



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE-2019-BT-CE-0015]

RIN 1904-AE34

Enforcement for Consumer Products and Commercial and Industrial Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (“DOE” or the “Department”) proposes to revise its existing enforcement regulations for certain consumer products and commercial and industrial equipment covered under the Energy Policy and Conservation Act of 1975, as amended (EPCA or the “Act”). The proposal, if adopted, would provide the regulated industry with further clarity and transparency about DOE’s enforcement process, including enforcement sampling procedures and test notice requirements. The proposal provides for a process to petition DOE for reexamination of a pending determination of noncompliance, and for DOE to have the discretion to consider third-party certification program testing as official enforcement test data. Ultimately, the proposal will further align DOE’s regulations with its statutory authority, foster communication between DOE and the regulated industry, and promote the effective and systematic enforcement of DOE’s regulations.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) no later than [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***]. See section V, “Public Participation,” for details.

ADDRESSES: You may submit comments using any of the below methods.

- 1) *Federal eRulemaking Portal*: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- 2) *E-mail*: Enforcement2019CE0015@ee.doe.gov. Include the docket number and/or RIN in the subject line of the message.
- 3) *Postal Mail*: Office of the Assistant General Counsel for Enforcement, U.S. Department of Energy, Mailstop GC-32, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 287-5997. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- 4) *Hand Delivery/Courier*: Office of the Assistant General Counsel for Enforcement, U.S. Department of Energy, Mailstop GC-32, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 287-5997. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: In any comment, include the words “Enforcement NOPR” and provide docket number EERE-2019-BT-CE-0015 and/or regulatory information number (RIN) number

RIN 1904-AE34. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket, which includes Federal Register notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at <https://www.regulations.gov/docket?D=EERE-2019-BT-CE-0015>. The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Smitha Vemuri, U.S. Department of Energy, Office of the General Counsel, GC-32, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 586-3421. E-mail: smitha.vemuri@hq.doe.gov.

For further information on how to submit a comment, review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287-1445 or by email: ApplianceStandardsQuestions@ee.doe.gov.

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I. Authority and Background

Title III of the Energy Policy and Conservation Act of 1975, as amended (“EPCA” or, in context, “the Act”)¹ sets forth a variety of provisions designed to improve energy efficiency.

¹ All references to EPCA refer to the statute as amended through the Energy Efficiency Improvement Act of 2015, Public Law 114-11 (April 30, 2015), the Power and Security Systems (PASS) Act, Public Law 115-78 (November 2, 2017), and the Ceiling Fan Energy Conservation Harmonization Act, Public Law 115-161 (April 3, 2018).

Part A of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The National Energy Conservation Policy Act (NECPA), Public Law 95–619, amended EPCA to add Part A–1 of Title III, which established an energy conservation program for certain industrial equipment. (42 U.S.C. 6311–6317) Under the Act, the regulatory program consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, which include performance and design standards, and (4) certification and enforcement procedures. Provisions of the Act include definitions (42 U.S.C. 6291, 6311), energy efficiency standards (42 U.S.C. 6295, 6313), test procedures (42 U.S.C. 6293, 6314), labeling provisions (42 U.S.C. 6294, 6315), and the authority to require information and reports from manufacturers, as well as enforcement authority (42 U.S.C. 6296, 6316).

The Federal Trade Commission (FTC) is primarily responsible for labeling consumer products, and DOE implements the remainder of the program. The testing requirements consist of test procedures prescribed under the authority of EPCA, which are used to aid in the development of standards for covered products or covered equipment, to make representations about equipment efficiency, and to determine whether covered products or covered equipment comply with standards promulgated under EPCA.

Sections 6298–6305, and 6316 of EPCA authorize DOE to enforce compliance with the energy conservation standards established for covered products and covered equipment. To ensure that all covered products and covered equipment distributed in the United States comply with DOE’s conservation standards and certification requirements, DOE promulgated enforcement regulations in 10 CFR part 429. On September 16, 2010, the Department published in the *Federal Register* a notice of proposed rulemaking regarding Certification, Compliance, and Enforcement for Consumer Products and Commercial and Industrial Equipment (September

2010 NOPR). 75 FR 56796. The September 2010 NOPR proposed to revise, consolidate and streamline the Department's existing certification, compliance, and enforcement regulations for certain consumer products and commercial and industrial equipment covered under EPCA. On March 7, 2011, DOE published in the *Federal Register* a final rule on the matter that revised the Department's regulations to, amongst other things, allow the Department to enforce applicable conservation standards in a proactive and fair manner based on the circumstances of each case (March 2011 Final Rule). 76 FR 12422. Some issues addressed by the rule included DOE-witnessed testing; the selection of units for enforcement testing from retail, distribution, or manufacturer sources, depending on the circumstances, to ensure enforcement test results that are as unbiased, accurate, and representative as possible; and alternative approaches to enforcement testing in certain circumstances, such as when the requested model is low-volume. DOE subsequently published two correction notices in May 2011 and August 2011. 76 FR 24762; 76 FR 46202.

Separate from other covered products and equipment, the enforcement provisions for electric motors are currently located at 10 CFR part 431, subpart U. On June 24, 2016, DOE published a notice of proposed rulemaking proposing a variety of changes to the current compliance, certification, and enforcement regulations for electric motors and small electric motors. (June 2016 NOPR) 81 FR 41378. No final rule was promulgated in that rulemaking, and this proposal does not address each of the previously proposed changes. Instead, in this rulemaking, DOE is only proposing to apply the enforcement procedures found at subpart C of part 429 to electric motors and small electric motors.

II. Summary of the Proposal

DOE remains committed to establishing a systematic and fair approach to enforcement that will allow the Department to enforce standards and certification requirements effectively and ensure a level playing field in the marketplace without unduly burdening regulated entities. In this document, based on experience and a greater understanding of the challenges faced in the enforcement process by both DOE and the regulated industry, DOE proposes to again revise its enforcement regulations to ensure they convey a clear and comprehensive enforcement process. The document proposes revisions to existing enforcement procedures applicable to both covered products and covered equipment. Revising the current enforcement procedures will afford further certainty and clarity to the regulated industry, facilitate communication between DOE and the regulated industry, and advance the effective enforcement of DOE's regulations. In addition to minor edits throughout the regulation for clarity and readability, DOE's proposal is summarized below.

To provide additional process in instances where DOE is planning to make a finding of noncompliance, DOE proposes to provide manufacturers and private labelers with a letter of intent stating DOE's intent to issue a notice of noncompliance determination for a basic model. DOE also proposes a petition process to ask DOE (within 30 days after issuance of a letter of intent) to reexamine the pending determination.

To reduce manufacturer burden, DOE proposes to no longer require within its regulations that manufacturers inform customers of DOE's determination of noncompliance. Further, to ensure clarity and consistency regarding how to attain a notice of allowance to distribute a redesigned or modified basic model after a finding of noncompliance, DOE also proposes to provide the full notice of allowance process explicitly within its regulations.

DOE is also proposing regulations to make clear the extent of the Department's enforcement authority under EPCA and the Department's process for exercising that authority. DOE desires to make more transparent the process by which it may exercise its statutory authority to: (1) make a determination of noncompliance for a basic model subject to a design requirement; (2) request from any party information concerning the certification of or compliance of a basic model with an applicable conservation standard; (3) make a finding of noncompliance based on information received through the course of an investigation, which may include information other than DOE's own test data; (4) pursue or settle enforcement actions, with adherence to statutory timeframes set forth in EPCA; (5) request and attain test units via the issuance of a test notice; and (6) seek injunctive relief.

In response to feedback from various industry associations, DOE proposes within its regulations to have the discretion to consider third-party certification program testing as official enforcement test data.

DOE proposes to restructure and clarify its regulations pertaining to DOE's sampling provisions. To provide manufacturers with a better understanding of how DOE's sampling plans apply, the proposal also explicitly provides that in addition to DOE enforcement testing, there are other bases upon which DOE may make a finding of noncompliance (e.g., in whole or part on DOE's own enforcement testing, testing from another Federal agency, or a manufacturer's own test report.)

DOE also proposes updates to current enforcement regulations to account for prohibited actions prescribed by Congress that are not reflected within DOE's enforcement regulations.

DOE proposes that it may make a finding of noncompliance based on a single test where the results of the assessment test are so far from an applicable standard (i.e., at least 25% worse) that a finding of compliance is extremely unlikely.

DOE also notes in this proposal that the Department expects to address administrative law judge hearing procedures in a subsequent rulemaking.

DOE proposes to move the enforcement provisions for electric motors from 10 CFR part 431, subpart U, to 10 CFR 429.110 with corresponding revisions, and to move the enforcement sampling provisions unchanged to a new appendix E to subpart C of part 429. DOE also proposes to explicitly adopt for small electric motors the proposed enforcement provisions in subpart C to part 429.

