

## II. Need for Correction

As published, the regulatory text in the July 2022 final rule may result in confusion as to the applicability of specific certification provisions that apply to CFLKs. The current regulatory text is also in conflict with the current compliance date for energy conservation standards for CFLKs in 10 CFR 430.32(s)(6). Because this final rule would simply correct an error in the text without making substantive changes in the July 2022 final rule, the changes addressed in this document are technical in nature.

## III. Procedural Issues and Regulatory Review

DOE has concluded that the determinations made pursuant to the various procedural requirements applicable to the July 2022 final rule remain unchanged for this final rule technical correction. These determinations are set forth in the July final rule. 87 FR 43952, 43973–43976.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), DOE finds that there is good cause to not issue a separate notice to solicit public comment on the changes contained in this document. Issuing a separate notice to solicit public comment would be impracticable, unnecessary, and contrary to the public interest. Neither the errors nor the corrections in this document affect the substance of the July 2022 final rule or any of the conclusions reached in support of the final rule. Providing prior notice and an opportunity for public comment on correcting objective, typographical errors that do not change the substance of the test procedure serves no useful purpose.

Further, this rule correcting a regulatory text error makes non-substantive changes to the test procedure. As such, this rule is not subject to the 30-day delay in effective date requirement of 5 U.S.C. 553(d) otherwise applicable to rules that make substantive changes.

### List of Subjects in 10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

### Signing Authority

This document of the Department of Energy was signed on August 26, 2022, by Dr. Geraldine L. Richmond, Undersecretary for Science and Innovation, 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 August 26, 2022.

**Treena V. Garrett,**

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

For the reasons stated in the preamble, DOE corrects part 429 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations by making the following correcting amendments:

### PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

- 1. The authority citation for part 429 continues to read as follows:

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

- 2. Section 429.33 is amended by revising the introductory text of paragraphs (b)(2)(i) and (ii), paragraph (b)(3)(i), and paragraph (b)(3)(ii) introductory text to read as follows:

#### § 429.33 Ceiling fan light kits.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) For ceiling fan light kits manufactured prior to January 21, 2020:

\* \* \* \* \*

(ii) For ceiling fan light kits manufactured on or after January 21, 2020:

\* \* \* \* \*

(3) \* \* \*

(i) For ceiling fan light kits with any other socket type manufactured prior to January 21, 2020, a declaration that the basic model meets the applicable design requirement, and the features that have been incorporated into the ceiling fan light kit to meet the applicable design requirement (e.g., circuit breaker, fuse, ballast).

(ii) For ceiling fan light kits manufactured on or after January 21, 2020:

\* \* \* \* \*

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## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[EERE–2021–BT–DET–0034]

RIN 1904–AF30

### Energy Conservation Program: Final Determination of Miscellaneous Gas Products as a Covered Consumer Product

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

**ACTION:** Final rule; final determination.

**SUMMARY:** The U.S. Department of Energy (“DOE”) has determined that miscellaneous gas products (“MGPs”), which are comprised of decorative hearths and outdoor heaters, qualify as covered products under Part A of Title III of the Energy Policy and Conservation Act, as amended (“EPCA”). DOE has determined that coverage of MGPs is necessary and appropriate to carry out the purposes of EPCA, and that the average U.S. household energy use for MGPs is likely to exceed 100 kilowatt-hours per year. **DATES:** The effective date of this rule is October 6, 2022.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed in the [www.regulations.gov](http://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-DET-0034](http://www.regulations.gov/docket/EERE-2021-BT-DET-0034). The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Ms. Julia Hegarty, U.S. Department of Energy, Office of Energy Efficiency and

Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Email: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

Mr. Matthew Schneider, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (240) 597-6265. Email: [Matthew.Schneider@hq.doe.gov](mailto:Matthew.Schneider@hq.doe.gov).

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### I. Introduction

The following section briefly discusses the statutory authority underlying this final rule, as well as some of the relevant historical background related to the inclusion of MGPs as covered equipment under the Energy Policy and Conservation Act (“EPCA”), as amended.

#### A. Statutory Authority

EPCA<sup>1</sup> authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B<sup>2</sup> of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain consumer products, referred to generally as “covered products.”<sup>3</sup> In addition to specifying a list of consumer products that are covered products, EPCA authorizes the Secretary of Energy to classify additional types of consumer products as covered products. EPCA defines a “consumer product” in relevant part as any article (other than an automobile) of a type—(A) which in operation consumes, or is designed to consume, energy; and (B) which, to any significant extent, is distributed in commerce for personal use or consumption by individuals; without regard to whether such article of such type is in fact distributed in commerce for personal use or consumption by an individual.<sup>4</sup> (42 U.S.C. 6291(a)(1)) For a given consumer product to be classified as a covered product, the Secretary must determine that: classifying the product as a covered product is necessary or appropriate to carry out the purposes of this chapter; and the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (“kWh”) (or its British thermal unit (“Btu”) equivalent) per year. (42 U.S.C. 6292(b)(1))<sup>5</sup>

When attempting to cover additional consumer product types, DOE must first determine whether these criteria from

42 U.S.C. 6292(b)(1) are met. Once a determination is made, the Secretary may prescribe test procedures to measure the energy efficiency or energy use of such product. (42 U.S.C. 6293(a)(1)(B)) Furthermore, once a product is determined to be a covered product, the Secretary may set standards for such product, subject to the provisions in 42 U.S.C. 6295(o) and (p), provided that DOE determines that four additional criteria at 42 U.S.C. 6295(l) have been met. Specifically, 42 U.S.C. 6295(l) requires the Secretary to determine that: the average household energy use of the products has exceeded 150 kWh per household for a 12-month period; the aggregate 12-month energy use of the products has exceeded 4,200 gigawatthours; substantial improvement in energy efficiency of products of such type is technologically feasible; and application of a labeling rule under 42 U.S.C. 6294 is unlikely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) that achieve the maximum energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(l)(1))

#### B. Background

On February 7, 2022, DOE published a notice of proposed determination (“NOPD”) that proposed to determine coverage for MGPs, which are consumer products comprising: (1) Those hearth products that are not direct heating equipment (“DHE”) (*i.e.*, those hearth products that are indoor or outdoor decorative hearth products) and (2) outdoor heaters. 87 FR 6786 (“February 2022 NOPD”). The rulemaking history of MGPs as well as hearth products is discussed in the February 2022 NOPD. 87 FR 6786, 6787–6788.

### II. General Discussion

DOE developed this determination after considering comments, data, and information from interested parties that represent a variety of interests. Table II.1 lists the interested parties that provided comments on the February 2022 NOPD.

<sup>1</sup> All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116-260 (Dec. 27, 2020).

<sup>2</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A and is hereinafter referred to as such.

<sup>3</sup> The enumerated list of covered products is at 42 U.S.C. 6292(a)(1)–(19).

<sup>4</sup> As such, in considering the potential scope of coverage, DOE does not consider whether an individual product is distributed in commerce for residential or commercial use, but whether it is of

a type of product distributed in commerce for residential use.

<sup>5</sup> DOE has defined “household” to mean an entity consisting of either an individual, a family, or a group of unrelated individuals, who reside in a particular housing unit. For the purpose of this definition:

Group quarters means living quarters that are occupied by an institutional group of 10 or more unrelated persons, such as a nursing home, military barracks, halfway house, college dormitory, fraternity or sorority house, convent, shelter, jail or correctional institution.

Housing unit means a house, an apartment, a group of rooms, or a single room occupied as separate living quarters, but does not include group quarters.

Separate living quarters means living quarters: (i) to which the occupants have access either directly from outside of the building, or through a common hall that is accessible to other living quarters and that does not go through someone else’s living quarters, and (ii) occupied by one or more persons who live and eat separately from occupant(s) of other living quarters, if any, in the same building. 10 CFR 430.2.

TABLE II.1—FEBRUARY 2022 NOPD WRITTEN COMMENTS

Commenter(s)	Abbreviation	Comment No. in the docket	Commenter type
Hearth, Patio & Barbecue Association .....	HPBA .....	2*, 3, and 11	Trade Association
American Gas Association. ....	AGA .....	4	Trade Association.
American Public Gas Association .....	APGA .....	5 and 14	Trade Association.
National Propane Gas Association .....	NPGA .....	6	Trade Association.
Dana Moroz .....	Moroz .....	7	Individual.
The Outdoor GreatRoom Company .....	OGC .....	8	Manufacturer.
Hearth & Home Technologies .....	HHT .....	9	Manufacturer.
Alliance for Green Heat .....	AGH .....	10	Efficiency Organization.
California Investor-Owned Utilities .....	CA IOUs .....	12	Utilities.
Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Natural Resources Defense Council, Northwest Energy Efficiency Alliance.	Joint Commenters .....	13	Efficiency Organizations.
American Gas Association and American Propane Gas Association.	Gas Associations .....	15	Trade Association.
The Air-Conditioning, Heating, and Refrigeration Institute .....	AHRI .....	16	Trade Association.

\* Comment No. 2 was submitted by Barton Day, Counsel for HPBA.

#### A. Definitions and Scope of Coverage

MGP's as considered in this final determination are comprised of decorative hearth products and outdoor heaters. In the February 2022 NOPD, DOE proposed to define a "decorative hearth product" as a gas-fired appliance that:

- Simulates a solid-fueled fireplace or presents a flame pattern;
  - Includes products designed for indoor use, outdoor use, or either indoor or outdoor use;
  - Is not designed to be operated with a thermostat;
  - For products designed for indoor use, is not designed to provide space heating to the space in which it is installed; and
  - For products designed for outdoor use, is not designed to provide heat proximate to the unit. 87 FR 6786, 6790.
- A wide range of decorative hearth products are available on the market, including, for example, gas log sets, gas fire pits, gas stoves, and gas fireplace inserts. Decorative hearth products may be used indoors or outdoors.

In the February 2022 NOPD, DOE proposed to define an "outdoor heater" as a gas-fired appliance designed for use in outdoor spaces only, and which is designed to provide heat proximate to the unit. 87 FR 6786, 6790.

