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# THE GEORGE WASHINGTON UNIVERSITY

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WASHINGTON, DC

Public Interest Comment<sup>1</sup> on

The Department of Energy's Proposed Rule

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

“Process Rule NPRM”

Docket ID No. EERE-2017-BT-STD-0062

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The George Washington University Regulatory Studies Center improves 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 comment on the Department of Energy's (DOE) proposed Process Rule for establishing new or revised energy conservation standards and test procedures does not represent the views of any particular affected party or special interest, but it is designed to evaluate the effect of DOE's proposal on overall consumer welfare.

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<sup>1</sup> 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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## Introduction

In a notice of proposed rulemaking (NPRM), DOE is proposing to “update and modernize the Department’s current rulemaking methodology titled, ‘Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products’ (‘Process Rule’).”<sup>3</sup> While the agency has adhered to internal procedures for adopting energy conservation standards for years, the NPRM seeks to make those procedures binding on the agency and align its Process Rule with the Energy Policy and Conservation Act of 1975 (EPCA), as amended. The proposed Process Rule attempts a number of changes and seeks comment on additional ways to improve the procedures. Specifically, DOE states that the document would improve DOE’s process in the following ways:

These proposals would address: (1) Processes that may no longer track the current legal requirements of EPCA; (2) processes that do not take into account the maturation of DOE’s appliance program to the point that modernization is necessary; (3) that DOE has not rigorously followed the Process Rule in many instances; (4) the need for regulatory reform to reduce the costs and burdens of rulemaking; and (5) the need to clarify that the Process Rule applies to commercial/industrial equipment. In evaluating and seeking to expand the positive impacts of the Process Rule, as well as remedying the above-described negative developments, this proposal will address the changed landscape of the rulemaking process under EPCA, and endeavor to modernize the Process Rule.<sup>4</sup>

DOE’s proposed rule includes many important provisions and is largely a step in the right direction. This public comment will focus on eight areas of interest in the revised Process Rule, highlighting both beneficial changes and additional areas for improvement.

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<sup>3</sup> Department of Energy, “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,” 84 FR 3910, February 13, 2019, p. 3910.  
<https://www.federalregister.gov/documents/2019/02/13/2019-01854/energy-conservation-program-for-appliance-standards-proposed-procedures-for-use-in-new-or-revised>.

<sup>4</sup> 84 FR 3912.

## Regulatory Analysis

### Formalizing the Process Rule

In its NPRM, DOE proposes to make the Process Rule binding on the agency.<sup>5</sup> The decision rests primarily on the enhanced predictability and consistency provided by formalization, so that “all stakeholders know what to expect during the rulemaking process.”<sup>6</sup>

Formalizing the Process Rule and making it binding on the department is a positive step. By explicating DOE’s decision-making process and holding the agency to reasonable standards, the Process Rule could improve transparency and accountability for new and revised energy conservation standards. Two related benefits of formalization are that (1) it will likely improve opportunities for public participation on energy conservation standards, by binding the agency to its procedures for early input from stakeholders; and (2) it clarifies the Process Rule’s applicability to both consumer products and commercial and industrial equipment.

Making the Process Rule binding on DOE is consistent with research on agency decision-making and analysis. While explaining the benefits of formally institutionalizing and adopting agency processes into the regulatory code, Ellig argues that such commitments could be strengthened by making the agency accountable in the courts:

The Department of Energy states that these commitments do not create new grounds for judicial review of its regulations, but commits to (1) providing notice and explanation of any deviations in specific instances, and (2) publishing a notice in the Federal Register if it permanently alters any of the policies or procedures. An independent agency that wanted to offer an even more credible commitment could specify that noncompliance with its policies and procedures published in the CFR could be grounds for judicial review.<sup>7</sup>

Although the article cited above discusses analysis at independent agencies, the same logic applies to any agency. While DOE’s existing processes for new and revised energy conservation standards in 10 CFR 430 preclude judicial review,<sup>8</sup> the proposed Process Rule removes that language. By making the Process Rule binding and opening itself to judicial review, DOE strengthens its credible commitment to following its internal procedures.