III. Discussion of Revisions

In this section, DOE provides a detailed analysis of its proposed rule.

A. Enforcement for Electric Motors and Small Electric Motors

As a part of this comprehensive proposed rule regarding DOE's enforcement procedures, DOE proposes that the enforcement provisions in subpart C to part 429 that apply to all other types of covered products and equipment apply to electric motors and small electric motors. DOE proposes to transition the enforcement provisions currently in place for electric motors from 10 CFR part 431, subpart U to 10 CFR part 429, subpart C, and to move the enforcement sampling provisions to a new appendix E in subpart C of part 429. DOE proposes to reserve subpart U.

The enforcement provisions for electric motors are currently located at 10 CFR part 431, subpart U. As for other types of covered products and equipment, these regulations prescribe an enforcement process through which DOE determines whether an electric motor manufacturer is in violation of the energy conservation requirements of EPCA. The current regulations, amongst other things, identify various prohibited acts that may subject a manufacturer to civil penalties. Subpart U also details remedies for addressing cases of noncompliance and a process for the assessment and recovery of civil penalties.

Harmonizing the enforcement process for motors with the process for all other types of covered products and equipment would ensure that electric motors and small electric motors manufacturers are afforded the same processes (e.g., the petition for reexamination process discussed in Section III.I.) as manufacturers of all other covered products and equipment. The enforcement process provided in 10 CFR part 429 is significantly more developed than the current procedures for electric motors, so transitioning motors to the Part 429 process will provide greater clarity to manufacturers. The proposal provides that enforcement testing for motors would only be conducted by a laboratory that is accredited to the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC), “General requirements for the competence of testing and calibration laboratories,” ISO/IEC 17025:2005(E). Further, the proposal would remove the regulatory provision allowing electric motors manufacturers to request additional DOE testing after DOE makes a noncompliance determination, and permit DOE to use its discretion to conduct additional testing due to a defective unit in the initial sample.

There are also several proposed prohibited acts regarding electric motors and small electric motors that reflect the unique statutory provisions for each type of equipment, and that are proposed to be relocated to 10 CFR part 429. Those prohibited acts are discussed in more detail in Section III.B. of this proposed rulemaking.

B. Prohibited Acts

DOE proposes to remove the prohibited act currently at 10 CFR 429.102(a)(7) (i.e., distribution in commerce by a manufacturer or private labeler of a basic model of a covered product or covered equipment after a notice of noncompliance determination (NND) has been issued to the manufacturer or private labeler). DOE understands that this regulatory language suggests that it is a separate violation to distribute a noncompliant product after DOE issues a notice of noncompliance determination. However, pursuant to EPCA, it is a prohibited act to distribute in commerce in the U.S. any covered product or equipment not in compliance with an applicable energy conservation standard, regardless of whether DOE has issued an NND or not. 42 U.S.C. 6302(a)(5) Thus, the prohibited act intended to be covered by 10 CFR 429.102(a)(7) is currently covered under 10 CFR 429.102(a)(6).

DOE proposes to add prohibited acts to 10 CFR 429.102(a) for distribution of rough service lamps and vibration service lamps that do not meet the applicable standard(s) and to codify at 10 CFR 429.102(a) the prohibited acts related to grid-enabled water heaters. DOE also proposes to amend 10 CFR 429.102(a)(9) to clarify that DOE interprets the provision as prohibiting the distribution of an adapter designed to allow the use of a non-medium screw base lamp in a medium screw base socket. Because the term “incandescent lamp,” which is used in the current text, is defined to include only lamps with a medium screw base, the provision would lead to the

absurd result of prohibiting distribution of an adapter for only medium screw base lamps that do not have a medium screw base, which renders the provision a nullity.

DOE proposes to move certain prohibited acts to 10 CFR 429.102, and adjust two of these acts to reflect that the prohibitions apply (by statute) to all covered equipment for which DOE has promulgated a labeling rule. Specifically, DOE proposes to move and adjust the prohibited acts from 10 CFR 431.382(a)(1), (2), and (4) to 10 CFR 429.102 as follows: 1) Manufacturers and private labelers are prohibited from distributing in commerce any covered equipment that is not labeled in accordance with part 431; 2) Manufacturers, distributors, retailers, and private labelers are prohibited from removing or rendering illegible from any covered equipment any label required to be provided under part 431; and 3) Manufacturers, distributors, retailers, and private labelers are prohibited from advertising electric motors in a catalog from which the equipment may be purchased, without including in the catalog all information as required by 10 CFR 431.31(b), provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor. DOE requests comment on whether the last clause of the third prohibited act (i.e., “provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor”) provides any value given that the labeling provision for electric motors has been in effect for motors manufactured since October 5, 2000.

The inclusion of electric motors in 10 CFR 429.102 would also clarify that certain additional prohibited acts not currently specified in 10 CFR 431.382 also apply to electric motor

manufacturers.² As discussed in the March 7, 2011 CCE final rule (see 76 FR 12422, 12440), these prohibited acts are within the scope of the prohibited acts specified in EPCA at 42 U.S.C. 6302 (See 42 U.S.C. 6316(a)).

EPCA provides in 42 U.S.C. 6317(f)(1)(A) prohibited acts that apply to small electric motors (and distribution transformers and HID lamps) identical in effect to those found at section 6302(a)(1) and (2); however, DOE has not adopted labeling provisions for small electric motors and is not proposing in this rule to do so. Accordingly, the prohibited acts related to labeling would not apply to small electric motors or any other type of covered equipment for which DOE has not established labeling provisions.

C. Design Standards

DOE proposes edits to 10 CFR 429.106 in order to clarify that design requirements are energy conservation standards that are subject to DOE investigation and enforcement. EPCA explicitly provides that energy conservation standards include design requirements for certain enumerated products, and that DOE may enforce such standards. (42 U.S.C 6291, 6311, 6303, and 6316). Nevertheless, DOE believes that the proposed edits to DOE's regulations are necessary, as it has received some questions from manufacturers as to whether manufacturers and private labelers of products are subject to design standards are also subject to the

² These entail prohibitions against the following actions: failure to test any covered product or covered equipment subject to an applicable energy conservation standard in conformance with the applicable test requirements prescribed in 10 CFR part 430 or 431; deliberate use of controls or features in a covered product or covered equipment to circumvent the requirements of a test procedure to produce test results that are unrepresentative of a product's energy or water consumption if measured pursuant to DOE's required test procedure; and knowing misrepresentation by a manufacturer or private labeler by certifying an energy use or efficiency rating of any covered product or covered equipment distributed in commerce in a manner that is not supported by test data.

enforcement process set forth in 10 CFR part 429, Subpart C. To provide the regulated industry with an explicit understanding of how DOE may make its determination of noncompliance for models subject to a design standard, DOE's proposal explicitly states that a test unit of a basic model subject to a design requirement may be selected for enforcement testing or examination. In such an instance, DOE will make a determination of noncompliance for the basic model based on an examination of whether a single unit of the basic model fails to comply with the applicable design requirements, as the standard applies to a design – not the measured performance of individual units – such that one unit can demonstrate noncompliance.

D. DOE Investigation and Basis of Noncompliance

Pursuant to EPCA, DOE has authority to initiate enforcement actions to ensure compliance with, amongst other things, its certification requirements and energy conservation standards. Current DOE regulations already provide that DOE may request any information relevant to determining compliance. DOE proposes to revise its procedures to provide that the Department retains the discretion to request data, underlying the certification of a basic model or belief as to whether a basic model is compliant with an applicable standard, from any party. DOE has historically requested this information from manufacturers of covered products and equipment. DOE proposes to revise its regulations to include explicitly that DOE may request the information from a party other than the manufacturer of the covered equipment, such as a third-party certification program or other manufacturer with independent test data. This proposal ensures that DOE can enforce its regulations in instances where relevant information is retained by parties other than the manufacturer. Parties other than the manufacturer often conduct independent testing to determine compliance with applicable standards. In such instances, DOE's ability to retrieve that test information could save government testing resources, and

ensure that DOE can enforce in a timely manner, which will further DOE's goals of maintaining a level playing field for all parties and encouraging compliance.

Should DOE obtain information from any party demonstrating that a basic model does not comply with a certification requirement or energy conservation standard, DOE may make a finding of noncompliance and impose civil penalties pursuant to its authority under EPCA. (42 U.S.C. 6303) To provide transparency within the regulation and further align its regulations with its statutory authority, DOE also proposes regulatory text at 10 CFR 429.112, explicitly setting forth that DOE's determination of noncompliance may be based on test data from a variety of sources: the manufacturer or private labeler, another Federal agency, or a third-party certification program; testing pursuant to §§429.104 and 429.110; and/or an admission. Stating the various bases upon which DOE may make a determination of noncompliance provides clarity for all parties.

