May 6, 2019

Daniel R. Simmons
Assistant Secretary
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy
1000 Independence Ave. SW
Washington, DC 20585


Dear Assistant Secretary Simmons:

Thank you for the opportunity to submit comments in response to the U.S. Department of Energy’s (DOE’s) February 13, 2019, Notice of Proposed Rulemaking (NOPR) concerning the “Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment” (Docket No. EERE-2017-BT-STD-0062). The Alliance to Save Energy is committed to the continued success of this program. While some elements of DOE’s proposal to amend and update its procedures—commonly collectively referred to as the “Process Rule”—are improvements, many more are likely to complicate the program, add redundancy while removing flexibility, and make it difficult to comply with statutory deadlines.

The Alliance is a nonprofit, bipartisan coalition of business, government, civil society and academic leaders who work together to drive greater U.S. energy productivity to achieve economic growth, a cleaner environment, and greater energy security, affordability and reliability. Since the Alliance was founded in the wake of the oil crises of the 1970s, the U.S. has made huge strides in driving energy efficiency throughout our economy through research, development, and deployment of new technologies; significant public- and private-sector investments; and sound policies. Thanks in part to federal energy efficiency policy, the U.S. has doubled its energy productivity since 1980, meaning we are generating twice as much gross domestic product from each unit of energy we consume compared to then. One of the most successful policies that has advanced energy efficiency—and currently delivers annual savings worth more than $60 billion—is the implementation of energy conservation standards for appliances, equipment, and lighting. The Alliance is committed to preserving benefits for homeowners, consumers, and businesses from the standards program.

Energy conservation standards are among the most impactful and cost-effective policies for cutting energy and water waste and lowering energy bills for U.S. consumers and businesses. The typical U.S. household saves about $500 each year because of national standards for
consumer products.¹ U.S. businesses also save money—an estimated $23 billion in 2015 alone—due to existing standards for equipment used in commercial buildings and industry.² Combined, total consumer and business bill savings reached about $80 billion in 2015.³ DOE estimates that cumulative savings from already existing appliance standards will exceed $2 trillion dollars by 2030.⁴ Recent research has shown that standards have not only saved money, but have also spurred innovations leading to enhanced choices available for consumers.⁵

As the Alliance stated for the record at the March 21, 2019, public meeting on DOE’s proposal, the best version of the standards program is transparent, predictable, robust, and steady. Above all else, DOE must meet its statutory deadlines and responsibilities to advance energy efficiency enacted and updated by Congress over the past 40 years. Nothing in a final rule should make it more difficult for DOE to follow the law. Yet, in the current NOPR under consideration, several elements would slow the program down, remove flexibility from the department to respond to stakeholders and make course-corrections during rulemakings, and remove the prospect of negotiations leading to direct final rules. By taking comments, DOE now has the opportunity to reevaluate its proposed approach and craft a Process Rule that is responsive to stakeholder concerns and delivers better standards for homeowners, consumers, and businesses consistent with its statutory requirements.

The Alliance opposes a binding Process Rule because it would remove beneficial flexibility that allows DOE to respond to unforeseen situations during rulemakings and make the program vulnerable to future lawsuits from stakeholders opposed to standards based on any number of real or perceived departures from procedure. While absolute adherence to the Process Rule seems helpful and intuitive to some stakeholders at present, the Alliance sees certainty in the prospect of a mandatory requirement making the program less transparent and predictable as DOE finds itself in a bind—unable to accommodate unexpected delays and increasingly out of compliance with its statutory deadlines. When judiciously deployed, flexibility should help stakeholders and lead to better standards. During the public meetings, some stakeholders suggested including a “good cause” exception in the Process Rule that could provide DOE with the flexibility it will inevitably need.⁶ To give stakeholders adequate assurances that the Process

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¹ Appliance Standards Awareness Project, Appliance Standards Questions and Answers (2017) (online at appliance-standards.org/sites/default/files/Why_National_Appliance_Standards%202017_0.pdf).
³ Id.
⁵ See note 2.
Rule will be followed in most cases—but not absolutely—DOE could also consider documenting any deviations from the Process Rule for public comment throughout the rulemaking process, especially, but not limited to, instances when a statutory deadline was set to be missed.

The Alliance supports the application of the Process Rule to commercial equipment. Doing so would promote program transparency and consistency and provide an important clarification going forward about rulemaking expectations and procedures. As the proposal notes, this formal acknowledgement of Process Rule application consistent with years of DOE practice.

