requirements may conflict with statutory requirements in EPCA. Reducing litigation risk, among other things, provides added certainty to DOE's rulemaking process. DOE also notes that removing the potential for procedural challenges stemming from a set of self-imposed requirements does not affect the ability of interested parties to bring substantive legal challenges under the relevant statutory provisions, such as the APA and EPCA. This change should contribute to DOE's ability to satisfy its statutory obligations in a timely manner.

For the aforementioned reasons, DOE is finalizing the proposal from the April 2021 NOPR to restore DOE's discretion to depart from the generally-applicable guidance of appendix A, subject to the modification discussed above requiring notice and explanation for each deviation.

B. Significant Energy Savings Threshold

As DOE noted in the preamble to the April 2021 NOPR, the Secretary of Energy may not prescribe an amended or new energy conservation standard if the Secretary determines that such standard will not result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6313(a)(6)(A)(ii)(II); and 42 U.S.C. 6316(a)) Congress did not define the statutory term ''significant conservation of energy,'' and, for several decades prior to the February 2020 Final Rule, DOE also did not provide specific guidance or a numerical threshold for determining what constitutes significant conservation of energy. Instead, DOE determined on a case-by-case basis whether a particular rulemaking would result in a significant conservation of energy.

In a departure from this practice, the February 2020 Final Rule added a numerical threshold for significant conservation of energy that currently applies to all energy conservation standards rulemakings for both covered products and equipment. That threshold requires an energy conservation standard to result in either: (1) A 0.30 quad reduction in site energy use over a 30-year analysis period or (2) a 10-percent reduction in site energy use over that same period. DOE explained in the February 2020 Final Rule its expectation that the threshold would ensure that economically-justified standards would be developed, while also making the rulemaking process more predictable. 85 FR 8626, 8670.

As DOE explained in its April 2021 proposal, the Department is reconsidering its policy views on whether this numerical threshold allows DOE to fully consider whether an energy conservation standard would result in significant conservation of energy. 86 FR 18901, 18905. In particular, DOE is reevaluating whether the significance of energy savings offered by a new or amended energy conservation standard can be determined without knowledge of the specific circumstances surrounding a given rulemaking.

As noted in the April 2021 NOPR, a uniform numerical threshold for site energy savings does not account for differences in primary energy and full-fuel-cycle (''FFC'') effects for different covered products and equipment when determining whether energy savings are significant. *Id.* Primary energy and FFC effects include the energy consumed in electricity production (depending on load shape), in distribution and transmission, and in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels). For example, 1 quad of site electricity energy consumption in 2022 corresponds to approximately 3.05 quads of FFC energy consumption (for a generic end-use load shape). By contrast, 1 quad of site natural gas or oil energy consumption in 2022 corresponds to 1.11 and 1.17 quads of FFC energy consumption, respectively.[9] Thus, FFC effects present a more complete picture of the impacts of potential energy conservation standards, including greenhouse gas emissions, and would allow DOE to more fully consider the impacts of potential energy conservation standards during its rulemaking processes. This is especially important in light of the fact that the United States has now rejoined the Paris Agreement and will exert leadership in confronting the climate crisis.[10]

Additionally, DOE pointed out in the April 2021 NOPR that some covered products and equipment have most of their energy consumption occur during periods of peak energy demand—a condition that a uniform numerical threshold does not capture. 86 FR 18901, 18905. The impacts of these products on the energy infrastructure can be more significant than those from products with relatively constant site energy use demand. For example, whereas consumer refrigerators operate 24 hours per day, 365 days per year, central air conditioners typically operate during only part of the year, including periods of peak demand (*i.e.,* during the hottest summer days), a factor that is likely to impact grid reliability. Thus, reducing energy use

[9] *See* Coughlin, K. Projections of Full-Fuel-Cycle Energy and Emissions Metrics. (2013). LBNL–6025E; Energy information Administration *Annual Energy Outlook 2021* (available at: *https://www.eia.gov/outlooks/aeo*).

[10] *See* Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad,'' 86 FR 7619 (Feb. 1, 2021).

during periods of peak demand has a more significant impact as it helps reduce stress on energy infrastructure. But the current threshold for determining whether energy savings are significant does not allow DOE to assign greater significance to energy savings that have a greater impact on reducing the stress on U.S. energy infrastructure. FFC and grid impacts are but two examples of any number of factors that cannot be fully accounted for when using DOE's current uniform threshold for significant conservation of energy.

Accordingly, DOE sought comment on whether to eliminate the current threshold for determining significant conservation of energy and to revert to its prior practice of making such determinations on a case-by-case basis or on any suggested alternatives. Commenter responses on this issue are summarized in the ensuing paragraphs, followed by the Department's response.

Comments Supporting Removal of the Significant Energy Savings Threshold

A number of commenters supported DOE's proposal to remove the February 2020 Final Rule's significant energy savings threshold. For example, in expressing support for DOE's proposal, NPCC noted its initial objection to the threshold when it was first proposed by DOE. (NPCC, No. 12 at p. 3) NEEA held a similar view, asserting that the threshold was overly prescriptive and would prevent DOE from adopting standards that save energy and are economically justified. The commenter provided hypothetical examples of what it viewed as anomalous results that might occur if the significant energy saving threshold were to be used in its current form. (NEEA, No. 43 at p. 2 (noting that DOE would be able to implement a standards rulemaking resulting in 0.1 quads of energy savings if it represented 11% of site energy use but would be unable to implement two separate rulemakings resulting in 0.2 quads and 8% of site energy use reduction each))

Some commenters also argued that the particular facts and circumstances need to be fully considered by DOE before it can make a determination regarding the significance of the energy savings involved. (State Commenters, No. 29 at p. 8; CEC, No. 35 at p. 5) Several Commenters also argued that the current significant energy savings threshold is both an unreasonable interpretation of EPCA and in conflict with existing case law. (State Commenters, No. 29 at p. 9 (asserting that the threshold violated EPCA, case law, and congressional intent, and would result in lost public benefits); Joint Environmentalist Commenters, No. 31 at pp. 3–4) (asserting that the threshold violated EPCA and judicial precedent); CEC, No. 35 at pp. 4–5 (citing *NRDC* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985) and asserting that energy savings are significant if they are not ''genuinely trivial'')) The CEC further argued that using a mandatory significant energy savings threshold as an initial consideration would allow DOE to side-step its obligations to evaluate the costs and benefits of any energy conservation opportunity that is not genuinely trivial, which is particularly important for technologies that may currently have a small market share but which could consume significant amounts of energy in the future (*e.g.,* electric vehicle supply equipment). It also warned that a static significant energy savings threshold could be abused in situations where products could be split into numerous categories in order to ensure that no product meets the threshold, such that no standards may be established or amended. (CEC, No. 35 at pp. 4–5)

The Joint Environmentalist Commenters characterized the adoption of the significant energy savings threshold as a ''harmful change'' that is inflexible. They argued that many of DOE's previously adopted energy conservation standards would not have met the 2020 February Final Rule's threshold, despite providing billions of dollars in utility bill savings, avoided health harms, and reduced greenhouse gas emissions. These commenters also argued that Congress intended for DOE to apply a gradualist approach by requiring the reexamination of standards at least every six years, and they reasoned that DOE cannot use a significant energy savings threshold to short-circuit this statutory requirement to reconsider standards at regular intervals. (Joint Environmentalist Commenters, No. 31 at pp. 3–5)

The Joint Advocacy Commenters argued generally that adoption of the proposals contained in the April 2021 NOPR would have the potential to achieve very large consumer and climate benefits, while still providing ample opportunity for stakeholder input throughout DOE's rulemaking process. (Joint Advocacy Commenters, No. 38 at p. 1) Regarding the threshold specifically, these commenters favored its removal because, in their view, such an arbitrary threshold is inconsistent with the relevant case law and congressional intent and has the potential to sacrifice large savings for both consumers and businesses since site energy savings of 0.30 quads (as provided in the threshold) are equivalent to electricity bill savings of about $11 billion. The Joint Advocacy Commenters further argued that the numerical threshold would prevent DOE from pursuing a standard, even if such standard would impose no costs, because the agency would never get to consider that level of savings as part of the required analysis of economic justification. These commenters also faulted the numerical threshold for not allowing DOE to account for factors such as the increased significance of energy savings that can reduce greenhouse gas emissions or the specific circumstances associated with a given product. They agreed with the April 2021 NOPR's arguments that the significant energy savings threshold does not allow DOE to account for other relevant considerations such as a potential standard's impact on peak demand and reduction of stress on the electric grid, and they added that the threshold could also prevent the successful conclusion of consensus agreements. For these reasons, the Joint Advocacy Commenters recommended that DOE should return to considering whether significant energy savings are present on a case-by-case basis, as it has historically done. (Joint Advocacy Commenters, No. 38 at pp. 2–3; Joint Advocacy Commenters (Appendix I), No. 38 at pp. 1, 2, 9–11)

IPI also supported DOE's proposed removal of the significant energy savings threshold and suggested that DOE should also consider other factors besides climate effects when determining whether energy savings are significant. (IPI, No. 17 at p. 1) In addition to supporting DOE's stated reasons for removing the threshold, IPI argued that had the threshold been in place when DOE set standards for commercial warm air furnaces in 2016, the Nation would have had to forego 12.4 million metric tons of CO_2 emissions savings, as well as significant reductions in criteria pollutants and consumer savings of $1 billion. (IPI, No. 17 at p. 2) The commenter asserted that foregoing such savings in the future by continuing to use the threshold would significantly undermine commitments to U.S. leadership on climate change and would bypass the ''cost-free chance[s] to save energy'' that courts have said that Congress did not intend for DOE to pass up. (IPI, No. 17 at pp. 2–3) In IPI's view, relying solely on numerical thresholds is arbitrary (IPI, No. 17 at p. 3), and it agreed with the April 2021 NOPR's observation that peak demand has a greater impact on U.S. energy infrastructure compared to

non-peak demand. IPI stated that the timing of energy demand matters not only in this context but also with respect to climate, health, and consumer impacts, explaining that electricity generators that satisfy peak demand can also be among the most-polluting generators and that some consumers may experience increased electricity pricing during peak demand periods. (IPI, No. 17 at pp. 3–4) As a result, in IPI's view, energy savings for appliances that operate during peak demand periods can have greater benefits for the climate, human health, and consumers than the raw numbers show. For this reason, IPI argued that these impacts should be considered when determining whether a given savings level is significant. (IPI, No. 17 at p. 4)

IPI added that climate and health impacts should be incorporated into DOE's reasoning for the removal of the current energy savings threshold. (IPI, No. 17 at p. 4) In addition to DOE's reasoning that the current threshold's link to site energy use does not permit DOE to account for differences in primary energy and FFC effects for different covered products, IPI contended that a given amount of site energy usage will also be associated with different amounts of FFC emissions depending on the fuel type used and that those different emissions will likewise be associated with different climate and health impacts. The commenter argued that these reasons favor DOE's consideration of climate and health impacts when assessing the significance of energy savings for a given standard and in repealing the February 2020 Final Rule's numerical thresholds.[11] (IPI, No. 17 at p. 4)

The CA IOUs also supported removal of the significant energy savings threshold, arguing that it directly conflicts with DOE's ability to set energy conservation standards that achieve the maximum energy savings that are technologically feasible and economically justified. They characterized it as an ''arbitrary minimum savings threshold'' and also faulted it for its potential to prevent DOE from setting efficiency standards for emerging technologies that may have relatively low market penetration currently but that present large savings opportunities for the future. The CA IOUs argued that appropriate Federal energy conservation standards could help reduce the social cost of such technologies and accelerate their acceptance, and accordingly, these commenters recommended that DOE should again interpret significant energy savings to mean not ''genuinely trivial'' (referencing the *Herrington* case). (CA IOUs, No. 34 at pp. 2–3)

Finally, the proposed elimination of the significant energy savings threshold was also supported by some manufacturers. A.O. Smith stated that it did not believe that appendix A needed to include a significant energy savings threshold, as the factors that EPCA requires DOE to evaluate include both savings and cost. (A.O. Smith, No. 27 at p. 4) Trane noted that, even with the current approach's ''10% improvement backstop,'' this level of improvement could represent a significant leap for many covered products that is simply impossible to achieve, let alone be technically feasible. (Trane, No. 23 at p. 3). Instead, Trane favored permitting DOE to use its own discretion, after carefully weighing stakeholder input, as to whether potential cumulative energy savings are significant enough to proceed with a standards rulemaking. (Trane, No. 23 at p. 3)

Comments Opposing Removal of the Significant Energy Savings Threshold

A number of commenters opposed DOE's proposal to remove the current threshold for significant energy savings. For example, in AHRI's view, DOE's establishment of the current significant energy savings threshold, rather than relying on a case-by-case determination, fell within DOE's authority under EPCA. (AHRI, No. 25 at p. 7) Many commenters asserted that the use of such a threshold would provide consistency, predictability, certainty, stability, or some combination of these elements, to regulated entities and stakeholders, and they argued that it would ensure that DOE pursues economically-justified standards. (AHRI, No. 25 at p. 7; Joint Industry Commenters, No. 40 at p. 12; Goodman, No. 22 at p. 3; Lutron, No. 16 at p. 2; Zero Zone, No. 21 at p. 2; Grundfos, No. 37 at p. 2; HI, No. 42 at p. 2; AGA, No. 33 at p. 5; MHI, No. 32 at p. 2). The SBA Office of Advocacy made special note that the threshold provides certainty to small businesses. (SBA Office of Advocacy, No. 14 at p. 5) A number of commenters also asserted that focusing on potential standards capable of satisfying the threshold would help DOE prioritize its resources and meet its statutory deadlines. (AHRI, No. 25 at pp. 7–8; Carrier, No. 26 at p. 2; Crown Boiler, No. 10 at p. 2; Nortek, No. 19 at p. 3; BWC, No. 24 at pp. 2–3; GEA, No. 20 at p. 3; Joint Industry Commenters, No. 40 at p. 12; ALA, No. 28 at 2; MHI, No. 32 at p. 2; AFP, No. 36 at pp. 1–2, 4; SBA Office of Advocacy, No. 14 at p. 5) (*See also* U.S. Boiler, No. 11 at pp. 2–5 *and* New Yorker Boiler, No. 13 at pp. 2–4)[12] GEA added that if a rule is not going to make a meaningful difference in energy consumption, DOE should make no new standard and return to the rule in three years, pursuant to EPCA. (GEA, No. 20 at p. 3) NAFEM cautioned that removing the threshold and leaving an undefined process will make standards rulemakings more contentious and less efficient. (NAFEM, No. 30 at p. 5)

Some commenters also contended that by removing the threshold, DOE would improperly be relying on factors outside of its statutory authority when considering whether to adopt a given standard (*e.g.,* rejoining of the U.S. to the Paris Agreement, reducing stress on energy infrastructure, and considering greenhouse gas emissions). (AHRI, No. 25 at p. 8; AFP, No. 36 at pp. 4–5) These commenters argued that DOE's consideration of ''significant conservation of energy'' is limited to whether there is a significant conservation of electricity or fossil fuels and does not extend to whether that conservation of energy would have a significant impact on other DOE priorities such as reducing peak demand, limiting stress on electricity infrastructure, or taking action on climate change. (AHRI, No. 25 at p. 8; AFP, No. 36 at pp. 4–5). AGA faulted DOE for proposing to remove the significant energy savings threshold before having even had a chance to use it. (AGA, No. 33 at p. 5 (noting the same and requesting DOE first analyze previous appliance efficiency rulemakings to provide context and a transparent rationale for the threshold value (or lack thereof) that DOE would apply to future rulemakings.)) ALA disfavored case-by-case determinations, and the organization asserted that the economic cost of the regulatory process and related testing should be weighed against the potential energy savings over a determined period of time. (ALA, No. 28 at p. 2) ALA noted its prior support for DOE's efforts to prioritize test procedures and standards development to identify categories offering consumers the most energy savings, and it argued that following this approach would allow DOE to target its limited resources on those products consuming the most

[11] IPI also offered as additional support its comments to DOE's prior proposals regarding appendix A in which it opposed the use of a threshold for significant energy savings. (IPI, No. 17 (Attachment 4) (Comments dated March 16, 2020) at pp. 3–4)); IPI, No. 17 (Attachment 5) (Comments dated May 6, 2019) at pp. 2–3)

[12] The comments from Crown Boiler will serve as the basis for discussion of the positions taken by these commenters, as the comments provided were essentially identical.

energy, thereby creating a baseline approach. (ALA, No. 28 at pp. 2–3) AFP noted that the agency has devoted substantial time and effort to rules producing little energy savings, while missing its deadlines 90 percent of the time. (AFP, No. 36 at pp. 1–2, 4 (citing DOE's own finding that 40 percent of the 60 rules it had examined produced 6 percent of the overall energy efficiency savings))

While many commenters supported the continued use of the significant energy savings threshold, some also recognized the need for DOE to have some flexibility in how the threshold would be applied. For example, while Carrier thought the threshold would apply in most instances, it acknowledged that there may be some instances where additional or alternative benefits may exist and suggested that DOE revise appendix A to provide the agency with the ability to address those unique cases (where appropriate) with notice and explanation. (Carrier, No. 26 at p. 2) The Joint Industry Commenters and Nortek reasoned that, even if appendix A became non-binding, DOE should retain the significant energy savings threshold, because DOE could undertake a deviation after giving the public notice and an opportunity for comment should other factors lead DOE to conclude that doing so would satisfy EPCA. (Joint Industry Commenters, No. 40 at p. 12; Nortek, No. 19 at p. 3) Goodman also offered alternatives to the complete removal of the threshold, suggesting that DOE either: (1) Retain the current threshold as a rebuttable presumption that, if met, would be deemed ''significant'' while savings levels falling under the threshold would be presumed ''insignificant'' unless DOE demonstrates otherwise or (2) define ''significant energy savings'' to be a value connected to the average annual per-household energy use requirement specified in 42 U.S.C. 6292(b)(1)(B). (Goodman, No. 22 at p. 4) Lutron suggested that if the current threshold causes problems in achieving the Administration's energy conservation and climate goals, lowering the threshold would be preferable to its removal. (Lutron, No. 16 at pp. 2–3) NAFEM stated that if DOE removes the threshold, appendix A should be revised to provide a list of all of the factors DOE may consider when making a determination that energy savings are significant. (NAFEM, No. 30 at p. 5) ALA asserted that there should be some baseline approach to setting standards to avoid wasting time and money, but it added that using exact thresholds are unlikely to apply to all product types. (ALA, No. 28 at p. 2)

Lennox suggested that DOE should issue a supplemental proposal with an analytical basis for its approach to determining significant energy savings, if the agency wants to consider eliminating its use of ''quantitative significance thresholds,'' including why a smaller threshold may not be appropriate. (Lennox, No. 18 at p. 9). Lennox went on to state that if DOE eliminates the use of thresholds, it should restore and strengthen the prior version of appendix A, where presumptions had existed against regulations such as those that would: (1) Result in a negative return on investment for the industry; (2) would significantly reduce the value of the industry; or (3) be the direct cause of plant closures, significant losses in domestic manufacturer employment, or significant losses of capital investment by domestic manufacturers. (Lennox, No. 18 at pp. 9–10) (*See also* 10 CFR part 430, subpart C, appendix A, section 5(e)(3) (2018))

Crown Boiler—in conjunction with both U.S. Boiler and New York Boiler, who both filed essentially identical comments (*see* U.S. Boiler, No. 11 at pp. 2–5 and New Yorker Boiler, No. 13 at pp. 2–4) [13]—made a number of arguments, in addition to those noted earlier, in support of the significant energy savings threshold. It argued that the threshold is an acknowledgement by DOE that there is a point at which projected energy (and carbon) savings become too small to be statistically significant and its proposed removal would, in its view, make appendix A less science-based, an action which would be in conflict with Executive Order 13990. (Crown Boiler, No. 10 at p. 2) Crown Boiler also stressed that energy efficiency standards have real world impacts, including added cost for equipment and potential job losses, and the commenter argued that DOE should be required to show a degree of energy savings above a *de minimis* level before setting an energy conservation standard. (Crown Boiler, No. 10 at p. 3) It further added that there is a direct relationship between fuel consumption and carbon emissions, and consequently, insignificant energy savings would be expected to also translate into insignificant carbon reductions. Crown Boiler reasoned that given these limitations, standards with a low-yield potential for energy savings would not justify the imposition of heavy regulatory burdens and DOE should avoid setting standards simply for purposes of ''international virtue signaling'' and to demonstrate leadership in confronting the climate crisis. (Crown Boiler, No. 10 at p. 3)

Crown Boiler also noted that an insignificant reduction in energy savings is highly unlikely to be realized entirely during a peak demand period, and the commenter added that DOE itself considered the impact that the significant energy savings threshold would have on potential reductions in peak demand, but that it determined that it retained the ability to consider the impacts of new standards on grid reliability if these concerns impacted specific rulemakings. (Crown Boiler, No. 10 at p. 3; *see also* 85 FR 8626, 8672 (Feb. 14, 2020)) Crown Boiler also challenged DOE's view that eliminating the threshold would allow DOE to consider potential source energy savings by pointing out that DOE had noted that it believed it was statutorily obligated to utilize site energy use when analyzing energy savings, and it asserted that the April 2021 NOPR did not address DOE's ability to consider source energy savings in this manner while still complying with EPCA. (Crown Boiler, No. 10 at pp. 3–4)

Additionally, Crown Boiler asserted that DOE's only possible error in setting its significant energy savings threshold was reducing it from the originally proposed value of 0.5 quad to the 0.3 quad threshold ultimately adopted. (Crown Boiler, No. 10 at p. 4) It pointed to two energy conservation standard rules—the 2016 rule for residential boilers and the 2020 rule for commercial boilers—as highlighting the potential for negative impacts in the absence of a threshold. The commenter asserted that each of these rules was expected to result in only a 0.6 percent improvement in efficiency, for a total of 0.16 quads and 0.27 quads over 30 years, respectively. Crown Boiler argued that in exchange for these small gains, both gas and oil boilers would face a significant reduction in their ability to work properly when installed with sub-optimal vent systems. Moreover, Crown Boiler argued that such boilers face an increased risk of reliability problems that could reduce efficiency in the field over time, and that manufacturers experienced a drain on engineering resources that would have otherwise been allocated to more productive uses (such as research into new technologies capable of operating on a higher concentration of renewable fuels). Crown Boiler viewed these outcomes as real losses that were traded for theoretical energy savings so low that it

[13] The comments from Crown Boiler will serve as the basis for discussion of the positions taken by these commenters.

raises questions as to whether DOE can credibly claim these predicted saving as accurate. (Crown Boiler, No. 10 at p. 4)

DOE's Response to Comments

In response to these comments, DOE first notes that several commenters discussed DOE's authority to establish a threshold for determining whether energy savings are significant. As discussed in the April 2021 NOPR, DOE proposed to remove the current numerical threshold for determining whether energy savings are significant because it did not allow DOE to consider the specific circumstances surrounding a given rulemaking, not because DOE lacked the statutory authority to establish a threshold. 86 FR 18901, 18905. As evidenced by the court's decision in *Herrington,* it is clear that DOE may choose to establish a numerical threshold as long as the threshold is consistent with the policies behind the program. *See Herrington,* 768 F.2d at 1376 (''we do not hold that the Act forbids DOE to set levels of significance for each product type as a percentage of the energy consumed by that product type, provided that the levels selected reasonably accommodate the policies of the Act.''). However, while establishing a threshold is permissible under EPCA, DOE does not believe it is the best course of action. As discussed previously, a set numerical threshold does not allow DOE to consider the specific circumstances (*e.g.,* electric infrastructure impacts, FFC effects, and greenhouse gas emissions) surrounding a given rulemaking when determining whether energy savings are significant.