E. Third-Party Certification Program Testing

DOE proposes that test data (for units tested in accordance with the applicable DOE test procedure) from a third-party certification program may be considered official enforcement test data upon which DOE may make a finding of noncompliance. Various industry associations have asked DOE to consider their test results as a part of DOE's enforcement process. DOE understands that reliance on a third-party certification program test in lieu of, or in addition to, testing conducted by DOE pursuant to a test notice may save resources for all parties and may lead to a more expedient enforcement process in some circumstances. Thus, this proposal provides DOE the opportunity to contemplate and potentially rely on test data obtained under a third-party certification test program as an official enforcement test.

F. Test Notice

DOE's proposal is intended to provide more specificity and transparency regarding DOE's current test notice process, and to make consistent with all other enforcement actions the test notice process for electric motors and small electric motors.

1. Test Notice Information

DOE seeks to provide manufacturers with more specific information about the units requested in a test notice. Unfortunately, in various enforcement actions, DOE has often received units that are not responsive to a test notice (e.g., units with varied designs or features as compared to the assessment test unit, units with similar nameplates but that are in fact different (in design, components, materials, etc.) from the assessment test unit). DOE's request in a test notice does not constitute a flexible request for units that a manufacturer may fulfill at its own discretion. In instances where DOE has already conducted an assessment test, the requested units are meant to be equivalent to the assessment test unit. Thus, in addition to identifying in the test notice the basic model selected for enforcement testing, DOE proposes that it may also include other characteristics or specifications of the requested units (e.g., individual model numbers, serial numbers, manufacturer date ranges, manufacture location). DOE anticipates that additional identifying information within the test notice will alleviate any confusion about exactly what units DOE is requesting. This additional communication will result in clarity and saved resources for all parties.

Current regulations state that DOE will identify in the test notice the exact date DOE is scheduled to begin testing the requested units. The proposed edits provide instead that DOE will identify in the test notice the approximate date of testing. The proposal accounts for the fact that the test laboratory's schedule can fluctuate such that it is not realistic to assure that testing will

begin on one specific day. DOE is, however, able to schedule an approximate date for testing that is usually within a one- to two-week range. Therefore, an approximate date in the test notice is more realistic and reliable.

2. Availability of Units

Current regulations state that DOE will work with the manufacturer to create an enforcement plan for testing when the requested units are low volume or built to order. In current practice, DOE in fact works with manufacturers to create an enforcement plan in other instances as well, such as when the manufacturer does not have the exact requested units and is unable to produce them, but can produce similar units. DOE proposes various edits to address scenarios where fewer than the requested number of units in the test notice are available for shipment.

In instances where manufacturers believe that test units are unavailable, DOE has found that the manufacturers often send alternate units (i.e., units that are different than those requested in the test notice) without communicating the circumstances of the potential unavailability to DOE. In some cases, DOE has learned that the manufacturer provided alternate units only upon the DOE laboratory inspection or test of the units. To foster communication and avoid wasted resources for both parties, the proposed edits address both DOE and the manufacturer's next steps when the manufacturer believes that the requested units are unavailable for shipment. Specifically, the manufacturer must inform DOE if it believes that the requested units in the test notice are unavailable and must provide details regarding the unavailability. The manufacturer must also inform DOE if it does not have the requested units but has similar ones, along with details about the similar units.

If DOE determines that the requested units are in fact unavailable, DOE will contact the manufacturer to develop a plan for enforcement testing. In such instances, DOE may test the available units, which may include testing of similar units identified by the manufacturer and/or may test units that become available within 30 days. Although these options are not novel to the test notice process, DOE proposes to restructure the options within the regulations to ensure applicability to all scenarios of test unit unavailability (as opposed to only when the units are low volume or built to order).

3. Selection of Units

The proposed edits provide that a test notice will specify whether DOE or the manufacturer will select units for testing. When DOE finalized existing regulations in 2011, DOE was in the practice of selecting all test units. However, over time the process has changed such that manufacturers often select units. Thus, the proposed edits capture both scenarios.

In addition, the proposed text further explains and clarifies the process of randomly selecting units in response to a test notice. Although the random selection of units has been discussed by DOE previously in the September 2010 NOPR and March 2011 Final Rule (75 FR 56804; 76 FR 12430), DOE finds that manufacturers continue to be uncertain about how to make selections, particularly in regards to how a batch sample is selected when the units are sourced from the manufacturer's warehouse, distributor, or other facility affiliated with the manufacturer. In order to provide clarification, in this proposal, DOE explains that the batch sample must be selected at random from all units of the specified model that are in inventory on the date of the test notice, including all units that have not yet been shipped. From that batch sample, the initial test sample should be randomly selected. DOE expects that the clarifying edits to the regulatory text will alleviate confusion about how to make the required random selection of units.

DOE also proposes to explicitly provide within its regulations the current practice regarding documentation required after issuance of a test notice. Specifically, the proposed text provides that DOE may ask for documentation demonstrating the location from which each unit is selected, and that the unit was in inventory at such location on the date the test notice was issued. DOE typically asks manufacturers to provide this information as it provides assurance that the units are from inventory as required and ensures that DOE understands the source of the test units.

4. Preparation of Units

Current regulatory text provides that a test unit provided in response to a test notice shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure. DOE has received inquiries as to whether these restrictions on preparation, modification, and adjustment also apply to DOE, or if DOE is permitted to alter test units. Thus, DOE proposes edits to current regulations in order to clarify that upon receipt of a test unit, DOE will only prepare, modify, or adjust a unit if allowable under the DOE test procedure or authorized by the manufacturer. Further, DOE will also notify the manufacturer if a test unit is received by the test lab in a condition that may impact performance. In such an instance, DOE may decide to test another unit depending on the condition of the particular unit. DOE may also determine that it can rectify the condition easily to continue with the test, for example, by replacing a commonly available part. However, in such an instance, DOE would still discuss the matter with the manufacturer prior to any modification.

G. Basic Model Compliance

1. General Applicability of Enforcement Sampling Procedures

DOE proposes restructuring and clarifying edits to regulations pertaining to DOE's enforcement sampling procedures. A significant portion of the information contained within DOE's proposal is currently contained at 10 CFR 429.110(e), and is restructured in DOE's proposed 10 CFR 429.111, but the current applicable sample sizes and references to the applicable appendices remain unchanged. DOE also proposes some new provisions to 10 CFR 429.111, which are discussed in further detail below. DOE also proposes to move the current enforcement sampling plan for electric motors, which is at appendix A to subpart U of part 431, to a new appendix E to subpart C of part 429 without change.

To provide the regulated industry with a better understanding of how DOE's sampling plans apply, as noted previously, DOE's proposal explicitly provides that in addition to DOE enforcement testing, there are other bases upon which DOE may make a finding of noncompliance (e.g., in whole or part on DOE's own enforcement testing, testing from another Federal agency, or a manufacturer's own test report.)

2. Sample Size

a. Reduced Sample Size

Current regulations at 10 CFR 429.110 indicate that, in an instance where units are unavailable for testing, DOE may make a determination of noncompliance based on a sample size of less than the otherwise required number of units. DOE's current regulations at 10 CFR 429.110(e)(7) also state that a reduced sample size may be used when testing is impractical or where a basic model has unusual testing requirements. To provide a more fulsome understanding of when DOE may rely on a reduced sample size, DOE also proposes 10 CFR 429.111(a)(7), which provides 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, or based on the manufacturer's test data.

b. Sample Comprised of a Single Unit

DOE also proposes to explicitly state that for all products, if the sample size is comprised of a single unit, DOE will determine noncompliance for the basic model based solely on the results of the single test. In such an instance, the sampling plans in the appendices do not apply. Although DOE believes that it is inherently understood that sampling statistics would not be applicable to a single unit, explicit inclusion within regulations provides transparency in the compliance determination process.

c. Noncompliance Determined by Single Assessment Test

DOE proposes that if the results of an assessment test show that the basic model performed at least 25% worse than the applicable energy conservation standard, DOE may make a determination of noncompliance for the basic model based solely on the results of such test. In such an instance, the sampling plans would not apply, as the determination is based on a single unit. This new process would avoid unnecessary expenditure of resources by both the manufacturer and DOE and would permit DOE to make a finding of noncompliance based on a single test where the results of the assessment test were so far below an efficiency standard or above a conservation standard that compliance is extremely unlikely.

3. Addition of walk-in cooler and freezer doors & panels

DOE's proposal adds walk-in cooler and freezer doors and panels to the list of equipment subject to the low-volume enforcement sampling procedures (i.e., the Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products in

Appendix B to Subpart C of Part 429). This equipment is not currently included within DOE's list because at the time the current regulations were drafted, only design standards applied to such equipment (versus the now also applicable performance standards), and thus, sampling provisions were not necessary at that time.