Following the establishment of a schedule for meeting statutory obligations, the Alliance supports the concept of setting priorities for standards rulemakings and issuing public announcements to allocate resources for data-gathering, research, and analysis and help stakeholders plan their engagement. However, DOE’s proposal is potentially duplicative of existing procedures based on statutory and regulatory requirements. First, for covered products, much of this prioritization is dictated by statute and therefore beyond DOE’s control. DOE has discretion (even without an amended Process Rule) when determining whether or not to update test procedures or standards, based on stakeholder feedback and its own analysis, but Congress has set the timing of those decisions as seven or six years, respectively. Second, DOE already contributes to the Regulatory Agenda. Perhaps stakeholder feedback gathered as part of requests for information (RFIs) and other comments could be used to help prioritize new product coverage and publicize its statutory deadlines, which could be helpful and encourage stakeholder engagement. DOE should consider how to better reconcile its statutory and regulatory requirements with its plans for priority-setting in a revised proposal.

The Alliance supports DOE’s interest in including stakeholder feedback early in standards rulemakings (i.e., before a NOPR is published). This has been effectively accomplished in the past by RFIs, which continues to the present in form of recent invitations to submit comments to DOE on a range of products. DOE’s proposal, however, for a “quick look” adds an unnecessary step to the rulemaking process that happens to be labeled “RFI” in the process flow chart included in the NOPR. This is needed, according to the NOPR, to reduce the burden on stakeholders, but it actually adds a step (i.e., an “early assessment review”) to the process. Adding steps to the process does not streamline rulemakings. The Alliance is unconvinced that an extra early assessment review is an improvement over the current use of RFIs.

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A serious complicating factor is DOE’s difficulty in explaining what it actually means by “early assessment review” and what it intends to do during this extra phase of standards rulemakings. In the NOPR, DOE states:

Therefore, as the first step in any proceeding to consider establishing or amending any energy conservation standard, DOE proposes to publish a notice in the Federal Register announcing that DOE is considering initiation of a proceeding, and as part of that notice, DOE would request submission of related comments, including data and information showing whether any new standard is economically justified, technologically feasible or would result in a significant savings of energy. If DOE receives sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, DOE would engage in a notice and comment rulemaking to make that determination. If DOE does not receive sufficient information or the information received is inconclusive with regard to statutory criteria, DOE would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard.8

But during the public meetings, DOE’s description of the early assessment review evolved as it tried to clarify when, exactly, it would be used.9 For example, in the NOPR, DOE adds the extra step to “any proceeding to consider establishing or amending any energy conservation standard.” But how would this affect products covered by ASHRAE standards or apply to instances of consensus recommendations? How much time would these extra steps add to standards rulemakings if DOE is bound to conduct an early assessment without exception? How does an early assessment review step affect DOE’s need to first complete test procedures? What happens when this longer timeline conflicts with a statutory deadline? DOE was not able to provide clear answers to these questions to the Alliance’ satisfaction.

Another source of confusion was DOE’s inability to clearly and consistently describe the extra step using flow charts. In the NOPR, the “quick look” step in the flow chart mostly reflects the narrative description: “[DOE] receives substantive comments indicating the rule is not technologically feasible or economically justified.”10 But this same step—the same words—are listed a second time following the release of a “RFI, framework document or other methodology.” This is difficult to square with DOE’s contention that the early assessment review is different in any meaningful way from its current practice of issuing RFIs to gather information early in the process. In addition, in the flow chart the “significant energy savings threshold test” happens after the second step rather than the early assessment review, which is at odds with the narrative description.

DOE’s difficulty with flow chart design continued during the April 11 public meeting. In response to stakeholder requests, DOE distributed an updated flow chart that added “its own analyses” to the description of the extra “Early Assessment” step even though it is missing from

9 See note 6.
10 See note 8, at 59.
the narrative and version in the NOPR. Most confusingly, once again in the updated flow chart the same words (including “its own analyses”) are used to explain DOE’s work during the “Early Assessment” and “Preliminary Stage” phases. It is a genuine challenge to fairly evaluate how it would improve transparency and predictability in standards rulemakings and avoid unnecessarily duplicating existing steps in the process.

The Alliance does not support establishing a “significant savings of energy” threshold because it is unnecessary. DOE should be primarily focused on meeting its statutory deadlines and addressing the statutory criteria established by Congress. And in the course of meeting those deadlines, DOE should instead be concerned with whether savings from standards are cost-effective in terms of energy savings and other benefits rather than significant on a national scale. The Alliance is less concerned with the numerical value that separates significant from non-significant than with the inherent arbitrariness and inflexibility of setting any threshold. Cost-effective savings are beneficial to homeowners, consumers, and businesses. A threshold at any level will lead to lost opportunities for cost-effective savings, including at times when stakeholder consensus emerges to advance energy efficiency but involves too little savings, and especially if products can be separated into narrower classes that fall short of an arbitrary line.

