

Date: June 14, 2021

To: Matthew Wiener, ACUS Vice Chair

From: Kevin Bromberg, Bromberg Regulatory Strategy

CC: Mark Thomson, ACUS Staff Counsel

Connor Raso, Regulation Committee Chair

Subject: Recommendation for Plenary Consideration – Early Input Recommendation

New Recommendation for the Plenary Session:

I greatly appreciate the Committee on Regulation’s adoption of my earlier recommendation to include references to both SBREFA and the DOE Process Rule as worthy examples of early input mechanisms employed by three different agencies over two decades. As a participant in early input procedures over forty years, I also thank Committee Chair Connor Raso for allowing me to address the Committee during the meeting on this important subject.

Based on a review of the revised June 2 language, I suggest that the Conference add the word “successful” as a descriptor of these two sets of procedures to provide a more accurate description of federal agency experiences with these two sets of procedures.

The relevant recommendation now appears at lines 27-30:

In so doing, they might look at agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement Fairness Act (SBREFA))⁹ or agency rules (e.g., the Department of Energy’s “Process Rule”),¹⁰ or practices that agencies have voluntarily undertaken in the absence of any legal requirement.

I suggest the addition of a new footnote 11 to the end of the sentence at line 30.

EPA and OSHA have successfully applied SBREFA procedures since 1997, and DOE has successfully applied the Process Rule since 1996.

The consultants’ report by Professors Carrington and Shapiro provided to the Committee has already provides evidence of the effectiveness of SBREFA.¹ In addition, the Committee report noted the positive impact SBREFA had on regulatory development at EPA and OSHA. I offer the

¹ Professor Shapiro’s recent book offers additional discussion of the merits of the SBREFA process. Shapiro, Stuart. *Analysis and public policy: Successes, failures and directions for reform*. Edward Elgar Publishing, 2016

following analysis of the DOE process rule in the Appendix below in support of its designation as a “successful” program for those unfamiliar with that rule.

Appendix to Recommendation:

DOE Process Rule – A Successful Example of Early Input Procedures

For those who are not familiar with the DOE process rule early input procedures, here is some background information in support of my recommendation above with respect to the DOE rule.

The “Process Rule” was first adopted in 1996, and the current version of the DOE process rule was promulgated in 2020. Appendix A to Subpart C of 10 CFR Part 430. The Process Rule outlines procedures and standards for the development of energy conservation standards for consumer and commercial products. The Process Rule contains an extensive set of early input procedures. In response to a new Biden Executive Order, DOE has proposed some revisions to this rule in April 2021, some of which face considerable opposition from regulated entities.

However, the new DOE process rule proposal makes no changes to the highly structured early input requirements. Indeed, the regulated entities and the energy conservation advocates have universally supported the DOE process for obtaining pre-proposal input which has been employed for 25 years and periodically improved since 1996. When DOE followed the Process Rule procedures faithfully, it has been universally recognized that the public interest has been well served.

In the preamble to the 2020 final rule, which included an update to the early input requirements, DOE observed that there was general support for its early input procedures, citing commenters of many different points of view. 85 Fed. Reg. 8626, 8654 (February 14, 2020). The agency concluded that DOE would continue to provide for “some form of preliminary data gathering and public comment process, including either an ANOPR or Framework Document and Preliminary Analysis, prior to issuing a proposed rule.” 85 Fed. Reg. 8655 (February 14, 2020).

Some of the most significant early input portions of the DOE Process Rule is provided below. In sum, the public is provided with a framework document for evaluating the costs and associated energy savings associated with alternative design standards (i.e., regulatory alternatives), and is provided an opportunity to provide written and sometimes oral comments to DOE in advance of the proposal stage. The agency specifies a public comment period of a minimum of 75 days and could include an opportunity for public hearing. Process Rule, Section 6 Process for Developing Energy Conservation Standards paragraph (d)(2).

As stated above, DOE is now evaluating updating some of the specific substantive requirements such as the definitions of “significant” energy savings and “economically justified,” but is not considering any revisions to the early input procedures. DOE now proposes to include a waiver of any procedures where needed on a case-by-case basis in the Process Rule (see Section 3 below).

Process Rule Excerpts Regarding Early Input [No amendments to these provisions are being considered, but DOE has proposed an additional option for a case-by-case waiver]

Appendix A to Subpart C of 10 CFR Part 430

1. Objectives:

This appendix establishes procedures, interpretations, and policies to guide the Department of Energy (“DOE” or the “Department”) in the consideration and promulgation of new or revised appliance energy conservation standards and test procedures under the Energy Policy and Conservation Act (EPCA). This appendix applies to both covered consumer products and covered commercial/industrial equipment. The Department’s objectives in establishing these procedures include:

- (a) *Provide for early input from stakeholders.* The Department seeks to provide opportunities for public input early in the rulemaking process so that the initiation and direction of rulemakings is informed by comment from interested parties. DOE will be able to seek early input from interested parties in determining whether establishing new or amending existing energy conservation standards will result in significant savings of energy and is economically justified and technologically feasible. In the context of test procedure rulemakings, DOE will be able to seek early input from interested parties in determining whether—
 - (1) Establishing a new or amending an existing test procedure will better measure the energy efficiency, energy use, water use (as specified in EPCA), or estimated annual operating cost of a covered product/equipment during a representative average use cycle or period of use (for consumer products); and
 - (2) Will not be unduly burdensome to conduct.