##### 1. Outdoor Heaters

In response to the definition for outdoor heaters proposed in the February 2022 NOPD, HHT commented that the proposed definition for outdoor heaters is very broad as it covers radiant heaters, firepits, and outdoor fireplaces. HHT added that the majority of the products in this category are for aesthetic appeal and not for use as a local heat source. (HHT, No. 9 at p. 2)

HPBA commented that the definition of outdoor heaters is vague, overbroad, unjustified, and susceptible to potential abuse. HPBA stated that if DOE intends to cover products other than gas-fired outdoor infrared patio heaters subject to the [American National Standards Institute (ANSI)] Z83.26 standard, they must be identified and a justification for their coverage provided. (HPBA, No. 11 at pp. 47–48) HPBA added that the definition is overbroad because it includes portable and non-portable units subject to ANSI Z83.26. HPBA stated that these two categories of products are too different in their design and constraints to be considered a single product. HPBA suggested that a heating efficiency standard for any of these products should be limited to strictly utilitarian heating products and should exclude "patio heaters." Further, HPBA stated that patio heaters are not strictly utilitarian as they provide outdoor lighting or visual appeal and are likely to be compromised by high heating efficiencies. (*Id.* at p. 48)

Moroz commented that patio heaters are the only outdoor appliance that should be covered as outdoor heaters, and stated that gas fireplaces and gas fire pits serve as decorative appliances, and should not be considered outdoor heaters. Moroz commented that they are only aware of outdoor gas fireplaces for decorative use, as opposed to being intended as heaters. Moroz questioned the benefit of regulating the efficiency of an appliance that emits heat directly to the atmosphere. (Moroz, No. 7 at p. 1)

The definition of outdoor heaters, as DOE proposed to define it in the February 2022 NOPD and as adopted in this final determination, could include products such as patio heaters, outdoor fire pits, and outdoor fireplaces, so long as they are designed to provide heat to

the space around the unit. (DOE notes that were such products not designed to provide heat to the space proximate the unit, they may instead be classified as decorative hearth products.) Therefore, DOE clarifies that products other than patio heaters could meet the definition of outdoor heaters, if those products are designed for use in outdoor spaces and designed to provide heat to the space proximate the unit. In contrast to the assertions by commenters that the definition is overbroad, DOE notes that products must meet specific criteria to be considered an outdoor heater—be designed for installation in outdoor spaces only, and be designed to provide heat proximate to the unit. If a product does not meet both aspects of this definition it would not be an "outdoor heater". Regardless of whether a product is marketed as a "patio heater" or some other term, or if it is certified to ANSI Z83.26 or another standard, it would be covered as an "outdoor heater" if it meets both parts of this definition. A product that is designed for installation outdoors, but that is not designed to provide heat proximate to the unit may be classified as a decorative hearth product if all other definitional criteria for decorative hearth product were met.

Moroz commented that an outdoor heater is operated when outdoor temperatures cause personal discomfort, and a decorative hearth appliance is operated when the user wishes to enjoy the ambiance created by the flame of the appliance. (Moroz, No. 7 at p. 2) HPBA suggested that patio heaters may produce a combination of heat, lighting, and/or visual appeal. (HPBA, No. 11 at p. 53) As noted above, outdoor products may be outdoor heaters or decorative hearth products, depending on whether

they are designed to provide heat proximate to the unit.

AHRI commented that manufacturers of fixed installation infrared outdoor heating equipment may approve their products to ANSI Z83.19, ANSI Z83.20, and ANSI Z83.26. AHRI further stated that heaters certified to these standards should be excluded from the definition of “outdoor heaters”. They commented that these standards set minimum radiant energy requirements and that, pursuant to 42 U.S.C. 6295(l), DOE would be required to demonstrate that a substantial improvement in energy efficiency is technologically feasible for such products. (AHRI, No. 16 at pp. 1–2) AHRI commented that the ANSI Z83.19 standard, Gas-Fired High-Intensity Infrared Heaters, is limited in its application to indoor non-residential and outdoor use and sets a minimum requirement for the radiant coefficient, which must be measured. (*Id.*) AHRI also stated that a fixed installation product that has been tested and certified to meet ANSI Z83.19 may in some instances choose to include additional certification to ANSI Z83.26, but that ANSI Z83.26 is not applicable to fixed installation heaters. (*Id.*) AHRI stated that the majority of heaters approved to ANSI Z83.19 are for industrial and commercial indoor use only although it may include coverage for outdoor use. AHRI commented that fixed installation outdoor heaters should be excluded from the proposed coverage determination because they are primarily certified to ANSI Z83.19 and ANSI Z83.20, which have provisions for minimum radiant energy measurement. (*Id.*) Moreover, AHRI commented that any heater primarily certified to ANSI Z83.19 and Z83.20 with additional certification to Z83.26 should be excluded from the scope of this rulemaking. (*Id.*)

AHRI commented that DOE should use industry consensus definitions for these products from appropriate industry standards to avoid products falling in and out of multiple classifications. (*Id.*) Additionally, AHRI commented that the definition of outdoor heaters should specify that their primary purpose is providing proximate heat and that such units are not an otherwise covered product. AHRI stated that without this specification, DOE may risk including otherwise unrelated covered products into the scope of its determination. (*Id.*)

The definition of “outdoor heater” proposed in the February 2022 NOPD and adopted in this final determination specifies that these products are “designed to provide heat proximate to the unit.” DOE notes that pursuant to 42

U.S.C. 6295(l), as discussed in section I.A, DOE is required to determine substantial improvement in energy efficiency is technologically feasible for any type (or class) of covered products. This coverage determination defines “miscellaneous gas products” as a covered product, which includes outdoor heaters, but DOE is not analyzing potential energy conservation standards in this notice. DOE will consider the technical feasibility, energy savings, and economic justification of potential energy conservation standards in a separate standards rulemaking. Furthermore, the requirement in EPCA that substantial energy efficiency improvement is technologically feasible is determined with respect to MGPs as a whole, including all products that would meet the definitions of outdoor heaters and decorative hearth products.

DOE acknowledges that the ANSI Z83.19<sup>6</sup> and ANSI Z83.20<sup>7</sup> standards cover heaters “intended for installation in and heating outdoor spaces or nonresidential indoor spaces”. However, as discussed in section II.A.3, the definition of “consumer product” as defined in 42 U.S.C. 6291(1) does not exclude coverage based on use in commercial applications as long as a product is, “to any significant extent, distributed in commerce for personal use or consumption by individuals”. Therefore, products that are distributed to a significant extent for residential use are appropriately classified as consumer products under EPCA. Additionally, 42 U.S.C. 6311(2)(A)(iii) specifies that the term “industrial equipment” excludes a product which is a “covered product” as defined in section 6291(a)(2). Thus, outdoor heaters meeting the definition established under this rule will not be subject to both the consumer product and industrial equipment provisions of EPCA. Additionally, 42 U.S.C 6295(l) specifies the criteria that DOE must satisfy in order to set standards for consumer products that the Secretary classifies as covered products, and whether or not such products are subject to industry standards or

<sup>6</sup> ANSI Z83.19–2009/CSA 2.35–2009. “American National Standard/CSA Standard For Gas-Fired High-Intensity Infrared Heaters”. See [webstore.ansi.org/Standards/CSA/ansiz83192009csa35?gclid=Cj0KCQjwvtvqVBhCVARIsAFUxcRsqkjws01RWgDy3QhYg6\\_OOB3ZZp4c7i-MhH2TrVyV5ohRDdi2rf0aAjjBEALw\\_wcB](https://webstore.ansi.org/Standards/CSA/ansiz83192009csa35?gclid=Cj0KCQjwvtvqVBhCVARIsAFUxcRsqkjws01RWgDy3QhYg6_OOB3ZZp4c7i-MhH2TrVyV5ohRDdi2rf0aAjjBEALw_wcB).

<sup>7</sup> ANSI Z83.19–2016/CSA 2.34–2016. “Gas-fired tubular and low-intensity infrared heaters”. See [webstore.ansi.org/Standards/CSA/ansiz83202016csa34?gclid=Cj0KCQjwvtvqVBhCVARIsAFUxcRsqkjws01RWgDy3QhYg6\\_OOB3ZZp4c7i-MhH2TrVyV5ohRDdi2rf0aAjjBEALw\\_wcB](https://webstore.ansi.org/Standards/CSA/ansiz83202016csa34?gclid=Cj0KCQjwvtvqVBhCVARIsAFUxcRsqkjws01RWgDy3QhYg6_OOB3ZZp4c7i-MhH2TrVyV5ohRDdi2rf0aAjjBEALw_wcB).

efficiency metrics is not a listed criterion.

## 2. Decorative Hearth Products

In response to the definition for “decorative hearth product” initially proposed in the February 2022 NOPD (see section II.A of this document), Moroz commented that “decorative hearth products” is too broad of a term and that the definitions found in the Canadian Regulation for Gas Fireplaces<sup>8</sup> are more specific and appropriate, and that DOE should align with the Canadian regulations where applicable. (Moroz, No. 7 at p. 1) OGC commented that “decorative hearth products” is too broad of a term to use for both indoor and outdoor decorative products that must comply with very different industry standards. OGC also commented that the primary function of outdoor decorative hearth products is the aesthetic qualities of their flame, and not the production of heat. OGC also commented that “outdoor hearth products,” as a category of products, was not defined in the scope of coverage in the February 2022 NOPD. (OGC, No. 8 at pp. 1–2) HHT commented that the primary function of the majority of hearth products is to have aesthetically appealing flames, as opposed to heating. (HHT, No. 9 at p. 2) Similarly, HPBA stated that fireplaces and similar products inherently produce heat and are designed “to be suitable for utilitarian use,” but they nevertheless state that these products cannot be reasonably regulated as utilitarian heating products. HPBA commented that it is an invalid assumption that products that produce heat are “heaters” and would be improved by a higher heating efficiency. HPBA also stated that gas fireplaces or similar products are not “purely decorative” because it is incorrect to assume that these products are not intended to provide heat. (HPBA, No. 11 at pp. 46–47)

As noted in the February 2022 NOPD, a variety of products, such as gas log sets, gas fire pits, gas stoves, and gas fireplace inserts (among others) could be considered as decorative hearth products if they meet all the definitional criteria. 87 FR 6786, 6788. DOE further

<sup>8</sup> Natural Resources Canada (NRCAN) defines a “gas fireplace” as a decorative gas fireplace or a heating gas fireplace. Further, a “decorative gas fireplace means a vented fireplace that is fuelled by natural gas or propane, is marked for decorative use only and is not equipped with a thermostat or intended for use as a heater” and a “heating gas fireplace means a vented fireplace that is fuelled by natural gas or propane and is not a decorative gas fireplace.” See [www.nrcan.gc.ca/energy-efficiency/energy-efficiency-regulations/guide-canadas-energy-efficiency-regulations/gas-fireplaces/6865](https://www.nrcan.gc.ca/energy-efficiency/energy-efficiency-regulations/guide-canadas-energy-efficiency-regulations/gas-fireplaces/6865).

notes that the decorative hearth products, as defined, can be marketed for use both indoors and outdoors. However, DOE may consider the relevant differences in indoor and outdoor products in any future analysis of potential test procedures and energy conservation standards for these products.

In response to comments stating that the function of hearth products can include aesthetics as well as heating, DOE notes that under its definition, decorative hearth products are not designed to provide heating to the space in which they are installed (indoor units) or the space proximate the heater (outdoor units). Although decorative hearths may give off some heat as a byproduct of the flame, the aesthetic appeal is what the product is designed to be used for, rather than the heating function.

HPBA commented that vented gas log sets are set apart from vented gas fireplaces by their unmatched realism and design for installation directly into the hearth of existing wood-burning fireplaces. HPBA stated that manufacturers work to minimize the visibility of hardware components to maximize realism in these products. HPBA added that electronic ignition systems require significant additional hardware, some of which is heat-sensitive, and compromise the visual appeal of the product. (HPBA, No. 11 at p. 40) HPBA stated that while gas log sets are the most “decorative” of all indoor products and may have little net heating utility in a normally heated home, they provide emergency heating utility when central heating systems are out. HPBA commented that continuous pilot lights, unlike electric ignition, are able to operate in an electrical outage. Further, HPBA stated that battery backup systems require much more vigilance with respect to battery replacement and that they require heat-sensitive hardware which may make them less suitable for emergency situations. (*Id.* at p. 41) HPBA commented that during weather disasters, batteries are often in short supply and a gas log set with a continuous pilot light could be useful. HPBA commented that a continuous pilot ban for vented gas log sets would impose regulatory burdens on products for which there are no regulatory benefits. (*Id.* at p. 42) HPBA commented that vented gas log sets certified to the ANSI Z21.84 standard operate by direct main burner ignition, by definition, cannot have continuous pilot lights. HPBA stated that these products should not be subject to regulation because they do not have continuous pilot lights. (*Id.*)

HPBA also commented that the volume of the flame is important for the fireplace installation to “look right” and that this feature is proportional to British thermal units (“Btu”) input. Therefore, HPBA states, important visual considerations effectively define a range of Btu inputs for a given installation. HPBA commented that heat output should not classify whether a product is a “heater” or “purely decorative” because flame art can have high heat outputs but should not be confused with utilitarian heating appliances. (HPBA, No. 11 at p. 51)

DOE notes that the definition for decorative hearth product does not prescribe a limit on Btu input for fireplaces to distinguish products that are a “heater” from those that are “purely decorative.” When classifying products, the intended design of the product is the criteria used for categorization, allowing fireplaces with high Btu input rates to continue to be classified as a decorative hearth product if all other definitional elements are met.