As for the argument that DOE's determinations of significance for energy savings should be limited to whether there is a significant conservation of electricity or fossil fuels and that it should not extend to the impacts of those energy savings, commenters seem to suggest that the significance of energy savings can be determined without consideration of the broader impacts of those savings. DOE does not agree with this position, nor does EPCA compel such an approach. As noted in *Herrington,* determining whether energy savings are significant should be informed by the underlying policies of the Appliance Standards Program. *Id.* DOE's Appliance Standards Program was created in the 1970's in response to an energy supply crisis. *See* EPCA (noting in the Act's description the law's intention ''[t]o increase domestic energy supplies and availability; to restrain energy demand; to prepare for energy emergencies; and for other purposes.'')

Congress expanded further on the intended policies underlying the Appliance Standards Program in subsequent amendments to EPCA. For example, the Energy Policy Act of 2005, Public Law 109–58 (Aug. 8, 2005), which, among other things, amended EPCA to establish energy conservations standards for additional consumer products, was enacted to ''ensure jobs for our future with secure, affordable, and reliable energy.'' The Energy Independence and Security Act of 2007, Public Law 110–140 (Dec. 19, 2007), which similarly amended EPCA to establish new energy conservation standards for consumer products and commercial equipment, was enacted to ''move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.'' Energy conservation achieved through the Appliance Standards Program helps achieve many of these policy objectives. For example, energy conservation standards can increase grid reliability by decreasing peak demand. Energy conservation standards also protect consumers by reducing greenhouse gas and other pollutant emissions. As a result, and in accordance with the court in *Herrington,* DOE believes any determination of whether energy savings are significant should involve some consideration of the potential impact of those energy savings on the policy objectives underlying the Appliance Standards Program. Thus, rather than being constrained in the manner suggested by these commenters—*i.e.,* that DOE is limited to determining significance solely in terms of the amount of projected electricity or fossil fuel energy savings—DOE is guided by the underlying policy objectives of EPCA, as amended, governing the Appliance Standards Program when determining whether potential energy savings are significant.

DOE also received several other comments disagreeing with DOE's decision to consider the potential impacts of energy savings when determining whether those energy savings are significant. Crown Boiler commented that DOE itself had noted it was statutorily obligated to utilize site energy use when analyzing energy savings. (Crown Boiler, No. 10 at pp. 3–4) Crown Boiler also commented that DOE had determined in the February 2020 Final Rule that it could address the impacts of new standards on grid reliability in individual rulemakings.

In response, DOE first notes that Crown Boiler's claim that DOE stated it was obligated to use site energy savings mischaracterizes DOE's position in the February 2020 Final Rule. In that rule, DOE stated that use of site energy savings was consistent with EPCA's definition for ''energy use'' and the process followed by DOE when determining whether to apply energy conservation standards to other covered products. 85 FR 8626, 8668. But, even if Crown Boiler's claim had been accurate, DOE did not propose to remove the threshold because the use of site energy savings itself is problematic. Instead, DOE proposed to remove the uniform numerical threshold because relying solely on the threshold itself does not account for the specific circumstances surrounding a given rulemaking. Nowhere is this deficiency more evident than in the consideration of FFC effects for electricity and natural gas where 1 quad of site electricity energy consumption corresponds to approximately 3.05 quads of FFC energy consumption, while 1 quad of site natural gas energy consumption corresponds to 1.11 quads of FFC energy consumption. DOE will continue to calculate potential site energy savings for energy conservation standards. But DOE will determine the significance of those site energy savings based on their impact, which may include impacts on FFC savings, grid reliability, and greenhouse gas emissions. Crown Boiler's second argument similarly misses the mark. DOE agrees that the impact of new standards on grid reliability can be addressed during individual rulemakings. But, that can only occur if the February 2020 Final Rule threshold has been met.

In response to comments that eliminating a uniform numerical threshold will reduce certainty and predictability in DOE's rulemaking process (*see, e.g.,* AHRI, No. 25 at p. 7; Joint Industry Commenters, No. 40 at p. 12; Goodman, No. 22 at p. 3) or lead to an undefined process that will make standards rulemakings more contentious and less efficient (NAFEM, No. 30 at p. 5), DOE notes that elimination of the numerical threshold will not change its rulemaking process. DOE will continue to collect information and conduct analyses to determine if new or amended standards would result in significant conservation of energy and are technologically feasible and economically justified. If these statutory criteria are met, DOE will propose new

or amended standards. Stakeholders will then have the opportunity to comment on the proposed new or amended standards, including whether the potential energy savings are significant. If new or amended standards are subsequently issued in a final rule, manufacturers will typically have between 3 and 5 years to come into compliance with the new or amended standards. (*See* 42 U.S.C. 6295(m)(4)) This is a consistent process based on well-established methodologies that have been extensively used over the long lifetime of DOE's Appliance Standards Program. As for claims that elimination of the uniform numerical threshold will lead to less predictable rulemakings, DOE does not issue new or amended energy conservation standards based solely on whether the potential energy savings are significant. Any new or amended standard must also be technologically feasible and economically justified. Further, DOE only makes these determinations after conducting a full analysis of all available information, including information obtained during the rulemaking process. And, while DOE acknowledges that a uniform numerical threshold makes for less complicated significance determinations, it does so by ignoring the very real differences, *e.g.,* FFC effects and electrical grid impacts, between energy savings across different rulemakings. DOE believes that any benefits of this approach are more than outweighed by its failure to account for the specific facts and circumstances surrounding an individual rulemaking.

As for commenters such as ALA and AFP that asserted the uniform numerical threshold would help DOE prioritize its resources and meet its statutory deadlines, DOE notes that having a threshold can only constrain DOE's ability to prioritize its resources. As discussed previously, a uniform numerical threshold does not account for the differences across covered products and equipment rulemakings, *e.g.,* FFC effects. For example, under the threshold established in the February 2020 Final Rule, DOE would not be able to prioritize a rule that saves 0.25 quad of site energy and 0.6 quad of FFC energy over a rule that saves 0.30 quad of site energy and 0.4 quad of FFC energy. DOE assumes commenters also meant that the threshold would result in more rulemakings resulting in determinations that standards do not need to be amended, which would free up DOE resources. But, in many cases the process for issuing a new or amended standard, in terms of the number of **Federal Register** publications and opportunities for public comment, is very similar to the process for issuing a final determination not to amend a standard. Both typically involve the issuance of pre-NOPR documents where DOE collects information and data in order to determine whether a new or amended standard would satisfy the relevant criteria in EPCA. DOE then uses these data and information to prepare a proposal on whether a new or amended standard is warranted. After reviewing public comments on the proposal, DOE issues a final document that either establishes a new or amended standard or determines that a new or amended standard is not warranted. Finally, a determination not to amend standards must be revisited within 3 years, while a decision to issue new or amended standards must be revisited within 6 years. (42 U.S.C. 6295(m)) DOE believes the other revisions to appendix A finalized in this document and the additional revisions that were proposed in the July 2021 NOPR will have a much greater impact on DOE's ability to meet its statutory deadlines.

As for the commenters who proposed a modified threshold, *e.g.,* a rebuttable presumption of significance or a lower threshold value, DOE notes these approaches pose the same problem as the threshold set in the February 2020 Final Rule. Namely, they assume on some level that the significance of energy savings can be determined without considering the specific circumstances surrounding a given rulemaking. Additionally, DOE notes that it has never stated the threshold for determining the significance of energy savings established in the February 2020 Final Rule is too high. Rather, the issue is that any set threshold ignores the very real differences in energy savings across different rulemakings.

Several commenters discussed the potential economic impacts on industry and consumers of DOE's proposal to remove the threshold for determining whether energy savings are significant. DOE notes that a determination that energy savings are significant is but one step in the process of issuing new or amended standards. EPCA still requires, among other things, that a new or amended standard be economically justified, which includes the consideration of economic impacts on manufacturers and consumers. (See 42 U.S.C. 6295(o)(2)(B)(i)(I)) DOE will continue to follow these provisions and to perform the required analyses to demonstrate and ensure that the relevant statutory criteria are satisfied before setting (or amending) energy conservation standards or deciding not to amend them.

With regards to Lennox's comment that, assuming the threshold is eliminated, DOE should restore and strengthen prior provisions from the July 1996 Final Rule, DOE will address these comments and the additional revisions proposed in the July 2021 NOPR in a separate final rule.

Finally, DOE does not agree with AGA's statement faulting the Department for proposing to remove the significant energy savings threshold before having even had a chance to use it. The effects of the threshold established in the February 2020 Final Rule on the Department's rulemaking processes were readily apparent on issuance of the rule. As discussed throughout this document, the February 2020 Final Rule, including the significant energy savings threshold, does not allow DOE to account for the particular circumstance of individual rulemakings, *e.g.,* FFC and electrical grid impacts.

Accordingly, for the aforementioned reasons, DOE has concluded that determinations of significance for energy savings should be made on a case-by-case basis. As a result, DOE is removing the significant energy savings threshold.

C. Determinations of Economic Justification

Under EPCA, any new or amended standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a)). To ensure that DOE meets this statutory mandate, DOE employs a walk-down process to select energy conservation standard levels. As a first step in the process, DOE screens out technologies for improving energy efficiency that are not feasible. DOE then uses the remaining technologies to create a range of trial standard levels (''TSLs''). These TSLs typically include: (1) The most-stringent TSL that is technologically feasible (*i.e.,* the ''max-tech'' standard); (2) the TSL with the lowest life-cycle cost; (3) a TSL with a payback period of not more than three years; and (4) any TSLs that incorporate noteworthy technologies or fill in large gaps between efficiency levels of other TSLs. Beginning with the max-tech TSL, DOE then determines whether a specific TSL is economically justified. In making that determination, DOE determines, after reviewing public comments and data, whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the

seven factors described in 42 U.S.C. 6295(o)(2)(B)(i). (*See also* 42 U.S.C. 6313(a)(6)(B)(ii) (applying the seven factors to ASHRAE equipment); 42 U.S.C. 6316(a) (applying the seven factors to non-ASHRAE equipment)). If DOE determines that the max-tech TSL is economically justified, the analysis ends, and DOE adopts the max-tech TSL as the new or amended standard. However, if DOE determines that the max-tech TSL is not economically justified, DOE walks down to consider the next-most-stringent TSL. This walk-down process continues until DOE determines that a TSL is economically justified or that none of the TSLs are economically justified.

In the August 2020 Final Rule, DOE modified this process to require that determinations of economic justification include a comparison of the benefits and burdens of the selected TSL against the benefits and burdens of the baseline case and all other TSLs. 85 FR 50937, 50944. DOE stated its belief that such an approach would allow for more reliable determinations that a specific TSL is economically justified. *Id.* at 85 FR 50939. While the requirement to conduct a comparative analysis affected DOE's process for determining whether a TSL is economically justified, it did not dictate any particular outcome or require DOE to modify its general approach of walking down from the max-tech TSL.

DOE's decision to add a comparative analysis to the process for determining whether a TSL is economically justified generated concern among several stakeholders that DOE would use the comparative analysis to select a TSL that maximizes net benefits, as opposed to the TSL that maximizes energy savings and is technologically feasible and economically justified. *Id.* DOE's statement in the August 2020 Final Rule that ''the purpose of EPCA's seven factors is not to select the standard that achieves the maximum improvement in energy efficiency, *no matter how minute an estimated cost savings*'' added further confusion to how DOE would use the comparative analysis in determining whether a TSL is economically justified. 85 FR 50937, 50939 (emphasis added).

In light of the confusion and uncertainty around whether a comparative analysis would result in DOE choosing the TSL that maximizes net benefits as opposed to the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified, DOE proposed to eliminate the requirement to conduct a comparative analysis when determining whether a specific TSL is economically justified in the April 2021 NOPR. 86 FR 18901, 18906. DOE received numerous comments on this proposal with some commenters in favor of eliminating the comparative analysis and others arguing that it should be retained.

Comments Supporting DOE's Proposal To Eliminate the Requirement To Conduct a Comparative Analysis in Determining Economic Justification

In support of DOE's proposal to remove the requirement to conduct a comparative analysis, several commenters expressed concern that the comparative analysis could lead to DOE selecting a TSL that does not represent the maximum improvement in energy efficiency that is technologically feasible and economically justified. (See *e.g.,* Joint Advocacy Commenters, No. 38 at p. 3; Grundfos, No. 37 at p. 3; CEC, No. 35 at p. 6; State Commenters, No. 29 at p. 9) Some commenters were particularly concerned that the comparative analysis would result in DOE choosing a TSL that maximizes net benefits instead of energy savings. (Joint Environmentalist Commenters, No. 31 at p. 5; CA IOUs, No. 34 at pp. 2–3) IPI commented that the approach would not be transparent and allow DOE to define what is ''economically justified'' on any subset of adverse impacts to which DOE may happen to arbitrarily assign controlling weight—a result that it asserted would be inconsistent with statutory requirements and rational decision making. (IPI, No. 17 (Attachment 4 (Comments dated March 16, 2020) at pp. 2–3; IPI, No. 17 (Attachment 5 (Comments dated May 6, 2019) at pp. 3–4)

Comments Opposing DOE's Proposal To Eliminate the Requirement To Conduct a Comparative Analysis in Determining Economic Justification

Other commenters opposed DOE's proposal to remove the requirement to conduct a comparative analysis. For example, several commenters stated the comparative analysis will ensure DOE, when faced with TSLs with comparable savings, chooses the trial standard level with a less severe negative impact. (*See, e.g.,* MHI, No. 32 at p. 2; Lutron, No. 16 at p. 3; Joint Industry Commenters, No. 40 at pp. 12–13) NAFEM commented that removal of the comparative analysis requirement could result in energy conservation standards that save more energy at the expense of product differentiation, refinement, and end-use flexibility. (NAFEM, No. 30 at p. 5) SBA Office of Advocacy commented that EPCA does not expressly prohibit an analysis of net benefits and DOE does not provide justification as to why a net benefits approach is inaccurate or otherwise prohibited, and instead merely states that the elimination of the comparative analysis is to reduce uncertainty. (SBA Office of Advocacy, No. 14 at p. 6) SBA Office of Advocacy also stated that engaging in a comparative analysis would ensure that DOE is considering the full scope of impacts of a particular standard and would help DOE in moving towards better compliance with the Regulatory Flexibility Act. (SBA Office of Advocacy, No. 14 at p. 7) Zero Zone stated that DOE should retain the comparative analysis for standard level selection, because the Department has not provided any evidence of an actual problem using that approach. (Zero Zone, No. 21 at p. 2) Finally, BWC stated that the comparative analysis would help DOE and stakeholders better assess the TSLs against the applicable statutory criteria. (BWC, No. 24 at p. 3)

DOE's Response to Comments

DOE first notes that both commenters in favor of the proposal to eliminate the comparative analysis and those against its removal stated that the comparative analysis could lead to the Department forgoing energy savings in favor of increased economic benefits. (*See, e.g.,* Joint Advocacy Commenters, No. 38 at p. 3; MHI, No. 32 at p. 2) Based on these comments, it is clear that the comparative analysis generated significant confusion and uncertainty about whether the process would result in DOE selecting the TSL that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified or a TSL that saves less energy but imposes lower costs on manufacturers and consumers.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the seven statutory factors, which allow DOE to consider the full breadth of impacts including benefits and costs, along with other factors the Secretary considers relevant. In practice, DOE determines an appropriate energy conservation

standard level for adoption by conducting a ''walk-down'' analysis of the trial standard levels (TSLs) considered in the proposal, after reviewing any public comments. DOE starts by analyzing the maximum technologically feasible (max-tech) level to see whether the statutory criteria for significant energy savings, technological feasibility, and economic justification have been met. If the max-tech TSL fails to meet any of these statutory criteria, DOE determines that it cannot adopt that level, and it then moves to the next highest TSL and conducts the same analysis. The agency continues in this manner until it reaches a TSL that meets all of the statutory criteria. Once DOE arrives at such level (if any), DOE is required under EPCA to choose that TSL because it represents the maximum improvement in energy efficiency that is technologically feasible and economically justified. (*See* 42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a))

With respect to the SBA Office of Advocacy's comments, DOE would like to clarify two issues. First, DOE did not state in the April 2021 NOPR that conducting an analysis of net benefits is inaccurate or otherwise prohibited by EPCA. The concern with the comparative analysis, as discussed previously, is that the process would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which is contrary to the statute. As for ensuring DOE considers the full scope of impacts of a particular TSL, the comparative analysis did not change the scope of impacts considered by DOE for a particular TSL. The analysis required DOE to compare the benefits and burdens of a TSL against the benefits and burdens of the baseline case and all other TSLs. 85 FR 50937. But, as stated in the August 2020 Final Rule, the vast majority of DOE's analytical work involves evaluating the seven factors for each TSL (*e.g.,* life-cycle costs, manufacturer impacts, total energy savings). 85 FR 50937, 50941. For example, DOE performs a manufacturing impact analysis to identify and quantify the impacts of any new or amended energy conservation standards on manufacturers. As part of this analysis, DOE uses the Government Regulatory Impact Model (''GRIM'') to calculate cash flows using standard accounting principles and changes in industry net present value (INPV) between the no-new-standards case and each proposed TSL. The difference in INPV between the no-new-standards case and each TSL represents the financial impact of the new or amended energy conservation standard on manufacturers. The addition of a comparative analysis has no effect on DOE's analysis of manufacturing impacts.

The comments received in response to the April 2021 NOPR have solidified DOE's concerns regarding the use of the comparative analysis. DOE has no desire to create a situation where stakeholders will question, and potentially challenge, whether the Department is choosing a TSL that maximizes net benefits instead of the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. Further, the process and criteria laid out in 42 U.S.C. 6295(o)(2)(B)(i) and 42 U.S.C. 6313(a)(6)(B)(ii) for determining economic justification are already sufficiently robust, and any potential, incremental improvement that may result from the use of a comparative analysis is outweighed by the uncertainty it casts over DOE's fulfillment of its statutory obligations under EPCA. As a result, DOE is eliminating the requirement in appendix A to conduct a comparative analysis when determining whether a TSL is economically justified. Consistent with EPCA and past practice, DOE will determine whether a TSL is economically justified after determining, based on the factors listed in 42 U.S.C. 6295(o)(2)(B)(i) and 42 U.S.C. 6313(a)(6)(B)(ii), whether the benefits of the standard exceed its burdens.