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3. Application of the Process Rule

(a) This appendix contains procedures, interpretations, and policies that are generally applicable to the development of energy conservation standards and test procedures. The Department may, as necessary, deviate from this appendix to account for the specific circumstances of a particular rulemaking.

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6. Process for Developing Energy Conservation Standards

This section describes the process to be used in developing energy conservation standards for covered products and equipment other than those covered equipment subject to ASHRAE/IES Standard 90.1.

(a) *Early Assessment.* (1) As the first step in any proceeding to consider establishing or amending any energy conservation standard, DOE will publish a document in the Federal Register announcing that DOE is considering initiating a rulemaking proceeding. As part of that document, DOE will solicit submission of related comments, including data and information on whether DOE should proceed with the rulemaking, including whether any new or amended rule would be cost effective, economically justified, technologically feasible, or would result in a significant savings of energy. Based on the information received in response to the notice and its own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended energy conservation standard or an amended test procedure. If DOE determines that a new or amended standard would not satisfy applicable statutory criteria, DOE would engage in notice and comment rulemaking to issue a determination that a new or amended standard is not warranted. If DOE receives sufficient information suggesting it could justify a new or amended standard or the information received is inconclusive with regard to the statutory criteria, DOE would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard, as discussed further in paragraph (a)(2) of this section.

(2) If the Department determines it is appropriate to proceed with a rulemaking, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a Framework Document and Preliminary Analysis, or an Advance Notice of Proposed Rulemaking (ANOPR). Requests for Information (RFI) and Notices of Data Availability (NODA) could be issued, as appropriate, in addition to these preliminary-stage documents.

(3) In those instances where the early assessment either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, and DOE undertakes the preliminary stages of a rulemaking to establish or amend an energy conservation standard, DOE may still ultimately determine that such a standard is not economically justified, technologically feasible or would not result in a significant savings of energy. Therefore, DOE will examine the potential costs and benefits and energy savings potential of a new or amended energy conservation standard at the preliminary stage of the rulemaking. DOE notes that it will, consistent with its statutory obligations, consider both cost effectiveness and economic justification when issuing a determination not to amend a standard.

(b) *Design options*—(1) *General.* Once the Department has initiated a rulemaking for a specific product/equipment but before publishing a proposed rule to establish or amend standards, DOE will typically identify the product/equipment categories and design options to be analyzed in detail, as well as those design options to be eliminated from further consideration. During the pre-proposal stages of the rulemaking, interested parties may be consulted to provide information on key issues through a variety of rulemaking documents. The preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a framework document and preliminary analysis, or an advance notice of proposed rulemaking (ANOPR). Requests for Information (RFI) and Notice of Data Availability (NODA) could also be issued, as appropriate.

(2) *Identification and screening of design options.* During the pre-NOPR phase of the rulemaking process, the Department will typically develop a list of design options for consideration. Initially, the candidate design options will encompass all those technologies considered to be technologically feasible. Following the development of this initial list of design options, DOE will review each design option based on the factors described in paragraph (b)(3) of this section and the policies stated in

section 7 of this Appendix (*i.e.*, Policies on Selection of Standards). The reasons for eliminating or retaining any design option at this stage of the process will be fully documented and published as part of the NOPR and as appropriate for a given rule, in the pre-NOPR documents. The technologically feasible design options that are not eliminated in this screening will be considered further in the Engineering Analysis described in paragraph (c) of this section.

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- (b) *Engineering analysis of design options and selection of candidate standard levels.* After design options are identified and screened, DOE will perform the engineering analysis and the benefit/cost analysis and select the candidate standard levels based on these analyses. The results of the analyses will be published in a **Technical Support Document (TSD)** to accompany the appropriate rulemaking documents.

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(d) *Pre-NOPR Stage—(1) Documentation of decisions on candidate standard selection.*

(i) If the early assessment and screening analysis indicates that continued development of a standard is appropriate, the Department will publish either:

(A) A notice accompanying a framework document and, subsequently, a preliminary analysis or;

(B) An ANOPR. The notice document will be published in the Federal Register, with accompanying documents referenced and posted in the appropriate docket.

(ii) If DOE determines at any point in the pre-NOPR stage that no candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified or constitute significant energy savings, that conclusion will be announced in the Federal Register with an opportunity for public comment provided to stakeholders. In such cases, the Department will proceed with a rulemaking that proposes not to adopt new or amended standards.

(2) *Public comment and hearing.* The length of the public comment period for pre-NOPR rulemaking documents will vary depending upon the circumstances of the particular rulemaking, but will not be less than 75 calendar days. For such documents, DOE will determine whether a public hearing is appropriate.