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BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS
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Thank you, Chairman Williams, Ranking Member Velázquez, and distinguished Members of the Committee, for the opportunity to testify today. I will be testifying concerning the Department of Energy’s approach to rulemaking for its energy conservation standards program, and specifically, how the process is structured to ensure that the voices of small businesses are heard.

I am a Professor of Law at The George Washington University Law School, and am currently serving as a Visiting Professor of Law at Georgetown University. I am a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and I have previously served as Deputy General Counsel for Litigation, Regulation, and Enforcement at the Department of Energy, with responsibility for the energy conservation standards rulemakings that are the topic of today’s hearing. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization, nor do I speak for the agency. My expertise relates to administrative law, energy law, and environmental law. My work is published in the country’s top scholarly journals as well as in many books and shorter works, and I regularly speak on these topics. Among my areas of research is the administrative rulemaking process, particularly in areas with scientific and technical complexity.

When I arrived at DOE in June 2021, I was immediately impressed to see that across the many professional experts who develop these rules, there is a deep commitment not only to the letter of the law, but to its spirit, which includes a commitment to good governance. Although much of my testimony outlines the legal constraints on the agency, I want to emphasize that these professionals do not merely check legal boxes in carrying out the agency’s work; they are dedicated to carefully considering all the facets of these rules, and to assisting with compliance once the rules are complete. In my testimony today, I will begin by outlining how the Energy Policy and Conservation Act (EPCA) works to ensure that manufacturers’ interests—including those of small businesses—are deeply engaged in every DOE rulemaking for energy conservation standards. Next, I will describe how DOE complies with the Regulatory Flexibility Act to provide an additional layer of protection for small businesses. Third, I will detail how DOE works to provide guidance and support to small businesses. Finally, I will share how DOE’s efficiency standards work in multiple ways to benefit small businesses’ bottom lines.

I. The Energy Policy and Conservation Act

As you know, Congress passed EPCA in 1975 at a time when consumer energy costs were rising and there was a scarcity of energy resources to meet rising demand. Congress itself set the first energy efficiency standards for consumer appliances and certain industrial

equipment,¹ and it directed DOE to periodically assess the standards and update them, using a detailed set of criteria.² The agency must set standards that achieve the “maximum improvement in energy efficiency” that are “technologically feasible and economically justified.”³ In addition, the standard must result in a significant conservation of energy.⁴ Congress then explicitly instructed the agency what 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—

- (I) the **economic impact of the standard on the manufacturers and on the consumers** of the products subject to such standard;
- (II) the **savings in operating costs** throughout the estimated average life of the covered product in the type (or class) **compared to any increase in the price** of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;
- (III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;
- (IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
- (V) 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;
- (VI) the need for national energy and water conservation; and
- (VII) other factors the Secretary considers relevant.⁵

In each proposed and final rule, DOE sets forth its detailed methodology and consideration of each of these seven factors.

Given this hearing’s focus on small businesses, I highlight that in the first factor—determining the impact of the proposed standard on manufacturers—DOE brings both quantitative and qualitative approaches to bear. These approaches are designed to identify how the proposed standards would “affect manufacturing employment, capacity, and competition, as

¹ This discussion cites to the provisions for consumer appliances but note that Congress similarly directed DOE to maintain efficiency standards for industrial equipment (which includes many commercial-scale equipment), 42 U.S.C. § 6313 (commercial); and for distribution transformers, 42 U.S.C. § 6317.

² See generally 42 U.S.C. § 6295 (setting forth initial standards and criteria for updating standards for consumer appliances).

³ *Id.* § 6295(o)(2)(A). There are similar standards for water efficiency.

⁴ *Id.*

⁵ *Id.* § 6295(o)(2)(B)(1)(I – VII) (emphasis added); see also 42 U.S.C. § 6313(3)(B)(ii) (similar for industrial equipment including commercial equipment).

well as how standards contribute to overall regulatory burden” and whether they would cause “any disproportionate impacts on manufacturer subgroups, including small business manufacturers.”⁶ And they include both computer modeling and actual interviews with small business owners.⁷ Moreover, in the analysis of economic impacts to consumers, where relevant, DOE specifically sets forth its assessment of costs and payback periods for small businesses, as compared to consumers as a whole.⁸

To gather the information needed to undertake its seven-factor analysis, DOE offers far more participatory opportunities than the Administrative Procedure Act requires.⁹ Not only does EPCA itself provide these opportunities, but the agency on its own initiative undertakes to offer webinars, field questions from stakeholders, and conduct outreach to stakeholders—all including small businesses—to ensure that they have opportunities to offer their expertise and insights. Indeed, the standards are developed in a phased process with multiple opportunities for participation,¹⁰ and all related material is posted in the rulemaking docket which is publicly available online.¹¹ Ultimately, the agency conducts a sophisticated analysis of the factors set forth above and publishes those in its proposed rule (in both a preamble and a technical support document); and it updates this analysis in response to comments in its final rules.¹²

⁶ 88 Fed. Reg. at 70,245.

