

Energy Efficiency Advisory

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DOE Proposes to Amend Energy Efficiency Process Rule

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The Department of Energy (DOE) is taking aim at Trump-era energy efficiency rulemaking procedures that the Biden Administration believes are roadblocks to its ambitious objectives. The proposed changes would have a significant impact. Comments on DOE's proposal are due by May 27, 2021; DOE will hold a webinar on April 23, 2021.

Trump-Era Changes to Process Rule. In 2020, DOE amended its Process Rule,¹ which had been in place since 1996, for establishing minimum efficiency standards and test procedures pursuant to the Energy Policy and Conservation Act (EPCA).²

Biden Administration Proposal to Roll Back Trump-Era Changes. On Inauguration Day, President Biden issued an Executive Order³ requiring DOE to consider rolling back the 2020 changes to the Process Rule. DOE is now proposing the following:⁴

- **Restoring DOE's Discretion to Depart from the Process Rule's General Guidance.** In contrast with the 1996 Process Rule, the 2020 version is binding on DOE. DOE is now proposing to revert to the Process Rule's original, non-binding status.

¹ 10 C.F.R. Part 430, subpart C, App. A, Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment (Process Rule).

² Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final Rule, 85 Fed. Reg. 8626 (Feb. 14, 2020); Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, 85 Fed. Reg. 50937 (Aug. 19, 2020). For a detailed analysis of the amended Process Rule, see our Energy Efficiency Advisory, *DOE Amends Efficiency Rulemaking Procedures; Proposes Amended Standards Selection* (Feb. 24, 2020), <https://www.hwglaw.com/energy-efficiency-advisory-doe-amends-efficiency-rulemaking-procedures-proposes-amended-standards-selection/>.

³ Exec. Order No. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁴ See Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Notice of Proposed Rulemaking, 86 Fed. Reg. 18901 (April 12, 2021).

- **Significant Energy Savings Threshold.** The most contentious part of the 2020 amended Process Rule has been its approach to determining if projected energy savings of a standard would be “significant” within the meaning of EPCA.⁵ For many years, DOE considered energy savings to be “significant” on a case-by-case basis. The 2020 amended Process Rule set numeric thresholds for determining “significant” energy savings. DOE now proposes to revert to its prior case-by-case approach.⁶
- **Determinations of Economic Justification.** DOE uses a “walk-down” process to select energy conservation standard levels. Before amendment to the Process Rule in 2020, this meant that, as a first step, DOE conducted a cost-benefit analysis of the most stringent selected trial standard level (TSL) that was technologically feasible (the max-tech standard). Then, if the benefits of the max-tech TSL exceeded its costs, DOE adopted the max-tech TSL as the standard. If not, DOE would “walk down” to consider the next most-stringent TSL (and, if needed, continue this process), until it determined—if it could—that the benefits of a TSL exceed its costs. This process allowed it to find the TSL that was economically justified, or that none of the TSLs were economically justified. In 2020, DOE included a comparison of the benefits and burdens of the selected TSLs against the benefits and burdens of the baseline case and all other TSLs. DOE now says that the comparative analysis generated confusion and that the prior approach was sufficiently robust. It therefore proposes to eliminate the 2020 approach.
- **Adoption of Industry Test Standards.** In 2020, DOE amended the Process Rule to require adoption, *without modification*, of industry consensus standards as test procedures, unless the standards do not meet EPCA criteria. DOE now believes that this created the false impression that it had adopted a new presumption of an “as-is” adoption of industry standards without meaningful review. It therefore proposes to clarify that industry standards must undergo a thorough agency review to ensure compliance with EPCA.
- **Finalization of Test Procedures Prior to Issuance of a Standards Proposal.** In 2020, DOE adopted a requirement that its test procedures be finalized at least 180 days before proposal of an efficiency standard. DOE has reconsidered the inflexible 180-day pause and proposes reverting to the 1996 Process Rule guidance that test procedure rulemakings be finalized sometime prior to publication of a proposal for a standard.

⁵ See 42 U.S.C. § 6295(o)(3)(B).

⁶ DOE now says that the numerical thresholds do not allow DOE to account for the increased significance of energy savings that may help mitigate the climate crisis. In addition, it says that the impact of products with most of their energy consumption occurring during periods of peak energy demand can be more pronounced than products with relatively constant demand. And it says that establishing a set, numerical site energy threshold for all covered products does not allow DOE to account for differences in primary energy and full-fuel-cycle effects for different covered products when determining significance.

- **Direct Final Rules.** DOE has authority to issue a “direct final rule” (DFR) to establish a standard.⁷ In 2020, DOE said that the EPCA provision for DFRs⁸ is just procedural and not an independent grant of rulemaking authority. DOE also provided additional guidance on the term “fairly representative” and adverse comments. DOE is now considering whether these changes were appropriate or necessary.
- **Negotiated Rulemaking.** In 2020, DOE adopted a procedure that it would follow when using negotiated rulemaking to develop a consensus proposal in consultation with interested parties, thereby addressing comments from stakeholders before issuing a proposed rule. DOE has tentatively determined that changes to its approach to negotiated rulemaking are warranted, including, on a number of points, reverting to the approach it employed prior to the 2020 amendments.

Conclusion. DOE has standards and test procedures for a wide range of products and equipment and is typically working simultaneously on fifty to one hundred rulemakings. The Process Rule applies to all of these proceedings. The public has an opportunity to participate in this new rulemaking on amending the Process Rule, which will have a broad impact long into the future.

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⁷ DOE may issue a DFR upon receipt of a joint proposal from a group of “interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates),” provided DOE determines the standards recommended in the joint proposal conform with the requirements of 42 U.S.C. § 6295(o) or § 6313(a)(6)(B), as applicable. *Id.* § 6295(p)(4)(A).

⁸ *Id.* § 6295(p)(4).