

## Energy Efficiency Advisory

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### **DOE Amends Energy Efficiency Interim Waiver Rule**

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The Department of Energy (DOE) has issued significant changes to its process for interim waivers of energy efficiency test procedures.<sup>1</sup> The new rule is effective February 14, 2022. It will certainly affect the introduction of innovative products into the marketplace.

**Importance of Interim Waivers.** Interim waivers perform a valuable function in the energy efficiency program pursuant to the Energy Policy and Conservation Act (EPCA).<sup>2</sup> Waivers allow for use of an alternate test procedure tailored to an innovative product where the existing DOE test procedure is inappropriate.<sup>3</sup> While a waiver request is being processed, DOE provides for interim waivers to ensure that it does not unreasonably impede introduction of these products. Under the applicable rules, DOE will grant an interim waiver “if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.”<sup>4</sup>

**Timing of Interim Waivers.** Most importantly, the new rule repeals a Trump-era provision that automatically grants an interim waiver request unless the Department rules on it within 45 business days. The new rule provides that, instead, DOE “will make best efforts to review a petition for interim waiver within 90 business days of receipt of a complete petition.”

The automatic 45-day provision was adopted by DOE in 2020, replacing a rule that, “if administratively feasible,” DOE would reach a determination on an application for interim waiver within 30 business days.<sup>5</sup> The 2020 rule was targeted by the Biden Administration on Inauguration Day, when President Biden issued an Executive Order requiring DOE and other agencies to immediately review numerous actions taken in the prior four years and to “consider suspending, revising, or rescinding” actions that are inconsistent with his Administration’s environmental and other goals.<sup>6</sup> An accompanying Fact Sheet specifically identified the 2020 rule.<sup>7</sup>

In adopting the new rule, DOE says that it often requires longer than 45 business days to adequately evaluate a request for interim waiver. Yet it “acknowledges that there is a need for improvement in its process to more timely address interim waivers.” Hence, the new rule implements a non-mandatory 90-day “best efforts” target for reviewing complete interim waiver petitions. DOE believes this would provide a more realistic and appropriate timeline for evaluating interim waiver petitions than the mandatory 45-day period.

**Other Changes.** DOE's new rule contains several other changes:

- It specifies the contents of a complete petition for interim waiver and formalizes the process by which DOE will respond to incomplete petitions.
- It specifies the information that must be provided in a request to extend a waiver to additional basic models.
- It specifies that when DOE amends a test procedure to address the issues presented in a waiver, the waiver or interim waiver will automatically terminate on the compliance date of the amended test procedure.
- It clearly sets forth the transition period for compliance with a decision and order or test procedure final rule.
- It aligns interim waivers with requirements of 10 C.F.R. Part 429 (certification, compliance, and enforcement), making clear that a model must be certified prior to distribution in commerce, and that certification must be based on testing conducted in conformance with the applicable test requirements in Parts 429, 430 (consumer products) and 431 (commercial and industrial equipment), or in accordance with an applicable test procedure waiver. This eliminates a 60-day grace period applicable in certain circumstances.
- It broadens the reasons why DOE may rescind/modify a waiver or interim waiver.

**Conclusion.** Industry often needs interim waivers to help assure timely introduction of innovative products into the marketplace. DOE's new rule may extend the timeline for issuance of such waivers from what they would have been under the 2020 rule. On the other hand, the 2020 rule has not—as a practical matter—had much impact. In any case, stakeholders should be aware of the changes in the new rule and plan accordingly.

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- <sup>1</sup> DOE, Office of Energy Efficiency and Renewable Energy, Test Procedure Interim Waiver Process, Final Rule, 86 Fed. Reg. 70945 (Dec. 14, 2021). DOE’s regulations for waivers are at 10 C.F.R. §§ 430.27 (consumer products), 431.401 (commercial and industrial equipment).
- <sup>2</sup> 42 U.S.C. § 6291 *et seq.*
- <sup>3</sup> DOE “will grant a waiver from the test procedure requirements if DOE determines either that the basic model(s) for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy or water consumption characteristics as to provide materially inaccurate comparative data.” 10 C.F.R. §§ 430.27(f)(2), 431.401(f)(2).
- <sup>4</sup> *Id.* §§ 430.27(e)(2), 431.401(e)(2). In addition, during the Obama Administration, DOE issued an Enforcement Policy Statement that “to encourage waivers and prevent the Department’s administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, the Department, as a matter of policy, will refrain from an enforcement action related to a specific basic model while a waiver request is pending with the Department.” The policy was reissued in 2017 and is still in effect. See DOE, *Enforcement Policy Statement – Pending Test Procedure Waiver Applications* (issued Dec. 23, 2010; reissued April 5, 2017), <https://www.regulations.doe.gov/ccms/templates/Enforcement%20Policy%20Statement%20-%20Pending%20Test%20Procedure%20Waiver%20Applications/>.
- <sup>5</sup> DOE, Office of Energy Efficiency and Renewable Energy, Amendments and Correction to Petitions for Waiver and Interim Waiver for Consumer Products and Commercial and Industrial Equipment, Final Rule, 79 Fed. Reg. 26591, 26593 (May 9, 2014).
- <sup>6</sup> Executive Order 13990 of January 20, 2021, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021).
- <sup>7</sup> The White House, *Fact Sheet: List of Agency Actions for Review* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>. In addition, DOE limited the effect of the December 2020 Final Rule by not applying it to petitions filed before January 11, 2021, that rule’s effective date.