The Alliance advises against removing flexibility from the process (i.e., making the Process Rule binding on DOE), but generally agrees that test procedures should be finalized before standards rulemakings are initiated. It is logical to require a final test procedure before issuing a standards NOPR. How else could a stakeholder assess what is possible for proposed energy efficiency levels of a standard? But it should be expected that, from time to time, new information or analysis conducted after a standards NOPR is issued could affect a test procedure. The Alliance is not arguing for concurrent development of test procedures and standards. But DOE should acknowledge that test procedures and standards inform each other. A binding Process Rule would make it impossible for DOE to accommodate stakeholders and resolve issues with test procedures without losing time and potentially missing statutory deadlines.

The Alliance generally supports the adoption of consensus industry test procedures as a reasonable starting point in standards rulemakings. This reflects the relative expertise and experience of industry stakeholders with respect to covered products, is rooted in DOE practice, and is soundly based on statutory authority. But DOE’s insistence on including “without modification” as a qualification for test procedures when the statute clearly provides instances when modifications are necessary is confusing and does nothing to improve predictability or transparency. The mark of an effective and appropriate test procedure is its ability to perform as

needed in a standards rulemaking, not whether it is adopted “without modification”, regardless of its origins.

The Alliance encourages DOE to retain flexibility in its continued use of Direct Final Rules (DFRs) to set standards, including when appropriate following a negotiated rulemaking. Used properly, as noted during the public meetings, DFRs can provide compliance options and incentives for stakeholders to work together to reach consensus. Negotiated rulemakings, whether combined with DFRs or not, improve the transparency of standards rulemakings and can help the program meet its statutory deadlines. The NOPR sets forth a reinterpretation of its authority to issue DFRs that would limit the attractiveness of this standards rulemaking option but offers no substantive justification. DOE seems to assert that only now does it really understand the law even though Congress has let it stand uncorrected for 12 years. The Alliance does not find DOE’s new arguments compelling and urges adherence to current practice with respect to DFRs and negotiated rulemakings.

The Alliance advises DOE against altering its analytical method to an economically rational consumer test. Statute requires that any efficiency standard issued by DOE must achieve the “maximum improvement in energy efficiency” that the Secretary of Energy determines is “technologically feasible and economically justified.” Using the current “walk down” process, DOE starts with the maximum technologically-feasible level of energy efficiency and determines whether it is economically justified, followed by a similar analysis for the remaining levels. This naturally allows DOE to meet both requirements.

In contrast, DOE now proposes for the Secretary to make the determination based on consideration of “whether an economically rational consumer would choose a product meeting the candidate/trial standard level over products meeting the other feasible trial standard levels after considering all relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs.” If that “economically rational consumer would not choose” the standard level based on those factors, then it would be rejected. The Alliance has two concerns with this approach. First, as mentioned by several participants at the April 11 public meeting, DOE does not define “economically rational consumer” in the NOPR. DOE’s proposal lacks any support for its ability to invent and animate a hypothetical economically-rational consumer and then extrapolate her behavior based on anything other than theory. The Alliance cannot possibly support this proposal, which substitutes an established and well-understood process based on statutory requirements for an opaque and highly fungible one.

Second, how DOE expects to apply this new methodology and meet its statutory obligations is also unclear. The factors described in the proposal might contribute to the economic justifiability of a standard level, but DOE is not directed to choose the most economically justified level. It must choose the maximum technologically-feasible level that is

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12 42 U.S.C. §6295 (o)(2)(A)
13 See note 8, at 106.
14 See note 11.
also economically justified. To be fair, some stakeholders might have information about consumer preferences for DOE to consider when conducting its analysis about economic justifiability, which could lead to better outcomes. But until DOE can clarify how its proposal will actually lead to results that comply with the law, the Alliance recommends against its adoption.

In conclusion, the Alliance is more concerned than encouraged by most of the elements of DOE’s proposal to update the Process Rule. But the concerns enumerated in these comments are intended to be helpful and constructive. DOE now faces the challenge of compiling and reconciling these comments and those from other stakeholders to craft a final rule that adheres to statutory obligations while balancing and accommodating the legitimate needs and interests from those who participate in the development of test procedures and standards rulemakings. As DOE moves ahead to the next step in its plans for the Process Rule, the Alliance encourages DOE to always put its legal responsibilities first when crafting procedures and timelines; acknowledge that built-in flexibility can be a feature rather than a bug and, when thoughtfully considered, designed to help the program steadily advance energy efficiency without sacrificing predictability; and remember the role energy-efficient appliances, equipment, and lighting products can play in improving energy affordability, energy resource integration, and the deployment of storage technologies across energy systems.

Thank you for your consideration.

Daniel Bresette
Vice President of Policy
Alliance to Save Energy