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<sup>5</sup> 84 FR 3945.

<sup>6</sup> 84 FR 3913.

<sup>7</sup> Ellig (2018), p. 33.

<sup>8</sup> 61 FR 36974, July 15, 1996, p. 36987: “The procedures, interpretations, and policies stated in this Appendix are not intended to establish any new cause of action or right to judicial review.”

Empirical research finds that judicial review of agency regulatory impact analyses motivates agencies to improve the quality of their analysis.<sup>9</sup> This improvement occurs in two ways. First and most directly, when a regulation is remanded to an agency due to flaws in the accompanying economic analysis, agencies improve their analysis when they revise the remanded rule.<sup>10</sup> In fact, this occurred in a case involving one of DOE’s early energy efficiency standards, *Natural Resources Defense Council, Inc. v. Herrington* (1985). DOE responded to judicial review by addressing problems in its analysis of energy efficiency standards for refrigerators.<sup>11</sup> The second way judicial review improves agency analysis is by creating incentives for agencies to produce better analysis in the first place. Empirical analysis finds that agencies tend to produce more thorough economic analysis accompanying a regulation if a federal appeals court previously examined the agency’s analysis for a similar regulation issued under the same or a predecessor statute.<sup>12</sup>

A common argument against judicial review of agency economic analysis is that most judges are generalists who are not capable of competently critiquing such a specialized analysis. But a close reading of cases where federal appeals courts examined agency regulatory impact analyses refutes this argument. One can find numerous examples where judges competently and carefully assessed the quality of the agency’s analysis at an appropriate level of detail. Thus, federal courts are most likely capable of reviewing DOE’s analysis of energy efficiency regulations, especially since they would be guided by the Process Rule’s articulation of the steps DOE commits to taking.

## Problem Identification

A foundational principle of regulatory analysis is identifying the problem to be solved by regulation. This is a widely accepted best practice in regulatory decision-making. In a peer-reviewed journal article on regulatory impact analysis, 19 experts point to identifying “the core problem (compelling public need) the regulation is intended to address” as a critical step in the analysis of a regulation.<sup>13</sup> Executive Order 12866 articulates that regulations should originate from legal obligation or a compelling public need, such as addressing market failure:

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<sup>9</sup> See, Reeve T. Bull & Jerry Ellig (2018). “Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis,” *Administrative Law Review* 70, no. 4 (Fall 2018), [http://www.administrativelawreview.org/wp-content/uploads/2019/02/Bull-Ellig\\_Final.pdf](http://www.administrativelawreview.org/wp-content/uploads/2019/02/Bull-Ellig_Final.pdf); also see, Reeve T. Bull & Jerry Ellig (2017). “Judicial Review of Regulatory Impact Analysis: Why Not the Best?,” *Administrative Law Review* 69, no. 4 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2953014](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953014).

<sup>10</sup> Reeve Bull and Jerry Ellig, “Improving Regulatory Impact Analysis: The Role of Congress and Courts, Part 3,” *Notice & Comment*, April 11, 2019, <https://yalejreg.com/nc/improving-regulatory-impact-analysis-the-role-of-congress-and-courts-part-3-by-reeve-bull-and-jerry-ellig/>.

<sup>11</sup> Bull & Ellig (2017), p. 778.

<sup>12</sup> Bull & Ellig (2018), pp. 940-43.

<sup>13</sup> Susan Dudley, Richard Belzer, Glenn Blomquist, Timothy Brennan, Christopher Carrigan, Joseph Cordes, Louis A. Cox, Arthur Fraas, John Graham, George Gray, James Hammitt, Kerry Krutilla, Peter Linquti, Randall Lutter, Brian Mannix, Stuart Shapiro, Anne Smith, W. Kip Viscusi & Richard Zerbe (2017). “Consumer’s Guide to

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.<sup>14</sup>

While requirements and obligations created by the statutory authority for energy conservation standards are of primary importance, DOE could additionally seek to incorporate best practices of regulatory analysis into its internal processes. DOE has been criticized by leading scholars of benefit-cost analysis for its failure to provide a coherent theory and evidence of a market failure that motivates many of these standards.<sup>15</sup> Because the analysis of energy conservations standards often lacks evidence of a market failure, DOE should consider including such a step in its rulemaking.

