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Public Interest Comment¹ on
The Department of Energy’s Regulatory Burden RFI:
“Reducing Regulatory Burden”

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Retrospective Review Comment Project

The George Washington University Regulatory Studies Center strives to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This response to the Department of Energy’s request for information on reducing regulatory burdens does not represent the views of any particular affected party or special interest, but is designed to enhance and reinforce DOE’s retrospective review efforts.

Introduction

Through its Regulatory Burden Request for Information (RFI), DOE is seeking comment from the public on how to effectively review its existing regulations, pursuant to Executive Order 13563. This comment addresses two of DOE’s questions for commenters:

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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(1) How can the Department best promote meaningful periodic reviews of its existing rules and how can it best identify those rules that might be modified, streamlined, expanded, or repealed?

(2) What factors should the agency consider in selecting and prioritizing rules and reporting requirements for review?³

In addressing the above questions, this comment offers three recommendations to DOE to further its retrospective review efforts:

- To evaluate the outcomes of its biggest rules, DOE should incorporate plans for retrospective review into its economically significant or major rules.
- DOE should allow enough time between its energy efficiency standards to allow for an effective review of each rule's effects before increasing the stringency of its standards.
- DOE should use the Herfindahl-Hirschman Index to measure whether its existing energy efficiency standards have had negative effects on competition in the regulated industries.

Incorporation of Retrospective Review into NPRMs

In his implementing memo on retrospective review, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, stated that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’”⁴ This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.”

In its 2013 Report to Congress on the Benefits and Costs of Federal Regulations, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to the flaws of ex ante analyses. According to that report, the result of systematic retrospective review of regulations:

should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and

³ 79 FR 37964

⁴ United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

importantly, rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.

As a part of its ongoing Retrospective Review Comment Project, the Regulatory Studies Center examines significant proposed regulations to assess whether agencies propose retrospective review as a part of their regulations, and submits comments to provide suggestions on how best to incorporate plans for retrospective review into their proposals. However, our research indicates that many agencies—including DOE—are not currently complying with E.O. 13563 and OMB’s direction to write and design their rules so as to facilitate retrospective analysis of their effects.

While each economically significant rule proposed by DOE this year mentions EO 13563, none includes a plan for retrospective review of its standards.⁵ The rules in question are all energy efficiency standards that have the potential to incur billions of dollars of costs and benefits.

Because of the magnitude of these rules, and the frequency with which DOE updates the stringency of its energy efficiency standards, DOE should write plans for retrospective review into the text of its rules. Below are five key steps that DOE should incorporate into its rules to improve the prospects of “maintaining a consistent culture of retrospective review and analysis”⁶:

- DOE should identify the problem that its proposed rule is intended to solve.
- DOE should provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals.
- DOE should commit to collecting information to assess whether its measurable metrics are being reached.
- DOE should provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings.
- DOE should write its proposal to allow measurement of both outputs and outcomes to enable review of whether the standards directly result in the outcomes that the Department intends.

⁵ It should be noted that while none of these rules includes a plan for retrospective review, in its proposed energy efficiency standards for general fluorescent lamps and incandescent reflector lamps DOE mentions the need to retrospectively review trends in rare earth prices for use in future regulations.

⁶ 79 FR 37964

Review of Previous Efficiency Standards

DOE regularly promulgates energy efficiency standards for residential and commercial appliances, pursuant to the Energy Policy and Conservation Act (EPCA). These standards apply to microwave ovens, dishwashers, clothes dryers, air conditioners, and other home and commercial appliances that consume energy. As such, these standards affect a broad swath of the American public, businesses and consumers alike.

At intervals, EPCA requires DOE to determine whether updated energy efficiency standards are necessary. However, on more than one occasion DOE has determined that such updates are necessary very shortly after implementation of its previous standards without allowing time for a retrospective review of the standards' effectiveness. This does not allow the Department to learn from implementation of past standards before issuing new rules. DOE's ex ante analyses of its energy efficiency standards are heavily reliant upon assumptions about future prices of energy and other goods, opportunity costs, and producer and consumer preferences and behavior. When DOE initiates new standards before the effects of previous standards are known, its ex ante analysis will suffer from uncertainty in baseline assumptions, as well as uncertain predictions of future effects.

In general, it would be best for the Department to resist updating its efficiency standards until after the effects—intended or not—are known. Below are three current examples of when retrospective review of previous efficiency standards would be useful prior to the promulgation of updated standards.