⁷ *E.g.*, *id.* at 70,246.

⁸ *E.g.*, *id.* at 70,272.

⁹ *See* 42 U.S.C. § 6306 (a) (in addition to notice-and-comment rulemaking provisions of APA § 503, the Secretary must “afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule”); *id.* §(b) (specifying that for consumer appliance standard-setting, in informal presentations, interested persons may question others who have made oral statements, including DOE employees concerning factual information). Note that DOE also works with the Appliance Standards and Rulemaking Federal Advisory Committee which permits negotiated rulemaking. *See* DEP’T OF ENERGY, APPLIANCE STANDARDS AND RULEMAKING FEDERAL ADVISORY COMMITTEE, at <https://www.energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee>.

¹⁰ The recently proposed standards for commercial refrigeration equipment provide an example. There, the agency issued a Request for Information in 2021, which initiated an early comment period. Thereafter, in 2022 the agency conducted a webinar and published a preliminary technical support document, again offering a comment period. The 2023 proposed rule offers yet another comment period, webinar, and opportunity to participate. These actions and dates are set forth in docket number EERE-2017-BT-STD-0007.

¹¹ *See, e.g.*, Rulemaking Docket, Energy Conservation Standards for Battery Chargers, EERE-2020-BT-STD-0013, at [regulations.gov](https://www.regulations.gov).

¹² *See, e.g.*, Proposed Rule, Energy Conservation Program: Energy Conservation Standards for Battery Chargers, 88 Fed. Reg. 16,112 (Mar. 15, 2023). Note that because of DOE’s numerous opportunities for public comment *before* publication of proposed rules, even the proposed rules engage with comments previously received. *See, e.g.*, Proposed Rule, Energy Conservation Standards for Commercial Refrigerators, Freezers, and Refrigerator-Freezers, 88 Fed. Reg. 70,196, 70,05-07 (Oct. 10, 2023) (describing and responding to general comments); *id.* at 70,212 (describing and responding to definitional comments); *id.* at 70,215 (describing and responding

In addition to building considerations for small businesses into the seven-factor analysis, moreover, Congress established a relief valve specifically for small manufactures: if the Secretary finds after consulting with the Attorney General that the new standard would decrease competition, she may grant an exemption to small manufacturers for up to two years.¹³ DOE maintains guidance on its website for how to seek such exemptions, all of which are published in the Federal Register.¹⁴

A final note about DOE's standards. The agency sets performance standards for manufacturers to meet, rather than imposing prescriptions for how they should meet the standards. This approach gives manufacturers flexibility to determine how best to meet the standards and encourages innovation—which creates opportunities for new small businesses to enter the market and existing ones to become more competitive.¹⁵

II. The Regulatory Flexibility Act

In addition to complying with the detailed analytical and procedural requirements described above, DOE complies with the Regulatory Flexibility Act, which expressly requires considering how a proposed rule with significant economic impact would impact small businesses.¹⁶ The analysis must be posted for public comment, and in the final rule, DOE responds to these comments. DOE's research in this regard is detailed and careful. It relies on databases of product manufacturers, state and trade association resources, and even marketing materials to identify small businesses. Next, it considers whether these small businesses would be required to undertake costs to convert their manufacturing processes to account for new standards, and it even invites individual interviews with small manufacturers to ensure its information is as accurate as possible. An overview of this analysis, and an overview of the process, can be found in every proposed and final rule to which this analytical requirement

to comments regarding equipment classes); *id.* at 70,235 (describing and responding to comments regarding manufacturing costs)

¹³ 42 U.S.C. § 6295(t). For purposes of this analysis, small manufacturers are those whose annual gross revenues do not exceed \$8 million for the prior year.

¹⁴ See 10 C.F.R. §§ 430.50 - .57 (setting forth requirements).

¹⁵ See OFF. OF INFO. & REG. AFFAIRS, U.S. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, GUIDANCE ON ACCOUNT FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS 4-5 (Oct. 2023), *available at* <https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf> (“changing a regulation based on a specific design standard to one based on a general *performance* standard may increase competition by allowing firms to produce products with innovative designs that meet or exceed that performance standard but have lower costs.”) (emphasis original).

¹⁶ 5 U.S.C. § 601.

applies.¹⁷ As described next, moreover, DOE offers guidance to small businesses for understanding and participating in the energy conservation standards program.

III. Transparent DOE Procedures and Guidance for Small Businesses

In accordance with Executive Order 13,272, DOE in 2003 published its procedures for implementing the Regulatory Flexibility Act.¹⁸ In addition, the agency developed a guidance document *Small Entity General Compliance Guide*, which is available on its website.¹⁹ This document uses plain language to describe the efficiency standards program, the ways that small businesses can participate, each step small businesses can take to ensure that they are in compliance with the standards, and the options for getting exceptions from the standards. The document also has a list of resources—including email addresses and phone numbers—that are available for any questions small businesses (or others) might have.