4. Design Standards

In line with the above discussion regarding models that are subject to design standards, in this proposal DOE explicitly states that the sampling plans in the appendices do not apply in instances where DOE is evaluating whether a basic model complies with an applicable design requirement, as the determination is based on a single unit.

H. Notification of Obligations

Current regulations at 10 CFR 429.114 address notification to the manufacturer of certain obligations and requirements of the manufacturer upon issuance of a notice of noncompliance determination. To this section, DOE proposes various clarifying edits for readability and proposes to remove the requirement that manufacturers must inform their customers of DOE's noncompliance determination.

I. Petitions for Reexamination

DOE proposes to add new §429.115 to 10 CFR part 429. This addition to the enforcement regulations provides the manufacturer or private labeler with a formal process to ask DOE to reexamine a pending determination of noncompliance. Historically, DOE has always accepted any information from parties both before and after the issuance of a test notice or notice of noncompliance determination. However, in order to provide manufacturers and private labelers with a specific process to request DOE to consider certain information and arguments prior to

DOE's issuance of a notice of noncompliance determination, DOE proposes to adopt regulations detailing a specific procedure and substance for such a request.

The proposal states that, at least 30 calendar days prior to the issuance of a notice of noncompliance determination, DOE will issue to the manufacturer or private labeler a letter of intent stating DOE's intent to issue a notice of noncompliance determination for the basic model. Within 30 days of DOE's issuance of a letter of intent, DOE will accept a petition for reexamination of the pending determination, which must include a variety of information: the material issue(s) that the manufacturer or private labeler has with the assessment and/or enforcement testing of the basic model; complete test reports or alternative efficiency determination methods (AEDM) information (if applicable) the manufacturer or private labeler believes demonstrate the basic model meets the applicable standard; all legal and other arguments that the manufacturer or private labeler wishes to make in support of its position; and information/test data regarding any previous representations of the basic model's energy consumption. The process as proposed provides the petitioner and DOE with a clear understanding of the information DOE requires to inform its reexamination of the pending determination, while still allowing the petitioner to submit any other information it deems pertinent.

The proposed process also serves to ensure that the petitioner, in support of its request, provides DOE with test data that is in fact relevant to the finding of noncompliance. As such, all test reports must demonstrate that the applicable DOE test procedure was followed. In addition, petitioners must inform DOE if the units it tested are different (in design, components, materials, etc.) from the units that are the basis of the pending finding of noncompliance, or if the units were modified prior to or during the test. In addition, for any testing completed after the

issuance of the letter of intent, the manufacturer must provide DOE with documentation, such as the source of the units, how they were selected, and if relevant, whether and how many units were available in inventory or from a retailer on the date of testing.

Upon review of a petition, DOE may modify or leave unchanged its pending determination. In any case, the process ensures that DOE considered the petitioner's submission of relevant materials. DOE also notes that although the petition must be submitted within 30 days of issuance of the letter of intent, the petitioner may always compile and share information at any earlier date, such as upon DOE's issuance of a test notice.

DOE also notes that the proposed petition for reexamination process addresses DOE's obligations under Section 6 of Executive Order 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," which requires that DOE, before issuing a notice of noncompliance determination, must afford the manufacturer or private labeler an opportunity to be heard regarding the pending determination.

J. Notice of Allowance

The Department proposes to provide within its regulations the complete process for attaining a notice of allowance after DOE has made a finding of noncompliance for a basic model. DOE has received feedback from various respondents indicating that the process, as currently explained within 10 CFR part 429 and the body of the notice of noncompliance determination, is not intuitive and deserves clarification. After review of current regulations at §429.114(d), DOE also believes that further clarity and explanation of the process within its regulations would be helpful to all parties. The proposal clarifies and captures various aspects of the notice of allowance process, including that a manufacturer or private labeler must, prior to distribution in commerce of a modified model, receive a notice of allowance from DOE for that modified

model. The proposal also explicitly states that the manufacturer or private labeler must, prior to receipt of a notice of allowance, provide DOE with a detailed explanation of all modifications and test data demonstrating that the modified basic model meets the applicable standard(s). If the manufacturer chooses to modify the noncompliant basic model, DOE also proposes that, as a part of its records, the manufacturer or private labeler maintain records of serial numbers of and the modifications made to any units of the noncompliant basic model in existing stock.

DOE regulations currently permit in-house or independent testing for determining compliance with DOE's performance based conservation standards. Currently, §429.116 provides that DOE may require testing by an independent third-party if DOE determines it is necessary to ensure compliance. Third-party testing may be essential to ensuring compliance in some circumstances, such as with manufacturers who are routinely found to violate standards, or in instances where DOE believes that the manufacturer's in-house testing is inaccurate or unreliable. Although DOE may rely on 10 CFR 429.116, for the sake of transparency and clarity of process, DOE proposes that the regulations pertaining to the notice of allowance process also explicitly incorporate this requirement – that the manufacturer or private labeler's testing in support of the request for a notice of allowance be performed at an independent, third-party testing facility.

K. Injunctions

DOE proposes minor edits to clarify that, in instances where a person fails to cease engaging in a prohibited act, DOE may either immediately seek an injunction or allow the person an opportunity to first implement a corrective action plan.

L. Response to a Notice of Proposed Civil Penalty in Writing

DOE proposes that a respondent's election of procedures in response to a notice of proposed civil penalty be made to the Department in writing. This is an established practice, and DOE believes that explicitly requiring the response to be in writing ensures that the respondent's election is made without miscommunication or misinterpretation.

M. Settlement

The respondent's election to settle a case, while available in every enforcement case, is not explicitly stated within current regulations. Thus, the proposed text explicitly provides a respondent in an enforcement action with the option of settlement. Further, DOE's proposal explains in greater detail the settlement process, including that the compromise agreement will set forth the terms of the agreement, and that DOE's General Counsel will sign an order adopting the agreement and assessing the civil penalty. The proposal as a whole completes the comprehensive list of the respondent's election of procedures, and provides clarity of the settlement process.

N. Administrative Law Judge Hearing and Appeal

DOE's proposal includes some minor edits to 10 CFR 429.126 for clarity and readability. In addition, the proposal includes a reference to a new subpart D, for which DOE plans to propose administrative law judge hearing procedures in the future.

O. Immediate issuance of order assessing civil penalty

DOE proposes edits to ensure that DOE's regulations clearly convey the statutory requirement that an election to have the procedures of 10 CFR 429.128 apply (i.e., in lieu of an administrative law judge hearing, the respondent elects to have DOE immediately issue an order assessing the civil penalty) must be made by the respondent within 30 days of the notice of

proposed civil penalty. The 30-day window within which this option is available is a timeframe mandated by EPCA and is currently captured within DOE regulations at 10 CFR 429.122.

Nevertheless, DOE has found that there is confusion over the timeframe to elect this option and believes that further clarification and additional references to the 30-day window will help create a better understanding of the statutory requirement.

Further, current regulations provide that, in instances where the respondent takes the maximum 30 days allowable to make a selection for the immediate issuance of an adopting order, the General Counsel must issue such order on that very same day. In order to create a more reasonable and realistic timeline, DOE also proposes edits to current regulations such that the General Counsel will not sign an adopting order sooner than 60 days after the issuance of the notice of proposed civil penalty.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This regulatory action is not a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, “Reducing Regulation and Controlling Regulatory Costs.” E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public

and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, “Enforcing the Regulatory Reform Agenda.” E.O. 13777 required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this rulemaking is consistent with the directives set forth in these executive orders.

As discussed in this NOPR, DOE is proposing to revise its enforcement regulations to ensure they convey a clear and comprehensive enforcement process and to revise existing enforcement procedures applicable to both covered products and covered equipment. The following section provides an overview of the costs and burdens discussed previously in this document.

Table IV.1 Summary of Cost Impacts for Enforcement for Consumer Products and Commercial and Industrial Equipment

Category	Present Value (thousands 2016\$)	Discount Rate (percent)
Cost Savings		
Reduction in Notification Costs	109	3
	42	7
Total Net Cost Impact		
Total Net Cost Impact	(109)	3
	(42)	7

Table IV.2 Summary of Annualized Cost Impacts for Enforcement for Consumer Products and Commercial and Industrial Equipment

Category	Annualized Value (thousands 2016\$)	Discount Rate (percent)
Annualized Cost Savings		
Reduction in Notification Costs	3.3	3
	2.9	7
Total Net Annualized Cost Impact		
Total Net Cost Impact	(3.3)	3
	(2.9)	7

As discussed in section III.H, DOE proposes to remove the requirement that manufacturers must inform their customers of DOE's noncompliance determination. DOE estimates that this will reduce manufacturer burden when manufacturers are issued a noncompliance determination by DOE, resulting in costs savings for manufactures. Based on a review of previous noncompliance determinations spanning the previous five years, DOE estimates there are on average 14.8 noncompliance determinations each year.