Perhaps an ideal stage to integrate the identification of a systemic problem would be during the “early assessment review” that is intended to encourage early input from stakeholders. DOE is proposing to amend its Process Rule to “provide for an early assessment review of the suitability of further rulemaking,” including the following commitment:

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 or amended standard is economically justified, technologically feasible or would result in a significant savings of energy.<sup>16</sup>

In such a notice, DOE could include an explanation and evidence of the systemic problem it has identified, such as a market failure, and intends to resolve through rulemaking. Problem identification is particularly useful in developing alternatives designed to remedy the market failure as directly as possible—e.g., supplying needed information to consumers where it appears to be lacking. Even if the agency concludes that there is no market failure or other compelling public need, the statement would provide useful information to policymakers and stakeholders on the regulatory justifications of each rulemaking and highlight areas of reform for the authorizing statutes.

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Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker,” *Journal of Benefit-Cost Analysis* 8, no. 2 (Summer 2017): pp. 187-204. <https://regulatorystudies.columbian.gwu.edu/consumer%E2%80%99s-guide-regulatory-impact-analysis-ten-tips-being-informed-policymaker>.

<sup>14</sup> Exec. Order No. 12866, Regulatory Planning and Review, §1(b)(1).

<sup>15</sup> Viscusi and Gayer *Journal of Regulatory Economics* article

<sup>16</sup> 84 FR 3917.

Alternatively, the analysis of market failure could be included in other areas of rulemaking. One option is for the analysis to be incorporated into the priority-setting analysis stage, “which considers ten factors ... to develop rulemaking priorities and proposed schedules for the development and issuance of all rulemakings.”<sup>17</sup> Alternatively, problem identification could be a part of the economic justification analysis,<sup>18</sup> which is a consideration in multiple parts of DOE’s rulemaking process for energy conservation standards.<sup>19</sup> For instance, the proposed Process Rule includes a section on “factors to be considered in selecting a proposed standard,” such as the impact on manufacturers, impact on consumers, and other social and distributional effects.<sup>20</sup> Furthermore, the revised Process Rule states that “For a standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens.”<sup>21</sup> The authorizing section of the U.S. Code—42 USC 6295 (o)(2)(B)(i)—lists seven categories for consideration and indicates that the Secretary has some discretion on additional factors to consider:

In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering— ... (VII) other factors the Secretary considers relevant.<sup>22</sup>

Given this discretion afforded to DOE, the Process Rule could incorporate analysis of the core problem a new or revised energy conservation standard is intended to address as a factor in decision-making.

## Early Stakeholder Input

A key focus on the proposed Process Rule is encouraging input from the public earlier in the process for establishing or revising energy conservation standards. Earlier stakeholder input is a positive development that strengthens DOE’s decision-making process and aligns with the regulatory best practices of notice-and-comment procedures.

The language of the proposed Process Rule indicates that early engagement is a binding requirement for DOE: “In all cases ... DOE will provide for some form of preliminary data gathering and public comment process including either an [advance notice of proposed rulemaking] or Framework Document and Preliminary Analysis, prior to issuing a proposed

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<sup>17</sup> 84 FR 3916.

<sup>18</sup> 84 FR 3923; also see, 42 USC 6295(o)(2)(B)(i).

<sup>19</sup> 84 FR 3925.

<sup>20</sup> 84 FR 3947.

<sup>21</sup> 84 FR 3948.

<sup>22</sup> 42 USC 6295(o)(2)(B)(i)(VII).

rule.”<sup>23</sup> By committing itself to early stakeholder engagement, DOE strengthens its commitment to orienting rulemaking to the public interest and acknowledging that the public can provide essential data or analysis to inform the need for regulation and the most beneficial approach to take.