In the February 2022 NOPD, DOE tentatively determined that the presence of a thermostat indicates that a product is designed to provide heat rather than being purely decorative. Thus, the proposed definition of decorative hearth products excluded those products equipped with a thermostat. This determination was consistent with the relevant ANSI standard for decorative gas fireplaces (*i.e.*, ANSI Z21.50, “Vented Decorative Gas Appliances”), which excludes products that are equipped with a thermostat. DOE requested comment on whether the presence of a thermostat would indicate that a hearth product is intended to provide heat to the space in which it is installed rather than being purely decorative. 87 FR 6786, 6790.

In response to the February 2022 NOPD, Moroz commented that it is inappropriate to assume that the presence of a thermostat always indicates that a hearth product is intended to provide heat to the space in which it is installed. Moroz commented that thermostats can provide automatic control of heat balance within the home, and in some cases act as a safety device. Moroz stated that while not currently applicable in the National Fire Protection Association (NFPA) 54, [“National Fuel Gas Code”], which the commenter suggests is the American installation code for gas appliances, CSA B149[.1] [“Natural Gas and Propane Installation Code”], which the commenter suggests is the Canadian installation code for gas appliances, requires that a thermostat be installed

on a gas fireplace when used in a bedroom in order to intervene when a user is not conscious of the appliance’s operation. (Moroz, No. 7 at p. 1)

Similarly, HHT commented that thermostat allowance and usage is determined by the standard a unit is certified to. HHT added that thermostats are a device for comfort control and does not mean that those products are meant for use as a primary heating source. (HHT, No. 9 at p. 1) OGC also commented that the use of a thermostat on a product is covered by the industry standard that the product is listed to. (OGC, No. 8 at p. 1) NPGA commented that a thermostat feature may be provided by manufacturers to assist consumers in measuring the intensity of the product but without the intention for consumers to utilize the product as a direct heating or space heating appliance. NPGA recommended that DOE consider defining decorative hearth products by the purpose(s) and feature(s) present in the product instead of by the absence of a feature, or by disqualifying products according to the presence of a feature. (NPGA, No. 14 at p. 3)

HPBA commented that thermostats on fireplaces and similar products can be used to turn a product on and off in response to heating demands or simply to prevent unintended overheating from non-utilitarian use. HPBA added that thermostats are not permitted on products certified to the ANSI Z21.50 standard but the presence of a thermostat does not indicate that such products are “heaters” or that they would be improved by a higher heating efficiency. (HPBA, No. 11 at p. 47)

DOE appreciates this feedback regarding the presence of a thermostat as an indicator that a hearth product is intended to provide heat to the surrounding space. DOE notes that the ANSI Z21.50 for vented gas decorative appliances specifies that the appliances are not for use with a thermostat. Additionally, in its energy efficiency regulations, NRCan defines “decorative gas fireplace” as a vented fireplace that is fueled by natural gas or propane, is marked for decorative use only and is not equipped with a thermostat or intended for use as a heater.<sup>9</sup> In an effort to align with industry standards and Canadian regulations, DOE concludes that it is appropriate to use the absence of a thermostat as a criterion for decorative hearth products. However, to fully align with ANSI Z21.50, DOE is

<sup>9</sup> See: [www.nrcan.gc.ca/energy-efficiency/energy-efficiency-regulations/guide-canadas-energy-efficiency-regulations/gas-fireplaces/6865](http://www.nrcan.gc.ca/energy-efficiency/energy-efficiency-regulations/guide-canadas-energy-efficiency-regulations/gas-fireplaces/6865). (Last accessed July 1, 2022.)

adopting a slight modification to criteria (3) in the definition of “decorative hearth products” to read “is not for use with a thermostat.”<sup>10</sup> DOE reasons that this slight modification, while not changing the intent of the definition proposed in the February 2022 NOPD, will fully align with the language of the industry standard and further clarify the meaning of the definition to exclude from decorative hearth products those products that are used with a thermostat.

HPBA commented that outdoor gas log sets differ from vented gas log sets because they include “match-lit” products (which are not used indoors due to safety concerns), they are operable under the variable conditions encountered outdoors, and they do not necessarily need to be installed in existing fireplaces with functioning flue systems. (HPBA, No. 11 at pp. 43–44) DOE appreciates this feedback regarding vented gas log sets and the distinction from outdoor gas log sets. However, as discussed previously, these products are covered as decorative hearth products if they meet the criteria outlined in the definition. DOE may consider the differences in these products in any future analysis of potential test procedures and/or energy conservation standards for MGPs.

### 3. Miscellaneous Gas Products Scope

In response to the February 2022 NOPD, HHT stated that the scope of coverage for MGPs is too broad and combines products that are used for aesthetic or decorative purposes with products used for heating. (HHT, No. 9 at p. 2)

Similarly, Moroz commented that “miscellaneous gas products” is too vague of a title and should not include decorative hearth products, outdoor gas fireplaces, and outdoor heaters all within the same classification, but rather coverage of products should be more specific. (Moroz, No. 7 at pp. 2–3) OGC similarly commented that “miscellaneous gas products” is too broad and mixes products that are primarily aesthetic and provide some comfort and illumination with products whose only utility is to provide heat. OGC suggested that DOE is attempting to cover any gas burning product with a visible flame regardless of its intended purpose. (OGC, No. 8 at p. 2)

HPBA stated that neither “outdoor heaters” nor “decorative hearth products” are identifiable products; rather, HPBA stated they are a

mishmash of products with little resemblance to one another. HPBA suggested that Congress did not intend for DOE to classify new products in this amorphous manner. (HPBA, No. 11 at pp. 22–23) Additionally, HPBA stated that DOE should abandon its definition-based approach to coverage determinations and instead use clear and precise details when describing a product. (HPBA, No. 11 at pp. 17–18) HPBA suggested that a descriptor similar to “vented gas products certified to the ANSI Z21.88 standard” would provide appropriate clarity and precision. (*Id.* at pp. 17–18) HPBA also stated that DOE cannot avoid the need for a coverage determination by “interpreting” a category of currently regulated products to include previously unregulated products, nor can it justify coverage for one product and assert coverage over another. (*Id.* at pp. 15–16) HPBA also stated that issuing a coverage determination requires product-specific consideration of issues to avoid products not reasonably susceptible to EPCA regulation from being swept into coverage along with other products and the gas usage of different products could be combined to meet EPCA’s requirements at 42 U.S.C. 6262(b)(1)(B). (*Id.* at p. 18)

NPGA expressed agreement with the comment submitted by HPBA that a more specific definition of the products potentially subject to the rulemaking and of the efficiency objectives would benefit the current rulemaking. (NPGA, No. 6 at pp. 1–2) NPGA discouraged DOE from including decorative hearth products and outdoor heaters in the same category of MGPs because their primary function and features differ, even though there may be some overlap in their function. NPGA expressed concern for such wide encompassing definitions of MGPs because it may make some products immediately unable to meet a potential standard based solely on design limitations. (*Id.* at p. 2) NPGA commented that the DOE’s rationale is difficult to understand and identify the value to be achieved by combining product types with different functionality and design. NPGA further added that, while the notice acknowledges that outdoor heaters and decorative products are different, an explanation for combining them is not offered. (*Id.* at p. 2) NPGA requested that the DOE separate decorative hearth products and outdoor heaters, and provide a narrower definition of the product types such as the differences between an outdoor fire table and an outdoor heater which may

have different operating capacities and operating hours. (*Id.* at p. 4) NPGA suggested that DOE should remove outdoor heaters from the definition of MGPs. (*Id.* at p. 2)

AHRI opposed the inclusion of decorative hearths and outdoor heaters in the same rulemaking. (AHRI, No. 16 at p. 3) AHRI commented that if DOE includes these products under the scope of coverage, it should perform separate rulemakings for decorative products covered by ANSI Z21.50, Z21.60, Z21.84, and Z21.97, and for outdoor heaters covered by ANSI Z83.26 to provide better clarity on regulations and simplify test procedures and performance criteria. (*Id.* at p. 5) AHRI added that outdoor heaters and decorative hearths have fundamentally different utility under the proposed definitions for which, they stated, one must provide heating and the other cannot provide heating, as well as differences in terms of market distribution and aggregate national energy use. (*Id.* at pp. 2–3)

The CA IOUs recommended that DOE should carefully develop complementary definitions for “decorative hearth products” and “vented hearth heaters” to ensure appropriate coverage of products currently on the market. (CA IOUs, No. 12 at p. 2) The CA IOUs commented that the shared appearance and performance characteristics of the various MGPs is highlighted by industry testimony (specifically, a comment submitted by HPBA) during the California Energy Commission’s Title 20 rulemaking process that indicated that performance standards for vented hearth heaters could result in the reclassification of a “vast majority” of heating products as decorative hearth products. The CA IOUs suggested that the ability to recertify products under different test procedures reinforces the need for complementary product definitions that provide appropriate coverage for all hearth products. (*Id.*)

In addition, AHRI stated that MGPs would combine multiple product types across both residential and commercial applications and that it is unclear if the coverage of outdoor heaters is aimed at commercial or residential products. AHRI stated that it is unclear why “commercial heating equipment” would be included in a standard for residential decorative hearths. (AHRI, No. 16 at pp. 2–3) They also stated, it appears as though the only motivation to group decorative hearths and outdoor heaters together is because separately, outdoor heaters would not meet the threshold for regulation. *Id.* In addition, AHRI stated that MGPs would combine

<sup>10</sup> The language of criteria (3) proposed in the February 7, 2022 NOPD was “is not designed to be operated with a thermostat”. 87 FR 6786, 6790.

multiple product types across both residential and commercial applications and that it is unclear if the coverage of outdoor heaters is aimed at commercial or residential products. HPBA similarly commented that while they are not familiar with non-portable infrared patio heaters, the coverage of these products as consumer products is not justified because many of these products are overwhelmingly used by commercial purchasers. HPBA stated that it appears that these products are rarely purchased or used by household consumers. (HPBA, No. 11 at pp. 48–49)

DOE finds that MGPs are similar enough in function and operation that it is appropriate to group them together. Decorative hearth products are gas-fired products that meet the criteria discussed in section II.A of this determination. The definition of decorative hearth products groups together all products that perform the same basic function—simulating a solid-fuel fireplace and/or presenting an aesthetic flame pattern while not being designed to heat the surrounding space—regardless of whether they are described in the marketplace as being a “gas fireplace insert”, “gas log set”, or some other term. While products such as gas logs, gas fireplace inserts, gas stoves, or other decorative hearth products may have distinct operational or design characteristics, DOE finds that the products are similar enough in function and operation that it is appropriate to group them all under a single definition of decorative hearth products for the purposes of this final determination because they all serve the same purpose of simulating a solid-fuel fireplace and/or presenting an aesthetic flame pattern while not being designed to heat the surrounding space. As noted previously, decorative hearth products can be designed for indoor or outdoor use (*i.e.*, these products include indoor decorative hearth products and outdoor decorative hearth products).