D. Adoption of Industry Test Standards

The February 2020 Final Rule amended appendix A to require adoption, without modification, of consensus industry test standards as test procedures for covered products and equipment, unless such standards do not meet the EPCA statutory criteria for test procedures. 85 FR 8626, 8678–8682, 8708. In essence, DOE sought to explain and codify its established practice, which is to analyze the appropriate industry consensus test standard, with the input of stakeholders and the interested public, to: (1) Determine that the EPCA criteria are met and use the consensus test standard as the Federal test procedure; (2) modify the standard so that it complies with the statutory criteria, or (3) reject the standard and develop an entirely new test procedure.

On further review, DOE has come to see that its attempt at clarification may have had the opposite effect, creating the false impression that DOE had put in place a new presumption for an ''as-is'' adoption of consensus industry test standards without meaningful review. That was not DOE's intention, and accordingly, the Department proposed to clarify in the April 2021 NOPR that while DOE will first consider applicable consensus industry test standards, such test standards must first undergo a thorough agency review to ensure that they meet the requirements of the statute and are compatible with DOE's compliance, certification, and enforcement (''CC&E'') regulations. 86 FR 18901, 18907.

Comments Supporting DOE's Clarification of Its Process for Adopting Consensus Industry Standards

The majority of commenters generally supported or had no objections to DOE's proposal to clarify that the Department will amend consensus industry test standards as necessary to ensure compliance with both the statutory requirements in EPCA and DOE's CC&E regulations. (*See, e.g.,* State Commenters, No. 29 at p. 10; Lutron, No. 16 at p. 3; NEEA, No. 43 at p. 3; Joint Environmentalist Commenters, No. 31 at p. 6; Joint Industry Commenters, No. 40 at p. 10) In citing their support for DOE's proposal, several commenters stated that consensus industry test standards are not generally designed for regulatory purposes and, as such, modifications to ensure compliance with EPCA and DOE's CC&E regulations are often necessary. (*See, e.g.,* CA IOUs, No. 34 at p. 5; Joint Advocacy Commenters, No. 38 at pp. 3–4) The CA IOUs and Joint Environmentalist Commenters also favored DOE's proposal because it would relieve stakeholders of the burden of having to participate in both industry and DOE test procedure development processes. (CA IOUs, No. 34 at p. 5; Joint Environmentalist Commenters, No. 31 at p. 6)

Aside from expressing their support for DOE's proposal, Lutron and the Joint Industry Commenters also asked DOE to clarify in the regulatory text of appendix A that industry test standards are consensus test procedures, which usually involve more than just industry stakeholders. (Lutron, No. 16 at p. 3; Joint Industry Commenters, No. 40 at p. 10)

Comments Opposing DOE's Clarification of Its Process for Adopting Consensus Industry Standards

Other commenters supported DOE's adoption of consensus industry test standards with little or no modification. (*See, e.g.,* Signify, No. 41 at p. 1; Lennox, No. 18 at p. 5; New Yorker Boiler, No. 13 at p. 5) These commenters expressed a variety of reasons for

advocating for the adoption of consensus industry test standards. For example, Crown Boiler and BWC stated that most consensus industry test standards are developed by all interested stakeholders, including manufacturers, industry advocates, regulators (including DOE), and certification agency laboratories. (Crown Boiler, No. 10 at p. 5; BWC, No. 24 at p. 3) Crown Boiler also noted that the committee members tend to have decades of experience and that DOE should rely on these committees to develop the test procedures. (Crown Boiler, No. 10 at p. 5) Some commenters stated that adopting consensus industry test standards would reduce burden on both DOE and stakeholders. (*See* BWC, No. 24 at p. 3 (stating that deviating from consensus industry test procedures will add unnecessary workload for DOE staff); Signify, No. 41 at p. 1 (stating that changes to consensus industry test procedures create unnecessary burden for industry and test laboratories)) Several commenters also stated that adoption of consensus industry test procedures would expedite DOE's test procedure rulemaking process and allow stakeholders to address standards rulemakings sooner. (*See, e.g.,* U.S. Boiler, No. 11 at pp. 5–6; GEA, No. 20 at p. 3) Finally, GEA stated that adopting consensus industry test procedures would reduce the likelihood of litigation over test procedures. (GEA, No. 20 at p. 3)

In order to avoid the need to make modifications to consensus industry test procedures, several commenters encouraged DOE to participate in the industry test standards development process as a way to ensure that consensus industry test standards are compatible with EPCA and DOE's CC&E regulations. (*See, e.g.,* Signify, No. 41 at p. 1; ALA, No. 28 at p. 3) Additionally, with regards to compatibility with DOE's CC&E regulations, Lennox stated that DOE should consider ''the potential need to modify the applicable CC&E requirements, not the industry test procedure.'' (Lennox, No. 18 at p. 5).

DOE's Response to Comments

As an initial matter regarding the request that DOE clarify that industry test standards are ''consensus'' test standards, DOE uses the term ''consensus'' broadly to indicate a process in which multiple stakeholders develop and finalize the industry test standard. The use of the term ''consensus'' is not intended as an assessment of the representativeness of those stakeholders involved in the process. In certain cases, industry test standards were not developed by a group that is fully representative of DOE's rulemaking stakeholders, including energy-efficiency advocacy organizations, utilities, States, consumer groups, etc. DOE notes that under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, DOE must inform the public of the use and background of such standards. DOE must also evaluate these standards as to whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* whether they were developed in a manner that fully provides for public participation, comment, and review). In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission concerning the impact of the commercial or industry standards on competition.

In response to the remaining comments, DOE first notes that commenters have raised several valid points about the benefits of adopting consensus industry test standards with little to no modification (*e.g.,* reducing test procedure development cost). That said, these benefits cannot be realized at the expense of DOE's statutory obligations. In accordance with EPCA, DOE must ensure that a consensus industry test standard is reasonably designed to produce test results that measure energy efficiency or use during a representative average use cycle or period of use without being unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) As a result, DOE has often found it necessary to make modifications to an applicable consensus industry test standard to ensure compliance with these statutory requirements. For example, the DOE test procedure for dehumidifiers requires reduced indoor ambient temperature conditions as compared to those specified in the referenced industry test standard as DOE determined that the reduced conditions are more representative of the product's average use cycle as required by EPCA. 80 FR 45801, 45807 (July 31, 2015). As another example, the DOE test procedure for portable air conditioners includes several modifications to the industry test method that DOE determined would provide results that are representative of typical use. Specifically, in comparison to the industry test procedure, the DOE test procedure requires a different set of indoor and outdoor test conditions; an additional test condition for units with a dual-duct configuration; and additional provisions to account for heat transferred to the indoor conditioned space from the ducts and any infiltration air from unconditioned spaces, which are not accounted for in the industry test method. 81 FR 35241, 35250, 35248, 35253 (June 1, 2016).

Additionally, DOE notes that consensus industry test standards are often designed to support industry certification programs with the goal of verifying ratings within a tolerance specified by industry. DOE's CC&E regulations, on the other hand, are designed to ensure, in accordance with EPCA, that all products and equipment distributed in commerce in the United States comply with applicable Federal energy and water conservation standards. Furthermore, DOE's CC&E regulations seek to establish a level playing field amongst industry participants and to also help ensure that the utility bill savings that consumers expect from energy and water conservation standards are being realized. For example, in the past, DOE has had to specify airflow tolerances for certain industry standard test conditions that are referenced for the testing of certain categories of small, large, and very large air-cooled commercial package air conditioners and heating equipment after having determined that such tolerances are necessary to address potential variation in the measured efficiency and cooling capacity of the equipment. 80 FR 79655, 79659–79660 (Dec. 23, 2015). DOE also notes that industry representatives and other stakeholders are welcome to participate in the development and modification of the Department's CC&E regulations.[14] In fact, some of DOE's existing CC&E regulations were developed by a negotiated rulemaking that resulted in a consensus agreement amongst the Department, industry, and many diverse stakeholders over, among other things, the allowance of simulations to develop ratings under specific circumstances for commercial heating, ventilation, and air-conditioning equipment; commercial water heaters; and commercial refrigeration equipment. 80 FR 144 (Jan. 5, 2015).

DOE may also modify consensus industry test standards for other

[14] For example, DOE recently asked for comment on a proposal to amend the certification and reporting provisions for several covered products and equipment. 86 FR 43120 (August 6, 2021).

reasons. For example, DOE is not required to adopt or align its test procedures with sections of the consensus industry test standard that are not necessary for the method of test for metric(s) included in the DOE test procedure. For instance, sections of the industry test procedure regarding selection of models for testing under an industry certification program, verification of represented values and the associated tolerances, and operational requirements need not be referenced or aligned with under the DOE test procedure. This is consistent with the Department's longstanding practice to only include sections that are relevant to the method of test for metric(s) included in the DOE test procedure, or that provide clarifications that help promote understanding amongst regulated entities. Another instance where DOE may need to deviate from a consensus industry test standard is to address issues identified through DOE's test procedure waiver process. For example, a manufacturer may seek a test procedure waiver for a covered product that incorporates a new, innovative technology that was not contemplated by the consensus industry test standard or where some other deficiency in the test procedure forestalls successful testing. In such cases, DOE is required to update the Federal test procedure to eliminate the need for such a waiver. 10 CFR 430.27(l); 10 CFR 431.401(l).

Finally, although DOE has explained why the Department is often required to modify consensus industry test standards, DOE agrees with commenters that consensus industry test standards should serve as the basis for Federal test procedures whenever possible.[15] As a result, DOE wishes to underscore the importance of the consensus industry test procedure development process, including the need to ensure that a broad cross-section of stakeholder interests are represented in the development of such consensus industry standards. DOE believes that consensus test standards that represent a consensus across all stakeholders, not just industry, will be more likely to meet the statutory requirements in EPCA and DOE's CC&E regulations. To that end, DOE is committed to supporting the consensus industry standards development process by participating on relevant industry standards committees. However, DOE reiterates that the industry test standard development process cannot supplant the Department's test procedure rulemaking process, because DOE must still ensure that potential Federal test procedures meet applicable statutory requirements in EPCA and are compatible with DOE's CC&E regulations.

Accordingly, for the aforementioned reasons, DOE is clarifying in appendix A that consensus industry test standards must undergo a thorough review to ensure that they meet the requirements of EPCA and are compatible with DOE's CC&E regulations before being adopted as a Federal test procedure.

E. Finalization of Test Procedures Prior to Issuance of a Standards Proposal

In the February 2020 Final Rule, DOE adopted at section 8(d) of appendix A, a requirement that Federal test procedures establishing methodologies used to evaluate new or amended energy conservation standards be finalized at least 180 days prior to publication of a NOPR proposing new or amended energy conservation standards. 85 FR 8626, 8678, 8708. DOE explained that this approach would allow stakeholders time to gain familiarity with the new or amended test procedure prior to commenting on any proposed standards.

Upon further review, DOE has determined that, similar to other provisions in the February 2020 Final Rule, a one-size-fits-all requirement to finalize new or amended test procedures 180 days before proposing standards does not allow DOE to account for the particular circumstances of a rulemaking and may result in unnecessary delays. For instance, as noted in the April 2021 NOPR, some test procedure amendments may involve only minor modifications that do not change the measured energy efficiency of a covered product or equipment. 86 FR 18901, 18907–18908. As a result, DOE proposed to remove this 180-day spacing requirement and revert to the approach previously followed in the July 1996 Final Rule that test procedure rulemakings be finalized prior to publication of an energy conservation standards proposal, which permitted DOE to appropriately adjust the length of time between the test procedure final rule and an energy conservation standards proposal. *Id.* DOE also sought comment on any alternatives to its proposal, including whether DOE should retain a set period between finalization of a test procedure and issuance of a standards NOPR. *Id.*

Comments Supporting DOE's Proposal To Eliminate the Requirement That Test Procedures Be Finalized at Least 180 Days Prior to Issuance of a Standards NOPR

Several commenters expressed their support for DOE's proposal in the April 2021 NOPR. These commenters stated that the 180-day requirement may not be necessary for all rulemakings and that DOE should have the flexibility to determine the appropriate period between finalization of new or amended test procedures and issuance of proposed standards. (*See, e.g.,* Joint Advocacy Commenters, No. 38 at pp. 4–5; NEEA, No. 43 at pp. 3–4; CA IOUs, No. 34 at pp. 1, 3–4) Some of the commenters cited negotiated rulemakings, where test procedures and energy conservation standards are often considered and issued in parallel, as an area where the 180-day requirement delays implementation of consensus standards without providing a corresponding benefit. (*See, e.g.,* Joint Advocacy Commenters, No. 38 at pp. 4–5; NEEA, No. 43 at pp. 3–4) Commenters also argued that minor modifications to a test procedure may not warrant a lengthy delay before issuance of a standards proposal. (*See, e.g.,* NEEA, No. 43 at pp. 3–4; Joint Environmentalist Commenters, No. 31 at p. 2) Finally, Joint Advocacy Commenters expressed concern that the 180-day requirement could lead to DOE foregoing certain test procedure corrections in order to avoid delaying rulemakings. (Joint Advocacy Commenters, No. 38 at pp. 4–5)

Comments Supporting the Requirement That Test Procedures Be Finalized at Least 180 Days Prior to Issuance of a Standards NOPR

Several commenters asserted that the 180-day period is necessary to allow stakeholders the opportunity to conduct testing and gain familiarity with the new or amended test procedure so as to better inform their understanding of the impacts of a proposed energy conservation standard. (*See, e.g.,* AHRI, No. 25 at p. 9; ALA, No. 28 at p. 3; AGA, No. 33 at p. 5; BWC, No. 24 at p. 2) These commenters also expressed a variety of other reasons for opposing removal of the 180-day period between finalization of a test procedure and issuance of a standards proposal. For instance, Zero Zone opposed eliminating the 180-day spacing between test procedure and energy conservation standards rules, stating that DOE has not documented any

[15] The National Technology Transfer and Advancement Act of 1995 (''NTTA''), Public Law 104–113, and the Office of Management and Budget (''OMB'') Circular A–119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, both direct Federal agencies to adopt voluntary consensus standards unless they are inconsistent with applicable law or otherwise impracticable.

delays that would be caused if the 180-day waiting period were to be applied. The SBA Office of Advocacy noted that small businesses have limited resources and staff, and in many instances, they do not have the ability to test their products on-site. According to the SBA Office of Advocacy, small businesses must instead either hire an outside laboratory to test the products and report back or pull employees from other tasks to conduct such testing in-house. (SBA Office of Advocacy, No. 14 at p. 5) BWC argued that the benefits of having a finalized test procedure far outweigh any delay in complying with statutory deadlines, particularly in light of EPCA's anti-backsliding provisions. (BWC, No. 24 at p. 2)

Comments Supporting Alternatives to DOE's Proposal

Numerous commenters recognized that a 180-day period between finalization of a test procedure and issuance of a standards NOPR is not always necessary. However, these commenters did not agree with DOE's proposal to eliminate the 180-day period and determine the appropriate period on a case-by-case basis. Instead, these commenters suggested a variety of approaches for determining an appropriate length of time between finalization of a test procedure and issuance of a standards proposal. For instance, several commenters suggested revising the relevant section of appendix A to allow DOE to shorten the 180-day period through some formal mechanism, which would include an opportunity for stakeholder input. (*See, e.g.,* Carrier, No. 26 at p. 3; Crown Boiler, No. 10 at pp. 4–5) Other commenters suggested that DOE should list the limited circumstances under which it would deviate from the 180-day period. (A.O. Smith, No. 27 at p. 4; Lennox, No. 18 at p. 4) Similarly, if DOE eliminates the requirement for a standardized 180-day period, ALA requested that DOE provide clear and specific guidance on when the 180-day period would be warranted. (ALA, No. 28 at p. 4) Several other commenters urged DOE to retain the 180-day period when the test procedure is new or makes significant changes that will impact measured energy use or efficiency. (*See, e.g.,* Lutron, No. 16 at pp. 2, 3–4, Joint Industry Commenters, No. 40 at p. 9; EEI, No. 9 at pp. 64–65) Nortek acknowledged that there are situations where 180 days is not necessary (*e.g.,* minor technical corrections to a longstanding test procedure), and in those cases, the company stated that it would be supportive of a 90-day minimum. (Nortek, No. 19 at p. 3) Grundfos recommended that DOE: (1) Include a proposed timeline in each test procedure NOPR/final rule for input from stakeholders, and (2) conduct a mandatory webinar for related input to be heard. The company reasoned that such approach would provide DOE with the flexibility it desires, while preventing DOE from defining arbitrary timelines without negotiation. (Grundfos, No. 37 at pp. 1–2) While Goodman expressed support for retaining the 180-day requirement, Goodman also stated that, if DOE chooses to modify the 180-day period, the Department should define the 180-day period as preferred but not mandatory in appendix A and articulate with specificity and on the record its reasons for choosing a lesser time period. (Goodman, No. 22 at p. 3)

DOE also received an alternative joint proposal from AHAM, ALA, Hearth Patio and Barbecue Association (HPBA), NEMA, Plumbing Manufacturers International (PMI), ASAP, and ACEEE. These stakeholders suggested that DOE provide a 180-day time period between the finalization of a new or amended test procedure and the end of the comment period on the proposed standard. They also specified that DOE could deviate from the 180-day requirement for negotiated rulemakings and test procedure changes that are limited to calculation changes (*e.g.,* use factor or adder) (AHAM *et al.* Submission, No. 74 at pp. 2–3)

DOE Response to Comments

Commenters uniformly expressed support for finalizing test procedures prior to proposing new or amended standards. (*See, e.g.,* Carrier, No. 26, at p. 3; Lutron, No. 16 at pp. 2, 3–4; CA IOUs, No. 34 at pp. 1, 3–4; NEEA, No. 43 at pp. 3–4; Joint Industry Commenters, No. 40 at p. 8; Whirlpool, No. 9 at p. 36) For example, the CA IOUs encouraged DOE to complete test procedure final rules before publication of a NOPR for new or amended energy conservation standards whenever possible (due to generally better outcomes in both proceedings). (CA IOUs, No. 34 at pp. 1, 3–4) Where commenters differed was on the minimum length of time between finalization of a test procedure and issuance of a standards proposal—and under what circumstances, if any, that period of time should be shortened (or lengthened).

With respect to the comments in favor of DOE retaining the 180-day requirement for all test procedure rulemakings, DOE agrees with the majority of commenters who recognized that a 180-day period is not necessary for all test procedure rulemakings (*e.g.,* minor technical corrections and negotiated rulemakings). As stated throughout this rulemaking, DOE is amending appendix A to avoid situations where an inflexible process lengthens a rulemaking without providing a corresponding benefit. Thus, DOE is not establishing a minimum period of time between finalization of a test procedure and issuance of a standards proposal that would be applied across all of the Department's rulemakings.

Nevertheless, while the majority of commenters recognized that the 180-day period was not necessary for every rulemaking, a large number of commenters wanted more guidance on circumstances under which DOE would provide stakeholders with sufficient time to become familiar with a new or amended test procedure prior to having to comment on a standards proposal. These commenters typically cited new test procedures or test procedure amendments that impact measured energy use as instances necessitating that DOE provide some period of time for stakeholders to gain familiarity with the test procedure prior to commenting on any proposed standards. (*See, e.g.,* Joint Industry Commenters, No. 40 at p. 9; Trane, No. 23 at p. 2)

In response to these comments, DOE first notes that it already acknowledged in the April 2021 NOPR that there may be circumstances where a longer rulemaking timeline is necessary to allow stakeholders time to become familiar with a new or amended test procedure. *See* 86 FR 18901, 18908. Further, DOE's proposal to revert to the guidance provided in the 1996 version of Appendix A that test procedures be finalized prior to issuance of a standards proposal does not prevent DOE from finalizing test procedures well in advance (*i.e.,* 180 days or more) of proposing new or amended energy conservation standards.

However, recognizing the importance of this issue to stakeholders, DOE believes a modified version of its proposal from the April 2021 NOPR can meet the Department's goal of avoiding the inefficiencies and unnecessary delays of a one-size-fits-all rulemaking approach while assuring stakeholders they will have sufficient time to gain familiarity with a new or amended test procedure prior to commenting on a standards proposal. As such, DOE is adopting the proposal from the April 2021 NOPR that test procedures be finalized prior to issuing a standards proposal. However, in response to comments, DOE is also adopting a

requirement that new test procedures or significant test procedure amendments that impact measured energy use or efficiency be finalized at least 180 days before the end of the comment period of a proposal for new or amended standards. DOE will state in the test procedure final rule whether this 180-day provision applies and why—*i.e.,* because the test procedure is either new or the amendments impact measured energy use or efficiency. While DOE is adopting the 180-day period as requested by several commenters, DOE is tying the 180 days to the end of the comment period instead of the issuance of the standards proposal. DOE believes this is a better approach for two reasons. First, it recognizes that the comment period, which is at least 60 days, also provides stakeholders with an opportunity to gain familiarity with the new or amended test procedure. And second, it provides DOE with more flexibility in issuing standards proposals, which can benefit both DOE and stakeholders. For instance, if DOE needs to meet a statutory deadline for issuing a standards NOPR, the Department could choose to issue a standards NOPR with a longer comment period in order to more quickly issue that NOPR after finalizing a new or amended test procedure. In addition to helping DOE meet a statutory deadline, the longer comment period would also give stakeholders more time to comment on aspects of the standards proposal that are not directly related to the test procedure. Finally, as suggested in the AHAM *et al.* proposal, DOE is adopting exceptions to the 180-day requirement for negotiated rulemakings and test procedure amendments that only result in a calculational change. In the first instance, stakeholders can determine the appropriate period between finalization of the test procedure and issuance of a standards NOPR as part of their negotiations. With regards to the second instance, calculational changes do not require stakeholders to conduct new tests to determine the effect of the test procedure change on measured energy use or efficiency.

