Appliance Standards Awareness Project
National Consumer Law Center, on behalf of its low-income clients
Northwest Energy Efficiency Alliance

December 30, 2020

Ms. Smitha Vemuri
U.S. Department of Energy
Office of General Counsel, GC-32
1000 Independence Avenue SW
Washington, DC 20585

RE: Docket Number EERE–2019–BT–CE–0015/RIN 1904–AE34: Notice of Proposed Rulemaking for Enforcement for Consumer Products and Commercial and Industrial Equipment

Dear Ms. Vemuri:

This letter constitutes the comments of the Appliance Standards Awareness Project (ASAP), National Consumer Law Center, on behalf of its low-income clients (NCLC), and Northwest Energy Efficiency Alliance (NEEA) on the notice of proposed rulemaking for enforcement for consumer products and commercial and industrial equipment. 85 Fed. Reg. 53691 (August 31, 2020). We appreciate the opportunity to provide input to the Department.

We support DOE's efforts to increase transparency and specificity within the enforcement provisions. Many of the proposed edits clarify enforcement provisions and make explicit the procedures that DOE utilizes to make a finding of noncompliance. For example, clarifying that design requirements are energy conservation standards and are therefore subject to DOE enforcement gives manufacturers clear knowledge of how design standards fit into DOE's enforcement process. In addition, the proposed petition for reexamination process provides specificity to both DOE and manufacturers on the procedures by which manufacturers can contest a pending determination of noncompliance. It gives manufacturers a streamlined process for engagement on noncompliance issues while reducing inefficient back and forth discussions. The process will also provide a level playing field for all manufacturers who intend to petition a pending determination of noncompliance and assist DOE with promptly and effectively evaluating claims.

We support applying the enforcement provisions that apply to all other products and equipment to electric motors and small electric motors. We agree that it makes sense to harmonize the enforcement process for motors with that for all other product types. As DOE notes in the NOPR, because the enforcement process for all other products is significantly more developed than the current procedures for electric motors, harmonizing the enforcement provisions will provide greater clarity to manufacturers.[1]

We support DOE having the authority to obtain and use relevant data from any party to make a finding of noncompliance. Current regulations already allow for DOE to request any information relevant to determining compliance.[2] The proposed change would make explicitly clear DOE's authority to request information from a manufacturer or private labeler, another Federal agency, or a third-party

[1] 85 Fed. Reg. 53693.
[2] 85 Fed. Reg. 53694.

certification program[3]. Additionally, DOE should detail the flow of data and information from third-party certification programs to DOE to ensure timely receipt of information regarding compliance (e.g., certification programs should notify DOE within 15 or 30 days after finding that a product is out of compliance with DOE standards). Timely receipt of this information will enable DOE to promptly conduct and complete a fair and thorough investigation which may or may not lead to an enforcement action. If these programs fail to promptly provide evidence of potential noncompliance to DOE, the integrity of both the program and the DOE standards may be at risk. Consumers may continue to be sold products that fall short of claimed performance (and legal requirements), and competitors who play by the rules may be undercut in the market.

We support DOE having the discretion to include third-party certification program test data as official enforcement test data. This proposed change can benefit both DOE and manufacturers by saving unnecessary time and expenses. DOE would have the flexibility and opportunity to consider alternate test data if the proper number of sampling units are not available. In addition, manufacturers that produce small batches of units may save money by not needing to produce additional units for DOE if there is third-party test data available. Third-party tests would still need to follow the appropriate test procedure and would be limited to formal certification programs only.[4] As DOE explained at the public meeting on December 8, the Department would bear the burden of the decision and therefore would need to have great confidence in any third-party test data used.

We support DOE's proposed changes regarding sample size. DOE is currently able to use a reduced sample size in certain instances, such as when units are not available for testing or when a basic model has an unusual testing requirement.[5] We support DOE specifying that a reduced sample size may also apply in other circumstances, such as when DOE makes a determination of noncompliance for a basic model subject to design requirements. We also agree that it is beneficial to clarify that if the sample size is comprised of a single unit, the sampling statistics would not apply. In addition, we support DOE having the option to make a finding of noncompliance based on a single test if the model performs significantly worse than the standard. As DOE explained at the public meeting, without this change, manufacturers could drag out the process, creating unnecessary expenses for DOE and unfairly impacting competitors and consumers. In addition, the proposed petition for reexamination process, which would also be applicable under this circumstance, will give manufacturers protection if they believe DOE has made a mistake.

DOE should maintain the requirement for manufacturers to inform customers of noncompliance. Currently, if DOE issues a notice of noncompliance, the manufacturer is obligated to give written notification of the determination of noncompliance to all persons to whom they have distributed products.[6] In the NOPR, DOE proposes to remove this requirement.[7] At the public meeting on December 8, DOE claimed that this change would reduce burden on manufacturers and still allow for information to be available to the public on the DOE enforcement webpage. However, DOE itself notes that this

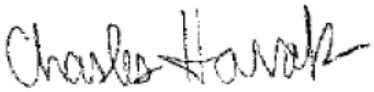
[3] We believe DOE uses "certification program" in the notice to describe programs that conduct tests to verify claimed efficiency or energy/water use. We urge DOE to consider any program that conducts such testing, regardless of whether it also provides certification services, as a potential source of data and information for enforcement purposes.
[4] DOE Public Meeting on Enforcement NOPR, 12/8/20.
[5] 85 Fed. Reg. 53696.
[6] 10 CFR § 429.114.
[7] 85 Fed. Reg. 53696.

change will result in annual cost savings for all manufacturers of only $3,718.[8] We believe that these very small savings for some manufacturers are not significant enough to justify the change. In fact, the proposal would disadvantage manufacturers of compliant products by not directly informing customers of their competitors' noncompliance. Additionally, we believe that very few purchasers are even aware of DOE's enforcement webpage. DOE's proposal would thus ultimately harm customers since they would no longer be notified directly of noncompliant products. Furthermore, we believe that the requirement of informing customers of noncompliance is itself a deterrent to noncompliance.

Thank you for considering these comments.

Sincerely,

Kanchan Swaroop
Technical Advocacy Associate
Appliance Standards Awareness Project



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[8] 85 Fed. Reg. 53699.