As noted by commenters, all hearth products, including those that are decorative and are not designed to provide a significant amount of heat to the surrounding space, produce some amount of heat even if it is not their primary function. Grouping indoor decorative hearths and outdoor decorative hearths is appropriate because, as noted, they have similar forms and functions. Outdoor hearths and outdoor heaters are also similar in that they are gas-fired products that are used outdoors and may provide aesthetic value to consumers (in particular, outdoor hearths and outdoor heaters with visible flames may be considered substitute products for many

consumers), and therefore grouping these products is also appropriate. Outdoor heaters without flames are very similar to those with flames. DOE’s analysis of MGPs as a covered products assessed outdoor heaters, which it defines as products that are gas-fired appliances designed for use in outdoor spaces only, and which are designed to provide heat proximate to the unit. Some outdoor heaters meeting DOE’s definition have visible flames and some do not.

Furthermore, DOE disagrees with the assertion that its motivation in grouping these products was related to annual energy use thresholds. As discussed above, DOE believes these products are appropriately grouped based on their function and operation. In the February 2022 NOPD, DOE estimated that both outdoor heaters and decorative hearth products individually meet the energy use threshold under 42 U.S.C. 6292(b)(1)(B). 87 FR 6792. Aggregate annual energy use was not a factor in determining the scope of MGPs. Should DOE proceed with a rulemaking to establish energy conservation standards, DOE would determine if MGPs satisfy the energy use threshold provisions at 42 U.S.C. 6295(j)(1) during the course of that rulemaking.

DOE did not include ANSI safety certifications into its definitions of miscellaneous gas products, decorative hearth products, or outdoor heaters because DOE understands that many hearth products could be certified to various or multiple standards, and defining product classifications based on the safety standard could allow products to change classification if their certification standard were changed. Additionally, it could be possible for hearth products to not indicate the ANSI standard to which it is certified.

In response to the suggestion that many outdoor heaters would more appropriately be classified as commercial products, DOE notes that EPCA defines “consumer product,” in part, as an article that “to any significant extent, is distributed in commerce for personal use or consumption by individuals.” (42 U.S.C. 6291(1)). Standards established for MGPs as a consumer product under EPCA would, therefore apply to any MGP distributed to any significant extent as a consumer product for residential use. Although many outdoor heaters (and other types of MGPs) can be used in commercial settings, they are appropriately classified as consumer products because many of these products are also distributed in commerce for residential use.

#### 4. Propane Products

In response to the February 2022 NOPD, HPBA commented that although the coverage of any MGPs is not warranted; coverage for propane-fueled products would be even harder to justify for many of these products. (HPBA, No. 11 at p. 51) HPBA added that many prefabricated outdoor fireplaces use propane as fuel, and consumers are directed to close the valves on the propane cylinders when the product is not in use and the potential for unnecessary pilot light use would be limited by the volume of the cylinder. (*Id.* at pp. 45, 53)

OGC commented that propane-fueled decorative hearth products and outdoor heaters should not be within the scope of coverage because the relatively high cost of propane and the user understanding that products operated on bottled propane are operated on a limited supply of fuel already encourages users to practice energy conservation and monitor their usage. (OGC, No. 8 at p. 2) AHRI commented that for portable or free-standing propane heaters, it would be unlikely that a standing pilot would be left on as it would drain the propane tank when the heater was not in use. (AHRI, No. 16, p. 5) Similarly, HHT and NPGA commented that propane fuel usage is already regulated by the size of the container it is sold in or used out of. (HHT, No. 9 at p. 2; NPGA, No. 14 at p. 4) Therefore, NPGA concluded that the energy use of propane-fueled decorative hearth products or outdoor heaters is determined by the consumer rather than an efficiency standard. (NPGA, No. 14 at p. 4)

Conversely, Moroz commented that the inclusion of propane-fueled decorative hearth products and outdoor heaters should be done only to harmonize with NRCAN regulations for hearth appliances. (Moroz, No. 7 at p. 2) AGH commented that they support the inclusion of propane products within the scope of the proposed coverage determination of MGPs. The commenter stated that stoves and fireplaces that use propane are often nearly identical to ones that use natural gas and are very popular in areas not served by gas pipelines. AGH stated that companies that produce natural gas appliances also produce propane appliances and the regulation of one without the other would create a confusing and artificial distinction. AGH added that the cost of propane is typically higher than natural gas; therefore, consumers could benefit from transparent and minimum efficiency ratings. (AGH, No. 10 at p. 2) The Joint Commenters also expressed



their support for the inclusion of propane products in the scope of proposed coverage determination for MGPs. (Joint Commenters, No. 13 at p. 1) The Joint Commenters referenced a 2017 Lawrence Berkley National Laboratory Hearth Study that showed that 59 percent of hearth products use natural gas and 17 percent use propane and suggested that they expect the proportion of decorative hearth products that use propane to be similar and that the inclusion of propane products may represent significant energy savings. The Joint Commenters also noted their market review findings that one large retailer listed 151 models of propane-fueled units and 23 models of natural gas-fueled outdoor heaters while another large retailer's website listed 352 models of propane-fueled units and 56 models of natural-gas fired outdoor heaters. (*Id.* at pp. 1–2)

DOE defines the term “gas” to mean either natural gas or propane in 10 CFR 430.2. Therefore, based on the existing definition of “gas,” MGPs would include propane-fueled outdoor heaters and decorative hearth products. However, should test procedures and energy conservation standards for MGPs be considered in the future, DOE may consider whether propane-fueled products warrant different treatment under test procedures and energy conservation standards than natural gas-fueled MGPs.

#### 5. Unvented Hearth Products

OGC commented that unvented indoor products must be certified to ANSI Z21.11.1 and that whether the product is used primarily as heat or for its decorative qualities is determined by the user. (OGC, No. 8 at p. 3) Moroz commented that because the heat from combustion in an unvented gas fireplace is distributed into the surrounding living space, it is appropriate for them to be classified as heaters. (Moroz, No. 7 at p. 2) HHT stated that they are not aware of any unvented hearth product that is solely decorative and that the ability of a product to provide sufficient heat for a space is dependent on the space in which it is installed. HHT stated that it is not aware of any characteristics that differentiate purely decorative unvented indoor hearth products from unvented heaters. (HHT, No. 9 at p. 2) HPBA stated that heating output does not provide a distinction between different categories of vent-free fireplaces or log sets. (HPBA, No. 11 at p. 51) HPBA stated that vent-free gas fireplaces and log sets, which have an inherently high heating efficiency because they release all of their heat to the space, may be chosen because of

ease of installation or because they may be the only practical option. (*Id.* at pp. 51–52) DOE is not aware of any purely decorative unvented hearth products and agrees that unvented indoor products are not decorative hearth products as defined in this determination. Hearth heaters, including unvented hearth heaters, are separately regulated products and DOE is in the process of considering standards for these products in a separate rulemaking (see docket EERE–2022–BT–STD–0018).

#### 6. ANSI Standard Certifications

In response to the February 2022 NOPD, HHT commented that the following industry standards should be reviewed for the coverage determination for decorative hearth products and outdoor heaters: ANSI Z21.50, Z21.84, Z21.11, Z83.26, Z21.60, Z21.97, Z83.19. (HHT, No. 9 at p. 1) OGC commented that the industry standards covered in the February 2022 NOPD are adequate to cover the different product types identified. (OGC, No. 8 at p. 1)

DOE reviewed the scope of ANSI Z21.50, ANSI Z21.60, ANSI Z21.84, ANSI Z21.97, and ANSI Z83.26 to inform the proposed scope of coverage of MGPs in the February 2022 NOPD. 87 FR 6786, 6788–6789. DOE has also since identified products certified to ANSI Z21.11 and ANSI Z83.19 and reviewed the scope of these standards as well. As appropriate, DOE used provisions from these ANSI standards to inform its understanding of appropriate product categorizations, but, as discussed in section II.A.3, DOE did not include ANSI safety certifications into its definitions of miscellaneous gas products, decorative hearth products, or outdoor heaters because this could lead to inconsistent classifications.

#### B. Other Comments Received

##### 1. Indoor Heating Products

HPBA asserted that no gas fireplace products qualify as DHE. The commenter added that fireplace products are not included in any of the 16 DHE product categories, nor do they resemble products that are DHE. Further, HPBA stated that EPCA does not give DOE authority to create additional categories of DHE. (HPBA, No. 11 at pp. 19–21)

DOE notes that MGPs are a separate consumer product category from DHE, and that DHE are not at issue in this coverage determination rulemaking. Indeed, in its decision for *Hearth, Patio & Barbecue Association v. Department of Energy, et al.* 706 F.3d 499 (D.C. Cir. 2013), the United States Court of

Appeals for the District of Columbia Circuit held that the phrase “vented hearth heater” did not encompass decorative fireplaces as that term is traditionally understood. As discussed in the February 2022 NOPD, DOE believes that classifying vented hearth heaters as vented home heating equipment would be consistent with the Court’s opinion, in that vented hearth heaters provide space heating. Therefore, DOE concluded that although there are not currently energy conservation standards for vented hearth heaters, these products are appropriately covered as vented home heating equipment (and DHE). 87 FR 6786, 8688. However, MGPs do not include vented hearth heaters. Thus, DOE is not creating an additional category of DHE through this coverage determination, but rather is establishing a new category of separately covered products consistent with its authority under EPCA.

HPBA further commented that heating efficiency standards for vented gas fireplaces would limit the range of available products and leave many consumers without vented gas fireplaces appropriate for their needs but would not make such products better or more efficient gas fireplaces. (HPBA, No. 11 at pp. 27–28) HPBA explained that the core appeal of fireplaces is “not in their heating utility per se, but in the unique combination of features that make a fireplace a fireplace.” (*Id.*)

DOE notes that consumer utility impacts of standards for vented gas fireplaces will be considered in any future energy conservation standards rulemaking, including the aesthetic appeal of fireplace features.

HPBA commented that vented gas fireplaces do not produce particulate emissions that are often characteristic of many older solid fuel fireplaces which, they stated, makes them more desirable from an air quality standpoint, particularly in the homes of individuals with respiratory problems such as asthma. (HPBA, No. 11 at p. 29) HPBA stated that, while vented gas fireplaces can have significant heating utility, few consumers regularly use their fireplace heaters for utilitarian heating purposes, and very few do so exclusively. The commenter added that better space heating options exist that are both less costly and better tailored for the purposes of strictly utilitarian heating use. (*Id.* at pp. 29–30)

HPBA stated that the market for fireplaces with very high efficiency is small because there is little or no demand for fireplaces that generate too much heat. HPBA stated that one of their members found it possible to make



fireplaces that utilize condensing technology to reach high heating efficiency but that the market was insufficient to sustain production of condensing gas fireplaces. (HPBA, No. 11 at p. 30)

In response to DOE's request for comments on outdoor hearth products designed to provide a large amount of heat, HPBA commented that a fireplace or similar product does not exist that is designed to provide a large amount of heat as its primary function. HPBA stated that the primary function of a fireplace or similar product is to be a fireplace or similar product. HPBA stated that although it is often part of the appeal that such products produce heat, their purpose is to be enjoyed. HPBA further added that the enjoyment is undermined if too much heat is produced. HPBA also commented that the heat output of fireplaces and similar products does not provide reasonable basis for characterization of such products as "heaters" for purposes of efficiency regulation. (HPBA, No. 11 at p. 49).