For the aforementioned reasons, DOE is finalizing the proposal from the April 2021 NOPR that test procedures be finalized prior to issuance of a standards proposal, subject to the modifications discussed above establishing a minimum period of 180 days between the finalization of a test procedure and the end of the standards NOPR comment period for, with certain exceptions: (1) New test procedures; and (2) amended test procedures that impact measured energy use or efficiency.

F. Direct Final Rules

As discussed in the April 2021 NOPR (*see* 86 FR 18901, 18908–18909), the Energy Independence Security Act of 2007, Public Law 110–140 (Dec. 19, 2007), amended EPCA, in relevant part, to grant DOE authority to issue a ''direct final rule'' (''DFR'') to establish energy conservation standards in appropriate cases. Under this authority, DOE may issue a DFR adopting energy conservation standards for a covered product or equipment upon receipt of a joint proposal from a group of ''interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates),'' provided DOE determines the energy conservation standards recommended in the joint proposal conform with the requirements of 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. (42 U.S.C. 6295(p)(4)(A)) While these two provisions contain many of the requirements DOE typically must satisfy in issuing an energy conservation standard, such as the prohibition against setting less-stringent standards (*i.e.,* the ''anti-backsliding'' requirement), they do not adopt all the requirements of a typical energy conservation standard rulemaking. For example, 42 U.S.C. 6295(o) does not specify a mandatory time period between promulgation of an energy conservation standard and the compliance date for that standard (*i.e.,* compliance period). DOE has looked to the joint proposals to fill in these necessary details. This process had been well-received by manufacturers, trade organizations, and energy efficiency advocates, as it allowed more room for negotiation, which in turn made it easier for stakeholders to reach a consensus agreement. February 2020 Final Rule, 85 FR 8626, 8682–8683.

In a departure from this practice, DOE clarified in the February 2020 Final Rule that 42 U.S.C. 6295(p)(4) is a procedure for issuing a DFR and not an independent grant of rulemaking authority. As such, under the February 2020 Final Rule, any joint proposal submitted to DOE under the DFR provision must identify a separate rulemaking authority such as 42 U.S.C. 6295(m) (amendment of standards) or 42 U.S.C. 6295(n) (petition for amended standard) and comply with the requirements (*e.g.,* compliance periods) listed in that provision. *Id.* DOE also provided additional guidance on the Department's interpretation of ''fairly representative'' and obligations upon receipt of an adverse comment. *Id.* at 85 FR 8683–8685.

In the April 2021 NOPR, DOE explained that it is reconsidering whether these clarifications regarding the DFR process are appropriate or necessary, for the reasons set forth subsequently. This reconsideration begins with the language of the statute. The language in 42 U.S.C. 6295(p)(4) is clear that DOE may issue standards recommended by interested persons that are fairly representative of relative points of view as a DFR when the recommended standards are in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable. There are no other requirements listed, which is consistent with the unique circumstances of rules issued under the DFR provision. DOE's overarching statutory mandate in issuing energy conservation standards is to choose a standard that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified—a requirement found in 42 U.S.C. 6295(o).

Many of the other requirements found in EPCA constrain DOE's discretion in setting standards for the benefit of stakeholders. For example, mandatory compliance periods are intended to give manufacturers sufficient lead time to design new products and shift manufacturing capacity as necessary. Similarly, EPCA provides that manufacturers shall not be required to apply new standards to a product with respect to which other new standards have been required during the prior 6-year period. (42 U.S.C. 6295(m)(4)(B)) But, if manufacturers agree to a shorter compliance period or two tiers of standards as part of a consensus agreement submitted under the DFR provision, it would be odd if DOE were then forced to deny such a proposal based upon requirements designed to protect the interests of those same manufacturers. That being said, DOE will still deny such a proposal if it is not fairly representative of manufacturers' points of view. (42 U.S.C. 6295(p)(4)(A)) Similarly, DOE will also deny such a proposal if it does not meet applicable criteria in 42 U.S.C. 6295(o), which, among other things, require DOE to consider the economic impact on manufacturers (including small manufacturers) and any possible lessening of competition that may result from imposition of the proposed standard. As to this latter point, pursuant to EPCA, DOE receives a written determination from the Attorney General as to the potential anti-competitive effects from any proposed energy conservation standard. (*See* 42 U.S.C. 6295(o)(2)(B)(i)(V) and (ii))

Issuing standards through a consensus agreement among stakeholders is different than DOE's normal rulemaking process. There is a corresponding difference in the statutory criteria that DOE must apply to each process, one that is made clear by the language in 42 U.S.C. 6295(p)(4). Accordingly, DOE has proposed to eliminate the rigid requirement that DFR submittals identify a separate rulemaking authority and instead revert to the Department's prior practice of evaluating DFR submittals based on the criteria laid out in 42 U.S.C. 6295(p)(4).

As discussed previously, DOE also provided additional guidance on the Department's interpretation of ''fairly representative'' and obligations upon receipt of an adverse comment. Upon reconsideration, DOE believes that the additional guidance may be overly prescriptive in some circumstances. For instance, the February 2020 Final Rule required a group submitting a DFR proposal to include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities (as appropriate for the given covered product or equipment), consumers, and States. 85 FR 8626, 8683. While this list may be appropriate for some DFR proposals, it is not universally applicable. For instance, some of DOE's regulated industries do not have small business manufacturers (*e.g.,* external power supplies).[16] DOE also stated it would publish in the **Federal Register** any DFR proposal to obtain feedback as to whether the proposal was submitted by a group that is fairly representative of relevant points of view. *Id.* Once again, this may be good practice for some DFR proposals (*e.g.,* those concerning newly covered products or equipment), but it may be unnecessary for most DFR proposals. The bulk of DOE's covered products and equipment have gone through multiple rounds of rulemakings, and DOE has become very familiar with the relevant points of view for these covered products and equipment.

With respect to DOE's discussion of adverse comments in the February 2020 Final Rule, DOE largely repeated the requirements listed in 42 U.S.C. 6295(p)(4)(C). Namely, DOE will withdraw a DFR if one or more adverse comments may provide a reasonable basis for withdrawing the rule under 42 U.S.C. 6295(o), 42 U.S.C. 6313(a)(6)(B), or any other applicable law. The one clarification DOE offered was that the Department may consider comments as adverse, even if the issue was brought up previously during the rulemaking process. *Id.* at 85 FR 8685. However, this clarification does not offer any insight into how DOE will determine whether an adverse comment provides a reasonable basis for withdrawing the rule.

For these reasons, DOE considered whether the guidance contained in the February 2020 Final Rule concerning DFRs is unnecessary or redundant to the statutory language in 42 U.S.C. 6295(p)(4) and proposed to add ''where appropriate'' to clarify that DOE retains the discretion to determine what ''fairly representative'' means for a given DFR submission on a case-by-case basis. Regardless of whether the DFR section in appendix A is retained, deleted, or revised, DOE stated that it will continue to evaluate DFR proposals in accordance with 42 U.S.C. 6295(p)(4).

DOE requested comments on the merits of its proposed revisions to the DFR section, as well as any alternative approaches, such as deletion of or amendments to the section or retention of aspects of this section. Additionally, DOE sought comment regarding small business perspectives and related impacts as to the proposed application of the DFR provision of EPCA.

In response to the April 2021 NOPR, DOE received a considerable number of comments on its proposal related to DFRs, which were overwhelmingly supportive of DOE's proposed return to the Department's historic approach to DFRs that was in place before adoption of the February 2020 Final Rule. (Hamdi, No. 7 at p. 1; NPCC, No. 12 at p. 5; Carrier, No. 26 at p. 3; A.O. Smith, No. 27 at p. 5; MHI, No. 32 at pp. 3–4; Nortek, No. 19 at p. 4; Joint Environmentalist Commenters, No. 31 at pp. 6–7; CA IOUs, No. 34 at p. 4; CEC, No. 35 at p. 7; Grundfos, No. 37 at p. 3; Joint Advocacy Commenters, No. 38 at pp. 5–6; Joint Advocacy Commenters (appendix I), No. 38 at pp. 1, 2, 13–14; NEEA, No. 43 at p. 4; Lennox, No. 18 at p. 7; Goodman, No. 22 at p. 4; Trane, No. 23 at p. 3; Joint Industry Commenters, No. 40 at p. 16) However, there were a few commenters who opposed DOE's proposal and instead supported retention of the approach to DFRs contained in the February 2020 Final Rule. (AGA, No. 33 at p. 6; AFP, No. 36 at p. 2; Anonymous, No. 39 at p. 1) These comments and their rationale are discussed in further detail in the paragraphs that follow.

Comments in Support of DOE's Proposal To Return to Its Prior Practice Regarding the Use of the DFR Provision in EPCA

A number of commenters argued that a return to DOE's prior interpretation of EPCA's DFR provisions are authorized by and consistent with the statute's requirements. (Joint Environmentalist Commenters, No. 31 at pp. 6–7; CEC, No. 35 at p. 7; Joint Advocacy Commenters, No. 38 at p. 6; A.O. Smith, No. 27 at p. 5) On this point, the Joint Environmentalist Commenters made the case that EPCA's DFR provision at 42 U.S.C. 6295(p)(4) expressly authorizes DOE to accept a proposed standard negotiated by a representative group of stakeholders, provided that the proposal complies with 42 U.S.C. 6295(o) (residential products) or 42 U.S.C. 6313(a)(6)(B) (commercial and industrial products). The Joint Environmentalist Commenters disagreed with DOE's interpretation in the February 2020 Final Rule that 42 U.S.C. 6295(p)(4) confers no independent grant of rulemaking authority upon DOE, and, as a result DFRs must satisfy the statutory requirements associated with another rulemaking authority, *e.g.,* 42 U.S.C. 6295(m) or 42 U.S.C. 6295(n). Instead, these commenters favored a return to DOE's prior flexibility in this area (*e.g.,* consideration of different compliance timelines). (Joint Environmentalist Commenters, No. 31 at pp. 6–7) Similarly, the CEC supported DOE's proposed interpretation in the April 2021 NOPR that the direct final rule provision at 42 U.S.C. 6295(p)(4) grants the agency rulemaking authority separate and distinct from its general authority to adopt energy conservation standards. The commenter argued that the interpretation of that statutory provision contained in the February 2020 Final Rule is inconsistent with the language of the statute and congressional intent to facilitate DFRs. Consequently, the CEC encouraged DOE to move forward with its proposal. (CEC, No. 35 at p. 7)

The NPCC reasoned that the direct final rule provision enacted by Congress was designed with the intent to streamline mutually agreed upon standards. The NPCC stated that the current rule's requirement that DOE first identify a separate and independent basis for a given standards rulemaking adds unnecessary steps and requirements to the direct final rule process. Consequently, the NPCC supported the removal of this provision. (NPCC, No. 12 at p. 5) Likewise, Nortek stated that it disagrees with DOE's decision in the February 2020 Final Rule to define DFRs as a procedural tool and to eliminate the use of DFRs in negotiated rulemaking. (Nortek, No. 19 at p. 4) Trane and Lennox also agreed with DOE's proposal to eliminate the requirement for a separate rulemaking

[16] *See* 85 FR 30636, 30648 (May 20, 2020).

authority and to implement its DFR authority on a case-by-case basis, evaluating consensus proposal submissions based on the criteria laid out in 42 U.S.C. 6295(p)(4). (Trane, No. 23 at p. 3; Lennox, No. 18 at p. 6)

Most of the commenters favored a return to DOE's prior approach to DFRs because of the increased flexibility that approach provided. (Joint Environmentalist Commenters, No. 31 at pp. 6–7; CA IOUs, No. 34 at p. 4; Joint Advocacy Commenters, No. 38 at p. 6; Joint Advocacy Commenters (Appendix I), No. 38 at pp. 1, 2, 13–14) For example, Carrier characterized DOE's earlier direct final rule process as an efficient, cost-effective regulatory process for both the government and stakeholders, a point echoed by MHI and NEEA. (Carrier, No. 26 at p. 3; MHI, No. 32 at pp. 3–4; NEEA, No. 43 at p. 4) A.O. Smith stated that applying the DFR authority in a flexible manner, so as to permit consideration of measures such as alternative compliance dates, dual metrics, phased-in compliance by product/equipment class, and two-tiered standards, is both permitted under EPCA and essential to maintain as part of the Program's structure. The company supports the use of the DFR authority in this manner because it affords manufacturers with flexibility for consensus-based or negotiated solutions. (A.O. Smith, No. 27 at p. 5) The CA IOUs made a similar point, arguing that DOE's pre-2020 Final Rule guidance for direct final rules may lead to more nuanced and detailed approaches to test procedures and energy conservation standards through utilization of the mechanisms cited by A.O. Smith. (CA IOUs, No. 34 at p. 4) MHI added the DFRs can incentivize the consensus process. (MHI, No. 32 at pp. 3–4)

Citing the ability to utilize those same mechanisms, the Joint Advocacy Commenters reasoned that many of the other EPCA requirements beyond those included in 42 U.S.C. 6295(o) and 42 U.S.C. 6313(a)(6)(B) are for the benefit of stakeholders, but they are arguably unnecessary in the context of DFRs. For example, the Joint Advocacy Commenters stated that other EPCA provisions specify lead times for compliance so as to provide manufacturers with sufficient time to comply with a new standard, but such considerations are not necessary when manufacturers negotiate an agreement subjecting themselves to a different compliance date. (Joint Advocacy Commenters, No. 38 at pp. 5–6; Joint Advocacy Commenters (Appendix I), No. 38 at pp. 1, 2, 13–14)

There was considerable discussion and overlap of issues between appendix A's DFRs and negotiated rulemaking provisions, because in the past, most DFRs have arisen out of that type of rulemaking proceeding. A number of commenters stressed that in contrast to the restriction in the February 2020 Final Rule, negotiated rulemakings should once again be permitted to result in a consensus recommendation that leads to a DFR. (Grundfos, No. 37 at p. 3; NEEA, No. 43 at p. 4; Lennox, No. 18 at p. 7) Generally, commenters pointed to the statutory protections associated with both DFRs and negotiated rulemaking as adequate to ensure the fairness, transparency, and integrity of the process, as explained subsequently.

For example, NEEA noted how the DFR provisions already provide several safeguards, including a requirement that the consensus recommendation for standards be fairly representative of relevant points of view and the potential for a DFR to be withdrawn upon receipt of one or more adverse comments (leading to further notice and comment rulemaking). Particularly where there is a consensus agreement, NEEA argued that further comment beyond that provided by the DFR would be redundant. (NEEA, No. 43 at p. 4) Similarly, MHI asserted that the interested persons that are fairly representative of relevant points of view who participate in that process will have taken the time during or in advance of the rulemaking to exchange views and reach a common or joint understanding of what level of energy efficiency or energy use will reasonably strike a balance between benefits and burdens. (MHI, No. 32 at pp. 3–4). Consequently, MHI argued that DOE should give substantial weight to the consensus views of these participants in light of their competing interests. (MHI, No. 32 at p. 4) Furthermore, the Joint Industry Commenters stated that, ''[a]t a minimum, the 'relevant points of view' are likely to reflect the views of the persons who will bear the heaviest burden of implementing the regulatory mandate and the responsibility for certifying compliance (manufacturers, specifically those who make and use the covered product), the persons who are active in promoting the maximum improvement in energy savings (energy efficiency advocates), and representatives of the country's citizens who are expected to realize net benefits from a mandatory rule (States).'' (Joint Industry Commenters, No. 40 at p. 16)

However, the Joint Advocacy Commenters cautioned that the February 2020 Final Rule's additional guidance regarding what constitutes a ''fairly representative'' group of stakeholders and its clarification regarding adverse comments may be overly prescriptive, a position in agreement with DOE's April 2021 NOPR. (Joint Advocacy Commenters, No. 38 at pp. 5–6; Joint Advocacy Commenters (appendix I), No. 38 at pp. 1, 2, 13–14) Along these lines, Lennox also warned that appendix A should not go further than the statutory language regarding participants (*i.e.,* manufacturers, States, and efficiency advocates) to also include ''energy utilities, consumers,'' per the February 2020 Final Rule. Instead, Lennox stated that it supports amending appendix A to include the language ''where appropriate'' regarding parties, thereby avoiding any unnecessary constraints to the DFR process. (Lennox, No. 18 at pp. 6–7)

In a more neutral posture, NAFEM took the position that this is not a critical issue, arguing that it is not overly concerned either with DOE maximizing its use of DFR when issues are routine and non-controversial, or even to reflect the results of a well-conducted negotiated rulemaking, so long as DOE can overcome the other statutory issues it identifies with such negotiated rulemakings. (NAFEM, No. 30 at pp. 6–7)

A few commenters provided suggestions for potential process improvements. For example, although Grundfos supported DOE's proposal that a negotiated rulemaking may culminate in a term sheet recommending a DFR, the commenter suggested that before such recommendation is accepted, DOE should be required to publish a determination (with supporting reasoning) that the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) Working Group meets the EPCA requirement to be ''fairly representative of relevant points of view.'' (Grundfos, No. 37 at p. 3)

The Joint Advocacy Commenters stated that although they have no qualms about retaining the DFR section of appendix A with the modifications proposed, they alternatively support removal of that section, because the statute already provides sufficient guidance regarding DOE's DFR authority. (Joint Advocacy Commenters, No. 38 at p. 6)

Comments Opposing DOE's Proposal To Return To Its Prior Practice Regarding the Use of the DFR Provision in EPCA

Three commenters provided dissenting views in opposition to DOE's proposal regarding DFRs as set forth in the April 2021 NOPR. (AGA, No. 33 at p. 6; AFP, No. 36 at p. 2; Anonymous,

No. 39 at p. 1) These commenters largely supported the approach to DFRs presented in the February 2020 Final Rule, for the reasons that follow.

AFP supported the reasoning DOE provided in its 2020 Final Rule indicating that the DFR statutory provision does not provide an independent grant of rulemaking authority (*i.e.,* outlining its own set of substantive requirements when establishing or amending a standard) but is instead only a procedural process for issuing a standard authorized under another provision of EPCA. In AFP's view, nothing in EPCA permits DOE to interpret the DFR provision as a means to evade EPCA's requirements with respect to compliance periods, energy efficiency metrics, or other factors. (AFP, No. 36 at p. 2) An anonymous commenter expressed similar views, quoting extensively from that portion of the February 2020 Final Rule final rule making the case that the DFR provision does not create any additional flexibility with regard to such statutory requirements. (Anonymous, No. 39 at p. 1)

AGA stated that the February 2020 Final Rule contains appropriate and necessary clarifications and requirements to help ensure that negotiated rulemakings and direct final rules are treated distinctly from each other and not conflated. (AGA, No. 33 at p. 6) Rather than making a broad change, AGA suggested that it would be preferable for DOE to allow for divergences from the current set of requirements where the need for such divergences is appropriately substantiated by DOE. It added that a DFR and its accompanying process should be consistent with EPCA and the APA and that since a DFR is issued without prior notice and comment, the process for these rules should only be used when DOE has deemed that rule to be routine or noncontroversial in accordance with the relevant statutory requirements. (AGA, No. 33 at p. 6)

DOE Response to Comments

After careful consideration of these comments, DOE has decided to adopt the identified changes to its DFR process along the lines proposed in the April 2021 NOPR. In essence, DOE has concluded that it is appropriate to return to its historic practice for DFRs in place prior to the February 2020 Final Rule. DOE agrees with the commenters who argued that the February 2020 Final Rule's interpretation of EPCA's DFR provision (*i.e.,* as a purely procedural one) is not the best reading of the statute, and DOE disagrees with those commenters such as AFP and AGA, who support the opposite statutory reading. Instead, DOE is reverting to its longstanding interpretation that the DFR provision conveys upon DOE a substantive grant of rulemaking authority, thereby allowing stakeholders to negotiate over more aspects of the energy or water conservation standard, *e.g.,* compliance periods, so long as the requirements of 42 U.S.C. 6295(o) (and 42 U.S.C. 6313(a)(6)(B), as applicable) are met.

DOE has determined that the February 2020 Final Rule imposed certain unnecessary restrictions upon the use of DFRs, thereby limiting DOE's flexibility, program efficiency, and the usefulness of this important regulatory tool provided by Congress. In the past, DFRs—arising from both consensus agreement submissions and negotiated rulemakings—have frequently utilized measures such as alternative compliance dates, dual metrics, phased-in compliance by product/equipment class, and two-tiered standards. These measures have typically resulted in greater overall energy savings more quickly, an outcome which the Department finds consistent with the energy-saving purposes of EPCA, and DOE agrees with MHI that the Department should give such consensus recommendations appropriate weight.