Recent testimony from Susan Dudley, a former administrator of the Office of Information and Regulatory Affairs (OIRA), highlights the importance of seeking early public input. Utilizing methods of early engagement “make the factors influencing the agency’s thinking more transparent to the public at a stage when public input could be very valuable.”<sup>24</sup> Seeking early input could produce “more efficient analysis at the NPRM stage and fewer surprises during public comment.”<sup>25</sup> Academic research also highlights the need for inputs such as the analysis of alternatives earlier in the rulemaking process; when tools like benefit-cost analysis and assessing alternative approaches are early inputs in the process, they are more likely to inform agency decision-making rather than justify already decided outcomes.<sup>26</sup> Furthermore, empirical research suggests that certain forms of early engagement are positively associated with higher quality regulatory impact analysis. These include advance notices of proposed rulemakings and requests for information.<sup>27</sup>

Nevertheless, DOE should be careful to advance processes that incorporate stakeholders from across the spectrum of potentially interested parties. Limiting stakeholders to those with predominantly special interests, such as manufacturers, could lead to decisions inconsistent with the public interest. In essence, making early engagement accessible and soliciting input from a wide variety of stakeholders is a critical component of prudent regulatory reform. Likewise, DOE should be cautious about anticompetitive concerns when issuing Direct Final Rules (DFR), which are also discussed below. Since DOE already consults with the Department of Justice (DOJ) to assess the anticompetitive effects of its rulemakings,<sup>28</sup> it may consider expanding that collaboration with DOJ and consulting them earlier in the process.

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<sup>23</sup> 84 FR 3918.

<sup>24</sup> Susan E. Dudley (2019). Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Regulatory Affairs and Financial Management. Prepared statement for hearing on “From Beginning to End: An examination of Agencies’ Early Public Engagement and Retrospective Review” p. 4. <https://www.hsgac.senate.gov/hearings/from-beginning-to-end-an-examination-of-agencies-early-public-engagement-and-retrospective-review>.

<sup>25</sup> Dudley (2019), p. 5.

<sup>26</sup> See, Christopher Carrigan & Stuart Shapiro (2017). “What’s wrong with the back of the envelope? A call for simple (and timely) benefit–cost analysis,” *Regulation & Governance* 11, no. 2 (June 2017): 203–212. <https://doi.org/10.1111/rego.12120>.

<sup>27</sup> Jerry Ellig & Rosemarie Fike (2016). “Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis,” *Journal of Benefit-Cost Analysis* 7, no. 3 (2016): 523–559.

<sup>28</sup> See, the following sections of the revised Process Rule: (7)(e)(2)(i)(I), (7)(e)(2)(ii), and (15)(c).

## Significant Energy Savings

DOE is proposing a threshold-based approach that “would examine energy savings through the twin lenses of [1] the total amount of projected energy savings and [2] the relative percentage increase in efficiency/decrease in energy usage that could be obtained from setting or amending standards for a given product/equipment.”<sup>29</sup> Based on its preliminary findings, the agency concluded that relying on a threshold-based analysis could reduce regulatory burdens “without significantly reducing energy savings.”<sup>30</sup> As constructed, if either threshold is achieved, DOE would move on to further analyses of technological feasibility and economic justification.<sup>31</sup>

Instituting a threshold-based analysis would help DOE avoid marginally effective revisions to standards whose benefits are outweighed by their costs. However, since the expected energy savings are based on projections, DOE should also conduct *ex post* evaluation to determine the accuracy of the savings estimates of standards that are implemented.<sup>32</sup> This *ex post* analysis could inform future energy savings projections, especially when the same type of product or equipment is considered for a revised energy conservation standard down the road. In addition, *ex post* analysis would provide information on the effectiveness of a significance threshold and whether the threshold was set at the right level.

Nevertheless, even if a standard is expected to create significant energy savings, it could still be undesirable economically. DOE acknowledges that if either threshold is reached, the agency would conduct economic justification analysis.<sup>33</sup> However, the chart depicting its decision-making approach indicates that after a rule passes a significant energy savings test, it would move on to a notice of proposed rulemaking.<sup>34</sup>

DOE should not rely on threshold-based analysis as the sole determinant as to whether a standard proceeds with notice and comment, but instead use the threshold as an additional filtering mechanism. Relying on a threshold to filter out certain standards is useful because decreasing marginal returns to energy savings likely exist for most products. Nonetheless, some standards with benefits that do not outweigh their costs may still reach the threshold, which is why economic justification analysis is needed. DOE should clarify the decision-making approach shown in its chart<sup>35</sup> and ensure that standards undergo economic justification analysis before issuing an NPRM.