IV. Energy Conservation Standards Benefit Small Businesses' Bottom Lines

As described above, DOE ensures that its energy conservation standards are developed in a transparent, participatory process that is open to all stakeholders, with a special focus on the interests of small businesses. What is special about this program, however, goes beyond the agency's careful effort developing rules: This program brings concrete benefits to householders, small businesses, and other commercial enterprises in the form of real and meaningful savings.

According to one study, for example, DOE's conservation standards are projected to save households an average of \$840 a year in 2030.²⁰ Businesses saved even more: almost \$23 billion dollars in utility bills nationwide.²¹ In recent rulemakings, DOE has emphasized benefits from energy conservation to the tune of billions of dollars. For instance, DOE estimates that its proposed energy conservation standards for battery chargers will save consumers, which includes small businesses, up to \$9 billion in energy costs.²² And in its proposed standards for commercial refrigeration equipment, DOE estimates that consumers—again, including small businesses—will save up to \$7.1 billion in energy costs.²³ These, of course, are proposed rules, so they will still benefit from the further refinement that the notice-and-comment period provides. Even at this stage, it bears emphasis that with electricity prices now higher than before in many states,

¹⁷ See, e.g., 88 Fed. Reg. at 16,162-163 (describing analysis for proposed battery charger standards and inviting comment on all facets of analysis); 88 Fed. Reg. at 70,296-299 (same for proposed commercial refrigeration standards).

¹⁸ 68 Fed. Reg. 7990 (Feb. 19, 2003).

¹⁹ DEP'T OF ENERGY, APPLIANCE STANDARDS PROGRAM AND TEST PROCEDURES: SMALL ENTITY <https://www.energy.gov/sites/default/files/2023-07/sbrefa-general-compliance-guide.pdf>

²⁰ Andrew deLaski & Joanna Mauer, *Energy-Saving States of America: How Every State Benefits from National Appliance Standards*, at 2 (Feb. 2017), at <https://appliance-standards.org/sites/default/files/Appliances%20standards%20white%20paper%202%202-14-17.pdf>.

²¹ *Id.* at 6.

²² 88 Fed. Reg. 16,115 (using a three-percent discount rate).

²³ 88 Fed. Reg. at 70,0199 (using a three-percent discount rate).

these rules will promote even greater savings for residential consumers and small businesses alike.²⁴

There are other benefits, too. For example, lowering electricity use means lowering emissions of harmful pollutants like sulfur dioxide and nitrogen oxides. To demonstrate the point, DOE estimates that its proposed energy conservation standards for commercial refrigeration equipment will generate up to nearly \$6 billion in public health benefits associated with reductions in sulfur dioxide and nitrogen oxide emissions.²⁵ Numerous studies have demonstrated that air pollution reductions mean better health for workers, translating into fewer days of lost work.²⁶ Such disruptions in staffing are especially burdensome for small businesses, which, as the National Federation of Independent Businesses has noted, are already feeling the strain from labor supply shortages.²⁷

And as climate change disruption even further presents risks to the economy and worker wellbeing, this important program's additional benefits should not be understated. Reduced greenhouse gas emissions associated with energy savings directly support climate change mitigation. Reduced energy reliance also translates to grid resiliency; and of course, reduced costs to consumers alleviate the burdens of those who are most impacted by climate disasters. Not all of these avoided costs are fully quantified, but those that are quantified are significant. For instance, DOE estimates its proposed battery charger standards will avoid climate costs of up to \$2.1 billion.²⁸ And the proposed commercial refrigeration standards are estimated to avoid climate costs of over \$3 billion.²⁹ These benefits extend to small businesses and should not be overlooked.

Thank you again for the opportunity to testify today. I look forward to your questions.

²⁴ DOE employs a sophisticated approach to energy cost estimates that accounts for a number of variables, including region, seasonal variability, building size, and sector. *See, e.g.*, 88 Fed. Reg. at 70,239 (describing methodology).

²⁵ 88 Fed. Reg. at 70,200 (using a three-percent discount rate); *see also* 88 Fed. Reg. at 16,115 (health benefits of the proposed battery charger rule of \$3.8 billion (3% discount rate)).

²⁶ *E.g.*, Org. for Econ. Cooperation & Dev't, *The Economic Consequences of Outdoor Air Pollution* (June 2016); Matthew Neidell & Nico Pestel, *Air Pollution and Worker Productivity*, IZA World of Labor 2023 (synthesizing studies).

²⁷ Nat'l Fed. of Indep. Bus., *Small Businesses Continue to Struggle with Labor Shortages and Inflation*, Feb. 15, 2023, <https://www.nfib.com/content/analysis/economy/small-businesses-continue-to-struggle-with-labor-shortages-and-inflation/> (last visited Nov. 6, 2023).

²⁸ Energy Conservation Standards for Battery Chargers, 88 Fed. Reg. at 16115 (using a three-percent discount rate).

²⁹ 88 Fed. Reg. at 70,200 (using a three-percent discount rate).