To estimate the cost savings manufacturers would experience due to the proposal to remove the requirement to notify consumers of noncompliance determinations, DOE first estimated the cost savings of drafting a notification letter and then of identifying all customers that purchased noncompliant units.

DOE assumes manufacturers currently incur costs to write a noncompliance letter to their customers. DOE estimates that an average noncompliance determination would result in a general and operations manager spending one hour writing a letter and an executive spending 30 minutes reviewing the letter that would be sent to all customers that purchased noncompliant units. DOE estimated that the average hourly rate to employ a general and operations manager is \$77.67 and the average hourly rate to employ an executive is \$125.48.³ Therefore, the average cost to draft a noncompliance notification letter to all customers is approximately \$140 per basic model that is found to be noncompliant. This proposal is estimated to result in approximately

³ The Bureau of Labor Statistics mean hourly wage rate "General and Operations Manager" is \$59.56 (May 2018: <https://www.bls.gov/oes/current/oes111021.htm>) and the mean hourly wage for "Chief Executives" is \$96.22 (May 2018: <https://www.bls.gov/oes/current/oes111011.htm>).

Additionally, according to the Annual Survey of Manufacturers for NAICS code 31-33, all manufacturing, wages represent approximately 77 percent of the total cost of employment. (AMS 2016, NAICS code 31-33; <https://www.census.gov/programs-surveys/asm.html>)

\$2,078 of costs savings annually for all manufacturers to forgo drafting on average 14.8 notifications of noncompliance each year.

DOE assumes manufacturers currently incur costs to identify customers that have purchased noncompliant units. DOE assumes there are two types of basic models that are found to be noncompliant, low-volume basic models with less than 100 units sold and, high-volume basic models with 100 or more units sold. DOE assumes low-volume basic models are typically sold individually, with each customer only purchasing one unit on average, while high-volume basic models are typically sold in a group of 50 units per customer, with each customer purchasing 50 units as a single purchase on average. DOE assumes that it takes manufacturers approximately 5 minutes to identify a single customer's contact information. This equally applies to customers of low-volume and high-volume basic models. Therefore, it takes manufacturers an equal amount of time to identify the low-volume customer that purchased one unit and the high-volume customer that purchased 50 units.

Based on previous noncompliance findings, DOE estimates that typically 31 units are sold for a low-volume basic model and 600 units are sold for a high-volume basic model. Therefore, a low-volume basic model manufacturer would have to identify 31 customers on average and a high-volume basic model manufacturer would have to identify 12 customers on average (600 divided by 50).

Again, DOE assumes that a general and operations manager would be responsible for identifying customers and the average hourly rate for this employee is \$77.67.⁴ Therefore, on average it costs approximately \$201 to identify all customers of low-volume basic models and \$78 to identify all customers of high-volume basic models.⁵ Based on the weighted average of low-volume and high-volume basic models found noncompliant,⁶ this proposal is estimated to result in cost savings of approximately \$1,640 annually for all manufacturers to forgo identifying customers of noncompliant basic models.

Overall, this proposal is estimated to result in cost savings of approximately \$3,718 annually for all manufacturers to forgo drafting on average 14.8 notifications of noncompliance each year, identifying customers of noncompliant models, and sending noncompliance letters to customers.

DOE anticipates that the remainder of the amendments proposed in this document would not impact manufacturers' burden during the enforcement process. Most of the proposed amendments will provide additional certainty and clarity to the regulated industry, facilitate

⁴ The Bureau of Labor Statistics mean hourly wage rate "General and Operations Manager" is \$59.56 (May 2018: <https://www.bls.gov/oes/current/oes111021.htm>).

Additionally, according to the Annual Survey of Manufacturers for NAICS code 31-33, all manufacturing, wages represent approximately 77 percent of the total cost of employment.

(AMS 2016, NAICS code 31-33; <https://www.census.gov/programs-surveys/asm.html>)

⁵ There are on average 31 customers of low-volume models and on average 122 customers of high-volume models. The hour employment cost is \$77.67, and each customer take approximately 10 minutes to identify ($\$77.67 * 1/6 \text{ hr} * 31 = \401 ; $\$77.67 * 1/6 \text{ hr} * 122 = \$1,579$).

⁶ Based on previous noncompliance findings over the past five years, DOE estimated that approximately 27 percent of noncompliant models had less than 100 units sold, and 73 percent of noncompliant models had 100 or more units sold.

communication between DOE and the regulated industry, and advance the effective enforcement of DOE's regulations.

This proposed rule is estimated to result in cost savings. The proposed rule would yield an annualized cost saving of approximately \$2,926 (2016\$) using a perpetual time horizon discounted to 2016 at a 7 percent discount rate. Therefore, if finalized as proposed, this rule is expected to be an E.O. 13771 deregulatory action.

DOE requests comment on its understanding of the impact and associated costs of these proposed amendments.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: <http://energy.gov/gc/office-general-counsel>.

Under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003, DOE reviewed this proposal. DOE certifies that the proposed

rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis of this certification is set forth in the following paragraphs.

The Small Business Administration (SBA) considers a business entity to be a small business, if, together, with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes established by the North American Industry Classification System (NAICS) and are available at <https://www.sba.gov/document/support--table-size-standards>.

This proposal impacts manufacturers of all covered products and covered equipment subject to DOE's energy conservation, water conservation, and design standards. DOE estimates that the manufacturing of all these covered products and covered equipment includes approximately 20 unique NAICS codes. The SBA threshold number of employees for these 20 NAICS codes ranges from 500 to 1,500 total employees. DOE estimates there are several hundred small businesses that manufacture the products and equipment covered by this proposal.

DOE is attempting to revise the current enforcement procedures on manufacturers of covered products and covered equipment to give certainty and clarity to the regulated industries, to facilitate communication between DOE and the regulated industries, to reduce burden, and to advance the effective enforcement of DOE's regulations. Since this proposal would reduce burden and result in cost savings, as described in section IV.B, on all manufacturers, including small businesses, DOE tentatively concludes that the impacts of this proposal would not have a "significant economic impact on a substantial number of small entities," and that the preparation of an IRFA is not warranted. DOE will transmit the certification and supporting statement of

factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

DOE requests comment on its finding that this proposal would not present a significant economic impact on the several hundred small businesses that manufacture products and equipment covered by this proposal.

D. Review Under the Paperwork Reduction Act of 1995

The Paperwork Reduction Act (PRA) of 1995 requires that U.S. Federal Government agencies obtain Office of Management and Budget (OMB) approval prior to collecting data in any situation where 10 or more respondents, within a 12 month period, are involved and the questions are standardized in nature. This proposed rule does not seek to collect any information or data in such a manner; accordingly, DOE has determined that neither review nor approval by OMB under the PRA is required.

E. Review Under the National Environmental Policy Act

We are analyzing this proposed regulation in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

F. Review Under Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or

regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at

<http://energy.gov/gc/office-general-counsel>. DOE examined this proposed rule according to UMRA and its statement of policy and determined that its requirements do not apply because the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” 53 FR 8859 (March 18, 1988) that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB to maximize the quality, objectivity, utility, and integrity of information. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published

at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has reviewed this proposed rule under the Executive Order 13211, and has concluded that it is not a significant regulatory action under Executive Order 12866; would not have a significant adverse effect on the supply, distribution, or use of energy; and that the Administrator of OIRA has not designated it as a significant energy action. Accordingly, DOE has concluded that it is not necessary to prepare a Statement of Energy Affects.

M. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of

1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

Because this proposed rulemaking does not authorize or require use of any commercial standard, the FEAA requirements do not apply.

N. Description of Materials Incorporated by Reference

In this NOPR, DOE is not proposing to incorporate by reference any new industry standard. The incorporation by reference of ISO/IEC 17025:2005(E) in §429.110 has already been approved by the Director of the Federal Register and there are no proposed changes in this NOPR.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Submitting comments via <https://regulations.gov>. The <https://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <https://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <https://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <https://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large

volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that

<https://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to <https://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a

list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors DOE considers when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Requests for Comment

DOE welcomes written comments from the public on all aspects of its proposal, and any subject related to DOE's enforcement process, including topics not specifically raised in this proposed rule. DOE continues to seek views from all interested parties on how DOE's enforcement rules can best be developed to ensure effective enforcement. DOE requests comment on its finding that this proposal would not present a significant economic impact on the several hundred small businesses that manufacture products and equipment covered by this proposal.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on July 28, 2020, by William S. Cooper III, General Counsel and Daniel R Simmons, Assistant Secretary for Energy Efficiency, pursuant

to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on July 28, 2020.