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<sup>29</sup> 84 FR 3923.

<sup>30</sup> 84 FR 3923.

<sup>31</sup> 84 FR 3923.

<sup>32</sup> The agency should bind itself to planning for retrospective review when it writes a rule. This topic is also discussed below under the retrospective review section.

<sup>33</sup> 84 FR 3923.

<sup>34</sup> 84 FR 3925.

<sup>35</sup> 84 FR 3925.



## Direct Final Rules

DOE uses DFRs to adopt energy conservation standards when the agency receives “a joint proposal from a group of ‘interested persons that are fairly representative of relevant points of view.’”<sup>36</sup> DFRs operate as an exemption to Administrative Procedure Act’s notice-and-comment requirements for informal rulemaking.<sup>37</sup> DOE had previously used a balancing test to weigh adverse comments about the DFR against the expected benefits of the standard and the likelihood that further consideration would alter the result of the rulemaking.<sup>38</sup> In its proposed Process Rule, DOE is moving away from the balancing test and “will look not at the quantity of comments received but rather at the substance of the adverse comment,” so that a single adverse comment could be enough to trigger withdrawal of a DFR.<sup>39</sup> If DOE withdraws a DFR, it will instead proceed using notice-and-comment rulemaking.

Moving away from the balancing test is a positive development, since DFRs constrain public input in the rulemaking process. While DFRs are generally reserved for “routine or noncontroversial” regulations,<sup>40</sup> DOE’s usage of DFRs depart from this norm. Multiple rules establishing energy conservation standards “are large rules that merit careful consideration and review rather than a direct final rulemaking that diverges from the traditional rulemaking process.”<sup>41</sup> These rules imposed net costs on a substantial portion of consumers based on DOE’s projections—for one rule, up to 45% of households in some regions.<sup>42</sup>

Potentially costly rules that may impose adverse impacts on a substantial portion of the public should adhere to notice-and-comment procedures that provide for public participation. Circumventing public input, especially from those bearing a net burden from the rule, through DFRs departs from regulatory best practices<sup>43</sup> and favors the input of special interests and

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<sup>36</sup> 84 FR 3927.

<sup>37</sup> Susan E. Dudley & Jerry Brito (2012). Chapter 4, “The Regulatory Process: How the Sausage is Made” in *Regulation: A Primer*, 2nd Ed. *Mercatus Center at George Mason University and the George Washington University Regulatory Studies Center*, p. 38.  
[https://www.mercatus.org/system/files/RegulatoryPrimer\\_DudleyBrito\\_0.pdf](https://www.mercatus.org/system/files/RegulatoryPrimer_DudleyBrito_0.pdf).

<sup>38</sup> 84 FR 3930.

<sup>39</sup> 84 FR 3930.

<sup>40</sup> Dudley & Brito (2012), p. 38.

<sup>41</sup> Sofie Miller (2018). “Public Interest Comment on The Department of Energy’s Request for Information Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products,” March 2, 2018, p. 3.

<sup>42</sup> Miller (2018), p. 18. *Also see*, Sofie Miller (2017). “Public Interest Comment on The Department of Energy’s Proposed Rule Energy Conservation Program: Energy Conservation Standards for Residential Central Air Conditioners and Heat Pumps,” April 25, 2017.

<sup>43</sup> James Yates (2017). “‘Good Cause’ Is Cause for Concern,” December 17, 2017, p. 4. Available at SSRN: <https://ssrn.com/abstract=3089469> or <http://dx.doi.org/10.2139/ssrn.3089469>.

organized groups over the general public. Even when a DFR could shorten the timeline for an energy conservation standard, it is not worth the tradeoff of less public engagement.