DOE notes that the definitions for MGPs cover products, in part, depending on whether or not it is designed to provide heating to the space in which it is installed. Regardless of the utilization of the product by the end consumer, the designed intention of the product by the manufacturer can be classified as to whether it is intended to provide heating. It is on this basis that DOE is not excluding vented gas fireplaces from the definition of decorative hearth products, as DOE's market research found that vented gas fireplace products that are not designed to provide space heating are available on the market.

AGH commented that efficiencies of gas stoves are often unavailable and confusing and that the database maintained by the Canadian government is the only reliable source for gas stove efficiencies. (AGH, No. 10 at p. 1) AGH stated that their interactions with retailers and manufacturers yielded contradictory and inaccurate information. AGH concluded that consumers should be cautious of efficiency claims from manufacturers and retailers and suggested that the Canadian database is more reliable. AGH commented that consumers who want to save on heating bills often use their gas stove or fireplace to heat the core of the house instead of the furnace to heat the entire house. AGH stated that gas fireplaces and stoves are often used to provide heat to homes as either a primary or secondary heat source; additionally, they stated, many retailers advertise that gas inserts can easily

serve as the primary source of heat for a home and cited a manufacturer's claim that gas inserts can use "50 [percent] to 90 [percent] less gas than gas logs and up to 75 [percent] less gas than a gas furnace."<sup>11</sup> Additionally, AGH stated that gas furnaces can waste up to 30 percent of their heat from leaking ducts. AGH concluded from this information that consumers could save significant amounts of money and gas if gas fireplaces and stoves are regulated under EPCA. (*Id.* at pp. 1–2)

DOE conducted market research through which the DOE identified both gas stove products that are intended to provide space heating and gas stove products that are not intended to provide space heating. Therefore, DOE is not excluding all gas stoves from coverage as MGPs. DOE notes that any indoor gas stove that is designed to heat the space in which it is installed does not meet the criteria outlined in the definition of a decorative hearth product and will thereby not be covered as MGP.

## 2. Shipments

AGH raised concerns that DOE may have underestimated the annual shipments of MGPs by relying on data from HPBA. AGH commented that HPBA's estimates only include appliance shipments by their member companies. They further suggested that even member companies may choose not to provide data and that some of the largest gas appliance manufacturers have dropped their HPBA membership in recent years. (AGH, No. 10 at p. 2) The Joint Commenters stated their belief that the DOE may be underestimating the annual shipments of MGPs because although it was stated in the February 2022 NOPD that the hearth product shipments were scaled from the technical support document ("TSD") that accompanied a notice of proposed rulemaking (NOPR) proposing energy conservation standards for hearth products published on February 9, 2015 (80 FR 7082) ("the February 2015 NOPR")<sup>12</sup> ("the February 2015 NOPR TSD"), they stated that it was unclear what the scaling factor was intended to represent and that the hearth product shipments reported by HPBA appear to be significantly higher than those in Table 9.3.1 of the February 2015 NOPR

<sup>11</sup> AGH cited a blog post by Karen Duke titled "Is a Gas Fireplace Worth It?" See [www.victorianfireplaceshop.com/is-a-gas-fireplace-worth-it](http://www.victorianfireplaceshop.com/is-a-gas-fireplace-worth-it).

<sup>12</sup> On March 31, 2017, DOE withdrew a proposed determination of coverage for hearth products that was published on December 31, 2013 (78 FR 79638) in the bi-annual publication of the DOE Regulatory Agenda. (82 FR 40270, 40274 (August 24, 2017)) This withdrawal, in effect, revoked the February 2015 NOPR.

TSD. (Joint Commenters, No. 13 at p. 2) Further, the Joint Commenters stated that shipments of MGPs may have increased significantly due to the COVID-19 pandemic, and it is therefore, believed by the commenters that the number of annual shipments is underestimated by DOE. (*Id.*)

The CA IOUs added that the use of hearth products is continuing to increase in California and is anticipated to do so through the year 2035. (CA IOUs, No. 12 at p. 1)

DOE notes that it used the shipment data available at the time of the February 2022 NOPD to develop the estimates of energy consumption. In the Request for Information on Energy Conservation Standards for Miscellaneous Gas Products published on June 14, 2022 ("June 2022 RFI"),<sup>13</sup> DOE requested updated shipment figures for decorative hearth products and outdoor heaters. 87 FR 35925. In response to the Joint Commenters, DOE notes that the shipment data for gas appliances reported by HPBA comprise more products than only decorative hearths, therefore some of the HPBA shipments are excluded from DOE's estimates for decorative hearths. HPBA provided DOE with shipments of hearth products for the February 2015 NOPR, which are available in Chapter 9 of the February 2015 NOPR TSD. These shipments reflect the number of decorative hearths and hearth heaters shipped by HPBA members from 2005 to 2013. DOE took these shipments and compared them to overall gas appliance shipments reported by HPBA<sup>14</sup> during that time and, on average, decorative hearths and hearth heaters accounted for 68 percent the HPBA reported total annual hearth industry shipments. DOE applied this 68 percent to HPBA shipments of gas appliances beyond 2013<sup>15</sup> to develop a stock of hearth heaters and decorative hearths in 2022. To develop a stock of decorative hearths for the February 2022 NOPD, DOE assumed that 39 percent of total decorative hearths and hearth heater shipments were decorative. This is the same percentage that was used to estimate decorative shipments in the analysis supporting the February 2015 NOPR. DOE understands that the COVID-19 pandemic may have increased the demand for MGP products including outdoor heaters and DOE may

<sup>13</sup> See: [www.regulations.gov/document/EERE-2022-BT-STD-0017-0001](https://www.regulations.gov/document/EERE-2022-BT-STD-0017-0001).

<sup>14</sup> U.S. Hearth Industry Shipments: 1998–2021. [www.hpba.org/Resources/Annual-Historical-Hearth-Shipments](http://www.hpba.org/Resources/Annual-Historical-Hearth-Shipments).

<sup>15</sup> U.S. Hearth Industry Shipments: 1998–2021. [www.hpba.org/Resources/Annual-Historical-Hearth-Shipments](http://www.hpba.org/Resources/Annual-Historical-Hearth-Shipments).

consider future growth of product shipments in a standards analysis.

### 3. Energy Use Analysis

OGC commented that DOE needs to demonstrate that an improvement in efficiency is feasible to conserve energy resources in order to cover a product, which OGC stated had not been done in the proposed determination. (OGC, No. 8 at p. 2) NPGA stated that they were unable to evaluate the potential benefits, energy savings, or improvements for consumers because the scope of products potentially subject to the February 2022 NOPD is overly broad. (NPGA, No. 14 at pp. 2, 3, and 5)

HPBA commented that the “outdoor heater” and “decorative hearth” definitions are not clear enough to know which product operating hours should be compared. HPBA added that the operative hours of “decorative hearths” should not be compared to anything because the products which are included are too diverse and that the estimate of operating hours of “decorative hearths” would not be representative of any particular product included. (HPBA, No. 11 at pp. 52–53) Specifically, HPBA commented that fireplaces are architectural features that add to the appeal and market value of a home whether or not they are used. HPBA added that a substantial percentage of fireplaces see little or no active use. (HPBA, No. 11 at pp. 29, 31) The CA IOUs commented that the performance standards for MGPs can deliver cost-effective savings for Californians and contribute to a significant reduction of greenhouse gas emissions nationally. The CA IOUs commented that MGPs can operate for many years and stated that DOE’s assumption that the lifetime of these products is fifteen years is supported by analysis and interviews in both California and Canada; therefore, they stated, DOE should begin regulation of these products as soon as possible. (CA IOUs, No. 12 at p. 1)

#### a. Ignition Systems

In response to the February 2022 NOPD, NPGA cautioned the DOE against defining scope or standards according to the presence of a standing pilot light. NPGA commented that for propane-powered outdoor heaters, a push-button or dial control connected to a pilot are designed for consumer safety and ease of ignition. NPGA added that unlike indoor products powered by natural gas, propane-powered outdoor heaters are not designed for pilot lights to remain on indefinitely. NPGA stated that clarification is needed as to why the DOE would find the ignition system

breakdowns for outdoor heaters or standing pilot operating hours data for outdoor heaters to be useful information or impactful upon energy conservation standards. (NPGA, No. 14 at p. 4)

OGC commented that ignition systems and operation for outdoor products differs from that of indoor products and that DOE’s energy usage calculations for these products are therefore incorrect. OGC stated that outdoor heaters use either an electronic ignition or a thermo-electric safety valve. The commenter stated that electronic ignition systems either ignite the main burner directly or may ignite a pilot burner that ignites the main burner, but the pilot is extinguished once the main burner is shut off, and that thermo-electric systems typically ignite the main burner directly and use heat from the main burner to activate the thermo-electric safety valve. (OGC, No. 8 at p. 3) HPBA commented that many outdoor gas fireplaces have open combustion chambers in which continuous pilot lights have a tendency to blow out. HPBA also commented that many prefabricated outdoor fireplaces have simple dial and push-button pilot light that is designed to be turned on and off manually to facilitate safe main burner ignition and pilot light controls that make it easy for consumers to avoid unnecessary pilot light use. (HPBA, No. 11 at pp. 45, 53) HPBA further stated that the potential for such continuous pilot lights to be left burning is unknown but likely to be limited. (*Id.* at p. 45) HPBA commented that the pilot lights for these products are not designed to be left on indefinitely and would likely burn out if they were left burning for an extended period of time. HPBA stated that they are not aware of any pilot light operating hours data and added that this data serves no purpose for products that are not designed to be left with their pilot lights burning indefinitely. (*Id.* at pp. 53–54)

AHRI commented generally that standing pilots are a practical and beneficial solution for units without an outside power source. (AHRI, No. 16 at p. 5) Similarly, HPBA commented that, for gas log sets, there are physical and mechanical challenges that limit the potential for electronic alternatives and the market for these products would likely be damaged by a continuous pilot ban. (HPBA, No. 11 at pp. 36–37)

HPBA stated that outdoor gas log sets are designed to be installed in the hearths of existing wood-burning fireplaces and face similar challenges as vented gas log sets in transitioning to electronic ignition, in that electronic ignition would negatively impact aesthetics and the added hardware

would be difficult to conceal or shield from excessive heat. HPBA added that an increase in cost or decrease of appeal in outdoor gas log sets could cause consumers to leave conventional wood-burning fireplaces in operation, thereby causing adverse environmental impacts. (*Id.* at p. 43) HPBA also commented that a ban on continuous pilot lights for these products could have adverse safety impacts because, for outdoor fire pits that use continuous pilots, the pilot provides a means to minimize the risk of delayed main burner ignition involving the sudden ignition of a significant amount of gas. (*Id.*)