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

**PART 429--CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR
CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT**

1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291-6317, 28 U.S.C. 2461 note.

2. Revise §429.1 to read as follows:

§429.1 Purpose and scope.

This part sets forth the procedures to be followed for certification, determination and enforcement of compliance of covered products and covered equipment with the applicable conservation standards set forth in parts 430 and 431 of this subchapter.

3. Section 429.2(a) is revised to read as follows:

§429.2 Definitions.

(a) The definitions found in 10 CFR parts 430 and 431 of this chapter apply for purposes of this part.

* * * * *

4. Revise § 429.100 to read as follows:

§429.100 Purpose and scope.

This subpart describes the enforcement authority of DOE to ensure compliance with the conservation standards regulations in 10 CFR parts 429, 430 and 431.

5. Section 429.102 is amended by:

- a. Revising paragraphs (a)(1), and (5) through (10);
- b. Adding paragraphs (a)(11) through (14); and
- c. Revising paragraph (c)(4)(iii).

The revisions and additions read as follows:

§429.102 Prohibited acts subjecting persons to enforcement action.

(a) * * *

(1) Failure of a manufacturer to provide, maintain, permit access to, or copying of records required to be supplied under the Act or this part or failure to make reports or provide other information required to be supplied under the Act or this part, including but not limited to failure to properly certify covered products and covered equipment in accordance with subpart B of this part;

* * * * *

(5) Failure of a manufacturer to permit a DOE representative to observe any testing required by the Act, this part, or 10 CFR part 430 or part 431 of this chapter, or to inspect the results of such testing;

(6) Distribution in commerce by a manufacturer or private labeler of any new covered product or covered equipment that is not in compliance with an applicable energy conservation standard;

(7) Knowing misrepresentation by a manufacturer or private labeler by certifying an energy use or efficiency rating of any covered product or covered equipment distributed in commerce in a manner that is not supported by test data;

(8) For any manufacturer, distributor, retailer, or private labeler to distribute in commerce an adapter that—

(i) Is designed to allow a lamp that does not have a medium screw base to be installed into a fixture or lamp holder with a medium screw base socket; and

(ii) Is capable of being operated at a voltage range at least partially within 110 and 130 volts;

(9) For any manufacturer or private labeler to knowingly sell a product to a distributor, contractor, or dealer with knowledge that the entity routinely violates any regional standard applicable to the product; or

(10) For any person to sell at retail a rough service lamp or vibration service lamp in a package containing more than one lamp; or

(11) For any person —

(i) To activate an activation lock for a grid-enabled water heater with knowledge that such water heater is not used as part of an electric thermal storage or demand response program;

(ii) To distribute an activation key for a grid-enabled water heater with knowledge that such activation key will be used to activate a grid-enabled water heater that is not used as part of an electric thermal storage or demand response program;

(iii) To otherwise enable a grid-enabled water heater to operate at its designed specification and capabilities with knowledge that such water heater is not used as part of an electric thermal storage or demand response program; or

(iv) To knowingly remove or render illegible the required label of a grid-enabled water heater; or

(12) Distribution in commerce by a manufacturer or private labeler of any covered equipment that is not labeled in accordance with 10 CFR part 431 of this chapter; or

(13) Removal from any covered equipment or rendering illegible, by a manufacturer, distributor, retailer, or private labeler, any label required to be provided under 10 CFR part 431 of this chapter; or

(14) Advertisement of an electric motor, by a manufacturer, distributor, retailer, or private labeler, in a catalog from which the equipment may be purchased, without including in the catalog all information as required by §431.31(b) of this chapter, provided, however, that this shall not apply to an advertisement of an electric motor in a catalog if distribution of the catalog began before the effective date of the labeling rule applicable to that motor.

* * * * *

(c) * * *

(4) * * *

(iii) An outdoor unit that is part of any combination certified at less than the standard applicable in the region in which it is installed.

6. Section 429.106(b) is revised to read as follows:

§429.106 Investigation of compliance.

* * * * *

(b) DOE may, at any time, request any information relevant to determining compliance with any requirement under 10 CFR parts 429, 430 and 431, including data from any party that underlies the certification of a basic model and/or demonstrates whether a basic model complies with an applicable conservation standard (including any applicable design requirements).

7. Section 429.110 is revised to read as follows:

§429.110 Enforcement testing.

(a) DOE may determine that test data for units tested in accordance with the applicable test procedure specified in 10 CFR part 430 or part 431 of this chapter by DOE pursuant to this section or §429.104, another Federal agency pursuant to other provisions or programs, or a third-party certification program is official enforcement test data upon which DOE may make a finding of noncompliance.

(b) If DOE has reason to believe that a basic model does not comply with an applicable standard, it may select and test units as follows.

(1) *Test location.* DOE testing will be conducted at a laboratory accredited to the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC), “General requirements for the competence of testing and calibration

laboratories,” ISO/IEC 17025:2005(E) (incorporated by reference; see §429.4). If testing cannot be completed at an independent laboratory, DOE, at its discretion, may allow enforcement testing at a manufacturer's laboratory, so long as the lab is accredited to ISO/IEC 17025:2005(E) and DOE representatives witness the testing. In addition, for commercial packaged boilers with rated input greater than 5,000,000 Btu/h, DOE, at its discretion, may allow enforcement testing of a commissioned commercial packaged boiler in the location in which it was commissioned for use, pursuant to the test provisions at §431.86(c) of this chapter, for which accreditation to ISO/IEC 17025:2005(E) would not be required.

(2) *Test notice.* To obtain units for enforcement testing to determine compliance with an applicable standard, DOE will issue a test notice addressed to the manufacturer in accordance with the following requirements:

(i) DOE will send the test notice to the manufacturer.

(ii) The test notice will specify the basic model selected for testing, and may include other characteristics or specifications of the requested units (e.g., individual or nameplate model numbers, serial number or manufacture date range(s), manufacture location). In addition, for electric motors with non-standard endshields or flanges and partial electric motors, the test notice may specify that the manufacturer provide a general purpose electric motor of equivalent electrical design and enclosure.

(iii) The test notice will specify the method of selecting the test sample, the maximum size of the sample and the size of the initial test sample, the approximate date testing is to be started, and the facility at which testing will be conducted. The test notice may also

provide for situations in which the selected basic model is unavailable for testing and may include alternative models or basic models.

(iv) DOE will state in the test notice whether DOE or the manufacturer will select the units for testing.

(v) The test notice will specify whether the units selected must be from the manufacturer's inventory, from one or more distributors, and/or from one or more retailers. DOE may ask for documentation demonstrating the location from which each unit was selected, and that the unit was in inventory at such location on the date the test notice was issued. If any unit is selected from a distributor or retailer, the manufacturer shall make arrangements with the distributor or retailer for compensation for or replacement of any such units.

(vi) DOE may require in the test notice that the manufacturer of a basic model ship or cause to be shipped from a retailer or distributor at the manufacturer's expense the requested number of units of a basic model specified in such test notice to the testing laboratory specified in the test notice. The manufacturer shall ship or cause to be shipped the specified test unit(s) of the basic model to the testing laboratory within 5 working days from the date of the test notice.

(3) *Test Unit Availability.* (i) If the manufacturer believes that it is unable to provide DOE with units of the basic model as specified in the test notice (e.g., having the same design, components, materials, manufacture date or date range, manufacture location, and nameplate or individual model number), the manufacturer must immediately notify DOE in writing, and include details of why the units are unavailable and what efforts the manufacturer has taken to secure them. If the manufacturer believes that it has similar, but not exactly the same,

units that should satisfy the test notice, it must immediately notify DOE in writing, and include details about the specific units available and an explanation of how such units differ from the units requested. If DOE determines that the requested units are unavailable, DOE will contact the manufacturer to develop a plan for enforcement testing, which may include testing of similar units identified by the manufacturer.

(ii) If DOE determines that fewer than the requested units of a basic model are available for testing when the manufacturer receives the test notice, then DOE may test the available unit(s) (which may, under paragraph (b)(3)(i) of this section, include testing of similar units identified by the manufacturer) and/or one or more other units of the basic model if expected to become available within 30 calendar days.

(iii) For the purposes of this section, available units are those that are available for distribution in commerce within the United States.

(4) *Test unit selection.* As specified by DOE in the test notice, either DOE or the manufacturer will select units for testing from one of the following sources:

(i) *Manufacturer's warehouse, distributor, or other facility affiliated with the manufacturer.* DOE or the manufacturer will select a batch sample at random in accordance with the provisions in §429.111 and the conditions specified in the test notice. The batch sample must be selected at random from all units of the specified model that are in inventory on the date of the test notice, including all units that have not yet been shipped. From that batch sample, DOE or the manufacturer will randomly select an initial test sample of units for testing in accordance with the instructions in the test notice.