## Negotiated Rulemaking

The revised Process Rule includes a section on negotiated rulemaking, and the proposal separates DFRs from negotiated rulemaking. A key distinction between the two processes is “the outcome of any negotiated rulemaking would be a proposed rule, which would be subject to a comment period, as required under EPCA and the Administrative Procedure Act.”<sup>44</sup>

The decisions to separate DFRs and negotiated rulemaking and establish that the outcome of negotiated rulemaking would be a proposed rule are positive developments. In part, DOE’s decision is in response to a public comment that noted “procedural and analytical drawbacks” of negotiated rulemaking.<sup>45</sup> It stated, “While negotiated rules have the benefit of consensus among interested parties, they do not tend to provide these important decision-making inputs,” including input from the public, analysis of public welfare effects, and assessment and comparison of alternatives.<sup>46</sup> Miller identified four shortcomings to negotiated rulemaking, which are briefly summarized here:<sup>47</sup>

1. Negotiated rulemaking is likely to form regulatory decisions based on consensus instead of maximizing the net benefits to society.
2. Benefit-cost analysis informs the process of developing rules, particularly by illustrating the potential tradeoffs across alternatives. This process of information and development assists with choosing regulatory approaches that maximize net benefits.
3. When rules are negotiated prior to public participation, “comments submitted by outside parties may receive less than due consideration because the policy approach has already been decided.”
4. Because of the composition of negotiated rulemaking committees, such rules could be especially prone to the public choice concerns of special interests choosing regulatory approaches that disadvantage competitors and make consumers worse off.

In essence, notice-and-comment procedures are more likely to produce meaningful public participation at a more effective time in the process. Even if negotiated rulemaking’s outcome is a proposed rule, DOE’s proposal constrains public participation early in the process, which is inconsistent with the Process Rule’s other provisions for early stakeholder engagement.

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<sup>44</sup> 84 FR 3932.

<sup>45</sup> 84 FR 3932. Also see, Miller (2018), pp. 5–8.

<sup>46</sup> Miller (2018), p. 6.

<sup>47</sup> Miller (2018), pp. 5–6.

## Retrospective Review

Under its discussion of “Other Revisions and Issues,” DOE requests feedback on whether and how to “conduct retrospective reviews of the energy savings and costs of energy conservation standards.”<sup>48</sup> The agency received mixed comments on the topic, so “DOE is continuing to evaluate the prospect of conducting these types of reviews, including on a longer-term (e.g., 10-year) basis but has not, as of yet, reached a final decision as to how to proceed.”<sup>49</sup>

Incorporating provisions for retrospective review into the Process Rule is essential to improving existing energy conservation standards and formulating new standards in a more effective and transparent manner. Multiple executive directives across administrations have emphasized the need for retrospective review of regulations.<sup>50</sup> Miller articulated the value of retrospective review for energy conservation standards:

DOE’s *ex ante* analyses of its energy efficiency standards rely heavily upon assumptions about future prices of energy and other goods, opportunity costs, producer and consumer preferences, and behavior. When DOE opts to initiate 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 the future, it would be reasonable 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. One practical step in the right direction would be to assess *ex post* how accurate the Department’s assumptions were regarding consumer appliance use and actualized energy savings.<sup>51</sup>

Put simply, *ex post* analysis would help assess the effectiveness of existing standards and inform the analytical inputs used to create and revise them. In the context of the Process Rule, there could be two main components of such provisions: (1) the review of existing standards and analytical

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<sup>48</sup> 84 FR 3939.

<sup>49</sup> 84 FR 3940.

<sup>50</sup> See, [Executive Order 12866](#) of September 30, 1993, [Executive Order 13563](#) of January 18, 2011, and [Executive Order 13777](#) of February 24, 2017.

<sup>51</sup> Miller (2018), p. 8.

assumptions; (2) changes to how new standards are established by building in metrics, indicators, and timelines at the rule's outset.<sup>52</sup>

A framework for “evidence-based regulation” by Peacock et al. offers practical steps for how to implement retrospective review provisions.<sup>53</sup> The framework suggests methods for planning, collecting, and using evidence throughout the life a regulation as well as predicting, evaluating, and improving outcomes. A key feature of the framework is using retrospective review to periodically reassess the effectiveness and value of the rule. See the figure below for an outline of the framework:<sup>54</sup>

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<sup>52</sup> A related question for DOE to ponder is whether inserting a requirement for *ex post* analysis into the process rule would be enforced by the courts. Would adherence to retrospective review requirements be subject to judicial review?