Automatic Commercial Ice Makers

On March 17, 2014, DOE published a proposed rule updating energy efficiency standards for automatic commercial ice makers.⁷ At publication of DOE's proposed rule, DOE already regulated energy and water use rates for 13 of the 25 equipment classes covered by the proposed rule.⁸ Compliance with these standards was required as of January 1, 2010.⁹ While DOE is statutorily required to make a determination by January 1, 2015 as to whether updating these standards is “technically feasible and economically justified”,¹⁰ it may make the most sense for

⁷ For our analysis of this rule, please see “Retrospective Review Comment on DOE's Proposed Efficiency Standards for Commercial Ice Makers.” By Sofie E. Miller, May 16, 2014.
https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RSC_PIC-13563-EERE-2010-BT-STD-0037.pdf

⁸ 79 FR 14866

⁹ 79 FR 14854

¹⁰ 42 U.S.C. 6313(d)(3)(A)

DOE to first review the efficacy of its existing standards in order to course-correct if necessary before issuing a new rule.

Manufacturers are still uncertain as to the effect of DOE's 2010 standards, and in the text of DOE's proposed rule, some argued that updating the standards again so soon "would negatively impact both manufacturers and end users."¹¹ One manufacturer reported that the previous efficiency standards had required nearly all of the company's engineering resources for between 1 and 2 years, a significant commitment of resources.¹² Additionally, manufacturers are still working to analyze the effects of DOE's 2010 standards on equipment repair costs,¹³ and the lack of this information hampers DOE's analysis of potential changes in these costs as a result of its proposed standards.

Additionally, promulgating updates to the existing standards so soon may not give DOE the chance to evaluate how effective its standards were in reducing energy consumption, which is the primary goal of the rule. DOE should also consider mitigating factors that could have accomplished or undermined reductions in energy consumption absent the rule (e.g. energy prices, potential rebound effects, unintended consumer behaviors, etc.). DOE should take this chance to measure the environmental benefits of its previous rule to improve its ex ante analyses of energy efficiency standards going forward.

DOE tends to conduct detailed ex ante analyses of the costs and energy savings associated with its proposed rules, but these (necessarily) are heavily dependent on assumptions about future prices of energy and other goods, opportunity costs, and producer and consumer preferences and behavior. Retrospective review that compares predicted outcomes with actual outcomes is essential to test these assumptions and calibrate DOE's models. This should be done before DOE proposes new standards based on uncertain parameters. In the case of automatic commercial icemakers, DOE should conduct a retrospective review of its 2010 efficiency standards to calibrate its model before issuing new standards.

General Fluorescent Lamps and Incandescent Reflector Lamps

On April 29, 2014, DOE published a proposed rule that would increase energy efficiency standards for general service fluorescent lamps (GSFLs) and incandescent reflector lamps (IRLs).¹⁴ According to DOE's Office of Energy Efficiency and Renewable Energy, GSFLs are

¹¹ 79 FR 14866

¹² 79 FR 14904

¹³ 79 FR 14894

¹⁴ For our analysis of this rule, please see "Retrospective Review Comment on DOE's Proposed Energy Efficiency Standards for Fluorescent and Incandescent Lamps." By Sofie E. Miller, June 30, 2014.

fluorescent tubes that are generally installed in ceilings,¹⁵ and IRLs are directional lamps such as spotlights and floodlights that have a reflective coating on the inside of the bulb to focus and aim the light.¹⁶

DOE has already prescribed certain energy efficiency standards for IRLs and GSFLs, most recently in its 2009 Lamps Rule. Compliance with these standards was required as of July 14, 2012. Further, for certain GSFL product classes, many manufacturers were granted a stay of enforcement of the 2009 Lamps Rule and, as a result, the standards have not yet been fully implemented.¹⁷ While DOE is statutorily required to make a determination about whether to update these standards, it may make the most sense for DOE first to review the efficacy of its existing standards in order to course-correct if necessary before promulgating a new rule.

