

## DOE Requests Comment on Amending Energy Efficiency Procedures

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The Department of Energy (DOE) is seeking input on potential revision of its procedures for adopting energy efficiency standards. A public meeting will be held on January 9, 2018. Comments are due by February 16, 2018. The proceeding has broad implications for industry.

### DOE Considers Changes to Process Rule

DOE has longstanding procedures, the "Process Rule," for developing efficiency standards.<sup>1</sup> These include such features as early input from stakeholders and highly detailed analyses. DOE is now considering amending these procedures. It has issued a related Request for Information (RFI) and notice of meeting.<sup>2</sup> This initiative stems from DOE's intent to reduce regulatory burden while meeting the agency's statutory obligations in developing standards.

### DOE Requests Input on Key Areas

DOE has flagged several potential improvements to the Process Rule, but welcomes comments on others as well.

- **Direct Final Rule.** DOE has authority under the Energy Policy and Conservation Act (EPCA) to use "direct final rule" (DFR) rulemaking for standards after receiving a joint proposal from a group of "interested persons that are fairly representative of relevant points of view." The agency believes that DFRs can achieve objectives in the Process Rule, *e.g.*, providing for early input from stakeholders and building consensus on standards.

DOE wants comment on amending the Process Rule to address use of DFRs. It also wants comment on (1) when a joint proposal would be deemed as submitted by a group of interested persons that are fairly representative of relevant points of view, thereby permitting use of the DFR mechanism; (2) the nature and extent of "adverse comments" that may provide DOE with a reasonable basis to withdraw the DFR, leading to further rulemaking pursuant to a notice of proposed rulemaking (NOPR) that accompanies the DFR; and (3) what constitutes the "recommended standard contained in the statement," and the scope of any resulting DFR.

- **Negotiated Rulemaking.** DOE uses negotiated rulemaking to develop a consensus proposal on rules in consultation with interested parties. Working groups seek to develop consensus standards for specific products. A working group then reports to the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC), which votes on adopting a consensus agreement. DOE believes that negotiated rulemaking achieves many objectives of the Process Rule.

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<sup>1</sup> See 10 C.F.R. Part 430, Subpt. C, App. A.

<sup>2</sup> 82 Fed. Reg. 59992 (Dec. 18, 2017).

The agency wants comment on potentially amending the Process Rule to include the use of negotiated rulemaking in appropriate cases.

- **Elimination of Advance Notice of Proposed Rulemaking; Inclusion of Alternate Means to Gather Additional Information Early in the Process.** The Process Rule contains references to Advance Notice of Proposed Rulemaking (ANOPR). Amendments to EPCA have eliminated the requirement that DOE publish an ANOPR for standards. Hence, the agency wants to eliminate all references to the ANOPR requirement in the Process Rule. DOE says it has other ways to get early input and information from stakeholders, *e.g.*, Framework and Preliminary Analysis documents, Notices of Data Availability, and RFIs.

DOE wants comment on whether to revise the Process Rule to include any of the foregoing alternative pre-rule steps.

- **Application of the Process Rule to Commercial Equipment.** The terms of the Process Rule apply only to consumer products, but DOE nonetheless follows the rule for commercial equipment.

DOE wants comment on whether the Process Rule should be amended to clarify that the rule is equally applicable to commercial equipment.

- **Use of Industry Standards in DOE Test Procedures.** DOE often uses test procedures contained in industry standards when developing its own standards. In so doing, the agency has sometimes modified the industry test procedure.

DOE wants comment on amending the Process Rule to specify circumstances under which the agency would consider using an industry standard, without modification, as the DOE test procedure. One approach would be that any changes in relation to an industry standard would occur only where the benefits would outweigh the burdens on industry.

- **Timing of the Issuance of DOE Test Procedures and Standards.** The Process Rule provides that DOE is to issue test procedures before issuing an NOPR on standards. DOE has not always done so, citing, *e.g.*, lack of resources or information. This has resulted in considerable pushback by industry.

DOE wants comment on whether to amend the Process Rule to ensure that the agency follows the test-procedure-before-standards-NOPR process.

- **Improvements to DOE's Analyses.** DOE wants input on amending the Process Rule to improve its analyses and models, reduce burden, and increase transparency. Objectives include increased use of outside technical expertise; early elimination of problematic design options; thorough analysis of impacts; and transparent and robust analytical methods.

- **Other Issues.** DOE wants comment on matters not currently addressed in the Process Rule:
  - Should the rule include criteria for "no amended standards" determinations when supported by data and when small energy savings require significant upfront cost?
  - Should the rule include criteria for consideration of voluntary, non-regulatory, and market-based alternatives to standards? There are precedents for this: voluntary agreements between industry and energy efficiency advocacy groups for set-top boxes and small network equipment.
  - Should the rule establish, on a product-by-product basis, the amount of energy savings that is not "significant," thereby rendering revisions to standards not justified? Caution is warranted. In the 1980s, DOE's approach to significant energy savings was found wanting by a court.<sup>3</sup>
  - Should the rule make compliance with the rule mandatory? Currently, DOE may deviate from the rule, with notice and an explanation, and it may modify the rule with an accompanying explanation. In addition, the provisions of the rule "are not intended to establish any new cause of action or right to judicial review."<sup>4</sup>

## Conclusion

DOE has issued a broad request for input on the Process Rule. It includes not only the areas discussed herein but also on any other aspects of the rule that commenters believe warrant improvement. Industry should participate in this rulemaking, not only making its views known in this important matter but also being ready to address positions put forth by others. The outcome will likely have an overarching effect on industry long into the future.

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<sup>3</sup> *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

<sup>4</sup> 10 C.F.R. Part 430, Subpt. C, App. A, § 14.