HPBA commented that when outside temperatures are low, the heat from a vented gas fireplace must initially overcome a column of cold air in the vent system. HPBA stated that this can present significant challenges with longer-vent installations and particularly with more heat-efficient designs that employ heat exchangers or flue restrictors to raise thermal efficiency and control excess air. HPBA stated that a cold-start-up can cause serious operational problems such as start-up lag, flame lift, burner outage, draft reversal, and delayed main burner ignition. HPBA added that any of these issues would be immediately observable by the consumer and can be quite alarming. HPBA stated that a pilot light warms the flue and establishes proper draw prior to main burner ignition to address all of the listed issues. HPBA commented that intermittent pilot ignition (“IPI”) systems with a continuous pilot ignition (“CPI”) function were created to address these concerns and that in some installations a continuous pilot flame is needed to ensure proper product operation. HPBA added that CPI functions are used to prevent or resolve operational problems. (*Id.* at pp. 38–39) HPBA stated that the development of “on demand” systems has made it possible for CPI functions on IPI systems to be converted into “on demand” functions. (*Id.* at p. 39) HPBA stated that DOE did not include “on demand” pilots which were developed to eliminate standing pilots in gas fireplace products. HPBA added that these on-demand ignition systems are currently one of the most common of the relevant ignition systems. (*Id.* at pp. 24–25)

HPBA commented that gas fireplace products are different in every relevant aspect from products such as residential furnaces for which it was relatively easy to convert the pilot ignition. HPBA cited the following as major the differences: gas fireplaces are typically prominently displayed so that the glow of a pilot light is visible when the lights are out,

gas fireplaces are generally “attended appliances” for which the main burners are used only through the conscious action of the consumer, gas fireplaces usually have user-friendly dial and push-button continuous pilot light controls, continuous pilot lights provide unique utility for gas fireplace consumers, and they have inherent characteristics that make the use of IPI technology particularly challenging. (*Id.* at p. 35) HPBA stated that frequent user operation of pilot lights is not necessary and that the elimination of pilot lights would affect consumer utility. (*Id.* at p. 36)

HPBA commented that the industry recognized that the elimination of continuous pilot lights could potentially result in energy savings and have invested considerable resources to develop alternatives. HPBA stated that these efforts have resulted in a dramatic trend away from the use of continuous pilots on vented gas fireplaces. (*Id.*)

HPBA stated that the use of continuous pilot lights on vented gas fireplaces is already being phased out; therefore, HPBA commented that the imposition of regulatory burden to hasten market developments is unnecessary. (*Id.* at p. 37) HPBA commented that DOE should consider why there hasn’t already been widespread adoption of IPI technology (without CPI functionality) in the gas fireplace industry, why IPI systems with a CPI function and “on-demand” ignition systems were developed by the gas fireplace industry exclusively to provide an alternative to IPI-only systems for vented gas fireplaces, and why some retailers have reported that they choose to activate the CPI function on IPI products they sell. (*Id.* at p. 37) HPBA stated that it is difficult to ensure that vented gas fireplaces with IPI-only ignition systems will not experience potentially significant operational problems in some installations. HPBA added that the specific technical issues that may occur are related to the differences between vented gas fireplaces and the types of products for which IPI systems were designed. (*Id.* at pp. 37–38)

HPBA stated that gas fireplaces and log sets are so materially different from each other that combined data on the proportion of ignition system types for both products would be wildly inaccurate as applied to either. (*Id.* at p. 19)

HPBA stated that they explored an initiative to eliminate continuous pilot lights on a wide range of outdoor gas products and determined that it would have little potential to conserve energy

and would have undesirable collateral safety impacts. (*Id.* at p. 45)

The CA IOUs stated that the California Energy Commission (“CEC”) determined that, using an assumption of 1,000 Btu/hour for gas burners and annual standing pilot operating hours of 4,612 hours per product, decorative hearth products and outdoor gas fireplaces will provide cost effective energy savings that will exceed the thresholds set by 42 U.S.C. 6292 (b)(1) and 42 U.S.C. 6295(l). The CA IOUs stated that using the CEC’s assumptions, standing pilots used 4,161,569 Btu/year per unit which is equivalent to 1,219 kWh and exceeds the requirements to set standards under EPCA. (CA IOUs, No. 12 at p. 2) The CA IOUs stated that a CEC analysis determined that decorative hearth products with an on-demand pilot light used 1,747,755 Btu/year while decorative hearths with intermittent pilot energy used only 188,882 Btu/year. The CA IOUs also stated that the CEC determined that intermittent pilot light technologies are readily available. The CA IOUs stated the feasibility and savings that were demonstrated support that federal regulation of these products is consistent with the purposes of EPCA. (*Id.*)

In response to concerns about potential standards that could eliminate the use of continuous pilot lights or regulate other ignition systems in the future, DOE notes that the current coverage rulemaking is only to determine whether coverage of MGPs is necessary or appropriate to carry out the purposes of EPCA, as discussed in section I.A. DOE maintains that patio heaters fall under the proposed definition of outdoor heaters and, by extension, MGPs, regardless of the type of ignition used in the product. DOE is not proposing standards for MGPs in this final determination of coverage. Comments regarding the benefits and obstacles for potential standards for MGPs will be considered in a separate energy conservation standards rulemaking.<sup>16</sup>

In response to comments on the energy use estimates, DOE notes that it did not use the same operating characteristics for indoor decorative hearth pilot operation and outdoor heater pilot operation. DOE understands that a large percentage of outdoor heaters are propane, however, there are fixed outdoor heaters on the market. DOE adjusted the standing pilot hours and the percentage of standing pilots of

decorative hearths to make an estimate of ignition energy use for outdoor heaters. In DOE’s energy consumption estimate, it was assumed that only around 10 percent of outdoor heaters kept the pilot on when the main burner was not operating and the standing pilot hours were reduced to account for the fact that outdoor heaters are likely more seasonal than decorative hearths. In the February 2022 NOPD, DOE requested comment on the breakdown of ignition systems and standing pilot operating hours for outdoor heaters, and received no data. 87 FR 6786, 6792.

In response to the CA IOUs, DOE notes that the energy consumption analysis in the February 2022 NOPD was developed to determine if coverage of MGPs was warranted under 42 U.S.C. 6292(b). DOE will consider the technical feasibility, energy savings, and economic justification of various technologies in a standards rulemaking.

#### b. Main Burner Operation

OGC and HHT stated that outdoor conditions vary greatly from season to season as well as by location and climate. (OGC, No. 8 at p. 3; HHT No. 9 at p. 3) OGC expressed concerns that DOE assumes outdoor decorative products are operated regardless of the outdoor ambient temperature without data to substantiate that assumption. (OGC, No. 8 at p. 3) Moroz stated that they are not aware of any data representing the operating hours of either outdoor heaters or decorative hearth appliances. (Moroz, No. 7 at p. 2) OGC added that they are unaware of available data on outdoor usage or energy consumption and that the operating characteristics for outdoor heaters, indoor decorative products, and outdoor decorative products are likely to be different. (OGC, No. 8 at p. 3)

NPGA stated in response to the February 2022 NOPD, that energy usage was estimated according to outdated survey information. NPGA also stated that decorative hearth products and outdoor heaters are intrinsically produced for different uses by consumers. NPGA commented that the data and surveys collected in past years were not administered according to the proposed product definition presented in the current notice and therefore, urged the DOE to issue an RFI for more data and present the data and proposed definitions for stakeholders in a new notice. (NPGA, No. 14 at pp. 2–3) NPGA commented that the DOE should pursue the most recent and up-to-date data on energy usage and manufacturing production because this information is crucial to determining if these products

<sup>16</sup>Docket for Miscellaneous Gas Products Energy Conservation Standards: [www.regulations.gov/docket/EERE-2022-BT-STD-0017](http://www.regulations.gov/docket/EERE-2022-BT-STD-0017).

use enough energy to meet the threshold for regulation under EPCA. (*Id.* at p. 2)

AHRI also stated that they do not view the prescription of decorative hearth usage data to outdoor heaters to be a valid assumption. AHRI further added that the consumer survey used to estimate decorative hearth usage may be questionable because all of the estimates were derived from a single survey. AHRI noted that the survey (although published in June of 2017) was conducted in February of 2016, there was no mechanism for respondents to confirm ownership of the equipment in question, and it was not confirmed that the respondents' "subjective answers" reflected the manufacturers' design for decorative hearth equipment. (AHRI, No. 16 at pp. 3–4)

The Joint Commenters stated that it is not clear in the February 2022 NOPD whether match-lit units were included in the national energy use calculation. (The Joint Commenters, No. 13 at p. 2)

HPBA suggested that heating standards would be problematic because increasing heating efficiency and thus heat output can lead to more heat output than is desired. HPBA further suggested that even moderately high heating efficiency standards could substantially reduce the number of fireplaces appropriate to a given installation. Additionally, HPBA stated that an increase in heating efficiency cannot be expected to produce energy savings by reducing the burner operating hours required to satisfy heating needs. (HPBA, No. 11 at pp. 31–34)

DOE notes that the average operating hours for decorative hearths from the February 2022 NOPD was based on operating data for both indoor decorative hearths and outdoor decorative hearths from a 2017 survey by the Lawrence Berkeley National Laboratory ("2017 hearth survey").<sup>17</sup> There was no assumption that outdoor decorative hearths operate the same regardless of outdoor air temperatures; the national average was created by averaging the operating hours for decorative products (both indoor and outdoor) by region. DOE lacked data on the operation of outdoor heaters at the time of the February 2022 NOPD. The 2017 Hearth Survey provided estimates of main burner hours for decorative hearths and hearth heaters and noted a positive correlation between the main burner operating hours and utility for

heat. DOE used the decorative hearth burner operating hours for outdoor heaters as those were the smallest amount of operating hours in the survey and therefore constitutes a conservative estimate. While DOE understands that the operating characteristics of decorative hearths and outdoor heaters may vary, given that large portions of the U.S. have long periods of cooler temperatures, it is unlikely that outdoor heaters would operate significantly less than what was assumed in the February 2022 NOPD. As DOE did not receive any data on the operating hours of decorative hearths or outdoor heaters, DOE did not change its estimates of national and household energy consumption.

DOE also notes that the 2017 Hearth Survey is the most comprehensive study of hearth products in the United States. While the respondent's answers were subjective, DOE has confidence in the survey because the percentage of products identified as decorative or mostly decorative (38 percent) is consistent with the percentage of total hearth shipments that were decorative (39 percent) from the February 2015 NOPR.

In response to the Joint Commenters, the main burner energy consumption of match-lit products was included in the national energy use calculation.

This coverage determination rulemaking is only to determine whether coverage of MGPs is necessary or appropriate to carry out the purposes of EPCA, as discussed in section I.A. DOE is not proposing standards for MGPs in this final determination of coverage. DOE may consider the impacts of standards on consumer utility in a future energy conservation standards rulemaking.