Commenters have expressed concern that the limited span of time between the rulemakings will have a severe and negative impact on manufacturers, who may not be able to recover investments in new technologies or to develop products meeting even higher standards than those in the 2009 Lamps Rule.^{18,19} Some manufacturers argue that “the market has not fully shifted to reflect the impacts of the July 2012 standards and there is little to no accurate information available regarding future market shares and technology capability.”²⁰ Further, manufacturers are still unsure as to how the 2009 Lamps Rule will affect future sales, since there are a large number of lighting options on the market, and manufacturers are still waiting to see which types of lamps consumers will choose.²¹

DOE should retrospectively review its previous standards to assess the validity of its ex ante analysis before using the same models and assumptions to issue new energy efficiency rules. In the case of commercial automatic ice makers, there has not yet been time to assess the effects of these standards. Before finalizing its proposed rule, DOE should conduct a retrospective review of its 2009 Lamps Rule.

https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/image/RSC_PIC-13563-EERE-2011-BT-STD-0006.pdf

¹⁵ http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/70

¹⁶ http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/58

¹⁷ 79 FR 24082

¹⁸ 79 FR 24082

¹⁹ 79 FR 24136

²⁰ 79 FR 24082

²¹ 79 FR 24137

Residential Dishwashers

According to the 2014 Spring Unified Agenda of Regulatory and Deregulatory Actions, DOE plans to propose updated energy efficiency standards for residential dishwashers in September of this year. DOE most recently finalized energy efficiency standards for residential dishwashers on October 1, 2012, which were effective immediately, leaving fewer than two years between implementation of its most recent standards and its forthcoming proposal.²²

Going forward, it would be prudent for DOE to review the effects of any existing energy efficiency standards before pursuing updated, more stringent standards. This will allow DOE to measure the efficacy of its assumptions and to use actual (rather than hypothesized) baselines in its ex ante analyses, improving the quality of analysis and regulatory outcomes.

Anti-Competitive Effects

Pursuant to the EPCA, DOE is required to consider “the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard” before finalizing a new energy efficiency rule.²³ This evaluation is conducted by the Antitrust Division within the Department of Justice (DOJ). While this prospective evaluation is finalized before the rule goes into effect, it is also important to measure anti-competitive effects after a standard is implemented to determine whether the standard is economically justified, as required by statute.

For example, as noted above, DOE recently proposed a rule that would increase energy efficiency standards for GSFLs and IRLs, just four years after issuing its 2009 Lamps Rule. When DOJ initially reviewed DOE’s 2009 Lamps Rule, it found that the standards would have anti-competitive impacts on the IRL industry.²⁴ However, DOE promulgated the standards despite DOJ’s warning that the standards could adversely affect competition.

As part of its review the effects of the 2009 Lamps Rule, DOE should undertake to evaluate the effects of its standard on competition. It may want to consult with DOJ in this process. DOE should consider applying the Herfindahl-Hirschman Index (HHI), which DOJ uses to evaluate

²² For our analysis of this rule, please see “Public Interest Comment on the Department of Energy’s Direct Final Rule: Energy Conservation Standards for Residential Dishwashers.” By Sofie E. Miller, September 14, 2012. https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE_EE_RE_2011_BT_STD_0060.pdf

²³ 42 U.S.C. 6295(o)(2)(B)(i)(V). <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap77-subchapIII-partA-sec6295.pdf>

²⁴ 79 FR 24136

the anti-competitive effects of mergers, to measure concentration in the GSFL and IRL industries pre- and post-enforcement of the 2009 standards.²⁵

As it plans for retrospective review of each of its economically-significant efficiency regulations, DOE should commit to measuring any anti-competitive effects, and to examining changes in the HHI upon implementation of its standards. Understanding the regulations' effects on market structure will be important to understanding whether the rules achieve their stated objectives, and the benefits and costs associated with implementation. This should inform the public about any unintended anti-competitive effects of DOE's energy efficiency standards, and improve DOE's analysis of future standards.

Recommendations

So far this year, only one of DOE's proposed rules has mentioned retrospective review,²⁶ and none of DOE's proposals incorporated retrospective review plans. Going forward, DOE should incorporate plans for retrospective review into its major rules to facilitate transparency, public accountability, and measurement of the success of its rules.

Additionally, DOE should review the efficacy of its existing energy efficiency standards before making a determination that further standards are necessary. After conducting review, DOE should incorporate any lessons learned or unintended consequences into its future standards, both to improve ex ante analysis and to improve rulemaking outcomes.

Finally, these retrospective reviews should include application of the Herfindahl-Hirschman Index to measure any potentially anti-competitive effects, especially energy efficiency standards that DOJ has determined would have anti-competitive effects on the regulated industries (e.g. the 2009 Lamps Rule and the 2012 Dishwasher Rule).

²⁵ "Herfindahl-Hirschman Index." *Antitrust Division: Public Documents: Merger Enforcement*. U.S. Department of Justice, n.d. Web. 27 June 2014.

²⁶ See footnote 5