(ii) *Retailer or other party not affiliated with the manufacturer.* DOE, the retailer, or other party not affiliated with the manufacturer will select an initial test sample of units at random from the inventory of the retailer or other party. This sample must provide the minimum units necessary for testing in accordance with the instructions in the test notice. Depending on the results of the testing, DOE may select additional units for testing from the retailer or other facility.

(iii) *Previously commissioned commercial packaged boilers with a rated input greater than 5,000,000 Btu/h.* DOE may test a sample of at least one unit in the location in which it was commissioned for use.

(5) *Test unit preparation.* (i) Prior to and during testing, a test unit selected for enforcement testing will not be prepared, modified, or adjusted in any manner by DOE unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure, or is authorized by the manufacturer in response to a specific modification request by DOE. One test shall be conducted for each test unit in accordance with the applicable test procedure prescribed in 10 CFR part 430 or part 431 of this chapter.

(ii) Prior to and during testing, a test unit selected for enforcement testing shall not be prepared, modified, or adjusted in any manner by the manufacturer. No quality control, testing or assembly procedures shall be performed by the manufacturer on a test unit, or any parts and subassemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(iii) DOE may consider a test unit to be defective if such unit is inoperative or is found to be in noncompliance due to failure of the unit to operate according to the manufacturer's

operating instructions. DOE will notify the manufacturer if a test unit is received by the test lab in a condition that may impact its performance. DOE may authorize testing of an additional unit on a case-by-case basis.

(c) A test unit of a basic model subject to a design requirement may be selected in accordance with the procedures under paragraph (b) of this section. In such an instance, DOE will make a determination of noncompliance for the basic model based on an examination of whether a single unit of the basic model fails to comply with the applicable design requirements.

8. Section 429.111 is added to read as follows:

§429.111 Basic model compliance.

(a) DOE will evaluate whether a basic model complies with an applicable performance standard(s) based on testing conducted in accordance with the applicable test procedure specified in 10 CFR part 430 or 431 of this chapter, and with the following sampling procedures:

(1) For all products, if the sample size is comprised of a single unit, DOE will determine noncompliance for the basic model based solely on the results of the single test. In such an instance, the sampling plans in the appendices of this subpart do not apply.

(2) For products with applicable energy conservation standard(s) in §430.32 of this chapter, and commercial pre-rinse spray valves, illuminated exit signs, traffic signal modules and pedestrian modules, commercial clothes washers, dedicated-purpose pool pumps, and metal halide lamp fixtures, and compressors:

(i) If the sample size is comprised of two or three units, DOE will apply appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain

Low-Volume Covered Products) using a sample size (n_1) equal to the number of units tested to determine if the basic model is noncompliant.

(ii) If the sample size is comprised of four or more units (up to 21), DOE will apply appendix A of this subpart (Sampling Plan for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment) using a sample size equal to the total number of units tested to determine if the basic model is noncompliant.

(3) For automatic commercial ice makers; commercial refrigerators, freezers, and refrigerator-freezers; refrigerated bottled or canned vending machines; commercial HVAC & WH products; walk-in cooler and walk-in freezer panels, and walk-in cooler and walk-in freezer doors; and walk-in cooler and walk-in freezer refrigeration systems, if the sample size is comprised of two or more units (up to four), DOE will apply appendix B of this subpart (Sampling Plan for Enforcement Testing of Covered Equipment and Certain Low-Volume Covered Products) using a sample size (n_1) equal to the number of units tested to determine if the basic model is noncompliant.

(4) For distribution transformers, if the sample size is comprised of two or more units (up to five), DOE will apply appendix C of this subpart (Sampling Plan for Enforcement Testing of Distribution Transformers).

(5) For pumps subject to the standards specified in §431.465(a) of this chapter, DOE will determine if the basic model is noncompliant based on the arithmetic mean of the sample (up to four units).

(6) For uninterruptible power supplies, if a basic model is certified for compliance to the applicable energy conservation standard(s) in §430.32 of this chapter according to the sampling plan in §429.39(a)(2)(iv)(A) or is not certified, DOE will make a determination of noncompliance using a sample size of not more than 21 units and follow the sampling plan in appendix A of this subpart (Sampling Plan for Enforcement Testing of Covered Consumer Products and Certain High-Volume Commercial Equipment). If a basic model is certified for compliance to the applicable energy conservation standard(s) in §430.32 of this chapter according to the sampling plan in §429.39(a)(2)(iv)(B), DOE will make a determination of noncompliance using a sample size of at least one unit (up to four) and follow the sampling plan in appendix D of this subpart (Sampling Plan for Enforcement Testing of Uninterruptible Power Supplies).

(7) For electric motors and small electric motors, if the sample size is comprised of five or more units (up to 20) DOE will apply appendix E of this subpart (Sampling Plan for Enforcement Testing of Electric Motors and Small Electric Motors) using a sample size (n_1) equal to the number of units tested to determine if the basic model is noncompliant.

(8) DOE may make a determination of noncompliance based on a sample size of less than four units (five for distribution transformers, electric motors, and small electric motors) in limited circumstances (e.g., when DOE makes a determination of noncompliance for a basic model subject to design requirements; when DOE's test notice process pursuant to §429.110(a)(3) results in a reduced sample size).

(b) DOE will evaluate whether a basic model complies with an applicable design requirement(s) based on examination of a single unit of the basic model, on design information, or pursuant to a

test notice issued under §429.110(b). In such an instance, the sampling plans in the appendices of this subpart do not apply.

(c) If the results of any assessment test conducted pursuant to §429.104 provides results that the basic model performed 25% or worse than the applicable energy conservation standard, DOE may make a determination of noncompliance for the basic model based solely on the results of such test. In such an instance, the sampling plans in the appendices of this subpart do not apply.

9. Section 429.112 is added to read as follows:

§429.112 Basis of noncompliance determination.

DOE may make a determination that a basic model does not comply with an applicable energy conservation standard based on test data from manufacturer or private labeler, another Federal agency, or a third-party certification program; testing pursuant to §§429.104 and 429.110 of this part; and/or an admission.

10. Section 429.114 is revised to read as follows:

§429.114 Notice of noncompliance determination and notice to cease distribution of a basic model.

(a) In the event that a basic model is determined to be noncompliant with an applicable energy conservation standard, DOE may issue a notice of noncompliance determination to the manufacturer or private labeler.

(1) The notice of noncompliance determination will notify the manufacturer or private labeler that it is a prohibited act to distribute in commerce a basic model that does not meet applicable standards.

(2) The manufacturer or private labeler must, within 30 calendar days of the issuance of the notice of noncompliance determination, submit to DOE records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of the basic model(s) determined to be in noncompliance.

(b) In the event that DOE determines a manufacturer has failed to comply with an applicable certification requirement with respect to a particular basic model, DOE may issue a notice of noncompliance determination to the manufacturer.

(1) The notice of noncompliance determination will notify the manufacturer of its obligation to immediately comply with the applicable certification requirement.

(2) The manufacturer must, within 30 calendar days of the issuance of the notice of noncompliance determination, submit to DOE records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of the basic model.

(c) At least 30 calendar days prior to the issuance of a notice of noncompliance determination, DOE will issue to the manufacturer or private labeler a letter of intent stating DOE's intent to issue a notice of noncompliance determination for the basic model.

11. Section 429.115 is added to read as follows:

§429.115 Petitions for reexamination.

(a) Within 30 calendar days after issuance of DOE's letter of intent to issue a notice of noncompliance determination under §429.114, the manufacturer or private labeler may petition DOE to reexamine such determination. Such petitions must be submitted to DOE in writing, and must contain:

- (1) The material issue(s) that the manufacturer or private labeler has with the assessment and/or enforcement testing of the basic model;
 - (2) Complete test reports or AEDM information (if applicable) the manufacturer or private labeler believes demonstrate the basic model meets the applicable standard;
 - (3) All legal and other arguments that the manufacturer or private labeler wishes to make in support of its position;
 - (4) Information regarding any previous representations of the basic model's energy consumption, and if different than paragraph (a)(3) of this section, the complete test reports or AEDM information in support of such representations; and
 - (5) Any other pertinent material.
- (b) Test reports submitted as a part of a petition must demonstrate that the applicable DOE test procedure specified in 10 CFR part 430 or part 431 of this chapter was followed in its entirety.
- (c) The manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE if the tested units' design, components, materials, manufacture date or date range, or manufacture location differ in any way from the unit(s) of the basic model (specified in the letter of intent) tested pursuant to §429.104 or 429.110. If no units of the basic model specified in the letter of intent were tested pursuant to §429.104 or 429.110, the manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE if the tested unit's design, components, or materials differ in any way from the least efficient model within such basic model.