#### 4. Economic Analysis

The Gas Associations commented that it is important that the DOE implement the recommendations from the recent National Academies of Sciences, Engineering, and Medicine ("NASEM") report<sup>18</sup> into all of its appliance rulemakings. In particular, the Gas Associations recommended, based on the NASEM report, that DOE should pay greater attention to economic justification for the standards as required by EPCA and, to conclude that standards are economically justified, DOE should attempt to find significant failures of private markets or irrational behavior by consumers in the no-

standards case. Additionally, the Gas Associations recommended that the DOE expand the Cost Analysis segment of the Engineering Analysis to include ranges of costs, patterns of consumption, diversity factors, energy peak demand, and variance regarding environmental factors. The Gas Associations also recommended that the DOE give greater weight to ex post and market-based evidence of markups in order to project more accurate effects of a standard on prices. (Gas Associations, No. 15 at p. 2)

The Gas Associations recommended that DOE provide an argument for the plausibility and magnitude of potential market failure related to the energy efficiency gap in its analysis. They added that there should be a presumption that the market actors behave rationally, unless DOE can provide evidence to the contrary. The Gas Associations also recommended that DOE should give greater attention to a broader set of potential market failures on the supply side. They stated that this should include how standards might reduce the number of competing firms and how they might impact price discrimination, technological diffusion, and collusion. (*Id.*)

In response to the Gas Associations recommendations for the economic analysis, DOE notes that the current coverage rulemaking is only to determine whether coverage of MGPs is necessary or appropriate to carry out the purposes of EPCA. Economic considerations would be analyzed as part of an energy conservation standard rulemaking.

#### 5. Process-Related Comments

In response to the February 2022 NOPD, the CA IOUs agreed with DOE's tentative finding that the coverage of MGPs is necessary and appropriate to carry out the purposes of EPCA. (CA IOUs, No. 12 at p. 1) The Joint Commenters also indicated their support of DOE's determination that decorative hearths and outdoor heaters qualify as MGPs covered under EPCA. However, the Joint Commenters encouraged DOE to not finalize the proposed determination until energy conservation standards have been finalized, since information that is learned during the rulemaking process for both test procedures and energy conservation standards can ultimately inform the coverage determination. (Joint Commenters, No. 13 at p. 1)

HPBA and APGA requested that DOE further explain its proposal with specific regard to the identification of the specific product for which coverage is proposed, and why (and how) DOE

<sup>17</sup> Siap, David, Willem, Henry, Price, Sarah, Yang, Hung-Chia, Lekov, Alex. Survey of Hearth Products in U.S. Homes. Energy Analysis and Environmental Impacts Division, Lawrence Berkeley National Laboratory. June 2017. [eta.lbl.gov/publications/survey-hearth-products-us-homes](https://eta.lbl.gov/publications/survey-hearth-products-us-homes).

<sup>18</sup> Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards. NASEM (2021). Available at: [nap.nationalacademies.org/read/25992/chapter/1](https://nap.nationalacademies.org/read/25992/chapter/1).

believes that it would be appropriate to regulate each of those products. (HPBA, No. 2 at pp. 1–2; APGA, No. 5 at pp. 1–2)

HPBA and AGA requested that DOE hold a public meeting to clarify its current proposal. (HPBA, No. 2 at p. 1; AGA, No. 4 at p. 2) HPBA requested the opportunity to present specific recommendations concerning DOE's basic regulatory approach to facilitate a constructive exchange of information and ideas. (HPBA, No. 2 at pp. 2–3) Additionally, HPBA included in their comments a resubmission of the comments they submitted on May 11, 2015, in response to the February 2015 NOPR as evidence to support their claim of inadequate informational exchange. (*Id.* at p. 10) HPBA also added that DOE is behind on statutory deadlines for regulatory actions on numerous products that it has a mandatory duty to complete and therefore it is not “necessary” or “appropriate” for DOE to regulate MGPs. (*Id.* at p. 54) AGA commented that the rulemaking history in this proposal and the unaddressed concerns of stakeholders makes a public meeting appropriate. AGA added that the meeting should address concerns including outstanding coverage determinations, whether there is a justifiable basis for regulating covered products, and how covered products may be regulated. (AGA, No. 4 at pp. 1–2)

In response, DOE notes that although the scope of the February 2015 NOPR differed from the current coverage determination, many insights from that rulemaking (for example, information about technology options that are also relevant to MGPs) informed the current coverage determination. Additionally, DOE responds that stakeholders were given the opportunity to provide written comments in response to the proposed coverage determination, which DOE determines to be a sufficient opportunity to provide feedback. Moreover, as noted above, this rulemaking only establishes coverage for MGPs. DOE's authority and responsibility to determine the coverage of MGPs is distinct from its authority under EPCA. Prior to the adoption of any energy conservation standards or test procedures for these products, stakeholders will have additional opportunities for comment, including a public meeting(s).

The Gas Associations commented that the proposed coverage determination of MGPs is neither necessary nor appropriate within the meaning of 42 U.S.C. 6292(b)(1)(A). They added that DOE has not provided sufficient

evidence to demonstrate economic justification or significant energy savings for an efficiency standard for MGPs. (Gas Associations, No. 15 at pp. 2–3) They stated that the February 2022 NOPD treated broad categories of different products as though they are a single product and recommended the withdrawal of the proposed coverage determination for reconsideration. (*Id.* at p. 3) OGC commented that the coverage of “miscellaneous gas products” is not necessary or appropriate to carry out the purposes of EPCA and that it is too broad to justify coverage under EPCA. (OGC, No. 8 at p. 3) OGC and HHT further commented that the information and analysis in the February 2022 NOPD are inadequate to support the issuance of a determination for MGPs. Consequently, OGC recommended that the proposed determination be withdrawn and treated as an RFI to allow for more collaboration with industry to properly determine what is considered a covered product. (OGC, No. 8 at p. 1; HHT, No. 9 at pp. 1, 3)

Similarly, HPBA requested that the DOE withdraw the February 2022 NOPD and discontinue any further regulatory efforts with respect to gas fireplaces, fireplace inserts, freestanding stoves, gas log sets, outdoor gas products designed to have visual appeal (fire pits, fire tables, tiki torches, patio heaters that double as outdoor lighting or flame art, and pure objects of flame art), and strictly utilitarian portable patio heaters. HPBA added that coverage for the listed products is neither “necessary” nor “appropriate” within the meaning of 42 U.S.C. 6292(b)(1)(A) and was not proven otherwise by the February 2022 NOPD. HPBA stated that there is no potential for energy savings or economic justification that could be provided by efficiency standards for these products and that these products are unsuitable targets for efficiency regulation. (HPBA, No. 11 at p. 1) HPBA commented that the DOE's attempt to establish coverage of MGPs is not supported by EPCA and stated that the February 2022 NOPD did not provide a reasonable basis to conclude that MGPs are worth regulating. (*Id.* at pp. 13–15) HPBA stated that DOE should follow the direction of Executive Order 13563 and ensure that it has incorporated information and perspectives from those who are likely to be affected by the proposal. (*Id.* at p. 12) HPBA stated that coverage determinations must be product-specific and that to establish that coverage is warranted, DOE must demonstrate that the product is not a “gnat” and explain why regulation of

that product is “necessary” or “appropriate” to carry out EPCA's purposes. HPBA also stated that there is insufficient data and information used for the analysis. They added that data collection should be the first step in the development of a rule. HPBA stated that the pace of technological and market changes has made it so information concerning the prevalence of continuous pilot lights becomes quickly outdated. HPBA commented that while they have not had sufficient opportunity to review the basis of the DOE's claims, they stated that the February 2022 NOPD is based on inaccurate information, inadequate data, and arbitrary assumptions. (*Id.* at pp. 24–25)

DOE notes that Part A of Title III of EPCA, 42 U.S.C. 6291 *et seq.*, authorizes DOE to classify additional types of consumer products as covered products upon determining that: (1) classifying the product as a covered product is necessary or appropriate for the purposes of EPCA; and (2) the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours per year (kWh/yr). (42 U.S.C. 6292(b)(1)). DOE's evaluation of MGPs under this standard is discussed in section II.C of this determination.

### C. Evaluation of Miscellaneous Gas Products as Covered Products

DOE evaluated whether MGPs, which are comprised of decorative hearth products and outdoor heaters, are “consumer products” under EPCA. As discussed in section I of this document, a consumer product is any article (other than an automobile) of a type—(A) which in operation consumes, or is designed to consume energy; and (B) which, to any significant extent, is distributed in commerce for personal use or consumption by individuals; without regard to whether such article of such type is in fact distributed in commerce for personal use or consumption by an individual. (42 U.S.C. 6291(a)(1)) MGPs consume energy during operation and are distributed in commerce for personal use by individuals. Therefore, DOE has determined that MGPs are consumer products within the scope of EPCA.

The following sections describe DOE's evaluation of whether MGPs fulfill the criteria for being added as covered products pursuant to 42 U.S.C. 6292(b)(1). As stated previously, DOE may classify a consumer product as a covered product if:

(1) Classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA; and

(2) The average annual per-household energy use by products of such type is likely to exceed 100 kWh (or its Btu equivalent) per year.

#### 1. Coverage Necessary or Appropriate To Carry Out the Purposes of EPCA

DOE has determined that coverage of MGPs is necessary or appropriate to carry out the purposes of EPCA, which include:

To conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses; and

To provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products. (42 U.S.C. 6291(4)–(5))

DOE estimates that annual shipments of MGPs have averaged approximately 190,000 units per year from 2016 to 2020.<sup>19</sup> DOE estimates that the aggregate national energy use of decorative hearth products is 0.0135 quadrillion British thermal units (“quads”) (4.0 Terawatt-hours (“TWh”)),<sup>20</sup> and that the aggregate national energy use of outdoor heaters is estimated to be 0.0007 quads (0.2 TWh).<sup>21</sup> DOE estimates that the aggregate national energy use of

decorative hearth products and outdoor heaters, comprising MGPs, is 0.0143 quads (4.2 TWh). Coverage of MGPs would result in the conservation of energy supplies through the regulation of energy efficiency. Therefore, DOE has determined that coverage of MGPs is necessary and appropriate to carrying out the purposes of EPCA, thereby satisfying the provisions of 42 U.S.C. 6292(b)(1)(A).

#### 2. Average Annual Per-Household Energy Use

DOE estimates that decorative hearths account for 93 percent of the MGP market and that outdoor heaters account for 7 percent. DOE calculated the weighted average per-household energy use of an MGP to be 4.1 MMBtu/yr (1,211 kWh/yr).<sup>22</sup> Therefore, DOE estimates that the average annual per-household energy use for MGPs is likely to exceed 100 kWh/yr, thereby satisfying the provisions of 42 U.S.C. 6292(b)(1)(B).

### III. Final Determination

Based on the foregoing discussion, DOE concludes that including MGPs, as defined in this final determination, as covered products is necessary and appropriate to carry out the purposes of EPCA, and the average annual per-household energy use by products of such type is likely to exceed 100 kWh/yr. Based on the information discussed in section II of this final determination, DOE is classifying MGPs as a covered product. This final determination does not establish test procedures or energy conservation standards for MGPs. DOE will address test procedures and energy conservation standards through its normal rulemaking process.