In providing a streamlined process for DFRs, Congress built in certain safeguards in the relevant statutory provision, namely the requirement that a joint statement recommending an energy or water conservation standard must be ''fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates)'' and the potential for withdrawal of a DFR upon receipt of one or more adverse comments. (42 U.S.C. 6295(p)(4)(A) and (C)) However, because each rulemaking proceeding is different (in terms of both issues and stakeholders), DOE has concluded that it is beneficial for the agency to assess representativeness and any adverse comments on a case-by-case basis. For example, if there are no small business manufacturers producing a certain covered product, that should not preclude consideration of a consensus agreement or a negotiated rulemaking leading to a DFR. Unfortunately, in seeking to clarify DOE's DFR process, the February 2020 Final Rule inadvertently imposed a one-size-fits-all regime that may not be appropriate for all proceedings.

DOE is not adopting the suggestion of Grundfos that before such a consensus recommendation is accepted, the Department should be required to publish a determination (with supporting reasoning) that an ASRAC Working Group meets the EPCA requirement to be ''fairly representative of relevant points of view.'' If an interested party has concerns as to representativeness, this issue may be addressed in a comment on the DFR (potentially as an ''adverse'' comment). Particularly given the numerous statutory deadlines DOE faces for energy conservation rulemakings, the agency does not find it reasonable to put in place a separate comment opportunity for this narrow issue, as a consolidated comment opportunity would suffice and serve the same purpose.

Thus, in this final rule, DOE is retaining the expanded list of potentially representative parties (*i.e.,* beyond the statutorily required manufacturers, States, and efficiency advocates) but adding ''where appropriate'' in recognition of the fact that there is no set group of relevant points of view across all rulemakings. DOE anticipates that such an approach will encourage consensus agreement and DFRs, consistent with the requirements of EPCA. Similarly, DOE is removing discussion of adverse comments from appendix A, so as not to limit the Department's ability to consider the merits of such comments on a case-by-case basis.

In addition, DOE is also returning to its historic practice that a negotiated rulemaking may result in a term sheet with recommendations culminating in a DFR. (For further discussion of negotiated rulemaking, see section G of this final rule.) The Department has concluded that the contrary position taken in the February 2020 Final Rule was an overly restrictive interpretation not compelled by EPCA or the NRA. Upon further consideration, DOE now sees the applicable provisions of these two statutory sources can be read in harmony to allow for DFRs to arise from such proceedings, a result consistent with 5 U.S.C. 561, *Purpose,* of the NRA which states, ''Nothing in this subchapter shall be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.'' DOE does not agree with the more restrictive approach recommended by the AGA, because it could unnecessarily limit use of the provision Congress placed in statute. Consequently, DOE is clarifying that a negotiated rulemaking can result in a DFR.

DOE notes that even if the position taken in the February 2020 rule was not erroneous, as a matter of policy, a

negotiated rulemaking can still result in a direct final rule. DOE's independent (and separate) authority to initiate a direct final rule does not preclude the possibility that it may be the product of a negotiated rulemaking. The consensus agreement contemplated under DOE's authority under 42 U.S.C. 6295(p)(4) only requires that DOE receive a joint statement from specified interested parties and that the recommended standard(s) be in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

For the aforementioned reasons, DOE is finalizing its proposed revisions to the DFR section of appendix A, thereby restoring flexibility to the process and allowing the Department to tailor its approach to the needs of individual energy conservation standard or test procedure rulemakings on a case-by-case basis. DOE concludes that retention of a revised DFR section as part of appendix A will provide additional clarity for interested parties.

G. Negotiated Rulemaking

As discussed in the April 2021 NOPR (*see* 86 FR 18901, 18909–18911), the Department adopted a new section 11, *Negotiated Rulemaking Process,* in the February 2020 Final Rule to set forth the procedures that DOE would follow when using negotiated rulemaking under the Appliance Standards Program. 85 FR 8626, 8708–8709. These provisions discussed DOE's historical use of negotiated rulemaking, along with a few modifications to the agency's past approach. 85 FR 8626, 8685–8686. As that final rule explained, negotiated rulemaking is a process by which an agency attempts to develop a consensus proposal for regulation in consultation with interested parties, thereby addressing comments from stakeholders before issuing a proposed rule. This process is conducted in accordance with the requirements of the NRA. To facilitate potential negotiated rulemakings, DOE established the Appliance Standards and Rulemaking Federal Advisory Committee (''ASRAC'') to comply with the Federal Advisory Committee Act, Public Law 92–463 (5 U.S.C. App. 2). As part of the DOE process, working groups have been established as subcommittees of ASRAC, from time to time, for specific products, with one member from the ASRAC committee attending and participating in the meetings of the specific working group. Ultimately, the working group reports to ASRAC, and ASRAC itself votes on whether to make a recommendation to DOE to adopt a consensus agreement. The negotiated rulemaking process allows real-time adjustments to the analyses as the working group is considering them. Furthermore, it allows parties with differing viewpoints and objectives to negotiate face-to-face regarding the terms of a potential standard. Additionally, it encourages manufacturers to provide data for the analyses in a more direct manner, thereby helping to better account for manufacturer concerns. DOE recognizes the value of this process and encourages submission of joint stakeholder recommendations.

The February 2020 Final Rule also discussed the following key points related to negotiated rulemaking at 85 FR 8626, 8685:

- Negotiated rulemakings will go through the ASRAC process outlined above, and the appropriateness of a negotiated rulemaking for any given rulemaking will be determined on a case-by-case basis.
- In making this determination, DOE will use a convener to ascertain, in consultation with relevant stakeholders, whether review for a given product or equipment type would be conducive to negotiated rulemaking, with the agency evaluating the convener's recommendation before reaching a decision on such matter.
- The following five factors militate in favor of a negotiated rulemaking: (1) Stakeholders have commented in favor of negotiated rulemaking in response to the initial rulemaking notice; (2) the rulemaking analysis or underlying technologies in question are complex, and DOE can benefit from external expertise and/or real-time changes to the analysis based on stakeholder feedback, information, and data; (3) the current standards have already been amended one or more times; (4) stakeholders from differing points of view are willing to participate; and (5) DOE determines that the parties may be able to reach an agreement.
- If a negotiated rulemaking is initiated, a neutral and independent facilitator, who is not a DOE employee or consultant, shall be present at all ASRAC working group meetings.
- DOE will set aside a portion of each ASRAC working group meeting to receive input and data from non-members of the ASRAC working group.
- Finally, a negotiated rulemaking in which DOE participates under the ASRAC process will not result in the issuance of a DFR, and further, any potential term sheet upon which an ASRAC working group reaches consensus must comply with all of the provisions of EPCA under which the rule is authorized.

After further consideration, DOE tentatively determined in the April 2021 NOPR that further changes to its approach to negotiated rulemaking are necessary and appropriate. Although section 11 of appendix A largely mirrors the process DOE has followed when the Department has determined, on a case-by-case basis, that such alternative rulemaking procedures would be useful to supplement the normal notice-and-comment rulemaking process, DOE proposed in the April 2021 NOPR to make certain modifications to the process articulated in that section. On a number of points, DOE proposed to revert to the approach it employed prior to promulgation of the February 2020 Final Rule. The following paragraphs outline the proposed changes from the April 2021 NOPR.

First, DOE would clarify that although the Department has frequently used facilitators and considered whether to use convenors in past negotiated rulemakings, the use of such individuals is left to agency discretion and is not required under the NRA (*see* 5 U.S.C. 563(b)). A ''convenor'' performs the task of canvassing various interested parties regarding the potential and feasibility of achieving consensus in a particular matter. In contrast, a ''facilitator'' helps guide the discussion among the participants to a negotiated rulemaking. While DOE recognizes the value of using a convenor and/or a facilitator in certain cases, there are also instances where DOE can adequately assess whether a given situation is ripe for a consensus-based approach through negotiated rulemaking. These instances may occur where DOE has accumulated years or decades of experience with setting standards with a particular product or equipment, or where DOE is approached by concerned stakeholders. In those instances, it may not be necessary to expend the time and/or resources associated with the use of a convenor. Consequently, DOE proposed to eliminate the requirement for use of a convenor and a facilitator and to instead retain discretion to utilize the services of such individuals in appropriate cases. This change in approach would allow the agency to conserve resources and avoid delay where such services are not necessary.

Second, DOE proposed that the list of factors militating in favor of a negotiated rulemaking, as currently articulated at section 11(a)(3) of appendix A, are neither mandatory nor exclusive. The NRA already sets forth factors for consideration at 5 U.S.C. 563(a). Because the factors set forth in section 11(a)(3) of appendix A may not be appropriate in all cases, DOE proposed

to no longer be bound by this list when determining whether it is appropriate to convene a negotiated rulemaking. Instead, the Department proposed to consider the factors articulated under 5 U.S.C. 563(a), as well as any other considerations relevant to the specific product/equipment proceeding in question.

Third, DOE proposed to revert to its prior approach, which would allow for a negotiated rulemaking to result in a term sheet recommending promulgation of a DFR under 42 U.S.C. 6295(p)(4). (*See* section III.F of this document for a more complete discussion of DFRs.) DOE tentatively concluded that the approach adopted in the February 2020 Final Rule (*i.e.,* that a negotiated rulemaking must result in a proposed rule followed by a final rule) was an overly restrictive reading of the NRA. While 5 U.S.C. 563(a) discusses issuance of a proposed rule and a final rule, 42 U.S.C. 6295(p)(4) (under EPCA) already mandates publication of a proposed rule simultaneously with a DFR—and in the event of an adverse comment that may provide a reasonable basis for withdrawal, DOE is required to conduct further rulemaking under the proposed rule, proceeding to a final rule, if appropriate. (42 U.S.C. 6295(p)(4)(C)(i)(II)) Furthermore, at 5 U.S.C. 561, *Purpose,* the NRA states, ''Nothing in this subchapter shall be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.'' In light of the above, DOE has tentatively concluded that these relevant legal authorities can be read in harmony and do not preclude the possibility of a negotiated rulemaking that results in a recommendation to implement the body's consensus through a DFR. Accordingly, DOE proposed to revert to its prior position on this topic.

In light of these proposed modifications, DOE tentatively concluded that section 11 of the revised appendix A would become largely redundant of the NRA requirements to which the agency is already subject, and therefore, the Department found section 11 to be unnecessary and proposed its removal. DOE noted, however, that its proposal to remove this section from appendix A in no way reflected a change in the Department's perception of the value of negotiated rulemaking or its intention to use negotiated rulemaking in appropriate cases. Similarly, this proposal was not expected to affect DOE's practice of providing opportunities for public comment and access to working group documents and meetings/webinars throughout the negotiated rulemaking process. DOE requested comments on the merits of this proposed approach including comments regarding the proposed complete removal of section 11, as well as any alternatives to this proposal, such as amendments or revisions to the section or retention of aspects of section 11. *See generally* April 2021 NOPR 86 FR 18901, 18909–18911.

In response to the April 2021 NOPR, DOE received a considerable number of comments on its proposal related to the topic of negotiated rulemaking, which like the comments on the proposed DFR provisions, were overwhelmingly supportive of both the negotiated rulemaking mechanism itself and DOE's proposal to return to the Department's historic approach to such rulemakings that was in place before adoption of the February 2020 Final Rule. (Hamdi, No. 7 at p. 1; NPCC, No. 12 at p. 5; Carrier, No. 26 at p. 3; ALA, No. 28 at p. 4; CEC, No. 35 at p. 7; Joint Advocacy Commenters, No. 38 at p. 7; Joint Advocacy Commenters (appendix I), No. 38 at pp. 1, 2, 15; NEEA, No. 43 at p. 4; Lennox, No. 18 at pp. 8–9; Goodman, No. 22 at p. 3; Nortek, No. 19 at p. 4; CEC, No. 35 at p. 7; CA IOUs, No. 34 at p. 4) A small minority of commenters either favored the approach to negotiated rulemaking contained in the February 2020 Final Rule or otherwise expressed concern with the proposal set forth in the April 2021 NOPR. (AGA, No. 33 at p. 6; MHI, No. 32 at pp. 1–2) All of these comments and their rationale are discussed in further detail in the paragraphs that follow.

Comments in Support of DOE's Proposal Regarding Negotiated Rulemaking

Commenters generally agreed that DOE's use of negotiated rulemakings has yielded substantial benefits. For example, ALA stated that negotiated rulemakings implemented through DOE's ASRAC process have produced significant energy savings by allowing a collaborative effort among interested parties that can be faster, more transparent, and less contentious than the normal rulemaking process. (ALA, No. 28 at p. 4)

A number of commenters favored a return to DOE's prior practice regarding negotiated rulemaking because of the increased flexibility that approach provided. On this point, the Joint Environmentalist Commenters generally opposed what they characterized as the unnecessarily strict limits and restrictions related to negotiated rulemaking in the February 2020 Final Rule, beyond the requirements of the NRA, so these commenters expressed support for returning flexibility to the process for negotiated rulemakings. (Joint Environmentalist Commenters, No. 31 at pp. 6–7; CA IOUs, No. 34 at p. 4) The CA IOUs argued that the use of negotiated rulemaking (in combination with DFRs) offers flexibility and can lead to more nuanced and detailed approaches to test procedures and standards, such as staged standards, different compliance dates, and multiple efficiency standards. The CA IOUs added that it has been their experience that direct negotiations between stakeholders has resulted in energy conservation standards that are quicker and easier for industry to implement and that save more energy overall than would have been achievable through the conventional rulemaking process. (CA IOUs, No. 34 at p. 4) The CEC added that a reversion back to DOE's prior, effective negotiated rulemaking practice is based on and consistent with the requirements of the NRA. (CEC, No. 35 at p. 7) GEA described negotiated rulemaking with direct final rules as a powerful tool for fast progress that reduce the use of DOE resources. GEA added that negotiated rulemaking offers all stakeholders an opportunity for increased control, decreases the likelihood of litigation, and provides an opportunity for solutions outside the scope of EPCA's analytical framework and for the consideration and resolution of standards and test procedures for multiple products at once. (GEA, No. 20 at p. 3) NEEA also stated that negotiated rulemakings (in combination with DFRs) can lead to more efficient rulemaking. (NEEA, No. 43 at p. 4)

As discussed previously, there was considerable discussion and overlap of issues between appendix A's DFR and negotiated rulemaking provisions, because in the past, most DFRs arose out of that type of rulemaking proceeding. A number of commenters stressed that in contrast to the restriction in the February 2020 Final Rule, negotiated rulemakings should once again be permitted to result in a term sheet with a consensus recommendation that leads to a DFR. (NPCC, No. 12 at p. 5; Carrier, No. 26 at p. 4; MHI, No. 32 at p. 3; Nortek, No. 19 at p. 4; Joint Environmentalist Commenters, No. 31 at pp. 6–7; Joint Advocacy Commenters, No. 38 at p. 7; Joint Advocacy Commenters (appendix I), No. 38 at pp. 1, 2, 15; NEEA, No. 43 at p. 4; NAFEM, No. 30 at p. 7; Joint Industry Commenters, No. 40 at p. 15) On this point, A.O. Smith argued that the

approach contained in the February 2020 Final Rule undermines DOE's own authority under EPCA. In A.O. Smith's view, DOE's past application of the DFR provision to permit a DFR to result from a negotiated rulemaking has ensured that the DFR's ''fairly representative'' requirement has been met, and the commenter asserted that the negotiated rulemaking process has been an important advancement and addition to the Appliance Standards Program, and for these reasons, its use should continue. A.O. Smith also asserted that applying the DFR provision in this manner meets the goal of Congress to promote consensus agreements that reflect broad input from interested parties who can fashion agreements that best promote the aims of the statute. It added that when DOE receives a consensus agreement consistent with the DFR process, that act alone is sufficient to satisfy the statute so long as 42 U.S.C. 6295(o) (or 42 U.S.C. 6313(a)(6)(B) as applicable) are met. (A.O. Smith, No. 27 at p. 5)

Commenters also addressed the individual proposed changes regarding negotiated rulemakings that DOE presented in the April 2021 NOPR. On the topic of convenors and facilitators, most stakeholders expressed support for DOE's proposal to make their use discretionary in appropriate cases. (NPCC, No. 12 at p. 5; Carrier, No. 26 at p. 3; Grundfos, No. 37 at p. 3) Commenters offered the following views. The Joint Industry Commenters agreed that a convenor and a facilitator may not be necessary in every negotiated rulemaking, and the Joint Advocacy Commenters added that use of facilitators and convenors is not required under the NRA. (Joint Industry Commenters, No. 40 at p. 15; Joint Advocacy Commenters, No. 38 at p. 7) Similarly, NAFEM stated that although it generally acknowledges the benefits of facilitators in appropriate cases, DOE and stakeholders have experience as to when engagement of facilitators would be helpful. (NAFEM, No. 30 at p. 7) However, Grundfos argued that DOE has sufficient experience with these roles to clearly define in appendix A when their use would be warranted. (Grundfos, No. 37 at p. 3)

Once again, DOE proposed in the April 2021 NOPR to clarify that the list of factors militating in favor of a negotiated rulemaking, as currently articulated at section 11(a)(3) of appendix A, are neither mandatory nor exclusive. Because the specified factors may not be appropriate in all cases, DOE reasoned that it should no longer be bound by this list when determining whether it is appropriate to convene a negotiated rulemaking, but instead proposed to consider the factors articulated under 5 U.S.C. 563(a), as well as any other considerations relevant to the specific product/equipment proceeding in question. In response, commenters offered the following input. Carrier and the Joint Advocacy Commenters agreed that the factors favoring a negotiated rulemaking currently listed in Section 11(a)(3) of appendix A are not exclusive, and the Joint Advocacy Commenters also pointed out that they are not mandatory. (Carrier, No. 26 at pp. 3–4; Joint Advocacy Commenters, No. 38 at p. 7) The Joint Industry Commenters likewise stated that they have no objection to DOE eliminating the list of factors in appendix A militating in favor of a negotiated rulemaking, and, instead considering the factors under 5 U.S.C. 563(a). (Joint Industry Commenters, No. 40 at p. 15)

Among commenters who generally supported DOE's proposal regarding negotiated rulemaking, there was mixed reaction as to how best to address section 11 of appendix A (Negotiated Rulemaking Process). Some commenters recommended that section 11 should be eliminated (as the Department proposed in the April 2021 NOPR). (NPCC, No. 12 at p. 5; Joint Advocacy Commenters, No. 38 at p. 7; NEEA, No. 43 at p. 4) Other commenters recommended that section 11 should be retained with revisions. (Carrier, No. 26 at p. 4; Grundfos, No. 37 at p. 3; Joint Industry Commenters, No. 40 at pp. 14–15; Lennox, No. 18 at pp. 8–9)

Commenters favoring removal of section 11 offered the following reasoning in support of their position. The Joint Advocacy Commenters agreed that DOE's proposal complies with the requirements of the NRA and that given the existing NRA requirements, section 11 of the February 2020 Final Rule is unnecessary and should be removed. (Joint Advocacy Commenters, No. 38 at p. 7) NEEA stated its agreement with DOE's proposal to remove the language related to negotiated rulemaking from appendix A, arguing that the NRA already sufficiently specifies that process. The commenter asserted that the negotiated rulemaking provisions of the February 2020 Final Rule did not clarify that process and that it may have added unnecessary burden in some cases. (NEEA, No. 43 at p. 4)

Commenters who favored retention of section of 11 with revisions offered the following reasoning in support of that view, including any specific language offered. Grundfos argued that a modified version of section 11 of appendix A should be allowed to remain in the regulation, because it assists stakeholders in understanding how that process will work under the NRA. (Grundfos, No. 37 at p. 3) Along those same lines, Carrier suggested that DOE should expressly state its modified process for negotiated rulemakings by updating the current text of section 11 to: (1) Provide the flexibility to determine whether a convener or facilitator is needed; (2) provide the flexibility to consider factors beyond those currently listed in Section 11(a)(3); and (3) allow the promulgation of a direct final rule from a negotiated rulemaking. (Carrier, No. 26, at p. 4) Finally, the Joint Industry Commenters also stated that DOE should reinsert several aspects of the July 1996 Final Rule, which include the following: First, DOE should include the following statement from the July 1996 Final Rule: ''[u]nder the guidelines in this appendix, DOE will support the development and submission of consensus recommendations for standards by representative groups of interested parties to the fullest extent possible.'' Second, DOE should indicate that it will consider deferring its rulemaking analysis while a representative group of interested parties works to develop joint recommendations on standards. Third, DOE should propose a consensus recommendation submitted by a breadth of interested parties so long as it met the applicable statutory criteria. Lastly, DOE should give substantial weight to consensus recommendations. (Joint Industry Commenters, No. 40 at pp. 14–15) MHI recommended inclusion of nearly identical language as that suggested by the Joint Industry Commenters. (MHI, No. 32 at p. 3)

While Lennox is generally supportive of DOE's clarifications regarding the negotiated rulemaking process, the company suggests retaining an abbreviated version of appendix A's section on negotiated rulemaking. (Lennox, No. 18 at p. 8). Lennox offered the following suggested modifications. First, Lennox stated that DOE could retain the substance of the first two sentences in section 11(a)(1) indicating ''In those instances where negotiated rulemaking is determined to be appropriate, DOE will comply with the requirements of the Negotiated Rulemaking Act (NRA) (5 U.S.C. 561–570) and the requirements of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2). To facilitate potential negotiated rulemakings, and to comply with the requirements of the NRA and the FACA, DOE established the Appliance Standards and Rulemaking