<sup>53</sup> Marcus Peacock, Sofie E. Miller, & Daniel R. Pérez, “A Proposed Framework for Evidence-Based Regulation,” The George Washington University Regulatory Studies Center, Working Paper, February 22, 2018, [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Peacock-Miller-Perez\\_Evidence-Based-Regulation.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Peacock-Miller-Perez_Evidence-Based-Regulation.pdf).

<sup>54</sup> Peacock et al. (2018), p. 6.

## Evidence-Based Regulation Framework

### I. Regulatory Design

- A. Identify the problem (state the “compelling public need”).
- B. Evaluate whether modifications to existing rules can address the problem.
- C. Identify and assess available alternatives to direct regulation.
- D. If regulating, determine that the preferred alternative addresses the problem.
- E. Set clear performance goals and metrics for outputs and outcomes.
- F. Exploit opportunities for experimentation.
- G. Plan and budget for retrospective review.

### II. Regulatory Decision-making

- A. Assess the expected benefits, costs, and other impacts.
- B. Clearly separate scientific evidence from policy judgments.
- C. Make relevant data, models and assumptions available to the public.

### III. Retrospective Review

- A. Reassess planned retrospective review and modify if necessary.
- B. Gather necessary data on regulatory outputs and outcomes.
- C. Implement retrospective review plan.
- D. Compare measured outcomes to original performance goals.
- E. Reassess the rule using new information and the factors in the regulatory design.

As demonstrated by the evidence-based regulation framework, both designing regulations *ex ante* to document their performance and assessing them *ex post* to evaluate their outcomes are critical steps to take. Utilizing retrospective review could also help DOE achieve some of its stated objectives in the Process Rule. For example, multiple areas of the revised text of Appendix A could benefit from *ex post* evaluation:

- Section (1)(f) – “Use transparent and robust analytical methods ... that are fully documented for the public and that produce results that can be explained and reproduced...”<sup>55</sup>
- Section (6)(d)(1) – “Identification of engineering analytical methods and tools.”<sup>56</sup>
- Section (6)(f)(2) – “Identification of analytical methods and tools.”<sup>57</sup>

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<sup>55</sup> 84 FR 3945.

<sup>56</sup> 84 FR 3947.

<sup>57</sup> 84 FR 3947.

- Section (14)(h)(1) – “Key modeling and analytical tools.”<sup>58</sup>
- Section (17) – “Cross-Cutting Analytical Assumptions”<sup>59</sup>

DOE can use prior rulemakings and their results to inform future ones and revise existing standards. As the agency suggests,<sup>60</sup> even conducting retrospective review on a longer-term basis would be better than the status quo and provide meaningful information to the agency and interested stakeholders.

## Improving Analysis of Appliance Standards

One particular area that would benefit from additional modification in the revised Process Rule is the analysis of consumer appliance standards. Even when a market failure has been identified, the costs and benefits of an energy conservation standard may be unequally distributed. Miller explained how this applies to DOE’s standards:

As is true for all regulations, there is a distribution of regulatory benefits and costs across the regulated public in DOE’s efficiency standards, with some consumers benefitting and others experiencing net costs. DOE typically considers what proportion of consumers will bear net costs in its determination of whether a standard is economically justified.<sup>61</sup>

But DOE does not provide clear criteria for how it evaluates distributive impacts in its energy conservation standards, particularly the distribution of net costs across different regions. To remedy this, DOE should incorporate “a threshold for determining what proportion of consumers bearing net costs is too much.”<sup>62</sup> Another commenter suggested a similar approach, where the agency would avoid new or revised standards when the percentage of consumers would be economically harmed reaches a certain threshold.<sup>63</sup>

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<sup>58</sup> 84 FR 3951.