- (d) The manufacturer or private labeler must, for each test report submitted as a part of the petition, inform DOE whether the tested units were prepared, modified, or adjusted in any manner prior to and during testing.
- (e) In the event that, as a part of its petition, a manufacturer or private labeler submits test reports for testing completed after the date of issuance of the letter of intent, the manufacturer or private labeler must provide DOE with documentation identifying the source of the tested units and an explanation of how the units were selected for testing. If the tested units were built subsequent to the date of issuance of the letter of intent, the manufacturer or private labeler must provide documentation demonstrating whether and how many units were available in inventory or from a retailer on the date of testing.
- (f) Failure to submit a petition as specified in this section constitutes a waiver of the right to petition DOE to reexamine the pending determination.
- (g) DOE will only consider validly submitted petitions, as required in paragraphs (a) through (e) of this section.
- (h) DOE may require that the manufacturer or private labeler provide information or documentation to supplement its petition.
- (i) Upon review of a validly submitted petition, DOE may modify or leave unchanged DOE's pending determination of noncompliance of the basic model.

12. Section 429.116 is revised to read as follows:

§429.116 Additional certification testing requirements.

If DOE determines that independent, third-party testing is necessary to ensure compliance with the rules of this part, 10 CFR part 430, or part 431, a manufacturer must base its certification of a basic model under subpart B of this part on independent, third-party laboratory testing.

13. Section 429.117 is added to read as follows:

§429.117 Notice of allowance.

- (a) After issuance of a noncompliance determination under §429.114(a), a manufacturer or private labeler may modify a noncompliant basic model in such manner as to make it comply with the applicable standard(s).
- (b) Prior to distribution in commerce in the United States of the modified model, the manufacturer or private labeler must request in writing a notice of allowance from DOE.
- (c) The manufacturer or private labeler's request to DOE for a notice of allowance must include:
 - (1) A detailed explanation of all modifications made, including a clear explanation of all features removed or added to make the model comply with the applicable standard(s).
 - (2) Complete test data, which satisfy the sampling requirements under §429.11 and the product-specific sections in subpart B of this part, and demonstrate that:
 - (i) The applicable DOE test procedure specified in 10 CFR part 430 or part 431 of this chapter was followed in its entirety; and
 - (ii) The modified basic model meets the applicable standard when applying the appropriate sampling provisions under subpart B of this part.
- (d) DOE may require that the manufacturer or private labeler's testing in support of the request for a notice of allowance be performed at an independent, third-party testing facility.
- (e) The manufacturer or private labeler must treat the modified basic model as a new basic model, to include:

- (1) The modified basic model must be assigned a new basic model number;
 - (2) Any model within the new basic model must be assigned a new individual model number; and
 - (3) Such new basic model must be certified in accordance with the provisions of this part.
- (f) The manufacturer or private labeler must maintain records for the modified basic model, including records of serial numbers of and the modifications made to any units of the noncompliant basic model in existing stock.
- (g) Such records shall be organized and indexed in a fashion that makes them readily accessible for review by DOE upon request.
- (h) The manufacturer or private labeler must retain these records consistent with §429.71.

14. Section 429.118 is revised to read as follows:

§429.118 Injunctions.

- (a) If a manufacturer, private labeler or any other person as required fails to cease engaging in a prohibited act, DOE may immediately seek an injunction. In such instance, DOE will notify the manufacturer, private labeler or any other person as required, of the prohibited act(s) at issue and DOE's intent to seek a judicial order enjoining the prohibited act(s).
- (b) DOE may, in its discretion, provide the manufacturer, private labeler or other person, an opportunity to deliver to DOE, within 15 calendar days of the notification provided pursuant to paragraph (a) of this section, a corrective action and compliance plan detailing the steps it will take to ensure that the prohibited act(s) cease(s). DOE will review the plan and, if satisfactory, monitor implementation of such plan. If DOE determines the manufacturer, private labeler or

other person is not effectively implementing such plan, DOE may seek an injunction immediately upon notifying the manufacturer, private labeler or other person of this decision and DOE's renewed intent to seek an injunction.

15. Section 429.120 is revised to read as follows:

§429.120 Maximum civil penalty.

Any person who knowingly commits a prohibited action listed in §429.102(a) may be subject to assessment of a civil penalty of no more than \$460 for each violation. As to §429.102(a)(1) with respect to failure to certify, and as to §429.102(a)(2), and (5) through (12), each unit of a basic model of a covered product or covered equipment distributed shall constitute a separate violation. For violations of §429.102(a)(1), (3), and (4), each day of noncompliance shall constitute a separate violation for each basic model at issue.

16. Section 429.122 is revised to read as follows:

§429.122 Notice of proposed civil penalty.

(a) The General Counsel (or delegee) shall provide notice of any proposed civil penalty.

(b) The notice of proposed civil penalty shall:

(1) Include the amount of the proposed civil penalty;

(2) Include a statement of the material facts constituting the alleged violation; and

(3) Inform the person of the opportunity to elect in writing within 30 calendar days of receipt of the notice to have the procedures of §429.128 (in lieu of those of §429.126) apply with respect to the penalty.

17. Section 429.124 is revised to read as follows:

§429.124 Election of procedures.

(a) In responding to a notice of proposed civil penalty, the respondent may:

(1) Request, in writing, an administrative hearing before an Administrative Law Judge (ALJ) under §429.126;

(2) Within 30 calendar days of issuance of such notice, elect in writing to have the procedures of §429.128 apply; or

(3) Submit a signed compromise agreement (provided by DOE pursuant to §429.132), to settle the matter for the civil penalty amount and conditions provided by DOE within such agreement.

(b) Any election to have the procedures of §429.128 apply may not be revoked except with the consent of the General Counsel (or delegee).

(c) If the respondent fails to respond to a notice issued under §429.120 or otherwise fails to indicate its election of procedures, DOE shall refer the civil penalty action to an ALJ for a hearing under §429.126.

18. Section 429.126 is revised to read as follows:

§429.126 Administrative law judge hearing and appeal.

(a) Pursuant to §429.124, DOE shall refer a civil penalty action brought under §429.122 to an Administrative law judge (ALJ), who shall afford the respondent an opportunity for an agency hearing on the record in accordance with the procedures of subpart D of this part.

(b) After consideration of all matters of record in the proceeding, the ALJ will issue a recommended decision and, if appropriate, recommend a civil penalty. The decision will include

a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(c)(1) The General Counsel (or delegee) shall adopt, modify, or set aside the conclusions of law or discretion contained in the ALJ's recommended decision and shall issue a final order, which may assess a civil penalty. The General Counsel (or delegee) shall include in the final order the ALJ's findings of fact and the reasons for the final agency actions.

(2) Any person against whom a penalty is assessed under this section may, within 60 calendar days after the date of the final order assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the final order, or the court may remand the proceeding to the Department for such further action as the court may direct.

19. Section 429.128 is revised to read as follows:

§429.128 Immediate issuance of order assessing civil penalty.

(a) A respondent may elect within 30 calendar days of issuance of a notice of proposed civil penalty for DOE to issue an order assessing the civil penalty. In such case, the General Counsel (or delegee) shall issue an order assessing the civil penalty proposed in the notice of proposed penalty under §429.122, not sooner than 60 calendar days after the respondent's receipt of the notice of proposed penalty.

(b) If within 60 calendar days of receiving the assessment order in paragraph (a) of this section the respondent does not pay the civil penalty amount, DOE shall institute an action in the

appropriate United States District Court for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

20. Section 429.132 is amended by adding paragraph (e) to read as follows:

§429.132 Compromise and settlement.

* * * * *

(e) If a settlement is agreed to by the parties, a compromise agreement setting forth the terms of the agreement shall be signed by the respondent and DOE, and the General Counsel (or delegee) shall set forth a final order adopting the compromise agreement and assessing any civil penalty.

The case shall be closed in accordance with the terms of the settlement.

Appendix A to Subpart C of Part 429 [Amended]

21. Appendix A to subpart C of part 429, paragraph (a), is amended by removing the reference “§429.57(e)(1)(i)” and adding in its place, “§429.111”.

Appendix B to Subpart C of Part 429 [Amended]

22. Appendix B to subpart C of part 429, paragraph (a), is amended by removing the reference “§429.57(e)(1)(ii)” and adding in its place, “§429.111”.

PART 431— ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

23. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291-6317; 28 U.S.C. 2461 note.

24. Appendix A to subpart U of part 431 is redesignated as appendix E to subpart C of part 429.

25. Revise the heading to newly redesignated appendix E to subpart C of part 429 to read as follows:

Appendix E to Subpart C of Part 429—Sampling Plan for Enforcement Testing of Electric Motors and Small Electric Motors

* * * * *

Subpart U -- [Removed and Reserved]

26. Remove and reserve subpart U of part 431, consisting of §§431.381 through 431.387.