Federal Advisory Committee (ASRAC).'' Similarly, Lennox argued that DOE could retain some or all of section 11(a)(4) whereby ''DOE will provide notice in the **Federal Register** of its intent to form an ASRAC working group (including a request for nominations to serve on the committee), announcement of the selection of working group members (including their affiliation), and announcement of public meetings and the subject matter to be addressed.'' Furthermore, according to Lennox, DOE has not explained why it is deleting appendix A subsections 11(b) and (c), and the commenters believes these subsections seem appropriate. For instance, Lennox pointed out that subsection 11(c) merely states ''A negotiated rulemaking may be used to develop energy conservation standards, test procedures, product coverage, and other categories of rulemaking activities.'' Lennox opined that retaining this language seems a helpful clarification on the potential scope of negotiated rulemaking. Subsection 11(b) states ''DOE's role in the negotiated rulemaking process is to participate as a member of a group attempting to develop a consensus proposal for energy conservation standards [and the commenter noted that 'test procedures or other rulemaking activities' should be added here] for a particular product/equipment and to provide technical/analytical advice to the negotiating parties and legal input where needed to support the development of a potential consensus recommendation in the form of a term sheet.'' Again, Lennox argued that this language seems to be a helpful clarification, and the commenter asserted that DOE does not explain the reasons for deleting this particular subsection. Moreover, Lennox argued that appendix A should affirmatively indicate a negotiated rulemaking (*e.g.,* through ASRC) can lead directly to a DFR. (Lennox, No. 18 at pp. 8–9)

Comments Opposing DOE's Proposal Regarding Negotiated Rulemaking

Finally, some commenters expressed opposition to or concern about the April 2021 NOPR's proposed changes to the negotiated rulemaking section of appendix A. Specifically, AGA stated that although it supports the use of negotiated rulemakings, it had previously sought to include provisions in appendix A to promote and require full participation. In AGA's view, DOE's current proposal to remove appendix A's provisions regarding negotiated rulemakings should not be adopted because the current set of requirements are critical elements to help ensure full participation in the negotiated rulemaking process. (AGA, No. 33 at p. 6) Furthermore, MHI asserted that the negotiated rulemaking process that it experienced as part of its efforts to assist in the development of energy conservation standards for manufactured homes resulted in certain stakeholders having an outsized influence, which led to skewed outcomes. In MHI's view, the proposed rule that resulted from that negotiated rulemaking would have had a detrimental impact on the ability of consumers to afford a manufactured home. MHI argued that any DOE standard-setting process should be transparent, allow for input from all affected stakeholders, and provide a reasonable cost-benefit analysis before engaging in a rulemaking that can have significant impacts on industry and consumers. (MHI, No. 32 at pp. 1–2)

DOE's Response to Comments

After careful consideration of these comments, DOE has decided to adopt the identified changes to its negotiated rulemaking process along the lines proposed in the April 2021 NOPR. In essence, DOE has concluded that it is appropriate to return to its historic practice for negotiated rulemaking in place prior to the February 2020 Final Rule. DOE agrees with the commenters who argued that in attempting to codify DOE's existing practice, appendix A provisions in section 11, *Negotiated Rulemaking Process,* imposed certain unnecessary restrictions that were beyond the requirements of the NRA, thereby limiting DOE's flexibility and the usefulness of this important regulatory tool. Consequently, through this final rule, DOE is restoring its flexibility in the context of the negotiated rulemaking process, thereby allowing the Department to tailor its approach to the needs of individual energy conservation standard or test procedure rulemakings on a case-by-case basis.

To be clear, DOE hereby reiterates its strong support for negotiated rulemakings and consensus agreements in appropriate cases, and the Department acknowledges the substantial benefits of such mechanisms mentioned by commenters. DOE and many stakeholders have considerable experience with negotiated rulemakings, including those conducted under the auspices of ASRAC. DOE is familiar with the circumstances under which a negotiated rulemaking is most likely to have the potential to be successful, and the Department is also aware when the services of a convenor or facilitatory would be useful. Consequently, rather than having a mandatory but non-exhaustive list of factors for consideration for initiation of a negotiated rulemaking, DOE believes that it is better for the Department to be able to consider all relevant circumstances, so it has decided that the February 2020 Final Rule's list of factors is unnecessary and overly restrictive, and therefore, it should be eliminated. Similarly, because of limited resources and the need for rulemaking efficiency, DOE has decided to eliminate the required use of convenors and facilitators as part of every negotiated rulemaking, but to instead employ such individuals on a case-by-case basis when the agency determines it appropriate.

DOE also agrees with the vast majority of commenters that, consistent with the agency's historic approach, it should be permissible for a negotiated rulemaking to result in a term sheet with recommendations that culminate in a DFR. DOE has concluded that contrary provisions in the February 2020 Final Rule were driven by an interpretation of EPCA not compelled by the statute. For the reasons explained in the April 2021 NOPR, DOE has once again concluded that the DFR provision at 42 U.S.C. 6295(p)(4) constitutes substantive authority which offers DOE some flexibility for rulemakings with consensus agreements, as long as the requirements of 42 U.S.C. 6295(o) (or 42 U.S.C. 6313(a)(6)(B) as applicable) are met. When the negotiated rulemaking process has been combined with a DFR, it has been possible to implement agreements with staged standards, different compliance dates, and multiple efficiency standards. Typically, such process has achieved greater energy savings, done so more expeditiously, and reduced the risk of litigation. DOE agrees with AGA and MHI as to the importance of public participation in its negotiated rulemaking process, and that is why ASRAC meetings are open to the public with opportunities for non-Working Group member input. DOE does not agree with MHI that members of any ASRAC negotiating committee have more influence than others, given the balance of various points of view that is required by ASRAC. DOE also notes that EPCA itself imposes a requirement that any joint statement recommending an energy conservation standard must be fairly representative of relevant points of view (*see* 42 U.S.C. 6295(p)(4)(A)). DOE has concluded that these measures provide adequate safeguard in terms of public participation.

As for the suggestion from Joint Industry Commenters that DOE reinsert several statements regarding negotiated

rulemaking from the July 1996 Final Rule, DOE believes that the statements are either unnecessary or potentially in tension with the Department's obligations and authority under EPCA. First, the Objectives section of appendix A already contains a statement encouraging the development of consensus recommendations for new or revised standards. DOE has also clarified in the Objectives section that this support and encouragement extends to consensus recommendations developed in accordance with the NRA. Second, with regards to potentially delaying a rulemaking analysis while stakeholders work to develop a consensus recommendation, DOE believes it would be ill-advised in many situations to curtail its own rulemaking analysis in the hopes that stakeholders come to a consensus agreement in time to meet a statutory deadline. With respect to affording substantial weight to consensus recommendations and issuing them as proposals, EPCA already contains criteria for evaluating consensus proposals. (*See* 42 U.S.C. 6295(p)(4)(A)) DOE will determine whether to issue a consensus agreement as a proposal in accordance with these criteria.

In light of the changes being adopted for negotiated rulemaking as part of this final rule, DOE sees little reason to retain a separate section of appendix A dedicated to negotiated rulemaking. What remains essentially grants DOE the same level of flexibility accorded to it under the NRA, and it is noted that the Department's past attempt to clarify its existing process produced some level of confusion. Furthermore, DOE's prior, longstanding negotiated rulemaking practice has generally been transparent, open to the public, and well understood by interested stakeholders. Consequently, for these reasons, DOE has concluded that inclusion of a section on negotiated rulemaking in appendix A is unnecessary and susceptible to generating further confusion, so, therefore, the Department is removing such section entirely.

H. Other Topics

In addition to receiving comments on the proposed revisions to appendix A set forth in the April 2021 NOPR, DOE received numerous other comments related to appendix A. These comments fall primarily into two categories: (1) Comments related to aspects of appendix A not addressed in the April 2021 NOPR; and (2) comments challenging the basis for the rulemaking. Regarding the first category, DOE will address these comments and the additional revisions proposed in the July 2021 NOPR in a separate final rule.

As to the second category, several commenters stated that since the February 2020 Final Rule has only been in effect for a limited period of time DOE has not had sufficient experience with the rule to establish a reasonable basis for determining that modifications are needed to help meet the Department's statutory obligations under EPCA. (*See, e.g.,* AHRI, No. 25 at p. 7; Crown Boiler, No. 10 at p. 2) DOE does not agree with these comments. First, many of the effects of the February 2020 Final Rule on the Department's rulemaking processes were readily apparent on issuance of the rule. The February 2020 Final Rule created a one-size-fits-all rulemaking process that was binding on DOE. Further, the February 2020 Final Rule and the August 2020 Final Rule added additional, mandatory steps to the rulemaking process that are not required by any applicable statute. These mandatory provisions, among other things, added steps to the rulemaking process and required buffer periods (*i.e.,* delays) between certain rulemaking actions. Further, since the February 2020 Final Rule became effective on April 14, 2020, DOE has had to conduct additional rulemaking steps (early assessment RFIs) [17] and delay other rulemaking actions in accordance with the binding provisions of the February 2020 Final Rule. Consequently, these provisions increased both the length of the rulemaking process and the overall resource burdens on DOE by requiring additional steps that may not always be needed under the circumstances of a given rulemaking. In addition, as stated throughout the April 2021 NOPR and this final rule, DOE is not revising appendix A because the February 2020 Final Rule revisions offered no policy benefits or were otherwise legally deficient. Instead, DOE is revising appendix A because it unnecessarily constrains DOE's ability to readily meet its considerable statutorily-imposed rulemaking obligations under EPCA. From a practical perspective, applying a mandatory, one-size-fits-all rulemaking process does not allow the Department to account for the specific circumstances of a particular rulemaking. For example, the February 2020 Final Rule required that all test procedures be finalized at least 180 days prior to issuance of an associated standards proposal. DOE recognizes that in certain cases a delay between finalization of a test procedure and issuance of a standards proposal is necessary for stakeholders to gain familiarity with the new test procedure before having to comment on proposed standards. However, that is not the case for all of DOE's test procedure rulemakings, such as those instances where DOE makes minor, technical amendments to the test procedure that do not affect measured energy use or efficiency. In such cases, there is no need to delay a standards proposal for 180 days, especially when DOE is striving to meet rulemaking deadlines and facing lawsuits regarding missed rulemaking deadlines.

AHRI also disagreed with DOE's statement that appendix A is best described and utilized as generally applicable guidance that may guide, but not bind, the Department's rulemaking process. AHRI stated that the modifications proposed in the April 2021 NOPR are not enough to render appendix A as an interpretive rule that is not binding on DOE and does not require notice and comment rulemaking procedures. AHRI went on to state that appendix A promulgates rules governing specific contexts such that it amounts to an exhaustive framework designed to cabin its discretion. (AHRI, No. 25 at pp. 11–12)

DOE disagrees with AHRI's characterization of the revisions made to appendix A in this document. As DOE has made clear throughout the April 2021 NOPR and this document, the purpose of these revisions to appendix A is to ensure that DOE is not bound by a rigid, one-size-fits-all rulemaking process that does not account for the specific circumstances of a rulemaking. This rule does not cabin DOE's discretion. Instead, this rule restores DOE's discretion to tailor its rulemaking processes to, among things, avoid unnecessary delays and burdens on the Department's rulemaking resources.

Finally, AHRI also argued that DOE's proposal did not consider the regulated community's reliance on the February 2020 Final Rule's procedures in the context of ongoing proceedings for test procedures and energy conservation standards. In its view, the regulated community has a significant interest in both the regulations relating to test procedures and energy conservation standards that DOE develops, as well as the process in promulgating those regulations. These regulatory actions, it argued, trigger a complex series of

[17] *See* ''Energy Conservation Program: Energy Conservation Standards for Certain Commercial and Industrial Equipment; Early Assessment Review; Refrigerated Bottled or Canned Beverage Vending Machines,'' 85 FR 35394 (June 10, 2020); ''Energy Conservation Program: Test Procedures for Certain Commercial and Industrial Equipment; Early Assessment Review; Pumps,'' 85 FR 60734 (Sept. 28, 2020).

business and governance decisions by the regulated community requiring precise planning and budgeting to respond to those actions. AHRI argued that by proposing to rescind appendix A six months after the rule itself took effect and without addressing concerns related to the regulated community's efforts to prepare for adjustments related to the February and August 2020 Final Rules, DOE has not considered these serious reliance interests. (AHRI, No. 25 at p. 12) Citing *Nat'l Urban League* v. *Ross,* 977 F.3d 770 (9th Cir. 2020), AHRI emphasized that there is no specific length of time for which a rule must have been in place for serious reliance interests to exist, and in certain cases, a shorter period of time may be sufficient to create those interests in light of the surrounding circumstances. (AHRI, No. 25 at pp. 12–13) As a result, AHRI argued that given the link between test procedures and standards—including the process by which DOE develops them—and the regulated community's critical organizational and financial obligations to achieve compliance, it has clearly demonstrated that the regulated entities have serious reliance interests in the February 2020 Final Rule. (AHRI, No. 25 at p. 13)

DOE notes that AHRI's stated reliance interests are general in nature, and at no point does AHRI detail with any specificity what those specific reliance interests are or their extent. While it is true that, at the time of the NOPR's publication, appendix A in its current form had been in effect for a six-month period, this fact alone, in spite of AHRI's views to the contrary, does not lend itself towards establishing a particularly strong reliance interest. When coupled with DOE's clearly stated intention to further modify appendix A to enhance DOE's flexibility in addressing the considerable rulemaking obligations imposed by EPCA, any purported reliance interest that interested parties may claim to have regarding the various provisions that DOE sought to make in its April 2021 proposal—and that are being finalized in this document—are further diminished.[18]

To elaborate on these points, DOE notes that in establishing its reliance interests, AHRI relied upon bare assertions to that effect. Thus, DOE has been presented with no credible evidence of the reliance interests or impacts at stake as a result of DOE's change to appendix A. *See, Kiewit Power Construction* v. *Sec'y, Department of Labor,* 959 F.3d 381, 399 (D.C. Cir. 2020) (noting the absence of reliance concerns where a regulation existed for less than four months). *Compare, Encino Motorcars* v. *Navarro,* 126 S. Ct. 2117, 2126–2127 (2016) (finding reliance interests on the part of regulated employers were implicated in an agency's attempt to change that agency's decades-old approach in an opposite manner). Moreover, to the extent that reliance interests may exist, DOE does not believe that, based on the current record, these reliance interests were as significant as AHRI claims. If such reliance interest did exist and were as significant as AHRI claims, DOE expects that the commenter would have demonstrated such reliance with some particularity, but AHRI did not. Presumably, reliance interests could not form until such time as DOE finalized its changes to appendix A; at earliest, the clock could have started February 14, 2020, but even then, stakeholders knew that at least one important aspect of appendix A (*i.e.,* the comparative analysis of potential standard levels) was still undergoing ongoing rulemaking, with such provision not being finalized until August 19, 2020. Further, Executive Order 13990, which directed DOE to consider suspending, revising, or rescinding the February and August 2020 Final Rules, was issued on January 20, 2021. Given that DOE once again proposed changes to appendix A on April 12, 2021, the intervening period arguably left very little time for significant reliance interests to develop or strongly attach. Furthermore, as evidenced by the earlier review/revision process for appendix A, stakeholders were aware that DOE's internal procedures are subject to change, and such fact should have tempered their reliance expectations.

DOE also notes that in those instances where rulemakings are currently underway, the Department is following the existing requirements of appendix A by providing early assessment requests for information to the public to help DOE decide its next steps with respect to test procedure and energy conservation standard rulemaking activities—thereby mitigating any harm to the reliance interests of interested parties. DOE also notes that interested parties will have a transition period (the 30 days between publication of this final rule and its effective date) in which to adjust to the application of the version of appendix A being adopted in this final rule. Consequently, under the current set of circumstances, DOE has seen no evidence of ''serious reliance interests'' regarding a rule that governed DOE's rulemaking procedures and was only in effect for 6 months. *See, FCC* v. *Fox Television,* 556 U.S. 502, 514–15 (2009) (noting an agency need not conduct a more searching review beyond explaining its reasons for reversing course and accounting for any ''serious reliance interests'' that may be present). And assuming *arguendo* that some limited reliance interests were found to exist, the agency has clearly stated its reasons regarding the need to change course consistent with and in light of the Department's EPCA obligations.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866

This regulatory action is a significant regulatory action under section 3(f)(4) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this final regulatory action was subject to review under the Executive order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

The revisions contained in this final regulatory action are procedural changes designed to improve DOE's ability to meet its rulemaking obligations and deadlines under EPCA. These revisions would not impose any regulatory costs or burdens on stakeholders, nor would they limit public participation in DOE's rulemaking process. Instead, these revisions would allow DOE to tailor its rulemaking processes to fit the facts and circumstances of a particular rulemaking for a covered product or equipment.

DOE currently has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and is typically working on anywhere from 50 to 100 rulemakings (for both energy conservation standards and test procedures) at any one time. Further, these rulemakings are all subject to deadlines. Typically, review cycles for energy conservation standards and test procedures for covered products are 6 and 7 years, respectively.

[18] The effective date for the August 2020 Final Rule was October 19, 2020, and a NOPR proposing changes to appendix A was published in the **Federal Register** on April 12, 2021. Consequently, while nearly a year has passed since the promulgation of appendix A's stricter requirements, the public—including all interested industry parties—have been on notice since the release of the April 2021 NOPR as to DOE's intentions to modify these requirements. As such, stakeholders have been accorded lead time to modify their expectations and plans regarding the prospective functioning of DOE's regulatory process for the Appliance Standards Program and any reliance on them have been necessarily diminished.

(42 U.S.C. 6295(m)(1); 42 U.S.C. 6293(b)(1)) Additionally, if DOE decides not to amend an energy conservation standard for a covered product, the subsequent review cycle is shortened to 3 years. (42 U.S.C. 6295(m)(3)(B)) It is challenging to meet these cyclical deadlines for more than 60 categories of covered products and equipment. In fact, as previously discussed, DOE is currently facing two lawsuits that allege DOE has failed to meet rulemaking deadlines for 25 different consumer products and commercial equipment. In order to meet these rulemaking deadlines, DOE cannot afford the inefficiencies that come with a one-size-fits-all rulemaking approach. For example, having to issue an early assessment RFI followed by an ANOPR to collect early stakeholder input when a NODA would accomplish the same purpose unnecessarily lengthens the rulemaking process and wastes limited DOE resources. Similarly, having to delay issuance of a proposed energy conservation standard for 180 days because of a minor modification to a test procedure makes it more difficult for DOE to meet rulemaking deadlines, while offering no benefit to stakeholders. The revisions contained in this document allow DOE to eliminate these types of inefficiencies that lengthen the rulemaking process and waste DOE resources, while not affecting the ability of the public to participate in the rulemaking process. Eliminating inefficiencies that lengthen the rulemaking process allows DOE to more quickly develop energy conservation standards that deliver the environmental benefits, including reductions in greenhouse gas emissions, that DOE is directed to implement under E.O. 13990. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the greater the resulting energy savings and environmental benefits.

Further, the revisions contained in this document would not dictate any particular rulemaking outcome in an energy conservation standard or test procedure rulemaking. DOE will continue to calculate the regulatory costs and benefits of new and amended energy conservation standards and test procedures issued under EPCA in future, individual rulemakings.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website at: *https://energy.gov/gc/office-general-counsel.*

This final rule details generally applicable guidance that may guide, but not bind, the Department's rulemaking process. The revisions are intended to improve DOE's ability to meet the obligations and deadlines outlined in EPCA by allowing DOE to tailor its rulemaking procedures to fit the specific facts and circumstances of a particular covered product or equipment, while not affecting the ability of any interested person, including small entities, to participate in DOE's rulemaking process. Because this final rule imposes no regulatory obligations on the public, including small entities, and does not affect the ability of any interested person, including small entities, to participate in DOE's rulemaking process, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no final regulatory flexibility analysis is required. *Mid-Tex Elec. Co-Op, Inc.* v. *F.E.R.C.,* 773 F.2d 327 (1985).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Specifically, this final rule, addressing clarifications to appendix A itself, does not contain any collection of information requirement or revisions to existing information collections that would trigger the PRA.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this proposed action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. DOE has also determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A6 because it is strictly procedural and meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an Environmental Assessment or an Environmental Impact Statement.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing

policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final 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. It will primarily affect the procedure by which DOE develops proposed rules to revise energy conservation standards and test procedures. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. 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. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at *https://www.energy.gov/gc/office-general-counsel* under ''Guidance & Opinions'' (Rulemaking)) DOE examined this final rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

H. 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 final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this final rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed

statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE concluded that the regulatory action in this document, which makes clarifications to appendix A that guides the Department in proposing energy conservation standards is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this final rule.

L. Review Consistent With OMB's Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report,'' dated February 2007, has been disseminated and is available at the following website: *www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.* Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. The results from that review are expected later in 2021.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final 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, Test procedures.

