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

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

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

**I. The Energy Policy and Conservation Act**

As you know, Congress passed EPCA in 1975 at a time when consumer energy costs were rising and there was a scarcity of energy resources to meet rising demand. Congress itself

set the first energy efficiency standards for consumer appliances,<sup>1</sup> and it directed DOE to periodically assess the standards and update them, using a detailed set of criteria.<sup>2</sup> The agency must set standards that achieve the “maximum improvement in energy efficiency” or water efficiency that are “technologically feasible and economically justified.”<sup>3</sup> Congress then explicitly instructed the agency what to consider:

In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering—

- (I) the **economic impact of the standard on the manufacturers and on the consumers** of the products subject to such standard;
- (II) the **savings in operating costs** throughout the estimated average life of the covered product in the type (or class) **compared to any increase in the price** of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;
- (III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;
- (IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
- (V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
- (VI) the need for national energy and water conservation; and
- (VII) other factors the Secretary considers relevant.<sup>4</sup>

In addition to building considerations for small businesses into the initial analysis, moreover, Congress established a relief valve specifically for small manufactures: if the Secretary finds after consulting with the Attorney General that the new standard would decrease competition, she may grant an exemption to small manufacturers for up to two years.<sup>5</sup>

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<sup>1</sup> I focus this discussion on consumer appliances, but note that Congress similarly directed DOE to maintain efficiency standards for industrial equipment (which includes many commercial-scale equipment), 42 U.S.C. § 6313 (commercial); and for distribution transformers, 42 U.S.C. § 6317.

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

<sup>3</sup> *Id.* § 6295(o)(2)(A).

<sup>4</sup> *Id.* § 6295(o)(2)(B)(1)(I – VII) (emphasis added); see also 42 U.S.C. § 6313(3)(B)(ii) (similar for industrial equipment including commercial equipment).

<sup>5</sup> *Id.* §(t). Small manufacturers are those whose annual gross revenues do not exceed \$8 million for the prior year.

To gather the information needed to undertake this analysis, DOE offers far more participatory opportunities than the Administrative Procedure Act requires.<sup>6</sup> Not only does EPCA itself provide these opportunities, but the agency on its own initiative undertakes to offer webinars, field questions from stakeholders, and conduct outreach to stakeholders—all including small businesses—to ensure that they have opportunities to offer their expertise and insights. Indeed, the standards are developed in a phased process with multiple opportunities for participation, and all related material is posted in the rulemaking document which is publicly available online.<sup>7</sup> Ultimately, the agency conducts a sophisticated analysis of the factors set forth above and publishes those in its proposed rule (both a preamble and a technical support document); and it updates this analysis in response to comments in its final rules.<sup>8</sup>

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

## II. The Regulatory Flexibility Act

In addition to complying with the detailed analytical and procedural requirements described above, DOE complies with the Regulatory Flexibility Act, which expressly requires considering how a proposed rule with significant economic impact would impact small businesses.<sup>9</sup> The analysis must be posted for public comment, and in the final rule, DOE responds to these comments. DOE’s research in this regard is detailed and careful. It relies on databases of product manufacturers, state and trade association resources, and even marketing materials to identify small businesses. Next, it considers whether these small businesses would be required to undertake costs to convert their manufacturing processes to account for new standards, and it even invites individual interviews with small manufacturers to ensure its

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<sup>6</sup> See 42 U.S.C. § 6306 (a) (in addition to notice-and-comment rulemaking provisions of APA § 503, the Secretary must “afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule”); *id.* §(b) (specifying that for consumer appliance standard-setting, in informal presentations, interested persons may question others who have made oral statements, including DOE employees concerning factual information). Note that DOE also works with the Appliance Standards and Rulemaking Federal Advisory Committee which permits negotiated rulemaking. See DEP’T OF ENERGY, APPLIANCE STANDARDS AND RULEMAKING FEDERAL ADVISORY COMMITTEE, at <https://www.energy.gov/eere/buildings/appliance-standards-and-rulemaking-federal-advisory-committee>.

<sup>7</sup> See, e.g., Rulemaking Docket, Energy Conservation Standards for Battery Chargers, EERE-2020-BT-STD-0013, at [regulations.gov](https://www.regulations.gov).

<sup>8</sup> See, e.g., Proposed Rule, Energy Conservation Program: Energy Conservation Standards for Battery Chargers, 88 Fed. Reg. 16,112 (Mar. 15, 2023).

<sup>9</sup> 5 U.S.C. § 601.

information is as accurate as possible. An overview of this analysis, and an overview of the process, can be found in every proposed and final rule.<sup>10</sup>

### **III. Transparent DOE Procedures and Guidance for Small Businesses**

In accordance with Executive Order 13,272, DOE in 2003 published its procedures for implementing the Regulatory Flexibility Act.<sup>11</sup> In addition, the agency developed a guidance document *Small Entity General Compliance Guide*, which is available on its website.<sup>12</sup> This document uses plain language to describe the efficiency standards program, the ways that small businesses can participate, each step small businesses can take to ensure that they are in compliance with the standards, and the options for getting exceptions from the standards. The document also has a list of resources—including email addresses and phone numbers—that are available for any questions small businesses (or others) might have.

### **IV. Energy Conservation Standards Benefit Small Businesses' Bottom Lines**

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

According to one study, for example, DOE's conservation standards are projected to save households an average of \$840 a year in 2030.<sup>13</sup> Businesses saved even more: almost \$23 billion dollars in utility bills nationwide.<sup>14</sup> In recent rulemakings, DOE has emphasized benefits from efficiency to the tune of billions of dollars. And as electricity prices are now higher than before in many states, these rules will promote even greater savings for consumers and small businesses alike.

There are other benefits, too. For example, lowering electricity use means lowering emissions of harmful pollutants like particulate matter and air toxics. Numerous studies have demonstrated that air pollution reductions mean better health for workers, translating into fewer days of lost work.<sup>15</sup> And as climate change disruption even further presents risks to the economy

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<sup>10</sup> See, e.g., 88 Fed. Reg. at 16,162-163 (describing analysis for proposed battery charger standards and inviting comment on all facets of analysis).

<sup>11</sup> 68 Fed. Reg. 7990 (Feb. 19, 2003).

<sup>12</sup> DEP'T OF ENERGY, APPLIANCE STANDARDS PROGRAM AND TEST PROCEDURES: SMALL ENTITY <https://www.energy.gov/sites/default/files/2023-07/sbrefa-general-compliance-guide.pdf>

<sup>13</sup> Andrew deLaski & Joanna Mauer, *Energy-Saving States of America: How Every State Benefits from National Appliance Standards*, at 2 (Feb. 2017), at <https://appliance-standards.org/sites/default/files/Appliances%20standards%20white%20paper%202%202-14-17.pdf>.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> In its proposed rule for battery chargers, DOE calculated health benefits of \$3.8 billion (3% discount rate). See 88 Fed. Reg. at 16,115.

and worker wellbeing, this important program for mitigating those costs should be viewed as a major positive feature of our legal landscape.<sup>16</sup>

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

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<sup>16</sup> *See id.* (avoided climate costs of \$2.1 billion at 3% discount rate).