### IV. Procedural Issues and Regulatory Review

#### A. Review Under Executive Orders 12866 and 13563

Executive Order (“E.O.”) 12866, “Regulatory Planning and Review,” as supplemented and reaffirmed by E.O. 13563, “Improving Regulation and Regulatory Review,” 76 FR 3821 (Jan. 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory

objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit “significant regulatory actions” to OIRA for review. OIRA has determined that this final regulatory action does not constitute a “significant regulatory action” under section 3(f) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

#### B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (“IRFA”) and a final regulatory flexibility analysis (“FRFA”) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (Aug. 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 rulemaking process. 68 FR 7990. DOE

<sup>19</sup> This estimate was developed by scaling the average hearth product shipments from 2010–2013 on page 9–2 of Chapter 9 in the February 2015 NOPR Technical Support Document to the total HPBA gas appliance shipments from 2010 to 2013 and applying that average to the total gas appliance shipments to the 2016 through 2020 shipments from HPBA ([www.hpba.org/Resources/Annual-Historical-Hearth-Shipments](http://www.hpba.org/Resources/Annual-Historical-Hearth-Shipments)). Manufacturer interviews conducted for the February 2015 NOPR analysis were used to develop the market share of decorative hearths (39%) and outdoor heaters (3%) from total shipments. The market shares were assumed to remain constant from 2016–2020.

<sup>20</sup> The aggregate national energy use of decorative hearths is based on energy use estimates developed in section V.B of this document, along with historical shipments from HPBA ([www.hpba.org/Resources/Annual-Historical-Hearth-Shipments](http://www.hpba.org/Resources/Annual-Historical-Hearth-Shipments)) and the February 2015 NOPR National Impact Analysis, of which 39 percent are assumed to be decorative hearths, and a 15-year hearth lifetime which was used for all products in the February 2015 NOPR for hearth products (U.S. Department of Energy. Technical Support Document: Energy Conservation Programs for Consumer Products, Energy Conservation Standards for Hearth Products. Chapter 8: Life-Cycle-Cost Analysis. January 30, 2015. Available at: [www.regulations.gov/document/EERE-2014-BT-STD-0036-0002](http://www.regulations.gov/document/EERE-2014-BT-STD-0036-0002)).

<sup>21</sup> The aggregate national energy use of outdoor heaters is based on energy use estimates developed in section V.B of this document, along with historical shipments from the February 2015 NOPR National Impact Analysis, which assumed that ratio of patio heaters shipments to HPBA hearth shipments was 3 percent, and a 15-year hearth lifetime which was used for all products in the February 2015 NOPR for hearth products (U.S. Department of Energy. Technical Support Document: Energy Conservation Programs for Consumer Products, Energy Conservation Standards for Hearth Products. Chapter 8: Life-Cycle-Cost Analysis. January 30, 2015. Available at: [www.regulations.gov/document/EERE-2014-BT-STD-0036-0002](http://www.regulations.gov/document/EERE-2014-BT-STD-0036-0002)).

<sup>22</sup> For more detail on the energy use calculations, please refer to the February 2022 NOPD, available at: [www.regulations.gov/document/EERE-2021-BT-DET-0034-0001](http://www.regulations.gov/document/EERE-2021-BT-DET-0034-0001).

has made its procedures and policies available on the Office of the General Counsel's website ([www.energy.gov/gc/office-general-counsel](http://www.energy.gov/gc/office-general-counsel)).

DOE reviewed this final determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. This final determination does not establish test procedures or standards for MGPs. On the basis of the foregoing, DOE certifies that this final determination has no significant economic impact on a substantial number of small entities.

#### *C. Review Under the Paperwork Reduction Act*

This final determination, which concludes that MGPs meet the criteria for a covered product for which the Secretary may consider prescribing energy conservation standards pursuant to 42 U.S.C. 6295(o) and (p), imposes no new information or record-keeping requirements. Accordingly, the OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

#### *D. Review Under the National Environmental Policy Act of 1969*

Pursuant to the National Environmental Policy Act of 1969 ("NEPA"), DOE has analyzed this final determination in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this final determination 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. 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this final determination 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*

E.O. 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure

meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. This final determination does not establish energy conservation standards for MGPs. DOE has examined this final determination and concludes that it does not preempt State law or have substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. Therefore, no further action is required by Executive Order 13132.

#### *F. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final determination meets the relevant standards of E.O. 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. Public Law 104-4, sec. 201 (codified at 2 U.S.C. 1531). For a 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 "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. DOE's policy statement is also available at [www.energy.gov/sites/prod/files/gcprod/documents/umra\\_97.pdf](http://www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf).

DOE examined this final determination according to UMRA and its statement of policy and determined that the determination does not contain a Federal intergovernmental mandate, nor is it expected to require expenditures of \$100 million or more in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. As a result, the analytical requirements of UMRA do not apply.

#### *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 determination 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 E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), DOE has determined that this final determination 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). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at: [www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf](http://www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf). DOE has reviewed this final determination under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

### *K. Review Under Executive Order 13211*

E.O. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that 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 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.

This final determination, which does not amend or establish energy conservation standards for MGPs, is not a significant regulatory action under E.O. 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

### *L. Information Quality*

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.” 70 FR 2664, 2667.

In response to OMB’s Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.<sup>23</sup> 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. 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. DOE is in the

process of evaluating the resulting report.<sup>24</sup>

### *M. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this final determination prior to its effective date. The report will state that it has been determined that the final determination 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 determination.

### **List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

### **Signing Authority**

This document of the Department of Energy was signed on August 26, 2022, by, Dr. Geraldine L. Richmond, Under Secretary for Science and Innovation, 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 August 26, 2022.

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

For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, to read 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.

<sup>23</sup> The 2007 “Energy Conservation Standards Rulemaking Peer Review Report” is available at the following website: [energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0](http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0) (last accessed July 1, 2022).

<sup>24</sup> The report is available at [www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards](http://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards).

■ 2. Section 430.2 is amended by adding, in alphabetical order, definitions of “Decorative hearth product”, “Miscellaneous gas products”, and “Outdoor heater” to read as follows:

**§ 430.2 Definitions.**

\* \* \* \* \*

*Decorative hearth product* means a gas-fired appliance that—

(1) Simulates a solid-fueled fireplace or presents a flame pattern;

(2) Includes products designed for indoor use, outdoor use, or either indoor or outdoor use;

(3) Is not for use with a thermostat;

(4) For products designed for indoor use, is not designed to provide space heating to the space in which it is installed; and

(5) For products designed for outdoor use, is not designed to provide heat proximate to the unit.

\* \* \* \* \*

*Miscellaneous gas products* mean decorative hearth products and outdoor heaters.

\* \* \* \* \*

*Outdoor heater* means a gas-fired appliance designed for use in outdoor spaces only, and which is designed to provide heat proximate to the unit.

\* \* \* \* \*

[FR Doc. 2022–18856 Filed 9–2–22; 8:45 am]

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## BUREAU OF CONSUMER FINANCIAL PROTECTION

### 12 CFR Chapter X

#### Consumer Financial Protection Circular 2022–04: Insufficient Data Protection or Security for Sensitive Consumer Information

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Consumer Financial Protection Circular.

**SUMMARY:** The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2022–04, titled, “Insufficient Data Protection or Security for Sensitive Consumer Information.” In this circular, the Bureau responds to the question, “Can entities violate the prohibition on unfair acts or practices in the Consumer Financial Protection Act (CFPA) when they have insufficient data protection or information security?”

**DATES:** The Bureau released this circular on its website on August 11, 2022.

**ADDRESSES:** Enforcers, and the broader public, can provide feedback and comments to [Circulars@cfpb.gov](mailto:Circulars@cfpb.gov).

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Sellers, Senior Counsel, Office of Supervision, Fair Lending and Enforcement, at (202) 435–2661. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

#### SUPPLEMENTARY INFORMATION:

##### Question Presented

Can entities violate the prohibition on unfair acts or practices in the Consumer Financial Protection Act (CFPA) when they have insufficient data protection or information security?

##### Response

Yes. In addition to other Federal laws governing data security for financial institutions, including the Safeguards Rules issued under the Gramm-Leach-Bliley Act (GLBA), “covered persons” and “service providers” must comply with the prohibition on unfair acts or practices in the CFPA. Inadequate security for the sensitive consumer information collected, processed, maintained, or stored by the company can constitute an unfair practice in violation of 12 U.S.C. 5536(a)(1)(B). While these requirements often overlap, they are not coextensive.

Acts or practices are unfair when they cause or are likely to cause substantial injury that is not reasonably avoidable or outweighed by countervailing benefits to consumers or competition. Inadequate authentication, password management, or software update policies or practices are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers, and financial institutions are unlikely to successfully justify weak data security practices based on countervailing benefits to consumers or competition. Inadequate data security can be an unfair practice in the absence of a breach or intrusion.

##### Analysis

Widespread data breaches and cyberattacks have resulted in significant harms to consumers, including monetary loss, identity theft, significant time and money spent dealing with the impacts of the breach, and other forms of financial distress. Providers of consumer financial services are subject to specific requirements to protect consumer data. In 2021, the Federal Trade Commission (FTC) updated its Safeguards Rule implementing section 501(b) of GLBA, to set forth specific criteria relating to the safeguards that certain nonbank financial institutions

must implement as a part of their information security programs.<sup>1</sup> These safeguards, among other things, limit who can access customer information, require the use of encryption to secure such information, and require the designation of a single qualified individual to oversee an institution’s information security program and report at least annually to the institution’s board of directors or equivalent governing body. The Federal banking agencies also have issued interagency guidelines to implement section 501 of GLBA.<sup>2</sup>

In certain circumstances, failure to comply with these specific requirements may also violate the CFPA’s prohibition on unfair acts or practices. The CFPA defines an unfair act or practice as an act or practice: (1) that causes or is likely to cause substantial injury to consumers, (2) which is not reasonably avoidable by consumers, and (3) is not outweighed by countervailing benefits to consumers or competition.<sup>3</sup>

A practice causes substantial injury to consumers when it causes significant harm to a few consumers or a small amount of harm to many consumers. For example, inadequate data security measures can cause significant harm to a few consumers who become victims of targeted identity theft as a result, or it can cause harm to potentially millions of consumers when there are large customer-base-wide data breaches. Information security weaknesses can result in data breaches, cyberattacks, exploits, ransomware attacks, and other exposure of consumer data.<sup>4</sup>

Further, actual injury is not required to satisfy this prong in every case. A significant risk of harm is also sufficient. In other words, this prong of unfairness is met even in the absence of a data breach. Practices that “are likely to cause” substantial injury, including inadequate data security measures that have not yet resulted in a breach, nonetheless satisfy this prong of unfairness.<sup>5</sup>

<sup>1</sup> 86 FR 70272 (Dec. 9, 2021).

<sup>2</sup> See 66 FR 8616 (Feb. 1, 2001). These guidelines are currently codified at 12 CFR pt. 30, appendix B (OCC); Regulation H, 12 CFR 208, appendix D–2 (Board); Regulation Y, 12 CFR 225, appendix F (Board); 12 CFR pt. 364, appendix B (FDIC).

<sup>3</sup> 12 U.S.C. 5531(c). The unfairness standard in the CFPA is similar to the unfairness standard in section 5 of the Federal Trade Commission Act.

<sup>4</sup> *Compliance Management Review—Information Technology*, CFPB Examination Procedures (Sept. 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_compliance-management-review-information-technology-examination-procedures.pdf](https://files.consumerfinance.gov/f/documents/cfpb_compliance-management-review-information-technology-examination-procedures.pdf).

<sup>5</sup> See, e.g., *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246 (3d Cir. 2015) (“Although unfairness claims ‘usually involve actual and completed harms,’ ‘they may also be brought on the