Signing Authority

This document of the Department of Energy was signed on November 19, 2021 by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for 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 November 19, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Appendix A to subpart C of part 430 is revised to read as follows:

Appendix A to Subpart C of Part 430—Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment

1. Objectives

This appendix establishes procedures, interpretations, and policies to guide the Department of Energy (''DOE'' or the ''Department'') in the consideration and promulgation of new or revised appliance energy conservation standards and test procedures under the Energy Policy and Conservation Act (EPCA). This appendix applies to both covered consumer products and covered commercial/industrial equipment. The Department's objectives in establishing these procedures include:

(a) *Provide for early input from stakeholders.* The Department seeks to provide opportunities for public input early in the rulemaking process so that the initiation and direction of rulemakings is informed by comment from interested parties. DOE will be able to seek early input from interested parties in determining whether establishing new or amending existing energy conservation standards will result in significant savings of energy and is economically justified and technologically feasible. In the context of test procedure rulemakings, DOE will be able to seek early input from interested parties in determining whether—

(1) Establishing a new or amending an existing test procedure will better measure the energy efficiency, energy use, water use (as specified in EPCA), or estimated annual

operating cost of a covered product/equipment during a representative average use cycle or period of use (for consumer products); and

(2) Will not be unduly burdensome to conduct.

(b) *Increase predictability of the rulemaking timetable.* The Department seeks to make informed, strategic decisions about how to deploy its resources on the range of possible standards and test procedure development activities, and to announce these prioritization decisions so that all interested parties have a common expectation about the timing of different rulemaking activities. Further, DOE will offer the opportunity to provide input on the prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring.

(c) *Eliminate problematic design options early in the process.* The Department seeks to eliminate from consideration, early in the process, any design options that present unacceptable problems with respect to manufacturability, consumer utility, or safety, so that the detailed analysis can focus only on viable design options. DOE will be able to eliminate from consideration design options if it concludes that manufacture, installation or service of the design will be impractical, or that the design option will have a material adverse impact on the utility of the product, or if the design option will have a material adverse impact on safety or health. DOE will also be able to eliminate from consideration proprietary design options that represent a unique pathway to achieving a given efficiency level. This screening will be done at the outset of a rulemaking.

(d) *Fully consider non-regulatory approaches.* The Department seeks to understand the effects of market forces and voluntary programs on encouraging the purchase of energy efficient products so that the incremental impacts of a new or revised standard can be accurately assessed and the Department can make informed decisions about where standards and voluntary programs can be used most effectively. DOE will continue to be able to support voluntary efforts by manufacturers, retailers, utilities, and others to increase product/equipment efficiency.

(e) *Conduct thorough analysis of impacts.* In addition to understanding the aggregate social and private costs and benefits of standards, the Department seeks to understand the distribution of those costs and benefits among consumers, manufacturers, and others, as well as the uncertainty associated with these analyses of costs and benefits, so that any adverse impacts on subgroups and uncertainty concerning any adverse impacts can be fully considered in selecting a standard. DOE will be able to consider the variability of impacts on significant groups of manufacturers and consumers in addition to aggregate social and private costs and benefits, report the range of uncertainty associated with these impacts, and take into account cumulative impacts of regulation on manufacturers. The Department will also be able to conduct appropriate analyses to assess the impact that new or amended test procedures will have on manufacturers and consumers.

(f) *Use transparent and robust analytical methods.* The Department seeks to use qualitative and quantitative analytical methods that are fully documented for the public and that produce results that can be explained and reproduced, so that the analytical underpinnings for policy decisions on standards are as sound and well-accepted as possible.

(g) *Support efforts to build consensus on standards.* The Department seeks to encourage development of consensus proposals, including proposals developed in accordance with the Negotiated Rulemaking Act (5 U.S.C. 561 *et seq.*), for new or revised standards because standards with such broad-based support are likely to balance effectively the various interests affected by such standards.

2. Scope

The procedures, interpretations, and policies described in this appendix apply to rulemakings concerning new or revised Federal energy conservation standards and test procedures, and related rule documents (*i.e.,* coverage determinations) for consumer products in Part A and commercial and industrial equipment under Part A–1 of the Energy Policy and Conservation Act (EPCA), as amended, except covered ASHRAE equipment in Part A–1 are governed separately under section 9 in this appendix.

3. Application

(a) This appendix contains procedures, interpretations, and policies that are generally applicable to the development of energy conservation standards and test procedures. The Department may, as necessary, deviate from this appendix to account for the specific circumstances of a particular rulemaking. In those instances where the Department may find it necessary or appropriate to deviate from these procedures, interpretations or policies, DOE will provide interested parties with notice of the deviation and an explanation.

(b) If the Department concludes that changes to the procedures, interpretations or policies in this appendix are necessary or appropriate, DOE will provide notice in the **Federal Register** of modifications to this appendix with an accompanying explanation. DOE expects to consult with interested parties prior to any such modification.

(c) This appendix is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity.

4. Setting Priorities for Rulemaking Activity

(a) In establishing its priorities for undertaking energy conservation standards and test procedure rulemakings, DOE will consider the following factors, consistent with applicable legal obligations:

(1) Potential energy savings;

(2) Potential social and private, including environmental or energy security, benefits;

(3) Applicable deadlines for rulemakings;

(4) Incremental DOE resources required to complete the rulemaking process;

(5) Other relevant regulatory actions affecting the products/equipment;

(6) Stakeholder recommendations;

(7) Evidence of energy efficiency gains in the market absent new or revised standards;

(8) Status of required changes to test procedures; and

(9) Other relevant factors.

(b) DOE will offer the opportunity to provide input on prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring.

5. Coverage Determination Rulemakings

(a) DOE has discretion to conduct proceedings to determine whether additional consumer products and commercial/industrial equipment should be covered under EPCA if certain statutory criteria are met. (42 U.S.C. 6292 and 42 U.S.C. 6295(l) for consumer products; 42 U.S.C. 6312 for commercial/industrial equipment)

(b) If DOE determines to initiate the coverage determination process, it will first publish a notice of proposed determination, providing an opportunity for public comment of not less than 60 days, in which DOE will explain how such products/equipment that it seeks to designate as ''covered'' meet the statutory criteria for coverage and why such coverage is ''necessary or appropriate'' to carry out the purposes of EPCA. In the case of commercial equipment, DOE will follow the same process, except that the Department must demonstrate that coverage of the equipment type is ''necessary'' to carry out the purposes of EPCA.

(c) DOE will publish its final decision on coverage as a separate notice, an action that will be completed prior to the initiation of any test procedure or energy conservation standards rulemaking (*i.e.,* DOE will not issue any Requests for Information (RFIs), Notices of Data Availability (NODAs), or any other mechanism to gather information for the purpose of initiating a rulemaking to establish a test procedure or energy conservation standard for the proposed covered product/equipment prior to finalization of the coverage determination). If DOE determines that coverage is warranted, DOE will proceed with its typical rulemaking process for both test procedures and standards. Specifically, DOE will finalize coverage for a product/equipment at least 180 days prior to publication of a proposed rule to establish a test procedure.

(d) If, during the substantive rulemaking proceedings to establish test procedures or energy conservation standards after completing a coverage determination, DOE finds it necessary and appropriate to expand or reduce the scope of coverage, a new coverage determination process will be initiated and finalized prior to moving forward with the test procedure or standards rulemaking.

6. Process for Developing Energy Conservation Standards

This section describes the process to be used in developing energy conservation standards for covered products and equipment other than those covered equipment subject to ASHRAE/IES Standard 90.1.

(a) *Early assessment*—(1) *Initiating the rulemaking process.* As the first step in any proceeding to consider establishing or amending any energy conservation standard, DOE will publish a document in the **Federal Register** announcing that DOE is considering initiating a rulemaking proceeding. As part of that document, DOE will solicit submission of related comments, including data and information on whether DOE should proceed with the rulemaking, including whether any new or amended rule would be cost effective, economically justified, technologically feasible, or would result in a significant savings of energy. Based on the information received in response to the notice and its own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended energy conservation standard or an amended test procedure. If DOE determines that a new or amended standard would not satisfy applicable statutory criteria, DOE would engage in notice and comment rulemaking to issue a determination that a new or amended standard is not warranted. If DOE receives sufficient information suggesting it could justify a new or amended standard or the information received is inconclusive with regard to the statutory criteria, DOE would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard, as discussed further in paragraph (a)(2) of this section.

(2) *Preliminary rulemaking documents.* If the Department determines it is appropriate to proceed with a rulemaking, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a Framework Document and Preliminary Analysis, or an Advance Notice of Proposed Rulemaking (ANOPR). Requests for Information (RFI) and Notices of Data Availability (NODA) could be issued, as appropriate, in addition to these preliminary stage documents.

(3) *Continued evaluation of statutory criteria.* In those instances where the early assessment either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, and DOE undertakes the preliminary stages of a rulemaking to establish or amend an energy conservation standard, DOE may still ultimately determine that such a standard is not economically justified, technologically feasible or would not result in a significant savings of energy. Therefore, DOE will examine the potential costs and benefits and energy savings potential of a new or amended energy conservation standard at the preliminary stage of the rulemaking. DOE notes that it will, consistent with its statutory obligations, consider both cost effectiveness and economic justification when issuing a determination not to amend a standard.

(b) *Design options*—(1) *General.* Once the Department has initiated a rulemaking for a specific product/equipment but before publishing a proposed rule to establish or amend standards, DOE will typically identify the product/equipment categories and design options to be analyzed in detail, as well as those design options to be eliminated from further consideration. During the pre-proposal stages of the rulemaking, interested parties may be consulted to provide information on key issues through a variety of rulemaking documents. The preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a framework document and preliminary analysis, or an advance notice of proposed rulemaking (ANOPR). Requests for Information (RFI) and Notice of Data Availability (NODA) could also be issued, as appropriate.

(2) *Identification and screening of design options.* During the pre-NOPR phase of the rulemaking process, the Department will typically develop a list of design options for consideration. Initially, the candidate design options will encompass all those technologies considered to be technologically feasible. Following the development of this initial list of design options, DOE will review each design option based on the factors described in paragraph (b)(3) of this section and the policies stated in section 7 of this Appendix (*i.e.,* Policies on Selection of Standards). The reasons for eliminating or retaining any design option at this stage of the process will be fully documented and published as part of the NOPR and as appropriate for a given rule, in the pre-NOPR documents. The technologically feasible design options that are not eliminated in this screening will be considered further in the Engineering Analysis described in paragraph (c) of this section.

(3) *Factors for screening of design options.* The factors for screening design options include:

(i) *Technological feasibility.* Technologies incorporated in commercial products or in working prototypes will be considered technologically feasible.

(ii) *Practicability to manufacture, install and service.* If mass production of a technology under consideration for use in commercially-available products (or equipment) and reliable installation and servicing of the technology could be achieved on the scale necessary to serve the relevant market at the time of the effective date of the standard, then that technology will be considered practicable to manufacture, install and service.

(iii) *Adverse Impacts on Product Utility or Product Availability.*

(iv) *Adverse Impacts on Health or Safety.*

(v) *Unique-Pathway Proprietary Technologies.* Unique-Pathway Proprietary Technologies. If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further.

(c) *Engineering analysis of design options and selection of candidate standard levels.* After design options are identified and screened, DOE will perform the engineering analysis and the benefit/cost analysis and select the candidate standard levels based on these analyses. The results of the analyses will be published in a Technical Support Document (TSD) to accompany the appropriate rulemaking documents.

(1) *Identification of engineering analytical methods and tools.* DOE will select the specific engineering analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the design options identified as a result of the screening analysis.

(2) *Engineering and life-cycle cost analysis of design options.* DOE and its contractor will perform engineering and life-cycle cost analyses of the design options.

(3) *Review by stakeholders.* Interested parties will have the opportunity to review the results of the engineering and life-cycle cost analyses. If appropriate, a public workshop will be conducted to review these results. The analyses will be revised as appropriate on the basis of this input.

(4) *New information relating to the factors used for screening design options.* If further information or analysis leads to a determination that a design option, or a combination of design options, has unacceptable impacts, that design option or combination of design options will not be included in a candidate standard level.

(5) *Selection of candidate standard levels.* Based on the results of the engineering and life-cycle cost analysis of design options and the policies stated in paragraph (b) of this section, DOE will select the candidate standard levels for further analysis.

(d) *Pre-NOPR Stage*—(1) *Documentation of decisions on candidate standard selection.*

(i) *New or amended standards.* If the early assessment and screening analysis indicates that continued development of a standard is appropriate, the Department will publish either:

(A) A notice accompanying a framework document and, subsequently, a preliminary analysis or;

(B) An ANOPR. The notice document will be published in the **Federal Register**, with accompanying documents referenced and posted in the appropriate docket.

(ii) *No new or amended standards.* If DOE determines at any point in the pre-NOPR stage that no candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified or constitute significant energy savings, that conclusion will be announced in the **Federal Register** with an opportunity for public comment provided to stakeholders. In such cases, the Department will proceed with a rulemaking that proposes not to adopt new or amended standards.

(2) *Public comment and hearing.* The length of the public comment period for pre-NOPR rulemaking documents will vary depending upon the circumstances of the particular rulemaking, but will not be less than 75 calendar days. For such documents, DOE will determine whether a public hearing is appropriate.

(3) *Revisions based on comments.* Based on consideration of the comments received, any necessary changes to the engineering analysis or the candidate standard levels will be made.

(e) *Analysis of impacts and selection of proposed standard level.* After the pre-NOPR stage, if DOE has determined preliminarily that a candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified or

constitute significant energy savings, economic analyses of the impacts of the candidate standard levels will be conducted. The Department will propose new or amended standards based on the results of the impact analysis.

(1) *Identification of issues for analysis.* The Department, in consideration of comments received, will identify issues that will be examined in the impacts analysis.

(2) *Identification of analytical methods and tools.* DOE will select the specific economic analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the candidate standard levels.

(3) *Analysis of impacts.* DOE will conduct the analysis of the impacts of candidate standard levels.

(4) *Factors to be considered in selecting a proposed standard.* The factors to be considered in selection of a proposed standard include:

(i) *Impacts on manufacturers.* The analysis of private manufacturer impacts will include: Estimated impacts on cash flow; assessment of impacts on manufacturers of specific categories of products/equipment and small manufacturers; assessment of impacts on manufacturers of multiple product-specific Federal regulatory requirements, including efficiency standards for other products and regulations of other agencies; and impacts on manufacturing capacity, plant closures, and loss of capital investment.

(ii) *Private impacts on consumers.* The analysis of consumer impacts will include: Estimated private energy savings impacts on consumers based on national average energy prices and energy usage; assessments of impacts on subgroups of consumers based on major regional differences in usage or energy prices and significant variations in installation costs or performance; sensitivity analyses using high and low discount rates reflecting both private transactions and social discount rates and high and low energy price forecasts; consideration of changes to product utility, changes to purchase rate of products, and other impacts of likely concern to all or some consumers, based to the extent practicable on direct input from consumers; estimated life-cycle cost with sensitivity analysis; consideration of the increased first cost to consumers and the time required for energy cost savings to pay back these first costs; and loss of utility.

(iii) *Impacts on competition.* The analysis of impacts on competition will include an industry concentration analysis.

(iv) *Impacts on utilities.* The analysis of utility impacts will include estimated marginal impacts on electric and gas utility costs and revenues.

(v) *National energy, economic, and employment impacts.* The analysis of national energy, economic, and employment impacts will include: Estimated energy savings by fuel type; estimated net present value of benefits to all consumers; and estimates of the direct and indirect impacts on employment by appliance manufacturers, relevant service industries, energy suppliers, suppliers of complementary and substitution products, and the economy in general.

(vi) *Impacts on the environment.* The analysis of environmental impacts will include estimated impacts on emissions of carbon and relevant criteria pollutants, and impacts on pollution control costs.

(vii) *Impacts of non-regulatory approaches.* The analysis of energy savings and consumer impacts will incorporate an assessment of the impacts of market forces and existing voluntary programs in promoting product/equipment efficiency, usage, and related characteristics in the absence of updated efficiency standards.

(viii) *New information relating to the factors used for screening design options.*

(f) *Notice of proposed rulemaking*—(1) *Documentation of decisions on proposed standard selection.* The Department will publish a NOPR in the **Federal Register** that proposes standard levels and explains the basis for the selection of those proposed levels, and will post on its website a draft TSD documenting the analysis of impacts. The draft TSD will also be posted in the appropriate docket on *www.regulations.gov.* As required by 42 U.S.C. 6295(p)(1) of EPCA, the NOPR also will describe the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards.

(2) *Public comment and hearing.* There will be not less than 75 days for public comment on the NOPR, with at least one public hearing or workshop. (42 U.S.C. 6295(p)(2) and 42 U.S.C. 6306).

(3) *Revisions to impact analyses and selection of final standard.* Based on the public comments received, DOE will review the proposed standard and impact analyses, and make modifications as necessary. If major changes to the analyses are required at this stage, DOE will publish a Supplemental Notice of Proposed Rulemaking (SNOPR), when required. DOE may also publish a NODA or RFI, where appropriate.

(g) *Final rule.* The Department will publish a Final Rule in the **Federal Register** that promulgates standard levels, responds to public comments received on the NOPR, and explains how the selection of those standards meets the statutory requirement that any new or amended energy conservation standard produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and constitutes significant energy savings, accompanied by a final TSD.

7. Policies on Selection of Standards

(a) *Purpose.* Section 6 describes the process that will be used to consider new or revised energy efficiency standards and lists a number of factors and analyses that will be considered at specified points in the process. Department policies concerning the selection of new or revised standards, and decisions preliminary thereto, are described in this section. These policies are intended to elaborate on the statutory criteria provided in 42 U.S.C. 6295. The procedures described in this section are intended to assist the Department in making the determinations required by EPCA and do not preclude DOE's consideration of any other information consistent with the relevant statutory criteria. The Department will consider pertinent information in determining whether a new or revised standard is consistent with the statutory criteria.

(b) *Screening design options.* These factors will be considered as follows in determining whether a design option will receive any further consideration:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially-viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have significant adverse impact on the utility of the product/equipment to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology will have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

(c) *Identification of candidate standard levels.* Based on the results of the engineering and cost/benefit analyses of design options, DOE will identify the candidate standard levels for further analysis. Candidate standard levels will be selected as follows:

(1) *Costs and savings of design options.* Design options that have payback periods that exceed the median life of the product or which result in life-cycle cost increases relative to the base case, using typical fuel costs, usage, and private discount rates, will not be used as the basis for candidate standard levels.

(2) *Further information on factors used for screening design options.* If further information or analysis leads to a determination that a design option, or a combination of design options, has unacceptable impacts under the policies stated in this Appendix, that design option or combination of design options will not be included in a candidate standard level.

(3) *Selection of candidate standard levels.* Candidate standard levels, which will be identified in the pre-NOPR documents and on which impact analyses will be conducted, will be based on the remaining design options.

(i) The range of candidate standard levels will typically include:

(A) The most energy-efficient combination of design options;

(B) The combination of design options with the lowest life-cycle cost; and

(C) A combination of design options with a payback period of not more than three years.

(ii) Candidate standard levels that incorporate noteworthy technologies or fill in large gaps between efficiency levels of other candidate standard levels also may be selected.

(d) *Pre-NOPR Stage.* New information provided in public comments on any pre-NOPR documents will be considered to determine whether any changes to the candidate standard levels are needed before proceeding to the analysis of impacts.

(e)(1) *Selection of proposed standard.* Based on the results of the analysis of impacts, DOE will select a standard level to be proposed for public comment in the NOPR. As required under 42 U.S.C. 6295(o)(2)(A), any new or revised standard must be designed to achieve the maximum improvement in energy efficiency that is determined to be both technologically feasible and economically justified.

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

(i) A trial standard level will not be proposed or promulgated if the Department determines that it is not both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) For a trial standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the factors listed in 42 U.S.C. 6295(o)(2)(B)(i). A standard level is subject to a rebuttable presumption that it is economically justified if the payback period is three years or less. (42 U.S.C. 6295(o)(2)(B)(iii))

(ii) If the Department determines that interested persons have established by a preponderance of the evidence that a standard level is likely to result in the unavailability in the United States of any covered product/equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time of the determination, then that standard level will not be proposed. (42 U.S.C. 6295(o)(4))

(iii) If the Department determines that a standard level would not result in significant conservation of energy, that standard level will not be proposed. (42 U.S.C. 6295(o)(3)(B))

(f) *Selection of a final standard.* New information provided in the public comments on the NOPR and any analysis by the Department of Justice concerning impacts on competition of the proposed standard will be considered to determine whether issuance of a new or amended energy conservation standard produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and still constitutes significant energy savings or whether any change to the proposed standard level is needed before proceeding to the final rule. The same policies used to select the proposed standard level, as described in this section, will be used to guide the selection of the final standard level or a determination that no new or amended standard is justified.