<sup>59</sup> 84 FR 3952.

<sup>60</sup> 84 FR 3940.

<sup>61</sup> Miller (2018), p. 11.

<sup>62</sup> Miller (2018), p. 14.

<sup>63</sup> 84 FR 3919: “Lennox argued that DOE should more actively consider no amended standard’ scenarios, and to this end, DOE should apply presumptions against over-regulation as part of this consideration. By having robust presumptions against new or more stringent regulations—for instance, by applying an approach that avoids new efficiency standards where 20 percent or more of consumers would be ‘economically harmed’—these presumptions would, in Lennox’s view, protect manufacturers from overregulation. Lennox argued that applying this type of approach would be better than trying to develop a one-size-fits-all approach definition of significant energy savings. (See Lennox, No. 17 at pp. 14–15)”

The economic justification analysis in 42 USC 6295(o)(2)(B)(i) could be a good place to incorporate this threshold.<sup>64</sup> Similar to the threshold-based analysis for significant energy savings, DOE could determine that if a certain proportion of consumers were harmed by the rulemaking, the standards would not be economically justified. In the revised text of the Process Rule itself, the consumer net cost threshold could be added to multiple places:

- Section (7)(e)(2)(i) under “Policies on Selection of Standards”<sup>65</sup>
- Section (15)(d) under “Principles for the Analysis of Impacts on Consumers”<sup>66</sup>

In particular, the latter section focuses specifically on “Variation in consumer impacts” and suggests considering voluntary approaches when significant negative impacts affect subgroups of the population.<sup>67</sup>

## Conclusion and Recommendations

The Process Rule proposes substantial changes to DOE’s procedures for establishing new and revised energy conservation standards. While the proposal makes many improvements over the current rulemaking methodology, additional positive changes can be undertaken.

What follows is a summary of the key recommendations made by this public comment:

1. By making the Process Rule binding and opening itself to judicial review, DOE strengthens its credible commitment to following its internal procedures. DOE should move ahead with its decision to bind itself to the revised Process Rule.
2. A foundational principle of regulatory analysis is identifying the problem to be solved by regulation. DOE should consider including such a step in its rulemaking and decision-making process, potentially during its early assessment review.
3. Earlier stakeholder input in the Process Rule strengthens DOE’s decision-making process and aligns with regulatory best practices. DOE should prioritize processes that incorporate stakeholders from across the spectrum of potentially interested parties and that guard against anticompetitive effects.
4. The proposed threshold-based analysis would help DOE avoid marginally effective revisions to standards whose benefits are outweighed by their costs. DOE should also conduct *ex post* evaluation to determine the accuracy of the projected energy savings of standards that are implemented. DOE should clarify the decision-making approach shown in its chart (at 84 FR 3925) and ensure that standards undergo economic justification analysis before issuing an NPRM.

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<sup>64</sup> See, Miller (2018), p. 13.

<sup>65</sup> 84 FR 3948.

<sup>66</sup> 84 FR 3952.

<sup>67</sup> 84 FR 3952.

5. DOE is moving away from the balancing test in its process for DFRs, which is a positive development. DOE should also avoid relying on DFRs because potentially costly rules that may impose adverse impacts on a substantial portion of the public should adhere to notice-and-comment procedures that provide for public participation.
6. The decisions to separate DFRs and negotiated rulemaking and establish that the outcome of negotiated rulemaking would be a proposed rule are positive developments. DOE should prioritize traditional notice-and-comment procedures because negotiated rulemaking constrains public participation early in the process.
7. DOE should establish procedures in the Process Rule for retrospective review. DOE can use prior rulemakings and their results to inform future ones and revise existing standards. Such provisions for *ex post* analysis should (1) review existing standards and their analytical assumptions, and (2) build in metrics, indicators, and timelines at the outset of a rule.
8. The costs and benefits of energy conservation standards may be unequally distributed, but DOE does not provide clear criteria for how it evaluates distributive impacts. DOE should establish a threshold that limits the proportion of consumers bearing net costs from its standards. This threshold could be incorporated into the economic justification analysis.