8. Test Procedures

(a) *General.* As with the early assessment process for energy conservation standards, DOE believes that early stakeholder input is also very important during test procedure rulemakings. DOE will follow an early assessment process similar to that described in the preceding sections discussing DOE's consideration of amended energy conservation standards. Consequently, DOE will publish a notice in the **Federal Register** whenever DOE is considering initiation of a rulemaking to amend a test procedure. In that notice, DOE will request submission of comments, including data and information on whether an amended test procedure rule would:

(1) *Measurements.* More accurately measure energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product during a representative average use cycle or period of use without being unduly burdensome to conduct; or

(2) *Reduce testing burden.* DOE will review comments submitted and, subject to statutory obligations, determine whether it agrees with the submitted information. If DOE determines that an amended test procedure is not justified at that time, it will not pursue the rulemaking and will publish a notice in the **Federal Register** to that effect. If DOE receives sufficient information suggesting an amended test procedure could more accurately measure energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct, reduce testing burden, or the information received is inconclusive with regard to these points, DOE would undertake the preliminary stages of a rulemaking to amend the test procedure, as discussed further in the paragraphs that follow in this section.

(b) *Identifying the need to modify test procedures.* DOE will identify any necessary modifications to established test procedures prior to initiating the standards development process. It will consider all stakeholder comments with respect to needed test procedure modifications. If DOE determines that it is appropriate to continue the test procedure rulemaking after the early assessment process, it would provide further opportunities for early public input through **Federal Register** documents, including NODAs and/or RFIs.

(c) *Adoption of Industry Test Methods.* DOE will adopt industry test procedure standards as DOE test procedures for covered products and equipment, but only if DOE determines that such procedures would not be unduly burdensome to conduct and would produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that equipment during a representative average use cycle. DOE may also adopt industry test procedure standards with modifications, or craft its own procedures as necessary to ensure compatibility with the relevant statutory requirements, as well as DOE's compliance, certification, and enforcement requirements.

(d) *Issuing final test procedure*—(1) *Process.* Test procedure rulemakings establishing methodologies used to evaluate proposed energy conservation standards will be finalized prior to publication of a NOPR proposing new or amended energy conservation standards. Except as provided in paragraph (d)(2) of this section, new test procedures and amended test procedures that impact measured energy use or efficiency will be finalized at least 180 days prior to the close of the comment period for:

(i) A NOPR proposing new or amended energy conservation standards; or

(ii) A notice of proposed determination that standards do not need to be amended. With regards to amended test procedures, DOE will state in the test procedure final rule whether the amendments impact measured energy use or efficiency.

(2) *Exceptions.* The 180-day period for new test procedures and amended test procedures that impact measured energy use or efficiency specified in paragraph (d)(1) of this section is not applicable to:

(i) Test procedures developed in accordance with the Negotiated Rulemaking Act or 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; or

(ii) Test procedure amendments limited to calculation changes (*e.g.,* use factor or adder). Parties submitting a consensus recommendation in accordance with paragraph (i) of this section may specify a time period between finalization of the test procedure and the close of the comment for a NOPR proposing new or amended energy conservation standards or a notice of proposed determination that standards do not need to be amended.

(e) *Effective Date of Test Procedures.* If required only for the evaluation and issuance of updated efficiency standards, use of the modified test procedures typically will not be required until the implementation date of updated standards.

9. ASHRAE Equipment

(a) EPCA provides that ASHRAE equipment are subject to unique statutory requirements and their own set of timelines. More specifically, pursuant to EPCA's statutory scheme for covered ASHRAE equipment, DOE is required to consider amending the existing Federal energy conservation standards and test procedures for certain enumerated types of commercial and industrial equipment (generally, commercial water heaters, commercial packaged boilers, commercial air-conditioning and heating equipment, and packaged terminal air conditioners and heat pumps) when ASHRAE Standard 90.1 is amended with respect to standards and test procedures applicable to such equipment. Not later than 180 days after the amendment of the standard, the Secretary will publish in the **Federal Register** for public comment an

analysis of the energy savings potential of amended energy efficiency standards. For each type of equipment, EPCA directs that if ASHRAE Standard 90.1 is amended, not later than 18 months after the date of publication of the amendment to ASHRAE Standard 90.1, DOE must adopt amended energy conservation standards at the new efficiency level in ASHRAE Standard 90.1 as the uniform national standard for such equipment, or amend the test procedure referenced in ASHRAE Standard 90.1 for the equipment at issue to be consistent with the applicable industry test procedure, respectively, unless—

(1) DOE determines by rule, and supported by clear and convincing evidence, that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified; or

(2) The test procedure would not meet the requirements for such test procedures specified in EPCA. In such case, DOE must adopt the more stringent standard not later than 30 months after the date of publication of the amendment to ASHRAE/IES Standard 90.1 for the affected equipment.

(b) For ASHRAE equipment, DOE will adopt the revised ASHRAE levels or the industry test procedure, as contemplated by EPCA, except in very limited circumstances. With respect to DOE's consideration of standards more-stringent than the ASHRAE levels or changes to the industry test procedure, DOE will do so only if it can meet a very high bar to demonstrate the ''clear and convincing evidence'' threshold. Clear and convincing evidence would exist only where the specific facts and data made available to DOE regarding a particular ASHRAE amendment demonstrates that there is no substantial doubt that a standard more stringent than that contained in the ASHRAE Standard 90.1 amendment is permitted because it would result in a significant additional amount of energy savings, is technologically feasible and economically justified, or, in the case of test procedures, that the industry test procedure does not meet the EPCA requirements. DOE will make this determination only after seeking data and information from interested parties and the public to help inform the Agency's views. DOE will seek from interested stakeholders and the public data and information to assist in making this determination, prior to publishing a proposed rule to adopt more-stringent standards or a different test procedure.

(c) DOE's review in adopting amendments based on an action by ASHRAE to amend Standard 90.1 is strictly limited to the specific standards or test procedure amendment for the specific equipment for which ASHRAE has made a change (*i.e.,* determined down to the equipment class level). DOE believes that ASHRAE not acting to amend Standard 90.1 is tantamount to a decision that the existing standard remain in place. Thus, when undertaking a review as required by 42 U.S.C. 6313(a)(6)(C), DOE would need to find clear and convincing evidence, as defined in this section, to issue a standard more stringent than the existing standard for the equipment at issue.

10. Direct Final Rules

In accordance with 42 U.S.C. 6295(p)(4), on receipt of a joint proposal, including a consensus recommendation developed in accordance with the Negotiated Rulemaking Act (5 U.S.C. 561 *et seq.*), that is submitted by interested persons that are fairly representative of relevant points of view, DOE may issue a direct final rule (DFR) establishing energy conservation standards for a covered product or equipment if DOE determines the recommended standard is in accordance with 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B) as applicable. To be ''fairly representative of relevant points of view'' the group submitting a joint statement must, where appropriate, include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, consumers, and States. However, it will be necessary to evaluate the meaning of ''fairly representative'' on a case-by-case basis, subject to the circumstances of a particular rulemaking, to determine whether fewer or additional parties must be part of a joint statement in order to be ''fairly representative of relevant points of view.''

11. Principles for Distinguishing Between Effective and Compliance Dates

(a) *Dates, generally.* The effective and compliance dates for either DOE test procedures or DOE energy conservation standards are typically not identical, and these terms should not be used interchangeably.

(b) *Effective date.* The effective date is the date a rule is legally operative after being published in the **Federal Register**.

(c) *Compliance date.* (1) For test procedures, the compliance date is the specific date when manufacturers are required to use the new or amended test procedure requirements to make representations concerning the energy efficiency or use of a product, including certification that the covered product/equipment meets an applicable energy conservation standard.

(2) For energy conservation standards, the compliance date is the specific date upon which manufacturers are required to meet the new or amended standards for applicable covered products/equipment that are distributed in interstate commerce.

12. Principles for the Conduct of the Engineering Analysis

(a) The purpose of the engineering analysis is to develop the relationship between efficiency and cost of the subject product/equipment. The Department will use the most appropriate means available to determine the efficiency/cost relationship, including an overall system approach or engineering modeling to predict the reduction in energy use or improvement in energy efficiency that can be expected from individual design options as discussed in paragraphs (b) and (c) of this section. From this efficiency/cost relationship, measures such as payback, life-cycle cost, and energy savings can be developed. The Department will identify issues that will be examined in the engineering analysis and the types of specialized expertise that may be required. DOE will select appropriate contractors, subcontractors, and expert consultants, as necessary, to perform the engineering analysis and the impact analysis. Also, the Department will consider data, information, and analyses received from interested parties for use in the analysis wherever feasible.

(b) The engineering analysis begins with the list of design options developed in consultation with the interested parties as a result of the screening process. The Department will establish the likely cost and performance improvement of each design option. Ranges and uncertainties of cost and performance will be established, although efforts will be made to minimize uncertainties by using measures such as test data or component or material supplier information where available. Estimated uncertainties will be carried forward in subsequent analyses. The use of quantitative models will be supplemented by qualitative assessments as appropriate.

(c) The next step includes identifying, modifying, or developing any engineering models necessary to predict the efficiency impact of any one or combination of design options on the product/equipment. A base case configuration or starting point will be established, as well as the order and combination/blending of the design options to be evaluated. DOE will then perform the engineering analysis and develop the cost-efficiency curve for the product/equipment. The cost efficiency curve and any necessary models will be available to stakeholders during the pre-NOPR stage of the rulemaking.

13. Principles for the Analysis of Impacts on Manufacturers

(a) *Purpose.* The purpose of the manufacturer analysis is to identify the likely private impacts of efficiency standards on manufacturers. The Department will analyze the impact of standards on manufacturers with substantial input from manufacturers and other interested parties. This section describes the principles that will be used in conducting future manufacturing impact analyses.

(b) *Issue identification.* In the impact analysis stage, the Department will identify issues that will require greater consideration in the detailed manufacturer impact analysis. Possible issues may include identification of specific types or groups of manufacturers and concerns over access to technology. Specialized contractor expertise, empirical data requirements, and analytical tools required to perform the manufacturer impact analysis also would be identified at this stage.

(c) *Industry characterization.* Prior to initiating detailed impact studies, the Department will seek input on the present and past industry structure and market characteristics. Input on the following issues will be sought:

(1) Manufacturers and their current and historical relative market shares;

(2) Manufacturer characteristics, such as whether manufacturers make a full line of models or serve a niche market;

(3) Trends in the number of manufacturers;

(4) Financial situation of manufacturers;

(5) Trends in product/equipment characteristics and retail markets including manufacturer market shares and market concentration; and

(6) Identification of other relevant regulatory actions and a description of the nature and timing of any likely impacts.

(d) *Cost impacts on manufacturers.* The costs of labor, material, engineering, tooling, and capital are difficult to estimate, manufacturer-specific, and usually proprietary. The Department will seek input from interested parties on the treatment of cost issues. Manufacturers will be encouraged to offer suggestions as to possible sources of data and appropriate data collection methodologies. Costing issues to be addressed include:

(1) Estimates of total private cost impacts, including product/equipment-specific costs (based on cost impacts estimated for the engineering analysis) and front-end investment/conversion costs for the full range of product/equipment models.

(2) Range of uncertainties in estimates of average cost, considering alternative designs and technologies which may vary cost impacts and changes in costs of material, labor, and other inputs which may vary costs.

(3) Variable cost impacts on particular types of manufacturers, considering factors such as atypical sunk costs or characteristics of specific models which may increase or decrease costs.

(e) *Impacts on product/equipment sales, features, prices, and cost recovery.* In order to make manufacturer cash-flow calculations, it is necessary to predict the number of products/equipment sold and their sale price. This requires an assessment of the likely impacts of price changes on the number of products/equipment sold and on typical features of models sold. Past analyses have relied on price and shipment data generated by economic models. The Department will develop additional estimates of prices and shipments by drawing on multiple sources of data and experience including: Actual shipment and pricing experience; data from manufacturers, retailers, and other market experts; financial models, and sensitivity analyses. The possible impacts of candidate/trial standard levels on consumer choices among competing fuels will be explicitly considered where relevant.

(f) *Measures of impact.* The manufacturer impact analysis will estimate the impacts of candidate/trial standard levels on the net cash flow of manufacturers. Computations will be performed for the industry as a whole and for typical and atypical manufacturers. The exact nature and the process by which the analysis will be conducted will be determined by DOE, with input from interested parties, as appropriate. Impacts to be analyzed include:

(1) Industry net present value, with sensitivity analyses based on uncertainty of costs, sales prices, and sales volumes;

(2) Cash flows, by year; and

(3) Other measures of impact, such as revenue, net income, and return on equity, as appropriate. DOE also notes that the characteristics of a typical manufacturers worthy of special consideration will be determined in consultation with manufacturers and other interested parties and may include: Manufacturers incurring higher or lower than average costs; and manufacturers experiencing greater or fewer adverse impacts on sales. Alternative scenarios based on other methods of estimating cost or sales impacts also will be performed, as needed.

(g) *Cumulative Impacts of Other Federal Regulatory Actions.* (1) The Department will recognize and seek to mitigate the overlapping effects on manufacturers of new or revised DOE standards and other regulatory actions affecting the same products or equipment. DOE will analyze and consider the impact on manufacturers of multiple product/equipment-specific regulatory actions. These factors will be considered in setting rulemaking priorities, conducting the early assessment as to whether DOE should proceed with a standards rulemaking, assessing manufacturer impacts of a particular standard, and establishing compliance dates for a new or revised standard that, consistent with any statutory requirements, are appropriately coordinated with other regulatory actions to mitigate any cumulative burden.

(2) If the Department determines that a proposed standard would impose a significant impact on product or equipment manufacturers within approximately three years of the compliance date of another DOE standard that imposes significant impacts on the same manufacturers (or divisions thereof, as appropriate), the Department will, in addition to evaluating the impact on manufacturers of the proposed standard, assess the joint impacts of both standards on manufacturers.

(3) If the Department is directed to establish or revise standards for products/equipment that are components of other products/equipment subject to standards, the Department will consider the interaction between such standards in setting rulemaking priorities and assessing manufacturer impacts of a particular standard. The Department will assess, as part of the engineering and impact analyses, the cost of components subject to efficiency standards.

(h) *Summary of quantitative and qualitative assessments.* The summary of quantitative and qualitative assessments will contain a description and discussion of uncertainties. Alternative estimates of impacts, resulting from the different potential scenarios developed throughout the analysis, will be explicitly presented in the final analysis results.

(1) Key modeling and analytical tools. In its assessment of the likely impacts of standards on manufacturers, the Department will use models that are clear and understandable, feature accessible calculations, and have clearly explained assumptions. As a starting point, the Department will use the Government Regulatory Impact Model (GRIM). The Department will also support the development of economic models for price and volume forecasting. Research required to update key economic data will be considered.

(2) [Reserved]

14. Principles for the Analysis of Impacts on Consumers

(a) *Early consideration of impacts on consumer utility.* The Department will consider at the earliest stages of the development of a standard whether particular design options will lessen the utility of the covered products/equipment to the consumer. See paragraph (b) of section 6.

(b) *Impacts on product/equipment availability.* The Department will determine, based on consideration of information submitted during the standard development process, whether a proposed standard is likely to result in the unavailability of any covered product/equipment type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products/equipment generally available in the U.S. at the time. DOE will not promulgate a standard if it concludes that it would result in such unavailability.

(c) *Department of Justice review.* As required by law, the Department will solicit the views of the Department of Justice on any lessening of competition likely to result from the imposition of a proposed standard and will give the views provided full consideration in assessing economic justification of a proposed standard. In addition, DOE may consult with the Department of Justice at earlier stages in the standards development process to seek its preliminary views on competitive impacts.

(d) *Variation in consumer impacts.* The Department will use regional analysis and sensitivity analysis tools, as appropriate, to evaluate the potential distribution of impacts of candidate/trial standard levels among different subgroups of consumers. The Department will consider impacts on significant segments of consumers in determining standards levels. Where there are significant negative impacts on identifiable subgroups, DOE will consider the efficacy of voluntary approaches as a means to achieve potential energy savings.

(e) *Payback period and first cost.* (1) In the assessment of consumer impacts of standards, the Department will consider Life-Cycle Cost, Payback Period, and Cost of Conserved Energy to evaluate the savings in operating expenses relative to increases in purchase price. The Department also performs sensitivity and scenario analyses when appropriate. The results of these analyses will be carried throughout the analysis and the ensuing uncertainty described.

(2) If, in the analysis of consumer impacts, the Department determines that a candidate/trial standard level would result in a substantial increase in product/equipment first costs to consumers or would not pay back such additional first costs through energy cost savings in less than three years, Department will assess the likely impacts of such a standard on low-income households, product/equipment sales and fuel switching, as appropriate.

15. Consideration of Non-Regulatory Approaches

The Department recognizes that non-regulatory efforts by manufacturers, utilities, and other interested parties can result in substantial efficiency improvements. The Department intends to consider the likely effects of non-regulatory initiatives on product/equipment energy use, consumer utility and life-cycle costs, manufacturers, competition, utilities, and the environment, as well as the distribution of these impacts among different regions, consumers, manufacturers, and utilities. DOE will attempt to base its assessment on the actual impacts of such initiatives to date, but also will consider information presented regarding the impacts that any existing initiative might have in the future. Such information is likely to include a demonstration of the strong commitment of manufacturers, distribution channels, utilities, or others to such non-regulatory efficiency improvements. This information will be used in assessing the likely incremental impacts of establishing or revising standards, in assessing—where possible—appropriate compliance dates for new or revised standards, and in considering DOE support of non-regulatory initiatives.

16. Cross-Cutting Analytical Assumptions

In selecting values for certain cross-cutting analytical assumptions, DOE expects to continue relying upon the following sources and general principles:

(a) *Underlying economic assumptions.* The appliance standards analyses will generally use the same economic growth and development assumptions that underlie the most current *Annual Energy Outlook* (*AEO*) published by the Energy Information Administration (EIA).

(b) *Analytic time length.* The appliance standards analyses will use two time lengths—30 years and another time length that is specific to the standard being considered such as the useful lifetime of the product under consideration. As a sensitivity case, the analyses will also use a 9-year regulatory timeline in analyzing the effects of the standard.

(c) *Energy price and demand trends.* Analyses of the likely impact of appliance standards on typical users will generally adopt the mid-range energy price and demand scenario of the EIA's most current *AEO.* The sensitivity of such estimated impacts to possible variations in future energy prices are likely to be examined using the EIA's high and low energy price scenarios.

(d) *Product/equipment-specific energy-efficiency trends, without updated standards.* Product/equipment-specific energy-efficiency trends will be based on a combination of the efficiency trends forecast by the EIA's residential and commercial demand model of the National Energy Modeling System (NEMS) and product-specific assessments by DOE and its contractors with input from interested parties.

(e) *Price forecasting.* DOE will endeavor to use robust price forecasting techniques in projecting future prices of products.

(f) *Private Discount rates.* For residential and commercial consumers, ranges of three different real discount rates will be used. For residential consumers, the mid-range discount rate will represent DOE's approximation of the average financing cost (or opportunity costs of reduced savings) experienced by typical consumers. Sensitivity analyses will be performed using discount rates reflecting the costs more likely to be experienced by residential consumers with little or no savings and credit card financing and consumers with substantial savings. For commercial users, a mid-range discount rate reflecting DOE's approximation of the average real rate of return on commercial investment will be used, with sensitivity analyses being performed using values indicative of the range of real rates of return likely to be experienced by typical commercial businesses. For national net present value calculations, DOE would use the Administration's approximation of the average real rate of return on private investment in the U.S. economy. For manufacturer impacts, DOE typically uses a range of real discount rates which are representative of the real rates of return experienced by typical U.S. manufacturers affected by the program.

(g) *Social discount rates.* Social discount rates as specified in OMB Circular A–4 will be used in assessing social effects such as costs and benefits.

(h) *Environmental impacts.* (1) DOE calculates emission reductions of carbon dioxide, sulfur dioxide, nitrogen oxides, methane, nitrous oxides, and mercury likely to be avoided by candidate/trial standard levels based on an emissions analysis that includes the two components described in paragraphs (h)(2) and (3) of this section.

(2) The first component estimates the effect of potential candidate/trial standard levels on power sector and site combustion emissions of carbon dioxide, nitrogen oxides, sulfur dioxide, mercury, methane, and nitrous oxide. DOE develops the power sector emissions analysis using a methodology based on DOE's latest *Annual Energy Outlook.* For site combustion of natural gas or petroleum fuels, the combustion emissions of carbon dioxide and nitrogen oxides are estimated using emission intensity factors from the Environmental Protection Agency.

(3) The second component of DOE's emissions analysis estimates the effect of potential candidate/trial standard levels on emissions of carbon dioxide, nitrogen oxides, sulfur dioxide, mercury, methane, and nitrous oxide due to ''upstream activities'' in the fuel production chain. These upstream activities include the emissions related to extracting, processing, and transporting fuels to the site of combustion as detailed in DOE's Fuel-Fuel-Cycle Statement of Policy (76 FR 51281 (August 18, 2011)). DOE will consider the effects of the candidate/trial standard levels on these emissions after assessing the seven factors required to demonstrate economic justification under EPCA. Consistent with Executive Order 13783, dated March 28, 2017, when monetizing the value of changes in reductions in CO_2 and nitrous oxides emissions resulting from its energy conservation standards regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, DOE ensures, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A–4 of September 17, 2003 (Regulatory Analysis).

[FR Doc. 2021–25725 Filed 12–10–21; 8:45 am]

BILLING CODE 6450–01–P